ALASKA LEGISLATURE COMMITTEE FILES 1991-1992 8672
6879 HOUSE HEALTH EDUCATION & SOCIAL SERVICES

§ 1914. Petition to court of competent jurisdiction to invalidate action upon showing of certain violations

RESEARCH GUIDE

Federal Procedure L Ed:

19 Fed Proc, L Ed §§ 46:453, 454.

Law Review Articles:

Davies, Implementing the Indian Child Welfare Act. 16 Clearinghouse Rev 179, July, 1982.

Trentadue and DeMontigny, The Indian Child Welfare Act of 1987: A Practitioner's Perspective. 62 ND L Rev 487, 1986.

INTERPRETIVE NOTES AND DECISIONS

25 USCS § 1914 does not make applicable full faith and credit provisions of 28 USCS § 1738, and § 1914 does not implicitly authorize federal court to adjudicate custody of Indian children independently after state court has rendered final judgment, in litigation in which interested Indian tribe had participated. Kiowa Tribe of Oklahoma v Lewis (1985, CA10 Kan) 777 F2d 587.

Superior Court, not California Court of Appeal, has jurisdiction to entertain petition to invalidate proceeding for termination of parental rights under 25 USCS § 1914, because petition is not in nature of extraordinary writ, and therefore not within original jurisdiction of appellate court. In re Blake C. (1986, 1st Dist) 177 Cal App 3d 15, 222 Cal Rptr 763.

Under California law, Superior Court, not Court of Appeals is proper forum for parent to raise claim under 25 USCS § 1914 seeking to invalidate custody order under 25 USCS § 1912, since claim does not fall within appellate court's original jurisdiction. In re Blake C. (1986, 1st Dist) 178 Cal App 3d 608, 224 Cal Rptr 167.

Alleged violations of Indian Child Welfare Act (25 USCS §§ 1901 et seq.) in temporary legal custody proceedings do not invalidate later permanent custody proceedings where (1) court did not rely upon temporary proceedings in later permanent custody proceedings, (2) permanent custody hearing involved different witnesses and was conducted before different judge and (3) substantial evidence apart from temporary custody order supported termination of parental rights. Re Mem (1984, Mont) 670 P2d 1241.

§ 1915. Placement of Indian children

RESEARCH GUIDE

Law Review Articles:

Trentadue and DeMontigny, The Indian Child Welfare Act of 1987: A Practitioner's Perspective. 62 ND L Rev 487, 1986.

INTERPRETIVE NOTES AND DECISIONS

Indian tribes are to play central role in custody proceedings involving Indian children; tribe may alter placement preference system established, and foster home license which is approved by tribe is entitled to preference when state agency places child associated with tribe; provisions reflect Congress' concern for essential tribal relations of Indian people; intervention by tribe in adoption proceeding is available. Re J.R.S. (1984, Alaska) 690 P2d 10.

State adoption statute which did not prescribe preference for adoptive placement with biological relatives, unlike provisions of Indian Child Welfare Act, 25 USCS § 1915, did not violate equal protection. Re W.E.G. (1985, Alaska) 710 P2d 410.

Reasonable proximity provision of 25 USCS § 1915 was not violated by trial court order placing child with relatives who would temporarily be moving to Seattle, where, in its discretion, trial court determined that evidence showed child's special need to overcome emotionally based learning disability justified such placement. Re D.C. (1986, Alaska) 715 P2d 1.

Factual support in record in trial court as to "good cause" for failure to comply with statutory child placement preference directives of 25 USCS § 1915 are necessary for appropriate appellate review. Re Interest of Bird Head (1983) 213 Neb 741, 331 NW2d 785.

§ 1916. Return of custody

RESEARCH GUIDE

Federal Procedure L Ed:

19 Fed Proc, L Ed §§ 46:451, 454.

§ 1917. Tribal affiliation information and other information of protection of rights from tribal relationship; application of subject of adoptive placement; disclosure by court

RESEARCH GUIDE

Federal Procedure L Ed:

19 Fed Proc, L Ed §§ 46:454, 458.

§ 1918. Reassumption of jurisdiction over child custody proceedings

RESEARCH GUIDE

Federal Procedure L Ed:

19 Fed Proc, L Ed §§ 46:445, 454, 455, 457, 459, 461, 462.

Law Review Articles:

Davies, Implementing the Indian Child Welfare Act. 16 Clearinghouse Rev 179, July, 1982.

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§ 1919. Agreements betwe

Federal Procedure L E
19 Fed Proc, L Ed §§

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§ 1921. Higher State or
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§ 1922. Emergency rem

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ND L Rev 487, 198

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Indian Child Welfare Act (25 USCS §§ 1901 et seq.) does not confer tribal jurisdiction over adoption proceedings in Alaskan Indian tribe where tribe members sued to compel state to recognize such proceedings, because jurisdiction was vested in state of Alaska by 28 USCS § 1360 and members' theory of implied residual concurrent jurisdiction could not stand in light of specific reassumption of jurisdiction procedures in 25 USCS § 1918, with which tribe failed to comply. Native Village of Venetie I.R.A. Council v Alaska (1988, DC Alaska) 687 F Supp 1380.

§ 1919. Agreements between States and Indian tribes

RESEARCH GUIDE

Federal Procedure L Ed:
19 Fed Proc, L Ed §§ 46:446, 447, 454.

INTERPRETIVE NOTES AND DECISIONS

Neither 42 USCS § 671(a)(4) nor 25 USCS § 1919(a) require states and Indian tribes to enter into foster care agreements under 42 USCS § 672(a)(2)(B), and thus absence of agreement between tribe and state regarding foster care renders tribe ineligible to receive federal foster care payments under § 672. Native Village of Stevens v Smith (1985, CA9 Alaska) 770 F2d 1486.

§ 1920. Improper removal of child from custody; declination of jurisdiction; forthwith return of child: danger exception

RESEARCH GUIDE

Federal Procedure L Ed:
19 Fed Proc, L Ed §§ 46:447, 454.

INTERPRETIVE NOTES AND DECISIONS

Voluntary placement agreement between mother of Indian child and state which allowed state to provide temporary foster care for child is not subject to requirements of Indian Child Welfare Act (25 USCS §§ 1901 et seq.) and agreement was not improper because it was neither executed nor certified according to § 1913(a); agreement could not furnish basis for court to decline jurisdiction under § 1920 and return child to mother. D.E.D. v State (1985, Alaska) 704 P2d 774.

§ 1921. Higher State or Federal standard applicable to protect rights of parent or Indian custodian of Indian child

RESEARCH GUIDE

Federal Procedure L Ed:
19 Fed Proc, L Ed § 46:454.

Law Review Articles:
Davies, Implementing the Indian Child Welfare A. 16 Clearinghouse Rev 179, July, 1982.

§ 1922. Emergency removal or placement of child; termination; appropriate action

INTERPRETIVE NOTES AND DECISIONS

State was not required under 25 USCS § 1912(a) to give statutory 10-day notice prior to emergency custody proceedings involving Indian child where mother had abandoned child, and where foster parents with whom child had been placed under voluntary agreement were no longer obligated to care for him; such proceedings fall within § 1922's exception for emergency removal of Indian child. D.E.D. v State (1985, Alaska) 704 P2d 774.

§ 1931. Grants for on or near reservation programs and child welfare codes

RESEARCH GUIDE

Am Jur:
2 Am Jur 2d, Adoption § 26.

Law Review Articles:
Davies, Implementing the Indian Child Welfare Act. 16 Clearinghouse Rev 179, July, 1982.
Trentadue and DeMontigny, The Indian Child Welfare Act of 1987: A Practitioner's Perspective. 62 ND L Rev 487, 1986.

INTERPRETIVE NOTES AND DECISIONS

Congress intended by 25 USCS § 1931(b) that tribal approval be recognized as equivalent to state licensing or approval, and thus, for purposes of tribe's eligibility for federal foster care payments under 42 USCS § 672(c), tribally approved foster home is equivalent to and substitute for state approval or licensing. Native Village of Stevens v Smith (1985, CA9 Alaska) 770 F2d 1486.

Geographic location alone does not determine whether program seeking funding under Indian Child Welfare Act of 1978 (25 USCS §§ 1931 to 1934) is to be characterized as "off" or "near" reservation; rather client population served by program is determinative factor. United Indians of All Tribes Foundation (1983) 90 ID 376.

§ 1951. Information availability to and disclosure by Secretary

RESEARCH GUIDE

Am Jur:
2 Am Jur 2d, Adoption § 26.

Law Review Articles:
Trentadue and DeMontigny, The Indian Child Welfare Act of 1987: A Practitioner's Perspective. 62 ND L Rev 487, 1986.

§ 1952. Rules and regulations

RESEARCH GUIDE

Law Review Articles:
Davies, Implementing the Indian Child Welfare Act. 16 Clearinghouse Rev 179, July, 1982.

§ 1961. Education; day schools; report to congressional committees; particular consideration of elementary grade facilities

RESEARCH GUIDE

Am Jur:
2 Am Jur 2d, Adoption § 26.

CHAPTER 22. EDUCATION PROGRAMS OF BUREAU OF INDIAN AFFAIRS

Section
2004. School boundaries
2008a. Administrative cost grants
2016a. [Repealed]
2020. Voluntary services
2021. Proration of pay
2022. Extracurricular activities
2022a. Early childhood development program
2022b. Tribal departments of education
2023. [Repealed]

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§ 2001. . Standards for basic education of Indian children in Bureau or contract schools

(a) Studies and surveys for establishment and revision of standards. The Secretary, in consultation with the Assistant Secretary of Health, Education, and Welfare for Education [Secretary of Education], and in consultation with Indian organizations and tribes, shall carry out or cause to be carried out by contract with an Indian organization such studies and surveys, making the fullest use possible of other existing studies, surveys, and plans, as are necessary to establish and revise standards for the basic education of Indian children attending Bureau schools and contract schools. Such studies and surveys shall take into account factors such as academic needs, local cultural differences, type and level of language skills, geographical isolation and appropriate teacher-student ratios for such children, and shall be directed toward the attainment of equal educational opportunity for such children.

(b) Minimum academic standards; proposal, establishment, applicability, etc. (1) [Unchanged]

(2) Such standards shall apply to Bureau schools, and subject to subsection (e), to contract schools, and may also serve as a model for educational programs for Indian children in public schools. In establishing and revising such standards, the Secretary shall take into account the special needs of Indian students and the support and reinforcement of the specific cultural heritage of each tribe. Such standards shall include a requirement, developed in coordination with Indian tribes, the affected local school boards, the Indian Health Service of the Department of Health and Human Services, the State health departments, and the Federal Center for Disease Control, on immunization for childhood diseases, including provisions for in-school immunization, where necessary.

(c) [Unchanged]

(d) Waiver or revision of minimum academic standards or alternative or modified standards by tribal governing body or local school board; action by Secretary on revised standards. A tribal governing body, or the local school board if so designated by the tribal governing body, shall have the local authority to waive, in part or in whole, the standards established under subsections (b) and (c), where such standards are deemed by such body to be inappropriate or ill-conceived. The tribal governing body or designated school board shall, within 60 days thereafter, submit to the Secretary a proposal for alternative standards that takes into account the specific needs of the tribe's children. Such revised standards shall be established by the Secretary unless such standards are specifically rejected by the Secretary for good cause and the Secretary notifies each affected tribe and local school board in writing of such rejection. Such rejection shall be final and not reviewable.

(e) Contracts for implementation of minimum academic standards or alternative or modified standards pursuant to request of contract school board; alternative or modified standards in lieu of established minimum academic standards or alternative or modified standards pursuant to request of contract

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PUBLIC LAW 95-608 [S. 1214]; Nov. 8, 1978

INDIAN CHILD WELFARE ACT OF 1978

For Legislative History of Act, see p. 7530

An Act to establish standards for the placement of Indian children in foster or adoptive homes, to prevent the breakup of Indian families, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That this Act may be cited as the "Indian Child Welfare Act of 1978". Indian Child Welfare Act of 1978. 25 USC 1901 note.

SEC. 2. Recognizing the special relationship between the United States and the Indian tribes and their members and the Federal responsibility to Indian people, the Congress finds— 25 USC 1901.

(1) that clause 3, section 8, article I of the United States Constitution provides that "The Congress shall have Power * * * To regulate Commerce * * * with Indian tribes" and, through this and other constitutional authority, Congress has plenary power over Indian affairs;

(2) that Congress, through statutes, treaties, and the general course of dealing with Indian tribes, has assumed the responsibility for the protection and preservation of Indian tribes and their resources; Congress, responsibility for protection of Indians.

(3) that there is no resource that is more vital to the continued existence and integrity of Indian tribes than their children and that the United States has a direct interest, as trustee, in protecting Indian children who are members of or are eligible for membership in an Indian tribe;

(4) that an alarmingly high percentage of Indian families are broken up by the removal, often unwarranted, of their children from them by nontribal public and private agencies and that an alarmingly high percentage of such children are placed in non-Indian foster and adoptive homes and institutions; and

(5) that the States, exercising their recognized jurisdiction over Indian child custody proceedings through administrative and judicial bodies, have often failed to recognize the essential tribal relations of Indian people and the cultural and social standards prevailing in Indian communities and families.

SEC. 3. The Congress hereby declares that it is the policy of this Nation to protect the best interests of Indian children and to promote the stability and security of Indian tribes and families by the establishment of minimum Federal standards for the removal of Indian children from their families and the placement of such children in foster or adoptive homes which will reflect the unique values of Indian culture, and by providing for assistance to Indian tribes in the operation of child and family service programs. 25 USC 1902.

SEC. 4. For the purposes of this Act, except as may be specifically provided otherwise, the term— Definitions. 25 USC 1903.

(1) "child custody proceeding" shall mean and include—

(i) "foster care placement" which shall mean any action removing an Indian child from its parent or Indian custodian for temporary placement in a foster home or institution or the home of a guardian or conservator where the parent or Indian custodian cannot have the child returned upon demand, but where parental rights have not been terminated;

(ii) "termination of parental rights" which shall mean any action resulting in the termination of the parent-child relationship;

(iii) "preadoptive placement" which shall mean the temporary placement of an Indian child in a foster home or institution after the termination of parental rights, but prior to or in lieu of adoptive placement; and

(iv) "adoptive placement" which shall mean the permanent placement of an Indian child for adoption, including any action resulting in a final decree of adoption.

Such term or terms shall not include a placement based upon an act which, if committed by an adult, would be deemed a crime or upon an award, in a divorce proceeding, of custody to one of the parents.

(2) "extended family member" shall be as defined by the law or custom of the Indian child's tribe or, in the absence of such law or custom, shall be a person who has reached the age of eighteen and who is the Indian child's grandparent, aunt or uncle, brother or sister, brother-in-law or sister-in-law, niece or nephew, first or second cousin, or stepparent;

(3) "Indian" means any person who is a member of an Indian tribe, or who is an Alaska Native and a member of a Regional Corporation as defined in section 7 of the Alaska Native Claims Settlement Act (85 Stat. 688, 689);

43 USC 1606.

(4) "Indian child" means any unmarried person who is under age eighteen and is either (a) a member of an Indian tribe or (b) is eligible for membership in an Indian tribe and is the biological child of a member of an Indian tribe;

(5) "Indian child's tribe" means (a) the Indian tribe in which an Indian child is a member or eligible for membership or (b), in the case of an Indian child who is a member of or eligible for membership in more than one tribe, the Indian tribe with which the Indian child has the more significant contacts;

(6) "Indian custodian" means any Indian person who has legal custody of an Indian child under tribal law or custom or under State law or to whom temporary physical care, custody, and control has been transferred by the parent of such child;

(7) "Indian organization" means any group, association, partnership, corporation, or other legal entity owned or controlled by Indians, or a majority of whose members are Indians;

(8) "Indian tribe" means any Indian tribe, band, nation, or other organized group or community of Indians recognized as eligible for the services provided to Indians by the Secretary because of their status as Indians, including any Alaska Native village as defined in section 3(c) of the Alaska Native Claims Settlement Act (85 Stat. 688, 689), as amended;

43 USC 1602.

(9) "parent" means any biological parent or parents of an Indian child or any Indian person who has lawfully adopted an Indian child, including adoptions under tribal law or custom. It does not include the unwed father where paternity has not been acknowledged or established;

(10) "reservation" means Indian country as defined in section 1151 of title 18, United States Code and any lands, not covered under such section, title to which is either held by the United States in trust for the benefit of any Indian tribe or individual or held by any Indian tribe or individual subject to a restriction by the United States against alienation;

(11) "Secretary" means the Secretary of the Interior; and

(12) "tribal court" means a court with jurisdiction over child custody proceedings and which is either a Court of Indian Offenses, a court established and operated under the code or custom of an Indian tribe, or any other administrative body of a tribe which is vested with authority over child custody proceedings.

TITLE I—CHILD CUSTODY PROCEEDINGS

Indian tribes, exclusive jurisdiction over Indian child custody proceedings. 25 USC 1911.

SEC. 101. (a) An Indian tribe shall have jurisdiction exclusive as to any State over any child custody proceeding involving an Indian child who resides or is domiciled within the reservation of such tribe, except where such jurisdiction is otherwise vested in the State by existing Federal law. Where an Indian child is a ward of a tribal court, the Indian tribe shall retain exclusive jurisdiction, notwithstanding the residence or domicile of the child.

(b) In any State court proceeding for the foster care placement of, or termination of parental rights to, an Indian child not domiciled or residing within the reservation of the Indian child's tribe, the court, in the absence of good cause to the contrary, shall transfer such proceeding to the jurisdiction of the tribe, absent objection by either parent, upon the petition of either parent or the Indian custodian or the Indian child's tribe: *Provided*, That such transfer shall be subject to declination by the tribal court of such tribe.

(c) In any State court proceeding for the foster care placement of, or termination of parental rights to, an Indian child, the Indian custodian of the child and the Indian child's tribe shall have a right to intervene at any point in the proceeding.

(d) The United States, every State, every territory or possession of the United States, and every Indian tribe shall give full faith and credit to the public acts, records, and judicial proceedings of any Indian tribe applicable to Indian child custody proceedings to the same extent that such entities give full faith and credit to the public acts, records, and judicial proceedings of any other entity.

Foster care placement, court proceedings. 25 USC 1912.

SEC. 102. (a) In any involuntary proceeding in a State court, where the court knows or has reason to know that an Indian child is involved, the party seeking the foster care placement of, or termination of parental rights to, an Indian child shall notify the parent or Indian custodian and the Indian child's tribe, by registered mail with return receipt requested, of the pending proceedings and of their right of intervention. If the identity or location of the parent or Indian custodian and the tribe cannot be determined, such notice shall be given to the Secretary in like manner, who shall have fifteen days after receipt to provide the requisite notice to the parent or Indian custodian and the tribe. No foster care placement or termination of parental rights proceeding shall be held until at least ten days after receipt of notice by the parent or Indian custodian and the tribe or the Secretary: *Provided*, That the parent or Indian custodian or the tribe shall, upon request, be granted up to twenty additional days to prepare for such proceeding.

(b) In any case in which the court determines indigency, the parent or Indian custodian shall have the right to court-appointed counsel in any removal, placement, or termination proceeding. The court may, in its discretion, appoint counsel for the child upon a finding that such appointment is in the best interest of the child. Where State law makes no provision for appointment of counsel in such proceedings, the court

shall promptly notify the Secretary upon appointment of counsel, and the Secretary, upon certification of the presiding judge, shall pay reasonable fees and expenses out of funds which may be appropriated pursuant to the Act of November 2, 1921 (42 Stat. 208; 25 U.S.C. 13).

(c) Each party to a foster care placement or termination of parental rights proceeding under State law involving an Indian child shall have the right to examine all reports or other documents filed with the court upon which any decision with respect to such action may be based.

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

(e) No foster care placement may be ordered in such proceeding in the absence of a determination, supported by clear and convincing evidence, including testimony of qualified expert witnesses, that the continued custody of the child by the parent or Indian custodian is likely to result in serious emotional or physical damage to the child.

(f) No termination of parental rights may be ordered in such proceeding in the absence of a determination, supported by evidence beyond a reasonable doubt, including testimony of qualified expert witnesses, that the continued custody of the child by the parent or Indian custodian is likely to result in serious emotional or physical damage to the child.

Parental rights, voluntary termination. 25 USC 1913.

SEC. 103. (a) Where any parent or Indian custodian voluntarily consents to a foster care placement or to termination of parental rights, such consent shall not be valid unless executed in writing and recorded before a judge of a court of competent jurisdiction and accompanied by the presiding judge's certificate that the terms and consequences of the consent were fully explained in detail and were fully understood by the parent or Indian custodian. The court shall also certify that either the parent or Indian custodian fully understood the explanation in English or that it was interpreted into a language that the parent or Indian custodian understood. Any consent given prior to, or within ten days after, birth of the Indian child shall not be valid.

(b) Any parent or Indian custodian may withdraw consent to a foster care placement under State law at any time and, upon such withdrawal, the child shall be returned to the parent or Indian custodian.

(c) In any voluntary proceeding for termination of parental rights to, or adoptive placement of, an Indian child, the consent of the parent may be withdrawn for any reason at any time prior to the entry of a final decree of termination or adoption, as the case may be, and the child shall be returned to the parent.

(d) After the entry of a final decree of adoption of an Indian child in any State court, the parent may withdraw consent thereto upon the grounds that consent was obtained through fraud or duress and may petition the court to vacate such decree. Upon a finding that such consent was obtained through fraud or duress, the court shall vacate such decree and return the child to the parent. No adoption which has been effective for at least two years may be invalidated under the provisions of this subsection unless otherwise permitted under State law.

25 USC 1914.

SEC. 104. Any Indian child who is the subject of any action for foster care placement or termination of parental rights under State law, any parent or Indian custodian from whose custody such child was removed, and the Indian child's tribe may petition any court of com-

petent jurisdiction to invalidate such action upon a showing that such action violated any provision of sections 101, 102, and 103 of this Act.

Adoptive placement of Indian children.
25 USC 1915.

SEC. 105. (a) In any adoptive placement of an Indian child under State law, a preference shall be given, in the absence of good cause to the contrary, to a placement with (1) a member of the child's extended family; (2) other members of the Indian child's tribe; or (3) other Indian families.

(b) Any child accepted for foster care or preadoptive placement shall be placed in the least restrictive setting which most approximates a family and in which his special needs, if any, may be met. The child shall also be placed within reasonable proximity to his or her home, taking into account any special needs of the child. In any foster care or preadoptive placement, a preference shall be given, in the absence of good cause to the contrary, to a placement with—

(i) a member of the Indian child's extended family;

(ii) a foster home licensed, approved, or specified by the Indian child's tribe;

(iii) an Indian foster home licensed or approved by an authorized non-Indian licensing authority; or

(iv) an institution for children approved by an Indian tribe or operated by an Indian organization which has a program suitable to meet the Indian child's needs.

(c) In the case of a placement under subsection (a) or (b) of this section, if the Indian child's tribe shall establish a different order of preference by resolution, the agency or court effecting the placement shall follow such order so long as the placement is the least restrictive setting appropriate to the particular needs of the child, as provided in subsection (b) of this section. Where appropriate, the preference of the Indian child or parent shall be considered: *Provided*, That where a consenting parent evidences a desire for anonymity, the court or agency shall give weight to such desire in applying the preferences.

