Limit Government Intrusion in Indian Families’ Lives

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Response Essays
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The Indian Child Welfare Act (ICWA) restricts government intervention in Indian families’ lives, imposes important obligations on the government that benefit both children and parents when it does interfere, and limits the ease by which private entities profit from government action.

Penalizing Indian Parents for Being Indian

Imagine the terror of losing your children in a legal proceeding lasting one minute in which you had no opportunity to speak. In Rapid City, South Dakota, state courts routinely approve the “emergency” taking of American Indian children from their homes, based solely on a state worker’s affidavit, for months. This happens before the parents can secure a lawyer or review the evidence. They have no right to participate in the hearing. Once the child is under the control of the state, state workers can and do dictate terms to Indian parents, often making those parents choose between their culture and their children, or imposing impossible burdens on the parents. This all happens before the state has even proven its claims. Yet this is a common occurrence for Indian families throughout Indian country, not just South Dakota. Under these conditions, it follows that Indian children are disproportionately represented in foster care nationwide. Rapid City’s rules hearken back to an earlier era when many state agencies defined simply living in Indian country as harmful to children. ICWA is designed to end that kind of race discrimination, slow state processes down and, hopefully, establish a system to protect Indian children and Indian families.
Absent ICWA, Indian parents are penalized for being Indian. Consider Indian parents alleged to be addicts. An Indian parent might seek help from the tribal community to combat addiction in a traditional way. But state workers mandate instead that the parent attend meetings with strangers and impose punitive, zero tolerance, random drug tests during a time of intense vulnerability, invasive tests that directly conflict with the parent’s cultural beliefs. Indian parents that do not obey will not see their children. Parents must make a choice between their culture and their children, a penalty only Indians must face.

ICWA requires state workers to actively provide culturally sensitive services that reduce the price Indians must pay for being Indians, services often available through the family’s tribe. Tribes offer culturally relevant services for children, too. The Attorney General’s Advisory Committee on American Indian/Alaska Native Children Exposed to Violence concluded that compliance with ICWA would surely reduce the number of Indian children in foster care and the number of court orders terminating parental rights. ICWA slows down the state court Indian child welfare machine, irritating judges and advocates. And so compliance is uncommon.

ICWA as Gold Standard in Child Welfare
Given that Casey Family Programs, the Children’s Defense Fund, the Child Welfare League of America, and 15 other child welfare advocacy groups argue that ICWA is the gold standard in child welfare, one that should substantially apply to all children and their families, Mr. Sandefur’s “penalty” claim is an odd one. The assertion that ICWA slows down the response to child abuse by introducing Indian tribes into the equation is simply false; child abuse scandals happen in state government more. Indian tribes have the same incentive as any government to stop child abuse and, more and more frequently, have the capability to offer important services to victims. Per capita, even the poorest Indian tribes expend far greater resources on providing services to Indian children in need than notoriously underfunded state programs. Tribal services often are all that Indian families can rely upon, given that state child welfare systems in 19 states and in virtually all urban areas are broken.
Stripping tribal services from Indian children and parents is no solution. The “penalty” claim is an attack on ICWA’s due process requirements, and yet this due process is what makes ICWA the gold standard that all parents should enjoy. Due process violations are already rampant in the system. Why make them worse? I am in agreement with Mr. Sandefur that denying ICWA’s procedural protections to non-tribal members is wrong – something like ICWA’s protections should apply meaningfully to all.

Follow the Money
Not much remains of Mr. Sandefur’s “penalty” claim except that ICWA makes it harder for private adoption agencies to tap into a pool of potential Indian adoptees for the benefit of their paying clients. Who benefits if ICWA tumbles? As usual, the answer can be found by following the money. Start with the beneficiaries of the $14 billion private adoption market. The adoption industry long has been a foe of ICWA. Conversely, Indian tribes do not profit from the termination of parents’ rights. ICWA requires the state to seek an Indian family to adopt where possible, but private adoption agencies don’t get paid unless an adoption with a paying family goes through. In both direct placement adoptions and adoptions following failed reunifications with parents, money works against reunification with families and ICWA compliance. Some foster parents are encouraged by private agencies to become foster-to-adopt parents, altering the goal of foster care from reunification to termination for adoption. And being told they will be able to adopt their Indian foster children just as soon as the parents’ rights are terminated creates an adversarial relationship – not one that encourages the stated goal of reunification. In addition, fees charged by private and religious adoption agencies taint direct placement adoption petitions. Adoptive families are good people, but they come from an overwhelmingly non-Indian pool of potential parents. Questions on race are endemic in adoption circles.

