

Factors and events leading to the passage of the Indian Child Welfare Act

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ABSTRACT (ABSTRACT)

The Indian Child Welfare Act became law on Nov 8, 1978. A study examines the historical and contemporary forces and events that led to the passage of this landmark piece of child welfare legislation.

FULL TEXT

The year was 1968 and members of the Devils Lake Sioux Tribe of North Dakota were concerned about the treatment of American Indian children by local county welfare officials. The children were routinely removed from their families and placed in foster homes and for adoption with non-Indian couples. To make matters worse, all of these actions were carried out without consultation with either tribal officials or the Indian community [U.S. Senate Hearings 1974]. Although many other tribal groups had experienced similar treatment but had not chosen or had felt powerless to respond, the Devils Lake Sioux Community decided to challenge these actions. They requested assistance from the Association on American Indian Affairs (AAIA) in New York, founded in 1923 to defend the rights of American Indians and Alaskan Natives and to promote social, economic, and civic equality for their communities. AAIA's decision to become involved set in motion a chain of events that ultimately resulted in the passage of the Indian Child Welfare Act (ICWA) a decade later. The circumstances and activities that led to the passage of the ICWA can be understood in the context of relevant historical background and contemporary factors, issues, and activities.

The Effect of European Conquest on American Indian Children and Families

American Indian children are "born into two relational systems, a biological family and a kinship network such as a clan or band" [Blanchard & Barsh 1980: 351]. Traditionally, American Indian and Alaskan Native children were "protected in a society in which child-rearing was a community affair, in which behavioral expectations and discipline were clearly structured and in which children were highly valued" [Cross 1986: 285]. The impact of European contact with, and eventual dominance of, American Indians was so profound that it affected every aspect of traditional American Indian society, including child-rearing and family relations. Modes of economic production and exchange, political expression, and social reproduction between the two societies differed so radically from each other that traditional parent-child relationships were thrown into disarray, and the continuity and utility of kinship and other indigenous family systems were destabilized [Coontz 1988].

A Legacy of Policies and Practices Affecting American Indian Children and Families

The actions by county welfare officials in North Dakota that prompted the Devils Lake Sioux to contact AAIA were the latest manifestations of ongoing practices by federal and state governments and private organizations that resulted in the breakup of American Indian families and the placement of their children in various forms of out-of-home care. From the earliest days of the American republic, one of the primary intents of federal Indian policy was to eradicate the "Indianness" in young people. As far back as 1819, the Civilization Fund Act provided education for Indian youths for the purpose of "introducing among them the habits and arts of civilization" [Prucha 1975: 33]. Later, the placement of Indian children in boarding schools served a similar purpose. These schools were a tool of

federal policy designed to sever parent-child relationships and bring about assimilation. Instead of being returned to the family during school vacations, young American Indians were placed in the homes of Caucasians under what was known as the "outing system" [Meriam 1928]. Moreover, when parents would not willingly send their children away, federal government employees would engage in the practice of "kid catching," forcibly taking the children to distant schools [Coolidge 1977].

In contemporary times, certain child welfare policies and practices may not have been overtly assimilationist, but the consequences were the same. In 1958, the Bureau of Indian Affairs (BIA) and the Child Welfare League of America (CWLA) established the Indian Adoption Project (IAP) to provide adoptive placements for American Indian children whose parents were deemed unable to provide a "suitable" home for them. Since few American Indian families actively sought or were encouraged to adopt American Indian children, the IAP emphasized transracial placements [Office of Human Development 1976]. A decade later, approximately 395 Indian children had been adopted by Caucasian parents, often with tribal approval. Over half were living with families in eastern states, far from their people and cultures.