(d) The standards to be applied in meeting the preference requirements of this section shall be the prevailing social and cultural standards of the Indian community in which the parent or extended family resides or with which the parent or extended family members maintain social and cultural ties.

(e) A record of each such placement, under State law, of an Indian child shall be maintained by the State in which the placement was made, evidencing the efforts to comply with the order of preference specified in this section. Such record shall be made available at any time upon the request of the Secretary or the Indian child's tribe.

Petition, return of custody.
25 USC 1916.

SEC. 106. (a) Notwithstanding State law to the contrary, whenever a final decree of adoption of an Indian child has been vacated or set aside or the adoptive parents voluntarily consent to the termination of their parental rights to the child, a biological parent or prior Indian custodian may petition for return of custody and the court shall grant such petition unless there is a showing, in a proceeding subject to the provisions of section 102 of this Act, that such return of custody is not in the best interests of the child.

Removal from foster care home.

(b) Whenever an Indian child is removed from a foster care home or institution for the purpose of further foster care, preadoptive, or adoptive placement, such placement shall be in accordance with the provisions of this Act, except in the case where an Indian child is being returned to the parent or Indian custodian from whose custody the child was originally removed.

25 USC 1917.

SEC. 107. Upon application by an Indian individual who has reached the age of eighteen and who was the subject of an adoptive placement,

the court which entered the final decree shall inform such individual of the tribal affiliation, if any, of the individual's biological parents and provide such other information as may be necessary to protect any rights flowing from the individual's tribal relationship.

Reassumption, jurisdiction over child custody proceedings. 25 USC 1918. 18 USC prec. 1151 note. 25 USC 1321. 28 USC 1360 note.

SEC. 108. (a) Any Indian tribe which became subject to State jurisdiction pursuant to the provisions of the Act of August 15, 1953 (67 Stat. 588), as amended by title IV of the Act of April 11, 1968 (82 Stat. 73, 78), or pursuant to any other Federal law, may reassume jurisdiction over child custody proceedings. Before any Indian tribe may reassume jurisdiction over Indian child custody proceedings, such tribe shall present to the Secretary for approval a petition to reassume such jurisdiction which includes a suitable plan to exercise such jurisdiction.

(b)(1) In considering the petition and feasibility of the plan of a tribe under subsection (a), the Secretary may consider, among other things:

(i) whether or not the tribe maintains a membership roll or alternative provision for clearly identifying the persons who will be affected by the reassumption of jurisdiction by the tribe;

(ii) the size of the reservation or former reservation area which will be affected by retrocession and reassumption of jurisdiction by the tribe;

(iii) the population base of the tribe, or distribution of the population in homogeneous communities or geographic areas; and

(iv) the feasibility of the plan in cases of multitribal occupation of a single reservation or geographic area.

(2) In those cases where the Secretary determines that the jurisdictional provisions of section 101(a) of this Act are not feasible, he is authorized to accept partial retrocession which will enable tribes to exercise referral jurisdiction as provided in section 101(b) of this Act, or, where appropriate, will allow them to exercise exclusive jurisdiction as provided in section 101(a) over limited community or geographic areas without regard for the reservation status of the area affected.

(c) If the Secretary approves any petition under subsection (a), the Secretary shall publish notice of such approval in the Federal Register and shall notify the affected State or States of such approval. The Indian tribe concerned shall reassume jurisdiction sixty days after publication in the Federal Register of notice of approval. If the Secretary disapproves any petition under subsection (a), the Secretary shall provide such technical assistance as may be necessary to enable the tribe to correct any deficiency which the Secretary identified as a cause for disapproval.

(d) Assumption of jurisdiction under this section shall not affect any action or proceeding over which a court has already assumed jurisdiction, except as may be provided pursuant to any agreement under section 109 of this Act.

States and Indian tribes, agreements. 25 USC 1919.

SEC. 109. (a) States and Indian tribes are authorized to enter into agreements with each other respecting care and custody of Indian children and jurisdiction over child custody proceedings, including agreements which may provide for orderly transfer of jurisdiction on a case-by-case basis and agreements which provide for concurrent jurisdiction between States and Indian tribes.

(b) Such agreements may be revoked by either party upon one hundred and eighty days' written notice to the other party. Such

revocation shall not affect any action or proceeding over which a court has already assumed jurisdiction, unless the agreement provides otherwise.

Improper removal of child from custody.
25 USC 1920.

SEC. 110. Where any petitioner in an Indian child custody proceeding before a State court has improperly removed the child from custody of the parent or Indian custodian or has improperly retained custody after a visit or other temporary relinquishment of custody, the court shall decline jurisdiction over such petition and shall forthwith return the child to his parent or Indian custodian unless returning the child to his parent or custodian would subject the child to a substantial and immediate danger or threat of such danger.

25 USC 1921.

SEC. 111. In any case where State or Federal law applicable to a child custody proceeding under State or Federal law provides a higher standard of protection to the rights of the parent or Indian custodian of an Indian child than the rights provided under this title, the State or Federal court shall apply the State or Federal standard.

Emergency removal of child.
25 USC 1922.

SEC. 112. Nothing in this title shall be construed to prevent the emergency removal of an Indian child who is a resident of or is domiciled on a reservation, but temporarily located off the reservation, from his parent or Indian custodian or the emergency placement of such child in a foster home or institution, under applicable State law, in order to prevent imminent physical damage or harm to the child. The State authority, official, or agency involved shall insure that the emergency removal or placement terminates immediately when such removal or placement is no longer necessary to prevent imminent physical damage or harm to the child and shall expeditiously initiate a child custody proceeding subject to the provisions of this title, transfer the child to the jurisdiction of the appropriate Indian tribe, or restore the child to the parent or Indian custodian, as may be appropriate.

Effective date.
25 USC 1923.

SEC. 113. None of the provisions of this title, except sections 101(a), 108, and 109, shall affect a proceeding under State law for foster care placement, termination of parental rights, preadoptive placement, or adoptive placement which was initiated or completed prior to one hundred and eighty days after the enactment of this Act, but shall apply to any subsequent proceeding in the same matter or subsequent proceedings affecting the custody or placement of the same child.

TITLE II—INDIAN CHILD AND FAMILY PROGRAMS

25 USC 1931.

SEC. 201. (a) The Secretary is authorized to make grants to Indian tribes and organizations in the establishment and operation of Indian child and family service programs on or near reservations and in the preparation and implementation of child welfare codes. The objective of every Indian child and family service program shall be to prevent the breakup of Indian families and, in particular, to insure that the permanent removal of an Indian child from the custody of his parent or Indian custodian shall be a last resort. Such child and family service programs may include, but are not limited to—

(1) a system for licensing or otherwise regulating Indian foster and adoptive homes;

(2) the operation and maintenance of facilities for the counseling and treatment of Indian families and for the temporary custody of Indian children;

(3) family assistance, including homemaker and home counselors, day care, afterschool care, and employment, recreational activities, and respite care;

(4) home improvement programs;

(5) the employment of professional and other trained personnel to assist the tribal court in the disposition of domestic relations and child welfare matters;

(6) education and training of Indians, including tribal court judges and staff, in skills relating to child and family assistance and service programs;

(7) a subsidy program under which Indian adoptive children may be provided support comparable to that for which they would be eligible as foster children, taking into account the appropriate State standards of support for maintenance and medical needs; and

(8) guidance, legal representation, and advice to Indian families involved in tribal, State, or Federal child custody proceedings.

(b) Funds appropriated for use by the Secretary in accordance with this section may be utilized as non-Federal matching share in connection with funds provided under titles IV–B and XX of the Social Security Act or under any other Federal financial assistance programs which contribute to the purpose for which such funds are authorized to be appropriated for use under this Act. The provision or possibility of assistance under this Act shall not be a basis for the denial or reduction of any assistance otherwise authorized under titles IV–B and XX of the Social Security Act or any other federally assisted program. For purposes of qualifying for assistance under a federally assisted program, licensing or approval of foster or adoptive homes or institutions by an Indian tribe shall be deemed equivalent to licensing or approval by a State.

42 USC 620, 1397.

Additional services.

SEC. 202. The Secretary is also authorized to make grants to Indian organizations to establish and operate off-reservation Indian child and family service programs which may include, but are not limited to—

25 USC 1932.

(1) a system for regulating, maintaining, and supporting Indian foster and adoptive homes, including a subsidy program under which Indian adoptive children may be provided support comparable to that for which they would be eligible as Indian foster children, taking into account the appropriate State standards of support for maintenance and medical needs;

(2) the operation and maintenance of facilities and services for counseling and treatment of Indian families and Indian foster and adoptive children;

(3) family assistance, including homemaker and home counselors, day care, afterschool care, and employment, recreational activities, and respite care; and

(4) guidance, legal representation, and advice to Indian families involved in child custody proceedings.

Funds.

SEC. 203. (a) In the establishment, operation, and funding of Indian child and family service programs, both on and off reservation, the Secretary may enter into agreements with the Secretary of Health, Education, and Welfare, and the latter Secretary is hereby authorized for such purposes to use funds appropriated for similar programs of the Department of Health, Education, and Welfare: *Provided*, That authority to make payments pursuant to such agreements shall be effective only to the extent and in such amounts as may be provided in advance by appropriation Acts.

25 USC 1933.

(b) Funds for the purposes of this Act may be appropriated pursuant to the provisions of the Act of November 2, 1921 (42 Stat. 208), as amended. 25 USC 13.

SEC. 204. For the purposes of sections 202 and 203 of this title, the term "Indian" shall include persons defined in section 4(c) of the Indian Health Care Improvement Act of 1976 (90 Stat. 1400, 1401). 25 USC 1934. 25 USC 1603.

TITLE III—RECORDKEEPING, INFORMATION AVAILABILITY, AND TIMETABLES

SEC. 301. (a) Any State court entering a final decree or order in any Indian child adoptive placement after the date of enactment of this Act shall provide the Secretary with a copy of such decree or order together with such other information as may be necessary to show— Final decree, information to be included. 25 USC 1951.

(1) the name and tribal affiliation of the child;
(2) the names and addresses of the biological parents;
(3) the names and addresses of the adoptive parents; and
(4) the identity of any agency having files or information relating to such adoptive placement.

Where the court records contain an affidavit of the biological parent or parents that their identity remain confidential, the court shall include such affidavit with the other information. The Secretary shall insure that the confidentiality of such information is maintained and such information shall not be subject to the Freedom of Information Act (5 U.S.C. 552), as amended.

(b) Upon the request of the adopted Indian child over the age of eighteen, the adoptive or foster parents of an Indian child, or an Indian tribe, the Secretary shall disclose such information as may be necessary for the enrollment of an Indian child in the tribe in which the child may be eligible for enrollment or for determining any rights or benefits associated with that membership. Where the documents relating to such child contain an affidavit from the biological parent or parents requesting anonymity, the Secretary shall certify to the Indian child's tribe, where the information warrants, that the child's parentage and other circumstances of birth entitle the child to enrollment under the criteria established by such tribe.

SEC. 302. Within one hundred and eighty days after the enactment of this Act, the Secretary shall promulgate such rules and regulations as may be necessary to carry out the provisions of this Act. Effective date. Rules and regulations. 25 USC 1952.

TITLE IV—MISCELLANEOUS

Day schools.
25 USC 1961.

SEC. 401. (a) It is the sense of Congress that the absence of locally convenient day schools may contribute to the breakup of Indian families.

Report to congressional committees.

(b) The Secretary is authorized and directed to prepare, in consultation with appropriate agencies in the Department of Health, Education, and Welfare, a report on the feasibility of providing Indian children with schools located near their homes, and to submit such report to the Select Committee on Indian Affairs of the United States Senate and the Committee on Interior and Insular Affairs of the United States House of Representatives within two years from the date of this Act. In developing this report the Secretary shall give particular consideration to the provision of educational facilities for children in the elementary grades.

Copies to each State.
25 USC 1962.

SEC. 402. Within sixty days after enactment of this Act, the Secretary shall send to the Governor, chief justice of the highest court of appeal, and the attorney general of each State a copy of this Act, together with committee reports and an explanation of the provisions of this Act.

25 USC 1963.

SEC. 403. If any provision of this Act or the applicability thereof is held invalid, the remaining provisions of this Act shall not be affected thereby.

Approved November 8, 1978.

LEGISLATIVE HISTORY:

HOUSE REPORT No. 95-1386, accompanying H.R. 12533 (Comm. on Interior and Insular Affairs).
SENATE REPORT No. 95-597 (Comm. on Indian Affairs).
CONGRESSIONAL RECORD:
Vol. 123 (1978): Nov. 4, considered and passed Senate.
Vol. 124 (1978): Oct. 14, H.R. 12533 considered and passed House; passage vacated, and S. 1214, amended, passed in lieu.
Oct. 15, Senate concurred in House amendments.

INDIAN CHILD WELFARE ACT OF 1978

P.L. 95-608, see page 92 Stat. 3069

Senate Report (Indian Affairs Committee) No. 95-597, Nov. 3, 1977 [To accompany S. 1214]

House Report (Interior and Insular Affairs Committee) No. 95-1386, July 24, 1978 [To accompany H.R. 12533]

Cong. Record Vol. 123 (1977)

Cong. Record Vol. 124 (1978)

DATES OF CONSIDERATION AND PASSAGE

Senate November 4, 1977; October 15, 1978

House October 14, 1978

The Senate bill was passed in lieu of the House bill after amending its language to contain the text of the House bill.

The House Report is set out.

HOUSE REPORT NO. 95-1386

[page 1]

The Committee on Interior and Insular Affairs, to whom was referred the bill (H.R. 12533) to establish standards for the placement of Indian children in foster or adoptive homes, to prevent the breakup of Indian families, and for other purposes, having considered the same, report favorably thereon with an amendment and recommend that the bill as amended do pass.

* * * * * * * * *

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PURPOSE

The purpose of the bill (H.R. 12533), introduced by Mr. Udall et al.,[1] is to protect the best interests of Indian children and to promote the stability and security of Indian tribes and families by establishing minimum Federal standards for the removal of Indian children from their families and the placement of such children in foster or adoptive homes or institutions which will reflect the unique values of Indian culture and by providing for assistance to Indian tribes and organizations in the operation of child and family service programs.

BACKGROUND

* * * I can remember (the welfare worker) coming and taking some of my cousins and friends. I didn't know why

and I didn't question it. It was just done and it had always been done * * *.[2]

[1] H.R. 12533 was introduced by Representatives Udall, Roncallo, Baucus, Bingham, Blouin, Burke of California, Phillip Burton, Carr, Dellums, Fraser, Miller of California, Risenhoover, Selberling, Stark, Tsongas, Vento, and Weaver. A similar bill, S. 1214, has been approved by the Senate.

[2] Testimony of Valancia Thacker before Task Force 4 of the American Indian Policy Review Commission.

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The wholesale separation of Indian children from their familieis is perhaps the most tragic and destructive aspect of American Indian life today.

Surveys of States with large Indian populations conducted by the Association on American Indian Affairs (AAIA) in 1969 and again in 1974 indicate that approximately 25–35 percent of all Indian children are separated from their families and placed in foster homes, adoptive homes, or institutions. In some States the problem is getting worse: in Minnesota, one in every eight Indian children under 18 years of age is living in an adoptive home; and, in 1971–72, nearly one in every four Indian children under 1 year of age was adopted.

The disparity in placement rates for Indians and non-Indians is shocking. In Minnesota, Indian children are placed in foster care or in adoptive homes at a per capita rate five times greater than non-Indian children. In Montana, the ratio of Indian foster-care placement is at least 13 times greater. In South Dakota, 40 percent of all adoptions made by the State's Department of Public Welfare since 1967–68 are of Indian children, yet Indians make up only 7 percent of the juvenile population. The number of South Dakota Indian children living in foster homes is per capita, nearly 16 times greater than the non-Indian rate. In the State of Washington, the Indian adoption rate is 19 times greater and the foster care rate 10 times greater. In Wisconsin, the risk run by Indian children of being separated from their parents is nearly 1,600 percent greater than it is for non-Indian children. Just as Indian children are exposed to these great hazards, their parents are too.

The Federal boarding school and dormitory programs also contribute to the destruction of Indian family and community life. The Bureau of Indian Affairs (BIA), in its school census for 1971, indicates that 34,538 children live in its institutional facilities rather than at home. This represents more than 17 percent of the Indian school age population of federally-recognized reservations and 60 percent of the children enrolled in BIA schools. On the Navajo Reservation, about 20,000 children or 90 percent of the BIA school population in grades K–12, live at boarding schools. A number of Indian children are also institutionalized in mission schools, training schools, etc.

In addition to the trauma of separation from their families, most Indian children in placement or in institutions have to cope with the problems of adjusting to a social and cultural environment much different than their own. In 16 States surveyed in 1969, approximately 85 percent of all Indian children in foster care were living in non-Indian homes. In Minnesota today, according to State figures, more than 90 percent of nonrelated adoptions of Indian children are made by non-Indian couples. Few States keep as careful or complete child welfare statistics as Minnesota does, but informed estimates by welfare officials elsewhere suggest that this rate is the norm. In most

Federal and mission boarding schools, a majority of the personnel is non-Indian.

It is clear then that the Indian child welfare crisis is of massive proportions and that Indian families face vastly greater risks of involuntary separation than are typical of our society as a whole.

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Standards

The Indian child welfare crisis will continue until the standards for defining mistreatment are revised. Very few Indian children are removed from their families on the grounds of physical abuse. One study of a North Dakota reservation showed that these grounds were advanced in only 1 percent of the cases. Another study of a tribe in the Northwest showed the same incidence. The remaining 99 percent of the cases were argued on such vague grounds as "neglect" or "social deprivation" and on allegations of the emotional damage the children were subjected to by living with their parents. Indian communities are often shocked to learn that parents they regard as excellent caregivers have been judged unfit by non-Indian social workers.

In judging the fitness of a particular family, many social workers, ignorant of Indian cultural values and social norms, make decisions that are wholly inappropriate in the context of Indian family life and so they frequently discover neglect or abandonment where none exists.

For example, the dynamics of Indian extended families are largely misunderstood. An Indian child may have scores of, perhaps more than a hundred, relatives who are counted as close, responsible members of the family. Many social workers, untutored in the ways of Indian family life or assuming them to be socially irresponsible, consider leaving the child with persons outside the nuclear family as neglect and thus as grounds for terminating parental rights.

Because in some communities the social workers have, in a sense, become a part of the extended family, parents will sometimes turn to the welfare department for temporary care of their children, failing to realize that their action is perceived quite differently by non-Indians.

Indian child-rearing practices are also misinterpreted in evaluating a child's behavior and parental concern. It may appear that the child is running wild and that the parents do not care. What is labelled "permissiveness" may often, in fact, simply be a different but effective way of disciplining children. BIA boarding schools are full of children with such spurious "behavioral problems."

One of the grounds most frequently advanced for taking Indian children from their parents is the abuse of alcohol. However, this standard is applied unequally. In areas where rates of problem drinking among Indians and non-Indians are the same, it is rarely applied against non-Indian parents. Once again cultural biases frequently affect decisionmaking. The late Dr. Edward P. Dozier of Santa Clara Pueblo and other observers have argued that there are important cultural differences in the use of alcohol. Yet, by and large, non-Indian social workers draw conclusions about the meaning of acts or conduct in ignorance of these distinctions.

The courts tend to rely on the testimony of social workers who often lack the training and insights necessary to measure the emotional risk the child is running at home. In a number of cases, the AAIA has obtained evidence from competent psychiatrists who, after examining the defendants, have been able to contradict the allegations offered

by the social workers. Rejecting the notion that poverty and cultural differences constitute social deprivation and psychological abuse, the Association argues that the State must prove that there is actual physical or emotional harm resulting from the acts of the parents.

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The abusive actions of social workers would largely be nullified if more judges were themselves knowledgeable about Indian life and required a sharper definition of the standards of child abuse and neglect.

Discriminatory standards have made it virtually impossible for most Indian couples to qualify as foster or adoptive parents, since they are based on middle-class values. Recognizing that in some instances it is necessary to remove children from their homes, community leaders argue that there are Indian families within the tribe who could provide excellent care, although they are of modest means. While some progress is being made here and there, the figures cited above indicate that non-Indian parents continue to furnish almost all the foster and adoptive care for Indian children.

Due process

The decision to take Indian children from their natural homes is, in most cases, carried out without due process of law. For example, it is rare for either Indian children or their parents to be represented by counsel to or have the supporting testimony of expert witnesses.

Many cases do not go through an adjudicatory process at all, since the voluntary waiver of parental rights is a device widely employed by social workers to gain custody of children. Because of the availability of the waivers and because a great number of Indian parents depend on welfare payments for survival, they are exposed to the sometimes coercive arguments of welfare departments. In a recent South Dakota entrapment case, an Indian parent in a time of trouble was persuaded to sign a waiver granting temporary custody to the State, only to find that this is now being advanced as evidence of neglect and grounds for the permanent termination of parental rights. It is an unfortunate fact of life for many Indian parents that the primary service agency to which they must turn for financial help also exercises police powers over their family life and is, most frequently, the agency that initiates custody proceedings.

The conflict between Indian and non-Indian social systems operates to defeat due process. The extended family provides an example. By sharing the responsibility of child rearing, the extended family tends to strengthen the community's commitment to the child. At the same time, however, it diminishes the possibility that the nuclear family will be able to mobilize itself quickly enough when an outside agency acts to assume custody. Because it is not unusual for Indian children to spend considerable time away with other relatives, there is no immediate realization of what is happening—possibly not until the opportunity for due process has slipped away.

Economic incentives

In some instances, financial considerations contribute to the crisis. For example, agencies established to place children have an incentive to find children to place.

Indian community leaders charge that federally-subsidized foster care programs encourage some non-Indian families to start "baby farms" in order to supplement their meager farm income with foster

care payments and to obtain extra hands for farmwork. The disparity between the ratio of Indian children in foster care versus the number of Indian children that are adopted seems to bear this out. For example,

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in Wyoming in 1969, Indians accounted for 70 percent of foster care placements but only 8 percent of adoptive placements. Foster care payments usually cease when a child is adopted.

In addition, there are economic disincentives. It will cost the Federal and State Governments a great deal of money to provide Indian communities with the means to remedy their situation. But over the long run, it will cost a great deal more money not to. At the very least, as a first step, we should find new and more effective ways to spend present funds.

Social conditions

Low-income, joblessness, poor health, substandard housing, and low educational attainment—these are the reasons most often cited for the disintegration of Indian family life. It is not that clear-cut. Not all impoverished societies, whether Indian or non-Indian, suffer from catastrophically high rates of family breakdown.

Cultural disorientation, a person's sense of powerlessness, his loss of self-esteem—these may be the most potent forces at work. They arise, in large measure, from our national attitudes as reflected in long-established Federal policy and from arbitrary acts of Government.

One of the effects of our national paternalism has been to so alienate some Indian patents from their society that they abandon their children at hospitals or to welfare departments rather than entrus them to the care of relatives in the extended family. Another expression of it is the involuntary, arbitrary, and unwarranted separation of families.

It has already been noted that the harsh living conditions in many Indian communities may prompt a welfare department to make unwarranted placements and that they make it difficult for Indian people to qualify as foster or adoptive parents. Additionally, because these conditions are often viewed as the primary cause of family breakdown and because generally there is no end to Indian poverty in sight, agencies of government often fail to recognize immediate, practical means to reduce the incidence of neglect or separation.

