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The Credibility of Child Protective Services Rests on the Integrity of the Department Director

Daniel Pollack, MSSA, Esq.

We all make mistakes: Our perception or judgment turns out to be wrong. There is a misunderstanding. We are inattentive. We fail to act appropriately to deter an avoidable negative outcome.

At an early age we all heard our parents and teachers tell us that when we make a mistake we should admit it, take steps to ensure it does not happen again, and then move on. For whatever reasons–diminished status, outsized ego, loss of power, perception of vulnerability–it seems that while many of us grew up in an environment where admitting a mistake was commendable, in today's litigious environment, too many of us opt to rationalize or paper over our errors. In the human services world, particularly child welfare and child protective services (CPS), this is most unfortunate, because the negative outcome usually involves an innocent child. When the inability to admit a mistake involves a high-level administrator, even all the way up to the director of a department, the problem is horrific.

The CPS system is vast:

- The national estimate of children who received a CPS investigation response or alternative response increased 9.5% from 2012 (3,172,000) to 2016 (3,472,000).
- The number and rate of victims have fluctuated during the past 5 years. Comparing the national rounded number of victims from 2012 (656,000) to the national estimate of victims in 2016 (676,000) shows an increase of 3%.
- Three-quarters (74.8%) of victims were neglected, 18.2% were physically abused, and 8.5% were sexually abused.
- For 2016, a nationally estimated 1,750 children died of abuse and neglect at a rate of 2.36 per 100,000 children in the national population" (U.S. Department of Health and Human Services, 2016, p. 4).

In 2016, there were 7.4 million referrals for suspected child abuse or neglect (U.S. Department of Health and Human Services, 2016, p. 6). It is therefore no wonder that so many DHS/DSS directors have had a CPS case that caused their eventual downfall. The case made them look either incompetent or politically partisan, or both.

Instant replay in professional sports is ubiquitous. Cameras are recording every play from every angle. Umpires and referees can be immediately vindicated or discredited on many calls. CPS is only vaguely similar. At times, decision-making is obvious and clear-cut. But often, it is shades of gray–sometimes light, sometimes dark–and always in motion. Most importantly, perceptions and judgments made weeks or months ago must constantly be reframed and rethought based upon new information and insights. The past is always in the present.

From a legal and liability viewpoint, nothing enhances

the dollar value of a lawsuit like reviewing the file of a child who has died or been severely injured, and seeing that the director had an opportunity to correct a mistake yet instead stubbornly insisted that no mistake was made in the first place. In a word, he or she covered up a misstep.

Napoleon Bonaparte was wrong when he said, "In politics... never retreat, never retract... never admit a mistake." Applied to the world of child protection, dead wrong.

Let's not be naïve: Being the director of a department of human services is as much the result of a political process as the result of a meritocracy. As such, the most competent person is not always selected. As in any organization, CPS investigators and supervisors take their cues from the top. What the director does reflects the culture of the department. When winks and nods suggest more regard for the department's image than the children it is supposed to protect, lawsuits can morph into scandal. And that's when directors rightfully lose their jobs.

Integrity is not an object that is lost or misplaced. It is a value that is too easily forfeited.

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Governors as Policymakers: Child Welfare as an Election Issue

Mary Elizabeth Collins, AM, PhD

Introduction

Governors can be major policy actors in child welfare. As the head of the executive branch of state government, the governor oversees the public agency responsible for child welfare. This becomes very noticeable when a tragedy happens to a child in the state's care, and agencies often institute reactive responses (Collins, 2018). What about a more proactive effort to pursue a policy agenda in child welfare? Are there circumstances in which governors would take initiative in determining a policy agenda in child welfare? Gubernatorial campaigns provide an opportunity to examine this question. This article offers an analysis of gubernatorial candidates' attention to issues of child welfare in the recent November 2018 state elections.

Background

Child maltreatment continues to be a major social problem requiring intervention. The most recent data identify that during federal fiscal year 2017, child protective service agencies received 4.1 million referrals for abuse or neglect (U.S. Department of Health and Human Services, 2019). In response to these referrals, child protective service agencies have extensive procedures for investigating referrals, making determinations, and referring for follow up services. State and county child welfare agencies have the statutory responsibility for responding to allegations of child maltreatment. Then, often contracting with private providers, state and county agencies may provide a range of services to both families and children to meet federally stated goals of child safety, permanency, and well-being.

As with any policy arena, politics is a profound force influencing the numerous policy processes of agenda-setting, policy design, implementation, and evaluation. Children are often disadvantaged in the policy process (Gormley, 2012). At the most basic level, their lack of voting power and lack of financial resources assure that they will not be a powerful group in seeking favorable policy attention. Moreover, their developmental stage, particularly at younger ages, makes it necessary that others act on their behalf. Child advocacy takes many forms (DeVita & Mosher-Williams, 2001), including state ombuds to monitor state actions in regard to children's interests (O'Neill, 2011), class actions lawsuits on behalf of children's rights (Center for the Study of Social Policy, 2012), and efforts to support children's voices in care systems (Caldwell, McConvey, & Collins, 2019).

The policies and practices of child welfare most often come to the public's attention in the aftermath of child tragedies in care. Several scholars have documented the "cycle" of attention in these cases both in the U.S. (e.g., Gainsborough, 2010) and elsewhere (e.g., Ayre, 2001). Key factors in the cycle include: massive media attention; public calls for action; and responses by leaders that initially minimize, but often eventually result in partial and symbolic actions such as firing the head of the agency, reprimanding workers involved, forming commissions to make recommendations, and extensive case reviews. Gainsborough (2010) has noted that policymakers like to be perceived as caring about issues affecting children, but young people's lack of political power results in largely symbolic actions with

few attached resources.

Agenda-setting theory helps us to understand why some issues become a focus of policymakers while others do not. Kingdon's multiple streams framework (2003) identified processes of problem definition, policy formulation, and politics as critical forces. Previous research (Gainsborough, 2010; Collins, 2018) has often focused on the "problem" of child abuse, its framing by advocates, and the use of data and focusing events to help attain agenda status. The policy stream identifies that some potential solutions are more viable than others, and that policy entrepreneurs are needed to match a viable solution to a well-crafted problem definition at a propitious time for policy making. According to Kingdon (2003), the "politics" stream includes factors such as elections, the political mood, and the influence of interest groups. The 2018 elections for governor in the U.S. provide an opportunity to examine this particular part of the politics stream.

This analysis examined the campaign of each candidate for governor in the 2018 state elections. Gubernatorial campaigns occurred in 36 states and included 80 candidates. I reviewed the website of each campaign to determine the stated issues of the campaign. As candidates for public office, these positions are publicly available. In almost all cases, the campaign clearly identifies either "issues" or "priorities" on their website.

I reviewed each of the candidates' campaign websites and recorded the stated issues. I then coded them into common categories. Although the primary research question is related to child welfare, I identified all mentions related to "children" or "families" to examine the broader extent to which concerns of children and families were part of the candidates' stated agenda. Other variables that I recorded included the state, the candidate's party, and whether the candidate was an incumbent.

One other source of information was the most recent data about child maltreatment (U.S. Department of Health and Human Services, 2019). Two indicators from this data source are provided in Table 1: child fatalities per 100,000 children and referrals per 100,000 children. These data indicate of the extent of the problem of child maltreatment in each state.

Findings

Only two candidates for governor had clear statements about their interest in addressing child welfare issues. The Democratic candidate for Governor of New Hampshire identified "Protecting Vulnerable Children" as a key issue. This included providing stable funding for child protection and child violence prevention, following recommendations of an earlier audit report, and setting up an independent system of care to address needs and prevent violence. The other candidate was the Democratic candidate for Governor of Iowa, who highlighted "Supporting Children and Families," which included early childhood interventions, child care and economic security, and explicit attention to child welfare and child abuse. Neither candidate was elected.

Two incumbent governors addressed a child welfare issue in a narrow way. The Republican incumbent of New Hampshire described a record of achievements. Among those listed, under "Safety," was listed "added 20 new DCYF case workers across the state." New Hampshire, like many states, had experienced recent tragedies involving children in care, and this was the incumbent candidate's documented response. The Republican incumbent from Arizona listed "Safety and Security for All." This encompassed several more specific issues including border security, better investigation for sexual assault victims, opioids, child safety, and catching child support evaders. Within child safety, the website noted that the governor "has turned around the agency," reporting that the number of kids in foster care is down 20% and the agency has received an award from Casey Family programs. Generally, incumbent candidates' websites focused on portraying their accomplishments, compared to challengers whose websites were more explicit about their plans going forward.

Two other candidates proposed narrow issue areas related to child welfare, rather than broad systemic attention. The Democratic candidate in Arizona had several points related to "End Cycle of Poverty," including reducing unintended teen pregnancy, pre-K programs, support for low income and first generation college students, and diversion of parents from the

criminal justice system. One additional point specific to child welfare was to train and recruit effective foster and adoptive families. The candidate noted on the website that he himself had been adopted. A somewhat unique area of "protecting girls from early marriage" was identified by the Democratic candidate in South Carolina.

More broadly than child welfare, addressing child poverty, strongly linked with child maltreatment (Drake & Jonson-Reid, 2014), was a stated issue in two winning campaigns. Gavin Newsom, now the Democratic Governor of California, offered a multi-component platform of ideas to address child poverty, and Janet Mills, now Democratic Governor of Maine, highlighted the more specific issue of child hunger. Although these efforts are not labelled "child welfare" or focused specifically on the prevention of child abuse, given the known relationship between poverty and child maltreatment, success in reducing child poverty and child hunger might be expected to improve the lives of children and reduce the need for child welfare system involvement.

Education and health care were common among candidates' platforms (identified 59 and 50 times, respectively). Although robust systems of high quality and accessible systems of education and health care would provide great benefits to all children and have potential to reduce some environmental risks to children, they are not specific to child welfare. Moreover, their general nature and ability to serve large populations make them politically popular with more privileged economic and social groups.

Examining the data in Table 1, there appeared to be no discernible pattern in the relationship between child maltreatment and issue statements of gubernatorial candidates for governor. In the two states (Iowa and New Hampshire) where candidates provided the most robust attention to child welfare, data do not suggest that child welfare issues were more serious in comparison to other states. The incumbents in New Hampshire and Arizona offered narrow responses on these issues; Arizona, like New Hampshire, was not an outlier according to the NCCANDS data.

Beyond Child Welfare

Candidates speak to a range of issues affecting children and families but aim to address these in a wide variety of ways. For example, a fairly large number identified issues of crime/safety (n = 20) or opioids (n = 19), but these concerns were not typically focused on children specifically.

Where "family" was concerned, responses tended to reflect party ideologies. For example, the South Dakota Republican candidate described a Family First Initiative with a number of points that were conservative (prolife, religious liberty/traditional marriage, reduce dependency/increase work, respect for parental rights) and some that were more neutral (military readiness, help for incarcerated parents, and expansion of residential/family based drug treatment that would keep children out of foster care). The Alaskan Republican candidate identified parental rights, particularly related to school choice and educational decisions. The Alaskan Democratic candidate linked family issues with women, focusing on child care and family leave.

Along with education and health care, some other popular (n = 20 or more) issue areas included employment/economic development (n = 59), government reform (n = 34), environment/energy (n = 31), crime/safety (n = 20), veterans (n = 20), and tax reform (n = 20).

Discussion

This analysis rarely found specific attention to child protection and the child welfare system to be a focus of candidates for governor. This is not a surprising finding, but it is impactful to contrast this lack of focus with state responses when tragedies occur to children in care. When those tragedies happen, a typical pattern of response often emerges, with the governor often playing a prominent role. In the face of child tragedies in care, particularly when the case is extreme, when there have been a pattern of cases, or when it appears the agency is at fault, there may be vocal public response and demand for something to be done (Gainsborough, 2010). In this heated and high-profile environment, reactive actions are a typical result (Gainsborough, 2010; Collins, 2018). More considered evidence-based approaches, with potentially more

Table 1: Child fatalities and Referrals for Maltreatment in the Sample States

State	Child fatalities per 100,000	Referrals for maltreatment per 100,000
AL	**2.56**	25.7
AK	1.08	100.2
AZ	2.14	46.6
AK	**5.24**	80.8
CA	1.62	44.2
CO	**2.77**	75.4
CT	1.48	55.6
FL	**2.40**	56.3
GA	**3.74**	48.8
HI	1.31	14.5
ID	2.25	47.2
IL	**2.55**	--
IA	**2.60**	71.0
KS	1.96	55.3
ME	--	63
MD	**3.04**	39.5
MA	--	60.5
MI	**2.34**	68.8
MN	1.85	69.9
NE	0.21	74.5
NV	3.06	52.8
NH	0.77	57.8
NM	**3.28**	80.2
NY	**3.06**	--
OH	**2.80**	70.1
OK	2.19	81.4
OR	**3.43**	82.3
PA	1.58	--
RI	**2.41**	64.4
SC	**2.53**	41.7
SD	2.33	74.2
TN	2.85	86.3
TX	2.53	34.6
VT	0.00	169.1
WI	2.42	61.3
WY	2.93	54.5
Average (all states)	2.32	

Note: **bold indicates above the average*

meaningful results, are limited. Furthermore, a proactive policy-making approach would also demonstrate a more serious commitment to the issues of child abuse and neglect and the broader issues of enhancing child well-being. Highlighting, promoting, and committing to efforts that address the range of serious issues facing young people would provide the leadership necessary to tackle these challenges. Governors are in a position to provide this leadership at the state level.

Governors themselves may lack the relevant substantive expertise to engage in issues related to child welfare and child maltreatment. They frequently have backgrounds in law, business, or government, and rarely in social work, human services, or the helping professions. But they can surround themselves with advisors and staff members with appropriate expertise on these topics. Foremost among the topics requiring the attention of governors and other policymakers is understanding the evidence of the long term negative effects of child maltreatment and other adverse experiences in childhood (Shonkoff et al., 2012). These pervasive and substantial effects have both human and financial costs. Costs are obviously of interest to governors and other policymakers in the states. Using the most current available data and up-to-date analytic techniques, Peterson, Florence, and Klevens (2018) estimated that the economic burden of child maltreatment based on 2015 substantiated nonfatal cases was $428 billion; estimates for all investigated non-fatal incidents was estimated at $2 trillion. When considering the costs of actions and inactions, it is also relevant to consider the substantial costs of ineffective reactive actions. Aside from the costs to the child and family, states' reactive strategies (e.g., replacing agency administrators, increasing administrative burden on caseworkers related to extensive documentation, convening advisory commissions, defending agencies against class action litigation) often result in an inefficient

use of valuable state resources with limited impact on the safety and well-being of children.