With funding from the U.S. Children's Bureau, Fanshel [1972] showed that the adoptions appeared to meet the young child's physical and emotional needs and that adoptive parents appeared satisfied. Fanshel, however, acknowledged that problems could surface as the children entered adolescence, and he questioned the appropriateness of these placements. Joseph H. Reid, former executive director of CWLA, noted in the foreword to Fanshel's [1972] research that the interest shown by Caucasian families in adopting American Indian children prompted states to promote in-state adoptions of these children by Caucasian families. Although this change kept American Indian adopted children closer to their geographical roots, it still kept them separated from their cultural roots. During the early 1970s the Standing Rock Sioux, Sisseton-Wahpeton Sioux, three affiliated tribes of the Fort Berthold Reservation, and the Oglala Sioux Tribes passed resolutions demanding an end to removal practices, especially when they involved transracial placements [Unger 1977].

A study conducted by AAIA in 1969 and presented at the 1974 U.S. Senate Hearings on Indian Child Welfare showed that in most states with large American Indian populations, roughly 25% to 35% of Indian young people had been separated from their families, and that Indian children were much more likely to experience out-of-home placement than non-Indian children. Differential rates of Indian adoptive placement varied by as much as 19 times the rate for non-Indian adoptions in Washington State to 1.3 times the rate in Arizona; differential rates of foster home placement varied from 15.7 times greater in South Dakota to 2.6 times greater in Arizona. The relatively low differential placement rates for Arizona have to be considered in the context of the large percentage of Indian children placed in boarding schools. Table 1 summarizes the differential rates determined by AAIA's 1969 study. (Table 1 omitted)

Subsequent studies by AAIA in 1974, and again in 1976 at the request of the American Indian Policy Review Commission (AIPRC), found similar disparities in placement rates. A task force submitting a final report to AIPRC also confirmed the large percentage of Indian children in non-Indian family foster care and adoptive placements [Task Force Four 1976]. Extreme poverty, prejudice, discrimination, and cultural misunderstanding were cited by Indian advocates as the reasons for both higher placement rates and transracial placements [Unger 1977].

Policy and Practice Consequences for American Indian Children and Parents

The consequences to both parents and children of breaking up American Indian families were first noted by Meriam et al. [1928] over 60 years ago:

In relieving them [Indians] of the care of their children the government robs them of one of the strongest and most fundamental of the economic motives, thereby keeping them in the state of childhood [p. 576]...The effects of early deprivation of family life are apparent in the children. They too are the victims of an arrested development. [p. 577] Coontz [1988] reminds us that families play critical roles in socializing youngsters in the culture they are born into, defining their eventual place in the social order, and helping shape and mediate all family members' definitions of themselves as individuals. Cumulatively, assimilationist, removal, and transracial placement policies and practices have been extremely damaging to the viability of American Indian and Alaskan Native culture and corrosive to

Indian youngsters' development of strong personal identities. They have also undermined the establishment and maintenance of positive behavioral dynamics and healthy emotional relationships among family members [U.S. Senate Hearings 1974].

Promoting Understanding of Indian Child Welfare Problems and Building Support for Action

AAIA staff members quickly learned that the circumstances in North Dakota were being repeated in other jurisdictions. They initiated public awareness and information activities and also established communication with officials of the U.S. Department of Health, Education and Welfare and the BIA, and with members of Congress, to convey the magnitude and implications of the child removal and placement problems, clarify how destructive these actions were for Indian children and families, and request governmental investigation and responses [U.S. Senate Hearings 1974].

On July 16, 1968, at a press conference at the Overseas Press Club in New York City, AAIA Executive Director William Byler and a delegation of Devils Lake Sioux described the plight of their families and children [U.S. Senate Hearings 1974]. Byler noted in his opening statement that "as sad and as terrible as the conditions are that Indian children must face as they grow up, nothing exceeds the cruelty of being unjustly and unnecessarily removed from their families" [U.S. Senate Hearings 1974: 95].

In addition to the press conference, a mechanism for regular communication of information was deployed. After using its general newsletter for several years to generate and disseminate information, in 1974 AAIA began to publish "Indian Family Defense," a newsletter devoted exclusively to Indian child welfare concerns [Unger 1977]. This sent a steady flow of Indian child welfare information into public policy and professional channels.

Responding to the Problems

Developing Tribal Government Child Welfare Capacity

In one of its initial efforts, AAIA helped the Devils Lake Sioux community establish a tribal child welfare board that would make formal recommendations to the tribal judge on child welfare cases [U.S. Senate Hearings 1974].