As surely as poverty imposes severe strains on the ability of familes to function—sometimes the extra burden that is too much to bear—so too family breakdown contributes to the cycle of poverty.

CONSTITUTIONALITY

The Department of Justice, in its reports to the committee of February 9 and May 23, 1978, raises questions regarding the constitutionality of certain of the provisions of the legislation. While the committee did not agree with the Department on these issues, certain changes were made in the legislation which will meet some of the Department's concerns. Other issues remain, however. In view of the constitutional doubts of the Department, the committee feels compelled to respond.

Supremacy clause

Clause 2 of article VI of the U.S. Constitution provides:

> This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the
>
> [page 13]
>
> United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby; any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

When Congress legislates pursuant to its delegated powers, conflicting State law and policy must yield, *Gibbons* v. *Ogden*, 22 U.S. 1 (1824)[1]; *Hill* v. *Florida ex rel. Watson*, 325 U.S. 538 (1945)[2]; *Nash* v. *Florida Industrial Comm.*, 389 U.S. 235 (1967)[3]; *Lee* v. *Florida*, 392 U.S. 378 (1968)[4]; *Perez* v. *Campbell*, 402 U.S. 637 (1971)[5].

The Constitution, laws, and treaties of the United States are as much a part of the law of every State as its own local laws and constitution. Their obligation "is imperative upon the State judges, in their official and not merely in their private capacities. From the very natur of their judicial duties, they would be called upon to pronounce the law applicable to the case in judgment. They were not to decide merely according to the laws or constitution of the State, but according to the laws and treaties of the United States—'the supreme law of the land.'" *Martin* v. *Hunter's Lessee*, 1 Wheat. 304 (1816); State courts have both the power and duty to enforce obligations arising under Federal law. *Claflin* v. *Houseman*, 93 U.S. 130 (1876)[6]; *Second Employers' Liability Cases*, 223 U.S. 1 (1912); *Testa* v. *Katt*, 330 U.S. 386 (1947)[7].

Plenary power of Congress over Indian affairs

The question is then: "Does Congress have power to legislate as proposed in the bill?" Clause 3, section 8, article I of the Constitution provides:

> The Congress shall have Power * * * To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes.

In an unbroken line of Supreme Court decisions, beginning with Chief Justice John Marshall's decision in *Worcester* v. *Georgia*, 31 U.S. 515 (1832)[8]:

> (The Constitution) confers on Congress the powers of war and peace; of making treaties, and of regualting commerce with foreign nations, and among the several states, and with the Indian tribes. These powers comprehend all that is required for the regulation of our intercourse with the Indians. They (Congress) are not limited by any restrictions on their free actions.

And ending with *United States* v. *Wheeler*—U.S.—(March 22, 1978):

> (There is an) undisputed fact that Congress has plenary authority to legislate for the Indian tribes in all matters, including their form of government.

The Supreme Court has, time and again, upheld the sweeping power of Congress over Indian matters. The cases are far too numerous to cite, but two cases will serve to exemplify this position. In *U.S.* v. *Kagama*, 118 U.S. 375 (1886)[9] the Court said:

> These Indian tribes are wards of the nation. They are communities *dependent* on the United States. Dependent largely for their daily food. Dependent for their political

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1. 6 L.Ed. 23.
2. 65 S.Ct. 1373, 89 L.Ed. 1782.
3. 88 S.Ct. 362, 19 L.Ed.2d 438.
4. 88 S.Ct. 2096, 20 L.Ed.2d 1166.
5. 91 S.Ct. 1704, 29 L.Ed.2d 233.
6. 23 L.Ed. 833.
7. 67 S.Ct. 810, 91 L.Ed. 967.
8. 8 L.Ed. 483.
9. 6 S.Ct. 1109, 30 L.Ed. 228.

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> rights. They owe no allegiance to the States, and receive from them no protection. Because of the local ill feeling, the people of the States where they are found are often their deadliest enemies. From their very weakness and helplessness, so largely due to the course of dealing of the Federal government with them, and the treaties in which it has been promised, there arises the duty of protection, and with it the power. This has always been recognized by the Executive and by Congress, and by this court, whenever the question has arisen.

And in *United States* v. *Nice*, 241 U.S. 591 (1916),[10] the Court held:

> The power of Congress to regulate or prohibit traffic with tribal Indians within a State whether upon or off an Indian reservation is well settled * * *. Its source is twofold; first, the clause of the Constitution expressly investing Congress with authority "to regulate Commerce * * * with the Indian tribes", and, second, the dependent relation of such tribes to the United States.

It cannot be questioned that Congress has broad, unique powers with respect to Indian tribes and affairs, There is only one caveat: While those powers may be plenary, the exercise may not be arbitrary. For example, Congress may not take Indian property without just compensation nor may it establish a religion for Indian tribes.

Plenary power and child welfare

The question then is: "Is the regulation of child custody proceedings and the imposition of minimum Federal standards an appropriate exercise of Congress plenary power over Indian affairs?"

We need only cite three cases to lay the foundation for the power of Congress to legislate in this area. In *U.S.* v. *Holliday*, 70 U.S. 407 (1866),[11] the Court said:

> Commerce with foreign Nations, without doubt, means commerce between citizens of the United States and citizens or subjects of foreign governments as individuals. And so commerce with Indians tribes means commerce with the individuals composing those tribes.

In *Dick* v. *U.S.*, 208 U.S. 340 (1908),[10] the Court held:

> As long as these Indians remain a distinct people, with an existing tribal organization, recognized by the political department of the Government, Congress has power to say with whom, and on what terms, they shall deal * * *.

Knoepfler, in *Legal Status of American Indian & His Property* (1922), 7 Ia. L.B. 232, stated: "Commerce with the Indian tribes has been construed to mean practically every sort of intercourse with the Indians either in the tribes or as individuals."

Finally, the Maryland Court of Appeals, in a case involving the attempted adoption of an Indian child (*Wakefield* v. *Little Light*, 276 Md. 333, 347 A. 2d 228 (1975)), stated:

> We think it plain that child-rearing is an "essential tribal relation" within * * * (the test of) *Williams* v. *Lee* (358 U.S. 217 (1959)).[11]

10. 36 S.Ct. 696, 60 L.Ed. 1192.
11. 18 L.Ed. 182.
12. 28 S.Ct. 399, 52 L.Ed. 520.
13. 79 S.Ct. 269, 3 L.Ed.2d 251.

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And again:

> * * * (C)onsidering that there can be no greater threat to 'essential tribal relations' and no greater infringement on the right of the * * * tribe to govern themselves than to interfere with tribal control over the custody of their children, we agree with the conclusion expressed in *Wisconsin Potowatomies* (*Wisconsin Potowatomies* v. *Houston*, 393 F. Supp. 719 (1973)) that in determining subject matter jurisdiction in such circumstances, the only rational approach is to determine the domicile of the Indian child. By using the Indian child's domicile as the State's jurisdictional basis, the Indian tribe is afforded significant protection from losing its essential rights of childrearing and maintenance of tribal identity.

Even this State court recognized that a tribe's children are vital to its integrity and future. Since the United States has the responsibility to protect the integrity of the tribes, we can say with the *Kagama* court, " * * * there arises the duty of protection, and with it the power."

Geographic scope of plenary power

Is the Congress limited to Indian lands or to the reservation in the exercise of its plenary power over Indian affairs? The answer is clearly, "No". Again, we need only cite one or two cases to support this conclusion.

In *U.S.* v. *Holliday*, supra, the Court said:

> If commerce, or traffic, or intercourse is carried on with an Indian tribe, or with a member of such tribe, it is subject to be regulated by Congress; although within the limits of a State. The locality of the traffic *can have nothing to do with the power*. (Emphasis added.) The right to exercise it in reference to any Indian tribe, or any person who is a member of such tribe, is absolute, without reference to the locality of the traffic, or the locality of the tribe, or the member of the tribe with whom it is carried on.

In *Perrin* v. *U.S.*, 232 U.S. 478 (1914),[14] the Court held:

> We come, then, to the objection that the prohibition in the act of 1894 confers an unnecessarily extensive territory and is not limited in duration, and so transcends the power of Congress. As the power is incident only to the presence of the Indians and their status as wards of the Government, it must be conceded that it does not go beyond what is reasonably essential to their protection, and that, to be effective, its exercise must not be purely arbitrary, but founded upon some reasonable basis. * * * On the other hand, it must also be conceded that, in determining what is reasonably essential to the protection of the Indians Congress is invested with a wide discretion and its action, unless purely arbitrary, must be accepted and given full effect by the courts.

We cite again *U.S.* v. *Nice*, supra: "The power of Congress to regulate or prohibit traffic with tribal Indians within a State *whether upon or off an Indian reservation* is well settled * * *." (Emphasis added.)

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14. 34 S.Ct. 387, 58 L.Ed. 691.

Membership and plenary power

The question occurs, as raised by the Department of Justice in its report: "Is the power of Congress limited, constitutionally, to only those individuals who are formally enrolled as members of an Indian tribe?" Again, the answer is negative.

In 1934, Congress enacted the Indian Reorganization Act of June 18, 1934 (48 Stat. 988). Section 19 defined "Indians" as:

> * * * all persons of Indian descent who are members of any recognized Indian tribe now under Federal jurisdiction, and all persons who are descendants of such members who were, on June 1, 1934, residing within the present boundaries of any Indian reservation, and shall further include all other persons of one-half or more Indian blood.

Categories two and three of this definition are clearly not enrolled members of a tribe, by definition; yet Congress conferred the rights and benefits of the act upon this class of Indians, including the right to preference in Federal employment in the Bureau of Indian Affairs and the Indian Health Service. When the Supreme Court was called upon to construe the constitutionality of the Indian preference section of the Indian Reorganization Act in the case of *Morton* v. *Mancari*, 417 U.S. 535 (1974),[15] it was aware that Indians who were not enrolled members of a tribe were made eligible for this preference by act of Congress, but did not strike the law down as invidiously discriminatory.

The reason it did not was because it was aware of its own past decisions with respect to congressional power over Indians not members of a tribe, Congress may disregard the existing membership rolls and direct that per capita distributions be made upon the basis of a new roll, even though such act may modify prior legislation, treaties, or agreements with the tribe. *Stephens* v. *Cherokee Nation*, 174 U.S. 445

(1899)[16] Thus, the Supreme Court in the case of *Sizemore* v. *Brady*, 235 U.S. 441 (1914)[17] said:

> * * * Like other tribal Indians, the Creeks were wards of the United States, which possessed full power, if it deemed such a course wise, to assume full control over them and their affairs, to ascertain who were members of the tribe * * *.

In *Federal Indian Law*, at page 45 in note 10, it is said:

> It has been held that Congress is not bound by the tribal rule regarding membership and may determine for itself whether a person is an Indian from the standpoint of a Federal criminal statute. *United States* v. *Rogers*, 4 How. 567 (1846).

In the very recent case of *United States* v. *Antelope*, 45 U.S.L.W. 4361 (April 19, 1977), the Supreme Court said:

> It should be noted, however, that enrollment in an official tribe has not been held to be an absolute requirement for federal jurisdiction. * * *

Federal District Court Judge Battin, in *Dillon* v. *Montana*, (1978), ordered:

> 2. That for purposes of applying this (Federal) exemption, the class of "Indian persons" * * * shall include persons possessing the following qualifications:

15. 94 S.Ct. 2474, 41 L.Ed.2d 290.
16. 19 S.Ct. 722, 43 L.Ed. 1041.
17. 35 S.Ct. 135, 59 L.Ed. 308.

[page 17]

> (a) that the person possess some quantum of Indian blood;
>
> (b) that the person be recognized as an Indian by the community in which he or she lives, and that the putative taxpayer's wardship status has not been terminated by the government;
>
> (c) that the person be an enrolled member of a federally recognized Indian tribe *or otherwise eligible to be recognized as an Indian ward by the Federal Government.* (Emphasis added.)

If the courts have found that Congress has the power to act with respect to nonenrolled Indians in the foregoing kinds of circumstances, how much more is its power to act to protect the valuable rights of a minor Indian who is eligible for enrollment in a tribe? This minor, perhaps infant, Indian does not have the capacity to initiate the formal, mechanical procedure necessary to become enrolled in his tribe to take advantage of the very valuable cultural and property benefits flowing therefrom. Obviously, Congress has power to act for their protection. The constitutional and plenary power of Congress over Indians and Indian tribes and affairs cannot be made to hinge upon the cranking into operation of a mechanical process established under tribal law, particularly with respect to Indian children who, because of their minority, cannot make a reasoned decision about their tribal and Indian identity.

Supremacy clause versus States' rights

From the foregoing, it is clear that Congress has full power to enact laws to protect and preserve the future and integrity of Indian tribes by providing minimal safeguards with respect to State proceedings for Indian child custody. The final question is, paraphrasing the Department of Justice; "Does Congress have power to control the incidents of child custody litigation involving nonreservation Indian children and parents pursuant to the Indian commerce clause sufficient to override the significant State interest in regulating the procedure to be followed by its courts in exercising jurisdiction over what is traditionally a State matter?"

First, let it be said that the provisions of the bill do not oust the State from the exercise of its legitimate police powers in regulating domestic relations.

The decisions of the Supreme Court will set to rest the principal objection. It is appropriate to begin with the landmark case of *McCulloch* v. *Maryland*, 17 U.S. 316 (1819);[18] where the Court stated:

> Let the end be legitimate, let it be within the scope of the Constitution, and all means which are appropriate, which are plainly adapted to that end, which are not prohibited, but consistent with the letter and spirit of the Constitution, are constitutional.

In *Brown* v. *Western Ry. Co.*, 338 U.S. 294 (1949);[19] the Court said:

> The argument is that while state courts are without power to detract from "substantive rights" granted by Congress * * * they are free to follow their own rules of "practice" and "procedure" * * *. A long series of cases previously decided, from which we see no reason to depart,

18. 4 L.Ed. 579.
19. 70 S.Ct. 105, 94 L.Ed. 100.

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> makes it our duty to construe the allegations of this complaint ourselves in order to determine whether petitioner has been denied a right of trial granted him by Congress. This federal right cannot be defeated by forms of local practice. * * * Strict local rules of pleading cannot be used to impose unnecessary burdens upon rights of recovery authorized by Federal laws.

In *Dice* v. *Akron, C.Y.Y. R.R. Co.*, 342 U.S. 359 (1952);[20] the Court held:

> Congress * * * granted petitioner a right * * *. State laws are not controlling in determining what the incidents of this Federal right shall be."

Chief Justice Holmes, in *Davis* v. *Wechsler*, 263 U.S. 22 (1923);[21] put it succinctly:

> Whatever springes the State may set for those who are endeavoring to assert rights that the State confers, the assertion of Federal rights, when plainly and reasonably made, is not to be defeated under the name of local practice.

We will quote merely two other cases to support the proposition that Congress may, constitutionally, impose certain procedural bur-

dens upon State courts in order to protect the substantive rights of Indian children, Indian parents, and Indian tribes in State court proceedings for child custody.

The Court, in *American Railway Express Co.* v. *Levee.* 263 U.S. 19 (1923)[20] held that:

> The laws of the United States cannot be evaded by the forms of local practice * * *. The local rules applied as to the burden of proof narrowed the protection that the defendant had secured (under Federal law), and therefore contravened the law.

And finally, in an extensive quote from the landmark decision of the Court in *Second Employers' Liability Cases*, 223 U.S. 1 (1912), we examine the duty of State courts, otherwise having jurisdiction over the subject matter, to enforce Federal substantive rights:

> We come next to consider whether rights arising from congressional act may be enforced, as of right, in the courts of the States when their jurisdiction, as prescribed by local law, is adequate to the occasion * * *. (The State court was of the opinion that it could decline to enforce the Federal right) because * * * it would be inconvenient and confusing for the same court, in dealing with cases of the same general class, to apply in some the standard of right established by congressional act and in others the different standards recognized by the laws of the State. * * * It never has been supposed that courts are at liberty to decline cognizance of cases merely because the rules of law to be applied in their adjudication are unlike those applied in other cases.
>
> We conclude that rights arising under the (Federal) act in question may be enforced, as of right, in the courts of the States when their jurisdiction, as prescribed by local law, is adequate to the occasion.

20. 72 S.Ct. 312, 96 L.Ed. 398.
21. 44 S.Ct. 13, 68 L.Ed. 143.
22. 44 S.Ct. 11, 68 L.Ed. 140.

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Conclusion

Under the rules of the House, this committee has been charged with the initial responsibility in implementing the plenary power over, and responsibility to, the Indians and Indian tribes. In the exercise of that responsibility, the committee has noted a growing crisis with respect to the breakup of Indian families and the placement of Indian children, at an alarming rate, with non-Indian foster or adoptive homes. Contributing to this problem has been the failure of State officials, agencies, and procedures to take into account the special problems and circumstances of Indian families and the legitimate interest of the Indian tribe in preserving and protecting the Indian family as the wellspring of its own future.

While the committee does not feel that it is necessary or desirable to oust the States of their traditional jurisdiction over Indian children falling within their geographic limits, it does feel the need to establish minimum Federal standards and procedural safeguards in State Indian child custody proceedings designed to protect the rights of the child as an Indian, the Indian family and the Indian tribe.

SECTION-BY-SECTION ANALYSIS

As amended by the committee, the legislation completely rewrites S. 1214 as passed by the Senate. In addition, the amendment in the nature of a substitute for H.R. 12533, as further amended, differs significantly from H.R. 12533 as introduced. The following is a section-by-section analysis of the bill as reported with appropriate explanations.

Section 1

Section 1 provides that the bill may be cited as the "Indian Child Welfare Act of 1978".

Section 2

Section 2 contains congressional findings. As amended, it lays the foundations for the power and responsibility of the Congress to legislate in the field of Indian child welfare.

Section 3

Section 3 contains a congressional declaration of policy. As amended, the section makes clear that the underlying principle of the bill is in the best interest of the Indian child. However, the committee notes that this legal principle is vague, at best. In a footnote on page 835 in the decision of *Smith* v. *OFFER*, 431 U.S. 820 (1977), the Supreme Court stated:

> Moreover, judges too may find it difficult, in utilizing vague standards like "the best interests of the child", to avoid decisions resting on subjective values."

SECTION 4

Section 4 defines various terms used in the bill.

Paragraph (1) defines the term "child custody placement" by defining four discrete legal proceedings included within the term. S. 1214 and H.R. 12533, as introduced, used the term "placement" which proved to be ambiguous with respect to the various provisions

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of the bill. The terms may not be current in the legal lexicon of domestic relations and might have some different or overlapping meaning in normal usage. The terms are intended to have the meaning given to them in the paragraph.

Paragraph (2) defines the term "extended family member". The concept of the extended family maintains its vitality and strength in the Indian community. By custom and tradition, if not necessity, members of the extended family have definite responsibilities and duties in assisting in childrearing. Yet, many non-Indian public and private agencies have tended to view custody of an Indian child by a member of the extended family as prima facie evidence of parental neglect. It should be noted that the concept was not unknown in the non-Indian world. Justice Brennan, in his concurring opinion in *Moore* v. *East Cleveland*, 431 U.S. 494, 508 (1977), noted:

> In today's America, the "nuclear family" is the pattern so often found in much of white suburbia * * *. The Constitution cannot be interpreted, however, to tolerate the imposition by government upon the rest of us white sub-

> urbia's preference in patterns of family living. The "extended family" * * * remains not merely still a pervasive living pattern, but under goad of brutal economic necessity, a prominent pattern—virtually a means of survivial—for large numbers of the poor and deprived minorities of our society.

Paragraph (3) defines "Indian" as any person who is a member of an Indian tribe.

Paragraph (4) defines "Indian child." The committee rejects the use of the term "merely" by the Department of Justice to qualify the eligibility of an Indian to be a member of an Indian tribe, particularly with respect to a minor. Blood relationship is the very touchstone of a person's right to share in the cultural and property benefits of an Indian tribe. We do note that, for an adult Indian, there is an absolute right of expatiration from one's tribe. *U.S. ex rel. Standing Bear* v. *Crook*, 25 Fed. Cas. No. 14891 (1879). However, this right has no relevance to an Indian child who, because of his minority, does not have the capacity to make a reasoned decision about exercising his right to enroll in his tribe.

Paragraph (5) defines "Indian child's tribe." It is assumed that the appropriate official can make a reasonable judgment about which Indian tribe the Indian child has the more significant contacts in cases where the child is eligible for membership in more than one tribe.

Paragraph (6) defines "Indian custodian." Where the custody of an Indian child is lodged with someone other than the parents under formal custom or law of the tribe or under State law, no problem arises. But, because of the extended family concept in the Indian community, parents often transfer physical custody of the Indian child to such extended family member on an informal basis, often for extended periods of time and at great distances from the parents. While such a custodian may not have rights under State law, they do have rights under Indian custom which this bill seeks to protect, including the right to protect the parental interests of the parents.

Paragraph (7) defines "Indian organization".

Paragraph (8) defines "Indian tribe".

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Paragraph (9) defines "parent". It should be noted that the last sentence is not meant to conflict with the decision of the Supreme Court in *Stanley* v. *Illinois*, 405 U.S. 645 (1972).[23]

Paragraph (10) defines the term "reservation". For the limited purpose of jurisdiction over Indian child custody proceedings, the last sentence of the paragraph addresses and varies the holding in cases such as *DeCoteau* v. *District Court*, 420 U.S. 425 (1975);[24] and *Rosebud* v. *Kneip*, 97 S. Ct. 1361 (1977).

Paragraph (11) defines "Secretary" as the Secretary of the Interior.

Paragraph (12) defines "tribal court".

Section 101

Subsection (a) provides that an Indian tribe shall have exclusive jurisdiction over child custody proceedings where the Indian child is residing or domiciled on the reservation, unless Federal law has vested that jurisdiction in the State. It further provides that the domicile of an Indian child who is the ward of a tribal court is deemed to be that of the court, which is generally in accord with existing law. The provi-

sions on exclusive tribal jurisdiction confirms the developing Federal and State case law holding that the tribe has exclusive jurisdiction when the child is residing or domiciled on the reservation. *Wisconsin Potowatomies* v. *Houston*, 393 F. Supp. 719 (1973); *Wakefield* v. *Little Light*, 276 Md. 333 (1975); *In re Matter of Greybull*, 543 P. 2d 1079 (1975); *Duckhead* v. *Anderson et al.*, Wash. Sup. Ct., November 4, 1976.

Subsection (b) directs a State court, having jurisdiction over an Indian child custody proceeding to transfer such proceeding, absent good cause to the contrary, to the appropriate tribal court upon the petition of the parents or the Indian tribe. Either parent is given the right to veto such transfer. The subsection is intended to permit a State court to apply a modified doctrine of *forum non conveniens*, in appropriate cases, to insure that the rights of the child as an Indian, the Indian parents or custodian, and the tribe are fully protected.

Subsection (c), for purposes of State proceedings for foster care placement or termination of parental rights, confers a right of intervention upon the Indian custodian and the Indian child's tribe. The committee is advised that the parents would have this right in any event.

Subsection (d) provides that the public acts, records, and judicial proceedings of an Indian tribe with respect to child custody proceedings shall be given full faith and credit by other jurisdictions to the same extent that such jurisdictions extend full faith and credit in other circumstances.