To address the human and financial costs related to maltreatment, substantial research efforts have built a considerable evidence base of interventions that might guide decision-making in establishing a proactive approach to child protection (e.g., MacMillan, Wathen, Barlow, Fergusson, Leventhal, & Taussig, 2009). Thyer, Babcock, and Tutweiler (2017) noted that with the rapid increase of well-designed outcome studies, the accumulated evidence can be difficult for policymakers and other stakeholders to access, synthesize, and utilize. They provide information about some of the most relevant online resources that identify the degree of research support behind potentially useful interventions in child welfare practice. These include, for example, the Substance Abuse and Mental Health Services Administration (SAMHSA)'s National Registry of Evidence-Based Programs and Practices (NREPP), the California Evidence-Based Clearinghouse for Child Welfare (CEBC), and the National Child Traumatic Stress Network (NCTSN).

In addition to specific evidence-based programs, as well as investment in research to continue to develop the evidence base for interventions, governors can also lead their states in developing the administrative infrastructure needed at the state level to undergird best practices. Chahine and Sanders (2013) summarized several strategies based on a series of national forums that Casey Family Programs convened to influence and mobilize national efforts to improve safety and prevent child maltreatment-related fatalities. Critical steps include improving surveillance systems to have better data, particularly around child maltreatment deaths, which are underreported; using known risk factors (e.g., poverty, substance abuse, domestic violence) to improve prevention strategies; using population-level prevention strategies (e.g., public information campaigns); identifying flaws in organizational processes that contribute to practice errors; and using comprehensive cross-system community-based approaches. Additionally, states might also use policies, practices, and investments related to establishing a high quality workforce, training and development, and evaluation of training (Collins, 2008) to potentially improve the administrative infrastructure needed to protect children.

Addressing the needs of children and families in a proactive manner values these constituencies in their own right. This moral argument must remain part of the approach to securing resources for children and families. Additionally, there is evidence that investing in building strong families and healthy children has economic benefits. In one rigorous study, Peterson, Florence, Thomas, and Klevens (2018) conducted a cost-benefit analysis of two primary prevention programs for each of the 50 states. This analysis, based on existing data regarding the current population, costs, and maltreatment incidence, indicated that the implementation of these two programs might prevent child maltreatment for thousands of children. The researchers concluded that states could substantially offset the costs of the programs in the long term through the monetary value of benefits related to reductions in maltreatment and its adverse consequences. Several other cost-benefit analyses are available that governors and other policymakers can use. Maher, Corwin, Hodnett, and Faulk (2012), for example, used a cost-savings analysis of the statewide implementation of an evidence-informed parenting education program (Nurturing Parent Program), finding a positive benefit-cost ratio.

Political challenges remain to be addressed. Positive benefits may not occur until a distant future in which the current officeholder may have little stake. Political calculations are known to emphasize short term benefits with long term costs rather than the reverse. Consequently, this is an arena in which strong leadership is needed; leadership requires attention to the benefits of the state and its populace in the long term. This tendency also requires the advocacy community to engage in sustained argument emphasizing a long term perspective.

Elections for governor provide an opportunity to push candidates to consider more proactive options for addressing child welfare issues within the state. They provide a "window of opportunity" (Kingdon, 2003) to get these issues onto the policymaking agenda. Governors rarely have reason to address these issues unless they are pressured to do so. Like all other policy

issues, child welfare, and the interests of children and youth more broadly, are political. There is no common understanding of what children are entitled to from government, which child-focused issues deserve priority, or how government recognizes and addresses their concerns (or not).

Policy theories note that children do not vote, and they do not have money. For many, their parents are not in a position to secure resources for their families. Quite the contrary, often trapped by poverty, substance use, and incarceration, parents are more likely to receive punitive attention. Existing racial disproportionality, and the racism that accompanies it, also puts families a political disadvantage (Roberts, 2002). Lacking resources and their resulting power, they can do little to influence the policy process. Maltreated children and those at risk for maltreatment continue to require professionals, advocates, and allies to pressure policymakers for beneficial policy treatment.

While child deaths in care have long provided a policy window, effective policy is rarely the result of reactive responses within the glare of the media and public spotlight resulting from tragedies that happen to children in care. Yet this descriptive analysis indicates that issues related to child abuse are rarely on governors' agendas during elections. This is a missed opportunity for the public to engage with candidates on this issue and to press for a greater commitment toward securing safety and well-being for young people. Policy processes are highly complex, involving numerous actors. Governors are key actors, and their public platforms during and after elections provide an important indicator of the importance of children's issues to their planned administration. Elevating the importance of vulnerable children to be on par with other important state issues is critical. Broad-based, comprehensive strategies are needed to improve the range of supports for children and families; otherwise there is a risk that specific attention to child abuse prevention and intervention or the state agency with responsibility for these efforts might push costs onto other state systems that are also important.

In this article I have documented the minimal attention that gubernatorial candidates gave to child welfare in the recent elections. Existing research on negative effects of maltreatment, costs of inaction, and a burgeoning knowledge base of effective approaches provide tools in our arsenal of advocacy strategies. Cognizant of agenda-setting processes and political context, these strategies are necessary to more aggressively convince governors and other policymakers to engage in proactive efforts on behalf of vulnerable children for both moral and economic reasons.

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Book Review: Medical Evaluation of Child Sexual Abuse: A Practical Guide (4th Ed.)

Debra Esernio-Jenssen, MD

Medical Evaluation of Child Sexual Abuse: A Practical Guide (4th Edition)
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Published by the American Academy of Pediatrics
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The plot of Maya Angelou's fictional autobiography, "I Know Why the Caged Bird Sings," is comparable to the often harrowing ordeal that many child sexual abuse victims endure. The book's protagonist, Marguerite (aka Maya), was sexually abused at age 8. When she disclosed the name of her rapist, her mother's boyfriend, he was killed after being incarcerated for one day. Marguerite subsequently became mute for 5 years, believing that her voice was responsible for his murder. Marguerite is like many child sexual abuse victims. Known, trusted adults abuse them, and yet it is the victim that bears the shame and feelings of guilt when they ultimately disclose.

Co-editors Drs. Finkel and Giardino* intended for this book to be "a standard reference text" for the medical evaluation of child sexual abuse. This book does indeed offer a concise but vast culmination of expert knowledge regarding all aspects of child sexual abuse from prevalence to prevention.

The chapters are very interesting and well referenced:

- The legal chapter is exceptionally written and provides an easy to understand overview of everything a provider must consider legally when performing child sexual abuse evaluations.
- The mimics chapter is extremely thorough and provides excellent supportive images.
- The telemedicine chapter highlights a pragmatic and less costly approach to fulfilling the need for comprehensive exams performed by or peer reviewed by child abuse specialists.
- The chapters including the components of the medical evaluation including history, anogenital examination, evidence collection, and treatment are thoughtfully organized, well written and supported by well-prepared case examples and excellent photodocumentation.

However, there are some noteworthy exceptions. On page 53, the author recommends using an anatomical model during the child's history to help clarify the "child's perception of whether an object was placed between the labia or into the vagina." As detailed and referenced in chapter 11, forensic interview approaches that use media (i.e., anatomic drawings and dolls) with younger children have been associated with generating inaccurate information. Exposing a young victim child who has limited developmental understanding of the anogenital area to a real-life model and demonstrating digital insertion into a vagina and/or anus may cause psychological retraumatization. More research is needed to determine the efficacy of this technique.

There are also discrepancies in the physical exam chapter regarding anogenital examination and interpretation and the use of speculums in pubertal females compared to the most current consensus of medical interpretation of findings (Adams, Farst, & Kellogg, 2018) and evaluation of the sexually assaulted adolescent (Crawford-Jakubiak, Alderman, Leventhal, AAP Committee on Child Abuse and Neglect, & AAP Committee on Adolescence, 2017), respectively.

As the book states, "the transverse diameter of the hymenal orifice alone cannot be relied on as a sole diagnostic finding of vaginal penetration" (p. 69). Experts no longer consider the transverse diameter of the hymenal orifice useful in diagnosing sexual abuse, as there is significant variability depending upon the child's relaxation and the examiner's technique. In regards to the statement, "a bimanual or speculum examination is indicated in most postpubertal children with a history involving penetration into the vagina" (p. 60), a bimanual exam is not part of a sexual assault evaluation, nor is the use of a speculum. Practitioners rarely use speculums if there is concern for injury or active vaginal bleeding. However, use of a speculum may be traumatic for a teenager and "may lead to avoidance of reproductive health care in the future" (Crawford-Jakubiak et al., 2017).

In the section on penile-vaginal penetration, there is no evidence to support that "a transection of the hymen observed in the prepubertal child should remain evident even when the membrane becomes estrogenized in puberty" (p. 92). In prepubertal children, hymenal injuries have been shown to heal rapidly with the majority revealing little or no evidence of previous trauma (McCann, Miyamoto, Boyle, & Rogers, 2007). There is also no medical substantiation to the statement that the size of an adolescent's hymenal orifice or accommodation of an adult vaginal speculum correlates with the size of an inserting foreign body (p. 92). Again, hymenal orifice size is no longer a diagnostic consideration (Adams et al., 2018). Drug-facilitated sexual assault (DFSA) and its effect on hymen/anal tissue relaxation is another important criterion to consider when making a diagnosis of sexual abuse/assault, as victims of DFSA are less likely to have genital and nongenital trauma (Harper, 2011).

Overall, this book is a useful and extensive practical guide for clinicians evaluating children who are suspected victims of sexual abuse, and it is therefore worthy of purchase.

**Editor's Note: Dr. Giardino is the former Editor-in-Chief of the APSAC Advisor. He did not solicit or approve this book review.*

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Introduction to the Special Section

Kathleen Coulborn Faller, PhD, ACSW, DCSW

APSAC consistently attempts to improve benefits for its members. In 2018, the APSAC Board of Directors approved a proposal for a special section within an issue of the *APSAC Advisor* to address contested issues in child maltreatment and child welfare. As professionals working in the fields of child welfare and child maltreatment, we are constantly confronted with complex problems and difficult decisions. The goal of this special section is to enhance members' ability to think critically about the issues addressed.

There are no easy answers in our field. There are frequently multiple sides to the problems we need to address, and there may be unintended consequences of our interventions.

Each year APSAC aims to publish articles in the *Advisor* that focus on current contested issues in the field. The Publications Committee, the Amicus Committee, the Policy Center, and the current *Advisor* editor(s) determine which controversies each issue should address, and identify a guest editor for each of the contested issues. Each guest editor selects authors to write succinct arguments for each side of the topic (pro/con). Authors on each side of the argument then exchange papers and write brief responses to the opposing viewpoints.

The inaugural Contested Issues Special Section explores two topics:

1. **Indian Child Welfare Act (ICWA).** Passed by Congress and signed into law in 1978, ICWA has been a controversial statute from the beginning. Its intent is to decrease the alarmingly high rate of removal of Indian children from Indian families and their tribal communities. Advocates for the importance of culture for children's wellbeing support the statute. Advocates for children's rights argue that ICWA puts the interests of the child's tribe above the needs of the individual child. Guest Editors: Frank Vandervort, JD & Kathleen Coulborn Faller, PhD

2. **Appropriate responses of child welfare agencies to drug exposed newborns.** How should the child welfare system respond to substance-exposed newborns? Should substance use during pregnancy be treated as child abuse, and how do we balance the interests of the mother and child? Guest Editor: Kenneth Feder, PhD

About the Guest Editor

***Kathleen Coulborn Faller, PhD, ACSW, DCSW**, is Marion Elizabeth Blue Professor Emerita of Children and Families in the School of Social Work at the University of Michigan and Co-Director of the Family Assessment Clinic of Washtenaw Co., MI. She is involved in research, clinical work, teaching, training, and writing on child sexual abuse, child welfare, and the child welfare workforce. She is the author, editor, or co-editor of ten books. She has published over 100 research and clinical articles.*

She has been a member of American Professional Society on the Abuse of Children (APSAC) since its inception and served on the APSAC Board of Directors 1991-1997 and the APSAC Executive Committee 1992-1997. She was a member of the APSAC Board (2013-2019) and the Executive Committee (2014-2019). She chairs the Practice Guidelines Committee (2013-2019). She also served as chair of the Publications Committee (2015-2019).

Introduction: How Should Child Welfare Respond to Substance Use in Pregnancy?

Kenneth Feder, PhD

Substance use in pregnancy can be harmful to the health of a mother and a developing fetus. However, should it be treated as child abuse? This is a complicated issue, and one we hear radically differing points of view on in this point-counterpoint.

Alcohol use in pregnancy, particularly binge drinking, is harmful and can lead to growth, academic, and behavior problems in childhood and across the life course—there is no known safe level of alcohol consumption in pregnancy. Tobacco use during pregnancy increases the risk of stillbirth, low birth weight, sudden infant death syndrome (SIDS), and later health problems.

Health professionals have also raised concerns about other drugs like opioids, cocaine, amphetamines, and marijuana. Concerns include that children may be born dependent on these drugs and need to be weaned off at birth, and that drug use can lead to complications of pregnancy and later health problems. However, scientists have struggled to determine the extent to which these drugs cause harm, as opposed to other health risks—like poor nutrition, lack of prenatal care, domestic violence, and alcohol or tobacco use—that pregnant women are often also exposed to when they use these drugs (Konijnenberg, 2015).

What is clear is that the healthiest choice for pregnant women is to abstain from substance use, other than prescribed medications, during pregnancy. What is much less clear is how society should respond when pregnant women do use potentially harmful drugs.

According to Guttmacher Institute, 23 states and the District of Columbia consider substance use in pregnancy to be child abuse under civil child welfare statutes (2018). Proponents may argue that this designation appropriately acknowledges the harms of drug use, and helps involve the child welfare system in the affairs of high-risk children. On the other hand, treating substance use in pregnancy as child abuse raises a host of complex practical, legal, and ethical issues. Critics charge these laws may actually harm children and pregnant women. This could happen if laws deter women from seeking prenatal care or lead to unnecessary foster care placements. Critics also argue these laws raise civil rights concerns—they may disproportionately target low income and minority women, and may infringe on women's rights and autonomy.

The United States' opioid epidemic has created a growing urgency to figure out the best societal response to substance use in pregnancy. Opioid use during pregnancy and related health problems have increased over the past decades (Patrick & Schiff, 2017), and there is evidence that the opioid epidemic is driving an increasing number of children into contact with the child protection and foster care systems (Ghertner, Baldwin, Crouse, Radel, & Waters, 2018).

In this point-counterpoint, attorneys and physicians with expertise in child welfare, child abuse prevention, family law, and women's rights debate these complex issues.

About the Guest Editor

Kenneth Feder, PhD, *is a recent graduate of the Johns Hopkins Bloomberg School of Public Health. He studies how public policies and programs can best meet the needs of children growing up in families struggling with substance use problems. Much of his research focuses on the United States' opioid epidemic.*

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How Should We Respond to Pregnancy and Substance Use?

