

# Blood Quantum and the Ever-Tightening Chokehold on Tribal Citizenship: The Reproductive Justice Implications of Blood Quantum Requirements

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*Blood often serves as the basis for identity for many groups in the United States. Native Americans, however, are the only population in which blood is a requirement for collective belonging and can be the determining factor for whether one receives tribal benefits and services. Many Tribal Nations use blood quantum, the percentage of Indian blood one has, as a bright-line rule to determine qualification for tribal membership. Initially established as a colonial tool of dispossession and assimilation, tribes adopted blood quantum to ensure the preservation of culture and community.*

*This Article contends that tribal adoption of blood quantum limits tribal members' reproductive autonomy and violates the tenets of reproductive justice. Forcing tribal members to consider the blood quantum of their future children limits individual choice of partner and the manner in which tribal members choose to build their families. This limitation of autonomy and violation of reproductive justice principles is especially stark when analyzed in combination with contemporary pressures on Native conception and parenting, including urban migration, dysgenic environmental impacts on fertility, sexual violence, and inadequate, underfunded, and abusive reproductive healthcare. Collectively, these pressures decrease fertility, the number of available partners, and the ability for Native people to conceive and parent within their own communities.*

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*By applying the principles of reproductive justice, Tribal Nations may begin to reassess what belonging means in Native communities and how tribal membership policies can support reproductive autonomy. The current rise of nation-building and concentrated push for self-determination in Native communities provides a unique opportunity to interrogate the priorities of tribal membership requirements and reimagine inclusion and collective belonging in Native Nations.*

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#### INTRODUCTION.

#### INDIAN BLOOD AND REPRODUCTIVE JUSTICE: IMPLICATIONS FOR TRIBAL MEMBERSHIP

“How much Native American are you?” is a question every Native person has been asked. Being Native American is not fractional, and yet it is treated as such with such ferocity that blood quantum, a fractional measurement of the amount of “Indian blood” you have, is considered one of the fundamental questions of federal Indian law. This is not surprising, given how common it is in America that blood serves as a proxy for identity. When asked about someone’s heritage, the response is often given in fractions—one-quarter Dutch, one-half Japanese, for example. Family members are referred to “by blood” or “by marriage,” as if choosing to enter a family instead of being born into it places someone in a separate class. For the majority of Americans, the idea of blood classification is rarely questioned. Someone’s fractionated heritage or relational classifications are descriptors of ties to another person or culture, and rarely confer the overarching idea of a collective belonging.

For Native American peoples, however, the idea of blood relations becomes a fundamental measure of inclusion within their communities. Most Native Nations require a certain blood quantum—often one-quarter—to qualify for citizenship.<sup>1</sup> The minimum blood quantum requirement currently serves as a bright-line rule for determining eligibility for tribal citizenship and is often used as a way to ensure sufficient ties to tribal norms, culture, and ancestors.<sup>2</sup> However, blood quantum requirements were originally instituted by the United States government in an effort to strip Native people of land and other rights and services.<sup>3</sup> In present day, blood quantum requirements also serve to significantly limit the number of people who are eligible for tribal citizenship. Citizenship for those with too low a blood quantum is denied regardless of their ties to the tribe or community, which can even include people who were raised on or are

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1. DAVID WILKINS & SHELLY HULSE WILKINS, *DISMEMBERED: NATIVE DISENROLLMENT AND THE BATTLE FOR HUMAN RIGHTS* 58 (2017).

2. Matthew L. Fletcher, *Tribal Membership and Indian Nationhood*, 37 *AM. INDIAN L. REV.* 1, 1–2 (2012).

3. *Id.*

currently living on tribal land.<sup>4</sup> While tribal nations have adopted the use of blood quantum in an effort to preserve their cultures and communities, such limitations now threaten to jeopardize the existence of Native Nations at large, as you cannot have a nation without citizens.<sup>5</sup>

Requiring a certain blood quantum for membership not only threatens the continued survival of Native Nations, but also, given the current reality of life as a Native person in America, serves to limit the reproductive freedom of individual tribal members.<sup>6</sup> Reproductive justice, a movement created by women of color to address the complete physical, mental, spiritual, social, political, and economic well-being of people with the capacity for pregnancy, provides a framework for analyzing such issues, including limitations on reproductive freedom, and explores a multi-pronged approach to solving these problems and advancing the well-being of all people with the capacity for pregnancy. Blood quantum requirements disrupt several core principles of reproductive justice, such as the right to have children under the conditions one chooses and the right to parent the children one has in safe and healthy environments of one's choice.<sup>7</sup> These values are grounded in the idea that reproductive autonomy is a human right, and it is the "obligation of the government and society to ensure the conditions are suitable for implementing one's decisions."<sup>8</sup> Reproductive justice moves beyond the demand for privacy and respect for individual choices, focusing on how the ability of any person to control their reproductive destiny is directly linked to the conditions of one's community, environment, and government. By focusing on the systemic inequality of the ability to control one's reproductive destiny, the tenets of reproductive justice seek to interrogate how social, environmental, and political changes can provide the systemic framework necessary for one's individual decisions to be optimally realized.

Enforcing blood quantum requirements for citizenship forces parents to choose between having a child with a partner of their choice regardless of their tribal affiliation (or lack thereof) and having the ability to ensure citizenship for their child in their own community. This is especially true in light of declining

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4. *Id.* at 2.

5. See, e.g., Ward Churchill, *The Crucible of American Indian Identity: Native Tradition Versus Colonial Imposition in Postconquest North America*, 39 AM. INDIAN CULTURE & RES. J. 41, 56 (1999) ("To tighten or even adhere to quantum requirements in the face of such realities is to engage in a sort of autogenocide by definitional/statistical extermination."); see also Russell Thornton, *Tribal Membership Requirements and the Demography of 'Old' and 'New' Native Americans*, 16 POPULATION RES. & POL'Y REV. 33, 38 (1997).

6. Crystal Hayes, Carolyn Sufrin & Jamila B. Perritt, *Reproductive Justice Disrupted: Mass Incarceration as a Driver of Reproductive Oppression*, 110 AM. J. PUB. HEALTH S21, S21 (2020) ("Reproductive oppression—the regulation and exploitation of individuals' bodies, sexuality, labor, and procreative capacities as a strategy to control individuals and entire communities.").

7. SISTERSONG, *What is Reproductive Justice?*, <https://www.sistersong.net/reproductive-justice> [<https://perma.cc/798H-9Y59>].

8. *Id.*

fertility levels on reservations,<sup>9</sup> migrations out of tribal land,<sup>10</sup> mass sterilization of Indigenous peoples in the United States,<sup>11</sup> and a general lack of reproductive healthcare in Indian Country,<sup>12</sup> all of which limit the likelihood that tribal citizens will have children who are eligible for membership. The confluence of membership limitations and external factors disallows Indigenous parents from fully realizing their reproductive autonomy.

The former Principal Chief of my Nation, Wilma Mankiller, said: “Leaders are encouraged to remember seven generations in the past and consider seven generations in the future when making decisions that affect the people.”<sup>13</sup> The path set for Native Nations today will dictate their very existence seven generations from now. The rise of nation-building and push for self-determination in Native communities provides a unique opportunity to interrogate the priorities of Native Nations and reimagine belonging in our communities. Using the principles of reproductive justice, we can begin to reexamine what belonging means in Native communities and what it would look like to have communities and tribal governments supporting our reproductive choices for the good of our Nations. We can reassess our reliance on a colonial tool of assimilation and redefine our own identities and existence, while honoring and respecting reproductive autonomy and familial solidarity.

Part I discusses the colonial history of blood quantum requirements and how they were established and used to marginalize Indigenous people. This Part also examines the ways pre-contact Indigenous communities conceptualized membership and inclusion. It then traces the development and implementation of blood quantum requirements over time as the United States continued to attempt to assimilate Native Americans. Finally, it reviews the contemporary uses of blood quantum and identifies the challenges blood quantum requirements attempt to address in Native Nations today.

Part II examines how blood quantum requirements in present day are a violation of the principles of reproductive justice. It discusses five aspects of contemporary Native Nations: migration out of Indian Country; negative fertility

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9. See JOYCE A. MARTIN, BRADY E. HAMILTON, MICHELLE J.K. OSTERMAN & ANNE K. DRISCOLL, 68(13) NAT’L VITAL STAT. REPS., BIRTHS: FINAL DATA FOR 2018, [https://www.cdc.gov/nchs/data/nvsr/nvsr68/nvsr68\\_13-508.pdf](https://www.cdc.gov/nchs/data/nvsr/nvsr68/nvsr68_13-508.pdf) [<https://perma.cc/DJF7-5EDD>] (Nov. 27, 2019) [hereinafter 2018 CDC BIRTH DATA REPORT].

10. TINA NORRIS, PAULA L. VINES & ELIZABETH M. HOEFFEL, THE AMERICAN INDIAN AND ALASKA NATIVE POPULATION: 2010, 13 (2012) [<https://perma.cc/9WGH-L2ZV>] [hereinafter 2010 CENSUS].

11. See generally U.S. GOV’T ACCOUNTABILITY OFF., HRD-77-3, INVESTIGATION OF ALLEGATIONS CONCERNING INDIAN HEALTH SERVICE (Nov. 4, 1976); Jane Lawrence, *The Indian Health Service and the Sterilization of Native American Women*, 24 AM. INDIAN Q. 400 (2000).

12. Allison Herrera, *Indigenous Women Face Extra Barriers When It Comes to Reproductive Rights*, HIGH COUNTRY NEWS (Feb. 14, 2020), <https://www.hcn.org/issues/52.3/indigenous-affairs-public-health-indigenous-women-face-extra-barriers-when-it-comes-to-reproductive-rights> [[perma.cc/Q8XQ-FTF6](https://perma.cc/Q8XQ-FTF6)].

13. Ann Litts, MEDIUM (May 1, 2020), <https://annlitts.medium.com/i-particularly-love-wilma-mankillers-quote-which-appears-frequently-b7ea7925b37c> [[perma.cc/H4YR-WX6Y](https://perma.cc/H4YR-WX6Y)].

impacts from extractive environmental policies and practices; the history of mass sterilization of Indigenous peoples that prevents many from having blood-related children and significantly decreases the availability of partners in certain communities; the lack of quality reproductive healthcare in Indian Country; and the combination of sexual violence and lack of reproductive healthcare that often results in forced pregnancy. Each of these factors threatens the ability of Native peoples to freely make choices about their partners and pregnancies without significant consideration of what the long-term consequences of that choice will mean for their families and communities. This Part shows that blood quantum requirements, especially in light of these contemporary aspects of Native Nations, infringe on Native peoples' abilities to exercise full reproductive autonomy without undue burden.

Part III examines recent population data, which suggest that while the number of Native people is growing, the number of people eligible for tribal membership is getting smaller. This Part identifies the threat that blood quantum poses to the survival of Native Nations as a whole by analyzing the demographic patterns of Native people. It argues that this lack of reproductive autonomy and adherence to blood quantum requirements is leading to a decrease in eligible tribal members and is a threat to the survival of Native Nations.

Part IV identifies a possible alternative to strict blood quantum requirements that embodies the principles of reproductive justice, respects reproductive autonomy, and creates a more flexible membership criteria such that more people would be eligible for membership. This alternative incorporates blood quantum as one of many factors by which tribes can deem someone eligible for membership. It also introduces a potential program that would allow those with a blood quantum too low for membership to still be eligible to become citizens after completion of a cultural immersion program, thus allowing for reproductive autonomy while still preserving cultural continuity and honoring tribal preferences and needs.

## I.

### THE EVOLVING CRITERIA FOR TRIBAL CITIZENSHIP

#### *A. Federal Recognition and Citizenship*

Today, the federal government only recognizes a subset of Native peoples: those who belong to federally recognized Nations within the continental United States.<sup>14</sup> These peoples, the “federally recognized tribes,” receive recognition from the Bureau of Indian Affairs (the BIA) as sovereigns. As such, they possess the right of self-government, the ability to have government-to-government relationships with the United States, and the ability to determine who can be a

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14. See Notice of Indian Entities Recognized by and Eligible to Receive Services from the United States Bureau of Indian Affairs, 84 Fed. Reg. 1200 (Feb. 1, 2019).

citizen of their nation.<sup>15</sup> Further, federally recognized tribes are entitled to certain benefits and services from the BIA.<sup>16</sup> Membership requirements for each of these tribes are set by the tribe itself,<sup>17</sup> but approximately two-thirds of tribes in the United States still use some level of blood quantum as a requirement for citizenship.<sup>18</sup> However, this was not how many tribes defined membership before the federal intervention.<sup>19</sup>

### B. *Membership and Inclusion in Pre-Contact Native Societies*

There is no record of the idea of blood quantum in pre-contact Native Nations, where kinship and community formed the basis of inclusion.<sup>20</sup> Instead, tribes across the country engaged in high levels of comingling with neighboring communities and applied principles of consanguinity of and affinity towards the entire community as bases for inclusion.<sup>21</sup> Native American communities at the time had “[high] degrees of sociocultural inclusiveness and consequent reproductive interactivity” and these processes, over time, erased meaningful genetic distinction between neighboring groups.<sup>22</sup> Intertribal marriage was likely one of the most common reasons for tribal admixture.<sup>23</sup> For example, many Northwestern tribes regularly practiced and even encouraged marriage with other communities.<sup>24</sup> The Coast Salish had a community linked through ties of

15. *See id.*

16. *See* BENEFITS.GOV, BUREAU OF INDIAN AFFAIRS (BIA) FINANCIAL ASSISTANCE AND SOCIAL SERVICES, <https://www.benefits.gov/benefit/801> [perma.cc/G6HY-G3V4]. Benefits include tangible things such as healthcare (through the Indian Health Services), housing, educational assistance, food assistance, and per capita shares of tribal revenue. Benefits can also include access to tribal services more broadly, including community centers, cultural activities, and language classes. Citizenship also allows one to be party to legal proceedings in front of a tribal court. Citizenship also has non-tangible benefits such as a feeling of inclusion, a recognized link to one’s community, and a sense of official identity.

