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193505

"Wellness - An Indigenous Perspective"

By: Gene D. Thin Elk (Lakota)

Wellness is the harmonious interaction of our whole being through the spiritual and physical realm. We Indigenous Peoples must realize the gift of life from the Creator, the opportunity of creation through free will and privilege to be a relative on mother earth. We return this acknowledgment through acts of humility and sacrifice. Giving all of this back to the Creator. This completes our circle of existence.

1. Connection with the Creator, lifegiver;
2. Knowingness of the creative process in nonphysical form, life-force;
3. Knowingness of the interconnection of all life; (Mitakuye)
4. Knowingness of the interdependence of all of life; (Oysin)
5. Knowing and understanding the appropriate usage of our native tongue, our language is a physical exercise of our spiritual knowingness and connection;
6. Knowing that our spirit is our true essence;
7. Knowing our cultural values and traditions are intergenerational connection to and from the creator; (Wakan)
8. Knowing that this life force is always constant and our human conception and cognition of this life force is interpreted and reinterpreted through earth experiences;
9. Knowing and understand our relationships and addressing each relative in appropriateness and respect;
10. Knowing our position within our societies, the purpose of each society and how each society relates to the larger society;
11. Knowing our position in the intergenerational relationships, to use the appropriate language, tone of voice, infliction of words and use of the appropriate word(s);
12. Knowing that there are things of which we need to know and equally important, there are things of which we must grow into, earn or become in harmony with and there are things we need not know;
13. Knowing that sacred instruments, indigenous concepts, spiritual teachings are to be shared only in appropriate settings, matters and ceremonies. They must never be used out of context or for personal benefit.
14. Knowing the responsibility and privilege of each stage of development, learning how to be a child, how to be a youth, a young adult and an elder;
15. Knowing that you belong to this universe, this earth, your family, your People and they are a part of the whole of life;
16. Knowing in which way you are related and fulfilling the relationship with respect and honor;
17. Understand that as a individual keeping the constant reciprocal effort back to the Lifegiver, Creator, through peace and gratitude which lead to a life of humility;
18. Committing to treat oneself as a conduit of this relationship with the Lifegiver, Creator, for others;
19. Having respect and honor for all relations, to their appropriate degree interact with them to enhance the creative flow in the universe and personal experiences;
20. Accept that all events are and our action or reaction is a learning for discernment in the spirit, mental, physical and emotional understanding;
21. Knowing that this earth time is temporal, iciye wicasa, means, existing in the domains of the physical laws within the spirit laws;

CONCEPTS ORDER FORM

NATIVE AMERICAN ALCOHOL AND SUBSTANCE ABUSE VIDEO TAPE SERIES

Check ( ) tapes to be ordered

DEVELOPMENTAL DYNAMICS WITHIN CHEMICALLY DEPENDENT FAMILIES

_____200: THE SACRED TREE OF LIFE

_____200A: Pre-PARA ALCOHOL SYNDROME-IMPRINT STAGE (BIRTH TO 4 YEARS)

_____200B: Pre-PARA ALCOHOL SYNDROME-IMPRINT STAGE (4 YEARS TO 9 YEARS)

_____200C: PARA ALCOHOL SYNDROME-IMPACT STAGE III (9 YEARS TO 14 YEARS)

_____200D: PARA ALCOHOL SYNDROME-IMPACT STAGE IV (14 YEARS TO 18 YEARS)

_____201: PSYCHO-DRAMA "TWO HOURS AND TWO BEERS"

_____202: NATURAL VS. UNNATURAL WORLD WITHIN NATIVE AMERICAN CULTURE

_____203: RED ROAD APPROACH IN CHEMICAL DEPENDENCY HABILITATION

_____204: INTRODUCTION TO NATIVE AMERICAN PSYCHE IN THERAPY SETTING

_____205: FOUR THERAPY TARGETS WITHIN

_____206: SACRED SEVENTH DIRECTION

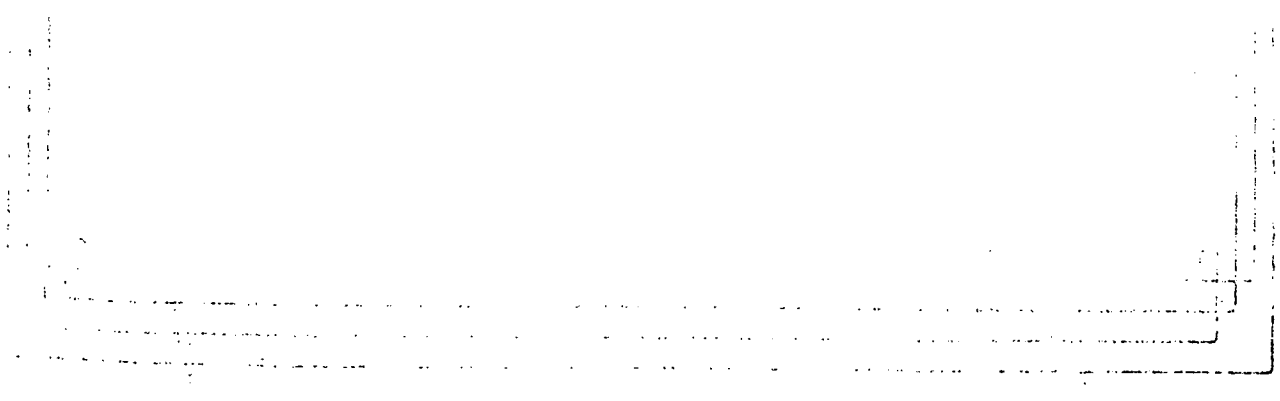
_____207: HOW TO CONDUCT "HEALING THROUGH FEELING" Groups

All tapes are $150.00 per tape. They range from 30 minutes to 60 minutes depending upon the subject.

SALE

Total cost of the entire set as of 01-99 is $1,500.00.

Checks Payable to: Medicine Wheel Inc.
Box 501
Vermillion, SD 57069



Child Abuse Investigations

Reporting Requirements

PUBLIC LAW 101-630, Title IV

Sec. 404 REPORTING PROCEDURES

(a) Any person who knows or has reasonable suspicion that a child was abused or that actions may result in the abuse of a child in Indian country...shall report such abuse or actions to the local child protection services or local law enforcement agency.

(d) Any person making such a report based on their reasonable belief and in good faith shall be immune from civil or criminal liability for making that report.

Indian Child Protection Act
Reporting Procedures
Codified As 18 USC 1169

Reporters

--Physicians, surgeons, dentists, podiatrists, chiropractors, nurses, dental hygienists, optometrists, medical examiners, EMTs, paramedics, or health care providers

--Teachers, school counselors, instructional aides, teacher's assistants, or bus drivers employed by any tribal, Federal, public or private school

-- Administrative officers, supervisors of child welfare and attendance, or truancy officers of any tribal, Federal, public or private school

--Child care workers, headstart teachers, public assistance workers, or workers in a group home or residential day care facility, or social workers

--Psychiatrists, psychologists or psychological assistants

--Licensed or unlicensed marriage, family or child counselors

--Persons employed in the mental health profession

--Law enforcement officers, probation officers, workers in juvenile rehabilitation or detention facilities, or persons employed in a public agency and responsible for enforcement of statues and judicial orders

Crime Control Act of 1990
Reporters

Covered professionals are similar to those outlined in 101-630 with the addition of:

--Hospital personnel and administrators

--Osteopaths

--Pharmacists

--Ambulance drivers

--Undertakers

--Coroners

--Medical examiners

--Alcohol and drug treatment personnel

--Foster parents

--Commercial film and photo processors

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What Is Non Reporting?

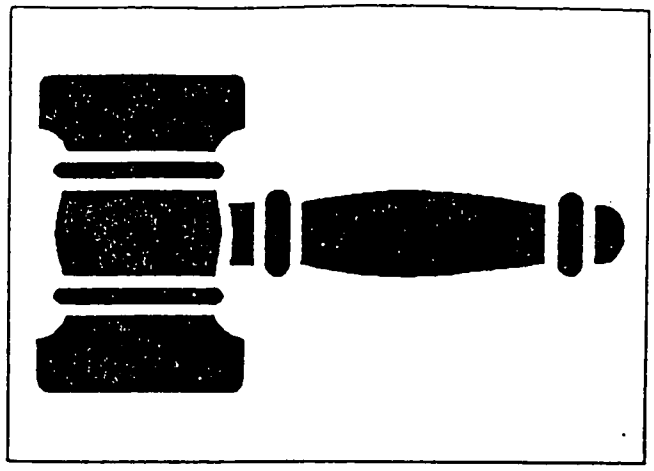
Any of the "Reporters" previously listed, who know, or have reasonable suspicion that:

--A child was abused in Indian country, or

--Actions are being taken, or are going to be taken, that would reasonably be expected to result in abuse of a child in Indian country

AND

--Fails to immediately report such abuse or actions to the local child protective services agency, or local law enforcement agency



Penalties For Non-Reporting

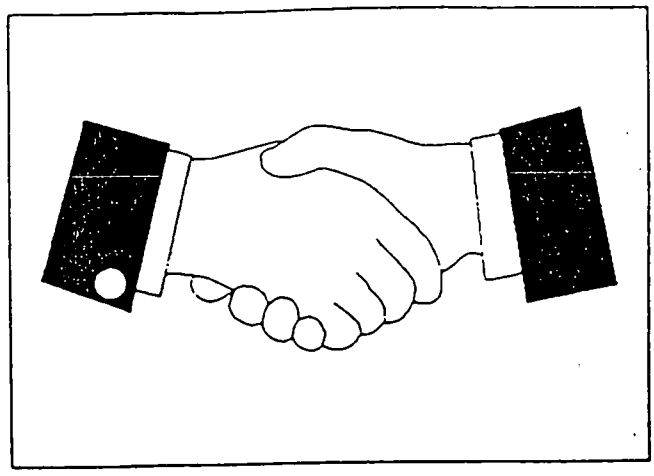
—Any person who fails to report shall be fined not more than $5,000 or imprisoned for not more than 6 months, or both

—Any person who supervises, or has authority over, one of the defined "Reporters"

AND

—Inhibits or prevents that person from making the report

SHALL BE FINED NOT MORE THAN $5,000 OR IMPRISONED FOR NOT MORE THAN 6 MONTHS OR BOTH



Cross Reporting Requirements

When a local law enforcement agency or local child protective services agency receives an initial report from any person regarding

--The abuse of a child in Indian country

--Or actions that would reasonably be expected to result in abuse of a child in Indian country

The receiving agency shall immediately notify appropriate officials of the other agency of such a report. When prepared, a copy of the written report will be furnished to the other agency

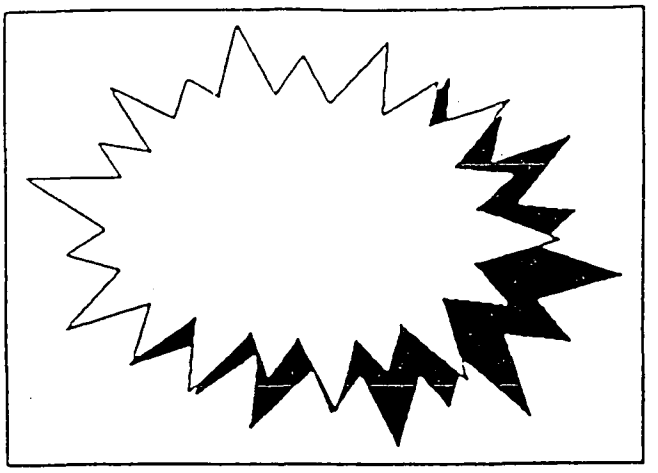
Where a report of abuse involves an Indian child, or where the alleged abuser is an Indian, and the preliminary inquiry indicates a criminal violation has occurred, the local law enforcement agency shall immediately report such occurrence to the FBI

Crime Control Act of 1990

Criminal Penalty for Failure to Report

Chapter 110 of Title 18, U.S. Code, is amended by adding

2258. Failure to report child abuse A person who, while engaged in a professional capacity or activity described in subsection (b) of section 226 of the Victims of Child Abuse Act of 1990 on Federal land or in a federally operated (or contracted) facility, learns of facts that give reason to suspect that a child has suffered an incident of child abuse and fails to make a timely report as required by subsection (a) of that section, shall be guilty of a Class B misdemeanor

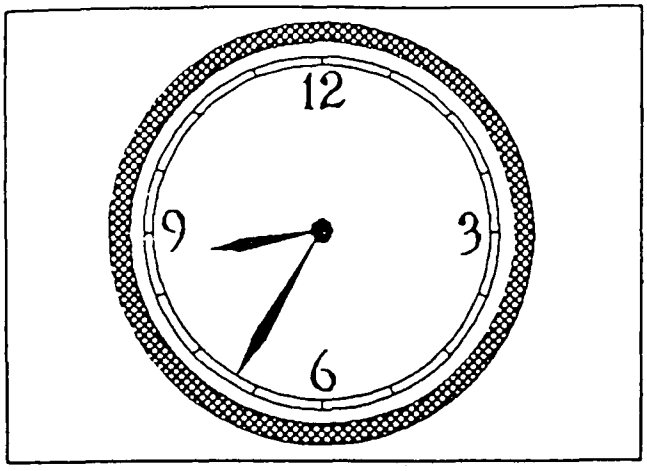


When a local law enforcement agency receives an initial report of child abuse, neglect, or actions reasonably expected to result in abuse of a child in Indian country, they shall immediately:

- Notify appropriate officials of Social Services, Child Protective Services (CPS)
- If preliminary inquiry indicates a criminal violation has occurred, report the occurrence to the FBI
- Initiate an investigation
- Take appropriate steps to secure the safety and well being of the child or children involved

Cases requiring immediate report to the Chief, BIA Division of Law Enforcement Services, include, but are not limited to:

- Incidents resulting in the death of a child
- Cases involving multiple victims
- Allegations of "cover-ups"
- Tribal leaders or agency superintendent involvement
- Cases involving injury of a child in a foster care, group care facility, or institutional placement (BIA, State or Tribal)
- Cases in which a child was injured in a BIA operated or tribally contracted school facility
- Allegation of any law enforcement wrongdoing in the handling of the case



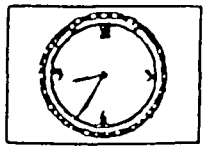
Within 24 hours of receipt of an alleged child abuse or neglect incident, the law enforcement official shall notify the following:

- [x] Local Child Protection Team

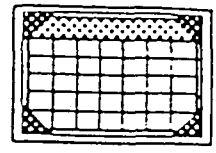
- [x] Area Personnel Officer, if a BIA employee is involved

- [x] Alleged perpetrator's supervisor. This applies only when the perpetrator's position has routine contact or control over children.

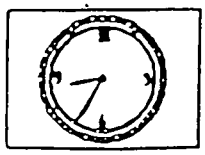
NOTE: See exceptions.



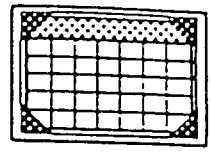
Within 36 hours after receiving an initial report, the law enforcement official shall assure that a written report is prepared, including, if available:



- ☑ The name, address, age, and sex of the child that is the subject of the report
- ☑ The grade and the school in which the child is currently enrolled
- ☑ The name and address of the child's parents or other persons responsible for the child's care
- ☑ The name and address of the alleged offender
- ☑ The name and address of the person who made the report to the agency
- ☑ A brief narrative as to the nature and extent of the child's injuries, including any previous known or suspected abuse of the child or the child's siblings, and the suspected date of the abuse
- ☑ Any other information the agency or the person who made the report to the agency believes to be important to the investigation and disposition of the alleged abuse



Preliminary investigations by law enforcement MUST be immediately initiated and completed within 72 hours. Preliminary investigations are intended to:



--Determine whether the victim is in a life threatening situation

--Whether action must be taken to safeguard evidence

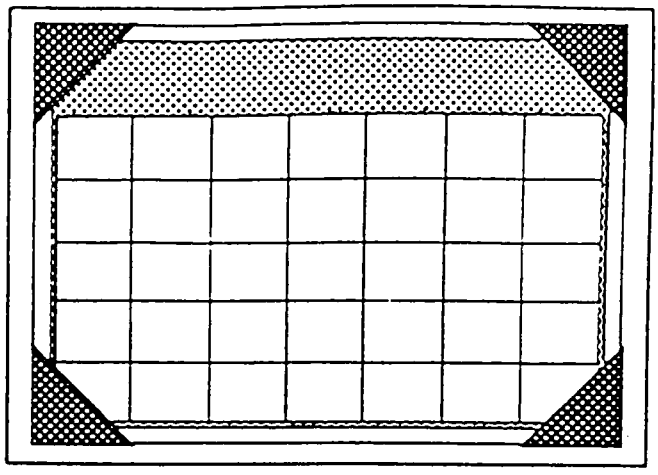
--Whether victims must be removed from the environment

--And, if appropriate, what interim personnel actions should be initiated against the alleged perpetrator

--Local law enforcement office should track all investigations to ensure cases are properly pursued

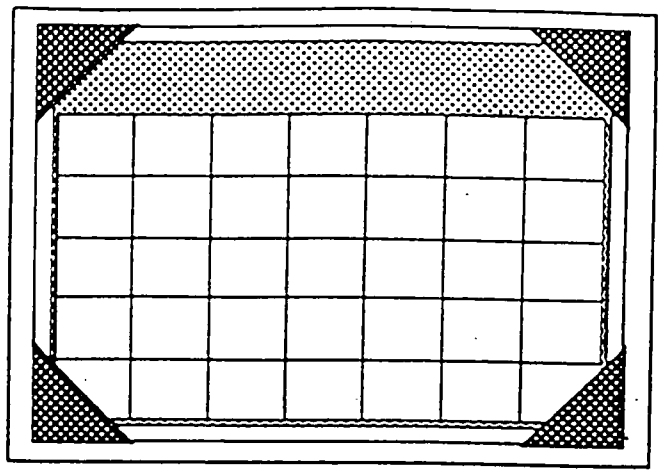
All cases
24 hrs day - 7 days week

Majority of emp on Res. BIA employees
Issues preferential hiring practices



Biweekly, the local law enforcement office shall report the progress of the investigations, until the case is closed, to:

- **Local Child Protection Team**
- **Area Personnel Officer, if a BIA employee is involved**
- **The alleged perpetrator's supervisor**
  if BIA employee



The BIA operated local law enforcement office shall routinely, at least once a month, notify the local school principal on all reports and incidents of child abuse and neglect affecting children in that local school

IF A CHILD TELLS YOU
ABOUT ABUSE, BELIEVE IT

IT SHOULDN'T HURT
TO BE A CHILD...
REPORT SUSPECTED CHILD ABUSE

Public Law 101-630, Title IV

Sec.404 REPORTING PROCEDURES

(a) Any person who knows or has reasonable suspicion that a child was abused or that actions may result in the abuse of a child in Indian country.....shall report such abuse or actions to the local child protective services or local law enforcement agency.

(d) Any person making such a report based on their reasonable belief and in good faith shall be immune from civil or criminal liability for making that report.

IF A CHILD TELLS YOU
ABOUT ABUSE, BELIEVE IT!

IT SHOULDN'T HURT
TO BE A CHILD...
REPORT SUSPECTED CHILD ABUSE

For Further Information,
Contact:

Child Protection Coordinator
Bureau of Indian Affairs
1849 "C" St, N.W.
MS 4603, M.I.B.
Washington, D.C. 20240
(202) 208-6858
FAX (202) 208-5113

IF YOU SUSPECT CHILD ABUSE,
CONTACT ANY
LAW ENFORCEMENT OFFICER

To report suspected incidents of child abuse or neglect

Contact Your Local Law Enforcement Office
or the
Bureau of Indian Affairs
Child Protection Hotline at

1-800-633-5155

Hours: 7:00 am - 5:00 pm (ET)
Answering service all other
hours, week-ends, and holidays

INDIAN COUNTRY

CHILD PROTECTION

The Indian Child Protection and Family Violence Prevention Act*

What Does It Mean To You?

*IN SUMMARY FORM
For a complete copy of Public Law 101-630, contact the Child Protection Coordinator

SOME EXAMPLES OF CHILD ABUSE:

Physical Abuse - *Nonaccidental injury to a child*

Sexual Molestation - *The exploitation of a child for the sexual gratification of an adult.*

Emotional Abuse - *A pattern of behavior that attacks a child's emotional development and sense of self-worth.*

Neglect - *The failure to provide a child with the basic necessities of life: food, clothing, shelter, or medical care.*

WHY BE CONCERNED ABOUT CHILD ABUSE?

After careful review, Congress found that incidents of child abuse in Indian country were grossly underreported and that such incidents must be identified, reported and investigated. In response, Congress passed Public Law 101-630, Title IV, the Indian Child Protection and Family Violence Prevention Act.

Sec.404 REPORTING PROCEDURES
Listing of those persons required to report incidents of child abuse

Sec.405 CENTRAL REGISTRY
Requires a feasibility study on the establishment of a Central Registry for reports or information on child abuse

Sec.406 CONFIDENTIALITY
Tribal, State and Federal agencies which investigate child abuse may share information with another like agency on a "need to know" basis

Public Law 101-630 Title IV
Codified as 25 U.S. Code §§ 3201 - 3211

Sec.407 WAIVER OF PARENTAL CONSENT
On a case-to-case basis, medical examination and interviews with a child suspected of having been abused may be conducted without the consent of the parent, guardian or legal custodian if it is in the best interests of the child.

Sec.408 CHARACTER INVESTIGATION
(a) Any individual who is employed or is being considered for employment by BIA or IHS who has regular contact with or control over children shall undergo a character (background) investigation and shall meet minimum character standards
(b) Minimum standards shall ensure that no individual has been found guilty of, or entered a plea of no contest or guilty to any offense under Federal, State or Tribal law involving crimes of violence, sexual assault, molestation, exploitation, contact or prostitution; or crimes against persons
(c) Each Indian tribe or tribal organization that receives funds under the Indian Self-Determination and Education Assistance Act or the Tribally Controlled Schools Act of 1988 shall conduct such background investigations with standards of character no less stringent than those aforementioned.

NOTE: *For further clarification on Character Investigations, contact your designated Security Officer.*

Sec.409 INDIAN CHILD ABUSE TREATMENT GRANT PROGRAM**
To provide grants for tribal programs for treatment of victims of child sexual abuse

Sec.410 INDIAN CHILD RESOURCE AND FAMILY SERVICES CENTERS**
To be established in each of BIA's 12 Areas, staffed by a multi-disciplinary team with experience and training in prevention, investigation and treatment of incidents of family violence, child abuse and child neglect.

Sec.411 INDIAN CHILD PROTECTION AND FAMILY VIOLENCE PREVENTION PROGRAM**
To provide grants for tribes to develop such programs

**Not Yet Funded

TITLE V-INDIAN HEALTH CARE
Refers primarily to the Indian Health Service, known as the "Indian Health Care Amendments of 1990"

CHILD PROTECTION RESOURCES IN YOUR COMMUNITY

SOCIAL SERVICES:

LAW ENFORCEMENT:

Medico-legal Issues in the Evaluation of Child Sexual Abuse

Rich Kaplan, MD
Medical Director
Center on Child Abuse and Neglect
South Dakota Children's Hospital

What constitutes an appropriate medical evaluation of an allegedly sexually abused child?

Guiding Principles

- Patient Centered
- Medically Oriented
- Evidence Based

Patient Centered

- Independent
- Humane

Medically Oriented

- Diagnosis and Treatment
  - Undiagnosed conditions
  - Signs of other maltreatment
  - S.T.D.'s
  - Psychotherapy
  - Safety-Protection

Evidence Based

- An Abuse Epistemology
  - Refereed Journals
  - Relevant Clinical Experience
  - Not Theories
  - Daubert

The Exam

- History/Interview
- Laboratory/x-ray

History/Interview

- Focal vs. Suggestive
- Dolls?
- The Healing Starts

Physical Exam

- Developmental Assessment
- Growth Parameters
- Complete Head To Toe
- Genital Exam/Colposcopy

Lab and X-ray

- GC
- Chlamydia
- HSV
- HPV
- PCR vs Culture
- Serology
- Skeletal Series

The Examiners

- The Interviewer
- The Practitioner

Diagnostic Formulation

- History
- Behavioral Changes
- Physical Findings
- Lab/X-ray

Documentation

- To Tape or Not to Tape

Ethical Medical Testimony

- Science and experience --not theory
- Don't take sides
- The truth will set you free

193505

CHILD SEXUAL ABUSE IN INDIAN COUNTRY
A TRAINING SESSION FOR TRIBAL AND FEDERAL JUDGES OF THE EIGHTH CIRCUIT

MAY 20-21, 1999
GREAT FALLS, MONTANA

TABLE OF CONTENTS:

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National Criminal Justice Reference Service (NCJRS)
Box 6000
Rockville, MD 20849-6000

Child Sexual Abuse In Indian Country

May 20-21,1999
Townhouse Inns of Montana
1411 10th Avenue South
Great Falls, Montana

May 20, 1999

8:00-8:30 Continental Breakfast

8:30-8:45 Welcome and Invocation

Honorable B.J. Jones, Chief Judge Sisseton, Wahpeton Tribal Court

Gene Thin Elk
U.S.D.-Vermillion,S.D

8:45-10:30 Examining Child Sexual Abuse in Indian Country-

An examination of the prevalance of child sexual abuse in Indian country, the sociological factors, and cultural impact of child sexual abuse on Indian families.

Alcoholism, the Indian Family, and Child Sexual Abuse

Gene Thin Elk
Co-founder of the"Red Road Approach"
University of South Dakota
Vermillion, S.D.

10:30-10:45 Break

10:45-noon Coordinating the Tribal and Federal Investigation of Child Sexual Abuse and Pre-Trial Detention

Moderator-Honorable Leland Pond
Fort Belknap Tribal Court

An examination of how child sexual abuse is investigated, federal and tribal reporting requirements, interrogating child victims, and coordination between tribal and federal authorities on pre-trail release. Discussion of apperant reluctance of other family members to testify in child sexual abuse cases.

Carl Free
Criminal Investigator-Lake Traverse Reservation
Agency Village, S.D.

John Ellis
Former F.B.I. Agent
Pierre,S.D.

Noon-1:00 Working Lunch-

1:00-2:30 Federal and Tribal Definitions of Child Sexual Abuse

Moderator-Honorable Orson Windy Boy
Chippewa,Cree Tribal Court-

An examination of the federal criminal statutes and tribal criminal and civil laws governing child sexual abuse and how each Court system adjudicates cases

Lori Harper, Asst.United States Attorney District Montana
Honorable John St. Clair Chief Judge Wind River Tribal Court

2:30 -2:45 Break

2:45-4:00 Evidentiary Issues in Child Sexual Abuse Cases

Moderator-Honorable James Arnoux,
Blackfeet Tribal Court

An examintion of the medical evidence of child sexual abuse, issues surrounding the questioning of victims and the testimony of abused children including incorroborated testimony, psycholoogical evidence of the child abuse syndrome, use of hearsay exceptions in child sexual abuse cases and other evidentiary issues.

Dr.Richard Kaplan
University of South Dakota School of Medicine
Sioux Falls, S.D.

Richard Ducotte
Attorney
Kinderlex Child Welfare Litigation Planning
New Orleans, LA.

4:00-5:00 Group Discussion

Overview of day and how tribal and federal judges can jointly address issues involing child sexual abuse.

May 21,1999

8:00-8:30 Continental Breakfast

8:30-8:45 Invocation

8:45-10:15 Remembering the Child: working with child victims of sexual abuse on Federal and Tribal level

Moderator-Honorable A.T. Stafne
Chief Judge Fort Peck Tribal Court

An examination of the psychological impact of child sexual abuse on Indian children and adult victims of child sexual abuse. An examination of preparing Indian children to testify in court, potential deleterious impact of multiple interrogations of victim, and coordinating tribal and federal adjudications to avoid further victimization of child.

Luke Yellow Robe
Children's Home Society
Keystone, S.D.

10:15-10:30 Break

10:30-12:00 Dispositional Alternatives in Child Sexual Abuse Cases

Moderator Louis Burke
Chief Judge Confederated Salish Kootenai Tribal Court

An examination of the Federal sentencing guidelines and how they are applied in child sexual abuse cases, dispositional alternatives available to tribal judges and working with perpetrators.

Lori Harper Asst. US Attorney Montana
Honorable Isaac Dog Eagle,-Standing Rock Tribal Court
Keri Brehn,Victim Witnes Coor. District of Montana

Sponsored by Northern Plains Tribal Judicial Institute
under a grant from the Deptment of Justice,
Office of Victims of Crime

LIST OF PARTICIPANTS - TRIBAL AND FEDERAL JUDGES' TRAINING ON CHILD SEXUAL ABUSE IN INDIAN COUNTRY
MAY 20-21, 1999
GREAT FALLS, MONTANA

TRIBAL JUDGES AND STAFF

1. Honorable Isaac Dog Eagle
   Associate Judge- Standing Rock Sioux Tribal Court
   President-Northern Plains Tribal Judges' Association
   P.O. Box 363
   Fort Yates, North Dakota 58538
   Phone 701-854-3807
   Fax 701-854-3761

2. Honorable A.T. Stafne
   Chief Judge
   Fort Peck Tribal Court
   P.O. Box 1133
   Wolf Point, MT 59201
   406-768-5557

3. Honorable Leland J. Pond Sr.
   Chief Judge
   Fort Belknap Community Court
   RR1, Box 66
   Harlem, MT 59526
   406-353-2205 (Ext. 390)

4. Honorable Terry Healey
   Associate Judge
   Fort Belknap Community Court
   RR1, Box 66
   Harlem, MT 59526
   406-353-2205 (Ext. 390)

5. Honorable John St. Clair
   Chief Judge
   Shoshone & Arapahoe Tribal Court
   P.O. Box 608

Fort Washakie, Wyoming 82514
307-332-7094

6. Honorable Glen Birdinground
Chief Judge
Crow Tribal Court
P.O. Box 489
Crow Agency, MT 59022
406-638-2681

7. Honorable Enos Johnson
Chippewa-Cree Tribal Court
RR 1, Box 544
Box Elder, MT 59521
406-395-4735

8. Honorable Judge Windy Boy
Chippewa-Cree Tribal Court
RR 1, Box 544
Box Elder, MT 59521
406-395-4735

9. Justice Kenny Gerdipee
Appellate Court Judge
Chippewa-Cree Tribal Court
RR 1, Box 544
Box Elder, MT 59521
406-395-4735

10. Mike Parker
Prosecutor
Chippewa-Cree Tribal Court
RR 1, Box 544
Box Elder, MT 59521
406-395-4735

11. Honorable Louise Burke
Chief Judge
Confederated Salish & Kootenai Tribal Court
P.O. Box 278

Pablo, MT. 59855
406-675-2700

12. Honorable Stephen Lozar
P.O. Box 455
Polson, MT. 59860
406-883-3417

13. Honorable Gary Acevedo
Confederated Salish & Kootenai Tribal Court
P.O. Box 278
Pablo, MT. 59855
406-675-2700

14. Honorable Winona Tanner
Confederated Salish & Kootenai Tribal Court
P.O. Box 278
Pablo, MT. 59855
406-675-2700

15. Honorable Trudy Miller
Blackfeet Tribal Court
P.O. Box 1200
Browning, MT. 59417

16. Honorable B.J. Jones
Chief Judge
Sisseton-Wahpeton Sioux Tribal Court
P.O. Box 568
Agency Village, SD 57262
605-698-7629

PRESENTERS

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UNITED STATES COURT OF APPEALS DECISIONS REGARDING CHILD SEXUAL ABUSE

1. ***United States of America v. Lonnie Horse Looking***, 1998 U.S. App. LEXIS 2185, September 9, 1998 (In a case off the Rosebud reservation involving despicably severe sexual and physical abuse of a six month child, Court rejects Defendant's argument that the admission of statements made to law enforcement was in error on ground that Defendant had been properly Mirandized and that the Defendant failed to properly allege involuntariness of statements even after being given second chance by magistrate. Court also rejects argument that trial court committed error by permitting government to interview defense witness before trial on ground issue not preserved for appeal and witness' testimony not exculpatory. Trial court did not err in denying admission of a calendar prepared by defendant and his family on ground that calendar was hearsay and was not a contemporaneous recitation of facts but prepared later. Lastly, sufficient evidence existed to sustain convictions on all counts)

2. ***United States of America v. Weaselhead,*** 1998 U.S. App. LEXIS 21880, September 9, 1998 (Court holds that the federal prosecution of a Blackfeet Indian for sexual abuse of a minor barred by double jeopardy because Defendant had already been prosecuted for same conduct underlying federal prosecution in the Winnebago Tribal Court. Court holds that in light of Duro v. Reina's holding that Indian tribes lack the inherent sovereign authority to prosecute non-member Indians, the Winnebago Tribal Court was exercising authority under a federal delegation and thus the subsequent federal prosecution was barred. Decision may cause some problems with initial tribal prosecution when federal prosecution is sought later.)

3. ***United States v. Rouse***, 111 F.3d 561 (8th Cir. 1997), reconsidering 100 F.3d 560 (8th Cir. 1996) (In case off the Yankton Sioux reservation involving several defendants and victims the Court reverses its earlier panel decision reversing several convictions of sexual abuse of minors on grounds that the district court erred in excluding certain expert opinion testimony and in denying defendants' motion for independent pretrial psychological examinations of the abused children. Court holds that defendants failed to preserve argument that State DSS denied defense

counsel adequate access to children for investigation and that government did not contribute to such denial. Court reverses itself on whether the Defendants displayed a need for further physical and psychological examination of the children by holding that the physical examinations conducted were adequate and that psychological evaluations on competency of children were not requested to the district court and that thus the children were presumed competent to testify. Court also strongly endorses the notion that children should be not further traumatized by court proceedings by holding that: *Of course, the court must protect a criminal defendant's right to a fair trial, but it must also protect the State's paramount interest in the welfare of the child. Making court-ordered adversarial examinations routinely available would raise a barrier to the prosecution of this kind of crime by maximizing the trauma that its victims must endure. At a minimum, therefore, the court should heed a custodial agency's opinion that pretrial access to the child for investigative or adversarial purposes is unnecessary or unwise. Given the difficulty of balancing these important interests, we conclude that, if the custodian of a child witness opposes access as not in the child's best interest, defendant must show that denial of access would likely result in an absence of "fundamental fairness essential to the very concept of justice" before the trial court need reach the question whether some type of access may appropriately be ordered.*
Court also denies the Defendants' claims that permitting three of the victims to testify via closed circuit television violated the confrontation rights of the Defendants on ground that: *Accordingly,"where necessary to protect a child witness from trauma that would be caused by testifying in the physical presence of the defendant, at least where such trauma would impair the child's ability to communicate, the Confrontation Clause does not prohibit use of a procedure" which preserves "the essence of effective confrontation" -- testimony by a competent witness, under oath, subject to contemporaneous cross-examination, and observable by the judge, jury,and defendant. Before invoking such a procedure, the district court must find that the child "would be traumatized, not by the courtroom generally,but by the presence of the defendant.*

Court also affirms trial court's denial of testimony regarding sexual activity of child victims on ground that defendants failed to timely notify government of intent to use as required by Rule 412.

Court rejects Defendants' argument that admission of statements made by

children at initial interview with FBI was hearsay on ground that the statements met the requirements of the residual hearsay exception, Fed. R. Evid. 803(24), because they had indicia of reliability and the children were also available for cross-examination.

Court affirms the lower court's decision rejecting the testimony of defendants' psychological expert who intended to testify that children's testimony was unreliable because it had been implanted in them by multiple inappropriate interrogations because such testimony invaded the province of the jury and did not satisfy the Daubert standard for expert testimony. Court also, in a closer call, upheld the Court's rejection of an offer of proof made by the expert on the ground that it was harmless error because the jury heard substantial evidence from the expert on the suggestibility of the methods of interrogation used.

Lastly, the Court upheld the denial of a new trial motion based on juror misconduct finding that a challenged juror was not a racist and affirmed the trial court's decision to allow the government to reopen its case after resting to better establish crimes occurred in Indian country.

4. ***United States v. LeCompte***, 99 F.3d 274 (8th Cir. 1996) Court reverses conviction for sexual contact with minor on ground that trial court committed error in permitting in other incidents of sexual contact between defendant and other children on theory that it demonstrated modus operandi of the defendant with children he allegedly molested. In dicta Court also cautions the trial court about deviating upward in sentence calculation on ground not listed in the sentencing guidelines.

5. ***United States v. Butler***, 56 F.3d 941 (8th Cir. 1995) Court affirms conviction for aggravated sexual abuse and one count of engaging in sexual contact in Indian country. Court rejects argument that child witness was subjected to leading direct examination on ground that there was only one leading question objected to and that leeway can be given in the direct examination of child victims. Court also upholds trial court's decision to permit in prior uncharged sexual act committed by the Defendant on same victim on ground that count of sexual contact is an intent crime and that the prior bad act shows intent and also it shows identity of the Defendant. Court also rejects a challenge to a witness credibility jury instruction which allegedly gave more credence to the testimony of child witnesses on ground it substantially advised the jury of its obligation to weigh all

witness testimony adequately.

4. ***United States v. Lawrence,*** 51 F.3d 150 (8th Cir. 1995) Court upholds a dismissal of an indictment charging the Defendant, a non-Indian, with sexual contact of a minor on ground that the victim in question, although meeting the requirement of having some degree of Indian blood, was not considered Indian by her community under the test laid out in St. Cloud v. United States, 702 F. Supp. 1456 (D.S.D. 1988). Those factors, which the Court considered in declining order of importance, are: 1) tribal enrollment; 2) government recognition formally and informally through receipt of assistance reserved only to Indians; 3) enjoyment of the benefits of tribal affiliation; and 4) social recognition as an Indian through residence on a reservation and participation in Indian social life. Id. at 1461.

5. ***United States v. Whitted,*** 11 F.3d 782 (8th Cir. 1993) Court reverses the conviction of the Defendant who was convicted of several counts of aggravated sexual abuse and contact on ground that the trial court erred in permitting the doctor who performed medical evaluations on the child victim to testify: *My final diagnosis was that [L.] had suffered repeated child sexual abuse. "Dr. Likness testified he recommended that L. not be exposed to her father in the near future.* The Court held that: *Because jurors are equally capable of considering the evidence and passing on the ultimate issue of sexual abuse, however, a doctor's opinion that sexual abuse has in fact occurred is ordinarily neither useful to the jury nor admissible.* Court also holds that issue could be raised on appeal even though Whitted did not make timely objection because the error was manifest and prejudiced the Defendant.

7. ***United States v. Knife***, 9 F.3d 705 (8th Cir.1993) Court upholds trial court's determination for sentencing purposes that crime of aggravated sexual contact had been committed by force because Defendant had laid on victim and threatened her if she told anyone. See also United States v. Shoulders, 1993 U.S. App. LEXIS 21660.

8. ***United States v. Eagle Thunder***, 893 F.2d 250 (8th Cir. 1990) Court affirms conviction of Defendant for aggravated sexual abuse denying his claim that he was prejudiced by the Court's failure to severe trial from

co-defendant's who was convicted of kidnapping child victim and that Court erred in denying admissibility of prior sexual activity testimony regarding child victim on ground that the Defendant failed to properly offer it.

9. ***United States v. St. Pierre***, 812 F.2d 417 (8th Cir. 1987)Court affirms conviction of unlawful carnal knowledge of Defendant's stepdaughter and rejects argument that Court's refusal to permit testimony regarding the minor child's maintenance of pornographic material and other statements regarding her alleged sexual promiscuity was in error, that the Defendant's right to due process was denied by Court's refusal to appoint another expert to evaluate the child and him to determine whether he met the profile of a sex offender. Court also upheld the government's use of prior sexual acts committed by the Defendant upon the child victim on ground that it tended to show motive, opportunity and intent.

10. ***United States v. Denoyer***, 811 F.2d 436 (8th Cir. 1987) Court upholds conviction under Assimilative Crimes Act for involuntary sodomy of Defendant's son and rejects argument that statements made by the son to a doctor were inadmissible hearsay. Court also upholds trial court's refusal to suppress statements made by the Defendant to a law enforcement officer to the effect that the Defendant suspected that child was victim of sexual abuse. Court also rejects the Defendant's argument that he should have been permitted to demonstrate to the jury that the community he lived in was replete with sexual abuse and that others could have committed the crime.

11. ***United States v. Azure***, 801 F.2d 336 (8th Cir. 1996)Court reverses conviction of Indian for carnal knowledge of a female under 16 on ground that the Court erred in allowing pediatrician to vouch for credibility of child sexual abuse victim, holding that the Court erred in allowing the pediatrician to testify that she saw no reason why the child's testimony would be untrue.

12. ***United States v. Renville,*** 779 F.2d 430 (8th Cir. 1984) Court upholds trial court's finding that court had jurisdiction under Assimilitative Crimes Act to prosecute Indian for forcible rape against daughter in Indian country because incest under Major Crimes Act referred to state law which did not define incest as including forcible rape. Court

also upholds statements made by minor to medical professionals as statements made to assist diagnosis.

13. ***United States v. Clark,*** 1998 U.S. App. LEXIS 22373 Court upholds conviction of person for committing aggravated sexual abuse on Red Lake Indian reservation and rejects argument that Red Lake reservation is not Indian country because Tribe had never ceded land to United States for allotment on ground that the reservation need not be ceded to US for Indian country status to apply.

14. ***United States v. Crow***, 148 F.3d 1048 (8th Cir. 1998) Court reverses the Defendant's sentence and remands on ground that base offense level was improperly determined because there was insufficient evidence to demonstrate force in conviction for aggravated sexual contact when only force was the removal of victim's clothing and threat made after the crime.

15. ***United States v. A.W.***L., 1997 U.S. App. LEXIS 17916 Court upholds adjudication of juvenile as sexual offender finding that he was an Indian under the commonly-accepted definition of Indian laid out in United States v. Lawrence.

16. ***United States v. Jones,*** 104 F.3d 193 (8th Cir. 1997) Court holds that a tribal law enforcement officer need not notify a Defendant of possible federal charges when interrogating for tribal crime.

17. ***United States v. Gregor***, 98 F.3d 1080 (8th Cir. 1996) Court upholds conviction of resident of Wagner for statutory rape on ground that Wagner is within Indian country. (Note that this case may or may not be good law dependent upon the fate of federal court decisions regarding what exactly is the Yankton Sioux Indian reservation)

18. ***United States v. Cavanaugh***, 1996 U.S. App. LEXIS 10923 Court vacates sentence on conviction of aggravated sexual contact on ground that trial court did not adequately find that threats or force had been used by the Defendant in the commission of offense and that base offense level had not been established.

19. ***Nazarenus v. United States,*** 69 F.3d 1391 (8th Cir. 1995) Court affirms denial of habeas corpus application of defendant convicted of

aggravated sexual abuse claiming ineffective assistance of counsel because counsel had not objected to government continuance requests that permitted DNA exams which showed that he was a liar when he denied having sex with victim.

20. ***United States v. R.E.J.***, 29 F.3d 375 (8th Cir. 1994)Court affirms trial court's adjudication of juvenile as delinquent for committing two counts of sexual abuse of minor.

21. ***Shaw v. United States,*** 24 F.3d 1040 (8th Cir. 1996) Court reverses denial of evidentiary hearing on habeas corpus of Defendant convicted of several counts of aggravated sexual abuse on ground that Defendant was entitled to hearing on claim that trial counsel was ineffective by not offering evidence of prior sexual activity of minor victim to demonstrate source of venereal disease as well as alternative theory on torn hymen.

22. ***United States v. Yellow***, 18 F.3d 1438 (8th Cir. 1994) Court upholds conviction of Defendant for raping his disabled brother and minor sister on Red Lake reservation finding that the trial court did not err in admitting evidence of prior acts of sexual abuse against the victims on ground that it tended to show identity, motive and intent. Court also finds that the other acts were demonstrated by a preponderance of the evidence. Court also upholds the admission of statements made to a psychologist as statements made to assist in diagnosis under Fed. R. Evid. 803(4), rejecting the argument that such statements cannot be made to a psychologist. Court also upholds departure upward in sentence on ground that the victims suffered severe psychological harm based upon judge's observations and expert records.

23. ***United States v. Clown***, 925 F.2d 270 (8th Cir. 1991) Court affirms sentence for incest under ACA finding that sexual abuse was most analogous federal crime for application of federal sentencing guidelines.

24. ***United States v. Demarrias***, 876 F.2d 674 (8th Cir. 1989) Court upholds conviction of abusive sexual contact on ground that it is a lesser included offense of aggravated sexual abuse and sexual abuse of a minor. Court also upholds federal jurisdiction over offenses under Major Crimes Act finding that the Sexual Abuse Act amended Major Crimes Act. Court finally holds that the act of the presiding district court judge leaving

town and allowing the magistrate to accept the verdict did not violate the federal magistrate law.

Criminal Jurisdiction in Indian Country
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CRIMINAL JURISDICTION IN INDIAN COUNTRY

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OVERVIEW: Criminal jurisdiction in Indian country involves a mixture of federal, state and tribal law with jurisdiction dependent upon such factors as the race of the perpetrator and victim, as well as the situs of the crime. This outline reviews some of the pertinent issues relative to the question of who possesses jurisdiction over a perpetrator of a crime in Indian country.

I. Definition of Indian country - 18 U.S.C. 1151

Indian country is legislatively defined by the United States Congress at 18 U.S.C. 1151 as:

A. all lands within the limits of any Indian reservation notwithstanding the issuance of any patent, and including rights-of way running through Indian allotments This definition encompasses all lands within the exterior boundaries of a reservation even if the land is held in fee simple by a non-Indian entity or person. See Solem v. Bartlett, 465 U.S. 463(1984). Thus, if an Indian commits an offense within the exterior boundaries of the reservation tribal and federal jurisdiction would lie even if the crime occurred on fee land.

B. all dependent Indian communities within the borders of the United States whether within the original or subsequently acquired territory thereof. A dependent Indian community is defined in the case law based upon four inquiries. See United States v. South Dakota, 665 F.2d 837, 839 (8th Cir. 1981); United States v Driver, 945 F.2d 1410 (8th Cir. 1991)

1. Whether U.S. retains title to land and the authority to regulate in area. Those communities located on trust land outside the reservation boundaries are considered dependent communities.

2. The nature of the area and the relationship of the inhabitants to an Indian tribe or to the federal government. A majority population of a particular Tribe residing in Indian Housing authority housing would be considered a dependent Indian community.

3. Cohesiveness of the community and its reliance upon federal services.

4. Whether the area has been set aside for the use of Indians. For example, the Sisseton Tribal Court has ruled that a county road that connects the town of Sisseton with the seat of tribal government is a dependent Indian community.

C. Rights of way running through Indian allotments - this includes state, county and unmaintained roads that run through

Indian allotments even if the highway runs outside the exterior boundaries of the reservation.

II. Definition of Indian

A In General - In most cases, in order for either a tribal or federal court to exercise jurisdiction over a person in a criminal matter two conditions have to be met.

1. Possess some Indian blood;

2. Be regarded as Indian by his or her community.

B. Other Tests

1. Enrolled in federally-recognized tribe or other indicia of membership. See United States v. Broncheau, 597 F.2d 1260, 1263 (9th Cir. 1979)(enrollment not required for Indian to be considered member of Tribe.)

2. Adoption into Tribe is generally not sufficient to create Indian status. See United States v. Rogers, 45 U.S. (4How.) 567 (1846); but see Matter of Dependency and Neglect of A.L., 442 N.W.2d 233 (S.D. 1989)(Tribe's enrollment of white child sufficient to trigger application of Indian Child Welfare Act).

C. St. Cloud Test
Under this test, adopted by the United States Court of Appeals for the Eighth Circuit in U.S. v. Lawrence, 51 F.3d 150 (8th Cir. 1995), the Court adopted the standard set out in St. Cloud v. United States, 702 F. Supp. 1456 (D.S.D. 1988) for a determination of who is an Indian (perpetrator and victim).

1.Tribal enrollment - generally is dispositive of issue.

2. Government recognition through receipt of benefits (IHS, BIA GA, commodities, etc.).

3. Enjoyment of the benefits of tribal affiliation.

4. Special recognition as Indian through residence on reservation and participation in social life.

These criteria should be examined in the totality to make the determination of whether a perpetrator or victim is Indian. However, even if the perpetrator meets the definition of Indian under these criteria, if he is a member of a terminated tribe, he is generally not considered "Indian" for purposes of federal jurisdiction. See St. Cloud; US v. Heath, 509 F.2d 16 (9th Cir. 1974).

D. Duro v. Reina, 495 U.S. 676(1990) - Duro had held that tribal courts do not have the inherent authority to exercise

criminal jurisdiction over non-member Indians. Congress legislatively repealed Duro in 1991 vesting tribal courts with the authority to prosecute non-member Indians to the same extent the federal courts exercise jurisdiction over Indians under the Major Crimes Act.

III. TYPES OF CRIMES

In general, federal courts exercise jurisdiction over offenses committed in Indian country by Indians and against Indians under several federal statutes, including the Major Crimes Act, 18 U.S.C. 1153, the Indian Country Crimes Act, 18 U.S.C. 1152, and the Assimilative Crimes Act, 18 U.S.C. 13, which the Supreme Court has held applies to crimes that occur in Indian country. Williams v. United States, 327 U.S. 711 (1946). Tribal courts exercise concurrent jurisdiction over crimes prosecuted by the United States, except those crimes where the perpetrator is non-Indian, and other crimes defined by tribal code or the Code of Indian Offenses. State Courts can only exercise jurisdiction over crimes committed by one non-Indian against another in Indian country or a victimless crime committed by a non-Indian, except in Public Law 280 reservations where states exercise jurisdiction over violations of prohibitory statutes, not regulatory ones. See 18 U.S.C. 1162; 25 U.S.C. 1322.

A. Federal Court Jurisdiction

1. Major Crimes Act - 18 U.S.C. 1153 - As the result of Ex parte Crow Dog, 109 US 556 (1883), the United States enacted the Major Crimes Act to criminalize federally certain major crimes. Those crimes now include: murder, manslaughter, kidnapping, maiming, kidnapping, rape, involuntary sodomy, carnal knowledge of any female who has not attained age of 16, assault with intent to commit rape, incest, assault with intent to commit murder, assault with a dangerous weapon, assault resulting in serious bodily injury, arson, burgarly and robbery.

2. Concurrent jurisdiction of tribal courts - Tribal courts retain concurrent criminal jurisdiction over offenses covered by Major Crimes Act and double jeopardy does not apply to bar prosecution by federal court after tribal court prosecution. US v. Wheeler, 453 U.S. 313 (1978). The same rule also may apply to a subseqent federal prosecution after a CFR court prosecution, but no case law on this. Nor does the United States' Attorney's internal Petite policy, directing the United States not to prosecute a person already prosecuted by another sovereign, bar the prosecution of an Indian in federal court for the same offense prosecuted in tribal court. See United States v. Lester, 992 F.2d 124 (8th Cir. 1993).

a. Uncounselled guilty plea in tribal court generally cannot be used as admission against interest in federal court prosecution, but counselled ones can. United States v. Ant, 882 F.2d 13 (9th Cir. 1991).

b. Time served on tribal court sentence not necessarily credited on federal sentence, but discretionary with Attorney General.

c. Tribal Court convictions not used under federal sentencing guidelines to determine category of offender, but can be used to enhance sentence. See US v. Gallaher, 29 F.3d 635 (9th Cir. 1994).

3. Assimilative Crimes Act, 18 U.S.C. 13 - permits federal prosecutions by assimilating state substantive law. See United States v. Norquay, 905 F.2d 1157 (8th Cir. 1990)(although burglary is to be punished under state law, federal courts are still permitted to apply the federal sentencing guidelines to determine appropriate sentence).

4. Indian Country Crimes Act, 18 U.S.C. 1152 - general laws of the United States applicable to federal enclaves apply in Indian country. This includes the Assimilative Crimes Act. Williams v. United States , 327 U.S. 711 (1946).

5. Death Penalty - Death penalty inapplicable to Indians committing criminal offense subject to death penalty in Indian country unless Tribe opts in to death penalty. 18 U.S.C. 3598. Indians, however, are subject to the death penalty for other federal offenses that carry the death penalty (assasination, espionage, etc.) Nor are recent legislative enactments expanding federal penalties for federal offenses applicable to Indian country unless Tribes opt in. See 18 U.S.C. 3559(c)(6) (three strikes law); 18 U.S.C. 5032 (juveniles under 13 tried as adults.)

6. Special federal criminal statutes - Some statutes, for example, 18 U.S.C. 1165(illegal for non-Indian to enter on Indian land for unauthorized hunting and fishing); 18 U.S.C. 1164 (destruction of reservation boundary); 25 U.S.C. 171(enter into land transaction without federal authority) apply specifically to non-Indians who enter Indian country.

B. State Court Jurisdiction - turns on question of whether state has been vested with criminal jurisdiction under federal law, such as Pub. L. 280, or other special criminal federal statute, and on race of perpetrator and victim.

1. General - Absent some act of Congress, states have no jurisdiction to prosecute Indians for criminal offenses committed within Indian country or to prosecute non-Indians for criminal offenses committed against Indian victim in Indian country. Washington v. Confederated Bands of Yakima Nation, 439 U.S. 463 (1979); State v. Kuntz, 66 N.W.2d 531 (N.D. 1954); State v. Greenwalt, 663 P.2d 1178 (Mont. 1983); State v. Larson, 455 N.W.2d 600 (S.D. 1990).

2. Liquor offenses - one court has held that because Congress gave states and tribes the concurrent authority to regulate the introduction of liquor into Indian country, states can exercise criminal jurisdiction over criminal "liquor violations." Fort Belknap Indian Community v. Mazurek, 43 F.3d 428 (9th Cir. 1994). Tribes have civil authority to regulate liquor sales throughout Indian country, but no criminal jurisdiction to prosecute non-Indian violators. See City of Timber Lake v. Cheyenne River Sioux Tribe, 10 F.3d 554 (8th Cir. 1993). Luke v. Mellette County, 508 N.W.2d 6 (S.D. 1993).

3. Non-Indian v. Non-Indian - State courts have jurisdiction to prosecute this crime that occurs in Indian country or non-Indian victimless crime.

4. Pub. L. 280- 18 U.S.C. 1162; as amended, 25 U.S.C. 1322 et seq.- gave certain states mandatory criminal jurisdiction over crimes occuring in Indian country and gave other states option to exercise jurisdiction.

a. Mandatory states - California, Oregon, Nebraska(except Winnebagos and Omahas have been retroceded jurisdiction), Minnesota(with exception of Red lake),Wisconsisn, and Alaska.

b. Optional states must comply with Pub. L. 280 and amend their state constitutions to accept jurisdiction. After enactment of Indian Civil Rights Act, 25 U.S.C. 1301 et seq., Tribes must affirmatively accept jurisdiction by tribal election. See Kennerly v. District Court, 400 U.S. 423 (1971). State cannot overrule prior state court precedent if effect is to vest state with jurisdiction after 1968 without tribal consent. See Rosebud Sioux Tribe v. State of South Dakota, 900 F.2d 1164 (8th Cir. 1990).

c. Tribal courts retain concurrent jurisdiction over criminal offenses with state courts.

d. States only obtained authority to enforce prohibitory laws in Indian country, not regulatory laws, such as gaming laws. See California v. Cabazon Band of Indians, 480 U.S. 202(1987); Confederated Tribes of Colville Reservation v. Washington, 938 F.2d 146 (9th Cir. 1991)(states have no authority to impose state regulatory traffic laws upon reservation-domiciled Indians). States cannot enforce mandatory insurance laws, et al, upon reservation Indians even in Pub. L. 280 states. Nor can states impose hunting and fishing regulatory laws upon reservation Indians.

e. Retrocession - Under Pub. L. 280, as amended, there is a provision found at 25 U.S.C. 1323 allowing a state to petition the United States to retrocede, or restore, tribal criminal or civil jurisdiction.

f. Special statutes - Congress has enacted special statutes, applicable to only certain tribes, vesting state courts with criminal jurisdiction over Indian country. See State v. Hook, 476 N.W.2d 565 (N.D. 1991)(North Dakota vested with criminal misdemeanor jurisdiction over Fort Totten Indian reservation).

C. Tribal Court Jurisdiction - Tribal Courts have criminal jurisdiction over all Indians who commit criminal offenses within Indian country. This jurisdiction is concurrent with federal courts in non-Pub. L. 280 states and with state courts in Pub. L. 280 states. Tribal courts have exclusive criminal jurisdiction to prosecute violations of regulatory statutes in Pub. L. 280 states.

1. Oliphant v. Suquamish Indian Tribe, 435 U.S. 191 (1978)(Tribal courts have been necessarily divested of criminal jurisdiction over non-Indians). Note that Oliphant does not divest tribal court of authority over quasi-criminal actions such as protection order proceedings or mental commitments.

2. Indian Civil Rights Act - 25 U.S.C. 1301 et seq.- governs the rights of criminal defendants in tribal courts.

a. Santa Clara Pueblo v. Martinez, 436 U.S. 49 (1978)(exclusive remedy for violation of Indian Civil Rights Act in federal court is writ of habeas corpus challenging detention).

b. Several Tribal Courts have held that ICRA waives immunity of tribal officials for suits in tribal court alleging violations of ICRA.

c. Federal Tort Claims remedy available for person aggrieved by tribal entity operating under 638 contract who violates ICRA.

d. No right to court-appointed counsel, but right to counsel of Defendant's choice if he pays. Tribe can require counsel to be member of tribal bar.

e. Punishment under ICRA now limited to one year and $5,000.00 fine for each offense. 25 U.S.C. 1302 (7).

CRIMINAL JURISDICTION IN INDIAN COUNTRY

FEDERAL PRACTICE SEMINAR
Fargo, ND
March 15, 1996

Charles M. Carvell
Assistant Attorney General

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CRIMINAL JURISDICTION IN INDIAN COUNTRY *

I. Introduction

Jurisdiction over criminal offenses is divided among federal, state, and tribal governments on the basis of the nature of the crime, the location of the crime, and the Indian or non-Indian status of not only the offender but also the victim. Consequently, fundamental to understanding Indian criminal law are the terms "Indian" and "Indian country." Once the Indian or non-Indian status of the offender and victim is established and it is determined whether or not the crime occurred in Indian country, the fairly well settled lines between state, federal, and tribal criminal jurisdiction can be applied.[1]

II. Defining "Indian"

A. The definition of "Indian" for purposes of criminal law

There does not exist a definition of "Indian" applicable for all purposes. Some federal laws define the term, but such definitions are applicable only to the Congressional acts in which they appear. Federal criminal jurisdiction statutes do not generally define "Indian." E.g., 18 U.S.C. § 1152 (General Crimes Act); 18 U.S.C. § 1153 (Major Crimes Act).[2] The courts, however, have developed a two-part test by which to determine Indian status.

"[F]or purposes of federal criminal jurisdiction, an Indian is a person who (1) has some Indian blood; and (2) is 'recognized' as

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* The views expressed in this paper are not necessarily those of the Office of the Attorney General or the State of North Dakota.

[1] This paper does not discuss the unique jurisdictional rules governing liquor violations in Indian country. On the subject, see, 18 U.S.C. §§ 1154, 1156, 1161; Rice v. Rehner, 463 U.S. 713 (1983); Ft. Belknap Indian Community v. Mazurek, 43 F.3d 428 (9th Cir. 1994); City of Timberlake v. Cheyenne River Sioux Tribe, 10 F.3d 554 (8th Cir. 1994), cert. denied, 114 S.Ct. 2741 (1994); United States v. Morgan, 614 F.2d 166 (8th Cir. 1980).

[2] A statute prohibiting federal employees from contracting or trading with Indians limits "Indian" to, inter alia, a member of a tribe eligible for BIA services. 18 U.S.C. § 437(d).

an Indian by a tribe or by the federal government." United States v. Lawrence, 51 F.3d 150, 152 (8th Cir. 1995). See also United States v. Broncheau, 597 F.2d 1260, 1263 (9th Cir.), cert. denied, 444 U.S. 859 (1979); United States v. Dodge, 538 F.2d 770, 786 (8th Cir. 1976), cert. denied, 429 U.S. 1099 (1977); United States v. Driver, 755 F.Supp. 885, 888 (D.S.D.), aff'd on other grounds, 945 F.2d 1410 (8th Cir. 1991), cert. denied, 502 U.S. 1109 (1992); St. Cloud v. United States, 702 F.Supp. 1456, 1460 (D.S.D. 1988.

1. *The Indian blood element.* The element of "some Indian blood" requires an identifiable Indian ancestry, that is, ancestors living in what is now America prior to the arrival of Europeans. A particular amount of Indian blood is not required. In St. Cloud v. United States, 702 F.Supp. at 1460, the court found 15/32 of Yankton Sioux blood sufficient to satisfy the test. Oglala Sioux Indian blood in the amount of 11/128 is sufficient. United States v. Lawrence, 51 F.3d at 152. See also United States v. Dodge, 538 F.2d at 786 (1/4 Indian blood); United States v. Driver, 755 F.Supp. at 888 (7/32 sufficient and citing a civil case in which 1/8 was ruled adequate).

2. *The Indian recognition element.* "In determining whether a person is recognized as an Indian, courts have looked to both recognition by a tribe or society of Indians or by the federal government." United States v. Dodge, 538 F.2d at 786. In the Eighth Circuit, four factors guide the "recognition" analysis. United States v. Lawrence, 51 F.3d at 152; United States v. Driver, 755 F.Supp. at 888-89; St. Cloud v. United States, 702 F.Supp at 1461-62. They are:

a. Tribal enrollment. Tribal enrollment is "the common evidentiary means of establishing Indian status." United States v. Broncheau, 597 F.2d at 1263. One district court considers tribal enrollment "the most important factor." United States v. Driver, 755 F.Supp. at 888. And tribal enrollment alone has been sufficient proof of Indian status. E.g., Azure v. United States, 248 F.2d 335, 337 (8th Cir. 1957). It is, however, to be noted that a person may still be an Indian for jurisdictional purposes without being enrolled with a recognized tribe. United States v. Broncheau, 596 at 1265; United States v. St. Cloud, 702 F.Supp. at 1461; Ex parte Pero, 99 F.2d 28, 31 (7th Cir. 1938), cert. denied, 306 U.S. 643 (1939).

b. Government recognition through receipt of assistance reserved for Indians. Assistance that might establish federal recognition can include medical services from the Indian Health Service, receipt of school books under the Johnson-O'Malley Act, and receipt of federal housing assistance. See United States v. Lawrence, 51 F.3d at 153; St. Cloud v. United States, 702 F.Supp. at 1461-62.

c. Enjoying the benefits of tribal affiliation. "This factor, like the tribal-enrollment and social-recognition factors, goes to the question of tribal recognition of Indian status." United States v. Lawrence, 51 F.3d at 153. Participation in a tribal alcohol treatment and counseling program and obtaining employment through a tribally-administered employment program satisfy this factor. St. Cloud v. United States, 702 F.Supp. at 1462.

d. Social recognition as an Indian. The following facts supported a finding of social recognition. "St. Cloud...lives on the...Reservation in federally provided housing, is a member of the Indian community, and participates in Indian social life. St. Cloud identifies himself as an Indian, and is not at all integrated into non-Indian society." St. Cloud v. United States, 702 F.Supp. at 1462. But see State v. District Court, 851 P.2d 405, 407 (Mont. 1993) (the defendant was found to be a non-Indian even though "he was adopted by an Indian; attended Indian schools; practiced the Indian religion; participated in tribal customs; married an Indian; and has Indian children," he was, however, unenrolled and did not receive federal benefits as an Indian). The following supported a finding of non-recognition. "[T]he alleged victim was born off the reservation; that except for one seven-month period immediately preceding the alleged [crime], she had lived her entire life off the reservation; that she did not attend pow-wows, Indian dances or other Indian cultural events; and that she and her family lived without focusing on their Indian heritage." United States v. Lawrence, 51 F.3d at 154. Sporadic visits to the reservation do not support a finding of recognition. United States v. Driver, 755 F.Supp. at 889.

B. Special Circumstances

1. *Members of terminated tribes.* In the 1950s and early 1960s Congress terminated some tribes from federal supervision. A member of a terminated tribe is not an Indian under federal

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criminal statutes. United States v. Antelope, 430 U.S. 641, 646 n.7 (1977)(dicta); United States v. Heath, 509 F.2d 16, 19 (9th Cir. 1974). There are no terminated tribes in North Dakota, although the Turtle Mountain Band of Chippewa was under consideration for termination. The issue can be relevant in North Dakota if a member of a terminated tribe, while living in or visiting North Dakota, is involved in a crime.

2. *Indian adoptions of non-Indians.* A non-Indian adopted into a tribe or recognized as an Indian by a tribe is not an Indian for federal jurisdictional purposes. United States v. Rogers, 45 U.S. (4 How.) 567, 572-73 (1846). Such person fails the Indian blood test. But non-Indian adoptees may be subject to tribal criminal jurisdiction. Nofire v. United States, 164 U.S. 657 (1897).

III. Defining "Indian Country"

"Indian country" is defined generally for criminal purposes in 18 U.S.C. § 1151, to include "(a) all land within the limits of any Indian reservation...(b) all dependent Indian communities within the borders of the United States...and (c) all Indian allotments, the Indian titles to which have not been extinguished..."

A. Reservations

There are four reservations in North Dakota, the Fort Berthold Indian Reservation, the Standing Rock Sioux Indian Reservation, the Turtle Mountain Indian Reservation, and the Devils Lake Sioux Indian Reservation (Fort Totten). At one time a small portion of the Sisseton-Wapheton Sioux (Lake Traverse) Reservation extended into southeastern North Dakota. That reservation was opened to settlement by non-Indians under an 1891 Act. It was later determined that the 1891 Act disestablished the reservation. DeCoteau v. District Court, 420 U.S. 425 (1975).

The Fort Berthold, Standing Rock, and Devils Lake Reservations have also been opened to non-Indian settlement by Congress. Non-Indians own most of the land within the Fort Berthold Reservation. Mary Jane Schneider, North Dakota Indians: An Introduction 97 (1986). Non-Indians own about 75% of the Devils

Lake Reservation and about 50% of the Standing Rock Reservation. Id. at 92, 102.

1. *Non-Indian land within reservations.* A crime committed on non-Indian land within a reservation is nonetheless committed in Indian country. Seymour v. Superintendent, 368 U.S. 351, 357-59 (1962). Similarly, "State highways within the boundaries of a reservation are a part of the reservation." Gourneau v. Smith, 207 N.W.2d 256, 258 (N.D. 1973).

2. *Disestablished reservations.* Many federal defendants assert that the federal court is without jurisdiction because the reservation has been disestablished or diminished and, therefore, the alleged crime was committed outside of Indian country. The basis for all such claims is that Congress intended to disestablish or diminish reservations when Congress opened reservations to non-Indian homesteaders for settlement. Such claims have failed in North Dakota except for that made with regard to the Sisseton-Wapheton Reservation. DeCoteau v. District Court, 420 U.S. 425 (1975).

In United States v. Long Elk, 565 F.2d 1032, 1035-36 (8th Cir. 1977), the court ruled that a 1913 Act opening the eastern half of the Standing Rock Reservation for settlement did not diminish it. It also noted that United States ex rel. Condon v. Erickson, 478 F.2d 684 (8th Cir. 1973), held, by implication, that a 1908 Act opening the western half of the reservation did not diminish it. Long Elk, 565 F.2d at 1035.

The Court of Appeals has also considered the status of the Fort Berthold and Devils Lake Reservations. Recently, a defendant challenged the federal court's jurisdiction over a crime committed in New Town. He claimed that the crime did not occur in Indian country because the 1910 Act opening the Fort Berthold Reservation removed the land from reservation status. United States v. Standish, 3 F.3d 1207, 1208 (8th Cir. 1993). The court disagreed, declining to overturn New Town v. United States, 454 F.2d 121 (8th Cir. 1972), which concluded that Congress did not intend the 1910 Act to diminish the reservation. The 1904 Act opening the Devils Lake Reservation to non-Indians has been held not to have disestablished it. United States v. Grey Bear, 828 F.2d 1286, 1291 (8th Cir. 1987).

3. *Expanding reservations?* Since statehood, the state and federal government have assumed that the bed of Devils Lake is

outside of the Devils Lake Reservation. The state has exercised jurisdiction over the lake as well as activities on it just as if the lake were not Indian country. The Devils Lake Sioux Tribe asserts that the 1867 Treaty creating the reservation should be interpreted to include the lake within the reservation. Its claim is pending before the federal district court. Devils Lake Sioux Tribe v. North Dakota, et al., Civ. No. A2-86-87 (D.N.D. N.E. Div.). In addition, some present members of the tribal council assert tribal title to Camp Grafton, the Army National Guard training site located on the north side of the lake.

4. *New reservations?* The Little Shell Pembina Chippewa Band is seeking the federal government's recognition as an Indian tribe. If the petition is successful the new tribe may seek to establish a homeland in North Dakota.

5. *De facto reservations.* In United States v. Azure, 801 F.2d 336 (8th Cir. 1986), the court considered a challenge to its jurisdiction. Azure claimed that the crime did not occur in Indian Country because it took place in his home two miles from the Turtle Mountain Reservation. Id. at 338. The house was located on land held in trust for the benefit of the tribe. Id. "It is well established that the actions of the federal government in its treatment of Indian land can create a de facto reservation, even though the reservation is not created by a specific treaty, statute, or executive order." Id. Some "key factors" in finding a de facto reservation are actions of the BIA in expending funds and providing social services to the area. Id. at 338-39. The court ruled that "it would appear here that the Indian trust land, although not within the boundaries of the Turtle Mountain Reservation, can be classified as a de facto reservation, at least for purposes of federal criminal jurisdiction." Id. at 339.

Recently, the district court stated that New Town, even if the Fort Berthold Reservation were disestablished, would be considered within a de facto reservation. United States v. Standish, C4-92-22-02, Memorandum and Order 3 (N.W.D. N.D. Oct. 29, 1992), aff'd on other grounds, 3 F.3d 1207 (8th Cir. 1993). Thus, the concept of a de facto reservation has been recognized in North Dakota.

Authority for the concept, however, is limited and its application conflicts with principles of federalism, thus posing a constitutional problem.

A number of the cases that discuss the de facto reservation idea do so as dictum. Minnesota v. Hitchcock, 185 U.S. 373, 389 (1902); Mattz v. Arnett, 412 U.S. 481 (1973); United States v. John, 437 U.S. 634 (1978); Langley v. Ryder, 602 F. Supp. 335, 341 n. 6 (D.C. La.), aff'd 778 F.2d 1092 (5th Cir. 1985). Unique about these cases is that if a reservation was not found the tribes in question would have been without a homeland. None of these cases concerned land which would give the tribe a second or an expanded reservation. The court's analysis could have been influenced by consideration of a tribe's need for a homeland. See also Sac and Fox Tribe v. Licklider, 576 F.2d 145, 149 (8th Cir.), cert. denied 439 U.S. 955 (1978).

Other courts have examined and applied the concept more skeptically. In Pittsburg & Midway Coal Mining Co. v. Yazzie, 909 F.2d 1387 (10th Cir.), cert. denied sub nom. Navajo Tax Comm'n v. Pittsburg & Midway Coal Mining Co., 498 U.S. 1012 (1990), and the court reviewed acts that had diminished the size of the Navajo Reservation. Id. at 1419, 1422. It then found a number of circumstances in the area's subsequent history that pointed to a reservation-like status. Id. at 1419-20. Nonetheless, the court declined to "'remake history' and declare a de facto reservation in face of clear congressional intent to the contrary." Id. at 1420.

Sokaogon Chippewa Community v. Exxon Corp., 805 F. Supp. 680 (E.D. Wis. 1992), aff'd 2 F.3d 219 (7th Cir. 1993), states that the United States must have "affirmatively intend[ed]" to treat the land as a reservation "and must have 'approved' the treatment of the land as a reservation." Id. Thus, a tribe cannot itself create a de facto reservation. Also, the governmental authority establishing a de facto reservation "must be competent." Id. at 698. "Indian Office employees and field agents are not competent to establish reservations without approval from a person with authority." Id. at 698 n.18. The court also stated that "the boundaries of such a reservation must be defined precisely by writing 'or by long continued and consented to occupation within well understood contours.'" Id. at 698.

A difficulty with the de facto reservation concept is that it conflicts with state sovereignty. States entered the Union with their sovereignty intact. Blatchford v. Native Village of Noatak, 501 U.S. 775, 779 (1991). Finding Indian country to exist outside of reservations may conflict with the Tenth Amendment and principles of federalism. See United States v. Lopez, 115 S.Ct.

1624 (1995); New York v. United States, 505 U.S. 144 (1992); Metcalf & Eddy v. Mitchell, 269 U.S. 514, 523 (1926). Only with state consent can land be transformed into Indian country and thereby deprive the state of its jurisdiction over it. See Paul v. United States, 371 U.S. 245, 264-65 (1963); James v. Dravo Contracting Co. 302 U.S. 134, 141 (1937); Surplus Trading Co. v. Cook, 281 U.S. 647, 650 (1930); Tubby v. State, 327 So.2d 272, 282 (Miss. 1976); State v. Shepard, 300 N.W. 905 (Wis. 1941).

B. Dependent Indian communities

The second type of Indian country referred to in 18 U.S.C. § 1151 is "dependent Indian community." Determining whether land constitutes a dependent Indian community requires consideration of four factors:

> (1) whether the United States has retained "title to the lands which it permits the Indians to occupy," and "authority to enact regulations and protective laws respecting this territory". . .(2) "the nature of the area in question, the relationship of the inhabitants of the area to Indian tribes and to the federal government, and the established practice of government agencies toward the area". . .(3) whether there is "an element of cohesiveness. . . manifested either by economic pursuits in the area, common interests, or needs of the inhabitants as supplied by that locality" . . .and (4) "whether such lands have been set apart for the use, occupancy and protection of dependent Indian peoples"....

United States v. South Dakota, 665 F.2d 837, 839 (8th Cir. 1981), cert. denied, 459 U.S. 823 (1982).

None of these factors is determinative. "'The test for determining what is a dependent Indian community must be a flexible one, not tied to any single technical standard such as percentage of Indian occupants.'" Id. at 842. For example, the fact that a state has asserted jurisdiction over an area does not necessarily defeat a finding of a dependent Indian community. Id. Each determination is unique. "'[T]he ultimate conclusion as to whether an Indian community is Indian country is quite factually dependent.'" Housing Authority of the Seminole Nation v. Harjo,

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790 P.2d 1098, 1101 (Okla. 1990). Indeed, an area that is Indian country can later lose that status. Id. at 1104. Below are some of the factors considered by courts in their review of this question.

The factors include: tribal control of the housing authority which manages the land; housing built with federal money; purpose is to provide adequate housing which is unavailable on the reservation; land owned in trust by the United States; Indian Health Service provides water, sewer, and medical services; BIA maintains roads; county has never asserted criminal jurisdiction; area's ties to federal government; presence of non-Indians; kind of tribal services provided as compared with tribal services provided on the reservation; percentage of Indian residents; BIA provides school bus service; BIA assists in providing fire protection and schools; distance from reservation; Indian churches and ceremonial grounds nearby; role of BIA in law enforcement; Indian or non-Indian character of surrounding area; need of Indians to travel outside of area to obtain BIA and tribal services; state provides schools; state provides water, law enforcement, and sanitation services; state maintains roads; businesses in the area pay state tax and are subject to state and county health and building codes; primary purpose of area is commercial activity not protection of Indians; land owned by tribal housing authority; and land involved in a HUD housing program and subject to extensive federal regulations.

This list was derived from the following cases. After each case is a note about the kind of land at issue. United States v. Driver, 755 F. Supp. 885 (D.S.D. 1991), aff'd 945 F.2d 1410 (8th Cir. 1991), cert. denied, 502 U.S. 1109 (1992) ("home located in a community called Blackpipe Housing"); United States v. Cook, 922 F.2d 1026 (2d Cir.), cert. denied sub nom. Tarbell v. United States, 500 U.S. 941 (1991) (6 mile area that is home to the St. Regis Tribe); Blatchford v. Sullivan, 904 F.2d 542 (10th Cir. 1990), cert. denied, 498 U.S. 1035 (1991) (Navajo Estates, a small housing subdivision in a rural settlement); Housing Authority of the Seminole Nation v. Harjo, 790 P.2d 1098 (Okla. 1990) (a 6½ acre tract with four houses); Indian Country U.S.A. Inc. v. Oklahoma, 829 F.2d 967 (10th Cir. 1987), cert denied, sub nom. Oklahoma Tax Comm'n v. Muscogee (Creek) Nation, 487 U.S. 1218 (1988) (gaming establishment located on the 100 acre "Mackey Site"); United States v. Azure, 801 F.2d 336 (8th Cir. 1986) (house and township near the Turtle Mountain Reservation); United States v. Mound, 477 F. Supp. 156 (D.S.D. 1979) (tribal housing

project in Eagle Butte, S.D.); United States v. South Dakota, 665 F.2d 837 (8th Cir. 1981), cert. denied, 459 U.S. 823 (1982) (tribal housing project in Sisseton, S.D.); Weddell v. Meierhenry, 636 F.2d 211 (8th Cir. 1980), cert. denied, 451 U.S. 941 (1981) (the town of Wagner, S.D.); Youngbear v. Brewer, 415 F. Supp. 807 (D. Iowa 1976), aff'd 549 F.2d 74 (8th Cir. 1977) (the "Sac and Fox Indian Settlement").

These cases also set forth some general rules to be applied in assessing the presence of a dependent Indian community.

The Eighth Circuit, in finding a housing project to be a dependent Indian community, cautioned that it was "not expanding the definition of a dependent Indian community to include a particular locale merely because a small segment of the population consists of Indians receiving various forms of federal assistance." United States v. South Dakota, 665 F.2d at 843. See also United States v. Martine, 442 F.2d 1022, 1024 (10th Cir. 1971) (the mere presence of a group Indians in an area "would undoubtedly not suffice" to establish a dependent Indian community). This is so even if Indians constitute most of the area's population and give it a distinctly Indian character. Blatchford v. Sullivan, 904 F.2d at 549. On the other hand, the fact non-Indians live in the area does not prohibit it from being a dependent Indian community. United States v. Mound, 477 F. Supp. at 160. In deciding Azure, which concerned land near the Turtle Mountain Reservation, the Court commented on the "element of cohesiveness," but found that the township's sparse population made a finding of cohesiveness less likely. United States v. Azure, 801 F.2d at 339. It nonetheless found the township to be a dependent Indian community. Id. The court noted that the United States owns the land, the BIA exercises certain criminal jurisdiction over Indians in the township, the land is leased only to Indians, the BIA maintains the roads, and the federal government recognizes the area as a dependent Indian community. Id. at 339.

1. *The Circle of Nations School (Wapheton Indian School).* This tribally operated, federally funded school for Indian children is located in the middle of Wapheton, N.D. In Allery, et al. v. Hall, et al., Civ. No. 93-280, Mem. Op. (Richland County Dist. Ct., Mar. 10, 1994), the court inclined to the view that the school is not Indian country for civil purposes. Whether it is Indian country for criminal law purposes has not been decided.

2. *United Tribes Technical College.* The college is located in Bismarck. The state has jurisdiction over crimes committed at the college. State v. His Chase, 531 N.W.2d 271, 272 (N.D. 1995); United States v. Goings, 504 F.2d 809, 811-12 (8th Cir. 1974).

3. *Trenton Indian Service Area.* Because of the small size of the Turtle Mountain Reservation, tribal members were given an opportunity to settle elsewhere. A number settled in the Trenton, N.D., area. State v. Gohl, 477 N.W.2d 205, 206 (N.D. 1991). The area is known as the Trenton Indian Service Area. Whether it or any part of it constitutes Indian country has not been decided.

4. *Sisseton-Wapheton Casino.* The Sisseton-Wapheton Sioux Tribe recently purchased land in Richland County from a non-Indian. It plans to operate a casino on the tract. The United States, upon the tribe's request, has accepted the land into trust. Its Indian country status for criminal, as well as civil jurisdiction is unresolved. The county and the tribe are discussing an agreement to address law enforcement issues.

5. *Indian housing off the Turtle Mountain Reservation.* There is a good deal of land located near but outside of the Turtle Mountain Reservation. It is owned either by the tribe or the federal government and used to provide housing for tribal members. Although one of these areas was found to be Indian country in United States v. Azure, 801 F.2d 336 (8th Cir. 1986), it remains to be determined whether other areas have that status. See Housing Authority of the Seminole Nation v. Harjo, 790 P.2d 1098, 1104 (Okla. 1990)(the fact that one house built by the tribal housing authority is a dependent Indian community does not mean that all such houses have the same status). Rolette County officials consider some of the housing areas to constitute dependent Indian communities.

C. Indian allotments

Reservations were originally held in communal ownership by tribes. By statute, particularly the General Allotment Act of 1887, 25 U.S.C. § 331, et seq., Congress allotted to individual tribal members small tracts of land. (The technical distinction between a trust allotment and a restricted allotment is discussed in United States v. Ramsey, 271 U.S. 467, 470 (1925)). Whether a tract is an allotment can be determined from the realty records of

the Bureau of Indian Affairs' area office in Aberdeen, S.D., and possibly from BIA records and tribal records on the reservation.

D. Trust land

There is a question whether trust land constitutes Indian country for purposes of criminal law. Trust land is land held in trust by the United States for the benefit of a tribe or individual Indian.

The Court, in a civil suit, ruled that Indian country is any area that has been validly set apart for the use of Indians under the superintendence of the United States. Oklahoma Tax Commission v. Potawatomi Indian Tribe, 498 U.S. 505, 511 (1991). See also Buzzard v. Oklahoma Tax Commission, 992 F.2d 1073, 1076 (10th Cir. 1993). This is a broader definition than that in the criminal law statute, 18 U.S.C. § 1151. The Court has held that trust land meets this expanded definition. Potawatomi Tribe, 498 U.S. at 511. However, two years later it confined Indian country to the three definitions set forth in Section 1151. Oklahoma Tax Commission v. Sac & Fox Tribe, 508 U.S. 114, 113 S.Ct. 1985, 1992 (1993).

The Eighth Circuit Court of Appeals has ruled that taking land into trust is an unconstitutional delegation of authority to the executive branch. South Dakota and City of Oacoma v. United States Dep't of Interior, 69 F.3d 878, 885 (8th Cir. 1995), pet. for reh'g en banc denied. And as discussed in the section on de facto reservations, taking off-reservation land into trust may violate principles of federalism. Cohen is probably correct in concluding that trust lands "have Indian country status when part of a dependent Indian community....Otherwise, the Indian country status of trust lands located outside of reservation boundaries is uncertain." Cohen's Handbook of Federal Indian Law 45 (1982 ed.)

IV. State, Tribal, and Federal Criminal Jurisdiction in Indian Country

A. State Jurisdiction

1. *In general.* '[C]riminal offenses by or against Indians have been subject only to federal or tribal laws, except where Congress...has expressly provided that State laws shall apply." Washington v. Yakima Indian Tribe, 439 U.S. 463, 470-71 (1979). In Donnelly v. United States, 228 U.S. 243, 271-72 (1913), the Court held that states do not have jurisdiction over crimes committed by non-Indians against the person or property of Indians.

While the state is without jurisdiction over crimes that involve Indians as either offender or victim, the state has exclusive criminal jurisdiction in Indian country over crimes committed by non-Indians against non-Indians. "For Indian country crimes involving only non-Indians, longstanding precedents of this Court hold that state courts have exclusive jurisdiction..." Duro v. Reina, 495 U.S. 676, 681 n.1 (1990). This jurisdiction extends to victimless crimes committed by non-Indians. State v. Vandermay, 478 N.W.2d 289, 290 (S.D. 1991)(operating an overweight vehicle); State V. Schaeffer, 781 P.2d 264, 266 (Mont. 1989)(violation of pawnbroker laws); State v. Thomas, 760 P.2d 96, 98 (Mont. 1988)(failure to report motor vehicle accident); State v. Burrola, 669 P.2d 614, 615 (Ariz. Ct. App. 1983)(possession of deadly weapon); State v. Warner, 379 P.2d 66 (N.M. 1963)(driving under the influence). The state has no other criminal jurisdiction in Indian country. Solem v. Bartlett, 465 U.S. 463, 465 n.2 (1984). It does not even have jurisdiction over non-Indians who commit misdemeanor crimes against Indians. State v. Larson, 455 N.W.2d 600, 601-02 (S.D. 1990); State v. Flint, 756 P.2d 324, 325-26 (Ariz. Ct. App. 1988), cert denied, 109 S.Ct. 3228 (1989); State v. Greenwalt, 663 P.2d 1178, 1182-83 (Mont. 1983); State v. Kuntz, 66 N.W.2d 531, 532 (N.D. 1954)(by implication). This lack of state authority over misdemeanor crime can place a strain on the justice system because tribes do not have jurisdiction over non-Indians, leaving the federal government as the only authority with jurisdiction.

2. *The unique feature of the Devils Lake Reservation.* In 1944 the Devils Lake Sioux Tribe requested that Congress formally recognize state criminal jurisdiction on the reservation. Two years later Congress approved an Act entitled: "An Act to confer jurisdiction on the State of North Dakota over offenses committed by or against Indians on the Devils Lake Indian Reservation." Act of May 31, 1946, ch. 279, 60 Stat. 229. The statute has been construed to give the state jurisdiction over Indians who commit non-major offenses on the reservation. State v. Hook, 476 N.W.2d 565, 571 (N.D. 1991) rev'g State v. Lohnes, 69 N.W.2d 508 (N.D.

1955). See also Negonsott v. Samuels, 507 U.S. 99, 113 S.Ct. 1119 (1993)(ruling that a nearly identical statute gives Kansas concurrent jurisdiction to prosecute crimes by or against Indians on Kansas reservations); Youngbear v. Brewer, 549 F.2d 74 (8th Cir. 1977)(construing a similar statute as giving Iowa only misdemeanor jurisdiction). Thus, the Devils Lake Reservation is unique. The scope of state criminal jurisdiction on it is much different and far more extensive than it is on the other reservations.

B. Tribal Jurisdiction

1. *Jurisdiction over non-Indians and non-member Indians.* "By submitting to the overriding sovereignty of the United States, Indian tribes...necessarily give up their power to try non-Indian citizens..." Oliphant v. Suquamish Indian Tribe, 435 U.S. 191, 210 (1978). Recently, Congress gave tribes criminal jurisdiction over Indians who are not members of the prosecuting tribe. 25 U.S.C. § 1301(2). This was in response to Duro v. Reina, 495 U.S. at 688, which held that tribal authority is a "power over its members" and that "[i]n the area of criminal enforcement...tribal power does not extend beyond internal relations among members." See also Greywater v. Joshua, 846 F.2d 486, 493 (8th Cir. 1988)(holding that the Devils Lake Sioux Tribe does not have criminal jurisdiction over a member of the Turtle Mountain Band of Chippewa).

The Congressional authorization to tribes of jurisdiction over non-member Indians presents a constitutional issue in light of this statement: "Our cases suggest constitutional limitations even on the ability of Congress to subject American citizens to criminal proceedings before a tribunal that does not provide constitutional protections as a matter of right." Duro v. Reina, 495 U.S. at 693.

2. *Jurisdiction over Indians.* "It is undisputed that Indian tribes have the power to enforce their criminal laws against tribal members." United States v. Wheeler, 435 U.S. 313, 322 (1978). Tribes have exclusive power to try and punish Indians who commit misdemeanor crimes against Indians. Id. at 328; United States v. Antelope, 430 U.S. at 642-43 n.2; United States v. Johnson, 637 F.2d 1224, 1231 (9th Cir. 1980); Iron Crow v. Oglala Sioux Tribe, 231 F.2d 89, 96 (8th Cir. 1956). Tribes also have jurisdiction, concurrent with the United States, over Indians who commit misdemeanors against non-Indians. United States v. John,

587 F.2d 683, 687-88 (5th Cir. 1979). It is uncertain whether tribes also have the power, concurrently with the United States, to prosecute Indians who commit major crimes. Duro v. Reina, 495 U.S. at 680 n.1; Oliphant, 435 U.S. at 203 n.14; John, 587 f.2d at 686 n.6. The question is likely moot since tribes are limited to imposing a maximum of one year imprisonment and a fine of $5,000. 25 U.S.C. § 1302(7).

C. Federal Jurisdiction

Federal criminal jurisdiction in Indian country rests largely on two statutes, the General Crimes Act and the Major Crimes Act. 18 U.S.C. §§ 1152, 1153.[3] The General Crimes Act states that unless otherwise provided by law,

> the general laws of the United States as to the punishment of offenses committed in any place within the sole and exclusive jurisdiction of the United States...shall extend to the Indian Country.
>
> This section shall not extend to offenses committed by one Indian against the person or property of another Indian, nor to any Indian committing any offense in the Indian country who has been punished by the local law of the tribe, or to any case where, by treaty stipulations, the exclusive jurisdiction over such offenses is or may be secured to the Indian tribes respectively.

18 U.S.C. § 1152. The Act extends federal jurisdiction into Indian country except for the three named exceptions. The statute's mention of "general laws" refers to "those laws commonly known as federal enclave laws, which are criminal statutes enacted by Congress...governing [federal] enclaves such as national parks." United States v. Cowboy, 694 F.2d 1228, 1234 (10th Cir. 1982).

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[3] Other federal criminal laws dealing with Indians include, and all being in Title 18, § 437 (federal employees from trading with Indians); § 1158 (counterfeiting the Indian Arts and Craft Bd. trademark); § 1159 (misrepresenting goods as Indian products); § 1163 (theft from tribal organizations); § 1164 (injury to Indian country boundary and hunting and fishing signs); § 1165 (hunting, trapping, and fishing on Indian land).

In the event there is a gap in the federal criminal law, then the Assimilative Crimes Act, 18 U.S.C. 13, applies. This Act, which is a "general law" within Section 1152, allows state criminal laws to supply the missing offense under federal law. Williams v. United States, 327 U.S. 711, 719 (1946). The crime is charged as a federal offense and tried in federal court but state law defines the crime and the sentence. State law cannot be assimilated when any federal law punishes the conduct. United States v. Butler, 541 F.2d 730, 734 (8th Cir. 1976).

The second significant federal statute is the Major Crimes Act. It is directed to the crimes of Indians. It states that Indians who commit such crimes as murder, manslaughter, kidnapping, rape, and arson, are subject to federal jurisdiction. 18 U.S.C. § 1153.

1. *Jurisdiction over non-Indians.* The United States does not have jurisdiction over a non-Indian when the victim is also non-Indian. New York ex rel. Ray v. Martin, 326 U.S. 496, 499-500 (1946); United States v. Draper, 164 U.S. 240, 247 (1896); United States v. McBratney, 104 U.S. 621, 624 (1881). As explained above, in this situation the state holds exclusive jurisdiction. Duro v. Reina, 495 U.S. at 681 n.1. The only exception occurs when the crime is a federal crime wherever it is committed, such as treason or assaulting a federal officer.

When the non-Indian's victim is Indian the state does not have jurisdiction, nor does the tribe. Only the federal government, as authorized by the General Crimes Act can bring the non-Indian to justice. Williams v. United States, 327 U.S. 711, 714 (1946); Donnelly v. United States, 228 U.S. 243, 271-72 (1913).

2. *Jurisdiction over Indians.* If the crime committed in Indian country by an Indian is a major crime, the Major Crimes Act gives the federal government jurisdiction. 18 U.S.C. § 1153. If the crime is non-major and the Indian's victim is Indian, the tribe, as discussed above, has exclusive jurisdiction. If the crime is non-major and the Indian's victim is non-Indian then the federal government has concurrent jurisdiction with the tribe. Section 1152 makes applicable to Indian country the criminal laws of the United States, but the statute contains several exceptions. One states that the section does not apply "to any Indian committing any offense in Indian country who has been punished by the local law of the tribe..." 18 U.S.C. § 1152. Thus, if the tribe

punishes an Indian who commits a crime against a non-Indian § 1152 would seem to preclude a federal prosecution. At least one court has reached this conclusion. United States v. LaPlant, 156 F.Supp. 660 (D. Mont. 1957). On the other hand, if the tribe does not punish the offender, the United States may prosecute.