Section 102

Subsection (a) requires that, in an involuntary proceeding in State courts with respect to an Indian child, the moving party must provide certain notices to the parent or Indian custodian and the tribe. In lieu notice to the Secretary of the Interior is provided in cases where the location of the individual or tribe cannot reasonably be determined. The committee expects that the Secretary would make diligent efforts to relay such notice to the parent, custodian, and/or tribe. The subsection was amended to provide that the court would require such notice where it had actual or constructive knowledge of the Indian affiliation of the child.

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23. 92 S.Ct. 1208, 31 L.Ed.2d 551.

24. 95 S.Ct. 1082, 43 L.Ed.2d 300, rehearing denied 95 S.Ct. 1667, 421 U.S. 939, 44 L.Ed.2d 95.

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Subsection (b) provides that an indigent parent or Indian custodian shall have a right to court-appointed counsel in any involuntary State proceeding for foster care placement or termination of parental rights. Where State law makes no provision for such appointment, the Secretary is authorized, subject to the availability of funds, to pay reasonable expenses and fees of such counsel. In adopting this amendment, the committee notes with approval the decision of the U.S. District Court for the Southern District of Florida in *Davis* v. *Page*, 442 F. Supp. 258 (1977), wherein the court held:

> Without benefit of counsel, Hilary Davis was little more than a spectator in the adjudicatory proceeding. She was ignorant of the law of evidence, and of the substantive law governing dependency proceedings. She sat silently through most of the hearing, and fearful of antagonizing the social

> workers, reluctantly consented to what she believed would be the placement of her child with the state for a few weeks. (p. 260.)
>
> The right to the integrity of the family is among the most fundamental rights under the Fourteenth Amendment. (p. 261.)
>
> The parent's interest in the custody and companionship of his child and the grievous nature of the loss which accompanies interference with that interest suffice to mandate the provision of counsel under a balance of interest test without further inquiry * * *. (T)he right to counsel inevitably emerges as an element of procedural due process. (p. 263.)

Subsection (c) provides that each party to a State court proceeding for foster care or termination of parental rights shall have a right to examine relevant documents filed with the court upon which it may base its decision. The committee was advised that, in many cases, Indian parents or custodians have been, practically, denied the right.

Subsection (d) provides that a party seeking foster care placement or termination of parental rights involving an Indian child must satisfy the court that active efforts have been made to provide assistance designed to prevent the breakup of Indian families. The committee is advised that most State laws require public or private agencies involved in child placements to resort to remedial measures prior to initiating placement or termination proceedings, but that these services are rarely provided. This subsection imposes a Federal requirement in that regard with respect to Indian children and families.

Subsections (e) and (f) establish evidentiary standards for foster care placement or termination of parental rights. As introduced, H.R. 12533 required a "beyond a reasonable doubt" standard for both actions. While the committee feels that the removal of a child from the parents is a penalty as great, if not greater, than a criminal penalty, it amended the bill to reduce the standard to "clear and convincing" in the case of foster care where parental rights are not terminated. The phrase "qualified expert witnesses" is meant to apply to expertise beyond the normal social worker qualifications.

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Section 103

Subsection (a) provides that consent to foster care placement or termination of parental rights must be executed in writing before a judge of a court of competent jurisdiction and that the judge must be satisfied the consequences of such consent was fully understood by the parent or custodian. Where the judge determines the parent or custodian does not have a sufficient command of the English language, it should be interpreted into a language such person does understand. The committee does not intend that the execution of the consent need be in open court where confidentiality is requested or indicated.

Subsection (b) permits a parent or Indian custodian to withdraw consent to a foster care placement at any time.

Subsection (c) authorizes a parent or Indian custodian to withdraw consent to termination of parental rights or adoptive placement of an Indian child at any time prior to the entry of a final decree.

Subsection (d) authorizes the setting aside of a final decree of adoption of an Indian child upon petition of the parent upon grounds

that consent thereto was obtained through fraud or duress. This right is limited to 2 years after entry of the decree, unless a longer period is provided under State law. With respect to subsections (b), (c), and (d), the committee notes that nothing in those subsections prevents an appropriate party or agency from instituting an involuntary proceeding, subject to section 102, to prevent the return of the child, but does not wish to be understood as routinely inviting such actions.

Section 104

Section 104 authorizes the child, parent, or Indian custodian, or the tribe to move to set aside any foster care placement or termination of parental rights on the grounds that the rights secured under sections 101, 102, or 103 were violated.

Section 105

Section 105, as a whole, contemplates those instances where the parental rights of the Indian parent has already been terminated. The section seeks to protect the rights of the Indian child as an Indian and the rights of the Indian community and tribe in retaining its children in its society.

Subsection (a) provides that, in the absence of good cause to the contrary, a preference shall be given to adoptive placement of an Indian child with the extended family; a member of the child's tribe; or another Indian family. This subsection and subsection (b) establish a Federal policy that, where possible, an Indian child should remain in the Indian community, but is not to be read as precluding the placement of an Indian child with a non-Indian family.

Subsection (b) establishes a similar preference for foster care or preadoptive placements of an Indian child. The language was amended to conform to language in H.R. 7200 of this Congress relative to foster care and adoptive placements in the least restrictive settings.

Subsection (c) provides that the tribe may establish a different order of preference which will be followed in lieu of the Federal standards as long as such order is consistent with the least restrictive setting standard in subsection (b). Where appropriate, the preference

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of the child or parent shall be considered and a request for anonymity of a consenting parent shall be given weight in applying the preferences. While the request for anonymity should be given weight in determining if a preference should be applied, it is not meant to outweigh the basic right of the child as an Indian.

Subsection (d) provides that the standards to be used in meeting the preference shall be those prevailing in the relevant Indian community. All too often, State public and private agencies, in determining whether or not an Indian family is fit for foster care or adoptive placement of an Indian child, apply a white, middle-class standard which, in many cases, forecloses placement with the Indian family.

Subsection (e) requires the State to maintain records showing what efforts have been made to comply with the preference standards of this section and to make such records available to the tribe and Secretary.

Section 106

Subsection (a) authorizes a biological parent of an Indian child to petition for the return of the child when a previous adoption of such

child fails. The child shall be returned to the parent upon such petition, unless there is a showing, in a proceeding subject to the provisions of section 102, that such return would not be in the best interests of the child.

Subsection (b) provides that when an Indian child is being removed from a foster care home for purposes of further foster care placement, preadoptive placement, or adoptive placement, such further placement shall be subject to the provisions of this act, unless the child is being returned to the parent or Indian custodian.

Section 107

Section 107 confers a right upon an adult Indian, who was the subject of adoption, to secure necessary information from the court which entered the decree to enable the person to protect and secure any rights he may have from his tribal affiliation. There appears to be a growing trend in State law, supported by developing psychology, that an adopted individual has an inherent right to know his genealogical background. However, this section and section 301 are not aimed at that right. These provisions are aimed at different, but no less valuable rights. One, those provisions will help protect the valuable rights an individual has as a member or potential member of an Indian tribe and any collateral benefits which may flow from the Federal Government because of such membership. Two, these provisions will help protect the rights and interests of an Indian tribe in having its children remain with or become a part of the tribe.

Section 108

Subsection (a) authorizes an Indian tribe, which became subject to State jurisdiction under Public Law 83-280 or any other Federal law, to reassume jurisdiction over child custody proceedings upon petition to the Secretary of the Interior including a suitable plan.

Subsection (b) authorizes the Secretary, in considering a petition for reassumption, to take into consideration various factors affecting the exercise of such jurisdiction, including membership rolls, size of reservation or former reservation, and population base. Depending on

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such circumstances, the Secretary is given the flexibility to authorize partial retrocession based upon the referral authority under section 101(b) or to limit the geographic scope of the full exercise of 101(a) jurisdiction. The subsection was adopted as an amendment in order to take into consideration special circumstances, such as those occurring in Alaska and Oklahoma.

Subsection (c) provides for publication of notice of reassumption by the Secretary in the Federal Register and for the effective date of such reassumption.

Subsection (d) provides that reassumption shall not affect ongoing proceedings at the time of reassumption unless provided for in an agreement under section 109.

Section 109

Section 109 authorizes Indian tribes and States to enter into mutual agreements or compacts with respect to jurisdiction over Indian child custody proceedings and related matters. It also provides for revocation of such agreements by the parties.

Section 110

Section 110 establishes a "clean hands" doctrine with respect to petitions in State court for the custody of an Indian child by a person who improperly has such child in physical custody. It is aimed at those persons who improperly secure or improperly retain custody of the child without the consent of the parent or Indian custodian and without the sanction of law. It is intended to bar such person from taking advantage of their wrongful conduct in a subsequent petition for custody. The child is to be returned to the parent or Indian custodian by the court unless such return would result in substantial and immediate physical danger or threat of physical danger to the child. It is not intended that any such showing be by or on behalf of the wrongful petitioner.

Section 111

Section 111 provides that, where State law affords a higher degree of protection of the rights of the parent or Indian custodian, such standard will be applied by the State court in lieu of the related provision of this title. The section was amended by the committee to include any relevant protection or standard established under Federal law.

Section 112

Section 112 would permit, under applicable State law, the emergency removal of an Indian child from his parent or Indian custodian or emergency placement of such child in order to prevent imminent physical harm to the child notwithstanding the provisions of this title. Such emergency removal and/or placement is to continue only for a reasonable length of time and the committee expects that the appropriate State official or authority would take expeditious action to return the child to the parent or custodian; transfer jurisdiction to the appropriate tribe; or institute a proceeding subject to the provisions of this title.

Section 113

Section 113 provides for the orderly phasing in of the effect of the provisions of this title. As amended, it provides that none of the pro-

visions of this title, except section 101(a), would apply to any State action for foster care placement; for termination of parental rights; for preadoptive placement; or for adoptive placement which was initiated or completed prior to enactment of this act. However, it is intended that the provisions would apply to any subsequent discrete phase of the same matter or with respect to the same child initiated after enactment. For instance, if the foster care placement of an Indian child was initiated or completed prior to enactment and then, subsequent to enactment, the child was replaced for foster care, or an action for termination of parental rights was initiated, or the child was placed in a preadoptive situation, or he was placed for adoption, the provisions of the act would be applicable to those subsequent actions.

Section 201

Subsection (a) authorizes the Secretary to make grants to Indian tribes and organizations to fund Indian child and family service pro-

grams on or near the reservation and lists nonexclusionary services to be provided in such programs.

Subsection (b) permits tribes and organizations to use such grant money for non-Federal matching share with respect to titles IV–B and XX of the Social Security Act or other similar Federal programs. It would also recognize the licensing or approval of foster or adoptive homes or institutions by Indian tribes as equivalent to State licensing or approval.

Section 202

Section 202 authorizes the Secretary to make similar grants to Indian organizations for off-reservation programs.

Section 203

Section 203 authorizes the Secretary of the Interior and the Secretary of Health, Education, and Welfare to enter into joint funding agreements with respect to Indian child and family service programs, to the extent that funds are made available by appropriation acts for such purposes. The authority of the Snyder Act of November 2, 1921 (42 Stat. 208) is made available for the appropriation of funds for grants to tribes and organizations.

Section 204

Section 204 provides that, solely with respect to sections 202 and 203 of this act, "Indian" shall have the meaning assigned to it in section 4(c) of the Indian Health Care Improvement Act of 1976 (90 Stat. 1400, 1401).

Section 301

Subsection (a) provides that any State court entering a final decree of adoption of an Indian child after the date of enactment of this act shall provide a copy of such decree together with certain other basic information to the Secretary, including any affidavit of a parent requesting anonymity. The Secretary is required to maintain such information and records and to insure that such information is kept confidential. The subsection provides that such information shall not be subject to the Freedom of Information Act.

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Subsection (b) provides that, upon request of an adopted Indian child over age 18; an adoptive or foster parent of an Indian child; or an Indian child's tribe, the Secretary shall release such information as may be necessary for enrollment of the child or for otherwise protecting the rights of the child as an Indian. Where the biological parent has requested anonymity, the Secretary is authorized to certify to an Indian tribe the eligibility of an Indian child under the tribe's membership criteria without disclosing the identity of the parents, if such certification is acceptable to the tribe.

Section 302

Section 302 establishes timetables and consulting requirements for the secretarial promulgation of regulations implementing this act.

Section 401

Section 401 directs the Secretary to submit a report to the Congress on the feasibility of providing Indian children with schools located near their homes. The committee was informed of the devastating impact of the Federal boarding school system on Indian family life

and on Indian children, particularly those children in the elementary grades and considers that it is in the best interests of Indian children that they be afforded the opportunity to live at home while attending school. It is noted that more than 10,000 Navajo children in grades 1 to 8 are boarded.

Section 402

Section 402 requires the Secretary, within 60 days after enactment, to provide appropriate notice and information about this act and its provisions to appropriate State officials.

Section 403

Section 403 provides that if any provision of this act is held invalid, the remaining provisions shall not be affected thereby.

LEGISLATIVE HISTORY

The Indian child welfare legislation is the outgrowth of hearings and investigations conducted in the 93d, 94th, and 95th Congress. In 1974, the Subcommittee on Indian Affairs of the Senate Committee on Interior and Insular Affairs, at the urging of Indian tribes and organizations, conducted oversight hearings on the removal of Indian children from their families and the placement of such children in foster and adoptive homes. Testimony was taken from a wide spectrum of public and private witnesses which tended to confirm reports of abuses of the rights of Indian tribes, parents, and children in the process.

During the 94th Congress, Task Force IV of the American Indian Policy Review Commission, established by the act of January 2, 1975 (88 Stat. 1910), addressed the issue of Indian child placements. After a series of hearings, the task force report and findings supported the findings of the Senate oversight hearings. In the latter part of 1976 and early 1977, the Commission considered the findings and recommendations of the task force on Indian child welfare matters. In its final report to the Congress, the Commission made a number of recommendations on the issue, many of which have been included in H.R. 12533.

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On April 1, 1977, Senator Abourezk introduced S. 1214 which was referred to the Senate Select Committee on Indian Affairs. On August 4, 1977, the Senate committee held hearings on the bill, again, taking testimony from the broad spectrum of concerned parties, public and private, Indian and non-Indian. The committee adopted an amendment in the nature of a substitute and reported the amended bill to the Senate on November 3, 1977 (S. Rept. No. 95–597). The bill passed the Senate on November 4, 1977.

In the House, S. 1214 was referred to the Committee on Interior and Insular Affairs. On February 9 and March 9, 1978, the Subcommittee on Indian Affairs and Public Lands held hearings on the bill, hearing 8 hours of testimony from 34 witnesses. The subcommittee received comments on S. 1214, either by oral testimony or written communication, from 3 executive departments; 20 States; 22 non-Indian private organizations; 35 Indian organizations; and 38 Indian tribes.

On April 18, 1978, the subcommittee marked up S. 1214 and adopted an amendment in the nature of a substitute. This substitute was subsequently introduced by Mr. Udall et al. as a clean bill, H.R.

12533. On June 21, 1978, the full committee took up consideration of the legislation and proceeded to the markup of H.R. 12533 in lieu of S. 1214. The committee adopted an amendment in the nature of a substitute to H.R. 12533 which was further amended. H.R. 12533, as amended, was reported from the committee favorably, by voice vote.

COST AND BUDGET ACT COMPLAINCE

Title II of the bill directs the Secretary of the Interior to institute programs for child and family service assistance. These programs include authority to construct centers on and off reservations and to provide a variety of assistance programs directed toward the stability and integrity of the Indian family. CBO has projected a cost of approximately $175 million over the next 5 fiscal years. The committee feels that this estimate is high and is based upon assumptions which are probably not valid, but it agrees that the costs will not exceed a total of $125 million. For instance, it assumes construction of family service centers in every case in which an Indian reservation or urban area might be eligible for such center. In fact, existing facilities, both on the reservation and in the urban areas, would probably be used to house the various programs contemplated in the bill. The analysis of H.R. 12533 by the Congressional Budget Office follows:

U.S. CONGRESS,
CONGRESSIONAL BUDGET OFFICE,
Washington, D.C., July 11, 1978.

Hon. MORRIS K. UDALL,
Chairman, Committee on Interior and Insular Affairs, U.S. House of Representatives, Washington, D.C.

DEAR MR. CHAIRMAN: Pursuant to Section 403 of the Congressional Budget Act of 1974, the Congressional Budget Office has prepared the attached cost estimate for H.R. 12533, the Indian Child Welfare Act of 1978.

Should the committee so desire, we would be pleased to provide further details on the attached cost estimate.

Sincerely,

ALICE M. RIVLIN,
Director.

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CONGRESSIONAL BUDGET OFFICE COST ESTIMATE

JULY 11, 1978.

1. Bill No.: H.R. 12533.
2. Bill title: Indian Child Welfare Act of 1978.
3. Bill status: As ordered reported from the House Committee on Interior and Insular Affairs, June 21, 1978.
4. Bill purpose: The purpose of this bill is to establish standards for placement of Indian children in foster or adoptive homes and to establish grants to Indian tribes and Indian organizations for the construction and operation of Indian family development centers. H.R. 12533 does not request any additional authorizations for the purposes of this bill. Rather, the act states that the new programs will be authorized under the act of November 2, 1921 (the Snyder Act). The Snyder Act provides permanent and open ended authorization for Indian programs. This bill is subject to subsequent appropriation action.

5. Cost estimate:

	Millions
Fiscal year 1979:	
Estimated additional authoriztaion	-----
Estimated costs	-----
Fiscal year 1980:	
Estimated additional authorization	27.6
Estimated costs	6.8
Fiscal year 1981:	
Estimated additional authorization	32.3
Estimated costs	30.4
Fiscal year 1982:	
Estimated additional authorization	42.2
Estimated costs	38.2
Fiscal year 1983:	
Estimated additional authorization	52.4
Estimated costs	45.0

The costs of this bill falls within budget function 500.

6. Basis for estimate: The projected cost for H.R. 12533 is based on programmatic information and assumptions supplied by the Bureau of Indian Affairs (BIA). Below are the specific assumptions for this estimate.

(1) There are 150 potential locations both on and off the reservations that would be eligible to build and operate a child development center as described in the bill. It was assumed by BIA that a maximum of 30 centers would be constructed annually at a cost in fiscal year 1980 of $658,000 per center.

(2) Once built, each center would be operated by a professional and support staff of 15. The first full year costs (fiscal year 1981) covering operating expenses for 30 centers is estimated to be $7.9 million.

(3) The building costs were inflated by the CBO projection for cost increases in the residential building industry. The other expenses were inflated by the CBO projection for increases in the CPI.

(4) The spendout on construction for the development center is spread over 3 years, while the spendout for operating expenses is spread over a 2-year period. The fiscal year 1980 spendout is relatively low reflecting a lagtime for planning and development of the centers.

(5) This cost estimate assumes an enactment for this bill of October 1978 with appropriation action completed and regulations issued by October 1979.

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7. Estimate comparison: None.

8. Previous CBO estimate: On November 2, 1977, CBO prepared an estimate on S. 1214, the Indian Child Welfare Act of 1977. The Senate bill is essentially the same as H.R. 12533. However, S. 1214 did not assume the use of Snyder Act authorization and included additional authorization language to cover the provision of the bill setting an authorization level of $26 million for fiscal year 1979.

9. Estimate prepared by Deborah Kalcevic.

10. Estimate approved by James L. Blum, Assistant Director for Budget Analysis.

INFLATIONARY IMPACT STATEMENT

At the level of funding estimated by the Congressional Budget Office, enactment of this legislation would have some minimal inflationary impact. This impact is lessened since the cost will be spread out over 5 fiscal years.

OVERSIGHT STATEMENT

Other than normal oversight responsibilities exercised in conjunction with these legislative operations, the committee conducted no specific oversight hearings and no recommendations were submitted to the committee pursuant to rule X, clause 2(b)2.

COMMITTEE RECOMMENDATION

The Committee on Interior and Insular Affairs, by a voice vote, recommends that the bill, as amended, be enacted.

DEPARTMENTAL REPORTS

The report of the Department of the Interior, dated June 6, 1978, and the reports of the Department of Justice, dated February 9, 1978, and May 23, 1978, are as follows:

U.S. DEPARTMENT OF THE INTERIOR,
OFFICE OF THE SECRETARY,
Washington, D.C., June 6, 1978.

Hon. MORRIS K. UDALL,
Chairman, Committee on Interior and Insular Affairs, House of Representatives, Washington, D.C.

DEAR MR. CHAIRMAN: This Department would like to make its views known on H.R. 12533, the Indian Child Welfare Act of 1978, and urges the committee to make the recommended changes during markup of the bill. We understand the Department of Justice has communicated its concerns with the bill to the committee, and we urge the committee to amend the bill to address those concerns.

If H.R. 12533 is amended as detailed herein and as recommended by the Department of Justice's letter of May 23, 1978, we would recommend that the bill be enacted.

Title I of H.R. 12533 would establish nationwide procedures for the handling of Indian child placements. The bill would vest in tribal courts their already acknowledged right to exclusive jurisdiction over Indian child placements within their reservations. It would also pro-

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vide for transfer of such a proceeding from a State court to a tribal court if the parent or Indian custodian so petitions or if the Indian tribe so petitions, and if neither of the parents nor the custodian objects.

Requirements dealing with notice to tribes and parents and consent to child placements are also a major element of the bill. Testimony on the problems with present Indian child placement proceedings repeatedly pointed out the lack of informed consent on the part of many Indian parents who have lost their children.

Title I would also impose on State courts evidentiary standards which would have to be met before an Indian child could be ordered removed from the custody of his parents or Indian custodian. Court-appointed counsel would be available to the parent or custodian upon a finding of indigency by the court.

State courts would also be required, under the provisions of H.R. 12533, to apply preference standards set forth in section 105 in the placing of an Indian child. These preferences would strengthen the

chances of the Indian child staying within the Indian community and growing up with a consistent set of cultural values.

Title II of H.R. 12533, entitled "Indian Child and Family Programs," would authorize the Secretary of the Interior to make grants to Indian tribes and organizations for the establishment of Indian family service programs both on and off the reservation. Section 204 would authorize $26 million for that purpose.

Title III of H.R. 12533, entitled "Recordkeeping, Information Availability, and Time'ables," would direct the Secretary of the Interior to maintain records, in a single central location, of all Indian child placements affected by the act. Those records would not be open, but information from them could be made available to an Indian child over age 18, to his adoptive or foster parent, or to an Indian tribe, for the purpose of assisting in the enrollment of that child in an Indian tribe.

Title IV of H.R. 12533, entitled "Placement Prevention Study," would direct the Secretary of the Interior to prepare and submit to Congress a plan, including a cost analysis statement, for the provision to Indian children of schools located near their homes.

Although we support the concept of promoting the welfare of Indian children, we urge that the bill be amended in the following ways.

Section 4(9) defines the term "placement." This definition is crucial to the carrying out of the provisions of title I. We believe that custody proceedings held pursuant to a divorce decree and delinquency proceedings where the act committed would be a crime if committed by an adult should be excepted from the definition of the term "placement". We believe that the protections provided by this act are not needed in proceedings between parents. We also believe that the standards and preferences have no relevance in the context of a delinquency proceeding.

Section 101(a) would grant to Indian tribes exclusive jurisdiction over Indian child placement proceedings. We believe that section 101(a) should be amended to make explicit that an Indian tribe has exclusive jurisdiction only if the Indian child is residing on the reservation with a parent or custodian who has legal custody. The bill does not address the situation where two parental views are involved. Therefore, the definition of domicile is inadequate and the use of the word "parent" as defined does not articulate the responsibilities of the courts to both parents.