17. *See* *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 55–56 (1978) (granting tribes exclusive power to determine their membership/citizenship requirements); *but see* *Cherokee Nation v. Nash*, 267 F. Supp. 3d 86, 140 (D.D.C. 2017) (requiring Cherokee Nation to extend citizenship to the Freedmen regardless of their current Constitutional citizenship rules).

18. Most tribes in the United States use one-quarter as their blood quantum cutoff, while some use one-half or one-eighth. WILKINS & WILKINS, *supra* note 1, at 58.

19. *Id.* at 27.

20. *Id.*

21. *See* Ryan W. Schmidt, *American Indian Identity and Blood Quantum in the 21st Century: A Critical Review*, 2011 J. ANTHROPOLOGY 1, 4–5 (2011); *see also* Fletcher, *supra* note 2, at 12 (telling the story of Leopold Pokagon, an Ottawa (or perhaps Chippewa) man who moved in with a Potawatomi woman and later became an *ogema* (tribal leader) for the Potawatomi community, something that could never happen today, as Pokagon did not have the required blood quantum or lineal ties to the Potawatomi).

22. *See* Churchill, *supra* note 5, at 41.

23. Brief for the Rosebud Sioux Tribe, et al. as Amici Curiae Supporting Respondents at 12, *Duro v. Reina*, 495 U.S. 676 (1990) (No. 88-6546), 1989 WL 1126953, at 6.

24. *Id.*

marriage and kinship that extended up and down the coast and created a social network in the area with no clear boundaries.<sup>25</sup>

Further, many communities had well-established procedures for incorporating individuals or other groups from neighboring tribes outside of marriage. These procedures were practiced with varying degrees of scale and frequency, ranging from individual adoptions to the incorporation of entire families or clans.<sup>26</sup> There are even recorded instances where the number of outsiders incorporated into a group clearly exceeded the number of original members of that group, such as when significant numbers of the Huron and Susquahannock were absorbed by the Mohawk in the seventeenth century.<sup>27</sup> In sum, identity in this period was based more on social, cultural, and territorial alignment and unity where inclusion was not a finite resource, and less around racial or political categorization with strict in- and out-group limits.

### C. *Post-Contact Shifting of Ideas about Identity and Belonging*

While there are conflicting accounts of the relationships between Native peoples and settlers in the 1400s to 1600s,<sup>28</sup> some scholars have demonstrated that Native peoples were so open to welcoming outsiders into their communities that some colonists were deemed the “[W]hite Indians of Colonial America.”<sup>29</sup> Settler accounts describe how, after being taken prisoner in a conflict, colonists were adopted by local Native communities instead of killed.<sup>30</sup> Many of these accounts include references to “every captive [leaving] the Indians with regret,” and to colonists, once “recovered” from Native people, being “closely watched [lest] they will certainly return to the Barbarians.”<sup>31</sup> Additionally, children born from a Native/non-Native union were rarely relinquished to the settlers.<sup>32</sup> Native parents also regularly visited and maintained relationships with White children who were taken captive and later returned to their colonial villages.<sup>33</sup> The inclusion of these people in Native communities, even post-contact, showcases how traditional notions of “membership” in Native communities were not rooted in blood alone, but instead were marked by broader ideas of social and cultural togetherness.

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25. See Wayne Suttles, *Affinal Ties, Subsistence, and Prestige Among the Coast Salish*, 62 AM. ANTHROPOLOGIST 2, 296 (1960).

26. See Schmidt, *supra* note 21, at 12.

27. *Id.*

28. Jane Tompkins, “Indians”: *Textualism, Morality, and the Problem of History*, 13 CRITICAL INQUIRY 101, 103 (1986) (detailing how both primary and secondary sources about the time period are contradictory and, at times, “completely incommensurable”).

29. See James Axtell, *The White Indians of Colonial America*, 32 WM. & MARY Q. 55, 61–63 (1975).

30. See Fletcher, *supra* note 2, at 13 (discussing the Anishinaabeg practice of incorporating prisoners into their own polity).

31. See Churchill, *supra* note 5, at 42.

32. *Id.* at 65–66.

33. *Id.*



The expropriation of Indian identity, driven largely by non-Natives leaving the colonies to join Native communities, led to the import of colonial concepts of citizenship and discrete group limits onto Native communities. Threatened by the comingling of White and Native communities, colonists manufactured a racial hierarchy defined by the perceived innate ability of some to civilize.<sup>34</sup> In doing so, arbitrary sociopolitical distinctions between peoples were grounded in biological characteristics. Such distinctions formalized and institutionalized these differences into racial categories with hard lines.<sup>35</sup>

With this institutionalization came the projection of inferiority onto Indigenous peoples. The hierarchy that was created simultaneously emphasized the need for assimilation of Native peoples into colonial ways of life<sup>36</sup> and discouraged colonists from viewing Indigenous people, even those who adopted a more colonial lifestyle, as anything more than a second, inferior class and, thus, as exploitable.<sup>37</sup> The colonial classification and subjugation of Indigenous peoples treated group membership as a finite resource and served as the foundation for future *de jure* and *de facto* legal exploitation on the basis of these classifications.

*D. The Use of 'Blood' as an Identifier in Indigenous Communities During the Treaty, Removal, and Reservation Periods*

There is little indication that Native communities viewed the admixture of White and Native communities as threatening, untoward, or even abnormal.<sup>38</sup> In fact, many mixed Native people were rejected entirely by White society and became some of the greatest advocates for Native Nations.

This is exemplified by a story from my own Nation, the war between the Rosses and the Ridges.<sup>39</sup> During the period immediately preceding the Cherokee removal (1832–1839), the Cherokee people were split between those who wanted to fight to stay in their homeland in what is now Georgia and Tennessee, and those who wanted to leave the area peacefully and move to the Indian Territory, now Oklahoma. Those who wanted to leave were led by John Ridge (who was seven-eighths Cherokee) and several of his “well-blooded” followers. Those who wanted to remain in their homeland and fight for their nation were led by John Ross, who himself was one-eighth Cherokee. My family, and many

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34. See Schmidt, *supra* note 21, at 2.

35. *Id.*

36. This included adopting Western views on property ownership, clear in- and out-group distinctions, and Western familial structures.

37. See Bethany Berger, *Red: Racism and the American Indian*, 56 UCLA L. REV. 591, 593 (2009).

38. See Churchill, *supra* note 5, at 43.

39. Jami Murphy & Will Chavez, *June 22, 1839: A Bloody Day in Cherokee Nation*, CHEROKEE PHOENIX (June 22, 2020), [https://www.cherokeephoenix.org/culture/june-22-1839-a-bloody-day-in-choerokee-nation/article\\_6254b899-f25e-5f73-b23a-839e3b6ce00a.html](https://www.cherokeephoenix.org/culture/june-22-1839-a-bloody-day-in-choerokee-nation/article_6254b899-f25e-5f73-b23a-839e3b6ce00a.html) [https://perma.cc/CR9V-RYQD].

other Cherokee families, view John Ross as the hero, the one willing to do what it took to preserve our Nation. His blood quantum is not part of the commonly told story.<sup>40</sup>

While Native Nations remained open to including mixed and White people in their polity, including allowing Whites to naturalize as tribal citizens, Anglo-American legal systems struggled to classify mixed people.<sup>41</sup> Legally, though the use of blood quantum to divide property was not foreign to the colonists,<sup>42</sup> mentions of “half-blood” or “mixed-blood” Indians in early treaties were largely only used to substantiate the ability of Indian nations to decide their own membership requirements.<sup>43</sup> During the Treaty (1774–1835), Removal (1835–1861), and Reservation (1861–1887) periods,<sup>44</sup> Indians were recognized by what they were not: namely White and U.S. citizens.<sup>45</sup> This “othering” was based on the fundamental understanding that “legal status as ‘Indian’ hinged on membership in an Indian polity.”<sup>46</sup>

Most often, the federal government recognized mixed people as Indian as long as they lived among the tribe with which they were affiliated.<sup>47</sup> Treaties from this era recognize mixed-blood and half-blood Indians purely within the context that those people were recognized by various tribes.<sup>48</sup> This meant that many treaties the United States signed with Native Nations fully recognized various tribes’ right to define their own citizenship, which could and often did include mixed-blood individuals and individuals with little to no Indian blood at all.<sup>49</sup>

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40. See Churchill, *supra* note 5, at 44 (discussing the Ridge/Ross story and examples of “mixed blood” people fighting for their tribal nation, including the Comanche, Cheyenne, Oglala Lakota, and Crow people).

41. See Gregory Ablavsky, “With the Indian Tribes”: Race, Citizenship, and Original Constitutional Meanings, 70 STAN. L. REV. 1025, 1061 (2018).

42. See Paul Spruhan, *A Legal History of Blood Quantum in Federal Indian Law to 1935*, 51 S.D. L. REV. 1, 4 (2006) (detailing the use of “whole blood” and “half blood” in English law for inheritance purposes).

43. See *id.* at 10–12.

44. MATTHEW FLETCHER, PRINCIPLES OF FEDERAL INDIAN LAW 81–85 (2015).

45. For the majority of this time, U.S. citizenship was restricted to landed White men. See Bethany Berger, *Reconciling Equal Protection and Federal Indian Law*, 98 CALIF. L. REV. 1165, 1177 (2010) (arguing that designation as an Indian automatically precluded American citizenship); see also Ablavsky, *supra* note 41, at 1056.

46. See Ablavsky, *supra* note 41, at 1057.

47. See Spruhan, *supra* note 42, at 9–18 (describing many situations in which mixed people were counted as Indian, though there are inconsistencies on how much “Indian blood” was required as a baseline for consideration).

48. See Abi Fain & Mary Kathryn Nagle, *Close to Zero: The Reliance on Minimum Blood Quantum Requirements to Eliminate Tribal Citizenship in the Allotment Acts and the Post-Adoptive Couple Challenges to the Constitutionality of ICWA*, 43 MITCHELL HAMLINE L. REV. 801, 810–813 (2017); 1877 COMM’R INDIAN AFFAIRS ANN. REP. 69–70.

49. The extension of tribal membership to mixed and non-Native people also extended the United States’ obligations, as many of these treaties required the United States to perform certain duties, including distributing annuities or rations based on the total number of tribal members. See Fain & Nagle, *supra* note 48, at 810.

The United States judiciary, however, often applied inconsistent rules about what classified someone as Indian, depending on the court and the judge.<sup>50</sup> Judges would switch between considering matrilineal and patrilineal descent, if one was living with the tribe or not, if their parents married into the tribe or were blood-related in some way, and other considerations. In this way, the American system continued to randomly classify people as Indian or not based on what were often arbitrary and unclear distinctions, not considering whether the affiliated tribe considered the individual a member and not respecting the individual's identity.

*E. The Allotment Acts and the Formation of Racial Classifications of Indians*

It was not until the federal government began to allocate resources to individual tribal members that concerns over “how Indian” someone was became a focus for the federal government.<sup>51</sup> Driven by westward expansion and the need for land for settlers, Congress passed the General Allotment Act of 1887.<sup>52</sup> Also known as the Dawes Act, this was the first of several acts designed to divide tribal land and allot parcels to individual tribal citizens, with a goal of displacing Native peoples so that the federal government could give more land to White settlers.<sup>53</sup> The Dawes Act created the Dawes Commission, which decided who was eligible for tribal membership and what land they received.<sup>54</sup> Driven by the desire to open as much land as possible for settlers, the Dawes Commission narrowly defined tribal membership, often restricting membership to those with a high degree of Indian blood.<sup>55</sup> Though the Allotment Acts did not explicitly define “Indian” and the blood quantum requirements therein, it did allow Indian agents, commissioners, and the Commissioner of Indian Affairs to determine who was to be considered an Indian and who was not.<sup>56</sup> The enrollment and allotment process institutionalized the notion of blood quantum as a fundamental tenet of Indian identity.

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50. See Spruhan, *supra* note 42, at 19.

51. Many state governments, however, used blood quantum as a basis for denying Indians basic rights, including the ability to hold office, marry, and testify in court. See Spruhan, *supra* note 42, at 5; see also Fain & Nagle, *supra* note 48, at 814.