Martin Guggenheim, JD
Lynn Paltrow, JD

The question raised in this point-counterpoint is whether substance use in pregnancy should be treated as child abuse and, if not, what should be the appropriate public response? Consider some of the embedded questions raised here. Is our society better off legislating as if fertilized eggs, embryos, and fetuses inside a woman's body are equivalent to children born and outside of her body? How much control over women should a just society allow? And, is there a medical, scientific basis for the assumption underlying this exchange—that use of any of the criminalized drugs causes unique or exceptional risks of harm? These are vital antecedent questions to the one formally proposed in this point-counterpoint exchange.

There is not enough space here to address all of these important questions. It is clear though that from the perspective of personified eggs, embryos, and fetuses, every pregnancy creates extremely well-documented risks of harm. Approximately 15-20% of all pregnancies (unrelated to use of controlled substances) end in miscarriage or stillbirth (Office on Women's Health, 2019). In other words, by becoming pregnant a woman puts her unborn child at risk of harm, including death. Indeed, everything she does or doesn't do, everything she breathes, eats, and drinks can, arguably, pose a risk of harm. As a result, the question posed for this point-counterpoint creates the illusion of focus on only one action—drug use—but provides the basis for making every woman, from the moment she has a fertilized egg inside of her, subject to state scrutiny as a potential child abuser for all of her actions and choices.

So, the short, simple answer to the question posed here should be "no," purely in terms of gender equality, and the avoidance of oppressing women. But we realize many readers will reject this perspective, insisting that treating a woman's drug use during pregnancy as child abuse is perfectly fair, even gender neutral. So, we will address two other questions that presume the legitimacy of this exchange.

The first is whether a pregnant woman's use of substances deserves attention by public health officials and healthcare providers. The second is, if it does, how it should be addressed. We have little doubt that both pregnancy and the use of substances are subjects worthy of attention by public health officials. Treating pregnancy and drug use as child abuse, however, is a serious mistake, because it drives pregnant women underground to avoid being reported, discourages honest communications if they remain above ground, and turns control of healthcare decisions over to people without training in health care, including caseworkers and judges with the power to regulate pregnant women's lives as a condition of keeping or regaining custody of their children.

Treating pregnancy and drug use as child abuse also radically expands the role of child welfare authorities and sets a dangerous precedent for interpreting pregnant women's lives and health as proper subjects of control through state child welfare systems. Instead, public resources should be devoted to addressing poverty, which has repeatedly been shown

to pose greater risks to infants than exposure to any criminalized drugs or controlled substances. Drug use should not be confused with drug dependency problems any more than alcoholism should be confused with drinking alcohol. Public health policy should encourage and provide the resources that pregnant women with dependency problems need to secure appropriate treatment, including such medications as methadone and buprenorphine. The best way to ensure this is not to treat drug use during pregnancy as child abuse.

Consider a different matter: Should doctors report families to child welfare officials when they learn that children are living in homes with exposed asbestos and lead paint in the apartment walls, are residing near mercury emitting coal facilities or drinking lead contaminated water in Flint, Michigan or Newark, New Jersey? There is no doubt that children exposed to these substances are at risk of significant health harms that are well established as contributing to or causing asthma, cancer, and reduced brain functioning. Nonetheless, it begs the question: Should doctors who are aware that children are living in conditions exposing them to these hazards notify child welfare officials?

The answer, of course, is "no." And that's because we have collectively agreed that not everything that might be hazardous to children's health or well-being ought to the fall within the ambit of child welfare. We comfortably leave many things that constitute significant dangers to which children are exposed to the category of public health. The claim that drug use is different because it requires an affirmative act taken by the pregnant woman ignores the volition involved when people decide where to live and with whom they will live. And for people whose drug use has actually become problematic, the question is not about choice to use but rather how it, along with anything else in their lives, actually affects their parenting ability. The critical point we mean to make is that not all public health problems impacting children should be (or in fact are) committed to the child welfare system.

We suggest that one of the worst choices public health officials could make would be to require that a woman's pregnancy and use of certain drugs become the focus of the child welfare system (American College of Obstetricians and Gynecologists, 2014). In our experience, the child welfare system too commonly lacks the skill, resources, and commitment to serve the well-being of the families with which it interacts. Too often, children are needlessly removed from their parents' custody, an extremely counterproductive response for a system putatively committed to preserving families, which in some cases may involve actually helping a parent address a substance dependency problem that is affecting their parenting ability.

Moreover, once a child enters the foster care system, child welfare officials possess an extremely dangerous power which, in the past generation, has been unleashed at an unprecedented level—the termination of parental rights. Today, more than at any other time in United States history, labeling pregnancy and drug use as child abuse runs the risk of leading to the permanent destruction of the family. In an ever-growing number of states, any evidence of use is defined as abuse. In Texas and Kentucky, for example, parents are fast tracked to parental termination (Tex. Fam. Code Ann. § 161.001(R); Ky. Rev. Stat. Ann. § 625.090(1)(a)(3)). In Alabama, a report to child welfare based on pregnancy and evidence of drug use is the same as a report to the police with arrest and incarceration likely along with the certainty of family separation (Ala. Code § 26-14-3(a); Martin, 2015). In South Carolina, Oklahoma, and West Virginia, mothers are often arrested for crimes in relationship to their pregnancies and subjected to family separation through child welfare interventions (*Whitner v. State*, 1997; *State v. McKnight*, 2003; Okla. Stat. Ann. tit. 10A, § 1-1-105; *In re A.L.C.M.*, 2017). For some women, their parental rights will be permanently terminated, because the prison sentence exceeds the time period parents are required to be able to take custody of their children under the 1997 Adoption and Safe Families Act.

So, to cut to the chase, only those willing to risk that pregnant women who use drugs will be forbidden from ever having custody of their children should endorse treating pregnancy and drug use as child abuse. The rest of us should not. We should refuse to count pregnant people in relationship to the fertilized eggs, embryos, or fetuses still inside of them as "child

abusers." This not only ensures that women do not lose their civil rights upon becoming pregnant, it also frees public health officials from a straight-jacketed child welfare system that too rarely improves the lives of the families it serves.

Moreover, we should have a public health system in the United States that accords expert professionals the widest degree of discretion to make informed decisions about the patients they serve. Nothing is more threatening to that vision than the universal mandatory reporting requirements in the United States. In every state, mandated reporters are supposed to contact child welfare officials whenever they have reason to believe that a child has been or at risk of being "maltreated" by his or her parent. In this arrangement, all professionals are low level deputies of the child welfare system (and in a number of other states, of the criminal law system) assigned a nondiscretionary task: identify children who have been exposed prenatally to any amount of select substances, and report them as abused or neglected to other professionals authorized to address the matter. Child welfare laws should not impede a health professional's capacity to exercise discretion to treat each patient individually.

We should explore this question from still another angle. If healthcare professionals are persuaded that they should involve child welfare authorities whenever they become aware that a woman has become pregnant and is using selected substances, then what about the science establishing the teratogenic effect for infants and children of alcohol and the extensive, evidence-based research identifying multiple and serious risks of tobacco use during pregnancy? The use of illicit drugs is not different in terms of the risk of harm to fetuses and newborns; indeed, the myth of the "crack baby" has been exposed by the scientific community as racism disguised as medical information (The New York Times Editorial Board, 2018b). Moreover, none of the claims of unique harm from any of the criminalized substances has ever been supported by actual evidence-based medical research. Indeed, the risks, both in terms of types of harm and in terms of number of children exposed, are significantly smaller as compared with tobacco or alcohol use. A false campaign focused on the impact of cocaine use on fetuses led to a public health panic focused almost exclusively on Black women that has never quite abated. This set the precedent for punitive child welfare interventions for all pregnant women, including increasing numbers of low-income, rural, white women who use methamphetamine or opioids (Martin, 2015; The New York Times Editorial Board, 2018b).

None of these matters should be the subject of child welfare, if for no other reason than that it results in pregnant women avoiding treatment, including prenatal care, discourages women from giving birth in approved medical facilities, and encourages some women to have unwanted abortions rather than face loss of custody if they continue to term (Frank, Augustyn, Knight, Pell, & Zuckerman, 2001; Gomez, 1997; Morgan & Zimmer, 1997; Boyd, 1999; Terplan & Wright, 2011). It also too often results in misinformed judges placing women's lives at risk by forbidding them from obtaining methadone or buprenorphine treatment—the gold standard of care for opioid dependency problems.

Ultimately, our focus should be on how to assure people who would benefit from health-related interventions that their efforts will be rewarded with access to that care on a confidential basis. Relying on the child welfare system does the opposite. It also exacerbates class- and race-based inequality of response leading to the ever-growing disproportionate negative impact on poor women and, especially, poor women of color.

Finally, we should understand that this inquiry is neither neutral nor science-based. Our public health system has long accepted that pregnant women and their future children face many risks to their health—some of them related to addictions to alcohol and nicotine. For more than a generation, drinking alcohol during pregnancy has been on the radar of public health professionals as behavior that has a potential for negative impacts on fetuses and newborn children. Smoking is responsible for as many as 30% of infants born with low birth weight. Nicotine affects fetuses' nervous systems and brain development. Yet the most our public health systems have been willing to do about this is to alert the public of the possible risks

associated with ingesting alcohol or tobacco during pregnancy. We've never seriously considered making it a gender specific crime for pregnant women alone to engage in this disfavored behavior.

We cannot engage in the question of this point-counterpoint without asking why we have deliberately chosen to limit our response to these known hazards. For some problems, American society has engaged in a public education program, believing that informing the public is a sufficient response. But for pregnancy and substance use, some propose a very different response. Why the difference? We believe it is cultural, class- and race-infused, conforms to entrenched presumptions and prejudices about drug use, and provides a very convenient distraction from real threats to child and family well-being such as lack of access to health care, housing, and jobs for an increasing number of Americans. Treating drug use in pregnancy as child abuse is a bad idea that disserves the needs of the community, of parents, and of children.

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To Protect and Provide for Children, Prenatal Substance Use Must be Considered Abuse

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The use of drugs and alcohol during pregnancy is harmful to the developing child. When children are born having been exposed to these substances, children's protective services should uniformly substantiate child maltreatment in order to ensure that the child's parent(s) and the child receive the treatment and services necessary to address the child's immediate safety, protect the government's compelling interest in the child's welfare, and ensure the best long-term outcome for the child.

Approximately 4 million babies are born annually in the United States. For decades, public health professionals, medical providers, and advocates for children have expressed concern about children exposed in utero to alcohol, tobacco, and illicit drugs. Because of the complexity of the problem, policy makers have struggled with the proper response.

In addition to ongoing concerns about alcohol and tobacco exposure, a major current focus is the increased exposure to opioids in the midst of the ongoing epidemic. For example, a statewide task force in Massachusetts in 2016 found that the number of neonates with opioid exposure increased from 2.6 per 1000 hospital births in 2004 to 14.7 per 1000 in 2013, an increase of more than 500% (Franca, Mustafa, & McManus, 2016). Between March 1, 2014 and March 31, 2015, the state's Department of Children and Families (DCF) responded to 2265 cases of children born exposed to opioids (Ho & Rovzar, 2017).

These drug exposed newborns and their families require a tremendous amount of public and private resources. The Massachusetts task force found they account for some 10,000 hours per month of DCF employee time, as well as approximately $169 million taxpayer dollars annually (Franca, Mustafa, & McManus, 2016; Ho & Rovzar, 2017). The cost of providing medical care to these babies drives up the cost of health insurance. The costs of ongoing intervention and education dwarf medical costs, and lifetime costs and lost productivity are even higher.

Concern about the impact of prenatal exposure is not new, although the most immediate focus has changed over time. In different eras, concern about substance use by pregnant women has included alcohol (since the early 1900s), marijuana (1930s), cocaine (1980s–1990s), methamphetamine (early 2000s), and opioids (later 2000s). In recent years, research suggests there has again been an upsurge in methamphetamine use.

Impacts of Use

Each substance (e.g., alcohol, cocaine) has both short- and long-term deleterious effects on the child's development. The precise impact of prenatal exposure varies depending on a host of factors such as the mother's general health, nutrition, level of prenatal medical care, timing of use, and the existence of other stressors in the mother's life (e.g., domestic violence) during the pregnancy. A particularly important factor is polysubstance use.

The harms of alcohol to the developing fetus are difficult to overstate. For instance, prenatal exposure

to alcohol is a leading cause of intellectual disability in the United States (Williams & Smith, 2015). Thus, the American Academy of Pediatrics takes the position that no amount of alcohol use during pregnancy is safe (Williams & Smith, 2015). The impacts on the child impose tremendous consequences on the communities in which these children live. Recent research suggests that prenatal alcohol exposure often goes unrecognized or is misdiagnosed (Chasnoff, Wells, & King, 2015).

Smoking tobacco has numerous harmful impacts on the developing fetus. Among these are increased risk of miscarriage, low birth weight, and increased risk of perinatal death. Prenatal exposure to tobacco smoke negatively impacts both cognitive and behavioral functioning, as well as motor and sensory functions.

Children born exposed to marijuana experience sleep disturbances through the first three years of life, increased impulsivity, decreased attention, and lowered IQ. By age 10, these children exhibit increased levels of juvenile delinquency, which continues into adolescence. Prenatal exposure seems particularly to impact the brain's executive functioning (Ross, Graham, Money, & Stanwood, 2015; Day, Leach, & Goldschmidt, 2011; Irner, 2012).

Research finds a correlation between prenatal exposure to cocaine and premature birth, low birth weight, smaller than average head circumference, and generalized growth retardation. As they grow, these children may experience poor self-regulation, increased excitability, and poorer language skills than their non-exposed peers. They may also have difficulty attaching to a primary caregiver. Later in childhood, these children exhibit increased aggression and elevated levels of delinquent behavior. FMRI studies have shown structural abnormalities in their brains (Ross et al., 2015; Shankaran et al., 2007).

Prenatal methamphetamine exposure is associated with premature birth, low birth weight, growth restrictions during gestation, cardiac and cranial anomalies, brain development deficits (e.g., visual-motor integration, verbal-spatial memory, and attention), and small brain size (Ross et al., 2015).

As noted, opioid use has increased dramatically in recent years. Their use during pregnancy is associated with lowered birth weight, small head circumference, smaller brain volume, increased cognitive and motor skills impairment, hyperactivity, and increased difficulties with attention. These children may experience structural brain deficits that are "debilitating and long-lasting" (Ross et al., 2015, p. 68). Infants with opioid exposure can be born opioid dependent and may go through a withdrawal syndrome, which, if untreated, can be life threatening. Today, when healthcare professionals treat opioid addiction, they typically do so with medications that themselves can have harmful side effects, but which have benefits that outweigh these risks. For example, heroin addiction may be treated with methadone. But methadone use during pregnancy may result in a newborn who experiences withdrawal symptoms with a number of the same or similar impacts as heroin use. The rationale for this form of treatment is that both withdrawal and relapse present even greater risks to the developing child.