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We believe that reservations located in States subject to Public Law 83-280 should be specifically excluded from section 101(a), since the provisions of section 108, regarding retrocession of jurisdiction, deal with the reassumption of tribal jurisdiction in those States.

Section 101(b) should be amended to prohibit clearly the transfer of a child placement proceeding to a tribal court when any parent or child over the age of 12 objects to the transfer.

Section 101(e), regarding full faith and credit to tribal orders, should be amended to make clear that the full faith and credit intended is that which States presently give to other States.

Section 102(a) would provide that no placement hearing be held until at least 30 days after the parent and the tribe receive notice. We believe that in many cases 30 days is too long to delay the commencement of such a proceeding. We suggest that the section be

amended to allow the proceeding to begin 10 days after such notice with a provision allowing the tribe or parent to request up to 20 additional days to prepare a case. This would allow cases where the parents or tribe do not wish a full 30 days' notice to be adjudicated quickly, while still affording time to the parent or tribe who needs that time to prepare a case. We also suggest that the section be amended to require the Secretary to make a good faith effort to locate the parent as quickly as possible and to provide for situations in which the parent or Indian custodian cannot be located.

We also believe that there is a need for specific emergency removal provisions in H.R. 12533. A section should be added allowing the removal of a child from the home without a court order when the physical or emotional well-being of the child is seriously and immediately threatened. That removal should not exceed 72 hours without an order from a court of competent jurisdiction.

Section 102(b) would provide the parent or Indian custodian of an Indian child the right to court-appointed counsel if the court determines that he or she is indigent.

We are opposed to the enactment of this section. We do not believe that there has been a significant demonstration of need for such a provision to justify the financial burden such a requirement would be to both the States and the Federal Government.

Section 102(c) would allow all parties to a placement to examine all documents and files upon which any decision with respect to that placement may be based. This provision conflicts with the Federal Child Abuse and Neglect Treatment Act, Public Law 93-247, which provides confidentiality for certain records in child abuse and neglect cases. We believe that such a broad opening of records would lead to less reporting of child abuse and neglect. However, we do recognize the right of the parent to confront and be given an opportunity to refute any evidence which the court may use in deciding the outcome of a child placement proceeding. We recommend that the Indian Child Welfare Act conform with the provisions of Public Law 93-247.

Section 102(e) of H.R. 12533 would require the State court to find beyond a reasonable doubt, before ordering the removal of the child from the home, that continued custody on the part of the parent or custodian will result in serious emotional or physical damage to the child. We believe that the burden of proof is too high. We would support the language found in section 101(b) of the Senate-passed

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S. 1214, which would impose a burden of clear and convincing evidence and would set down certain social conditions which could not be considered by the court as prima facie evidence of neglect or abuse. We also believe that the language "will result" in serious damage to the child should be amended to read "is likely to result" in such damage. It is almost impossible to prove at such a high burden of proof that an act will definitely happen.

Section 105 of H.R. 12533 would impose on State courts certain preferences in placing an Indian child. Subsection (c) would substitute the preference list of the Indian child's tribe where the tribe has established a different order of preference by resolution.

Language should be included in that subsection which would require that resolution to be published in the Federal Register and later included in the Code of Federal Regulations. This would allow the State court easy access to the preferences of the various tribes.

It is also unclear what the last sentence in subsection (c) means in allowing the preference of the Indian child or parent to be considered "where appropriate". We believe that the preference of the child and the parent should be given due consideration by the court regardless of whether that court is following the preferences set forth in section 105(a) or 105(b), or whether it is following a preference list established by an Indian tribe. Therefore, we recommend that a separate subsection be added to section 105 stating that the preferences of the Indian child and of the parent be given due consideration by the court whenever an Indian child is being placed.

Section 106 deals with failed placements and requires that, whenever an Indian child is removed from a foster home or institution in which the child was placed for the purpose of further placement, such removal shall be considered a placement for purposes of the act. We see no reason for requiring a full proceeding every time a child is moved from one form of foster care to another. We do, however, recognize the need for notification of the parents and the tribe of such move and for applying the preferences set forth in section 105. Therefore, we recommend that subsection (b) of section 106 be amended to require the notice and preference provisions to apply when a child is moved from one form of foster care to another and to require the removal to be considered as a new placement only in the case where termination of parental rights is at issue.

Section 107 deals with the right of an Indian who has reached age 18 and who has been the subject of a placement to learn of his or her tribal affiliation. We believe that rather than apply to the court for such information, the individual involved should apply to the Secretary of the Interior. Under the provisions of title III, the Secretary would maintain a central file with the name and tribal affiliation of each child subject to the provisions of the act. Therefore, the Secretary would be more likely than the State court to have the information needed to protect any rights of the individual involved which may flow from his or her tribal affiliation.

Finally, with respect to title I, we believe that a section should be added which would state that the provisions of the act should apply only with respect to placement proceedings which begin 6 months after the date of the enactment of the act. This would allow States some time to familiarize themselves with the provisions of the act and

would thus avoid the chance of having large numbers of placements invalidated because of failure to follow the procedures of the act.

Such a section should also state that the intent of the act is not the pre-emption by the Federal Government of the whole area of Indian child welfare and placement. In any case where a state has laws which are more protective than the requirements of this act, e.g., with regard to notice and enforcement, those laws should apply.

We believe that many of the authorities granted by title II of the bill are unnecessary because they duplicate authorities in present law, and therefore, we recommend the deletion of title II.

We find especially objectionable in title II the following:

The authorization for an unlimited subsidy program for Indian adoptive children. We believe that any such program should be limited to hard-to-place children or children who are or would be eligible for foster care support from the Bureau of Indian Affairs.

We also believe that the amount of any such support would have to be limited to the prevalent State foster care rate for maintenance and medical needs.

The authorization for grants to establish and operate off-reservation Indian child and family service programs.

The new separate authorization of $26 million in section 203(b) of title II.

The provisions of section 201(c) which would authorize every Indian tribe to construct, operate, and maintain family service facilities regardless of the size of the tribe or the availability of existing services and facilities.

The authorization for the use of Federal funds appropriated under title II to be used as the non-Federal matching share in connection with other Federal funds.

However, we believe that the last sentence of section 201(b), providing that licensing or approval by an Indian tribe should be deemed equivalent to that done by a State, should remain in the bill under title I as a separate section.

We have no objection to section 301 of title III of H.R. 12533. We believe that requiring the Secretary to maintain a central file on Indian child placements will better enable the Secretary to carry out his trust responsibility, especially when judgment funds are to be distributed.

However, we object to the provisions of section 302(c), which would require the Secretary to present any proposed revision or amendment of rules and regulations promulgated under that section to both Houses of Congress. Any such proposed revision or amendment would be published in the Federal Register and we believe that placing this additional responsibility on the Secretary is both burdensome and unnecessary.

We believe that section 401 of Title IV should be amended to read as follows:

SEC. 401. (a) It is the sense of Congress that the absence of locally convenient day schools may contribute to the breakup of Indian families.

(b) The Secretary is authorized and directed to prepare and submit to the Select Committee on Indian Affairs of the United States Senate and the Committee on Interior and Insular Affairs

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of the U.S. House of Representatives within 1 year from the date of this act, a report on the feasibility of providing Indian children with schools located near their homes. In developing this report the Secretary shall give particular consideration to the provision of educational facilities for children in the elementary grades.

The Office of Management and Budget has advised that there is no objection to the presentation of this report from the standpoint of the administration's program, and that enactment of the House subcommittee's present version of H.R. 12533 would not be consistent with the administration's objectives.

Sincerely,

FORREST J. GERARD,
Assistant Secretary.

DEPARTMENT OF JUSTICE,
Washington, D.C., February 9, 1978.

Hon. MORRIS K. UDALL,
Chairman, Committee on Interior and Insular Affairs, House of Representatives, Washington, D.C.

DEAR MR. CHAIRMAN: This is to bring to your attention several areas where the Department of Justice perceives potential problems with S. 1214, a bill to establish standards for the placement of Indian children in foster or adoptive homes, to prevent the breakup of Indian families, and for other purposes. In our view, certain provisions of the bill raise serious constitutional problems because they provide for differing treatment of certain classes of persons based solely on race. S. 1214 was passed by the Senate on November 4, 1977 and is now pending in the Interior and Insular Affairs Subcommittee on Indian Affairs and Public Lands.

This Department has not been involved in the hearings relating to the bill. Our comments therefore are based on a reading of the text of the bill rather than on a review of the testimony and legislative history which necessarily would be considered by a court which had to interpret its provisions and determine its constitutional validity.

As you may be aware, the courts have consistently recognized that tribal governments have exclusive jurisdiction over the domestic relationships of tribal members located on reservations, unless a State has assumed concurrent jurisdiction pursuant to Federal legislation such as Public Law 83-280. It is our understanding that this legal principle is often ignored by local welfare organizations and foster homes in cases where they believe Indian children have been neglected, and that S. 1214 is designed to remedy this, and to define the Indian rights in such cases.

The bill would appear to subject family relations matters of certain classes of persons to the jurisdiction of tribal courts which are presently adjudicated in State courts. The bill would accomplish this result with regard to three distinct categories of persons, all possessing the common trait of having enough Indian blood to qualify for membership in a tribe. One class would be members of a tribe. Another class would be nontribal members living on reservations, and a third would be nonmembers living off reservations. These three classes would be

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denied access to State courts for the adjudication of certain family relations matters unless "good cause" is shown under section 102(c) of the bill.

The general constitutional question raised by S. 1214 is whether the denial of access to State courts constitutes invidious racial discrimination violative of the fifth amendment. See *Bowling* v. *Sharp*, 347 U.S. 497 (1954). This question is most properly addressed by focusing on each of the three classes described above and contrasting each class with a similarly situated class of persons whose access to State courts is not affected by the bill.

The class of persons whose rights under the bill may, in our opinion, constitutionally be circumscribed by this legislation are the members of a tribe, whether living on or near a reservation. In *Fisher* v. *District Court*, 424 U.S. 382 (1976), the Supreme Court addressed an argument made by members of the Northern Cheyenne Tribe that denial to them of access to the Montana State courts to pursue an adoption did

not involve impermissible racial discrimination. In that case, both the persons seeking to pursue adoption of the child in question and the natural mother of the child who contested the right of the Montana courts to entertain the adoption proceeding were residents of the reservation and members of the tribe. The Court stated that:

> The exclusive jurisdiction of the Tribal Court does not derive from the race of the plaintiff but rather from the quasi-sovereign status of the Northern Cheyenne Tribe under Federal law. Moreover, even if a jurisdictional holding occasionally results in denying an Indian plaintiff a forum to which a non-Indian has access, such disparate treatment of the Indian is justified because it is intended to benefit the class of which he is a member by furthering the congressional policy of Indian self-government. *Morton* v. *Mancari*, 417 U.S. 535, 551–555 (1974).[25] 424 U.S., at 390–91.

In *Fisher*, the class to which the Court was apparently referring consisted of members of the Northern Cheyenne Tribe. This is so because of the Court's citation to *Morton* v. *Mancari*, in which the Court had upheld preferential treatment of Indians in certain employment situations by reasoning that the "preference, as applied, is granted to Indians not as a discrete racial group, but rather, as members of quasi-sovereign tribal entities * * *." 417 U.S., at 554.

More recently, the Court has reentered this thicket in *United States* v. *Antelope*, 45 U.S.L.W. 4361 (U.S. April 19, 1977). In that case, enrolled Coeur d'Alese Indians contended that their Federal convictions for murder of a non-Indian on the Coeur d'Alese Reservations were products of invidious racial discrimination because a non-Indian participating in the same crime would have been tried in State court and would have had certain substantial advantages regarding the elements required to be proved for conviction.[1] The Court, in rejecting this claim, held that the Coeur d'Alese Indians "were not subjected to Federal criminal jurisdiction [under 18 U.S.C. § 1153] because they are of the Indian race but because they were enrolled members of the Coeur d'Alese Tribe." Id., at 4363.

[1] Specifically, the State of Idaho, in which the crime occurred, did not have a felony murder rule so that, in order to be convicted of first-degree murder, the State would have had to prove certain elements that were not required to be proven in the Federal trial because a felony-murder rule was in effect in the latter court.

25. 94 S.Ct. 2474, 41 L.Ed.2d 290.

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We believe that *Mancari*, *Fisher*, and *Antelope* directly support the constitutionality of this bill as it affects the access of tribal members to State courts. At the same time, these cases do not resolve the constitutionality of S. 1214 as it would affect the rights of nontribal members living either on or off reservations. Indeed, they can be read to suggest that, absent tribal membership, Congress' freedom to treat differently persons having Indian blood is diminished.

With regard to nonmembers living on a reservation, a footnote in the *Antelope* case would appear indirectly to address, but not resolve, the question presented by this bill:

> "It should be noted, however, that enrollment in an official tribe has not been held to be an absolute requirement for Fed-

eral jurisdiction, at least where the Indian defendant lived on the reservation and 'maintained tribal relations with the Indians thereon.' *Ex Parte Pero*, 99 F. 2d 28, 30 (CA 7 1938). See also *United States* v. *Ives*, 504 F. 2d 935, 953 (CA 9 1974) (dicta). Since respondents are enrolled tribal members, we are not called on to decide whether nonenrolled Indians are subject to [Federal criminal jurisdiction] and we therefore intimate no views on the matter." [2]

In *Ex parte Pero, supra*, the seventh circuit affirmed the grant of a writ of habeas corpus to a nonenrolled Indian, who had been convicted of murder in a State court, holding that the Indian could only be tried in Federal court by virtue of what was then 18 U.S.C. § 548, the predecessor of 18 U.S.C. § 1153. The court appeared to base its holding on the fact that the Indian was the "child of one Indian mother and half-blood father, where both parents are recognized as Indians and maintain tribal relations, who himself lives on the reservation and, maintains tribal relations and is recognized as an Indian * * *." Id., at 31.

With regard to nonmembers who are otherwise eligible for tribal membership who live on reservations, *Pero* at least stands for the proposition that the federal interest in the "guardian-ward relationship" is sufficient to secure to a nonenrolled Indian the protection of a Federal criminal proceeding as opposed to tiral by a State court. *Pero* is, however, predicated on a Federal interest which would appear to us to differ in kind from the Federal interest identified in *Mancari*, *Fisher*, and *Antelope*. In those latter cases, the Federal interest in promoting Indian self-government was specifically identified as a touchstone of the Court's opinions. In our view, this weighty interest is present in S. 1214 in a more attenuated form with regard to nontribal members, even those living on reservations. An eligible Indian who has chosen, for whatever reasons, not to enroll in a tribe would be in a position to argue that depriving him of access to the State courts on matters related to family life would be invidious. Such an Indian presumably has, under the first amendment, the same right of association as do all citizens, and indeed would appear to be in no different situation from a non-Indian living on a reservation who, under S. 1214, would have access to State courts. The only difference between them would, in fact, be the racial characteristics of the former.

We also think that even *Pero* only marginally supports the constitutionality of this bill as applied to nonmembers living on reserva-

[2] 45 U.S.L.W., at 4303 n. 7.

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tions. In *Pero*, the focus of the Court's inquiry was on the contacts between the convicted Indian and the Indian tribe and reservation. In S. 1214, the inquiry would appear to be solely directed to contacts between the Indian child and the Indian tribe, whereas the persons whose rights are most directly affected by the bill are the parents or guardians of the child.[3] Thus, there is little support for the constitutionality of this bill as applied to nontribal members living on reservations and the rationale applied by the Court in *Mancari*, *Fisher*, and *Antelope* would not save the bill. The simple fact is that the parents of an Indian child may find their substantive rights altered by virtue of their Indian blood and the simple fact of residence on a reservation. The Court has never sanctioned such a racial classification which

denied substantive rights, and we are unable to find any persuasive reason to suggest that it would to so.

Our conclusion with regard to nonmembers living on reservations is even more certain in the context of nonmembers living off reservations. In such a situation, we are firmly convinced that the Indian or possible non-Indian parent may not be invidiously discriminated against under the fifth amendment and that the provisions of this bill would do so. Assuming a compelling governmental interest would otherwise justify this discrimination, we are unable to suggest what such an interest might be.

For reasons stated above, we consider that part of S. 1214 restricting access to State courts to be constitutional as applied to tribal members. However, we think that S. 1214 is of doubtful constitutionality as applied to nontribal members living on reservations and would almost certainly be held to be unconstitutional as applied to nonmembers living off reservations.[4]

The Office of Management and Budget has advised that there is no objection to the submission of this report from the standpoint of the administration's program.

Sincerely,

PATRICIA M. WALD,
Assistant Attorney General.

DEPARTMENT OF JUSTICE,
Washington, D.C., May 23, 1978.

Hon. MORRIS K. UDALL,
Chairman, Committee on Interior and Insular Affairs, House of Representatives, Washington, D.C.

DEAR MR. CHAIRMAN: We would like to take this opportunity to comment on the House Subcommittee on Indian Affairs version of S. 1214, the Indian Child Welfare Act of 1978.

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[3] As we understand the bill, this denial of access to State courts would be predicated on the existence of "significant contacts" between the Indian child and an Indian tribe and that this issue would be "an issue of fact to be determined by the court on the basis of such considerations as: Membership in a tribe, family ties within the tribe, prior residency on the reservation for appreciable periods of time, reservation domicile, the statements of the child demonstrating a strong sense of self-identity as an Indian, or any other elements which reflect a continuing tribal relationship."

The bill is unclear as to whether this determination would be made by a tribal court or State court.

[4] We also note our concern with the language used in sections 2 and 3 of the bill regarding "the Federal responsibility for the care of the Indian people" and the "special responsibilities and legal obligations to American Indian people." The use of such language has been used by at least one court to hold the Federal Government responsible for the financial support of Indians even though Congress had not appropriated any money for such purposes. *White v. Califano, et al.*, Civ. No. 70-5031, USDC, S. Dak. (September 12, 1977). We fear the language in this bill could be used by a court to hold the United States liable for the financial support of Indian families far in excess of the provisions of title II of the bill and the intent of Congress.

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As you know, the Department presented at some length its views on one constitutional issue raised by S. 1214 as it passed the Senate in a letter to you dated February 9, 1978.[1] Briefly, that constitutional issue concerned the fact that S. 1214 would have deprived parents of Indian children as defined by that bill of access to State courts for the adjudication of child custody and related matters based, at bottom, on the racial characteristics of the Indian child. We express in that letter our belief that such racial classification was suspect under the fifth amendment and that we saw no compelling reason which might justify its use in these circumstances. This problem has

been, for the most part, eliminated in the subcommittee draft, which defines "Indian child" as "any unmarried person who is under age 18 and is either (a) a member of an Indian tribe or (b) eligible for membership in an Indian tribe and is the biological child of a member of an Indian tribe."

We are still concerned, however, that exclusive tribal jurisdiction based on the "(b)" portion of the definition of "Indian child" may constitute racial discrimination. So long as a parent who is a tribal member has legal custody of a child who is merely eligible for membership at the time of a proceeding, no constitutional problem arises. Where, however, legal custody of a child who is merely eligible for membership is lodged exclusively with nontribal members, exclusive tribal jurisdiction cannot be justified because no one directly affected by the adjudication is an actual tribal member. We do not think that the blood connection between the child and a biological but noncustodial parent is a sufficient basis upon which to deny the present parents and the child access to State courts. This problem could be resolved either by limiting the definition of Indian child to children who are actually tribal members or by modifying the "(b)" portion to read, "eligible for membership in an Indian tribe and is in the custody of a parent who is a member of an Indian tribe."

A second constitutional question may be raised by § 101(e) of the House draft. That section could, in our view, be read to require Federal, State, and other courts to give "full faith and credit" to the "public acts, records and judicial proceedings of any Indian tribe applicable to Indian child placements" even though such proceedings might not be "final" under the terms of this bill itself. So read, the provision might well raise constitutional questions under several Supreme Court decisions. *E.g.*, *Halvey* v. *Halvey*, 330 U.S.610 (1947).[26] We think that problem can be resolved by amending that provision to make clear that the full faith and credit to be given to tribal court orders is no greater than the full faith and credit one State is required to give to the court orders of a sister State.

A third and more serious constitutional question is, we think, raised by section 102 of the House draft. That section, taken together with sections 103 and 104, deals generally with the handling of custody proceedings involving Indian children by State courts. Section 102 establishes a fairly detailed set of procedures and substantive standards which State courts would be required to follow in adjudicating the placement of an Indian child as defined by section 4(4) of the House draft.

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[1] The views expressed in that letter were subsequently presented to the Subcommittee on Indian Affairs and Public Lands of your House committee in testimony by this Department on Mar. 9, 1978.

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26. 67 S.Ct. 903, 91 L.Ed. 1133.

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As we understand section 102, it would, for example, impose these detailed procedures on a New York State court sitting in Manhattan where that court was adjudicating the custody of an Indian child and even though the procedures otherwise applicable in this State-court proceeding were constitutionally sufficient. While we think that Congress might impose such requirments on State courts exercising jurisdiction over reservation Indians pursuant to Public Law 83-280,

we are not convinced that Congress' power to control the incidents of such litigation involving nonreservation Indian children and parents pursuant to the Indian commerce clause is sufficient to override the significant State interest in regulating the procedure to be followed by its courts in exercising State jurisdiction over what is a traditionally State matter. It seems to us that the Federal interest in the off-reservation context is so attenuated that the 10th Amendment and general principles of federalism preclude the wholesale invasion of State power contemplated by section 102. See Hart, "The Relations Between State and Federal Law," 54 Colum. L. Rev. 489, 508 (1954).[2]

Finally, we think that section 101(b) of the House draft should be revised to permit any parent or custodian of an Indian child or the child himself, if found competent by the State court, to object to transfer of a placement proceeding to a tribal court. Although the balancing of interests between parents, custodian, Indian children, and tribes is not an easy one, it is our view that the constitutional power of Congress to force any of the persons described above who are not in fact tribal members to have such matters heard before tribal courts is questionable under our analysis of section 102 above and the views discussed above in regard to section 4(4).

II. NONCONSTITUTIONAL PROBLEMS

There are, in addition, a number of drafting deficiencies in the House draft. First, we are concerned about some language used in sections 2 and 3 regarding "the Federal responsibility for the care of the Indian people" and the "special responsibilities and legal obligations to American Indian people." The use of such language has been relied on by at least one court to hold the Federal Government responsible for the financial support of Indians even though Congress has not appropriated any money for such purposes. *White* v. *Califano*, 437 F. Supp. 543 (D.S.D. 1977). We fear the language in this bill could be used by a court to hold the United States liable for the financial support of Indian families far in excess of the provisions of title II of the bill and the apparent intent of the drafters.

Second, section 101(a) of the House draft, if read literally, would appear to displace any existing State court jurisdiction over these matters based on Public Law 83-280. We doubt that is the intent of the draft because, inter alia, there may not be in existence tribal courts to assume such State-court jurisdiction as would apparently be obliterated by this provision.

---

[2] We note that we are aware of no congressional findings which would indicate the inadequacy of existing State-court procedures utilized in these custody cases, even assuming that such findings would strengthen Congress' hand in this particular matter. As a policy matter, it is clear to us that the views of the States should be solicited before Congress attempted to override State power in this fashion, a position this Department took in testimony before the Senate Select Committee on Indian Affairs on Senate Joint Resolution 102 on Feb. 27, 1978.

