

# Why Should Indian Children be Treated Differently?



By Judge Leonard Edwards (retired)

**About the author:** Judge Edwards is a retired judge from Santa Clara County, California, where he served for 26 years, primarily in the juvenile court. He now works as a consultant. His writings can be seen on his website: [judgeleonardedwards.com](http://judgeleonardedwards.com).

Attacks on implementation of the Indian Child Welfare Act (ICWA) have recently been in the headlines. Several critics of the ICWA have stated that Indian Children should not be treated differently in child welfare and adoption proceedings.<sup>1</sup> Legal actions have been led with the intention to declare the ICWA unconstitutional arguing that it discriminates based on race.<sup>2</sup> A federal court judge has recently found that a state court judge has illegally denied Indian parents of their due process rights after the state has removed their children.<sup>3</sup> A recent United States Supreme Court case held that the ICWA does not apply if the biological father does not have present custody of the child.<sup>4</sup> Years ago, in an attempt to circumvent the ICWA, state courts created the Existing Indian Family Exception to the ICWA which remains the law in several states.<sup>5</sup> Editorial perspectives have also appeared arguing that all children should be governed by the best interests test in custody and adoption disputes, and that Indian tribes should not be given any special consideration.<sup>6</sup> Custody and adoption disputes between foster parents and either Indian parents (or Indian tribes) have attracted national attention in the media with articles that seem favor the non-Indian foster parents who have “bonded” to the Indian child.<sup>7</sup> The numbers of Indian children removed from parental control and placed with non-Native American families continues to far exceed the numbers of non-Native American children removed from parental care.<sup>8</sup> Additionally, a Supreme Court Justice has written that the ICWA is unconstitutional arguing that Congress has no power to legislate adoption laws.<sup>9</sup>

Despite these attacks, there are compelling reasons why the ICWA should be fully implemented. This article outlines some of the reasons for full implementation and argues that there are important reasons why Native American children should receive special treatment in the courts.

## Some History

The ICWA reflects important cultural and historical facts that justify its existence. The United States Constitution created a federal-tribal trust relationship,<sup>10</sup> one that was

confirmed in early and recent Supreme Court decisions.<sup>11</sup> The trust relationship armed the federal government's commitment to protect Indian children.<sup>12</sup>

That relationship changed significantly in the 19th and early 20th Centuries. Sadly, the United States federal government and state and local governments have treated Native Americans unfairly for more than 150 years, breaking treaties, seizing land, and violating the trust relationship established in the Constitution and numerous treaties.<sup>13</sup> State and federal policies weakened or destroyed Indian tribal and family structures in an effort to assimilate Indians into the dominant culture. These policies included the destruction of tribal governments, the removal of high numbers of Indian children from their families and tribes, the creation of compulsory boarding school education for Indian children, and criminal prosecution against those who practiced Indian religions.<sup>14</sup>

Perhaps the most egregious recent example involved state and federal governmental actions towards Native American children. Governmental policies have resulted in the removal of Native American children from their families and tribes in high numbers.<sup>15</sup> Beginning in 1959, The Indian Adoption Project aspired to systematically place the entire Indian child population with non-Indian families across lines of nation, culture, and race.<sup>16</sup> The Adoption Resource Exchange of North America (ARENA), founded in 1966, was the immediate successor to the Indian Adoption Project. ARENA was the first national adoption resource exchange devoted to finding homes for hard-to-place children. It continued the practice of placing Native American children with non-Indian adoptive parents for a number of years into the early 1970s. The goal was assimilation. As one Native American stated:

*The endgame, the official federal policy, was that the tribes wouldn't exist.*<sup>17</sup>

Church leaders also encouraged the adoption of Indian children. One author estimates that there were thousands of Navajo children adopted by members of the Latter Day Saints, while the Catholic Church and other Christian denominations removed Indian children from their homes to place them in residential institutions; from there they were to be adopted out.<sup>18</sup> Adoption was seen as the best method to assimilate Indian children into mainstream America.