3. *Summary.* The above rules can be summarized in the following table, but keep in mind that the Devils Lake Reservation is subject to different rules because of the 1946 federal statute:

CRIMINAL JURISDICTION IN INDIAN COUNTRY	
PERSONS INVOLVED	**JURISDICTION**
Indian against Indian	
- major crime	United States (& possibly concurrent jurisdiction with the tribe)
- non-major crime	Tribe
Indian against Non-Indian	
- major crime	United States (& possibly concurrent jurisdiction with the tribe)
- non-major crime	Tribe (& United States if tribe has not rendered punishment)
Non-Indian against Non-Indian	State
Non-Indian against Indian	United States

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Judicature

THE JOURNAL OF THE AMERICAN JUDICATURE SOCIETY
NOVEMBER-DECEMBER 1995 VOL 79 NO 3

COVER: NAVAJO HOGAN, MONUMENT VALLEY, ARIZONA. PHOTO BY STEPHEN TRIMBLE. ILLUSTRATION BY ESTELLE CAROL

JUDICATURE. The Journal of the American Judicature Society (ISSN 0022-5800). Volume 79, Number 3. November-December. Published bi-monthly. Institutional subscriptions $48 a year, single issues, $9; Foreign $60 a year, single issues, $11. Individual subscriptions available only through membership in the American Judicature Society. Views and opinions in articles are not to be taken as official expressions of the American Judicature Society's policy unless so stated.

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Indian Tribal Courts and Justice

A Symposium

Letters

Footnote fight

Reading footnotes is normally a pretty boring experience, but the arrival on my desk of the most recent issue of *Judicature* (September-October 1995) raised my blood pressure. I have nothing but praise for *Judicature* for posing the important question: "Case law citations: Do we need a new system?" and I salute Wisconsin lawyer Gary Sherman for his excellent presentation of the arguments in favor of reform. I feel compelled, nevertheless, to correct the erroneous information conveyed about Louisiana's reform efforts in the anti-change companion article by West Publishing Company staffers Donna Bergsgaard and Andrew Desmond.

Bergsgaard and Desmond are very familiar with my activities—both as Louisiana state law librarian and prior to July as president of the American Association of Law Libraries—in support of Louisiana's public domain citation format and of the reform movement nationally. It is very likely they have heard or read both Louisiana Chief Justice Pascal F. Calogero's remarks and mine on the favorable developments resulting from Louisiana's adoption of the court rule authorizing the format. I therefore consider it disingenuous and intellectually dishonest of Bergsgaard and Desmond to write on page 63 of their article: "In 1994 [actually December 17, 1993], the Louisiana Supreme Court adopted a 'vendor-neutral' citation format based on docket number, but attorneys have received the new format poorly and are apparently not using it." The accompanying footnote reads: "Aarons, 'Cite-Fight: The War on West,' *Law Office Computing*, April/May 1995, at 49 (interview with Carol Billings, Louisiana state law librarian)." Had I been a casual reader of this footnote, I would have assumed that the source of the information about the alleged failure of the Louisiana format was none other than yours truly.

I immediately remembered that the "Cite-Fight" article was the very one that had required me to write a letter to the editor of *Law Office Computing* (which appeared in the June/July issue) to correct misquotations and misinterpretations of my remarks. The only statement in that article that could have prompted the erroneous conclusion by Bergsgaard and Desmond is the following: "Billings admits there have been problems in Louisiana, but says the citation system is catching on before its use becomes mandatory on July 1. [Actually, it became mandatory on July 1, 1994.] In the first six months, a number of attorneys were confused.... It hadn't occurred to them why we were doing this." Chief Justice Calogero, numerous Louisiana lawyers, or I would have been happy to give the two West authors a current update on the growing acceptance of the format and on the resulting price decreases in the cost of CD-ROM versions of Louisiana primary sources now that West has two competitors.

Carol D. Billings
Director
Law Library of Louisiana
New Orleans, Louisiana

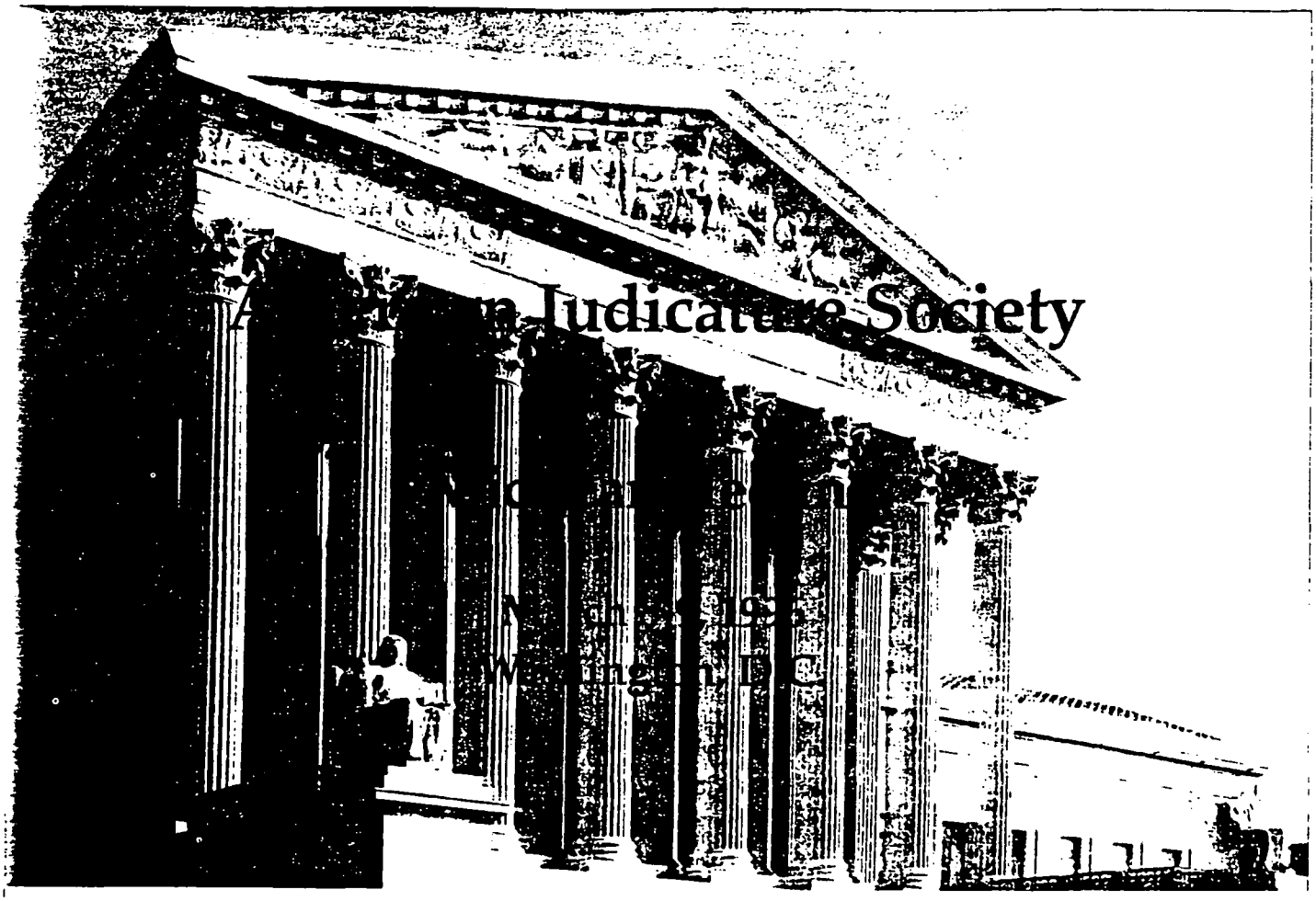
The authors respond

West communicates often with its Louisiana customers. Since the adoption of the Louisiana public domain citation scheme, many attorneys and judges have advised our editors and sales and customer service representatives that the new citation scheme is confusing and burdensome. Attorneys and researchers have described it to us as "a pain." While attorneys now have no choice but to use the new citation scheme in appellate briefs, we continue to question—based on our communications with Louisiana practitioners—whether attorneys are using the new citation format in office memoranda, opinion letters, and trial court memoranda. To us, Carol Billings's interview in the *Law Office Computing* article corroborated what we've heard often, so we stand by our statement that "attorneys have received the new format poorly and are apparently not using it" (except, of course, when compelled by law to do so).

Ms. Billings repeats the fallacy that Louisiana's adoption of a public domain citation scheme is responsible for driving down the cost of CD-ROM products in Louisiana. In reality, the price of CD-ROM products of every kind has declined since 1993—not only in Louisiana, but also in the vast majority of states that chose not to create new public domain citation schemes. The actual reasons for lower CD-ROM prices are an increased user base (due to greater availability of CD-ROM drives in newer PCs), increases in the number of CD-ROM titles available, and reduced production costs. On the other hand, government-mandated citations have increased the cost of preparing briefs in Louisiana because researchers are now compelled to learn and use a complicated new system.

West has incorporated the new public domain citation format in its advance sheets, bound volumes, Westlaw, and CD-ROM products, and in so doing greatly expanded awareness and facilitated the use of the new citation scheme. Like many, we aren't enthusiastic about the new citation scheme—it increases our costs, too. However, we remain committed to serving the case law research needs of all of our customers in whatever format they are most comfortable with: print, online, or CD-ROM. We are proud of our more than 100 years of continuous service to the bench, bar, and people of Louisiana.

Donna M. Bergsgaard
Andrew R. Desmond



Friday March 8

3:00 p.m. "Perspectives on Court-Congress Relations: The View from the Hill and the Federal Bench" —Hotel Washington

5:30 p.m. Reception at the Supreme Court of the United States

Saturday, March 9

8:30 a.m. Business meeting and panel. "Shall We Dance? The Courts, the Community, and the News Media" —Courtroom of the U.S. Court of Appeals for the Armed Forces

Afternoon Optional activities will be arranged

6:00 p.m. Reception and dinner
Magic show by Chief Judge Loren Smith, U.S. Court of Federal Claims
—Hotel Washington

All members are welcome

To register, or for additional information, call (312) 558-6900 x113.

Tribal courts: providers of justice and protectors of sovereignty

Tribal courts are now the premier institutions that struggle to analyze and identify the extent of tribal jurisdiction and sovereignty.

by Frank Pommersheim

Tribal courts are the frontline institutions that most often confront issues of American Indian self-determination and sovereignty. At the same time they are charged with providing reliable and equitable adjudication in the many and increasingly diverse matters that come before them. They also constitute a key entity for advancing and protecting the rights of self-government.

Tribal courts are of growing significance throughout Indian country, especially in light of the Supreme Court decisions in *National Farmers Insurance Cos. v. Crow Tribe of Indians*[1] and *Iowa Mutual Insurance v. LaPlante*.[2] As Justice Thurgood Marshall wrote in *Iowa Mutual*, "Tribal courts play a vital role in tribal self-government...and the Federal Government has consistently encouraged their development."[3] As a result of this continued and growing recognition, tribal courts are now the premier institutions that struggle to analyze and identify the extent of tribal jurisdiction and sovereignty.

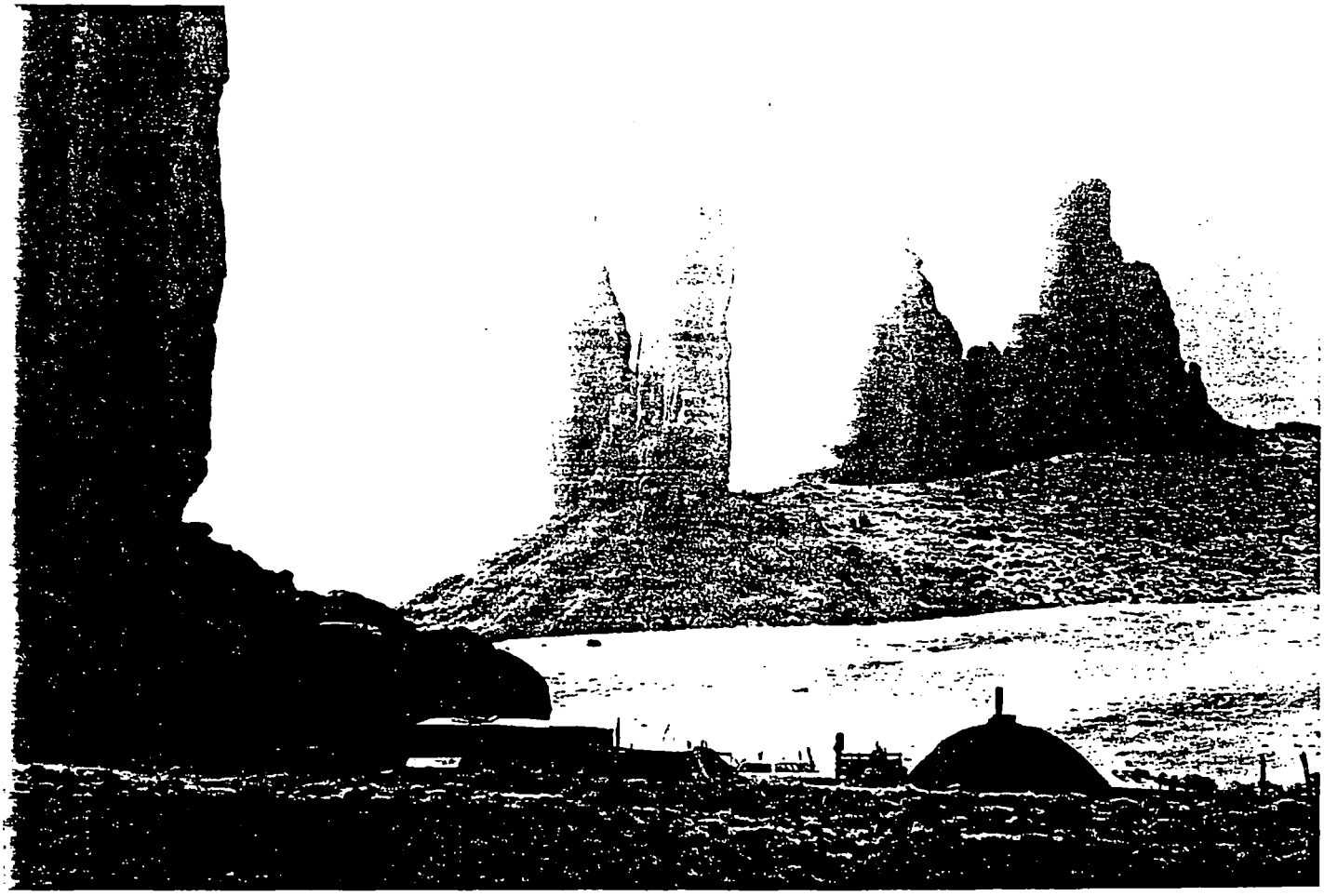
Despite these important trends, the history and development of tribal courts remain little known outside the confines of the special field of scholarship and practice known as Indian law. This is unfortunate. The issues confronting tribal courts have broad significance not only for what happens on the reservation and in Indian country, but also for the meaning and integrity of the dominant legal system and society as a whole. These larger themes include the history of Indian-non-Indian relations and the development and understanding of sovereignty within the national republic, which is most often thought to contain only two sovereigns, but in reality contains three.

Without increased attention to these matters, there will continue to be a woefully incomplete and distorted picture of history and legal reality. In essence, there is a need to extend our foundational webs of legal beliefs to include a strand that is grounded in a

***FRANK POMMERSHEIM** is a professor of law at the University of South Dakota.*

For elaboration of the issues identified in this introduction, see Pommersheim, BRAID OF FEATHERS: AMERICAN INDIAN LAW AND CONTEMPORARY TRIBAL LIFE. (University of California Press, 1995).

1. 471 U.S. 845 (1985).
2. 480 U.S. 9 (1987).
3. *Id.* at 14-15.



basic recognition and understanding of tribal sovereignty and tribal courts. This is the rationale for this symposium on tribal courts.

In this period of rapid and exciting change, the challenges facing tribal courts are essentially twofold and interdependent: Tribal courts must strive to respond competently and creatively to federal and state pressures coming from the outside, and to cultural values and imperatives from within. These themes are addressed in the symposium.

First, U.S. Attorney General Janet Reno articulates the efforts of the Justice Department to develop an increased understanding of tribal sovereignty and to encourage support of tribal courts. Professor Judith Resnik then probes the relationship of tribal court activities in the context of the history of federal court jurisprudence and its varied response both to "difference" and to the quite distinct constitutional narratives evoked by state and tribal claims of sovereignty.

Ada Pecos Melton of the U.S. Department of Justice and Chief Judge Carey Vicenti of the Jicarilla Apache tribe focus on what tribal courts are now doing to ensure they remain culturally informed by, and relevant to, the traditions that have nurtured and sustained them. Douglas Endreson, an attorney who represents Indian tribes, provides a comprehensive survey of what tribal courts are doing in their decisional law, with particular focus on the challenges of defining the scope and existence of tribal power within the dictates of the exhaustion rule, procedural claims and individual rights, and the development of substantive tribal law.

Chief Judge Elbridge Coochise of the Northwest Intertribal Court System and Joe Myers, executive director of the National Indian Justice Center, recount the history and funding problems of the Indian Tribal Justice Act of 1993. The issue concludes with articles by Chief Judge J. Clifford Wallace of the U.S. Court of Appeals for the Ninth Circuit and Arizona Chief Justice Stanley Feldman and David Withey, which describe efforts within the federal and state judiciaries to advance cooperation, communication, and understanding in their interaction with tribal courts.

A historic moment

All of this, it should be noted, is taking place at an important historic moment that needs to be considered carefully so as not to repeat a crucial error of the past. At the turn of the century, in the case of *Lone Wolf v. Hitchock*,[1] the Supreme Court announced the startling

[1] 187 U.S. 553 (1903).

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"Tribal courts play a vital role in tribal self-government....and the Federal Government has consistently encouraged their development."
—Justice Thurgood Marshall

doctrine that Congress has "plenary power" to legislate without limitation in Indian affairs, even to the point of unilaterally abrogating treaties. Historically, the plenary power doctrine—unhinged from any constitutional mooring—facilitated the geographical, political, and legal absorption of Indian tribes into the federal republic and enhanced the realization of the national goal of "manifest destiny." This expansive doctrine has no textual constitutional grounding and often serves to incapacitate and destabilize tribal governments because initiatives of tribal governance may be limited or thwarted altogether by the federal government's exercise of this unlimited power. This is in stark contrast, for example, to the Tenth Amendment, which provides a constitutional benchmark for issues involving the allocation of federal and state power.

The destabilizing and constitutionally questionable doctrine of plenary power ought not to be extended into the judicial realm by the Supreme Court or Congress. The Supreme Court in both *National Farmers Union* and *Iowa Mutual* appears to be intent on avoiding the repetition of such a mistake. These recent decisions are marked by their concern for deference, comity, and respect for the actions of tribal courts. In these decisions, since the Court itself has not spoken in terms of plenary power concerns, it is all the more necessary to be aware of the potential dangers. Subordination of tribal courts to a kind of judicial plenary power would be a dramatic, if not fatal, step backward into a kind of judicial "manifest destiny." Knowledge and understanding remain the best hedge against such an occurrence.

In addition to this far-reaching and legal moment, there is the complementary trajectory of the rapid development of tribal courts. Tribal courts have demonstrated an exceptional capacity for growth in competence and sophistication in the last quarter century. They are currently hearing more cases of greater complexity and impact than ever before. As part of this process of significant change, tribal courts are crafting a unique jurisprudence of vision and cultural integrity. In other words, tribal courts are responding competently and creatively to federal oversight pressures and cultural values in order to synthesize the best of both traditions.

Despite the weight of history and the attendant legal complexity that often surrounds tribal courts, there is also a more basic and profoundly human concern. As noted by Vine Deloria Jr., a leading Sioux intellectual, the key to a more benign and morally coherent era is based in the core values of respect and dignity:

> The lesson which seems so hard to learn is that of dignity and respect. Some of the voices...may appear to be complaining about the loss of land, the loss of a way of life, or the continuing propensity of the white race to change the terms of the debate to favor himself. But deep down these are cries about dignity, complaints about the lack of respect. "It is not necessary," Sitting Bull said, "that eagles should be crows."[5]

A basic unity of important purpose dominates the daily workings of tribal courts. It is this unity and commitment that demonstrates both the tenacity and the hope that underpins the struggle to flourish. All of this takes place in small tribal courthouses throughout Indian country, as reservation inhabitants interact with the law in an ongoing effort to construct an enduring future.

The Supreme Court decisions in *National Farmers Union* and *Iowa Mutual Insurance* reaffirm the federal policy of encouraging tribal self-determination and self-government. Tribal courts are properly seen as vital institutions for implementing this important national policy. As a result, they are the very visible explorers charting much of the future of tribal self-determination. As part of this mission, they need greater understanding, growing support, and continued recognition as the enduring forums for rendering justice and fair play throughout Indian country.

5. Deloria, quoted in Nabokov, ed., NATIVE AMERICAN TESTIMONY xviii (Viking, 1991).

A federal commitment to tribal justice systems

Litigation practice and a series of projects of the U.S. Department of Justice support the federal government's longstanding policy of self-determination for Indian tribes.

by Janet Reno

The earliest pronouncements of the U.S. Supreme Court recognized the sovereignty of American Indian tribal governments and characterized them as "domestic dependent nations." Chief Justice John Marshall described the Indian tribe as "a distinct political society separated from others, capable of managing its own affairs and government itself...."[1] A year later Marshall elaborated that "Indian nations had always been considered as distinct, independent, political communities, retaining their original natural rights, as the undisputed possessors of the soil, from time immemorial...."[2] Today, tribal governments retain inherent authority to govern their affairs, unless Congress has divested them of this authority.

Indian tribal sovereignty is subject to the plenary power of Congress to regulate Indian affairs. This exceptional power is guided by the federal government's trust responsibility to Indian tribes to protect them and their property.

Tribal authority for self-government includes the power to administer justice. Indeed, tribal justice systems are essential pieces of the mosaic of tribal self-governance. The U.S. Department of Justice is firmly committed to increasing self-determination for American Indian tribal governments by strengthening tribal justice systems.

In April 1994, President Bill Clinton reinforced the longstanding federal policy supporting a substantial degree of self-determination for Indian tribes.[3] Federal agencies were directed to deal with Indian tribes on a government-to-government basis when tribal governmental or treaty rights are at issue. Subsequently, in June 1995, the Department of Justice issued its policy on Indian sovereignty and government-to-government relations with Indian tribes. Under this policy:

> The Department is committed to strengthening and assisting Indian tribal governments in their development and to promoting Indian self-governance. Consistent with federal law and Departmental responsibilities, the Department will consult with tribal governments concerning law enforcement priorities in Indian country, support duly recognized tribal governments, defend the lawful exercise of tribal governmental powers in coordination with the Department of the Interior and other federal agencies, investigate government corruption when necessary, and support and assist Indian tribes in the development of their law enforcement systems, tribal courts, and traditional justice systems.

Some of the most important contributions the Department of Justice can make to tribal self-governance are to support the development and strengthening of viable tribal justice systems, and to defend the exercise of tribal self-government powers through tribal justice systems.

***JANET RENO** is attorney general of the United States.*

Tribal justice systems

Central to tribal sovereignty is the capacity for self-governance through tribal justice mechanisms. As Congress has found, tribal justice systems

1. Cherokee Nation v. Georgia, 30 U.S. (5 Pet.) 1, 16 (1831).

2. Worcester v. Georgia, 31 U.S. (6 Pet.) 515, 559 (1832).

3. *See* memorandum for the heads of executive departments and agencies on the subject of government-to-government relations with Native American tribal governments. PUBLIC PAPERS OF THE PRESIDENTS OF THE UNITED STATES, WILLIAM J. CLINTON, 1994, Book I at 800-803. For previous policy statements see "The Forgotten American," Message from President Lyndon B. Johnson, March 6, 1968, H.R. Doc. 90-272; "The American Indians", Message from President Richard M. Nixon, July 8, 1970, H.R. Doc. 91-363; "Statement on Indian Policy," January 24, 1983, PUBLIC PAPERS OF THE PRESIDENTS OF THE UNITED STATES, RONALD REAGAN, 1984 Book 1 at 90-100; "Government-to-Government Relationship of the United States with Indian Tribal Governments", Statement by President George Bush, June 21, 1991, 137 Cong. Rec. S. 8388-401.

are "important forums for ensuring public health and safety and the political integrity of tribal governments." They are "the appropriate forums for the adjudication of disputes affecting personal and property rights," and they are "essential to the maintenance of the culture and identity of Indian tribes...."[4]

While the federal government has a significant responsibility for law enforcement in much of Indian country,[5] tribal justice systems are ultimately the most appropriate institutions for maintaining order in tribal communities. They are local institutions, closest to the people they serve. With adequate resources and training, they are most capable of crime prevention and peace keeping. Fulfilling the federal government's trust responsibility to Indian nations means not only adequate federal law enforcement in Indian country, but enhancement of tribal justice systems as well.

Tribal courts are essential mechanisms for resolving civil disputes that arise on the reservation or otherwise affect the interests of the tribe or its members. In the absence of a contrary treaty or statutory provision, tribal courts are presumed to have jurisdiction over such civil litigation, including actions involving non-Indians.[6] The integrity of and respect for tribal courts are critical for encouraging economic development and investment on the reservations by Indians and non-Indians alike.

Tribal courts are also important vehicles for helping to resolve family problems. They can bring families together and hold parents and children accountable to themselves, each other, and the community. The Supreme Court and Congress have determined that in many instances tribal courts must have exclusive jurisdiction to resolve disputes concerning the status of Indian families.[7]

Tribal courts articulate tribal values. They can act to preserve tribal culture and customs. Tribal values are affirmed not only in decisions about such issues as children, contract disputes, and sentencing, but also in the process by which the decisions are made, the way disputes are resolved, and the manner in which justice is done.

Tribal justice support

In May 1994, the Departments of Justice and Interior sponsored the National American Indian Listening Conference in Albuquerque, New Mexico. The event brought together American Indian leaders with federal cabinet and sub-cabinet officials to give the latter an opportunity to do something they rarely have done with tribal leaders—listen. The Justice Department heard many tribal leaders describe the difficulties of their tribal justice systems due to lack of funding, training, recognition and enforcement of tribal court orders, and lack of jurisdiction over important criminal issues arising in Indian country. Again and again the point was made that support for tribal justice systems is essential to the realization of true self-governance for Indian tribes.

Tribal justice systems are ultimately the most appropriate institutions for maintaining order in tribal communities.

In response the Justice Department established the Office of Tribal Justice to coordinate the department's policy toward Indian tribes, both within the department and with other government agencies. The department also initiated a Tribal Courts Project to help tribal governments develop and strengthen their systems of justice.

The project seeks to increase general public awareness about tribal justice systems. It initiated the symposium of articles on tribal justice systems in this issue of *Judicature* as part of its effort to increase visibility of tribal courts as essential participants in the nationwide administration of justice.[8] The project encourages the creation of innovative training and technical assistance for tribal justice personnel, and it works with federal and state judiciaries and bar associations to improve dialogue and jurisdictional problem solving with tribal courts. Due regard is given to traditional systems of justice as well as those based on Western models. The department's overall goal is to help tribal justice systems operate as partners with state and federal judiciaries in the administration of justice.

In September, the department designated 45 tribal governments nationwide as Tribal Court-DOJ Partnership Projects. The primary criterion for designation was a demonstrated commitment by the tribal government to support and strengthen the tribal justice system. The department's goal is to strengthen tribal justice systems, particularly their abilities to deal with family violence and juvenile issues. Designation as a Partnership Project does not involve a grant of money. The Tribal Courts Project will work with the designated Partnership Projects to assess their court systems and will create technical assistance and training opportunities, primarily through the local offices of U.S. attorneys. The Tribal Courts Project will also work with the state and federal judiciaries to gain their assistance for the Partnership Projects. The commitment of these 45 tribal govern-

4. Indian Tribal Justice Act, 25 USC 3601.

5. The Indian Major Crimes Act, 18 U.S.C. §1153, created federal jurisdiction over serious felonies committed by Indians. The General Crimes Act, 18 U.S.C. §1152, created federal jurisdiction over crimes between Indians and non-Indians.

6. National Farmers Union Ins. Cos. v. Crow Tribe, 471 U.S. 845 (1985); Iowa Mutual Insurance Co. v. LaPlante, 480 U.S. 9 (1987).

7. Fisher v. District Court, 424 U.S. 382 (1976); Mississippi Choctaw v. Holyfield, 490 U.S. 30 (1989); Indian Child Welfare Act, 25 U.S.C. §1901 et seq.

8. The Department of Justice solicited articles from each of the authors because of his or her expertise. Each article expresses the opinion of the author and does not necessarily reflect the views or policies of the Department of Justice.

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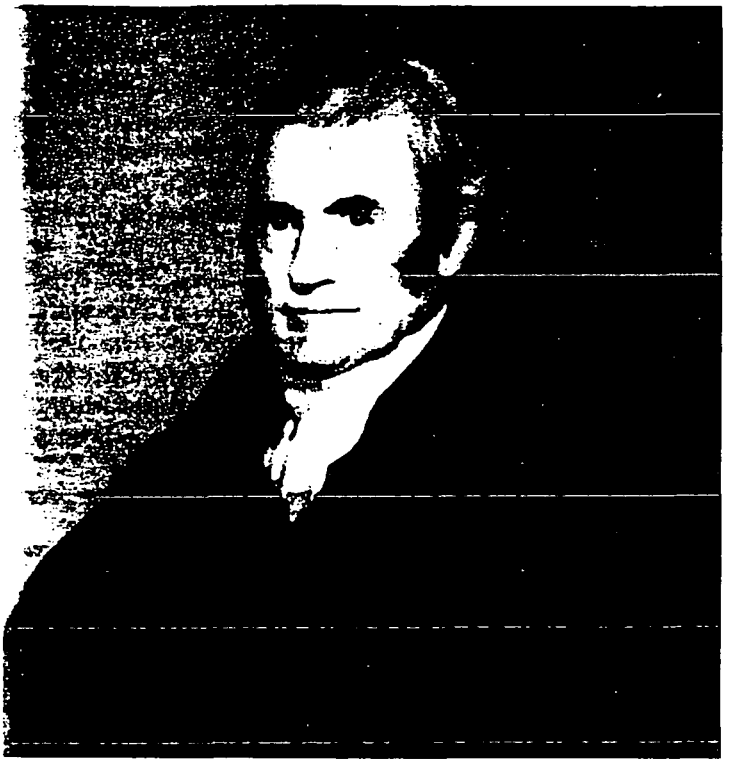
ments to improving their justice systems will be taken into consideration when the department makes monetary grants in future years.

Federal law prosecutions

One of the Justice Department's top priorities is to improve law enforcement in Indian country. In cooperation with interested tribal governments, it has taken the initiative in facilitating the convening of federal court on or near reservations. The goal is to increase available resources for the prosecution of misdemeanor crime committed by non-Indians on the reservation, over which tribal courts do not have jurisdiction.[9]

In most states,[10] federal courts have jurisdiction over certain felonies committed by Indians in Indian country. They also have jurisdiction over other crimes committed in Indian country by non-Indians against Indians or by Indians against non-Indians.[11] Thus, while tribal courts retain jurisdiction over misdemeanors committed by Indians, they do not have jurisdiction over the same crimes committed by non-Indians. However, both federal and state law enforcement and prosecutors tend to focus their energies on more serious crimes and often lack the resources to arrest and prosecute misdemeanor offenses committed by non-Indians in Indian country. Since federal courts are often located far from Indian reservations, active prosecution of non-felony domestic violence, child abuse, weapons offenses, vehicle violations, substance abuse, and theft is limited.

As a result, misdemeanor crime by non-Indians against Indians is perceived as being committed with impunity.[12] This discourages victims from reporting crimes and police from making arrests, and it encourages the spread of crime because prosecution is unlikely.



The Indian tribe is "a distinct political society separated from others, capable of managing its own affairs and government itself...." —Chief Justice John Marshall

One partial solution is the convening of federal court, using a magistrate judge, on or near reservations where federal courts already have jurisdiction but are not fully exercising it because of inconvenience due to distance, lack of resources, or other reasons. This involves no expansion of federal jurisdiction.[13] It is merely moving the federal forum closer to Indian country, thereby focusing attention on previously unredressed misdemeanors.

Under this initiative, a U.S. magistrate judge is now hearing federal misdemeanor cases several days each month on the Warm Springs Reservation in Oregon. The District of Oregon provides a part-time magistrate judge, the U.S. attorney provides a prosecutor, and the Warm Springs Tribal Council allows the federal court to use the tribal courtroom. The immediate availability of the federal court will allow tribal police to increase drug enforcement and to work with the Immigration and Naturalization Service to arrest illegal aliens on the reservation engaged in criminal activities.

This project is not only a means for improved law and order on the reservation, but it is also an innovative vehicle for channeling technical assistance and training to tribal courts. In return for the use of the tribal courtroom, the Oregon federal court clerk will provide training and technical assistance to the tribal court clerk in areas such as case management and automated record keeping. The U.S. attorney's office will provide training, technical assistance, and oversight to

9. Oliphant v. Suquamish Tribe, 435 U.S. 191 (1978).

10. State courts exercise criminal jurisdiction in those states governed by Public Law 280, *see* Goldberg, *Public Law 280: The Limits of State Jurisdiction over Reservation Lands*, 22 UCLA L. REV. 535 (1975); or by special acts of Congress conferring jurisdiction on the state, *see, e.g.* Negonsott v. Samuels, 113 S.Ct. 1119 (1993) (discussing 18 U.S.C. 3243, which confers jurisdiction on the state of Kansas), 25 U.S.C. 232 (conferring jurisdiction on New York).

11. State courts have jurisdiction over crimes committed by non-Indians against non-Indians in Indian country. United States v. McBratney, 104 U.S. 621 (1882).

12. This is based on extensive conversations with tribal leaders at the National American Indian Listening Conference in Albuquerque and at the Northwest Indian Nations Conference in Salt Lake City in June 1995, and with many U.S. attorneys whose districts encompass Indian country.

13. The magistrate judge's jurisdiction is limited by the requirement of the defendant's consent. *See* 18 U.S.C. 3401(a) and (b).

the tribal prosecutor when acting on behalf of the federal government.

Convening federal court on the Warm Springs Reservation is intended to send a message to non-Indians that they can no longer commit petty crimes in Indian country with impunity. It is also designed to serve as a model for federal-tribal court cooperation. It will provide invaluable data about crime over which the tribal courts have no criminal jurisdiction.

Civil litigation support

The Justice Department's litigation practice supports the appropriate exercise of tribal court civil jurisdiction. The principles encompassed under the general legal doctrine of "exhaustion of tribal remedies" is of particular significance.

The firm federal policy supporting tribal self-government and tribal courts is the basis for the Supreme Court's holdings requiring the federal courts to give tribal courts the first opportunity to determine the scope of their civil jurisdiction. If a challenge to tribal court jurisdiction is eventually heard by federal court, the latter forum will greatly benefit from the expertise of the tribal court and its development of a complete factual and legal record. That approach also encourages the tribal courts to explain the precise basis for accepting jurisdiction.[13]

The Justice Department firmly supports appropriate use of tribal administrative and judicial forums in accordance with federal statutes and Supreme Court rules. Thus, the department has urged in a series of amicus briefs application of exhaustion and ripeness principles to a variety of situations. For instance, the department has successfully argued that non-Indians should be required to exhaust tribal court remedies in contract disputes with Indians concerning gaming on Indians lands.[15] Similar principles require non-Indians to pursue tribal administrative and judicial remedies concerning tribal regulation of reservation waters on the Flathead Reservation in Montana.[16] It has also been the department's position that the Navajo Nation Tax Commission and tribal courts should make the initial determination whether the tribe may tax coal mining activities conducted by non-Indians outside reservation boundaries but in Indian country as defined by statute.[17] The department has argued that exhaustion and ripeness principles should be applied to matters regulated by the tribal government through administrative proceedings unless there are express federal statutory limits on the tribe's authority to address the dispute or there is no functioning tribal court.[18]

Tribal courts can act to preserve tribal culture and customs.

The Justice Department encourages other federal agencies to respect tribal court jurisdiction and use tribal courts for litigation. For example, the Cheyenne River Sioux Tribe developed a lease whereby the tribe leases property to individual tribal members to enable them to obtain Rural Housing Program loans from the Farmers Home Administration. In the event of default, the lease provides that the foreclosure action be brought in the Cheyenne River Sioux Tribal Courts under the Tribal Law and Order Code. The Justice Department supported this provision and secured the agreement of the U.S. attorney in South Dakota to represent the Farmers Home Administration in tribal court if the need arises.

Justice program grants

Although the Justice Department does not have funding to support the operation of tribal courts, increased efforts are now being made to channel more justice-related funds to Indian country through discretionary grant programs. An American Indian and Alaska Native Desk has been established in the Office of Justice Programs to enhance access by American Indian and Alaska Native tribes to information regarding criminal justice funding opportunities and technical assistance.

The Violence Against Women Act of 1994 provides that 4 percent of funds available to combat violent crimes against women be set aside for grants to tribal governments.[19] Grants to support law enforcement, prosecution, and victim services to combat sexual assault and domestic violence were awarded to 14 tribal governments and consortia in 1995. If the program is fully funded in 1996, grants will be made to as many as 45 additional tribal governments.

The Bureau of Justice Assistance is working with two tribal governments under the Tribal Strategies Against Violence Program, the purpose of which is to develop local partnerships among law enforcement, prosecution, social and educational service providers, community leaders, businesses, residents, and youths to develop strategies for community policing, prosecution, family abuse, juvenile delinquency, and prevention education. An additional program is being established to provide technical assistance

14. National Farmers Union, *supra* n. 6, at 855-857.

15. Tamiami Partners Ltd. v. Miccosukee Tribe of Indians of Florida, 999 F.2d 503 (11th Cir. 1993).

16. Middlemist v. Babbitt, 824 F.Supp. 940 (D.Mont.1993), aff'd. 19 F.3d 1318 (9th Cir. 1994), cert. den. 115 U.S. 420 (1995).

17. 18 U.S.C.A. §1151. Pittsburgh & Midway Coal Mining Co. v. Watchman, 52 F.3d 1531 (10th Cir. 1995).

18. Reservation Telephone Cooperative v. The Three Affiliated Tribes of the Fort Berthold Reservation (No. 95-1526 NDBI) (Appeal pending in 8th Circuit). The issue is whether the tribal tax commission and tribal court should make the initial determination whether the Three Affiliated Tribes of the Fort Berthold Reservation can impose a tax on non-Indian owned telephone line rights-of-way over reservation lands held in trust by the United States.

19. 42 U.S.C. §3796gg.

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Peterson Zah, former president of the Navajo Nation, addresses the National American Indian Listening Conference in May 1994. Also pictured, from left, are Attorney General Janet Reno, Ada Deer, assistant secretary for Indian affairs, Department of the Interior, and Interior Secretary Bruce Babbitt.

to tribal courts to improve tribal-state-federal court relations and to address such issues as court organization, personnel management, facilities, automation, caseflow evaluation, and criminal justice records.

During the last six years, the Office of Victims of Crime has funded tribal governments directly and through grants to states to operate victim assistance programs addressing child abuse and neglect, sexual assault, domestic violence, and other violence-related crimes. It has also provided significant funding for training and technical assistance to help develop and implement these and other programs serving crime victims in Indian country. In the coming year increased funding will be available for additional programs. Several tribal courts will be funded to develop Court Appointed Special Advocate programs. Funds also have been set aside to develop a training and technical assistance project for tribal judges.

The Office of Juvenile Justice and Delinquency Prevention has funded four tribal governments since 1992 to develop community-based programs for delinquent Indian youth or those at risk of having contact with the juvenile justice system. Work has been done to support the establishment of Boys and Girls Clubs in Indian communities and to reduce disproportionate minority confinement in secure juvenile facilities. Tribal governments will soon be awarded grants in a variety of additional programs: the Safe Futures Program to support coordinated services for at-risk youth and families in the juvenile justice system, training and technical assistance to provide intensive community-based day treatment for juveniles at risk of delinquency and for those who have already been referred to juvenile court, children's advocacy centers, and training for tribal law enforcement to address juvenile crime and delinquency.

Under the Crime Control Act of 1994, four tribal governments have been awarded drug court planning grants, 164 tribal governments have received community-oriented policing services grants, and two tribal governments have received grants to plan boot camps.

The National Institute of Justice has recently begun to collect and disseminate information on criminal justice issues of significance to Indians. An overview of victim services programs in Indian country will be prepared and disseminated, criminal justice system issues unique to Indian communities will be identified, and recommendations for future research and evaluation will be developed.

Indian Country Justice Initiative

An Indian Country Justice Initiative has recently been started to improve the responsiveness of the Justice Department to criminal justice needs in Indian country. The Criminal Division and the Administrative Office of the U.S. Courts are working with the Laguna Pueblo in New Mexico and the Northern Cheyenne tribe in Montana on implementation. The goals are to coordinate federal and tribal justice systems; develop innovative approaches to addressing crime; improve existing criminal justice systems, communications, and procedures; and strengthen capabilities for offender supervision, treatment, prevention, and training on these reservations. The U.S. Probation and Pretrial Services Division has approved a Native American probation officer liaison position for each project. Additional money for treatment of substance abusers and sex offenders will be available, as well as on-reservation assistance for victims and witnesses.

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The Justice Department's commitment to strengthening tribal justice systems is one aspect of the federal government's recognition of Indian tribes as domestic dependent nations and is a necessary corollary to the department's wide-ranging responsibility for law enforcement in Indian country. In keeping with its policy on Indian sovereignty and government-to-government relations with Indian tribes, the department has launched significant efforts to increase public awareness and appreciation of tribal courts, to work with state and federal judiciaries and bar associations to improve dialogue and jurisdictional problem solving, and to create innovative training and technical assistance opportunities for tribal justice personnel. Sometimes this takes the form of hands-on technical assistance, sometimes the form of grants, and sometimes the form of cooperation with federal and state judges. In any case, the goal remains the same: to help ensure that tribal justice systems can take their rightful place as partners with states and the federal government in the nationwide administration of justice.

Multiple sovereignties: Indian tribes, states, and the federal government

Although often unrecognized, three entities within the territory that constitutes the United States—Indian tribes, states, and the federal government—have forms of sovereignty. The rich and complex relationships among these three sovereignties need to become integrated into the discussion and law of federalism.

by Judith Resnik

Federal law about Indian tribes tends to be considered separately from the body of law about federal-state relations. But the problems of coordination, cooperation, deference, and preclusion—central to the law of federalism—are also pivotal when contemplating the authority of Indian tribes and their courts. At issue are the respective arenas of Congress and the executive branch, as well as the allocation of power among tribes, states, and the federal government, the attributes and prerogatives of sovereigns, and the deference and comity entailed in intercourt relationships.

In the context of either state-federal or tribal-federal law, the task is to work out relations among sovereigns that share land and history. Yet equation of states and tribes would be erroneous, for profound differences of history, sociology, and politics exist between the two. When viewed in tandem, however, these bodies of law teach lessons about the interactions between sovereigns and the interdependency of rules, the tensions that sharing jurisdiction imposes, the pressures toward nationalization and homogenization, the wide-spread ambivalence toward centralization and assimilation, the vitality of both tribal and state courts, and the impulses toward and the costs of diversity.[1]

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Tribes and the Constitution

The U.S. Constitution appears to recognize tribes as having a status outside its parameters, as entities free from the taxing powers of states and of the federal government and with whom the federal government shares commercial relations and makes treaties.[2] Some Indian law scholars argue that the net result is constitutional recognition of a third domestic sovereign,[3] while others describe the relationship as existing outside the Constitution.[4] At issue is whether international law, rather than internal rules, provides the appropriate paradigm for evaluating relations between the United States and Indian tribes.[5]

The image of tribes as not a part of the United States constitutional story fits the history. Tribes did not partake in the Constitutional Convention or

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1. For elaboration of these issues, see Judith Resnik, *Dependent Sovereigns: Indian Tribes, States, and the Federal Courts*, 56 U. CHI. L. REV. 671 (1989), and Judith Resnik, *Retreading "The Federal Courts": Revising the Domain of Federal Courts Jurisprudence at the End of the Twentieth Century*, 47 VAND. L. REV. 1021 (1994).

2. U.S. CONST. art. I, §2, cl. 3 (excluding Indians "not taxed" for purposes of apportioning members of House of Representatives among the states); U.S. CONST. art. I, §8, cl. 3 (giving Congress the power to regulate commerce with the Indian Tribes); U.S. CONST. amend. XIV, §2 (reiterating the exclusion of "Indians not taxed" for purposes of apportionment). For interpretations of other clauses as referring to tribes, see Charles F. Wilkinson, *Civil Liberties Guarantees when Indian Tribes Act as Majority Societies: The Case of the Winnebago Retrocession*, 21 CREIGHTON L. REV. 773, 774-75 (1988).

3. Wilkinson, *Civil Liberties Guarantees*, *supra* n. 2, at 774; *see also* Charles F. Wilkinson, AMERICAN INDIANS, TIME, AND THE LAW: NATIVE SOCIETIES IN A MODERN CONSTITUTIONAL DEMOCRACY (1987).

4. *See, e.g.*, Milner S. Ball, *Constitution, Court, Indian Tribes*, 1987 AM. B. FOUND. RES. J. 1 (analyzing the imposition, without constitutional bases, of both federal judicial and legislative authority over tribes).

5. *See, e.g.*, Oklahoma Tax Comm. v. Chickasaw Nation, 115 S. Ct. 2214, 2217-18 (1995) (invoking international law when concluding that Oklahoma could collect income taxes from Indians because "[t]he Treaty...does not displace the rule, accepted interstate and internationally, that a sovereign may tax the entire income of its residents."); Jill Norgren, *Protection of What Rights They Have: Original Principles of Federal Indian Law*, 64 N.D. L. REV. 73 (1988). *See also* Robert A. Williams Jr., *The Algebra of Federal Indian Law: The Hard Trial of Decolonizing and Americanizing the White Man's Indian Jurisprudence*, 1986 WIS. L. REV. 219; Russell Lawrence Barsh and James Youngblood Henderson, THE ROAD: INDIAN TRIBES AND POLITICAL LIBERTY (1980).

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...in the federation of powers. By the end of the 19th century, however, Congress was in the business of regulating the internal affairs of tribes, and the Supreme Court was upholding such regulation as properly within the powers of Congress to protect its "wards." Years earlier, Chief Justice John Marshall cast the claim of federal "plenary power" over Indian tribes in terms of the right of "discovery,"[7] but as Joseph Story noted, "it seems difficult to perceive, what ground of right any discovery could confer."[8]

The uncomfortable truth, referred to in several Supreme Court decisions, is that federal power derived from conquest. As Justice Stanley Reed put it, "Every American schoolboy knows... it was not a sale but the conquerors' will that deprived [Indian tribes] of their land."[9] By virtue of its physical force, the federal government took land, removed people from their homes, attempted to dissuade them from observing their customs, and imposed its rule.

The principle usually relied on to justify exercise of governmental powers within the United States is consent of the governed, but it does not much apply in the Indian tribal context. Unlike states, which ceded some sovereignty with the passage of the Constitution,[10] Indian tribes did not. Yet, as William Canby explains, "the sovereignty of the tribes is subject to exceptionally great powers of Congress to regulate and modify the status of the tribes."[11] Moreover, ac-

6. *See, e.g.*, United States v. Kagama, 118 U.S. 375, 384 (1886) (because Indian communities were "dependent on the United States," state lacked jurisdiction to try a tribal member for murder).

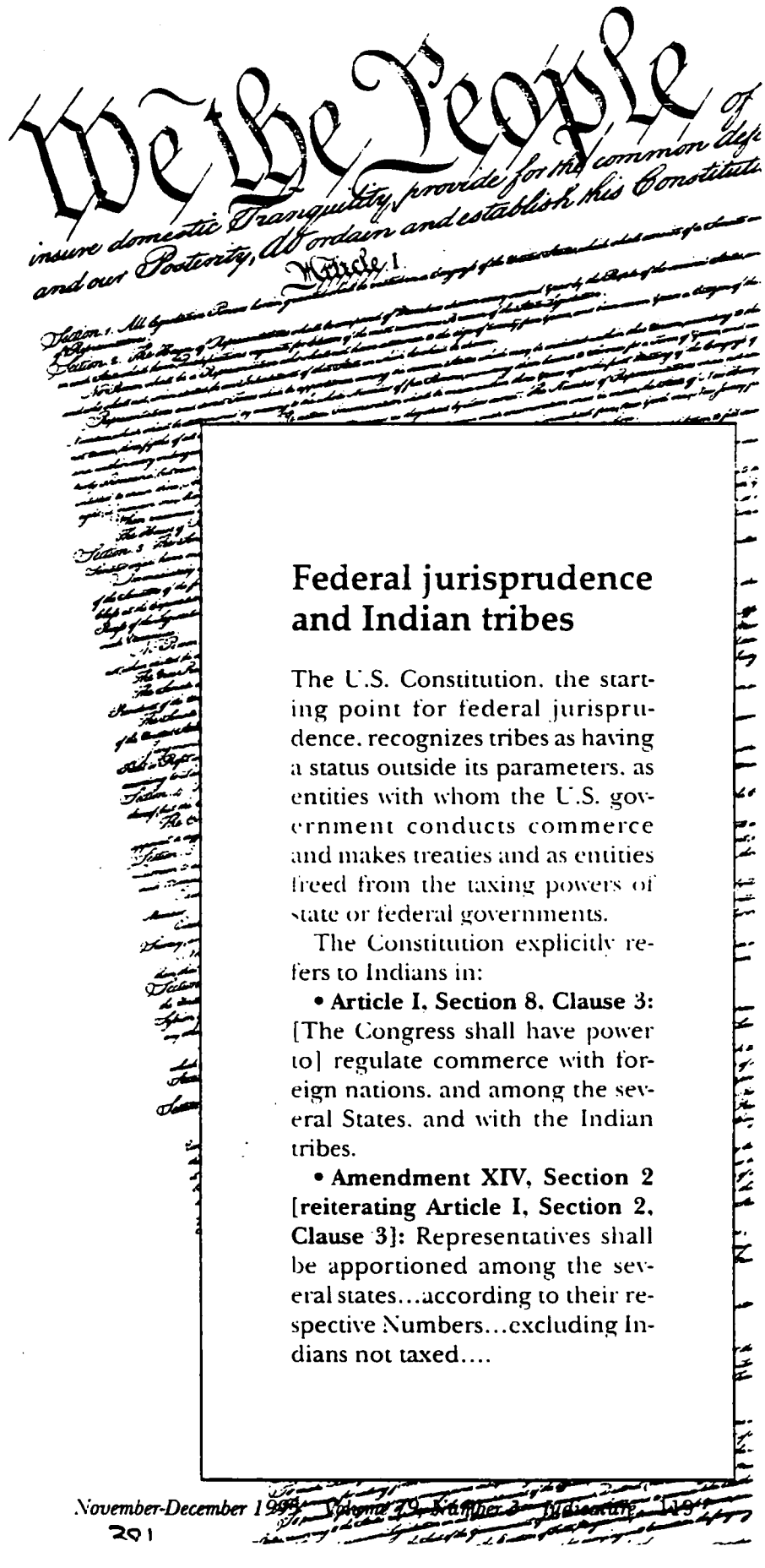
7. Johnson v. M'Intosh, 21 U.S. (8 Wheat) 543, 573 (1823).

8. Joseph Story, THE CONSTITUTIONAL CLASS BOOK: A BRIEF EXPOSITION OF THE CONSTITUTION OF THE UNITED STATES 14-15 (1834).

9. Tee-Hit-Ton Indians v. U.S., 348 U.S. 272, 289-90 (1955).

10. The dimensions of which are unclear. *See, e.g.*, United States v. Lopez, 115 S. Ct. 1624 (1995), and U.S. Term Limits, Inc. v. Thornton, 115 S. Ct. 1842 (1995) (two recent decisions in which the nine justices disagreed about the constitutional allocation of power between state and federal governments).

11. Hon. William C. Canby Jr., *The Status of Indian Tribes in American Law Today*, 62 WASH. L. REV. 1, 1 (1987). *See generally* Hon. William C. Canby Jr., AMERICAN INDIAN LAW IN A NUTSHELL (2d ed. 1988); Robert N. Clinton, *Redressing the Legacy of Conquest: A Vision Quest for a Decolonized Federal Indian Law*, 46 ARK. L. REV. 77 (1993); Nell Jessup Newton, *Federal Power over Indians: Its Sources, Scope, and Limitations*, 132 U. PA. L. REV. 195 (1984).



Federal jurisprudence and Indian tribes

The U.S. Constitution, the starting point for federal jurisprudence, recognizes tribes as having a status outside its parameters, as entities with whom the U.S. government conducts commerce and makes treaties and as entities freed from the taxing powers of state or federal governments.

The Constitution explicitly refers to Indians in:

- **Article I, Section 8, Clause 3:** [The Congress shall have power to] regulate commerce with foreign nations, and among the several States, and with the Indian tribes.
- **Amendment XIV, Section 2 [reiterating Article I, Section 2, Clause 3]:** Representatives shall be apportioned among the several states...according to their respective Numbers...excluding Indians not taxed....

cording to the Supreme Court, "Congress has the power to abrogate Indian treaty rights."[12]

For judges, lawyers, and scholars practiced in considering constitutional allocations of powers, the Supreme Court's repeated statement of the enormity of federal "plenary" power over tribes is both stunning and dislocating. Consider the holding of a 1985 opinion: "[A]ll aspects of Indian sovereignty are subject to defeasance by Congress."[13] When making such a statement, ordinary constitutional exegesis would oblige the Supreme Court to refer to a constitutional provision or to another legal document, such as a treaty, granting power to the federal government.[14] Even when constitutional theorists assert that a branch of the federal government has unfettered powers (such as prosecutorial discretion), reference is usually made to other forms of constraint (such as political recall or dependence on voter confidence).

A relevant example of expansive constitutional power and its limits comes from the jurisdictional field itself. Congress is often said to have "plenary" power over federal court jurisdiction,[15] but that power is limited—if not by Article III then by other constitutional provisions, such as the Fourteenth Amendment. A standard of law school classes is the proposition that, however broad reaching Congress's Article III power is, Congress can surely not use race as a category of jurisdiction.[16] But move to the arena of the federal relationship with tribes and even that seemingly easy assumption requires revision. Both the courts and Congress have recognized the use of tribal membership as a basis of federal court jurisdiction. One might argue that such decisions rest on a political rather than a racial identity. But jurisdictional rules that rely on some amount of "Indian blood" demonstrate that, at the time such policies were crafted, tribes were seen from the colonizers' perspective as racial groupings. Moreover, jurisdictional authority tied to one's political affiliations is also troubling. Yet some contemporary jurisdictional rules continue to rely on whether a litigant is or is not an "Indian."[17]

In short, federal law on Indian tribes sits uneasily within a context of commitment to legal constraints on governmental powers. Given a desire to trumpet one's national heritage, it is difficult to grapple with events deeply embarrassing to those committed to a vision of the United States as founded upon consent and dedicated to nondiscriminatory treatment. No comforting milestones are available. No transformative moments, akin either to the enactment of the Fourteenth Amendment or to *Brown v. Board of Education*, make easy the beginning of a revised narrative. Instead, once federal courts jurisprudence includes discussion of federal-tribal relations, the claim that the U.S. Constitution sets all the limits of federal power is undermined.

Changing parameters

Congress and the Supreme Court have shifted policies toward Indian tribes many times within the last century. In 1887, under the General Allotment Act,[18] Congress authorized the president to "allot" land to individual Indians. The land was to be held in trust for a period of time and then freed for conveyance. As Justice Sandra Day O'Connor has explained, the legislation "seem[ed] in part animated by a desire to force Indians to abandon their nomadic ways...to 'speed assimilation'...and...to free new lands for further white settlement."[19]

By the 1930s, Allotment Act policies had diminished Indian land holdings from 138 million to 48 million acres. Criticism of the policy resulted in congressional enactment in 1934 of the Indian Reorganization Act,[20] which stopped allotment, proclaimed congressional support for Indian self-governance, and provided for creation of tribal constitutions.

A few decades later, federal policy shifted again. In addition to efforts resulting in "termination" of tribes as entities recognized by the federal government, in 1968 Congress enacted the Indian Civil Rights Act,[21] which provided individuals with rights against tribes akin to the protections of the Bill of Rights. Many advocates of tribal sovereignty saw the Indian Civil Rights Act as intrusive on tribal self-determination, while others supported some aspects of the legislation as appropriately constraining tribal governments and recognizing distinctive tribal traditions.[22]

Executive, judicial, and legislative action since the late 1960s has altered the tone once again. In 1968, President Lyndon Johnson termed the Indian "the forgotten American," and in 1970, President Richard Nixon's executive order steered federal policies toward tribal sovereignty by supporting greater autonomy.[23] In a series of cases, the Supreme Court announced some rules of deference to tribal courts' civil jurisdiction,[24] permitted only limited powers in criminal cases,[25] and circumscribed tribal regulatory activities.[26]

In 1978, Congress pressed for additional tribal court authority by enacting the Indian Child Welfare Act, which provides tribal jurisdiction in custody proceedings involving In-

12. South Dakota v. Bourland, 113 S. Ct. 2309, 2315 (1993) (concluding that, by taking land within the Cheyenne River Sioux Reservation to build a dam, the United States limited the tribe's power to regulate non-Indian hunting and fishing on that land).

13. National Farmers Union Ins. Cos. v. Crow Tribe, 471 U.S. 845, 851, n.10 (1985) (quoting Escondido Mutual Water Co. v. La Jolla Bands of Mission Indians, 466 U.S. 765, 788, n.30 (1984)).

14. Marbury v. Madison, 5 U.S. (1 Cranch) 137, 176 (1803) ("The powers of the legislature are defined, and limited; and that those limits may not be mistaken, or forgotten, the constitution is written.").

15. Ex Parte McCardle, 74 U.S. (7 Wall.) 506, 514 (1868); Sheldon v. Sill, 49 U.S. (8 How.) 441, 449 (1850).

16. *See* Lawrence Gene Sager, *The Supreme Court—1980 Term—Foreword: Constitutional Limitations on Congress' Authority to Regulate the Jurisdiction of the Federal Courts*, 95 HARV. L. REV. 17, 26-27 (1981).

17. *See* Duro v. Reina, 495 U.S. 676 (1990) as revised by Act of Oct. 28, 1991, Pub. L. No. 102-137, 105 Stat. 646, amending 25 U.S.C. §1301; Oliphant v. Suquamish Indian Tribe, 435 U.S. 191 (1978).

18. Act of Feb. 8, 1887, ch. 119, 24 Stat. 388 (1887) (also known as the Dawes Act).

19. Hodel v. Irving, 481 U.S. 704, 706 (1987).

20. 48 Stat. 984 (1934), codified as amended at 25 U.S.C. §461 et seq. (also know as the Wheeler-Howard Act).

21. 25 U.S.C. §§1301-1341 (1988 & Supp. 1995).

22. *See* Donald L. Burnett Jr., *An Historical Analysis of the 1968 'Indian Civil Rights' Act*, 9 HARV. J. LEGIS. 557 (1972).

23. The Forgotten American, Message from the President of the United States, H.R. DOC. NO. 90-272, 114 CONG. REC. 5394-98 (March 6, 1968); The American Indians, Message from the President of the United States, H.R. DOC. NO. 91-363, 116 CONG. REC. 23131 (July 8, 1970).

24. National Farmers Union Ins. Cos. v. Crow Tribe, 471 U.S. 845 (1985); Iowa Mutual Ins. Co. v. LaPlante, 480 U.S. 9 (1987).

25. Duro v. Reina, 495 U.S. 676 (1990); Oliphant v. Suquamish Indian Tribe, 435 U.S. 191 (1978).

26. South Dakota v. Bourland, 113 S. Ct. 2309 (1993); Brendale v. Confederated Yakima Nation, 492 U.S. 408 (1989).

dian children residing or domiciled within reservations, as well as on the reservation under certain circumstances.[27] In 1993, Congress passed the Indian Tribal Justice Act to promote the expansion and effective use of tribal courts by making federal funding available for facilities, libraries, and publications.[28] Thus far, no federal funds have been forthcoming under this act, but federal, state, and tribal judges have joined together to form councils to facilitate interjurisdictional communication.[29]

While cordiality and respect now pervade the descriptions, questions of intersovereign relations remain.[30] Time and again, a tribe or a state makes a claim of sovereign autonomy, of exemption from national norms, of the right to have different rules. Time and again, litigants argue to federal, state, or tribal judges that their courts lack authority over them. In each context, legal actors within tribes, states, and the federal government are obliged to think about visions of government, about when to recognize autonomy of sovereigns within sovereigns and how to give meaning to the word "sovereignty." When will difference be tolerated? Fostered? More fundamentally, what are the baseline rules or perspectives from which a rule is seen as "different"? When will variation in norms be trumpeted as evidence of self-constituency and when will it be decried as oppressive? Of whom? A few examples, below, demonstrate the complexity of even the seemingly simple proposition of respecting sovereignty.

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In 1968, President Lyndon Johnson termed the Indian "the forgotten American."

Interdependencies of norms

In the annals of federal Indian law, several major recent jurisdictional markers require attention. A first is the 1978 case, *Santa Clara Pueblo v. Martinez*.[31] In 1939, the Santa Clara Pueblo adopted an ordinance detailing its membership rules. Children of female members who married outside the pueblo would not be "Santa Claran," while children of male members who married outside the pueblo would be. Two years later, Julia Martinez, a member of the Santa Clara Pueblo, and Myles Martinez, a Navajo, married, resided on the Santa Clara Pueblo, and had several children.

In the 1970s, after trying unsuccessfully to persuade the pueblo to change its membership rules, Julia Martinez and her daughter Audrey filed a lawsuit under the Indian Civil Rights Act: they asked a federal court to invalidate the ordinance as denying equal protection and to require the pueblo to count the Martinez children as members.[32] Eventually, the Supreme Court responded. In a decision by Justice Thurgood Marshall, the Court concluded that the Indian Civil Rights Act did impose restrictions on tribal governments that are "similar, but not identical, to those contained in the Bill of Rights and the Fourteenth Amendment."[33] The Court held, however, that aside from its provision for habeas corpus, Congress had not given jurisdiction to federal courts to enforce its mandates. According to the Court, to infer federal civil jurisdiction would be to undermine the congressional purpose of preserving "tribal sovereignty" and "self-government."[34]

27. Pub. L. No. 95-608, 92 Stat. 3069, codified at 25 U.S.C. §1901 et seq. (1988). *See* Mississippi Band of Choctaw Indians v. Holyfield, 490 U.S. 30 (1989) (rejecting state court jurisdiction and providing federal common law definition of statutory term "domicile").

28. Pub. L. No. 103-176, 107 Stat. 2004 (1993), codified at 25 U.S.C. §3601; §3613 (b)(2)-(7) (supp. 1995).

29. *See* J. Clifford Wallace, *A New Era of Federal-Tribal Court Cooperation*, 79 JUDICATURE 150 (1995); Stanley G. Feldman and David L. Withey, *Resolving state-tribal jurisdictional dilemmas*, 79 JUDICATURE 154 (1995). "Judicial federalism" is on the rise in state-federal relations as well. *See, e.g.*, COMMITTEE ON LONG RANGE PLANNING—JUDICIAL CONFERENCE OF THE UNITED STATES, PROPOSED LONG RANGE PLAN FOR THE FEDERAL COURTS 21 (March 1995) (chapter entitled "Judicial Federalism"); Malcolm M. Lucas, *Keynote Address: National Conference on State-Federal Judicial Relationships*, 78 VA. L. REV. 1663 (1992) (at 1992 first national conference of state and federal judges); William W Schwarzer, Nancy E. Weiss and Alan Hirsch, *Judicial Federalism in Action: Coordination of Litigation in State & Federal Courts*, 78 VA. L. REV. 1689 (1992).

30. For the concern that national organizations of tribes have the "potential to erode tribal sovereignty," see Nell Jessup Newton, *Let a Thousand Policy-Flowers Bloom: Making Indian Policy in the Twenty-First Century*, 46 ARK. L. REV. 26, 34 (1993).

31. 436 U.S. 49 (1978). A rich set of commentaries illuminates this case: *see, e.g.*, Robert Laurence, *A Quincentennial Essay on Martinez v. Santa Clara Pueblo*, 28 IDAHO L. REV. 307 (1992); Robert A. Williams Jr., *Gendered Checks and Balances: Understanding the Legacy of White Patriarchy in an American Indian Cultural Context*, 24 GA. L. REV. 1019 (1990); Angela Harris, *Race and Essentialism in Feminist Legal Theory*, 42 STAN. L. REV. 581 (1990).

32. The Indian Civil Rights Act states: "No Indian tribe in exercising powers of self-government shall...deny to any person within its jurisdiction the equal protection of its laws." 25 U.S.C. §1302(8) (1982).

33. *Santa Clara Pueblo*, 436 U.S. at 57 (footnote omitted).

34. *Id.* at 62-64.

At one level, *Santa Clara Pueblo* is an "easy" case, identifiably a triumph for tribal self-governance. As the district judge had put it, "In deciding who is and who is not a member, the Pueblo decides what it is that makes its members unique, what distinguishes a Santa Clara Indian from everyone else in the United States."[35] Similarly, Justice Marshall spoke of the "often vast gulf between tribal traditions and those with which federal courts are more intimately familiar."[36]

But the line between the United States and the Santa Clara Pueblo is not so easily drawn. The construction of the 1939 membership rules is not only an artifact of the pueblo as a political entity constituting itself. When in 1934 the Indian Reorganization Act was passed, the Santa Clara Pueblo (like many other tribes) organized under its provisions. In 1935, as required by this act, the secretary of the interior approved a newly written Santa Clara Pueblo Constitution that begins: "We, the people of the Santa Clara Pueblo, in order to establish justice, promote the common welfare and preserve the advantages of self-government, do ordain and establish this Constitution."[37] Under that document, Santa Clara members could include "children of mixed marriages between members of the Santa Clara pueblo and nonmembers" if the tribal council so decided, as well as "persons naturalized as members of the pueblo."[38]

In 1939, however, the secretary of the interior approved an amendment changing membership rules by limiting them to children either of two Santa Claran parents or "born of marriages between male members...and non-members."[39] The sources of the change in membership rules are not available from the case records. What is known is that the Bureau of Indian Affairs was much involved in creating tribal constitutions; its models and "boilerplate provisions" were often adopted without much alteration.[40] Further, in the 1930s, the Department of the Interior recommended that tribal membership rules be restrictive.[41] More recent editions of the BIA instruction manual suggest that membership rules be explained in tribal constitutions. When such rules make significant changes in the size of a tribe, the BIA's central office, rather than its branches, must approve the alterations.[42]

The point here is neither to debate the authority of a sovereign—here, the Santa Clara Pueblo—to change its rules nor to claim homogeneity among tribes. The more than 400 federally recognized tribes, as well as the many other tribes, have a range of membership and of other rules.[43] The point, rather, is to make plain that Santa Clara Pueblo's rule making should not be seen as a completely autonomous action. Federal policies urged written constitutions and promoted restrictive membership definitions. The idea of membership itself was central to federal law that linked the provision of federal benefits to membership status. According to the trial court opinion in *Santa Clara Pueblo*, the "most important of the material benefits" sought by the family were "land use rights."[44] Without the membership status conferred by the pueblo, the Martinez children could not receive federal health benefits or federal assistance in building homes on pueblo land.

Under *Santa Clara Pueblo*, tribal courts enforce most mandates of the Indian Civil Rights Act.

Thus, for advocates of tribal autonomy, *Santa Clara Pueblo* is less a victory than it might seem. While a federal court had not mandated membership rules, federal policies created the incentives that framed the litigation; executive branch officials were part of the very process of developing membership rules. Further, federal law requires Interior Department approval of tribal constitutions,[45] and federal rules determine what constitutes a "tribe" as a matter of federal law.[46]

Santa Clara Pueblo also does not stand as an example of federal toleration of tribal norms deeply divergent from those of the United States. Link-

35. Martinez v. Santa Clara Pueblo, 402 F. Supp. 5, 15 (D.N.M. 1975).

36. *Santa Clara Pueblo*, 436 U.S at 72, n.32.

37. Constitution and Bylaws of the Pueblo of Santa Clara, New Mexico (approved Dec. 20, 1935) in Appendix to Petition for Writ of Certiorari, Martinez v. Santa Clara Pueblo, No. 76-682 (1976). While the document is obviously influenced by the U.S. Constitution, that constitution in turn may have been influenced by the government of the Iroquois Confederacy. *See* Arthur C. Parker, *The Constitution of the Five Nations, or the Iroquois Book of the Great Law*, 184 N.Y. STATE MUSEUM BULL. (1916).

38. Constitution and Bylaws of the Pueblo of Santa Clara, in Appendix, *supra* n. 37, at 2. Litigated at trial, with opposing anthropological interpretations, were the history and practice of Santa Claran membership. *See* Resnik, *Dependent Sovereigns*, *supra* n. 1, at 705-12.

39. Ordinance of 1939, in Appendix, *supra* n. 37, at 18.

40. Barsh & Henderson, *supra* n. 5, at 117-22. More recently, some tribes have amended these documents, and their courts are developing jurisprudential interpretations. *See* Frank Pommersheim, *A Path Near the Clearing: An Essay on Constitutional Adjudication in Tribal Courts*, 27 GONZAGA L. REV. 393 (1991-92).

41. U.S. Dep't of the Interior, Circular No. 3123 (Office of Indian Affairs, Nov. 18, 1935) (interpreting the Indian Reorganization Act to provide benefits for Indians who had "actual tribal affiliation or...by possessing one-half degree or more of Indian blood" and linking approvals of tribal constitutions to rules limiting membership in certain ways).

42. U.S. Dep't of the Interior, Bureau of Indian Affairs, Tribal Constitutions: A Handbook for BIA Personnel, at E 6-7 (1987).

43. *See* Elmer R. Rusco, *Civil Liberties Guarantees under Tribal Law: A Survey of Civil Rights Provisions in Tribal Constitutions*, 14 AM. INDIAN L. REV. 269, 290 (1989) (of 220 tribal constitutions reviewed, no uniform pattern on civil liberties emerged).

44. Martinez v. Santa Clara Pueblo, 402 F. Supp. 5, 14 (D.N.M. 1975).

45. *See* 25 U.S.C. §476(a) (1988 & Supp. 1995).

46. 1 Opinions of the Solicitor of the Dep't of Interior Relating to Indian Affairs at 447 (Powers of Indian Tribes) (Oct. 25, 1934); 25 C.F.R. §83.7 (1995), and the discussion in Robert N. Clinton, Nell Jessup Newton and Monroe E. Price, AMERICAN INDIAN LAW 78-93 (3d ed. 1991).

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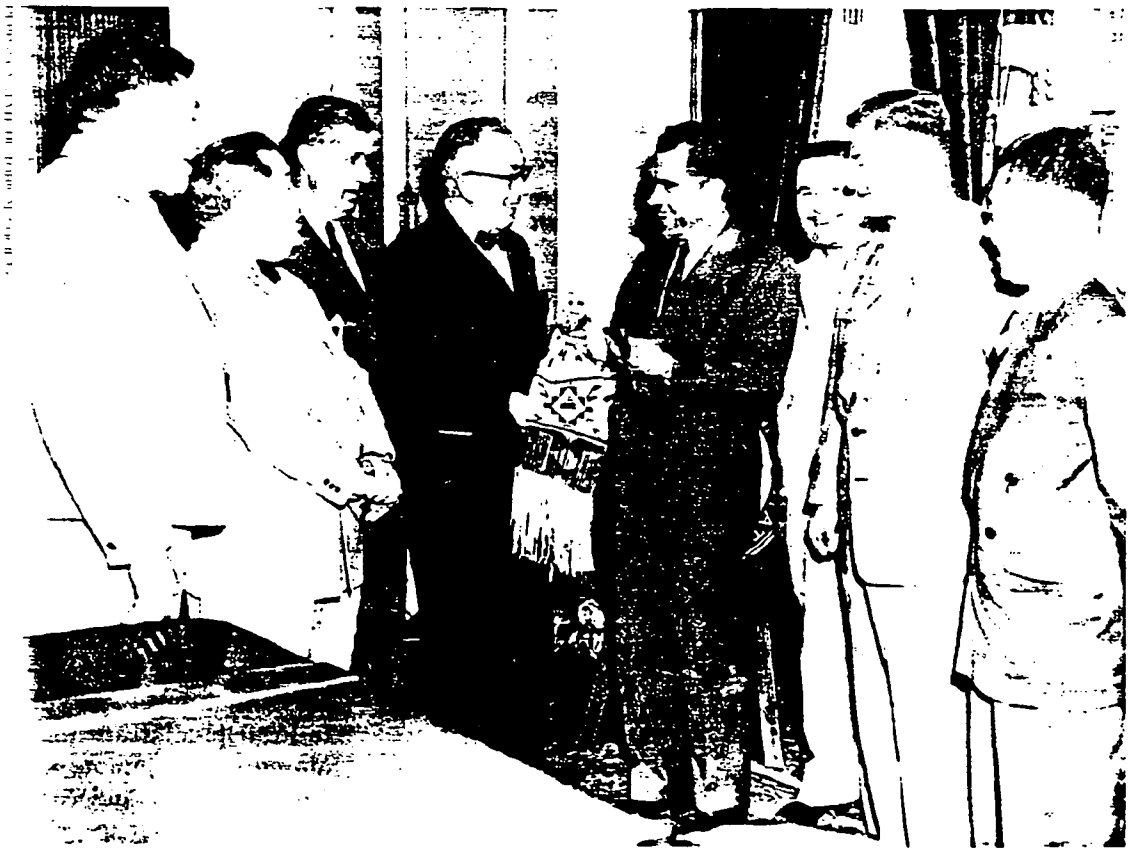


In 1954 Vice-President Richard Nixon received a peace pipe from a delegation of Indians. In 1970, as president, he signed an executive order supporting greater autonomy for Indian tribes.

ing rights of children to their fathers was a feature of the common law,[47] as was differential treatment of women and men. In short, the membership rule at issue in *Santa Clara Pueblo* needs be understood as akin to a joint venture, crafted under pressure from the federal government and not at odds with federal traditions.

Measures of sovereignty

Advocates of *Santa Clara Pueblo* as a guidepost to tribal sovereignty can fairly argue that, by limiting the role of federal courts when members of tribes object to their tribes' practices, its holding has far-reaching implications. Under its holding, tribal courts rather than federal courts enforce most of the mandates of the Indian Civil Rights Act.

But how much to celebrate the decision depends on how one defines sovereignty and on what incidents of sovereignty one values. While the Court in *Santa Clara Pueblo* concluded that a narrow interpretation of the Indian Civil Rights Act was required to avoid what it viewed to be federal interference with a "tribe's ability to maintain itself as a culturally and politically distinct entity,"[48] just two months before, in *Oliphant v. Suquamish Indian Tribe*,[49] the Court held that Indian tribes lacked authority to punish non-Indians who commit crimes on tribal reservations.

Oliphant arose when two non-Indian residents of the Suquamish reservation sought and won habeas corpus relief from convictions in the tribal courts. According to the majority opinion by then-Associate Justice William Rehnquist, to permit tribal courts to try non-Indians would be "inconsistent" with the status of Indian tribes. Tribal powers were limited not only by treaty but by some ill-defined prohibition that they not "conflict with [the] overriding sovereignty" of the United States.[50] According to the majority, while "some Indian tribal court systems have become increasingly sophisticated and resemble in many respects their state counterparts," tribal justice would not always comport with the due process requirements of federal law.[51]

Oliphant contrasts sharply with *Santa Clara Pueblo*. Tribes are permitted to decide some "internal" matters,[52] but the central problem of maintaining order on land (frequently populated, in part by virtue of federal Allotment Act policies, by members of many tribes and by individuals unaffiliated with tribes) is beyond their ken. The Court went further in *Duro v. Reina*,[53] holding that tribal courts also lacked authority over non-tribal members, but that rule has been reversed by Congress.[54] Currently, tribal courts have jurisdiction over those criminal

47. 25 U.S.C. §184 (1988) provides that when an "Indian woman" and a "white man" married prior to the enactment of the statute in 1897, their children would continue to have rights via their mothers to Indian tribal properties. That provision altered the common law practice, under which the "condition of the father prevails, in determining the status of the offspring...." Letter of George H. Shields, assistant attorney general (Nov. 27, 1891), in S. Exec. Doc. No. 59, 53d Cong., 2d Sess., In re Sioux Mixed Blood at 6.

48. 436 U.S. at 72 (footnote omitted).

49. 435 U.S. 191 (1978).

50. *Id.* at 208-210.

51. *Id.* at 211-212.

52. One analogy in federalism doctrine is the "domestic relations exception" to diversity jurisdiction, in which federal courts decline to exercise the jurisdiction they have when litigants bring divorce, child custody, and support cases to them. *See* Ankenbrandt v. Richards, 112 S. Ct. 2206 (1992), criticized in Naomi R. Cahn, *Family Law, Federalism and the Federal Courts*, 79 Iowa L. Rev. 1073 (1994); *see also* Judith Resnik, *"Naturally" Without Gender: Women, Jurisdiction and the Federal Courts*, 66 N.Y.U. L. Rev. 1682, 1739-1750 (1991).

53. 495 U.S. 676 (1990).

54. Act of Oct. 28, 1991, Pub. L. No. 102-137, amending 25 U.S.C. §1301(2)(3)(4).

defendants who are Indians and who have committed certain crimes within tribal lands.

On the civil side, in the wake of *Santa Clara Pueblo*, the Supreme Court held in *National Farmers Union Insurance Companies v. Crow Tribe*[54] and in *Iowa Mutual Insurance Company v. LaPlante*[55] that federal courts should not exercise civil jurisdiction over activities arising on tribal lands, at least not if cases are pending in tribal courts and tribal remedies have been exhausted, and possibly not thereafter.[56] Here the doctrines echo law generated in the context of state-federal relations. A basic proposition is that while federal courts do not lack jurisdiction, rules of comity and abstention mandate deference to another court's decision.

The deference accorded states on the criminal side is not paralleled in the tribal context.

But reflective of the differing histories of states and tribes, the fit is far from exact. On the civil side, Supreme Court opinions arguably demonstrate greater federal deference to tribal courts than to state courts. If a tribe is found to have jurisdiction, then its holdings on the merits, even when implicating federal law, cannot be reviewed by the U.S. Supreme Court.[57] But in some contexts, federal courts accord less deference to decisions of tribal courts than to those of state courts. Unlike the full faith and credit accorded to state court decisions about their own jurisdiction, federal courts have retained power to decide the question of tribal jurisdiction anew.[58]

Moreover, the deference accorded states on the criminal side, exemplified by *Younger v. Harris*[59] and by a growing body of federal habeas law insulating state decision making, is not paralleled in the tribal context. While state criminal laws can be applied to non-citizens within state borders (but not always to Indian tribe members), under *Oliphant*, tribes cannot enforce their criminal laws against non-Indians but must instead depend on another sovereign's law-enforcement interests.[60]

In addition, while the Supreme Court has imposed exacting standards when Congress has attempted to curtail state sovereign immunity,[61] the Court has a more relaxed standard for interpreting statutes involving limits on tribal powers. Even with the rule that because of the "dependent" status of tribes, statutes are to be construed in their favor, the Court's statutory inquiries rely on a wider range of materials and principles than when states' sovereign powers are at stake.[62]

It is not only limits on jurisdiction that demonstrate ongoing federal control. Tribal courts themselves have a history of federal oversight. A first mechanism that imposes federal norms of tribal dispute resolution processes is divesting tribes of jurisdiction or supervising their exercise of it. A second method of control has been to construct and influence tribes about how to exercise the jurisdiction that remains theirs. In 1884, the secretary of the interior established "Courts of Indian Offenses," staffed by Indian judges charged with bringing federal legal norms to the tribes.[63] After the Indian Reorganization Act of 1934, many tribes adopted courts operating under federal regulations, hence known as "CFR" courts.[64] Some commentators view the 1968 Indian Civil Rights Act as continuing the pressures on tribes to rely on federal legal traditions. Moreover, in opinions like *Oliphant*, federal judges indicate that their measure of tribal court quality is based on United States standards,[65] prompting concern among Indian law scholars that federal deference may depend on imitation of federal practices.[66]

Of course, just as the Santa Clara

55. *See generally* Frank Pommersheim, *The Crucibles of Sovereignty: Analyzing Issues of Tribal Jurisdiction*, 31 Ariz. L. Rev. 329 (1989).

56. 471 U.S. 845 (1985).

57. 480 U.S. 9 (1987).

58. *See* Stock West Corp. v. Taylor, 964 F.2d 912 (9th Cir. 1992) (en banc) (describing the discretion of the federal court and finding abstention proper there); Altheimer & Gray v. Sioux Mfg. Corp., 983 F.2d 803, 814 (7th Cir.), *cert. denied*, 114 S. Ct. 621 (1993) (requiring examination of "factual circumstances of each case...in order to determine whether the issue in dispute is truly a reservation affair entitled to the exhaustion doctrine").

59. *See* Iowa Mutual Ins. Co. v. LaPlante, 480 U.S. at 20-22 (Stevens, J., concurring and dissenting). *See also Santa Clara Pueblo*, 436 U.S. at 60 n.21 (judgments of tribal courts may be due full faith and credit in certain situations "properly within their jurisdiction"); In re Larch, 872 F.2d 66, 68 (4th Cir. 1989) (noting authority supporting the proposition that tribes constitute "territories" due full faith and credit under the Parental Kidnaping Prevention Act); Tracy v. Superior Court, 810 P.2d 1030 (Ariz. 1991) (honoring Navajo court certificates compelling attendance of witness at trial under the Uniform Act to Secure the Attendance of Witnesses From Without a State in Criminal Proceedings).

60. As the Ninth Circuit put it, "[T]he question of tribal court jurisdiction is a federal question." FMC v. Shoshone-Bannock Tribes, 905 F.2d 1311, 1314 (9th Cir. 1990), *cert. denied*, 499 U.S. 943 (1991) (establishing *de novo* review for "federal legal questions" and a more deferential "clearly erroneous standard of review for factual questions.").

61. 401 U.S. 37 (1971).

62. *See* Wallace, *supra* n. 29, at 153 (discussing designation by federal authorities in Arizona and Oregon of tribal prosecutors as special assistant U.S. attorneys to fill in "jurisdictional gaps" and appointing federal magistrate judges to hold court sessions on tribal reservations). Given the differing traditions of punishment, tribal courts may be able to exercise civil jurisdiction to accomplish that for which the federal and state system use criminal provisions.

63. Atascadero State Hospital v. Scanlon, 473 U.S. 234 (1985). The Court has also concluded that absent consent, states are immune from suit by tribes. Blatchford v. Native Village of Noatak, 501 U.S. 775 (1991).

64. *See, e.g.*, Hagen v. Utah, 114 S. Ct. 958, 965-66 (1994); South Dakota v. Bourland, 113 S. Ct. at 2316-20.

65. *See* Robert N. Clinton, *Development of Criminal Jurisdiction over Indian Lands: The Historical Perspective*, 17 Ariz. L. Rev. 951 (1975).

66. *See* Indian Self-Determination and the Role of Tribal Courts, A Survey of Tribal Courts Conducted by the American Indian Lawyer Training Program (1977); Frank Pommersheim, *Liberation, Dreams and Hard Work: An Essay on Tribal Court Jurisprudence*, 1992 Wis. L. Rev. 411 (1992).

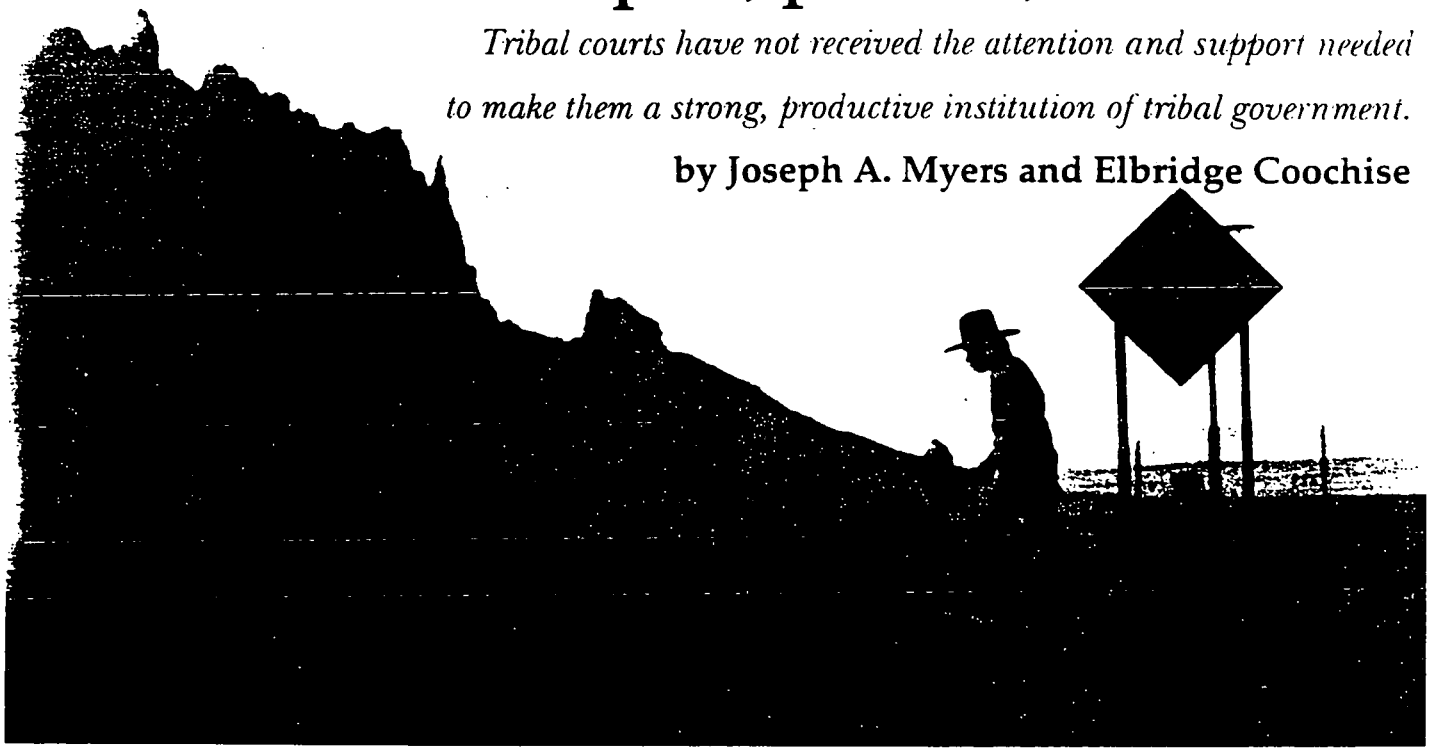
67. "[S]ome Indian tribal courts have become increasingly sophisticated and resemble in many respects their state counterparts." *Oliphant*, 435 U.S. at 211-12.

68. *See* Frank Pommersheim, *The Contextual Legitimacy of Adjudication in Tribal Courts and the Role of the Tribal Bar as an Interpretive Community: An Essay*, 18 N.M. L. Rev. 49, 70 (1988).

Development of tribal courts: past, present, and future

Tribal courts have not received the attention and support needed to make them a strong, productive institution of tribal government.

by Joseph A. Myers and Elbridge Coochise



In the 19th century, the United States had little interest in including Indian people within its citizenry. Indian reservations were deliberately located apart from white communities. Indians were persuaded to remain on the reservation, first by the military, then by Indian agents, and then by the Indian police. Indians were not Americans, and federal officials had no interest in having them gain American citizenship and individual liberties under the Constitution.

In 1883, the commissioner of Indian affairs authorized creation of the courts of Indian offenses (CFR courts) to operate under a set of rules created by the Bureau of Indian Affairs (BIA). Previously, Indian agents summarily sentenced those they believed to be guilty of wrongdoing on Indian reservations. By 1890, agents on most reservations were appointing their "own" Indians to serve as police and judges. By distributing favors, Indian agents were able to control police forces by paying virtually nothing to handpicked Indians. Although courts had functioned on some reservations for several years, Congress appropriated no funds for judges until $5,000 was made available in 1888.

One federal court described the early CFR courts as "mere educational and disciplinary instrumentalities by which the government of the United States is endeavoring to improve and elevate the condition of these dependent tribes to whom it sustains the relation of guardian."[1] Judges would often take into account Indian custom when Indians came before the CFR courts, but this did not translate into leniency. More likely, it meant a tougher penalty or subjection to traditional sanctions for a uniquely Indian offense. Several important Indian customs and religious practices, such as the sun dance, medicine men, and distribution of property owned by an Indian on his death, were outlawed, and violations were punished by CFR courts.

Indians on many reservations continued to resolve serious disputes among themselves outside the CFR courts. Traditional sanctions such as restitution, banishment, payment to a victim or his heirs, and vengeance were common. But, as *Ex Parte Crow Dog*[2] illustrates, federal authorities attempted to arrest and punish Indians under federal law when Indian rem-

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1. United States v. Clapox, 35 F.575, 577 (D. Ore. 1888).
2. 109 U.S. 556 (1883).

codes seemed inadequate. Crow Dog's traditional punishment for murdering Spotted Tail (restitution to survivors) was seen as inappropriate and not fitting with the "civilizing" plan of the whites. When Crow Dog appealed his federal murder conviction, the Supreme Court reversed, holding that there was no jurisdiction to apply federal law in such disputes. Congress responded by passing the Major Crimes Act[2] to extend federal enforcement of certain crimes between Indians occurring on reservations, ending exclusive tribal jurisdiction over crimes between Indians on reservations.

No specific statutory authority ever has existed for CFR courts. In 1921, however, the Snyder Act[3] empowered the commissioner of Indian affairs to expend money for a variety of services to Indians, including "the employment of...Indian police [and] Indian judges...." But Congress was hostile to later attempts to validate the courts and to clarify their jurisdiction. More recently, courts have found authority for establishing CFR courts under the general statutory powers of the commissioner of Indian affairs.

By the 1930s it was clear that assimilationist policies had failed. Allotment had caused the loss of 90 million acres by Indians, and tribal governments were ruled by the Indian agents. Life on Indian reservations was miserable. Congress enacted the Indian Reorganization Act[4] to allow tribes to re-establish and assert their governing powers, and to redress other adverse effects of earlier policies.

Under the act, tribes were to draft their own constitutions and laws and set up their own courts. Most had little recollection of their traditional systems, and the reinstitution of traditional law on reservations was neither realized nor encouraged by BIA officials. Most tribes either remained under the old system or adopted codes modeled closely after the BIA code. Courts adopting their own codes became known as "tribal courts." A clear trend since the Indian Reorganization Act has been for tribes to develop codes and convert from CFR courts to tribal courts operating under tribal sovereignty.

Indian Civil Rights Act

In the mid-1960s federal policy moved toward self-determination. Just as this policy was being articulated and programs were being proposed to implement it, Congress enacted the Indian Civil Rights Act of 1968. Until then, tribes were not subject to the U.S. Constitution. Concern over allegations of some tribes' civil rights violations led to imposition of most Bill of Rights requirements on all tribes. The Indian Civil Rights Act not only limits tribal courts in their disposition of cases, but imposes requirements of due process upon them.

Tribal courts have yet to receive a single benefit under the Indian Tribal Justice Act.

In 1978, a decade after the Indian Civil Rights Act became law, the Supreme Court decided *Santa Clara Pueblo v. Martinez*,[6] holding that the act was unenforceable in the federal courts except through a writ of habeas corpus. Two forums, the Court observed, remained available for relief: tribal forums and, where tribal constitutions require secretarial approval of new ordinances, the Department of the Interior.

In the mid-1980s, the U.S. Commission on Civil Rights began a six-year investigation prompted by federal officials who were disappointed by the *Martinez* decision. The commission strongly supported congressional initiatives to authorize funding of tribal courts in an amount equal to those of equivalent state courts. It was hoped that increased funding would allow for much-needed increases in judicial salaries, law clerks for tribal judges, the funding of public defenders and defense counsel, and increased access to legal authorities.[7]

The commission also supported proposed congressional initiatives to provide a more equitable distribution of funding for tribal forums, an annual survey and report to Congress regarding the funding needs of tribal courts, and funding that allows for flexibility among tribal forums.

The Tribal Justice Act

In February 1991, Senator John McCain introduced the first in a series of tribal court enhancement bills. Finally Congress passed the Indian Tribal Justice Act in December 1993.[8] However, Indian tribes and tribal court systems have yet to receive a single benefit under the act because the BIA has yet to implement it.

The act promised $58.4 million per year in federal funding for the operation and enhancement of Indian tribal courts instead of the current $12 million to $14 million per year. However, the BIA and the U.S. House Appropriations Committee failed to request funds for fiscal year 1994 or 1995. Only minimal funds ($5 million) were requested for fiscal 1996. Yet, even this minimal amount was deleted by the Appropriations Committee. It is now up to the U.S. Senate to restore at least minimal funding for the Indian Tribal Justice Act.