[page 41]

Third, the apparent intent of section 4(10) is, in effect, to reestablish the diminished or disestablished boundaries of Indian reservations for the limited purpose of tribal jurisdiction over Indian child placements. We think that such reestablishment, in order to avoid potential constitutional problems, should be done in a straightforward manner after the reservations potentially affected are identified and Congress

has taken into account both the impact on the residents of the area to be affected and any other factors Congress may deem appropriate.

The Office of Management and Budget has advised that there is no objection to the presentation of this letter and that enactment ofthe House Subcommittee on Indian Affairs version of S. 1214 would not be consistent with the administration's objectives.

Sincerely,

PATRICIA M. WALD,
Assistant Attorney General.

[page 42]

DISSENTING VIEWS

H.R. 12533 should be sent back to the Subcommittee on Indian Affairs and Public Lands for additional consideration because of major defects in the bill and because of inadequate opportunity for affected States and agencies to testify on the bill.

I feel a special responsibility to the House of Representatives to submit this dissenting opinion because I was the only Member expressing grave concerns about many of the bill's provisions.

Largely because of my concerns about legal protection for the Indian child, the natural parents, and the adoptive parents, many changes were made at a staff level to improve the bill. These changes were many and substantive and much improvement was made in this regard. Amendments also helped improve the bill but major defects remain.

Among these numerous issues are the cost to the States to enforce the provisions, new layers of programs for Indian tribes, and basic constitutional issues like State-Indian jurisdiction. These were not carefully enough considered during markup.

I call these problems to the attention of my colleagues and urge that the bill be rejected until those issues can more carefully be discussed by both the Congress and the public. Below I detail the problems.

HISTORY OF H.R. 12533

H.R. 12533 is the outgrowth of S. 1214 which was passed by the Senate and assigned to the House Subcommittee on Indian Affairs and Public Lands. This bill was the markup vehicle in the subcommittee and was reported with very little discussion or participation by members.

Subsequent to the subcommittee markup, the subcommittee staff, apparently noting the major defects of S. 1214, drafted an entirely new bill, H.R. 12533, and circulated it as the markup vehicle for the full Interior and Insular Affairs Committee.

Markup was scheduled for 2 or 3 weeks during which time I raised objection and numerous questions which resulted in many of the changes being made to improve the legal protections now contained in the bill.

To my knowledge the new bill, H.R. 12533 and the subsequent drafts were never generally circulated to the States, juvenile judges, public and private welfare agencies, or even to the Indian tribes.

The bill should have been circulated for comment in light of the major revisions made and being considered.

MANY GROUPS SOUGHT ADDITIONAL TIME

It should be pointed out that many groups, including the Departments of Interior and Justice, expressed the need for either major changes or additional time to study the bill and comment.

[page 43]

For example the Justice Department in a letter dated May 23, 1978, for Assistant Attorney General Patricia Wald to the committee chairman expressed numerous practical and constitutional concerns with the language in S. 1214. While some of those problems may have been alleviated in H.R. 12533, I am unaware of any further review by the Justice Department. In that letter, discussing the House version, Ms. Wald raised some serious questions: (1) Whether the bill under *White* v. *Califano* might hold the Federal Government responsible for the financial support of Indians even though no money had been appropriated, (2) whether the bill might displace any existing State court jurisdiction on Indian child welfare matters in Public Law 280 States even where tribal courts did not exist, and (3) whether the bill might have the effect of reestablishing diminished or disestablished boundaries of Indian reservations for the limited purpose of tribal jurisdiction over Indian child placements.

In regard to (3) she wrote:

> We think that such reestablishment, in order to avoid potential constitutional problems, should be done in a straightforward manner after the reservations potentially affected are identified and Congress has taken into account both the impact on the residents of the area to be affected and any other factors Congress may deem appropriate.

To my knowledge this issue was never discussed.

The Department of Interior, in a seven-page letter dated June 6, 1978 from Assistant Secretary Forrest J. Gerard, raised numerous questions about H.R. 12533. Among other considerations Mr. Gerard said:

> We believe that many of the authorities granted by title II of the bill are unnecessary because they duplicate authorities in present law, and therefore, we recommend the deletion of title II.

I would point out that title II remains in the bill largely as drafted and that it even provides payment to adoptive parents of Indian children. In addition, it provides for construction of Indian family service facilities off of reservations regardless of the size of the tribe or the availability of existing services and facilities.

It should be noted that many of the concerns expressed by Mr. Gerard, who is a strong advocate of Indian, were not, in my opinion, properly addressed.

In a memorandum dated June 19, 1978, from the Congressional Research Service, additional points were raised which I believe should have been considered more thoroughly.

Aside from the above Federal concerns, I am even more distressed by objections raised by officials in my State of Montana after I forwarded a copy of the bill for review.

On June 20, 1978, the following telegram was received by the committee from Gov. Thomas L. Judge, of Montana.

> It has come to my attention that you have scheduled the markup on H.R. 12533, the Indian Child Welfare Act. This legislation identifies some real problems and we are in agreement with the intent of the bill. However, there may be some
>
> [page 44]
>
> ill effect. I urge you to hold hearings on the bill to allow us time to present our concern. I am sure you want to insure that problems are solved without creating new ones at the same time. Thank you very much for your consideration of this request.

That message was received just 1 day before reporting the bill and the request was not granted. I suspect the concerns of Governor Judge would have been reflected by other States, especially Public Law 280 States, had they been more aware of the provisions.

Below is a letter from the State of Montana attorney for social and rehabilitation services. The letter is unsigned because it was first transmitted to me by telecopier on the day before the markup and subsequently sent in the form below and not received in my office until 5 days after the markup. I suggest all Members will want to read this letter before voting on the bill.

STATE OF MONTANA,
SOCIAL AND REHABILITATION SERVICES,
Helena, Mont., June 20, 1978.

Hon. RON MARLENEE,
Congressman from Montana, U.S. House of Representatives,
Washington, D.C.

DEAR CONGRESSMAN MARLENEE: In response to a request from Bob Ziemer of your staff, the Office of Legal Affairs of the Montana Department of Social and Rehabilitation Services has reviewed H.R. 12533—The Indian Child Welfare Act.

Our study of the bill has been hurried, but we can foresee numerous problems in the delivery of social services to Montana Indian children and families if the act is passed in its present form. For this reason we urge you to ask the Committee on Interior and Insular Affairs to defer further markup on the bill until affected States, and especially Montana, can more fully comment on its consequences.

Constitutional questions aside, several problems of implementation are readily apparent from reading the bill. For example, although the bill requires State courts to give preference to certain homes in placing Indian children based on evidence in the record, the bill does not provide any mechanism requiring the family or the tribe to present such evidence. Nor does it create a means by which already overburdened State courts can discover such evidence on their own.

But even more disturbing to the Montana Department of Social and Rehabilitation Services is the bill's lack of clarity on the issue of payment for social services for Indian children and families. Section 201(b) of title II of the bill states:

> The provision or possibility of assistance under this act shall not be a basis for the denial or reduction of any assistance otherwise authorized under titles IV-B and XX of the

Social Security Act or any other other federally assisted program.

This language suggests a strong possibility that a State whose courts had not exercised jurisdiction over an Indian child or family would be called upon to fund at least part of the social services delivered to that

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Indian child or family. This office believes that in all cases in which an Indian tribal court exercises jurisdiction the financial burden for providing social services should fall exclusively upon the tribe and the Federal Government.

In addition, it appears that tribal courts may pick and choose those Indian children over which they will exercise jurisdiction, however State courts are allowed no choice. One potential result, of course, is that tribal courts will waive jurisdiction in all difficult or expensive cases while State courts and, hence, the State agencies administering title IV and title XX will have no choice but to accept those cases. Such a situation is clearly inequitable.

As can be seen from these comments the Indian Child Welfare Act leaves many issues unresolved. Although quick action on the bill may be politically expedient, the Montana Department of Social and Rehabilitation Services strongly recommends that full and deliberate consideration be given to all aspects of the bill.

If we can provide further assistance to you, please feel free to contact us.

Sincerely yours,

RICHARD A. WEBER,
Staff Attorney, Office of Legal Affairs,
Montana Department of Social and
Rehabilitation Services.

With regard to the above letter, Members will note the concern expressed about the possible financial burden. I need not remind my colleagues that one of the major costs of local and State governments are the courts. And in light of the Proposition 13 attitude across this country I question the wisdom of passing legislation which may have significant impact on State and county budgets without one iota of evidence in the record as to what that cost might be. On this issue alone the bill ought to be rejected and returned to committee for additional hearings.

It should be noted, in fairness, that many church groups urged passage of the bill. However, the National Conference of Catholic Charities raised many substantive questions. While many of those were resolved in the redrafting of the bill and the amendment process, others remain outstanding.

But perhaps one of the strongest arguments for defeating the bill came in a letter of June 12, 1978, from the National Council of State Public Welfare Administrators. The concluding paragraph of that letter said:

> The National Council of State Public Welfare Administrators believes that H.R. 12533 should not be enacted prior to a much broader consultation than has thus far been achieved by the responsible congressional committees. Enclosed is a resolution approved by representatives of 38

States and two jurisdictions present at the council meeting on June 7-8, 1978 in support of this recommendation.

Below is a copy of the resolution adopted by over two-thirds of the States public welfare administrators.

[page 46]

NATIONAL COUNCIL OF STATE
PUBLIC WELFARE ADMINISTRATORS
OF THE AMERICAN PUBLIC WELFARE ASSOCIATION,
Washington, D.C., June 7, 1978.

SOCIAL SERVICES COMMITTEE RECOMMENDATIONS [3]

Indian Child Welfare Act—H.R. 12533 (S. 1214)

1. Support objectives of proposed legislation to establish safeguards against separation of Indian children from their parents and inappropriate foster care or adoptive placements outside the cultural setting of the Indian child.

2. Recommend the council note that, while many constructive changes over the Senate-passed bill (S. 1214) have been incorporated in the House version, there remain a significant number of provisions whose impact on Indian families, tribal courts, State courts, and State and local child welfare services programs needs to be explored more extensively than has been done.

3. Express concern that the bill as written may work against its objective of achieving stability and permanency for the Indian child whose home situation is such that temporary or permanent placement becomes a necessity, and that the result may be many such children will be well served neither by the state/local public child welfare system or by the Indian community.

4. Recommend that H.R. 12533 in its June 7 version be widely disseminated for discussion among affected groups, including the more than 270 federally recognized governing bodies of Indian tribes, bands, and groups, as well as to representatives of State courts, juvenile judges, and public and private child welfare services agencies, before being debated by the full House.

In addition, it is my understanding that a telegram was received by the full committee just prior to markup from the National Council of Juvenile and Family Court Judges, or a similar organization, asking for additional time for review. I did not see a copy of that communication but I was advised it exists.

I apologize for this lengthy dissent because basically I agree that some legislation is needed to give Indian tribes greater voice in the placement of Indian children. However, this bill goes way beyond what is needed by authorizing a whole new layer of Indian programs both on and off the reservations, payments to adoptive parents of adopted children, a certain impact on State courts, and the possible upsetting of boundaries for jurisdictional questions. For these and the other reasons outlined above I urge my colleagues to defeat this bill.

RON MARLENEE.

[3] Approved by the National Council of State Public Welfare Administrators on June 7, 1978.

HJR

76

REPRESENTATIVE DAVE DONLEY

ALASKA STATE LEGISLATURE
DISTRICT ELEVEN
SEAT A

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CHAIRMAN
JUDICIARY COMMITTEE
VICE CHAIRMAN
REGULATION REVIEW COMMITTEE
MEMBER
RULES COMMITTEE
LABOR AND COMMERCE COMMITTEE

MEMORANDUM

TO: HESS Committee Members

FROM: Representative Dave Donley DD

RE: HJR 76, a resolution to amend the Constitution to provide constitutional guarantees for victims of crime

DATE: February 25, 1992

Thank you for hearing HJR 76, a resolution that proposes an amendment to the Alaska Constitution to provide key guarantees to victims of crime.

HJR 76 is straightforward legislation that is intended to elevate to a constitutional guarantee a number of rights already provided to victims of crime by statute. HJR 76 is intended to protect and maintain the rights delineated in these statutes. It is proposed to address the disparity represented by the fact that the rights of the criminally accused are guaranteed by our Federal and State Constitutions, but the rights of innocent victims are not. In an era where procedural due process is just as vital to victims of crime as it is to the accused, this amendment provides key guarantees to the victims of crime.

Specifically, HJR 76 proposes to amend the State Constitution to provide crime victims a constitutional guarantee to:

1) the right to timely disposition of the case

JUNEAU OFFICE
(During Legislative Session January through May)
P.O. BOX V, JUNEAU, ALASKA 99811 • (907) 465-3892 (FAX) 463-5661

Sponsor Statement

2) the right to participate in court proceedings, including a right to notification, a right to attend all court proceedings the accused has the right to attend, a right to confer with prosecution, and a right to make a statement to the court at sentencing

3) the right to restitution, and

4) the right to information about the conviction, sentence, imprisonment, and release of the accused.

Together these guarantees will operate to ensure that the crime victim is treated with fairness and respect throughout the criminal justice process. HJR 76 is modelled after a similar, successful amendment to the Michigan Constitution that was overwhelmingly approved by Michigan voters in 1988.

Thank you for taking the time to hear this legislation today.

DD/jmn

HOUSE COMMITTEE REPORT

(7)

Date Referred: February 19, 1992 FURTHER REFERRALS: Judiciary
Finance

Date of Committee Action: 2/25/92

The HEALTH EDUCATION AND SOCIAL SERVICES Committee considered: HJR 76

HOUSE JOINT RESOLUTION NO. 76 RIGHTS OF VICTIMS OF CRIMES

Proposing an amendment to the Constitution of the State of Alaska relating to the rights of victims of crimes.

RECOMMENDATIONS: [ ] the same title
be replaced with _____ [ ] a new title

[ ] have attached amendments(s)
[ ] do pass
[ ] do not pass
[ ] no recommendations
[✓] individual recommendations
[ ] additional referral to the _____ Committee

ADOPTS: _____ letter of Intent

ATTACHES NEW FISCAL NOTE(s): (Dept) APPROVES PREVIOUS: (Dept/Date)

[✓] fiscal impact _____ [ ] fiscal note(s) _____

[ ] zero fiscal note _____ [ ] zero fiscal note(s) _____

SIGNING DO PASS	DP	OTHER RECOMMENDATIONS	DNP	NR	AM
	✓	Cheri Davis		✓	
	✓	Mark Hanley		✓	
	✓				
	✓				

CHAIRMAN'S SIGNATURE

FISCAL NOTE

STATE OF ALASKA
1992 LEGISLATIVE SESSION

BILL NO. HJR 76

Revision Date:
Title: Amendment to the Constitution RE: Rights of Victims of Crimes
Sponsor: Representative Donley
Requestor: Representative Donley

Department Affected: Office of the Governor-Elections
BRU: Division of Elections
Component: 11-Primary and General Elections

COMPONENT SERIAL NO. 0 0 2 2

Expenditures/Revenues: (Thousands of Dollars)

OPERATING	FY 93	FY 94	FY 95	FY 96	FY 97	FY 98
PERSONAL SERVICES	0	0	0	0	0	0
TRAVEL	0	0	0	0	0	0
CONTRACTUAL	2.2*	0	0	0	0	0
SUPPLIES	0	0	0	0	0	0
EQUIPMENT	0	0	0	0	0	0
LAND & STRUCTURES	0	0	0	0	0	0
GRANTS, CLAIMS	0	0	0	0	0	0
MISCELLANEOUS	0	0	0	0	0	0
TOTAL OPERATING	2.2*	0	0	0	0	0
CAPITAL	0	0	0	0	0	0
REVENUE FUND SOURCE:	0	0	0	0	0	0

FUNDING: (Thousands of Dollars)

GENERAL FUND	2.2*	0	0	0	0	0
FEDERAL FUNDS	0	0	0	0	0	0
OTHER FUND SOURCE:	0	0	0	0	0	0
TOTAL	2.2*	0	0	0	0	0

POSITIONS:

FULL-TIME	0	0	0	0	0	0
PART-TIME	0	0	0	0	0	0
TEMPORARY	0	0	0	0	0	0

Estimate of current year impact: 0

ANALYSIS: (Attach a separate page if necessary.) * This figure covers cost of inclusion of information about this issue in the Official Elections Pamphlet as required by AS 15.58, and programming for DataVote counting of votes cast on this measure. However, only 4 measures can be printed on a single ballot card. Should this measure require printing an additional ballot card, the fiscal impact would be: 53.4.

Prepared by: Laura A. Driver, Projects Coordinator
Division: Elections
Phone: 465-4611
Date: 02/21/92

Approved by Commissioner:
Agency: Office of the Governor
Date:

Distribution (by preparer): Leg. Fin., Legislative Sponsor, Requestor, OMB/DBR, Gov. Legis. Ofc., & Impacted Agency(ies).

Rev 10/07/91
SJR76.FN2

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THE ORIGINAL

Proposal B — 1988

Introduced by Representative Van Regenmorter — 84th Legislature — HJRP

Amendment to the Michigan Constitution

Article I, §24

Sec. 24. (1) Crime victims, as defined by law, shall have the following rights, as rovided by law:

The right to be treated with fairness and respect for their dignity and privacy roughout the criminal justice process.

The right to timely disposition of the case following arrest of the accused.

The right to be reasonably protected from the accused throughout the criminal stice process.

The right to notification of court proceedings.

The right to attend trial and all other court proceedings the accused has the right attend.

The right to confer with the prosecution.

The right to make a statement to the court at sentencing.

The right to restitution.

The right to information about the conviction, sentence, imprisonment, and elease of the accused.

(2) The legislature may provide by law for the enforcement of this section.

(3) The legislature may provide for an assessment against convicted defendants to ay for crime victims' rights.

pproved by House of Representatives April 20, 1988: By the Senate July 12, 1988
pproved by the People of Michigan November 8, 1988: Effective December 24, 1988

Back-up

National Institute of Justice

Research in Action

James K. Stewart, Director

Reprinted from *NIJ Reports/No. 203* May/June 1987

Crime victims:
Learning how to help them

by Robert C. Davis

Future legal historians may well call the 1980's the decade in which a start was finally made toward recognizing victims of crime as central characters in the criminal event, worthy of concern, respect, and compassion. Since 1981, President Reagan has proclaimed National Victims of Crime Week annually to focus attention on victim problems. In April 1982, he established the President's Task Force on Victims of Crime, which made 68 recommendations for addressing the problems of victims. Then in 1984 the Attorney General's Task Force on Family Violence presented 63 recommendations for combating violence within the family and aiding its victims.

Crime victims have also been the subject of a good deal of legislation. The 1982 Omnibus Victim and Witness Protection Act requires use of victim impact statements at sentencing in Federal criminal cases, greater protection of Federal victims and witnesses from intimidation by defendants or their associates, restitution by offenders to victims of Federal crimes, guidelines for fair treatment of victims and witnesses in Federal criminal cases, and more stringent bail laws. The Comprehensive Crime Control Act and the Victims of Crime Act of 1984 authorize Federal funds for State victim compensation and victim assistance programs. These funds are distributed by the Office of Justice Programs, through its Office for Victims of Crime and Bureau of Justice Assistance.

More than 35 States have enacted comprehensive legislation protecting the interests of the victim, compared with 4 before 1982. State victim compensation programs have continued to expand (43 States and the District of Columbia now have such programs), as have victim assistance services in the community.

Research has played an important role in the rethinking of public policies about crime victims. Much of that research has been sponsored by the National Institute of Justice. Institute-supported projects have provided legislators, criminal justice planners, and practitioners with new information on the effects of crime on victims, on the success of programs to help victims recover psychologically and financially, and on ways of helping victims through the criminal justice process.

This article reviews some of the significant findings of NIJ research on victims. It also reports on studies now in progress and on questions that still need to be answered. (Most of the research reports discussed are listed in references at the end of the article.)

Crime takes psychological toll

Only recently have people come to realize that victims of crime experience crisis reactions similar to those experienced by victims of war, natural disasters, and catastrophic illness.

Research in 1975 focused on victim experiences both with crime and with the criminal justice system. The findings had a significant impact on the thinking of criminal justice planners and the development of programs for victims and witnesses. Researchers at Marquette University[1] interviewed 3,000 victims and witnesses from cases active in Milwaukee County's court system and 1,600 persons identified as victims of serious personal crimes by a previous National Crime Survey.

They found mental or emotional suffering to be the most frequent problem expressed by victims in general, while time and income loss posed the greatest difficulties for victims involved in the court process. The fear and emotional distress experienced by victims often extended as well to the victims' families and friends.

The study produced a wealth of policy recommendations to improve the treatment of victims and witnesses in the courts. Many have since been widely adopted.

The Milwaukee study introduced the term "secondary victimization" to characterize the distress experienced by the family and friends of crime victims. In 1982, a research team from the New York Victim Services Agency,[2] pursuing this theme, questioned 240 New York City victims of robbery, nonsexual assault, and burglary. They asked about problems and needs stemming from the crime and about organizations and individuals to whom victims turned for assistance.

While few victims had sought assistance from organizations, virtually all had received help from friends, neighbors, or relatives. The help ranged from listening while victims "ventilated," to aiding in apprehending the criminal, to lending money, to helping with replacement of doors, windows, and locks.

The New York researchers then contacted supporters named by the victims and interviewed them about the costs (and benefits) incurred in helping the victims. Most supporters reported being glad to help, but many said that their own fears about crime had been heightened because of the victim's experience. Such reactions were most prevalent among family members and neighbors of victims.

Robert Davis is Director of Research and Information Systems for the Victim Services Agency in New York City. He has been principal investigator for three NIJ research grants.

The study showed that the effects of crime hit hardest among the poor. Psychological distress and crime-related problems were more common among the less affluent and less educated, and these differences persisted at least up to 4 months after the crime. Similarly, poorer, less educated supporters were more likely than affluent supporters to report that providing assistance had placed a burden on them.

In a surprising finding, an earlier study revealed that nearly as many burglary as robbery victims underwent a "crisis reaction" during the weeks following victimization. In fact, according to researchers at the American Institutes for Research,[3] the impact of crime on victims' emotions and everyday behaviors was actually greater for burglary than for robbery victims.

Psychological reactions of victims were examined in depth under a 1984 NIJ study funded in response to a Victims Task Force recommendation. Researchers at the Medical University of South Carolina[4] interviewed female victims of sexual assault, robbery, aggravated assault, and home burglary, identified through a random victimization study.

Psychological adjustment of victims was measured against that of a sample of nonvictims. Details were gathered about current psychological status, previous mental health history, treatment history, and about the crime itself. This research provides the first reliable information about the proportion of victims in various crime categories who experience serious adjustment problems. Results indicate that victims of sexual assault suffer more adverse psychological reactions and adjustment problems than victims of robbery and burglary.

Helping crime victims cope

Research detailing crime's impact on victims helped build support for creation of special service programs to help them cope. As victim witness programs proliferated during the 1970's, so did evaluations of these programs. Most evaluation efforts, however, were limited in scope, often confined to questioning victims about how they felt about services they used.