### The Indian Child Welfare Act

While many social policy leaders, such as the Child Welfare League of America (CWLA), supported and praised these projects, Indian leaders attacked them as destructive to the Indian culture. Researchers demonstrated that federal and state policies were destroying American Indian Families.<sup>19</sup> Ultimately, some leading politicians joined them in an effort to change the law. During Congressional hearings in the 1970's Senator Abourezk testified that "placement of Indian children in non-Indian settings resulted in

their Indian culture, the Indian traditions, and in general, their entire way of life... being smothered.” Senator Abourezk concluded that this loss “strikes at the heart of Indian communities and has been called cultural genocide.”<sup>20</sup>

These observations were a driving force behind the Congressional passage of the Indian Child Welfare Act (ICWA) in 1978.<sup>21</sup> The ICWA confirmed the need for greater protections for Indian children and the preservation of Indian culture. The United States Congress found

*...an alarmingly high percentage of Indian families are broken up by the removal, often unwarranted, of their children from them by nontribal public and private agencies and that an alarmingly high percentage of such children are placed in non-Indian foster and adoptive homes and institutions.*<sup>22</sup>

The ICWA imposed upon state child welfare practices substantive and procedural requirements which state courts must follow. Most notably, the ICWA answered the question, “What is in an Indian child’s best interest?”

The ICWA answered that state courts must now give primary consideration to the placement of Indian children with their extended families and tribal communities.<sup>23</sup> Additionally, the ICWA requires state courts to recognize tribal authority and jurisdiction over tribal children. The law has made it more difficult for the state governments to remove Indian children from their homes and more difficult to adopt Indian children outside of their tribes.<sup>24</sup> Further, the ICWA identified the best interests of Indian children as being served by protecting “the rights of the...child as an Indian.”<sup>25</sup> The United States Supreme Court confirmed the ICWA’s placement priority, calling it “the most important substantive requirement imposed on state courts.”<sup>26</sup>

Years later, some child welfare leaders came to accept the ICWA. In 2001.

The Director of the CWLA, Shay Bilchik, apologized for the CWLA’s role in the Indian Adoption Project and ARENA stating, “No matter how well intentioned and how squarely in the mainstream this was at the time, it was wrong; it was hurtful; and it reflected a kind of bias that surfaces feelings of shame, as we look back with the 20/20 vision of hindsight.”<sup>27</sup>

## Looking Ahead

The ICWA’s passage and the apology from child welfare leaders still seem insufficient in light of the attacks on the ICWA.<sup>28</sup> The high numbers of Indian children removed from home and placed with non-Indian families or in congregate care remains high, and implementation of the ICWA is spotty.<sup>29</sup> More needs to be done to make the ICWA an effective legal protection for Indian children and the preservation of their culture.

State court compliance with the ICWA has been difficult to achieve. Some state courts still resist following the ICWA. Even when trial courts attempt to follow the law, compliance is challenging. The law is complex and must be studied carefully to understand it correctly. Trial judges may see only one case involving the ICWA in a year. Judicial trainings on the ICWA can be effective, but these trainings have to compete with all of the other subject matter judges must keep pace with including criminal, civil, probate, and juvenile law. As a result most judicial training conferences around the country do not include sessions on the ICWA. Appellate case law reveals that substantial numbers of trial court decisions involving the ICWA are reversed. For example, the California appellate courts reversed hundreds of cases involving the ICWA just on the issue of notice to the tribes.<sup>30</sup>

More importantly, we must all resist the temptation to assimilate Native American people in our mistaken belief that the best interests of these children is to be placed with non-Native American families. We must accept that Native Americans have a different culture, one that is neither better nor worse than ours. We need to respect that culture and the Native American way of living. Respect comes with the acknowledgment that other cultures have different ways of living and that those ways comprise their identity as a people. This means we must not assume that we can “save them” from a life style that is different, but not necessarily better nor worse than our own. The Indian baby may seem like a “blank slate” that any family can rear, but this belief is simply inaccurate. Biological research confirms that much of the newborn’s characteristics and behavior are heritable.<sup>31</sup> The “blank slate” belief is not only incorrect, but it is short-sighted and does not acknowledge a person’s need to identify with his or her people and culture. Many human beings want to know with whom they share their DNA and will search for those persons throughout their life. As one adopted Indian adult stated:

*We were brought up without our culture, which took a terrible toll on our lives. I grew up angry and miserable.*<sup>32</sup>

One Cherokee Indian described Native adoptees as suffering from what she called Split Feather Syndrome — the damage caused by loss of tribal identity and growing up “different” in an inhospitable world.<sup>33</sup> She continued to describe the stories of adoptees lives:

*Even in loving families, Native adoptees live without a sense of who they are. Love doesn’t provide identity.*<sup>34</sup>

Starting with a foundation of respect, specific steps should be taken. First, judicial educators must introduce and train judges in the new federal ICWA regulations published on June 14, 2016.<sup>35</sup> These comprehensive regulations received over 2,100 comments from

child welfare and other experts from around the country prior to their issuance, an extraordinarily high response. The comments resulted in modification of some of the Guidelines issued by the Bureau of Indian Affairs in 2015.<sup>36</sup> They clarify ambiguities in the ICWA and confirm the original intent of Congress. For example, the regulations state that the Existing Indian Family Exception doctrine, a judicial attempt to circumvent the ICWA, is not the law.<sup>37</sup> Second, judges should appoint counsel to represent tribal interests in cases involving the ICWA. Counsel will be able to ensure that the tribal interests will be effectively presented in court proceedings and that the ICWA is followed.<sup>38</sup> Third, each state must continue to expend significant time and energy to implement the ICWA. State efforts should include reaching out to work with tribal courts, including ICWA trainings at judicial education institutes, and collaborating with tribal leaders on legal issues that involve both state and tribal courts. Examples of these efforts include the State Court-Tribal Court Forums in California, South Dakota, Wisconsin, Arizona and other states.<sup>39</sup>

Fourth, continuing education leaders working with the bar should require that attorneys receive training in the ICWA. They can do this by ensuring that workshops on the ICWA are a part of legal symposiums and including issues regarding the ICWA on state bar examinations. Fifth, Indian leaders and others should meet with media representatives and carefully explain the history of the ICWA and why it should be followed in court proceedings. This exchange will give media representatives the context they should include in any article regarding cases involving the ICWA.

It makes sense to start with the legal system.

Justice is fundamental to our ideals and our way of life in the United States. State and tribal courts should work cooperatively to provide the best possible justice for persons who appear in one or both court systems.

State courts must respect the valid orders that tribal courts issue just as tribal courts should respect valid state court orders. Judicial leadership will be critical if these goals are to be accomplished. Agencies in the justice system should work collaboratively to ensure justice for all persons. Tribal and state law enforcement agencies, prosecutors, probation officers, defense counsel, and court clerical staff should create and maintain a seamless criminal justice system that both protects children, their families, and communities, and provides justice to all. Child welfare workers whether working for the state or local government should partner with tribal social workers to ensure that children are protected and families are provided with needed services to protect children and preserve families. All of this can be accomplished if we overcome the temptation to try to

“save” children living in a different culture and, instead, work together collaboratively to improve outcomes for all children within their own cultures.

So, should Indian children be treated differently than other children? Given the history of Indian children in the United States and the trust relationship promised to them by the United States government, the answer is Yes. Congress has passed the ICWA and other laws and signed treaties indicating that Indian children must be protected. Drawing upon a remarkably large number of comments, the new regulations affirm and clarify the intent of Congress when it wrote the ICWA. It now becomes our task to ensure that Indian children receive the special treatment they deserve.