The only step the BIA has taken to implement the act was the appointment in 1994 of Carey N. Vicenti as special assistant for tribal justice support. His efforts to implement the act were thwarted, and he recently left the BIA in frustration.

3. Act of March 3, 1885, ch. 341, §9, 23 Stat. 362, 385 as amended, 18 U.S.C. §1153.
4. 25 U.S.C. §13.
5. 25 U.S.C. §§461-479.
6. 436 U.S. 49, 98 S.Ct. 1670, 56 L.Ed.2d 106 (U.S. Sup. Ct. 1978). For a further discussion of *Martinez*, see Resnik, *Multiple sovereigns: Indian tribes, states, and the federal government*, 79 JUDICATURE 118, 121 (1995).
7. The Indian Civil Rights Act: A Report of the United States Commission on Civil Rights (June 1991).
8. Public Law 103-176 (Dec. 1993).

The Indian Tribal Justice Act was significantly watered down from the original version, which would have taken tribal court oversight out of the BIA and recognized an independent, nationally based tribal judicial conference. That provision was deleted despite great protest by tribal judges and the majority of tribal government leaders. The remaining feature of the act was the promised increase of funding levels for tribal court operations. In the end many supporters of tribal court improvement legislation simply concentrated on getting funding for tribal courts.

Specifically, the Indian Tribal Justice Act promised the following, none of which has come through, except the awarding of a contract to conduct the tribal court survey:

- $50 million per year in base support funding for tribal justice systems;
- $7 million per year for technical assistance, training, and improvements of tribal justice;
- $500,000 per year in administrative expenses for the BIA's upgraded Office of Tribal Justice Support;
- $500,000 per year in administrative expenses for tribal judicial conferences; and
- $400,000 for a survey of tribal court systems.

The BIA's FY95 budget request noted that there are 232 tribal judicial systems and 22 CFR courts, for a total of 254 Indian court systems. Given the current $12 million in federal funding, the average is less that $48,000 per court system, per year to fund judges, clerks, prosecutors, defenders, the juvenile and probation departments, bailiffs and process servers, court facilities, court resources, and administrative costs. Even under the $50 million per year promised under the Indian Tribal Justice Act, the average funding would be only $200,000 per court system. There are no state or federal court systems that function on only $200,000 year, let alone less than $48,000 per year.

Even the Commission on Civil Rights concluded that the major challenge before tribal court systems was the lack of funding. As the commission concluded in its 1991 report, "Congress should afford tribal forums the opportunity to operate with adequate resources, training, funding, and guidance, something that they have lacked since the inception of the Indian Tribal Justice Act."

The Indian Tribal Justice Act required the BIA to conduct the tribal court survey by June 3, 1994. Judge Elbridge Coochise, president of the National American Indian Court Judges Association, proposed that NAICJA be the non-federal entity to conduct the survey but the BIA turned down his proposal, contending they could not enter into a sole source contract for more than $25,000 due to federal regulations.

Funding for tribal courts should be transferred to the Department of Justice.

There was no BIA action on the tribal court survey until Judge Carey Vicenti was hired to implement the act. He assembled a task force to select an entity to perform the survey, and prepare draft regulations for the base funding formula. It unanimously recommended that NAICJA be the sole source contractor, and the recommendation was approved. However, in December 1994 the BIA decided to put the survey contract up for competitive bids. A contract has since been awarded to the American Indian Law Center to conduct the survey.

Justice Department efforts

Unlike the BIA, the U.S. Department of Justice (as Attorney General Janet Reno points out elsewhere in this issue) has made substantial efforts, with minimal funds, in recent years to address issues concerning Indian tribal justice systems and to assist in improving interaction among tribal, state, and federal court systems.

An increasing number of people and organizations throughout Indian country are recommending that funding for both tribal court systems and tribal law enforcement be transferred from BIA to the Department of Justice. This recommendation is based not only upon current Department of Justice policy, but upon the principle that law enforcement and judicial services are vital government functions and critical to the day-to-day functioning of tribal governments. Since law enforcement and judicial services are not priority matters at the BIA, implementation of the Indian Tribal Justice Act should be transferred to the Department of Justice.

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Tribal courts have not received the attention and support needed to make them a strong, productive institution of tribal government. Despite this bleak history, positive changes are occurring.

Improvements are being generated by cooperative communication among the federal, state, and tribal judiciaries, myths are being discarded, and working relationships established. Resources are being shared, and we are talking to each other. Although the future of tribal courts may be at risk because of federal funding cutbacks, the outlook for survival is encouraging given the cooperative dialogue of recent years. But let us not forget that Indians have always been at risk in this society.

A new era of federal-tribal court cooperation

The Ninth Circuit Task Force on Tribal Courts is helping to encourage dialogue and bring about changes beneficial to the federal judiciary and tribal courts.

by J. Clifford Wallace

Cooperation between federal and tribal courts must begin with an appreciation of the difficulty in defining the boundaries of this unique relationship. Although the Tenth Amendment is relatively specific in determining the dimensions of the federal-state relationship, the Constitution is decidedly less specific in identifying the nature of federal-tribal interaction. This lack of constitutional direction renders the scope of federal authority in Indian affairs, and the relationship between federal and tribal courts, unclear.[1]

While most of us have been taught about the relationship between the states and the federal government, the status of tribal governments and tribal courts is something to which few are exposed. Thus, although we acquire a basic understanding of the federal-state issue, we receive no corresponding understanding of the federal-tribal relationship.

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Federal-tribal interaction was originally grounded in treaties. The tribes were regarded as independent nations with full power to punish crime and to resolve disputes within their territories. Over the decades, however, that view has been eroded by exercises of congressional plenary power, mostly in the restriction of tribal criminal jurisdiction. Without a constitutionally defined framework, Congress and the courts have developed a patchwork of laws and holdings limiting the jurisdictional reach of tribal courts and creating awkward jurisdictional gaps. This, in turn, has led to tension in the federal-tribal court relationship, exacerbated by instances of the federal judiciary's misunderstanding tribal law and failing to respect tribal court judgments.[2]

The Judicial Council of the Ninth Circuit has recognized the importance of these issues and the role the federal judiciary can play in addressing the problems that persist between tribal and federal courts. That recognition springs from a legitimate role federal judges can play in such intercourt activity, an acknowledgment of how much we have to learn (and how much our counterparts in the tribal courts can teach us), and from a willingness to share our resources, both tangible and intangible, toward bridging the jurisdictional gaps and mending the abraded fabric of federal-tribal judicial relations.

The federal courts' role

It is not intuitively obvious that the federal courts have a legitimate role to play in diplomatic relations with tribal courts. The two systems are, after all, independent, serving different sovereigns. Federal judges should be careful, however, not to extrapolate the principle of judicial independence—which protects judges from outside pressures in their adjudication—to insulate themselves from productive and meaningful cooperation with outside entities in areas of judicial administration. Federal courts must cooperate with their counterparts in the states and in the Indian tribes if they are to ensure the effective delivery of justice across jurisdictional boundaries.

A strong example is set by the federal courts' relatively recent emphasis on cooperation with state judiciaries. The Ninth Circuit in particular has worked to promote the establishment and vitality of state-federal judicial councils in all states in the circuit. Important issues addressed by these councils have included federal habeas corpus review of state court decisions (particularly in the death penalty area), the impact of federal bankruptcy proceedings on pending state court cases, and attorney discipline.

By working together to solve prob-

1. Pommersheim, *Federal Courts and Their Role in the Context of Problems and Solutions Involving Tribal and State Courts*, background paper for Building Common Ground: A Leadership Conference to Develop a National Agenda to Reduce Jurisdictional Disputes Between Tribal, State, and Federal Courts, 1 (1993).

2. *Id.*

lems in the administration of justice. The judiciaries of the respective sovereigns enjoy the side benefit of increased trust and understanding. That understanding—of the politics of federal-tribal relations and the status and role of tribal courts—is critical to ensuring justice in tribal communities.

Tribal courts task forces

The desire to extend the dialogue and cooperation that led to the successful federal-state court interaction prompted me in 1992 to commence tribal courts relations projects in the Ninth Circuit. We were subsequently joined by then-Chief Judge Monroe McKay of the Tenth Circuit. The Ninth Circuit Task Force on Tribal Courts, chaired by Ninth Circuit Judge William Canby, was given a broad charge: to identify and address the problems faced by the court systems of the various Indian tribes in the Ninth Circuit, as well as jurisdictional gaps and tensions between the two systems. Chief Judge McKay appointed a parallel committee in the Tenth Circuit.

Congress and the courts have developed a patchwork of laws and holdings limiting the jurisdictional reach of tribal courts.

At the outset, the task forces envisioned a large conference. One of the critical lessons learned, however, is that most of the needs and problems to be addressed are local in nature. Each of the tribal courts is unique. Some tribal courts have judges who are college educated and law-school trained; some do not. Some have well-developed tribal codes; some do not. Some are adequately funded; most are not. Some have institutionalized separation of powers from the tribal council; some do not. Some enjoy the respect and deference of their tribal council; some do not. Federal courts will be in a position to help address the challenges only if they appreciate the particular concerns of particular tribal courts.

Moreover, when tensions recur between tribal and federal courts, they will usually involve the same players in each court system. Therefore, the most productive approach is not to hold a large 15-state two-circuit conference—to which financially-strapped tribal courts could not afford to send their judges anyway—but rather to foster interaction on a local level.

In the last two years, the Ninth Circuit task force has been involved primarily in establishing an ongoing dialogue among the various federal and tribal courts in the circuit. As a result, we have been able to obtain a better understanding of the tribal courts and to begin to address the issues requiring attention.

We have begun to appreciate a few issues and concepts that are essential to understanding the federal-tribal court relationship. Our task force has been actively involved in educating judicial officers and staff about them.

Placing issues in context

First, we must recognize the distinction between Indian law and tribal law. Generally, Indian law refers to the system of federal laws and regulations that govern U.S. relations with the various Indian tribes. In contrast, tribal law is the law that the Indian tribes enact and enforce within their own communities. While federal judges are often called upon to resolve issues of Indian law, they generally have no jurisdiction over the interpretation or application of tribal law. Too often, the distinction between tribal and Indian law has been blurred or misunderstood, contributing to inconsistency in federal court decisions and damaging relations with the tribal courts. The Hopi, for example, have been reluctant to commit much of their tribal law and custom to written English for fear that they may somehow "lose" it. Indeed, as long as they do not reduce aspects of their tribal law to writing, no one outside of the Hopi tribe—including the federal courts—can presume to interpret and to apply such Hopi law for the Hopi people.[3]

Typically, when tribal court judgments are challenged in federal court, the federal court should direct its inquiry to whether the tribal court had jurisdiction, and it should make this inquiry only after the parties have exhausted all procedures in the tribal court.[4] The Supreme Court also held that the tribal courts are capable of vindicating the rights created by the Indian Civil Rights Act, and that the act's habeas corpus provision was as far as Congress intended to interfere in tribal affairs.[5] The Supreme Court has made it clear, therefore, that tribal law is to be applied by tribal courts, and that tribal court decisions, at least on the merits, are appealable to the federal courts only through the limited remedy of habeas corpus. Moreover, although not required to give full faith and credit to tribal court judgments, the federal courts should recognize the legitimacy of tribal courts by affording their judgments a reasonable measure of comity.[6]

Second, we must recognize that the primary underlying issues are not racial or discrimination issues. For purposes of Indian law, an "Indian" is not a racial or ethnic categorization as much as it is a legal and political status. While some quantum of Indian blood is always necessary for a person to be classified as an "Indian" for purposes of federal criminal jurisdiction, a person who is a full-blooded Indian racially may nevertheless not be re-

3. Elbridge Coochise, president of the National American Indian Court Judges Association, address to the Washington State-Federal Council (Apr. 1995); Chief Justice Emory Sekaquaptewa, appellate court of the Hopi tribe, telephone interview, Dec. 7, 1995.

4. *See* National Farmers Union Ins. Cos. v. Crow Tribe, 471 U.S. 845 (1985).

5. Santa Clara Pueblo v. Martinez, 436 U.S. 49 (1978).

6. *Cf.* Oklahoma state court rules, requiring state courts to give full faith and credit to judgments of tribal courts that have adopted a similar rule affording full faith and credit to state court judgments. Okla. Stat. Ann. tit. 12, ch. 2, app., R. 30.

garded as an Indian subject to federal jurisdiction. The most often used example refers to members of terminated tribes. When the government terminates its political relationship with a tribe, those tribal members are no longer subject to the federal criminal jurisdiction as Indians.[7]

Unlike other "minority" groups, recognized Indian tribes have the right to make laws and to be governed by them. As the Supreme Court said in *National Farmers Union*,

> Federal law, implemented by statute, by treaty, by administrative regulations, and by judicial decisions, provides significant protection for the individual, territorial, and political rights of the Indian tribes. The tribes also retain some of the inherent powers of the self-governing political communities that were formed long before Europeans first settled in North America.[8]

Moreover, the functioning of tribal councils, unlike the state and local governments, is not necessarily governed by the U.S. Constitution. Until 1968, with the passage of the Indian Civil Rights Act, Indians in tribal court did not even enjoy the protections of the Bill of Rights, and even the act does not guarantee full protection. For example, the tribes are not required to appoint counsel for indigents—a requirement of the Sixth Amendment that is fully applicable to the states.[9]

Federal judges should be careful to treat Indian litigants and criminal defendants with appropriate dignity and to consider their claims in the appropriate context. Typically, Indian defendants and claimants are not seeking equal treatment. Rather, they come to the court with a different package of rights to assert, rights rooted in treaties with the U.S. government that guarantee them some measure of self-determination.

Appreciating tribal courts

Tribal courts make a vital contribution to the efficient functioning of our multilayered justice system. The courts of the Navajo nation will decide about 25,000 civil and criminal cases this year, not including traffic offenses, juvenile matters, alternative traditional court proceedings, and appeals. The smaller Gila River tribal court decided 7,290 cases last year. If these cases were filed in federal courts, we could not absorb them with our current resources. Thus, we should respect and appreciate the tribal courts for the tremendous amount of work they do to resolve disputes. As the legal market scrambles for alternative forums in which to pursue claims and resolve conflicts, due largely to the limited capacity of the federal courts as currently staffed, we should not take for granted, but rather honor and appreciate, the tribal forums that shoulder such a significant burden.

Traditional tribal courts may also serve as models of alternative dispute resolution. The Civil Justice Reform Act required each federal district to experiment with various techniques for expense and delay reduction in the handling of civil cases. This legislation was prompted by a popular perception that our own judicial system has failed to evolve into a sufficiently efficient and effective one for many civil litigants. In addition to experimentation under the Civil Justice Reform Act, the federal courts would do well to look to traditional tribal courts, many of which have over the years developed very effective and efficient justice systems.

For example, the Navajo peacemaker courts employ a time-honored system of dispute resolution that predates and predicts modern successes with mediation. The Navajo nation had its own legal structure and dispute settlement procedures long before the first Europeans arrived in the Americas.[10] These procedures required talking things out to reach a consensus, encouraged restitution and making the injured person whole, and emphasized forgiveness. Several Pueblo communities also use traditional alternatives to litigation.

It is instructive as well to consider not only tribal methods, but also tribal conceptions of justice. As protracted litigation in our federal courts has the potential to send all parties home—winners and losers—both impoverished and embittered by the experience, we might consider new approaches that, like the Navajo system, emphasize healing, both for the individual and for the community. Adversarial law offers at best a win-lose situation, and all too often results in a lose-lose situation. Some tribal court systems, on the other hand, are much more likely to yield a result that satisfies everyone involved.

Ninth Circuit efforts

The patchwork of laws and holdings limiting the jurisdictional reach of tribal courts has led to jurisdictional gaps and tensions between the two systems. With no criminal jurisdiction over non-Indians in Indian country, and with minimal power to address serious crimes committed by Indians, the tribes have a very limited ability to enforce a rule of law in their own lands. As Judge Canby summarized it,

> [Tribal authorities and tribal courts] are also perceived by the community as having responsibility for the control of crime. But when a crime is committed, the tribal courts may be powerless, depending on who committed the crime and who was the victim. If a non-Indian assaults an Indian (not an unusual domestic dispute in these days of intermarriage), the jurisdiction is federal, and federal agents and courts are often far away and concerned with other things. If a non-Indian assaults a non-Indian or commits a victimless crime [on tribal land], the state and not the tribe has jurisdiction. If an Indian commits a major crime, the jurisdiction is federal. If an Indian commits a misdemeanor, the tribe has jurisdiction, exclusive if the victim was an Indian or if there was no victim, concurrent with federal if the victim was non-Indian.
>
> In some instances in the past when Indians have committed major crimes but the federal authorities are too distant or too busy to investigate or prosecute, the tribe has resorted to prosecution of the offender for some lesser misdemeanor. In that regard, the tribal court ends up doing the federal court's business, but it cannot do it as thoroughly because its jurisdiction is limited.[11]

The prevalence of non-Indian crime on reservations requires the prosecution of non-Indians. To that end, the federal courts in the Ninth Circuit, in cooperation with the Department of Justice, as well as the tribal council of the Warm Springs

7. Newton, *Permanent Legislation to Correct* Duro v. Reina, 17 AM. INDIAN L. REV. 109, 123 (1992).
8. 471 U.S. at 851.
9. Argersinger v. Hamlin, 407 U.S. 25 (1972).
10. Austin, *ADR and the Navajo Peacemaker Court*, 32 JUDGES' J. 8 (Spring 1993).
11. Statement of Hon. William C. Canby Jr. to the Senate Committee on Indian Affairs, Aug. 2, 1995.

tribe in Oregon, have developed a project aimed at closing this gap. A new part-time U.S. magistrate judge has been appointed in Bend, Oregon, and holds court regularly at the Warm Springs reservation. Non-Indian misdemeanor cases that slipped through the cracks previously and went unprosecuted (leaving the reservation an easy mark for non-Indian petty crime), will now be heard by the federal magistrate judge when he convenes federal court on the reservation.

The Department of Justice also has been working to cross-designate a Warm Springs tribal prosecutor as a special assistant U.S. attorney to bring these cases before the magistrate judge. In addition, the U.S. attorney for the District of Arizona has already designated several tribal prosecutors as special assistants to help fill jurisdictional gaps.

A number of tribes have expressed concern about allowing federal courts to convene in their communities, fearing that it undermines their sovereignty. This suspicion, which the Warm Springs tribe was able to overcome, is precisely the type of problem our task force has helped alleviate. Ongoing dialogue between tribal and federal courts should promote mutual understanding and trust. After two centuries of actions that have repeatedly undermined that trust, the federal courts recognize this must be a long-term effort.

Dialogue and understanding

In the course of our tribal courts project we have focused on educating federal judges, building a cooperative working relationship with tribal judges, establishing an ongoing dialogue with tribal judges, and fostering attitudes of mutual respect on both the federal and the tribal sides.

In November, the Ninth Circuit Judicial Council adopted a resolution urging the state-federal councils throughout the circuit to include tribal court representatives as fully participating and voting members of the council. At the suggestion of our task force, the District of Oregon, with the consent and support of the state court judges on that council, has already done so. The two largest tribal courts in Oregon, the Umatilla and Warm Springs, are now regular participants in the Oregon State-Federal-*Tribal* Council, and its agendas include items of particular relevance to tribal relations. The Washington State-Federal Council has also placed relations with tribal courts on its agendas and has invited a tribal court representative to address it on issues of intercourt cooperation.

Federal courts would do well to look to traditional tribal courts for ADR methods.

The District of Arizona recently hosted a Federal-Tribal Judicial Conference that brought tribal and federal judges together to discuss issues of jurisdiction, comity, and cooperative court administration. Moreover, at the request of the Ninth Circuit Task Force, the Arizona State-Tribal Forum has invited full membership and participation by representatives of the federal courts.

Thanks to the efforts of the Ninth Circuit Task Force, larger-scale meetings have taken place in Reno, Nevada, in conjunction with a National Judicial College seminar on tribal court jurisdiction. The federal judges who participated in that seminar and in the accompanying meetings came away with a much better appreciation for the difficulties and issues faced by tribal courts in the Ninth and Tenth circuits. The Federal Judicial Center, the educational arm of the federal judiciary, has recognized the importance of this area of law and last year sponsored the first-ever seminar for federal judges on Indian law.

Providing local training to tribal court judges and personnel would be enormous value, and we are committed to providing the necessary resources to the tribal courts in our circuit. We are now evaluating the feasibility of including tribal judges in the training programs provided for federal judges within our circuit. In this way, tribal judges would receive valuable training while interacting with federal judges. We are also evaluating the possibility of training tribal court clerk staff, and donating books and other surplus resource materials to the tribal courts. While these efforts are in the early stages of development, we are confident that they will prove successful in helping to enhance the effectiveness of the tribal court system and federal-tribal court relations.

*****

The work of the Ninth Circuit Task Force on Tribal Courts represents a significant accomplishment in the effort to improve federal-tribal interaction. In conjunction with the Department of Justice, the Tenth Circuit Task Force, and Judge Elbridge Coochise of the National American Indian Court Judges Association, we are beginning to close the jurisdictional gaps and to heal the tensions in the federal-tribal court relationship. We will continue to facilitate an ongoing dialogue between federal and tribal judges and to institute changes that will be beneficial to both the federal judiciary and the tribal courts. We hope that our efforts will succeed in resolving many of the issues that have developed from the patchwork system of laws that has evolved over the past two centuries. Inevitably, incremental changes based on mutual respect and understanding will be the most fruitful path for increased federal and tribal judicial cooperation and understanding.

Resolving state-tribal jurisdictional dilemmas

As a project of the Conference of Chief Justices is demonstrating, it is possible through communication and cooperation to minimize jurisdictional problems between state and tribal courts.

by Stanley G. Feldman and David L. Withey

All states have both Indian and non-Indian citizens. Even states with no federally recognized Indian lands have citizens with ties to Indian country that may become a factor in matters before the courts. In states that do contain Indian country, some Indian citizens live outside and some non-Indian citizens live within Indian country. The business and social affairs and problems of many people—citizens and visitors, Indians and non-Indians—thus traverse the political/legal boundaries of Indian country every day.

Independent, functioning tribal governments exercising jurisdiction over land and people are a growing reality. Although these governments are sovereign in somewhat the same manner that states are sovereign, they are much more subject to the supremacy of the federal government. Tribal governments, according to one ruling, are most "analogous to the territories of the United States, which are also subject to Congress' plenary power."[1] Yet, as Chief Justice John Marshall noted, tribal governments are most accurately described as domestic dependent nations that have retained inherent sovereignty.[2] Indeed many state-tribal jurisdictional problems are comparable to issues between states or nations. Consider these examples:

- A suspect flees across the border with law enforcement officers in hot pursuit.
- Law enforcement officers are unable to arrest a husband who has violated a protective order issued in a different jurisdiction.
- Resolution of an important contract dispute is delayed while the parties litigate which jurisdiction should resolve the substantive dispute.
- A key witness refuses to travel to the jurisdiction in which a case is to be tried.
- Children live in poverty in one jurisdiction despite a court order requiring payment of substantial child support by a noncustodial parent living in another jurisdiction.

These types of jurisdictional problems arise not only between states but also in disputes between state and tribal jurisdictions. In the latter situation, the issues are even more problematic because tribal jurisdiction is based on the identity of the parties involved in addition to both the matter at issue and the territory in which an event occurs. Consider these additional examples:

- A non-Indian father is not prosecuted for misdemeanor abuse of his Indian child on an Indian reservation because the tribe lacks jurisdiction to prosecute non-Indians, the state lacks jurisdiction to prosecute offenses involving Indians and committed in Indian country, and the U.S. attorney lacks resources to prosecute misdemeanors.
- Tribal police decline to enforce a state domestic violence protective order recognized by the tribal court because they have no authority to arrest a non-Indian spouse for violating the order.
- An Indian is prosecuted by federal authorities for an offense lesser than homicide due to the difficulty of proving the necessary intent. A tribal prosecutor believes she can prove the necessary intent, but the tribal court cannot impose a sentence of more than six months in jail for any offense.
- A non-Indian spouse receives a default divorce and child custody decree in state court about the same time as the Indian spouse receives a similar decree in tribal court.
- An Indian living in Indian country requires inpatient mental health care but cannot be involuntarily committed by a state court due to its lack of jurisdiction. A tribal court commitment is insufficient because the state hospital is authorized to receive commitments only from state courts.

These and similar occurrences are certainly fairly common and illustrate the problems inherent in limitations of tribal jurisdiction. Another hypothetical provides even more food for thought: Bonnie, an Indian, and Clyde, a non-Indian who resides with Bonnie in Indian country, rob the tribal casino, receive a speeding ticket in Phoenix, rob a convenience store in California, and trespass on the beach in Mexico. They could both be fully prosecuted by all jurisdictions in which they committed their offenses except

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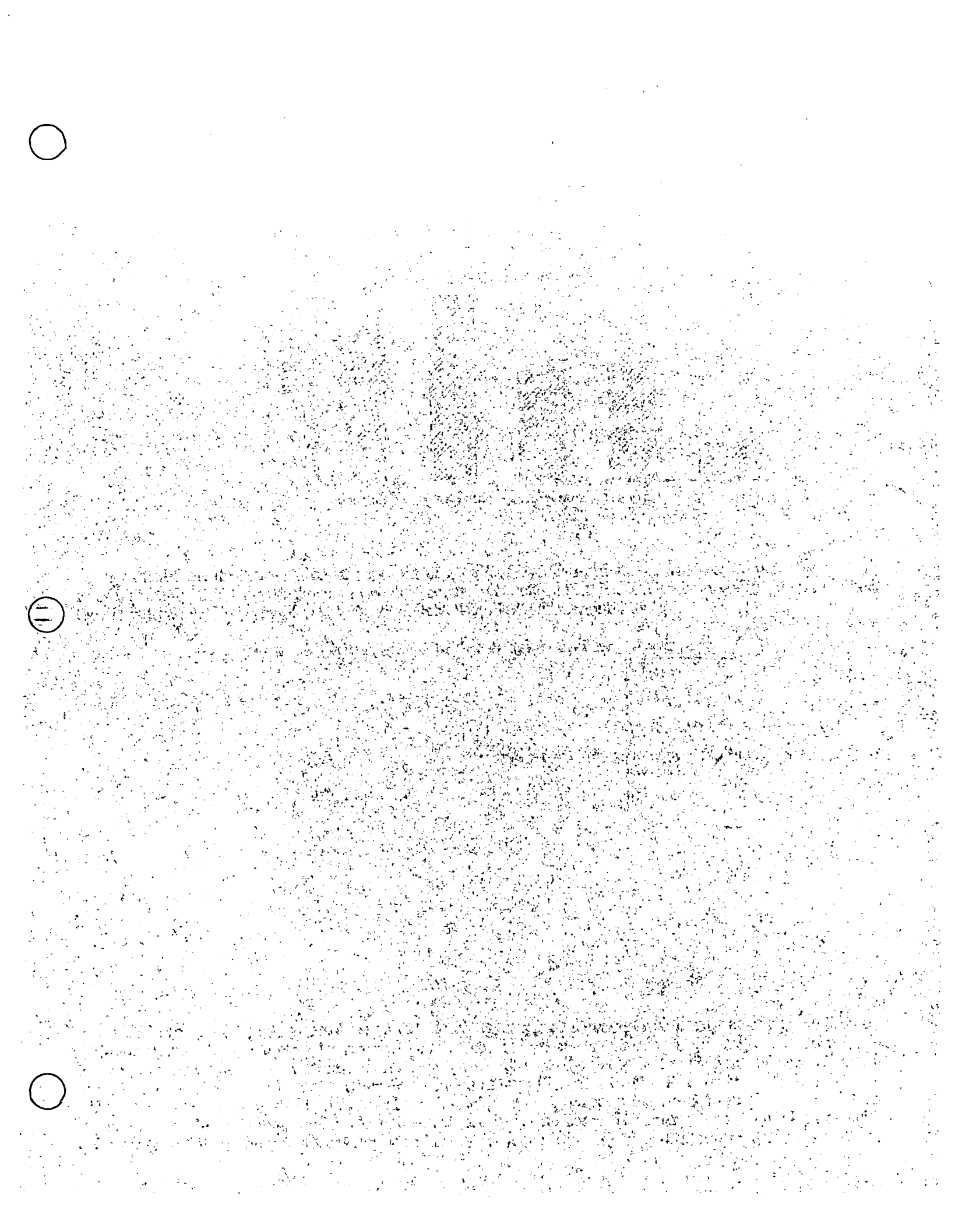
1. Tracy v. Superior Court, 168 Ariz. 23, 32, 81 P.2d 1030, 1039 (1991).
2. Cherokee Nation v. Georgia, 30 U.S. (5 Pet.) 1 (1831); Worcester v. Georgia, 31 U.S. (6 Pet.) 515 (1832).



CHILD ABUSE, CHILD SEXUAL ABUSE, AND CHILD NEGLECT CASE STATISTICAL REPORT

Prepared by Ada Pecos Melton
and Michelle Chino

National Statistics—Federal Level

The case statistics were collected as part of a federal level child abuse and neglect (CA/CN) mail survey administered to Indian Health Service (IHS) service unit directors and Bureau of Indian Affairs (BIA) agency superintendents nationwide. The IHS and BIA combined response rate for the mail questionnaire was 86.5% (IHS = 94%, BIA = 79%). There are several possible reasons for non-response: 1) The type of services an agency provides varies greatly. Agencies that did not respond and could not be contacted through follow-up activities, may have felt unable to respond if they do not provide CA/CN related services. Those who indicated they were not federally run or did not provide direct services were eliminated. 2) Some agencies refused to complete the survey noting personnel and time constraints in completing the survey. 3) CA/CN is a sensitive issue and intervention activities are under intense tribal scrutiny in some locations. Some employees felt their jobs would be threatened and thus declined to respond. 4) There was also an indication of denial from several who refused to participate because "these problems do not exist in my community." Despite the lower than expected response rate, the returns provided numbers large enough to make some statements about CA/CN in Indian communities and the role of the IHS in addressing this issue. Of all the responding agencies, a total of 37 agencies were able to return some or all of the information requested for our analysis of case statistics.

Sample sizes for individual questions varied, as some responding organizations did not collect or have access to certain types of data included on the questionnaire. However, the minimum sample size exceeded 900 incidents, so all of the analyses had sufficient power to detect small differences in the variables tested. Analyses were conducted to determine frequencies and to test associations between variables. The smallest unit of analysis in this data set is a reported incident, of which there was a total of 2037 during calendar years 1989 and 1990. These 2037 incidents involved 1800 child victims, some of whom were the victims of two or more abuse incidents in any given year. Unless otherwise indicated, columns headed "number" refer to numbers of reported incidents rather than numbers of children.

Geographic Location

The data were collected from 10 of the 12 IHS national Service Areas and 17 states within those areas. As indicated in Table 2a, the Navajo, Aberdeen, Albuquerque, and Oklahoma Service Areas had the most reported incidents during the two years surveyed.

Table 2a. Reports of child abuse and neglect incidents, by Area

Service area	number	percent
Albuquerque	305	15.0%
Navajo	501	24.6%
Portland	155	7.6%
Aberdeen	332	16.3%
Phoenix	144	7.1%
Bemidji	73	3.6%
Nashville	61	3.0%
Alaska	49	2.4%
Oklahoma	263	13.0%
Billings	152	7.5%

When examined by state (Table 2b), New Mexico, Arizona, and North Dakota reported the most incidents. However, it is important to emphasize that, due to the varying populations of American Indian and Alaska Natives in responding areas, combined with the low response rate, it is not possible to compare

rates of child abuse and neglect between various geographic areas. Such analyses require population-based data, which are not available to us at this time.

Table 2b. Reports of child abuse and neglect incidents, by state

State	number	percent	State	number	percent
New Mexico	513	25.2%	Oregon	87	4.3%
North Dakota	215	10.6%	Utah	144	7.1%
Michigan	24	1.2%	New York	52	2.6%
Alaska	49	2.4%	Wisconsin	45	2.2%
Arizona	293	14.4%	Oklahoma	129	6.3%
Idaho	68	3.3%	South Dakota	103	5.1%
Louisiana	9	.4%	Minnesota	4	.2%
Kansas	134	6.6%	Nebraska	14	.7%
Montana	152	7.5%			

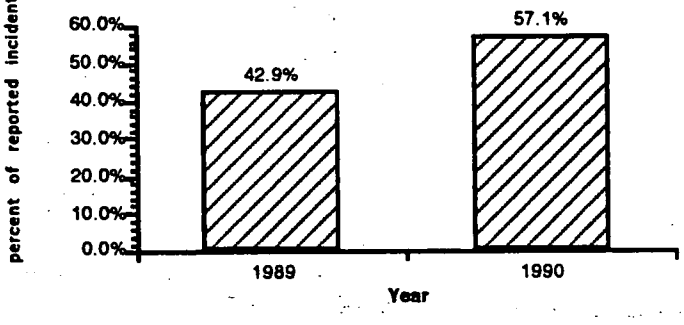
Agency

Of the incidents included in our data set, 57.5% were from BIA agencies and 42.5% were from IHS service providers. Such information needs to be interpreted cautiously, because of the different roles of IHS and BIA agencies in cases of child maltreatment. Further, direct comparison of reported incidents by the two agencies is complicated by the differences in absolute numbers of potential responding organizations as well as different response rates for our mailed surveys. A more useful approach is to examine the relative proportion of incidents of physical abuse, sexual abuse, and neglect reported by IHS and BIA respondents.

Year

Approximately half (54.0%) of the case reports included information concerning the year in which the incident occurred, either 1989 or 1990 (Figure 1). Of those, over half (57.1%) were 1990 cases, suggesting an increase in reported cases over time. However, the large proportion of cases missing this information combined with the low response rate make such an interpretation tentative at best. The apparent increase may be the result of an increase in incidents of maltreatment, but it may also result from improved recognition and reporting of such incidences. Current research suggests that while the incidence of child abuse may be on the rise, training and improved data management systems have contributed to an increase in agencies' ability to detect, diagnose, report, and track cases of child maltreatment.

Figure 1. Year in Which Incident Was Reported (n=1101)

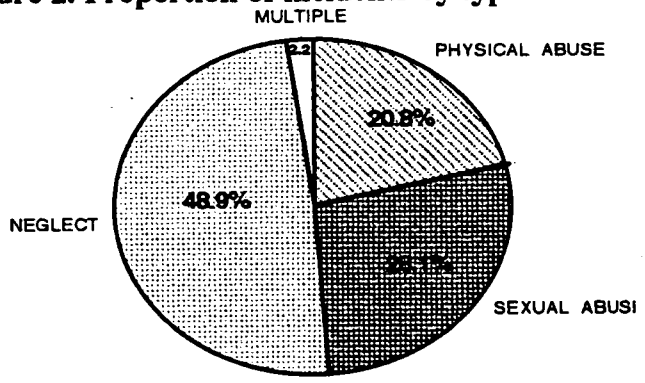


Abuse Type

As indicated by Figure 2, the greatest proportion of reported cases were of neglect (48.9%). Sexual abuse (28.1%) and physical abuse (20.8%) cases comprised most of the remainder of the reports. A few (2.3%) cases involved more than one type of abuse, e.g. physical abuse and neglect, in the same report.

Data collection formats within many agencies provide for only one type of abuse per incident report, and there were some questions initially regarding the few reports of multiple abuse type incidences. In addressing these questions it is felt that while multiplicity may be under-recorded, it is not as frequent as originally suspected. This may imply different motivations and different circumstances surrounding different types of maltreatment and warrants further study.

Figure 2. Proportion of incidents by type of abuse



IHS respondents reported higher proportions of physical abuse (23.2%) than BIA respondents (19.8%), though these differences were not statistically significant (Table 3). However, IHS incidents involved a significantly higher proportion of sexual abuse than BIA incidents (IHS = 31.5%; BIA = 26.7%), while BIA respondents reported relatively more incidents of neglect (BIA = 53.5%; IHS = 45.3%; $\chi^2 = 13.1$; $p < .002$). These inter-agency differences clearly have implications regarding the types of services provided by each agency to child victims of abuse and neglect.

Table 3. Proportions of physical abuse, sexual abuse, and neglect incidents, by Agency (n = 1975)

Abuse type	IHS	BIA
Physical abuse	23.2%	19.8%
Sexual abuse	31.5%	26.7%
Neglect	45.3%	53.5%

As noted earlier, the number of incidents reported varies considerably between states and service units. Thus, the total number of incident reports for that area biases the contribution of each area to the total sample of incidents reported. So, it is not surprising that the Navajo Service Area reported the greatest number of incidents of physical abuse and of neglect, and that the Aberdeen Service Area reported the greatest number of incidents of sexual abuse. These two service areas submitted over 40% of the reported incidents in our data set. An χ^2 analysis of the association between location and abuse type allows a more critical evaluation of the relative proportions of physical abuse, sexual abuse, and neglect in each service area.

As indicated in Table 4, the Phoenix Service Area was the only to have significantly higher proportion of incidents of physical abuse than expected; the Aberdeen, Nashville, and Oklahoma service areas all had significantly fewer incidents than expected. Sexual abuse was higher than expected in the Portland, Aberdeen, and Phoenix Service Areas, and lower than expected in the Albuquerque, Bemidji, and Nashville Service areas. Finally, there were more incidents of neglect than expected in the Bemidji, Nashville, and Oklahoma service areas, and a lower than expected proportion in the Portland and Phoenix Service Areas.

Table 4. Proportions of physical abuse, sexual abuse, and neglect incidents, by Service Area (n = 1973)

Abuse type	Higher than Expected	Lower than Expected
Physical abuse **Average = 21.2%**	Phoenix (36.6%)	Aberdeen (9.1%) Nashville (8.5%) Oklahoma (16.0%)
Sexual abuse **Average = 28.7%**	Portland (40.4%) Aberdeen (44.1%) Phoenix (40.1%)	Albuquerque (21.2%) Bemidji (9.0%) Nashville (8.5%)
Neglect **Average = 50.1%**	Bemidji (68.7%) Nashville (83.0%) Oklahoma (67.2%)	Portland (31.4%) Phoenix (23.2%)

Number of Incidents

Respondents were asked to indicate whether each report represented the first incident for a child, or whether it represented one of multiple incidents associated with the same victim in a given year. Surprisingly, this was the most frequently misunderstood question of any included in the questionnaire. Several respondents included more than one incident for the "same victim," when in fact the cases included victims of more than one age, sex, etc. Also, it should be noted that the incident number refers only to a particular year, and the same children may have been victims in reports of previous years not included in our survey.

With these qualifications in mind, analysis of the incident field showed the following (Table 5). For the years 1989 and 1990, there were, as far as could be determined from the data, 1800 child victims of at least one incident of neglect, physical abuse, or sexual abuse. Of these, 1626 (90.3%) victims had one report only, 127 (7.0%) had two reports, 37 (2.0%) had three reported incidents, 7 (.4%) had four, and three (.2%) were the victims of five or more reported incidents.

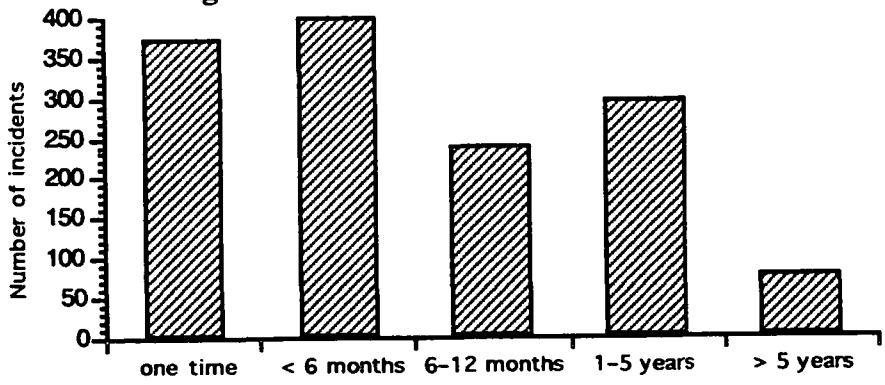
Table 5. Number of incidents reported for each child victim in any one year (n = 2037)

Number of Incidents	number of cases	percent
One incident only	1626	90.3%
Two incidents	127	7.0%
Three incidents	37	2.0%
Four or more incidents	10	.7%
Total	**1800**	**100.0%**

Duration

The duration of abuse for reported cases was fairly evenly distributed among the given options (Figure 3), i.e.: one time only (27.1%), duration of less than 6 months (28.8%), 6–12 months (17.2%), and 1–5 years (21.4%); few reported cases (5.6%) exceeded five years in duration. It is noteworthy that victim age is not uniformly distributed (as will be discussed below), and is instead skewed toward younger ages, particularly ages <5 years old. Thus, for a substantial proportion of the sample (≈ 40%), duration of abuse exceeding five years would not be possible (as they are not yet five years old).

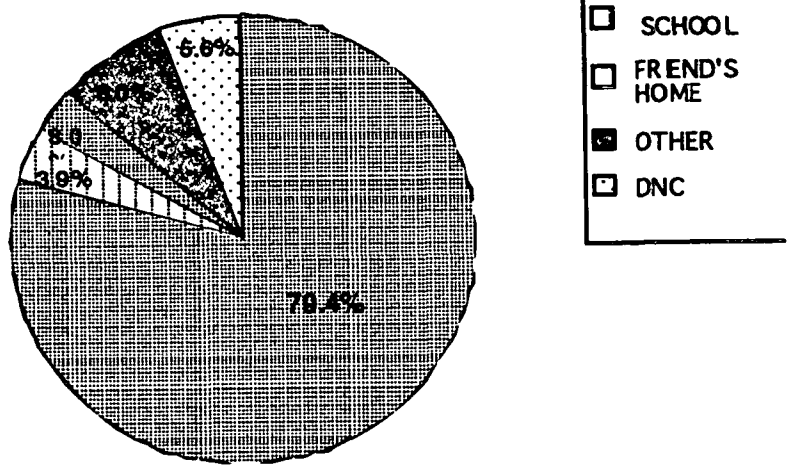
Figure 3. Duration of abuse



Location

By far the greatest proportion of reported cases (79.4%) occurred in the victims' homes (Figure 4). Less frequently, incidents of abuse and neglect occurred at school (3.9%), a friend's home (3.0%), or other locations (8.0%). This type of data was not collected by 5.6% of respondents.

Figure 4. Location at Which Reported Incident Occurred

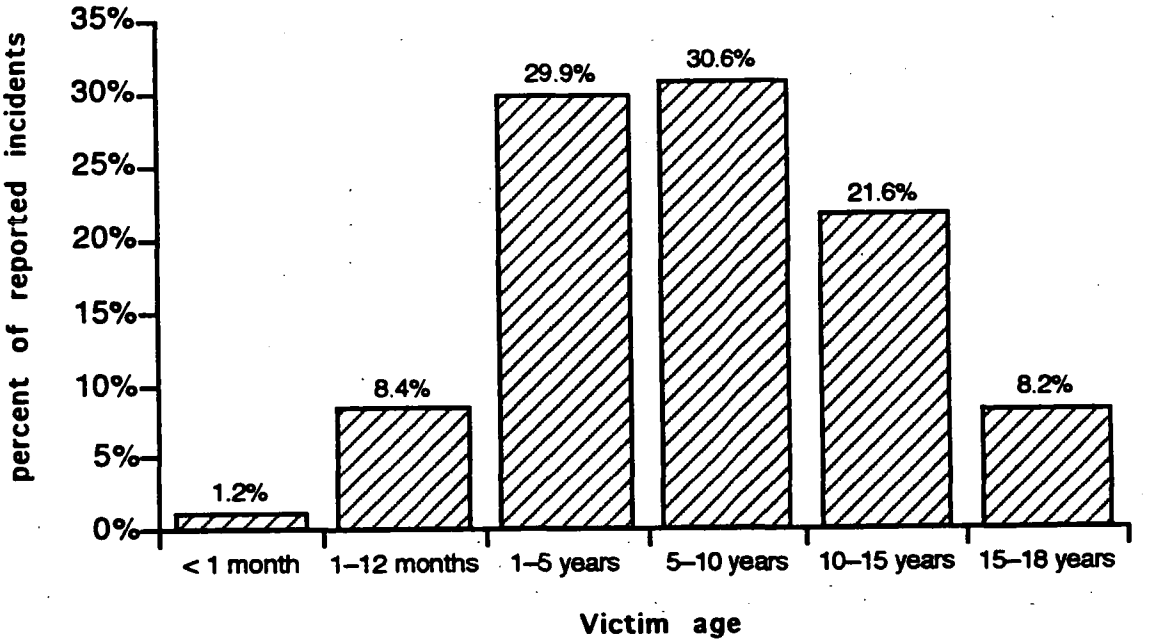


Victim Age

Within the given age ranges, the reported victim ages appear to be approximately normally distributed (Figure 5), with the mode at 5–10 years (30.6% of cases). When examined more closely, it is clear that a disproportionate number of victims are under one year old (9.6% vs. 5.6% if the distribution was uniform), with a particular concentration of victims under one month old (1.2% vs. .46% if distribution was uniform). When victim age is examined by type of abuse, it is clear that sexual abuse victims were older than victims of neglect or physical abuse were. Sexual abuse generally increases as a proportion of total cases with increasing victim age, and is most common in the 10–15 year victim age category, comprising over 40% of

incidents in that age range (41.6%). Conversely, neglect was most common in the youngest victim age group, and decreased as a proportion of total incidents with increasing victim age; over 80% (82.6%) of incidents with victims < 1 month old reported neglect, contrasted with 32.3% of incidents with victims aged 10–15 years. Physical abuse varied little with victim age, consistently accounting for 17–26% of cases in all victim age groups.

Figure 5. Distribution of Victim Ages for all Reported Incidents



Victim Sex

Table 6 shows the proportion of male and female victims in all reports, by abuse type. As indicated in this table, over half (57.1%) of victims were female. Male and female victims were approximately equally represented in cases of physical abuse (52.8% male) and neglect (51.1% male), while sexual abuse cases had primarily female victims (79.8%). These differences were statistically significant ($\chi^2 = 162$; $p < .0001$).

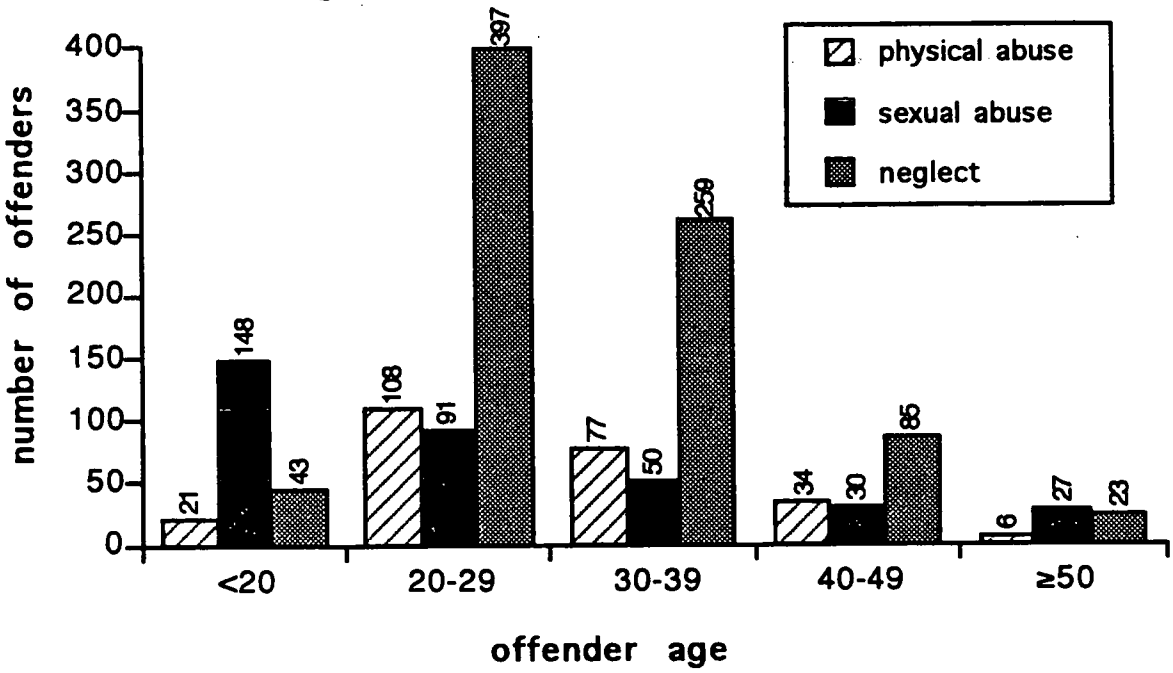
Table 6. Proportion of male and female victims in all reports and by abuse type (n = 2022)

	Victim sex			
	Male		Female	
	number	percent	number	percent
Total	867	42.9%	1155	57.1%
Physical abuse	220	52.8%	197	47.2%
Sexual abuse	114	20.2%	450	79.8%
Neglect	502	51.1%	481	48.9%

Offender Age

The greatest proportion of offenders fell into two age categories: 20–29 (42.5% of cases) and 30–39 (37.7%). When examined by abuse type, physical abuse cases were fairly evenly distributed over all age groups (Figure 6). Offenders in sexual abuse cases were significantly more likely to be younger (<20) or older (>50) than average, while offenders in neglect cases were more likely to be in age categories 20–30 and 30–40 years old. These differences are statistically significant ($\chi^2 = 352$; $p < .0001$).

Figure 6. Offender Age by Abuse Type



Offender Sex

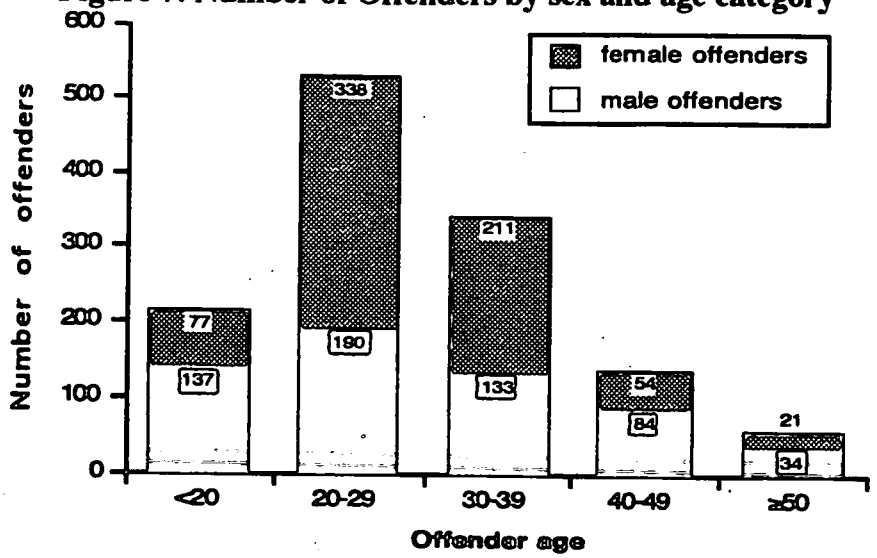
While it appeared that offenders were approximately equally likely to be male or female (48.9% male, 51.1% female), a sex bias was evident when cases were further distinguished by type of abuse (Table 7). Offenders were significantly more likely to be male in cases of sexual abuse (90.2% male) and physical abuse (59.3% male), and most often female (74.7% female) in cases of neglect ($\chi^2 = 566$; $p < .0001$).

Table 7. Proportion of male and female offenders in all reports and by abuse type (n = 1553)

	Offender sex			
	Male		Female	
	number	percent	number	percent
Total all	757	48.9%	796	51.1%
Physical abuse	191	60.4%	125	39.6%
Sexual abuse	390	90.3%	42	9.7%
Neglect	150	20.2%	613	79.8%

As indicated by Figure 7, male offenders were over-represented in both the youngest (< 20 years old) and oldest (> 40 years old) age groups, while the interim categories had significantly more female than male offenders did ($\chi^2 = 82.0$; $p < .0001$).

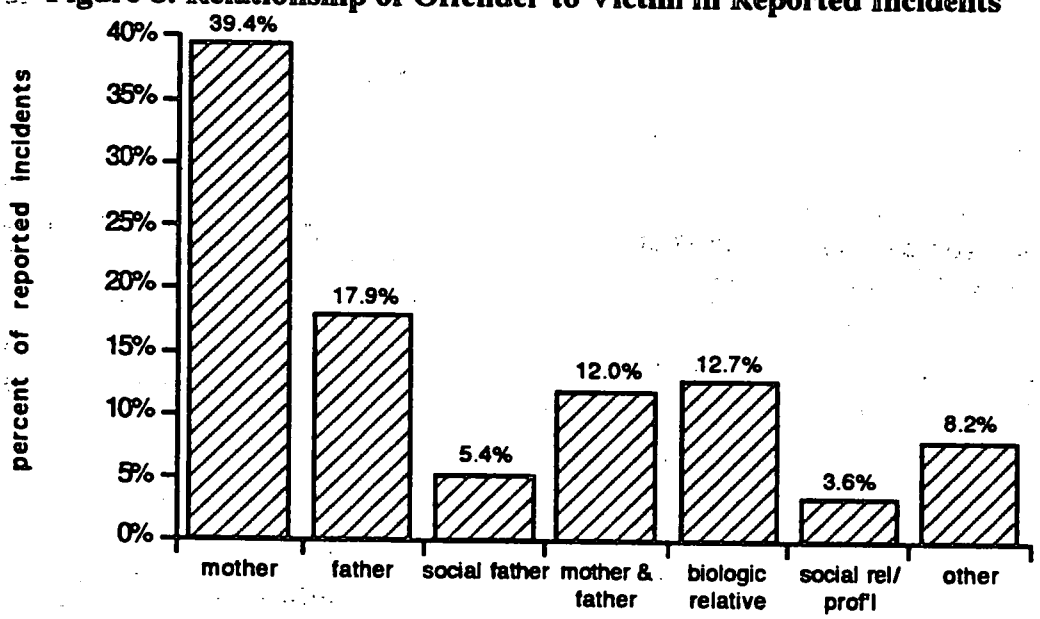
Figure 7. Number of Offenders by sex and age category



Victim-Offender Relationship

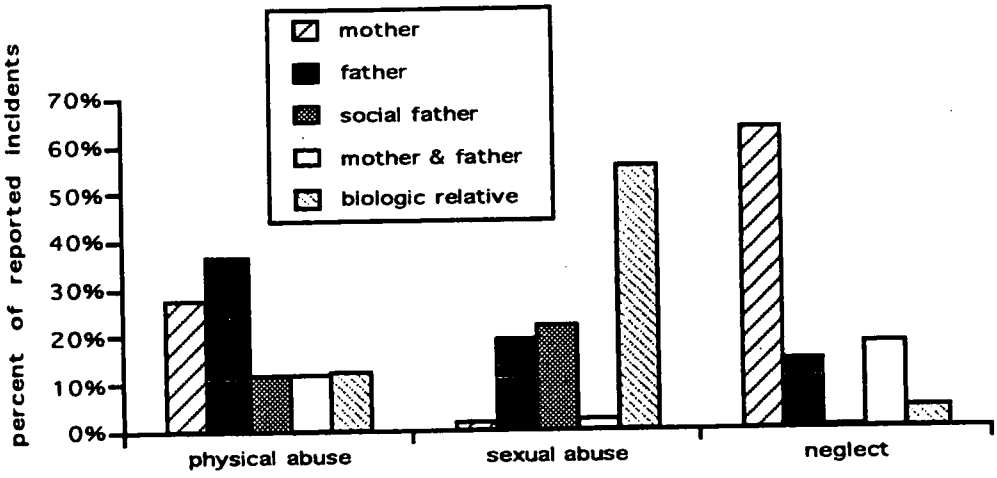
The most frequently reported offenders in our data set (Figure 8) were victims' mothers (39.4%), fathers (17.8%), mothers and fathers together (12.0%), and other biological relatives (12.7%). Stepfathers, mothers' boyfriends, and other "social fathers" comprised a small percentage of the total (5.4%).

Figure 8. Relationship of Offender to Victim in Reported Incidents



When examined by specific type of abuse (Figure 9), significant differences exist in associations between various offender categories and the three abuse types ($\chi^2 = 791$; $p < 0001$).

Figure 9. Relationship between Offender and Victim, by Abuse Type



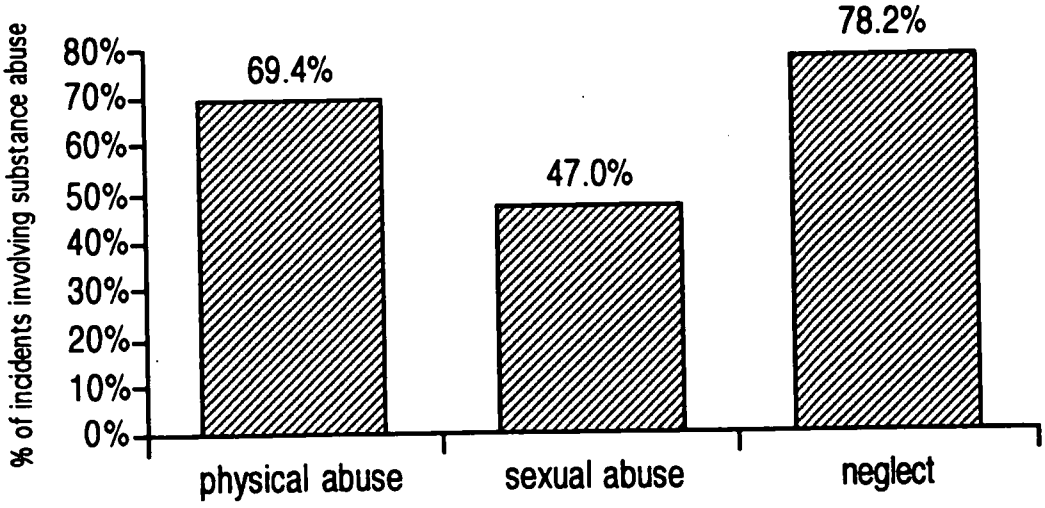
Mothers were the primary perpetrators in cases of neglect (62.9% of neglect cases). Fathers were the primary offenders in cases of physical abuse (36.3% of cases). Stepfathers and other social fathers were over-represented in cases of both physical (11.8%) and sexual abuse (22.0%), and other biological relatives were the primary perpetrators of sexual abuse (55.3% of cases).

Substance Abuse

Substance abuse was a factor in nearly three-quarters (70.3%) of cases in which such data were collected (Figure 10). The prevalence of substance abuse varied with offender sex, offender relationship to victim, offender age, and type of abuse.

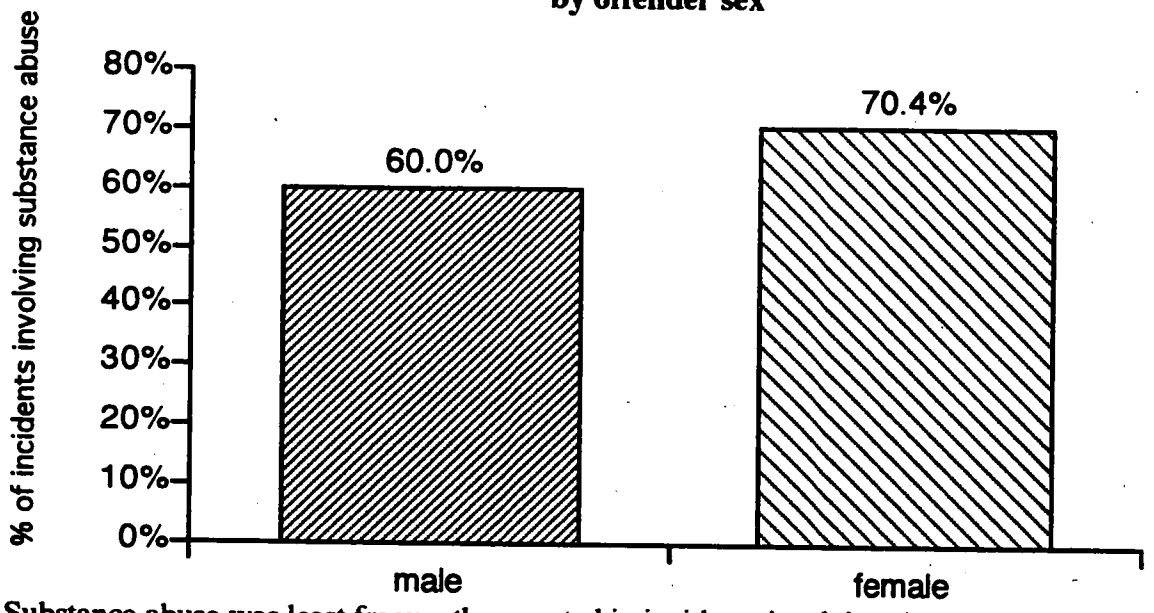
The association of substance abuse and abuse type was examined. Analyses showed that incidents of sexual abuse were significantly less likely to be associated with substance abuse (47.0%) than either incidents of physical abuse (69.4%) or neglect (78.2%).

Figure 10. Percent of incidents involving substance abuse by abuse type



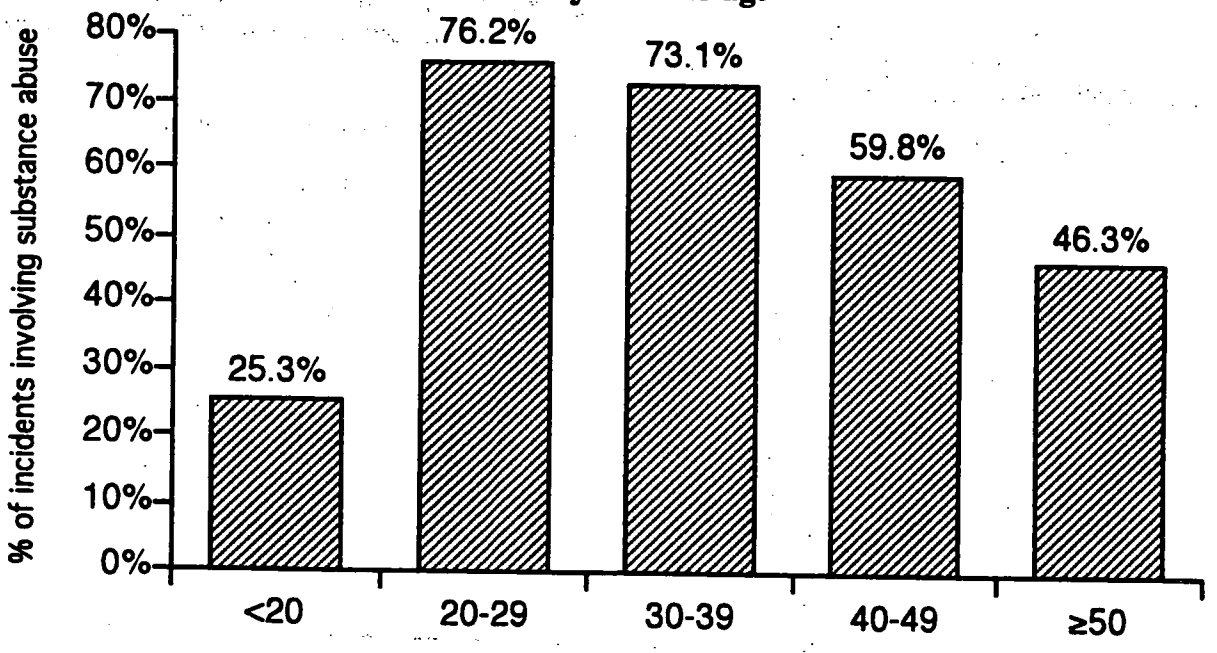
When substance abuse was examined within each offender sex (Figure 11), significant differences became apparent. Incidents with male offenders were less likely to involve substance abuse (60% of incidents) than incidents with female offenders (70.4% of incidents; $\chi^2 = 13.8$; $p < .0002$).

Figure 11. Percent of Incidents involving substance abuse, by offender sex



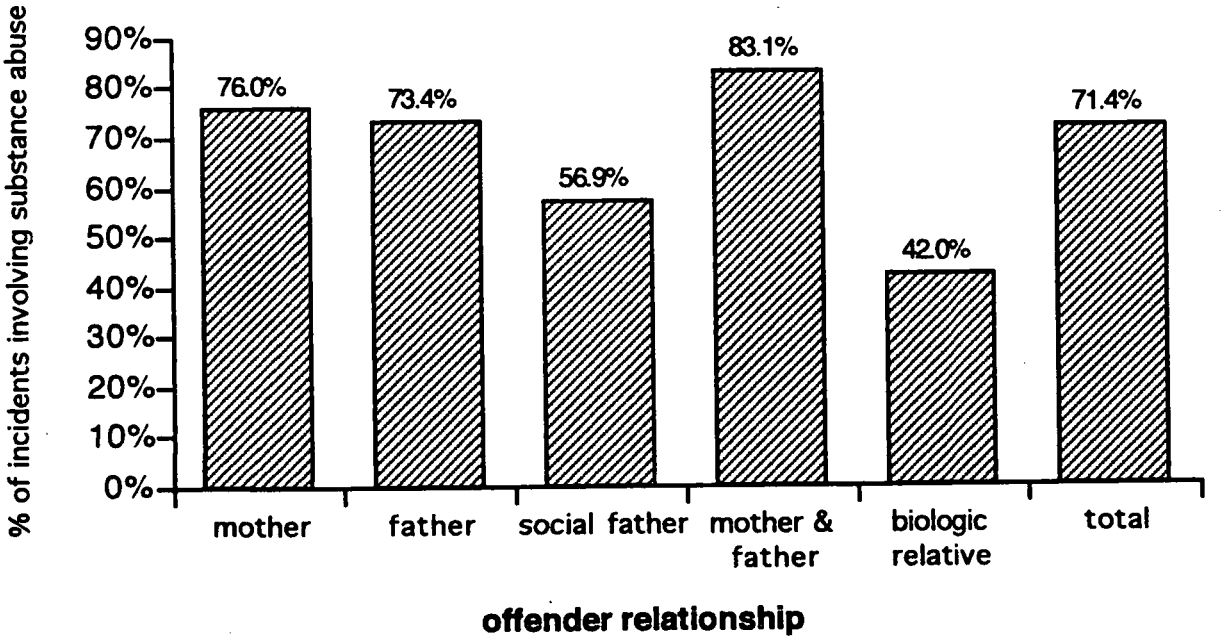
Substance abuse was least frequently reported in incidents involving the youngest (< 20 years old) and oldest (> 40 years old) offenders (Figure 12). In the interim age categories, ages 20–40, substance abuse was a factor in approximately three-quarters of reported incidents. The differences in substance use among different age groups were statistically significant ($\chi^2 = 171$; $p < .0001$).

Figure 12. Percent of incidents involving substance abuse, by offender age



When examined by offender relationship (Figure 13), incidents with offenders who were mothers or fathers were approximately equally likely to involve substance abuse (76.0% and 73.4%, respectively).

Figure 13. Percent of Incidents Involving Substance Abuse, by Offender Relationship



Cases in which both parents were involved had the highest proportion of substance abuse (83.1%). Other offenders had lower rates of substance abuse; approximately half of cases involving social fathers (56.9%) or other biologic relatives (42.0%) included substance abuse as a factor in the incidents (χ^2 = 87.5; $p < .0001$).

Few multivariate statistics were used in the analyses of the case statistics due to the categorical nature of the data. The one exception was an analysis of the association between substance abuse and duration of abuse, controlling for victim age, offender age, abuse type, and offender relationship (Figure 14). To utilize multiple regression, a dummy variable was substituted for the dichotomous substance abuse variable. The resulting multiple regression indicated that substance abuse was positively correlated to the duration of abuse; this relationship persisted when victim age, offender age, abuse type, and offender relationship were controlled ($\beta = .2$; $p < .0001$).

Figure 14. Substance abuse as a predictor of abuse duration in incidents of abuse and neglect (n = 970)

Control variable	Regression statistics
victim age	$\beta = .20$
offender age	$r^2 = .084$
victim-offender relationship	$p < .0001$

The substance abuse variable, however, explained only 4% of the variance in duration of abuse, and the addition of the other four controlling variables increased this to only 8%. Thus, many other factors influence the duration of abuse observed in this sample.

It should be emphasized that the association between substance abuse and duration of abuse is not necessarily causal; a plausible explanation would be that certain environmental factors (e.g. family history, unemployment, and lack of family support) might influence duration of abuse and substance abuse.

Unfortunately, information such as this was not available for offenders in this data set. However, such associations may suggest the type of information, which would be usefully included in child abuse and neglect records collected in the future.

CHILD SEXUAL ABUSE

This research illuminated the misconceptions and misinformation associated with the issue of child sexual abuse (CSA), partly the result of the dearth of information available on this topic. While this research cannot provide a detailed report on the issues for victims, offenders, families, and service providers, it can serve to clarify the primary issues and provide a base of information. Child sexual abuse is included in the range of child maltreatment issues discussed above, but the dynamics involved in sexual abuse warrant a separate analysis and a specialized focus for prevention and intervention. The data collection facilitated the development of a profile of sexual abuse cases within the context of Indian child maltreatment. By understanding specific risk factors and possible outcomes, appropriate and effective prevention and intervention can be developed. The following sections are included to provide detailed information about the extent of CSA in Indian communities, and an overview of some of the current perspectives on definition and treatment issues.

Definitions of sexual abuse

Sexual abuse is defined as the exploitation of a child for the sexual gratification of an adult, and includes non-contact, manipulative contact, and forced aggressive contact. Non-contact sexual abuse does not involve touching and may include calls, sexual jokes, propositions, and in showing pornography. Manipulative contact involves touching which appears non-hostile and has been psychologically rather than forcefully imposed. It may include unwanted hugs, kisses, and pinching, tickling, photographs, handling genitals, masturbation, oral genital contact. Forced aggressive contact is sexual activity that is forced, and it may include: rape; oral, vaginal, or anal sexual contact; sexual bondage; or maiming. The memory of victimization compounds the trauma and can be manifested verbally and/or physiologically. Depending on when the abuse occurred, it might be possible to treat memories of sexual abuse through physical therapy, role playing, and in other forms of therapy. It is also critical that service providers be aware that children who have been victimized are more likely to be victimized again and/or re-abused.

Rates and Reporting Trends

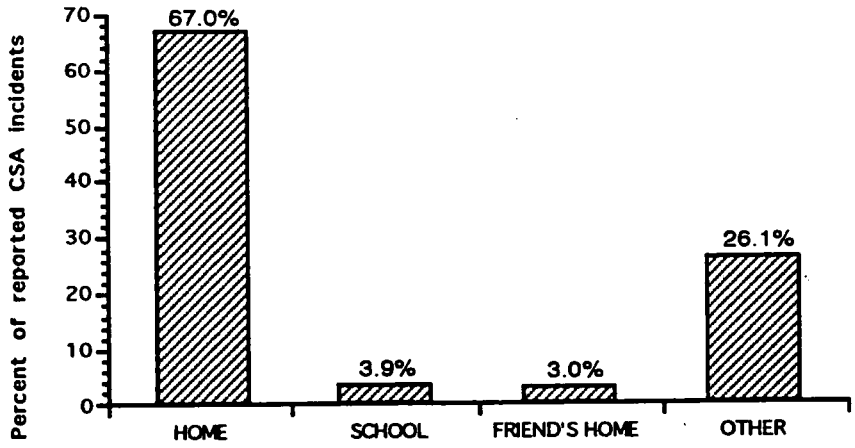
The national data indicate that child sexual abuse represents a significant proportion (28.1%) of child maltreatment cases in Indian country, and the number of reported cases is increasing. While rates appear to vary considerably, CSA is an issue in every community. Some of the differences in rates may be due to reporting, the availability and input of other agencies, denial, or the epidemic nature of CSA in some communities.

A greater percentage of IHS cases are CSA, probably due to the medical implications of cases. In some locations tribal agencies are equipped to deal with CSA cases, but often they do so without the assistance and collaboration of federal agencies. The lack of interagency communication and coordination of services may hinder service provision, and serve to obstruct the acquisition of sufficient statistical information for program expansion and development.

Location

By far the greatest proportion of reported cases (67%) occurred in the victims' homes (Figure 15). Less frequently, incidents of CSA occurred at school (3.9%), a friend's home (3.0%), or other locations (26.1%). Sexual abuse was more frequent than physical abuse or neglect among incidents occurring at friends' homes, with sexual abuse comprising 78.2% of those incidents. Additionally, sexual abuse incidents were more likely than physical abuse or neglect to occur at "other" locations such as relatives' homes, public buildings, vehicles, out of doors, etc.

Figure 15. Location at which reported CSA incident occurred

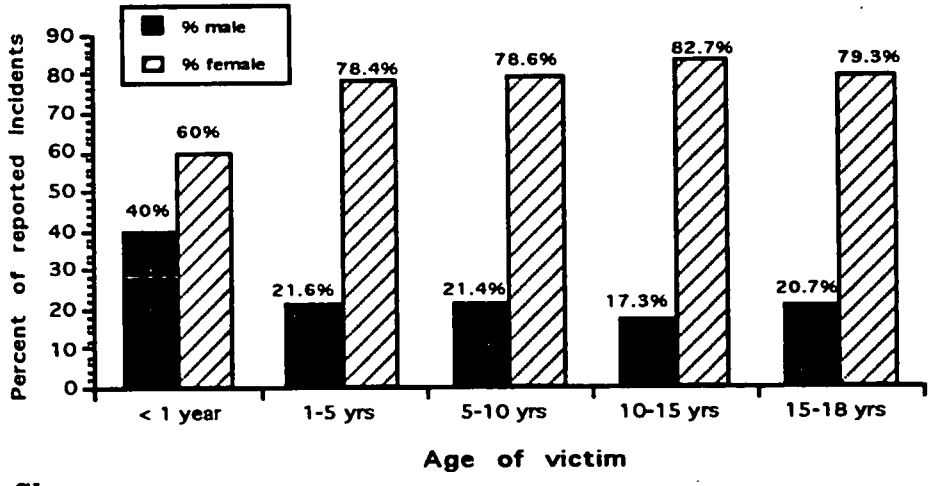


Victim Profile

More than three fourths (79.8%) of the sexual abuse victims in this sample were female. It should be noted that there is some controversy over the preponderance of females in sexual abuse reports. Some clinicians suggest that male victims may be as frequent as female victims, but that boys and their families may be far less likely to report sexual abuse and/or seek help. It is of importance to note that in the very youngest age category there is more equity in victim sex (40% male, 60% female).

In general, sexual abuse victims were older than victims of neglect or physical abuse. Sexual abuse generally increases as a proportion of total cases with increasing victim age, and is most common in the 10–15 year victim age category, comprising over 40% of incidents in that age range (41.6%). Although CSA victims are generally older than other abuse victims, CSA is not confined to adolescence (Figure 16). In this sample 58.79% of CSA victims were pre-adolescent (<10 years old), with about 1% of victims under one year of age.

Figure 16. Distribution of CSA victim ages, by sex

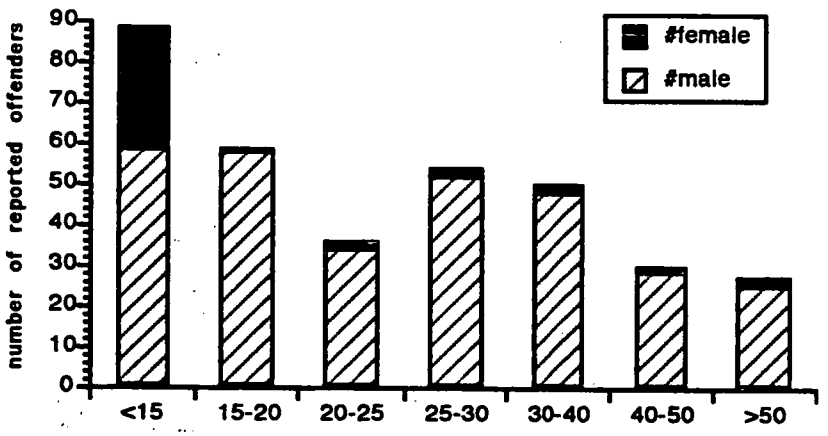


Offender Profile

Offenders are significantly more likely to be male in cases of sexual abuse (90.2% male). Offenders in sexual abuse cases were also significantly more likely to be younger (<20) or older (>50) than average. It is of interest to note that in the youngest age category, female offenders nearly equaled male offenders (30 female, 59 male) and account for the majority of female sex offenders in this data set (75%). In every other

age category male offenders predominated. The preponderance of young female offenders does not coincide with an increase in male victims however. The victims of the youngest offenders were primarily the same sex as the perpetrator. There are important implications for treatment and for understanding the some of the variance in sexual abuse with youthful offenders.

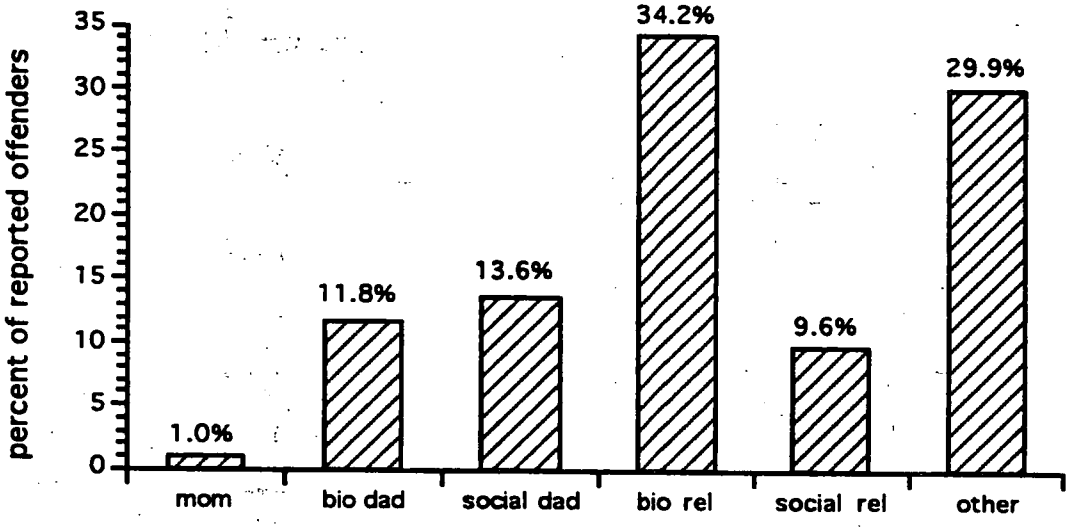
Figure 17. Number of offenders by sex and age category



Victim-Offender Relationship

Non-parental biological relatives were the primary perpetrators of sexual abuse (55.3% of CSA cases), and stepfathers and other social fathers were also over-represented as perpetrators of CSA (22.0% of cases). Thirty percent of offenders were listed as "other" and primarily included friends, neighbors, and individuals known to the victim.

Figure 18. Relationship between CSA victim and offender

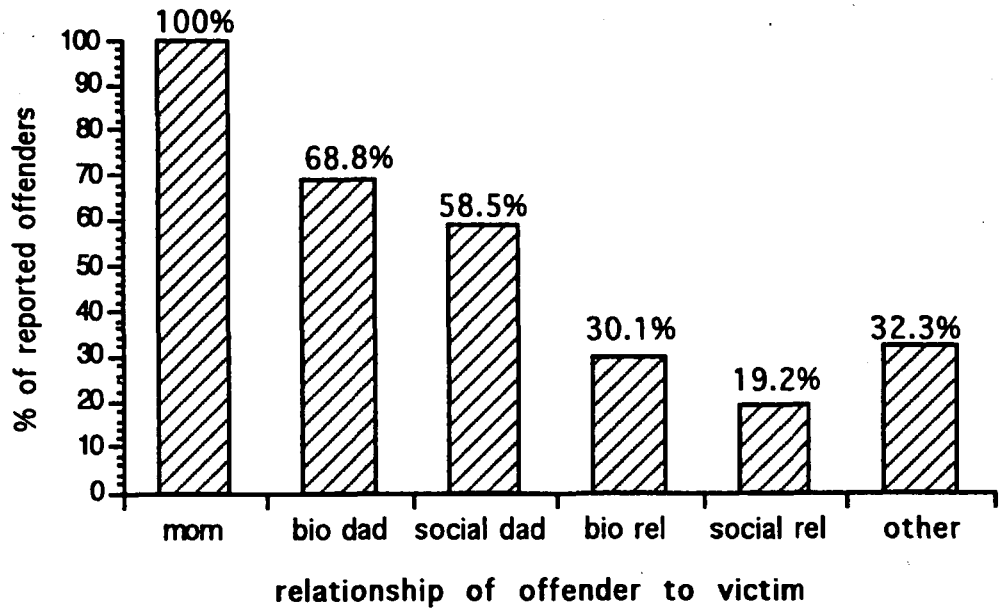


It is not known whether the perpetrators were caretakers, such as babysitters, at the time of the incident, The fact that the majority of offenders fall into the category of extended family provokes some questions regarding perpetrator access to children and the cycle of abuse within families.

Child Sexual Abuse and Substance Abuse

The association of substance abuse and abuse type was examined. Analyses showed that incidents of sexual abuse were significantly less likely to be associated with substance abuse (47.0%) than either incidents of physical abuse (69.4%) or neglect (78.2%). This trend differs somewhat in other data sets. Data analyzed for several specific service units showed higher proportions of substance abuse in cases of CSA, compared to other abuse types. However, it is unclear whether the difference lies in the substance abuse/abuse type association, or whether other differences in the data sets confound the comparison (e.g. differences in the primary perpetrators of CSA).. It will be important to understand how substance abuse increases risk of CSA and other abuse types, and what combination of interventions and services can best mitigate this risk.

Figure 19. Percent of CSA offenders reported using alcohol or drugs at the time of the incident



Current Perspectives for An Approach to Treatment

In attempting to formulate a model of how the experience of sexual abuse affects individuals, researchers have put together seemingly endless lists of categorical behaviors designed to aid in diagnosing victims of CSA. However, these lists often serve to confuse, more than assist, those who must identify and treat child sexual abuse. A more useful approach has been outlined by Finklehor and Browne (1988). They propose that the trauma of sexual abuse can be broken down into four generalized traumatizing phenomena, which in combination, make the experience of child abuse a unique experience sexual, abuse a unique experience.

These components include 1) traumatic sexualization, 2) stigmatization, 3) powerlessness, and 4) betrayal. Finklehor and Browne suggest that these factors alter the cognitive and emotional orientation of the child, thus distorting the child's self-concept, worldview, and affective capacities. When children attempt to cope with the world through these distortions, it may result in many of the behavioral problems noted to be in association with child abuse victims. With these components as a conceptual framework, a categorical listing of specific behaviors becomes more appropriate. In this section we will outline Finklehor and Browne's approach, as well as provide a useful description of specific behavioral manifestations of abusive experiences, family dynamics, developmental characteristics of sexually abused children, and assessment criteria for treating offenders.

These lists do not attempt to suggest any one-to-one correspondence between CSA and certain behaviors or thoughts. Such lists cannot be expected to be either comprehensive (some victims will manifest behaviors not included on any list of CSA-associated behaviors) or exclusive (not all victims will have all, or even any, of the characteristics noted as "typical"). What these concepts are useful for is a framework for future research aimed at understanding of child sexual abuse, the development of assessment instruments, in making clinical assessments of sexual abuse victims, and guiding planned interventions.

Traumatic Sexualization

Traumatic sexualization is the process by which a child's sexuality is shaped in developmentally inappropriate and interpersonally dysfunctional ways. This can occur when a child is repeatedly rewarded, by an offender e.g. through the exchange of gifts, affection, attention, or privileges, for sexual behavior that is inappropriate to the child's level of development. The child learns to use sexual behavior as strategies to manipulate others to meet his or her own emotional and developmental needs. Traumatic sexualization can also occur when certain parts of a child's anatomy become fetishized and given distorted importance and meaning, and through the misconceptions and confusions about sexual behavior communicated to the child from the offender. It can also be the result of very frightening or painful memories that become associated with sexual activities. Sexual abuse experiences can vary greatly in the degree of traumatic sexualization that occurs. Children who have been traumatically sexualized, to whatever degree, often have inappropriate repertories of sexual behavior, with confusions and misconceptions about their sexual self-concepts and unusual emotional associations to sexual activities.

Dynamics

Child rewarded for sexual behavior inappropriate to developmental level
Offender exchanges attention and affection for sex
Sexual parts of child fetishized
Offender transmits misconceptions about sexual behavior and sexual morality
Conditioning of sexual activity with negative emotions and memories

Psychological Impact

Increased salience of sexual issues
Confusion about sexual identity
Confusion about sexual norms
Confusion of sex with love and care-getting/caregiving
Negative associations with sexual activities and arousal sensations
Aversion to sex and intimacy

Behavioral Manifestations

Sexual preoccupations and compulsive sexual behaviors
Precocious sexual activity
Aggressive sexual behaviors
Promiscuity
Prostitution
Sexual dysfunction: flashbacks, difficulty in arousal and/or orgasm
Avoidance of or phobic reactions to sexual relations and/or intimacy
Inappropriate sexualization of parenting

Stigmatization

Stigmatization refers to the negative connotations (e.g. guilt, shame) that are communicated to the child surrounding the experiences. These eventually become incorporated into the child's self image. These negative communications can come from the offender, who may blame or denigrate the victim, or from the family and community, who may blame the child either directly (i.e. loose morals) or indirectly (i.e. damaged goods). Very often boys are blamed for victimization more than girls are, and thus male victims may receive less family or community support. Increased stigmatization has been shown to be a good predictor of the victim becoming a future abuser.

Dynamics

Offender blames, denigrates victim
Offender and others pressure child for secrecy
Child infers attitudes of shame about activities
Others have shocked reaction to disclosure
Others blame child for events
Victim is stereotyped and treated as damaged goods

Psychological Impact

Guilt, shame
Lowered self-esteem
Sense of being different than others

Behavioral Manifestations

Isolation
Drug or alcohol abuse
Criminal involvement
Self-mutilation
Suicide

Betrayal

Betrayal refers to the dynamic in which children discover that someone on whom they were dependent has caused them harm. Children can experience betrayal not only from the offender but also from family members who may be unwilling or unable to protect them, or who may change their attitude towards the child after disclosure. The extent to which the sense of trust was betrayed often depends on the closeness of the relationship between the victim and the offender. Within this dynamic is the lack of protection the child may feel. The child is "on this/her own," and critical developmental energy is put towards self-protection rather than on necessary developmental tasks. Victims are always monitoring others, and never really learn how to take care of themselves or their own children.

Dynamics

Naïve trust and vulnerability to being manipulated
Violation of expectation that others will provide care and protection
Child's well being disregarded
Lack of support and protection from parent(s)

Psychological Impact

Grief, depression
Extreme dependency
Impaired ability to judge trustworthiness of others
Mistrust, particularly of men

Anger, hostility

Behavioral Manifestations

Clinging
Vulnerability to subsequent abuse and exploitation
Allowing own children to be victimized
Isolation
Discomfort in intimate relationships
Marital problems
Aggressive behavior
Delinquency

Powerlessness

Powerlessness refers to the process in which the child's will, desires, and sense of efficacy are continually contravened. It is theorized that this occurs any time the child's territory and body space is repeatedly invaded against the child's will. Powerlessness is reinforced when the child's attempts to stop the abuse are frustrated; powerlessness is increased when the child feels trapped, fearful, or unable to make adults understand or believe what is happening. These dynamics are analogous to post-traumatic stress syndrome where the message is that there is no safety and no recourse but compliance. This creates passive, dependent people who feel they cannot do anything with their lives.

Dynamics

Body territory invaded against the child's wishes
Vulnerability to invasion continues over time
Offender uses force or trickery to involve child
Child feels unable to protect self and halt abuse
Repeated experience of fear
Child is unable to make others believe

Psychological Impact

Anxiety, fear
Lowered sense of efficacy
Perception of self as victim
Need to control
Identification with the aggressor

Behavioral Manifestations

Nightmares
Phobias
Somatic complaints; eating and sleeping disorders
Depression
Dissociation
Running away
School problems, truancy
Employment problems
Vulnerability to subsequent victimization
Aggressive behavior, bullying
Delinquency
Becoming an abuser

Assessment Criteria For Treatment Of Sexual Abuse Offenders

Assessment factors for the treatment of child sexual abuse offenders should include some of the following assessment criteria. The type of treatment appropriate to the situation may differ according to the extent and combination of various factors and characteristics.

Offense factors

1. nature of the offense
2. degree of aggressiveness used
3. extent of harm to victim
4. frequency of offenses
5. duration of sexually aberrant behavior
6. progressiveness of offenses
7. victim selection characteristics
8. substance use in conjunction with offense

Offender characteristics

1. age and sophistication
2. honesty and openness
3. degree of acceptance of responsibility for behavior
4. level of empathy for victim
5. motivation to participate in treatment
6. prior offense history
7. prior treatment history
8. substance abuse problems
9. psychosis, intellectual incapacity or significant neurological impairment
10. school, social and/or employment adjustment
11. sexual and sexual fantasy compulsivity
12. history of own victimization

Situational factors

1. family system pathology
2. family denial versus acceptance of offense
3. family support and cooperation in treatment
4. access of offender to potential victims
5. extrafamilial support system
6. stressors

Family Dynamics

There are four conditions consistent with sexual abuse:

The offender needs motivation to abuse—the other three listed below mitigates motivation

a. emotional congruence
b. sexual arousal
c. blockage—the offender represses normal feelings and social norms

The offender has to overcome internal inhibitors

a. Individual—alcohol (substance abuse can overcome internal inhibitors and serve to rationalize behavior), psychosis, failure of incest inhibitors

b. sociocultural—social toleration of sexual interest in children, no minimal sanctions, social tolerance for deviance committed while intoxicated, contempt for the victim and/or for Indian people.

The offender has to overcome external impediments, i.e., and opportunity

a. mother absent, ill, distanced, intoxicated, non-protective, victimized
b. social isolation and erosion of social networks—isolated communities and isolated children are very vulnerable
c. lack of supervision
d. unusual opportunities to be alone with the children, e.g. shift work
e. unusual sleeping conditions
f. lack of social support for the mother
g. barriers to female equality
   - patriarchal prerogatives
   - The higher the status of the offender, the lower the probability of disclosure due to the increased chance that the victim will be severely stigmatized by increased protection of the offender
h. ideology of family sanctity
i. child pornography
j. minimization of unresolved abuse by victimized mother
   - women who have been victimized often seek mates who seem to understand children but who are instead deceptive, manipulating individuals
k. financial constraints
   - Poorer people are more willing to trade their children's safety for a pedophile's resources
   - the neediest of people are the ones most likely to become victimized

The offender has to overcome/subvert the child's resistance

a. small children cannot resist - pedophiles use slow, calculated seduction to overcome resistance
b. resistance can also be overcome by the use of physical force, threats, etc. sexual abuse may be combined with physical violence in a family where there is a cycle of aggression, power, and violence
c. child is emotionally insecure, deprived, naïve, trusting
d. social powerlessness of children, lack of sex education for children

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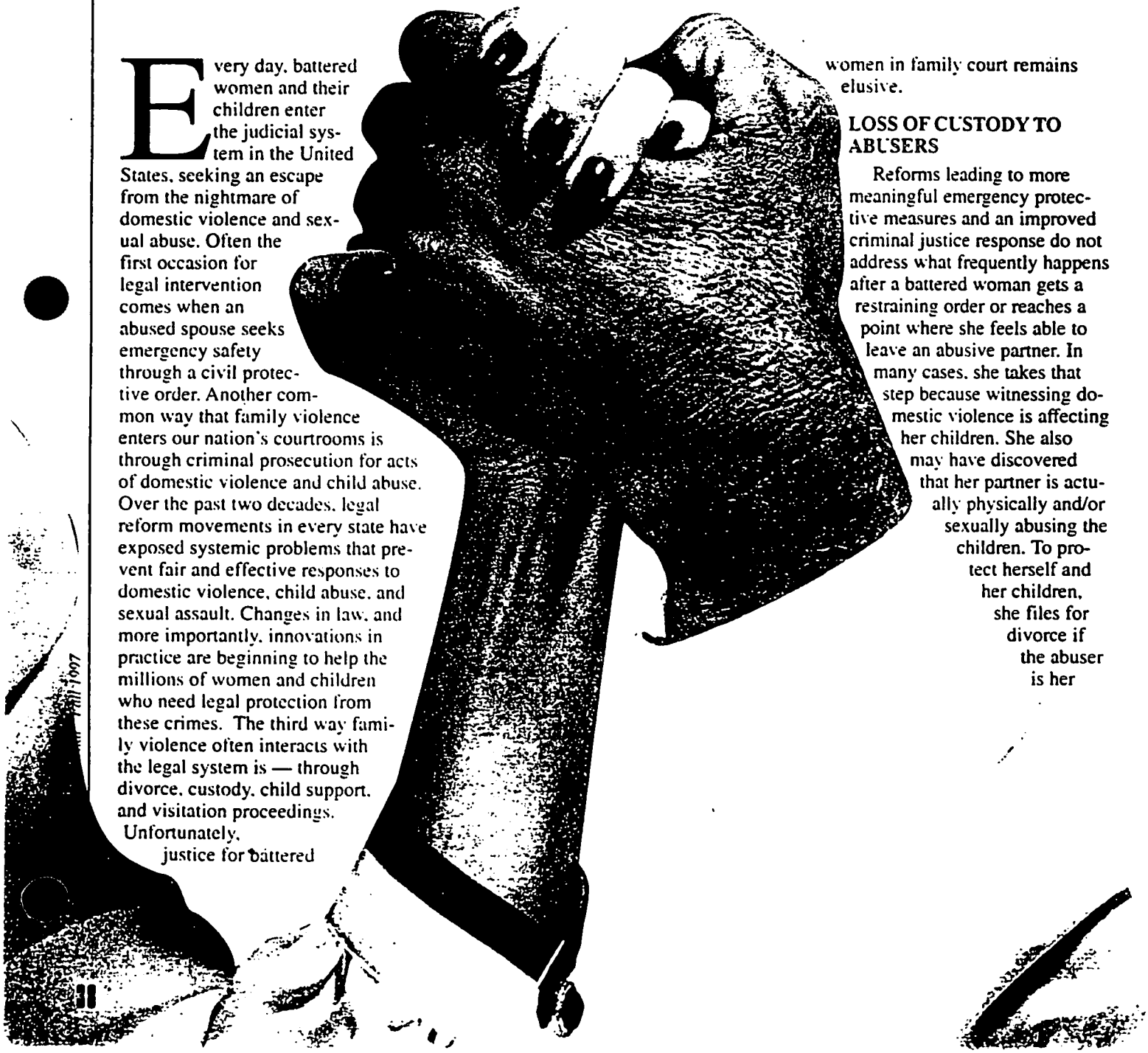
Fairness and Accuracy in Evaluations of Domestic Violence and Child Abuse in Custody Determinations

By Rita Smith and Pamela Coukos



Every day, battered women and their children enter the judicial system in the United States, seeking an escape from the nightmare of domestic violence and sexual abuse. Often the first occasion for legal intervention comes when an abused spouse seeks emergency safety through a civil protective order. Another common way that family violence enters our nation's courtrooms is through criminal prosecution for acts of domestic violence and child abuse. Over the past two decades, legal reform movements in every state have exposed systemic problems that prevent fair and effective responses to domestic violence, child abuse, and sexual assault. Changes in law, and more importantly, innovations in practice are beginning to help the millions of women and children who need legal protection from these crimes. The third way family violence often interacts with the legal system is — through divorce, custody, child support, and visitation proceedings. Unfortunately, justice for battered women in family court remains elusive.