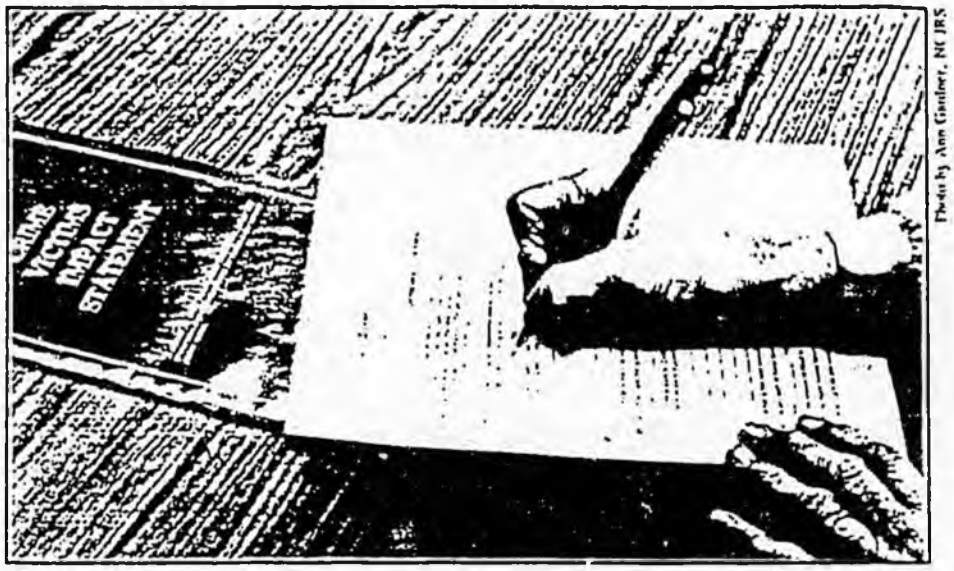

Photo by Ann Gardner, NCJRS

Victims in the Federal courts and in many State courts can now make "impact statements" that may affect sentencing decisions. An NIJ-funded study is currently looking at this State experience to find out how the laws have actually been implemented by local criminal justice agencies.

In fact, little was known about the effect of one of the key services offered: crisis intervention. An NIJ-funded assessment by the American Institutes for Research[5] in 1981 found that no studies had "examined whether the project clients suffer less trauma, either in the short or long run, than victims who go without help."

Crisis intervention program research. To rectify this lack, researchers at the Institute for Social Analysis[6] evaluated the effectiveness of a program in which victim counselors called in by the police aided victims at the crime scene. The researchers interviewed victims twice within 6 months of the crime.

The study found that victims of robbery, burglary, and nonsexual assault were traumatized by crime, although not to as great an extent as rape victims. Prior life stress contributed significantly to the "initial, most troubling stages" of victims' psychological distress and, in fact, was the strongest single determinant of victim distress.

However, the authors noted that victims who received project services differed markedly from those who did not: the police summoned counselors only for the most traumatized victims. It was therefore not surprising that the measures of emotional trauma did not indicate any substantial effects for those who received services.

To learn more about crisis intervention services, the New York Victim Services Agency[7] studied victims of robbery, burglary, assault, and rape. The victims were randomly assigned to one of four experimental groups: (a) crisis intervention with supportive counseling, (b) crisis intervention using a form of cognitive/behavioral therapy, (c) material assistance only, or (d) a control group receiving no services.

Three months later no differences were apparent between the experimental groups on measures of psychological or material recovery from the effects of crime. However, the vast majority of victims chose to attend only one session of counseling. Research now in progress in New York is examining how counseling can be more helpful to victims. Specifically, the study is finding out if giving victims information on how to protect themselves from future crime can lead to speedier psychological recovery.

Victim compensation program research. In 1981, the U.S. Attorney General's Task Force on Violent Crime

observed that there was a need for study of "the various crime victim compensation programs and their results." The National Institute then funded a survey[9] of how victim compensation programs were structured and run. The survey reported that only a small fraction of victims at that time were aware assistance was available and applied for it. The authors also found that compensation programs had generally served increasing numbers of victims while maintaining low administrative costs relative to other kinds of benefit programs.

The victim in the criminal justice system

In the 1970's and early 1980's, the criminal justice community began to realize that victims play a key role in the ability of the police and courts to bring criminals to justice.

For many years studies have continued to show that the victim is crucial in helping police apprehend criminals. Research by the Rand Corporation[10] in 1975 reported that information supplied by the victim to the first police officer responding to a crime is more important than any followup investigative work.

A 1984 study by the Police Executive Research Forum[11] underscored the importance of the victim's actions. The research found that the time it took *citizens to call the police* affected the probability of on-scene arrests to a greater extent than the time it took *police to respond to the call*. And earlier research by the Institute for Law and Social Research[12] reported that a larger number of citizen witnesses in a case, as distinguished from police or professional witnesses, increased the chances of conviction.

Based on research findings in this area, the National Institute produced public service announcements that dramatize how citizen action—or inaction—can affect criminal justice outcomes.

The system's response to victims

Victims are more likely to report a crime if they think the police will respond effectively. And victim satisfaction with police response seems to be determined primarily by the predictability rather than the speed of the police response. Victims will accept a delayed response in nonemergency cases if they are told in advance when to expect police.[13]

The earlier research in Milwaukee,[1] examining the impact of crime on victims, also measured victim reactions to the criminal justice system. One significant finding was that a positive experience with the criminal justice system led victims to be more willing to cooperate with officials in the future.

The study recommended several ways to make involvement in prosecution more attractive to victims, including the use of equitable witness fees and establishing an Office of Justice Advocates to represent the needs of victims, witnesses, and jurors within the criminal justice system. Other recommendations stressed the importance of modifying criminal justice policies and procedures to make them more responsive to victims and to keep both victims and witnesses better informed throughout the adjudication process.

Other research[14] showed that some victims and witnesses fail to cooperate with prosecutors because officials do not communicate important information to them: prosecutors or police may fail to inform people that they are needed as witnesses or to tell them when they should appear in court.

Rape victims

How the criminal justice system deals with particularly traumatized groups of victims—rape victims—was the focus of a 1976 study by the Battelle Memorial Institute Law and Justice Study Center.[15] The research surveyed police and prosecution agencies nationwide and looked at practices in several jurisdictions.

Police officers and prosecutors at that time lacked training in putting together the essential ingredients for successful prosecution of rape cases, Battelle concluded. Reports were distributed to help patrol officers, prosecutors, police and prosecutor administrators, and legislators improve the chances for successful prosecution of rape cases and to make criminal justice more responsive to the needs of rape victims.

Photo by Nelson Hakeman

A counselor at New York's Victim Services Agency helps a victim cope with the aftermath of crime and assists her in working with the criminal justice system. More and more communities are offering victim counseling services.

Domestic violence victims

Are nonstranger violence cases treated less severely by the courts than stranger-to-stranger cases? If so, is this because that is what the victims want?

Research by the Institute for Social Analysis in 1983[16] sought answers to these questions in a study of four jurisdictions. In the four sites, the dismissal rate for nonstranger violence cases was three times higher than for stranger-to-stranger cases, the researchers found. Nevertheless, nonstranger victims were more satisfied with case outcomes than stranger-to-stranger victims. The reason: they were likely to believe that the defendant's behavior would change as a result of punishment imposed by the court or simply as a result of arrest and prosecution.

Many police forces are changing the way they respond to family violence, especially spouse abuse, at least in part because of findings from an Institute-sponsored experiment published in 1984.[17] Police policy in responding to domestic disturbances generally was to counsel the parties or to order the aggressor party to leave the premises for 8 hours or more.

The Institute experiment, however, found that arresting the aggressor leads to fewer repeat offenses. Conducted by the Minneapolis Police Department, the controlled experiment randomly assigned officers to provide one of three responses to violent domestic disputes. The research showed that only 10 percent of aggressors who were arrested repeated their violence within 6 months compared to 19 percent of those involved in mediation and 24 percent of those who were ordered to leave the home.

The study is currently being replicated in six more cities, to refine understanding of the most appropriate police response to domestic violence situations.

Child victims

How the courts deal with child victims is the subject of research conducted by the American Bar Association.[18] This study examined data in three counties (Fairfax, Virginia; Mercer, New Jersey; Santa Cruz, California) to see if the courts are too lenient in sentencing child sexual abusers. It also examined the practices of criminal justice and child welfare agencies in processing child sexual abuse cases over a several-year period.

While the study's statutory review found little difference between sentencing provisions for offenses involving child versus adult victims, analysis of case files revealed a pattern of more severe sentences in adult victim cases. In cases involving child victims, a higher proportion of abusers knew or were related to their victims, which may help explain the greater leniency observed. Almost half of the confirmed child victim cases did not result in an arrest, and only 63 percent of those arrested were prosecuted, with the offenders often being allowed to plead guilty to a misdemeanor. The study pointed out the need for better interagency coordination in such cases, and for greater community consensus on what sanctions are appropriate.

The Institute has also examined both research and experience in the use of child victims as witnesses. A report by Abt Associates, Inc.,[19] describes new techniques and legal theories for obtaining a child victim's testimony with a minimum of trauma for the child. Two research efforts now being conducted in Colorado[20] and North Carolina[21] are examining the effects of criminal justice system participation on child victims of sexual assault.

Consideration of victim impact

Several major research projects have focused on the idea that a crime's effect on the victim ought to play a larger role in sentencing decisions.

A 1984 study by the Institute for Law and Social Research[22] sought to understand how criminal justice officials learn about victim harm, how victim harm affects their decisions about cases, and how victims respond to their experiences with the criminal justice system. The researchers interviewed police, prosecutors, judges, and victims at eight sites chosen to include providers of both extensive and limited services for victims.

The study found that of three variables examined (injury, psychological harm, and property stolen), only victim injury appeared to be important in prosecutors' screening decisions. None of the three factors was important in sentencing decisions.

The study also found that the majority of police officers, prosecutors, and judges felt that current levels of victim involvement were about right. Yet victims felt that being better informed, punishing the defendant more harshly, and providing more social services were important to increasing their satisfaction. Moreover, sites with full-service victim programs (where officials were more influenced by victim-related factors than practitioners elsewhere) were found to have the highest levels of victim satisfaction.

The first systematic effort to allow victims a chance to participate directly in case decisions was described in a 1979 report by the University of Chicago Law School.[23] Researchers evaluated an experiment in Dade County, Florida, in which victims participated in pretrial settlement conferences for certain criminal cases selected on a random assignment basis. At the conferences, judges, attorneys, the arresting officer, defendants, and victims discussed the incident and tried to fashion an appropriate disposition.

The results were mixed. Only a third of the victims attended the conferences; many victims, however, told researchers they had not been notified that a conference was scheduled. Most victims who did come said little and did not demand unreasonable punishment, the authors noted.

The authors found some evidence that victims whose cases went to conference were more satisfied with the way their cases were processed than other victims were. However, no differences were found between victims who did attend and those who did not with regard to their satisfaction with case outcomes or with the criminal justice system.

Several years later, NIJ awarded a grant to the Institute for Law and Social Research (INSLAW)[24] to replicate the

Dade experiment in three additional sites. INSLAW found that victims who attended settlement conferences were more satisfied with case outcomes and with the idea of plea bargaining than victims who did not attend. The level of victim participation was similar to that in earlier results. About half of invited victims attended, and victims who did come usually only described the facts of the case.

Another study has provided some of the first empirical data on a procedure which is gaining acceptance across the country. In California, a 1982 Victim's Bill of Rights included a provision that victims had the right to appear and be heard at adult felony sentencing proceedings and at parole eligibility proceedings for adults and juveniles. The effects of the provision on victims and on criminal justice personnel—judges, clerks, prosecutors, parole officers, and probation officers—were examined in a 1983 Institute grant to the University of the Pacific's McGeorge Law School.[24]

The study found that inadequate notification procedures were a major problem: less than half the victims sampled were aware that they had the right to appear and speak at sentencing. Less than 3 percent of the eligible victims actually did appear.

Most victims interviewed said the right to speak at hearings was important, but most also indicated that they would need more information, more support, and some legal assistance to be able to exercise this right effectively. Victims also wanted information about the status of the case against the defendant as much as they desired the legal right to participate in the case.

Research is now giving special attention to the impact and effectiveness of various reforms designed to make the criminal justice system more responsive to victims. For example, the Institute is currently funding a nationwide examination[25] of States with legislation allowing victim impact statements, to determine how the legislative intent has been implemented through administrative regulations and through actual practices of criminal justice and victim services personnel.

Similarly, the Institute has helped promote the view of the victim as vital participant and witness by supporting research on how victims are treated by the system; on innovative programs and legislation to expand the victim's role; and on the victim's historical status in the criminal justice system and rights under the law.

Currently under way is a nationwide study of the more than 30 States with victim bill of rights legislation.[26] The research will determine how legislative intent is being carried out, identify successful approaches to meeting the needs of crime victims, and pinpoint victim concerns requiring additional attention.

Unresolved issues

The availability of services for victims and a larger role for victims are becoming part of the American criminal justice system. Research has provided the underpinning to many of today's innovations in the treatment of victims. But there remains much to be learned about ways to make these reforms as effective and as efficient as possible. The following highlights only a few of the issues research might address.

More information is needed on the effects of service programs for victims. These are some specific questions that might be addressed:

- Which counseling techniques work best for which victims?
- Can we learn something about which techniques might be most effective by studying differences in coping styles between victims who do and those who do not recover quickly after the crime?
- Can police officers, whose behavior seems to significantly shape how victims react to their experience, be trained successfully in techniques to alleviate victims' trauma?
- Do programs designed to aid victims in the court process promote greater willingness of victims to cooperate with officials?
- Are compensation programs aiding those victims with the greatest needs or are such victims often excluded due to lack of information or overly complex application procedures?

Secondly, more research is needed about the role of the victim in the criminal justice system. Current research on victim impact statements will yield important information on the administrative effects of such statements. But we still need to learn about other basic issues involving the use of impact statements:

- How many victims actually want the opportunity to make a statement?
- Does the opportunity to make a statement promote the healing of psychological wounds?
- Do victims view the opportunity to make impact statements as meaningful involvement in the criminal justice process? If so, do impact statement opportunities increase satisfaction with the criminal justice system? What new incentives can be developed to increase victim participation?

Research might provide useful answers to questions on other victim-related issues as well. For instance:

- Do elderly and child victims have special psychological or material needs that are currently not being addressed?
- What are the benefits and impediments to having the private sector ease victims' financial burden through employee counseling and referrals and provision of paid leave for medical treatment or court appearances?

Unquestionably, the attention given to victim issues over the past two decades has changed police, prosecutor, and court procedures throughout the United States. In many jurisdictions programs now exist to help reduce the trauma of victimization and to ease the victim's way through the criminal court process.

Research projects funded by the National Institute of Justice and others have provided the impetus and rationale for many reforms in the treatment of victims. Continued collaboration by researchers and practitioners can help sustain these advances and lead to new ways of helping victims of crime.

THE PRECEDING PAGES WERE TREATED
AS A UNIT IN THE ORIGINAL FILE

SB

3

MEMORANDUM

TO: Rep. Pat Carney, Co-Chair
Rep. Georgianna Lincoln, Co-Chair
House HESS Committee

RE: SB 3 -
Elder Abuse

FR: Senator Jay Kerttula

D: April 22, 1991

I would appreciate it if you would schedule Senate Bill 3, relating to Elder Abuse.

Alaska Statute 47.24.020 requires the Department of Health and Social Services to investigate reports of elder abuse, interview the elderly person and prepare a written report. The law directs the department to stop the investigation at the elderly person's request.

Senate Bill 3 requires an in-person interview prior to termination of an investigation of elder abuse. While this requirement is implied in existing statute, the long-term care ombudsman has stated that many investigations are currently terminated after telephone interviews. The long-term care ombudsman testified to situations of older Alaskans who were subjected to extended periods of abuse after being coerced by their abuser into requesting termination of investigations over the telephone. Senate Bill 3 clarifies the meaning of "personal interview" which is required by existing statute.

Senate Bill 3 has a "0" fiscal note from the Department of Health and Social Services and is supported by both the administration and the long-term care ombudsman.

Thank you for your consideration of this request.

Sponsor statement

Senate Bill 3 is aimed at helping alleviate the first problem, and I urge the Senate HESS Committee to pass the bill. For your information I have attached some background information on elder abuse which was contained in report which Legislative Research did at my request. I have also attached several newspaper articles on the topic for your information.

ELDER ABUSE BACKGROUND

Nationally, the most common forms of elder abuse are physical abuse (including neglect) and financial exploitation. They are followed by emotional abuse or neglect, and sexual abuse. Elders also are often victims of self-neglect. Elders who are abused physically may be beaten, slapped, cut, burned or shoved; they may be deprived of food, supervision or medical care; they may be sexually abused; or they may be forcibly confined to a bed, a chair or a room. Those who are emotionally abused may be assaulted or threatened verbally. They also may be frightened, humiliated, intimidated, isolated or treated as children.

Profiles of the Typical Victim and Elder Abuser

The typical victim is a frail, 75-year-old woman who cannot care for herself. The victim generally depends on the family or an unrelated person for care and protection. Victims may have a drinking probem and a tendency to take the blame for the abuse. They may be excessively loyal to the caregiver. They may also have a history of abuse and be unpleasant or demanding.

The typical abuser is under stress, has a substance abuse problem, and frequently was abused as a child. Three out of four elder abusers are members of the victim's family. The son of the victim is the most likely abuser, followed by the daughter of the victim.

Data from the National Aging Resource Center on Elder Abuse indicate that two-thirds of the victims in reported cases in 1988 were female. Almost one-third of the abusers were adult children of the abused (30 percent). Aboutr 15 percent of abusers were the abused's spouse and about 13 percent were identified as the "service provider." Other reported abusers included friends or neighbors, other relatives, siblings and grandchildren.

Reporting

Most elder abuse is not reported, and this situation is worsening.. In 1980, an estimated one in six cases were reported; in 1985, one in five were reported; and in 1990, one in eight were reported. Nationally, elder abuse is far less likely to be reported than child abuse.

Alaska reports the second highest rate of elder abuse among the 43 states (including Washington, D.C.) with mandatory reporting laws. Alaska reports 9.18 cases of abuse per 1,000 elderly residents. If national estimates hold true for Alaska (one case reported for every eight which occurs), there were about 2,200 actual cases of elder abuse in Alaska in 1988. In that year, 273 cases were reported.

THE FOLLOWING PAGES MAY NOT FILM LEGIBLY BECAUSE OF THE POOR QUALITY OF THE ORIGINAL

Elderly remain silent to abuse

By JULIA SOPALSKI
Times Writer

Abuse of the elderly in Alaska is a quiet problem. Its victims mostly are silent.

State officials are aware of incidents involving senior citizens, but the extent of the problem is unknown because official reports are never filed, said William O'Connor, an ombudsman for the Older Alaskans Commission. Senior citizens in trouble often are too intimidated to admit they are in an abusive situation, O'Connor said.

The Division of Family and Youth Services in 1989 received 265 reports of abuse of adults over 60 years of age, down from 303 in 1988. But O'Connor said the statistics can be misleading because there is not enough money for social workers to follow up and investigate the reports. There may be more than the numbers indicate, he said.

A mandatory reporting law was passed in Alaska in 1983, requiring health and social workers to report suspected abuse of an elderly person. Failure to do so can result in a fine.

But the report is only recorded in division statistics if a caseworker has time to check it out, O'Connor said.

"I remember a case in the Kenai a few years back where a physician tried for more than six months to report a case of elderly abuse," O'Connor said. "If they won't listen to a physician, what happens when the person calling is only a concerned neighbor?"

The big problem is the shortage of workers in adult protection services, O'Connor said. Across the state, only three social workers are employed full time in adult protection — two in Anchorage and one in Fairbanks. All other caseworkers with the DFYS carry a combined load of child and adult cases.

"With all the children we have being sexually and physically abused, with blood like that running under the door, of course they take priority," he said.

Establishing the prevalence and needs of children in abusive situations is easier, partially because of staff resources, said Pat O'Brien, DFYS social services program officer in Juneau. O'Brien has worked for the agency for 19 years.

Alaska's mandatory reporting law was passed with little funding to back it up, O'Brien said. When the division was deluged with reports of child abuse several years ago, the state cut back on Adult Protective Services, O'Brien said, and the program has never recuperated.

Social workers with Adult Protective Services say working for a child in an abusive situation can be easier than helping a senior in trouble. The social worker can investigate a report of child abuse with or without the agreement of the child or parents.

For adults, the social worker is in an advocacy role, said John Burke with the DFYS office in Anchorage. Adults are considered competent to make their own decisions, and an investigation of reported abuse cannot be continued if the suspected victim denies the allegation, he said.

Burke said abuse of the elderly, physical abuse in particular, is not a severe problem in Anchorage. When there is abuse, it often is a result of alcohol or drug abuse and a dysfunctional family setting, the same conditions that give rise to child abuse.

The problem of abuse of the elderly also existed in the past, Burke said, but today there are options allowing senior citizens more control over their situation. The elderly in the Anchorage area inform each other of public health and housekeeping services and gather at the se-

See Elderly, page C-3

Katt

May 13, 1990
Anchorage Times

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78 Proper
79 Scribble
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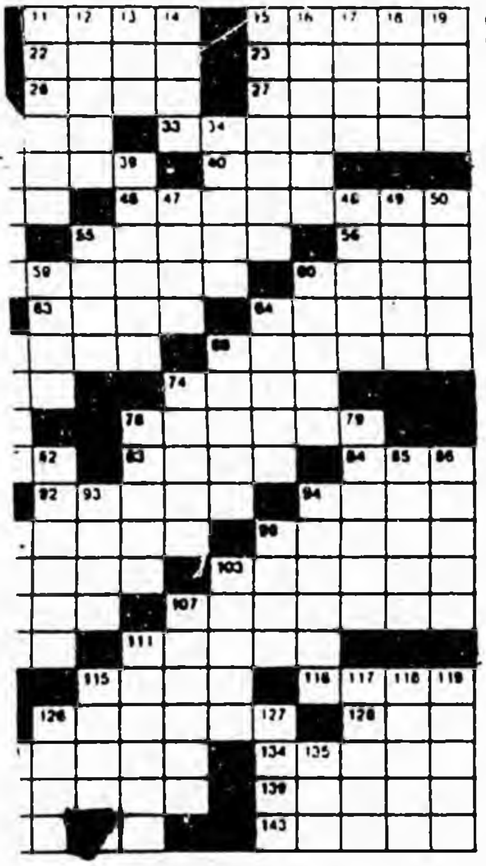

Every day, at 9:30 a.m., three vans packed with hot meals begin their daily trips to the homes of house-bound senior citizens scattered from Government Hill to Potter's Marsh.

In April, these Meals On Wheels vans delivered 2,734 main meals.

Judy Moor, regional supervisor of Alaska Management Technologies, oversees 25 homemakers who go out each day to help 120 senior citizens with their laundry, shopping and house cleaning.

These are organizations that provide daily necessities allowing senior citizens to remain independent in their own homes. Without the help, many would be forced to enter nursing homes.

But as these workers and drivers go about their daily routine of providing clean living spaces and nutritious meals, they perform another invaluable task.

"For a lot of these seniors we are the only contact with other people they have on a daily basis. So the drivers become my eyes and ears," said Scott Earl, home-care manager for the Salvation Army.

