Native American children deserve equal protection

By Timothy Sandefur

Americans were scandalized last year by the case of Lexi, a six-year-old California girl who was snatched from the arms of her foster parents on the orders of Choctaw tribal officials, and sent to live in Utah with a different family instead. Lexi had lived with her foster parents for four years—two-thirds of her life—and called them "Mommy" and "Daddy," but one of her great-great-great-great grandparents was a full-blooded Choctaw Indian. That meant courts treated her case differently. In most cases, judges use the "best interests of the child" test, but California judges ruled that in cases involving Indian children, the child's best interests is only one of a "constellation of factors" to consider. Since tribal leaders wanted Lexi sent to Utah, the court ordered it done—regardless of the trauma to her.

Lexi's case was just one of many that illustrates a shocking fact: although American courts long ago repudiated the doctrine of "separate but equal," and forbade the government from relegating any race of children to second-class status, there's one group to whom this protection doesn't apply: Indians. Thanks to the Indian Child Welfare Act (ICWA), they're subjected to overt racial segregation, and to different rules than those that apply to their white, black, Asian, or Hispanic peers—rules that make it harder to protect Native children from abuse and neglect, and extraordinarily difficult to find them safe, loving, adoptive homes.

Congress passed ICWA in 1978 out of concern that state child welfare agencies were taking Indian children away from parents too often, or for insufficient reasons. ICWA aimed to fix this by boosting legal protections for parents, limiting the situations in which kids could be taken away, and ensuring that tribal courts decided cases that arose on reservations.

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Unfortunately, the Act went further, and imposed restrictions that today harm children, and even veto the choices of Indian parents when they seek to promote their kids' best interests. This is especially shocking when one considers that Indian children are the most at-risk demographic of Americans: facing higher rates of abuse, neglect, drug and alcohol dependency, and suicide than any other group in the country.

One problem with the Act is that it applies not to tribal members, but to children who are "eligible for membership, and have a tribal member for a biological parent. Since virtually every tribe defines eligibility based on biological criteria, that means ICWA applies to children based not on cultural affiliation with a tribe, but solely on the DNA in their blood. A child who grows up in an Indian home, speaks an Indian language, and practices a Native religion, is not "Indian" under ICWA if he or she doesn't meet the genetic profile. Even adopted kids don't count. By contrast, a child like Lexi qualifies as "Indian," and is subject to ICWA, despite having no connection to tribal culture, solely because she has the right DNA.

ICWA applies only to state courts, and is not limited to children on reservations. The result is a case like that of Charles (not his real name), who was born in Ohio to Ohio parents, and has lived most of his life with an Ohio foster family—but who, if the Gila River tribe has its way in an ongoing lawsuit, will be sent to live on a reservation in Arizona, with people he's never met, simply because he has the "25 percent Indian blood" required for tribal membership. What matters under ICWA is not whether Charles identifies as Indian—he doesn't. But he meets the racial profile.

ICWA also limits how child protection agencies can rescue Native children from abuse or neglect. Under state and federal law, a child of any other race can be taken from unfit parents if officials first make "reasonable efforts" to prevent family breakup. That means giving parents the opportunity to quit drugs, obtain psychological counseling, or otherwise preserve the family unit. That makes sense, because it's best to keep children with parents if possible. On the other hand, it would be risky to reunite them with parents who have molested them or harmed them seriously—so the "reasonable efforts" requirement is excused in those cases. ICWA, however, has a different rule: it requires officials to make "active efforts"—meaning more than "reasonable" efforts—and that requirement is not excused in cases of systematic abuse. That means Indian children must be returned to the parents who have harmed them, over and over. Only in the most extreme cases can they be taken into state care.

Worse still, an Indian birth parent's rights cannot be severed—a necessary step before adoption—unless a judge finds "beyond a reasonable doubt," based on expert witness testimony, that the child faces severe risk. That means it's literally easier to put a defendant on death row than for an Indian child to be adopted by non-Indians.

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Thanks to the ICWA, Native American children are subject to overt racial discrimination, and to different rules than those that apply to their white, black, Asian or Hispanic peers.

These rules often harm Native parents, too. In one recent Arizona case, an Indian father asked a court to sever the rights of the non-Indian mother, whose drug use led her to neglect their children. The court refused, holding that he failed to make "active efforts" because he had barred her from visiting the kids. Of course, he did that because she was an unfit parent. Thus ICWA penalized him for being a conscientious dad.

That's not an isolated case: the Washington Supreme Court ruled last year against an Indian mother who wanted to sever the rights of her abusive ex-husband so that her new husband could adopt her son. The court said no, because she had not made "active efforts" to rehabilitate her ex—and it didn't matter that he wasn't Indian. In these and other cases, ICWA overrides the wishes of Native American parents who are trying to do what's best for their children.

ICWA also imposes race-based "preferences" for foster care and adoption that require state officials to place Indian children in "Indian" homes (even if the adults are members of a different tribe) instead of with white, black, Hispanic, or Asian foster parents. Similar race-based rules for adoption make it practically impossible for non-Natives to give Native American children a permanent adoptive home.

These race-based restrictions aren't in the best interests of Indian kids. Yet even more shocking than all the rest, state courts and federal bureaucrats have declared that the "best interests of the child" test does not apply to cases involving Indian children.

That's shameful. Indian children are American citizens entitled to the same protections as all other kids. When they're in need, their best interests as individuals should count for more than the color of their skin—and the race of the adults who love them should not be an obstacle to finding them the stability and support they need. Native Americans have suffered terrible wrongs throughout history. The time has come to put an end to it—and to say that all children deserve equal protection before the law.

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