52. See TASK FORCE FOUR: FEDERAL, STATE, AND TRIBAL JURISDICTION, REPORT ON FEDERAL, STATE, AND TRIBAL JURISDICTION: FINAL REPORT TO THE AMERICAN INDIAN POLICY REVIEW COMM'N 111–12 (1976), <https://www.narf.org/hill/documents/icwa/federal/lh/76rep/76rep.pdf> [<https://perma.cc/8LAE-GKSQ>] (“In response to extreme pressure from [W]hites for access to Indian lands and mineral riches, Congress passed the General Allotment Act of 1887.”).

53. *Id.*

54. *Dawes Act (1887)*, ARCHIVES.GOV (Feb. 8, 2022), <https://www.archives.gov/milestone-documents/dawes-act> [<https://perma.cc/6M4F-4RCW>].

55. ANGIE DEBO, AND STILL THE WATERS RUN: THE BETRAYAL OF THE FIVE CIVILIZED TRIBES (1940).

56. See Fain & Nagle, *supra* note 48, at 823.

With every amendment and subsequent Allotment Act,<sup>57</sup> the understanding of tribal membership moved further from citizenship of a Native Nation and closer to a biophysical definition of the word “Indian” that required a certain blood quantum.<sup>58</sup> This came to a head for Cherokee Nation (and the other “Five Civilized Tribes”<sup>59</sup>) in the Curtis Act of 1898, which gave the Dawes Commission the authority to create membership rolls, and to determine who was and who was not included on those rolls.<sup>60</sup> This, in effect, gave the Dawes Commission (and by proxy the federal government) permission to decide the identity of every member of the “Five Civilized Tribes,” to decide if they were “Indian enough.”<sup>61</sup> Dawes Commission decisions controlled not only allotments, but also citizenship in Native Nations.<sup>62</sup>

In this way, the federal government granted itself the power to exclude people based on blood quantum and dispossessed Native Nations of the ability to decide their own citizenship criteria, supplanting it with a destructive scheme intended to demolish Native Nations and assimilate Indians. As Abi Fain and Mary Kathryn Nagle put it, “The [Allotment Acts] were nothing less than an attempt to dismantle tribal governments, eliminate tribal citizenship, and ultimately transfer lands from Indian to non-Indian control.”<sup>63</sup> In fact, “the explicit purpose of allotment was to dissolve tribes as collective entities.”<sup>64</sup> All of this was done without the consultation of a single Indigenous person or Native Nation.<sup>65</sup> By instituting these stringent racial requirements for citizenship, the federal government not only purposefully stripped people of their land but also significantly limited the number of people eligible for tribal membership—an attempt to literally breed tribes out of existence.<sup>66</sup> Blood quantum, in effect, became a way to destroy Native Nations.

#### *F. The Indian Reorganization Act and the Restoration of Political Affiliation*

The Indian Reorganization Act of 1934 (IRA) restored the notion of “Indian” as a political affiliation.<sup>67</sup> Instituted in response to growing concern that

57. The General Allotment Act of 1877 was amended in 1891, extended by the Curtis Act of 1906, and amended by the Burke Act of 1906.

58. See Fain & Nagle, *supra* note 48, at 825.

59. The Cherokee, Chickasaw, Choctaw, Muscogee Creek, and Seminole Nations.

60. See Fain & Nagle, *supra* note 48, at 833.

61. See *id.* at 834.

62. *Id.*

63. *Id.* at 824.

64. See Spruhan, *supra* note 42, at 24.

65. See Alexandra Witkin, *To Silence a Drum: The Imposition of United States Citizenship on Native Peoples*, 21 HIST. REFLECTIONS 353, 375 (1995) (“Without seeking the opinions of Native nations or individual Natives, reformers called for legislation imposing citizenship on all Native people.”).

66. See *id.* at 378; see also Spruhan, *supra* note 42, at 1–3.

67. See Sam Thypin-Bermeo, *Political Cooperation and Procedural (In)justice: A Study of the Indian Reorganization Act*, 2 AM. INDIAN L.J. 300, 303–304 (2013).

the Allotment Acts caused significant damage to Native Nations and their citizens, the IRA was intended to “replace assimilationist policies” of the previous era in an effort to bolster tribal self-determination.<sup>68</sup> Immediately after the passing of the IRA, the BIA offered assistance with tribal constitutional drafting and created boilerplate constitutions that were adopted by many tribes in the 1930s.<sup>69</sup> Many of these constitutions built in a role requiring the BIA and the Secretary of Interior to approve any changes to the constitutions.<sup>70</sup> According to both the IRA and regulations circulated from the Secretary of the Interior, only “appropriate” constitutions are accorded approval.<sup>71</sup>

The Department of the Interior (DOI) circulated a declaration in 1935 that detailed its views on “Membership in Indian Tribes” which was addressed to all “engaged in [the] Indian Reorganization Act.”<sup>72</sup> The declaration stated that “Congress [has] a definite policy to limit the application of Indian benefits,” and suggested tests to limit membership in tribes to those expected to “participate in tribal relation and affairs,” such as having both parents be members of the tribe or having a “certain degree of Indian blood.”<sup>73</sup> When reviewing tribal constitutions, the DOI has actively considered how to “prevent . . . the admission to tribal membership of a large number of applicants of a small degree of Indian blood.”<sup>74</sup>

Given this new guidance around membership criteria and the fact that the BIA would only approve “appropriate” constitutions, it seems clear that the adoption of blood quantum requirements into tribal constitutions was expected and effectively required. As such, while the IRA reintroduced the concept of membership based on lineage and descent at the discretion of the individual Nation, this was supplanted by blood quantum as a main determinant of membership due to significant pressures from the BIA, DOI, and Secretary of Interior.<sup>75</sup> In this way, the federal government continued their quest from the Assimilation Era to legally define Indians out of existence.

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68. See Fain & Nagle, *supra* note 48, at 831.

69. See Judith Resnik, *Dependent Sovereigns: Indian Tribes, States, and the Federal Courts*, 56 U. CHI. L. REV. 671, 713 (1989).

70. *Id.*

71. *Id.*

72. *Id.* at 715.

73. *Id.*

74. See Kirsty Gover, *Genealogy as Continuity: Explaining the Growing Tribal Preference for Descent Rules in Membership Governance in the United States*, 33 AM. INDIAN L. REV. 243, 262 (2008).

75. 25 U.S.C. § 5129 (2020) (“The term ‘Indian’ as used in this Act shall include all persons of Indian descent who are members of any recognized Indian tribe”); Paul Spruhan, *Indian as Race/Indian as Political Status: Implementation of the Half-Blood Requirement Under Indian Reorganization Act, 1934-1945*, 8 RUTGERS RACE & L. REV. 27, 31 (2006) (“If a tribe was recognized, all members of Indian descent fell within the first category of ‘Indian’ in the IRA, regardless of blood quantum.”).

### G. Termination Era

The Termination Era of federal Indian policy began after World War II and is most-notably marked by the House Concurrent Resolution 108, in which Congress stated its plan “to make the Indians within the territorial limits of the United States subject to the same laws and entitled to the same privileges and responsibilities as are applicable to other citizens of the United States, to end their status as wards of the United States.”<sup>76</sup>

This policy was directly assimilative and was intended to dissolve tribal governments and fully integrate Native people into the United States, relieving the federal government’s fiduciary and trust responsibilities to the tribes.<sup>77</sup> While this era was most notably marked by the termination of entire tribes, there were instances of the federal government using blood quantum to significantly limit tribal nations.<sup>78</sup> One such example is the Ute, where the Ute Partition Act of 1954 terminated Ute citizenship for anyone less than 51 percent Ute.<sup>79</sup> Further, while not addressing membership directly, the Termination Era also saw the implementation of the American Indian Relocation Program, which incentivized Native people to move off the reservation and away from their communities.<sup>80</sup> The program provided immediate financial assistance and job training in major cities, causing a significant migration away from tribal communities. The program also encouraged Native people to start families with non-Native people and establish homes away from the reservation.<sup>81</sup> The Termination Era disenfranchised many Native people, disrupted tribal communities, and started the mass migration away from Native communities.

### H. Self-Determination Era

Public backlash from the Termination Era led to an increased interest in Native self-determination starting in the 1960s.<sup>82</sup> Since the early 1970s, the definition of “Indian” in federal law has consistently been “citizen of a Tribal Nation.”<sup>83</sup> However, the use of blood quantum as a qualifier for tribal citizenship

76. H.R. Con. Res. 108, 83d Cong. (1953).

77. See ROBERTA ULRICH, *INDIAN NATIONS FROM TERMINATION TO RESTORATION*, 1953-2006, 3–21 (2010).

78. During this period, the United States terminated 109 tribes and disenrolled 3 percent of all Native people. See FRANCIS PAUL PRUCHA, *THE GREAT FATHER: THE UNITED STATES GOVERNMENT AND AMERICAN INDIANS* 1058 (1984).

79. Ute Partition Act of 1954, Pub. L. No. 671, 68 Stat. 868. See generally Byron Warren Metcalf, *Lambs of Sacrifice: Termination, the Mixed-blood Utes, and the Problem of Indian Identity*, 64 UTAH HIST. Q. (1996).

80. LA V. MADIGAN, *THE AMERICAN INDIAN RELOCATION PROGRAM* 3 (1956).

81. See Azusa Ono, *The Relocation and Employment Assistance Programs, 1948-1970: Federal Indian Policy and the Early Development of the Denver Indian Community*, 5 *INDIGENOUS NATIONS STUDIES* J. 27, 29 (2004).

82. See PRUCHA, *supra* note 78, at 1085.

83. See Fain & Nagle, *supra* note 48, at 850; see also Indian Self-Determination and Education Assistance Act of 1975, 25 U.S.C. § 450b(d) (2000) (“‘Indian’ means a person who is a member of an

has grown drastically. In publicly available tribal constitutions enacted before 1950, 44 percent had an explicit blood quantum requirement; currently over 70 percent of publicly available tribal constitutions have some form of blood quantum requirement.<sup>84</sup> The notion of minimum blood quantum to qualify for citizenship is used in approximately two-thirds of federally recognized tribes today, most of which use one-quarter as the lower limit.<sup>85</sup> Measures of blood quantum in most tribes are tribal-specific—the one-quarter minimum needs to come from that tribe specifically in order to qualify. Thus, in two-thirds of Native Nations today, those seeking membership need to have the total of at least one full-blooded Native grandparent (including two grandparents that were each one-half, or one being three-quarters and one one-quarter, etc.) in order to qualify.

In order to more fully understand why blood quantum is still relevant for tribal governance, we must first identify what is gained through tribal citizenship. First and foremost is an identity and a sense of belonging—you belong to the Nation as much as the Nation belongs to you. With citizenship also comes traditional civil rights, such as the right to vote, run for tribal office, and be within the jurisdiction of tribal courts. Citizenship also gives members tangible benefits, both from the tribe and from the BIA. Benefits from the BIA include access to healthcare through Indian Health Services, education assistance, housing and food assistance, and other material benefits.<sup>86</sup> While most BIA benefits are available to any enrolled member, tribally administered benefits vary from Nation to Nation. Many Nations have monthly pay-outs from tribally owned resources or companies, most often either natural resource extraction or gambling profits that are shared among all members.<sup>87</sup> Many Nations also own their land as a collective in trust; members live in reservation housing for low or no cost.<sup>88</sup> Many tribes in the United States also have closed cultural practices: their sacred knowledge, teachings, and stories are guarded from outsiders and only members have access to many of the teachings and ceremonies.<sup>89</sup>

For many communities, the use of blood quantum in modern Native Nations helps to restrict access to these benefits, teachings, and services to those

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Indian tribe.”); Indian Financing Act of 1974, 25 U.S.C § 1452(b) (2000) (“‘Indian’ means any person who is a member of any Indian tribe, band, group, pueblo, or community which is recognized by the federal government as eligible for services from the Bureau of Indian Affairs and any ‘Native’ as defined in the Alaska Native Claims Settlement Act.”).

84. See Gover, *supra* note 74, at 251.

85. See WILKINS & WILKINS, *supra* note 1, at 58.

86. U.S. DEP’T OF INTERIOR BUREAU OF INDIAN AFFAIRS, DIVISION OF HUMAN SERVICES, <https://www.bia.gov/bia/ois/dhs> [<https://perma.cc/3BKZ-AY2J>].

87. Daniel Cobb, *How Native Americans Use the Gaming Industry to Revitalize Their Communities*, GREAT COURSES DAILY (Feb. 25, 2019), <https://www.thegreatcoursesdaily.com/how-native-americans-use-the-gaming-industry-to-revitalize-their-communities/> [[perma.cc/4Y9L-U6UK](https://perma.cc/4Y9L-U6UK)].

88. See NATIONAL CONGRESS OF AMERICAN INDIANS, Trust Land, <https://www.ncai.org/policy-issues/land-natural-resources/trust-land> [<https://perma.cc/PQ5F-7BPD>].

89. See DEPT. OF HEALTH AND HUM. SERVICES, *Culture Card: A Guide to Build Awareness: American Indian and Alaska Native* (Jan. 2009), <https://store.samhsa.gov/sites/default/files/d7/priv/sma08-4354.pdf> [[perma.cc/TZ2U-SLVK](https://perma.cc/TZ2U-SLVK)].

who have a measurable and provable connection to the tribe. Blood quantum requirements help ensure cultural continuity across generations, work to not overtax Native Nations' resources, and create a feeling of connectedness within the tribe. It allows for Nations to ensure citizens are related to the ancestors of the tribe and gives tribes the ability to classify people as insiders. It also limits the number of people who can become members and have the ability to share in these resources.