LOSS OF CUSTODY TO ABUSERS

Reforms leading to more meaningful emergency protective measures and an improved criminal justice response do not address what frequently happens after a battered woman gets a restraining order or reaches a point where she feels able to leave an abusive partner. In many cases, she takes that step because witnessing domestic violence is affecting her children. She also may have discovered that her partner is actually physically and/or sexually abusing the children. To protect herself and her children, she files for divorce if the abuser is her

husband, and initiates custody proceedings if they have children in common. If they have preexisting legal determinations respecting custody or visitation, she seeks to modify these arrangements. Shockingly, these common sense protective actions too often lead to the nonabusive, "protective" parent being put on trial. She then may face a loss of custody to the abusive parent, a loss of visitation, or in extreme cases, the termination of parental rights.

This article attempts to explain the counter-intuitive phenomenon of protective parents losing custody to batterers and abusers. It also highlights the ways abusive partners use custody[1] as a weapon to intimidate battered women, and how batterers frequently initiate or prolong litigation to perpetuate abuse. Through the use of spurious and discredited psychological "syndromes," an abusive parent may successfully portray the protective parent as mentally unstable and undeserving of custody. The prevalent belief that many parents fabricate domestic violence and child abuse allegations during divorce and custody disputes makes it easier for batterers to win custody. As explained below, however, there is no evidence to support the belief that there is a widespread pattern of false allegations.

Many judges face the difficult and unenviable task of determining custody and visitation between contending parents, cases that by themselves raise a host of issues. These cases are even more challenging when they involve allegations of domestic violence and/or child sexual abuse. The stakes are much higher given that an erroneous decision could place a child at risk of harm. Judges understandably seek the tools that can help them evaluate whether the allegations are true, in order to make a decision that protects the child and is fair to the parents. However, judges should be wary of much of the psychological evidence offered to assist a court in evaluating abuse allegations, which may be used to cover up abuse and wrongly characterize the reporting parent with a pathological diagnosis. Indeed, respected authorities such as the American Psychological Association (APA) have discredited many of these approaches. One example of this type of unsupported psychological labeling can be found in an article recently appearing in this publication, written by Ira Daniel Turkat, entitled "Management of Visitation Interference[2], which is discussed later in this article."

Only by understanding the dynamics of domestic violence, and by stringently examining any psychological evidence offered to minimize or negate the effects of abuse, can a court feel confident that its decision is both fair and safe.

The authors wish to thank NCADV interns, Erica Niezgoda and Alisa Stein, and Dana Rayl West, the founder of Justice for Kids, for their invaluable contributions to this article.

DOMESTIC VIOLENCE AND CHILD CUSTODY

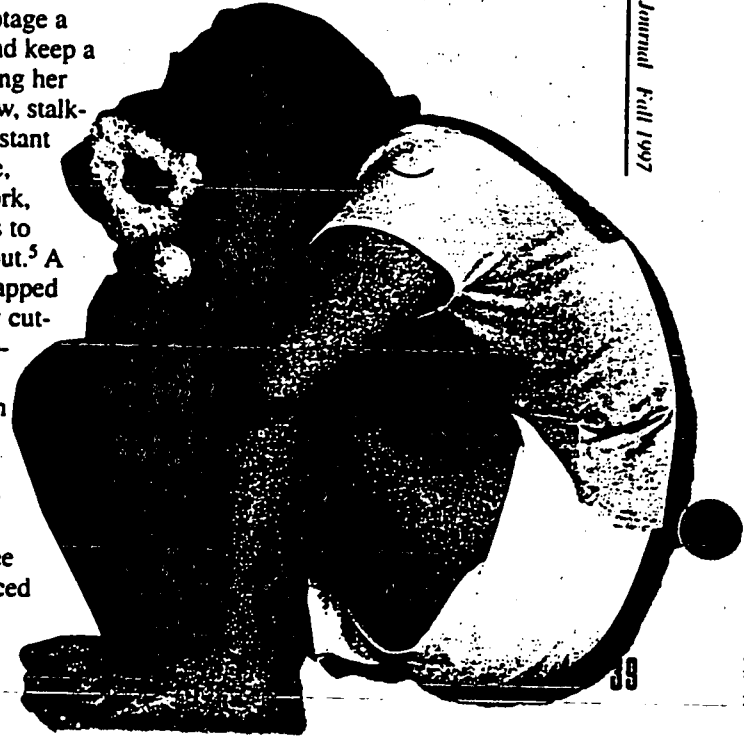
The Dynamics of Domestic Violence. According to the Department of Justice, at least one million women are beaten, raped, or murdered by intimate partners every year.[3] Other estimates put the number closer to four million.[4] Domestic violence is more than just the physical acts of violence themselves, but includes a range of controlling and coercive, emotionally abusive behavior, threats, and intimidation.

A batterer may carry on a relentless campaign to destroy his partner's self-esteem. An abuser may sabotage a woman's efforts to obtain and keep a job. Strategies include stealing her clothes before a job interview, stalking her at work, making constant phone calls to her workplace, causing her to be late for work, and inflicting visible injuries to make her feel unable to go out.[5] A batter may keep a woman trapped in an abusive relationship by cutting her off from outside support and placing her in fear of serious injury or death. An abuser will frequently threaten to harm or kill a woman or her children if she leaves.

Separated women are three times more likely than divorced women and twenty-five times more likely than married women still living with their husbands, to be victimized by a batterer.[6] Due to the historical failure of local law enforcement to intervene in domestic violence cases, a battered woman realistically may believe that reporting abuse, filing criminal charges, or obtaining a protective order will only fuel violent retaliation. Her family, his family, or even their church may pressure her to stay in the marriage, despite the violence.

This is not to say that battered women are passive victims; indeed, many women have developed important self-protection strategies when trapped by abuse, and may be using their best judgment about whether it is safer to stay with the abuser than to attempt to leave.

[J]udges should be wary of much of the psychological evidence offered to assist a court in evaluating abuse allegations.



The Dynamics of Domestic Violence in Custody Disputes. Despite a perception that the courts disproportionately favor mothers, one study has shown that fathers who fight for custody win sole or joint custody in 70 percent of these contests.[7] An abusive partner will often threaten to take the children in order to keep the mother in the relationship. If she leaves, he may continue efforts to harass and control her by manipulating custody litigation. The APA put it best: "[w]hen a couple divorces, the legal system may become a symbolic battleground on which the male batterer continues his abuse. Custody and visitation may keep the battered woman in a relationship with the battering man; on the battleground, the children become the pawns."[8]

A batterer may use inconsistent child support payments to economically abuse his children and former spouse.[9] Fathers who batter the mother are twice as likely to seek sole custody of their children than are nonviolent fathers, and are three times as likely to be arrears in child support.[10] Additionally, an abusive parent is likely to disrupt court-ordered visitation schedules as a way to continue the abuse of his former partner.[11] Finally, a batterer may manipulate the legal system with false psychological "syndrome" evidence to emotionally abuse his victim. By portraying their mother as "malicious," the batterer may also harm the children.

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The Effect of Domestic Violence on Children. Domestic violence harms children because of the psychological impact of witnessing or being aware of abuse, and because in many cases a person who beats his spouse or partner also abuses the children in the household. Various studies indicate that approximately 3.3 to 10 million children annually witness their parents' violence,[12] and studies show that between fifty and seventy percent of batterers also abuse the children.[13] The effects of domestic violence on children may include psychological and social trauma and somatic symptoms/responses caused by witnessing abuse, an increased likelihood of committing crimes outside the home, and an increased likelihood of being in a violent relationship, either as an abuser or as his/her victim.[14]

Often the impact on the children is a strong factor in a woman's determination to leave a batterer. The discovery that witnessing domestic violence is harming a child, that an abuser has begun to assault the children in the household, or fear that a child will grow up to become an abuser frequently fuels a decision to leave.[15] Ironically, this decision may have serious consequences for the mother. Instead of support and assistance at this crucial time, she may be dragged into custody litigation with her batterer. Of course, if she stays, or fails to report abuse of the children, she risks being charged with abuse and neglect, and losing her children.

Legal Standards for Considering Domestic Violence in Custody Determinations. Because domestic violence has such a negative effect on children, the prevailing trend in family law is to disfavor granting custody to abusive parents, and to structure visitation to protect the battered spouse and the children. Almost all states properly consider a parent's prior domestic violence or child abuse when deciding whether that parent should have sole or joint custody. Currently, over forty jurisdictions require consideration of domestic violence as at least a factor in custody cases when evaluating an arrangement that is in the "best interest of the child."[16] Some have adopted a presumption against a perpetrator of domestic or family violence having sole or joint custody.[17] In 1990, the U.S. Congress unanimously passed a resolution calling on states to modify their laws and include a presumption against granting custody to batterers.[18] The Model Code promulgated by the National Center for Juvenile and Family Court Judges (NCJFCJ) recommends a rebuttable presumption against an abusive parent having sole or joint custody.[19]

As recommended by the NCJFCJ Model Code, in deciding visitation arrangements, some type of restrictions including supervised visitation may be appropriate in cases where the parent has committed acts of domestic violence and/or child abuse.[20] Unsupervised visitation gives an abusive parent unfettered access to the child, and an opportunity to inflict harm on both the child and the custodial parent. According to one study, 5 percent of abusive fathers threaten during visitation to kill the mother, 34 percent threaten to kidnap their children, and 25 percent threaten to hurt their children.[21] For these reasons visitation exchange can be a dangerous situation for many battered women[22] and for their children.[23]

MISUSE OF PSYCHOLOGICAL EVIDENCE

Although both common sense and the prevailing legal standard dictate careful consideration of evidence of domestic or family violence when determining custody, allegations of domestic violence and/or child sexual abuse made during a divorce or custody proceeding are not always taken seriously. These allegations often are wrongly perceived as false, because they are asserted in a contentious envi-

ronment, and because of the widespread myth that parents fabricate domestic violence and child abuse allegations in order to gain an advantage in court. When combined with the misuse of psychological syndrome evidence, the perception that a parent has fabricated the allegations often results in unfair retribution against the reporting protective parent.

The Validity Problems of the So-called "Syndromes." The tendency to wrongly blame reporting parents can be largely traced to an increasing diagnosis of insupportable "syndromes" such as "Parental Alienation Syndrome." In his book, *Parental Alienation Syndrome: A Guide for Mental Health and Legal Professionals*,[24] Psychiatrist Richard A. Gardner defines Parental Alienation Syndrome (PAS) as a "disturbance in which children are preoccupied with deprecation and criticism of a parent—denigration that is unjustified and/or exaggerated...[T]he concept...includes the brainwashing component, but is much more comprehensive. It includes not only conscious, but subconscious and unconscious factors within the programming parent that contribute to the child's alienation."[25] Gardner describes PAS as a situation in which a psychologically overwhelmed mother or father, either knowingly or unknowingly, creates in his or her child misperceptions of the other parent.[26] Despite attempts at gender neutrality, Gardner in fact presents PAS as an overwhelmingly female problem: he finds that mothers are the perpetrators in 90 percent of the cases he deems to involve PAS.[27] He further characterizes PAS as a rampant problem, affecting, to varying degrees of severity, 90 percent of his caseload.[28] Gardner's work is entirely self-published and unreviewed.[29]

Psychologist Ira Daniel Turkat talks approvingly of PAS while introducing an even more extreme version — "Malicious Mother Syndrome" (MMS) — in his article on visitation interference appearing recently in the *Judges' Journal*.[30] MMS differs from PAS in two ways. First, while PAS theoretically can involve either gender as the perpetrator, Turkat presents MMS as strictly a woman's psychological abnormality; there is no male version of the syndrome. Second, while in an instance of PAS the perpetrator's supposed goal is merely to alienate his or her children from the other parent, in instances of MMS, the mother is apparently "committed to a broad-based campaign to hurt the father directly."[31]

The tendency to wrongly blame reporting parents can be largely traced to an increasing diagnosis of insupportable "syndromes" such as "Parental Alienation Syndrome."

There are very serious flaws in Turkat's article. First, he never addresses domestic violence or child abuse, or how each might impact visitation. While focusing on the specter of "malicious mothers" who interfere with visitation, he never mentions the well-documented form of custodial interference — batterers using visitation as an opportunity to harm the mother and children.[32] Second, he relies upon questionable statistics to document the problem of visitation interference by so-called malicious mothers. Like Gardner, Turkat's research apparently comes only from his own clinical observations.[33] The statistics he cites from other sources may be no more reliable. For example, he cites as evidence a statistic on visitation interference from an advocacy group which, when contacted, admitted that there were no scientific studies to directly support the figure.[34]

Others who have reviewed this type of syndrome evidence have sharply questioned its validity. The APA states that "no data" exist to support PAS.[35] Professor John E. B. Myers, a leading expert on scientific and psychological testimony in court cases, includes PAS among those syndromes that "give a false sense of certainty," and goes on to say that this syndrome is not a diagnostic tool and provides "no insight into the cause of . . . 'parental alienation.' "[36] Since it is nondiagnostic in nature, Myers suggests that PAS "should not be admissible to prove that a person's symptoms result from a particular cause."[37]

The most disturbing aspect of theories like PAS and MMS is how they can be used as a cover for domestic violence and child abuse. Although Gardner repeatedly insists that PAS is never present when there is "real" abuse, he offers no useful guidance in differentiating these cases.[38] Clearly, children who have witnessed one parent battering the other, or experienced abuse themselves, will have negative feelings about the abuser. PAS provides a convenient explanation for behaviors that legitimately might occur in abuse cases. As Gardner himself points out, "when bona fide abuse does exist, then the child's responding hostility is warranted and the concept of the PAS is not applicable."[39]

Using unscientific "syndrome" evidence can have serious consequences, and according to the APA, in domestic violence cases, "[p]sychological evaluators not trained in domestic violence may contribute to this process by ignoring or minimizing the violence and by giving *inappropriate pathological labels* to women's responses to chronic victimization."[40] The protective parent's mental "impairment" can be used to portray her as a less fit parent, and justify granting custody to the batterer. She may have to attend ongoing mediation or marriage counseling with her abuser, endangering her further. In a worst case scenario, the diagnosis can result in the protective mother's loss of the child to foster care and even the ultimate termination of her parental rights. This can result in placement of the child back into the custody of the abuser, endangering the child further.

Unscientific syndrome theories also feed on a serious misperception of the rate of false accusations. In its Report of the Presidential Task Force on Vio-

lence and the Family, the APA confirms that, "that false reporting of family violence occurs infrequently... reports of child sexual abuse do not increase during divorce and actually occur in only about 2 percent to 3 percent of the cases. . . even during custody disputes, fewer than 10 percent of cases involve reports of child sexual abuse."[41] If PAS were as common as Gardner reports — 90 percent of his caseload — then the reporting of abuse should be much more prevalent. Furthermore, the overall reported rates should be dramatically higher in cases where custody is an issue as compared with the general population of families. But studies examining this comparison do not find significantly higher rates of any abuse allegations raised during divorce or custody proceedings.[42] Moreover, these studies find only a very small rate of fabricated allegations in this context.[43] As the APA documents, "when objective investigations are conducted into child sexual abuse reports that surface during divorce or custody disputes, the charges are as likely to be confirmed as are reports made at other times."[44]

Turkat's and Gardner's theories appeal to an understandable desire to minimize the realities of domestic violence and sexual abuse of children. No one wants to think of a child in pain, especially if that pain is caused by a parent. However, the courts must recognize that by taking these syndromes seriously, they send a clear message to abused women and children: Do not come to us because we will not believe you.

EVIDENTIARY ADMISSIBILITY OF INSUPPORTABLE SYNDROME EVIDENCE

Since PAS and MMS are unproven concepts, they do not meet the standards for admissibility of scientific evidence. Courts should be vigilant in evaluating *any* psychological expert testimony that claims to be able to discern false from true allegations, or that can be used to explain away or cover up abuse. Judges should particularly worry about theories such as PAS and MMS, which raise serious concerns of gender bias. When measured against the two most common standards states use for the admissibility of scientific evidence, the *Frye*[45] test and the standard applied by the Supreme Court in *Daubert v. Merrell-Dow Pharmaceuticals, Inc.*[46] PAS and MMS should not be allowed into evidence.

The most disturbing aspect of theories like PAS and MMS is how they can be used as a cover for domestic violence and child abuse.

The *Frye* test, first announced in *United States v. Frye*[47] by the District of Columbia Circuit Court, applies to the admissibility of scientific evidence in almost twenty-five states. To be admissible, the scientific technique "must be sufficiently established to have gained general acceptance in the particular field in which it belongs."[48] Even scientifically valid techniques should not be admitted until their reliability has been proven and generally accepted.[49] Commentators have praised this test for ensuring that a pool of experts is available to explain a theory's significance once it becomes admissible, for promoting uniformity in legal decisions, and for keeping the reliability of the scientific technique from becoming a major issue of the trial.[50]

PAS has *not* been established as scientifically valid. Gardner based his findings on an informal generalization of observations from his own psychiatric practice.[51] This hardly qualifies as a representative sample or rigorous scientific technique. He does not publish his studies and has therefore never been peer reviewed; his books are self-published.[52] Similarly was invented by Turkat based upon even less reliable evidence. He cites only himself as an authority on the subject, and apparently relies solely on anecdotal observations.[53] Both have failed to achieve general acceptance in the psychological community. In fact, as the APA has explicitly stated, "there are no data to support the phenomenon called parental alienation syndrome."[54] Turkat himself admits that "necessary scientific research on this syndrome [PAS] has yet to appear."[55] Since MMS has only recently been created, the APA has not specifically addressed this "syndrome." It has, however, warned against applying such "inappropriate pathological labels."[56]

Even under the more liberal *Daubert* or "relevance" approach to scientific data, PAS and MMS fail to meet the standards for admissibility and should be rejected when offered into evidence. Under *Daubert*, "the trial judge must ensure that any and all scientific testimony or evidence admitted is not only relevant, but reliable."[57] The court went on to say that general acceptance of the technique (or, in this case, syndrome) and whether the theory or technique has been tested are important factors in determining admissibility, and that "a known technique that has been able to attract only a minimal support within the community may properly be viewed with skepticism."[58]

The Seventh Circuit has noted that the *Daubert* analysis applies to "all kinds of expert testimony," and "[i]n all cases. . . the district court must ensure that it is dealing with an expert, not just a hired gun."[59] Since PAS and MMS have not been tested rigorously or subjected to peer review, their reliability has not been established and they should not be used by courts in making custody determinations.

Many state courts, correctly applying these standards, have rejected evidence and expert testimony regarding PAS and similar theories that purport to identify the truth or falsity of allegations of abuse. In *New Jersey v. JQ*, the court held that "[t]here is simply no scientific foundation for an expert's evaluation of the credibility of a witness or for the conclusion that a psychologist or other social scientist has some particular ability to ferret out truthful from deceitful testimony."[60]

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Citizens's Suggestions

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If possible, a small area for a stand-up snack bar could be so designated, and a vendor contracted to provide minimal food services. A far less satisfactory choice is vending machines, but only if they are kept well-stocked, in working order, and can make change. Courthouses can even coordinate with nearby restaurants to offer low-priced "jury specials" for lunch and allow the businesses to place their menus in the waiting area to publicize the accessibility of this option.

Although many of these initiatives involve only minimal cost, others may require a more significant expense, thereby creating a financial burden on a jurisdiction, especially if it needs to upgrade furniture or space. Jury facility upgrades should be made an integral part of the overall budget and funded at an accelerated rate until the facilities are up to the space and quality standards of the other facilities in the courthouse.

PROCESSING JURORS EFFICIENTLY

As mentioned above, a more carefully considered schedule would allow jurors to report in at staggered times during the course of a day, to be promptly processed and trained, and to move more quickly to a courtroom for voir dire. If not selected, the juror would be quickly dismissed. The difference between this ideal and the present "induction center" method is that in the latter the jurors are either disregarded altogether or not given much regard as to when they are likely to be needed on any specific day. To use a business analogy, it is similar to having an excess product inventory on hand to cover inefficiencies in planning and production. And just as American companies were forced to recognize in the eighties the significant cost of oversupplying their inventories, so too must courts realize that they are paying a hidden cost for oversupplying their inventory of potential jurors. That cost is the impact on the public faith in the jury system. Judges, court administrators, counsel, and other participants must ask a simple question: Is this inefficiency worth the ill will and civic bad faith it engenders? Moreover, is it worth the money it takes to track down, recontact, call into court, and even penalize nonreporting jurors who refuse to be treated like chattel?

To further respond to the jury pool, and perhaps even to speed up processing, a hierarchical denotation system could be implemented to designate certain jurors as the "next group in waiting." This would allow those who are not so designated to go about their work or other business without constant anxiety about whether they will be called next.

TRAINING AND MOTIVATING JURORS

One of the greatest shortcomings of American management is the lack of employee training. Oftentimes when you run across a bumbling employee, you can safely assume that he or she is the product of an inept or overwhelmed manager. Conversely, successful organizations are noted for excellent training. If, instead of wasting the potential jurors' time, courts used that time to educate the citizenry about the courtroom experience, we could hopefully produce more qualified juries. Let's face it. In the waiting rooms, you have a captive audience. Even if the people do not want to be there, most of them have accepted the fact that they *will* be there.

This represents a golden opportunity to mobilize citizens for the rule of law instead of letting them languish. Many courts do this in the most minimal way, with a short videotape that introduces the courtroom players and the most basic concepts. Perhaps we should be more aggressive and, after introducing our system, compare it to other such systems around the world, not so much to illustrate the supposed flaws of any other approach but to educate our citizens on the privileges we have in this country and to engender greater appreciation of our methodology. A presentation providing a historical overview of our jury system and how it has evolved might prove fruitful, and it probably could help explain why things are done the way they are. I am not suggesting that we brainwash the masses. I just suggest that, in the hurly-burly of everyday life, we oftentimes lose sight of our societal goals and this might offer an opportunity to create a commonality among citizens rather than the divisiveness we constantly witness around us.

Fairness & Accuracy

(continued from page 42)

Similarly, a Florida appellate court in *In re TMW* noted that "[u]se of the word syndrome leads only to confusion . . . The best course is to avoid any mention of syndromes."[61] New York also refused to allow admission of testimony concerning PAS in *New York v. Loomis*,[62] and a Wisconsin appellate court rejected PAS as too controversial, stating that "there is limited research data, and there are uncertain risks."[63]

"[T]he presentation of questionable psychological syndrome evidence may have significant ramifications for justice."[64] That is why it is so important for judges, child protective service workers, and court-appointed officials to refuse to accept or rely on the untested, unproven, and unreliable PAS and MMS. No child should be placed in harm's way simply because a professed "expert" has created yet another unproven theory.

CONCLUSION

The most well-intentioned judges may be completely unaware of how they view protective parents until they are presented with the empirical information about domestic violence and child abuse. Judicial education programs on these issues can make a difference. For example, one of the judges evaluating the comprehensive curriculum developed by the National Judicial Education Program (NJEP) entitled *Adjudicating Allegations of Child Sexual Abuse When Custody Is*

In Dispute, admitted how the program had impacted his handling of a case, in which he resisted an initial inclination to be punitive toward the parent making the allegation.[65] In addition to the NJEP curriculum, the Family Violence Prevention Fund offers a curriculum entitled *Domestic Violence and Children: Resolving Custody and Visitation Disputes*. Judicial education commissions can further aid this process by making abuse related information available, and incorporating it into their education and training programs.

The ultimate determination of what custodial or visitation arrangements are appropriate for a case involving domestic violence and/or child abuse is a complex responsibility. Failure to protect battered women and abused children guarantees a host of related societal and legal problems. The judge's role in custody disputes is to provide a fair forum, as well as to protect at risk children and adults from harm. By seeking unbiased and well-documented sources of information regarding domestic violence and child abuse, the rates of false allegations, and preventive measures to protect battered spouses and abused children, the courts fulfill their duty toward all parties.

NOTES

1. Although the term "custody" is frequently used throughout this article standing alone, similar abuses and dynamics have been observed in related proceedings to determine visitation or child support or to obtain a divorce. *See* Joan Zorza, *Retaliatory Litigation in* FLORIDA DOMESTIC VIOLENCE LAW 22-1 to 22-3 (Susan Swihart ed., 1996).

2. Ira Daniel Turkat, *Management of Visitation Interference*, JUDGES' JOURNAL, Spring 1997, at 17 [hereinafter Turkat, *Visitation Interference*].

3. Ronet Bachman and Linda Salzman, *Violence Against Women: Estimates From the Redesigned Survey* 3, 4 (construing U.S. DEPT. OF JUSTICE, BUREAU OF JUSTICE STATISTICS (1995)).

4. *See, e.g.*, THE VIOLENCE AGAINST WOMEN ACT OF 1993, S. Rep. No. 103-138, at 38 (1993).

5. *See, e.g.*, Jody Raphael, *Domestic Violence and Welfare Receipt* (1996).

6. Bachman and Salzman, *supra* note 3 at 4; *see also* Caroline Wolf Harlow, *Female Victims of Violent Crime* (construing U.S. DEPT. OF JUSTICE BUREAU OF JUSTICE STATISTICS (1991)).

7. RUTH ABRAMS AND JOHN GREANEY, SUPREME JUDICIAL COURT OF MASSACHUSETTS, REPORT OF THE GENDER BIAS STUDY OF THE SUPREME JUDICAL COURT 62-63 (1989).

8. AMERICAN PSYCHOLOGICAL ASSOCIATION, REPORT OF THE AMERICAN PSYCHOLOGICAL ASSOCIATION PRESIDENTIAL TASK FORCE ON VIOLENCE AND THE FAMILY 40 (1996) [hereinafter APA REPORT].

9. Nonpayment of child support is one form of economic control. Nechama Masliansky, *Child Custody and Visitation Determinations When Domestic Violence Has Occurred*, 30 CLEARINGHOUSE REV. 273, 304 (1996).

10. APA REPORT, *supra* note 8, at 40.

11. *Id.*; *see also* Julie Kunce Field, *Visiting Danger: Keeping Battered Women and Their Children Safe*, 30 CLEARINGHOUSE. REV. 295, 303 (1996).

12. B.E. Carlson, *Children's Observations of Interpersonal Violence*, *in* BATTERED WOMEN AND THEIR FAMILIES: INTERVENTION STRATEGIES AND TREATMENT PROGRAMS (1984); *See also* PETER JAFFE, DAVID WOLFE & SUSAN KAYE WILSON, CHILDREN OF BATTERED WOMEN (1990).

13. *See, e.g.*, Lee H. Bowker, Michele Arbitell & J. Richard McFerron, *On the Relationship Between Wife Beating and Child Abuse*, *in* FEMINIST PERSPECTIVES ON WIFE ABUSE 158, 164 (Kersti Yllo & Michelle Bograd eds. 1988).

14. Mary Kenning, Anita Merchant, and Alan Tompkins, *Research on the Effects of Witnessing Parental Battering: Clinical and Legal Implications*, *in* WOMEN BATTERING: POLICY RESPONSES 237 (Michael Steinman ed. 1991).

15. *See, e.g.*, Lee H. Bowker, *Ending the Violence: A Guidebook Based on the Experiences of 1000 Battered Wives* 97 (1986).

16. Joan Zorza, *Protecting the Children in Custody Disputes When One Parent Abuses the Other*, 29 CLEARINGHOUSE REV. 1113, 1119 (1996).

17. *See, e.g.*, WYO. STAT. § 20-2-112(b), 20-2-113(a) (1994); ARIZ. REV. STAT. ANN. § 25-332 (West Supp. 1994).

18. H. Con. Res. 172, 101st Cong. (1990).

19. MODEL CODE ON DOMESTIC AND FAMILY VIOLENCE, § 401 1994 [hereinafter MODEL CODE].

20. MODEL CODE, §§ 405, 406.

21. Zorza, *Protecting the Children*, *supra* note 16, at 1117.

22. *See generally* Field, *supra* note 11.

23. Robert B. Straus, *Supervised Visitation and Family Violence*, 29 FAM. L. Q. 229, 238-39 (1995).

24. RICHARD A. GARDNER, THE PARENTAL ALIENATION SYNDROME: A GUIDE FOR MENTAL HEALTH AND LEGAL PROFESSIONALS (1992).

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25. *Id.* at 59-60.
26. *Id.*
27. *Id.* at 61-62.
28. *Id.* at 59.
29. Cheri L. Wood, Note, *The Parental Alienation Syndrome: A Dangerous Aura of Reliability*, 27 LOY. L.A. L. REV. 1367, 1368, n.7 1994 [hereinafter *Dangerous Aura*].
30. *See* Turkat, *Visitation Interference*, *supra* note 2, at 18-19.
31. *Id.* at 18.
32. APA REPORT, *supra* note 8, at 40-41; *see also* Field, *supra* note 11, at 295-96.
33. *See generally* Ira Daniel Turkat, *Divorce Related Malicious Mother Syndrome*, 10 J. Fam. Violence 253 (1995) [hereinafter Turkat, *Malicious Mother Syndrome*].
34. Turkat, *Visitation Interference*, *supra* note 2, at 17 (citing the Children's Rights Council). When contacted by NCADV staff, a Children's Rights Council representative said that their statistic on visitation interference was merely a "guesstimate" extrapolating from other studies on divorce generally.
35. APA REPORT, *supra* note 8, at 40.
36. John E. B. Myers, *Expert Testimony Describing Psychological Syndromes*, 24 PAC. L. REV. 1449, 1455 n. 21 (1993).
37. *Id.* at 1462.
38. *See* GARDNER, *supra* note 24, at 61.
39. *Id.*
40. APA REPORT, *supra* note 8, at 100 (*emphasis added*).
41. APA REPORT, *supra* note 8, at 12.
42. *See, e.g., Dangerous Aura*, *supra* note 29, at 1373-74, nn. 54-56 (citing studies).
43. *See, e.g.*, Nancy Thoennes and Patricia G. Tjaden, *The Extent, Nature and Validity of Sexual Abuse Allegations in Custody/Visitation Disputes*, 14 CHILD ABUSE & NEGLECT 151, 161-62 (1990).
44. APA REPORT, *supra* note 8, at 12.
45. Frye v. United States, 293 F. 1013 (D.C. Cir. 1923).
46. Daubert v. Merrell-Dow Pharmaceuticals, Inc., 113 S.Ct. 2786 (1993).
47. Frye, 293 F. at 1013.
48. Frye, 293 F. at 1014.
49. *See* PAUL C. GIANNELLI & EDWARD J. IMWINKELRIED, SCIENTIFIC EVIDENCE §1- 5, at 9 n.19 (2d ed. 1993).
50. *See, e.g., id.* at §9-1 (*cited in* Aura Etlinger, *Social Science Research in Domestic Violence Law* 58 ALB. L. REV. 1259, 1268 (1995)).
51. *See generally* GARDNER, *supra* note 24.
52. *Dangerous Aura*, *supra* note 29, at 1367, 1368 n.7.
53. *See generally* Turkat, *Malicious Mother Syndrome*, *supra* note 33.
54. APA REPORT, *supra* note 8, at 40.
55. Turkat, *Visitation Interference*, *supra* note 2, at 18.
56. APA REPORT, *supra* note 8, at 100.
57. *Daubert*, 113 S.Ct. at 2795.
58. *Id.* at 2797 (citing United States v. Downing, 753 F.2d at 1238).
59. Tyus v. Urban Search Management, 102 F.3d 256, 263 (7th Cir. 1996).
60. New Jersey v. JQ, 252 N.J. Super. 11, 40 (1991).
61. In re TMW, 553 So.2d 260, 262 n.3 (Fla.App. 1 Dist. 1989) (quoting John E. B. Myers).
62. *See* New York v. Loomis, 1997 N.Y. Misc. LEXIS AT *141 (1997) (refusing to allow psychological examination of the defendant's children and their mother for symptoms of parental alienation syndrome).
63. Wiederholt v. Fischer, 169 Wis.2d 524, 534, 485 N.W.2d 442 (1992).
64. James T. Richardson, Gerald P. Ginsburg, Sophia Gatowski, & Shirley Dobbin, *The Problems Applying* Daubert *to Psychological Syndrome Evidence*, 79 JUDICATURE 1, 12 (July-August 1995).
65. Lynn Hecht Schafran, *Adjudicating Allegations of Child Sexual Abuse When Custody Is In Dispute: A New Model Judicial Education Curriculum*, 81 JUDICATURE 30 (July-August 1997).

Chair Column

(continued from page 44)

cutors, public defenders, probation officers, bailiffs, and courtroom assistants.

The judicial outreach programs that have been created at the local level throughout the nation are surprisingly numerous and diverse. I have asked Gordon Griller, as chair of the Division's Courts and Community Committee, to collect materials on these local initiatives. Our plan is to prepare a handbook from these materials and distribute it to presiding judges across the country to stimulate them to inaugurate suitable judicial outreach programs in their communities. I will devote more column space to this topic in a future column.

CEELI Programs Promoted. The Central and Eastern European Legal Initiative (CEELI) provides an opportunity for American judges to promote democratic values in nations emerging from decades of totalitarian government. CEELI is an ABA entity, partially publicly funded, with offices in Washington, D.C. Judges from our Division have participated in CEELI-sponsored programs to advise on procedures regarding use of juries in criminal trials; to promote judicial independence, usually in countries where judges are employees of Justice Ministries; and to strengthen appellate processes.

To publicize CEELI's programs—and to expand your opportunity to participate in them—I have asked Judge Judith Chirlin, as the new chair of the Division's CEELI Committee, to help establish a regular column in *The Judges' Journal* that would highlight the contributions of American judges in the international arena. Judy has promised to do so, starting with the winter issue, just as soon as she returns from a CEELI program in Bulgaria.

Internal Division Projects. The Division's officers have a busy year ahead of them. Hopefully, we will see continued progress in increasing the membership of the Judicial Division. It is pertinent to note that whereas roughly 40 percent of the nation's lawyers belong to the ABA, only about 12 percent of its judges do. I have appointed Judge David Horowitz to chair the Division's Membership Committee with the charge that he and the Division's staff redouble efforts to invite newly sworn judges to join the Judicial Division. I have asked the six conference leaders to ensure that all new members are welcomed personally by telephone and offered an opportunity to participate in meaningful committee work.

We also must continue to address the financial condition of the Division. The ABA supports Judicial Division members with general revenues that are significantly higher than the support received by the members of any other ABA Section. We need to look seriously at this and ascertain methods to obtain a more secure future. As I said, 1997–1998 promises to be a very challenging year.

OVERVIEW OF FEDERAL STATUTES REGARDING CHILD SEXUAL ABUSE

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SEXUAL OFFENSES UNDER CHAPTER 109A, AND INCEST

All the felony sexual abuse offenses under Chapter 109A are major felonies that can be used in prosecutions under either § 1153 or § 1152, regardless of the tribal affiliation of the offender or victim. There are four substantive statutes: aggravated sexual abuse (§ 2241), sexual abuse (§ 2242), sexual abuse of a minor (§ 2243), and abusive sexual contact (§ 2244). Until September 13, 1994, § 2245 contained the pertinent definitions. With passage of the Violent Crime Control and Law Enforcement Act of 1994, a new potentially capital offense, sexual abuse resulting in death, was added as § 2245[1], and the definitions were moved to § 2246. New sections were also added relating to punishments for repeat offenders (§ 2247)[2] and restitution to victims (§ 2248).

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[1] The death penalty is only applicable if the tribe has opted in under § 3598. Thus, if the tribe has not opted in, the punishment is life in prison for any type of sexual abuse in Chapter 109A that results in death. If the tribe has opted in, the offense is capital.

[2] The maximum penalties stated in the discussions below are for first-time offenders in cases not resulting in death. Pursuant to § 2247, recidivists face a maximum penalty of up to twice what would be otherwise authorized. A recidivist for these purposes is a person who commits at Chapter 109A offense after he has a final conviction for a Chapter 109A offense or similar state offense.

Incest is also a § 1153 major felony. It is not defined in federal law and must be assimilated from state statutes.

A. DEFINITIONS

1. Critical Terms in Definitions

To understand the differences between the Chapter 109A offenses, it is important to know the difference between a sexual act and a sexual contact. Conduct that includes a sexual act is treated much more seriously than conduct that includes only sexual contact.

The common misconception is that "penetration" involves an actual intrusion, however slight, into the interior of the vagina or the rectum. As will be discussed more fully below, that is not required.

2. Sexual Acts -- § 2246(2)

a. Penis to vulva or anus

Section 2246(2)(A) defines one form of sexual act: "contact between the penis and the vulva or the penis and the anus. " It specifically states that "contact involving the penis occurs upon penetration, however slight." So, if the penis "penetrates" either the vulva or the anus, the defendant has engaged in a sexual act.

Note that the anatomical terms used are "vulva" and "anus," not "vagina " and "rectum." The "vulva" is commonly held to mean the external genital organs of the female, including specifically the labia majora, or outer labia. It includes the area immediately outside the

vaginal opening, between the labia minora and the labia majora. Similarly, the "anus" is the tissue that constitutes the opening of the rectum, which includes the outer surface of that tissue.

b. Oral sexual acts

Section 2246(2)(B) defines the second type of sexual act: contact between the mouth and the penis, vulva, or anus. Unlike with § 2246(2)(A), discussed above, "contact" is not defined and there is no requirement of "penetration." Note also that the terms used are again "vulva" and "anus," such that oral contact with the external surfaces would fall within the definition of a sexual act.

c. Digital penetration

Section 2246(2)(C) defines the third type of sexual act: "penetration, however slight, of the anal or genital opening of another by a hand or finger or by any object, with an intent to abuse, humiliate, harass, degrade, or arouse or gratify the sexual desire of any person."

First, this type of sexual act always requires the specified unlawful intent. Second, it need not be the defendant whose sexual desires are intended to be aroused or gratified. Third, the anatomical terms change from "vulva" and "anus" to "genital opening" and "anal opening." Penetration through clothing is sufficient to support a prosecution under this statute.

d. Direct touching of child's genitalia

The Violent Crime Control and Law Enforcement Act of 1994 added a new type of sexual act in § 2246(2)(D). It consists of "the intentional touching, not through the clothing, of the genitalia of another person who has not reached the age of 16." It requires the same unlawful intent as § 2246(2)(C). The touching is not restricted to touching with the defendant's hands or fingers, and the victim's full "genitalia" are included. However, since "genitalia" commonly means one's reproductive organs, it probably does not include the victim's anus, buttocks, groin, inner thighs, or breasts.

3. Sexual Contact -- § 2246(3)

Sexual contact is defined as "the intentional touching, either directly or through the clothing, of the genitalia, anus, groin, breast, inner thigh, or buttocks of any person with an intent to abuse, humiliate, harass, degrade, or arouse or gratify the sexual desire of any person."

The requisite intent is the same as that required under § 2246(2)(C) and (D) for digital penetration and direct genital touching. The term "clothing" is not limited to wearing apparel. A touching through a blanket may qualify.

B. AGGRAVATED SEXUAL ABUSE -- 18 U.S.C. § 2241

Aggravated sexual abuse is the most serious of the four substantive sexual abuse statutes. It always involves a sexual act, rather than sexual contact, and attempts to commit aggravated sexual abuse also constitute in themselves aggravated sexual abuse. There is no spousal immunity, so committing these acts upon one's

spouse is criminal.

There are several ways to commit aggravated sexual abuse. The maximum penalty in each case is life imprisonment, unless the offense causes death, in which case the penalty is death where the tribe has opted for the death penalty, and life in prison if the tribe has not. In addition, for violations of § 2241(c), Aggravated Sexual Abuse with Children, the penalty for second offenders is a mandatory term of life in prison, if the death penalty is inapplicable.

1. By Force or Threat -- § 2241(a)

One type of aggravated sexual abuse occurs when the defendant knowingly causes another person to engage in a sexual act by either using force against the victim, or threatening or placing the victim in fear that someone will be killed, kidnapped, or subjected to serious bodily injury.

The force requirement may be satisfied by showing the use or threatened use of a weapon; sufficient force to overcome, restrain, or injure a person, or the use of a threat of harm sufficient to coerce or compel submission by the victim. A victim's will can be overcome by threats to harm a third person, usually the victim's child.

2. By Rendering the Victim Incapable of Refusing -- § 2241(b)

Section 2241(b) provides that it is also aggravated sexual abuse when, essentially, the defendant knowingly makes the victim incapable of refusing to engage in a sexual act and "thereby" engages in the sexual act with the victim.

The theory is that deliberately causing a person to be unable to assert his or her will is as reprehensible as overcoming the victim's will with force or threats.

There are two ways of causing the victim to be incapable of refusing consent:

a. Rendering victim unconscious

The defendant commits aggravated sexual abuse if he knowingly renders the victim unconscious and "thereby" engages in a sexual act with the unconscious victim.

b. Administering intoxicants

The defendant also commits aggravated sexual abuse if he knowingly administers a drug, intoxicant, or other similar substance to the victim by force or threat of force, or without the victim's knowledge or permission, and "thereby" "substantially impairs the ability of [the victim] to appraise or control conduct" and engages in a sexual act with the impaired victim.

So, if the defendant spikes the victim's drinks without her knowledge and gets her so drunk that she cannot understand what is going on well enough to refuse him sex, he has committed forcible rape as if he had held a gun to her head.[3]

3. With Children Under 12 -- § 2241(c)

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[3] The sentencing guidelines also equate force or threats with the forcible or surreptitious administration of intoxicants. See U.S.S.G. § 2A3.1(b)(1).

It is aggravated sexual abuse for the defendant to engage--or, as noted above, attempt to engage--in a sexual act with a child under 12. Period. There is no requirement of threats, force, unconsciousness, or impairment. It is also a strict liability offense with respect to the age of the child. 18 U.S.C. § 2241(d).

Unlike the case with statutory rape of a child between 12 and 16, which is contained in § 2243(a) and discussed below, in a prosecution for aggravated sexual abuse with a child under 12, the age of the defendant does not matter. So long as the victim is under 12, there is no minimum age requirement for the defendant. Theoretically, a seven-year-old boy could be proceeded against as a juvenile offender for engaging in a sexual act with a girl aged 11 years and 11 months. Of course, the girl would be equally liable for engaging in the sexual act with the boy.

On September 23, 1996, Congress added a new crime to § 2241(c), making it a separate federal offense to cross a state line with the intent to engage in a sexual act with a child under 12. This new crime is not specific to Indian Country, and does not include crossing into or out of Indian Country with the required intent. It could be used in an Indian Country prosecution, if, for example, it could be proven that the suspect crossed from one state to another with the intent to sexually abuse a child under 12 in Indian Country, even if the suspect was stopped before he was able to complete, or even initiate, the act.[4]

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[4] The amendment to § 2241(c) was part of the Amber Hagerman Child Protection Act of 1996, which was incorporated in an appropriations act in the waning days of the Congressional session. The Amber Hagerman Child Protection Act also adds to § 2241(c) the

C. SEXUAL ABUSE -- 18 U.S.C. § 2242

Sexual abuse is the second most serious of the four substantive sexual abuse statutes. It, too, always involves a sexual act rather than sexual contact, and attempts to commit sexual abuse also constitute sexual abuse in themselves. Again, there is no spousal immunity, so committing these acts upon one's spouse is criminal.

There are two types of sexual abuse. Neither is a lesser included offense of aggravated sexual abuse by use of force or aggravated sexual abuse of a person incapable of consenting.

The maximum penalty for sexual abuse is 20 years imprisonment, unless the crime results in death.

1. Sexual Abuse by Threats -- § 2242(1)

One type of sexual abuse occurs when the defendant knowingly causes another person to engage in a sexual act by threatening or placing the victim in fear, other than the high degree of fear specified in § 2241(a)(2) that someone will be killed, kidnapped, or subjected to serious bodily injury.

Under this statute, the requirement of threats or placing the victim in fear may be satisfied by showing that the threat or intimidation created in the victim's mind in apprehension of fear of harm to herself or to others. See United States

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new crime of committing sexual abuse "under the circumstances described in subsections (a) and (b)" with victims between the ages of 12 and 16. This "new crime" is not really new, as aggravated sexual abuse through the use of force or with a person rendered incapable of refusing consent was already a serious crime under § 2241(a) or (b), regardless of the age of the victim. However, as noted above, the penalty for this crime is greatly enhanced for second offenders, who now face a mandatory term of life imprisonment for non-consensual sexual abuse of children age 16 or under.

v. Johns, 15 F.3d 740 (8th Cir. 1994) (fear victim would be rejected by religious spirits).

2. Sexual Abuse of Person Unable to Consent -- § 2242(2)

Section 2242(2) makes it sexual abuse to engage in a sexual act with another person if the victim is either: (A) incapable of appraising the nature of the conduct; or (B) physically incapable of declining participation in, or communicating unwillingness to engage in, that sexual act."

Although, as stated above, sexual abuse is not a lesser included offense of aggravated sexual abuse of a person incapable of consenting, the type of conduct in this instance is similar. If the defendant takes advantage of the victim by deliberately causing her to be unable to resist, the crime is aggravated sexual abuse. On the other hand, if the defendant happens across a victim who is already impaired in her ability to refuse and simply takes advantage of the fortuitous circumstance, the crime is sexual abuse.

Common applications of § 2242(2) include sexual acts with developmentally handicapped adults or with drunken or stoned victims who knowingly and voluntarily got drunk or stoned. See e.g., United States v. Barrett, 937 F.2d 1346 (8th Cir.), cert. denied, 502 U.S. 916 (1991).

D. SEXUAL ABUSE OF A MINOR OR WARD -- 18 U.S.C. 2243

The third type of sexual abuse that also requires proof of a sexual act is sexual abuse of a minor or ward. As with aggravated sexual abuse and sexual abuse, attempts are included within the definition of the crime. However, sexual abuse of a

minor or ward is not a lesser included offense of either aggravated sexual abuse or sexual abuse. United States v. Amos, 952 F.2d 992 (8th Cir. 1991).

1. Sexual Abuse of a Minor -- § 2243(a)

This is the federal statutory rape law. It consists of engaging in a sexual act with a person between the ages of 12 and 16, or crossing a state line with the intent to do so. Consent is not a defense, but either (a) a reasonable belief that the victim was at least 16, or (b) being married to the victim at the time of the offense is a valid defense. Also, the defendant must be at least four years older than the victim. The government does not have to prove, however, that the defendant knew how old the victim was, nor that he knew there was a four-year age difference between them.

The maximum penalty for sexual abuse of a minor that does not result in death is fifteen years in prison. However, if the sexual abuse was perpetrated by force or against a person rendered incapable of refusing consent, as defined in § 2241(a) or (b), and if the perpetrator has a prior state or federal conviction for aggravated sexual abuse, then the mandatory penalty is life in prison.

2. Sexual Abuse of a Ward -- § 2243(b)

This crime consists of engaging in a sexual act with a person who is in "official detention" and "under the custodial, supervisory, or disciplinary authority" of the defendant at the time of the act. There is no age requirement,

but marriage, oddly enough, is a defense.[5]

"Official detention" is defined at § 2246(5). It includes, among other things, being detained by, or at the direction of, a federal officer or employee after charge, arrest, conviction, or adjudication of juvenile delinquency; or being in the custody of, or in someone else's custody at the direction of, a federal officer or employee for purposes incident to the detention, such as transportation, medical services, court appearances, work, and recreation. It specifically does not include persons released on bail, probation, or parole.

The maximum penalty for sexual abuse of a ward that does not result in death is one year in prison.

E. ABUSIVE SEXUAL CONTACT -- 18 U.S.C. § 2244

Abusive sexual contact is the fourth and least serious type of sexual offense in Chapter 109A. It is contained in § 2244, and the various types parallel the elements of aggravated sexual abuse, sexual abuse, and sexual abuse of a minor or ward, except that they involve sexual contact instead of sexual acts. However, abusive sexual contact is not a lesser included offense of aggravated sexual abuse, sexual abuse or sexual abuse of a minor, to the extent that these do not require proof of the specific intent to abuse, humiliate, harass, degrade, or arouse or gratify sexual desires. United States v. Demarrias, 876 F.2d 674 (8th Cir. 1989).

Sexual contact engaged in under circumstances that would constitute

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[5] It seems fairly unlikely that a federal officer or employee would be entrusted, in his or her official capacity, with the detention of his or her spouse.

aggravated sexual abuse if the contact had been a sexual act carries a maximum penalty of ten years, unless death results. If the circumstances would have constituted sexual abuse, sexual abuse of a minor, or sexual abuse of a ward, the maximum penalties are three years, two years, and six months, respectively. Under "other circumstances" that would not fit any of §§ 2241, 2242, or 2243, knowingly engaging in sexual contact punishable by six months in prison. The misdemeanor offenses, of course, cannot be prosecuted federally if both the offender and victim are Indian.

CHILDREN AS VICTIMS AND WITNESSES

18 U.S.C. 3509

The Crime Control Act of 1990 (18 U.S.C. § 3509 provides the following special alternatives for child victims:

1. Establishment of a multi-disciplinary team, including representatives from health social service, law enforcement, and legal service agencies to coordinate the assistance needed to help child victims.

2. Alternatives to live, in-court testimony, if the child is unable to testify out of fear or if it would traumatize him. Any videotaped deposition shall be destroyed five years after the judgment of the trial court, but not before a final judgment by the Supreme Court.

3. Competence exam, if there is a compelling reason to suspect that the child is not competent.

4. Privacy protection. All documents which disclose the name of the child in an abuse case shall be filed under seal and a protective order may be issued.

5. Closed courtroom, if necessary to prevent substantial psychological harm or if an open courtroom would render him unable to communicate.

6. Victim Impact Statements prepared by the multi-disciplinary team to express the crime's personal consequences on the child.

7. Guardian ad litem to protect the best interests of the child and to attend all depositions, hearings, and trial proceedings.

8. Adult attendant for emotional support.

9. Speedy trial. The court may designate the case as being of special public importance and may give it precedence over other cases.

10. Extension of child statute of limitations so that prosecution may not be precluded before the child reaches the age of 25 years.

11. Testimonial aids. The child may use anatomical dolls, drawings, etc. to assist in testifying.

FEDERAL RULES OF EVIDENCE 413, 414 and 415

I. Enactment of Fed. R. Evid. 413, 414 and 415

A. Congress enacted these rules to establish a general rule of admissibility for similar crimes evidence in sexual assault cases. Congress recognized and intended that this would make the admission of similar crimes evidence in sexual assault cases the norm, and its exclusion exceptional. These rules were enacted as part of the Violent Crime Control and Law Enforcement Act of 1994.

B. Rule 413 applies to sexual assault prosecutions generally. Rule 414 applies specifically to child molestation prosecutions, and Rule 415 applies in civil suits premised on sexual offenses. Rule 413 is generally broader in scope than Rule 414 because it incorporates no limitation based on the age of the victims. However, Rule 414 is broader in one respect because it includes among its predicate offenses child pornography crimes.

By way of illustration, if a defendant is charged with molesting a child, evidence that a search of his apartment showed him to be in possession of a large trove of child pornography would be relevant since it would tend to establish that he has an abnormal sexual interest in children. In contrast, if a defendant were charged with raping an adult victim, knowledge that he possessed child pornography would have relatively little relevance. Rule 414 accordingly includes child pornography offenses as predicates, while Rule 413 does not.

C. The trial court must engage in Rule 403 balancing in relation to the evidence offered under these rules. Rule 403 provides a limited basis for excluding evidence, though relevant, if its probative value is substantially outweighed by the danger of unfair prejudice. Exclusion of evidence under Rule 403 is an extraordinary remedy. United States v. LeCompte, 1997 W.L. 781217.

II. Fed. R. Evid. 413-414 supersede Fed. R. Evid. 404(b).

A. Rules 413-414 supersede in sex offense cases the restrictive aspects of Fed. R. Evid. 404(b). In contrast to Rule 404(b)'s general prohibition of evidence of character or propensity, the new rules for sex offense cases authorize admission and consideration of evidence of an uncharged offense for its bearing "on any matter to which it is relevant." This includes the defendant's propensity to commit sexual assault or child molestation offenses, and assessment of the probability or improbability that the defendant has been falsely or mistakenly accused of such an offense.

140 Cong. Rec. H8991 (1994) (remarks of principal House sponsor, Rep. Molinari); see 137 Cong. Rec. S3238-40 (1991)(statement of Senate sponsors); David J. Karp, Evidence of Propensity and Probability in Sex Offense Cases and

Other Cases, 70 Chi.-Kent L.Rev. 15, 18-21-33-34 (1994).

B. Evidence of offenses for which the defendant has not previously been prosecuted or convicted is admissible, as well as prior convictions. No time limit is imposed on the uncharged offenses for which evidence may be admitted; as a practical matter, evidence of other sex offenses by the defendant is often probative and properly admitted, notwithstanding very substantial lapses of time in relation to the charged offense or offenses.

140 Cong. Rec. H8992 (1994)(remarks of Rep. Molinari); see 137 Cong. Rec. S3240, 4342 (1991)d(similar points in Senate sponsors' statement); Karp, 70 Chi.-Kent L. Rev. at 19.

III. Appellate Decisions

A. The decisions of the Eighth Circuit and other circuits confirm that evidence of other sexual offenses offered under Rules 413-15 is normally to be admitted. The Eighth Circuit has held that "Rule 414 and its companion rules...Rule 413...and Rule 415...are general rules of admissibility in sexual assault and child molestation cases for evidence that the defendant has committed offenses of the same type on other occasions," and that the "'new rules...supersede in sex offense cases the restrictive aspects of Federal Rules of Evidence 404(b).'" United States v. LeCompte, 1997 W.L. 781217 (1997). In United States v. Sumner, 119 F.3d 658 (8th Cir. 1997), the Eighth Circuit noted the legislative "presumption favoring admissibility" under Rule 414. The court further noted the legislative intent that Rules 413-415 put "evidence of uncharged offenses in sexual assault and child molestation cases on the same footing as other types of relevant evidence that are not subject to a special exclusionary rule. The presumption is in favor of admission." 119 F.3d at 662 (quoting and citing the legislative sponsor).

B. United States v. Mound is a pending Eighth Circuit case involving admission of evidence of a prior child molestation crime under Rule 413. The constitutionality of Rule 413 is at issue. The district court engaged in Rule 403 balancing and allowed admission of the defendant's prior conviction for assaulting another 12-year-old girl. The district court found the prior conviction was relevant and probative for purposes allowed under Rule 413. On appeal the defendant challenges the constitutionality of Rule 413.

C. In United States v. Sumner, 119 F.3d 658 (8th Cir. 1977), the court noted the legislative "presumption favoring admissibility" under Rule 414. The court further noted that Rules 413-415 put "evidence of uncharged offenses in sexual assault and child molestation cases on the same footing as other types of relevant evidence that are not subject to a special exclusionary rule. The presumption is in favor of admission." Id. At 662.

D. Other appellate decisions have directly upheld the constitutionality of propensity evidence. In United States v. Enjady, 1998 W.L. 17344 (10th Cir. 1998), the Court held that admission of a prior sexual assault to show propensity under Rule 413 did not violate the defendant's constitutional right to due process. Following Enjady, in United States v. Castillo, 1998 W.L. 156558 (10th Cir. 1998), the Court noted the broad historical support for allowing propensity evidence in sexual offense cases.

E. United States v. Guardia, 135 F.3d 1326 (10th Cir. 1998), set forth the following:

> Evidence must pass several hurdles before it can be admitted under Rule 413. First, the defendant must be on trial for "an offense of sexual assault." Second, the proffered evidence must be of "another offense of ... sexual assault." Third, the trial court must find the evidence relevant--that is, the evidence must show both that the defendant had a particular propensity, and that the propensity it demonstrates has a bearing on the charged crime. Fourth and finally, the trial court must make a reasoned, recorded finding that the prejudicial value of the evidence does not substantially outweigh its probative value.
>
> Id. At 1332.

The Court concluded that the exclusion of evidence that a physician charged with sexual abuse had improperly touched women other than the victims was not an abuse of discretion.

F. Twenty-nine states allow propensity evidence in some category or categories of sex offense cases. See Reed, 21 Am. J. Crim. L. At 188. In People v. Fitch, 63 Cal. Rptr. 2d 753 (1997), the California Court of Appeals upheld the validity of sexual offenses to show propensity and rejected constitutional objections.

UNITED STATES CODE ANNOTATED
TITLE 18. CRIMES AND CRIMINAL PROCEDURE
PART II–CRIMINAL PROCEDURE
CHAPTER 223–WITNESSES AND EVIDENCE

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Current through P.L. 104-333, approved 11-12-96

§ 3509. Child victims' and child witnesses' rights

(a) Definitions.–For purposes of this section–

(1) the term "adult attendant" means an adult described in subsection (i) who accompanies a child throughout the judicial process for the purpose of providing emotional support;

(2) the term "child" means a person who is under the age of 18, who is or is alleged to be–

(A) a victim of a crime of physical abuse, sexual abuse, or exploitation; or

(B) a witness to a crime committed against another person;

(3) the term "child abuse" means the physical or mental injury, sexual abuse or exploitation, or negligent treatment of a child;

(4) the term "physical injury" includes lacerations, fractured bones, burns, internal injuries, severe bruising or serious bodily harm;

(5) the term "mental injury" means harm to a child's psychological or intellectual functioning which may be exhibited by severe anxiety, depression, withdrawal or outward aggressive behavior, or a combination of those behaviors, which may be demonstrated by a change in behavior, emotional response, or cognition;

(6) the term "exploitation" means child pornography or child prostitution;

(7) the term "multidisciplinary child abuse team" means a professional unit composed of representatives from health, social service, law enforcement, and legal service agencies to coordinate the assistance needed to handle cases of child abuse;

(8) the term "sexual abuse" includes the employment, use, persuasion, inducement, enticement, or coercion of a child to engage in, or assist another person to engage in, sexually explicit conduct or the rape, molestation, prostitution, or other form of sexual exploitation of children, or incest with children;

(9) the term "sexually explicit conduct" means actual or simulated–

(A) sexual intercourse, including sexual contact in the manner of genital-genital, oral-genital, anal-genital, or oral-anal contact, whether between persons of the same or of opposite sex; sexual contact means the intentional touching, either directly or through clothing, of the genitalia, anus, groin, breast, inner thigh, or buttocks of any person with an intent to abuse, humiliate, harass, degrade, or arouse or gratify sexual desire of any person;

(B) bestiality;

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(iii) A judicial officer, appointed by the court; and

(iv) Other persons whose presence is determined by the court to be necessary to the welfare and well-being of the child, including an adult attendant.

The child's testimony shall be transmitted by closed circuit television into the courtroom for viewing and hearing by the defendant, jury, judge, and public. The defendant shall be provided with the means of private, contemporaneous communication with the defendant's attorney during the testimony. The closed circuit television transmission shall relay into the room in which the child is testifying the defendant's image, and the voice of the judge.

(2) Videotaped deposition of child.—(A) In a proceeding involving an alleged offense against a child, the attorney for the Government, the child's attorney, the child's parent or legal guardian, or the guardian ad litem appointed under subsection (h) may apply for an order that a deposition be taken of the child's testimony and that the deposition be recorded and preserved on videotape.

(B)(i) Upon timely receipt of an application described in subparagraph (A), the court shall make a preliminary finding regarding whether at the time of trial the child is likely to be unable to testify in open court in the physical presence of the defendant, jury, judge, and public for any of the following reasons:

(I) The child will be unable to testify because of fear.

(II) There is a substantial likelihood, established by expert testimony, that the child would suffer emotional trauma from testifying in open court.

(III) The child suffers a mental or other infirmity.

(IV) Conduct by defendant or defense counsel causes the child to be unable to continue testifying.

(ii) If the court finds that the child is likely to be unable to testify in open court for any of the reasons stated in clause (i), the court shall order that the child's deposition be taken and preserved by videotape.

(iii) The trial judge shall preside at the videotape deposition of a child and shall rule on all questions as if at trial. The only other persons who may be permitted to be present at the proceeding are—

(I) the attorney for the Government;

(II) the attorney for the defendant;

(III) the child's attorney or guardian ad litem appointed under subsection (h);

(IV) persons necessary to operate the videotape equipment;

(V) subject to clause (iv), the defendant; and

(VI) other persons whose presence is determined by the court to be necessary to the welfare and well-being of the child.

The defendant shall be afforded the rights applicable to defendants during trial, including the right to an attorney, the right to be confronted with the witness against the defendant, and the right to cross-examine the child.

(iv) If the preliminary finding of inability under clause (i) is based on evidence that the child is unable to

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(E) persons whose presence, in the opinion of the court, is necessary to the welfare and well-being of the child, including the child's attorney, guardian ad litem, or adult attendant.

(6) Not before jury.--A competency examination regarding a child witness shall be conducted out of the sight and hearing of a jury.

(7) Direct examination of child.--Examination of a child related to competency shall normally be conducted by the court on the basis of questions submitted by the attorney for the Government and the attorney for the defendant including a party acting as an attorney pro se. The court may permit an attorney but not a party acting as an attorney pro se to examine a child directly on competency if the court is satisfied that the child will not suffer emotional trauma as a result of the examination.

(8) Appropriate questions.--The questions asked at the competency examination of a child shall be appropriate to the age and developmental level of the child, shall not be related to the issues at trial, and shall focus on determining the child's ability to understand and answer simple questions.

(9) Psychological and psychiatric examinations.--Psychological and psychiatric examinations to assess the competency of a child witness shall not be ordered without a showing of compelling need.

(d) Privacy protection.--

(1) Confidentiality of information.--(A) A person acting in a capacity described in subparagraph (B) in connection with a criminal proceeding shall--

(i) keep all documents that disclose the name or any other information concerning a child in a secure place to which no person who does not have reason to know their contents has access; and

(ii) disclose documents described in clause (i) or the information in them that concerns a child only to persons who, by reason of their participation in the proceeding, have reason to know such information.

(B) Subparagraph (A) applies to--

(i) all employees of the Government connected with the case, including employees of the Department of Justice, any law enforcement agency involved in the case, and any person hired by the Government to provide assistance in the proceeding;

(ii) employees of the court;

(iii) the defendant and employees of the defendant, including the attorney for the defendant and persons hired by the defendant or the attorney for the defendant to provide assistance in the proceeding; and

(iv) members of the jury.

(2) Filing under seal.--All papers to be filed in court that disclose the name of or any other information concerning a child shall be filed under seal without necessity of obtaining a court order. The person who makes the filing shall submit to the clerk of the court--

(A) the complete paper to be kept under seal; and

(B) the paper with the portions of it that disclose the name of or other information concerning a child redacted, to be placed in the public record.

(3) Protective orders.--(A) On motion by any person the court may issue an order protecting a child from

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(E) expert medical, psychological, and related professional testimony;

(F) case service coordination and assistance, including the location of services available from public and private agencies in the community; and

(G) training services for judges, litigators, court officers and others that are involved in child victim and child witness cases, in handling child victims and child witnesses.

(h) Guardian ad litem.--

(1) In general.--The court may appoint a guardian ad litem for a child who was a victim of, or a witness to, a crime involving abuse or exploitation to protect the best interests of the child. In making the appointment, the court shall consider a prospective guardian's background in, and familiarity with, the judicial process, social service programs, and child abuse issues. The guardian ad litem shall not be a person who is or may be a witness in a proceeding involving the child for whom the guardian is appointed.

(2) Duties of guardian ad litem.--A guardian ad litem may attend all the depositions, hearings, and trial proceedings in which a child participates, and make recommendations to the court concerning the welfare of the child. The guardian ad litem may have access to all reports, evaluations and records, except attorney's work product, necessary to effectively advocate for the child. (The extent of access to grand jury materials is limited to the access routinely provided to victims and their representatives.) A guardian ad litem shall marshal and coordinate the delivery of resources and special services to the child. A guardian ad litem shall not be compelled to testify in any court action or proceeding concerning any information or opinion received from the child in the course of serving as a guardian ad litem.

(3) Immunities.--A guardian ad litem shall be presumed to be acting in good faith and shall be immune from civil and criminal liability for complying with the guardian's lawful duties described in paragraph (2).

(i) Adult attendant.--A child testifying at or attending a judicial proceeding shall have the right to be accompanied by an adult attendant to provide emotional support to the child. The court, at its discretion, may allow the adult attendant to remain in close physical proximity to or in contact with the child while the child testifies. The court may allow the adult attendant to hold the child's hand or allow the child to sit on the adult attendant's lap throughout the course of the proceeding. An adult attendant shall not provide the child with an answer to any question directed to the child during the course of the child's testimony or otherwise prompt the child. The image of the child attendant, for the time the child is testifying or being deposed, shall be recorded on videotape.

(j) Speedy trial.--In a proceeding in which a child is called to give testimony, on motion by the attorney for the Government or a guardian ad litem, or on its own motion, the court may designate the case as being of special public importance. In cases so designated, the court shall, consistent with these rules, expedite the proceeding and ensure that it takes precedence over any other. The court shall ensure a speedy trial in order to minimize the length of time the child must endure the stress of involvement with the criminal process. When deciding whether to grant a continuance, the court shall take into consideration the age of the child and the potential adverse impact the delay may have on the child's well-being. The court shall make written findings of fact and conclusions of law when granting a continuance in cases involving a child.

(k) Stay of civil action.--If, at any time that a cause of action for recovery of compensation for damage or injury to the person of a child exists, a criminal action is pending which arises out of the same occurrence and in which the child is the victim, the civil action shall be stayed until the end of all phases of the criminal action and any mention of the civil action during the criminal proceeding is prohibited. As used in this subsection, a criminal action is pending until its final adjudication in the trial court.

(l) Testimonial aids.--The court may permit a child to use anatomical dolls, puppets, drawings, mannequins, or

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(a) serving a warrant of arrest; or

(b) arresting or attempting to arrest a person committing or attempting to commit an offense in his presence, or who has committed or is suspected on reasonable grounds of having committed a felony; or

(c) making a search at the request or invitation or with the consent of the occupant of the premises.

(June 25, 1948, c. 645, 62 Stat. 803; Oct. 11, 1996, Pub.L. 104–294, Title VI, § 601(a)(8), 110 Stat. 3498.)

HISTORICAL AND STATUTORY NOTES

Reviser's Note

Based on Title 18, U.S.C., 1940 ed., § 53a (Aug. 27, 1935, c. 740, § 201, 49 Stat. 877).

Words "or any department or agency thereof" were inserted to avoid ambiguity as to scope of section. (See definitive section 6 of this title.)

The exception in the case of an invitation or the consent of the occupant, was inserted to make the section complete and remove any doubt as to the application of this section to searches which have uniformly been upheld.

Reference to misdemeanor was omitted in view of definitive section 1 of this title. (See reviser's note under section 212 of this title.)

Words "upon conviction thereof shall be" were omitted as surplusage, since punishment cannot be imposed until conviction is secured.

Minor changes were made in phraseology.

Legislative History

For legislative history and purpose of Pub.L. 104–294, see 1996 U.S. Code Cong. and Adm. News, p. ___

CHAPTER 109A—SEXUAL ABUSE

§ 2241. Aggravated sexual abuse

(a) By force or threat.—Whoever, in the special maritime and territorial jurisdiction of the United States or in a Federal prison, knowingly causes another person to engage in a sexual act—

(1) by using force against that other person; or

(2) by threatening or placing that other person in fear that any person will be subjected to death, serious bodily injury, or kidnapping;

or attempts to do so, shall be fined under this title, imprisoned for any term of years or life, or both.

(b) By other means.—Whoever, in the special maritime and territorial jurisdiction of the United States or in a Federal prison, knowingly—

(1) renders another person unconscious and thereby engages in a sexual act with that other person; or

(2) administers to another person by force or threat of force, or without the knowledge or permission of that person, a drug, intoxicant, or other similar substance and thereby—

(A) substantially impairs the ability of that other person to appraise or control conduct; and

(B) engages in a sexual act with that other person;

or attempts to do so, shall be fined under this title, imprisoned for any term of years or life, or both.

(c) With children.—Whoever crosses a State line with intent to engage in a sexual act with a person who has not attained the age of 12 years, or in the special maritime and territorial jurisdiction of the United States or in a Federal prison, knowingly engages in a sexual act with another person who has not attained the age of 12 years, or knowingly engages in a sexual act under the circumstances described in subsections (a) and (b) with another person who has attained the age of 12 years but has not attained the age of 16 years (and is at least 4 years younger than that person), or attempts to do so, shall be fined under this title, imprisoned for any term of years or life, or both. If the defendant has previously been convicted of another Federal offense under this subsection, or of a State offense that would have been an offense under either such provision had the offense occurred in a Federal prison, unless the death penalty is imposed, the defendant shall be sentenced to life in prison.

(d) State of mind proof requirement.—In a prosecution under subsection (c) of this section, the Government need not prove that the defendant knew that the other person engaging in the sexual act had not attained the age of 12 years.

(Added Pub.L. 99–646, § 87(b), Nov. 10, 1986, 100 Stat. 3620, and amended Pub.L. 103–322, Title XXXIII, § 330021(1), Sept. 13, 1994, 108 Stat. 2150; Pub.L. 104–208, Div. A, Title I, § 101(a) [Title I, § 121, subsection 7(b)], Sept. 30, 1996, 110 Stat. 3009–31.)

HISTORICAL AND STATUTORY NOTES

Codification

Identical provision was enacted by Pub.L. 99–654, § 2, Nov. 14, 1986, 100 Stat. 3660.

Effective Date

Pub.L. 99–646, § 87(e), Nov. 10, 1986, provided that: "This section and the amendments made by this section [enacting this chapter; amending sections 113(a), (b), 1111(a), 1153, and 3185(12) of this title, sections 300w–3(a)(1)(G), 300w–4(c)(6), and 9511 of Title 42, The Public Health and Welfare, and section 1472(k)(1) of Title 49, Transportation]; and repealing chapter 99 (sections 2031 and 2032) of this title] shall take effect 30 days after the date of the enactment of this Act [Nov. 10, 1986]."

[Effective Date provision similar to Pub.L. 99–646, § 87(e), was enacted by Pub.L. 99–654, § 4, Nov. 14, 1986, 100 Stat. 3664.]

Short Title of 1996 Amendments

Pub.L. 104–208, Div. A, Title I, § 101(a) [Title I, § 121, subsec. 7(a)], Sept. 30, 1996, 110 Stat. 3009–31, provided that: "This section [probably should be this subsection, which amended this section and section 2243 of this title] may be cited as the 'Amber Hagerman Child Protection Act of 1996'."

Short Title

Pub.L. 99–646, § 87(a), Nov. 10, 1986, provided that: "This section [enacting this chapter; amending sections 113(a), (b), 1111(a), 1153, and 3185(12) of this title, sections 300w–3(a)(1)(G), 300w–4(c)(6), and 9511 of Title 42, The Public Health and Welfare, and section 1472(k)(1) of Title 49, Transportation; repealing chapter 99 (sections 2031 and 2032) of this title; and enacting note provision under this section] may be cited as the 'Sexual Abuse Act of 1986'."

[Short Title provision similar to Pub.L. 99–646, § 87(a), was enacted by Pub.L. 99–654, § 1, Nov. 14, 1986, 100 Stat. 3660.]

Legislative History

For legislative history and purpose of Pub.L. 99–646 see 1986 U.S.Code Cong. and Adm.News, p. 6139. See, also, Pub.L. 103–322, 1994 U.S. Code Cong. and Adm. News, p. 1801.

§ 2242. Sexual abuse

Whoever, in the special maritime and territorial jurisdiction of the United States or in a Federal prison, knowingly—

(1) causes another person to engage in a sexual act by threatening or placing that other person in fear (other than by threatening or placing that other person in fear that any person will be subjected to death, serious bodily injury, or kidnapping); or

(2) engages in a sexual act with another person if that other person is—

(A) incapable of appraising the nature of the conduct; or

(B) physically incapable of declining participation in, or communicating unwillingness to engage in, that sexual act;

or attempts to do so, shall be fined under this title, imprisoned not more than 20 years, or both.

(Added Pub.L. 99–646, § 87(b), Nov. 10, 1986, 100 Stat. 3621, and amended Pub.L. 103–322, Title XXXIII, § 330021(1), Sept. 13, 1994, 108 Stat. 2150.)

HISTORICAL AND STATUTORY NOTES

Codification

Identical provision was enacted by Pub.L. 99–654, § 2, Nov. 14, 1986, 100 Stat. 3661.

Effective Date

Section effective 30 days after Nov. 10, 1986, see section 87(e) of Pub.L. 99–646, set out as a note under section 224E of this title.

Legislative History

For legislative history and purpose of Pub.L. 99–646 see 1986 U.S.Code Cong. and Adm.News, p. 6139. See, also, Pub.L. 103–322, 1994 U.S. Code Cong. and Adm. News, p. 1801.

§ 2243. Sexual abuse of a minor or ward

(a) Of a minor.—Whoever crosses a State line with intent to engage in a sexual act with a person who has not attained the age of 12 years, or, in the special maritime and territorial jurisdiction of the United States or in a Federal prison, knowingly engages in a sexual act with another person who—

(1) has attained the age of 12 years but has not attained the age of 16 years; and

(2) is at least four years younger than the person so engaging;

or attempts to do so, shall be fined under this title, imprisoned not more than 15 years, or both.

(b) Of a ward.—Whoever, in the special maritime and territorial jurisdiction of the United States or in a Federal prison, knowingly engages in a sexual act with another person who is—

(1) in official detention; and

(2) under the custodial, supervisory, or disciplinary authority of the person so engaging;

or attempts to do so, shall be fined under this title, imprisoned not more than one year, or both.

(c) Defenses.—(1) In a prosecution under subsection (a) of this section, it is a defense, which the defendant must establish by a preponderance of the evidence, that the defendant reasonably believed that the other person had attained the age of 16 years.

(2) In a prosecution under this section, it is a defense, which the defendant must establish by a preponderance of the evidence, that the persons engaging in the sexual act were at that time married to each other.

(d) **State of mind proof requirement.**—In a prosecution under subsection (a) of this section, the Government need not prove that the defendant knew—

(1) the age of the other person engaging in the sexual act; or

(2) that the requisite age difference existed between the persons so engaging.

(Added Pub.L. 99–646, § 87(b), Nov. 10, 1986, 100 Stat. 3621, and amended Pub.L. 101–647, Title III, § 322, Nov. 29, 1990, 104 Stat. 4818; Pub.L. 104–208, Div. A, Title I, § 101(a) [Title I, § 121, subsection 7(c)], Sept. 30, 1996, 110 Stat. 3009–31.)

HISTORICAL AND STATUTORY NOTES

Codification

Identical provision was enacted by Pub.L. 99–654, § 2, Nov. 14, 1986, 100 Stat. 3661.

Effective Date

Section effective 30 days after Nov. 10, 1986, see section 87(e) of Pub.L. 99–646, set out as a note under section 2241 of this title.

Legislative History

For legislative history and purpose of Pub.L. 99–646 see 1986 U.S.Code Cong. and Adm.News, p. 6139. See, also, Pub.L. 101–647, 1990 U.S.Code Cong. and Adm.News, p. 6472.

§ 2244. Abusive sexual contact

(a) **Sexual conduct in circumstances where sexual acts are punished by this chapter.**—Whoever, in the special maritime and territorial jurisdiction of the United States or in a Federal prison, knowingly engages in or causes sexual contact with or by another person, if so to do would violate—

(1) section 2241 of this title had the sexual contact been a sexual act, shall be fined under this title, imprisoned not more than ten years, or both;

(2) section 2242 of this title had the sexual contact been a sexual act, shall be fined under this title, imprisoned not more than three years, or both;

(3) subsection (a) of section 2243 of this title had the sexual contact been a sexual act, shall be fined under this title, imprisoned not more than two years, or both; or

(4) subsection (b) of section 2243 of this title had the sexual contact been a sexual act, shall be fined under this title, imprisoned not more than six months, or both.

(b) **In other circumstances.**—Whoever, in the special maritime and territorial jurisdiction of the United States or in a Federal prison, knowingly engages in sexual contact with another person without that other person's permission shall be fined under this title, imprisoned not more than six months, or both.

(Added Pub.L. 99–646, § 87(b), Nov. 10, 1986, 100 Stat. 3622, and amended Pub.L. 100–690, Title VII, § 7058(a), Nov. 18, 1988, 102 Stat. 4403; Pub.L. 103–322, Title XXXIII, § 330016(1)(K), Sept. 13, 1994, 108 Stat. 2147.)

HISTORICAL AND STATUTORY NOTES

Codification

Identical provision was enacted by Pub.L. 99–654, § 2, Nov. 14, 1986, 100 Stat. 3661.

Effective Date

Section effective 30 days after Nov. 10, 1986, see section 87(e) of Pub.L. 99–646, set out as a note under section 2241 of this title.

Legislative History

For legislative history and purpose of Pub.L. 99–646 see 1986 U.S.Code Cong. and Adm.News, p. 6139. See, also, Pub.L. 100–690, 1988 U.S. Code Cong. and Adm. News, p. 5937; Pub.L. 103–322, 1994 U.S. Code Cong. and Adm. News, p. 1801.

§ 2245. Sexual abuse resulting in death

A person who, in the course of an offense under this chapter, engages in conduct that results in the death of a person, shall be punished by death or imprisoned for any term of years or for life.

(Added Pub.L. 103–322, Title VI, § 60010(a)(2), Sept. 13, 1994, 108 Stat. 1972.)

HISTORICAL AND STATUTORY NOTES

Prior Provisions

A prior section 2245 was renumbered section 2246 by Pub.L. 103–322, Title VI, § 60010(a)(1), Sept. 13, 1994, 108 Stat. 1972.

Legislative History

For legislative history and purpose of Pub.L. 103–322, see 1994 U.S. Code Cong. and Adm. News, p. 1801.

§ 2246. Definitions for chapter

As used in this chapter—

(1) the term "prison" means a correctional, detention, or penal facility;

(2) the term "sexual act" means—

(A) contact between the penis and the vulva or the penis and the anus, and for purposes of this subparagraph contact involving the penis occurs upon penetration, however, slight;

(B) contact between the mouth and the penis, the mouth and the vulva, or the mouth and the anus;

(C) the penetration, however slight, of the anal or genital opening of another by a hand or finger or by any object, with an intent to abuse, humiliate, harass, degrade, or arouse or gratify the sexual desire of any person; or

(D) the intentional touching, not through the clothing, of the genitalia of another person who has not attained the age of 16 years with an intent to abuse, humiliate, harass, degrade, or arouse or gratify the sexual desire of any person;

(3) the term "sexual contact" means the intentional touching, either directly or through the clothing, of the genitalia, anus, groin, breast, inner thigh, or buttocks of any person with an intent to abuse, humiliate, harass, degrade, or arouse or gratify the sexual desire of any person;

(4) the term "serious bodily injury" means bodily injury that involves a substantial risk of death, unconsciousness, extreme physical pain, protracted and obvious disfigurement, or protracted loss or impairment of the function of a bodily member, organ, or mental faculty;

(5) the term "official detention" means—

(A) detention by a Federal officer or employee, or under the direction of a Federal officer or employee, following arrest for an offense; following surrender in lieu of arrest for an offense; following a charge or conviction of an offense, or an allegation or finding of juvenile delinquency; following commitment as a material witness; following civil commitment in lieu of criminal proceedings or pending resumption of criminal proceedings that are being held in abeyance, or pending extradition, deportation, or exclusion; or

(B) custody by a Federal officer or employee, or under the direction of a Federal officer or employee, for purposes incident to any detention described in subparagraph (A) of this paragraph, including transportation, medical diagnosis or treatment, court appearance, work, and recreation;

but does not include supervision or other control (other than custody during specified hours or days) after release on bail, probation, or parole, or after release following a finding of juvenile delinquency.

(Added Pub.L. 99–646, § 87(b), Nov. 10, 1986, 100 Stat. 3622, § 2245, renumbered § 2246 and amended Pub.L. 103–322, Title IV, § 40502, Title VI, § 60010(a)(1), Sept. 13, 1994, 108 Stat. 1945, 1972.)

HISTORICAL AND STATUTORY NOTES

Codification

Identical provision was enacted by Pub.L. 99–654, § 2, Nov. 14, 1986, 100 Stat. 3662.

Effective Date

Section effective 30 days after Nov. 10, 1986, see section 87(e) of Pub.L. 99–646, set out as a note under section 2241 of this title.

Legislative History

For legislative history and purpose of Pub.L. 99–646, see 1986 U.S.Code Cong. and Adm.News, p. 6139. See, also, Pub.L. 103–322, 1994 U.S. Code Cong. and Adm. News, p. 1801.

§ 2247. Repeat offenders

Any person who violates a provision of this chapter, after one or more prior convictions for an offense punishable under this chapter, or after one or more prior convictions under the laws of any State relating to aggravated sexual abuse, sexual abuse, or abusive sexual contact have become final, is punishable by a term of imprisonment up to twice that otherwise authorized.

(Added Pub.L. 103–322, Title IV, § 40111(a), Sept. 13, 1994, 108 Stat. 1903.)

HISTORICAL AND STATUTORY NOTES

Legislative History

For legislative history and purpose of Pub.L. 103–322, see 1994 U.S. Code Cong. and Adm. News, p. 1801.

§ 2248. Mandatory restitution

(a) **In general.**—Notwithstanding section 3663 or 3663A, and in addition to any other civil or criminal penalty authorized by law, the court shall order restitution for any offense under this chapter.

(b) **Scope and nature of order.**—

(1) **Directions.**—The order of restitution under this section shall direct the defendant to pay to the victim (through the appropriate court mechanism) the full amount of the victim's losses as determined by the court pursuant to paragraph (2).

(2) **Enforcement.**—An order of restitution under this section shall be issued and enforced in accordance with section 3664 in the same manner as an order under section 3663A.

(3) **Definition.**—For purposes of this subsection, the term "full amount of the victim's losses" includes any costs incurred by the victim for—

(A) medical services relating to physical, psychiatric, or psychological care;

(B) physical and occupational therapy or rehabilitation;

(C) necessary transportation, temporary housing, and child care expenses;

(D) lost income;

(E) attorneys' fees, plus any costs incurred in obtaining a civil protection order; and

(F) any other losses suffered by the victim as a proximate result of the offense.

(4) **Order mandatory.**—(A) The issuance of a restitution order under this section is mandatory.

(B) A court may not decline to issue an order under this section because of—

(i) the economic circumstances of the defendant; or

(ii) the fact that a victim has, or is entitled to, receive compensation for his or her injuries from the proceeds of insurance or any other source.

[(C) and (D) Repealed. Pub.L. 104–132, Title II, § 205(b)(2)(C), Apr. 24, 1996, 110 Stat. 1231]

[(5) to (10) Repealed. Pub.L. 104–132, Title II, § 205(b)(2)(D), Apr. 24, 1996, 110 Stat. 1231]

(c) **Definition.**—For purposes of this section, the term "victim" means the individual harmed as a result of a commission of a crime under this chapter, including, in the case of a victim who is under 18 years of age, incompetent, incapacitated, or deceased, the legal guardian of the victim or representative of the victim's estate, another family member, or any other person appointed as suitable by the court, but in no event shall the defendant be named as such representative or guardian.

[(d) and (e) Repealed. Pub.L. 104–132, Title II, § 205(b)(3), Apr. 24, 1996, 110 Stat. 1231]

[(f) Redesignated (c)]

(Added Pub.L. 103–322, Title IV, § 40113(a)(1), Sept. 13, 1994, 108 Stat. 1904, and amended Pub.L. 104–132, Title II, § 205(b), Apr. 24, 1996, 110 Stat. 1231.)

HISTORICAL AND STATUTORY NOTES

Effective Date of 1996 Amendments

Section 211 of Pub.L. 104–132 provided that: "The amendments made by this subtitle [enacting sections 3613A and 3663A of this title, amending this section and sections 2259, 2264, 2327, 3013, 3556, 3563, 3572, 3611, 3612, 3613, 3614, 3663, and 3664 of this title and Rule 32 of the Federal Rules of Criminal Procedure, and enacting provisions set out as notes under this section, section 3551 of this title, and section 994 of Title 28, Judiciary and Judicial Procedure] shall, to the extent constitutionally permissible, be effective for sentencing proceedings in cases in which the defendant is convicted on or after the date of enactment of this Act [Apr. 24, 1996]."

Legislative History

For legislative history and purpose of Pub.L. 103–322, see 1994 U.S. Code Cong. and Adm. News, p. 1801. See, also, Pub.L. 104–132, 1996 U.S. Code Cong. and Adm. News, p. 924.

CHAPTER 110—SEXUAL EXPLOITATION AND OTHER ABUSE OF CHILDREN

§ 2251. Sexual exploitation of children

(a) Any person who employs, uses, persuades, induces, entices, or coerces any minor to engage in, or who has a minor assist any other person to engage in, or who transports any minor in interstate or foreign commerce, or in any Territory or Possession of the United States, with the intent that such minor engage in, any sexually explicit conduct for the purpose of producing any visual depiction of such conduct, shall be punished as provided under subsection (d), if such person knows or has reason to know that such visual depiction will be transported in interstate or foreign commerce or mailed, or if such visual depiction has actually been transported in interstate or foreign commerce or mailed.

(b) Any parent, legal guardian, or person having custody or control of a minor who knowingly permits such minor to engage in, or to assist any other person to engage in, sexually explicit conduct for the purpose of producing any visual depiction of such conduct shall be punished as provided under subsection (d) of this section, if such parent, legal guardian, or person knows or has reason to know that such visual depiction will be transported in interstate or foreign commerce or mailed or if such visual depiction has actually been transported in interstate or foreign commerce or mailed.

(c)(1) Any person who, in a circumstance described in paragraph (2), knowingly makes, prints, or publishes, or causes to be made, printed, or published, any notice or advertisement seeking or offering—

(A) to receive, exchange, buy, produce, display, distribute, or reproduce, any visual depiction, if the production of such visual depiction involves the use of a minor engaging in sexually explicit conduct and such visual depiction is of such conduct; or

(B) participation in any act of sexually explicit conduct by or with any minor for the purpose of producing a visual depiction of such conduct:

shall be punished as provided under subsection (d).

(2) The circumstance referred to in paragraph (1) is that—

(A) such person knows or has reason to know that such notice or advertisement will be transport-

identical to those otherwise provided for assaults involving an official victim; when no assault is involved, the offense level is 6.

Historical Note: Effective October 15, 1988 (see Appendix C, amendment 64). Amended effective November 1, 1989 (see Appendix C, amendments 89 and 90); November 1, 1992 (see Appendix C, amendment 443); November 1, 1997 (see Appendix C, amendment 550).

* * * * *

3. CRIMINAL SEXUAL ABUSE

§2A3.1. Criminal Sexual Abuse; Attempt to Commit Criminal Sexual Abuse

(a) Base Offense Level: 27

(b) Specific Offense Characteristics

(1) If the offense was committed by the means set forth in 18 U.S.C. § 2241(a) or (b) (including, but not limited to, the use or display of any dangerous weapon), increase by 4 levels.

(2) (A) If the victim had not attained the age of twelve years, increase by 4 levels; or (B) if the victim had attained the age of twelve years but had not attained the age of sixteen years, increase by 2 levels.

(3) If the victim was (A) in the custody, care, or supervisory control of the defendant; or (B) a person held in the custody of a correctional facility, increase by 2 levels.

(4) (A) If the victim sustained permanent or life-threatening bodily injury, increase by 4 levels; (B) if the victim sustained serious bodily injury, increase by 2 levels; or (C) if the degree of injury is between that specified in subdivisions (A) and (B), increase by 3 levels.

(5) If the victim was abducted, increase by 4 levels.

(c) Cross Reference

(1) If a victim was killed under circumstances that would constitute murder under 18 U.S.C. § 1111 had such killing taken place within the territorial or maritime jurisdiction of the United States, apply §2A1.1 (First Degree Murder).

(d) Special Instruction

(1) If the offense occurred in a correctional facility and the victim was a corrections employee, the offense shall be deemed to have an official victim for purposes of subsection (a) of §3A1.2 (Official Victim).

Commentary

Statutory Provisions: 18 U.S.C. §§ 2241, 2242. For additional statutory provision(s), see Appendix A (Statutory Index).

Application Notes:

1. *For purposes of this guideline—*

"Permanent or life-threatening bodily injury," "serious bodily injury," and "abducted" are defined in the Commentary to §1B1.1 (Application Instructions). However, for purposes of this guideline, "serious bodily injury" means conduct other than criminal sexual abuse, which already is taken into account in the base offense level under subsection (a).

"The means set forth in 18 U.S.C. § 2241(a) or (b)" are: by using force against the victim; by threatening or placing the victim in fear that any person will be subject to death, serious bodily injury, or kidnaping; by rendering the victim unconscious; or by administering by force or threat of force, or without the knowledge or permission of the victim, a drug, intoxicant, or other similar substance and thereby substantially impairing the ability of the victim to appraise or control conduct. This provision would apply, for example, where any dangerous weapon was used, brandished, or displayed to intimidate the victim.

2. *Subsection (b)(3), as it pertains to a victim in the custody, care, or supervisory control of the defendant, is intended to have broad application and is to be applied whenever the victim is entrusted to the defendant, whether temporarily or permanently. For example, teachers, day care providers, baby-sitters, or other temporary caretakers are among those who would be subject to this enhancement. In determining whether to apply this enhancement, the court should look to the actual relationship that existed between the defendant and the victim and not simply to the legal status of the defendant-victim relationship.*

3. *If the adjustment in subsection (b)(3) applies, do not apply §3B1.3 (Abuse of Position of Trust or Use of Special Skill).*

4. *If the defendant was convicted (A) of more than one act of criminal sexual abuse and the counts are grouped under §3D1.2 (Groups of Closely Related Counts), or (B) of only one such act but the court determines that the offense involved multiple acts of criminal sexual abuse of the same victim or different victims, an upward departure would be warranted.*

5. *If a victim was sexually abused by more than one participant, an upward departure may be warranted. See §5K2.8 (Extreme Conduct).*

6. *If the defendant's criminal history includes a prior sentence for conduct that is similar to the instant offense, an upward departure may be warranted.*

Background: Sexual offenses addressed in this section are crimes of violence. Because of their dangerousness, attempts are treated the same as completed acts of criminal sexual abuse. The maximum term of imprisonment authorized by statute is life imprisonment. The base offense level represents sexual abuse as set forth in 18 U.S.C. § 2242. An enhancement is provided for use of force; threat of death, serious bodily injury, or kidnapping; or certain other means as defined in 18 U.S.C. § 2241. This includes any use or threatened use of a dangerous weapon.