The medical evidence is clear. Prenatal exposure to alcohol and illicit drugs has long-term, possibly permanent, negative impacts on a child. In addition, the postnatal environment plays a critical role in mitigating or exacerbating these impacts.

Policy Question

Given the harm of prenatal exposure, the question becomes one of public policy. What policies should governments implement to reduce the use of alcohol and drugs by pregnant women? What policies will protect the welfare of prenatally exposed children and provide them the best chance for a positive long-term outcome? What policies best protect the government's paramount interest in child safety and its compelling interest in child well-being? How do we balance the needs of pregnant women with the harm to their children? Whose rights should prevail?

Legal Structure

The law presumes that a parent is fit to raise his or her child without the interference of state authorities. A fit parent has a constitutional right to the care, custody, and control of his or her child, to make choices about parenting. Those choices, however, are not beyond

the authority of government agents. Courts have held for nearly a century that the government has a compelling interest in the welfare of children, which provides the state broad authority to protect children. Every state has exercised that prerogative in the child protection context by establishing a system to identify and respond to child maltreatment. For their part, children have conflicting interests. A child has both a constitutional right to be cared for by his or her parent and a statutory right to benefit from state protection.

The presumption that a parent is fit to raise a child is rebutted by evidence that a parent's actions are harmful to a child, or when the parent fails to provide the child those things necessary to a healthy upbringing (e.g., basic necessities, medical care). This is the basis for child protection laws.

A basic definition of child abuse is the non-accidental infliction of a physical injury upon a child. This definition does not require that a parent intend to harm to the child. According to the Children's Bureau, which administers the federal government's child protection laws, child abuse may include "any action that results in a physical impairment of a child" (Children's Bureau, 2016, p. 2). Yet in most states, using drugs or alcohol while pregnant is not considered child abuse. It should be.

Imagine this scenario: a mother injects her newborn baby with heroin, and that injection results in impairment of the child's functioning. That act would almost certainly be considered child abuse in every state in the country. But if that same mother injects herself with heroin before giving birth, with the same impact on the baby, that is typically not considered child abuse.

Given the overwhelming evidence that prenatal use of alcohol and drugs is harmful to the child, our contention is that state child welfare agencies should call this what it is: child abuse. Doing so allows the state to effectuate its compelling interest in the welfare of the child, and provides the authority to ensure that the mother and/or father receive the necessary addiction treatment. A finding of abuse provides the best opportunity for the child's needs—both medical and non-medical—to be monitored and addressed, and, in some cases, may be the only way for the family to obtain needed services.

Government should take a number of actions to prevent and respond to this form of child abuse. First, it is imperative that pregnant women who are using alcohol, tobacco, or illicit drugs be supported in obtaining treatment. Yet there is a dearth of treatment available. This is particularly true of treatment of the quality and duration necessary to make a meaningful impact on the problem. As a purely financial matter, the government would save tremendous amounts of money in the long-term by providing more money for drug treatment and prevention of drug exposed infants. For example, a baby born experiencing neonatal abstinence syndrome—withdrawal from opioids—will cost about $45,000 more to care for in the immediate post-birth period than a child that is born unexposed (Patrick et al., 2012). Multiply that by many thousands and add to it the long-term costs of addressing the needs outlined above, and the case for the provision of treatment is clear.

A purely voluntary system presents complications. Research and clinical experience demonstrate that pregnant users will often withhold information about their use from healthcare providers and may lie when directly asked (Lester, Andrezzi, & Appiah, 2004; Lester et al., 2001). Thus, identifying the pregnant user may be difficult.

States have experimented with more aggressive responses when a pregnant user is identified. Neither is optimal and each presents other problems. A small number of states allow civil commitment of a pregnant woman for drug treatment if she refuses to enter treatment voluntarily, just as a court may commit a person for mental health treatment. These laws have not been effective because there is a lack of adequate treatment facilities and a lack of funding to support the ordered treatment. Another option is criminal prosecution, which several states allow. The purpose of criminal prosecution is to punish criminal wrongdoing. Such a prosecution may be used to force a woman to seek treatment, but that is not always the case. Prosecution does nothing to protect or provide for the child's needs. No evidence suggests that these laws have led to less drug use during pregnancy or to

fewer drug-exposed babies being born.

Neither of these approaches is optimal. None alone, or in any combination, is likely to solve the problem. To complicate the picture, any—or all—may discourage pregnant women from seeking out prenatal medical care, an outcome that could exacerbate the harm to children. It is therefore imperative to approach this issue as one of child maltreatment, using case investigation and determination for service provision and support, rather than penalty and criminalization.

Unfortunate at it is, children are going to continue to be born having been prenatally exposed to these substances. The federal government, through the Child Abuse Prevention and Treatment Act, now encourages states to enact mandatory reporting laws that cover exposed newborns, but explicitly leaves the definition of child abuse to individual states. Therefore, every state's law and agency policy should make clear that alcohol or drug use during pregnancy is child abuse. Doing so provides the best chance that that child's mother will receive necessary treatment, that the child's needs will be addressed, and that the government's compelling interest in the child's well-being will be protected.

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Response to: How Should We Respond to Pregnancy and Substance Use?

Frank E. Vandervort, JD
Vincent J. Palusci, MD, MS

We begin our reply by asking the reader to consider this typical case taken from Professor Vandervort's current practice. It is one of several similar cases currently being handled by the clinic he works in and similar to many dozens—perhaps hundreds—of cases handled over the past 30 years:

Recently, a baby tested positive for opioids at birth, exhibited symptoms of withdrawal, and spent a week in neonatal intensive care. His mother told medical providers that in addition to cocaine, she used heroin, methadone (unprescribed), alcohol, and cigarettes while pregnant. Her older child, who also tested positive for illicit drugs at birth, was twice removed from her care due to her substance abuse, and twice returned to her custody before being placed permanently with his father. The mother has a 16-year history of polysubstance abuse. She has been convicted seven times of various petty crimes ranging from larceny to drug possession, and at this writing is in jail for domestic violence. The baby's father, a 34-year-old drug addict who began using heroin by age 16, facilitated the mother's drug use during the pregnancy and used drugs with her. He also has an extensive history of petty crime, has never maintained employment, is currently homeless, and has refused to seek legitimate treatment for his diagnosed mental illness despite its availability at public expense.

Professor Guggenheim and Ms. Paltrow first try to link our arguments to the abortion debate and the efforts by some to declare a fetus a "person" entitled to constitutional protections. Later they argue that acknowledging prenatal use of illicit drugs as child abuse is merely an effort to control or oppress women.

We have no quarrel with a woman exercising her right to choose to terminate her pregnancy, a right we support. Nor do we care to oppress or control the lives of women. Once, however, a woman has exercised her constitutional rights to become pregnant and to bring that pregnancy to term, the law imposes duties upon her. Duties to the child to which she gives birth, who also has rights, and duties to the broader community. This is no different from the exercise of any other constitutional right.

In a flash of rhetorical glibness, our counterparts label as "radical" a policy that is anything but. Even in Roe v. Wade, the Supreme Court made clear that late in pregnancy the public has important interests at stake. Congress and the states have long required that prenatal substance abuse result in a CPS referral. While the fathers of these children are often complicit in the mothers' prenatal drug use, the law recognizes that women are uniquely situated in relation to pregnancy.

Next, our counterparts advance the poverty trope, suggesting that child protection is a means of oppressing the poor. Tragically, 20% of America's children are born into poverty. Most women living in poverty do not use illicit drugs during pregnancy. Most pregnant women who live in poverty work at low-paying jobs and do everything within their power to obtain necessary health care and birth

healthy children. The community helps through programs like WIC, Medicaid, Section 8 housing, home visitor programs, SNAP, and TANF.

As the case above illustrates, many pregnant women who use illicit drugs—certainly those whose children must be removed—face a multiplicity of problems in addition to their addiction. These include mental illness, developmental delay, long histories of petty criminality to support their drug habit, domestic violence, and homelessness. Many have multiple children, some previously born drug dependent, some not.

Guggenheim and Paltrow correctly point out the harms of alcohol and nicotine. We agree these substances are dangerous when used during pregnancy. They are frequently used in combination with other drugs and, unfortunately, magnify the harm to the child. Polysubstance abuse also makes it extremely difficult for researchers to determine the precise impact of a particular illicit drug on a newborn child. Of course, from the child's perspective, it doesn't matter that her neurodevelopmental disabilities are caused by heroin alone, heroin in combination with alcohol, or by nicotine and methamphetamine. Still, alcohol and nicotine are legal. Unlike heroin or cocaine, their use does not come with the criminality and violence that so often envelops the illicit drug trade and presents additional risk to children. Prenatal alcohol exposure can be difficult to detect at birth, manifesting only later. Nevertheless, when detected, we believe prenatal alcohol exposure should be considered child abuse. Every bottle of alcohol contains a warning and, in many states, establishments that serve alcohol must post signs warning about the harms of use during pregnancy. Mothers know these harms.

Guggenheim and Paltrow suggest a revisionist history of the "crack baby" epidemic. In fact, research is quite clear that cocaine use during pregnancy is harmful and may be devastating. The fact that most of the children of that period recovered (undoubtedly with residual effects) is true of most child abuse—with treatment, broken bones may heal, but if a parent breaks his or her child's bones, we would still call this child abuse.

Guggenheim and Paltrow argue for a "public health" approach to substance abuse during pregnancy. They write, "only those willing to risk that pregnant women who use drugs will be forbidden from ever having custody of their children should endorse treating pregnancy and drug use as child abuse." The child protection system is, of course, part of the public health response to the unique challenges of child maltreatment, including prenatal exposure. There are some women who use drugs during pregnancy who should never regain custody.

Indeed, there are some for whom the default should be termination of parental rights from the initial legal filing. Fortunately, when CPS becomes involved with drug-exposed newborns, removal occurs in fewer than 15% of cases, typically only after family preservation efforts prove unsuccessful (Rebbe 2019). But the child protection system has limited resources, and in the case above and ones like it, it may not make sense to use them for reunification when termination of parental rights would serve the child's interests. Recognizing such cases as what they are, harm inflicted upon children at the hands of their parent, allows society, through its agents, to preserve and protect the child's right to safely grow and develop for the benefit of the child, the family, and the community.

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Response to: To Protect and Provide for Children, Prenatal Substance Use Must be Considered Abuse

Martin Guggenheim, JD
Lynn Paltrow, JD

From the seemingly objective and scientific sounding statement, "the use of drugs and alcohol during pregnancy is harmful to the developing child," Frank Vandervort and Vincent Palusci recommend that every state's law should make clear that the use of any amount of alcohol or drugs by any woman at any stage of pregnancy is civil child abuse.

To make their case, they cite data that is either misleading or not relevant to the question at hand. For example, they cite a reported increase in the numbers of opioid exposed neonates. This increase is apparently intended to cause alarm and support the need for their proposed response. Exposure to opioids, however, is not the same as harm nor even a diagnosis of Neonatal Abstinence Syndrome. Moreover, it is not evidence of increased misuse or dependency on opioids by pregnant women. Exposure could be from appropriately prescribed pain management. (Are pregnant women whose agonizing pain is relieved by opioids child abusers?) Data from Tennessee and other states indicate that the majority of this increase is from the very positive news that more pregnant women are receiving the gold standard of medical care for opioid dependency: methadone and buprenorphine, both of which will produce a positive drug test in a newborn.

Our counterparts also devote substantial space to what they describe as "clear evidence" of the substantial harm of use of these substances by pregnant woman. We asked Dr. Carl Hart, a professor of psychiatry and psychology at Columbia University and the author or co-author of dozens of peer-reviewed scientific articles in the area of neuropsychopharmacology to comment on this "clear evidence" claim. He explained to us, "There are multiple inappropriate global statements asserting that prenatal substance exposure unequivocally produces harmful effects on the developing child. These conjectures either are not supported by evidence or are over-interpretations of limited data" (C. Hart, personal communication, February 14, 2019). Dr. Hart emphasized that the effects of substance use during pregnancy on children have been grossly overstated, and noted that recent research on alcohol indicates overstatement of risks from moderate prenatal alcohol exposure (McCormack et al., 2018).

Dr. Hart explained "that statistical differences" between exposed and non-exposed children reported in various studies "do not equate to clinically-relevant deficits. That is why it is paramount to determine whether scores are within the normal population range. If researchers are not cognizant of this potential pitfall, we run the risk of inappropriately labeling children as impaired as was the case during the so-called crack baby epidemic." He also noted that FMRI studies, among those Vandervort and Palusci referred to in support of their argument, "cannot

determine structural abnormalities; they only provide a measure of blood flow in brain as the participant completes an activity such as a cognitive task. The available brain-imaging techniques alone are insufficient to determine brain pathology or dysfunction" (C. Hart, personal communication, February 14, 2019; Hart, Marvin, Silver, & Smith, 2011).

Moreover, our counterparts fail to acknowledge, much less address, the social and legal consequences of treating pregnant women as a special class of persons whose legal activities—such as using alcohol, taking certain prescribed medications, or using (as opposed to possessing) certain drugs—may be treated as child abuse. And while the authors do include a paragraph about the harmful impacts of smoking tobacco on the developing fetus, they notably fail to include pregnant cigarette smokers in their list of women who should be treated as child abusers. Their unwillingness to label smoking as child abuse makes manifest that their position is less about science or child well-being than about choices shaped by conscious and unconscious beliefs regarding women, race, class, and privilege.

Insisting that women who use certain substances during pregnancy cause harm, the authors argue that their policy recommendation will reduce the use of alcohol and drugs by pregnant women and will protect children. However, for a decade or more, numerous states have done precisely what these authors call for: define pregnant women who use alcohol or drugs as child abusers. Yet there has not been a single peer reviewed study examining, much less finding, that such laws reduce substance use, protect children, or ensure their safety. Similarly, there is no peer-reviewed research to substantiate the claim that defining pregnant women as child abusers will allow CPS to ensure that any parent will receive the services they need, including appropriate drug dependency treatment (National Advocates for Pregnant Women, 2017).

There is plenty of evidence, however, that state child welfare agencies, including the New Jersey Division of Child Protection and Permanency (Pilkington, 2014; N.J. Div. of Child Prot. & Perm. v. Y.N., 2014), as well as CPS workers and family court judges believe that pregnant women parents who get the gold standard for opioid treatment—methadone and buprenorphine—should be reported and treated as child abusers.

The authors also suggest that newborns prenatally exposed to opioids are a financial drain on society. They neglect to address the fact that part of the costs attributed to these newborns are actually costs that result from hospital policies of removing such newborns from their mothers and putting those newborns in extremely expensive neonatal intensive care units. Such policies contradict peer reviewed research finding that babies do far better if allowed to remain with their mothers (rooming-in) and to breastfeed (Lacaze-Masmonteil & O'Flaherty, 2018). Such practices, though cost-saving and effective, will never become the norm as long as people stigmatize and demonize pregnant women as child abusers (Grossman et al., 2017).