However, though blood quantum has been adopted as an appropriate proxy for these policy goals, it is not necessary to achieve them. Blood quantum requirements are becoming more of an artificial barrier to access with each generation and threaten to fulfill their initial role of legally defining Native Nations out of existence. This is especially true in light of changing landscapes, economic and social needs, and responses to institutional harms. And while there is much disagreement about the continuing role of blood quantum in Native Nations, one thing is clear: blood quantum requirements have begun, and will continue, to fulfill their colonial role of restricting and shrinking Native Nations by continuing to violate and limit Native peoples' reproductive freedoms.<sup>90</sup> Without the ability to reproduce freely and parent with dignity, there is a real threat that Native Nations will be bred out of existence.

## II.

### EXAMINING BLOOD QUANTUM REQUIREMENTS THROUGH A REPRODUCTIVE JUSTICE FRAMEWORK

The use of blood quantum violates and limits Native peoples' reproductive freedoms, which perpetuates its colonial goals of eradication, and continues to affect the wellbeing of Native Nations today. To combat these goals, Native Nations must be able to freely reproduce and support their members in doing so. Being able to freely reproduce and parent are necessary for the continuation of any society and are especially crucial for any population that has been threatened and attacked by colonialism or oppression. This is particularly true of Native Nations, whose rights to exist and reproduce have been threatened since colonial contact.

The right to have a child and the right to parent with dignity, both fundamental tenets of reproductive freedom and reproductive justice, are

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90. See, e.g., Paul Adams, *Blood Quantum Influences Native American Identity*, BBC NEWS (July 11, 2011), <https://www.bbc.com/news/world-us-canada-14089253> [<https://perma.cc/D5VC-RNFC>]; David Treuer, *How Do You Prove You're an Indian?*, N.Y. TIMES (Dec. 20, 2011), <https://www.nytimes.com/2011/12/21/opinion/for-indian-tribes-blood-shouldnt-be-everything.html> [[perma.cc/MDC3-F3QV](https://perma.cc/MDC3-F3QV)]; Harlan McKosato, *It's Time for Tribes to Get Creative with Blood Quantum*, INDIAN COUNTRY TODAY (Oct. 20, 2015), [https://indiancountrytoday.com/archive/it-s-time-for-tribes-to-get-creative-with-blood-quantum-zlcE4TzsnU--II\\_I8NW0Fw](https://indiancountrytoday.com/archive/it-s-time-for-tribes-to-get-creative-with-blood-quantum-zlcE4TzsnU--II_I8NW0Fw) [<https://perma.cc/59ZU-BWRJ>]; Emma Hodges, *Indian Enough*, OR. HUMANS. (Feb. 28, 2020), <https://www.oregonhumanities.org/rll/beyond-the-margins/indian-enough/> [<https://perma.cc/UNN3-92HL>].



necessary for the flourishing of a population.<sup>91</sup> Additionally, the right to have a child is often chilled when the right to parent with dignity is violated. These rights are intertwined and ultimately depend on each other. There are many realities of contemporary life for Native people that threaten the ability to have a child and parent with dignity, issues that blood quantum often compounds exponentially. This Section begins by giving a brief overview of reproductive justice and then discusses how five contemporary issues in Native Nations intersect with blood quantum requirements to suppress or violate the basic tenets of reproductive justice, including the right to have a child and the right to parent with dignity.

*A. Reproductive Justice: A Lens Through Which to Examine Blood  
Quantum*

Reproductive justice is a movement created by women of color focused on developing an “expansive and multilayered approach to the fight for reproductive freedom for all people.”<sup>92</sup> The three basic tenets of reproductive justice are “the human right to not have a child, the human right to have a child, and the human right to parent children in safe and healthy environments.”<sup>93</sup> In order to effectuate these three tenets, reproductive justice demands, among other things, “the state . . . not unduly interfere with [people]’s reproductive decision making” and that the government “create the conditions for [people] to exercise their decisions without coercion and with social supports.”<sup>94</sup> The right to parent, especially, is “based on the human right to make personal decisions about one’s life, and the obligation of government and society to ensure that the conditions are suitable for implementing one’s decisions.”<sup>95</sup> Reproductive justice focuses not just on the choice to have children or not, but the community, social, and governmental support for those choices in order to bring them to full effect.<sup>96</sup> This includes making available the ability to have children, wherever you want, with whomever you want, without outside pressure or concerns about the identity of the child. Parenting with dignity requires the ability to make choices that are best for oneself and one’s family without undue sacrifice of government support, community support, and broader inclusion.

Analysis through a reproductive justice framework focuses on how “economic and social systems harm lives and constrain the options both of

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91. Zakiya Luna & Kristin Luker, *Reproductive Justice*, 9 ANN. REV. L. & SOC. SCI. 327, 343 (2013).

92. Loretta Ross, *Introduction*, in RADICAL REPRODUCTIVE JUSTICE: FOUNDATIONS, THEORY, PRACTICE, CRITIQUE, 1, 12 (Loretta J. Ross, Lynn Roberts, Erika Derkas, Whitney Peoples, and Pamela Bridgewater Toure eds., 2017).

93. LORETTA ROSS & RICKIE SOLINGER, REPRODUCTIVE JUSTICE, AN INTRODUCTION 169 (2017).

94. *Id.*

95. *See* SISTERSONG, *supra* note 7.

96. *See id.*

individuals and communities.”<sup>97</sup> Reproductive justice asks that we pay attention to “nonbiological issues affecting reproductive bodies and parenting experiences in relation to the state and other authorities.”<sup>98</sup> It “connects the dots between many social justice issues that seem unrelated to reproductive rights” and compels the consideration of interrelated forces that affect the entirety of the reproductive experience.<sup>99</sup>

An analysis of blood quantum through a reproductive justice framework requires the examination of the social and political, the biological and nonbiological, and the interrelatedness of choice and behavior.<sup>100</sup> This analysis looks at how blood quantum requirements set by both the United States and tribal governments intersect with many other realities of Native American life. To many, feelings of pressure are ever-present: such as feeling pressure to choose or not choose a certain partner because the combined parental blood quantum would disallow the potential child from citizenship. Families have also split when some children qualify for citizenship and some do not.<sup>101</sup> Blood quantum requirements force Native people to consider the identity of their potential children when deciding when, where, how, and with whom they have children.

Looking at these requirements and constraints within the realities of the lives of Native people allows us to fully assess the role blood quantum plays in Native people’s reproductive autonomy. This Section addresses how migration and intermarriage, environmental harms, and institutional violations intersect with blood quantum requirements to suppress or violate the fundamental tenets of reproductive justice.

### *B. Contemporary Aspects of Native Life that Implicate Blood Quantum and Reproduction*

#### *1. Urbanization Decreases the Likelihood of Intratribal Children*

The past 50 years have seen a substantial rise of Native people leaving their tribal lands and moving to more urban areas. This relocation limits the number of available tribal members of reproductive age in the community left on the tribal land, potentially leading to a decreased possibility of tribal members having children together and preserving the blood quantum levels of the resulting children. Tribal members who have relocated are also more likely to meet non-

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97. See ROSS & SOLINGER, *supra* note 93, at 170.

98. *Id.* at 169.

99. *Id.*

100. See *supra* notes 87–90 and accompanying text.

101. See, e.g., Tailyr Irvine, *Reservation Mathematics: Navigating Love in Native America*, NAT’L MUSEUM OF THE AM. INDIAN, <https://americanindian.si.edu/developingstories/irvine.html> [<https://perma.cc/KHY9-H23E>]; Steve Russell, *Disappearing Indians: Who Decides Who’s In and Who’s Out?*, INDIAN COUNTRY TODAY (July 21, 2015), [https://indiancountrytoday.com/archive/disappearing-indians-who-decides-who-s-in-and-who-s-out-RH1jpNVp9kKuAgAkWg\\_smA](https://indiancountrytoday.com/archive/disappearing-indians-who-decides-who-s-in-and-who-s-out-RH1jpNVp9kKuAgAkWg_smA) [<https://perma.cc/CZ38-75FK>].

tribal members with whom they want to start a family. Altogether, these factors may lead to a number of tribal members having children who may not have the requisite blood quantum levels required to be a member of their Nation.

The urbanization of Native peoples and the resulting geographic separation largely began through U.S. government-forced assimilationist policies during the Termination Era and in the Indian Relocation Act.<sup>102</sup> The fundamental goal of this era was to deal with the “Indian problem” and assimilate Native people into broader American society, destroying Native communities and bringing an end to Native Nations.<sup>103</sup> This was effectuated by incentives to move to urban areas and a significant reduction in the financial support and social services available to Native Nations.<sup>104</sup>

While this assimilationist policy is no longer the federal government’s official stance, the conditions the policy created are still impacting Indian Country and emigration from reservations.<sup>105</sup> The lack of employment and educational opportunities on many reservations continues to drive people, especially young people, away from their communities to find work or attend school.<sup>106</sup> Today, Native people migrate to urban areas for education, work, and other financial opportunities, then often choose to stay, settle down, and start families away from tribal land. This geographic separation from tribal communities for the Native people who do not live on their tribal land makes it

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102. See generally PHILIP WEEKS, “THEY MADE US MANY PROMISES”: THE AMERICAN INDIAN EXPERIENCE 1524 TO THE PRESENT 193–208 (2002).

103. THE HOOVER COMMISSION REPORT ON ORGANIZATION OF THE EXECUTIVE BRANCH OF THE GOVERNMENT 465 (1949).

104. See Ono, *supra* note 81, at 29–32.

105. Max Nesterak, *Uprooted: The 1950s Plan to Erase Indian Country*, APM REP’TS (Nov. 1, 2019), <https://www.apmreports.org/episode/2019/11/01/uprooted-the-1950s-plan-to-erase-indian-country> [<https://perma.cc/8JCX-MLZ4>] (detailing the long-term effects of relocation, including poverty, homelessness, and lack of educational opportunities in Indian Country today as a result of the lack of investment during the Termination Era); Diane K. Levy & Nancy Pindus, *Hard Choices: How Moving On and Off Reservations Can Increase the Risk of Homelessness for American Indians*, URB. INST. (Jan. 8, 2020), <https://housingmatters.urban.org/articles/hard-choices-how-moving-and-reservations-can-increase-risk-homelessness-american-indians> [[perma.cc/3U4V-ELLW](https://perma.cc/3U4V-ELLW)] (discussing the increased mobility of Native people and the threat to housing on and off the reservation).

106. See, e.g., Katheryn Houghton, *Between Nations: Choosing to Live on or Off Reservations*, NATIVE NEWS 2014, [http://nativenews.jour.umt.edu/2014/?page\\_id=171](http://nativenews.jour.umt.edu/2014/?page_id=171) [<https://perma.cc/V5XW-KUF7>] (“Native Americans face a constant conflict: A push to move into a city, go to school, find a job, perhaps start a family and a pull to stay on the reservation, where there’s family and generations of support. The conflict is reasonable, tribal reservations are often impoverished and have unemployment rates well into the double digits. Urban areas are increasingly becoming rife with promise and opportunity.”); Jessica Martin, *Majority of American Indians Move off Reservations, but Their Cultural, Financial Services Remain Behind*, THE SOURCE: WASH. U. IN ST. LOUIS (Apr. 12, 2017), <https://source.wustl.edu/2007/04/majority-of-american-indians-move-off-reservations-but-their-cultural-financial-services-remain-behind/> [<https://perma.cc/69ST-G5K6>] (“[N]early 60 percent of American Indians reside off-reservation”); WEEKS, *supra* note 102, at 231–242 (detailing the reasons people left the reservation and the ways in which urban Indians attempted to stay connected to their culture and identity even after leaving the reservation).

much more difficult to find potential partners with the same tribal citizenship in their place of residence.

The migration out of Indian Country has been growing since the 1970s. Strikingly, today 78 percent of the self-identified American Indian/Alaska Native (AI/AN) population lives outside of Indian Country.<sup>107</sup> Due to migration from many different areas, urban Indian communities are often made up of people from many different tribes. This increases the potential for intertribal relationships. Migration and relocation away from tribal land also increases the incidence of marriages between Native and non-Native people.<sup>108</sup> According to 2010 Census data, over 60 percent of Native people today are married to non-Natives.<sup>109</sup>

As a result, many urban Indians identify as multiple races or multiple tribes, and as such would likely have a blood quantum of one-half or lower.<sup>110</sup> While urban Indian relationships have the potential to produce children who may qualify for membership, the lower the parents' blood quantum, the lower this potential becomes. For example, if someone with a blood quantum of one-half has a child with a non-Native or a person from a different tribe, that child would have a blood quantum of one-quarter, which is a threshold for many tribes. However, if the parent has a blood quantum of one-quarter and has a child with a non-Native or person not from the same tribe, that child would have a blood quantum of one-eighth and would not qualify in many tribes. Based on representative rates of intermarriage and migration, projections show that by 2080, the proportion of Native people with one-half or more blood quantum from a single tribe will fall to 8 percent while the proportion of those with less than one-quarter will rise to 60 percent.<sup>111</sup>

The choice to move off the reservation is difficult. Weighing the benefits of urban opportunities against the possibility of not finding a partner from the same tribe adds even more reproductive pressure. For some, including Tyler Walls, this choice presented a real issue when deciding to leave the Onondaga Nation in Syracuse for college in Arizona. When Tyler was leaving for college, he asked an Onondaga Chief if he should stay instead and find an Onondaga woman to marry. Reflecting on this conversation, Tyler describes his concerns:

Do I stop looking for an Onondaga or do I not care? Or do I now shift my my [*sic*] focus on Hopi women? . . . It's just so weird that we have to choose and really determine looking forward to our children if I don't marry into my tribe . . . my child is going to be even less Indian. . . I'm

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107. 2010 CENSUS, *supra* note 10, at 12–13.