Discussions involving AAIA employees, federal agency staff, and tribal leaders considered how Indian child welfare problems could be alleviated by building the capacity of tribal governments to meet the needs of children and families [Center for Social Research and Development 1975; Office of Human Development 1976]. Developing a governmental infrastructure for child welfare was seen as essential because many tribal governments lacked basic elements such as children's codes.

In general, tribal government has endured a long history of federal judicial doctrine, derived from two U.S. Supreme Court decisions that solidified tribal self-governing capacity but limited sovereignty. In *Cherokee Nation v. Georgia* [1831], the Court defined the legal and governmental status of the Cherokee Nation (and subsequently applied it to other tribes) as a "domestic dependent nation." In *Worcester v. Georgia* [1832], the Court established that the U.S. Congress had plenary power over Indian affairs.

Despite the sanctioning of limited sovereignty, the modern expression of tribal government remained relatively dormant for a century until 1934, when the passage of the Wheeler-Howard Act (Indian Reorganization Act) included encouragement for tribes to adopt a constitution and bylaws [Cohen 1982]. With the proliferation of federal programs as a result of the 1960s war on poverty and the Great Society initiatives, tribal governments increasingly administered human service oriented projects [Mannes 1990]. AAIA staff members, federal officials, and advocates explored how tribal governments could build on this process to provide child welfare services.

Encouraging Tribal/State Cooperation

Some federal bureaucrats viewed the resolution of Indian child welfare problems as not just contingent on developing a tribal infrastructure, but also dependent on facilitating an effective intergovernmental relationship between each state and the federally recognized American Indian or Alaskan Native tribal government(s) residing within its boundaries. In the early 1970s, a number of different entities were providing services to Indian children and families, and the mix of providers varied greatly from one locale to another [Office of Human Development 1976]. State and county governments, federal agencies such as the BIA and the Indian Health Service, private agencies, and certain tribes were all serving Indian people living either on reservations or in urban areas. The

number of players complicated the possibility of cooperation.

In 1970, the federal Social and Rehabilitative Services Agency (SRS), the organizational unit within which the U.S. Children's Bureau was housed at the time, instructed state child welfare agencies to follow the directives contained in tribal court orders that involved Indian children on reservations. It also reaffirmed the SRS position that federal child welfare financial assistance programs should be administered statewide and include reservations [Office of Human Development 1976].

Jurisdictional and Legal Complexities

Implementation of the 1970 SRS instruction was stymied for several reasons. States lacked respect for tribal court decisions. Although Indian child welfare cases could be brought before a tribal court, the range of decision options available to the tribal judge was quite limited. Many tribal governments had little or no capacity to actually deliver basic child welfare services, and tribal courts were often dependent on state-based services. State courts and welfare departments were unwilling to honor or give "full faith and credit" to tribal court orders because they saw tribal governments as lacking the ability to maintain effective "separation of powers" [Office of Human Development 1976]. For example, state officials believed that tribal administrative processes, judicial deliberations, and decision-making were not structurally insulated from legislative and political practices. The potential intrusion of politics into tribal judges' decisions was noted as a major impediment to impartiality. With most tribal judges lacking legal training and few tribal judicial codes addressing children's issues, tribal court actions lacked legitimacy in the eyes of state officials. Consequently, tribal court orders were mostly ignored and tribal courts were often not informed by the state/county agency of cases where they ought to have jurisdiction, or when placement decisions and actions affecting Indian children and families were made by state courts. Also, states' inability to tax Indian lands and income made them resist covering the costs of providing any social services on federally recognized tribes' reservations located within their borders [Office of Human Development 1976].