An enhancement is provided when the victim is less than sixteen years of age. An additional enhancement is provided where the victim is less than twelve years of age. Any criminal sexual abuse with a child less than twelve years of age, regardless of "consent," is governed by §2A3.1 (Criminal Sexual Abuse).

An enhancement for a custodial relationship between defendant and victim is also provided. Whether the custodial relationship is temporary or permanent, the defendant in such a case is a person the victim trusts or to whom the victim is entrusted. This represents the potential for greater and prolonged psychological damage. Also, an enhancement is provided where the victim was an inmate of, or a person employed in, a correctional facility. Finally, enhancements are provided for permanent, life-threatening, or serious bodily injury and abduction.

Historical Note: Effective November 1, 1987. Amended effective November 1, 1989 (see Appendix C, amendments 91 and 92); November 1, 1991 (see Appendix C, amendment 392); November 1, 1992 (see Appendix C, amendment 444); November 1, 1993 (see Appendix C, amendment 477); November 1, 1995 (see Appendix C, amendment 511); November 1, 1997 (see Appendix C, amendment 545).

§2A3.2. Criminal Sexual Abuse of a Minor (Statutory Rape) or Attempt to Commit Such Acts

(a) Base Offense Level: 15

(b) Specific Offense Characteristic

(1) If the victim was in the custody, care, or supervisory control of the defendant, increase by 2 levels.

(c) Cross Reference

(1) If the offense involved criminal sexual abuse or attempt to commit criminal sexual abuse (as defined in 18 U.S.C. § 2241 or § 2242), apply §2A3.1 (Criminal Sexual Abuse; Attempt to Commit Criminal Sexual Abuse).

Commentary

Statutory Provision: 18 U.S.C. § 2243(a). For additional statutory provision(s), see Appendix A (Statutory Index).

Application Notes:

1. *If the defendant committed the criminal sexual act in furtherance of a commercial scheme such as pandering, transporting persons for the purpose of prostitution, or the production of pornography, an upward departure may be warranted. See Chapter Five, Part K (Departures).*

2. *Subsection (b)(1) is intended to have broad application and is to be applied whenever the victim is entrusted to the defendant, whether temporarily or permanently. For example, teachers, day care providers, baby-sitters, or other temporary caretakers are among those who would be subject to this enhancement. In determining whether to apply this enhancement, the court should look to the actual relationship that existed between the defendant and the victim and not simply to the legal status of the defendant-victim relationship.*

3. *If the adjustment in subsection (b)(1) applies, do not apply §3B1.3 (Abuse of Position of Trust or Use of Special Skill).*

4. *If the defendant's criminal history includes a prior sentence for conduct that is similar to the instant offense, an upward departure may be warranted.*

Background: This section applies to sexual acts that would be lawful but for the age of the victim. It is assumed that at least a four-year age difference exists between the victim and the defendant, as specified in 18 U.S.C. § 2243(a). An enhancement is provided for a defendant who victimizes a minor under his supervision or care.

Historical Note: Effective November 1, 1987. Amended effective November 1, 1989 (see Appendix C, amendment 93); November 1, 1991 (see Appendix C, amendment 392); November 1, 1992 (see Appendix C, amendment 444); November 1, 1995 (see Appendix C, amendment 511).

§2A3.3. Criminal Sexual Abuse of a Ward or Attempt to Commit Such Acts

(a) Base Offense Level: 9

Commentary

Statutory Provision: 18 U.S.C. § 2243(b). For additional statutory provision(s), see Appendix A (Statutory Index).

Application Notes:

1. *A ward is a person in official detention under the custodial, supervisory, or disciplinary authority of the defendant.*

2. *If the defendant's criminal history includes a prior sentence for conduct that is similar to the instant offense, an upward departure may be warranted.*

Background: The offense covered by this section is a misdemeanor. The maximum term of imprisonment authorized by statute is one year.

Historical Note: Effective November 1, 1987. Amended effective November 1, 1989 (see Appendix C, amendment 94); November 1, 1995 (see Appendix C, amendment 511).

§2A3.4. Abusive Sexual Contact or Attempt to Commit Abusive Sexual Contact

(a) Base Offense Level:

(1) **16**, if the offense was committed by the means set forth in 18 U.S.C. § 2241(a) or (b);

(2) **12**, if the offense was committed by the means set forth in 18 U.S.C. § 2242;

(3) **10**, otherwise.

(b) Specific Offense Characteristics

(1) If the victim had not attained the age of twelve years, increase by **4** levels; but if the resulting offense level is less than **16**, increase to level **16**.

(2) If the base offense level is determined under subsection (a)(1) or (2), and the victim had attained the age of twelve years but had not attained the age of sixteen years, increase by **2** levels.

(3) If the victim was in the custody, care, or supervisory control of the defendant, increase by **2** levels.

(c) Cross References

(1) If the offense involved criminal sexual abuse or attempt to commit criminal sexual abuse (as defined in 18 U.S.C. § 2241 or § 2242), apply §2A3.1 (Criminal Sexual Abuse; Attempt to Commit Criminal Sexual Abuse).

(2) If the offense involved criminal sexual abuse of a minor or attempt to commit criminal sexual abuse of a minor (as defined in 18 U.S.C. § 2243(a)), apply §2A3.2 (Criminal Sexual Abuse of a Minor (Statutory Rape) or Attempt to Commit Such Acts), if the resulting offense level is greater than that determined above.

Commentary

Statutory Provisions: 18 U.S.C. § 2244(a)(1),(2),(3). For additional statutory provision(s), see Appendix A (Statutory Index).

Application Notes:

1. *"The means set forth in 18 U.S.C. § 2241(a) or (b)" are by using force against the victim; by threatening or placing the victim in fear that any person will be subjected to death, serious bodily injury, or kidnapping; by rendering the victim unconscious; or by administering by force or threat of force, or without the knowledge or permission of the victim, a drug, intoxicant, or other similar substance and thereby substantially impairing the ability of the victim to appraise or control conduct.*

2. *"The means set forth in 18 U.S.C. § 2242" are by threatening or placing the victim in fear (other than by threatening or placing the victim in fear that any person will be subjected to death, serious bodily injury, or kidnapping); or by victimizing an individual who is incapable of appraising the nature of the conduct or physically incapable of declining participation in, or communicating unwillingness to engage in, that sexual act.*

3. *Subsection (b)(3) is intended to have broad application and is to be applied whenever the victim is entrusted to the defendant, whether temporarily or permanently. For example, teachers, day care providers, baby-sitters, or other temporary caretakers are among those who would be subject to this enhancement. In determining whether to apply this enhancement, the court should look to the actual relationship that existed between the defendant and the victim and not simply to the legal status of the defendant-victim relationship.*

4. *If the adjustment in subsection (b)(3) applies, do not apply §3B1.3 (Abuse of Position of Trust or Use of Special Skill).*

5. *If the defendant's criminal history includes a prior sentence for conduct that is similar to the instant offense, an upward departure may be warranted.*

Background: This section covers abusive sexual contact not amounting to criminal sexual abuse (criminal sexual abuse is covered under §§2A3.1-3.3). Alternative base offense levels are provided to take account of the different means used to commit the offense. Enhancements are provided for victimizing children or minors. The enhancement under subsection (b)(2) does not apply, however, where the base offense level is determined under subsection (a)(3) because an element of the offense to which that offense level applies is that the victim had attained the age of twelve years but had not attained the age of sixteen years. For cases involving consensual sexual contact involving victims that have achieved the age of 12 but are under age 16, the offense level assumes a substantial difference in sexual experience between the defendant and the victim. If the defendant and the victim are similar in sexual experience, a downward departure may be warranted. For such cases, the Commission recommends a downward departure to the equivalent of an offense level of 6.

Historical Note: Effective November 1, 1987. Amended effective November 1, 1989 (see Appendix C, amendment 95); November 1, 1991 (see Appendix C, amendment 392); November 1, 1992 (see Appendix C, amendment 444); November 1, 1995 (see Appendix C, amendment 511).

* * * * *

United States of America, Appellee,
v.
Robert Lee WEASELHEAD, Jr., Appellant.

No. 97-4397.

United States Court of Appeals,
Eighth Circuit.

Submitted April 16, 1998.

Decided Sept. 9, 1998.

Appeal from the United States District Court for the District of Nebraska.

Before WOLLMAN, BEAM, and MORRIS SHEPPARD ARNOLD, Circuit Judges.

WOLLMAN, Circuit Judge.

***1** Robert Lee Weaselhead, Jr. appeals from an order by the district court denying his amended motion to dismiss the superseding indictment returned against him. He contends that Count III of the indictment offends the Double Jeopardy Clause of the Fifth Amendment. We reverse.

I.

Weaselhead is an adult Indian male and an enrolled member of the Blackfeet Indian Tribe of Montana. Although he now lives in Nebraska, he is not a member of the Winnebago Tribe domiciled in that state. In the early months of 1997, Weaselhead, then nineteen years old, entered into a sexual relationship with his fourteen-year-old girlfriend, a member of the Winnebago Tribe. This relationship was brought to the attention of tribal authorities. On March 20, 1997, Weaselhead was arraigned in Winnebago Tribal Court on charges of sexual assault, contributing to the delinquency of a minor, criminal trespass, and child abuse. Although the tribe was apparently aware that Weaselhead and the girl had engaged in sexual acts on more than one occasion, the indictment only charged conduct alleged to have occurred on March 15, 1997. Weaselhead's attorney negotiated a plea agreement with the tribal prosecutor. Pursuant to that agreement, Weaselhead pled no contest to one count of first degree sexual assault. The remaining charges were then dismissed. The tribal court entered a judgment of conviction and sentenced Weaselhead to, inter alia, 280 days in jail, 100 of which were suspended.

The same day that Weaselhead entered his plea in tribal court, he was indicted by a federal grand jury on a charge of engaging in a sexual act with an Indian female juvenile in violation of 18 U.S.C. §§ 2243 and 1153 (1997). He pled not guilty and moved to dismiss the indictment on double jeopardy grounds. The grand jury subsequently returned a superseding indictment, which charged three separate counts of sexual abuse. Counts I and II charged conduct occurring on February 27 and March 1, 1997, respectively. Count III charged sexual contact that occurred on March 15, the same incident that had resulted in Weaselhead's earlier conviction in tribal court.

Weaselhead then moved to dismiss each count. The magistrate judge submitted a report recommending that the motion be granted and the indictment dismissed on double jeopardy grounds, concluding that:

> [t]he dual prosecution of the defendant by both the tribal court and now the federal government does not implicate separate prosecutions by separate sovereigns. Rather, the tribal court was exercising jurisdiction over the defendant which flowed from a delegation of power from Congress and a subsequent prosecution by the federal government for the same offense is barred by the Fifth Amendment.

Report and Recommendation at 9. The government objected. Holding that the Double Jeopardy Clause was not implicated because the dual prosecution of Weaselhead was undertaken by separate sovereigns, the district court sustained the government's objections and denied the motion to dismiss.

***2** In this appeal brought pursuant to 28 U.S.C. § 1291, Weaselhead concedes the constitutional propriety of Counts I and II of the superseding indictment and challenges only the denial of his amended motion to dismiss Count III as a violation of double jeopardy. Our review is de novo. See United States v. Basile, 109 F.3d 1304, 1306 (8th Cir.), cert. denied, --- U.S. ----, 118 S.Ct. 189, 139 L.Ed.2d 128 (1997).

II.

The Double Jeopardy Clause of the Fifth Amendment provides that no person shall "be subject for the same offense to be twice put in jeopardy of life or limb." Protection from double jeopardy is a vital safeguard that is "fundamental to the American scheme of justice." United States v. Dixon, 913 F.2d 1305, 1309 (8th Cir.1990) (quoting Benton v. Maryland, 395 U.S.

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784, 796, 89 S.Ct. 2056, 23 L.Ed.2d 707 (1969)). "If such great constitutional protections are given a narrow, grudging application they are deprived of much of their significance." Dixon, 913 F.2d at 1309 (quoting Green v. United States, 355 U.S. 184, 198, 78 S.Ct. 221, 2 L.Ed.2d 199 (1957)).

The doctrine of dual sovereignty permits successive prosecutions by independent sovereigns based upon the same conduct. Because "each sovereign derives its power from a different constitutional source, ... both may prosecute and punish the same individual for the same act." Basile, 109 F.3d at 1307; see also Abbate v. United States, 359 U.S. 187, 193-96, 79 S.Ct. 666, 3 L.Ed.2d 729 (1959). Dual sovereignty principles are inapplicable, however, when the authority of two entities to prosecute an individual emanates from the same overriding sovereign. See, e.g., Waller v. Florida, 397 U.S. 387, 393-95, 90 S.Ct. 1184, 25 L.Ed.2d 435 (1970) (holding that city and state in which it was political subdivision could not bring successive prosecutions for same unlawful conduct despite fact that state law treated them as separate sovereigns); Puerto Rico v. Shell Co., 302 U.S. 253, 264-66, 58 S.Ct. 167, 82 L.Ed. 235 (1937) (holding that successive prosecutions by federal and territorial courts are impermissible because such courts are "creations emanating from the same sovereignty"); Grafton v. United States, 206 U.S. 333, 351-55, 27 S.Ct. 749, 51 L.Ed. 1084 (1907) (holding that soldier acquitted of murder by federal court-martial could not be retried for same offense by territorial court in Philippines). Thus, application of the dual sovereignty exception "turns on whether the two entities draw their authority to punish the offender from distinct sources of power." Heath v. Alabama, 474 U.S. 82, 88, 106 S.Ct. 433, 88 L.Ed.2d 387 (1985); see also United States v. Sanchez, 992 F.2d 1143, 1149-50 (11th Cir.1993).

***3** In United States v. Wheeler, 435 U.S. 313, 314, 98 S.Ct. 1079, 55 L.Ed.2d 303 (1978), the question was whether the Double Jeopardy Clause barred prosecution of an Indian in federal court after he had been convicted in tribal court of a lesser included offense arising out of the same incident. [FN1] The Court framed the issue as follows:

> It is undisputed that Indian tribes have power to enforce their criminal laws against tribe members. Although physically within the territory of the United States and subject to ultimate federal control, they nonetheless remain "a separate people, with the power of regulating their internal and social relations." Their right of internal self-government includes the right to prescribe laws applicable to tribe members and to enforce those laws by criminal sanctions.... [T]he controlling question in this case is the source of this power to punish tribal offenders: Is it a part of inherent tribal sovereignty, or an aspect of the sovereignty of the Federal Government which has been delegated to the tribes by Congress?

Id. at 322 (citations omitted). Thus, if the power to punish tribe members emanated from the tribe's inherent sovereignty, double jeopardy would not be implicated by a subsequent federal prosecution for the same conduct. However, if the ultimate source of power was "an aspect of the sovereignty of the Federal Government which [had] been delegated to the tribes by Congress," the Double Jeopardy Clause would bar a subsequent federal prosecution. Id.; see also Heath, 474 U.S. at 90-91.

The Court held that an Indian tribe's criminal jurisdiction over its members emanates from its inherent sovereign powers:

> [T]he sovereign power of a tribe to prosecute its members for tribal offenses clearly does not fall within that part of sovereignty which the Indians implicitly lost by virtue of their dependent status. The areas which such implicit divestiture of sovereignty has been held to have occurred are those involving the relations between an Indian tribe and nonmembers of the tribe. Thus, Indian tribes can no longer freely alienate to non-Indians the land they occupy. They cannot enter into direct commercial or governmental relations with foreign nations. And, as we have recently held, they cannot try nonmembers in tribal courts. These limitations rest on the fact that the dependent status of Indian tribes within our territorial jurisdiction is necessarily inconsistent with their freedom independently to determine their external relations. But the powers of self-government, including the power to prescribe and enforce internal criminal laws, are of a different type. They involve only the relations among members of a tribe. Thus, they are not such powers as would necessarily be lost by virtue of a tribe's dependent status.

Wheeler, 435 U.S. at 325-26 (citations omitted) (emphasis supplied). The Court therefore concluded:

> ***4** [T]he power to punish offenses against tribal law committed by Tribe members, which was part of the Navajos' primeval sovereignty, has never been taken away from them, either explicitly or implicitly, and is attributable in no way to any delegation to them of federal authority. It follows that when the Navajo Tribe exercises this power, it does so as part of its retained sovereignty and not as an arm of the Federal

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Government.
Id. at 328. As a result, when successive prosecutions of a tribe member are brought in tribal court and federal court, double jeopardy principles are not offended. See id. at 329-30; Heath, 474 U.S. at 90-91.

This case presents the necessary corollary to the holding in Wheeler. Here, the "controlling question ... is the source of [the] power to punish" nonmembers of the tribe whose racial status is nonetheless Indian. 435 U.S. at 322. Thus, we must determine whether the source of such power is "a part of inherent tribal sovereignty, or an aspect of the sovereignty of the Federal Government which has been delegated to the tribes by Congress." Id.

III.

By virtue of their status as the aboriginal peoples of this continent, Indian tribes retain certain incidents of their preexisting inherent sovereignty. Among these is the right to internal self-government, which "includes the right to prescribe laws applicable to tribe members and to enforce those laws by criminal sanctions." Id. The Supreme Court has interpreted the Indian Commerce Clause as granting Congress a "plenary power to legislate in the field of Indian affairs." Cotton Petroleum Corp. v. New Mexico, 490 U.S. 163, 192, 109 S.Ct. 1698, 104 L.Ed.2d 209 (1989); see U.S. Const. art. I, § 8, cl. 3. Thus, "[t]he sovereignty that the Indian tribes retain is of a unique and limited character. It exists only at the sufferance of Congress and is subject to complete defeasance." Wheeler, 435 U.S. at 323; see also United States v. Wadena, No. 96-4141, slip op. (8th Cir. Aug. 11, 1998).

In Oliphant v. Suquamish Indian Tribe, 435 U.S. 191, 195, 98 S.Ct. 1011, 55 L.Ed.2d 209 (1978), the Supreme Court held that Indian tribal courts do not have inherent criminal jurisdiction over non-Indians and therefore cannot assume such jurisdiction, at least not without specific legislative authorization to do so. As explained by the Court:

> [T]he tribes' retained powers are not such that they are limited only by specific restrictions in treaties or congressional enactments.... Upon incorporation into the territory of the United States, the Indian tribes thereby come under the territorial sovereignty of the United States and their exercise of separate power is constrained so as not to conflict with the interests of this overriding sovereignty. "[T]heir rights to complete sovereignty, as independent nations, [are] necessarily diminished."

*5 Id. at 208-09 (alterations in original) (citation omitted); see also Wheeler, 435 U.S. at 322-26 (discussing organic law doctrine of "implicit divestiture of sovereignty"). As a result, the Court concluded, "an examination of our earlier precedents satisfies us that, even ignoring treaty provisions and congressional policy, Indians do not have criminal jurisdiction over non- Indians absent affirmative delegation of such power by Congress." Oliphant, 435 U.S. at 208; see also Montana v. United States, 450 U.S. 544, 565, 101 S.Ct. 1245, 67 L.Ed.2d 493 (1981) (recognizing "general proposition that the inherent sovereign powers of an Indian tribe do not extend to the activities of nonmembers of the tribe").

In Duro v. Reina, 495 U.S. 676, 685, 110 S.Ct. 2053, 109 L.Ed.2d 693 (1990), the Court confirmed its earlier statements that, at least in criminal matters, a tribe's inherent sovereign powers extend only to tribe members, irrespective of an individual's racial status as an Indian. [FN2] It recognized that when a criminal prosecution reflects a "manifestation of external relations between the Tribe and outsiders," including nonmember Indians, such jurisdiction is necessarily "inconsistent with the Tribe's dependent status, and could only have come to the Tribe by delegation from Congress." Id. at 686. Importantly, any such congressional delegation of power is "subject to the constraints of the Constitution." Id. This is so because "[t]he exercise of criminal jurisdiction subjects a person not only to the adjudicatory power of the tribunal, but also to the prosecuting power of the tribe, and involves a far more direct intrusion on personal liberties." Id. at 688. Because all Indians are also full citizens of the United States, such an intrusion necessarily implicates "constitutional limitations," including the "fundamental basis for power within our constitutional system" that authority to govern is derived from "the consent of the governed." Id. at 693-94.

> Criminal trial and punishment is so serious an intrusion on personal liberty that its exercise over non-Indian citizens was a power necessarily surrendered by the tribes in their submission to the overriding sovereignty of the United States. [citation omitted]. We hesitate to adopt a view of tribal sovereignty that would single out another group of citizens, nonmember Indians, for trial by political bodies that do not include them. As full citizens, Indians share in the territorial and political sovereignty of the United States. The retained sovereignty of the tribe is but a recognition of certain additional authority the tribes maintain over Indians

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who consent to be tribal members. Indians like all other citizens share allegiance to the overriding sovereign, the United States. A tribe's additional authority comes from the consent of its members, and so in the criminal sphere membership marks the bounds of tribal authority.

*6 Id. at 693. Thus, "the sovereignty retained by the tribes in their dependent status within our scheme of government," does not include "the power of criminal jurisdiction over nonmembers." Id. at 684. Instead, the fundamental status of an Indian who is not a member of the tribe that seeks to prosecute him is identical to that of a non-Indian. See id. at 693.

Congress responded to Duro by amending the Indian Civil Rights Act (ICRA), 25 U.S.C. §§ 1301-03 (1983 & Supp.1998). [FN3] The amendment redefined the statute's definition of "powers of self-government" to include "the inherent power of Indian tribes, hereby recognized and affirmed, to exercise criminal jurisdiction over all Indians." 25 U.S.C. § 1301(2). It also created a definition of "Indian," as "any person who would be subject to the jurisdiction of the United States as an Indian under section 1153 of Title 18 if that person were to commit an offense listed in that section in Indian country to which that section applies." 25 U.S.C. § 1301(4).

These post-Duro amendments reflect an attempt by Congress to rewrite the fundamental principles upon which Duro, Oliphant, and Wheeler were based by redefining the Indian tribes' "inherent" sovereign status as having always included criminal jurisdiction over nonmember Indians. [FN4] Thus, we are presented with a legislative enactment purporting to recast history in a manner that alters the Supreme Court's stated understanding of the organizing principles by which the Indian tribes were incorporated into our constitutional system of government. The question we must address, then, is whether the amendment's authorization of criminal jurisdiction over nonmember Indians is, as Congress asserted, simply a non-substantive "recognition" of inherent rights that Indian tribes have always held or whether it constitutes an affirmative delegation of power.

The Supreme Court has not yet had occasion to directly construe the post- Duro revision of the ICRA. However, in South Dakota v. Bourland, 508 U.S. 679, 694-95, 113 S.Ct. 2309, 124 L.Ed.2d 606 (1993), issued after the changes had been enacted and permanently codified, the Court once again affirmed the principle that jurisdiction of an Indian tribe over nonmembers of the tribe, irrespective of race, is neither inherent nor sovereign, and is not possible absent an affirmative delegation of power from Congress:

> The dissent's complaint that we give "barely a nod" to the Tribe's inherent sovereignty argument is simply another manifestation of its disagreement with Montana, which announced "the general proposition that the inherent sovereign powers of an Indian tribe do not extend to the activities of nonmembers of the tribe," 450 U.S., at 565, 101 S.Ct., at 1258. While the dissent refers to our "myopic focus" on the Tribe's prior treaty right to "absolute and undisturbed use and occupation" of the taken area, it shuts both eyes to the reality that after Montana, tribal sovereignty over nonmembers "cannot survive without express congressional delegation," 450 U.S., at 564, 101 S.Ct., at 1258, and is therefore not inherent.

*7 508 U.S. at 695 n. 15 (internal citations omitted); see also Strate v. A-1 Contractors, 520 U.S. 438, 117 S.Ct. 1404, 1409 & n. 5, 137 L.Ed.2d 661 (1997); Montana v. Horseman, 263 Mont. 87, 866 P.2d 1110, 1115 (Mont.1993) (holding that Indian tribe's criminal jurisdiction over nonmember Indian was governed by status of law at time of crime and stating that "[a]lthough the Duro decision has been superseded by statute, the decision is still good law as it involves tribal sovereignty").

Although Congress possesses a sweeping, plenary power to regulate Indian affairs under the Indian Commerce Clause, that power remains subject to constitutional limitations. [FN5] It is necessarily tempered by "judicially enforceable outer limits," including "the judiciary's duty 'to say what the law is,' " which extends to interpretation of the Constitution itself. United States v. Lopez, 514 U.S. 549, 566, 115 S.Ct. 1624, 131 L.Ed.2d 626 (1995) (quoting Marbury v. Madison, 1 Cranch 137, 177, 2 L.Ed. 60 (1803)).

We conclude that ascertainment of first principles regarding the position of Indian tribes within our constitutional structure of government is a matter ultimately entrusted to the Court and thus beyond the scope of Congress's authority to alter retroactively by legislative fiat. Fundamental, ab initio matters of constitutional history should not be committed to "[s]hifting legislative majorities" free to arbitrarily interpret and reorder the organic law as public sentiment veers in one direction or another. City of Boerne v. Flores, --- U.S. ----, ----, 117 S.Ct. 2157, 2168, 138 L.Ed.2d 624 (1997).

Prior to the post-Duro amendment, criminal

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jurisdiction over nonmember Indians did not exist, as it had been "necessarily surrendered by the tribes in their submission to the overriding sovereignty of the United States." Duro, 495 U.S. at 693. Although Congress presumably acted within its power in delegating criminal jurisdiction over nonmember Indians to the tribes, it was beyond Congress's power to declare existent a sovereignty-based jurisdiction that the Court has declared to be nonexistent. Thus, we conclude that the post- Duro amendment to the ICRA constitutes an affirmative delegation of jurisdiction from Congress to the tribes.

IV.

Because the power of the Winnebago Tribe to punish those who are not its members emanates solely from congressionally delegated authority, the tribal court that convicted Weaselhead and the federal court in which a second conviction is now sought to be secured do not "draw their authority to punish the offender from distinct sources of power" but from the identical source. Heath, 474 U.S. at 88. The dual sovereignty limitation on the constitutional protection from double jeopardy is therefore inapplicable, and the Double Jeopardy Clause bars federal prosecution of Weaselhead for the same conduct that provided the factual basis for his earlier conviction in tribal court.

*8 The order denying Weaselhead's motion to dismiss Count III of the superseding indictment is reversed, and the case is remanded to the district court for further proceedings consistent with this opinion.

MORRIS SHEPPARD ARNOLD, Circuit Judge, dissenting.

As I understand it, the court is of the opinion that the determination of what sovereign powers Indian tribes inherently possess is somehow "ultimately entrusted to the [Supreme] Court and thus beyond the scope of Congress's authority to alter retroactively by legislative fiat." I respectfully disagree and cannot locate any such legal principle in the relevant cases or in the Constitution.

The court's reference to "the position of Indian tribes within our constitutional structure of government" would seem to indicate that it believes that inherent Indian sovereignty is defined by the Constitution, as would the court's reliance on Marbury v. Madison, 5 U.S. (1 Cranch) 137, 177, 2 L.Ed. 60 (1803). Indeed, it would be difficult to understand how Congress could have no power over determining the parameters of inherent tribal sovereignty unless the matter had some constitutional basis. But that is not the case.

Chief Justice Marshall, in Cherokee Nation v. Georgia, 30 U.S. (5 Peters) 1, 16-19, 8 L.Ed. 25 (1831), suggested that the question of whether an Indian tribe was a state was to be determined by reference to the uniform custom of nations and, more important, by reference to the history of our country's dealings with various Indian tribes. Indian tribes, he wrote, "have been uniformly treated as a state, from the settlement of our country.... The acts of our government plainly recognise the Cherokee nation as a state, and the courts are bound by those acts." Id. at 16. Chief Justice Marshall made no intimation that the Constitution had anything to say on the question of whether Indian tribes are states. The Constitution is simply silent on the matter and on the related question of inherent Indian sovereignty. These are matters that are to be decided by reference to governmental custom and practice and to the general principles of the jus gentium.

In other words, the question of what powers Indian tribes inherently possess, as the district court recognized, has always been a matter of federal common law. As a recent law review article noted, "Oliphant and Duro were not constitutional decisions; they were founded instead on federal common law." See L. Scott Gould, The Consent Paradigm: Tribal Sovereignty at the Millennium, 96 Colum. L.Rev. 809, 853 (1996). That being the case, Congress has the power to expand and contract the inherent sovereignty that Indian tribes possess because it has legislative authority over federal common law.

The tribal court in this case thus proceeded under an inherent sovereignty, not under one that Congress delegated, in exercising jurisdiction over Mr. Weaselhead, and the doctrine of double jeopardy would therefore not bar a further prosecution of him by the federal government.

*9 I therefore respectfully dissent and would affirm the district court on the basis of its well-reasoned opinion.

FN1. Prior to Wheeler, we had held that the Double Jeopardy Clause did not bar successive tribal and federal prosecutions of a tribe member for the same offense, creating a division of authority among the circuits. See United States v. Walking Crow, 560 F.2d 386, 388-89 (8th Cir.1977); Wheeler, 435 U.S. at 316 n. 6.

FN2. The Duro decision confirmed our prior holding

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that tribal courts are without criminal jurisdiction over nonmembers, including nonmember Indians. See Greywater v. Joshua, 846 F.2d 486, 493 (8th Cir.1988) ("We thus conclude that the Tribe's authority to prosecute nonmember Indians is nonexistent").

FN3. The amendment was initially effective only through September 30, 1991, but was subsequently enacted as a permanent measure. See Pub.L. No. 101-511, § 8077, 104 Stat. 1856, 1892-93 (1990) (codified at 25 U.S.C. § 1301(2), (4)); Pub.L. No. 102-137, § 1, 105 Stat. 646 (1991) (codified at 25 U.S.C. § 1301(2), (4)).

FN4. Weaselhead concedes, and we agree, that Congress's intent to do so is plain from the legislative history. See Mousseaux v. United States Comm'r of Indian Affairs, 806 F.Supp. 1433, 1441-43 (D.S.D.1992), aff'd in part and remanded in part on other grounds, 28 F.3d 786 (8th Cir.1994) (detailing legislative history of postDuro amendments and intent of Congress to thereby create "legal fiction" that Duro was never decided).

FN5. See, e.g., Seminole Tribe of Florida v. Florida, 517 U.S. 44, 72- 73, 116 S.Ct. 1114, 134 L.Ed.2d 252 (1996) (holding that Eleventh Amendment prevented Congress from authorizing suits by Indian tribes against States to enforce legislation enacted pursuant to Indian Commerce Clause); Duro, 495 U.S. at 693 (1990) (stating that Supreme Court precedent regarding legislative power over Indian affairs suggests "constitutional limitations even on the ability of Congress to subject American citizens to criminal proceedings before a tribunal that does not provide constitutional protections as a matter of right"); Hodel v. Irving, 481 U.S. 704, 712- 18, 107 S.Ct. 2076, 95 L.Ed.2d 668 (1987) (holding that congressional statute which escheated tribe members' and others' fractional interests in reservation trust lands to tribe was unconstitutional taking); Delaware Tribal Business Comm. v. Weeks, 430 U.S. 73, 84-85, 97 S.Ct. 911, 51 L.Ed.2d 173 (1977) (holding that plenary power of Congress in matters of Indian affairs is not absolute nor immune from judicial scrutiny); Morton v. Mancari, 417 U.S. 535, 553-55, 94 S.Ct. 2474, 41 L.Ed.2d 290 (1974) (stating that standard for determining whether statute was appropriate exercise of authority under Indian Commerce Clause is whether it is "tied rationally to the fulfillment of Congress' unique obligation toward the Indians").

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National Center on Child Abuse and Neglect

The Role of Law Enforcement in the Response to Child Abuse and Neglect

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The User Manual Series

U.S. DEPARTMENT OF HEALTH AND HUMAN SERVICES
Administration for Children and Families
Administration on Children, Youth and Families
National Center on Child Abuse and Neglect

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The Role of Law Enforcement in the Response to Child Abuse and Neglect

Donna Pence
Charles Wilson

1992

U.S. Department of Health and Human Services
Administration for Children and Families
Administration on Children, Youth and Families
National Center on Child Abuse and Neglect

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The Department of Health and Human Services acknowledges the contribution of Diane D. Broadhurst, author of *The Role of Law Enforcement n the Prevention and Treatment of Child Abuse and Neglect*, 1979. Ms Broadhurst also authored the 1984 revision to this manual.

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PREFACE

The Child Abuse Prevention and Treatment Act was signed into law in 1974. Since that time, the Federal Government has served as a catalyst to mobilize society's social service, mental health, medical, education, legal, and law enforcement resources to address the challenges in the prevention and treatment of child abuse and neglect. In 1977, in one of its early efforts, the National Center on Child Abuse and Neglect (NCCAN) developed 21 manuals (the *User Manual Series*) designed to provide guidance to professionals involved in the child protection system and to enhance community collaboration and the quality of services provided to children and families. Some manuals described professional roles and responsibilities in the prevention, identification, and treatment of child maltreatment. Other manuals in the series addressed special topics, for example, adolescent abuse and neglect.

Our understanding of the complex problems of child abuse and neglect has increased dramatically since the user manuals were developed. This increased knowledge has improved our ability to intervene effectively in the lives of troubled families. For example, it was not until the early 1980's that sexual abuse became a major focus in child maltreatment research and treatment. Likewise, we have a better grasp of what we can do to prevent child abuse and neglect from occurring. Furthermore, our knowledge of the unique roles key professionals can play in child protection has been defined more clearly, and a great deal has been learned about how to enhance coordination and collaboration of community agencies and professionals. Currently, we are facing new and more serious problems in families who maltreat their children. For example, there is a significant percentage of families known to Child Protective Services (CPS) who are experiencing substance abuse problems; the first "drug-exposed infant" appeared in the literature in 1985.

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Because our knowledge base has increased significantly and the state-of-the-art of practice has improved considerably, NCCAN has updated the *User Manual Series* by revising many of the existing manuals and creating new manuals that address current innovations, concerns, and issues in the prevention and treatment of child maltreatment. The user manuals offer a distillation of the current knowledge base in the field of child maltreatment, but cannot cover all aspects of the topic completely. These manuals should not serve as substitutes for a thorough familiarity with professional standards.

This manual, *The Role of Law Enforcement in the Response to Child Abuse and Neglect*, provides the foundation for the involvement of law enforcement agencies in combating the crime of child abuse and neglect. The manual is intended to be used primarily by local, State, tribal, and military law enforcement agencies. It may also be used by other professionals involved in child abuse and neglect intervention such as CPS, education, mental health, legal, health care, and early childhood professionals to gain a better understanding of the role of law enforcement in child protection. Other manuals are available that examine the role of CPS caseworkers, educators, health providers, and legal professionals, as well as a basic manual that provides an overview of the problem of child abuse and neglect and the roles of the key professionals in the prevention, identification, and treatment of child maltreatment.

ACKNOWLEDGMENTS

Donna M. Pence, Special Agent, Tennessee Bureau of Investigation, is currently Training Coordinator for the Bureau. A 17-year law enforcement veteran, Agent Pence was previously assigned to the Special Investigations Unit where she coordinated the Bureau's activities on Missing Children and Child Sexual Abuse Investigations. In addition to her training duties, she also consults on child sexual abuse and child homicide cases throughout the State. She is the primary trainer at the Tennessee Law Enforcement Training Academy on child abuse investigations. A nationally recognized trainer, she has published articles on child abuse investigation topics. Professional affiliations include the International Association of Women Police, FBI National Academy Associates, the American Professional Society on the Abuse of Children, and the Tennessee Child Advocacy Network.

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INTRODUCTION

PURPOSE OF MANUAL

This manual is designed to provide guidance to local and State law enforcement agencies, tribal police agencies, and law enforcement officials within the military establishment as they plan their involvement and fulfill their responsibilities in combating child abuse. The manual examines:

- the roles of law enforcement in the intervention of child maltreatment;
- the nature of team investigations;
- the investigative process;
- how other disciplines interrelate with law enforcement;
- interviewing children; and
- specialized types of investigations and issues of significant interest to law enforcement officers.

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The manual also will be useful to other professionals, especially child protective service (CPS) caseworkers as they attempt to work in a multidisciplinary environment with law enforcement personnel. If other professionals understand the role of law enforcement personnel and their motivations, potential conflict between disciplines can be reduced.

OVERVIEW OF THE CHILD PROTECTION SYSTEM

Law enforcement is one of the key professions involved in the child protection system. Each discipline involved in the system maintains its own purpose, authority, philosophical basis, and approaches to intervening in child abuse and neglect. For example, Child Protective Services (CPS) generally is designated as the agency responsible for receiving reports of intrafamilial child maltreatment (and in some States all types of abuse or neglect). The CPS agency maintains a social work orientation, with a focus on protection of the child from further abuse and neglect and maintaining the integrity of the family. CPS has a rehabilitative focus in its intervention. State and Federal laws and professional values and standards support the preservation or reunification of the family. Decision making in these agencies is often shared, with individual CPS caseworkers seeking consultation from supervisors or legal counsel prior to significant case action such as the removal of a child from his/her family.

Most child protection systems receive reports 24 hours a day. Some do so through family "hotlines" at the local or State level while other, generally more rural communities rely on law enforcement to receive the calls after hours. Law enforcement refers the emergencies to the "on-call" CPS caseworker. A few States rely exclusively on law enforcement for after hours emergency response. A limited number of agencies contract with private agencies to handle these cases. The largest percentage of the total reports are cases of neglect. In most jurisdictions law enforcement only becomes involved with the more serious cases, those involving serious injury, sexual assault, and death.

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Law enforcement's mission is to investigate crimes and refer those believed responsible for the crime for criminal prosecution. The police agency is organized in a quasi-military structure with clear lines of authority. Individual officers generally act on their judgment without the requirement of formal consultation with supervisors. The prosecutor and other professionals, such as victim/witness advocates, use the results of law enforcement investigations to prosecute cases and assist victims.

Other key professionals such as physicians and other health personnel not only treat the injuries incurred as the result of abuse, but also provide critical information to investigators. Mental health professionals are also valuable members of the community's child protection team, assisting investigators in understanding what has happened to the child and using their skills to treat the emotional effects of maltreatment. Officers involved in the child protection system encounter a greater diversity of judicial forums than in other areas of law enforcement. Not only will they work with prosecutors and criminal courts, but they may find themselves called upon to testify in juvenile or family court, divorce courts (when allegations of abuse are being considered), and even before State administrative bodies such as day care licensing boards. Often less known to the law enforcement officers are the other members of the community's child protection system such as public health professionals, domestic violence shelter staff, homemakers, volunteers, educators, self-help groups, and others.

ROLE OF LAW ENFORCEMENT IN COMBATING CHILD MALTREATMENT

Law enforcement officers tend to view child abuse and neglect not as a social problem, but rather in the context of criminal law, and in "most States, all or most all forms of reportable child abuse or child neglect are crimes."[1] Consequently, officers generally focus their energy on preservation and collection of evidence for criminal prosecution. Unless they have been trained in the philosophy of child protection, law enforcement officers will generally see little importance in family preservation. Many officers will believe a parent who abuses or neglects a child has abdicated parental responsibilities and does not deserve to care for the maltreated child. Most officers will consider incarceration of the person(s) responsible for the child's condition as the desirable outcome. As officers gain experience in cases of child maltreatment, they often begin to appreciate the civil protection alternatives CPS offers, the value of casework intervention, and the need for efforts to protect children without resorting to out-of-home placement.

Child abuse and neglect represents a departure from the more traditional law enforcement cases. Most crime reports can be accepted as generally factual. That is, if Mrs. Jones reports her house has been burglarized, the responding officers can enter the case with the presumption that a crime has occurred and set out to find the person(s) responsible. In child maltreatment cases, however, the officer must first establish that a crime has, in fact, occurred. He or she cannot assume, in the absence of other evidence, that the injury or sexual assault reported has occurred, and that the child's condition is the result of an individual's actions or willful inactions. In fact, 47 percent of cases of child abuse or neglect reported to CPS across the Nation do not present adequate evidence to be substantiated.[2] (Law enforcement officers can expect to see a somewhat higher rate of substantiated cases due to the nature of the cases with which they typically get involved.) The role of the law enforcement officer and the CPS caseworker, as well, is *first to determine if abuse or neglect has occurred*, and if so, *who is responsible*, then decide *what actions*, if any, *are necessary to protect the child*. Only then can the officer really focus on collecting the evidence necessary for a criminal prosecution.

SPECIALIZED KNOWLEDGE AND SKILLS

The crimes of child abuse and neglect also present some other unique issues. First, the victim is always a child, and some are very young. The officer's ability to communicate with children is dependent upon his/her understanding of cognitive and language development of children. The crime victims in this class of case are at a disadvantage in any subsequent legal proceedings. Second, many forms of abuse resemble nonabusive conditions. Inflicted traumatic injuries will be described by defense attorneys as the result of accidents. Some medical conditions may also be initially misdiagnosed as maltreatment, even by trained medical professionals. Therefore, the officer must consider all reasonable alternative explanations for the child's condition. The situation is especially sensitive when it involves child death. Complicating the investigation further is the fact that child abuse and neglect generally occurs in private places and the victims, for a number of reasons, may actively try to hide the evidence of maltreatment and deny its existence even when approached by an investigator.

Law enforcement officers assigned to child abuse investigations must possess special skills. The investigators chosen for this type of work should be able to communicate and empathize not only with the victim but also

with the family and the perpetrator. In many instances, if the investigator can talk effectively with the offender, he or she can obtain a confession or other incriminating statements. Often, meticulous, detailed effort is necessary to build the case. Also, knowledge of the patterns and types of child maltreatment is a necessity for the investigator.

Investigators who work with child abuse cases must receive special training. While a good investigator can work on a child abuse case, specialized knowledge and skills eliminate much of the guesswork on the part of the investigator. Any law enforcement training provided to investigators must focus on the special needs of the victim. It is important for the investigator to realize that the victims of child abuse may suffer both psychological and physiological trauma. Immediate attention to psychological wounds assures greater possibility of successful treatment just as immediate attention to physical wounds assures greater probability of successful medical treatment. Finally, investigators must also be able to share authority with other disciplines and work in a team environment with CPS officials if the outcome of all agencies is to be achieved.

LAW ENFORCEMENT ROLES

Law enforcement officers play many roles in the community's response to child abuse and neglect.

Prevention/Advocacy

Because law enforcement officers are seen as a symbol of public safety, they are in an excellent position to raise community awareness about child abuse and neglect. Their perspective on the issue will carry significant weight with the media and the public at large. Because of this, many law enforcement agencies actively participate in community education efforts designed to reduce the risk of child abuse and neglect and encourage reporting. The most common prevention programs are held in school settings and target extrafamilial sexual abuse. Officers conducting such programs must balance their presentations with material on abuse by relatives and caregivers if programs are to be effective for most potential victims.

Reporting

Because of their presence in the community, law enforcement officers often encounter situations that appear to involve child maltreatment. For example, on domestic calls or during drug arrests the officer may see evidence of harm to a child. Police are, in fact, legally mandated to report any suspected abuse and neglect in all but three States.[3] Nationally, law enforcement makes about 16 percent of all reports of suspected maltreatment to CPS.[4]

Support to Child Protective Services

It is increasingly important for CPS and law enforcement to work together. One area of cooperation involves law enforcement support to CPS. Sometimes CPS caseworkers must visit isolated, dangerous locations and deal with mentally unstable, violent, and/or substance controlled individuals. Caseworkers generally do not have on-site communication (radio, car phone, etc.), weapons, or special training in self-protection. Because of this and the stabilizing effect that law enforcement personnel have on many people, it is often necessary for law enforcement personnel to accompany CPS caseworkers to conduct their investigations.

Law enforcement officers may accompany CPS caseworkers based on the location of investigation, the time of night, or history of the subjects involved. Failure to have proper backup has unfortunately resulted in the deaths of several CPS caseworkers and injuries to many others.

Law enforcement's authority is also much more widely accepted than the CPS authority. Many times CPS caseworkers are denied access to alleged victims of maltreatment while law enforcement's requests to see the child are honored. The officer with the power of arrest is also in an excellent position to enforce any standing orders of the court. For example, in States that allow warrantless arrests of those violating civil protection orders, the officer may be able to remove an offender from the home who has previously been placed under restrictions by the court. In some circumstances, this may avoid the need to remove a child from his/her home.

When it is necessary to remove children from their home, law enforcement officers are often called upon for assistance. Law enforcement has general authority to take custody of children. However, 46 States give specific authority to officers to take legal custody of children without a court order.[5] Approximately 20 other States also provide the same authority to CPS caseworkers[6] but "most do not attempt forcible removal of the child without police assistance. This is good practice, because the parent is less likely to react violently if police are present."[7]

Immediate Response

Law enforcement is often able to react to emergency situations faster than CPS. If officials learn that a child is being seriously abused or the perpetrator is trying to flee the jurisdiction of the court with a child in State custody, a patrol unit can generally get to the scene much faster than CPS and stabilize the situation until CPS and/or law enforcement investigators can arrive. Law enforcement is also available 24 hours per day while the CPS after hour response is limited in some communities.

Investigative Role

Law enforcement is the criminal investigative agency in the community and often must investigate the same incident, involving the same people, as CPS. In many communities this involves a parallel investigation where CPS and law enforcement must attempt to not work at cross purposes. *To avoid potential conflict and to improve investigative outcomes, a team approach with CPS and law enforcement working collaboratively is far more desirable.*

There are, however, cases of maltreatment where law enforcement personnel generally work alone or take the lead role. These include child homicides, particularly where no other children are in the home; out-of-home care abuse (in many States); commercial child pornography (these cases often involve law enforcement teams with postal inspectors and the FBI); and organized sexual exploitation of minors (again involving the FBI if State lines were crossed).

Victim Support

In communities where no victim witness services are available, the law enforcement officer may be called upon to help prepare and support the child victim through the experience of prosecution. This may include taking the child to the courtroom prior to trial to see where everyone sits and explain what each person's role is; it may simply mean being available to a child who wants to talk about what is happening during the trial.

THE TEAM INVESTIGATION

Increasingly, professionals involved in child abuse and neglect investigations recognize the need to eliminate unnecessary duplication of effort, to promote proper and expeditious collection and preservation of evidence,[8] and to "develop a coordinated system for identifying and investigating appropriate calls."[9] This is best accomplished through a team approach[10] where both CPS and law enforcement work collaboratively, sharing information, assigning investigative tasks, and participating in a shared decision-making process. As a result of a team effort, the victim is less likely to be further traumatized by the investigation and a positive outcome for all investigative parties is enhanced.

As the Tennessee Child Sexual Abuse Task Force found in 1986,

> The team representatives of each discipline (law enforcement, child protective services, and in some cases prosecutors and mental health) bring their various expertise to be utilized as part of the total investigative process. By applying their expertise as part of a coordinated effort the Team members can work more efficiently and effectively. The independent goals of each discipline are still met with the only difference being that the investigative process will be coordinated through the Team. All Team members will not actually work all aspects of the investigation, but all will actively coordinate the total process drawing from the resources available through all involved disciplines and other disciplines as needed.[11]

Law enforcement brings to the team "expertise in the collection and preservation of evidence, in crime scene examination, and in taking statements and confessions."[12] Law enforcement can also make arrests and present the criminal case in a lawsuit through obtaining warrants, presenting the case at a preliminary hearing or grand jury and in criminal court. CPS caseworkers often have greater experience in interviewing children (victims and siblings), in assessing the risk of further abuse, in arranging for medical or psychological exams and services, and in working with the protective alternatives of juvenile or family court. Law enforcement can place children in custody, but the CPS agency generally must provide foster care services. Other members of an investigative team might include the prosecutor or agency attorney who assesses the evidence as it is collected and then formally prosecutes the case. The prosecutor can assist in drafting search warrants, preparing witnesses, and providing general direction and guidance. Mental health professionals also provide consultation to investigators on the clinical needs of the victim and others involved in the investigation, help interpret psychological information secured, and offer guidance on interviewing strategies with children and adults. To facilitate team operation, local agencies are encouraged to establish formal CPS/law enforcement protocols.[13] As the participants in a national consensus building conference on CPS/law enforcement cooperation concluded, the protocol should include:

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- statement of purpose;
- discussion of joint and respective missions and organizational responsibilities;
- types of cases covered (e.g., sexual abuse and serious or potentially serious cases of physical abuse);
- procedures for handling cases, including special investigative techniques;
- criteria for child's removal;
- criteria for arrest of suspects;

- criteria for law enforcement referral to the CPS agency;
- criteria for CPS referral to the law enforcement agency;
- procedures to assist the CPS agency;
- criteria and/or procedures for joint investigations, including timing, determining who has prime decision-making authority, and concurrent prosecutions;
- provisions for joint training;
- provisions for multidisciplinary consultation; and
- criteria and/or procedures for cooperation/ coordination with/among agencies.

Effective collaboration is based on mutual understanding of the unique perspective of each discipline. Interagency collaboration does not blend the disciplines into a homogeneous mix where the police are indistinguishable from CPS caseworkers. Rather a multidisciplinary team seeks to create a final product that retains the flavor and integrity of each ingredient. By understanding why other professionals believe and act as they do, team members are better able to accept, if not always agree with, the action of a fellow team member.[14]

PROBLEMS IN WORKING TOGETHER

The CPS caseworkers approach the job from a different perspective than most police officers. CPS caseworkers have a dual role, one part of which may appear to conflict with the other. The dual role is mandated by law in most States, and is integrated throughout social work literature and training. CPS is charged with the responsibility of protecting children from further abuse and neglect. This is a difficult task involving assessing not only what has happened but also predicting if it will ever happen again. As with police, the basic investigative questions for CPS are: Did the child suffer harm or is the child likely to suffer harm? Did the parent or caretaker cause the harm? What is the likelihood of the child being harmed in the future? What steps are necessary to protect the child? It is the last question that brings into play the second role of CPS: to make all reasonable efforts to preserve the natural family. The CPS agency is obligated to attempt to keep the family together or, once separated, to work toward family reunification. It is this role that becomes a major source of conflict on many teams. Many officers see permanent removal of the child, termination of parental rights, and adoption of the child as the only route available for the child to grow up in a "normal" setting. Officers may not understand the CPS philosophy that if his/her safety can be assured, the child's own family is the preferred place for him/her. Also, officers may not be aware of the problems and realities of foster care or the legal difficulties in terminating parental rights.

The decision making processes of the two systems differ in many ways. Law enforcement officers are accustomed to making rapid life and death decisions in the field without supervisory consultation or approval. Many CPS agencies have procedures that involve "shared decision making" on critical issues such as the emergency removal of a child. Police find the CPS need to consult with supervisors frustrating, time consuming, and an example of bureaucracy at its worst. CPS caseworkers find that consultation reduces inappropriate actions based on the emotions of the moment.

Visitation between the child in foster care and his/her parents is another source of conflict. Laws, court decisions, and agency procedures encourage visitation between a child and his/her parents once in foster care. Visitation is considered vital to the child's sense of continuity and belonging even when removed from an abusive home. It is, after all, the only home the child has known and even abusive parents represent some degree of security and attachment for the child. This visitation, generally supervised in cases of sexual abuse or severe physical abuse, is usually therapeutic for the child and is essential if the child is to return home. However, law enforcement may view visitation as undermining the criminal prosecution. Police often believe that the parents are using the time to directly or subtly pressure the child to recant (and often they are right). Many police and prosecutors would prefer to suspend visits pending the outcome of a criminal case. CPS typically disagrees and emphasizes that isolating the child from the family for an extended period can also lead to recantation of any allegations.

Recommendations for disposition of the offender after the conclusion of the investigation often emphasizes the differences in philosophies of law enforcement and CPS. In intrafamilial cases, recommendation for treatment outside of the correctional system has been a fairly common procedure for CPS staff. The vast majority of law enforcement officers are extremely skeptical about the efficacy of most treatment programs and, indeed, about the expertise of most therapists. They perceive that many of the offenders are just "going through the motions" in treatment to comply with court orders, and they see therapists, aided and abetted by CPS caseworkers, helping manipulative offenders escape the punishment they so justly deserve.

When lack of coordination or other factors lead the CPS caseworker to initiate the investigation alone or to interview any of the principals without law enforcement, the danger exists that they will unwittingly tamper with or destroy physical evidence or lead others to do so. But once familiar with the value of physical evidence collection, CPS staff can become frustrated with a law enforcement officer who does not pursue a timely search warrant where appropriate.

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These conflicts must be minimized and properly dealt with if the investigative goals of all parties are to be achieved and the secondary trauma to the victim limited. These issues can be addressed on two levels, the systems level and the individual level.

Systems Level Recommendations

Community service delivery systems should:

- **Establish formal teams.** Much conflict is overcome simply through familiarity and trust (although when personalities conflict the opposite may be true). This can be achieved on community levels through collaborative agreements or through State statutory changes.

- **Establish investigative protocols.** Protocols that clearly lay out the roles and responsibilities of both police and child protection standardize practice and enhance collaboration. Protocols can be developed even where no team agreement exists. Protocols enhance investigations by limiting conflict and clarifying expectations.

- **Provide adequate personnel to both agencies.** The sources of conflict are amplified when a disparity exists in the personnel resources available to the two agencies. When CPS staff committed to the team are disproportionate to police staff, conflict is inevitable as CPS feels compelled to proceed

even though law enforcement is unavailable to participate. Disparity in resources also may affect the individual level of commitment to the team concept, with resulting conflict.

- **Joint training.** This is one of the keys to collaboration once the team concept is realized. Training provides all parties with an opportunity to hear the same information and to learn skills together. It also provides an opportunity to acquaint the other discipline with the philosophical perspectives and unique concerns of others.

Individual Level Recommendations

Individual professionals should:

- **Reach out to the other discipline.** This should be done in informal, nonthreatening ways. It can take many forms, from suggesting that team members meet in a nonwork setting to inviting other disciplines to a staffing or case consultation. It is important for team members to know that they are professionally and personally valued.

- **Share professional information.** Even when joint training is not available, individuals can share research articles, procedure manuals, or other materials of mutual interest. Each contact helps build the sense of trust and breaks down the barriers to effective team work, particularly if the material shared relates to an area of conflict.

- **Keep communication open.** Even when the system does not provide for a close team approach, individuals can keep their counterparts informed on the status of individual cases through notes or telephone calls.

- **Confront the conflicts openly.** Areas of professional or personal conflict should be confronted in a nonthreatening and open manner. Discussion can put the issues on the table and sort them out. Some issues can be resolved; on others, the parties may agree to disagree.

The conflicts inherent in the relationship between CPS and law enforcement are serious but do not have to present road blocks to working together effectively. Communicating and formalizing the relationship where possible can break down barriers to effective team work. Dissonance can be reduced, and conflicts can be minimized. When the team concept works, it works for all: the police, CPS, and most importantly the child and family.[15]

THE INVESTIGATIVE PROCESS

Investigators involved in child maltreatment cases must determine if a crime has occurred. If a crime has occurred, officers must determine who is responsible, if any actions on law enforcement's part are necessary to protect the child, and if criminal prosecution is warranted. To answer these key questions, investigators must complete a number of tasks to collect necessary information.

INTERVIEWING THE REPORTER

The investigator must have certain information prior to initiating the investigation. An adequately trained officer or CPS caseworker may have already obtained the necessary information. If not, or if some additional clarification is necessary, the investigator should contact the reporter directly.[16]

Gathering Information From the Reporter

The more comprehensive the information provided by the reporter, the better able investigators are to determine the appropriateness of the report for law enforcement or CPS intervention and the better able they are to determine the level of risk to the child and the urgency of the response needed. Information gathering should focus on demographic information about the child and family; information about the alleged maltreatment; and information about the child, the parents, caretakers, and the family as a whole.

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Demographic Information[17]

Demographic information serves two primary purposes: to locate the child and family and to assist in the assessment of risk to the child. Each State defines the scope of demographic information to be collected. In general, officers should gather information regarding:

- The child's
  - — name, age (date of birth), sex, and race; and
  - — permanent address, current location, and school/day care attending.
- The parents'/caretakers'
  - — name, age, (date of birth), and race; and
  - — permanent address, current location, place of employment, and telephone number(s). (If the person alleged to have maltreated the child is a caretaker other than the child's parents, the above information should be gathered for both the parents and caretaker.)
- The family composition

— names, ages (dates of birth), sexes, race, and location of all children in the family;

— names, ages (date of birth), and location(s) of other children in the alleged offender's care (if the offender is not the birth parent, e.g., a babysitter);

— names of other relatives and nonrelatives living in the home;

— names, addresses, and telephone numbers of other relatives and their relationship to the child; and

— names, addresses, and telephone numbers of other sources of information about the family.

- The reporter's name, address, telephone number, and relationship to the child/family.

Information Regarding the Alleged Maltreatment

Investigators should obtain information about the type(s), nature, severity, chronicity, and the location(s) where the alleged maltreatment took place.

- The types of maltreatment. This refers to physical abuse, sexual abuse, neglect, and/or emotional abuse.

- The nature of the maltreatment. This refers to information regarding the specific characteristics of the maltreatment.

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— physical abuse: burns, beatings, kicking, biting, etc.;

— neglect: abandonment, withholding of needed medical care, lack of supervision, lack of adequate food or shelter, emotional deprivation, failure to register or send to school, and failure to thrive;

— sexual abuse/exploitation: fondling, masturbation, oral or anal sex, sexual intercourse, pornography, and forcing the child to engage in prostitution;

— emotional abuse: constant berating and rejecting treatment, scapegoating a particular child, and bizarre/cruel/ritualistic forms of punishment (e.g., locking a child in a dark closet, tying a child to a bedpost, or constantly belittling and demeaning a child); and

— parental/caretaker acts/omissions such as accidental versus intentional/premeditated, disregard for the child's age or condition, and instruments used.

- The severity of the maltreatment. It is important to obtain information from the reporter regarding the emotional and physical injury to the child.

— extent of the physical or emotional effects on the child (e.g., second- and third-degree burns on half of the child's body, withdrawal, suicidal behavior, and excessive fear); and

— location of the injury on the child's body.

- The chronicity of the maltreatment. Information gathering should focus on:

— whether there have been prior incidents of abuse or neglect;

— how long the abuse or neglect has been occurring; and

— whether abuse or neglect has increased in frequency or remained relatively constant.

- The location of the incident. It is important to ascertain the setting where the actual abuse or neglect occurred (e.g., home, school, supermarket).

Information Regarding the Child

To effectively evaluate the level of risk to the child and determine the urgency of the response, officers should obtain the following information from the reporter.

- The child's physical and emotional condition. This relates to the child's current condition and should consider any ongoing disabilities the child may have.

- The child's behavior. For example, does the child exhibit extremes in behavior?

Information Regarding the Parent(s)/Caretaker(s)

If the reporter has the information, it is important to gather as much information as possible about the parents/caretakers. Knowledge of the parents'/caretakers' emotional and physical condition, their behavior, history, view of the child, child rearing practices, and quality of their relationships outside the family helps to determine the level of risk to the child.

- The parents'/caretakers' emotional and physical condition (e.g., do the parents/caretakers misuse drugs/alcohol? Are the parents/caretakers physically ill or incapacitated?).

- The parents'/caretakers' behavior (e.g., do the parents/caretakers engage in violent outbursts? Do the parents/caretakers engage in bizarre irrational behavior?).

- The parents'/caretakers' history (e.g., were the parents/caretakers traumatized or victimized as children? Do the parents/caretakers have a history of trouble with the law?)

- The parents'/caretakers' view of the child (e.g., do the parents/caretakers view the child as bad or evil? Do the parents/caretakers blame the child for the child's condition?).

- The child rearing practices (e.g., do the parents/caretakers have unrealistic expectations of the children? Do they use verbal and physical punishment as the first response to misbehavior?).

- The parents'/caretakers' relationships outside the home (e.g., do the parents/caretakers have friends and what is the quality of those friendships?).

Information About the Family

CPS caseworkers need to gather as much information as possible about family characteristics, dynamics, and supports.

- The family characteristics (e.g., is this a blended or single parent family? Is there inadequate family income?).

- The family dynamics (e.g., is spouse abuse occurring? Is there marital conflict or poor communication? Is the family characterized by disorganization or chaos?).

- The family supports (e.g., are extended family accessible and available? Is the family connected in the community?).

Gathering this indepth information is essential because it helps to determine how quickly an investigation must begin. It enables officers to identify the victim(s), the parent(s)/caretaker(s), and the offender and determine how to locate them so that the initial investigation can be conducted. It also identifies other possible sources of information about the family that will help evaluate the possibility of past, current, or future abuse or neglect. Finally, it will assist the investigator in accurately and effectively planning the approach to the investigation.

FIELD INTERVIEWS

Physical Neglect

While neglect allegations are the most common form of child maltreatment reported to child protection agencies, criminal investigation and prosecution occurs in only a small minority of the cases. Allegations of physical neglect normally involve the care the child receives in his/her home. The first step in such an investigation is to visit the home, generally on an unannounced basis. The neglect may involve environmental hazards, a lack of supervision, abandonment, malnutrition, failure to provide medical care, or other factors. The officer investigating possible environmental hazards in the home should examine the living conditions with the permission of the occupant or, in extreme cases, under the authority of a search warrant. The investigator must draw a distinction between poverty, a dirty house, poor housekeeping and clutter, and true environmental hazards to the child. The distinction is best made by separating poverty or life style factors from those conditions that will adversely affect the child's health and safety. Significant amounts of human or animal feces; exposed live electrical wires; extreme rodent and insect infestation; rotting garbage; and structural damage to the house, exposing the child to the risk of illness or injury, may independently or collectively constitute child neglect.

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Unless law enforcement officers find clear and present danger requiring immediate action, they will rarely act independently in cases of child neglect. CPS staff are often in a better position to work with parents to reduce the risks to the child without unnecessary removal from the home. In fact, under Federal law, Public Law 96-272 (and many parallel State laws), the juvenile or family court requires CPS agencies to demonstrate that they attempted *reasonable* efforts to prevent out-of-home placement. Some communities have many options for avoiding foster care placement in neglect cases. These include intensive family preservation programs, day care, teaching homemakers, parenting classes, and traditional counseling. For some neglectful parents the answer is financial aid, with CPS referring them to income maintenance and job search programs. Law enforcement officers generally lack access to those services and consequently are handicapped in neglect investigations unless CPS is involved.

There are situations in which law enforcement may determine that independent action is required. These include times when CPS is not accessible and when:

- very young children are left unattended and no one can contact a responsible adult caretaker;
- the adults are under the influence of drugs or alcohol and their actions or inability to act constitute a clear threat to the child's safety (i.e., Driving-Under-the-Influence (DUI) or Driving-While-Intoxicated (DWI) or actual and threatened use of firearms); or
- the adult caretakers are/have been arrested and no responsible caretaker is available to care for the children.

A child neglect investigation includes a visit to the child's home or place where the neglect is alleged to have occurred to determine the physical conditions present. The investigation should include an interview with the caretaker(s) to determine their perception of the situation and to assess their ability and willingness to care for the child. The investigation may include securing medical assessments of the child, particularly in cases where malnutrition, failure to provide medical care, or improper physical care is alleged. A combination of medical exams and psychological or developmental assessments may also be useful, particularly when neglect is alleged to adversely affect the development of small children or in cases of emotional neglect. The CPS caseworker generally arranges for these assessments.

Physical Abuse

Criminal prosecution of physical child abuse is more common than prosecution of neglect, and the role of law enforcement becomes clearer. The first step after conferring with the complainant is to interview the child. The investigator, preferably acting as part of a team with CPS staff, can explain to the caretaker that the agency received a call concerning the child and that they would like to talk to the caretaker about the child's condition. It is important to avoid using the term child abuse at this stage as it has different meaning for different people and can elicit intense feelings resulting in parental resistance in the interview. Some parents may admit to disciplining their children in a way that accidentally caused severe injury. In reality, much physical abuse, if not most, is the result of the offender's efforts to discipline the child and a failure to control the situation, his/her temper, or the force used. However, caretakers rarely view what they have done as abuse.

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Interviewing the Alleged Victim

After explaining the reason for the visit, investigators should ask to see the child. One of the investigating team members should explain, if the child is old enough to understand, why they are there and what they will be doing. Depending on the allegations and/or the child's age, the investigator will need to visually examine the child for signs of obvious trauma. Investigators should document any injuries noted and, if possible, photograph areas of injury or of questionable physical findings. The child should be interviewed outside the presence of the caregiver. The investigator is interested in such issues as:

- establishing the child's developmental level;
- the child's explanation of any injuries;
- who the child perceives as his/her caretakers;
- how the child is disciplined;

- how other children in the home are disciplined;
- how often have the victim and/or siblings been injured in the past;
- what type of weapon or implement was used, and where it is now;
- if they bled after the assault, where their clothing is now, or any other item that might have been stained;
- who else saw the incident; and
- whom the child told of the incident.

If the investigator finds the child has sustained life threatening or severe injuries, the first priority is securing emergency medical attention for the child.

Interviewing Caretaker

After talking with the child and assessing the presence of obvious physical findings, the investigator should talk with the caretaker(s). The caretaker should be asked for his/her explanation of any injuries. Again, the investigator should make an initial assessment of the match between the injuries and the explanations the child and adult caretaker(s) provide. The investigator should remain nonjudgmental and matter-of-fact during this stage, since some people who physically abuse their children fail to recognize the impropriety of their actions and will openly acknowledge what has happened. If they recognize that the officer disapproves of what they have done, they will attempt to cover up their actions. In cases of significant injury, however, such resistance can be expected. If CPS staff are present, they may need to talk with the caretaker(s) about their background and current living situation to assess the risk of future abuse.

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The investigator may find that there have been a number of persons caring for the child during the period of injury, and the child may not be willing or able to identify the person responsible for the injury (due to trauma or age). In this case, the officer should obtain details about who has recently cared for the child, for what time periods, and if anyone else was present, building a chronology of care so the investigator knows the transition points between these caretakers. Names, addresses, and telephone numbers should be secured. If any of these caretakers are present, the investigator should discuss the injuries with them as well. If there is any question about who is responsible for the abuse, all caretakers should be asked what signs of injury they observed, when they first noticed them, and when was the last time they knew those injuries were not present. Investigators should also determine what they know of the other caretakers' actions, of any past history of injury to this or other children in the home, or other relevant factors.

Interviewing Other Children

If other children are under the care of the same people, the investigator should talk with these children and perform, as appropriate, a screening for signs of physical injury. Other children should be asked about any injuries noted, as well as their observations about the injury on the alleged victim. Even if no sign of abuse is present in these children, they may be able to provide valuable information about family interactions, such as how discipline is handled, by whom, whether it varies from child to child, etc.

Medical Examination

When there is evidence of injury in cases of physical abuse, it is advisable to secure a medical examination of the child as soon as possible. The physician can document any injuries and treat any conditions present. The physician can also check for injuries with little outward manifestations such as internal bleeding, old fractures, or shaken infant syndrome. The doctor can also assess the developmental level of smaller children. Perhaps the most valuable role of the physician (after the treatment of any injuries) is to assist in the assessment of the match between the injuries noted and the explanation offered. For example, if the parents say that a 1-month-old child pulled himself up in his crib and tumbled out, the physician can explain the implausibility of the story based on child development and show that the injuries sustained are not consistent with a fall but the result of violent shaking.

Crime Scene

While the order of these steps may vary by necessity, the law enforcement agency may wish to seek physical evidence to substantiate any criminal charges. Using either a consent to search or a search warrant, the officer will be interested in the instrumentalities of the crime, such as the rod, coat hanger, bed board, belt, etc., used to inflict the injuries; blood-stained items such as children's clothing; and the exact location where abuse occurred to possibly photograph blood splatters on wall/floor/furniture, etc.

Interviewing the Alleged Perpetrator

In the event a possible or alleged perpetrator is not the caretaker already interviewed, the officer should interview the subject. The interview of this person should be postponed until the investigator can get a clear idea of what has happened (unless the delay exposes children to undue risks). The interview should parallel the caretaker interview, seeking information nonjudgmentally, which will generally yield the best results. Again, the officer is not seeking an admission of responsibility for "abuse," but seeking an acceptance of responsibility for the injuries sustained.

Sexual Abuse

Due to the nature of child sexual abuse, law enforcement and CPS are strongly encouraged to approach the allegation of sexual abuse as an investigative team. This will reduce the number of interviews the child must experience and improve the investigative outcomes of both agencies. Prior to initiating the field investigation, investigators must make several key decisions.

- Who will take the lead in interviewing the alleged victim, siblings, or other child victims or witnesses?
- Who will be present during the interviews?
- Will the interviews be audiotaped or videotaped?
- Where will the interviews take place?
- Who will interview nonoffending adults?
- Who will interview the alleged perpetrator(s)?

Interviewing the Alleged Victim

Once the aforementioned decisions have been reached, the investigators should proceed with the field investigation. Generally *the first step*, after clarifying necessary information with the complainant, is to interview the alleged victim. For the most part investigators should seek to arrange this in a neutral setting and away from the place where the abuse may have occurred. The location of the interview should de-emphasize the "power" of the alleged perpetrator. For example, if the child is alleged to be abused by his/her father, then an interview in the family home is generally ill-advised because of the sense of power the child may perceive from the perpetrator, even if he is not home. However, the location should be in a place where the child can feel comfortable. Consequently, a busy police station may also be unwise. Many investigators have had success interviewing children at school, at a CPS interview room, or in a special room at the law enforcement agency. If the abuse occurred outside the home by a nonfamily member, the child's natural home may be the best location. The actual interview should be conducted consistent with the "Special Considerations for Interviewing Children" chapter of this manual.

Because of the nature of sexual abuse, the victim interview plays a far more critical role than in other forms of maltreatment. In sexual abuse cases, the investigative interviewer must be extremely thorough. The investigator must:

- Develop an understanding of the child's developmental level and vocabulary.
- Determine what, if anything, of a sexual nature the child says happened.
- Establish whether the incident appears to be sexual in nature or can be reasonably explained by normal caregiving activities.
- Determine how the incident fits into the normal pattern of care by the alleged perpetrator.
- Establish the date of the last event as accurately as possible.
- Eetermine if this abuse has happened before. If so, determine when and how often.
- Determine how the child was introduced to the activity; what transitional behaviors preceded the sexual interaction. Determine if elements of progression were present (i.e., moving from less intrusive to more intrusive forms of sexual activity).
- Determine whether the child believed that the sexual interaction was to be kept a secret and how that was communicated.
- Establish if there were subtle or overt bribes, enticements, or threats used in the engagement process.
- Determine what forms of coercion or pressure were employed to maintain secrecy.
- Determine what the perpetrator did before the incident; the events that transpired immediately before the incident; what the perpetrator said before, during, and after the event; and what happened after the incident.
- Establish whether the child can provide explicit details of the sexual interaction.

- Determine what the child remembers, including sensory details of the event. Find out if the child heard any sounds. Establish what the child saw from his/her perspective.
- Determine whether any physical items were used in the abuse that might become the object of a search and seizure.
- Establish if the child was wearing any clothing that may have become stained or torn and is it available.
- Determine if photographs or videotapes were made.
- Find out if any weapons were used or suggested by the perpetrator.
- Determine whether there are any idiosyncratic details that lend authenticity to the child's account.
- Establish if the child sustained physical injury as a result of the sexual activity.
- Find out who else was present and who may have any knowledge of the events.
- Determine if any other children were present or if the victim is aware of others who may be victims.
- Find out whom, if anyone, has the child told of the incident, in part or whole.
- Establish the role the nonoffending parent played and how he/she reacted to the disclosure.

Interviewing Other Children/Siblings

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After interviewing the alleged victim, the investigator should also talk with any other children identified as possible victims or witnesses for information about sexual activity directed at them or for any corroborating or conflicting information that they can provide. The child witnesses may not have direct knowledge of the incident, but may be able to confirm that the victim told them of the incidents long before the disclosure to adults. These other children may confirm elements of the victim's statement, such as seeing the perpetrator leaving the victim's room, hearing the victim's cries, or simply confirming the household routine that allowed the perpetrator to be alone with the victim as the child alleged.

Interviewing Other Adult Witnesses

Any adult witnesses who can shed light on the allegations should be interviewed for much of the same information as described above: what did they see, what were they told, and how did they react.

Interviewing the Nonoffending Spouse

In intrafamilial cases, the nonoffending parent, most commonly the mother, will be the next family member interviewed in depth. Frequently, this is the most difficult interview for the investigator. The primary goals of the officer's interview are:

- To learn what the nonoffending parent believes has happened and to provide corroborative evidence to support or refute the child's statement.

- To assess the capability and willingness of the nonoffending parent to protect the child in order to provide the child with a supportive environment. This is necessary for the child to heal and to enhance his/her ability to handle the challenges that the criminal justice system demands of the survivor of sexual abuse.

This interview, like that of the victim's, should be conducted in a neutral setting if possible. Only the interviewer and the parent should be present. Because of the nature of some of the questions the officer asks the parent (such as the concern about spousal violence or quality, quantity, and type of sexual activity engaged in with the offending spouse), the element of privacy should be maintained.

During the early stages of the interview, the investigator should convey an attitude of concern for the nonoffending parent and the child. No guilt or recriminations should be indicated by the interviewer. The interviewer should reassure the parent as much as possible that there is a legitimate investigative necessity for not only this interview but for specific questions that will be asked. The attitude of the interviewer should be that of seeking the truth and discovering what actually happened.

In general, the investigator wants to determine what the parent knows about the sexual abuse. *The investigator should tell the parent only what is absolutely necessary about the child's disclosure.* The investigator should not reveal anything during this interview that should not be repeated to the perpetrator. It is frequently best to use generalities, at least in the initial stages of the interview. There are a number of possible reactions to such information ranging from anger and grief to total disbelief and hostility. The interviewer might find it necessary to give the parent several minutes to ventilate and express his/her feelings before bringing the interview back on track. Some nonoffending parents will be very concerned about what will happen to them as opposed to the child's immediate well-being. While taking note of this attitude, the interviewer can make it clear that this will be discussed at a later time.

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It is necessary for the investigator to determine how much of the child's statement the parent can corroborate. As in all interviews, it is frequently best to let the parent talk about his/her knowledge in a flowing narrative style, and then go back to ask specific questions at the end of this parent's recitation. Specifics to be covered should include:

- Can the parent confirm any behavioral indicators?
- Does the parent recall any times when the sexual activity could have taken place?
- How long has the nonoffending parent known about the allegation?
- How did the parent become aware of the allegation?
- If the child disclosed, does the nonoffending parent believe the child? If so, why? If not, why not?
- What action has he/she taken since the child revealed the incidents?
- What statements has this parent made to the child concerning the allegations?

This information is extremely important in assessing the cooperation of the parent, his/her ability to influence the future cooperation of the child, and his/her desire and ability to protect the child from further abuse.

Other circumstantial evidence that this parent could provide to enhance the credibility of the child's statement includes a description of household routine; for example, which parent is the primary disciplinarian; who controls the finances; and what is the child's daily routine. These can be explored early in the interview in a manner that gives the nonoffending parent a chance to talk about nonsexual and less threatening matters first. The investigator needs to obtain all possible details during this initial interview. Once the nonoffending parent has had a chance to think about possible consequences of the situation or talks with the molester or other family members, he/she might be reluctant to expand on any statements that verify the child's account.

Once the investigator has an understanding of the family dynamics, he/she can move to the more sensitive issues:

- What is the nonoffending parent's relationship to his/her spouse (the offender)?
- Is there a history of violence between the alleged offender and family members?
- Is the nonoffending parent physically afraid of the alleged offender?
- What is the sexual relationship between the parents (i.e., frequency of sexual activity, type of sexual activity, does the alleged offender have the spouse engage in actions such as shaving the pubic area, wearing "juvenile" clothes, or speaking or acting like a child)?
- What sort of material does the suspect read or collect (soft-core pornography, hard-core pornography, child development literature, general sexuality literature, "detective" magazines, etc.)?
- What is the suspect's relationship with children other than the victim?
- Is there a history of arrest for any family members? If so, for what?
- Have there been any hospitalizations or psychiatric treatments for any family members? If so, where and for what reasons?
- Is there substance abuse by family members? The investigator should keep in mind that substance use/abuse by the alleged offender may be used by the defense as a mitigating factor in establishing the defendant's lack of responsibility. Substance use/abuse by the nonoffending parent might be critical in his/her inability to protect the child in the past and future. Substance abuse by the child might be a behavioral indicator of abuse.
- Does the nonoffending parent know the background of the suspect (i.e., was the offending spouse sexually or physically abused as a child)?
- Were there any prior marriages or children by other individuals? Does this parent know their names and current locations?
- What is the employment history of the offender?
- What is the military history of the offender?
- What is the nonoffending parent's relationship with his/her children, particularly the victim?

If the nonoffending parent is appropriately concerned, believes the child, and is supportive of the goals of the investigation, this parent can be enlisted as an ally with the investigator to help the child. If this parent does not believe or support the child or demonstrates a hostile, punitive, or rejecting attitude toward the child, then he/she cannot be considered properly protective of the victim. Out-of-home placement of the child should be discussed with CPS staff in these situations.

The interviewer should be aware of the services such as temporary shelters, financial assistance, medical and psychological assistance, etc., that are available for the nonoffending spouse and children . It is preferable to have this information in written form, which can be left with the nonoffending parent.

If possible, end the interview on a positive note, giving the nonoffending parent a card with the investigator's name and telephone number. Let the parent know that if he/she needs any assistance or thinks of anything that would help the child to feel free to call. The investigator should prepare the parent for further intervention of the criminal justice system, such as the possibility of preliminary hearings, grand jury proceedings, videotaped interviews, medical examinations, etc. The interviewer should attempt to address any concerns and answer any questions that the parent has at this time.

The law enforcement investigator should remember that if circumstances warrant, charges can be brought against the nonoffending parent for either complicity in the sexual abuse itself or failure to protect the child. This should be discussed with the team and the prosecutor, if appropriate.

Interviewing Parents in Out-of-Home Abuse Cases

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In out-of-home abuse cases where the perpetrator is not a family member, parents are interviewed after the child has been interviewed. Investigators are interested in what the child has told the parents concerning the assault(s) and in physical or behavioral indicators that they may have observed. In cases where the offender is someone known, the investigator wants to explore the parents' relationship with the offender, how they first met the offender, what the offender told them he/she was doing with their child, and how the offender responded to particular questions the parents asked concerning activities with the child.

It is important to confirm whether or not the parents believe the child and what plan they can develop to prevent further abuse. Investigators should offer parents an explanation of the steps in the investigative process and discuss the possibility that the child may recant the disclosure. Parents should be instructed not to question the child about the abuse but be prepared to discuss it if the child brings it up. Investigators should give parents a name and number to call if they have problems during the investigation or think of further details relevant to the case.[18]

Medical Examinations

Generally the next step in the investigative process is to arrange a medical examination, as appropriate. Some controversy exists as to which children should be physically examined. Advocates for exams for all alleged victims argue that the exam may provide evidence of genital trauma, venereal disease, or the presence of sperm even in cases where no abuse was disclosed by the child or the abuse was minimized by the victim. Another reason offered for examining every child is that it will assure the child victim that he/she is unharmed and allay any fears that they have been damaged. Other researchers suggest that requiring a child who has not been abused and denies any contact to undergo a genital exam is very stressful in its own right and may unnecessarily traumatize the child.

Evidence of sexual assault can be medically detected in only a minority of cases. Muram, for example, reported that only 45 percent of the cases studied revealed clear evidence of sexual assault among cases in which the perpetrator confessed.[19] Other researchers concur. Such findings are not surprising, given the nature of sexual abuse. Most incidents of exposure, fondling, forced masturbation, or oral sex would not be expected to leave medically detectable evidence. For this reason, the terms chosen by the physician for the exam report can be very powerful. A child disclosing a history of fondling to the examiner may be described on the report as having "no evidence of sexual abuse," subtly undermining the child's statement. The same physician may just as accurately phrase the results as, "consistent with the child's statement, no abnormal medical findings."[20]

Physicians and nurses specializing in child sexual abuse know ways to minimize the child's discomfort. Those working with the child should describe clearly, in terms the child will understand, what is going to happen, perhaps using anatomically detailed dolls. The child should be given as much control as possible over the exam. The examiner should conduct a general physical exam in a head-to-toe fashion, paying no more attention to the genitalia than is necessary. Tools such as colposcopes or special magnifying medical cameras may allow the examiner to see and record on film important findings.

The examiners should swab for sperm as appropriate to the case, which may include swabs of the mucus lining of the nose (where semen may have been aspirated after oral sex), vagina, rectum, or as indicated. Body orifices should be examined for trauma, unusual characteristics, or foreign bodies. Pregnancy testing may be appropriate, and venereal disease screening is often indicated. The body should be examined for teeth marks and signs of physical abuse.

The physician should take a thorough history from a child who is old enough to communicate verbally. This will help the examiner to focus the exam. In addition, statements made by physicians are admissible in many civil proceedings and, at times, in criminal trials.

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In taking the assault history, the physician should ascertain the time lapse since the assault and the kind of sexual contact (e.g., oral, anal, vaginal, whether or not ejaculation took place, and whether or not a condom was used). The number of assailants, use of force or weapons, or injuries secondary to force/restraints/escape should be explored. The physician needs to question the child concerning post-assault symptoms such as pain, bleeding, bruises, loss of consciousness, nausea, or vomiting. An example of a question a physician could ask is: Did the child have any post-assault activities, such as bathing or douching, defecation, urination, eating or drinking (which would be important in cases of oral assault), or was the clothing changed? The physician should try to document any prior sexual contact the child has had.

The investigator should request *legible* copies of all medical reports and notes. The investigator should confirm how evidence collected during the exam will be handled to ensure the chain of custody. All samples should be labeled with the name of the victim and identification number and with the signature of the person(s) responsible for collecting and processing the sample. The evidence should be maintained in a locked environment and signed over only to representatives of law enforcement or the prosecutor.

Crime Scene Search

A primary objective of every law enforcement investigation of child sexual abuse should be to avoid having the child victim testify in court. Building a case so strong that the defendant will want to plead out rather than go to trial is one way to accomplish this goal. The presence of physical evidence is a key determinant

toward this end. The investigator should view every case, no matter what the relationship between the offender and the child, as a case which he/she is preparing for vigorous prosecution. If, after the interview with the child, the investigator feels that this is a potentially valid complaint, the officer should proceed with the investigation, just as he/she would with any other criminal investigation.

One of the most important points to keep in mind in these cases is that corroborative evidence is extremely critical; all attempts should be made to secure *any* evidence that supports *any* statement that the child has made.

The investigator should also keep in mind standard investigative crime scene procedures and use these in all possible circumstances.

The following rules of evidence should be followed:

- **Recording.** Officers should note the position and the condition of the evidence and its relation to other evidence. Also, they should note the date and time the evidence was collected, who found it, who collected it, how it is marked, etc.

- **Preservation.** Officers should use: proper collection techniques, placing the evidence in a proper container; and marking the evidence.

- **Chain of evidence.** Officers must list everyone who handles evidence.

- **Evidence of violence.** Officers must look for weapons. The assailant with a weapon often leaves traces of his/her weapon or uses a weapon found at the scene and leaves it. Officers should note and photograph the victim's wounds and damaged clothing. Blood is important to note at the scene, as are signs of forced entry. These factors can help prove the element of force or lack of consent on the victim's part, which may be an issue at trial.

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- **Stain evidence.** Officers must look for many stains including: blood, semen, perspiration, saliva, etc.

- **Minute and latent evidence.** Evidence collectors must always search for fingerprints and vacuum for hairs and clothing fibers, if practical. For example, in an incest situation, if pubic hairs are discovered in the prepubescent child's bed, the investigator may also want to search for underwear recently worn by perpetrator and not washed to check for pubic hairs. These should be sent to the lab for comparison.

- **Specific places to search.**

  — Officers should search the bathroom for evidence, because the suspect may have bathed or washed the child.

  — Investigators should search for semen in the area where the assault occurred.

  — Officers must mark sheets or other fabrics on which a sexual assault took place on the exposed side, and they should then be folded. Fabrics that are not frequently washed, such as bedspreads, may show ejaculate long after the assault has taken place and should be submitted to the lab.

- **Evidence left.** Investigators should collect articles of clothing left, stains, fingerprints, weapons, etc.

- **Articles taken.** Officers should look for small items such as locks of hair, barrettes, panties, or pubic hairs which may have been taken by the offender as a souvenir or remembrance of the sexual activity.

- **Background evidence.** During the interview, the investigator should ask the child about furniture, wallpaper, ceiling fixtures, anything that would be difficult for the offender to remove or change. The collectors should search for such evidence and record it with either photographs or videotapes. The child's ability to relate this information shows accuracy of memory. This may be important evidence in a court hearing.

- **Instrumentalities of the crime.** Investigators should look for cameras, condoms, sexual devices, or any items that the child indicated were used in the commission of the sexual assault.

- **Lures.** Officers should search for toys, games, stuffed animals, etc., that the perpetrator may have used to entice the child into the situation or into the location where the assault occurred.

- **Child erotica.** Investigators should look for any material relating to children that is sexually arousing to an adult, such as child sketches, fantasy writings, diaries, and sexual aids. There is one important distinction between child pornography and child erotica. Although both are used for sexual arousal and gratification of the individual, child pornography has the added and more important dimension of effect on the child portrayed.

- **Child pornography.** Officers should look for any visual or print medium depicting sexually explicit conduct involving a child. Child pornography is photographs or films of children being sexually molested. The sexually explicit conduct can include sexual intercourse, bestiality, masturbation, sadomasochistic abuse, and lewd exhibition of the genitals or pubic area. The child(ren) visually represented in child pornography have not reached the age of consent. This is in effect a crime scene photograph of actual child abuse. Mere possession of child pornography is a crime in many States and now is considered a crime in certain circumstances under Federal law. In 1990, Congress passed P.L. 101-647, which included a provision in Title III, section 323 that amended 18 USC 2252, making possession of three or more items of child pornography a Federal crime if anything used to manufacture the pornographic material crossed State lines, the film or photographic paper was made in another State, or the camera was made in another State or country. In addition, the use of the mail to send child pornography is a separate Federal offense. Officers discovering child pornography should contact postal inspectors and the Federal Bureau of Investigation if a Federal violation appears to be present. This can lead to increases in investigative personnel assigned to the case, charging in multiple jurisdictions, and an enhanced period of incarceration.

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- **Adult pornography.** Officers should look for the use of adult pornography. There are several uses in child sexual abuse. In some instances, the offender may need the adult pornographic material to arouse himself to complete the sexual abuse of the child. In other situations, the material is shown to attempt to arouse the child so that the sexual abuse can take place. Or the material is shown to the child to lessen his/her inhibitions and to give the child some ideas as to the sexual activities he/she would "enjoy" engaging in. When an investigator discovers quantities of adult pornography on the premises, he/she should seize the adult material and compare the scenes in the commercially produced magazines and videotapes with the sexual activity with the child(ren) to determine if the same or similar poses were used with the child victim(s).

- **Homemade pornography and albums.** Investigators should seize child pornography or child erotica or simply a collection of nonsexual pictures of children such as school photographs. The nonsexual photographs may help identify other victims.

- **Personal letters and diaries.** Officers should examine all correspondence found at a residence to determine the type of correspondence. Investigators should also search for diaries, which might summarize sexual encounters the perpetrator has had or even list names and ages of sexual partner(s) and a brief description of the type of sexual activity. Thus a diary may be helpful in determining other victims that this offender has abused.

- **Audiotapes.** Officers should examine any audio cassettes. Some offenders will have the children talk onto cassette tapes. During these sessions, the children are encouraged to talk about the sexual acts they might perform or that they have performed before. In addition, sometimes the sexual abuse itself may be recorded on audiotape.

- **Home computers.** When a home computer is present in the home of an alleged offender, the investigator should determine if it is being used to contact others of like interest. Computers are also used to store information concerning the pedophile's photographic collection and his/her victims to facilitate retrieval. Should the investigator find a home computer and believe that it has been used for this purpose, the computer should be seized (both hardware and software) for further evaluation. Care should be taken during shut down and removal so as not to erase any data.

- **Cameras.** Investigators should seize still cameras and/or video cameras and recorder(s) if the child has related that he/she was photographed or was shown sexually explicit movies. All equipment used should be seized as well as undeveloped film found at the location. The video camera and recorder should be seized as well as all videotapes on the premises. These videotapes should be reviewed for content, despite the labeling on the outside of the cassette. The investigator should consult with the prosecutor to determine if a separate search warrant will be needed to view all the videotapes. Some agencies also seize any televisions used to show the videotapes to the child.

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The investigator should be creative in the search. The search warrant should be broad enough to include items that might not be considered sexual, but which the child may have mentioned in the statement as used by the offender to entice the child, help consummate the crime, or record the crime.

Investigators must also consider the possibility of obtaining a legal consent to search when interviewing a nonoffending spouse in an intrafamilial case.

As mentioned earlier, if the investigator believes that such items may be destroyed or hidden after the child is interviewed, the investigator should take immediate steps to secure this evidence. This may involve contacting the prosecutor to expedite the issuance of a search warrant or sending officers to the location where it is believed this material is housed to secure it until such time as a search warrant can be obtained. The investigator should consult with the prosecutor regarding what circumstances would be considered exigent where the items could be seized without a search warrant. Telephone search warrants might be used in jurisdictions where they are permitted.[21]

Interviewing the Alleged Perpetrator

If the identity of the offender is not known, the investigator should conduct normal investigative procedures to ascertain identity. This means neighborhood canvases, all points bulletins, a check of local jails, hospitals, etc., that have had recent inmate releases, strangers in the neighborhood, and suspicious vehicles that may have been reported.

If possible, the timing of the interview with the offender should be selected carefully. Many sexual abuse cases have been lost or jeopardized because investigators moved too rapidly to interview the offender before they were fully conversant with the facts of the case. The investigator must keep in mind that the offender is, in many cases, not likely to cooperate with him or her unless the offender is convinced that the investigator has strong evidence to prove the abuse. However, in some cases consideration should be given to interviewing this individual early in the investigation where the element of surprise can work to the investigator's advantage. The offender, if unaware of the investigation, will not have prepared an alibi, retained an attorney, or destroyed physical evidence, all of which is possible if the investigator does not act swiftly. This should be evaluated on a case-by-case basis.

There is no one style of interviewing a suspected child sexual assault offender. Just as there are different types of offenders, there are different techniques that will work with various offenders. Adolescents, for example, account for a significant number of offenders, and the interviewing style and procedure must be adjusted, consistent with local procedure. As stated earlier, the primary objective of any investigation is to collect enough corroborative evidence so that it will not be necessary to have the child testify in court. Therefore, the interview with the suspected offender should be handled in a timely and skilled fashion. It is preferable that only one investigator be present during the interview. As in interviews with the child victim, the offender will often feel inhibited about his/her behavior if other persons are present. It is desirable that this interview be conducted in a room with a two-way mirror and, if possible, videotaped for the record.

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The principal psychological factor contributing to a successful interrogation is privacy, being alone with the person under interrogation. In providing privacy during interrogations, it is advisable to select a quiet room with none of the usual police surroundings and with no distractions within the subject's view.

In cases where a suspect has given an alibi, it should be checked if at all possible before the interview begins. Any known inconsistencies in the alibi will assist the officer. Moreover, an alibi check may actually establish the innocence of the suspect. However, many other circumstances may point to his/her guilt. A background check should be done before the interview to determine if there are any prior arrests for crimes of a similar nature. The number of times he/she has moved or the number of jobs the suspect has held may point toward the fact that in prior communities and in prior places of employment there was some problem that might have stemmed from the individual's sexual preference.

The officer should avoid creating the impression that he/she is an investigator seeking a confession or conviction. It is far better to appear in the role of one who is seeking the truth. The neutrality of this position will give the investigator an advantage and may lull the suspect into being overconfident.

The interrogator should dress in civilian clothes rather than in uniform during an interrogation. Otherwise, the subject will have before him/her a constant reminder of police custody and the possible consequences of an incriminating disclosure. The investigator should avoid inflammatory words or expressions such as "rape," "pornography," "abuse," and "confess your crime." It is much more desirable, from a psychological

standpoint, to employ milder terminology like "touch," "caress," and "tell the truth." The investigator should keep in mind that some offenders do not view their activities with children as criminal. They may not regard the fondling of children as a criminal assault, and they may not regard the photographs of children in the nude or engaged in sexual activity as pornography. The investigator should maintain and use nonjudgmental language.