108. See Gary Sandefur & Trudy McKinnell, *American Indian Intermarriage*, 15 SOC. SCI. RSCH. 356, 368 (1986); see also Thornton, *supra* note 5, at 109–10.

109. Thornton, *supra* note 5, at 110.

110. *Id.*

111. *Id.*

it, I'm the last generation as far as me and my siblings go.<sup>112</sup>

Tyler is one-quarter Hopi and one-quarter Onondaga and is now the parent to a son who is less than one-quarter Hopi, Onondaga, Blackfeet, and Blood.<sup>113</sup> The Hopi, Blackfeet, and Blood Nations require a blood quantum of at least one-quarter to qualify for membership; Onondaga requires a blood quantum of one-half.<sup>114</sup> Tyler's son does not qualify for tribal membership in any of his parents' tribes.<sup>115</sup>

Tyler's partner, Souta Calling Last, has similar concerns about their son not being eligible for tribal enrollment, saying:

He may or may not be honored and he definitely will not be enrolled in the tribe where his grandmothers and grandfathers are from. And so his obstacle of just trying to maintain his daily peace as a Native man is impacted then and that has a lot of implications of like okay well as a mother, any obstacles he faces in life right now, I'm supposed to teach him how to deal with that.<sup>116</sup>

Tyler and Souta should not have to give up their right to parent within their communities because of the blood quantum of their child. They both left their communities to find educational opportunities and start a family, but they did not sever the ties to their communities. Conversely, Tyler and Souta both express the desire to have their son recognized by their Nations and are concerned about what ineligibility will mean for him long-term.<sup>117</sup> They are also concerned about what that means for their parenting. How will they navigate the additional obstacles of not having their son recognized by elders, welcomed to participate in closed ceremonies, or able to exercise treaty hunting and fishing rights?<sup>118</sup> How will they make their son feel welcomed in the community? How will they help him navigate trying to understand his identity when he is not allowed membership in his parents' Nations? And there are even broader considerations about what this will mean for the future—where will their Nations' populations be seven generations from now? The blood quantum requirements preventing Tyler and Souta's son from enrolling are also disrupting their ability to parent with dignity.

This is a common problem for Native people who leave their communities to find opportunities outside of Indian Country. They are faced with the impossible decision to either leave and better their own lives or stay and try to

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112. EMBRACERACE, *Identity Crisis: Tribal Nonenrollment & Its Consequences for Children*, <https://www.embracerace.org/resources/identity-crisis-tribal-nonenrollment-its-consequences-for-children> [perma.cc/S6UM-62A5].

113. *Id.*

114. *Id.* See THE HOPI TRIBE OFFICIAL WEBSITE, *Office of Enrollment* <https://www.hopi-nsn.gov/tribal-services/tribal-membership/enrollment/> [https://perma.cc/YT84-H2EL].

115. See EMBRACERACE, *supra* note 112.

116. *Id.*

117. *Id.*

118. *Id.*

ensure their children are able to be members of the tribe. Both choices have lifelong implications, yet there would be no choice to make if blood quantum was not a determinate factor in tribal enrollment. Without the force of blood quantum in the equation, Native people could choose to seek opportunities to better their own lives and feel confident that their children would still have a Nation to return to. They could honor the past seven generations by living their fullest lives, succeeding, and thriving, and they can attend to the future seven generations by making sure those generations exist and ensuring prosperity through their newfound opportunities.

2. *Environmental Impacts of Extractive Policies on Reservation Land and Native Fertility*

Many Native Nations have suffered the harms of extractive colonialism, and their members are still suffering the consequences. Environmental harm often affects fertility in addition to overall health, which may limit the number of tribal members who are capable of having biological children. A decrease in overall fertility decreases the number of potential partners in a community, incentivizing some tribal members to look outside the tribe for fertile partners with whom to have biological children. This may even cause tribal members not to have children at all as a result of not finding a suitable partner within the tribe. In any of these scenarios, parents are choice-limited, either forced to not have children or have children that may not qualify for membership in their parent's community because their blood quantum would be too low. While significant activism by Native Nations has cleared up many environmental harms in the past thirty years, the ongoing effects of fertility issues and the low birthrates associated with such issues are still a concern for Native Nations.

"Until people can be given some assurances, they're scared to death to even consider having kids," Ken Hansen, tribal administrator of the Shoalwater Bay Tribe says about the rash of failed pregnancies, stillbirths, and infant deaths that plagued his community in the 1990s.<sup>119</sup> "If an answer isn't found soon, people are afraid the tribe will vanish."<sup>120</sup> Runoff from cranberry bogs receiving intensive pesticide application caused over ninety percent of Shoalwater Bay Tribe pregnancies between 1990 and 1992 to end in miscarriage, stillbirth, or infant death, and it continues to affect the community's reproductive health.<sup>121</sup>

A similar story unfolded on the Saint Regis Mohawk Reservation. Starting in the mid-1980s, Katsi Cook, a local Mohawk midwife, began noticing a

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119. Ann Japenga, *A Patter of Failed Pregnancies, Infant Deaths Baffles Shoalwater Indian Tribe, Which Fears Extinction Because Its . . . : Babies Are Dying*, L.A. TIMES (Feb. 25, 1993), <https://www.latimes.com/archives/la-xpm-1993-02-25-vw-717-story.html> [perma.cc/V5NF-6WFP].

120. *Id.*

121. See EPA, THE SHOALWATER BAY RESERVATION: A LIMITED ENVIRONMENTAL ASSESSMENT: 1994 -1995, at iii-iv (1997).

significant increase in miscarriages and birth defects in her community.<sup>122</sup> Contamination of the water, soil, and fish on the St. Regis Mohawk Reservation from industrial plants on the St. Lawrence River was causing significant adverse reproductive outcomes for the Mohawk people.<sup>123</sup> This contamination led to the increase in fertility complications that Cook observed. The reproductive impact on the Mohawk people was severe—twenty years after she stopped trying to conceive, another Akwesasne Mohawk woman, profoundly affected by multiple miscarriages in the 1980s and 1990s, cried, “[M]y clan can’t continue from my part; I have no [children].”<sup>124</sup>

The plants leaked polychlorinated biphenyls (PCBs) into the waterway, which tainted both the water the Mohawk use daily and the fish they eat.<sup>125</sup> Not only did these PCBs cause high levels of miscarriage and birth defect, Mohawk women had twice the level of PCBs in their breast milk as compared to the average American woman.<sup>126</sup> Mohawk children that were breastfed had ten times the amount of PCBs in their urine as average American children.<sup>127</sup> Follow-up studies on the effects of chronic exposure to PCBs in these children showed that many of their health modalities were affected, including lower testosterone levels and precocious puberty, which can lead to decreased fertility or infertility later in life.<sup>128</sup> These children are now of reproductive age and suffering the consequences of environmental contaminant-based reproductive issues. Each of these stories shows that staying on the reservation can be just as detrimental as leaving to have a child that would qualify for tribal membership.

The Shoalwater Bay and Saint Regis Mohawk tribal communities are not the only tribal communities experiencing negative reproductive outcomes. Native communities across the United States experience reproductive issues resulting from exposure to environmental contaminants.<sup>129</sup> Extractive environmental practices are often found on tribal land and have created conditions that jeopardize the health of people living on the reservation,

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122. See ELIZABETH HOOVER, *THE RIVER IS IN US: FIGHTING TOXICS IN A MOHAWK COMMUNITY* 55 (2017).

123. See Elizabeth Hoover, Katsi Cook, Ron Plain, Kathy Sanchez, Vi Waghiyi, Pamela Miller, Renee Dufault, Caitlin Sislin & David O. Carpenter, *Indigenous Peoples of North America: Environmental Exposures and Reproductive Justice*, 120 ENV’T HEALTH PERSP. 1645, 1645 (2012) [hereinafter *Indigenous Peoples*]; see generally Asara Santiago-Rivera, Gayle Skawennio Morse, Anne Hunt & Henry Lickers, *Building A Community-Based Research Partnership: Lessons From the Mohawk Nation of Akwesasne*, 26 J. COMM. PSYCH. 163 (1998).

124. *Id.*

125. See Hoover et al., *Indigenous Peoples*, *supra* note 123, at 1647.

126. See Edward Fitzgerald, I Syni-An Hwang, Brian Bush, Katsi Cook & Priscilla Worswick, *Fish Consumption and Breast Milk PCB Concentrations Among Mohawk Women at Akwesasne*, 148 AM. J. EPIDEMIOLOGY 164, 164 (1998).

127. See generally Edward Fitzgerald, Syni-An Hwang, Marta Gomez, Brian Bush, Bao-Zhu Yang, Alice Tarbell, *Environmental and Occupational Exposures and Serum PCB Concentrations and Patterns Among Mohawk Men at Akwesasne*, 17 J. EXPO. SCI. & ENV’T. EPIDEMIOLOGY 269 (2007).

128. See Hoover et al., *Indigenous Peoples*, *supra* note 123, at 1647.

129. See generally Hoover et al., *Indigenous Peoples*, *supra* note 123.

especially people trying to conceive, pregnant people, and their unborn children.<sup>130</sup>

The Pine Ridge Reservation in South Dakota, which is home to the Oglala Lakota and the Navajo Nation, both had large uranium mining operations in the twentieth century.<sup>131</sup> Groundwater, surface water, and soil studies have traced gross alpha-radiation to the uranium mines,<sup>132</sup> which has been shown to be a significant contributor to infant mortality, miscarriage, and cancer.<sup>133</sup> On Pine Ridge, infant mortality is five times that of the national average, miscarriage rates are 6.35 times higher than the national average, and reproductive organ cancer rates are fifteen times that of the national average.<sup>134</sup> A 1992 study on the Navajo Nation found a significant increase in unfavorable birth outcomes when either parent worked with or near the uranium.<sup>135</sup> Moreover, animal studies have shown that chronic exposure to uranium leads to pathogenetic and pathomorphological changes to sperm, which affects fertility.<sup>136</sup> Additionally, studies show residual accumulation of several banned pesticides, including DDT, in water sources within Navajo Nation.<sup>137</sup> DDT serves as an anti-androgen that can affect reproductive system development and can lead to decreased fertility.<sup>138</sup>

In all of these situations, tribal members could improve their reproductive outcomes by having children with people not affected by the contaminated environment, who are usually not tribal members, or by utilizing assisted reproductive technologies (ART).<sup>139</sup> Each alternative helps individual tribal

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130. See *id.* at 1645; see generally Philippe Grandjean, *Late Insights Into Early Origins of Disease*, 102 BASIC CLINICAL PHARMACOLOGICAL TOXICOLOGY 94 (2008); David Carpenter, *Environmental Contaminants and Learning and Memory*, 1287 INT'L CONG. SERIES 185 (2006).

131. Lilas Jones Jarding, *Uranium Activities' Impacts on Lakota Territory*, INDIGENOUS POL'Y J. 2 (2011). See generally Jamie deLemos et al., *Development of Risk Maps to Minimize Uranium Exposures in the Navajo Churchrock Mining District*, 8 ENV'T HEALTH (2009).

132. Jarding, *supra* note 131, at 18–26.

133. See generally Pamela Williams & Stacy Fletcher, *Health Effects of Prenatal Radiation Exposure*, 82 AM. FAM. PHYSICIAN 488 (2010).

134. Nancy Unger, *Women, Sexuality, and Environmental Justice in American History*, in NEW PERSPECTIVES ON ENVIRONMENTAL JUSTICE: GENDER, SEXUALITY, AND ACTIVISM 45, 57 (Rachel Stein ed., 2004); Kenneth Wienski, *Leading Health Challenges Pine Ridge Reservation, South Dakota Oglala Sioux*, 5 JUNIPER ONLINE J. PUB. HEALTH 1, 1 (2007).

135. L.M. Shields, W.H. Wiese, B.J. Skipper, B. Charley & L. Benally, *Navajo Birth Outcomes in the Shiprock Uranium Mining Area*, 63 HEALTH PHYSICS 542, 546–49 (1992).

136. E.g., Yuhui Hao, Rong Li, Yanbing Leng, Jiong Ren, Jing Liu, Guoping Ai, Hui Xu, Yongping Su & Tianmin Cheng, *A Study Assessing the Genotoxicity in Rats after Chronic Oral Exposure to a Low Dose of Depleted Uranium*, 50 J. RADIATION RES. 521 (2009).