Disagreements over "spheres of authority" in delivering child welfare services and challenges by states regarding the licensing of Indian family foster homes, group homes, and institutions on reservations thwarted many initial tribal responses to Indian families and children [Office of Human Development 1976]. Rulings by attorneys general in Arizona set forth a legal rationale against providing child welfare services on reservations based on the inherent sovereignty of tribal governments [Center for Social Research and Development 1975]. In 1959 and 1970, the attorneys general determined that because of tribal sovereignty the state had no authority to directly license reservation-based child welfare entities or license an intermediary such as a tribal council or the BIA to actually provide services on a reservation [Center for Social Research and Development 1975].

The passage of Public Law 83-280 created the basis for additional legal complexities in North Dakota. Passed by Congress in 1953, the law reduced the range of tribal government sovereignty by permitting certain states to assume criminal and civil jurisdiction over reservations contained within their boundaries [Cohen 1982]. In 1963, when North Dakota assumed civil jurisdiction under P.L. 83-280, it determined that its authority could be applied only with tribal or individual Indian consent. Following this limited interpretation of state authority in response to the federal law, the North Dakota Supreme Court decided in 1963 that there was no basis for a positive ruling on a petition to terminate the parental rights of Indian parents living on the reservation, since the parents had not consented to the state's assumption of jurisdiction [Center for Social Research and Development 1975].

Certain states' use of judicial doctrine and legal interpretations to justify not serving Indian people, and evidence suggesting federally funded child welfare services were unavailable to reservation Indians on the same basis as they were to other state citizens, raised questions as to whether the states were in conflict with prevailing federal statutes and regulations and were engaged in unconstitutional practices. Although Title IV-A (involving financial assistance and AFDC-foster care) appeared to support services being provided uniformly throughout a state, Title IV-B (child welfare services) and Title XX (social services) seemed to permit some degree of variation of programs and services [Center for Social Research and Development 1975]. Prevailing case law, based on the principle of equal protection, made it clear that Indian people were fully entitled to these benefits [Center for Social Research and Development 1975].

In *Dandridge v. Williams* [1970], the U.S. Supreme Court determined that state classifications among people for social welfare based on nationality or race are "inherently suspect" and must pass a "strict scrutiny" test that demonstrates that the classification is essential to meeting a compelling state interest. The key legal issue became: Did a state's refusal to provide services and to license child welfare agencies or foster homes on reservations, based on arguments such as tribal sovereignty and the failure of Indians to pay state taxes, demonstrate a "compelling state interest" [Office of Human Development 1976]?

Determining that little progress had been made on its 1970 Program Instruction, SRS produced another in late 1974. This instruction required states to collaborate with tribes when reservation children were involved, and called on the states to develop special licensing standards for Indian foster homes and day care facilities [Office of Human Development 1976]. Lacking enforcement mechanisms, these federal policy statements had little impact. The ineffectiveness of these executive agency actions probably fueled greater interest in and support for a legislative response.

Legislative Action

Setting the Stage

Senate oversight hearings to address Indian child placement matters were eventually held during the Second Session of the 93rd Congress on April 8th and 9th of 1974 [U.S. Senate Hearings 1974]. Senator James Abourezk from South Dakota, Chairman of the Subcommittee on Indian Affairs, ran the hearings and served as patron. American Indian witnesses recounted their personal stories. The following exchange between Margaret Townsend of Fallon, Nevada, whose children were removed and placed in a family foster home, and Senator Abourezk, was indicative of the tone and substance of personal accounts.

Senator Abourezk: Is there anything else that you would like to say to the committee?

Mrs. Townsend: I think that most Indian women are overwhelmed by people who think their children should be taken away from them and they don't really stand up to anybody and they don't have anybody to tell.

Senator Abourezk: Does this happen to a lot of other Indian people in your community?

Mrs. Townsend: Oh, yes; it does. They just think it is the right thing for the welfare to be doing and they just never say or have anything to say. They just let them do whatever they want to, let them adopt them out or whatever.

[U.S. Senate Hearings 1974: 43-44]

The themes raised by Margaret Townsend were echoed by other witnesses. Cheryl DeCoteau of Sisseton, South Dakota, explained how she was asked by the state welfare staff to place her unborn child for adoption. The story of Don James Morrison, relayed by Mel Sampson, conveyed the anguish of an Indian youth living with Caucasian adoptive parents. Betty Jack, who chaired the Board of Directors of the American Indian Child Development Program in Wisconsin, told the committee about how her children were removed by state authorities. Mental health professionals gave detailed testimony on the psychological and social toll associated with extensive out-of-home placements, and the cumulative impact on tribal culture [U.S. Senate Hearings 1974].