A subject should be treated with decency and respect, regardless of the nature of his/her offense. This behavior on the part of the interviewer may well be the turning point of the interrogation and may make the suspect feel comfortable enough with the interrogator to give a full confession and, in fact, admit to crimes of which the interviewer had no prior knowledge. It has been noted by a number of investigators that once a child molester begins talking, he/she frequently details each and every episode of sexual assault that the offender can remember. A sympathetic, understanding attitude in an interrogation is far more effective than a threatening approach.

Because of the coercion issue, the interviewer should avoid, at any time during the interview, making any promises to the offender about the possible effect a confession would have on the prosecution of the case. To promise an offender anything at this time, including probation or a diversionary treatment program, is promising something the law enforcement officer cannot carry out. If the offender stands by his/her constitutional rights not to make a statement and the investigator then advises the offender that he/she will not be considered for diversion or treatment programs if he/she does not confess and he/she subsequently confesses, this confession may well be held as having been coerced and be considered inadmissible in a court hearing. Therefore, the investigator should work hard to establish rapport with the offender so that the offender wants to try and please or brag to the investigator about the activity.

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In dealing with a suspect whose guilt is definite or reasonably certain, the interrogator will usually disclose his/her belief in the suspect's guilt and attempt from the onset to secure a confession or incriminating statement. If the interview with the child was videotaped, it might be useful to show the offender all or part of the tape. In some instances, this has persuaded offenders to make a full confession.

During the interview with the suspect, investigators should:

- Display an attitude of confidence in the subject's guilt.
- Point out some, but by no means all, of the circumstantial evidence indicative of the subject's guilt.
- Sympathize with the subject by telling him/her that anyone else might have done the same thing under similar circumstances.
- Reduce the subject's guilt feelings by minimizing the seriousness of the offense. It is also helpful to tell the subject that the interrogator has heard many people tell about sexual activities far worse than any the subject can relate. The conduct itself should be discussed as though it were actually normal.
- Suggest a less revolting and more acceptable motivation or reason for the offense than that which is known or presumed. An offender should always be offered an opportunity to save face by letting him/her base the initial admission of guilt upon a motivation or reason for the act. To secure the initial admission of guilt, the interrogator should suggest such possible reasons, motives, or excuses. The important point is to have the subject place him/herself at the scene or to connect him/herself with the event in some way. Following a partial admission, the interrogator can then point out that the

circumstantial evidence negates certain explanations. The inconsistency between the subject's original denial of the crime and his/her present admission will deprive him/her of a possible defense.

- Remember, the main objective of the interview in many instances is to have the subject place him/herself at the scene or in contact with the victim.

- Display understanding and sympathy because it may urge the subject to tell the truth. Urge the subject to tell the truth for the sake of his/her own conscience, mental relief, or moral well-being as well as for the sake of everybody concerned, and also because it is the only decent, honorable thing to do.

- Seek an admission of lying about some incidental aspect of the occurrence. Once a subject has been caught in a lie about some incidental detail, he/she loses a great deal of ground. As he/she tries to convince the interrogator he/she is telling the truth, he/she can always be politely reminded that he/she was not telling the truth just a short while ago.

- Ask the subject a question regarding some detail of the offense rather than seek a general admission of guilt; getting an admission on seemingly insignificant details will sometimes lead the accused into a confession.[22]

Mental Health Information

As with medical findings, the opinions of mental health professionals will sometimes be introduced into child abuse investigations. Extreme caution should be exercised when mental health professionals are called upon to offer an opinion about whether *this* child was abused by *this* perpetrator, particularly if based on the assessment of the alleged offender. Various psychological tests and/or clinical interviews by a trained professional may yield information about the individual's predisposition to commit abuse or factors which may contribute to abuse, such as a history of victimization, immaturity, sexual arousal toward children, a tendency toward violence, or a loss of self-control. (It should be recognized that defense expert witnesses may argue that the lack of such known risk factors makes the individual innocent of any criminal charges.) Both arguments overstate the role of the mental health professional. The time for such input is when sentences are being determined, when the court is considering incarceration versus community-based alternatives. 205

While not appropriate evidence, the insight of mental health professionals can be helpful in child maltreatment investigations. Mental health therapists can best assess the impact of the abuse and the investigation on the child. They can provide insight into the ability of the child to testify and explain the developmental reasons for a child's actions. Their clinical training may help determine the credibility of a child's statements or how the investigator should proceed in interviewing the principals involved. State child abuse statutes abrogate professional privileges of confidentiality. Consequently, mental health professionals must share relevant information regarding a particular case.

DECISION MAKING

VALIDATION

At the heart of the investigative process is the decision regarding the validation of the allegations. Validation is the process of determining if abuse has occurred or, for CPS, whether risk of maltreatment is imminent. It is a term borrowed from CPS and may be used interchangeably with "substantiation," "indicated," or "founded" in some jurisdictions. More than a belief that the maltreatment has occurred, validation is based on substantial evidence. This decision does not require the same evidentiary standard as that of a criminal prosecution. As noted earlier, even when sufficient evidence is lacking for a criminal prosecution or abuse has not yet occurred, children can still be protected through skillful CPS intervention and/or the civil protections of the juvenile or family court.

Physical Abuse and Neglect

The decision regarding validation of alleged physical abuse is a comparatively straightforward process. Physical abuse leaves physical evidence of the assault on the child, which can be observed, documented by a physician, and photographed for evidence. Other tests that can document presence of physical abuse include: X-rays, lab tests (e.g., for poisoning), etc. The officer investigating a physical abuse case should weigh various factors.

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Medical Evidence

Medical evidence is the findings of licensed physicians or qualified medical practitioners that support or refute the allegations. This evidence may document injuries or conditions and explain how the injury or condition could have been sustained. Of particular interest are injuries medically inconsistent with the explanations offered by the caretaker, injuries consistent with inflicted trauma, or conditions that are the result of willful actions or inactions of caretakers.

Admission of the Perpetrator

This is self-explanatory: an individual acknowledges full or partial responsibility for causing the injury or condition.

Credible Witnesses

Individuals who support or refute the allegation and are willing to do so in court are credible witnesses. Care must be exercised to assess the credibility of persons offering statements who may have a bias about the incident, child, or perpetrator.

Mental Health Information

This information is garnered from clinical interviews, psychological test results, interpretation of tests, and interviews by qualified mental health professionals. However, mental health professionals do not have training to validate whether abuse or neglect occurred.

Victim's Statement

This statement details when, where, and how the abuse occurred and who is responsible.

Observed, Videotaped, or Photographed Injuries or Conditions

These include tapes, photographs, or other documented evidence usually produced by a licensed physician or a law enforcement officer.

Physical Evidence

Physical evidence is collected during the investigation at the crime scene (see discussion of the crime scene for physical abuse and neglect cases).

Behavioral or Physical Indicators of Abuse

208 These include any behaviors or physical symptoms involving the child noted by others that support or refute the allegation. For example, the teacher who sees bruises and notes that the child refused to dress for physical education class can help support other evidence of injury during the same time frame.

Sexual Abuse

Child sexual abuse presents far greater problems in validation than physical abuse, due to the nature of the abuse. For the most part, validation relies upon the same categories of evidence but with some special considerations. First, clear physical evidence is generally lacking, the abuse usually occurs secretly so no credible witnesses exist, often the child has been coerced into silence, and the victims' young age makes their statements problematic on the surface. Second, perpetrators are admitting to very serious felonies if they acknowledge their role in the abuse. Understandably, they are reluctant to do so. All of these factors make accurate validation of child sexual abuse very challenging. Defense experts at trials may well argue that every category of evidence used by investigators is invalid, yet investigators must make a reasonable determination of whether evidence exists of sexual abuse. The categories of evidence are discussed below.

Medical Findings

These are findings by a licensed physician or other qualified medical practitioner that support the allegation of sexual abuse, including a diagnosis of a sexually transmitted disease, or even pregnancy in some cases.

Admission of the Perpetrator

This is self-explanatory: the perpetrator confesses to specific sexual acts with a child.

Credible Witnesses

These are observations of child and adult witnesses, which serve to support or detract from the allegation. Extreme caution should be exercised about the credibility of witnesses (e.g., statements of parties engaged in a custody dispute).

Victim's Statement

Due to the nature of sexual abuse, many cases will hinge upon the statement of the alleged victim. Sexual abuse occurs secretly many forms of sexual abuse (fondling, fellatio, etc.), and leaves no long-term physical findings; the perpetrators are frequently well-respected, seemingly stable people. In the 1970's, it was suggested that investigators should believe all children when they alleged abuse. Currently, however, investigators must be able to articulate exactly *why* they find the child's statement credible or lacking credibility. Being able to explain why the statement is credible is critical in court.

The child's statement should be considered in terms of a set of factors suggested by various practitioners and researchers in the field. Most are based on extensive experience with victims of child sexual abuse. In 1983, Sgroi, Porter, and Blick laid the foundation for this work,[23] and their concepts have been expanded and refined by others. In 1988, Faller tested some of these ideas and found that statements of child sexual abuse victims (in cases of abuse confirmed by the perpetrators) generally fit into these validation criteria identified.[24] Not every criterion was met in every case and, in some cases of actual abuse, the child's statement did not fit the validation framework at all (particularly with young adolescent males).[25]

The following factors should be considered when assessing child victim statements: 209

- **History of abuse and related behaviors.**

  — **Multiple incidents over time.** The abusive incident, which resulted in the present referral, is probably not the first time abuse has occurred. Investigators should determine through the interview with the child if more than one incident had occurred. This situation is most common when the alleged perpetrator is a relative, friend, or caretaker of the victim.

  — **Details of sexual abuse.** It is important to get explicit details of the sexually abusive incidents from the child in *his/her own words*. The investigator may begin by establishing the child's present knowledge of appropriate/inappropriate touching and words used for genitals. The anatomically detailed dolls and art media can be useful in this process. Investigators must be careful not to lead the child and should seek the explicit information *in the child's own words*, which should be recorded verbatim.

    - Explicit details. Investigators should determine if the child is able to provide details of sexual activity beyond his/her developmental level. This is of greater significance with younger children than with adolescents.

    - Age-appropriate language. Investigators should consider whether the child described the details in age-appropriate language and sentence structure.[26] Caution should be used here as many parents teach their children the correct anatomical name for their body parts. Few young

children, however, would refer to penetration as "rape" or "intercourse." Such words suggest that the child may be relying on someone else's words.

- **Experience perspective.** Investigators should evaluate whether the child described the events from a participant child's point of view. For example, what did he/she feel, see, hear, taste, smell?

- **Richness of detail.** As children get older, they are often able to provide details of the surrounding environment, what the perpetrator said, who else was nearby, etc. Younger children tend to focus more on the central issues of the abuse and what is happening.

- **Idiosyncratic details.** Young children, even in the midst of abuse, sometimes note extraneous activities and include them in their report to the investigator. Such detail serves to support the credibility of their statement. For example, "While he had his pee thing in me, a dog started barking at the door."

- **Consistency.** Investigators should consider if the child was interviewed more than once, were the responses generally consistent from one interview to the next? Many children describe additional details and even new incidents in successive interviews as they get more comfortable. Kee McFarlane described this as "peeling the onion."[27] Were any elements of the child's story corroborated by others or by physical evidence?

- **Progression of sexual activity.** This takes several forms.

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  - **Transitional behaviors.** The investigator should explore what type of activities preceded the initiation of the overt sexual abuse. Many people who sexually molest children also engage in behaviors which, while not overtly sexual, serve to set up the abuse, just as an adult heterosexual male may use dinner and drinks with an adult female as a prelude to a sexual overture. This behavior includes actions that bring about nonsexual intimacy; if observed, this intimacy would appear within normal limits of adult–child contact, such as tickling, sharing a bed, bathing, or play activities. These behaviors become relevant if the child describes the first overt sexual contact in the context of the transitional behaviors. For example, "Daddy started helping Mom give me baths, then he just did it alone, and then one night while he was washing my back, his hand went inside of me."

  - **Progression of sexual activity from less intrusive to more intrusive behaviors.** Few perpetrators who have long-term access to their victims move immediately to intercourse. Many move more cautiously from one form of abuse to another, similar to transitional behaviors, from fondling exterior of clothes, to fondling under clothes, to penetration. The progression may occur over years, in some cases, or move rapidly in others.

  - **Progression within a single incident.** Investigators should determine if the child described the progressive activities leading to the abuse through such patterns as exterior clothing touching, followed by under clothing touching, to penetration. While older children may fabricate in this detail, smaller children generally lack the frame of reference to do so.

- **Child's sense of time.** Investigators must gather information on *when* and *how* the abuse began and *how many* incidents have occurred. Investigators should keep in mind that young children do not

have the same sense of time as adults. They may be unable to give dates and times. The investigator must relate the incidents to some event that is meaningful for the child. The following types of questions may help in this area:

> Who was your teacher at that time?
> Did this happen before or after Christmas?
> Can you remember anything else that happened around that time?
> Was this around the time of your birthday?
> Was it cold outside?
> Was there snow on the ground?

Sometimes children can describe what was on television at the time of the abuse or some other memorable event. The child may state that some of the other family members were on a trip out-of-State or grandmom was visiting, allowing the investigator to fix an approximate date.

If numerous incidents have occurred, it may be confusing to sort out all the times, dates, and places. In fact, this may take several interviews to delineate several specific incidents. It is essential that the investigator establish some sense of when the abuse began, the frequency of abuse, and how it progressed through the spectrum for purposes of indictment requirements.

- **Secrecy.** Investigators should establish if the abuse occured in a private place and if the child understood that the abuse was a secret.

- **Pressure/coercion/enticement.** Pressure, coercion, or enticement occur in two areas. First, investigators should establish how the perpetrator got the child to engage in the behavior. Did he/she entice or bribe the child; did he/she rationalize the behavior, for example, "all daddies do this;" did he/she threaten the child (anything from a loss of attention to death threats). The second type of pressure or coercion is that which is used to maintain the secret. This may range from the very subtle to the very threatening and overt. Investigators should determine what the child thought would happen if he/she told and why he/she believed this. Many perpetrators are fairly direct in warning the child not to tell, but may be more subtle in communicating the consequences of telling to the child. The pressure may range from, "You'll get in trouble," to "I won't love you anymore," to "Daddy will go to jail," to the extreme "I'll kill you," or "I'll kill your mommy." 211

- **Affect.** Officers must evaluate how the child acted during the disclosure. For example, was he/she tearful, afraid, embarrassed, anxious, or distressed? Did the affect differ when talking about less emotionally laden material and the abuse? Note that some children who have been exposed to very serious abuse may begin to disassociate from the abuse, and their affect will flatten accordingly.[28]

The investigator should review all these factors in assessing the credibility of the child's statement. In some cases, there will be little question as to the validity of the statements. In other cases, due to the child's age, personal circumstances of fear, and anxiety over disclosure, the statement will not be clear and definite. The investigator must weigh all the factors present and consider why some are weak or absent. For example, Faller's study showed boys are less emotional in their disclosure and provide less detail than girls.[29]

Observed, Videotaped, or Photographed Injuries or Conditions

This is documentation of physical injuries through observation from a trained physician, photographs produced by a physician or law enforcement officer, or videotapes demonstrating the conditions under which the child is living (e.g., severe physical neglect).

Physical Evidence

(See the segment on the crime scene search.) This evidence is collected during the crime scene investigation. Indicators vary with different victims.

Behavioral or Physical Factors That Might Be Indicative of Childhood Trauma

Some sexual behaviors of children are specific to sexual abuse. Other nonsexual behaviors in children may corroborate the child's disclosures. Still other behaviors in children are indicative of trauma and need to be explored for possible sexual abuse. For specific information on behavioral and physical indicators of sexual abuse, see the manual entitled *Preventing and Treating Child Sexual Abuse*.

Summary

The validation process should weigh all the factors described above, including those that support and refute the allegation. *Based on the sum of the factors the investigator should make a determination regarding the validity of the complaint.* Validation may be made based on only one factor if it is of sufficient strength. For example, the medical evidence or the child's statement alone may be compelling. However, cases should not be validated on behavioral or physical indicators or circumstantial evidence alone. If the case is valid, the investigator must determine what further action is necessary, including child protection efforts and criminal prosecution. In some cases, it will be evident that the child was abused, but the evidence to link the act or conditions to any specific perpetrator may be lacking.

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Prior interviews conducted by others (either family or other investigators) may well influence the information the child shares in your interview. Knowing how and by whom these other interviews were administered is critical in evaluating material that was disclosed at the interview under validation.

RISK ASSESSMENT

Once the investigator has determined that the child has been abused, the next step is to assess the risk of further abuse. Usually, CPS staff take the lead responsibility here. Many State child protection agencies have developed/implemented risk assessment tools to guide caseworker decision making. While risk assessment tools vary from State to State, the process normally attempts to identify the factors that either place the child at greater risk of abuse (risks) or the factors that reduce the risk of future maltreatment (strengths). In assessing risk, the caseworker considers the nature of the maltreatment, location of injuries, and factors present within the *parents* that heighten risk, such as:

- past abusive or neglectful behavior;
- use or abuse of alcohol or drugs;

- mental instability;
- interpersonal skills;
- knowledge of child development and expectations of their children;
- how they discipline their children; and
- flexibility or rigidity of child rearing attitudes.

Often, CPS caseworkers will also consider factors present within the *child* that place him/her at risk such as:

- the age of the child (most child abuse related deaths occur among very young children);
- physical, mental, emotional, or social development; and
- specific behaviors that may elicit abusive behavior, such as crying, demanding, or fighting.

In sexual abuse cases, risk factors may include:

- the sex and/or age of the child;
- the child's isolation from peers; or
- the child's relationship with the nonoffending spouse.

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The investigator may also take into account *family* factors that contribute to the risk such as:

- financial pressure;
- marital conflict;
- low levels of family interaction and mutual support;
- lack of extended family support;
- little supervision;
- role reversals, with the child fulfilling adult roles and meeting adult needs; and
- the nature of the bonding between family members.

The last major category consists of *environmental* factors, including:

- the physical conditions of the family home;
- the nature of the community in which they live; and
- the types of supports present for the family.

SAFETY PLANNING

Having concluded that maltreatment was present and having assessed the risks to the child, the CPS caseworker will seek ways to protect the child and reduce the risk of further maltreatment. The first and foremost goal is to ensure the child's safety while maintaining him/her in his/her own home. This may be accomplished by using certain services to address the risk elements. It may mean bringing a homemaker into the home to teach the caretaker parenting skills or putting the child in day care to give the parent a respite from child care. The safety plan may involve a temporary change in living circumstances for the child (moving into a relative or friend's home) or moving the alleged offender pending the outcome of the investigation. In sexual abuse cases, the plan may call for the alleged offender to move out of the home.

Law enforcement can play a key role in developing and enforcing such plans in cases where criminal prosecution is initiated. Following arrest, restrictions can be placed using a bond arrangement that requires the alleged offender to live elsewhere and have no unauthorized contact with the victim. Failure to comply with the agreement could lead to revocation of the bond and incarceration. "No contact" orders and civil protection orders may also be sought to help provide some authority to a safety plan.

REMOVAL FROM THE HOME

When all reasonable interventions that would protect the child in his/her own home have been examined but none are found suitable, removal from the home and placement in State custody may be necessary to protect the child from harm. Police officers may have to act in an emergency, but the likelihood of maintaining custody is enhanced if the decision to remove is made with juvenile or family court concurrence or at least in cooperation with CPS staff and their attorneys. Generally, removal from home and placement in foster care causes a total disruption of the child's life, including a loss of familiar surroundings, possessions, pets, friends, and family. The children frequently must change schools and move into totally unknown surroundings. This experience is very traumatic in its own right and should be avoided when possible. For this reason, CPS staff will explore possible relative placements or other avenues to minimize the negative impact of removal on children.

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SPECIAL CONSIDERATIONS FOR INTERVIEWING CHILDREN

The initial investigative interview with a child is a delicate situation requiring skill and tact. The setting for the interview should be chosen as carefully as possible. The interview should be held in a neutral setting where the child feels comfortable and not threatened. When a child is fairly young, his/her general schedule (e.g., naps) should be considered when scheduling interviews. If an interview in the home or location where the abuse may have occurred is unavoidable, the team is advised to select a place where the abuse is unlikely to have taken place. The interviewing team should consist of as few individuals as possible. Which team member questions the child is not as important as the skill of the interviewer *and* the preference that the child may indicate.

The interview will be enhanced if a cooperative adult accompanies the child and acts as liaison between the child and the interviewer. The adult can introduce the interviewer to the child as someone who is specially trained to help children. In addition, the adult can encourage the child to tell the interviewer everything that happened, thereby giving the child permission to talk freely.

It is important to conduct the interview in a quiet setting with minimal disruptions. It is also important to keep in mind that a child rarely feels free to disclose sensitive information when a parent or relative is present. However, if the child is extremely distressed or unwilling to be questioned alone, a nonoffending parent or other supportive adult may sit quietly in during the interview. Although multiple interviews may be necessary, the original interviewer should either conduct them or be present to introduce the child to the new interviewer. This preserves the rapport between the interviewer and the child and protects the child from unnecessary anxiety. However, it is extremely important to minimize the number of interviews and professionals the child experiences. The greater the number of interviews, the more trauma the child suffers. Whenever possible, the same individual, either the interviewer or a volunteer, should accompany the child to all appointments and proceedings relative to the case. The child is thus provided with a familiar and supportive person throughout the legal process.

In addition, the investigator must be extremely careful how he/she reacts to the child's statements. Inexperienced investigators hearing the graphic details of child sexual abuse for the first time from a small child may inadvertently display shock or discomfort. Most children are very perceptive and "pick up" on even subtle reactions by the adults around them. If the child believes the interviewer really does not want to hear the information, he/she may stop talking about the very issues that necessitated the interview in the first place. New investigators must become comfortable with the slang language of sexual assault and be able to talk about the details of abuse without emotion. Even body language and facial responses must be carefully controlled. The investigator must use his/her words and demeanor to encourage, not discourage, open communication.

THE INTERVIEW PROCESS

If a police officer is the interviewer or is going to sit in during the interview, he/she should ask him/herself two questions: "Should I be in uniform?" "Will the uniform distract or be threatening to the child?"

To answer these questions, the uniformed officer should consider the following five points:

- The child's beliefs about what would happen to the child if he/she disclosed. The officer should keep in mind that the child may have been told by the perpetrator that:

  — if the child told, the child would be punished, and the child may assume that the officer is the instrument of that punishment;

  — the child will get in trouble, and the police will arrest the child and take him/her away; or

  — if the child disclosed, the perpetrator would be arrested; the child may assume that the police officer is there for that function.

- The child's beliefs about police and past experiences with police. For example, have the parents told the child that the law enforcement officer's function is punitive; not one of a helpful, friendly individual who is there in the child's best interest?

- The child may view the police uniform as a symbol of protection and feel much safer having that protection present, believing that the uniform means that the perpetrator cannot be with the child again. The officer might find it to his/her advantage to either change into civilian clothes or put a jacket on over the uniform to play down obvious signs of authority. In all child interviews, the officer should remove and secure his/her weapon so that it is out of sight prior to the interview.

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- The child may believe that the uniform represents authority. This can be positive if a child looks to someone of authority to grant permission to talk freely. However, in some instances, such as when dealing with adolescent victims, the uniform may be a negative influence. The officer might find it to his/her advantage to either remove the uniform or to put on a jacket over the uniform to downplay obvious signs of authority.

- A smaller child is frequently attracted to the uniform and the various objects that are worn by the officer. An exploration of an officer's uniform, by the officer and the child, may help establish rapport and may enable the child to feel more comfortable.

Another issue to consider is that all interviews with children should be documented fully by the interviewer. If more than one interviewer is present, the professional not interviewing the child should take notes of the child's statements. These notes should be as exact as possible using the specific words of the child rather than an interpretation by the adult of what the child has said.

The interviewer should not stand above the child but should get down on the child's level, even if this means sitting on the floor. The interviewer should merely get close enough to the child to hear what the child has to say. The interviewer must remember that each person maintains a body space and to violate this space could be a reminder of the invasion of the offender.

Investigators must introduce themselves to the child. They may use their first name, if they feel comfortable doing so. Through school programs, many children have been exposed to an "Officer Friendly" type interaction and will respond well when the officer introduces him/herself as Officer Bill or Officer Mary. The investigator should also let the child know the agency that he/she represents. Initial questions should be unrelated to the incident itself, such as the child's age, where he/she goes to school, does he/she have any

brothers or sisters, what are his/her favorite games, etc. This should help the child become accustomed to talking with the interviewer in a nonthreatening manner. The interviewer should remember to look at the child throughout the interview.

The language the interviewer uses should be appropriate for the child's age and development. Questions should be phrased in familiar terms. As rapport is established, the interviewer evaluates that child's competency: Is the child able to distinguish between fantasy and reality? How does the child respond when asked to recall and relate information? For young children, what is their developmental level, do they understand the meaning of the words used?

It is generally advisable for the interviewer not to initiate physical contact with children during questioning. If the child touches the interviewer in a seductive or inappropriate manner (as some sexually abused children may), the interviewer may respond by saying, "I feel uncomfortable when you touch me that way. Let's not do that. We can just sit here next to each other. Okay?"

As a prelude to specific questions about the abuse incident, an investigator may talk with the child about the duties of his/her job. For example, "My job is to talk to children about things that happen in their lives. I talk to kids about things that make them happy, sad, mad, or angry. Sometimes these children have problems they need help with."

The interviewer should never suggest that the nature of the problem is already known. Rather they should encourage the child to talk. "Someone who is concerned about you called me today and said that you might have a problem at home and need some help."

If the child shows discomfort, this should be acknowledged and explored. To elicit a response, the interviewer might say, "You seem worried (scared, embarrassed, nervous) right now. What are you worried about? Are you worried that someone might find out you talked with me? Who are you worried about? What do you think will happen?"

The interview should flow from the general (getting to know the child) to the specific (the actual abuse).

During this phase of establishing an alliance or getting the child to trust the investigator, the officer needs to identify and build on the request—how the child hopes or wishes the law enforcement officer can help.

Law enforcement officers can accomplish this by:

- Identifying what the child wants (this child may want you to promise not to tell anyone).
- Identifying what the officer can do to meet what the child wants ("I can first listen to you tell me what happened to you.")
- Letting the child know that the interviewer is honest (won't lie to him/her) and is trustworthy.
- Enabling the child to perceive the interviewer as empathetic.

Encouraging Children To Use Their Own Language

Strategies to encourage children to use their own language include the following:

- Use verbal prefaces (e.g., "It is important for you to tell me so I can help you.").

- Avoid direct and leading questions. An example of a leading question is "Your father took your clothes off, didn't he?"

- Encourage clarification. As the interview progresses, the child will often make a vague reference to "trouble at home" or "the thing that happened after school." The interviewer might encourage clarification by paraphrasing the child's statement or by forming questions from key words that the child has used such as, "What kind of trouble at home do you mean?" or "Can you tell me about the thing that happened after school?"

- Do not use bribes or enticements. A child who has probably been told to be silent by a perpetrator will only be further confused when offered ice cream or toys as a reward for revealing information. Such methods will also jeopardize the case in court.

- Deal with the child's fear and try to decrease the child's anxiety. One way to do this is to let the child tell his/her account at his/her own pace.

- Acknowledge a child's embarrassment and/or reluctance to discuss troubles and issues. For example, if the child suggests that the problem involves a specific person (stepfather, baby-sitter, friend, etc.), the interviewer might ask, "What kind of problem are you having with your stepfather or with Uncle John?" If the child indicates embarrassment and reluctance, the interviewer should acknowledge it, reassure the child, and then restate the question. In addition, in sexual abuse cases, if the child answers, "Uncle John touches me down there (indicating the genital area) when we are alone," the interviewer should respond matter-of-factly, "What do you call that down there?" If the child is too embarrassed to answer or has difficulty in answering or giving specific details, the interviewer might then consider the introduction of anatomically detailed dolls.

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- In physical abuse cases, if the child does not introduce the injury, the investigator should ask specific questions to elicit the information. For example, "How did you get that cut on your head?" If the child's explanation is implausible, the investigator might try, "Is that what you're supposed to tell me?" The investigator should wait for a response and say, "What really happened?"

- Encourage a dialogue by discussing privacy with the child. As an investigator talks with the child about nonsexual and sexual parts of the body, he/she may also encourage a dialogue by talking with the child about privacy. Investigators can ask the child what privacy means. When the concept is understood, investigators may ask the child, "Do people give you privacy at home? Can you be by yourself when you want to be?" If their reply is, "Well, sometimes Uncle John comes into my room when I want to sleep," the interviewer can then ask for specifics.

Establishing Details of the Assault

In establishing the details of an assault, the investigator should move from general details to the specific details of the assault. The investigator needs to help decrease anxiety and fear by using focusing techniques.

- **Child's activity.** The investigator should help the child reconstruct his/her day. For example, "What were you doing that day?" (The weather, play inside or outside, school, television show, etc.)

- **Assailant's activity.** The investigator should try to learn what the assailant was doing.

- **Family's activity.** The officer should determine where other family members were during the assault (e.g., mother was out of house).

Pictures may be used to tell what happened during an event. Officers can encourage the child to draw his/her family, their home, or try to draw what happened. At this time, investigators must concern themselves not only with the facts of what happened but also the child's feelings about the incident. These pictures may be used as evidence in court so, after the child has finished drawing the picture, investigators should be sure to initial it and maintain it in a chain of custody. On the back of the drawing, investigators should write what the child stated he/she was drawing. For example, "In response to the question, how were you lying on the bed? Connie drew a picture of the bed with her and a figure she identified as Uncle Harvey on it. The figure drawn in red is Harvey." As the child uses the dolls or draws pictures, investigators must have the child describe, during the demonstration, what is going on. This may assist the investigator in making this information admissible in court, since it is information that was given as part of the demonstration and is not necessarily hearsay information.

In some jurisdictions, puppet play is used, where the child talks to the puppets and moves from talking about the puppets or with the puppets to talking about him/herself to the interviewer.

If, during the interview, the child indicates that other individuals were present at the time of the incident, this gives the investigator information about potential witnesses or victims. If several incidents of abuse have taken place, the child needs to be questioned concerning the first incident that occurred. Talking about earlier incidents is often less threatening than discussing more recent ones. This procedure also helps establish the progression of sexual activity in sexual abuse cases.

The interviewer should not ask leading questions but should pose open-ended questions that invite the child to elaborate. Questions such as, "Did your mom hit you there?" or "Did he pull your pants down?" will tempt the child to agree and should be avoided. In contrast, "What happened next?" or "Then what did he do?" are questions that encourage disclosure without being suggestive.

In some special situations, interviewers may wish to *repeat* exactly what the child said to facilitate their understanding of the child. This should be considered in the case where the child has a speech impediment or when a young child cannot be easily understood. This is especially important if an audiotape or videotape is being made.

As the abuse is revealed, the interviewer should underreact. A simple nod or "uh huh" is usually an effective acknowledgment. This matter-of-fact attitude helps ensure the child's confidence and encourages additional disclosure.

The duration of the perpetrator's access to the child should be explored since multiple incidents may have occurred. Access may be corroborated by adult friends or relatives of the child.

To determine if the child was told to keep a physical or sexual abuse incident a secret, the interviewer might ask, "What did your mom (or teacher) say about it (the incident) when you told her?" Often the victim will reply, "I never told my mother about it. It was a secret." This disclosure opens further dialogue and helps confirm the abuse.

When questioning is completed, the child should be thanked for helping. The child should be reassured that he/she is not to blame for the abuse and the adult is responsible. The interview should close with an open question about whether there is anything else the child wants to say. The child should be given a name or number to call if he/she has problems during the investigation or thinks of something else (if age appropriate). If the child expresses concern about what will happen (to self or perpetrator), answer the questions honestly. Explain that in this situation rules must be followed. However, detailed explanations about the prosecution of the offender can be confusing or alarming.

It should be remembered that not all abused children will be able to disclose on the first interview (or in some cases, ever), nor will all children disclose the totality of their abuse on the initial interview. It may be necessary for the interviewer to arrange for therapy for the child before the child feels comfortable or safe enough to disclose. Investigators should always keep in mind that the child may initially deny any abuse and even deny it repeatedly over a period of time. They may then begin to release bits and pieces of the abuse to test the reaction of the interviewer. This is especially true in cases of sexual abuse. Patience and skill are necessary in handling children of various ages, and experience will be one of the key factors in developing the investigator's competency in handling these situations.[30]

INTERVIEWING TOOLS

Investigators have found a variety of tools useful in communicating with small children (and sometimes older ones as well). Small children sometimes find it easier to communicate sensitive information about the abuse through some form of media. While these techniques help the child explain what is happening, there are pitfalls, including the potentially leading nature of the interview.[31]

Puppets

Many children are comfortable with puppets and will talk to a puppet when they would otherwise remain silent to the direct questions of an adult.

Drawings

Many preschool and school-age children like to draw. Investigators can request the child to draw a picture of his/her family, the perpetrator, or, more directly, the abuse (after disclosure). There are no standards by which such drawings may be interpreted as showing abuse. The principal advantage of drawings is that the investigator can ask the child to explain what was drawn. This is an excellent way to get needed details.

Bodygrams or Anatomically Detailed Drawings

Available commercially, these outline drawings of the human form allow the child to show where on the body he/she was touched and by what part of the perpetrator. The drawings are available in male and female, child and adult forms.

Doll Houses/Small Toy People

Some researchers have found that preschool children prefer small dolls, because they are less intimidating and more easily manipulated. Again, this tool allows children to verbalize what happened while they show the investigator.

Prevention Materials

Some investigators use materials such as coloring books designed for abuse prevention. This is risky from an investigative standpoint. Because the material was conceived as a prevention aid, it is often highly leading. For the most part, it is suggested that officers avoid the use of such tools during the investigative stage.

Dolls

Dolls that are not detailed anatomically can be used by the child to act out the story. The investigator should allow the child to select and name the dolls. Avoid using terms like, "Let's pretend this is Uncle Mike."

Anatomically Detailed Dolls

These are among the most commonly used tools. Not all anatomically "correct" dolls are "correct" enough to be accepted by the court. The investigator should receive training on how to use these dolls and review the manufacturer's instructions prior to use. The following guidelines should be observed.

The child must be interviewed verbally and give some indication that sexual abuse has occurred before the officer proceeds with introduction of the anatomically detailed dolls. Investigators should follow the principles described below during this interview:

- **Dolls should only be used if the child has difficulty or is embarrassed about describing the sexual abuse that has occurred.** Not all children need the aid of the dolls. *Investigators should not insist on using them if it is not necessary.*

- **Introduce the dolls fully clothed.** Investigators should tell the child that the dolls help when talking with children. They should also let the child know that the dolls belong to the agency, but the child may touch them during the interview. Further, investigators must explain that the dolls are different from most other dolls because they have all of their body parts, including the sexual parts, which is why they are helpful in describing what happened.

- **Let the child explore the dolls.** Investigators must remember that it is not necessarily indicative of abuse for children to engage in exploratory behavior with the dolls. Some children stick their fingers in various holes, pull on the penis, see if the penis fits into the vagina, anus, or mouth. Officers should not consider this evidence of sexual abuse. Investigators should listen to what the child says during this time. Some children may start to share details about previous sexual activity.

- **Pick a doll to name the body parts with the child.** Investigators should point and say "What do you call this?" Investigators should begin with nonsexual body parts, then move back and forth between sexual and nonsexual. They should repeat what the child says and use the child's terms. If the child uses slang terms for some body parts, the investigator should ask who suggested that name. Officers should cover each doll that will be used during the interview in the same way.

- **Ask the child to choose a doll to represent him/herself.** Investigators should not use the word "pretend," or "let's play like this is you." Investigators should have the child choose a doll to represent the person the child has named as the perpetrator.

- **Ask the child to show what happened.** Investigators should have the child *explain verbally* what is being demonstrated. They should also repeat back to the child what he/she is saying. Officers must ask about the first time something happened with the named offender and try to move forward in chronological order, using open-ended questions, for example, "What happened next? And then what happened? Did he/she do anything else to you? Ask you to do anything else?"

- **Avoid leading questions.** For example, "Where did Steve hurt you?" Questions beginning with who, how, when, what, or where are seldom leading. Officers should avoid questions that suggest the answer within the question and questions that can be answered yes or no. For example, "Daddy hurt you, didn't he?" Investigators should not use "why" questions with the child. They tend to imply that the child is at fault. Officers must keep sentences short and simple and use names (Daddy, Miss Sue) rather than pronouns. With young children, officers should avoid either/or questions.

- **Do not react visually to the child's statement.**

- **Do not bribe the child to talk** (for example, cookies, other special treats, or inappropriate verbal reinforcers).

- **Adapt the interview to the child's pace, not to the interviewer's urgency to learn what happened.** Children who feel pressured often reveal less. It may be helpful for officers to allow the child to talk about other things or play during the interview, returning to the subject of sexual abuse periodically.

- **Close the interview by praising the child for helping and being able to talk about something very personal and hard to discuss.** If the child discloses, investigators should let the child know he/she is not to blame; the adult is. They should also explain the next step in the process, and let the child know that what will happen next is due to the adult's actions, not because the child disclosed. When possible and appropriate, investigators should end the interview with an activity pleasant for the child.

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- **Because children who have been abused over time seldom disclose everything that has happened in the first interview, multiple interviews (two or three) may be important for every child suspected of being a victim.** They should be conducted by the same interviewer, at the same place, and on subsequent days if possible.[32]

- **If a child is *not* disclosing or cooperating with the interview, terminate the interview in a reasonable period of time.** If it is felt necessary, investigators should schedule another interview at a later date. A protracted interview with a nonresponsive child can be counterproductive and later used by defense attorneys *against* the investigator if the child subsequently discloses.

SPECIAL TYPES OF INVESTIGATIONS

CROSS-CULTURAL INVESTIGATIONS

Law enforcement officers will be called upon to investigate allegations of child maltreatment involving members of different ethnic or racial groups from their own. In some parts of the country, the cultural diversity of the community requires tremendous flexibility in the investigative style. Not only must officers be able to communicate with others who do not speak English, but they must also know the style of interview that will yield the most accurate results. Investigators will also need to consider cultural factors in the validation process.

Investigators need to be sure that their personal beliefs about child care do not become the standard to which they legally seek to hold others. As Elmer and Schultz illustrated, "an unproven popular belief is that young children should not be cared for by their older siblings. In some other cultures such caretaking arrangements are standard."[33] They further note that, "determining whether caretaking by siblings is evidence of neglect should be a matter of context; whether such caretaking is valued by the group or imposed on an unwilling child."[34] Numerous other examples exist that place the predominant culture's view of child rearing at odds with other cultures.

In addition, some cultural practices have the potential to be misinterpreted as child abuse. For example, Vietnamese may cause synthetical linear bruises from the cultural practice of coin-rubbing. The practice is for the treatment of fever, chills, or headache and involves massaging the back and chest with a coin.[35] The result may appear to be abuse related. Other practices of foreign cultures must be explored when the officer is called upon to investigate people whose culture is different and/or unknown.

However, the officer must also be cautious about the influence of racism. A national consensus building on law enforcement and CPS suggested, "just as racism plays a role in many parts of society, it is expressed in the child protection process at both individual and institutional level."[36] Officers must be attuned to their own beliefs about members of other racial groups and ensure that their beliefs do not influence their case judgment.

SEXUAL ABUSE ALLEGATIONS IN DIVORCE PROCEEDINGS OR RELATED TO CHILD CUSTODY DISPUTES

Reports of child sexual abuse arising during divorce or custody disputes seem to be increasing. These cases present some unique and perplexing issues to the investigator. Truly false reports of abuse are rare (as opposed to legitimate misunderstandings). Children rarely make up stories about abuse, and adults rarely report sexual assaults they know not to be true.[37] Motivations on the part of the parents in a custody dispute, however, may be different. One parent may act with vindictiveness or malice toward the other parent. Currently, allegations of abuse are one of the most powerful weapons available to an estranged parent in courts. Alleging child sexual abuse changes the balance of power and can immediately alter visitation arrangements and custody. For these reasons, many divorce judges and attorneys have become highly

skeptical of any allegations of abuse that arise during the dispute. They presume that if the charges were legitimate the charging parent should have made the allegations before divorce proceedings were initiated.

There are numerous reasons why the abuse may not have surfaced before the divorce, including changes in the offending parent's emotional support system, sexual outlets, housing and sleeping arrangements, or level of supervision over the child.[38]

Investigators should consider the following special issues when investigating these cases:

- **Interview the child in a neutral setting away from both parents' home and without the charging parent present.**

- **The child's statement about abuse must be carefully scrutinized.** Investigators should look for patterns in the child's statement or statements of siblings. Use of the same words over and over or using adult terminology should be examined by officers. The "coached" child will usually have few words to describe something about which he/she has no real knowledge. Investigators must look at the details of what the child is saying. In particular, preschool children are developmentally unable to falsify factual material in the proper context of the abuse.

  The investigator may have to assess the authenticity of the child's statement. For example, "Does the statement of abuse fit with other information provided (e.g., behavioral indicators)?" "Are the statements made dispassionately or with emotion or fear?" If not, "does there appear to be a reason for lack of emotion?" "How does the way the child describes the abuse relate to less emotionally laden material?"

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- **Note if the statements are made spontaneously or after normal introduction questions and preparation.**

It is also important to realize that some unfounded reports in custody cases come from a misunderstanding of some action on the part of the alleged perpetrator. For example, a preschool child may tell mother that, "Daddy hurt me on my pee-pee." The mother responds based on her negative feelings about the spouse and assumes child sexual abuse. The attention she focuses on the child reinforces the statement and encourages the child to say and do whatever generates the attention. In fact, the "hurt" the child described may have been from normal parent interactions,[39] playing, bathing, or changing clothes or diapers. Consequently, it is important for investigators to be sure that the child is describing actual abuse, not normal parent–child interaction that has been misinterpreted.

ALLEGATIONS OF SEXUAL ABUSE IN FOSTER CARE

With divorce cases, false allegations may arise out of the vindictiveness or misunderstandings of an adult and usually involve small children. Allegations in foster care more commonly involve somewhat older children, many of whom have a history of victimization. While children rarely lie about abuse, former victims of abuse are somewhat more likely to fabricate such charges or to misinterpret the actions of their caregivers as sexual abuse.[40] Assessing cases of abuse of children in foster care is more difficult, because the children may have been abused elsewhere and may be able to accurately describe sexual assault. They may have explicit knowledge of abusive behavior and know that last time it was accompanied by secrecy and/or coercion. Assessing their statement may be further complicated by emotional disturbance and/or a history of fabrication.

Special issues to consider in these cases include:

- Compare the details of the alleged abuse with prior victimization. Are the same words used and are the same acts or sequence of behavior described?

- If the child has a history of fabrication, how does the detail of the current allegations compare with the detail and consistency of past fabrications?

- What do other current or former foster children in the home or agency have to say about the child, the alleged perpetrator, and their relationship? Do they have circumstantial information to corroborate or refute the child's statement?

The fact that some foster children who were previously abused have a history of lying and emotional disturbance does not mean that such a child's statements regarding this abuse are not accurate.

MACRO-CASE

Abuse and exploitation of children in out-of-home care settings have occurred in many communities nationwide. The long-held stereotype of the single "stranger" offender who abuses a lone victim is one that has increasingly proved to be unrealistic. Many of the out-of-home care cases now being properly investigated show that where there is a single offender, there probably will be multiple victims (possibly involving hundreds of children), and that a number of these offenders communicate and/or associate with others who have a similar interest in children.

Some investigations may well involve multiple offenders, multiple children, and multiple jurisdictions. These cases are the most complex and time consuming in which an investigator is likely to be involved. Correctly handling this type of situation from its inception is of utmost importance. These multiple victim and multiple jurisdiction cases have been called "macro-cases" because of the potential size of the case. While the macro-case protocol is described here, other excellent protocols exist, such as Los Angeles County's Interagency Council on Child Abuse and Neglect's multivictim, multisuspect protocol. 225

Media reports on alleged sexual acts committed against children in numerous out-of-home settings have elevated public and professional concern about the investigative procedures followed, as well as the safety of children. This media attention does not stop with the initial reporting of the complaint but continues as the investigation progresses into the trial. The focus of such attention may prompt investigators to move more rapidly and prematurely than the case and caution would warrant otherwise. It is critical in the face of such media pressure that investigators proceed methodically and in an organized manner. In the final analysis, when confronted with such a case, an investigator must pause, plan, prepare, and then proceed carefully.

The investigative team should determine who will be the spokesperson for the investigation. This person must be comfortable talking on camera or to newspaper reporters. The team and its agency supervisors must agree on a media strategy. Obviously the spokesperson cannot disclose the details of the ongoing investigation. The spokesperson can, however, give the media useful information without compromising the investigation, the rights of the alleged offender, or the children.

The team spokesperson can discuss how investigations like these are handled and assure the reporter that the team is seeking facts and that they has taken steps to control the contamination of the children's statements. The spokesperson can also provide background information on the number of reports of child abuse received

each year and the rarity of allegations of multiple victim/multiple perpetrator cases. The spokesperson should present an image of professionals doing a difficult job in an objective manner. Having done so, it is incumbent that the team live up to this role. If the spokesperson responds to media inquiries with "no comment," the team opens itself up to manipulation by defense attorneys who, in many cases, have sought to portray the investigators as misguided zealots on a witch hunt.

Another overriding concern is to avoid pitfalls that defense attorneys will later use to try to destroy the case. Such cases defy the public imagination (and sometimes even that of the professionals investigating the case). This incredibility factor is easily exploited by defense attorneys. Attorneys will try to convince the public and jurors that "misguided zealots" (i.e., the investigators) have for some reason fabricated, induced, or brainwashed this preposterous tale into these innocent children's minds. The primary defense strategy that has emerged in many cases is to identify the principal investigators as the problem, rather than the offender(s). By diverting attention away from the defendant, the defense attorney clouds the issue of exactly who is on trial and what the issues really are. The defense seeks to convince the jury that it is more likely that one or possibly two well-intentioned but inept investigators planted the story in the children's minds, rather than face the reality of large-scale methodical abuse of children.

To limit such strategies, investigators are cautioned against relying exclusively on one or two principal investigators and are encouraged to establish two or more separate investigative teams and even involve multiple medical examiners when possible. The fewer the investigators, the greater the chance of challenge.

Investigative Teams and Design

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As soon as the possibility of a macro-case becomes known, the original investigator should request that additional personnel be assigned. These investigative teams should divide into separate units and act as separate units with absolutely no direct exchange of information among the different teams. The overall investigation and the work of these units should be coordinated by a central team leader.

Each unit should be assigned a cluster of potential victims to interview. It is wise to divide the high-risk population into different clusters and consequently different units.[41] The actual interviewing styles followed are consistent with other child victim interviews. Investigators should attempt to ascertain special activities, if any, that have involved the children, such as movies, television shows, games, clowns, magicians, or other similar events. Documenting such events may be important in separating fact from fantasy and in corroborating children's statements. This information may also become critical in avoiding erroneous conclusions that mix actual abuse with a special event in such a way as to mislead investigators to conclude that ritualistic abuse has occurred.[42]

In some macro-cases where extraordinary levels of coercion have been employed by the perpetrator(s) to enforce the children's silence, the victims will be slow to reveal what has happened; multiple interviews may be necessary. These children may initially deny all knowledge of abuse but then, as they feel more comfortable with the interviewer, the children may say, "it happened to someone else," or "it may have happened to a friend," and finally reveal that it actually happened to them—the process likened to peeling an onion one layer at a time.[43] Unfortunately, the defense will later use these inconsistencies to their advantage. A different qualified physician (if available) should be identified to examine the children of each cluster, if medical exams are to be given.

When the units complete their interviews (including those of the children's parents) and prepare their reports, the coordinator will then assign the new children to be interviewed. These may be children who were identified by the original cluster as other victims or witnesses, or other children whom the team coordinator has identified as "high-risk." These units will not be informed of the results of the other units' interviews to avoid the charge that the investigators were working in concert to pressure the children into telling the same stories. While each team should validate its own interviews using established validation procedures that can be articulated later in the courtroom setting, it will be the team coordinator who puts the whole puzzle together and validates that it is a macro-case rather than an isolated case or cases within a single population. A diagram of how the structure might appear is given in Figure 1.

This investigation format should be followed as long as the possibility of a macro-case continues. While it may not seem feasible to commit that many investigators to a single case, the investigation will be completed far more rapidly, and the likelihood of a positive outcome will be enhanced. In reality, the actual hours of personnel devoted to the case would not increase. This should also help ensure that interviews, medical examinations, and the collection of physical evidence will be conducted in a timely fashion.

The team coordinator should take the investigative information submitted to him/her and, with the aid of a charting specialist (where available), prepare association and/or flow charting of all the activities and relationships which interviewees provide. A summary of each interview should be kept to list the name of the interviewee, the primary offender, other victims that the interviewee names, other offenders that the child names, potential witnesses, items of physical evidence mentioned, and locations where the abuse occurred. The prosecutor's office should be kept abreast of this information to better determine when enough information exists to obtain search warrants, at what locations, and what pieces of evidence are believed to be present. If multiple locations have been exposed as abuse sites, the possibility of simultaneous raids should be explored.

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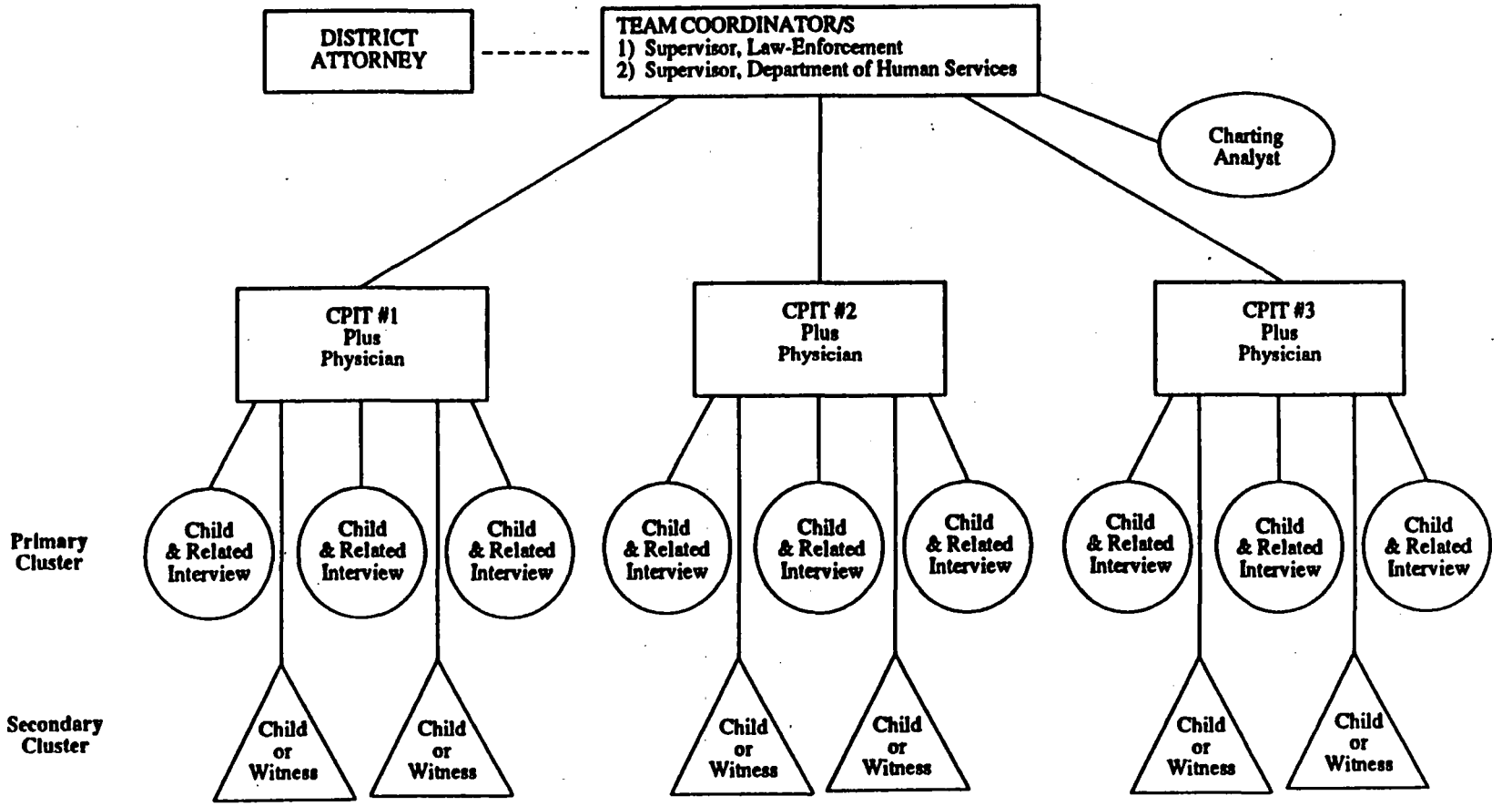
Since the potential for removal or destruction of evidence exists, this part of the investigation should move as rapidly as legally possible. Once the investigation is known publicly, past experience has shown that the likelihood of finding evidence the children have stated exists or finding it in the *same condition* that the children have described is rare.

As mentioned earlier, different physicians who are trained in the examination of sexually abused children should be employed. Many of these cases will require the use of specialized equipment and sophisticated techniques beyond the capabilities of untrained local physicians. Again, if only one doctor performs the exams, particularly if medical evidence is discovered, it is easy for the defense to challenge one physician's credentials, methodology of exams, and exam findings. Regrettably, many communities have few options in this area. By recruiting a different physician for each team, investigators minimize the chance that the defense will discredit the physician and relieve a single physician of the responsibility of having to document and testify in a multitude of cases.

By breaking down the number of interviews into manageable blocks, investigators are less likely to feel overwhelmed and confused about what has been disclosed and where the next step should lead. As always, the chain of evidence must be observed carefully.

Figure 1
SUGGESTED INVESTIGATION STRUCTURE



Parents

An important consideration is the reaction of the parents of the child victims and that of parents of possible victims. The mismanagement of the parents may be the single most common mistake in these types of cases and the most damaging to a successful investigation in the long run.

Investigators will see many different reactions by parents, from overreactive, overprotective, nonbelieving to supportive. In some situations, these reactions represent stages through which parents must pass to deal with the trauma of knowing that their child has been victimized. With other parents, investigators will see little or no movement toward healthy resolution. An effective investigation will address the issue, with a focus on moving parents to the more supportive mode. Initially, it will fall to the team coordinators to arrange for the proper environment for this process to begin.

A suggested protocol would be to call a meeting of all parents whose children are in the possible victim population as soon as the initial validation of a case has been made. This can be done by personal or telephone contact or by sending letters to parents requesting a meeting. The purpose of this meeting is to tell the parents that an investigation is underway and that they are requested to cooperate. Concern for the children and their well-being is stressed. It is appropriate to have one or more mental health practitioners at the meeting to assist in leading this discussion. Investigators can discuss the broad issues of child abuse and perhaps give the parents guidance on how to reduce risk of abuse in the future. The mental health professional can discuss how parents can best react to any disclosures or explain where to secure needed counseling. The investigators should expect a variety of emotions at this meeting, reflecting the various ways parents react to such allegations.

In some cases, families may distrust one another, fearing that information shared will get back to the alleged offender(s). The investigator leading the discussion should be clear on what will and can be discussed and what cannot. Smaller parent groups can then be established to help parents deal with the specific concerns they may have and to keep them informed of the progress of the investigation.

In summary, investigators must remember the following key points to successfully investigate a macro-case:

- Plan carefully, but react quickly, particularly in regard to possible physical evidence.
- Resist the temptation to respond to media pressure. Develop a strategy for all investigative agencies on how to respond to media inquiries. The team coordinators should be responsible for designating one person to be a media contact.
- Establish an investigative team large enough to interview all possible victims properly and quickly. Do not be afraid to ask for help.
- Appoint a team leader and break the team into investigative units, isolating the units from each other to avoid cross-contamination.
- Expect the children to reveal the abuse slowly.
- Chart and carefully document which child alleges what activity. These cases get complex very quickly.

- Understand parental reaction and try to harness parents' energies so they will not work against the investigative team.[44]

INVESTIGATION OF CHILD DEATHS

Investigating the death of a child can be among the most difficult and frustrating types of cases law enforcement officers will encounter. In some cases the cause of death will be clear and a perpetrator obvious; unfortunately, this does not always happen. The National Committee for Prevention of Child Abuse reported 1,211 child abuse-related fatalities nationwide in 1990.[45] Also of interest to law enforcement are preventable deaths due to neglect, such as the death of an infant left unattended in a house fire or the child who accidentally ingests illegal drugs. However, officers and medical professionals will often be able to only speculate as to what happened to cause the death, and the autopsy report will read "undetermined" or "Sudden Infant Death Syndrome (SIDS)." In most cases, the investigators must carefully balance their investigative needs with sensitivity and sympathy for the grieving family, who may not be responsible for the child's death. This requires skill and tact. The officer must gain adequate information to determine if the death was the result of the actions of the caregivers, without unduly adding to the trauma of the parents who lost the child. The basic steps in these cases are variations of normal investigations of possible homicides and physical abuse investigations.

Investigatory Steps

The Crime Scene

230 If the caretakers explain that the injury was sustained in a certain place, that location should be visited immediately. Photographs, videotapes, and/or diagrams should be made of the area where the injury occurred, noting the location of large toys, furniture, and other objects that might play a role in the injury or accident.[46] Any objects that might contain trace evidence should be secured. Depending on the case circumstance, the investigator may also wish to see other locations within the home, such as the child's room (if other than the alleged scene of the "accident") to observe any other possible sources of evidence (blood stains, vomit, or signs of struggle).

Interviewing Adults

All caretakers and adult witnesses should be interviewed as they are in a physical abuse investigation. Topics to address in the interview include:

- When was the last time they saw the child?
- What was the child's condition when last seen?
- If they noted the injury or condition, when did it first appear and how did it progress?
- List, to their knowledge, all persons who were with the child throughout the period of possible injury.
- How did they react to the injury or condition and how did other caretakers react?

- If the crime scene is significant, what observation did this person have of it and of charges made before the officer arrived?
- Have they ever noticed injuries or similar conditions before?
- Has the child been seen by a physician recently? If so, by whom?
- Has the child ever been hospitalized? If so, where?
- Does the child have regular medical contact? If so, with whom?
- Does the child have medical insurance? If so, with whom? (This will enable the investigator to acquire a history of medical contacts.)
- Has something of a similar nature ever happened to other children in the family or in prior relationships?
- Do any of the caretakers use and/or abuse alcohol or drugs?

Interviewing Other Children

If the cause of death appears to be the result of a traumatic injury, any other siblings or children in the house should be interviewed. Investigators should be interested in what the children observed and when. Investigators may explore many of the same issues with all the children. Children should be approached in a nonthreatening manner. Investigators should also assess whether these children may have been abused or are at risk. If abuse is suspected in the death of a child, CPS caseworkers should be working with the officers to assess the history and risk of abuse to any minor siblings.

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Interviewing Professionals

Any physicians, emergency medical technicians, or other professionals who responded to the scene or treated the child in the office or hospital should be interviewed. Complete statements should be taken regarding their observations and/or findings, statements made by the caretakers or others as to how caretakers acted during their contact, or other information of value.[47] They should also be questioned as to the medical procedures that they followed, which could have altered medical/physical evidence of abuse important in the validation of the case (for example, clothing the child was wearing was torn by emergency medical technicians to enable them to administer lifesaving measures).

Providing Relevant Information to Medical Examiner Prior to Autopsy

Officers should seek an autopsy any time the cause of death is suspicious. All pertinent information available should be provided to the medical examiner prior to the autopsy.[48] If the injury was reported as an accident, the medical examiner should review the officer's photographs, videotapes, and/or diagnosis to better assess the plausibility of the explanation given.[49] Statements taken from any suspects should be included.

Based on all the information available, the officer will need to decide if the case warrants further criminal actions such as presentation to the prosecutor and/or grand jury. Some cases will, in fact, be obvious

homicides, while others will first appear to be the result of inflicted injuries, but, upon autopsy, may be declared SIDS or, in some cases, "undetermined." Many SIDS cases are medical anomalies that are unavoidable and that defy medical explanation. Some researchers suggest that at least some SIDS deaths are misdiagnosed as child abuse cases and/or accidents. When no outward signs of trauma are noted, the officer must be exceedingly sensitive. Many such cases involve families who did not contribute to the child's death. However, the investigative process cannot be short circuited because some "child homicides resemble (SIDS), more commonly called crib death,"[50] such as certain internal injuries, shaken infant syndrome, suffocation, poisoning, Munchausen syndrome by proxy, or drug injection.

SPECIAL INVESTIGATIVE TECHNIQUES

MONITORED PRETEXT TELEPHONE OR PERSONAL CONVERSATIONS

This is a term given to the use of monitored and electronically recorded conversations between a child abuse (usually child sexual abuse) suspect and an alleged victim. If successful, the recorded words of the offender can be used to gain a confession or guilty plea before or, if necessary, during the trial.

Telephone Method

Use of the telephone is probably the most common method and represents the fewest risks for the victim. Under this arrangement, the victim would call the offender on the telephone and engage him/her in a conversation about the abuse. The caller needs to be fully prepared emotionally and intellectually for the contact. He/she must be capable of carrying on the conversation in a natural manner or the offender will become suspicious. When successful, these calls can yield detailed explanations on tape of why offenders had sexual contact with the child.

Personal Conversation

In this arrangement, the victim meets personally with the offender wearing a body transmitter, again engaging the offender in a conversation about the abuse. The conversation is monitored by the officer and recorded electronically. This strategy has produced detailed incriminating statements and even overt actions that suggest abuse was about to be initiated.

Cautions

Neither of these procedures should be used without consulting the department's legal counsel and without consideration of undue trauma for the child and his/her family. While pretext conversations offer a powerful tool when they work, they create risks to the victim and to the investigation. The victim must be emotionally stable and developmentally mature to not be adversely affected by the experience. This technique would be unwise and potentially emotionally abusive in its own right for a young victim or a severely traumatized and fearful victim. The telephone method is generally the least threatening for the victim, and the officer can exercise the greatest level of support and control (being in the room with the victim along with other supportive persons). The personal contact is far more threatening and risky. Even if law enforcement is nearby, the child is physically alone with the person who has victimized him/her and could conceivably be physically injured by the offender before law enforcement intervenes. For this reason, this technique is often reserved for adults who were victimized as children and who are now prepared for the confrontation.

Investigative Risks

A possible risk is an unsuccessful contact, providing the defense with exculpatory evidence. If the offender has been alerted to the investigation or is generally aware of this technique through media accounts of other cases, he/she will use the contact to profess his/her innocence. However, if the victim is too young, immature,

or emotionally unready to do this, he/she will not be convincing, thus alerting the offender and resulting in professions of innocence.

For the following reasons, investigators should exercise care in the use of this technique:

- **Authorization.** The alleged victim and parents should agree to the procedures with the understanding that at any time the child can terminate the call or meeting.
- **Timing.** It should be done early enough in the investigation so that the alleged offender is unaware of the investigation.
- **Victim maturity/stability.** This should be assessed in consultation with the mental health professional on the team, if available. While potentially placing stress on the victim, an elicited confession may allow the victim to avoid the extreme pressures of confrontation and cross-examination at trial.
- **Victim preparation.** The victim should be prepared fully and completely for the contact and should be offered maximum support and protection. It is not advisable to give the child a "script" to follow, but discuss in general the type of information the investigator must have.
- **Check equipment.** This is no time for equipment failure.
- **Staffing.** Have sufficient personnel in place if a face-to-face meeting is arranged. Backup is *essential*.
- **Background information of offender.** It is extremely important to know if the person being called has the CALLER ID™ system or any other means of determining from where the call is being placed. The call should be placed from a "safe" telephone where the child can provide a callback number if necessary.

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POLYGRAPHS AND PSYCHOLOGICAL STRESS EVALUATIONS

These are used by many law enforcement agencies in conducting criminal investigations. As with other cases, there are the traditional problems with admissibility at trial, but they "may encourage additional statements which can be used as evidence."[51] Many investigators have found polygraph reliability even more suspect in child sexual abuse cases. If used, careful attention should be given to the wording of the questions. (See the segment on interviewing the alleged perpetrator.) There is a natural temptation for some law enforcement officers to use a polygraph test to determine the accuracy of the child's statement. However, this practice sends a clear message to the child that the adults do not believe him/her, and it reinforces that child's belief that he/she is to blame.

AUDIOTAPES OR VIDEOTAPES

The use of audiotaping or videotaping victims varies radically across the country. Some States have laws that allow the introduction of investigative videotapes into evidence at various stages of the criminal trial. The appellate reviews on these statutes have been mixed. As a result, law enforcement officers are generally encouraged to defer to the prosecutor on the wisdom of audiotaping or videotaping statements of the victim. Some jurisdictions allow the use of the tapes in juvenile or family court, but not in criminal court. If such taping is acceptable within the jurisdiction, there are several advantages and disadvantages that must be weighed.

Advantages

- Taping reduces the number of times the victim must be interviewed, allowing other investigators, supervisors, and prosecutors to review the child's statement accurately without reinterviewing the victim.

- It provides an accurate account of the statement, not the recollections or interpretations of the interviewer.

- It can be extraordinarily powerful in gaining a confession. By playing a short powerful segment of the tape, it might be useful in breaking down the suspect's defenses.

- It can be used with a nonoffending parent to force the reality of the abuse upon him/her, in an effort to get him/her to protect the child.

- In some States, it can be used in lieu of the child's testimony in juvenile court, at grand jury, or at preliminary hearings. Additionally, in some States, it can be used at trial if the child is also available at trial. In other jurisdictions, the taped statements of the child taken during the investigation or in deposition *may* be admissible if the trial court finds the child to be "unavailable" as a witness. These procedures are being challenged in the appellate courts and the outcome of their use is uncertain.

Disadvantages

- A tape records the child's denials as well as disclosures. Many children disclose in phases, first denying, then disclosing a little, then more, and as they gain comfort, even more details. The tape documents the denials and earlier inconsistencies for the defense to exploit. 235

- The tape documents every error the interviewer makes, every misphrased or leading question.

- It allows defense "experts" an opportunity to critique every word chosen in the interview and to characterize the interviewer's actions in a negative manner.

- It is not admissible in many courts or cases.

- The equipment may make the child uncomfortable or distracted.

If taping is used, procedures should be built into the investigative protocol for when it is used, by whom, and in what cases. The protocol should also include the disposition of the tapes, i.e., who gets the copies. The team needs to be sure that it adequately attends to the technical aspects of recordings, so that the product is clear and one can see and hear what is happening during the interview.

ISSUES IN ARREST

THE MIRANDA WARNING

As in any other investigation, the Miranda warnings should be provided prior to any *custodial* interview of the alleged offender. Officers should never try to circumvent the necessity of these warnings by having the CPS caseworker interview the suspect in a custodial setting (such as a police station, jail, or after arrest). Failure to properly observe these requirements will result in the inadmissibility of the statement for trial and expose the parties to lawsuits.

If the investigator's interview is considered an in-custody interrogation, the law enforcement officer must give the perpetrator the following warnings as prescribed by the Supreme Court of the United States in the Miranda case.

- He/she has the right to remain silent, and he/she need not answer any questions.
- If he/she does answer questions, the answer can be used against him/her.
- He/she has the right to consult with an attorney before or during questioning by the police.
- If he/she cannot afford to hire an attorney, one will be provided for him/her without cost.

All of these warnings must be given in such a way that the suspect clearly understands what he/she is being told.

If the suspect indicates at any time or in any manner whatsoever that he/she does not want to talk, the interrogation must cease. The interrogator is no longer privileged to talk him/her out of this refusal to talk.

If the suspect says at any time that he/she wants a lawyer, the interrogation must cease until he/she has the opportunity to confer with an attorney. No further questions may be asked of him/her outside the lawyer's presence or without the lawyer's permission, nor can the interrogator "talk him out of his desire for a lawyer." However, the subject can recant of his/her own free will the desire for a lawyer.

Currently, the only time a police interrogation of a suspect who is in custody or otherwise restrained can be conducted is after he/she has been given the required warning and after he/she has expressly stated that he/she is willing to answer questions without a lawyer being present. Once that waiver is given, the interrogator may then proceed to employ those interrogation techniques and tactics that are normally used. They can also be used without prior warnings or waiver on a suspected person who is not in police custody or otherwise deprived of his/her freedom of action in any significant way.

USE OF ARREST VERSUS GRAND JURY PRESENTATION

"In most communities only a very small proportion of child abuse and neglect cases result in arrest"[52] and prosecution. When prosecution is indicated, the officer and prosecutor must make a determination about the

best way to proceed. Depending on the jurisdiction, the investigator will weigh the advantages and disadvantages of an immediate probable cause arrest against the advantages and disadvantages of other charging options, such as direct presentation to the grand jury.

The first decision is whether immediate arrest is required. Probable cause arrest has certain disadvantages in child abuse cases. In an incest case, for example, premature arrest may result in the family closing ranks to protect the perpetrator before the investigation is concluded.[53] In most jurisdictions, it means a preliminary hearing in which the child may have to testify often before he/she has even fully disclosed or begun to be prepared to confront the offender. A recantation on the stand can have a devastating impact on the child and the prosecution. As the National Center for Prosecution of Child Abuse suggests, "In general avoid having the child testify at preliminary proceedings," except where the law requires or the prosecutor wishes to evaluate the strength of the case.[54]

There are times when immediate arrest is indicated, including when:

- there is reason to believe that the perpetrator will flee the jurisdiction if given the opportunity;
- it is necessary to preserve the peace or protect the child; and
- the suspect presents an immediate threat to others.

Whenever arrest occurs, there are guidelines that will reduce the adverse impact of the process on the child in intrafamilial cases and increase the likelihood of cooperation from the offender.

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- Investigators should not arrest and handcuff the perpetrator in front of the victim, if there is any type of positive or formal relationship involved.
- If arrest is anticipated, investigators should be sure a records check is conducted for past arrests first; there may be outstanding charges or a history of resisting.
- Investigators may give a cooperative offender who has confessed the opportunity to present him/herself for arrest.

CONCLUSION

In the final analysis, the skills and judgments required of law enforcement officers in response to child abuse cases are significantly different than that expected of officers in the investigation of most criminal activity. Factors that set apart child abuse cases are:

- At the onset of the investigation, officers must not assume that abuse, and therefore a crime, has occurred. The investigation must not just seek who is responsible, but must first establish that what has happened constitutes child abuse as defined in State law.

- Officers must communicate effectively with children in child abuse cases far more often than in any other class of crime. The child, particularly in sexual abuse cases, may be the only witness to the crime (beside the perpetrator).

- The officer must share power and authority with staff of other investigative agencies who have an equal responsibility to investigate allegations of child abuse. CPS staff must be viewed and developed as allies, rather than competitors or impediments in the criminal investigative process.

- Officers must often defer to the judgments of other professionals in assessing the evidence before them, including physicians, coroners, or mental health professionals.

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- The officer may find that the case is affected by more judicial systems than any other class of crime he/she is likely to confront. It is not uncommon for the criminal investigation and prosecution to be influenced by the juvenile or family court judge, the divorce judge, or administrative bodies such as licensing review boards or State CPS due process systems.

Ultimately law enforcement and the criminal justice system alone cannot successfully confront child abuse. Likewise, the child protection system or the mental health or medical professions cannot deal effectively with this problem alone. It is only through the effective integration of the strengths of all who provide services to abused and neglected children and their families that successful outcomes can be achieved. For this reason, officers involved in the protection of children, either as a function of their patrol duties or as a special investigative assignment, must seek ways to build effective relationships and alliances with the other systems involved in child protection. Law enforcement officers cannot isolate themselves in their own system and expect to address this problem effectively. Officers who may be experienced in other aspects of law enforcement can only be effective if they acquire the special skills and knowledge needed for this work. While some officers may have natural abilities with children, special training promotes understanding of the special developmental limitations and abilities of growing children and positively influences the investigative and factfinding process.

Officers must also be prepared for the special emotional toll that child abuse cases may exact from professionals involved. Failure to fully appreciate this aspect can lead to early burnout, but may also cloud judgment and objectivity. The potential for such influences to adversely affect the officer's performance can

be mitigated through effective coordination with the other agencies and professions actively involved in the protection of children.

It is the interdisciplinary team that is our best tool in combating child maltreatment.

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GLOSSARY OF TERMS

Age-Appropriate Language - a phrase used to describe language used by the child during an investigative interview in relation to the child's developmental status. In other words, the law enforcement officer encourages the child to speak using his/her own language; the officer assesses the credibility of the child based on this interaction.

Child Protective Services (CPS) - the designated social service agency (in most States) to receive reports, investigate, and provide rehabilitation services to children and families with problems of child maltreatment. Frequently, this agency is located within larger public social services agencies, such as Department of Social Services or Human Services.

Child's Sense of Time - a phrase used to explain the fact that children frequently are unable to remember exact dates and times but may be able to remember in relation to incidents that are meaningful for them, such as "after school was out" or "around Halloween."

Day Care Licensing Boards - administrative bodies responsible for licensing day care homes and centers. When allegations of abuse or neglect at a day care center are made, the licensing department must determine if the license should be revoked based on an instance of child maltreatment.

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Family Preservation/Reunification - established in law and policy and the philosophical belief of social services agencies that children and families should be maintained together if the safety of the children can be ensured.

Juvenile and Family Courts - established in most States to resolve conflict and to otherwise intervene in the lives of families in a manner that promotes the best interest of children. These courts specialize in areas such as child maltreatment, domestic violence, juvenile delinquency, divorce, child custody, and child support.

Macro-Case - a term used to describe complex cases of abuse and exploitation of children in out-of-home care settings involving multiple offenders, multiple children, and/or multiple jurisdictions.

Monitored Pretext Telephone or Personal Conversations - a term given to the use of monitored and electronically recorded conversations between a child abuse suspect and an alleged victim.

Munchausen Syndrome by Proxy - a form of child abuse, Munchausen Syndrome by Proxy is characterized by the deliberate initiation or reporting of physical symptoms in a child. These symptoms do not follow the usual course of illness and may occur when the caretaker or parent believes that care of a sick child will solve personal conflicts and provide social rewards.

Multidisciplinary Team - established between agencies and professionals within the child protection system to mutually discuss cases of child abuse and neglect and to aid decisions at various stages of the child protection system case process. These teams may also be designated by different names, including child protection teams, interdisciplinary teams, or case consultation teams.

Out-of-Home Care - child care, foster care, or residential care provided by persons, organizations, and institutions to children who are placed outside the family, usually under the jurisdiction of juvenile/family court.

Protocol - an interagency agreement between CPS and law enforcement that delineates joint roles and responsibilities and establishes criteria and procedures for working together on cases of child abuse and negle -

Response Time - a determination made by CPS and law enforcement after receiving a child abuse report regarding the immediacy of the response needed by CPS or law enforcement.

Risk Assessment - an assessment and measurement of the likelihood that a child will be maltreated in the future, usually through the use of checklists, matrices, scales, and/or other methods of measurement.

Sudden Infant Death Syndrome (SIDS) - the sudden death of an infant under 1 year of age that remains unexplained after the performance of a complete postmortem investigation, including an autopsy, an examination of the scene of death, and review of the case history.

Substantiated - a finding made by CPS after investigating a child abuse or neglect report indicating that credible evidence exists to support that child maltreatment did occur. The criteria used to substantiate a report are different in each State. Other terms used in some States are "indicated," "validated," or "founded."

Unsubstantiated - a finding made by CPS after investigating a child abuse or neglect report indicating that credible evidence *does not* exist to support that child maltreatment occurred. In some States, the term "unfounded" is used.

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Validation - a determination made by law enforcement after examining the evidence regarding whether child abuse or neglect has occurred. Based on this determination, the officer must judge what further action is necessary.

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AUDIOVISUALS AND PUBLIC AWARENESS MATERIALS

For information on audiovisuals or public awareness materials on these topics, please contact:

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Federal Bureau of Investigation
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CHILD ABUSE IN INDIAN COUNTRY
MEDICAL ISSUES

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What constitutes an approriate medical evaluation of an allegedly sexually abused child ?

I. Guiding Principles
- A. Patient Centered
  - 1. Independent
  - 2. Humane
- B. Medically Oriented
  - 1. Diagnosis and Treatment
    - S.T.D.'s
    - Psychotherapy
    - Safety - Protection
  - 2. Evidence Based

II. The Exam
- A. History/Interview
  - 1. Focal vs. Suggestive
  - 2. Dolls?
  - 3. The healing starts
- B. Physical Exam
  - 1. Complete head to toe
  - 2. Genital Exam – when indicated
    - Colposcopy
- C. Lab and x-ray

III. The Examiners
- A. The Interviewer
  - Training
- B. The Practitioner
  - Training/Supervision

IV. The Findings
- A. Historical
  - 1. Content
  - 2. Developmental Assessment
  - 3. Affect
  - 4. Quality

B. Physical
    1. Exam
    2. Lab
C. Diagnostic Formulation

V. Documentation
To Tape or Not to Tape

VI. Ethical Medical Testimomy

AMERICAN ACADEMY OF PEDIATRICS

Committee on Child Abuse and Neglect

Guidelines for the Evaluation of Sexual Abuse of Children

There are few areas of pediatrics that have so rapidly expanded in clinical importance in recent years as sexual abuse of children. What Kempe referred to in 1977 as a "hidden pediatric problem"[1] is certainly less hidden. Recent incidence studies, while imperfect, suggest approximately 1% of children will experience some form of sexual abuse each year.[2] Children may be sexually abused either in intrafamilial or extrafamilial settings and are more frequently abused by males. Boys may be victimized nearly as often as girls. Adolescents are perpetrators in at least 20% of reported cases,[2] and women may be perpetrators, especially in day-care settings.[3] Pediatricians will encounter these cases in their practices and will be asked by parents and other professionals for their opinions. These guidelines are prepared for use by the primary care pediatrician. Pediatricians who "specialize" in the area of child abuse or child sexual abuse have generally developed their own protocols for their referral practices. In addition, specific American Academy of Pediatrics guidelines for the evaluation of rape of the adolescent are published and should be used for this age-group.[4]

Because a pediatrician has unique skills and a trusted relationship with patients and families, he or she will often be in a position to provide essential support and gain information not readily available to others involved in the investigative, evaluative, or treatment processes. By the same token, the pediatrician may feel inadequately prepared to perform a medical examination of a sexually abused child. The pediatrician should think about these issues when determining how best to utilize his or her skills while avoiding actions that may obstruct the collection of essential evidence. The pediatrician should know what resources are available in the community and should identify these in advance, including a consultant with special expertise in evaluating sexually abused children.

DEFINITION

Sexual abuse can be defined as the engaging of a child in sexual activities that the child cannot comprehend, for which the child is developmentally unprepared and cannot give informed consent, and/or that violate the social and legal taboos of society. The sexual activities may include all forms of oral-genital, genital, or anal contact by or to the child, or nontouching abuses, such as exhibitionism, voyeurism, or using the child in the production of pornography.[1] Sexual abuse includes a spectrum of activities ranging from violent rape to a gentle seduction.

Criminal statutes define and classify sexual abuse as misdemeanors or felonies, depending on whether varying degrees of penetration of body orifices occurred or whether physical or psychological force was used.

Sexual abuse can be differentiated from "sexual play" by assessing the frequency and coercive nature of the behavior and by determining whether there is developmental asymmetry among the participants. Thus, when young children are mutually looking at or touching each other's genitalia, and they are at the same developmental stage, no coercion is used, and there is no intrusion of the body, this should be considered normal (ie, nonabusive) behavior. However, when a 6-year-old coercively tries to have anal intercourse with a 3-year-old, this is not normal behavior, and the health and child protective systems should respond to it whether or not is is legally considered an assault.

The recommendations in this statement do not indicate an exclusive course of treatment to be followed. Variations, taking into account individual circumstances, may be appropriate.

This statement has been approved by the Council on Child and Adolescent Health.

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PRESENTATION

Sexually abused children will be seen by pediatricians in a variety of circumstances: (1) They may be brought in for a routine physical examination or for care of a medical illness, behavioral condition, or physical finding that would include child sexual abuse as part of the differential diagnosis. (2) They have been or are thought to have been sexually abused and are brought by a parent to the pediatrician for evaluation. (3) They are brought to the pediatrician by social service or law enforcement professionals for a "medical evaluation" as part of an investigation.

In the first instance, the diagnosis of sexual abuse and the protection of the child from further harm will depend on the pediatrician's willingness to consider abuse as a possibility. There are many ways sexual abuse can present,[5] and because children who are sexually abused are generally coerced into secrecy, a high index of suspicion is required to recognize the problem. On the other hand, the presenting symptoms are often so general in nature (eg, sleep disturbances, enuresis, encopresis, phobias) that caution must be exercised because these behaviors may be indicators of physical or emotional abuse or other nonabuse-related stressors. Among the more specific signs and symptoms of sexual abuse are rectal or genital pain, bleeding, or infection; sexually transmitted diseases; and developmentally precocious sexual behavior. Pediatricians evaluating children who have these signs and symptoms should at least consider the possibility of abuse and, therefore, should complete a report (see below).

Pediatricians who suspect sexual abuse as a possibility are urged to inform the parents of their concerns in a neutral and calm manner. It is critical to realize that the individual who brought the child to the pediatrician may have no knowledge of, or involvement in, the sexual abuse of the child. The physician may need to reinforce this point with office, clinic, or hospital staff. Children spend many hours in the care of people, other than the parents, who may be potential abusers. A complete history, including behavioral symptoms and associated signs of sexual abuse, should ensue. In some instances, the pediatrician may need to protect the child and, therefore, may delay informing the parent(s) until a report is made and an expedited interview with law enforcement and child protective services agencies can be conducted.

TAKING A HISTORY/INTERVIEWING THE CHILD

In many states, the suspicion of child sexual abuse as a possible diagnosis requires a report to the appropriate law enforcement or child protective services agency. All physicians should know what their state law requires and where and when to file a written report. The diagnosis of sexual abuse has both civil (protective) and criminal ramifications. Investigative interviews should be conducted by the designated agency or individual in the community to minimize repetitive questioning of the child. This does not preclude physicians asking relevant questions needed for a detailed pediatric history, including a review of systems. Occasionally children will spontaneously describe their abuse and indicate who it was who abused them. When asking 3- to 6-year-old children about abuse, the use of line drawings,[6] dolls,[7] or other aids[8] may be helpful. The American Academy of Child and Adolescent Psychiatry has guidelines for interviewing sexually abused children.[9] Children may also describe their abuse during the physical examination. It is desirable for those conducting the interview to use nonleading questions; avoid demonstrations of shock, disbelief, or other emotions; and maintain a "tell me more" or "and then what happened" approach. If possible, the child should be interviewed alone.

A behavioral review of systems may reveal events or behaviors relevant to sexual abuse, even in the absence of a clear history of abuse in the child.[5] The parent may be defensive or unwilling to accept the possibility of sexual abuse. This unwillingness is not of itself diagnostic, but it also does not negate the need for investigation.

In the second situation, where children are brought to physicians by parents who suspect abuse, the same behavioral history and approach is warranted.

In the third instance, when children are brought by protective personnel, little or no history may be available, other than that provided by the child. The pediatrician should try to obtain an appropriate history in all cases before performing a medical examination. The child may spontaneously give additional history during the physical examination as the mouth, genitalia, and anus are examined. When children are brought in by professionals, the history should focus on whether the symptoms are explained by sexual abuse, physical abuse to the genital area as a response to toileting accidents, or other medical conditions.

PHYSICAL EXAMINATION

The physical examination of sexually abused children should not lead to additional emotional trauma for the child. The examination should be explained to the child and conducted in the presence of a supportive adult not suspected of being party to the abuse. Many children are anxious about giving a history, being examined, or having proce-

dures performed. Enough time must be allotted to relieve a child's anxiety.

When the alleged sexual abuse has occurred within 72 hours, and the child provides a history of sexual abuse including ejaculation, the examination should be performed immediately. In this acute situation, rape kit protocols modified for child sexual assault victims should be followed to maintain a "chain of evidence." Adult rape kits have been adapted and standardized in some states (Florida, Indiana). These are available in emergency rooms, rape treatment centers, or law enforcement agencies. When more than 72 hours has elapsed, the examination usually is not an emergency, and therefore, the evaluation should be scheduled at the earliest convenient time for the child, physician, and investigative team.

The child should have a thorough pediatric examination, including assessments of developmental, behavioral, and emotional status. Special attention should be paid to the growth parameters and sexual development of the child. In the rare instance when the child is unable to cooperate and the examination must be performed because of the likelihood of trauma, infection, and/or the need to collect forensic samples, consideration should be given to performing the examination with the child under general anesthesia. Instruments that can magnify and illuminate the genital and rectal areas may be used if available, but they are not required. Any signs of trauma should be carefully documented. Specific attention should be given to the areas involved in sexual activity—the mouth, breasts, genitals, perineal region, buttocks, and anus. Any abnormalities should be noted.

In female children, the genital examination should include inspection of the medial aspects of the thighs, labia majora and minora, clitoris, urethra, periurethral tissue, hymen, hymenal opening, fossa navicularis, and posterior fourchette. Findings that are consistent with, but not diagnostic of, sexual abuse include (1) chafing, abrasions, or bruising of the inner thighs and genitalia; (2) scarring, tears, or distortion of the hymen; (3) a decreased amount of or absent hymenal tissue; (4) scarring of the fossa navicularis; (5) injury to or scarring of the posterior fourchette; (6) scarring or tears of the labia minora; and (7) enlargement of the hymenal opening. The volume of published literature is expanding quickly in this area.[10-15]

Various methods for visualizing the hymenal opening in prepubertal children have been described. Published studies are not uniform in their approach. The degree of relaxation of the child; the degree of separation, traction (gentle, moderate) on the labia majora, and the position of the child (supine, lateral, knee-chest); and the time taken will all influence the size of the orifice and the exposure of the hymen and the internal structures.[16] The technique used is less important than maximizing the view and recording the method and results (see below for discussion of significance of findings). Invasive procedures (eg, speculum or digital) are generally not necessary in the prepubertal child.

In male children, the thighs, penis, and scrotum should be examined for bruises, scars, chafing, bite marks, and discharge.

In both sexes, the anus can be examined in the supine, lateral, or knee-chest position. As with the vaginal examination, position may influence the anatomy. The presence of bruises around the anus, scars, anal tears (especially those that extend into the surrounding perianal skin), and anal dilation are important to note. Laxity of the sphincter, if present, should be noted, but digital examination is not always necessary. (See below for discussion of significance of findings.) Note the child's behavior and demeanor during the examination, and ask the child to demonstrate what, if anything, happened. Care should be taken not to suggest answers to questions.

LABORATORY DATA

In the examination occurring within 72 hours of acute sexual assault or sexual abuse with ejaculation, forensic studies should be performed. Routine cultures and screening of all sexually abused children for gonorrhea, syphilis, human immunodeficiency virus, or other sexually transmitted diseases are not recommended. The yield of positive cultures is very low in asymptomatic prepubertal children, especially those whose history indicates fondling only. When epidemiologically indicated, or when the history and/or physical findings suggest the possibility of oral, genital, or rectal contact, appropriate cultures and serologic tests should be obtained. The Centers for Disease Control and American Academy of Pediatrics Committee on Infectious Diseases also provide recommendations on laboratory evaluation.[17,18] The implications of the diagnosis of a sexually transmitted disease for the reporting of child sexual abuse are listed in Table 1.

Pregnancy prevention guidelines have been published by the Committee on Adolescence,[4] and the American Academy of Pediatrics Task Force on Pediatric AIDS has developed guidelines for human immunodeficiency virus testing for assailants.

DIAGNOSTIC CONSIDERATIONS

The diagnosis of child sexual abuse is made on the basis of a child's history. Physical examination

alone is infrequently diagnostic in the absence of a history and/or specific laboratory findings. The physician, the multidisciplinary team evaluating the child, and the courts must establish a level of certainty about whether a child has been sexually abused. Table 2 as prepared by the AAP Committee on Child Abuse and Neglect provides suggested guidelines for making the decision to report sexual abuse of children based on currently (November 1990) available information.

As indicated in Table 2, the presence of semen/sperm/acid phosphatase, a positive culture for gonorrhea, or a positive serologic test for syphilis makes the diagnosis of sexual abuse a medical certainty, even in the absence of a positive history (congenital forms of gonorrhea and syphilis excluded).

TABLE 1. Implications of Commonly Encountered Sexually Transmitted Diseases (STDs) for the Diagnosis and Reporting of Sexual Abuse of Prepubertal Infants and Children

STD Confirmed	Sexual Abuse	Suggested Action
Gonorrhea*	Certain	Report†
Syphilis*	Certain	Report
*Chlamydia**	Probable‡	Report
Condylomata acuminatum*	Probable	Report
Trichomonas vaginalis	Probable	Report
Herpes 1 (genital)	Possible	Report§
Herpes 2	Probable	Report
Bacterial vaginosis	Uncertain	Medical follow-up
Candida albicans	Unlikely	Medical follow-up

* If not perinatally acquired.
† To agency mandated in community to receive reports of suspected sexual abuse.
‡ Culture only reliable diagnostic method.
§ Unless there is a clear history of autoinoculation.
Prepared by the American Academy of Pediatrics Committee on Child Abuse and Neglect (November 1990).

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TABLE 2. Guidelines for Making the Decision to Report Sexual Abuse of Children

Data Available			Response	
History	Physical	Laboratory	Level of Concern About Sexual Abuse	Action
None	Normal examination	None	None	None
Behavioral changes	Normal examination	None	Low (worry)	± Report*; follow closely (possible mental health referral)
None	Nonspecific findings	None	Low (worry)	± Report*; follow closely
Nonspecific history by child or history by parent only	Nonspecific findings	None	Possible (suspect)	± Report*; follow closely
None	Specific findings	None	Probable	Report
Clear statement	Normal examination	None	Probable	Report
Clear statement	Specific findings	None	Probable	Report
None	Normal examination, nonspecific or specific findings	Positive culture for gonorrhea; positive serologic test for syphilis; presence of semen, sperm, acid phosphatase	Definite	Report
Behavioral changes	Nonspecific changes	Other sexually transmitted diseases	Probable	Report

* A report may or may not be indicated. The decision to report should be based on discussion with local or regional experts and/or child protective services agencies.
Prepared by the American Academy of Pediatrics Committee on Child Abuse and Neglect (November 1990).

Other physical signs or laboratory findings may be "suggestive of" or "consistent with" a child's history of sexual abuse. In the absence of a positive history, these findings are, at the least, worrisome or suspicious and require a complete history. If the history is negative, the physician may wish to observe the child closely to monitor changes in behavior or physical findings. If the history is positive, sexual abuse is more than a worry, and a report should be made to the agency authorized to receive reports of sexual abuse.

The differential diagnosis of genital trauma also includes accidental injury and physical abuse. This differentiation may be difficult and may require a careful history and multidisciplinary approach. There are many congenital malformations and infectious or other causes of anal-genital abnormalities that may be confused with abuse. Familiarity with these is important.[19]

After the examination, the physician should provide appropriate feedback and reassurance to the child and family.

RECORDS

Because the likelihood of civil or criminal court action is high, detailed records, drawings, and/or photographs should be kept. The submission of written reports to county agencies and law enforcement departments is encouraged. The more detailed the reports and the more explicit the physician's opinion, the less likely the physician may need to testify in civil (juvenile) court proceedings. Testimony will be likely, however, in criminal court where records alone are not a substitute for personal appearance. In general, the ability to protect a child may often depend on the quality of the physician's records.[20]

TREATMENT

All children who have been sexually abused should be evaluated by competent mental health providers to assess the need for treatment. Unfortunately, treatment services for sexually abused children are not universally available. The need for treatment will vary with the type of sexual molestation (intrafamilial vs extrafamilial), the length of time the molestation has gone on, and the age and symptoms of the child. In general, the more intrusive the abuse, the more violent the assault, the longer the sexual molestation has occurred, and the closer the relationship of the perpetrator to the victim, the worse the prognosis and the greater the need for long-term treatment. Whether or not the parents are directly involved, the parents may also need treatment and support in order to cope with the emotional trauma of the child's abuse (as in the instance when the child has been the victim of extrafamilial molestation).

LEGAL ISSUES

The legal issues confronting pediatricians in evaluating sexually abused children include mandatory reporting with penalties for failure to report; involvement in the civil, juvenile, or family court systems; involvement in divorce/custody proceedings in divorce courts; and involvement in criminal prosecution of defendants in criminal court. In addition, there are medical liability risks for pediatricians.