137. U.S. DEP'T OF THE INTERIOR, BUREAU OF INDIAN AFFAIRS, DRAFT PROGRAMMATIC ENVIRONMENT IMPACT STATEMENT FOR NAVAJO NATION INTEGRATED WEED MANAGEMENT PLAN 84 (Nov. 2016), <https://www.bia.gov/sites/bia.gov/files/assets/public/pdf/idc2-060714.pdf> [<https://perma.cc/2MQN-VF8Q>].

138. Jane Fisher, *Environmental Anti-androgens and Male Reproductive Health: Focus on Phthalates and Testicular Dysgenesis Syndrome*, 127 REPRODUCTION 305, 310 (2004).

139. See generally Adrea Korthase, *Seminal Choices: The Definition of "Indian Child" in a Time of Assisted Reproductive Technology*, 31 J. AM. ACAD. MATRIMONY L. 131 (2018).



members to have better reproductive outcomes, though with a significant chance that the resulting child would have a blood quantum that is half of their Native parent's. Both the Oglala Lakota and the Navajo Nations have a one-quarter blood quantum requirement for membership, which substantially frustrates the quest for a healthy pregnancy and child—especially if the tribal member has less than one-half blood quantum themselves.

While there are not widespread studies about environmental impact on every reservation in the United States, these case studies illuminate the vast array of negative reproductive effects attributable to environmental contaminants. These situations also highlight the pressures blood quantum creates for people having children after suffering these negative reproductive effects.<sup>140</sup> Extractive colonialism and the subsequent dysgenic fertility conditions created by environmental pollution and degradation prevent full reproductive autonomy for Native peoples. The decreased fertility and adverse birth outcomes significantly decrease the chances of finding a fertile partner within the community and incentivize people to look outside their community for partners, which increases their chance of having a child with a lower blood quantum who may not qualify for citizenship, as discussed in Part II.B.1 above. Additionally, while more and more people are looking to ART, including egg and sperm donation, when faced with infertility, Native people who want to ensure their child has the ability to enroll in their tribe may not have this option. Environmental impacts on fertility and health in Native communities has been a growing issue for decades and is now recognized as a reproductive justice issue. Environmental contaminants threaten the ability to have a healthy child and parent that child in a safe and healthy environment. Adding in the consideration of blood quantum and whether children you can have, either through finding a partner outside the community or by utilizing ART, will be eligible for membership and embraced by their communities further threatens the freedom to have a child and parent with dignity and safety.

### 3. *Sterilization Incentivizes Inter-marriage and Decreases Number of Potential Native Children*

Reproductive autonomy, especially for people with the capacity for pregnancy (PWCP) in Indian Country, has been compromised since settler contact.<sup>141</sup> The United States government undertook a massive sterilization campaign at Indian Health Services (IHS) facilities in the early 1970s.<sup>142</sup> 25 to 50 percent of all Native women, which estimates put at between 3,400 and 70,000 women, “were coercively, forcibly, or unwittingly sterilized permanently

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140. All case studies discussed are tribes with at least a twenty-five percent blood quantum requirement for citizenship.

141. See SARAH DEER, *THE BEGINNING AND END OF RAPE* 16–24 (2015); ANDREA SMITH, *CONQUEST: SEXUAL VIOLENCE AND AMERICAN INDIAN GENOCIDE* 7–34 (2015).

142. See generally Lawrence, *supra* note 11.

by tubal ligation or hysterectomy.”<sup>143</sup> This egregious abuse of Native people’s reproductive freedom perpetuated by the United States government irreversibly changed the lives of Native people and Native communities for many generations.

By removing the many opportunities for people to have children in Native communities, the United States government purposefully disrupted generations of Native families. In 1970, before the sterilization program, the average Native woman had 3.29 children.<sup>144</sup> By 1980, that number dropped to 1.3.<sup>145</sup> This means that births were reduced by more than half—and up to 139,300 children that otherwise would have been born between 1970 and 1980 were not, due to the IHS sterilization programs. This also means that each subsequent generation of Native people is missing at least 139,300 children.<sup>146</sup> This loss is especially salient for blood quantum requirements given that the IHS sterilization policy “singled out full-blooded Indian women for sterilization procedures,” which disproportionately affects the average blood quantum of communities with high sterilization rates.<sup>147</sup>

The two main consequences of this sterilization program were that: (1) these Native women could not have biological children, shrinking generations, and (2) many who were not sterilized were forced to look outside of their communities for partners if they wanted to have biological children.<sup>148</sup> These consequences both inevitably led to children with lower blood quantum or no direct blood relationship with the tribe,<sup>149</sup> the former through lack of children or adoption, the latter through migration and intermarriage, as discussed in Part II.B.1 above. Requiring communities in which sterilization practices were more prevalent to meet blood quantum requirements for membership only furthers the harms done by sterilization.

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143. The government reported 3,400, while Native researchers estimated 70,000. This is out of a total of 100,000–150,000 women of reproductive age at the time. D. Marie Ralstin-Lewis, *The Continuing Struggle Against Genocide: Indigenous Women’s Reproductive Rights*, 20 WICAZO SA REV. 71, 71–72 (2005). See also Lawrence, *supra* note 11, at 410; Beth Adams, *‘Reproduction on the Reservation’: The History of Forced Sterilization of Native American Women*, WXXI NEWS (Oct. 28, 2019), <https://www.wxxinews.org/post/reproduction-reservation-history-forced-sterilization-native-american-women> [perma.cc/CU9D-24VY].

144. See Mariah Gladstone, *Decades after Forced Sterilization, Native American Women in the US Still Face Rejection and Retraumatization in Healthcare*, LADY SCI. (Sept. 11, 2019), <https://www.ladyscience.com/features/forced-sterilization-native-american-women-face-rejection-retraumatization-in-healthcare> [https://perma.cc/V5QQ-22D9].

145. *Id.*

146. Birth rates in the years 1990, 2000, and 2010 were 2.18, 1.7, and 1.4, respectively. Sarah Cannon & Christine Percheski, *Fertility Change in the American Indian and Alaska Native Population, 1980–2010*, 37 DEMOGRAPHIC RSCH. 1, 8 (2017).

147. See Lawrence, *supra* note 11, at 411.

148. See Ralstin-Lewis, *supra* note 143, at 84.

149. While some tribes allow adoptees with no direct tribal lineage to legally become tribal members, this is not a universal practice. See Fletcher, *supra* note 2, at 14.

While the sterilization program itself clearly violates the right to have a child, blood quantum requirements further infringe on the right to have a child by forcing tribal men to consider whether they want to have a child with a non-tribal member that may not qualify for tribal membership. Blood quantum also interferes with the right to parent with dignity for people who did choose to have a child with a non-tribal member that did not qualify for citizenship and people who, due to the sterilization, could not have a child and chose to adopt a child without tribal blood.

4. *Inadequate, Underfunded, Negligent, and Abusive Healthcare and Reproductive Healthcare at Indian Health Services is Implicated in Negative Reproductive Outcomes*

Inadequate or insufficient healthcare is often associated with decreases in fertility and increases in maternal and fetal mortality. Most medical care on reservations is administered by Indian Health Services (IHS). Currently IHS serves approximately 2.6 million Native people from 574 tribes in thirty-seven states.<sup>150</sup> Access to IHS facilities is limited to those with tribal membership, and the majority of tribal members receive all of their medical care through the agency.<sup>151</sup> Given their dependence on IHS, Native women are especially vulnerable to medical abuse at IHS facilities, including the sterilization practices described in Part II.B.3 above.<sup>152</sup> IHS has a history of other significant ethical breaches as well, including hiring physicians with extensive histories of medical mistakes, regulatory sanctions, and malpractice claims against them; regularly overlooking physicians who assault their patients at IHS facilities or repeatedly deny adequate care; and allotting inadequate budgets.<sup>153</sup> Further, many Native Nations have severely lacking reproductive healthcare, including limited access to contraception, emergency contraception, and crisis pregnancy and abortion care.<sup>154</sup> In fact, the Hyde Amendment disallows IHS from performing abortions,

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150. INDIAN HEALTH SERV., *About IHS*, <https://www.ihs.gov/aboutihs/> [perma.cc/AM33-ZY5X].

151. See INDIAN HEALTH SERV., *Eligibility*, <https://www.ihs.gov/aboutihs/eligibility/> [perma.cc/QHK7-QJFB]; see also INDIAN HEALTH SERV., *About IHS*, *supra* note 150.

152. See Ralstin-Lewis, *supra* note 143, at 77.

153. See WALL ST. J. & FRONTLINE PBS, *Forsaken by the Indian Health Service* (Jan. 16, 2020), <https://www.wsj.com/articles/forsaken-by-the-indian-health-service-11579196871> [https://perma.cc/KU63-WAAE] (listing investigations into IHS done by Frontline and The Wall Street Journal); Nick Martin, *Congress is Starving the Indian Health Service and South Dakota Tribes are Paying with Their Lives*, SPLINTER (Dec. 15, 2018), <https://splinternews.com/congress-is-starving-the-indian-health-service-and-sout-1830879285> [https://perma.cc/XXX7-7RT4] (describing the severe budget crisis at IHS facilities in South Dakota); Dana Ferguson, *Violated: How Indian Health Service Betrays Patient Trust and Treaties in the Great Plains*, ARGUS LEADER (Dec. 5, 2018), <https://www.argusleader.com/in-depth/news/2018/12/05/south-dakota-health-care-ihs-hospital-native-american-trust-violated/1728819002> [perma.cc/S8SD-6DZ8] (describing the many medical mistakes that have cost patient lives at IHS facilities).

154. See Herrera, *supra* note 12.

with very few exceptions.<sup>155</sup> IHS also does not adequately provide Plan B, or any other emergency contraception, despite several lawsuits and a formal change to agency policy.<sup>156</sup>

IHS's reputation, combined with the continuing poor quality of healthcare services and lack of reproductive health services, has significant effects on maternal and fetal health and fertility on the reservation. Native women have maternal mortality rates three times higher than that of the general population, and fertility rates among Native women have significantly decreased since the 1990s.<sup>157</sup> Just as with the declining fertility rates due to environmental harms, declining fertility rates and increased maternal mortality rates incentivize Native people to leave the reservation to find better healthcare and healthier partners. This also similarly impacts blood quantum by dispersing tribal communities, forcing Native people to look outside of their communities for partners, and preventing them from having children at all. All of these impacts decrease the likelihood of having a child, or having a child with the necessary blood quantum.

These IHS abuses and lack of care violate several principles of reproductive justice. The right to have a child is implicated in poor care, decreased fertility, and higher maternal mortality. The right not to have a child is implicated in the lack of reproductive care available. The addition of blood quantum and the incentive to find a fertile partner outside the community also implicates the right to parent with dignity—having a child with a low blood quantum decreases the likelihood that the child will qualify for citizenship in the Nation. This alienates the parent and the child from the Nation and infringes on the right to have a child in the first place.

##### 5. *Sexual Violence and Forced Pregnancy*

Sexual violence has consistently been a threat to Native communities since the colonial period.<sup>158</sup> Today, violence against women, including sexual violence, is one of the biggest issues in Indian Country.<sup>159</sup> Best estimates suggest

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155. IHS will allow abortion care if the assault is reported within sixty days. However, a significant majority of survivors do not report their assaults, and just as many are not aware of this sixty-day rule. *Id.*

156. See Sofia Resnick, *No Plan B: Why Is the Indian Health Service Denying Native American Women Access to Emergency Contraception?*, REWIRE NEWS GROUP (Jan. 28, 2013), <https://rewirenewsgroup.com/2013/01/28/indian-health-service-continues-to-deny-native-american-women-access-to-emergency/> [<https://perma.cc/2B9K-QR5V>]; Herrera, *supra* note 12.

157. See Press Release, CDC Newsroom, *Racial and Ethnic Disparities Continue in Pregnancy-Related Deaths* (Sept. 5, 2019) [[perma.cc/BYS5-VWCV](https://perma.cc/BYS5-VWCV)]; Cannon & Percheski, *supra* note 146, at 8.

158. See generally DEER, *supra* note 141; SMITH, *supra* note 141.

159. See, e.g., Maren Machles, Carrie Cochran, Angela Hill & Suzette Brewer, *1 in 3 American Indian and Alaska Native Women Will be Raped, but Survivors Rarely Find Justice on Tribal Lands*, USA TODAY (Oct. 18, 2019), <https://www.usatoday.com/story/news/nation/2019/10/18/native-american-women-sexual-assault-justice-issue-tribe-lands/3996873002/> [<https://perma.cc/HNW6-Y94F>]; INDIAN L. RES. CTR., *Ending Violence Against Native Women*, <https://indianlaw.org/issue/ending-violence-against-native-women> [<https://perma.cc/HKV9-965R>]; NATIVE HOPE, *Sexual Assault: A Horrifying Reality for Native American Girls* (Jan. 17, 2020),

that at least half of all Native people have experienced sexual violence at some point in their life, with 96 percent of those assaulted being victimized by a non-Native person.<sup>160</sup> The lack of reproductive healthcare available in Indian Country, especially crisis pregnancy and abortion services, leaves many people carrying a child as a result of sexual assault without recourse.<sup>161</sup> Due to the significant impact of membership in one's Nation, decisions about the course of such pregnancy may be heavily influenced by the blood quantum of the child.