Passage of the Legislation

Under the direction of staff attorney Bertram Hirsch, AAIA had produced a set of recommendations for Congress that were entered into the 1974 Senate Hearing records. Blanchard [1977] noted that Senator Abourezk asked AAIA to prepare an Indian child welfare bill, which he then introduced on August 27, 1976 as S. 3777, the Indian Child Welfare Act of 1976. The bill was referred by the Senate Committee on Interior and Insular Affairs to the Subcommittee on Indian Affairs, where it died. On April 1, 1977, Senator Abourezk resurrected and reintroduced essentially the original bill as S. 1214 [U.S. Senate Report 1977]. Public hearings were held in August, 1977, and the testimony of witnesses affirmed that the problems detailed during the 1974 hearing remained unsolved.

Opposition to S. 1214 was raised by members of the Church of Jesus Christ of Latter-Day Saints (LDS) and the federal Departments of the Interior and of Health, Education and Welfare [U.S. Senate Report 1977]. The LDS Church was concerned that certain portions of the private placement section of the bill would eliminate their LDS Indian Student Placement Program. The program placed LDS Indian children between the ages of eight and 18 for at least one school year with an Anglo-Mormon family to receive "educational, social, and leadership opportunities

that were lacking on the reservation" [U.S. Senate Report 1977: 200]. A number of witnesses, including American Indian members of the LDS Church who lived with these families, attested to the virtues of the program. This testimony was in marked contrast to a state-of-the-field study of Indian child welfare conducted during 1975 and 1976, which questioned the benefit of Indian student participation in the LDS program [Office of Human Development 1976].

The federal departments believed that S. 1214 was not needed because another national child welfare bill, S. 1928 (which after many changes ultimately became the Adoption Assistance and Child Welfare Act of 1980), then being proposed by the Carter administration, addressed the same matters. The Senate committee disagreed with the federal agencies' positions, noting that S. 1928 did not support funds for Indian tribes to operate child welfare programs, and failed to recognize the sovereignty of tribal courts, jurisdictional problems, and placement preferences [U.S. Senate Report 1977].

A substitute bill incorporating a number of amendments was reported to the full Senate on November 3, 1977, and was passed by the Senate the next day. In the House, S. 1214 was referred to the Committee on Interior and Insular Affairs, and its Subcommittee on Indian Affairs held hearings on the bill. In addition to written comments and testimony regarding S. 1214 presented at the House hearings, a set of recommendations had been provided by AIPRC's Task Force Four, which had examined Indian child placement issues. S. 1214 was amended and a substitute bill was introduced by Representative Morris Udall of Arizona as H.R. 12533 [U.S. House of Representatives Report 1978].

Several major differences between the Senate and House versions of the Indian child welfare bill are worth noting. The House bill affirmed Congressional authority over Indian child welfare in response to questions of constitutionality raised by the U.S. Department of Justice. The underlying principle of H.R. 12533 was based on what was in "the best interest of the Indian child," even though the principle was acknowledged as being vague. The House version replaced the ambiguous term and concept of "placement" with "child custody placement" and delineated four specific legal proceedings constituting a "child custody placement": foster care placement; parental rights termination; preadoptive placement; and adoptive placement [U.S. House of Representatives Report 1978].

Representative Ron Marlenee of Montana was concerned that H.R. 12533 had not been sufficiently circulated to states, juvenile judges, public and private welfare agencies, and Indian tribes, and that as a result, the proposed legislation had not been subjected to thorough review and analysis [U.S. House of Representatives Report 1978]. Also, according to Representative Marlenee, groups such as the Montana Department of Social and Rehabilitation Services and the National Council of State Public Welfare Administrators, who had seen the bill and had questions about funding and jurisdiction, had not been given sufficient time to air their questions. This dissenting view had minimal effect on the movement of the proposed statute, and on June 21, 1978, the full House Committee on Interior and Insular Affairs chose to mark up H.R. 12533 instead of S. 1214 [U.S. House of Representatives Report 1978]. On October 14, 1978 the House passed H.R. 12533, and on the following day the Senate accepted the House version.