All pediatricians in the United States are required under the laws of each state to report suspected as well as known cases of child sexual abuse. These guidelines do not suggest that a pediatrician who sees a child with an isolated behavioral finding (nightmares, enuresis, phobias, etc) or an isolated physical finding (eg, a hymenal diameter of 5 mm) must feel obliged to report these cases as suspicious. If additional historical, physical, or laboratory findings suggestive of sexual abuse are present, the physician may have an increased level of suspicion and then should report. Pediatricians are encouraged to discuss cases with their local or regional child abuse consultants as well as with their local child protective services agency. In this way, agencies may be protected from being overburdened with large numbers of vague reports, and physicians may be protected from potential prosecution for failure to report.

Civil courts in most states will intervene protectively if it is more likely than not that child abuse or neglect has occurred. The court should be acting in the best interest of the child to try to determine the safety of the child's environment and should be less concerned with "who did it" than with how recurrence can be prevented. These courts should order evaluations and/or treatment, appoint a guardian ad litem and/or therapist for the child, and monitor the family during a treatment plan.

Pediatricians and children are faced with increasing numbers of cases in which parents who are in the process of separation or divorce are alleging that one or the other (or both) is sexually abusing the child during custodial visits. These cases are generally more difficult for the pediatrician, the child protective services system, and law enforcement agencies. They require more time and should not be unsubstantiated or dismissed simply because a custody dispute exists. Allegations of abuse that occur in the context of divorce proceedings should be reported to the child protective services agency.

A juvenile court proceeding may ensue to determine whether the child needs protection. The pediatrician should act as an advocate for the child in these situations and should encourage the appointment of a guardian ad litem by the court to represent the child's best interests. It should be noted that the American Bar Association indicates that the majority of divorces do not involve custody disputes, and relatively few custody disputes involve allegations of sexual abuse.[20]

In criminal proceedings, the standard of proof is the highest—"beyond a reasonable doubt" or "to a reasonable degree of medical certainty." For many physicians, this level of certainty may be a focus of concern because, in this setting, the pediatrician's testimony is part of the information used to ascertain the guilt or innocence of an alleged abuser. Physicians should be aware of the specificity of their findings and their diagnostic significance.[21]

Pediatricians may find themselves involved in civil malpractice litigation. The failure of a physician to recognize and diagnose sexual abuse in a timely manner may lead to liability suits if a child has been brought repeatedly to the physician and/or a flagrant case has been misdiagnosed. With approximately 50% of American children in some form of out-of-home care, the risk of sexual abuse outside the family is substantial (about half that of intrafamilial abuse)[3] and increases the importance of making the diagnosis in a timely manner. The possibility of a suit being filed for "false reports" by physicians exists. Statutes generally provide immunity as long as the report is done in good faith. We are unaware of any successful suits as of this writing.

Civil litigation suits may be filed by parents against institutions or individuals who may have sexually abused their children. The physician may be asked to testify in these cases. In the civil litigation cases, the standard of proof is "a preponderance of the evidence."

CONCLUSION

The evaluation of sexually abused children is increasingly a part of general pediatric practice. The pediatrician will be part of a multidisciplinary approach to the problem and will need to be competent in the basic skills of history taking, physical examination, selection of laboratory tests, and differential diagnosis. An expanding clinical consultation network is available to assist the primary care physician with the assessment of difficult cases.

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APSAC AMERICAN PROFESSIONAL SOCIETY ON THE ABUSE OF CHILDREN

PRACTICE GUIDELINES

Psychosocial Evaluation of Suspected Sexual Abuse in Young Children

Statement of Purpose

These Guidelines for mental health professionals reflect current knowledge and consensus about the psychosocial evaluation of suspected sexual abuse in young children. They are not intended as a standard of practice to which practitioners are expected to adhere in all cases. Evaluators must have the flexibility to exercise clinical judgment in individual cases. Laws and local customs may also influence the accepted method in a given community. Practitioners should be knowledgeable about various constraints on practice, and prepared to justify their decisions about particular practices in specific cases. As experience and scientific knowledge expand, further refinement and revision of these Guidelines are expected.

These Guidelines are specific to psychosocial assessments. Sexual abuse is known to produce both acute and long-term negative psychological effects requiring therapeutic intervention. Psychosocial assessments are a systematic process of gathering information and forming professional opinions about the source of statements, behavior, and other evidence that form the basis of concern about possible sexual abuse. Psychosocial evaluations are broadly concerned with understanding developmental, familial, and historical factors and events that may be associated with psychological adjustment. The results of such evaluations may be used to assist in legal decision making and in directing treatment planning.

Interviews of children for possible sexual abuse are conducted by other professionals as well, including child protective service workers, law enforcement investigators, special "child interviewers," and medical practitioners. Such interviews are most often limited to a single, focused session which concentrates on eliciting reliable statements about possible sexual abuse; they are not designed to assess the child's general adjustment and functioning. Principles about interviewing contained in the Guidelines may be applied to investigatory or history-taking interviews. Some of the preferred practices, however (e.g., number of interviews), will not apply.

Psychosocial evaluators should first establish their role in the evaluation process. Evaluations performed at the request of a court may require a different stance and include additional components than those conducted for purely clinical reasons. The difference between the evaluation phase and a clinical phase must be clearly articulated if the same professional is to be involved. In all cases, evaluators should be aware that any interview with a child regarding possible sexual abuse may be subject to scrutiny and have significant implications for legal decision-making and the child's safety and well-being.

I. The Evaluator

A. Characteristics

1. The evaluator should possess an advanced mental health degree in a recognized discipline (e.g., MD, or Masters or Ph.D. in psychology, social work, counseling, or psychiatric nursing).
2. The evaluator should have experience evaluating and treating children and families. A minimum of two years of professional experience with children is expected, three to five years is preferred. The evaluator should also possess at least two years of professional experience with sexually abused children. If the evaluator does not possess such experience, supervision is essential.
3. It is essential that the evaluator have specialized training in child development and child sexual abuse. This should be documented in terms of formal course work, supervision, or attendance at conferences, seminars, and workshops.
4. The evaluator should be familiar with current professional literature on sexual abuse and be knowledgeable about the dynamics and the emotional and behavioral consequences of abuse experiences.
5. The evaluator should have experience in conducting forensic evaluations and providing court testimony. If the evaluator does not possess such experience, supervision is essential.
6. The evaluator should approach the evaluation with an open mind to all possible responses from the child and all possible explanations for the concern about possible sexual abuse.

II. Components of the Evaluation

A. Protocol

1. A written protocol is not necessary; however, evaluations should routinely involve reviewing all pertinent materials; conducting collateral interviews when necessary; establishing rapport; assessing the child's general functioning, developmental status, and memory capacity; and thoroughly evaluating the possibility of abuse. The evaluator may use discretion in the order of presentation and method of assessment.

B. Employer of the Evaluator

1. Evaluation of the child may be conducted at the request of a legal guardian prior to court involvement.
2. If a court proceeding is involved, the preferred practice is a court-appointed or mutually agreed upon evaluation of the child.
3. Discretion should be used in agreeing to conduct an evaluation of a child when the child has already been evaluated or when there is current court involvement. Minimizing the number of evaluations should be a consideration; additional evaluations should be

conducted only if they clearly further the best interests of the child. When a second opinion is required, a review of the records may eliminate the need for reinterviewing the child.

C. Number of Evaluators

1. It is acceptable to have a single evaluator. However, when the evaluation will include the accused or suspected individual, a team approach is the preferred practice, with information concerning the progress of the evaluation readily available among team members. Consent should be obtained from all participants prior to releasing information.

D. Collateral Information Gathered as Part of the Evaluation

1. Review of all relevant background material as part of the evaluation is the preferred practice.
2. The evaluation report should document all the materials used and demonstrate their objective review in the evaluation process.

E. Interviewing the Accused or Suspected Individual

1. It is not necessary to interview the accused or suspected individual in order to form an opinion about possible sexual abuse of the child. 85
2. An interview with or review of the statements from a suspected or accused individual (when available) may provide additional relevant information (e.g., alternative explanations, admissions, insight into relationship between child and accused individual).
3. If the accused or suspected individual is a parent, preferred practice is for the child evaluator to contact or interview that parent. If a full assessment of the accused or suspected parent is indicated, a team approach is the preferred practice.

F. Releasing Information

1. Suspected abuse should always be reported to authorities as dictated by state law.
2. Permission should be obtained from legal guardians for receipt of collateral materials and for release of information about the examination to relevant medical or mental health professionals, other professionals (e.g., schoolteachers), and involved legal systems (e.g., CPS, law enforcement). Discretion should be used in releasing sensitive individual and family history which does not directly relate to the purpose of the assessment.
3. When an evaluation is requested by the court, information should be released to all parties to the action after consent is obtained.

III. Interviewing

A. Recording of Interviews

1. Audio or video recording may be preferred practice in some communities. Professional preference, logistics, or clinical consideration may contraindicate recording of interviews. Professional discretion is permitted in recording policies and practices.
2. Detailed written documentation is the minimum requirement, with specific attention to questions and responses (verbal and nonverbal) regarding possible sexual abuse. Verbatim quotes of significant questions and answers are desirable.
3. When audio and video recording are used, the child must be informed. It is desirable to obtain written agreement from the child and legal guardian(s).

B. Observation of the Interview

1. Observation of interviews by involved professionals (CPS, law enforcement, etc.) may be indicated if it reduces the need for additional interviews.
2. Observation by non-accused and non-suspected primary caregiver(s) may be indicated for particular clinical reasons; however, great care should be taken that the observation is clinically appropriate, does not unduly distress the child, and does not affect the validity of the evaluation process.
3. If interviews are observed, the child must be informed and it is desirable to obtain written agreement from the child and legal guardian(s).

C. Number of Interviews

1. Preferred practice is two to six sessions for directed assessment. This does not imply that all sessions must include specific questioning about possible sexual abuse. The evaluator may decide based on the individual case circumstances to adopt a less direct approach and reserve questioning. Repeated direct questioning of the child regarding sexual abuse when the child is not reporting or is denying abuse is contraindicated.
2. If the child does not report abuse within the two to six sessions of directed evaluation, but the evaluator has continuing concerns about the possibility of abuse, the child should be referred for extended evaluation or therapy which is less directive but diagnostically focused, and the child's protection from possible abuse should be recommended.

D. Format of Interview

1. Preferred practice is, whenever possible, to interview first the primary caretaker to gather background information.
2. The child should be seen individually for initial interviews, except when the child refuses to separate. Discussion of possible abuse in the presence of the caretaker

during initial interviews should be avoided except when necessary to elicit information from the child. In such cases, the interview setting should be structured to reduce the possibility of improper influence by the caretaker upon the child's behavior.

3. Joint sessions with the child and the non-accused caretaker or accused or suspected individual may be helpful to obtain information regarding the overall quality of the relationships. The sessions should not be conducted for the purpose of determining whether abuse occurred based on the child's reactions to the accused or suspected individual. Nor should joint sessions be conducted if they may cause significant additional trauma to the child. A child should never be asked to confirm the abuse statements in front of an accused individual.

IV. Child Interview

A. General Principles

1. The evaluator should create an atmosphere that enables the child to talk freely, including providing physical surroundings and a climate that facilitates the child's comfort and communication.
2. Language and interviewing approach should be developmentally appropriate.
3. The evaluator should take the time necessary to perform a complete evaluation and should avoid any coercive quality to the interview.
4. Interview procedures may be modified in cases involving very young, preverbal, or minimally verbal children or children with special problems (e.g., developmentally delayed, electively mute).

B. Questioning

1. The child should be questioned directly about possible sexual abuse at some point in the evaluation.
2. Initial questioning should be as non-directive as possible to elicit spontaneous responses. If open-ended questions are not productive, more directive questioning should follow.
3. The evaluator may use the form of questioning deemed necessary to elicit information on which to base an opinion. Highly specific questioning should only be used when other methods of questioning have failed, when previous information warrants substantial concern, or when the child's developmental level precludes more non-directive approaches. However, responses to these questions should be carefully evaluated and weighed accordingly.

C. Use of Dolls and Other Devices

1. A variety of nonverbal tools should be available to assist the child in communication, including drawings, toys, doll-houses, dolls, puppets, etc.
2. Anatomically detailed dolls should be used with care and discretion. Preferred

practice is to have them available for identification of body parts, clarification of previous statements, or demonstration by non- or low-verbal children after there is indication of abuse activity.

3. The anatomically detailed dolls should not be considered a diagnostic test. Unusual behavior with the dolls may suggest further lines of inquiry and should be noted in the evaluation report, but is not generally considered conclusive of a history of sexual abuse.

D. Psychological Testing

1. Formal psychological testing of the child is not indicated for the purpose of proving or disproving a history of sexual abuse.
2. Testing is useful when the clinician is concerned about the child's intellectual or developmental level, or about the possible presence of a thought disorder. Psychological tests can also provide helpful information regarding a child's emotional status.
3. Evaluation of non-accused and accused individuals often involves complete psychological testing to assess for significant psychopathology or sexual deviance.

V. Conclusions/Report

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A. General Principles

1. The evaluator should take care to communicate that mental health professionals have no special ability to detect whether an individual is telling the truth.
2. The evaluator may directly state that abuse did or did not occur, or may say that a child's behavior and words are consistent or inconsistent with abuse, or with a history or absence of history of abuse.
3. Opinions about whether abuse occurred or did not occur should include supporting information (e.g., the child's and/or the accused individual's statements, behavior, psychological symptoms). Possible alternative explanations should be addressed and ruled out.
4. The evaluation may be inconclusive. If so, the evaluator should cite the information that causes continuing concern but does not enable confirmation or disconfirmation of abuse. If inconclusiveness is due to such problems as missing information or an untimely or poorly-conducted investigation, these obstacles should be clearly noted in the report.
5. Recommendations should be made regarding therapeutic or environmental interventions to address the child's emotional and behavioral functioning and to ensure the child's safety.

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Appreciation goes to all the practitioner/experts who contributed much of their time and expertise to make these Guidelines valuable. Special thanks goes to Richard Stille, Ph.D., who helped synthesize the first draft.

The Guidelines will be updated periodically. Any comments or suggestions about them should be directed to Lucy Berliner through APSAC, 407 South Dearborn, Suite 1300, Chicago, Illinois, 60605.

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Genital and Anal Conditions Confused With Child Sexual Abuse Trauma

Jan Bays, MD, Carole Jenny, MD

• **Examination of a child with genital or anal disease may give rise to suspicion of sexual abuse. Dermatologic, traumatic, infectious, and congenital disorders may be confused with sexual abuse. Seven children referred to us are representative of such confusion.**

(*AJDC*. 1990;144:1319-1322)

When genital or anal disease occurs, the health care provider must perform a careful examination and consider diagnoses other than sexual abuse, especially when the child volunteers no history of abuse. Ten percent to 25% of children are sexually abused before age 18 years.[1] With increasing awareness of this problem, physicians are being called on more frequently to examine children for signs of possible abuse. A diagnosis of sexual abuse may have serious consequences for the child, family, and suspected offender. We will review the existing literature on conditions mistaken for injuries due to child sexual abuse and present cases of seven children referred to us.

PATIENT REPORTS

PATIENT 1.—A 6-year-old girl was referred for a sexual abuse examination after her pediatrician noted fresh vaginal bleeding and genital bruising and made a report of suspected abuse. On the day of the examination, the child had returned to her divorced mother after a visit with her father.

She had subepidermal bleeding over the left side of the clitoris, the left labium minus, and the left wall of the introitus. There was a 2-cm ruptured bulla in the posterior fourchette to the right of the midline. The hymen was normal. There was a slight decrease in the pigmentation of the skin surrounding the genitalia. There were two superficial fissures of the anal verge. The child was questioned in private and denied sexual abuse. She was referred to a dermatologist, who diagnosed lichen sclerosus confirmed by biopsy (Fig 1). Treatment with topical corticosteroid decreased the friability of the skin around the vagina and anus.

PATIENT 2.—A 5-year-old girl was referred by her private pediatrician with a complaint of intermittent vaginal bleeding. Over a 15-month period, the child had had 11 episodes of small amounts of red or brown blood on her underwear or on toilet paper. She had occasional episodes of dysuria. A vaginal culture was positive for *Streptococcus pyogenes* on one occasion, but treatment with antibiotics did not stop the vaginal bleeding. Serum follicle-stimulating hormone, luteinizing hormone, and estradiol levels were normal on two occasions.

Genital examination revealed Tanner 1 female genitalia with a large, dilated, tortuous vein running from the top of the clitoris down through the right labium majus. The vaginal opening was completely hidden in hymen tissue, which was swollen and dark beefy red. There were a number of bright red, dilated blood vessels in the posterior fossa. The child was interviewed alone and denied sexual abuse. A magnetic resonance imaging scan of the pelvis was normal. Examination under anesthesia revealed a hemangioma of the entire vagina. There was no evidence of sarcoma botryoides or foreign body. No treatment will be undertaken unless significant bleeding occurs.

PATIENT 3.—A 7-month-old female infant was seen in an emergency department for high fever. The examining pediatrician found an area in the perineum that he thought might be due to an injury from sexual abuse. The child and her 2-year-old sister were placed into protective custody by the police. Three days later, the child was brought in for examination at a sexual abuse evaluation center. Genital examination revealed a vaginal opening hidden in light pink, redundant hymen tissue, which showed no evidence of trauma. Just below the rim of the posterior fourchette in the midline there was a deep red depression measuring 2 mm long and 1 mm deep. Under the colposcope, this depression appeared to be a congenital pit (Fig 2), which could be manipulated and stretched so that the increased vascularity in its depth blanched. The infant's sister had a normal genital examination, and both girls were returned to the custody of their parents.

PATIENT 4.—A 5-year-old girl was brought to the outpatient clinic for a genital injury. The child stated that she had been climbing on a stool at her grandmother's house and had fallen. A wooden leg of the stool had struck and injured her genitalia. She had experienced two episodes of dysuria and hematuria in the 4 hours since the injury occurred. Several clinic personnel expressed concern that the child might have been sexually abused.

Genital examination revealed a 2-cm laceration in the crease lateral to the right labium minus, with adjacent bruising (Fig 3). The hymen was normal. The child denied sexual abuse. No report of suspected abuse was made.

PATIENT 5.—A 2½-year-old boy told his mother that his "bottom hurt" on returning from day care. His physician diagnosed anal trauma, and a day-care worker was interviewed by the police after the child said, "Mark hurt me." After the child was examined at a child abuse center, the diagnosis of perianal streptococcal cellulitis was made (Fig 4). On further questioning, the child said the day-care worker had hurt him when he was wiped after toileting. The pain apparently occurred because of preexisting anal irritation from the infection.

PATIENT 6.—A 5-year-old girl was referred to a sexual abuse evaluation program because her pediatrician had noted that her clitoris was split. Examination revealed a complete cleft of the upper genital structures, including the clitoris, labia minora, and anterior urethral wall. The child denied trauma or sexual abuse. Normal uterus, ovaries, and kidneys were visualized on ultrasound examination. Voiding cystourethrogram was normal except for a 1.7-cm split in the pubic symphysis. The child was referred to a pediatric urologist with a diagnosis of

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Fig 1.—Patient 1. Lichen sclerosus.

Fig 2.—Patient 3. Congenital pit of the perineal body.

Fig 3.—Patient 4. Straddle injury adjacent to the right labium.

Fig 4.—Patient 5. Perianal streptococcal cellulitis.

Fig 5.—Patient 6. Epispadius (incidental foreign body).

Fig 6.—Patient 7. Periurethral caruncle.

congenital epispadius (Fig 5).

PATIENT 7.—A 4-year-old girl was referred for possible sexual abuse when she complained of dysuria and had several episodes of hematuria after playing with older neighborhood children. The child and her playmates convincingly denied sexual abuse or sexual play when questioned by the patient's concerned mother and pediatrician. Genital examination revealed a hemorrhagic urethral caruncle (Fig 6). The child's symptoms resolved over 3 weeks with warm sitz baths and topical estrogen cream. A report of suspected abuse was not made.

COMMENT

Dermatologic Disorders

Erythema and excoriations of the genitalia are not signs specific to sexual abuse, as they may have many other common causes, including diaper dermatitis, poor hygiene, *Candida*, pinworms, and irritants such as bubble bath.[2,3] Increased pigmentation around the anus, although reported after chronic sexual abuse, is a common finding in nonabused children.[2] Bruises in the genital or anal area can raise suspicion of possible sexual abuse. Bruising confused with child abuse has been re-

ported in the Ehlers-Danlos syndrome,[4] hematologic disorders, hypersensitivity vasculitis, purpura fulminans, meningitis with disseminated intravascular coagulation, mongolian spots, and cases of coining or other folk medicine practices.[5] Phytodermatitis also has been mistaken for bruising or burns due to child abuse. This disorder occurs when plant psoralens, notably the juice of fig, lime, lemon, parsnip, or celery, contact the skin before sun exposure.[6,7]

Other dermatologic conditions that can cause pain, bleeding, fissures, and skin changes in the genital or anal regions that must be differentiated from signs of sexual abuse include lichen sclerosus, lichen planus, seborrheic dermatitis, atopic dermatitis, contact dermatitis, lichen simplex chronicus, and psoriasis.[8]

Lichen sclerosus manifests as alarming subepidermal hemorrhages and bullous and vesicular lesions that can occur after minor trauma such as wiping with toilet tissue, as occurred with patient 1. The clinician should be familiar with the atrophic skin and hourglass-shaped area of decreased pigmentation around the genitalia and/or anus that characterize this disease. A biopsy may be done to confirm the diagnosis.[9,10]

Labial fusion is a common condition in girls who are still in diapers. In older girls it may be more likely related to sexual abuse but is not diagnostic.[11,12]

Congenital Conditions

Congenital abnormalities of the genitalia can cause concern about possible sexual abuse. Patient 2 had a hemangioma of the hymen and vaginal wall that produced hypervascularity and swelling of the hymen tissues with intermittent bleeding. A vulvar hemangioma with ulcerative changes has been diagnosed and investigated as a perineal burn secondary to child abuse.[13] Another child was referred to protective services after she presented with a midline skin defect, thought to be a traumatic scar, extending from the fossa navicularis into the anus. Colposcopic examination at a child abuse center revealed no evidence of scarring. A diagnosis was made of congenital failure of midline fusion across the posterior fourchette.[14] A common congenital anomaly of the external anal sphincter may cause smooth, fan-shaped areas in the midline at the anal verge, which may be mistaken for anal scars. Although anal skin tags have been observed after trauma from anal sodomy,[3] a prominent medial raphe and anterior midline anal skin tags are also common in nonabused children.[2] Patient 3 had a congenital midline pit of the perineal body, which was confused with an injury due to abuse. Patient 6 had midline congenital cleft of the genital structures above the urethra, an anomaly that was undetected for 5 years despite regular pediatric care. Caution is advised in diagnosing midline lesions of the genitalia or anus.[2,12]

Injuries

Accidental injury to the genitalia may also be mistaken for sexual abuse.[15] Straddle injuries usually cause crushing of soft tissue over a solid structure such as the pubic symphysis, ischiopubic ramus, and adductor longus tendon. Compared with injuries due to sexual abuse, straddle injuries are more often anterior and unilateral, cause damage to the external rather than internal genital structures, and are associated with an acute and dramatic history. Patient 4 had characteristic historical and physical findings of a straddle injury. Severe genital injuries, including vaginal lacerations and rectovaginal fistula, have been described in girls falling astride sharp objects.[16]

Sudden, accidental violent abduction of the legs may cause splitting injuries of the midline genital structures.[3,17] However, in the only patient report of this type of injury, the cause was forced abduction of the thighs during sexual abuse.[18]

Motor vehicle accidents can cause injury to the genitalia.[16,19] A seat-belt injury causing referral for possible sexual abuse has been described. The injuries included abrasions to the labia, hematoma of the mons, and a perineal tear. The hymen was undamaged.[20] In patients of African or Middle Eastern origin, female circumcision in infancy or childhood can result in hemorrhage and unusual genital adhesions and scars.[16]

Genital strangulation by hairs or other objects can occur accidentally, as a result of sexual abuse, or as punishment for toilet accidents.[21] Masturbation is not reported to cause genital injuries except in severely developmentally delayed children or those who self-mutilate due to genetic diseases.[15,17,22] A review of 11 clinical and behavioral syndromes that can result in self-inflicted injury in children and adolescents includes one child with recurrent hematuria apparently caused by the child inserting a quartz crystal into his urethra. As the authors caution, however, self-destructive behavior is more common in abused and neglected children.[23] Tampon use is reported to cause slight stretching of the hymenal opening but not actual injuries to the hymen.[22,24,25]

Other Anal Conditions

Diseases that produce anal changes that might raise questions of abuse include Crohn's disease,[26] hemolytic uremic syndrome,[27] lichen sclerosus,[9,10] postmortem anal dilation,[5] rectal tumor, neurogenic patulous anus, and severe or chronic constipation and megacolon.[28,29] Eversion of the anal canal has been described as a result of sexual abuse.[28] However, Zempsky and Rosenstein[30] have listed 11 other medical conditions causing rectal prolapse in children. A causal relationship with anal abuse has not been established definitively.

Infections

Infections of the genitalia may lead to concerns about sexual abuse. Perianal streptococcal cellulitis, as in patient 5, can present as an erythematous perianal rash, painful defecation, anal fissures, and bleeding.[31] This case is an example of the importance of obtaining a careful history to distinguish innocent actions from sexual abuse. Vaginal varicella has been confused with genital herpes.[32] Genital warts in adults are considered sexually transmitted. In children, other possible routes include in utero transmission, inoculation during delivery, and autoinoculation.[33]

Urethral Conditions

In patient 7, bleeding from a urethral caruncle led to concerns about sexual abuse. Other urethral conditions causing bleeding or alarming changes in anatomy include urethral hemangioma,[34] urethral prolapse, urethral polyps, papilloma, urethral caruncle, sarcoma botryoides, and prolapsed ure-

terocele. Urethral prolapse occurs most commonly in prepubescent black girls. In one series, 67% (8/12) of girls with urethral prolapse had antecedent episodes of increased intra-abdominal pressure, which may have contributed to the condition. Sexual abuse was the cause of prolapse in one patient. Other causes were infection, seizures, respiratory and urinary tract infections, burns, straddle injury, and strangury.[35]

SUMMARY

Sexual abuse is included in the differential diagnosis of a variety of abnormal physical findings in the genital and anal area. It is prudent for clinicians who discover these abnormalities to be aware of other potential diagnoses, to take a complete medical history, and to become comfortable with questioning children and their parents about possible abuse. Parents can be told that sexual abuse is one of several possible explanations for their child's findings, and they can be asked if they have had any concerns about abuse. If appropriate, the clinician can interview the child alone and ask if anyone has touched or hurt them in their "private parts." If abuse is suspected, it may be necessary to refer the child for a second examination and an in-depth interview.[36]

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Child Sexual Abuse

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Estimates of the incidence of child sexual abuse vary enormously by the study methods employed (1a). In 1982, sexual abuse made up about 7% of all suspected reports of maltreatment made in the United States (1). Most authorities agree, however, that the true incidence greatly exceeds reported or disclosed cases. Sexual abuse may be more likely than other forms of abuse to remain hidden for years after its onset (2). Visible scars are rare, the victims often feel stigmatized (or suffer memory repression), and adults often react with anger and disbelief when children make disclosures. In population surveys, 5–20% of women report having had unwanted sexual experiences during childhood, and upwards of 50% give affirmative responses to more detailed probes about the occurrence of sexual maltreatment (3).

Although the figures may be biased to some extent by disclosure and referral patterns, studies have found that for many, if not the majority, of child victims, sexual abuse begins in the first few years of life (4,5). This early onset is one of the factors that contributes to delays in disclosure: young children are easily misled into believing that the activities are "special" and must be kept secret. Child sexual abuse is characterized by dynamics to which young, dependent children are particularly vulnerable. The perpetrator assures them that should they disclose, that dire consequences will ensue to themselves, other family members, or the perpetrator.

The legal definition of child sexual abuse includes both sexual contact (either intrusion into body orifices, fondling, or requiring the child to fondle or fellate the perpetrator) and noncontact acts (such as exhibitionism, involvement in child pornography, and deliberate exposure of children to sexually explicit materials). Sexual abuse of children generally begins with acts that may be confusing or frightening for

children but that do not involve physical harm. Contacts may slowly increase in intensity and intrusiveness, often over a period of years. Thus, physical findings in a child who has disclosed may be minimal if the disclosure is relatively early in the course of the abuse, or if the perpetrator has avoided or not yet begun intrusive activities.

APPROACH TO THE PHYSICAL EXAMINATION

Parents and children are often very anxious about examinations conducted in the course of evaluations for suspected maltreatment. After an initial disclosure, while the family is still in a state of crisis and unable to offer adequate support, the child may have undergone an initial exam in an emergency room, possibly conducted by a physician who was pressed for time or not comfortable with being involved in that type of case. If no previous exam has taken place, both parent and child may be worried that what has been arranged is the child's first "internal" exam, with the parent unable to conceal from the child his or her own distaste for such procedures. Thus, at the time the examination is scheduled, it is important to ask about such experiences and concerns and to outline what will be taking place. Families are usually greatly reassured to learn that the upcoming examination will not involve any instrumentation besides the use of a bright light and possibly some magnifying apparatus.

When the child's condition permits, it is preferable to speak to the child and parent before asking the child to disrobe. It is important to remember that the examination of a potentially abused child must be therapeutic as well as diagnostic. Both the child and the parent may feel or actually be victimized, or they may be feeling an acute lack of control and personal security, even if only from being required to follow through with evaluations because of the suspicion of abuse. Even more than with other medical encounters, it is vital that the clinician show respect for the family's concerns, privacy, and modesty.

In general, children suspected of being victims of maltreatment have or will be questioned closely by professionals who specialize in conducting forensically correct interviews. Such encounters must follow careful procedures to document questions and responses, avoid any appearance of leading the child or suggesting answers, and provide reassurance about the availability of support during the investigation. The interviews accompanying medical evaluations usually focus only on symptoms that may yield clues to infection or trauma. It is reasonable, however, for the clinician to tell the child that he or she would be happy to hear about what has happened if the child is comfortable telling the story. If the child says "no," the clinician can use information from the parents, police, or social service agencies to guide the evaluation. If the child is willing to provide some details, they should be noted carefully in the medical record. The clinician should try to make his or her questions and replies as open-ended and nonspecific as possible. Questions that ask whether a specific person performed a specific act (for example, "Did Mr. Smith ever put his penis in your mouth?") should be avoided at all costs. Better questions are, "Did anyone else do anything?" and "Did he do anything else?" It can also be important to reassure the child that the clinician is asking these questions to guide the exam and better help the child. Often, if the child has been questioned before, the child will think that the clinician is repeating the questions because he or she does not believe the previous statements.

The examination of a possibly abused child should extend from head to toe, regardless of the type of abuse suspected. Perhaps the most important reason for this is to help the child become accustomed to the clinician's touch, and to allow the clinician to demonstrate that he or she can be trusted to talk about the steps in the exam and respond to the child's signs of distress or discomfort. This period of adjustment is critical for the parent as well as for the child, since the parent's discomfort will be quickly transmitted to the child even if the child herself is not apprehensive. A second reason for conducting a thorough exam is that various forms of child abuse often occur together: signs of physical abuse or neglect may also be present. Finally, manifestations of sexual abuse are not confined to the genitalia and rectum. As discussed below, there may be injuries to the mouth or breasts, or physical findings suggestive of disseminated sexually transmitted diseases.

Depending upon the type of case and the extent of preparation for the visit, children may sometimes refuse all or part of the examination. Unless some serious injury or infection is suspected, it is preferable to defer the exam until another date (often after the child has had the opportunity to meet with a counselor or therapist) rather than use force or undue emotional pressure to obtain compliance. There is always some risk that the child's refusal represents an attempt to manipulate the parents or clinician, but this is far outweighed by the possibility that insisting will be revictimization of a child whose bodily integrity has already been violated. Refusals can often be avoided by careful preparation of the family prior to the visit, exploring the parent's reservations as well as the child's, and taking the exam slowly, giving the child ample opportunity to know what is happening and to take control to the extent possible.

Documentation plays a critical role in examinations of suspected abuse. Information in medical records may be admissible in court even though it could otherwise be kept out of discussion by rules about hearsay; for example, a child's identification of a perpetrator, made because the nature of the assault is important for the planning of diagnosis and treatment, may be admissible in court even if the child ultimately cannot testify herself or himself. As with other medical-legal cases, records will likely be scrutinized both by attorneys and by other clinicians, sometimes with the goal of discounting the findings or clouding their interpretation. It is thus crucial that clinicians clearly describe procedures and findings, and then separately discuss their conclusions. It is best to avoid words that may have specific legal meanings or emotional value (and that frequently lack any real medical significance) such as "intact" to describe a hymen or "marital" to describe the introitus. "Penetration," to a physician, may indicate insertion of an object into the anal canal or vagina; to an attorney, it may be legally defined as simple placement of a penis between the labia or buttocks; a child may report the sensation of "having something stuck inside me" after vulvar coitus or pressure on the perirectal skin. It is essential that the clinician give a description of the physical findings that can serve as primary data for other professionals to interpret independently along with the clinician.

EXTRAGENITAL LESIONS SUGGESTIVE OF SEXUAL ABUSE

Bites inflicted in the context of sexual abuse or assault may injure the breasts, stomach, or genitals themselves (6). Bite marks may also be found on the arms, nose, or earlobes; they may be inflicted in order to damage or hurt the victim, as well as for sexual gratification. Bites can provide important evidence in cases of suspected abuse because they may give some clue as to the identity of the abuser. Human bites cause a combination of crush injury with superficial laceration. Soon after the bite, only an elliptical or oval set of indentations may be visible in the skin, perhaps with a reddened area in the center from the force of sucking or folding the skin. Later, the outline of the bite may be visible as bruises

that correspond to the locations of the teeth. Although the skin does not provide good medium for making a perfect casting of the bite, it is often possible to assess the distance between the maxillary canine teeth: intercanine distances of greater than 3 cm most likely represent adult dentition (7). Fresh bites can also be swabbed for salivary residue and processed in the same manner as other forensic specimens.

The mouth should also be examined in cases of suspected sexual abuse or assault. Ulcers or exudates may be signs of sexually transmitted diseases. The frenula attaching the gums to the upper and lower lip or tongue may be lacerated from the application of gags or from forceful feedings. Erythema, petechiae, and bruising of the palate may occur after fellatio (8).

TECHNIQUES OF GENITAL EXAMINATION

Because of the scrutiny likely to follow any examination for suspected abuse, clinicians need to document not only their findings but how their examination was conducted. Recent work by McCann et al. (9,10) has demonstrated that differences in technique alter the types of observations that can be made about the prepubertal genitalia and the apparent size of the structures observed.

Three approaches are commonly used to examine prepubertal female genitalia. (a) The most common is the so-called supine separation technique. A child is asked to lie on her back, either on a parent's lap or examining table, with the hips fully abducted and the heels touching. The examiner applies lateral and slightly downward traction on the labia majora with the fingertips, exposing the hymen and vagina. (b) The supine traction variant of this technique is conducted in the same position, but instead the labia are held gently and pulled laterally, slightly forward, and slightly up. These supine positions are probably the most comfortable for the child, and they offer the best view of the labia, vestibule, and posterior fourchette. The separation technique, however, is least efficient in spreading out the hymen, and allowing its configuration and any opening to be seen. (c) A third possibility for an examination is the knee-chest position. The child is asked to kneel on an examining table with her back swayed, chest flat on the table, and knees slightly apart. The examiner then stands behind her, and gently spreads and pulls back the tissues adjacent to the introitus. Although it may be harder to prepare the child for this approach, it offers the greatest possibility of seeing up into the vagina and looking for foreign bodies or injury without the use of a speculum.

Regardless of the position used, good lighting and usually some magnification are important to the examination. Colposcopes are widely recommended for use in examinations for suspected maltreatment, but their benefits have also been debated (11). Major advantages of colposcopes are their excellent illumination, ability to take photographs, and distance that they afford between the examiner and child. Disadvantages include cost, lack of availability, and visualization of detail that, given the present state of knowledge, may be more suitable to research than clinical activities.

Time and patience are perhaps the most essential tools for examining small children's genitalia. Relaxation has a major impact on both how much visualization can be obtained and on the appearance of the structures visualized. The effort to avoid any direct instrumentation, even with only a moistened swab, means that traction often must be applied, relaxed, or reapplied to free up moist, adherent tissues, and then observations made in another position. This is only possible if the child is cooperative and the parent supportive.

EXAMINATION OF THE VULVA

The labia minora extend from the clitoris anteriorly to the area known as the posterior fourchette. The tissue that normally joins them posteriorly, known as the frenulum, is often stretched tightly when lateral traction is placed on the labia majora. Before puberty, the skin of the frenulum is very thin and superficial midline lacerations may often occur during examination. Vulvar irritation from either mechanical or infectious causes can also lead to increased friability. One study that was able to compare both probably abused with probably unabused girls found an increased prevalence of friability among both those with a history of sexual abuse and those who had been referred for vaginitis, vulvitis, and dysuria (12). Some unabused girls also have a midline, avascular appearing area in the posterior fourchette (10). These areas may be more pronounced with greater degrees of traction, and then seem to disappear as traction is relaxed. Of ongoing concern is how such areas might be distinguished from scars that could be attributed to prior trauma.

Friability in the posterior fourchette is often seen in conjunction with adhesions of the labia minora. Small adhesions are usually posterior, extending anteriorly from the fourchette. Because labial adhesions are thought to be caused by prior trauma or irritation, it would seem logical to expect them to be more common among children who have been sexually abused. Observations recorded in the literature, however, yield a confusing picture. Berkowitz et al. (13) reported finding labial adhesions in 10 of 375 girls younger than 5 years old referred for evaluation of possible sexual abuse (about 3%). This figure was higher than the "less than 1%" prevalence described in textbooks. In a comparative study that included older prepubertal girls, Emans et al. (12) found labial adhesions in nine of 127 "normals" (7%), four of 59 with vaginal problems (7%), and 21 of 118 with a history of sexual abuse (18%). When the results were analyzed separately by race, however, white girls had no difference in the prevalence of adhesions among the three study groups. There was a trend for abused black and Hispanic girls to have more adhesions, but the number of cases available for analysis was small. Finally, in the study of McCann et al. (10) of girls aged 1–10 years who had been screened to exclude likely cases of abuse, the prevalence of labial adhesions was nearly 40% among 90 girls examined in the supine position and 14% among 86 girls examined in the knee-chest position. These widely varying prevalence rates suggest major differences in the populations studied and the criteria used to make observations. Until more uniform data are developed, the association of adhesions with abuse is likely to remain a matter of conjecture.

A variety of conditions can cause changes in the vulvar tissue that can be mistaken for possible maltreatment (14). Perhaps the most problematic are the skin conditions such as lichen sclerosis and related disorders that can cause subepidermal bleeding, blisters, and superficial lacerations after minor trauma. Genital warts are a second very problematic finding. As discussed in the chapter by Tjaden and Rock (this volume), neither the natural history nor means of transmission of human papilloma virus (HPV) infection are well defined. Warts in toddlers and younger children may possibly be associated with perinatal infection, whereas it is more difficult to postulate nonsexual HPV infection in older children. When the concern for maltreatment arises because of a particular physical finding, and not because of a child's disclosure, it is important to carefully gather other medical information and to probe tactfully for evidence of behavioral or family problems before reaching a clinical conclusion. Once a concern for abuse is raised, it is very difficult to retract.

EXAMINATION OF THE HYMEN

Examination of the hymen has been the most intense focus of studies hoping to demonstrate findings diagnostic of sexual abuse in prepubertal girls. The normal hy-

men varies a great deal in appearance, although congenital absence apparently does not occur except in the case of major genitourinary malformations (15). Pokorny (16) has proposed the following classification:

- The fimbriated hymen has "redundant, gathered skirts" of tissues with a scalloped rim that attaches to all 360° of the rim of the hymenal ring.
- The circumferential hymen is composed of a "smooth, unfolded skirt" of tissue that also attaches to the full circumference of the hymenal ring.
- The posterior rim hymen appears as a crescent of tissue that runs generally from about 2 or 3 o'clock on the hymenal ring along the posterior edge to a symmetrical location on the opposite side. Partial openings in hymens are usually either central or anterior, probably reflecting how the urogenital sinus and the Müllerian structures join during embryogenesis. Anterior/posterior septae are also sometimes seen.
- The hymen may sometimes be imperforate. In that case, its appearance will differ from that of a large labial adhesion in that the urethra will not be covered. The fact that the membrane appears thin instead of thick helps to differentiate an imperforate hymen from agenesis of the vagina. Having the child cough should make the truly imperforate hymen bulge.

Before making a final determination of configuration, however, the clinician should check for relaxation and consider making observations in another examining position. In the study of McCann et al. (10), hymens that had appeared to be fimbriated using the supine separation method took on a smoother, crescentic appearance when traction was applied or the child was examined in the knee-chest position.

Early attempts to diagnose sexual abuse attempted to determine sizes of the hymenal opening that might be indicative of prior trauma. The landmark study in this area was reported by Cantwell (17), a comparison of findings among over 250 girls 12 and younger who had been admitted to a crisis care facility for treatment of various kinds of abuse. In this population, a hymenal opening of greater than 4 mm was strongly associated with a history of sexual abuse. A subsequent study by Emans et al. (12), however, offered some important methodologic improvements and questioned the utility of Cantwell's 4 mm cut-off point. Table 1 gives dimensions of the hymenal opening (measured supine) among children 3–6 years old, comparing asymptomatic children with those who gave a history of sexual abuse and those who had genital complaints. Although the asymptomatic children had, on the average, smaller openings, only four of the 55 children in the abused group had openings outside the range found in the asymptomatic girls. Based on these and other data, the authors concluded that the horizontal diameter of the hymenal opening was not a good indicator of previous vaginal or vulvar trauma, although girls with openings greater than 6 mm might be in a group at increased risk if they did not currently have some other vaginal complaint.

The study of McCann et al. (10) of apparently not abused girls provided further evidence against the 4 mm cut-off point, although it was not a comparison of abused

TABLE 1. *Horizontal diameter of the hymenal opening in girls 3–6 years of age*

Group	n	Mean (mm)	Range (mm)
History of sexual abuse	55	4.0	1–10
Asymptomatic	34	2.9	1–6
Vaginal complaints	19	4.1	2–10

Adapted from ref. 12.

and nonabused children. The study also demonstrated the extent of difference in hymenal opening diameter that could be attributed to a child's age and to examination techniques. Table 2 shows mean horizontal diameters for three age groups of children and three examination techniques. Average diameter increases with age, and is generally larger in the supine traction and knee-chest positions, although this difference is most important in young children. An important caveat in comparing these figures to Emans' is that McCann and colleagues did not average in the opening size of zero for those girls whose hymens appeared redundant and without an opening. This represented about 20% of the girls examined with the supine separation technique and 8% of those examined with supine traction or in the knee-chest position. This would tend to make McCann's average measurements larger than those made by other investigators who might have included all cases. The ranges reported by McCann, however, are similar to those reported by Emans and support the idea that diameters substantially larger than 4 mm may be normal findings. It is also important to note that vertical diameters tend to be larger than horizontal, and that studies comparing which dimension is most affected by injury, or which might ultimately provide the most sensitive or specific indicator of maltreatment, have yet to be reported. There are also some data to suggest that after injury and stretching the hymenal diameter may decrease over time (18). How rapidly and to what extent this may occur are not known, however.

Despite questions about its utility, measurement of the hymenal diameter continue to be an expected part of examining a prepubertal girl for suspected sexual abuse. Once variation in relaxation and examination technique are accounted for, colposcopes offer the most precise method of measurement. The very narrow depth of field allows the examiner to focus on the hymen, take a photograph, and subsequently photograph a ruler or other measuring device at exactly the same focal length and magnification. If the two images are printed at the same size, the ruler can be used to measure distances on the photograph. This procedure is complicated and subject to some error if the plane of the hymenal opening is not parallel to the plane of the colposcope lens, but it is far superior to holding a measuring device on the perineum and squinting down the vaginal canal toward the hymenal ring. Some clinicians use a probe of known diameter and hold it in or near the hymenal orifice. This can be successful if the child does not become

TABLE 2. *Horizontal diameter of hymenal opening in nonabused girls: variation by age and examining position*[a]

Age group	Examination method	n	Mean diameter (mm)	Range
2–4 years	Separation	21	3.9	1.0–5.5
	Knee-chest	29	4.6	2.5–7.5
	Traction	24	5.2	2.0–8.0
5–7 years	Separation	39	4.2	1.0–8.0
	Knee-chest	41	5.6	2.5–8.5
	Traction	43	5.6	1.0–9.0
8 years to Tanner Stage II	Separation	19	5.7	3.0–8.5
	Knee-chest	21	7.3	4.0–11.0
	Traction	20	6.9	2.5–10.5

[a]The children examined were volunteers who had been screened to determine risk factors or history that might be suggestive of maltreatment. See text for descriptions of examination methods and cautions about comparing figures with other published data.

Adapted from ref. 10.

frightened or if the probe does not touch sensitive tissues.

Several other characteristics of hymens may serve to demonstrate that an individual has a higher likelihood of having been sexually abused. These are well illustrated in the color atlas of prepubertal genital and rectal findings developed by the California Medical Association (19). Perhaps the most significant is a cleft or tear in the hymen posteriorly, especially at about the 6 o'clock position. Anecdotal reports (20,21) suggest that this is the area most likely to be damaged in violent sexual assault or attempted penile penetration (Fig. 1). In the study by Emans et al. (12), the presence of a cleft or healed tear in the hymen did not distinguish among abused, asymptomatic, and symptomatic girls. Only three girls, however, had a tear at 6 o'clock, and these were all individuals who had given a history of pain and penetration. Bumps on the hymen in the 3 o'clock to 9 o'clock region, adhesions of the hymen to the vaginal wall, attenuation of the hymen (narrowing of the rim), and increased vascularity of the hymen or surrounding tissue have all been found among children with a history of abuse, but Emans and colleagues found them in roughly equal or greater proportion among children with other vaginal complaints. These are all observations based on a relatively small number of studies and patients. Other studies reported to be in progress will certainly add to what is known.

FIG. 1. Colposcopic photograph of a prepubertal girl's genitalia. The hymen is attenuated, and there is a cleft or interruption at about 6 o'clock. (Courtesy of Dr. T. Doran, Sinai Hospital of Baltimore.) (©) 1990, The Williams and Wilkins Co., Baltimore)

INTRAVAGINAL FINDINGS

Especially by examining a child in the knee-chest position, it is often possible to see through the opening of the hymen and into the vagina. Anterior/posterior ridges (columns) run lengthwise, with transverse rugae branching out from them laterally. The length of the vagina varies a great deal with age and among individuals. From birth to about 7 years of age it is about 4–5 cm long (22). Just before puberty it is about 6–7 cm deep along its anterior wall and about 8–11 cm deep posteriorly (23). Penetration with an object larger than a single adult finger is said, after only a few episodes, to cause the vagina to lengthen and its folds to flatten.

The possibility of sexual abuse is often raised when a vaginal foreign body is found. Young children sometimes do put small objects in convenient orifices, and this is probably not a sign of molestation or abnormal psychosexual development unless it happens repeatedly or seems to be associated with an excessive amount of self-stimulatory behavior. What is unusual is for children to insert objects that would mimic coitus, or to do anything to themselves that one might anticipate to be painful. Such episodes suggest inflicted injury or, if self-inflicted, exposure to explicit sexual material. If a foreign body is suspected under these circumstances, an evaluation under anesthesia may be preferable to instrumentation or even irrigation in the office setting. Noninvasive approaches such as ultrasound might be considered first.

PERIRECTAL LESIONS

The prevalence of rectal injury in child abuse may well be underestimated, if only because knowledge of normal variations and the manifestations of trauma is even more scanty than for the genitalia. Serious injury to the rectum seems to be relatively uncommon in prepubertal sexual abuse, possibly because many child sexual abusers go to great lengths not to inflict trauma that will be detected. In addition, the anus is very expansive: Many stools are larger than the adult penis and can be accommodated without injury; therefore, penile penetration of the rectum may go undetected. Healing also appears to be quite rapid, so that minor injuries may be virtually undetectable by 2–3 weeks after a sexual encounter. More serious injuries may take place when the assailant is another child (and not capable of preventing detectable abuse), in the setting of violent sexual assault (rape), or among adolescents who are abused by adults practicing rectal sexual practices with violence or without lubrication such as in the insertion of hands ("fisting") or foreign bodies. It seems likely that as more sexual abuse victims come forward that the true prevalence of anal injuries will be found to be relatively high.

The types of injuries found in children or adults correspond to various aspects of the anatomy of the perirectal area (8,23). When the buttocks are first parted, the hyperpigmented skin of the anal verge can be seen surrounding the anterior-posteriorly oriented slit of the anus itself. The anal verge is roughly circular, and its skin is loosely applied over a thin layer of involuntary muscle and an easily disrupted network of small blood vessels (the inferior hemorrhoidal plexus). The muscle layer normally keeps the skin folded into multiple shallow furrows that fan out from the anus more or less symmetrically in all directions. Penetration with a single finger or other small object, especially if it is relatively well lubricated, may leave no visible mark on the anal verge except possibly for a shallow abrasion, possibly from a fingernail (24). Larger objects, however, especially if no lubricant is used, will tend to draw the anal verge skin inward with them. The fragile blood vessels under the skin may break, causing either localized or circumferential bruising (25). The skin itself may tear, causing a shallow fissure that may bleed. More extensive tears extending beyond the skin of the anal verge, either onto the adjacent skin of the buttocks or down into the rectal mucosa, are clearly unusual and suggest some nonphysiologic (abusive) trauma. On the other hand, shallow fissures are indistinguishable from the injuries that can be caused by the passage of a large, hard stool, or from the friability and maceration encountered with wearing diapers or poor hygiene.

Anecdotal reports suggest that unless there is chronic abuse most minor lesions of the anal verge resolve within a period of weeks. Areas of blue discoloration or hematomas resolve in a period of days, sometimes leaving small skin tags that may persist for an additional 2–3 weeks (24). These can be confused with midline skin tags in or near the anal verge, which are often a normal finding. In those cases, the tag will be noted to have been present since birth. Some observers (25) feel that increased prominence of the venous markings under the skin of the anal verge, or more pronounced filling and emptying of these vessels, may be a sign of prior trauma. Hemorrhoids may also be found and potentially are signs of prior trauma since otherwise they are rare in childhood. Other causes of hemorrhoids include perirectal infections and inflammatory bowel disease. Shallow fissuring in the past may leave fine scars

that appear to be triangular, with the point of the triangle facing the anal opening, when the skin folds of the anal verge are spread during an examination. Although some authorities have felt that scars created by objects passing out of the rectum look different from those created by objects going in, others (23) feel that these two scenarios generally leave the same markings. The latter base their opinion on the fact that the configuration of the scar appears to be determined by the action of the underlying musculature rather than the mechanics of the injury. McCann et al. (26), in their study of children who were thought *not* to be victims of abuse, reported finding shinier, triangular-shaped "smooth" areas in the perirectal skin anteriorly and posteriorly (at the 6 and 12 o'clock positions), which they attributed to the distribution of the underlying musculature.

Chronic abuse does appear to alter the skin of the anal verge. It becomes thickened from repeated abrasion and flattened as the underlying muscle becomes stretched. In extreme cases, the perianal area may take on a "funnel-shaped" appearance, so that the apparent opening of the anus is within the perianal skin, above its normal location at the point that the rectal mucosa begins. Although this finding is said to be rare in children, one group of physicians has reported seeing it in six of 224 prepubertal children examined for suspicion of sexual abuse (27).

The anal canal is the passage that links the lower rectum to the exterior of the body at the anus. It ranges from about 1 cm long in children to 3 cm in adults. The external part of the canal is made up of skin similar to that of the anal verge: delicate and very sensitive to pain, because it is innervated by the somatic sensory system. The internal portion is lined with a mucous membrane that is relatively insensitive to pain, because it derives its innervation from the autonomic system. The internal and external portions meet near the so-called dentate line, which gets its name from the appearance of the puckered, longitudinal folds (known as Morgagni's, anal, or rectal columns) of the internal portion. The dentate line is at the level at which the anal canal passes through the levator ani musculature. At the ends of the anal columns are blind folds known as anal valves. The "crypt" within each valve contains glands that serve to lubricate the area and that can be involved with perirectal infections and ultimately in the development of perianal abscesses (28).

Both trauma and infection (with chlamydia, gonorrhea, or herpes virus, for example) may produce erythema and edema of the anal mucosa (proctitis). Symptoms include a burning sensation and pain on defecation. If the irritation is caused by a single episode of trauma and is not associated with infection, it will resolve spontaneously. The anal mucosa may also be lacerated (with or without involving the deeper muscle layers), causing pain and bleeding. Laceration may be caused by insertion of the penis, other body parts, or an object of some kind. Care must be taken to assure that the laceration has not perforated the wall of the anal canal or of the rectum. These are very distensible structures and perforation suggests either great force or the introduction of a relatively large or sharp object. Perforations may enter either the peritoneal cavity or the perineal tissues. The former type of perforation usually presents rapidly with signs of peritonitis and free air in the abdomen, but the latter may not be readily apparent until cellulitis develops. Initial evaluation can include checking the hemocrit and vital signs to determine the extent of bleeding, and an upright abdominal film to search for a foreign body or free air in the peritoneal cavity. Children suspected of having serious acute, rectal trauma should be hospitalized for observation, surgical consultation, and possibly proctoscopy.

The anal sphincter is composed of two sets of overlapping musculature, the internal and external sphincters. The internal sphincter, which lies closest to the bowel, is an involuntary muscle innervated by the autonomic nervous system while the external sphincter, which wraps around the internal sphincter and extends the entire length of the anal canal, is striated, voluntary muscle. The external sphincter has no opposing muscles to force it to open; defecation is possible when the muscle relaxes from its usually contracted position.

Acute stretching of the sphincter may cause it to remain open for a period of hours. If the muscle fibers have not actually been ruptured (sometimes visible at the site of a laceration of the anal skin or mucosa) the injury will be followed by spasm. Injury to the anal area that does not stretch the sphincter may also result in spasm as the muscles attempt to "splint" sensitive tissues and reduce discomfort. Past the acute period, unless there has been repeated penetration or tearing, the sphincter will appear normal. Repeated penetration can result in stretching the sphincter so that it easily accommodates wide objects (several centimeters in diameter) and loses some of its strength (manifested as a decreased "grip" on an examiner's fingers). Scarring from an old laceration, or splinting because of an abscess or fissure, may produce increases in tone or asymmetry in the shape of the anus when closed.

One of the standard findings in routine physical examinations of children and adults is the so-called anal wink, a reflex tightening of the external sphincter in response to stimulation of the perirectal skin. The reflex is also sometimes triggered by simply spreading the buttocks. It can be abolished by lesions of the sacral segments of the spinal cord or of the pelvic nerves, and individuals can learn to inhibit it if they have experienced frequent stimulation in the perirectal area or in order to be cooperative with the examiner. Physicians who perform digital rectal examinations in adults, for example, know that with coaching and relaxation a patient can relax the sphincter to allow entry of a finger or an instrument. Children who have had repeated rectal examinations, or frequent enemas or other instrumentation, may also learn to inhibit contraction of the sphincter. It follows that failure to observe a strong wink, or the ability to relax the sphincter during observation or digital examination, is a nonspecific finding that may have many interpretations.

Some children tighten the anus when the buttocks are spread, and others relax it slightly, often allowing a small amount of flatus to escape. Both of these reactions are probably normal (23). If traction is applied to the perirectal skin to "test" the sphincter, the mucocutaneous junction of the anal canal can often easily be seen in normal individuals because it is actually just at or below the bottom edge of the sphincter muscles. McCann et al. (26) in their study of children thought not to be abused provide the only data regarding how far the anus should normally open when the buttocks are spread. In that study, more than half the children would gradually relax the sphincter if gentle traction was maintained for a sufficient time (average about 60 sec). The degree of relaxation frequently fluctuated during the exam. McCann's team observed rectal openings, when the examinations were conducted in the knee chest position, of up to 2 cm measured anterior-posteriorly (average 1 cm). Putting McCann's observations together with those of Paul (23), one could develop the following criteria for judging whether a child's rectum might be abnormally dilated:

- large diameter (> 2 cm) in the absence of stool in the rectal ampulla
- asymmetry of the anus when dilated
- apparently fixed opening—no gradual relaxation or fluctuation in diameter observed
- thickening and smoothing of the skin of the anal verge (although smoothing alone, during relaxation, is probably normal, reflecting only relaxation of the underlying muscles)

- decreased "grip" on digital exam (if one believes that digital exams are appropriate in cases of suspected sexual abuse).

If the child is willing or able to talk about what has happened, he or she should be asked in an open ended, nonleading way about discomfort or pain associated with the incident of abuse. Anal penetration is usually painful both initially and on withdrawal. This pain is often sharp, and children sometimes will report that the assailant "put a knife in my rear." This may sometimes actually be the case, but it is important to ask the child if a knife or other sharp object was actually seen. The discrepancy between this type of account and a finding of only minor or no lasting trauma often serve erroneously to discredit the child's statement. Clinicians can help by explaining the probable source of the child's perception. There is usually a dull aching sensation after anal penetration, or continued sharp pain if there has been more extensive trauma. Even with minimal trauma, there may be pain on defecation for 2 or 3 weeks, sometimes accompanied by a change in bowel habits.

If it is not appropriate to ask about the incident of abuse, or if one has not yet been disclosed, it is still important to enquire about other rectal symptoms such as burning or pain on defecation, passing blood, or problems with large, hard stools or chronic constipation. These questions can be asked as they would be normally, by asking about the frequency of defecation and medications or enemas that may have been administered. Changes in bowel habits are also of potential significance, as are episodes of encopresis after toilet training or apparent leakage of stool.

The perirectal exam must be more than a "quick look." Relaxation and good lighting are vital. The child should initially be assured that the exam will be totally external and not painful. He or she may be comfortable in a variety of positions including supine, bent over prone (standing or on a special proctoscopy table) or on the side. The knee-chest position also offers good visibility but may be the most embarrassing.

When the child is relaxed the buttocks can be spread gently and the configuration and reaction of the anus observed. As discussed above, either a reflex tightening or gentle relaxation is probably normal. If there is any doubt about the competency of the sphincter, the perirectal skin can be stimulated to provoke a wink, but a negative response in a relaxed child may not have great meaning. The anus itself should be a relatively uniform anterior-posterior slit, surrounded by a symmetrical area of hyperpigmented skin. The buttocks themselves should be examined for bruises and scars.

The perirectal skin should be examined for redness, scars, hemorrhoids, skin tags, fissures, ulcers, or warts. Irritation may be secondary to poor hygiene or pinworm infection. The folds of the anal verge can be gently spread tangentially to look for shallow fissures or scars that may not be immediately visible. Inspection and gentle palpation of the skin around the anal verge, especially anteriorly, may reveal bulging or tenderness suggestive of a perirectal abscess or fistula. Finally, traction on either side of the anal verge will allow inspection of the most distal portion of the anal canal, possibly revealing other hemorrhoids either external or internal (if they have prolapsed).

For most children with a normal examination, or with no findings suggestive of chronic abuse, no further inspection may be performed. A digital examination is not likely to yield any further information, except, perhaps, if there is reason to suspect a vaginal foreign body that might be felt through the anterior wall of the rectum. If there is reason to suspect serious acute or complicated chronic injury (perforation, fistula, foreign body), a specialist should be consulted for an examination with an appropriate instrument, probably under anesthesia.

When chronic abuse is suspected, but no acute injury is present, a digital exam may be the easiest way to determine the extent of stretching and decrease in strength, or alternatively the extent of scarring. The digital exam is best performed with a gloved, lubricated finger (29). Gentle pressure should be exerted with the ball of the finger, not the tip. Older children can be asked to bear down as if they were going to the bathroom. They should be warned that they may feel as if they are about to defecate but that this is not the case. As the sphincter relaxes, the finger can be rotated forward so that the tip enters first. If relaxation fails to occur, or there is tightening, waiting for a moment with the finger in place and reassuring the child may help. Once the finger is inserted, it can be rotated gently to assess first the uniformity of the superficial portion of the external sphincter and then the deep portion of the sphincter and the wall of the rectum.

FORENSIC PROCEDURES IN CASES OF SEXUAL ABUSE OR ASSAULT

When abuse or assault has taken place within 48 to 72 hours, it may be possible to detect materials from the abuser on the victim's body or clothing. This may provide important evidence to demonstrate that abuse has taken place and may sometimes help to identify the abuser. Procedures must be carefully followed to adequately collect and preserve available evidence.

Clothing

If the victim is still wearing the clothing worn at the time of the assault, he or she should stand on a large, clean cloth or paper sheet and remove all clothing. The clothing should be wrapped in the sheet, taking care not to spill any small objects that may have fallen onto it, and the bundle labelled and safely stored until it can be handed over to a police laboratory.

Examination for Traces of Semen

Finding traces of semen on a victim's body or clothing can be strong evidence that sexual contact of some kind took place. A first goal is to demonstrate that semen is present, and a second is to isolate genetic markers in the semen that may be linked with a particular perpetrator.

Examination for Semen on Skin

Victims may have semen from the abuser on their skin, often at sites adjacent to target areas for sexual contact. Ultraviolet (UV) light, which causes semen to fluoresce, can be used to aid detection. After a thorough explanation of the procedure, the room can be partially darkened. A few moments are required for the examiner's eyes to adapt to the dark. The UV light can be used to examine the thighs, buttocks, lower abdomen, chest, and lower face. Secretions may also be found in the hair, especially if the victim has tried to spit out ejaculate. If positive areas are found they can be swabbed with saline-moistened swabs that should be air-dried and put into empty, sterile blood collecting tubes or a clean paper envelope. If sealed tubes are used, the swabs must be totally dry to avoid overgrowth of contaminants. Alternatively, if preferred by the local forensic laboratory, the swabs can be immediately frozen instead of being dried. This may help preserve the activity of prostatic enzymes that can be used to identify the material as semen.

Semen is usually identified by looking microscopically for sperm and biochemically for enzymes and other proteins in the ejaculate. Both processes should be applied in all cases: as will be discussed below, the factors that influence retrieval of sperm and other seminal components act in a very variable manner. It is not unusual for sperm to be found in the absence of enzymes or vice versa. (Some abusers and rapists may

be impotent, so that even finding no evidence of semen does not rule out genital contact.)

Sperm

Although, normal male ejaculate can contain hundreds of millions of sperm, much smaller numbers are recovered from the vagina, even immediately after intercourse. In addition, the concentration of sperm in any individual's ejaculate may be decreased by elevated testicular temperature, chronic alcohol intake or procedures such as vasectomy.

Sperm recovered from the vagina shortly after sexual contact may still be observed to be moving when examined in wet preparations. The outer limit for finding motile sperm in adult vaginal secretions is often given as eight hours (30), although studies report a great deal of variation. Twelve hours appears to be the longest survival generally reported (31). Nonmotile sperm can be found for much longer periods, with reports ranging from 14 to 26 hours (30,32,33). These figures are all for sperm that, while nonmotile, are morphologically intact. Sperm without tails may be identified for considerably longer (33), but it may be harder to differentiate them from yeasts, debris, or other similar-size objects. Identification of intact sperm is more convincing forensic evidence (34).

Sperm may be found in other body sites besides the vagina. They can survive in the cervix for up to several days after sexual contact, or for a period of hours on the perineal skin. Survival in the anus and rectum is much shorter than the cervix or vagina: Whole sperm can usually be found for only a few hours, although pieces, if they can be properly identified, may be present for up to 2 days (33). In females, small numbers of sperm found in the anus or perirectal area may be contaminants from the vagina (34). Sperm may also be recovered from the oral cavity and surrounding skin. If the index of suspicion for oral sex is high, separate swabs should be taken from the perioral skin, the gums, the tongue, and the pharynx. The gums may be an especially good source. Their protected location in the mouth allows sperm to be retained there for several hours after contact, sometimes despite of the use of mouthwashes or toothbrushing.

A variety of techniques are described for obtaining specimens to examine for sperm. Some clinicians feel that wet preparations are generally not useful (32) because of the variable motility of sperm. Dried, stained smears may be more sensitive, and the have the advantage of creating a permanent record that other observers may examine. Swabs soaked with material to be examined can be immersed in 1 or 2 ml of saline or distilled water, or a portion of the swab can be cut off and dropped into the fluid so that the rest of the swab can be used for biochemical analysis (33). The fluid and swab are agitated to release sperm and then a drop of fluid can be air-dried on a slide and either stained (with Giemsa or hematoxylin and eosin) or processed as a cytopathology specimen.

Biochemical Markers

Semen contains several enzymes and other proteins that can be used to demonstrate its presence in vaginal fluids. The most commonly used biochemical marker for semen is the enzyme acid phosphatase (ACP) which is produced in the prostate. Small amounts of ACP are present in normal adult vaginal secretions, but at levels that are 100–1,000 times smaller than in semen. ACP is measured in international units (IU), with one IU equal to the amount of enzyme required to metabolize one micromole of substrate in 1 min. Several quantitative methods are available to measure ACP activity.

Given the excess of ACP in semen compared to vaginal secretions, it would seem

simple to use analysis of ACP in vaginal fluids to detect recent intercourse. Unfortunately, ACP activity diminishes rapidly in the vagina, although it is relatively stable on dry materials such as cloth if kept cool, dark, and relatively acid (35). In the vagina, activity related to prostatic ACP may not be distinguishable from normal vaginal enzyme after about 72 hr following intercourse.

Establishing cut-off values for inferring the presence of prostatic ACP, and determining the rate with which activity decays so that the time of coitus can be estimated, have been hampered by the fact that various collection and assay methods yield different dilutions of specimens and thus different values for "normal." In addition, normal adult vaginal ACP levels do not have a Gaussian (or "bell-shaped") distribution. The distribution of activity levels is log normal; that is, most women have relatively low levels of activity, but a small proportion of have relatively high levels. Pooling data from several studies, Sensabaugh (36) calculated that the 99% upper confidence limit for normal vaginal ACP activity is about 6.6 times a laboratory's average normal vaginal level using a consistent collection technique. For example, if the average ACP activity in adult females is 25 IU/L, a level of about 165 IU/L represents a 99% confidence upper limit of normal. ACP levels higher than this point would be presumed to be caused by the presence of prostatic enzyme. Sensabaugh also calculated multipliers to obtain 99% confidence intervals for estimated ACP activity for various time periods between coitus and when a sample is taken.

Other Tests Potentially Useful for Identifying Assailant

The following procedures may not be required in many cases and, with the exception of the first, can usually be postponed until after the initial examination. The clinician should consult with a police laboratory official or a designated sexual assault center to decide if collection is necessary.

Combings for Hair Samples

It may be useful to search for abuser's hair that has become adherent to the patient's body. If the patient has pubic hair it can be gently combed onto a piece of clean filter paper that is then carefully folded and placed in a labelled envelope for delivery to the police. If the patient struggled with and scratched the assailant, scrapings from under the fingernails may contain tissue useful in identifying the assailant or corroborating the history of struggle. Collection of blood or saliva from the patient may also be useful in differentiating his or her secretions from those of the assailant.

Identification of specific abusers from hair, blood, or semen samples has, until the present, been a difficult and often frustrating task. Most presently available testing has been based on a search for polymorphisms in blood group markers and serum proteins. Although several markers and proteins can be examined (fewer for semen than for blood or other tissues), patterns of variation cannot uniquely identify individuals. It can often be said that only one person in 100 or 1,000 would have a similar pattern of polymorphisms, but these odds are frequently not small enough to be the sole evidence linking a particular individual with a particular crime (37). This situation has been radically altered by the availability of genetic "fingerprinting" techniques based on detection of polymorphisms in human DNA (38).

"CHAIN OF EVIDENCE" FOR MEDICOLEGAL SPECIMENS

It is vital that a "chain of evidence" be maintained for sexually transmitted disease and other laboratory specimens associated with a case of suspected child abuse of any

kind. The "chain" is a written record assuring that the specimen which arrived in the laboratory for analysis was the same specimen taken from the patient. Although a medical facility's standard procedures are usually adequate for social service and juvenile court proceedings, they may be challenged and provide a handy defense for an abuser should a case be heard in a criminal court.

The chain may be carried out in many ways. A slip may accompany each specimen and contain spaces for the name and signature of each person handling the specimen (person collecting, transporting, evaluating) with the corresponding date and time handled. Alternatively, the clinician may describe the specimens collected in the medical record, carry them him or herself to the laboratory, and ask the technician to sign the record stating that the specimens were received and giving any laboratory number that may be assigned to them. Specimens collected for the police laboratory may be placed in a locked cabinet or "black box." When a police representative comes to collect the box, he or she should be asked to co-sign a slip describing the box's contents, and the date and time of transfer.

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EXPERT TESTIMONY IN CHILD SEXUAL ABUSE PROSECUTIONS

I. Presentation: Expert Testimony in Child Sexual Abuse Prosecutions

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II. Materials

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Psychological and Scientific Evidence in Criminal Trials

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Chapter 8

Child Sexual Abuse Syndrome

I. INTRODUCTION

II. EXPERT TESTIMONY

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I. INTRODUCTION

§ 8:1 Overview

By most accounts, reports of child sexual abuse in this country have grown exponentially over the past few decades. Whether the incidence of the crime is actually growing or the reporting of the crime is finally occurring is not clearly understood. What engenders no debate is that the abuse of children—whether physical, sexual, or emotional—is pernicious and damages their physical and mental well-being, often scarring them well into adulthood. Some children, sadly, do not survive the abuse.

Among the more discussed aspects of child abuse is child sexual abuse. Long believed by many simply to be fantastic childhood tales, the vast majority of Americans now believe sexual abuse of children occurs and occurs fairly frequently. Some people, however, believe that a witch hunt for sexual abuse has developed in this country, and

that the "experts" and courts have totally lost touch with reality.[1]

> In a recent publication, one group of commentators provided the following statistics: In 1991, an estimated 2,694,000 children were reported to Child Protective Services agencies as victims of . . . abuse or neglect. Of these, approximately 15 percent, or 404,100 were sex abuse cases. . . . The numbers for 1992 are even higher with an estimated 2,936,000 reported cases of . . . abuse and 17 percent, or 499,120 being sex abuse cases. There is also growing evidence that a substantial portion of the allegations are either unsubstantiated . . . or false. . . . Of the 2.7 million reported cases for 1991, an average of only 39 percent were substantiated following investigation.[2]

The prosecution of adults who physically batter children is a generally simpler process than the prosecution of sexual abusers. In physical abuse cases, there is usually ample physical evidence to support the claim of abuse. Additionally, physicians' testimony about the battered child syndrome has uniformly been admitted in courts and is accepted in the medical profession.[3] In sexual abuse cases, however, there is often no physical evidence and reliance on psychological evidence has therefore become more pronounced.

As with most societal issues being played out in the criminal courts, however, the road to prosecuting sexual abuse crimes has been difficult. There has been substantial conflict in these cases about what evidence should be admissible—most prominently in the area of admission of expert testimony. The prosecution has claimed that difficulties encountered inherent in proving sexual abuse has made the introduction of expert testimony a necessity. The defense

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[Section 8:1]

[1] The McMartin sexual abuse case in California and the Kelly Michaels case in New Jersey both underscore the growing belief among many that the allegations of sexual abuse are reaching hysterical proportions. In both cases, preschool teachers were accused by several children of sexual abuse—after numerous suggestive interrogations amid an atmosphere of hysteria. For an account of the McMartin case, see Coleman, Learning from the McMartin Hoax, 1(2) Issues in Child Abuse Accusations 68 (1989); Carlson, Six Years of Trial By Torture, Time Mag, Jan. 29, 1990. Some of the details of the interrogation in the *Michaels* case are contained in the appendix to the New Jersey Supreme Court's opinion. State v. Michaels, 642 A.2d 1372 (N.J. 1994).

[2] Jenkins & Howell, Child Sexual Abuse Examinations: Proposed Guidelines for A Standard of Care, 22 Bull Am Acad Psychiatry & L 5, 6 (1994).

[3] The battered child syndrome is a diagnostic tool used by physicians determining the cause of children's repeated physical injuries.

has claimed that much of the expert testimony results in unfair trials in which innocent people are convicted of crimes they did not commit.

The purpose of this chapter is to provide an overview for the practicing lawyer dealing with the child sexual abuse case. Its primary focus will be to provide an in-depth review of the psychological evidence aspects of the child sexual abuse case.

Specifically addressed will be the various concepts that have become integral to the prosecution and defense of child sexual abuse cases. These concepts include the so-called "child sexual abuse accommodation syndrome," the psychological underpinnings for the claims that "children do not lie about sexual abuse," the behavioral profiles often introduced at trial of sexually abused children, and the growing concern about suggestive interview techniques and anatomical dolls.

Additionally included in this chapter are a review of the various positions taken by the courts on the admission of psychological evidence, a discussion of the problems that arise in the uncovering of alleged abuse, and a step-by-step approach to trying the child sexual abuse case. Furthermore, the special problems of mass declarations of child abuse (where several children allege abuse at the hands of the same person) are reviewed. As in most of the chapters in this book, there are prosecution and defense checklists at the end of the chapter.

§ 8:2 Special problems of child sexual abuse cases

It is hard to imagine a category of criminal cases that presents more problems for both sides (and for the court) than child sexual abuse cases. The whole concept of child sexual abuse is such an affront to our sensibilities and so difficult to comprehend. With the growing awareness of child sexual abuse, many parents have been worried about leaving their child in day care, and many professionals in the day care business are terrified of the possibility of a child making a claim of sexual abuse.

In addition to the difficulties presented in the case of one (or a few) children alleging abuse, there are special difficulties faced by both the prosecution and the defense in cases of mass declarations. The *McMartin* case in California and the *Michaels* case in New Jersey

are perfect examples of the dangers and difficulties in the cases.[1]

§ 8:3 — Prosecution difficulties in child sexual abuse cases

Among the problems faced by prosecutors in these cases are the following:

- There are usually no witnesses to the crime, other than the child victim.
- The vast majority of cases occur where the adult in question has a relationship of trust with the child and the parties are often loathe to bring suit. There is often a great deal of disbelief by one parent when the other parent is accused of the acts, and the child is often pressured to recant the allegation.
- Sexual abuse often leaves no physical evidence as it may consist of improper touching or other acts.
- Children are often unbelievable witnesses and are hampered by an inability to verbalize and explain all the events.
- Children often react in unexpected ways to the abuse, evidencing behaviors that are difficult for jurors to understand.
- The tales of abuse are often too bizarre to be believed and jurors assume that the child must be fabricating the tale.
- Adults who abuse children often lead very respectable, upright lives in society, making it difficult for jurors to believe that the defendant could have committed such a pernicious act.
- Abused children have often been threatened or warned about not telling anyone about the abuse and they are therefore terribly afraid to reveal the abuse for fear that they or their family will be harmed.
- Children are often unable to state when or where the abuse occurred or specifically how many times it occurred, rendering their testimony less than believable.
- Children are often traumatized by testifying in court—both as a result of the public aspect of the proceeding and by the presence

[Section 8:2]

[1] Both of the cases referred to, State v. McMartin, and State v. Michaels, 642 A.2d 1372 (N.J. 1994), involved child sexual abuse claims made by children who were in day care programs run by the defendants. In the *McMartin* case, the jury returned a verdict of not guilty after a year-long trial. In the *Michaels* case, the Superior Court and Supreme Court of New Jersey reversed the conviction (on different issues), with the likely result that the case will not be able to be retried. The subject of mass declarations of child abuse is addressed in this chapter.

of the abusive individual of whom they are afraid and/or whom they still love.

As difficult a job as prosecutors have in these cases, defense counsel (and the courts) are faced with equally difficult challenges in the defense of child sexual abuse cases.

§ 8:4 — Defense difficulties in child sexual abuse cases

Among the difficulties presented in the defense of child sexual abuse cases are the following:

- Children are naturally sympathetic witnesses, whom jurors want to protect when they listen to them. Individuals accused of child sexual abuse crimes, on the other hand, are often not accorded the presumption of innocence by jurors, but are clearly viewed with distrust and suspicion.
- The flood of information on television, newspapers, magazines, and in other areas of the media about child sexual abuse has made the subject much more accessible and believable to the population at large. Many individuals are now convinced that there is an epidemic of child sexual abuse cases.
- It is almost impossible to find witnesses to corroborate the adult's denial of the act(s). How does a defendant prove that the touching did not occur?
- Stepfathers are often defendants and they have a historically "evil" reputation, deservedly or not.
- Most courts have permitted children to testify without reference to specific places, dates, or times, further complicating the availability of alibi and other defenses.
- There is often a lack of witnesses and physical or circumstantial evidence—the defendant has limited tools to construct a defense.
- Courts have become increasingly more lenient with prosecutorial attempts to introduce expert evidence to explain any discrepancies, bolster the child's testimony, and to explain the child's behavior.
- Some courts are not requiring that the child actually testify in court, but are permitting videotape testimony, thus depriving the jury of the right to evaluate the child's testimony in person.

There has recently been a growing awareness of the problems with inaccurate uncovering of child abuse by counselors, police, and pros-

ecutors. Specifically, the use of dolls and certain types of interrogation techniques have become more suspect.

§ 8:5 — Dilemma of courts handling sexual abuse cases

Courts handling these cases must deal with the dynamic of balancing their natural sympathy for the victims of crime with their need to assure the fairness of the proceedings to individuals accused of crimes. Additionally, courts must balance the need for expert testimony against the danger of unfair prejudice it poses.

Another major problem for the courts is in evaluating the science behind the testimony. Many courts are confused in the area of psychological testimony and are unsure of who is or who should be an authority. Additionally, many of the experts are not familiar with the literature and are not aware of the psychologically controversial nature of the testimony they are providing to the court.[1]

II. EXPERT TESTIMONY

§ 8:6 Advent of expert testimony

As the prosecution of sexual abuse cases became more prevalent in the 1980s, prosecutors began to push the courts to permit the introduction of expert testimony to explain why children were changing their stories, recanting tales of abuse, and acting in bizarre and inexplicable fashions. Additionally, prosecutors sought to buttress their cases by introducing expert testimony to explain to the jury that sexually abused children often exhibited certain behavior patterns (profiles) and that these patterns were exhibited by the child in question. Finally, some prosecutors attempted to introduce expert evidence to suggest that victims of child sexual abuse never or very rarely lie about such abuse.

The prosecutors in child sexual abuse cases have argued the following: that the rules of evidence should permit expert psychological testimony; that any difficulties with the expert's testimony went towards its weight and not its admissibility; that the jury's inherent bias against believing such testimony from children required such testimony; and that defendants were not unfairly prejudiced by the introduction of such testimony.

[Section 8:5]

[1] Chapter 2 contains a more complete discussion concerning the credentials of expert witnesses.

Not surprisingly, defense lawyers began seriously challenging this expert evidence on a variety of fronts, including challenges to the relevancy, reliability, and prejudicial effect of such evidence, the invasion of the jury's province to determine credibility, the qualifications of the experts, and the basic unfairness of the testimony.

The result of these arguments for and against expert testimony in child sexual abuse cases has been to create once again a wide divergence among the courts as to whether expert testimony should be admissible and, if so, what specific testimony should be considered by the jury.

To understand the courts' respective positions, it is necessary to understand fully the psychological concepts to which the court and litigants are referring in these cases. To that end, the following sections will contain an explanation of the psychology behind the testimony, along with a review of the current literature and the various difficulties, as understood by the experts.

§ 8:7 — Psychological aspects of child sexual abuse

There are several psychological aspects to child sexual abuse. There are the psychological aspects to why children do not tell people immediately about the abuse. There are the behaviors sexually abused children exhibit, sometimes referred to as behavior profiles. Additionally, there are the psychological issues regarding recantation, secrecy, and changes or discrepancies in the retelling of the abuse. This latter category is most frequently referred to as the child sexual abuse accommodation syndrome (CSAAS). Finally, there is the question of children's memory of and truthfulness about the abuse as well as children's suggestibility.

§ 8:8 — Confusion of the courts

Often, the courts (and litigants) confuse or misapprehend the psychological issues. Unfortunately, experts (or those who purport to be experts) also sometimes confuse these issues themselves, owing to the substantial and complex problems associated with expert testimony concerning child sexual abuse.

Among the areas of dispute are whether children lie about sexual abuse, whether there is an identifiable set of behaviors indicated by victims of sexual abuse, whether psychologists have any special way of discerning whether children are telling the truth, and whether

there is any validity to the child sexual abuse accommodation syndrome.

Further complicating the problem is the courts' leniency with regard to expert credentials. Often, the "experts" who testify do not have sufficient expertise and education to render the opinions they are giving in court. Because there has been a great deal of latitude by the courts with regard to expert witnesses, individuals who are not licensed psychologists or psychiatrists regularly render opinions that are far beyond their ken. The result of this procedure has been to create confusion in the courts.

One of the more pronounced misunderstandings has been the confusion of CSAAS evidence with behavioral profiles and the erroneous belief that CSAAS is a diagnostic syndrome. The following sections clearly explain the differences among the three types of evidence.

§ 8:9 Three possible types of psychological testimony

Generally, there are three different types of testimony that prosecutors have sought to introduce into evidence: behavior profiles of sexually abused children; child sexual abuse accommodation syndrome testimony; and testimony concerning whether children are telling the truth about sexual abuse.

§ 8:10 — Child sexual abuse accommodation syndrome

Psychiatrist Roland C. Summit first introduced a theory to explain how children adjusted, or accommodated to sexual abuse.[1] Termed the child sexual abuse accommodation syndrome (CSAAS), it quickly found its way into the courtroom. CSAAS consists of some or all of five elements often seen in sexually abused children: (1) secrecy, (2) helplessness, (3) entrapment and accommodation, (4) delayed or (5) conflicted disclosure and retraction.

Although the purpose of defining these characteristics as a syndrome was to provide a common language for those working with abused children,[2] the courts began to admit such evidence in sexual abuse prosecutions, often to buttress claims of abuse.

According to Dr. Summit and other professionals, CSAAS is not a diagnostic syndrome. "The syndrome does not detect sexual abuse.

[Section 8:10]

[1] Summit, M.D., The Child Abuse Accommodation Syndrome, 7 Child Abuse & Neglect 177 (1983).

[2] Id. at 191. See also Myers, Expert Testimony in Child Sexual Abuse Litigation, 68 Neb L Rev 1, 67 (1989)(hereinafter Myers, Expert Testimony).

Rather it *assumes* the presence of abuse, and explains the child's reactions to it."[3] In a criminal case, any evidence that *assumes* the existence of a material fact in issue (namely, whether the child was abused) is potentially dangerous testimony.

The method of using CSAAS in courts has often been erroneous, as many courts have admitted such syndrome evidence as if it were a diagnostic syndrome. However, there have been other misuses of the syndrome. One influential commentator has stated:

> If the first error was erroneously equating child sexual abuse accommodation syndrome with a diagnostic device, the second mistake was hardly less serious. Some professionals conflated the reactions described by Summit, which are not probative of abuse, with behaviors that are probative of abuse. This combination of behaviors was then denominated a syndrome, the presence of which was supposedly probative of abuse.[4]

Although Myers refers to "behaviors probative of abuse," the truth is that many experts also testify about behaviors that are not necessarily probative of abuse.[5] In any event, the purpose of CSAAS has often been lost in the courts and inappropriately admitted.

If CSAAS testimony should be admitted (and that is subject to some disagreement), the only appropriate way would appear to be as rebuttal testimony to the issue of delayed or inconsistent reporting and recantation. Some courts have allowed this testimony in for such purpose.[6] The purpose of admitting such testimony is to help rehabilitate the child's testimony after it has been attacked on the grounds of inconsistency, delay, or recantation.

Those who support the admission of such testimony claim that the jury should be educated about the typical method of explaining such methods of reporting to contradict the inference that the child is lying. That is, many people believe that individuals (including children) who recant or delay reporting, or who relate inconsistent stories or stories that change are not being honest. Since such delaying, reporting and recanting behavior is typical of abused children, juries should be advised of this.

Those who oppose the admission of such testimony argue that such evidence invades the province of the jury to determine credibil-

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[3] Myers, Expert Testimony at 67.

[4] Id.

[5] Behavioral profiles are addressed in the next section.

[6] See, e.g., Hosford v. State, 560 So. 2d 163 (Miss. 1990).

ity and that it impermissibly suggests that all child victims are telling the truth when, in fact, some are not. Additionally, arguments have been made that juries are readily able to understand why children are afraid to tell about sexual abuse or why they get confused or recant—namely, that they are children and not adults. Since these issue are within the range of common understanding, they do not need to be explained by expert witnesses. There are jurisdictions that have declined to admit such testimony on these various grounds.

While CSAAS testimony clearly is helpful in proving actual cases of child sexual abuse, it is exceedingly dangerous in cases in which the allegations are not true. In the cases where abuse by the defendant has not occurred, CSAAS testimony often eliminates the only defense the defendant can present. Again, the problem in sexual abuse cases is that in the courts' concern for the welfare of the child, they often lose sight of the fact that in all criminal proceedings defendants enjoy the constitutional presumption of innocence and entitlement to present a defense.

The Supreme Court of Arizona highlighted the problem of appropriate focus in *State v. Moran*,[7] noting that "[g]iven the egregious nature of child molestation, we are tempted to stretch the rules of evidence to their utmost. . . ."[8] That court also noted that child sexual abuse cases are "an evolving area of the law that calls for creative, cautious, and reliable approaches to issues of proof that endeavor *to protect blameless children and give their alleged abusers sufficient due process safeguards*."[9]

§ 8:11 — Behavioral profiles of sexually abused children

According to many psychologists who specialize in the area of child sexual abuse, there are several observable behaviors that are exhibited by the abused child. The admissibility of this evidence, sometimes referred to as a "profile" of the sexually abused child, has generated a lot of disagreement in the courts. Among the behaviors

[7] State v. Moran, 728 P.2d 248 (Ariz. 1986).

[8] Id. at 251 n.2.

[9] Id. Again, the court here seems to have lost sight of the purpose of a criminal trial: for a jury to determine beyond a reasonable doubt whether an individual, presumed to be innocent, has committed the acts with which he is charged. No more and no less is to be accomplished in a criminal case. It is not the appropriate forum to focus on the rights of the child nor is it the place to protect blameless children. The job of protecting children is for the family courts and the department of social services in these cases.

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described by experts *in the case law*[1] on sexual abuse are the following characteristics: pre-mature sexual knowledge, anger, depression, low self-esteem, fear of abuse stimuli, sexualized play, aggression, fear, clingyness, withdrawal, overly compliant and eager-to-please behavior, bed wetting, nightmares, excessive masturbation, and drawing figures with exaggerated or missing limbs.

These behaviors do not account for the full range of exhibited behaviors by children who have been abused. In addition, many of these behaviors are exhibited by children who have been exposed to or endured other trauma (divorcing parents, psychologically or physically abusive parents, or death of a parent, among others).[2] Even more significantly, some of these behaviors are exhibited by children without significant traumatic situations.[3]

In the past few years, however, there has been a growing consensus among professionals about the existence of specific, unique behaviors exhibited by children who have either "personal or vicarious sexual experience."[4] Specifically, these behaviors include "age-inappropriate knowledge of sexual acts or anatomy, sexualization of play and behavior in young children, the appearance of genitalia in young children's drawings, and sexually explicit play with anatomically detailed dolls."[5]

Another study that collected the results of various professional dealings with sexually abused children found a high level of agreement that the following factors indicated sexual abuse:

> age-inappropriate sexual knowledge; sexualized play; precocious behavior; excessive masturbation; preoccupation with genitals; indications of pressure or coercion exerted on the child; the child's story remains consistent over time; the child's report indicates an escalating progression of sexual abuse over time; the child describes idiosyncratic details of the abuse; and physical evidence of the

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[Section 8:11]

[1] There is a distinction between what the experts are writing about in scientific publications and what testimony has been admitted in the courtroom. The former is far more specific and exact than the latter.

[2] See, for example, studies collected in Cappy & Moriarty, Child Sexual Abuse Syndrome: Exploring the Limits of Relevant Evidence, 1 Crim Proc L Rev 1 (1991); Myers, Expert Testimony at 62.

[3] Gardner, Sex Abuse Hysteria, Salem Witch Trials Revisited, 60–65 (1991).

[4] Myers, Expert Testimony at 62.

[5] Id.

abuse.[6]

However, these results are by no means conclusive that the abuse has occurred. They simply are probative that abuse may have occurred. What the studies have failed yet to do, however, is to determine the application of these findings, or to ascertain how scientifically controlled these various survey findings were and whether enough children who were not abused are not exhibiting such behaviors. Whether an accurate diagnosis of child sexual abuse can be made by these observations has not yet reached the level of necessary consensus among professionals, however, to be readily admitted by all courts.

For example, numerous important questions have not yet been sufficiently addressed:

- Do children who have watched pornographic movies exhibit these same behaviors?
- Do children exhibit these behaviors if they saw their parents (or babysitter, for example) having sex?
- What is the effect of sexually explicit lyrics in music on children?
- Do children who learn about sexuality at an early age from other children exhibit these behaviors?
- Do children who have looked at pornographic pictures or books exhibit such behaviors?
- Is there any difference exhibited in groups of children from different socio-economic backgrounds and cultures?
- Have the changing mores of our society in the last several years resulted in children learning about sexuality at increasingly younger ages? What has been the effect of the media and television access to sexual information on children's early sexual knowledge?[7]

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[6] Conte, Evaluating Children's Reports of Sexual Abuse: Results From a Survey of Professionals (unpublished), cited in Myers, Expert Testimony at 75.

[7] The highly sexualized rap songs of the last few years seem to emphasize change in sexual knowledge among younger people. Additionally, the proliferation of twelve and thirteen- year-old children having sex suggests that children are being exposed to much more sexual information than previously believed.

Children who are brought up by neglectful parents or substance addicted parents are often exposed to sexual issues at a very young age, as a result of a lack of parental supervision. That does not mean, however, that those children were sexually abused.

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In addition to these questions, the courts have addressed the other questions concerning whether the behavior profiles sought to be introduced really are evidence of the type that should be admitted.

§ 8:12 — — Do sexual abuse victims react in an identifiable pattern?

One of the more difficult problems for many of the courts dealing with the question of whether to admit evidence of child sexual abuse is whether abused children react in an identifiable pattern. It appears, at this point, that sexually abused children do not exhibit a specific pattern of symptoms and that it is difficult to accurately diagnose children on the basis of such symptoms.[1] There are, however, individuals who claim to be able to diagnose sexual abuse from behavior patterns.[2]

According to most of the literature on the subject, the reactions to sexual abuse vary with the child, the nature and severity of the abuse, and the age of the child. Additionally, because of each individual's unique makeup, children exposed to the same abuse (for example, two children of an abusive father) may react in totally different fashions. As one commentator notes, there is "great variability in the type and severity of the children's reactions."[3]

In a National Institute of Mental Health study, written up by Lenore Walker,[4] over thirty-five different symptoms were noted in a study of 369 sexually abused children. Although roughly one-third of

[Section 8:12]

[1] See, e.g., Haugaard & Reppucci, The Sexual Abuse of Children, A Comprehensive Guide to Current Knowledge and Intervention Strategies 177–78 (1988); Gardner, Sex Abuse Hysteria, Salem Witch Trials Revisited (1991); and studies collected in Note, The Unreliability of Expert Testimony on the Typical Characteristics of Sexual Abuse Victims, 74 Geo LJ 429, 440-41 (1985).

[2] Many individuals who testified as experts in sexual abuse cases claim to be able to diagnose child sexual abuse by the behavior patterns of children. See, e.g., Allison v. State, 346 S.E.2d 380 (Ga. App. 1986), in which three expert witnesses testified about child sexual diagnoses based on behaviors exhibited by the child.

[3] Meyers, Expert Testimony in Child Sexual Abuse Litigation, 88 Neb L Rev 1, 55 (1988). This comprehensive article was published as part of a multi-disciplinary group composed of a law professor and several mental health practitioners. It has been widely cited by various courts around the country.

[4] Handbook on Sexual Abuse of Children, Assessment and Treatment Issues (1988).

the children suffered from low self-esteem, there were no symptoms that were exhibited by a majority of the children.[5]

§ 8:13 — — Do sexually abused children act like other children?