Depending on the blood quantum level of the Native parent, the high number of assaults by non-Native people may leave a significant portion of these children borne from assault without the ability to enroll with their tribe, regardless of whether they were raised on the reservation or by their Native parent. Further, even if the perpetrator was Native and from the same tribe, their name may not be listed on the child's birth certificate, effectively negating the blood quantum contribution of the perpetrator. Only the child's parent who is listed on the birth certificate counts towards their blood quantum calculation, so regardless of the perpetrator's Native status, the child will still have a half-decrease in blood quantum from their Native parent if their birth certificate is left blank.<sup>162</sup>

This can create situations in which only some children in a family meet the enrollment requirements. These split families can end up with different access to tribal services, including playgrounds, healthcare, and education, and the blood quantum requirement can cause significant issues if the non-enrolled children want to continue living on tribal land into their adulthood.<sup>163</sup> On top of the differing access to resources, the stigma and shame of being clearly othered may have lasting mental and emotional impact on a child who does not qualify.<sup>164</sup>

Asking a pregnant person to consider an artificial determinate of inclusivity when deciding the best course of action for their pregnancy after an assault

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<https://blog.nativehope.org/sexual-assault-a-horrifying-reality-for-native-american-girls> [<https://perma.cc/GE7X-SUDB>]; Julianne Pepitone, *These Stats on Sexual Assault Rates Among Native Women Will Shock You*, MSNBC (Nov. 14, 2018), <https://www.nbcnews.com/know-your-value/feature/these-stats-sexual-assault-rates-among-native-women-will-shock-nca935661> [<https://perma.cc/76XU-A3AF>].

160. NAT'L CONG. AM. INDIANS POL'Y RSCH. CTR., RESEARCH POLICY UPDATE: VIOLENCE AGAINST AMERICAN INDIAN AND ALASKA NATIVE WOMEN (Feb. 2018), [https://www.ncai.org/policy-research-center/research-data/prc-publications/VAWA\\_Data\\_Brief\\_FINAL\\_2\\_1\\_2018.pdf](https://www.ncai.org/policy-research-center/research-data/prc-publications/VAWA_Data_Brief_FINAL_2_1_2018.pdf) [<https://perma.cc/5ZYF-MVSP>].

161. On file with author; much of this is confidential first-hand account.

162. See Paul Spruhan, *CDIB: The Role of the Certificate of Degree of Indian Blood in Defining Native American Legal Identity*, 6 AM. INDIAN L.J. 169, 181 (2018).

163. See, e.g., Tailyr Irvine, *supra* note 101; Steve Russell, *supra* note 101; Hanah Redman, *Blackfeet – Fractioned Identity*, NATIVE NEWS (2013), [http://nativenews.jour.umt.edu/2013/?page\\_id=30](http://nativenews.jour.umt.edu/2013/?page_id=30) [<https://perma.cc/DDC8-N38S>].

164. See, e.g., Matt Strohl, *Sterling HolyWhiteMountain on Blood Quantum, Native Art, and Cultural Appropriation*, AESTHETICS FOR BIRDS (Jan. 31, 2019), <https://aestheticsforbirds.com/2019/01/31/sterling-holywhitemountain-on-blood-quantum-native-art-and-cultural-appropriation/> [<https://perma.cc/A3R3-JUTX>].

creates a massive disruption in the systemic framework necessary for one's individual reproductive decisions to be optimally realized. This sexual violence epidemic and the resulting traumas and pregnancies significantly affect the right to choose to have a child, the right to choose not to have a child, and the right to parent with dignity. Forcing a person to carry a pregnancy to term that they would not otherwise carry after a sexual assault due to lack of crisis care clearly violates the right not to have a child and the right to choose when you have a child. This is compounded when the decision of whether or not to carry the pregnancy to term is influenced by the child's blood quantum. The high potential for having a child, as a result of sexual assault, who does not qualify for membership violates the right to parent with dignity. The introduction of blood quantum to an already painful situation and potential decision to terminate a pregnancy, if the resources are even available, violates several of the tenets of reproductive justice and causes significant lasting harm to the survivors and their families. Modifying or eliminating blood quantum requirements would alleviate the pressure associated with deciding to have or parenting a child born from assault, allowing these children and families access to resources and community and easing the process for all involved.

*C. Contemporary Issues in Native Communities and Their Implications  
for Reproductive Justice*

Reproductive justice fundamentally necessitates the support of one's government and community in reproductive behavior and childrearing choices.<sup>165</sup> Reproductive justice also focuses on the ability to make personal decisions that are right for one's life and for the government and community to make sure those choices are supported.<sup>166</sup> Blood quantum, while instituted initially by the federal government on Native Nations, has been adopted by tribal governments all over the country.<sup>167</sup> The continued tribal use of blood quantum violates each of the tenets of reproductive justice and creates unsupportive and coercive communities.

Migration and intermarriage are on the rise in Indian Country, which creates the potential for many children who do not meet blood quantum criteria to be born into Native communities. The environmental harms that many reservations experience render people infertile and create additional incentives to move off the reservation and away from tribal communities, further decreasing the number of potential children who would qualify for tribal citizenship. Many Native people also experience infertility or the need to leave their communities to find a fertile partner as a result of the mass sterilization programs at IHS hospitals in the 1970s and the inadequate IHS healthcare and reproductive care available to Native people to this day. This additionally impacts the number of

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165. See SISTERSONG, *supra* note 7.

166. *Id.*

167. See WILKINS & WILKINS, *supra* note 1, at 58.

potential children whose blood quantum is high enough to qualify them for membership. The lack of IHS reproductive care, especially the inability to prevent or terminate an unwanted pregnancy that resulted from sexual assault, also has the potential to force Native peoples to have children who do not qualify for tribal membership.

Examining the social, political, economic, biological, and nonbiological issues affecting reproduction in Native communities shows that reproductive autonomy is threatened when blood quantum is required. The right to choose to have a child, to not have a child, and to parent with dignity with the support of ones' government and community are essential to the full vindication of reproductive autonomy.<sup>168</sup> Being forced to constantly consider how one's reproductive choices will impact future children's blood quantum eviscerates reproductive autonomy for Native peoples. Parenting with dignity requires community, social, and governmental support.<sup>169</sup> Not being able to enroll your child in your Nation, not being able to pass down closed cultural knowledge or communal property that has always been occupied by your family, and not feeling as if your child is a member of your Nation because they are not a citizen is not parenting with dignity. Further, the inability to parent with dignity, especially as it relates to tribal citizenship and all that comes with it, has a significant chilling effect on the right to have a child. People are less likely to have a child if they know their communities will not fully embrace their child.

Each of these contemporary issues in Indian Country are effects of colonial policies. Continuing to use blood quantum, irrespective of the harm it has the potential to do, only furthers those colonial policies and achieves the ultimate colonial goal of legally defining Native people out of existence. Splitting apart families and communities because of an arbitrary fraction that we allow to define people's lives contradicts the current work of nation-building. Preventing the exercise of reproductive autonomy is a continuation of colonial policies that sought to limit Native reproduction with the ultimate goal of eliminating Native peoples as a whole.

No one would debate that these children are a part of Native communities. They are born to Native people who belong to Native communities. The only thing preventing them from fully joining their own Nation is a biological fraction. A fraction that does not represent how Indian they are—only that, due to decades of colonialism and its contemporary effects, their blood quantum has been diluted to the point of non-recognition by the Tribe. In this way, the continuing use of blood quantum not only violates the reproductive rights of Native peoples, but also threatens the existence of Native Nations as a whole.

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168. See ROSS & SOLINGER, *supra* note 93, at 170–71.

169. See SISTERSONG, *supra* note 7.

## III.

BLOOD QUANTUM REQUIREMENTS ARE A THREAT TO THE SURVIVAL OF  
NATIVE NATIONS

The continued use of blood quantum requirements means there will be a smaller and smaller pool of people eligible for citizenship every year. In fact, we see this trend already happening. According to census data, the number of people who identified as American Indian/Alaska Native (AI/AN) grew 26.7 percent between 2000 and 2010.<sup>170</sup> However, the increase in enrolled tribal members from 2000 to 2010 was only 7.8 percent, significantly less than the growth in self-identifying AI/AN people during the same time period.<sup>171</sup> Even an overinclusive estimate of those who identify as a member of a non-federally recognized tribe (approximately 400 tribes)<sup>172</sup> or do not wish to enroll in their tribe for various reasons would still not explain this almost 20 percent difference. I believe this difference is likely due, at least in part, to blood quantum requirements for enrollment in tribal nations.

In order for blood quantum requirements to explain the difference in self-identification and enrollment, we would need to measure the average blood quantum of all AI/AN identifying people over time and compare it to enrollment rates over time. However, data this complete is not available, and the last report identifying average blood quantum of any population was published in 1950.<sup>173</sup> Thus, we must look to the change in the number of people who identify as mixed race with AI/AN being one of their races, as mixed-race Native people inherently have a lower blood quantum. If blood quantum is a contributing factor to this disparity, the number of mixed Native people would be increasing and the number of Native people who do not identify with any other race would be increasing at a much lower rate or decreasing. We can assume, given the information presented in the prior Section, that as the number of mixed Native people increases, the average blood quantum of Native people decreases.<sup>174</sup>

Fortunately, starting in 2000, the U.S. census gave people the option to self-identify as a single race or as multiple races. From 2000 to 2010 the number of

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170. In 2000, the total number was 4,119,301. In 2010, the number was 5,220,579. *See* 2010 CENSUS, *supra* note 10, at 4.

171. According to the BIA's American Indian Population and Labor Force Report, in 2010 there were 1,969,167 enrolled tribal members in the United States. In 2000, the BIA reported there were 1,816,504 enrolled tribal members in the United States. U.S. DEP'T OF THE INTERIOR, BUREAU OF INDIAN AFFAIRS, 2001 AMERICAN INDIAN POPULATION AND LABOR FORCE REPORT (2001); U.S. DEP'T OF THE INTERIOR, BUREAU OF INDIAN AFFAIRS, 2013 AMERICAN INDIAN POPULATION AND LABOR FORCE REPORT (2014).

172. Members of non-federally recognized tribes are not counted as enrolled tribal members by the BIA.

173. U.S. CONG., OFF. OF TECH. ASSESSMENT, INDIAN HEALTH CARE 4 (1986) [hereinafter IHS ASSESSMENT], <https://www.princeton.edu/~ota/disk2/1986/8609/8609.PDF> [<https://perma.cc/FL3J-2KPN>].

174. For a complete model, *see id.* at 79.



people self-identifying as AI/AN as their sole race grew 18.4 percent.<sup>175</sup> The number of people self-identifying as AI/AN in combination with another race grew 39.2 percent, double that of those identifying as AI/AN alone.<sup>176</sup> Though this data does not provide information on the average blood quantum amounts of respondents, it is clear that the number of mixed Native people is growing at a much higher rate than both Native people that do not identify as any other race and Native people that are enrolling in tribes. It is also clear that if this trend continues, blood quantum levels will decrease across the population.

Exclusion from tribal enrollment based on blood quantum is becoming a threat to the longevity of Native Nations. While the number of people who identify as Native is increasing, the number of people enrolling in tribes is increasing at a much slower rate and the number of people who identify as AI/AN as their only or primary race is slowing.<sup>177</sup> Additionally, the fertility rate for AI/AN people is much lower than the fertility replacement rate<sup>178</sup> and has been decreasing annually, further threatening the longevity of Native Nations.<sup>179</sup> If these trends continue in the same direction, it has been projected that by 2080, only 8 percent of the total Native population will have one-half or more blood quantum, while the number of Native people with one-quarter or less blood quantum will grow to around 60 percent.<sup>180</sup>

In an interview with EmbraceRace, Tyler Wall, a Hopi citizen, responds to the question of what is at stake with this issue of non-enrollment, saying: “So the whole existence of tribal people, sovereign nations is at stake.”<sup>181</sup> His partner, Souta Calling Last, a Blood Nation member, says this:

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175. From 2,475,956 in 2000 to 2,932,248 in 2010. 2010 CENSUS, *supra* note 10, at 4.

176. From 1,643,345 in 2000 to 2,288,331 in 2010. *Id.*

177. The 2000 Census data shows the number of people who identify as AI/AN alone increased 26 percent from 1990 to 2000. STELLA U. OGUNWOLE, U.S. CENSUS BUREAU, 2000 CENSUS BRIEFS, THE AMERICAN INDIAN AND ALASKA NATIVE POPULATION: 2000, at 3 (2002). This is markedly more than the 18% increase from 2000 to 2010, suggesting a significant slowing in the number of people who identify as AI/AN alone. *See* 2010 CENSUS, *supra* note 10, at 4.