Moor's business is contracted by the Alaska State Homemaker Program to provide domestic services throughout the state. The homemakers for Moor's agency are trained to spot neglect, trouble and possible abuse, she said.

"They tell me if something seems wrong. For example, Mr. Jones had $3,000 in his account, but it's suddenly gone, and then I can ask a state social worker to check on the senior," she said.

These in-home, community-based services are lifelines for many senior citizens, and both organizations have a waiting list. Social workers and senior advocates believe the services also can be a preventive measure in the area of abuse of the elderly.

Such abuse is a process that builds over a period of time, said John Burke. Burke is an adult-protection social worker for the Division of Family and Youth Services in Anchorage. A young family may decide that a grandparent would be better off living with them, and have all the best intentions, he said.

... family member ... gated to add a pension check to the family finances. With hard economic times, the situation can deteriorate, he said.

"With help from in-home services or senior day-care, the family is given relief from the stress that comes from the constant care needed by some seniors, or the senior can live independently and not become a burden," Burke said.

Lare Farmer-Lamm, DFYS social worker in Fairbanks, uses in-home services to stabilize homes where she sees an elderly person may be at risk but does not want to leave the family, she said. Workers coming into the home take pressure off the family and can keep an eye on the welfare of the elder.

Older Alaskans Commission ombudsman William O'Connor said there is a need for more of these services. He said additional funding for helping seniors in their own homes would help avoid the larger cost of having these same people in nursing homes. The passage of a bill this year to provide more community based in-home services is a step in the right direction, he said.

"I knew a lady who used to pay her attorney his $125 an hour fee to come over and change her light bulbs," O'Connor said. A person who is 70 or 80 years old and living alone knows they cannot take the chance of climbing up on a chair to change a light bulb. If they fall, they know they will end up in the hospital and they may wind up staying in the hospital until they are transferred to a nursing home, O'Connor said.

"There are seniors all over town who sit with burned out light bulbs. How much would it cost us to provide that service?" he asked.

If the state spent $100 a month providing this type of service for senior citizens, allowing them to stay in their own home, the cost would be much less than the $7,000 or $8,000 a monthly bill for a nursing home, O'Connor said.

"We're faced with a situation where we have to consider the more preventive approaches," he said. "We're going to run out of funds otherwise."

Elderly

Continued from page C-1

ior centers where they can exchange information.

In-home services available to seniors allow them to live independently and not become dependent on families, or vulnerable to situations that could put them at risk, Burke said.

Ronald Parker, regional manager for DFYS in Nome, has worked for 15 years in social services in rural Alaska. He said he sees very little physical abuse with seniors and actually has recorded a decrease in cases reported to his office. He said the re-emergence of interest in Native cultural values is responsible for the decrease, specifically Native respect for elders.

"There are not enough health and social services available in the villages so people get together and co-operatively provide the help and services their elders need," Parker said. Of the reports received by the office in Nome, which oversees the western section of the state, only two or three a year are substantiated. Those usually are linked to alcohol and substance abuse, Parker said.

But Lare Farmer-Lamm, an adult-protection social worker who has worked with the division in Fairbanks for seven years, disagreed with Parker's estimate.

"I know from what I hear in the community and on the streets that there is physical abuse out there," she said. "The problem is the same as in the rest of the country. Seniors are ashamed to talk about it.

"Older people don't want to tell on their kids, or they're afraid we'll take them away from their family," Farmer-Lamm said.

Farmer-Lamm said her office often hears about the abuse too late, when the senior is in the hospital and the police have taken the case.

Statistics collected by the Fairbanks office show a slow, but steady, increase in cases of abuse of the elderly, she said. During the first three months of 1985, the office had about 29 clients who were victims. For the same period this year, there are 55 clients.

People are starting to report more incidents, Farmer-Lamm said, but without funding for more field workers to check more reports, collecting statistics is impossible. She is the only adult-protection worker for a large area covering Interior Alaska. She said, for now, the program has to be crisis-oriented, giving the most severe cases priority.

O'Connor agreed with Farmer-Lamm. As long-term care ombudsman he travels the state investigating complaints concerning senior citizens. He said his focus is on problems of seniors in nursing home facilities, but added that the problem of abuse is not in institutions.

"Our nursing homes and other facilities for seniors are non-profit. This avoids a lot of the problems that occur in homes down below where they must cut corners to make a profit," he said.

The high standards of Alaska's Pioneers Homes are a model for facilities outside Alaska, O'Connor said.

Medicaid reimbursement for nursing home care in Alaska is the highest per diem reimbursement in the nation, and that allows the homes to hire better-qualified staff, he said. That helps make nursing homes in Alaska a safer place to live.

It is the elderly living in private homes that concerns him, O'Connor said.

Sixty percent of the complaints he investigates come from people who live in private residences, he said. When O'Connor has a social worker check out a complaint, the elderly person often is too intimidated to admit they are in an abusive situation.

"They think, 'I should have raised my children better than this,' and don't want to tell on their own kids," O'Connor said.

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responsibility of the majority to govern."

Rep. Dan Glickman, a Democrat from Kansas who was first elected in 1976, believes his colleagues have grown increasingly timid and speculates that the grass-roots firestorm Ronald Reagan stirred up in 1981 "terrorized" Democrats. (He fails to

ALASKA SENIOR NEWS

Dec 1990 p. 20

Conference renews battle against elder abuse

by Pamela Craver

A new elder abuse task force in Ketchikan is steaming ahead with plans to coordinate services among agencies to provide more help to neglected or abused adults.

Palmer social workers are talking about applying for grants to help abused elders in the Mat-Su Valley.

And the Division of Family and Youth Services (DFYS) has gathered statewide support for a budget increase to add four more social workers in adult protection.

These efforts to beef up services for seniors and vulnerable adults are just part of the enthusiasm to combat elder abuse generated by an October conference in Anchorage.

"I think a lot of people came away from (the conference) with a real sense of excitement and awareness that there have been too few services available to a real at-risk population," said Becky Smith, a social worker with DFYS in Ketchikan.

Smith and about 130 other social service providers, seniors, members of the Older Alaskans Commission (OAC) and hospital workers attended the conference, "Elder Abuse: A Front Line Perspective," sponsored by Providence Hospital, DFYS and the OAC.

Keynote speaker Dr. Sue M. Parkins, an emergency room protective team in Toledo, Ohio, discussed the signs and symptoms of elder abuse.

"The classic victim is a 75-year-old frail woman who has some medical problems," Parkins said. "The profile of the abuser is characterized by stress. . . substance abuse, financial stress," she said.

Most abuse occurs in families which have always been abusive, Parkins said. The family may have an abusive member or just be dysfunctional.

Parkins gave an example of how an abusive situation may evolve. A young man loses his job and moves in with his mother because he can no longer manage financially. He probably has a substance abuse problem which gets worse the longer he is unemployed.

As long as the mother is healthy the situation is okay, but as she gets older and more frail things deteriorate.

"Mom becomes more and more of a burden and starts being neglected or frankly abused," Parkins said.

"Mom may get dependent to the degree that she can't care for herself and really needs professional care or placement. If mom gets placed then her assets have to be liquidated," Parkins said, referring to Medicaid requirements to spend down assets before a person may receive nursing home coverage.

There is no incentive for the son

Most abuse occurs in families which have always been abusive. The family may have an abusive member or just be dysfunctional.

to place the mother since he then loses his place to live. Instead, he starts collecting his mother's Social Security checks and other entitlements. And the mother steadily declines without the help she needs.

Unreported abuse

In 1983 there were 273 reported cases of elder abuse in Alaska, Parkins said. But she is uncomfortable with these statistics.

"We can see those abused and try to imagine how many others there are," she said.

Typically, one out of every eight victims reports abuse, according to Parkins. Seniors are hesitant to report abuse for a number of reasons. Often it is their own family members abusing them, Parkins said.

Abused seniors also are fearful of what will happen if they report. Will they have to leave their home and enter a nursing home?

Not only are seniors hesitant to report abuse, health care professionals and service providers may not recognize signs of abuse.

"A lot of elder abuse findings relate to hygiene," Parkins said. Look for bed sores, she suggested.

[illegible]ration and malnutrition indicators. Seniors are [illegible] than children when [illegible] nutritional needs. [illegible] If dentures are fitperly, it could mean [illegible]on has lost a lot of weight. [illegible]ook at a person's skin, Parkins said.

Are there bruises? Burn or frostbite injuries?

If there are injuries, ask the person what happened.

"Listen to the story you're being told and if it doesn't make sense... then you have to wonder (if abuse is occurring)," Parkins said.

Documentation is key to getting more resources for combatting elder abuse, Parkins said.

Coordinating services

In a later panel discussion, conference participants discussed ways to improve the current system for dealing with elder abuse in the state.

"One of the keys that people identified at the conference was greater coordination of already existing services for elders and other vulnerable adults," said DFYS director Russ Webb.

Strategies for increasing coordination include community organizing, case assistance, increasing basic services such as foster homes, and developing a central office responsible for coordinating services at the state level.

Conference participants spent much time in individual groups hashing over the best ways to tackle the elder abuse problem.

"The group I went to was on community organization," said social worker Becky Smith.

"(The group) identified some criteria on how to make that happen. In a sense that's what we're doing," Smith added, referring to the elder abuse task force she later started in Ketchikan..

The Ketchikan task force is one of four elder abuse task forces in the state. Others are located in Anchorage, Fairbanks and Juneau.

"Our goals are to identify what services are being provided and what the criteria for receiving those services are," Smith said.

People may be denied services because they don't fit income or age requirements, Smith said. She and the 11 other members of the Ketchikan task force want "to do some brainstorming" on how to provide services to these people.

"Our goal is to line up all service agencies to do a coordinated public presentation," she said.

For more information on the Ketchikan task force call Becky Smith at 225-6611.

For information on elder abuse in your community or to report elder abuse, call the Division of Family and Youth Services.

Jan 1989 p. 20

Elder abuse law not solving growing problem

Stories by Pamela Craver

It's been five years since the Alaska legislature tackled the problem of elder abuse and passed a reporting law. But just about everyone dealing with the law says it hasn't even come close to solving the problem.

The law encourages people to report abuse. It requires people in a number of professions, such as doctors, police officers, pharmacists, administrators of nursing homes, social workers and employees of projects funded by the Older Alaskans Commission to report suspected abuse.

But many of those people aren't reporting.

For example, said Anita Stevens, casework supervisor for the Anchorage office of the Division of Family and Youth Services (DFYS), the office has received no reports from the Anchorage Police Department, even though there has been at least one case involving the department. The case was later reported by another social service agency. (See story, page 21.)

There are all kinds of reasons why people aren't reporting, said Pat O'Brien, caseworker DFYS consultant for adult services in Juneau.

"We don't realize that elders are vulnerable," she said. It's hard to tell whether a senior is being abused or if they are just "crotchety," she added.

Many seniors are reluctant to "tell on" their abusive children, O'Brien said. They look at it as confirmation that they are "losing it," she said. And others just don't want to get the abuser in trouble.

"Some (of those who should be reporting) think DFYS isn't going to do anything," O'Brien said.

Even though elder abuse is not being reported every time it occurs, the tally of abuse reports from July 1987 through June 1988 shows an alarming problem. DFYS received more than 800 reports of abuse of people age 60 and older. That was more than 60 percent of all adult abuse reported.

By most accounts this is only the tip of the iceberg.

"In this state we have a long way to go," said O'Brien, who just returned from a national conference on elder abuse.

"The field is booming," O'Brien said.

The lack of reporting in Alaska is a real stumbling block, according to Lois Pillifant, head of the Elder Abuse Task Force in Anchorage.

Proper statistics are needed before programs can be developed to deal with elder abuse, Pillifant said. Even though there seems to be ample need for an elder abuse shelter and elder abuse respite care, you can't get money to deal with the problem without first having statistics that show the extent of the need, she explained.

In Juneau there used to be a fairly active elder abuse task force. But the lack of reporting made it hard to keep working on the problem, according to Norma Nicholas. Nicholas, who is an advocate for older women on the Aiding Women From Abuse and Rape Emergencies (AWARE) shelter in Juneau, has no doubt that elder abuse exists in Juneau.

"What I do is public speaking to raise awareness," Nicholas said.

"Certain laws are generally the abusers," she added.

If an elder is being abused, social workers have very few options for taking them out of the abusive situation. There is only one foster home in Juneau, according to Ramona Green, a social worker with DFYS in Juneau. And that home is licensed to care for only five people.

Green referred one elderly man to the foster home when conditions at his own home became intolerable.

There generations were living in the same home, Green said. The grandson kept demanding money from the grandfather. He'd take the grandfather around town canvassing through the bars with him, spending his money and generally terrorizing him.

"The grandfather's son was distressed and, so, was cooperative," Green said. "We placed the grandfather in an adult foster home and he was delighted."

The Juneau man was lucky. Many seniors being abused or neglected have no options in their communities. In many Alaskan communities there are no adult care foster homes, nursing homes, or even adequate homemaker services to help relieve the stress and strain that often leads to abuse by a caregiver.

In Fairbanks, for instance, where there is an active and effective elder abuse task force, there are few alternatives for seniors who are being abused or neglected.

"Some of the folks just aren't appropriate for foster care," said Flay Mast'ban, staff manager for the Fairbanks office of DFYS. "And medically they don't qualify for nursing home care," she added. The big need is for an intermediate care facility. Currently, a person has to go to Anchorage to get that sort of care, she said.

The 1982 elder abuse reporting law allows an elder to refuse help, to halt an investigation into reported abuse. Often, a senior does just that, especially when the only alternative to an abusive situation is miles away in an unfamiliar city far from friends and relatives.

What follows on these two pages are individual stories about Alaskan seniors in abusive situations. These are elders who have been physically abused, financially abused or neglected. As with many elder abuse situations in Alaska, the only "resolution" to some of these cases was a decision to continue to put up with the situation, for lack of better alternatives.

But actual solutions to elder abuse problems are sometimes as hard to come by in Alaska as the statistics that define the extent of the problem.

Statistics on Abuse

Alaska's elder abuse reporting statute requires people in a number of professions to call the Department of Health and Social Services' Division of Family and Youth Services (DFYS) if they suspect a person 65 or older is suffering harm.

Below are statistics from reports made to DFYS from July 1987 through June 1988. Pat O'Brien with DFYS in Juneau examined that the numbers don't add up in all categories because of differing reporting practices in DFYS offices around the state. Some reports contain just the name and age of the person abused, O'Brien said.

If a case was not confirmed, that does not mean there was no abuse occurring, O'Brien said. Sometimes it meant a senior would not talk to DFYS, or a DFYS worker could not get in touch with the person.

Number of Reports	
Age 65 and over	278
Age 60 - 64	22
Age 18 - 59	185
Total	480
Sex of Victim	
Male	185
Female	303
Type of Harm	
Abandonment	17
Abuse	171
Economic Harm	127
Neglect	173
Relationship of Perpetrator to Victim	
Wife	7
Husband	40
Son	43
Daughter	19
Other Male Family Member	30
Other Female Family Member	19
Other Male	49
Other Female	66
Did the Victim Request that the Investigation be Terminated?	
Yes	117
No	160
Type of Reporter	
Mandatory	189
Other	77
Was the Report Confirmed:	
Yes	167
No	184

Source: Division of Family and Youth Services, Department of Health and Social Services Adult Protective Services Annual Report, Fiscal Year ending June 30, 1988.

Neglect: Devastating as physical blows

Reuben James was calling himself regularly. A couple of times he was found in the cold in Bethel without enough clothes on. Though his family was supposed to pay his bills, buy his food and take care of his medical needs, they did not. Old age assistance checks were being cashed on James' behalf but he wasn't getting the money.

"Everybody thought it was outrageous," said a Division of Family and Youth Services (DFYS) social worker in Bethel. "Something needed to be done."

James (not his real name), in his 70s, was a victim of elder abuse. He wasn't being beaten, he was neglected. For an elderly person who can't take care of himself, neglect can be just as devastating as outright physical blows.

Bethel Community Health Director Dr. Grace Alfonsi remembers seeing one older man with a dislocated shoulder. He was brought in five or six days after it happened.

His wife was an alcoholic, and so were his kids. The man couldn't take care of himself and had fallen out of bed.

They let him sit for days, Alfonsi said. And that kind of injury hurts like heck, she added.

Alfonsi, who last practiced in Chicago where she saw much more elder abuse, ends on an Eskimo respect for elders with holding down the amount of elder abuse she sees in Bethel.

> **Alfonsi has seen people put up with less-than-desirable conditions to stay with their families.**

There are many elderly in the Bethel area, said the social worker who related the story of Reuben James, but few reports of elder abuse.

If she had to guess, the social worker said she would put the number of elder abuse reports at no more than one or two a month.

But both the social worker and Alfonsi say there are probably more cases than they are aware of.

James' family neglected him because they were drinking, the social worker said. They didn't pay attention to James' needs.

He needed help cleaning himself, he couldn't bathe, and he was almost blind, the social worker said.

DFYS handled James' problem by holding family meetings. At the meetings the family admitted that they were unable to care for James.

DFYS tried to get James into the Ayaluik Apartments, senior housing in Bethel, where he could stay with another relative, but there weren't any spaces available. So James was sent to a nursing home in Seward, far from friends and relatives.

He died two years later.

"I don't think he really wanted to leave," the social worker said. "If he had a choice he would have stayed in the condition he was staying in," she added.

Alfonsi has seen people put up with less-than-desirable conditions to stay with their families.

Alfonsi tells about an elderly woman who had a stroke and was determined to stay with her daughter, even though the daughter had her own family to care for.

Alfonsi got reports that the daughter was neglecting her mother. But after visiting the home, Alfonsi determined the daughter was doing the best she could.

The mother was confined to bed and refused to come to the hospital for rehabilitation, Alfonsi said. She needed constant care, she needed to be turned every two hours, to be fed and bathed.

"Mom" was a Bethel nursing home patient," Alfonsi said. Still, Alfonsi recommended the mother be allowed to remain in the home and helped the daughter get homemaker services.

A homemaker now comes and helps the daughter with chores four hours a day.

It gives the primary caregiver a break, Alfonsi said.

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They love their children so they deprive themselves

When money that could pay for warm clothes and food is regularly taken from an elder by younger relatives and used for something else, an alert social worker would likely classify this as elder abuse.

But far too often, the elder person isn't aware of being abused. And even if they don't like the situation, they don't want anyone coming in to try to fix it.

"They don't understand the word 'abuse,'" said Agnes Moore, an elder abuse worker at Fairbanks' Women in Crisis-Counseling Assistance (WIC-CA).

Moore, 65, has seen many younger relatives manipulating grandma or grandpa to get at the elder's money. The elder may not understand there are options, and they may not even think Moore's agency is trying to help, Moore explained.

"Because they love their children and grandchildren, they deprive themselves of their own needs," Moore said.

"By the end of the month they don't have enough food or clothing."

And in Fairbanks, where winter is severe, lack of adequate clothing can be serious.

"I can't go in there and say 'stop doing that,'" Moore said. "It's their own life."

That is one major difference between elder abuse and child abuse. In cases of suspected child abuse, a social worker can take the child away from the family if he or she is being harmed.

"We can intervene against a child's will," said Fay MacPhee, staff manager for the Fairbanks office of the Division of Family and Youth Services (DFYS).

In a real low voice the Kaltag woman whispered, 'I don't know why she does it.'

In elder abuse, the elder must be willing to accept services, and often that doesn't happen, MacPhee said.

"It's hard (for an elder) to admit that maybe it's their child abusing them. It's a shameful thing," MacPhee said.

Because the law recognizes that older people are capable of making their own decisions, the court can intervene without the elder's consent only after an elder is declared incompetent, according to MacPhee.

Many of the cases Moore sees do not involve incompetent elders, just frail or dependent elderly being taken advantage of by children or younger members of the community.

"I know one case where the mother is crippled and has a drinking problem," Moore said. Her son takes money away from her, telling her she is no good.

He uses her drinking as an excuse to argue with her.

"She gets scared and she gives money to get rid of him... he beats her up if she don't give it to him," Moore said.

Moore spoke with another woman from Kaltag whose daughter was suspected of beating her. The mother denied that her daughter broke her arm and told Moore she fell on the wood pile.

"I speak her language," Moore said. "And I told her her daughter was abusing her," Moore said.

In a real low voice the Kaltag woman whispered, "I don't know why she does it."

That was all the woman would say about the abuse.

"She knows it's there," Moore said. But she depends on her daughter for everything.

"She (the daughter) cleans house, gets water and wood for me," the woman told Moore.

Without her daughter, the woman said, she simply couldn't manage.

Physical abuse: He'd rather handle it himself

Jim McKay's stepson liked to make sucker shots at him.

One day when McKay (not his real name) reached down to turn off the TV, his stepson caught him off guard and belted him one.

McKay, in his 70s, is a victim of elder abuse. Like a number of other Alaskan elder abuse victims, he figures he'd rather handle it himself, with police help when necessary, than get involved with restraining orders or the state social service bureaucracy.

"He (the stepson) smokes pot, gets drunk, pushes people around," McKay explained of his 26-year-old stepson.

More than once McKay has called the police to kick the stepson out of the house.

McKay, a recovering alcoholic himself, is a small soft-spoken man with a shock of graying hair and an infectious smile.

"I wasn't afraid," McKay said. "I didn't want to hurt him because I know this much about me... if I start it I'd go a little too far and it don't pay... I'm too old to spend time in that place where them bars are," he said.

Even after his wife's death, McKay has been harassed by her children.

They begrudged him the new home he moved into. He and his wife — who was part Native — had qualified for the home before she died. Afterwards, the lender assured McKay he could continue his application for the home, even though one of the qualifications of ownership was Native ethnicity. The stepchildren didn't agree.

"They wanted to get the house for themselves," McKay said. He offered to let them live with him and even offered to let his stepson live in the old trailer rent-free.

Nothing seemed to satisfy them. The stepchildren would get drunk and become abusive to McKay.

The stepson kicked down the door of McKay's new home. His stepdaughters stole family photos and mementos while McKay was out. One stepdaughter physically attacked McKay, punching him in the nose and scratching him all over the face.

McKay explained that he tried to hold her arms and stop her but she was able to wriggle free.

The last time the police came to take the stepson, McKay saw their report. It listed every time they had had to intervene between McKay and the stepson.

The policeman told McKay he should get a restraining order from the court to stop his stepson from contacting him, but McKay refused.

McKay hasn't seen his stepson since.

Where to report abuse

If you suspect elder abuse contact the nearest Division of Family and Youth Services (DFYS) office. DFYS staff is required to investigate all reports of elder abuse and to provide protective services where needed. The investigation will be terminated upon the elder's request.

Some DFYS numbers to call are:

- Anchorage, general reporting number 276-1450; David Tuel, 265-6016; Andy Liss, 265-6008.
- Fairbanks, 452-1644.
- Juneau, Ramona Green, [illegible].
- Ketchikan, Russell Sikes, 225-9611.

WANTED: COMPUTER

Employment-oriented computer classes for low-income senior citizens need computers for practice and lab work.

Especially helpful would be an IBM-compatible PC (a computer that will accept DOS and 5 1/4" disks). We are open to loans or donations of equipment for the four-month duration of the class.

These JTPA classes are employment-oriented and have helped many seniors return to work with new skills.

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Please call Jane at Older Persons Action Group, Inc. 276-1059.

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