Perhaps because of these financial incentives, private adoption agencies have engaged in ethically corrupt practices to avoid or attack ICWA, even where the courts enforced the law. Adoption counsel in Adoptive Couple v. Baby Girl is alleged to have
initially misspelled the Cherokee father’s name and incorrectly stated his birthday to prevent the Cherokee Nation from discovering that Baby V. was Indian. And later, counsel violated the Indian father’s privacy rights by advising the family to appear on television to advocate against ICWA. Throughout, the adoptive family benefitted from the media’s misstatement of critical facts that effectively turned public opinion against the biological father, an active duty military serviceman who was perfectly capable of caring for his daughter.

*In re Alexandria P.: Lexi’s Case*

Mr. Sandefur leads his article with a description of the video the foster parents created in the *Alexandria P.* case when the foster child was transferred to her family. Rather than do the transfer in private, with coordination between the foster parents, family, and state agency, the foster parents violated the child’s right to privacy by creating and distributing a video designed to drum up racial animus, even rage, against Indian families and Indian tribes.

*Alexandria P.* is a story of how foster parents created an adversarial relationship with a child’s family, disregarding the goal of reunification, and then created a perfect storm of anti-Indian media sentiment when they lost. Some facts should be made clear, in case they are not: Lexi knew and regularly visited her Utah family – her sisters and her aunt and uncle – and she always knew she was a foster child. From the beginning, the California foster couple was the only party to contest Lexi’s placement with her relatives. The state of California, the Choctaw Nation, her relatives, her father, and Lexi’s own counsel all agreed that the placement with her relatives was absolutely in her best interest. Not once did any court disagree.

ICWA was not to blame for the scene that people saw on the video. Rather, two things held up Lexi’s placement for years: first, the repeated failures of the trial court to apply the correct legal standard, and second, a California doctrine called “de facto parent” status that grants foster parents unique standing rights. After an emergency removal of
an Indian child, that child might be placed in a non-ICWA compliant placement to keep the child close to her parents for reunification – which is, after all, the goal of foster care. If the reunification process fails, which usually takes at least a year, ICWA (and the laws of 45 states) mandates that the child’s permanent placement be with relatives. Once California foster parents decide they know best for the child and are granted de facto parent status, they can fight the placement and further delay the return of the Indian child to relatives. This is what happened in Alexandria P.

Lexi’s aunt and uncle in Utah expressed interest in adopting her when the state first removed her in December 2011, which triggered concurrent permanency planning between the California foster parents and the Utah relatives. They visited Lexi monthly in anticipation of her return if reunification with her father failed. When reunification did fail, the trial court in December 2013 ordered her to be placed with her Utah relatives in accordance with the wishes of every party except the foster parents. They appealed, forcing a delay in the placement. The California appellate court in August 2014 held that the trial court applied the incorrect standard, and it remanded. The trial court in November 2015 again held in favor of the placement with the Utah relatives, and again the foster parents appealed. Lamenting the long delay, the appellate court still vacated the trial court’s placement order for again failing to apply the correct standard. In March 2016, the trial court again held in favor of the Utah relatives, and for a third time the foster parents appealed. This time the appellate court did not stop the transfer, and so the foster family condemned ICWA and publicized the transition to generate national attention, grossly violating Lexi’s right to privacy. In July 2016, the California Court of Appeals strongly affirmed the placement order in favor of the Utah relatives. Had the foster family respected the goal of reunification in the first instance, this would not have become a news item. Somehow Mr. Sandefur suggests the foster family should prevail anyway and that this unusual saga makes the case for undoing ICWA.
Casual racism against American Indians is alive and well. In this hostile racial climate, it shouldn’t be surprising that Indian parents in South Dakota argue that “there's this collective belief that Native people can’t take care of their own children.” The critique that ICWA improperly routes Indian children to their relatives’ homes instead of non-Indian homes is a critique that takes advantage of racial animus against Indian people and comes dangerously close to an allegation that Indian parents and tribal communities are inherently inferior (others have outright denounced the Goldwater Institute's goals for this reason). Indian people love their children the same as everyone else. ICWA, the gold standard in child welfare, is there to support Indian families against governments that too often devalue them.