We refuse to erase or demean pregnant women: What a woman who becomes pregnant does in response to her own life, health, and circumstances, is not the same as what she or anyone else does to a child once born. The greatest risk to children is not their own mothers; claiming so is a terrific distraction from the need to join together to address the social, economic, and racial disparities that are.

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Response to: To Protect and Provide for Children, Prenatal Substance Use Must be Considered Abuse

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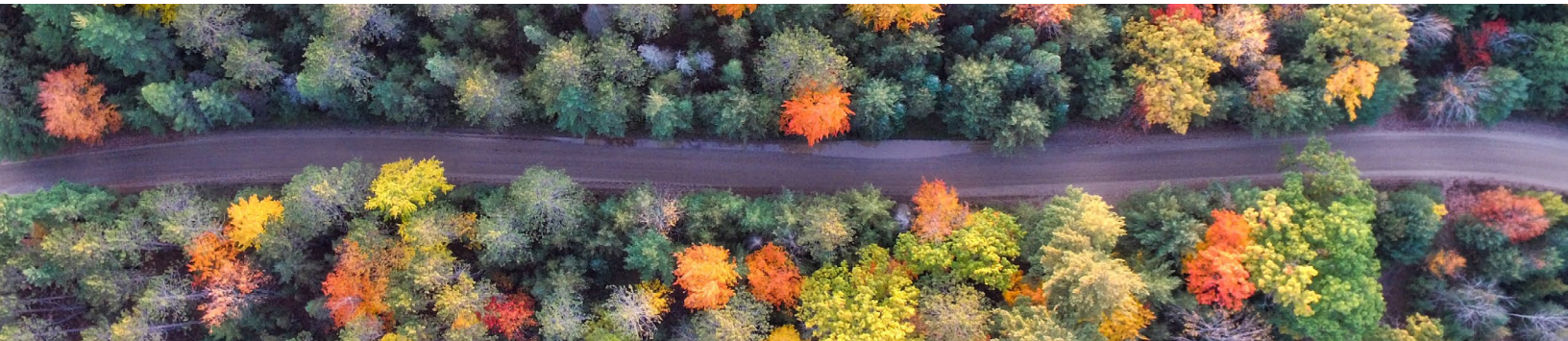

The Indian Child Welfare Act: A Brief Overview to Contextualize Current Controversies

Frank E. Vandervort, JD

Congress passed and the president signed the Indian Child Welfare Act (ICWA) into federal law in 1978. Because the Constitution grants to Congress the authority to make law regarding Indian tribes, ICWA's provisions are mandatory, unlike other federal child welfare legislation such as the Child Abuse Prevention and Treatment Act, which are voluntary. State authorities handling any case involving an "Indian child" must comply with ICWA.

ICWA has two overarching rationales. First, because "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" child welfare agencies and "an alarmingly high percentage of such children are in non-Indian foster and adoptive homes and institutions" (25 U.S.C. § 1901(4)). The second reason was that courts and child welfare agencies "have often failed to recognize the essential tribal relations of Indian people" (25 U.S.C. § 1901(5)).

ICWA's intent is to make it more difficult for state child protection authorities to remove Indian children from their parents' custody. It uses a number of procedural mechanisms to accomplish this goal. On October 4, 2018, in a case brought by three states and seven individuals against the federal government, a judge of the Federal District Court for the Northern District of Texas found ICWA's provisions unconstitutional because they violate the Equal Protection Clause of the Constitution. It also held that the Final Rule implementing the law issued in 2016 is unconstitutional in that it violates the Constitution's non-delegation, which prohibits an executive branch administrative agency from exercising legislative powers that the Constitution reserves to Congress[1]. On appeal, a three-judge panel of the Fifth Circuit Court of Appeals overturned the District Court's decision and found that neither the ICWA nor the 2016 Final Rule implementing it are unconstitutional.

This case, which may be appealed further, has touched off a national debate about the ICWA and whether it best serves the interests of children. What follows is a brief summary of ICWA's most salient procedural requirements.

Definitions

For purposes of this overview of ICWA, two definitions are important. As used in the statute, the term "Indian child" is a term of art and 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

[1] Brackeen v. Zinke, 338 F.Supp 3d 514 (N.D. Tex 2018). In 1979, the Bureau of Indian Affairs within the Department of the Interior issues non-binding Guidelines to help guide state courts' implementation of the ICWA's provisions. The Final Rule issued in 2016 is binding and has the force of law.

biological child of a member of an Indian tribe" (25 U.S.C. § 1903(4)). Note that the law does not apply to all Native American children, but only those who are members or who are eligible for membership in a federally recognized tribe.

An "Indian tribe" means a tribe, band, nation, or other group recognized by the Secretary of the Interior; this may include an Alaska Native Village (25 U.S.C. § 1903(8)).

Jurisdiction

Legally, jurisdiction addresses a court's authority to act in a particular type of case or over a particular litigant. Where an Indian child resides on or is domiciled on a reservation, the tribal court of that reservation has jurisdiction over the case rather than the state court (25 U.S.C. § 1911(a)). Where a child who resides on a reservation, is temporarily off the reservation, a state court may remove the child from parental custody on an emergency basis, if the child's circumstances place him or her at an imminent risk of harm. Once the imminent risk has passed, the court must return custody of the child to the parent (25 U.S.C. § 1922)

Where an Indian child resides off the reservation, a state court must transfer the case to the tribal court unless one or both parents object; the tribe may decline to accept transfer of the case (25 U.S.C. § 1911(b)).

If the case remains in the state court system, the child's tribe "shall have a right to intervene at any point" (25 U.S.C. § 1911(c)). Thus, the child's tribe is a party to any state child protection case involving an Indian child.

Whenever a State court "knows or has reason to know" that an Indian child is involved in a case, the party who has brought the case must notify the child's parent and the child's tribe of the proceedings in writing, which they must provide by registered mail, return receipt requested. If the identity of the child's tribe is unknown, the party bringing the case must notify the Secretary of the Interior (25 U.S.C. § 1912(a)).

Active Efforts Requirement

Before the court may remove an Indian child from parental custody, the state court must make a finding that the petitioner has made "active efforts" to prevent the child's removal, and that those efforts must have proven unsuccessful. Similarly, before a state court may terminate the rights of an Indian child's parents, the party seeking termination must demonstrate that state child protection authorities or another entity has made "active efforts" to reunify the child with his or her parents or Indian custodian (25 U.S.C. § 1912(d)). Generally, "active efforts" require more diligence on the part of state child welfare agencies than the "reasonable efforts" required by federal funding statues.

Evidentiary Requirements

Before the court may remove an Indian child from parental care and place him or her in foster care, the state court must determine that "continued custody of the child by the parent or Indian custodian is likely to result in serious emotional or physical damage to the child" (25 U.S.C. § 1912(e)). That finding must be supported by clear and convincing evidence and must include the testimony of at least one expert witness. By comparison, in most non-Indian child cases, the court may remove a child from parental custody on a much less demanding showing of harm or potential harm, typically probable cause that the child may be at risk. Similarly, in addition, the clear and convincing standard of evidence is typically required to permanently terminate a parent's parental rights (*Santosky v. Kramer,* 1982).

Before a state court may terminate the parental rights of an Indian child's parent, it must find that "continued custody of the child by the parent or Indian custodian is likely to result in serious emotional or physical damage to the child" (25 U.S.C. 1912(f)). The petitioner seeking to terminate the

parent's rights must present the testimony of "expert witnesses" to make the case. The evidence presented must support a finding by the state court that there is proof beyond a reasonable doubt, which is the highest standard of proof known in the law, and which is otherwise used only in criminal cases where a loss of physical liberty through incarceration is at stake.

Voluntary Placement

The ICWA also protects the rights of Indian tribes and parents in certain voluntary proceedings (25 U.S.C. § 1913). Specifically, the law protects the rights of tribes against Indian parents who would seek to adopt a child outside the tribe without the tribe's involvement. That was the case in *Mississippi Band of Choctaw Indians v. Holyfield* (1989). In that case the parents, who resided on their reservation, identified an adoptive home for their twins. When it was time for the twins to be born, the parents traveled off the reservation to the community in which the prospective adoptive parents, who were not Indian people, lived. After the children were born, their parents placed them with the adoptive family. The tribe challenged the adoption as violating its rights. The case made its way to the Supreme Court, which agreed with the tribe and invalidated the adoption because the tribe was not properly notified of the proceedings and was not allowed to intervene. Where, however, a child's Indian parent never had custody of the child, a non-Indian parent with sole custodial rights to the child may place the child for adoption without invoking ICWA's heightened procedural protections (*Adoptive Couple v. Baby Girl*, 2013).

Placement Preferences

When the courts properly remove an Indian child from a parental custody, or place him or her for adoption, the statute establishes a set of placement preferences for the child with which state courts must comply in the absence of good cause not to follow the preferences in a particular case (25 U.S.C. § 1915). If the child is being placed for adoption, the descending order of preference is: 1) placement with a family member; 2) placement with other members of the Indian child's tribe; 3) another Indian family. When courts place children into the foster care system, the descending order of preference is: 1) member of the child's extended family; 2) foster home licensed by the child's tribe; 3) Indian foster home licensed by a non-Indian licensing authority; 4) an institutional setting approved by the child's tribe or operated with an Indian organization. An individual tribe may alter the placement preferences established in the statute.

Conclusion

All professionals who work with children in the child welfare system should be aware of ICWA and its requirements. The procedural protections outlined here, as the following articles illustrate, have been controversial since the ICWA's enactment four decades ago.

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The Indian Child Welfare Act: A Brief Overview to Contextualize Current Controversies

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The Indian Child Welfare Act as the "Gold Standard"

Matthew L.M. Fletcher, JD
Kathryn E. Fort, JD

Daily, ardent observers of the news can follow the horrors of family separations at the United States/Mexico border. The American government takes terrified children who likely do not speak English away from their families. Even on the orders of the courts, the government is slow to reunite the families, cannot reunite the families because of administrative incompetence, or even simply refuses to reunite families (Jordan, 2019). Massive government-funded, privately operated institutions have sprung up around the nation to house these separated children, but there is little or no education, poor health care, and terrible food. Some children have died, and nobody knows how many because the government refuses to allow independent oversight (Jordan, 2018). American Indian people have experienced all this before.

From the latter half of the 19th century until well into the 20th century, the United States forcibly removed Indian children from their homes and moved them into boarding schools for the purpose of destroying their cultural identity as Indians. Government-funded, and often privately-operated, institutions sprung up all over the nation to take in these children. The school administrators cut Indian children's hair, dressed them in servants' attire or military clothes, forced them to engage in manual labor, and punished them for speaking their Native languages. Indian children had no health care, menial (and often violent) education, and terrible food. Many children died, but nobody knows how many because the institutions were accountable to no one (Jacobs, 2014; Fletcher & Singel, 2017).

Eventually, the boarding school program declined. The federal government began requiring state governments to handle Indian child welfare and education during the 1930s. By the 1950s, states had already failed on this front, so the United States piloted the Indian Adoption Project to initiate the removal of Indian children (again) for adoption out of Indian homes and into non-Indian homes. The states enthusiastically participated in removing Indian children from Indian homes. Some state agencies defined the mere act of living on an Indian reservation as neglect, allowing states to remove Indian children at will. Other state agencies defined Indian child-raising practices (which often differ culturally from non-Indian practices) as neglect, again allowing states to remove Indian children at will. Worse, states offered little or no procedural protections for Indian parents and custodians or tribes to challenge the removals. In far too many cases, Indian parents had no right to counsel, no right to be noticed of an emergency removal or termination hearing, no right to participate in removal hearings, and no right to see or challenge the evidence presented against them. One study concluded that 99% of the removals of Indian children were based on neglect (read: poverty) (H.R. Rep. No. 95-1386, 1978). By the middle of the 1970s, the states and certain nonprofit groups had removed 25 to 35% of all Indian children from their homes. (Jacobs, 2014; Fletcher & Singel, 2017; *Mississippi Band of Choctaw Indians v. Holyfield*, 1989)

The Indian Child Welfare Act of 1978 (ICWA) followed. Congress intended the law to slow and hopefully eliminate the discriminatory removal of Indian children from their homes while ensuring

that children in need of protection still received services (25 U.S.C. § 1901). The key element on the anti-discrimination front was jurisdictional. ICWA instructed state courts to transfer Indian child welfare cases arising off-reservation to the tribe's court system unless there was good cause not to do so (such as when there is no tribal justice system available) (25 U.S.C. § 1911(b)). ICWA mandated that state courts dismiss Indian child welfare matters where the Indian child was domiciled on the reservation (25 U.S.C. § 1911(a)).

In large part, however, ICWA is a procedural statute. At the time Congress passed ICWA, state procedural protections for all parents, not just Indian parents, were informal and weak (Columbia Law Review, 1970). ICWA guaranteed notice, the right to counsel, the right to examine the evidence, and the right to be heard in state courts to Indian parents and custodians (25 U.S.C. §§ 1912(a), (b), (c)). To help enforce this right, ICWA required states to notify the relevant tribes and allow the child's tribe to intervene (25 U.S.C. § 1911(c)). ICWA strengthened burdens of proof before an Indian parent's rights to their child(ren) could be terminated, and imposed an "active efforts" duty on states in support of family reunification efforts (25 U.S.C. § 1912(f)). When a state court did have jurisdiction over an Indian child, ICWA required state judges to give a preference to Indian foster families and adoptive families when possible (25 U.S.C. §§ 1915(a), (b)).

Congress did not intend ICWA to be the last word on Indian child welfare. It is a bare minimum of procedural protections for Indian children and parents. States can do better, and more often in recent years, they do. Since the 1970s, most states have heightened their procedural mandates protecting parents to resemble the regime of protections available to Indian parents. Notice, the right to be heard, the right to counsel, and other procedural protections are now common in state child welfare systems. Sadly, especially in poorer areas of America, those rights are paper rights. Too many state courts and agencies make little effort to reunify families in trouble. For whatever reason, political or otherwise, most states still lag behind in providing services to parents needed to promote the reunification of families. The enormous amount of litigation over ICWA's active efforts requirement shows that states only very grudgingly provide those needed services to parents. Many states' child welfare systems, most notably Texas's, are horribly broken. Patrick Higginbotham, a judge on the Fifth Circuit Court of Appeals recently noted that physical and sexual abuse in the Texas foster care system is an "epidemic," and that sexual violence is the "norm" (Higginbotham, p. 291, 2018). ICWA did yeoman work in encouraging states to update their child welfare laws by example, meriting the "gold standard" label that groups such as Casey Family Programs applied to ICWA (Brief of Casey Family Programs, *Adoptive Couple v. Baby Girl*, 2013).