Another issue that has arisen in child sexual abuse prosecutions is that sexually abused children exhibit many behaviors that are similar to children who have been subjected to other forms of abuse, such as battering, emotionally abused and neglected. As one commentator has noted:

> [O]ne cannot reliably say that a child exhibiting a certain combination of behaviors has been sexually abused rather than, for instance, physically abused, neglected, or brought up by psychotic parents. Although future research may support identification of victims by their behaviors, such identification is currently not possible.[1]

The behaviors exhibited by sexually abused children are often the behaviors of a child who has been betrayed, treated cruelly, terrified and emotionally damaged. In that sense, those children really are not different from the children whose parents berate them or beat them, starve them, or neglect them. At the most fundamental level, the child is not thriving because of mistreatment. "The problems are not abuse-specific; . . . the common problems all can be tied to the lack of nurturance . . . all [caregivers] failed to provide sensitive, supportive care for their child."[2]

In the courtroom, however, the fact that the behaviors are not truly distinct from one another damages their ability to be relevant, probative evidence. The lack of discriminant ability is often fatal in evidentiary decisions. More than one court has remarked on this issue:

> Suffice it to say, then, that the literature in the area is disparate and contradictory and that the child abuse experts have been unable to agree on a universal symptomology of sexual abuse, especially the precise symptomology that is sufficiently reliable to be used

[5] A chart containing the symptoms is contained in Cappy & Moriarty, The Child Sexual Abuse Syndrome: Exploring the Limits of Relevant Evidence in Criminal Trials, 1 Crim Prac L Rep 1, 2 (1993).

[Section 8:13]

[1] Haugaard & Reppucci, supra, at 178.

[2] Freidrich, Psychotherapy of Sexually Abused Children and Their Families 25 (1990).

confidently in a forensic setting as a determinant of abuse.[3]

Additionally complicating the issue is the fact that some experts in the field believe that certain of the behaviors ascribed to sexual abuse are actually normal childhood behaviors—such as temper tantrums, bedwetting, and nightmares.[4] Since these behaviors are often not indicative of abuse, there is a further dilution of their probative value.

Despite these problems inherent in the evidence, many courts (as will be fully discussed later in the chapter) have admitted evidence of behaviors exhibited by alleged abused children. In many jurisdictions, it would appear that the analysis performed by the Utah Supreme Court in *Rimmasch* was not undertaken. Rather, several courts have simply reviewed the expert testimony in a cursory fashion and decided to admit such testimony without benefit of much analysis.

§ 8:14 — Do sexually abused children lie about the abuse?

In case after case, prosecutors have introduced (or attempted to introduce) evidence through expert witnesses that victims of sexual abuse simply do not lie about their abuse. According to these experts who testify, children generally do not have sufficiently developed sexual knowledge to fabricate a tale of abuse, nor do they have the motivation to do so. These experts may also claim that children are reluctant to discuss the abuse and find it painfully difficult to relate such tales of abuse.

There are studies to support the claims that children do not lie about sexual abuse.[1] Empirical data would seem to support the claim that small children really would not know enough to fabricate

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[3] State v. Rimmasch, 775 P.2d 388, 401 (Utah 1989).

[4] Gardner, M.D., Sex Abuse Hysteria, Salem Witch Trials Revisited 60–65 (1991).

[Section 8:14]

[1] See, e.g., Berliner & Barbieri, The Testimony of the Child Victim of Sexual Assault, 40 J. Soc. Issues 125, 127 (1984), stating:

> there is little or no evidence indicating that children's reports are unreliable, and none at all to support the fear that children often made false accusations of sexual assault or misunderstand innocent behavior by adults. . . . Not a single study has ever found false accusations of sexual assault a plausible interpretation of a substantial portion of cases. Goodman, Aman & Hirschman report that in their experiments, "children *never* made up false stories of abuse even when asked questions that might foster such reports." (emphasis supplied).

such tales. For example, how would a four-year-old child have any knowledge to create the suggestion that a male adult put his penis in her mouth? Nothing in her realm of experience enables her to make such a statement. And yet, there are other influences on children, such as exposure to sexually explicit material, suggestibility in the interview process and manipulation by a trusted adult, that could affect a child's statements.

In studies addressing when children lie, researchers have identified five motivations for children to be inclined to fabricate. These motivations are "(1) avoiding punishment; (2) sustaining a game; (3) keeping a promise (e.g., protect a loved one); (4) achieving personal gains (e.g. rewards, being accepted into a group); (5) and avoiding embarrassment."[2]

The authors discussed various studies in which children were given one of the above-listed motives to lie. One study involved parents kissing their child while giving them a bath. Another study involved children watching an adult spill ink and then being told by that adult that the adult would be in trouble if the child told anyone about spilling the ink. A sizable percentage (42 percent) of five-year-olds involved in the study claimed to have no knowledge when asked about the spilled ink. In the bathtub experiment, half the children did not tell the truth in response to questions asked of them.

In making the connection between children's willingness and ability to lie in these five scenarios, the authors state as follows:

> Until now, researchers who have claimed that children cannot be coached to distort their testimony appear to have tilted the odds toward finding truthfulness among preschoolers by implicitly using motives that favor a truthful outcome (e.g., Goodman et al., 1990; Saywitz et al., 1991). There were no motives for the child to make false disclosures in these earlier studies.
>
> In sum, the most recent research on lying has attempted to approximate real-life crime contexts by weaving effect and motive into studies of recollection and by using highly familiar contexts such as observing loved ones break toys or being kissed while in the bathtub. Young children will consciously distort their reports of what they witnessed, and they will do so more in response to some motives (e.g., fear of reprisal and avoidance of embarrassment) than others (e.g., to sustain a gain, gain rewards).[3]

[2] Ceci & Bruck, Suggestibility of the Child Witness: A Historical Review and Synthesis, 113 Psychol Bull 403, 426 (1993), referring to the results of numerous studies.

[3] Id. at 426.

Although these studies do not prove that children may lie about abuse, they certainly call into question the studies that claim unequivocally that children do not lie about abuse. For those attorneys who are in jurisdictions which permit testimony about credibility, it would be wise to review the Ceci and Bruck article in its entirety and find out if there are any follow-up articles that have been published subsequently.

§ 8:15 — — Effects of exposure to sexually explicit material

It is conceivable that a four-year-old has heard about sexual incidents or matters from an older sibling, a friend, or from watching the Geraldo show while the babysitter was on the phone. In short, there are many ways that a child could develop sexually precocious knowledge, although it may be difficult to pinpoint such acquisition of knowledge in a specific child.

We live in a world where sexual mores have loosened drastically in the last several years. What was once unheard of is now commonplace. Profanity and sexual messages are everywhere—from advertising to MTV to movies and magazines. This has had an effect on younger children, as mental health professionals will attest. [1]

Often, there are relatively harmless types of exposure to sexually explicit scatological knowledge—children playing doctor, or watching a movie such as Dennis the Menace where one child fools another into kissing a doll's bare bottom. Children are naturally curious, and "private parts" often generate a great deal of curiosity.

When children are eight or nine, it is now more likely that they have been exposed to a fair amount of sexually explicit information on the television, in the movies and in the lyrics of song. [2] Children permitted to "channel surf" at will on the television without supervision will find material to which they should not be exposed. Any child who goes to the movies cannot help but be exposed to sexually explicit material. Even clothing advertisements are sexually

[Section 8:15]

[1] See, e.g., Gardner, Sex Abuse Hysteria: Salem Witch Trials Revisited, 19-22 (1991).

[2] Lyrics, for instance, such as the one from popular Snoop Doggy Dog song, Gin and Juice — "I'm dialing 187 (murder) with my dick in your mouth."

suggestive.[3]

Clearly, by the time a child is thirteen or fourteen, the child has sufficient sexual knowledge to comprehend and report sexual abuse as well as sufficient knowledge to fabricate sexual abuse. The huge increase in pregnancies among young girls of twelve, thirteen, and fourteen clearly indicates a growing exposure to and engagement in sex at younger and younger ages.

In children of all ages, however, there is always the possibility that they inadvertently observed their parents or babysitters engaging in sexual behavior.

§ 8:16 — — Suggestibility and interrogation of children

In other circumstances, some believe that the nature of the questioning about the abuse can confirm what actually never occurred. Recently, the Supreme Court of New Jersey issued an explosive opinion detailing the suggestive methods by which the police interrogated children in a sexual abuse case. In *State v. Michaels*,[1] the prosecution alleged that Ms. Michaels abused an entire preschool class. Numerous children confirmed the abuse and there were experts to testify about the behavioral effects of the child abuse. The defendant was ultimately convicted of 114 counts of child sexual abuse and sentenced to forty-seven years in jail.

On appeal, the New Jersey Superior Court reversed the conviction on various grounds. The supreme court subsequently heard the case only on the issue of the method of interrogation of the children and affirmed the superior court. In discussing whether the interrogation of children was suggestive, the court stated that "an investigatory interview of a young child can be coercive or suggestive and thus shape the child's responses . . . . If a child's recollection of events has been molded by an interrogation, that influence undermines the reliability of the child's responses as an accurate recollection of actual events."[2]

In the *Michaels* case, the court quoted pieces of the tape-recorded interviews and remarked that numerous children were told that the defendant was in jail because she had hurt children. They were also

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[3] The concern over sexually suggestive advertising, especially with the use of teenage models, became more vocal in the late summer of 1995. See, e.g., Carlson, Where Calvin Crossed the Line, TIME, Sept 11, 1995, at 64.

[Section 8:16]

[1] State v. Michaels, 642 A.2d 1372 (N.J. 1994).

[2] Id. at 1377.

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told to keep her in jail and to be the "little detectives" for the police. Mock police badges were given to the children who cooperated. In addition, the children were subjected to mild threats, cajoling, and bribery.

In sum, the court found that "the interviews of the children were highly improper and employed coercive and unduly suggestive methods. As a result, a substantial likelihood exists that the children's recollection of past events was both stimulated and materially influenced by that course of questioning."[3]

The court relied on the various psychological studies to support its finding that there was a substantial likelihood that the children's recollections were tainted.[4]

The dangers of suggestibility were addressed at length in a recent article by researchers Stephen J. Ceci and Maggie Bruck.[5] In that article, the authors review the research and results of studies performed on children's memories and suggestibility over the past several decades. Among the interesting findings made by these researchers were that children have a fragile boundary between reality and fantasy and may be confused about the source of certain memories.[6] Additionally, children are susceptible to adult questioning and often act in a manner that shows that they desire to comply with a respected authority figure.[7]

Thus, when police, social workers, or parents question a child about sexual abuse, they may be unknowingly suggesting the answer to the child in their questions. Apparently, "children some-

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[3] Id. at 1380.

[4] Studies relied upon by the New Jersey Supreme Court include: Poole & White, Effects of Question Repetition on Eyewitness Testimony of Children and Adults, 27 Developmental Psychology, (Nov 1991); Goodman & Hegelson, Child Sexual Assault: Children's Memory and the Law, 40 U Miami L Rev 181 (1985); Younts, Evaluating and Admitting Expert Opinion Testimony In Child Sexual Abuse Prosecutions, 41 Duke LJ 691 (1991); King & Yuille, Suggestibility and the Child Witness, in Children's Eyewitness Memory (Ceci, et al eds 1987); Berger, The Deconstitutionalization of the Confrontation Clause; A Proposal for a Prosecutorial Restraint Model, 76 Minn L Rev 557 (1992); and Ceci, Age Differences in Suggestibility, in Children's Eyewitness Memory (Ceci, et al eds 1987).

[5] Ceci & Bruck, Suggestibility of the Child Witness: A Historical Review and Synthesis, 113 Psychol Bull 403 (1993)(hereinafter Ceci & Bruck).

[6] Id. at 417–18.

[7] Accord Gardner, Sex Abuse Hysteria: The Salem Witch Hunts Revisited 94–95 (1991).

times attempt to make their answers consistent with what they see as the intent of the questioner rather than with their knowledge of the event.[8]

§ 8:17 — — Importance of videotaping interrogation

The United States Supreme Court in *Idaho v. Wright*[1] noted that the failure to use a videotaped interview with children in sexual abuse cases created the potential for elicitation of unreliable information.

The guidelines referred to in this book that detail proper interview techniques, along with the commentators, uniformly support the use of videotaping to make certain there is no coerciveness to the initial allegation.[2]

If there has been no videotaping in your case, urge the court to provide you wide latitude pretrial, and if it gets that far, during trial to fully develop any theory of suggestive or coercive questioning. Make sure you have reviewed the literature of the effects of suggestibility before you proceed with an examination. You will need to know what constitutes inappropriate questioning before you start your case.

§ 8:18 — — Dangers of repetitive questioning

According to the experts, there is a substantial danger that when children are repeatedly questioned, they will begin to mold their answers to the desires of the interrogators. When such interrogators are the prosecution (or their agents), the child's testimony will begin to be molded according to the prosecution's vision. The Supreme Court of New Jersey remarked on this phenomenon in the case of *State v. Michaels,:*[1]

> The use of incessantly repeated questions also adds a manipulative element to an interview. When a child is asked a question and gives an answer, and the question is immediately asked again, the child's

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[8] Ceci & Bruck at 418–22.

[Section 8:17]

[1] Idaho v. Wright, 497 U.S. 805 (1990).

[2] See generally Berger, The Deconstitutionalization of the Confrontation Clause: A Proposal for Prosecutorial Restraint Model, 76 Minn L Rev 557, 608 (1992); Goodman & Hegelson, Child Sexual Assault: Children's Memory and the Law, 40 U Miami L Rev 181, 195, 198–99 (1985).

[Section 8:18]

[1] State v. Michaels, 642 A.2d 1372 (N.J. 1994).

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> normal reaction is to assume that the first answer was wrong or displeasing to the adult questioner. . . . The insidious effects of repeated questioning are even more pronounced when the questions themselves over time suggest information to the children.[2]

In light of the results of these studies, there is a real need for prosecutors to be especially careful about how they conduct their interviews and a special motive for defense lawyers to carefully inquire about such interrogation.

§ 8:19 ——Appropriate interrogation techniques

As discussed earlier, it is critically important in child sexual abuse cases to ascertain that investigation was done properly—whether you are a defense lawyer or a prosecutor. There are guidelines promulgated for the proper interrogation of children, requiring that the interviewer remain "open, neutral and objective," and that the interviewer avoid asking leading questions, never threaten a child or try to force a reluctant child to talk. Additionally, the interviewer should never tell the child what other people have reported.[1]

To learn appropriate techniques for interviewing children, you may want to review the studies and guidelines studies and guidelines available on the subject.[2]

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[2] Id. at 1377 (citing Poole & White, Effects of Question Repetition on Eyewitness Testimony of Children and Adults, 27 Dev Psychol 975 (1991) and Goodman & Helgeson, Child Sexual Assault: Children's Memory and the Law, 40 U Miami L Rev 181, 195 (1985)).

[Section 8:19]

[1] *Michaels*, 642 A.2d at 1378, quoting American Prosecutors Research Institute, National Center for Prosecution of Child Abuse, Investigation and Prosecution of Child Abuse 7–9, 24 (1987).

[2] Those studies and guidelines include Myers, The Child Witness: Techniques for Direct Examination, Cross-Examination and Impeachment, 18 Pac LJ 801 (1987); American Academy of Child and Adolescent Psychiatry: Guidelines for the Clinical Evaluation of Child and Adolescent Sexual Abuse, 27 Am Acad Child Adolescent Psychiatry 655 (1988); Jenkins & Howell, Child Sexual Abuse Examinations: Proposed Guidelines for a Standard of Care, 22 Bull Am Acad Psychiatry & L 5 (1994).

§ 8:20 — — Anatomical doll debate

Anatomical dolls have been used for many years to help children who are believed to have been abused explain the abuse.[1] According to the experts, many professionals base their opinions on whether children were abused by watching them play with anatomical dolls.[2] There has developed, however, a growing debate about the use of these dolls among professionals.

Specifically, some professionals claim that the dolls are suggestive, simply because they are anatomically correct. For example, a "child may insert a finger into a doll's genitalia simply because of its novelty or 'affordance.'[3] The fact that a child will put two dolls together, simply because they fit together, needs to be considered in these cases.

The second problem alleged with anatomical dolls is that no control studies have been done. In other words, there are no standards for how nonabused children play with these dolls and there is no established protocol addressing the proper manner of how dolls should be used during the interview.

Dr. Richard Gardner, Clinical Professor of Child Psychiatry at the College of Physicians and Surgeons at Columbia University, claims that the exaggeration of the dolls' genitalia renders them overly suggestive:

> The child cannot but be startled and amazed by such a doll. The likelihood of the child's ignoring these unusual genital features is almost at the zero level. Accordingly, the dolls almost demand attention and predictably will bring about the child's talking about sexual issues. Again, the contamination here is so great that the likelihood of differentiating between bona fide and fabricated sex abuse has become reduced considerably by the utilization of these terrible contaminants.
>
> If one gives a child a peg and a hole, the child is going to put the peg in the hole unless the child is retarded or psychotic. . . . Give a child one of these female anatomical dolls with wide open mouth, anus, and vagina; the child will inevitably place one or more fingers in one of these conspicuous orifices. For many . . . , such an act is "proof"

[Section 8:20]

[1] See Boat & Everson, The Use of Anatomical Dolls Among Professionals in Sexual Abuse Evaluations, 12 Child Abuse & Neglect 171 (1988).

[2] Mason, A Judicial Dilemma: Expert Witness Testimony in Child Sex Abuse Trials, 19 J. Psych. & L. 185, 197–204 (1991).

[3] Ceci & Bruck at 423.

that the child has indeed been sexually abused.[4]

According to the review of studies considered by Ceci and Bruck, there are inconsistent results about whether anatomical dolls were probative of sexual abuse. Ceci and Bruck state the following:

> Our reading of the literature suggests that the techniques for using anatomical dolls have not been developed to the level that they allow for a clear differentiation between abused and nonabused children. It seems that for a small number of nonabused children, the dolls are suggestive in that these children engage them in sexual play.[5]

In the event you are handling a case in which anatomical dolls were used, it is important to review the research on these issues and discuss the matter fully with your expert.

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[4] Gardner, M.D., Sex Abuse Hysteria: The Salem Witch Trials Revisited 52 (1991).

[5] Id. at 424–25. Among the anatomical doll studies reviewed in this article are August & Forman, A Comparison of Sexually Abused and Nonabused Children's Behavioral Responses to Anatomically Correct Dolls, 20 Child Psychiatry & Human Dev 39 (1989); White, Interviewing Young Sexual Abuse Victims with Anatomically Correct Dolls, 10 Child Abuse & Neglect 519 (1986); Realmuto, Specificity and Sensitivity of Sexually Anatomically Correct Dolls in Substantiating Abuse: A Pilot Study, 29 J Am Acad Child & Adol Psych 743 (1990); Cohn, Anatomical Doll Play of Preschoolers Referred for Sexual Abuse and Those Not Referred, 15 Child Abuse & Neglect 455 (1991).

Proposed Amendment to Rule 702 (Approved to be recommended to the Standing Committee)

Rule 702. Testimony by Experts

If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise, provided that (1) the testimony is sufficiently based upon reliable facts or data, (2) the testimony is the product of reliable principles and methods, and (3) the witness has applied the principles and methods reliably to the facts of the case.

Proposed Advisory Committee Note

Rule 702 has been amended in response to *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993), and to the many cases applying *Daubert*. In *Daubert* the Court charged district judges with the responsibility of acting as gatekeepers to exclude expert testimony that is not reliable. The amendment affirms the trial judge's role as gatekeeper and provides some general standards that the trial judge must use to assess the reliability and helpfulness of proffered expert testimony. The Rule provides that expert testimony of all types -- not only the scientific testimony specifically addressed in *Daubert*--presents questions of admissibility for the trial court in deciding whether the evidence is reliable and helpful, and as such is governed by Rule 104(a).

Daubert set forth a non-exclusive checklist for trial courts to use in assessing the reliability of scientific expert testimony. The factors explicated by the *Daubert* Court are: (1) whether the expert's technique or theory can be or has been tested--that is, whether the expert's theory can be challenged in some objective sense, or whether it is simply a subjective, conclusory approach that cannot reasonably be assessed for reliability; (2) whether the technique or theory has been subject to peer review and publication; (3) the known or potential rate of error of the technique or

theory when applied; (4) the existence and maintenance of standards and controls; and (5) the degree to which the technique or theory has been generally accepted in the scientific community.

No attempt has been made to "codify" these specific factors set forth in *Daubert*. *Daubert* itself emphasized that the factors were neither exclusive nor dispositive. Other courts have recognized that not all of the explicated factors can apply to every type of expert testimony. See *Tyus v. Urban Search Management*, 102 F.3d 256 (7th Cir. 1996) (noting that the factors mentioned by the Court in *Daubert* do not neatly apply to expert testimony from a sociologist). See also *Kannankeril v. Terminix Int'l, Inc.*, 128 F.3d 802, 809 (3d Cir. 1997) (holding that lack of peer review or publication was not dispositive where the expert's opinion was supported by "widely accepted scientific knowledge"). The standards set forth in the amendment are broad enough to require consideration of any or all of the specific *Daubert* factors where appropriate.

Courts both before and after *Daubert* have found other factors relevant in determining whether expert testimony is sufficiently reliable to be considered by the trier of fact. These factors include:

(1) Whether experts are "proposing to testify about matters growing naturally

and directly out of research they have conducted independent of the litigation, or whether they have developed their opinions expressly for purposes of testifying." *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 43 F.3d 1311, 1317 (9th Cir. 1995).

(2) Whether the expert has unjustifiably extrapolated from an accepted premise to an unfounded conclusion. See *General Elec. Co. v. Joiner*, 118 S.Ct. 512, 519 (1997) (noting that in some cases a court "may conclude that there is simply too great an analytical gap between the data and the opinion proffered").

(3) Whether the expert has adequately accounted for obvious alternative explanations. See *Claar v. Burlington N.R.R.*, 29 F.3d 499 (9th Cir. 1994) (testimony excluded where the expert failed to consider other obvious causes for the plaintiff's condition). Compare *Ambrosini v. Labarraque*, 101 F.3d 129 (D.C.Cir. 1996) (the possibility of some uneliminated causes presented a question of weight, so long as the most obvious causes had been considered and reasonably ruled out by the expert).

(4) Whether the expert "is being as careful as he would be in his regular professional work outside his paid litigation consulting." *Sheehan v. Daily Racing Form, Inc.*, 104 F.3d 940, 942 (7th Cir. 1997). See also *Braun v. Lorillard Inc.*, 84 F.3d 230, 234 (7th Cir. 1996) (*Daubert* requires the trial court to assure itself that the expert "adheres to the same standards of intellectual rigor that are demanded in his professional work.").

(5) Whether the field of expertise claimed by the expert is known to reach reliable results. See *Sterling v. Velsicol Chem. Corp.*, 855 F.2d 1188 (6th Cir. 1988) (rejecting testimony based on "clinical ecology" as unfounded and unreliable).

All of these factors remain relevant to the determination of the reliability of expert testimony under the amendment.

The Court in *Daubert* declared that the "focus, of course, must be solely on principles and methodology, not on the conclusions they generate." 509 U.S. at 595. Yet as the Court later recognized, "conclusions and methodology are not entirely distinct from one another." *General Elec. Co. v. Joiner*, 118 S.Ct. at 519. Under the amendment, as under *Daubert*, when an expert purports to apply a methodology

consistent with professional standards, and yet reaches a conclusion that other experts in the field would not reach, the trial court may fairly suspect that the methodology has not been faithfully applied. See *Lust v. Merrell Dow Pharmaceuticals, Inc.*, 89 F.3d 594, 598 (9th Cir. 1996). The amendment specifically provides that the trial court must scrutinize not only the methodology that was used by the expert, but also whether the methodology has been properly applied to the facts of the case. As the court noted in *In re Paoli R.R. Yard PCB Litig.*, 35 F.3d 717, 745 (3d Cir. 1994): "any step that renders the analysis unreliable . . . renders the expert's testimony inadmissible. This is true whether the step completely changes a reliable methodology or merely misapplies that methodology."

Daubert involved scientific experts, and the Court left open whether the *Daubert* standards apply to expert testimony that does not purport to be scientifically-based. The inadaptability of many of the specific *Daubert* factors outside the hard sciences (e.g., peer review and rate of error) has led some courts to find that *Daubert* is simply inapplicable to testimony by experts who do not purport to be scientists. *See Compton v. Subaru of Am., Inc.*, 82 F.3d 1513 (10th Cir.) (*Daubert* inapplicable to expert testimony of automotive engineer), *cert. denied*, 117 S. Ct. 611 (1996); *Tamarin v. Adam Caterers, Inc.*, 13 F.3d 51 (2d Cir. 1993) (*Daubert* inapplicable to testimony based on a payroll review prepared by an

accountant). Other courts have held that *Daubert* is applicable to all expert testimony, while noting that not all of the *Daubert* factors can be applied readily to the testimony of experts who are not scientists. See *Watkins v. Telsmith, Inc.*, 121 F.3d 985, 991 (5th Cir. 1997), where the court recognized that "[n]ot every guidepost outlined in *Daubert* will necessarily apply to expert testimony based on engineering principles and practical experience", but stressed that the trial court after *Daubert* is still obligated to determine whether expert testimony is reliable; therefore, "[w]hether the expert would opine on economic evaluation, advertising psychology, or engineering," the trial court must determine "whether the expert is a hired gun or a person whose opinion in the courtroom will withstand the same scrutiny that it would among his professional peers."

The amendment does not distinguish between scientific and other forms of expert testimony. The trial court's gatekeeper function applies to testimony by any expert. While the relevant factors for determining reliability will vary from expertise to expertise, the amendment rejects the premise that an expert's testimony should be treated more permissibly simply because it is outside the realm of science. An opinion from an expert who is not a scientist should receive the same degree of scrutiny for reliability as an opinion from an expert who purports to be a scientist. See *Watkins v. Telsmith, Inc.*, 121 F.3d 984, 991 (5th Cir. 1997) ("[I]t seems exactly

backwards that experts who purport to rely on general engineering principles and practical experience might escape screening by the district court simply by stating that their conclusions were not reached by any particular method or technique."). Some expert testimony will be more objectively verifiable, and subject to the expectations of falsifiability, peer review, and publication. Other types of expert testimony will not rely on anything like a scientific method, and so will have to be evaluated by reference to other standard principles attendant to the particular area of expertise. The trial judge in all cases of expert testimony must find that it is properly grounded, well-reasoned, and not speculative before it can be admitted. If there is a well-accepted body of learning and experience in the field, then the expert's testimony must be grounded in that learning and experience to be reliable, and the expert must explain how the conclusion is so grounded. See, e.g., American College of Trial Lawyers, *Standards and Procedures for Determining the Admissibility of Expert Testimony after* Daubert, 157 F.R.D. 571, 579 (1994) ("Whether the testimony concerns economic principles, accounting standards, property valuation or other non-scientific subjects, it should be evaluated by reference to the 'knowledge and experience' of that particular field.").

The amendment requires that the testimony must be the product of reliable principles and methods and that they are reliably applied to facts of the case. While

"principles" and "methods" may convey one impression when applied to scientific knowledge, they remain relevant when applied to technical or other specialized knowledge. For example, when a law enforcement agent testifies regarding the use of code words in a drug transaction, the principle applied is that participants in such transactions regularly use code words to conceal the nature of their activities. The method used by the agent is the application of extensive experience to analyze the meaning of the conversations. So long as the principles and methods are sufficiently reliable and applied reliably to the facts of the case, this type of testimony should be admitted.

If the witness is relying solely or primarily on experience, then the witness must explain how that experience leads to the conclusion reached. The trial court's gatekeeper function requires more than simply "taking the expert's word for it." See *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 43 F.3d 1311, 1319 (9th Cir.) (1995) ("We've been presented with only the experts' qualifications, their conclusions and their assurances of reliability. Under *Daubert*, that's not enough."). The more subjective and controversial the expert's inquiry, the more likely the testimony should be excluded as unreliable. See *O'Conner v. Commonwealth Edison Co.*, 13 F.3d 1090 (7th Cir. 1994) (expert testimony based on a completely subjective methodology held properly excluded).

The amendment requires that expert testimony must be based upon reliable and sufficient underlying "facts or data." The term "data" is intended to encompass the reliable opinions of other experts. See the Advisory Committee Note to Rule 703.

There has been some confusion over the relationship between Rules 702 and 703. The amendment makes clear that the sufficiency of the basis of an expert's testimony is to be decided under Rule 702. Rule 702 sets forth the overarching requirement of reliability, and an analysis of the expert's basis cannot be divorced from the ultimate reliability of the expert's opinion. In contrast, the ``reasonable reliance" requirement of Rule 703 is a relatively narrow inquiry. By its terms, Rule 703 does not regulate the basis of the expert's opinion per se. Rather, it regulates whether the expert can rely on information that is otherwise inadmissible. If the expert purports to rely on inadmissible information, Rule 703 requires the court to determine whether that information is of a type reasonably relied upon by other experts in the field. If so, the expert can rely on the information in reaching an opinion. However, the question of whether the expert is relying on a *sufficient* and reliable basis of information--whether admissible information or not--is governed by the reliability requirement of Rule 702.

The amendment makes no attempt to set forth procedural requirements for exercising the trial court's gatekeeping function over expert testimony, such as are

discussed in, e.g, Margaret Berger, *Procedural Paradigms for Applying the Daubert Test*, 78 Minn.L.Rev. 1345 (1994). Courts have shown considerable ingenuity and flexibility in considering challenges to expert testimony under *Daubert.*, and it is contemplated that this will continue under the amended Rule. See, e.g., *Cortes-Irizarry v. Corporacion Insular*, 111 F.3d 184 (1st Cir. 1997) (discussing the application of *Daubert* in ruling on a motion for summary judgment); *In re Paoli R.R. Yard PCB Litig.*, 35 F.3d 717, 736, 739 (3d Cir. 1994) (discussing the use of *in limine* hearings); *Claar v. Burlington N.R.R.*, 29 F.3d 499, 502-05 (9th Cir. 1994) (discussing the trial court's technique of ordering experts to submit serial affidavits explaining the reasoning and methodology underlying their conclusions).

The amendment continues the practice of the original rule in referring to a qualified witness as an "expert." This was done to provide continuity and to minimize change. The use of the term "expert" in the rule does not, however, mean that a jury should be informed that a qualified witness is testifying as an "expert". Indeed, there is much to be said for a practice that prohibits the use of the term "expert" by both the parties and the court at trial. Such a practice "ensures that trial courts do not inadvertently put their stamp of authority" on a witness' opinion, and protects against the jury's being "overwhelmed by the so-called 'experts'." Hon. Charles Richey, *Proposals to Eliminate the Prejudicial Effect of the Use of the*

Word "Expert" Under the Federal Rules of Evidence in Criminal and Civil Jury Trials, 154 F.R.D. 537, 599 (1994) (setting forth limiting instructions and a standing order employed to prohibit the use of the term "expert" in jury trials).

Background: The offense covered by this section is a misdemeanor. The maximum term of imprisonment authorized by statute is one year.

Historical Note: Effective November 1, 1987. Amended effective November 1, 1989 (see Appendix C, amendment 94); November 1, 1995 (see Appendix C, amendment 511).

§2A3.4. Abusive Sexual Contact or Attempt to Commit Abusive Sexual Contact

(a) Base Offense Level:

(1) **16**, if the offense was committed by the means set forth in 18 U.S.C. § 2241(a) or (b);

(2) **12**, if the offense was committed by the means set forth in 18 U.S.C. § 2242;

(3) **10**, otherwise.

(b) Specific Offense Characteristics

(1) If the victim had not attained the age of twelve years, increase by **4** levels; but if the resulting offense level is less than **16**, increase to level **16**.

(2) If the base offense level is determined under subsection (a)(1) or (2), and the victim had attained the age of twelve years but had not attained the age of sixteen years, increase by **2** levels.

(3) If the victim was in the custody, care, or supervisory control of the defendant, increase by **2** levels.

(c) Cross References

(1) If the offense involved criminal sexual abuse or attempt to commit criminal sexual abuse (as defined in 18 U.S.C. § 2241 or § 2242), apply §2A3.1 (Criminal Sexual Abuse; Attempt to Commit Criminal Sexual Abuse).

(2) If the offense involved criminal sexual abuse of a minor or attempt to commit criminal sexual abuse of a minor (as defined in 18 U.S.C. § 2243(a)), apply §2A3.2 (Criminal Sexual Abuse of a Minor (Statutory Rape) or Attempt to Commit Such Acts), if the resulting offense level is greater than that determined above.

Commentary

Statutory Provisions: 18 U.S.C. § 2244(a)(1),(2),(3). For additional statutory provision(s), see Appendix A (Statutory Index).

Application Notes:

1. *"The means set forth in 18 U.S.C. § 2241(a) or (b)" are by using force against the victim; by threatening or placing the victim in fear that any person will be subjected to death, serious bodily injury, or kidnapping; by rendering the victim unconscious; or by administering by force or threat of force, or without the knowledge or permission of the victim, a drug, intoxicant, or other similar substance and thereby substantially impairing the ability of the victim to appraise or control conduct.*

2. *"The means set forth in 18 U.S.C. § 2242" are by threatening or placing the victim in fear (other than by threatening or placing the victim in fear that any person will be subjected to death, serious bodily injury, or kidnapping); or by victimizing an individual who is incapable of appraising the nature of the conduct or physically incapable of declining participation in, or communicating unwillingness to engage in, that sexual act.*

3. *Subsection (b)(3) is intended to have broad application and is to be applied whenever the victim is entrusted to the defendant, whether temporarily or permanently. For example, teachers, day care providers, baby-sitters, or other temporary caretakers are among those who would be subject to this enhancement. In determining whether to apply this enhancement, the court should look to the actual relationship that existed between the defendant and the victim and not simply to the legal status of the defendant-victim relationship.*

4. *If the adjustment in subsection (b)(3) applies, do not apply §3B1.3 (Abuse of Position of Trust or Use of Special Skill).*

5. *If the defendant's criminal history includes a prior sentence for conduct that is similar to the instant offense, an upward departure may be warranted.*

Background: This section covers abusive sexual contact not amounting to criminal sexual abuse (criminal sexual abuse is covered under §§2A3.1-3.3). Alternative base offense levels are provided to take account of the different means used to commit the offense. Enhancements are provided for victimizing children or minors. The enhancement under subsection (b)(2) does not apply, however, where the base offense level is determined under subsection (a)(3) because an element of the offense to which that offense level applies is that the victim had attained the age of twelve years but had not attained the age of sixteen years. For cases involving consensual sexual contact involving victims that have achieved the age of 12 but are under age 16, the offense level assumes a substantial difference in sexual experience between the defendant and the victim. If the defendant and the victim are similar in sexual experience, a downward departure may be warranted. For such cases, the Commission recommends a downward departure to the equivalent of an offense level of 6.

Historical Note: Effective November 1, 1987. Amended effective November 1, 1989 (see Appendix C, amendment 95); November 1, 1991 (see Appendix C, amendment 392); November 1, 1992 (see Appendix C, amendment 444); November 1, 1995 (see Appendix C, amendment 511).

* * * * *

identical to those otherwise provided for assaults involving an official victim; when no assault is involved, the offense level is 6.

Historical Note: Effective October 15, 1988 (see Appendix C, amendment 64). Amended effective November 1, 1989 (see Appendix C, amendments 89 and 90); November 1, 1992 (see Appendix C, amendment 443); November 1, 1997 (see Appendix C, amendment 550).

* * * * *

3. CRIMINAL SEXUAL ABUSE

§2A3.1. Criminal Sexual Abuse; Attempt to Commit Criminal Sexual Abuse

(a) Base Offense Level: **27**

(b) Specific Offense Characteristics

(1) If the offense was committed by the means set forth in 18 U.S.C. § 2241(a) or (b) (including, but not limited to, the use or display of any dangerous weapon), increase by **4** levels.

(2) (A) If the victim had not attained the age of twelve years, increase by **4** levels; or (B) if the victim had attained the age of twelve years but had not attained the age of sixteen years, increase by **2** levels.

(3) If the victim was (A) in the custody, care, or supervisory control of the defendant; or (B) a person held in the custody of a correctional facility, increase by **2** levels.

(4) (A) If the victim sustained permanent or life-threatening bodily injury, increase by **4** levels; (B) if the victim sustained serious bodily injury, increase by **2** levels; or (C) if the degree of injury is between that specified in subdivisions (A) and (B), increase by **3** levels.

(5) If the victim was abducted, increase by **4** levels.

(c) Cross Reference

(1) If a victim was killed under circumstances that would constitute murder under 18 U.S.C. § 1111 had such killing taken place within the territorial or maritime jurisdiction of the United States, apply §2A1.1 (First Degree Murder).

(d) Special Instruction

(1) If the offense occurred in a correctional facility and the victim was a corrections employee, the offense shall be deemed to have an official victim for purposes of subsection (a) of §3A1.2 (Official Victim).

Commentary

Statutory Provisions: 18 U.S.C. §§ 2241, 2242. For additional statutory provision(s), see Appendix A (Statutory Index).

Application Notes:

1. *For purposes of this guideline—*

"Permanent or life-threatening bodily injury," "serious bodily injury," and "abducted" are defined in the Commentary to §1B1.1 (Application Instructions). However, for purposes of this guideline, "serious bodily injury" means conduct other than criminal sexual abuse, which already is taken into account in the base offense level under subsection (a).

"The means set forth in 18 U.S.C. § 2241(a) or (b)" are: by using force against the victim; by threatening or placing the victim in fear that any person will be subject to death, serious bodily injury, or kidnaping; by rendering the victim unconscious; or by administering by force or threat of force, or without the knowledge or permission of the victim, a drug, intoxicant, or other similar substance and thereby substantially impairing the ability of the victim to appraise or control conduct. This provision would apply, for example, where any dangerous weapon was used, brandished, or displayed to intimidate the victim.

2. *Subsection (b)(3), as it pertains to a victim in the custody, care, or supervisory control of the defendant, is intended to have broad application and is to be applied whenever the victim is entrusted to the defendant, whether temporarily or permanently. For example, teachers, day care providers, baby-sitters, or other temporary caretakers are among those who would be subject to this enhancement. In determining whether to apply this enhancement, the court should look to the actual relationship that existed between the defendant and the victim and not simply to the legal status of the defendant-victim relationship.*

3. *If the adjustment in subsection (b)(3) applies, do not apply §3B1.3 (Abuse of Position of Trust or Use of Special Skill).*

4. *If the defendant was convicted (A) of more than one act of criminal sexual abuse and the counts are grouped under §3D1.2 (Groups of Closely Related Counts), or (B) of only one such act but the court determines that the offense involved multiple acts of criminal sexual abuse of the same victim or different victims, an upward departure would be warranted.*

5. *If a victim was sexually abused by more than one participant, an upward departure may be warranted. See §5K2.8 (Extreme Conduct).*

6. *If the defendant's criminal history includes a prior sentence for conduct that is similar to the instant offense, an upward departure may be warranted.*

Background: Sexual offenses addressed in this section are crimes of violence. Because of their dangerousness, attempts are treated the same as completed acts of criminal sexual abuse. The maximum term of imprisonment authorized by statute is life imprisonment. The base offense level represents sexual abuse as set forth in 18 U.S.C. § 2242. An enhancement is provided for use of force; threat of death, serious bodily injury, or kidnapping; or certain other means as defined in 18 U.S.C. § 2241. This includes any use or threatened use of a dangerous weapon.

An enhancement is provided when the victim is less than sixteen years of age. An additional enhancement is provided where the victim is less than twelve years of age. Any criminal sexual abuse with a child less than twelve years of age, regardless of "consent," is governed by §2A3.1 (Criminal Sexual Abuse).

An enhancement for a custodial relationship between defendant and victim is also provided. Whether the custodial relationship is temporary or permanent, the defendant in such a case is a person the victim trusts or to whom the victim is entrusted. This represents the potential for greater and prolonged psychological damage. Also, an enhancement is provided where the victim was an inmate of, or a person employed in, a correctional facility. Finally, enhancements are provided for permanent, life-threatening, or serious bodily injury and abduction.

Historical Note: Effective November 1, 1987. Amended effective November 1, 1989 (see Appendix C, amendments 91 and 92); November 1, 1991 (see Appendix C, amendment 392); November 1, 1992 (see Appendix C, amendment 444); November 1, 1993 (see Appendix C, amendment 477); November 1, 1995 (see Appendix C, amendment 511); November 1, 1997 (see Appendix C, amendment 545).

§2A3.2. Criminal Sexual Abuse of a Minor (Statutory Rape) or Attempt to Commit Such Acts

(a) Base Offense Level: **15**

(b) Specific Offense Characteristic

(1) If the victim was in the custody, care, or supervisory control of the defendant, increase by **2** levels.

(c) Cross Reference

(1) If the offense involved criminal sexual abuse or attempt to commit criminal sexual abuse (as defined in 18 U.S.C. § 2241 or § 2242), apply §2A3.1 (Criminal Sexual Abuse; Attempt to Commit Criminal Sexual Abuse).

Commentary

Statutory Provision: 18 U.S.C. § 2243(a). For additional statutory provision(s), see Appendix A (Statutory Index).

Application Notes:

1. *If the defendant committed the criminal sexual act in furtherance of a commercial scheme such as pandering, transporting persons for the purpose of prostitution, or the production of pornography, an upward departure may be warranted. See Chapter Five, Part K (Departures).*

2. *Subsection (b)(1) is intended to have broad application and is to be applied whenever the victim is entrusted to the defendant, whether temporarily or permanently. For example, teachers, day care providers, baby-sitters, or other temporary caretakers are among those who would be subject to this enhancement. In determining whether to apply this enhancement, the court should look to the actual relationship that existed between the defendant and the victim and not simply to the legal status of the defendant-victim relationship.*

3. *If the adjustment in subsection (b)(1) applies, do not apply §3B1.3 (Abuse of Position of Trust or Use of Special Skill).*

4. *If the defendant's criminal history includes a prior sentence for conduct that is similar to the instant offense, an upward departure may be warranted.*

Background: This section applies to sexual acts that would be lawful but for the age of the victim. It is assumed that at least a four-year age difference exists between the victim and the defendant, as specified in 18 U.S.C. § 2243(a). An enhancement is provided for a defendant who victimizes a minor under his supervision or care.

Historical Note: Effective November 1, 1987. Amended effective November 1, 1989 (see Appendix C, amendment 93); November 1, 1991 (see Appendix C, amendment 392); November 1, 1992 (see Appendix C, amendment 444); November 1, 1995 (see Appendix C, amendment 511).

§2A3.3. Criminal Sexual Abuse of a Ward or Attempt to Commit Such Acts

(a) Base Offense Level: 9

Commentary

Statutory Provision: 18 U.S.C. § 2243(b). For additional statutory provision(s), see Appendix A (Statutory Index).

Application Notes:

1. *A ward is a person in official detention under the custodial, supervisory, or disciplinary authority of the defendant.*

2. *If the defendant's criminal history includes a prior sentence for conduct that is similar to the instant offense, an upward departure may be warranted.*

Background: The offense covered by this section is a misdemeanor. The maximum term of imprisonment authorized by statute is one year.

Historical Note: Effective November 1, 1987. Amended effective November 1, 1989 (see Appendix C, amendment 94); November 1, 1995 (see Appendix C, amendment 511).

§2A3.4. Abusive Sexual Contact or Attempt to Commit Abusive Sexual Contact

(a) Base Offense Level:

(1) **16**, if the offense was committed by the means set forth in 18 U.S.C. § 2241(a) or (b);

(2) **12**, if the offense was committed by the means set forth in 18 U.S.C. § 2242;

(3) **10**, otherwise.

(b) Specific Offense Characteristics

(1) If the victim had not attained the age of twelve years, increase by **4** levels; but if the resulting offense level is less than **16**, increase to level **16**.

(2) If the base offense level is determined under subsection (a)(1) or (2), and the victim had attained the age of twelve years but had not attained the age of sixteen years, increase by **2** levels.

(3) If the victim was in the custody, care, or supervisory control of the defendant, increase by **2** levels.

(c) Cross References

(1) If the offense involved criminal sexual abuse or attempt to commit criminal sexual abuse (as defined in 18 U.S.C. § 2241 or § 2242), apply §2A3.1 (Criminal Sexual Abuse; Attempt to Commit Criminal Sexual Abuse).

(2) If the offense involved criminal sexual abuse of a minor or attempt to commit criminal sexual abuse of a minor (as defined in 18 U.S.C. § 2243(a)), apply §2A3.2 (Criminal Sexual Abuse of a Minor (Statutory Rape) or Attempt to Commit Such Acts), if the resulting offense level is greater than that determined above.

Commentary

Statutory Provisions: 18 U.S.C. § 2244(a)(1),(2),(3). For additional statutory provision(s), see Appendix A (Statutory Index).

Application Notes:

1. *"The means set forth in 18 U.S.C. § 2241(a) or (b)" are by using force against the victim; by threatening or placing the victim in fear that any person will be subjected to death, serious bodily injury, or kidnapping; by rendering the victim unconscious; or by administering by force or threat of force, or without the knowledge or permission of the victim, a drug, intoxicant, or other similar substance and thereby substantially impairing the ability of the victim to appraise or control conduct.*

2. *"The means set forth in 18 U.S.C. § 2242" are by threatening or placing the victim in fear (other than by threatening or placing the victim in fear that any person will be subjected to death, serious bodily injury, or kidnapping); or by victimizing an individual who is incapable of appraising the nature of the conduct or physically incapable of declining participation in, or communicating unwillingness to engage in, that sexual act.*

3. *Subsection (b)(3) is intended to have broad application and is to be applied whenever the victim is entrusted to the defendant, whether temporarily or permanently. For example, teachers, day care providers, baby-sitters, or other temporary caretakers are among those who would be subject to this enhancement. In determining whether to apply this enhancement, the court should look to the actual relationship that existed between the defendant and the victim and not simply to the legal status of the defendant-victim relationship.*

4. *If the adjustment in subsection (b)(3) applies, do not apply §3B1.3 (Abuse of Position of Trust or Use of Special Skill).*

5. *If the defendant's criminal history includes a prior sentence for conduct that is similar to the instant offense, an upward departure may be warranted.*

Background: This section covers abusive sexual contact not amounting to criminal sexual abuse (criminal sexual abuse is covered under §§2A3.1-3.3). Alternative base offense levels are provided to take account of the different means used to commit the offense. Enhancements are provided for victimizing children or minors. The enhancement under subsection (b)(2) does not apply, however, where the base offense level is determined under subsection (a)(3) because an element of the offense to which that offense level applies is that the victim had attained the age of twelve years but had not attained the age of sixteen years. For cases involving consensual sexual contact involving victims that have achieved the age of 12 but are under age 16, the offense level assumes a substantial difference in sexual experience between the defendant and the victim. If the defendant and the victim are similar in sexual experience, a downward departure may be warranted. For such cases, the Commission recommends a downward departure to the equivalent of an offense level of 6.

Historical Note: Effective November 1, 1987. Amended effective November 1, 1989 (see Appendix C, amendment 95); November 1, 1991 (see Appendix C, amendment 392); November 1, 1992 (see Appendix C, amendment 444); November 1, 1995 (see Appendix C, amendment 511).

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SENTENCING TABLE
(in months of imprisonment)

	Offense Level	Criminal History Category (Criminal History Points) I (0 or 1)	II (2 or 3)	III (4, 5, 6)	IV (7, 8, 9)	V (10, 11, 12)	VI (13 or more)
	1	0-6	0-6	0-6	0-6	0-6	0-6
	2	0-6	0-6	0-6	0-6	0-6	1-7
	3	0-6	0-6	0-6	0-6	2-8	3-9
	4	0-6	0-6	0-6	2-8	4-10	6-12
Zone A	5	0-6	0-6	1-7	4-10	6-12	9-15
	6	0-6	1-7	2-8	6-12	9-15	12-18
	7	0-6	2-8	4-10	8-14	12-18	15-21
	8	0-6	4-10	6-12	10-16	15-21	18-24
	9	4-10	6-12	8-14	12-18	18-24	21-27
Zone B	10	6-12	8-14	10-16	15-21	21-27	24-30
	11	8-14	10-16	12-18	18-24	24-30	27-33
Zone C	12	10-16	12-18	15-21	21-27	27-33	30-37
	13	12-18	15-21	18-24	24-30	30-37	33-41
	14	15-21	18-24	21-27	27-33	33-41	37-46
	15	18-24	21-27	24-30	30-37	37-46	41-51
	16	21-27	24-30	27-33	33-41	41-51	46-57
	17	24-30	27-33	30-37	37-46	46-57	51-63
	18	27-33	30-37	33-41	41-51	51-63	57-71
	19	30-37	33-41	37-46	46-57	57-71	63-78
	20	33-41	37-46	41-51	51-63	63-78	70-87
	21	37-46	41-51	46-57	57-71	70-87	77-96
	22	41-51	46-57	51-63	63-78	77-96	84-105
	23	46-57	51-63	57-71	70-87	84-105	92-115
	24	51-63	57-71	63-78	77-96	92-115	100-125
	25	57-71	63-78	70-87	84-105	100-125	110-137
	26	63-78	70-87	78-97	92-115	110-137	120-150
	27	70-87	78-97	87-108	100-125	120-150	130-162
Zone D	28	78-97	87-108	97-121	110-137	130-162	140-175
	29	87-108	97-121	108-135	121-151	140-175	151-188
	30	97-121	108-135	121-151	135-168	151-188	168-210
	31	108-135	121-151	135-168	151-188	168-210	188-235
	32	121-151	135-168	151-188	168-210	188-235	210-262
	33	135-168	151-188	168-210	188-235	210-262	235-293
	34	151-188	168-210	188-235	210-262	235-293	262-327
	35	168-210	188-235	210-262	235-293	262-327	292-365
	36	188-235	210-262	235-293	262-327	292-365	324-405
	37	210-262	235-293	262-327	292-365	324-405	360-life
	38	235-293	262-327	292-365	324-405	360-life	360-life
	39	262-327	292-365	324-405	360-life	360-life	360-life
	40	292-365	324-405	360-life	360-life	360-life	360-life
	41	324-405	360-life	360-life	360-life	360-life	360-life
	42	360-life	360-life	360-life	360-life	360-life	360-life
	43	life	life	life	life	life	life

REFERRALS FOR PHYSICAL AND SEXUAL ABUSE AGAINST CHILDREN

UNITED STATES ATTORNEY'S OFFICE
DISTRICT OF NORTH DAKOTA

Year	Physical Abuse	Sexual Abuse
1993	6	29
1994	7	27
1995	9	43
1996	10	45
1997	7	30
1998 (1/1 to 9/15)	11	30

Chart reflects matters, cases, and immediate declinations by victim

ATTACHMENT "C"

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INTRODUCTION

If you are a victim of or a witness to a crime, the Victim-Witness Assistance Program is designed to provide you with services while you are involved in the criminal justice system.

As a victim of a crime, you may be experiencing feelings of confusion, frustration, fear, and anger. Our staff can help you deal with these feelings. We also will explain your rights as a victim or witness, and help you better understand how the criminal justice system works.

One of the responsibilities of citizenship for those who have knowledge about the commission of a crime is to serve as witnesses at the criminal trial or one of the other hearings held in connection with the criminal prosecution. The federal criminal justice system cannot function without the participation of witnesses. The complete cooperation and truthful testimony of all witnesses are essential to the proper determination of guilt or innocence in a criminal case.

Our office is concerned that victims and witnesses of crime are treated fairly throughout their contact with the criminal justice system.

The United States Department of Justice and the United States Attorney's Office have taken several steps to make the participation by victims of crime and witnesses more effective and meaningful. One of these steps is the preparation of this handbook. We hope that it will provide the answers to many of your questions and will give you sufficient general information to understand your rights and responsibilities.

Thank you for your cooperation with our office and for your service as a witness. We appreciate the sacrifice of time that being a witness requires.

GENERAL INFORMATION FOR VICTIMS AND WITNESSES

The United States Attorney is the chief prosecutor of crimes against the laws of the United States. There is a United States Attorney's Office for each federal judicial district.

You are either a victim of a crime or are being asked to serve as a witness for the United States in a particular case.

This handbook is designed to help you understand the federal criminal justice system.

1. YOU ARE ENTITLED TO UNDERSTAND WHAT IS HAPPENING IN THE CASE IN WHICH YOU ARE INVOLVED

If you have questions about the case in which you are involved, you should feel free to call the Assistant United States Attorney who is handling the case and ask questions. Also, the Assistant United States Attorney may be contacting you throughout the case regarding various stages of the proceeding.

2. YOU ARE ENTITLED TO A WITNESS FEE FOR EVERY DAY THAT YOU APPEAR IN COURT IN CONNECTION WITH THE CASE

If you are not a federal government employee, you will receive a witness fee for each day that you are required to attend court in connection with the case, including time spent waiting to testify. Out-of-town witnesses receive reimbursement for certain travel expenses in addition to their daily witness fee.

At the conclusion of your testimony, you will be assisted in completing a witness voucher to make a claim for your fees. Generally, a check for all fees will be provided to you when the case is over.

If you are a federal government employee, the United States Attorney's Office will submit a "Certificate of Attendance" that will enable you to receive your regular salary, notwithstanding your absence from your job. You will not collect a witness fee in addition to that salary.

3. YOU HAVE THE RIGHT TO BE FREE FROM ANY THREATS

If anyone threatens you, or you feel that you're being harassed because of your contribution to the case being tried, you should immediately notify the United States Attorney's Office, the Federal Bureau of Investigation (FBI), or the law enforcement agency conducting the investigation. It is a federal offense to threaten, intimidate, harass, or mislead a witness in a criminal proceeding. Victims or witnesses have the right to be free of harassment or intimidation by the defendant or others.

The court may release the defendant while (s)he is awaiting trial under conditions that satisfy the court that the defendant will appear in court for all hearings and for trial. The court may require the defendant to post a money or property bond, or it may simply require the defendant to promise to appear. Since most federal criminal defendants are released on bond pending trial, you should not be surprised if you happen to see the defendant on release prior to trial. Nevertheless, if you have any concerns about the conditions of the defendant's release, please discuss them with the Assistant United States Attorney handling the case.

Of course, if you are threatened or harassed while you are attending court proceedings, you should report that fact immediately to the Assistant United States Attorney.

4. DISCUSSING THE CASE WITH OTHERS

United States Attorneys' Offices often receive calls from witnesses asking about their rights if a defense attorney or a defense investigator contacts them. Witnesses do not belong to either side of a criminal case. Thus, even though you may first be subpoenaed by the prosecution or by the defense, it is proper for the other side to try to talk to you. While it is the prosecution that is asking for your cooperation in this case, you may be contacted by the defense lawyer or an investigator for the defendant for an interview. While you may discuss the case with them if you wish to do so, you also have the right not to talk to them. The choice is entirely yours. If you do agree to an interview with a representative of the government or defense, here are some suggestions on how to deal with it:

First and foremost, you should always tell "the truth, the whole truth, and nothing but the truth."

If you give a statement to a lawyer or an investigator for the government or the defense, you do not have to sign the statement. However, any statement that you make during an interview, even if not signed, may be used to try to challenge or discredit your testimony in court if your testimony differs from that statement. This applies even to oral statements that are not reduced to writing at all.

If you decide to sign a statement, make sure you read it over very carefully beforehand and correct any mistakes.

Ask to have a copy of any statement that you make. Whether you sign the statement or not, you may tell the lawyer or investigator that you will refuse to give a statement unless you receive a copy of it.

When you have an interview with the defendant's lawyer or investigator, please let the United States Attorney's Office know about the interview. If you elect to have an interview with the defendant's lawyer or investigator, you may want to have present an additional person chosen by you to witness the interview.

You may discuss the case with anyone you wish. The choice is yours. Be sure you know to whom you are talking when you discuss the case. We encourage you not to discuss the case with members of the press, since you are a potential witness in a criminal case and the rights of the government and the defendant to a fair trial could be jeopardized by pre-trial publicity.

After a witness has testified in court, (s)he may not tell other witnesses what was said during the testimony until after the case is over. Thus, do not ask other witnesses about their testimony and do not volunteer information about your own.

The Assistant United States Attorney may discuss various aspects of the case with you to inform you and to prepare you for testimony if that is necessary. However, the Federal Rules for Criminal Procedure prevent an Assistant United States Attorney from disclosing to anyone, with limited exceptions, what has occurred in the grand jury. The purpose of this secrecy rule is to protect grand jurors and persons involved in the investigation and to make sure that no one tampers with the investigation or flees from the jurisdiction. For those reasons, an Assistant United States Attorney may be prevented from fully answering some of your questions about the results of the investigation or the decision of whether to file criminal charges.

5. SCHEDULING YOUR APPEARANCE IN COURT

There are several kinds of court hearings in a case in which you might be asked to testify. These include a preliminary hearing, a grand jury appearance, a motion hearing, and an appearance in court for trial or sentencing. It is difficult to schedule court hearings at a time convenient for everyone involved. Any court hearing requires the presence of witnesses, law enforcement officers, the defendant's lawyer, an Assistant United States Attorney, and the judge, as well as the defendant.

Therefore, WHEN THE COURT SETS A TIME AND PLACE FOR A HEARING IN THE CASE YOU ARE INVOLVED IN, YOU MUST BE THERE PROMPTLY, unless an emergency prevents it. And if you have been sent a subpoena -- a formal order to appear -- you should know that there are serious penalties for those who do not obey that order.

If you know in advance anything that might keep you from making a court appearance, let the United States Attorney's Office know immediately so that an attempt may be made to adjust the schedule. However, scheduling is at the discretion of the court.

Despite the best efforts of everyone concerned, court hearings do not always take place on schedule -- the hearing or trial is sometimes postponed or continued to a new date. When possible, the Assistant United States Attorney handling the case in which you are involved will discuss with you any proposed scheduling change. Also, the United States Attorney's Office will notify you of any postponements in advance of your appearance at court.

6. PLANNING YOUR TRIP TO COURT

As a victim or witness, you may have questions about transportation, the location of the courthouse, food service, or where to go and what time to appear. The United States Attorney's Office has assembled information on these subjects. You should feel free to ask either the case agent, the Assistant United States Attorney, or the Victim-Witness Coordinator about them.

7. HOW CASES TURN OUT

Many criminal cases are concluded without a trial being held. In many cases, the evidence of the defendant's guilt is so strong that (s)he pleads guilty to the crime. Guilty pleas and other ways the case may end without a trial are discussed below:

a. Guilty Plea

The defendant may choose to plead guilty. By pleading guilty, the defendant waives his or her right to a trial. Generally, the guilty plea constitutes a conviction.

b. Plea Agreement

The Assistant United States Attorney may enter into an agreement with the defendant whereby if the defendant pleads guilty to certain charges, the government will ask the court to dismiss other charges, or will take another position with respect to the sentence imposed or some other action. Sometimes, the defendant will agree to plead guilty to one or more of the charges or to a less serious or related offense. This process of obtaining a defendant's agreement to plead is recognized by the courts as a proper way of disposing of criminal cases. In fact, the United States Supreme Court held that agreed-upon pleas are to be encouraged.

The government usually benefits in several ways by entering into an agreement for a guilty plea to certain charges rather than going to trial against a defendant on all charges. One benefit is the guarantee of a conviction. Criminal cases always involve risks and uncertainties. Even a case that appears to be very strong may not result in a conviction if there is a trial. And in many cases, there is a possibility that certain evidence may not be admitted. The Assistant United States Attorney will consider this in deciding to agree to a plea to certain charges. Another benefit of plea agreements is the prompt and certain imposition of sentence, which is a major goal of the criminal justice system. A third benefit is that they help to obtain pleas and convictions of other defendants. Often, the Assistant United States Attorney will require, as a condition of a plea, cooperation of the defendant in further investigation or prosecutions of others. Also, since there is no trial and no witnesses are called to testify, the identity of informants and witnesses can remain undisclosed. This preserves an informant's usefulness in other investigations, and prevents inconvenience and emotional stress that witnesses might experience when they have to testify.

In deciding to accept certain pleas, the Assistant United States Attorney considers the effect of the criminal offense on the victims, the criminal history of the defendant, the seriousness of the offense, and the interest of society in seeing all crimes punished with certainty. The Assistant United States Attorney will also consider whether the proposed plea will expose the defendant to a maximum punishment that is appropriate even though the defendant may not plead guilty to all charges.

c. Declination and Dismissal

A case referred to the United States Attorney may not be acted upon, which is called a declination, or may be dismissed after it has been filed with the court. There are several reasons why cases may be declined or dismissed.

An Assistant United States Attorney has discretion to decline to prosecute a case based on several considerations. The Assistant United States Attorney must decline if the evidence is too weak. The Assistant United States Attorney is ethically bound not to bring criminal charges unless the admissible evidence will probably be sufficient to obtain a conviction. However, even when the evidence is sufficient, the Assistant United States Attorney may consider that there is not a sufficient federal interest served by prosecution, but that the defendant is subject to prosecution in another state or local court (including a state court for the prosecution of juvenile delinquents).

A dismissal may occur when the Assistant United States Attorney asks the court to do so. The Assistant United States Attorney may do so because the court has excluded critical evidence or witnesses have become unavailable. In other situations, evidence which weakens the case may come to light after the case has started. The court may dismiss a case over the objection of the Assistant United States Attorney when it determines that the evidence is insufficient to find the defendant guilty.

d. Pre-Trial Diversion

In selected cases, an Assistant United States Attorney may decide not to try a defendant right away or to bring charges immediately. Instead, the defendant is placed in a Pre-Trial Diversion Program. Under this program, the United States and the defendant enter into a contract in which the defendant agrees to comply with certain conditions and to be supervised by the United States Probation Office for a period of time, usually one year. One of the conditions may be to make restitution to the victims of a crime. If the defendant successfully complies with all of the conditions, no charges will be brought. If, however, the defendant fails to meet a condition, charges may be filed.

The Pre-Trial Diversion Program is designed for those defendants who do not appear likely to engage in further criminal conduct and who appear to be susceptible to rehabilitation. Overall, the objectives of the program are to prevent future criminal activity by certain defendants who would benefit by diversion from traditional punishment into community supervision and services. The program also helps to make criminal sanctions more appropriate to the individual offenders, and it saves judicial and prosecutive resources for concentration on major crimes.

Several factors may be considered in deciding upon diversion, including the criminal record of the defendant, the willingness of the defendant to make restitution, and the likelihood that the defendant may engage in further criminal conduct. Additionally, before a defendant may enter into a diversion program, the United States Probation Office must agree to supervise the defendant, and the defendant usually must admit that he or she committed the wrongdoing.

8. WHAT IF YOUR PROPERTY IS BEING HELD AS EVIDENCE?

Sometimes law enforcement officers take and store property belonging to witnesses as evidence in a trial. This might be property that was taken by law enforcement officers at the crime scene or that was stolen. If your property is being held as evidence by law enforcement officers and you would like to regain your property before the case is over, you should notify the law enforcement officer or Assistant United States Attorney who is handling the case in which you are involved. Many times arrangements can be made for early release of property. That is a determination to be made considering the value of the property as evidence at trial. In any event, at the conclusion of the case you should be able to have your property returned to you promptly. The prompt return of your property will always be sought. In those instances where this cannot be achieved, the Assistant United States Attorney will explain the reasons for retaining the property.

9. RECOVERING FINANCIAL LOSSES

Often, crime means a real financial loss for the victim. Perhaps you have had cash or valuable property stolen (and not recovered), have experienced damaged property, medical expenses, or a loss of income because you could not work, or the nature of the crime may be that you have been defrauded of money belonging to you. If any of these things have happened to you, please check to see if you have insurance which will cover the loss.

If you have no insurance or only partial coverage, there are three possible ways of trying to recover your losses. Unfortunately these three ways, discussed below, are not always effective in many cases.

a. Compensation

Crime victims' compensation programs, administered by the states, provide financial assistance to victims and survivors of victims of criminal violence. Payments are made for medical expenses, including expenses for mental health counseling and care; loss of wages attributable to a physical injury; and funeral expenses attributable to a death resulting from a compensable crime. Other compensable expenses include eyeglasses or other corrective lenses, dental services and devices, and prosthetic devices. Each state establishes its own instructions for applying for crime victims compensation, procedures to be used in processing applications, approval authority, and dollar limits for awards to victims.

b. Restitution

When an offender gives back the things (s)he stole from a victim, or otherwise makes good the losses (s)he has caused, (s)he has given restitution to the victim.

From the point of view of effective law enforcement, the time to seek restitution is when the defendant is found guilty or pleads guilty. If that is the final result of the case -- which is never a sure thing -- the trial judge must consider, by law, restitution as part of the offender's sentence. The decision, however, is the judge's. The judge might determine that the defendant does not have enough money to repay the debt to the victim, or the judge may decide to sentence the offender to jail or prison, in which case the defendant may not be able to earn money to pay back the victim.

You should discuss restitution with the Assistant United States Attorney. You should cooperate fully with the United States Attorney's Office and the United States Probation Office by giving them information regarding the impact that the crime had on you, as the victim. Without this information, the judge cannot make an informed decision on your need for restitution.

c. Civil Damages

A victim may try to recover his or her losses by a civil lawsuit against the defendant. Such a private lawsuit is completely separate from the criminal case. In fact, the jury in a civil case may find that the defendant owes the victim money, even though a different jury in the criminal case may find the defendant not guilty because the burden of proof is higher in a criminal case.

The difficulty in trying to obtain civil damages from the defendant is the same as in trying to get restitution; whatever money the defendant once had may now be gone. You may need a lawyer to bring such a suit. If you qualify, you may be able to get help free of charge from legal aid services. On the other hand, if your total losses are small, then you may not need a lawyer at all. You may be able to bring your own lawsuit without the assistance of a lawyer.

WHAT HAPPENS IN A FELONY CASE?

Any offense punishable by death or imprisonment exceeding one year is called a felony. Felonies are the most serious crimes. The prosecutors and the courts handle felony cases differently from misdemeanor cases (cases that have shorter possible sentences).

This part of the handbook is intended to explain the way a felony case moves through the court system. Each step is explained in the sections below. WITNESSES ARE NOT NEEDED AT EVERY STEP IN THE PROCESS. Most witnesses are asked to come to court only for a preliminary hearing, a grand jury hearing, a witness conference, or a trial.

Not every step is taken in every case. In fact, many cases end before they reach trial. Even so, you may wish to know all the steps that the case in which you are involved might go through.

1. INITIATING CHARGES BY COMPLAINTS

Some felony cases begin when the United States Attorney (or usually an Assistant United States Attorney), working with a law enforcement officer, files a criminal complaint before a United States Magistrate. This complaint is a statement, under oath, of facts sufficient to support probable cause to believe that an offense against the laws of the United States has been committed by a defendant. If the Magistrate accepts the complaint, a summons or arrest warrant will be issued for the defendant. In some cases, the defendant may have been arrested without a warrant, in which case the defendant is presented to the Magistrate at the time the complaint is filed.

Victims and witnesses of federal offenses may be interviewed by a law enforcement officer prior to the filing of a complaint. In those situations, the law enforcement officer will report the statements of the victim or witness to the Assistant United States Attorney assigned to the case. Sometimes the Assistant United States Attorney may wish to interview the witness in person.

2. THE INITIAL APPEARANCE

This is the defendant's first hearing after arrest. It takes place before a United States Magistrate, usually the same day the defendant is arrested. Witnesses are not needed for testimony at this hearing. The hearing has three purposes. First, the defendant is told his or her rights and the charges are explained. Second, the defendant is assisted in making arrangements for legal representation, by appointment of an attorney by the court, if necessary. Third, the court determines if the defendant can be safely released on bail.

Many defendants charged with a felony are released at the end of this hearing -- either they have posted money to guarantee their return for trial and other hearings, or they have been released on conditions which include their promise to return for future hearings or the trial. Those conditions may include the requirement that they not personally contact witnesses in the case. In some cases, the defendant will be detained without bail.

3. PRELIMINARY HEARING

The purpose of this hearing is to determine whether there is evidence to find probable cause to believe that the defendant has committed the offense charged. The burden is on the United States Attorney to produce sufficient evidence to support this finding. The United States Attorney does not have to prove at this hearing that the defendant is guilty, but must present evidence to show that there is good reason to proceed with the charges against the defendant. The date for this hearing will be set at the initial appearance.

Usually the law enforcement officer alone can give sufficient evidence that there is probable cause that the defendant has committed the offense. Occasionally, witnesses may be subpoenaed to testify; if you receive such a subpoena, you should get in touch with the Assistant United States Attorney who is handling the case as soon as possible.

4. GRAND JURY HEARINGS

A grand jury is a group of twenty-three (23) citizens from the same judicial district who meet to examine the evidence against people who may be charged with a crime. The work is done in complete secrecy. Only an Assistant United States Attorney and a stenographer meet with them -- plus those witnesses that are subpoenaed to give evidence before a grand jury.

Although a grand jury is not a trial, it is a serious matter. Witnesses are put under oath. Their testimony is recorded and may later be used during the trial. It is important to review carefully what y

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remember about the crime before you testify before the grand jury. You must tell the truth. Prior to testifying before the grand jury, you will probably meet with the case agent or the Assistant United States Attorney. This will help you get ready for your grand jury appearance.

After hearing the evidence presented by the Assistant United States Attorney, the grand jury will decide whether the case should be prosecuted. Grand jury charges against a defendant are called "indictments." If the grand jury finds that the case should not be prosecuted, they will return a "no true bill."

Not every witness in a serious crime is called to testify by the grand jury. Sometimes the grand jury will issue indictments on the basis of an officer's testimony alone. If you are called to testify, the Assistant United States Attorney should be able to give you an approximate time when your testimony will be heard.

Unfortunately, it is not always possible to schedule testimony to the minute. Your appearance may involve some waiting to be called before the grand jury itself, so we recommend that you bring some reading material along with you.

All witnesses who testify before the grand jury, except federal employees, are entitled to the same witness fee and expenses which are available for testifying in court at trial.

5. ARRAIGNMENT ON THE INDICTMENT

The defendant in this hearing is read the charges which are contained in an indictment, and his or her bail conditions are reviewed. Witnesses are usually not needed at this hearing. Usually at this hearing the date is set for the case to be heard at trial.

6. HEARINGS ON MOTIONS

Before the trial, the court may hear "motions" made by the defendant or the United States. These may include motions to suppress evidence, to compel discovery, or to resolve other legal questions. In most cases, witnesses are not needed at the motions hearing. If a witness is needed at this hearing, (s)he will receive a notice from the United States Attorney's Office.

7. THE WITNESS CONFERENCE

At some time before the trial date, the Assistant United States Attorney in charge of the case may contact you by letter or phone asking you to appear at a witness conference to prepare you for trial. The purpose of this witness conference is to review the evidence you will be testifying about with the Assistant United States Attorney who will be trying the case. You are entitled to a witness fee for attending this conference.

8. TRIAL

In many felony cases, the only contact witnesses have with the prosecutors comes at the witness conference and at the trial. Normally, when the trial date has been set, you will be notified by a subpoena -- a formal written order from the court to appear.

You should be aware that a subpoena is an order of the court, and you may face serious penalties for failing to appear as directed on that subpoena. Check your subpoena for the exact time at which you should appear. If for any reason you are unable to appear as the subpoena directs, you should immediately notify the Assistant United States Attorney who is working on the case.

Usually felony trials go on as scheduled; however, this is not always the case. Sometimes the defendant may plead guilty at the last minute, and the trial is therefore canceled. At other times, the defendant asks for and is granted a continuance. Sometimes the trial has to be postponed a day or more because earlier cases being heard by the court have taken longer than expected. When possible, the Assistant United States Attorney handling the case or the Victim-Witness Coordinator will discuss with you any proposed

scheduling change. Also, the United States Attorney's Office will do everything it can to notify you of any postponement in advance of your appearance at court.

Although all of the witnesses for trial appear early in the day, most must wait for some period of time to be called to the courtroom to give their testimony. For this reason, it is a good idea to bring some reading material or handwork to occupy your waiting time. If you are waiting in a courtroom, you should remember that it may be against the rules to read in court.

A felony trial follows the same pattern as the trial of any other criminal case before the court. The prosecution and the defense have an opportunity to make an opening statement, then the Assistant United States Attorney will present the case for the United States. Each witness that is called for the United States may be cross-examined by the defendant or the defendant's counsel. When the prosecution has rested its case, the defense then has an opportunity to present its side of the case. The United States may then cross-examine the defendant's witnesses. When both sides have rested, the prosecution and the defense have an opportunity to argue the merits of the case to the court or, in a case which is being heard by a jury, to the jury, in what is called a "closing argument." The court or the jury will then make its findings and deliver a verdict of guilty or not guilty of the offense charged.

After you have testified in court, you should not tell other witnesses what was said during the testimony until after the case is over. Thus, you should not ask other witnesses about their testimony, and you should not volunteer information about your own.

9. SENTENCING

In a criminal case, if the defendant is convicted, the judge will set a date for sentencing. The time between conviction and sentencing is most often used in the preparation of a pre-sentence investigation report. This report is prepared by the United States Probation Office. At the time of sentencing, the judge will consider both favorable and unfavorable facts about the defendant before determining the appropriate sentence to impose.

The function of imposing sentence is exclusively that of the judge. In some cases, (s)he has a wide range of alternatives to consider and may place the defendant on probation (in which the defendant is released in the community under supervision of the court for a period of years), or place the defendant in jail for a specific period of time, or impose a fine, or formulate a sentence involving a combination of these sanctions.

The court will also consider requiring the defendant to make restitution to victims who have suffered physical or financial damage as a result of the crime. If you are a victim, you should cooperate fully with the United States Attorney's Office and the United States Probation Office on preparing a Victim Impact Statement regarding the impact of the crime and the need for restitution. A Victim Impact Statement is a written description of your physical, psychological, emotional, and financial injuries that occurred as a direct result of the crime. A Victim Impact Statement is read by the judge who will be sentencing the defendant.

Victims and witnesses may attend the sentencing proceedings and also may have the opportunity to address the court at this time. The Assistant United States Attorney will tell you if such an opportunity exists for you and will talk to you about such a presentation.

WHAT HAPPENS IN A MISDEMEANOR CASE?

Any criminal offense punishable by imprisonment for a term not exceeding one year is a misdemeanor. Any misdemeanor that carries a penalty of imprisonment for not more than six months, a fine of not more than five hundred dollars ($500), or both, is a petty offense.

Misdemeanors include such offenses as minor assaults, simple possession of controlled substances, some tax law violations, and other offenses. Petty offenses include offenses against traffic laws as well as many regulations enacted by the agencies of the United States.

1. CRIMINAL INFORMATIONS OR COMPLAINTS

A misdemeanor case can be initiated in several ways. The United States Attorney may file a criminal information or a complaint with the court charging a misdemeanor. This is usually done after review of the evidence by an Assistant United States Attorney with a law enforcement officer's assistance. It is the United States Attorney's task to decide whether a case will be brought, and how that case will be charged. That review may involve the Assistant United States Attorney speaking to witnesses and victims, or it may be that the law enforcement officer will report the statements of victims and witnesses to the United States Attorney.

Once the complaint or information is filed, a date is set for the defendant to appear before the United States Magistrate for arraignment. In cases where an arrest has been made prior to the filing of a complaint or information, the arraignment takes place immediately.

2. ARRAIGNMENT

The arraignment before the United States Magistrate is a hearing during which the defendant is advised of his or her rights against self-incrimination and to the assistance of counsel, of his or her right to have the case heard before a United States District Court Judge or before a United States Magistrate, and of the dates for further proceedings in the case.

The Magistrate will review facts presented by the United States Attorney and by the defendant and set conditions of bail release. Those conditions may include a promise to appear on the date set for trial of the case, and/or the promise of a money bond to be forfeited if the defendant fails to appear, or other such conditions of release as seem fair and just to the Magistrate. The purpose of bond is to ensure that the defendant will be present when the case is heard for final disposition. It is not necessary for victims or witnesses to appear at this arraignment, unless they have been specifically instructed to do so by the case agent or the Assistant United States Attorney.

3. PETTY OFFENSES

Petty offenses are most often initiated by the issuance of a traffic violation notice (TVN). A TVN is issued to defendants by the law enforcement officer at the time of the offense. They command the defendant either to pay a collateral fine to dispose of the matter or to appear before the United States Magistrate on the date written on the ticket. Most often the case will be heard for trial before the United States Magistrate on that date, if the collateral is not paid. If you are a victim or a witness in one of these petty offense cases, the United States Attorney's Office may request that you attend a witness conference prior to trial.

4. TRIAL

A trial of a misdemeanor case follows the same pattern as the trial of any other criminal case before the court. The prosecution and the defense have an opportunity to make an opening statement, then the Assistant United States Attorney will present the case for the United States. Each witness called for the United States may be cross-examined by the defendant or the defendant's counsel. When the prosecution has rested its case, the defense then has an opportunity to present its side of the case. The United States may then cross-examine the defendant's witnesses. When both sides have rested, the prosecution and the defense have an opportunity to argue the merits of the case to the court or, in a case which is being heard by a jury, to the jury in what is called a "closing argument." (Some serious misdemeanor cases are heard with a jury, either before the Magistrate or before the United States District Court Judge.)

The court or the jury will then make its findings and deliver a verdict of guilty or not guilty of the offense charged.

5. SENTENCING

In petty offense cases, the court may proceed immediately after the verdict to sentencing. The defendant and the United States each has an opportunity to speak to the issue of sentencing. In misdemeanor cases, the court may request a pre-sentence investigation and report from the United States Probation Office. If such a report is ordered, sentencing will be suspended for a period of time to permit the report to be prepared. If the case before the court involves financial or physical injury to a victim of the crime, the court must consider restitution (repayment of damages to the victim as part of the sentence imposed).

A Victim Impact Statement, prepared by the victim, can be used to establish this element of damage. In cases in which damage has been suffered as a result of a misdemeanor offense, the victim should bring that damage to the attention of the Assistant United States Attorney handling the case, to ensure that the damage is set before the court. The victim should cooperate fully with the Assistant United States Attorney and the United States Probation Officer to determine the extent of the impact of the crime.

The function of imposing sentence is exclusively that of the judge, who has a wide range of alternatives to consider and, depending upon the case, may place the defendant on probation (the defendant is released into the community under the supervision of the court for a period of time), or place the defendant in jail for a specific period of time, or impose a fine. Victims and witnesses may attend the sentencing proceedings and also may have the opportunity to address the court at this time. The Assistant United States Attorney handling the case will tell you if such an opportunity exists for you and will talk to you about such a presentation.

CONCLUSION

We hope that this handbook has answered many of your questions as to how the federal criminal justice system operates and what is expected of you in your role as a potential witness. As explained in this handbook, witnesses have important responsibilities in this process, and their full cooperation is essential if the system is to operate effectively. Your contribution, in time and energy, is very much appreciated by everyone in the United States Attorney's Office.

If you have any other questions or problems related to the case, please contact the Victim-Witness Coordinator or the Assistant United States Attorney assigned to the case.

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NOTES

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CRIME VICTIMS' COMPENSATION PROGRAM

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U.S. Department of Justice
United States Attorney's Office
District of South Dakota

Preparing to Testify

INTRODUCTION

One of the responsibilities of citizenship for those who have knowledge about the commission of a crime is to serve as witnesses at the criminal trial, or at one of the other hearings held in connection with the criminal prosecution. The federal criminal justice system cannot function without the participation of witnesses. The complete cooperation and truthful testimony of all witnesses are essential to the proper determination of guilt or innocence in a criminal case.

The United States Department of Justice and the United States Attorney's Office have taken several steps to make the participation by witnesses more effective and meaningful. One of these steps is the preparation of this pamphlet. We hope that it will provide the answers to many of your questions and will give you sufficient general information to understand your rights and responsibilities.

Thank you for your cooperation with our office and for your service as a witness. We appreciate the sacrifice of time that being a witness requires.

TESTIFYING IN FEDERAL COURT

1. Before you testify, try to picture the crime scene — the objects there, the distances, and exactly what happened, so that you can recall the facts more accurately when you are asked. If the question is about distances or time, and if your answer is only an estimate, be sure you say it is only an estimate. Beware of suggestions by attorneys as to distances or times when you do not recall the actual time or distance. Do not agree with their estimate unless you independently arrive at the same estimate.

2. **SPEAK IN YOUR OWN WORDS.** Don't try to memorize what you are going to say. Be yourself. Prior to trial, go over in your own mind those matters about which you will be questioned.

3. There is no dress code in a courtroom; however, it is important to dress in a manner that shows respect for the courtroom proceedings.

4. Avoid distracting mannerisms such as chewing gum while testifying. Smoking is not allowed in federal courtrooms.

5. From the moment you enter the courtroom or courthouse, your behavior should be appropriate to the seriousness of the proceedings.

6. When you are called into court for any reason, be serious and avoid saying anything about the case until you are actually on the witness stand. Also, do not read in the courtroom unless asked to do so by the judge or the attorneys.

7. When you are called to testify, you will first be sworn in or affirmed. When you take the oath or affirmation say, "I do" clearly.

8. Most important of all, you are sworn to **TELL THE TRUTH**. Every true fact should be readily admitted. Do not stop to figure out whether your answer will help or hurt either side. Just answer the questions to the best of your memory. If you don't understand the question, say so. Don't make up an answer.

9. Do not exaggerate. Don't make overly broad statements that you may have to correct. Be particularly careful in responding to a question that begins, "Wouldn't you agree that...?" The explanation should be in your own words. Do not allow an attorney to put words in your mouth.

10. When a witness gives testimony, (s)he is first asked some questions by the lawyer who called the witness to the stand; in this case, it is an Assistant United States Attorney. This is called the "direct examination." The witness is then questioned by the defense lawyer in "cross-examination." Sometimes the process is repeated two or three times to help clear up any confusion. The basic purpose of direct examination is for you to tell the judge and jury what you know about the case. The basic purpose of cross-examination is to raise doubts about the accuracy of your testimony. If you feel you are being doubted in cross-examination, remember that to raise doubt is the defense counsel's job. Do not lose your temper. Always be courteous even if the lawyer questioning you appears discourteous.

11. Jurors are the ones who decide the facts of the case. Always speak clearly and loudly so that every juror can easily hear you.

12. DO NOT nod your head for a "yes" or "no" answer. Speak so that the court reporter (or recording device) can hear the answer.

13. If you don't understand the question asked by any of the attorneys, ask the attorney to repeat or rephrase the question so that you understand exactly what is being asked.

14. Give the answer in your own words, and if a question can't be truthfully answered with a simple "yes" or "no," ask to explain your answer.

15. Answer ONLY the question asked you. Do not volunteer information not actually asked for.

16. If your answer was not correctly stated, correct it immediately. If your answer was not clear, clarify it immediately. If you realize you have answered incorrectly, say, "May I correct something I said earlier?"

17. The judge and the jury are interested in the facts that you have observed or personally know about. Therefore, don't give your conclusions and opinions, and don't state what someone else told you, unless you are specifically asked.

18. Unless certain, don't say, "That's all of the conversation" or "Nothing else happened." Instead, you might say, "That's all I recall" or "That's all I remember happening." It may be that after more thought or another question, you will remember something important.

19. Sometimes, witnesses give inconsistent testimony — something they said before doesn't agree with something they said later. If this happens to you, don't get flustered. Just explain honestly why you were mistaken. The jury, like the rest of us, understands that people make honest mistakes.

20. Stop instantly when the judge interrupts you or when an attorney objects to a question. Wait for the judge to tell you to continue.

21. Give positive, definite answers when at all possible. Avoid saying, "I think," "I believe," or "In my opinion." If you do not remember certain details, it is best to say that you don't remember.

22. Sometimes an attorney may ask this question: "Have you talked to anyone about this case?" It is perfectly proper for you to have talked with the prosecutor, police, or family members before you testify, and you should respond truthfully to this question. Say very frankly that you have talked with whomever you have talked with — the Assistant United States Attorney, the victim, relatives, or anyone else. **ALL THAT WE WANT YOU TO DO IS TO TELL THE TRUTH.**

23. After a witness has testified in court, (s)he should not tell other witnesses what was said during the testimony until after the case is over. Thus, do not ask other witnesses about their testimony and do not volunteer information about your own.

If you have questions or problems related to the case, please contact the Victim-Witness Coordinator or the Assistant United States Attorney assigned to the case.

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YOUR RIGHTS AS A CRIME VICTIM

WHAT YOU SHOULD KNOW ABOUT SEXUAL ASSAULT

Victim Witness Program
United States Attorney's Office
3rd Street and Rosser Ave., Room 372
Bismarck, ND 58501
701-250-4396

SEXUAL ASSAULT: WHAT SHOULD I DO?

Sexual assault can be an extremely traumatic experience. As a survivor of sexual assault, you may have been hurt both physically and emotionally. Feelings of anger, guilt, shame and fear are common reactions. In addition to dealing with these emotions, you may also be concerned about being infected with a sexually transmitted disease or HIV, the virus that causes AIDS.

During this difficult time, you need to protect your health and the health of your loved ones. This brochure is designed to provide you with information about sexually transmitted diseases and medical and counseling services that are available to help you deal with your concerns. Remember - it is not your fault... you are not alone.

What should I do if I have been sexually assaulted?

Go to a safe place and call the police. The sooner you report the assault, the greater the chances that the offender will be caught. You should seek medical attention immediately. Because sexual assault is a violent act, you may need treatment for injuries such as bruises, cuts, broken bones or internal injuries. It is also possible that as a result of the sexual assault you may have been infected with a sexually transmitted disease (STD).

It is important for you to be examined so evidence can be collected. **Do not shower before being examined.** Evidence collected immediately after an assault is very important to the investigation of the offense.

What should I do if I did not seek medical attention immediately after an assault?

Get medical attention as soon as possible. It is important that you get a medical examination and are tested for HIV and other sexually transmitted diseases. Even though the results may turn up negative the first time, you should be tested again in 3-6 months.

How can I get counseling and/or information about sexual assault and sexually transmitted diseases?

Most sexual assault crisis centers have hotlines operated by sexual assault counselors who understand sexual assault and will talk with you confidentially. Phone numbers are listed on the back of this brochure.

Most medical testing centers also provide counseling. If counseling is not available at the testing site you have chosen, your Victim Witness Advocate from the United States Attorney's Office will assist you in making arrangements for counseling.

TESTING FOR SEXUALLY TRANSMITTED DISEASE AND HIV

How much will testing cost?

Your rights as a federal crime victim entitle you to testing at no cost to you. Certain requirements apply. Phone numbers of HIV test sites are listed on the back of this brochure. Most of the sites also offer STD testing. Testing and counseling for HIV at all sites are free of charge; however, some sites charge for STD testing based upon the individual's income. If you are unable to locate a free testing site, contact the Victim Witness Advocate at the United States Attorney's Office for assistance.

Who will have access to the test results?

You have the right to have up to two confidential and anonymous tests following sexual assault which poses a risk of transmission of HIV virus or STD. Test results are not given over the telephone or sent in the mail. The nurse who drew your blood will give you the test results on your second visit and explain them to you in private.

Do I need to be tested again?

You should be tested a second time approximately six months after the sexual assault. Even though an initial test is negative, you could still be infected with HIV. It can take up to six months after infection for antibodies to show up on a test. The United States Attorney's Office can assist you in obtaining this second test at no cost to you.

How do I find out if the defendant is infected with HIV/AIDS?

You cannot be infected with HIV if the offender does not have AIDS or has not been infected with HIV. As the victim of a sexual assault, you have the right to request that the defendant be tested for Acquired Immune Deficiency. (The law only allows for a defendant to be tested for HIV/AIDS, not for other sexually transmitted diseases). The Victim Witness Advocate at the U.S. Attorney's Office can assist you with your request to have the defendant tested. Certain requirements must be met.

The Assistant U.S. Attorney assigned to your case will present the request to the judge. If the initial test is negative, the judge can order the defendant to be tested again 6 and 12 months after the first test.

What about the defendant's test results?

The results of the defendant's test will be given to you; however, you will only be allowed to share this information with your doctor, counselor, family member or any sexual partner(s) you may have had since the sexual assault. Disclosure of these results to anyone else is a violation of law.

HOW TO CONTACT US:

Victim Witness Program
United States Attorney's Office
3rd Street and Rosser Ave., Room 372
Bismarck, ND 58501
701-250-4396

For additional information contact:

National Aids Hotline	1-800-342-2437
National STD Hotline	1-800-227-8922
National AIDS Info. Clearinghouse	1-800-458-5231
North Dakota AIDS Hotline	1-800-472-2180

TESTING SITES:

Bismarck	701-222-6525
Dickinson	701-227-0171
Devils Lake	701-662-7035
Fargo	701-241-1360
Grand Forks	701-746-2525
Jamestown	701-252-8130
Mandan	701-667-3370
Minot	701-852-1376
Rugby	701-776-6937
Stanton	701-745-3599
Wahpeton	701-642-7735
Williston	701-572-3763

U.S. Department of Justice

United States Attorney
District of North Dakota

Victim Witness Assistance Program

452 U.S. Post Office & Courthouse
3rd Street & Rosser Avenue
P.O. Box 699
Bismarck, ND 58502-0699

This pamphlet is to provide information and assistance to the victim/witness during the course of a federal criminal prosecution.

The United States Attorney's Office for the District of North Dakota has offices in Fargo (701) 239-5671 and Bismarck. The Victim Witness Coordinator is responsible for providing information, services and assistance to victims and witnesses who become involved in the federal criminal justice system.

VICTIM AND WITNESS PROTECTION ACT OF 1982

The Victim and Witness Protection Act of 1982 was enacted to "enhance and protect the necessary role of crime victims and witnesses in the criminal justice process; to ensure that the Federal Government does all that is possible within the limits of available resources to assist victims and witnesses of crime without infringing on the constitutional rights of defendants..."

The Victim and Witness Protection Act is a nationwide effort to restore balance to the federal criminal justice system by recognizing the need of victims and witnesses.

Carol Fricke, the United States Attorney's Office Victim Witness Coordinator, is available to offer assistance between the hours of 8:00 a.m. and 5:00 p.m., Monday through Friday. If you have any questions or need additional information, please call (701) 250-4396 in Bismarck and ask for the Victim Witness Coordinator.

VICTIM/WITNESS SERVICES

The Victim Witness Coordinator provides a wide range of services to federal victims and witnesses of serious crimes:

- informs and refers victims to services; directs victims to community resources and social services that can provide them with additional assistance.

- Orients victims and witnesses to the criminal justice system; explains the criminal justice process and court procedures.

- Notifies victims and witnesses of:
  - scheduling changes
  - case status
  - court appearances
  - case disposition

- Assists victims in completing victim impact statements.

- Arranges for separate waiting area for the victim prior to court appearance.

- Advocates restitution on behalf of the victim upon conviction of the accused.

- Notifies employers and creditors of victims and witnesses where their responsibilities in a prosecution affect absence from work or ability to make payment.

- Assists in protecting victims and witnesses from threats, harassment, intimidation and retaliation because of their contribution to the case.

- Informs victims and witnesses of the availability of witness fees and reimbursement of expenses.

- Assists victims with the speedy return of personal property held as evidence in a criminal case.

- Arranges special assistance and resources for child victims and witnesses.

- Assists victims in applying for compensation with North Dakota Crime Victims Reparations Board.

YOU HAVE THE RIGHT TO BE FREE FROM ANY THREATS BECAUSE YOU ARE A WITNESS IN A CASE.

If anyone threatens you, or you feel that you are being harassed because of your contribution to a criminal case, you should immediately notify the United States Attorney's Office or the Federal Bureau of Investigation.

It is a federal offense to threaten, intimidate, harass or mislead a witness in a criminal proceeding.

UNIFORM CRIME VICTIMS REPARATIONS ACT

In 1975 North Dakota passed the Uniform Crime Victims Reparations Act to provide a method of compensating and assisting innocent victims of criminal acts who suffer bodily injury or death. It does not provide compensation for property loss or damage. Compensation is provided in the amount of expenses actually suffered as a direct result of the criminal acts of others.

A claim for reparations must be filed within one year after the date of injury or death. Compensation will not be awarded to one who is the offender or an accomplice, or others if the award would unjustly benefit the offender or accomplice.

Reparations may not be awarded if the criminally injurious conduct was not reported to law enforcement within 72 hours after its occurrence. The board, upon finding that a claimant has not fully cooperated with law enforcement, may deny, reconsider or reduce an award.

Benefits Available

- Reasonable medical, and rehabilitation expenses;
- Wage loss;
- Replacement services loss (expenses incurred for services the claimant would normally have performed);
- Funeral expenses up to $1,500.00;
- Dependent's economic loss (loss of deceased's wage);
- Dependent's replacement services loss (expenses incurred by dependent for services which would normally have been performed for the dependents by the deceased victim).

The Crime Victims Reparations Act has established a maximum award amount of $25,000.00.

Attorney fees will be paid by the fund in some cases. Legal assistance is not required for filing a claim.

Claims may be filed by the victim, a representative of the victim, or by a dependent of a deceased victim.

Additional information about the program may be obtained by contacting:

Crime Victims Reparations
Worker's Compensation Bureau
Russel Building, Highway 83 N.
4007 North State Street
Bismarck, North Dakota 58501

Telephone: (701) 224-3870
1-800-445-2322

or contact:
Carol Fricke
Victim Witness Coordinator
Telephone: (701) 250-4396