178. *See* 2018 CDC BIRTH DATA REPORT, *supra* note 9, at 5, 13. The fertility replacement rate is the number of births (per 1,000 people with the capacity for pregnancy (PWCP)) required to exactly replace a generation and keep population levels steady (given steady mortality and migration rates). J. Craig, *Replacement Level Fertility and Future Population Growth*, 20 POPULATION TRENDS 22, 20 (1993). The replacement rate is generally thought to be 2,100 births per 1,000 PWCP. *Id.* However, this is a general number based on low infant and child mortality rates. *Id.* Data shows AI/AN populations have an infant and child mortality rate at almost double that of the average in America, which likely means the fertility replacement rate for Native people is closer to 2,300–2,400 births per 1,000 PWCP. Danielle M. Ely & Anne K. Driscoll, *Infant Mortality in the United States, Data From the Period Linked Birth/Death Infant File*, 68 NAT’L VITAL STAT. REPS. 1, 4 (2019), [https://www.cdc.gov/nchs/data/nvsr/nvsr68/nvsr68\\_10-508.pdf](https://www.cdc.gov/nchs/data/nvsr/nvsr68/nvsr68_10-508.pdf) [<https://perma.cc/N9UK-PDS4>]. The latest data show that the fertility rate for AI/AN populations is 1,650 births per 1,000 PWCP, much lower than the replacement rate. *See* 2018 CDC BIRTH DATA REPORT, *supra* note 9, at 13.

179. *See* 2018 CDC BIRTH DATA REPORT, *supra* note 9, at 13 (showing the birth rate decrease (per 1,000 PWCP) from 1,794.5 in 2016 to 1,650.5 in 2018).

180. *See* IHS ASSESSMENT, *supra* note 173; *see generally* Thornton, *supra* note 5.

181. EMBRACERACE, *supra* note 112.

What's at stake in the bigger picture is the survival and the existence of tribes at all. There are roughly 80 tribes that have practiced disenrollment. But every single tribe will or is practicing non-enrollment of future generations of children or existing youth. So the very existence of the tribal nation as a people is at stake.<sup>182</sup>

The continued existence of Native Nations requires continued enrollment of new members. Decreasing fertility levels combined with a decrease in the number of people enrolling in or eligible to enroll in federally recognized tribes threatens the ability of tribes to sustain or grow their populations. Without the ability to sustain or grow their populations, Native Nations will shrink and disappear, fulfilling the ultimate goal of blood quantum as it was instituted during the Allotment Era: the complete eradication and assimilation of Native Nations.

#### IV.

#### BLOOD QUANTUM SHOULD NOT BE THE STANDARD BY WHICH TRIBAL MEMBERSHIP IS MET

Community inclusion should not be dictated by the system of the oppressor. Nor should it perpetuate the systems of reproductive oppression introduced and institutionalized by the federal government. This is especially true considering how colonial abuse has led to present challenges for Native people to control their own reproductive choices and threats against the continued existence of Native Nations.

Native people in the United States today are faced with increasing levels of poverty, risk of experiencing houselessness, infertility, inadequate medical care, and other forms of oppression from the United States.<sup>183</sup> Many Native people have to make very difficult choices every day about what their futures will look like. One of those choices should not have to be whether their child will be able to enroll in their nation. Native Nations should take into account the changing demographics of their citizens, as well as all of the external factors that can influence one's ability and desire to have a child. Migration off of the reservation, dysgenic fertility effects on the reservation, infertility, sexual violence, lack of reproductive healthcare, and sterilization all make the ability to have a child with someone from your community immeasurably more difficult. While it is currently still possible, and occasionally prevalent, to have a number of children born who are eligible for membership in many Native Nations, the future does not look promising. An entire generation of children is currently being born without the ability to enroll in their communities, and in the next generation even more will follow.

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182. *Id.*

183. POWWOWS.COM, *Native American Issues Today | Current Problems & Struggles 2022* (Nov. 9, 2021), <https://www.powwows.com/issues-and-problems-facing-native-americans-today/> [<https://perma.cc/P9P8-2V8D>].

Inherent in the nature of sovereignty is the ability to control who is a citizen.<sup>184</sup> Tribal sovereignty allows tribes to set the rules around what their citizenship requirements are and who they are willing to extend membership to.<sup>185</sup> Tribes should actively exercise their sovereignty to adapt citizenship criteria away from the colonial notions of belonging imported onto them. Tribes should look to empower their citizens to create families however they see fit and adjust tribal citizenship criteria to meet the needs of their people. Tribes should not be asking their people to create families around a set of criteria that was imported for the specific purpose of deteriorating and extinguishing Native Nations.

While some feel that blood quantum keeps the tribe intact by preserving the links between people and ensuring membership for only those with a strong tie to the tribe and its cultural, spiritual, and community practices,<sup>186</sup> there are ways to do this without relying on blood quantum. Similarly, allocating stretched tribal resources does not need to be dictated by the number of people with a certain amount of tribal blood, but instead could be dictated by need within a more flexible set of membership criteria. Moreover, Native Nations are as heterogeneous as the people who populate them, suggesting a need for a more inclusive membership criteria that honors the needs of each tribe individually instead of a one-size-fits-all approach that was decided outside of the tribes to begin with.

Native Nations should consider the goals of citizenship for their communities and create criteria that honor those goals. Many authors have written ideas for different forms of tribal membership, some of which are briefly summarized here.<sup>187</sup> For example, tribes could create a list of criteria that honor the culture and traditions of their communities and, using a multi-factor approach, decide citizenship within those criteria. The list could include things like residency, language and cultural competency, lineal descent, or even advocating on the tribe's behalf.<sup>188</sup> Alternatively, tribes could have multiple categories of citizenship, including tiered rights within the categories, different voting systems, a right-of-return process for tribal members living off the reservation, a qualification process to receive certain tribal benefits, or only offer tribal benefits and services to those living on tribal land or engaged in a certain amount of cultural activity within the tribe.<sup>189</sup> These solutions attempt to solve

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184. See *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 55–56 (1978).

185. *Id.*

186. See McKosato, *supra* note 90.

187. See, e.g., Tommy Miller, Note, *Beyond Blood Quantum, the Legal and Political Implications of Expanding Tribal Enrollment*, 3 AM. INDIAN L. REV. 323, 340–356 (2014); Carole Goldberg, *Members Only? Designing Citizenship Requirements for Indian Nations*, 50 U. KAN. L. REV. 437, 463–71 (2002); Ben Hohenstatt, *Blood Simple: Is it Time to Rethink How Native is Defined?*, JUNEAU EMPIRE (Oct. 4, 2019), <https://www.juneauempire.com/news/blood-simple-is-it-time-to-rethink-how-native-is-defined/> [perma.cc/KJH3-SENZ].

188. See Miller, *supra* note 187, at 349–356.

189. *Id.*

the problem created by blood quantum requirements while still filtering people by the tribe's biggest priorities. However, they fail to address the full incorporation of those with a high enough blood quantum but who have been culturally separated from the tribe for any number of reasons. Allowing those with a high blood quantum and no cultural relations while disallowing those with lower blood quantum and cultural ties is counter to the ultimate goal of limiting tribal membership: the continuity of the Nation and its members' ways of life.

A. *A Hybrid Membership Model Based in Cultural Integration*

Tribes should consider instituting a system where, in addition to variable blood quantum requirements, they require cultural competence to qualify for membership. This system would include an integration program for tribal members of the diaspora that have lost connection with their tribal customs, culture, religion, etc., and allow for the outsiders who meet blood quantum requirements to enroll if they are dedicated to learning the practices of their Nation. It would also allow for those with low blood quantum and cultural competency, including those already living on the reservation, to qualify without going through the program.

Native Nations have been in the midst of a nation-building project for the past several decades.<sup>190</sup> With this nation-building has come language revitalization programs, broader access to spiritual practices, ceremonies, traditional food systems, hunting and fishing access advocacy, and many other practices and programs that would allow tribes to ensure cultural continuity into the new century.<sup>191</sup> Part of this work requires ensuring that the next seven generations are stewarding Native languages, religions, cultures, and customs into the next generation. Given this, it makes sense to require tribal members to have a cultural competency level that each individual tribe is comfortable with.

Achieving these levels of cultural competency may be easy for someone living on the reservation or in their community who is already speaking their language or participating in closed practices, regardless of their blood quantum. It may not be as easy, however, for tribal members who live far from the tribe or are not integrated with their people. This type of blood quantum plus re-integration and cultural competency program would allow for both groups to become tribal members while limiting those who only want to use tribal

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190. Anna Krausová, *Native Nation Building Through the Lens of Political Science*, 8 POL., GROUPS, & IDENTITIES 86, 86 (2020).

191. See, e.g., Teresa L. McCarty & Tiffany S. Lee, *The Role of Schools in Native American Language and Culture Revitalization: A Vision of Linguistic and Educational Sovereignty*, in INDIGENOUS EDUCATION (W. James Jacob, Sheng Yao Cheng, Maureen K. Porter eds., 2015); NAT'L INDIAN COUNCIL ON AGING, *The Importance of Food Sovereignty* (Apr. 26, 2019), <https://www.nicoa.org/the-importance-of-food-sovereignty/> [<https://perma.cc/VK3Y-UANZ>]; Brooke Mosay Ammann, *Linguistic and Cultural Revitalization in Indian Country: Lessons for Philanthropy*, NONPROFIT Q. (Nov. 4, 2019), <https://nonprofitquarterly.org/linguistic-and-cultural-revitalization-in-indian-country-lessons-for-philanthropy/> [[perma.cc/HLX3-2GUH](https://perma.cc/HLX3-2GUH)].

resources without maintaining a connection to their communities. A program like this would also allow tribes to create programming that is relevant for each individual Nation. Each Nation has its own needs and priorities, and a re-integration program could easily be tailored to fit the requirements and priorities of each Nation.

This change in how we consider membership would go beyond eschewing strict in- and out-group limits. It would begin to undo the harms of colonialism that have forced tribes to scatter, disallowed traditional tribal customs to be practiced openly, and consistently tried to assimilate or eradicate Native people. It would work to further tribal self-determination and Native nation-building. It would embody the idea that our identity as Native people is more than just blood—it is our relations. It would also integrate principles of reproductive justice into how we create and continue our communities.

Creating a program where community values are taught and implemented as a means for membership would not only allow for parents to embrace full reproductive autonomy but would also allow them to parent within a community. Such a program could help even children who are born and live in tribal communities to attend programs such as language classes and parents in tribal communities to take parenting classes. Those parenting classes could be structured in a way to provide guidance, support, kinship, and community while passing down sacred and traditional knowledge about birth and childrearing to parents. This would not only provide government and community support in allowing for every Native person's child to become a tribal citizen but would also create community support in a number of other areas of parents' lives as well, truly fulfilling the right to parent with dignity.

And while a cultural competency program would not undo the harms that cause decreased fertility or infertility, it would allow Native people's minds to be eased when they need to look outside of the tribe for partners, jobs, opportunities, or even assisted reproductive technologies. In this way, it would lift the chilling effect on the right to have a child that is brought about by minimum blood quantum membership limitations. Parents would never be forced to choose between having a child or not, and would no longer need to limit their partners based on tribal membership, because they would be assured that their children and their families would always have a place within their communities.

By creating membership criteria that emphasizes community and inclusion, Native Nations could incentivize the continued practice and promotion of tribal culture and spirituality without excluding those who actively want to be a part of the tribe but are barred by an arbitrary biological classification. In this way, Native Nations could empower their citizens to make choices that are right for them while actively choosing to be engaged in their communities and their cultures.

## CONCLUSION

Blood quantum membership requirements for Native Nations are a colonial legacy that was instituted as a way to assimilate or eradicate Native people. Blood quantum was used to strip Native people of their land, allow the federal government to back out of treaty promises for resources and support, and legally define Native Nations out of existence. This long-term colonial project has led to the adoption of blood quantum requirements into over two-thirds of Native Nations at present.

Stringent membership requirements based on arbitrary biological classifications harm the reproductive autonomy of Native peoples. Minimum blood quantum requirements create a situation in which parents have to choose between having a child with the partner of their choice or making sure their child would qualify for tribal membership. These types of choices are exacerbated by contemporary issues that Native communities face every day: migration and intermarriage, environmental harms that impact fertility, sterilization programs, inadequate reproductive healthcare, and sexual violence. Examining each of these issues and their intersection with blood quantum through a reproductive justice lens shows that forcing minimum blood quantum requirements onto parents who are already struggling with fertility is a violation of the tenets of reproductive justice. Reproductive justice necessitates the support of governments and communities in the exercise of reproductive autonomy. Anything less than support from the government and one's community infringes on the right to parent with dignity, and the right to have a child at all. Full support for parents in membership requirements paves the way for the full exercise of reproductive autonomy and would lead to membership requirement reforms that better address the needs of the tribe to begin with.

Instituting a program where people have multiple avenues for membership, and where options may be based on blood, cultural competency, or both, would be a much more inclusive way to approach tribal membership. The ultimate goal of tribal membership requirements is to protect the tribe's resources—be it cultural, physical, or economic—from false claims of relation to the tribe, and ensure those who benefit from the tribal community have ties to the community from which they are benefitting. A reintegration program allows for people with ties to the community—their level of tribal blood notwithstanding—to be a part of their Native Nations. Such programs would allow future generations to learn their languages, cultures, and practices. Altogether, a renewed conception of membership would serve the same purpose as blood quantum requirements, while better serving the needs of Native Nations. Blood quantum requirements are a violation of reproductive autonomy, and only through implementation of reproductive justice values in Native Nations will that autonomy be restored and justice be implemented. Rebuilding Native Nations for the next seven generations starts now, and it should start with a re-examination of what membership actually means for each Nation.