In very meaningful ways, ICWA and state laws are similar. ICWA was designed "*to protect the best interests of Indian children* and to promote the stability and security of Indian tribes" (25 U.S.C. § 1302) (emphasis added). Like state laws, ICWA requires courts to give preferences to family members in foster and permanent placements. Like state laws, ICWA is intended to reunify families whenever possible. State laws and ICWA contain similar, if occasionally differing in terms of degree, procedural rights for parents.

Any significant conflicts between ICWA and state laws are rooted in the long history of discrimination by states (and the federal government) against Indians. For example, Congress learned in the 1970s from a survey of 16 states that 85% of foster and permanent placements of Indian children were in non-Indian families (H.R. Rep. No. 95-1386, 1978). Congress included ICWA's placement preferences favoring Indian families to push back against state discriminatory practices against Indian foster and adoptive families (25 U.S.C. § 1901(4)).

Despite ICWA being a "gold standard," state child welfare practices continue to favor separation over reunification (Raz, 2019). Perhaps because ICWA forces state courts and agencies to slow down the process of separation, and perhaps because some state judges and agencies harbor ideology-based skepticism of the law, compliance with ICWA has always been very low. For example, ICWA requires state courts in their initial emergency removal

hearings to ask whether anyone has any reason to believe that the child removed from their home is an Indian child (25 C.F.R. § 23.11). ICWA kicks in immediately if anyone answers yes. It is fair to say that nationwide, compliance with that requirement is almost nonexistent. Failure to comply in the first instance could lead to serious delays later on; there are nearly 100 appeals a year on the basis of notice because no one asked that question in the beginning (Fort, 2019b). Lack of knowledge of the statute probably is the reason for the lack of compliance, but ignorance is no excuse.

The case of *Oglala Sioux Tribe v. Fleming* (formerly *Van Hunnik*) exemplifies this failure to comply with ICWA. Imagine the terror of losing your children in a legal proceeding lasting one minute in which you had no opportunity to speak. In 2015, a federal court found that the Rapid City, South Dakota state courts routinely approved the emergency taking of American Indian children from their homes, based solely on a state worker's affidavit, usually for months. This happened before the parents could secure a lawyer or review the evidence. Parents had no right to participate in the hearing. Once the child was under the control of the state, state workers dictated terms to Indian parents, often making those parents choose between their culture and their children, or imposing impossible burdens on the parents (*Oglala Sioux Tribe v. Van Hunnik*, 2015). In short, not much has changed in Rapid City since 1978. A federal appellate court vacated the trial court's order on jurisdictional grounds, but the facts of these cases remain untouched. The tribe is seeking review by the United States Supreme Court.

The irony of the challenges to ICWA is that the avoidance of tribal jurisdiction means that Indian children often will not be able to access culturally and tribally appropriate and creative innovations from tribal governments around the country. In her soon to be published casebook on Indian child welfare, Professor Fort surveys these innovations, writing:

> The specificities of tribal welfare codes differ according to tribal population, economic health, historical practices, and geographic locations. Disproportionate harms that many tribal communities have to deal with, such as domestic violence and drug use, also influence the particulars of a tribe's child welfare codes. Tribes have a unique freedom to design child welfare remedies and procedures that can both work to correct current issues and reflect a tribe's customary child rearing practices. Tribes can also ensure rights of children are guaranteed in their constitutions and codes, a practice not found in most states (Fort, 2019a).

Many Indian people are traditional people who do not take well to one-size-fits-all programs recommended by state social workers. State efforts to reunify families often end after one year when federal funding for foster care runs out; tribes can and often do continue those efforts for many years. State laws terminating parental rights legally end relationships between parents and children; some Indian tribes refuse to seek the termination of parental rights at all, or rarely. Tribes are often opting for traditional and culturally appropriate open adoptions rather than complete separation. Tribes, of course, (and the United States) treat child abuse as a criminal matter.

The leading challenge to ICWA comes from the State of Texas, which argues that the law violates federalism principles, and three individual adoptive couples who argue the law violates the equal protection component of the Due Process Clause of the Fifth Amendment (*Brackeen v. Zinke*, 2018). Oral arguments in the appeal took place in March 2019, and the outcome of the case remains in doubt. However, it is sadly ironic that the state of Texas, with its entire child welfare system in shambles, insists that Native children be forced through the state child welfare system rather than comply with ICWA. The tribes involved in the Brackeen case—the Cherokee Nation of Oklahoma, the Oneida Nation of Wisconsin, the Morongo Band of Mission Indians, the Quinault Indian Nation, and the Navajo Nation—have dedicated enormous resources to their child welfare programs, resources states like Texas withhold.

Professor Fletcher recently participated in a conference at the University of Colorado Law School regarding the status of the implementation of the United Nations Declaration of the Rights of Indigenous Peoples (2007). Implementation of most of the Declaration is very difficult because it is not easily enforceable in

the United States. Fletcher's part in this conference was to compare the Declaration to Indian child welfare laws and practices, along with several others. Multiple articles of the Declaration recognize the right of Indigenous peoples to prevent the removal of their children, and the right to raise and protect their children according to their cultures and traditions. We concluded ICWA is not perfect, but if we had to start from scratch in implementing the Declaration, we would be fairly satisfied with ICWA as a great first step. Federal Indian law and policy is often on the wrong side of history, but ICWA is unusually forward looking and progressive. Luckily for Indian people, we have ICWA. Now we just have to implement it properly, and defend it.

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The Indian Child Welfare Act: In the Best Interests of Children?

Kathryn A. Piper, JD, PhD

Congress passed the Indian Child Welfare Act (ICWA) in response to historic abuses by state child welfare and private agencies resulting in massive removals of Indian children from their parents and Indian communities. However, ICWA, as implemented, has too often placed the interests of Indian tribes above the best interests of the child. The case of *In re: J.T.,* 166 Vt. 288, 693 A.2d 675 (1997) provides a case in point.

Based on overwhelming evidence of physical and sexual abuse of J.T. and her sibling, C.T., and their parents' lack of progress over six years of involvement with child protective services (CPS), the State of Vermont filed a petition to terminate parental rights (TPR). The trial court granted the petition and the parents appealed. By then, the children had been living in a pre-adoptive foster home for years. At no point prior to the appeal had any party mentioned that the children might be of Indian ancestry, thereby triggering the Indian Child Welfare Act's (ICWA) requirement to notify the child's Indian tribe. The mother's counsel first raised the issue on appeal based on a reference buried in a 60-page report, admitted into evidence at the TPR hearing, that the father had mentioned to the psychologist that his father was a "full-blooded Mohican." There is no federally recognized Mohican tribe. The Vermont Supreme Court remanded the TPR order to the trial court for further proceedings consistent with ICWA. As the court noted, ICWA is jurisdictional and its applicability may be raised at any point in the proceedings. The court pointed out that Mohican could be an alternative spelling of the Mohegan or Mahican tribes, one of which is a federally recognized Indian tribe (*In re J.T. & C.T.,* 1997).

Justice James Morse filed a dissenting opinion in the J.T. case, noting that, due to the court's ruling, the TPR order "must be indefinitely delayed, along with all hope of a favorable adoption while the matter winds its way through the federal bureaucracy." Pointing to the "fears of the children regarding the uncertainty of their future," Justice Morse concluded: "The real tragedy of today's decision is the open-ended delay to establishing a permanent and stable home for these abused children." Further adding to the uncertainty of the children's placement was the court's order that "[i] f a [federally] recognized tribe does conclude that the children meet ICWA definition [of an Indian child], further proceedings consistent with the requirements of ICWA will be necessary" (*In re J.T.,* 1997, p. 289). These requirements include higher evidentiary standards, which make it more difficult to remove children from dangerous homes or allow them to be adopted (25 U.S.C. § 1912(d)-(f)).

Unfortunately, the court's ruling in the *J.T.* case is not an isolated ruling. ICWA requires the court and state agencies to notify Indian tribes or the Bureau of Indian Affairs (BIA) any time there is "reason to know" that a child who is the subject of a child custody proceeding is an Indian child (25 U.S.C. § 1912(a); Fed. Reg. § 23.107(b)). State courts have ruled that ICWA's notification requirement can be triggered by the mere possibility that the child involved may be of Indian ancestry. Once a court has "reason to know" that a child is an Indian child, then the court is to treat the

child as an Indian child unless and until it determines the child is not an Indian child. (Fed. Reg. 38870, 2016; 25 C.F.R. § 23.107)

The notification provision of ICWA, as applied in some cases, is a clear violation of the equal protection guarantee of the Fifth and Fourteenth Amendments to the U.S. Constitution. Putative Indian children are treated differently solely on the suggestion that they might be of Indian ancestry (Fed. Reg. § 23.107(b)). The United States Supreme Court has warned that "ancestry can be a proxy for race" and therefore must be viewed as a suspect category requiring the use of the "strict scrutiny" standard in reviewing the constitutionality of the classification (*Rice v. Cayetano*, 2000).

Separate and apart from ICWA's notification requirement, constitutional problems arise due to the overinclusive definition of an Indian child, as applied by the courts. The term "Indian child" is defined in 25 U.S.C. §1903(4): The child must be "either (a) a member of an Indian tribe; or (b) eligible for membership in an Indian tribe….and the biological child of a member of an Indian tribe." Because courts have recognized the sovereign right of Indian tribes to define their own membership,[1] courts have broadly defined the term "Indian child" in a way that allows ICWA to cast its net over children whose family may have no affiliation with an Indian tribe. They may have never stepped foot on an Indian reservation. They may never have participated in Indian culture, religious or political practices or identified themselves as Indian in any way. The child may never have been in the custody of the Indian parent (Fed. Reg. 2016, 38868).

Some state courts have attempted to limit ICWA's application to only those situations where the child has had some substantial political or cultural connections to the tribe, creating an "existing Indian family" (EIF) exception to the application of ICWA (*Brackeen v. Zinke*, 2018). However, the most recent regulation implementing ICWA that passed in 2016 (hereinafter, "final rule") restricted the use of this exception, making it clear that there is no exception to ICWA's applicability based on factors relied upon by state courts in creating the EIF exception (Fed. Reg. 2016, 38802). The final rule provides that state courts "may not consider factors such as the participation of the parents or Indian child in Tribal cultural, social, religious, or political activities" (Fed. Reg. 2016, 38868, codified at 25 C.F.R. § 23.103(c)).

When enacting ICWA, Congress recognized the absolute right of Indians to expatriate from their tribe, disenroll from the tribal membership, move away from the reservation and voluntarily assimilate into mainstream American society. Granted, in the past the federal government removed many Indians from their families and tribes in an effort to force Indians to assimilate. However, policies attempting to rectify the effects of these misguided efforts should not be imposed, generations later, on children with no real affiliation to an Indian tribe, at the expense of ensuring safety and timely permanence for them. Removing or terminating parental rights to such children does not result in any loss of Indian language and culture that ICWA is designed to prevent. Application of ICWA requirements in these circumstances does not prevent "harms to a child caused by disconnection with their Tribal communities and culture" if there was no such connection in the first place (Fed. Reg. 2016, 38838).

Moreover, ICWA applies even if the child's Indian parent is 1) not the custodial parent; or 2) not a member of an Indian tribe at the time the child is first placed in out-of-home care (*Michelle M. v. Dept. of Child Safety*, 2017). A non-custodial Indian parent, who was duly notified of the initiation of child protection proceedings, may wait until after the filing of a TPR petition to appear in court and to notify the court of his or her newly acquired membership in an Indian tribe. In such cases the Indian tribe would not have received the requisite notification of the child protection proceedings upon filing of the original petition alleging abuse or neglect, and would be allowed to ask the court to invalidate any prior court actions involving custody of the Indian child (25 U.S.C. §1914).

Courts have repeatedly ruled that only the tribes are arbitrators of their own membership. Since ICWA

[1] See, also, 25 C.F.R. §23.108(a), (b).

is jurisdictional and gives rights to the Indian tribe separate and apart from those of the parent, a parent cannot waive the protections offered to Indian tribes in ICWA (25 U.S.C. § 1911(b) (2012)).
Once the court determines that ICWA applies to a child custody proceeding, the Indian child's tribe has a statutory right to intervene and to request that jurisdiction over the proceeding be transferred to a Tribal court. In most cases, there is no statutorily mandated timeline for the exercise of this right (Fed. Reg. 2016, 38827).

Even if the proceedings remain in state courts, the tribe can invoke ICWA's statutory preferences for the placement of Indian children. There are no restrictions placed on Indian tribes as to the amount of time after first notification of the proceedings within which ICWA-preferred placements must be offered by the tribe. Indeed, in the *Brackeen* (2016) case, the Indian tribe did not notify the court of a potential alternative placement for the child until after the TPR order had been issued, one year after receiving notification of the proceedings and placement with the Brackeens. In any foster care, pre-adoptive, or adoptive placement, ICWA requires that a preference be given, in the absence of good cause to the contrary, to placement with (1) a member of the child's extended family (regardless of whether they are members of an Indian tribe); (2) other members of the Indian child's tribe; or (3) other Indian families (regardless of whether they are members of the child's Indian tribe) (25 U.S.C. §1915(a)-(b); ABA, 2018).

ICWA's first placement preference is for the Indian child to be placed with a member of the child's extended family, regardless of whether or not that family member is a member of an Indian tribe. While placement with kin is recognized as best practice in child welfare under most circumstances, the preference for kin placements is already written into most states' statutes and policies.[2] In order to obtain federal matching funds, states are required to give preference to adult relatives "provided that the relative caregiver meets all relevant State child protection standards" (42 U.S.C. § 671(a)(19), (29)). Recognizing the importance of placement within the child's community, Congress also requires states receiving federal funds to "prioritize placement in close proximity to the parents' home" (42 U.S.C. § 675(5)(a)).

The "best interests of the child" standard remains the polestar in all child custody proceedings in state courts when ICWA does not apply. There are clearly circumstances when placement with extended family members is not in a child's best interests. Before children are placed with kin, most state child welfare policies require agencies to look at such factors as the:

1. Nature of the relationship between the child and the kin caregiver;
2. Geographic proximity to a child's home and community;
3. Child's existing attachments to fictive kin, foster parents, school, and community;
4. Impact of the placement with a kin caregiver on reunification efforts;
5. Kin caregiver's ability to meet the child's needs;
6. Kin caregiver's willingness to be a permanent placement for the child if reunification efforts fail;
7. Timeliness of the kin caregiver's response after

[2] "All but two states give preference to extended family placements." Amici Curiae brief of Casey Family Programs and 30 Child Welfare Organizations in the case of Brackeen v. Zinke, citing Child Welfare Information Gateway, Placement of Children with Relatives 2 (2018) ("Placement with Relatives") (48 states require consideration of "giving preference to relative placements"); Amici curiae briefs available at https://turtletalk.blog/2019/01/17/merits-and-amicus-briefs-filed-in-brackeen-et-al-v-zinke-et-al-yesterday/

[3] In foster and pre-adoptive placements, ICWA does require placement in the least restrictive, most family-like setting within reasonable proximity to the child's home, "taking into account any special needs of the child" (25 U.S.C. §1915(b)). However, the placement preferences apply even if there is no preferred placement meeting these requirements.