The Indian Child Welfare Act (ICWA) became Public Law 95-608 on November 8, 1978. Title I of the legislation affirmed tribal governments' authority to assume jurisdiction over child custody placement proceedings involving reservation children and also required state courts to transfer jurisdiction for Indian children living off-reservation to tribal courts. Title II appropriated funds to the Bureau of Indian Affairs for grants to tribal governments and off-reservation Indian organizations for child welfare programs that would protect children, serve families, and preserve tribal culture. The other two titles set forth record-keeping and information procedures and called for a study to determine how the lack of local day schools might be contributing to the breakup of Indian families [U.S. House of Representatives Report 1978].

A Postscript to the Indian Child Welfare Act's Passage

According to Kessel and Robbins [1984], the ICWA generated controversy and misunderstanding within the social service community that undermined its intended impact. Fischler [1980] argued that the passage of the ICWA

jeopardized American Indian children because placement priorities emphasized parental and tribal rights at the expense of child protection; for example, a high standard of evidence was required to document harm to a child. American Indians and Alaskan Natives saw things differently. For Blanchard and Barsh [1980], the ICWA had addressed the fundamental issue of cultural preservation.

With enactment of the Indian Child Welfare Act, the federal government responded affirmatively to the petition of American Indians that their way of life be allowed to continue. At issue is not tribal right versus individual right, but rather the right of a people to maintain a culture that has provided them meaning in this world from the beginning of time. [p. 354]

In 1985, the Administration for Children, Youth and Families and the BIA funded a national study of Indian child welfare as affected by the implementation of the ICWA [Plantz et al. 1988]. The study revealed that public agencies and state courts in many jurisdictions were complying with the ICWA's various requirements. Several states had passed complementary state Indian child welfare legislation and had negotiated jurisdictional and service agreements with tribes. Public agencies appeared to be providing Indian children with the permanency and case review safeguards spelled out in the Adoption Assistance and Child Welfare Act of 1980. But public agencies were cited for still not providing Indian placements for many Indian children in out-of-home care, and the federal government was faulted for its limited efforts to convey performance standards and monitor and enforce compliance.

The study also identified a continuing excessive placement rate for American Indian and Alaskan Native children. Data indicated that placements for American Indian children had increased about 25% since passage of the ICWA, and that tribes administering child welfare programs seemed to be the major contributors to the increasing flow of Indian children into out-of-home care. Mannes [1993] suggests this is, in part, a result of the first generation of post-ICWA programs emphasizing culturally appropriate placements at the expense of placement prevention and/or family preservation efforts. Nevertheless, a review of case records of several tribes indicated that they were following good standards of casework practice, and that principles of permanency were being adhered to [Plantz et al. 1988].

In regard to the act itself, Title II has shifted during the past several years from funding discretionary grants to distributing funds on a formula basis. Tribes may not receive a level of support commensurate with their degree of need, but they no longer have to compete with one another, and have overcome the problem of having child welfare programs available one year and gone the next.

Societal identification and conceptualization of child welfare problems and the sanctioning of specific child welfare responses change over time, and these shifts can have important implications for Indian child welfare. One can only speculate what the impact of apparently eroding public opposition to transracial adoptions and the recently passed Multiethnic Placement Act (P.L. 103-382) might have on a future reauthorization of the ICWA. As Gordon [1988] asserts, an ever-changing mix of social moods, economic forces, legislative enactments, and political movements determines the answers to questions such as: What is labeled as unacceptable family behavior? What aspects of family problems are to be addressed? and What will be the form and substance of society's interventions? The responses to American Indian and Alaskan Native children and families by the second generation of post-ICWA programs will be largely shaped by how these questions are answered.

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