[4] In attempting to clarify what constitutes a" placement that does not comply with ICWA," commentary to the final rule suggests that "placing a child in a non-preferred placement would not be a violation of ICWA if the State agency and court followed the statute and applicable rules in making the placement" (Fed. Reg. 2016, 38846). However, it is still not clear what this means in light of the fact that courts, with "reason to know" the child is an Indian child, must act as if ICWA applies "unless and until it is determined that the child is not an Indian child" (Fed. Reg. 2016, 38803; 25 CFR Part 23).

[5] ICWA also requires the testimony of an expert witness in Indian tribal culture and childrearing practices before parental rights to an Indian child can be ordered. Such expert witnesses are hard to find in states like Vermont with no federally recognized tribes and a child welfare system that can hardly afford to fly such witnesses in from other states.

notification;
8. Suitability of the kin caregiver

Consideration of these factors does not necessarily come into play when Indian tribes invoke ICWA's placement preferences. The statute presumes that the preferred placements are in the best interests of the Indian child.[3] However, this presumption is unwarranted in many types of cases.

There is a "good cause" exception to the application of these statutory preferences. However, the final rule prohibits state courts, in making determinations of "good cause," from considering the best interests of the child (81 Fed. Reg. 38847). Moreover, state courts are not allowed to consider "ordinary bonding or attachment that results from time spent in a non-preferred placement that was made in violation of ICWA" (Fed. Reg. §23.132(d), (e))[4].

Too often, parents or Indian tribes do not raise the applicability of ICWA until a petition to TPR has been filed. In some cases, parents will quickly become members of an Indian tribe only after the filing of the TPR petition, hoping to invoke the stricter evidentiary criteria and higher burden of proof ICWA requires before a court can order termination of their parental rights.[5] Moreover, parents and tribes can argue for ICWA protections even if the court met ICWA's notification requirements at the commencement of the child protection proceedings when a child was first placed in foster care. The anguish that these eleventh-hour interventions by a tribe can cause for pre-adoptive foster parents and Indian children is well-illustrated by the three cases in *Brackeen v. Zinke* (2018). See also Deutch (2019), Sandefur (2017), Laird (2016), and Bakeis (1996), all of which cite other cases where placements proposed by tribes would disrupt children's attachments to non-ICWA preferred caregivers.

In their amici curiae brief in the appeal of *Brackeen*, Casey Family Services and 30 other child welfare organizations emphasize the importance of maintaining children's ties to their birth families as well as ties to the other "valuable connections children have with friends, extended family, neighbors, and perhaps most importantly, their school" (Brief of Casey Family Services, *Brackeen v. Zinke*, 2018). They argue that "placement within a child's broader community or network can help ensure a core group of adults whom a child can rely upon for different forms of support, mentoring, and guidance, sometimes called 'relational permanency.'" No child welfare professional would dispute this "gold standard" of child welfare policy. However, the imposition of ICWA's placement preferences can result in the exact opposite of this "gold standard," i.e., placement of the child with strangers far from his or her home and community and, in some cases, away from the only parents the child has ever known.

Congress and the BIA can address concerns listed above by making modifications to ICWA and its regulations. These modifications may solve some of the problems noted above. Regulators can implement these proposed changes without threatening the sovereignty of Indian tribes or allowing for unwarranted removals of Indian children from their tribal communities while at the same time protecting children's basic interests in safe, permanent, and loving homes:

1. Parents must be *enrolled* members of an Indian tribe at the commencement of child custody proceedings when the child is first removed *from the custody of the Indian parent* in order for ICWA to apply.
2. It is important to respect tribal sovereignty and recognize that only Indian tribes can determine their own membership. However, it would not be too burdensome to require Indian tribes to maintain with the BIA a registry of enrolled tribal members.
3. Tribes must be required to intervene and offer ICWA-preferred placements in a timely manner once they have received notification of the child custody proceeding. They should not be allowed to wait until a TPR proceeding has commenced before they seek to invoke the protections of ICWA.
4. ICWA's notification requirement must not be allowed to take effect upon the mere mention of a child's possible Indian ancestry. Without some changes to the way ICWA is applied, ICWA's notification requirement is based on

a racial classification, not a political one, and cannot pass strict scrutiny review under the equal protection and due process clauses of the Fifth and Fourteenth Amendments to the U.S. Constitution.

5. Provided the state agency and court have made sufficient inquiries as to the parents' possible membership in an Indian tribe, as required by the final rule, the failure to comply with ICWA's notification requirement should not result in the invalidation of court orders, a delay in child protection and adoption proceedings, and the disruption of the putative Indian child's foster, pre-adoptive, or adoptive placement.
6. Similarly, in order to demonstrate that the statute is narrowly tailored to achieve its compelling interest in ensuring tribal survival and preserving Indian culture, Congress should limit ICWA's application to only those families meeting the "existing Indian family" (EIF) criteria set forth in state courts that have adopted the EIF exception (Bakeis, 1996; Kennedy, 2003).
7. The statutory preference for placement with an Indian child's extended family should be amended to parallel the existing federal placement preference by adding the same statutory language set forth in 42 U.S.C. § 671(a)(19), (29): Preference should be given to adult relatives "provided that the relative caregiver meets all relevant State child protection standards."
8. ICWA's preference for placement with *any* Indian family should be repealed. This provision is clearly based on a racial classification that bears no rational relationship to the stated goals of ICWA which are specific to the *child's* tribe.

Other legitimate concerns arise from the fact that ICWA imposes "a set of legal disadvantages that make it harder to protect Indian children from abuse, and to find them permanent adoptive homes" (Sandefur, 2017, p. 22). ICWA requires that state courts meet a higher legal standard for the removal of and termination of parental rights to Indian children than states typically require in child protection proceedings involving non-Indian children. The standards governing state court proceedings involving non-Indian children are designed to strike a balance between parents' fundamental right to custody of their children and children's interests in safe, permanent homes that meet their basic needs. Child abuse and neglect are often difficult to prove, occurring as they do behind closed doors. Requiring proof of serious physical damage and "active efforts" (25 U.S.C. § 1912(d)-(f)), is likely to prevent or delay the removal of children from dangerous homes (Sandefur, 2017; Edwards, 2019) because the active efforts requirement in ICWA imposes a greater burden on states than reasonable efforts requirement imposed by federal law in non-ICWA state cases.

Moreover, ICWA requires proof beyond a reasonable doubt before a state may terminate parental rights, an evidentiary standard that the court in *Santosky v. Kramer* (1982) specifically rejected. In *Santosky*, the court noted that evidence in TPR cases is usually not susceptible to proof beyond a reasonable doubt, and such a burden of proof might "erect an unreasonable barrier to state efforts to free permanently neglected children for adoption" (Sandefur, 2017, p. 43). Too many Indian children may be left in abusive homes or foster care limbo because of ICWA's evidentiary standards.[6]

Indian children are U.S. citizens, too, and, as such, they have the same basic need for safe, nurturing, and stable homes as non-Indian children. As Sandefur (2017, p. 16) points out:

> [T]he Act itself defines children as "resources" that should be managed to achieve "the continued existence and integrity of Indian tribes." But Indian children are not resources. They are persons- citizens of the United States- and it is improper for government to treat any individual, or group of citizens defined by their ethnicity, as a means to achieve some third party's ends.

[6] Unfortunately, data to support this supposition are hard to find. There are no data elements in the National Child Abuse and Neglect Data System (NCANDS) or Adoption and Foster Care Analysis and Reporting System (AFCARS) indicating the applicability of ICWA (Children's Bureau, 2018). There is a compelling need to conduct further research into this issue.

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Response to: The Indian Child Welfare Act as the "Gold Standard"

Kathryn A. Piper, JD, PhD

In his article, Matthew Fletcher describes the deplorable history of the United States regarding the massive removal of Indian children from their homes and tribal communities from the 1850s through the 1970s. This response to Fletcher's article is written in full recognition of this legacy of discrimination and cultural genocide by federal and state governments (Sandefur, 2017), and does not contest that ICWA was passed with good intentions to remedy these abuses. Unfortunately, ICWA is now being applied in ways that harm Indian children (Laird, 2016). Too often, the interests of the Indian tribe are allowed to trump the best interests of the child (Deutch, 2019).

Moreover, ICWA does not begin to address the socioeconomic conditions—poverty, substandard housing, substance abuse, domestic violence, mental illness—that lead, in large part, to disproportionate numbers of Indian children being removed from their homes despite the implementation of ICWA (Deutch, 2019; Kennedy, 2003). As Professor and Elder Matthew Fletcher points out, ICWA is primarily a procedural statute. The due process protections offered by ICWA—the rights to notice, to counsel, to be heard, to examine the evidence—are essential guarantees that have been extended to children and parents in most state child protection proceedings. Unfortunately, these protections alone have not been enough to halt the intergenerational transfer of family dysfunction, trauma, and poverty that is prevalent in many disadvantaged families. What is needed is a massive infusion of resources and services for these families. Few advocates for families—whether American Indian or not—would disagree.

About the Author

***Kathryn A. Piper, PhD, JD**, is an attorney who represented children and parents in child protection proceedings for twenty years. She was certified as a Child Welfare Law Specialist by the National Association of Counsel for Children in 2012 and received her doctorate in social policy in 2016.*

Response to: The Indian Child Welfare Act as the "Gold Standard"

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Response to: The Indian Child Welfare Act: In the Best Interests of Children?

Matthew L.M. Fletcher, JD
Kathryn E. Fort, JD

The "solutions" provided in the article by Dr. Kathryn Piper, while well meaning, demonstrate a fundamental misunderstanding of tribes, the federal government, and the application of the Indian Child Welfare Act (ICWA). There is no data available anywhere that demonstrates Native children are kept in foster care longer than non-Native children because of ICWA, that they are harmed more than other non-Native children in foster care due to the heightened standards for removal or termination, or that applying the placement preferences, with their good cause exception, delays placement for Native children. Instead, the limited data we have on foster care generally shows that placing children in foster care has overwhelmingly negative outcomes, that kinship placements tend to help children, and that keeping children connected to their culture helps with creating resiliency factors they need to overcome early childhood trauma (Gallegos & Fort, 2017-2018; Pecora, 2006). ICWA does not hurt children—it's the one law out there trying to address the very issues foster care creates.

ICWA applies in state courts alongside state law. There is no "federal bureaucracy" that cases must wind through. Dr. Piper's solution of ordering the Bureau of Indian Affairs (BIA) to maintain a current list of all the Indian people in the country who are tribal members is fundamentally impractical in that the Bureau is not competent to maintain such a list. From a privacy perspective, a federal list of tribal members is a chilling idea, and would recreate an Orwellian bureaucracy Indian people and Indian tribes fought against generations ago in the assimilation and boarding school eras, ended by the rise of the current tribal self-determination era in the 1970s.

Dr. Piper recommends resuscitating the judicially created "existing Indian family" (EIF) theory of ICWA that the BIA formally repudiated in 2016 (25 C.F.R. § 23.2). That theory enabled non-Native judges to determine whether a family is "Indian enough" for ICWA to apply, focusing on hair and eye color, skin color, cheekbones, and other irrelevant factors (Maillard, 2003). The state court that first adopted this theory, Kansas, forcefully overruled itself in 2009, a decade ago (*In re A.J.S.*, 2009). Other states followed (Erler, 2018). ICWA requires states to determine only whether a child is a tribal member or eligible for membership, not whether a state judge thinks a child looks or acts like an Indian. Tribal citizenship is not an operation of race, it is a fundamentally political determination (*Morton v. Mancari*, 1974).

Finally, we must address the most pernicious talking point of anti-ICWA advocates—that the removal of Native children was a problem of past generations that is now over. No. ICWA has been in existence for one generation—the generation of the authors of this article. In 1977, a church group coerced Fletcher's future mother-in-law (a Michigan tribal citizen) to give up her daughter for adoption to a white couple (Fletcher & Singel, 2017). Indian removal is an ongoing concern. Indian children born prior to 1978 were removed from their families and communities with stunning rapidity and lack of due process. They were often placed with non-Native adoptive couples with no paperwork or information. ICWA tries to address generations, even centuries, of federal and state policies designed to destroy Native families, and

has only been operational for one generation. Every tribe that has spoken on this issue (more than 300 tribes signed the tribal amicus brief in the Brackeen v. Bernhardt litigation) (Brief of Amicus Curiae 325 Federally Recognized Tribes, 2019), and a vast majority of Native people, child welfare organizations and professionals, and child welfare judges all agree that ICWA is a beneficial law designed to provide higher levels of services and protections to children and families. We should be supporting those efforts, not seeking an easy way out of responsibility to those children.

About the Authors

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News of the Organization

Janet Rosenzweig, MS, PhD, MPA, Executive Director

Registration is Now Open for the APSAC 27th Colloquium, June 7-11 in New Orleans

Our 2020 Colloquium theme mirrors our mission: *Strengthening Practice through Knowledge*: Promoting Excellence in Prevention, Investigation and Intervention. APSAC's 27th Colloquium will bring high-quality learning opportunities to child maltreatment researchers and practitioners across experience levels and professions. Learn more and register here and join APSAC at our popular New Orleans venue. Experience with your peers our carefully planned combination of scholarly works during the day and NOLA fun at night!

APSAC's Efforts to Educate Policy Makers Go National

Washington D.C. Congressional briefings and Hill visits regarding the separation of immigrant children and parents at the southern U.S. border and immigrant children in federal custody were held on September 11th and 12th. This was not an officially APSAC sponsored event but grew out of an APSAC Amicus Committee Subcommittee, the Task Force on Immigrant Children in Federal Custody. Professor Warren Binford from Willamette University organized and led the these briefings and Hill visits with the pro bono assistance of Washington D.C. law firm Steptoe and Johnson. APSAC President David Corwin attended as a private citizen, as did APSAC's Policy Center staff. Click here for more information about the effort to help immigrant children and parents in federal custody. Click here to see the "Statement of Concern" developed by the APSAC Task Force.

An APSAC Amicus Brief Filed With the Supreme Court Is Still Changing Lives!

An APSAC Amicus brief is still changing lives!

In 2014, APSAC filed an amicus brief in the Supreme Court of the United States in a case that tested the admissibility of a young child's statements describing physical abuse he had suffered and identifying his mother's partner as the perpetrator of his injuries. The case, *Ohio v. Clark*, followed in a line of cases from the Court's 2004 decision *Crawford v. Washington*. These cases provide the basis for determining the conditions under which hearsay evidence, such as a statement by a very young child to a CPS investigator, can be used in court.

When the Supreme Court decided *Clark* in 2015, it agreed with APSAC that young children's statements describing abuse and identifying the perpetrator met the technical legal condition to be admitted. In doing so, it cited the APSAC brief as authority.

In August of this year, the Michigan Court of Appeals decided a similar case. Relying on *Clark*, the Michigan court held that statements made by two young children to a CPS worker describing abuse perpetrated against them by their mother's boyfriend, which were offered as hearsay in a prosecution of the boyfriend for felony child abuse and murder in relation to his assault of a third child in the home, were admissible. The ruling upheld the prior ruling that admitting the children's statements as hearsay without them testifying did not violate the defendant's right to confront witnesses against him.

In reaching this conclusion, Michigan became at least

the sixth state appellate court to follow the Supreme Court's lead in *Clark* and admit as non-testimonial the hearsay statements of young children, thereby holding perpetrators of child abuse accountable for their crimes. In addition to the six states, two federal appellate courts have also utilized *Clark's* holding to protect children.

This ripple effect demonstrates the influence APSAC's voice can have in important legal matters through our amicus work. If you would like more information about this brief, or the work of the amicus committee, please contact apsac@apsac.org.

Training Opportunities for Forensic Interviewers!

APSAC is offering two advanced institutes for Forensic Interviewers.

APSAC Advanced FI Institute: Enhancing Fundamental Skills for Forensic Interviewers

December 11 and 12, New Orleans

Aimed at experienced interviewers committed to excellence and continuous improvement of fundamental skills, this institute will be a combination of presentations, discussion, and activities focused on lessons from recent research that can inform experienced forensic interviewers on getting the most out of narrative event practice (NEP), how to use NEP to organize and inform questioning strategies later in the interview, and using critical thinking skills to develop more effective and precise approaches to substantive questioning aimed at maximizing reliable details from children.

Presented by: Patti Toth, JD; Kate Homan, MS

Forensic Interviewing Non-English-Speaking Families

January 26, 2020, San Diego

Many challenges face professionals who are conducting a forensic interview with children whose first language is not English. Deciding the language in which to conduct the forensic interview is critical, as is determining when it is necessary to utilize an interpreter. In this institute, participants will learn how to select, train, and utilize an interpreter properly, and how to guide a forensic interview with an interpreter.

Presented by: Maria Rosales-Lambert

For more information contact JCampbell@apsac.org or go to apsac.org and select "Training" from the menu bar.

Coming Soon! The APSAC/New York Foundling Webinar Series

APSAC and the New York Foundling will be launching a series of six free webinars featuring national experts on current topics, beginning on November 20 with Dr. David Finkelhor on "Trends in Childhood Adversities: Has Trauma Been Increasing?" Register for the webinar here. Additional topics will include Religion and Faith, Trauma Focused Cognitive Behavioral Therapy, The Impacts of Corporal Punishment, Psychological Maltreatment, and Special Issues in Forensic Interviewing. Watch the APSAC website for the 2020 dates and times!

APSAC Can Help With Conferences and Training

APSAC makes a great partner for a statewide organization planning a conference. Contact Jim Campbell if you'd like us to bring our national resources to your state or community. APSAC is now certified to offer CEUs in certain disciplines, further adding value to your event. We now also offer back-end support including online registration and credit card processing.

APSAC Is Working to Make Research Findings More Accessible!

We are aware of the high Impact Factor of our journal, *Child Maltreatment* (*CM*), but know that not everyone

has the time or inclination to read entire research articles. In the mental health and healthcare sectors, there is a reported 20-year gap between identification through research of important clinical knowledge and the application of that knowledge into direct practice. To help meet our goal of strengthening practice through knowledge, APSAC is now publishing Research to Practice Briefs to translate research findings published in *CM* into plain language, with an emphasis on implications for practice and policy. All briefs contain an introduction to the issue, a summary of the research questions, a summary of the findings, and the implications for policy and practice. You can find this most useful resource here.

To join our team of brief writers, explore bringing this project to a graduate class, or volunteer to review student briefs, contact BStromer@apsac.org.

Editorial Positions Open with APSAC

APSAC currently has several editorial positions open appropriate for a variety of disciplines and experience levels. Apply today to grow your editorial experience! For details and information on how to apply, click the links below.

- Editor, Child Maltreatment
- Child Maltreatment Editorial Board

New! Resources for the Parents You Serve!

APSAC is proud to offer materials designed to address the key risk factor for child abuse: social norms around corporal punishment. These resources translate the extensive research findings on the harms of spanking and provide parenting tips by age. The experts who serve on the National No Hit Zone Committee of the National Initiative to End Corporal Punishment produced the handouts, which are a series of informational brochures for parents of children explaining the harms and ineffectiveness of corporal punishment and effective alternatives by developmental age. The materials include a pledge to become a no hit home. APSAC is printing and shipping materials so that those who serve families can purchase at less expense than printing in smaller quantities. The PDFs can also be purchased at a minimal fee and be reproduced by the purchaser. See the samples and order them for your community using this link!

Washington Update

Ruth J. Friedman, PhD

Congress Passes Fiscal Year 2020 Budget Deal, Now Appropriations Deals Await

Congress just passed a major budget deal before August recess, which sets the parameters for annual spending bills that will need to be passed by September 30 to prevent a government shutdown. The House has passed 10 of 12 appropriations bills and included some important new funding for child and family services. Head Start and child care programs were increased by over $3 billion. CAPTA also got increases—a $5 million increase to state grants and a $35 million increase for the Community-Based Child Abuse Prevention (CB-CAP) grants. The Senate hasn't passed any appropriations bills yet, and their spending levels are expected to be different than the House. Congress is unlikely to finish their work on appropriations by the end of the fiscal year—September 30—so they will need to pass short-term bills (called "CR's"—Continuing Resolutions) to keep the government open.

House Looks at Conditions at the Border and Child Trauma

In response to the news reports about conditions at the U.S. border, the House of Representatives has highlighted the importance of understanding and responding to child trauma. On July 10, the House Oversight Committee held a hearing entitled "Kids in Cages: Inhumane Treatment at the Border." The hearing examined the impact of the Administration's deterrence policies on the humanitarian crisis at the border, reports of dangerous conditions and medical neglect, and abuse and misconduct at detention facilities. You can find statements and testimony and watch the hearing here. On July 11, the House Oversight Subcommittee on Civil Rights and Civil Liberties held a hearing entitled "Identifying, Preventing, and Treating Childhood Trauma: A Pervasive Public Health Issue that Needs Greater Federal Attention." The Committee heard from trauma survivors, public health experts, and government officials to examine the long-term consequences of childhood trauma and the insufficiency of the federal response to this urgent public health issue. You can find the Chairman's statement and witness testimony and watch the hearing here.

CAPTA Reauthorization Passes the House

On May 20, the House of Representatives passed H.R. 2480, the Stronger Child Abuse Prevention and Treatment Act, by voice vote. You can find Chairman Scott's bill summary here. The bill includes many key reforms that the National Child Abuse Coalition recommended to Congress, including higher funding authorization levels, reforms to prevent child abuse and neglect fatalities, better transparency on state implementation, and a stronger emphasis on prevention. You can find the Committee report here, which includes the bill text as well as the Committee's description of the bill, and you can watch the Committee's consideration of the bill here.

Celebrating the Life of MaryLee Allen

This June, the child welfare community lost an important leader and advocate. MaryLee Allen joined

the Children's Defense Fund more than 40 years ago and worked tirelessly over that time to protect and strengthen outcomes for America's most vulnerable children and families. She was a central voice in every piece of federal child welfare reform over those four decades—always keeping the needs of children front and center. In July, hundreds of friends and colleagues across the country celebrated her life and career. You can find the webstream of that event here.

About the Author

***Ruth Friedman, PhD**, is Executive Director of the National Child Abuse Coalition. She is an independent child and family policy consultant and national expert on early education, child welfare, and juvenile justice. She spent 12 years working for Democratic staff of the U.S. House Committee on Education and the Workforce, helping spearhead early learning, child safety, and anti-poverty initiatives. Dr. Friedman has a doctorate in clinical psychology and a master's degree in public policy. Prior to working for Congress, she was a researcher and therapist, focusing on resiliency in children and families living in high-poverty neighborhoods.*

AF-CBT for Families Experiencing Physical Aggression or Abuse Served by the Mental Health or Child Welfare System: An Effectiveness Trial

Hannah Holbrook, PhD

Original study authors: David J. Kolko, Amy D. Herschell, Barbara L. Baumann, Jonathan A. Hart, and Stephen R. Wisniewski

Introduction

Although treatment studies have investigated the effect of programs to prevent child physical abuse, very few effectiveness studies have explored the effect of treatment in families who have experienced or are at risk of experiencing child physical abuse. Research has found that Alternatives for Families: A Cognitive Behavioral Therapy (AF-CBT) improves child, caregiver, and family functioning compared to routine community services, but researchers have not yet studied this in a larger effectiveness trial in a real-world community setting. In this study, researchers randomly selected community providers within child welfare and mental health systems to receive either six months of AF-CBT training or treatment as usual (TAU).

Research Questions/ Hypotheses

1. Compared to community providers providing TAU, are providers trained in AF-CBT more likely to treat families who present with histories of physical force/aggression and more likely to directly target aggression during treatment?
2. Does AF-CBT show greater improvements than TAU on child, caregiver, and family functioning through a one-year follow-up period?
3. Is AF-CBT associated with a greater reduction in official reports of physical abuse compared to TAU?

Study Sample/Setting

The sample for this study was 10 community agency programs in Pennsylvania contracted to provide services in either the mental health system (MHS) or the child welfare system (CWS). Researchers randomly assigned 182 providers to either the AF-CBT condition or TAU. Providers randomized into the AF-CBT condition received six months of AF-CBT training and began approaching families regarding study participation following the training. Providers invited families receiving services at these agencies to participate in the study if they had a child 5-15 years of age, had weekly child contact, and reported at least one behavior related to physical force in the past 12 months. Researchers excluded families from the study if an adult had severe mental illness, substance abuse, or intellectual limitations. Enrolled families totaled 195 (AF-CBT = 122, TAU = 73). Provider outcome measures included number of families with whom providers used AF-CBT and number and nature of treatment goals attained. Child outcome measures included overall dysfunction, minor assault, and posttraumatic stress. Caregiver outcome measures included positive parenting practices, anger and threats of physical force, physical abuse risk, and minor assault. Additional outcome measures included family dysfunction, family conflict, and official CWS reports of physical and emotional abuse.

Findings

AF-CBT showed many benefits over TAU, though benefits differed by type of service agency.

MHS providers trained in AF-CBT provided more service to families with anger, aggression, and/or abuse during treatment and follow-up than TAU providers. In the CWS, AF-CBT providers provided more service than TAU providers only at six months. In the MHS only, AF-CBT cases showed greater reduction than TAU cases in child problems, physical assault directed to caregivers, family conflict, and abuse risk score. In the child welfare setting only, AF-CBT providers addressed more threats of physical force during treatment than TAU providers. However, caregiver use of threats only decreased (at a trend level) in the MHS. Accordingly, in the child welfare setting, families with AF-CBT providers achieved more of their overall treatment goals and aggression-specific goals at 12 months than families TAU providers. In both mental health and child welfare service systems, AF-CBT cases showed a greater reduction in family dysfunction than TAU cases. AF-CBT cases also showed a significant reduction in the number child physical and emotional abuse reports from baseline to 18 months after baseline, whereas TAU cases did not.

Recommendation

Early evidence shows that families benefit from AF-CBT, and yet prior to this study, researchers had not completed any large-scale effectiveness trials. Although it was necessary to randomize providers to different training conditions for this study, training many providers at the agency or community level is likely more sustainable over time. Existing strengths within systems and the providers who practice in those systems may influence outcomes. MHS providers had more educational training and job stability, whereas CWS providers had more experience with high-risk families and more resources to support intensive interventions. Further research is needed to determine which agency characteristics have the strongest association with outcomes, which will help agencies identify areas for improvement and close existing training gaps. Child welfare and mental health providers may help families access AF-CBT by sponsoring trainings for their own providers and by maintaining referral lists of local AF-CBT-trained professionals.

The results from this study indicate that both mental health and child welfare agencies were able to achieve benefits after a six-month training in AF-CBT, with more benefits evident in mental health settings. Given that the current training model for AF-CBT includes more extensive clinical training, supervision, and technological support than the six-month training implemented in this study, longer or more intensive training in AF-CBT may further strengthen outcomes. The authors suggest that training regarding tailoring goals and treatment strategies to each unique family may be particularly beneficial.

Bottom Line

Many providers are reluctant to engage with families who exhibit a history or risk of physical abuse. AF-CBT training for providers is an effective way to increase service engagement with high-risk families and also shows positive child, caregiver, and family outcomes. Further examination of agency characteristics, provider backgrounds, and family characteristics can deepen our understanding of how to effectively implement evidence-based treatments with high-risk families.

Citation

Kolko, D. J., Herschell, A. D., Baumann, B. L., Hart, J. A., & Wisniewski, S. R. (2018). AF-CBT for families experiencing physical aggression or abuse served by the mental health or child welfare system: An effectiveness trial. *Child Maltreatment, 23*(4). doi:1077559518781068

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Conference Calendar

December

December 11-12, 2019
APSAC Forensic Interview Institute
New Orleans, LA
www.apsac.org/forenic-interview-clinics

January

January 26, 2020
APSAC's Pre-Conference
Advanced Training Institutes
San Diego, CA
www.apsac.org
In Conjunction with the Rady Chadwick Conference

January 25-31, 2020
35th Annual San Diego International Conference on Child and Family Maltreatment
San Diego, CA
www.sandiegoconference.org

March

March 23-26, 2019
36th International Symposium on Child Abuse
Huntsville, AL
https://symposium.nationalcac.org/

March 25-29, 2020
Child Welfare League of America
"Sharing Ideas that Strengthen Families and Engage Communities to Promote Child Well-Being"
Washington, DC
https://www.cwla.org/cwla2020/

April

April 19-22, 2020
Ray E. Helfer Society Annual Meeting
San Diego, CA
https://www.helfersociety.org/

May

May 27-30, 2020
Association of Family and Conciliation Courts 57th Annual Conference
"When a Child Rejects a Parent: Are We Part of the Problem or the Solution?"
New Orleans, LA
https://www.afccnet.org/

June

June 7-11, 2020
APSAC's 27th Colloquium
"Strengthening Practice through Knowledge: Promoting Excellence in Prevention, Investigation, and Intervention"
New Orleans, LA
www.apsac.org

August

August 10-13, 2020
32nd Annual Crimes Against Children Conference
Dallas, TX
http://www.cacconference.org/

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