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1. See Cohen, Marie, “ICWA Puts Tribes’ Interests Ahead of Children’s” *The Chronicle of Social Change*, May 10, 2016;
  2. A.D. v Washburn, a federal action led on July 6, 2015, by the Goldwater Institute in Arizona; National Council for Adoption v Jewel, Virginia litigation; Doe v Jensen, Minnesota litigation; Doe v Pruitt, Oklahoma litigation; C.E.S. v Nelson, Michigan litigation. See ICWA Defense Project Memorandum, June 25, 2016; <https://turtletalk.files.wordpress.com/2015/08/2016-06-24-icwa-defense-project-memo-updated.pdf>. This argument ignores the fact that Indian tribes are sovereign nations and that the ICWA protects the citizens of their nation.
  3. Oglala Sioux Tribe v Luann Van Hunnik, in Pennington County, South Dakota, No. CIV. 13–5020–JLV.
  4. Adoptive Couple v. Baby Girl, 570 U.S. \_\_\_\_ ; 133 S. Ct. 2552; (2013).
  5. The Exception was created to avoid compliance with ICWA. See for example, Rye v. Weasel, 934 S.W.2d 257 (Ky. 1996). Most states have rejected this doctrine. See Administrative Office of the Courts, Judicial Council of California, *Bench Handbook: The Indian Child Welfare Act*, (Revised 2013), at pp. 6-7.
  6. Cohen, op.cit., footnote 1.
  7. The Baby Veronica and Baby Alexandria cases are but two of these. Weber, C., “A California family appealed to the state’s highest court Tuesday in the fight for a 6-year-old foster child who was removed from their home after a court ruled that her 1/64th Native American bloodline requires her to live with relatives in Utah,” Associated Press, March 22, 2016.
  8. <http://www.ncjfcj.org/sites/default/files/Disproportionality%20Rates%20for%20Children%20of%20Color%20in%20Foster%20Care%202013.pdf>; [https://www.childwelfare.gov/pubPDFs/racial\\_disproportionality.pdf](https://www.childwelfare.gov/pubPDFs/racial_disproportionality.pdf); <http://fosteringtogether.org/wp-content/uploads/2013/02/ICWA-Current-Stats-for-WA-State-1.pdf>; [http://newscenter.sdsu.edu/education/csp/les/04541-FY\\_Disproportionality\\_Native\\_Amer.pdf](http://newscenter.sdsu.edu/education/csp/les/04541-FY_Disproportionality_Native_Amer.pdf)
  9. Thomas, J., (concurring), Adoptive Couple v. Baby Girl, 133 S. Ct. 2552 (2013)
  10. Fletcher, M., & Singel, W., “Indian Children and the Federal-Tribal Trust Relationship,” Available at SSRN: <http://ssrn.com/abstract=2772139>
  11. Worcester v Georgia, 31 U.S. 515 (55-556, 560-61 (1832); Morton v Mancari, 417 U.S. 535 (1974).
  12. This protection was repeatedly spelled out in treaties throughout the early days of the nation. See Fletcher, M. & Singel, W., Op.Cit., footnote 10 at pp. 6-37.
  13. For a historical summary of the ways in which the federal, state and local governments treated Indian Children during the latter half of the 19th Century and the 20th Century, see Fletcher, M. & Singel, W. Id. at pp. 38-60. See also *The Destruction of American Indian Families*, Association on American Indian Affairs, Inc., New York, N.Y., 1977.

14. Id.

15. “Final regulations to strengthen implementation of the Indian Child Welfare Act issued,” *Char-Koosta News*, June 16, 2016; [http://www.charkoosta.com/2016/2016\\_06\\_16/Regs\\_strengthen\\_ICWA.html](http://www.charkoosta.com/2016/2016_06_16/Regs_strengthen_ICWA.html)

16. Testimony of the National Indian Child Welfare Association Regarding Proposed Amendments to the Indian Child Welfare Act: S. 569 and H.R. 1082, June 18, 1997.

17. Woodard, Stephanie, “Native Americans Expose the Adoption Era and Repair Its Devastation” *Indian Country*, 12/6/11. 18. Id. at p. 2.

18. Id. at p. 2.

19. *The Destruction of American Indian Families*, Association on American Indian Affairs, Inc., New York, N.Y., 1977.

20. “Indian Child Welfare Program”, Hearings before the Subcommittee on Indian Affairs, Committee on Interior and Insular Affairs, United States Senate, 95th Cong., 2d Sess. (April 8-9, 1974) at 3.

21. 25 U.S.C. §§ 1901 et seq.

22. Id. § 1901.

23. Id. § 1915.

24. 25 U.S.C. §§ 1912(d) & (f).

25. 25 U.S.C. § 1902. Congressional declaration of policy. The Congress hereby declares that it is the policy of this Nation to protect the best interests of Indian children and to promote the stability and security of Indian tribes and families by the establishment of minimum Federal standards for the removal of Indian children from their families and the placement of such children in foster or adoptive homes which will reflect the unique values of Indian culture, and by providing for assistance to Indian tribes in the operation of child and family service programs.

26. *Mississippi Band of Choctaw Indians v Holyeld*, 490 U.S. 30 (1989) at p.36.

27. Quoted in “Understanding The Indian Child Welfare Act,” The ICWA LAW CENTER, <http://www.icwlc.org/education-hub/understanding-the-ICWA/>

28. The pending case, *Oglala Sioux Tribe v Luann Van Hunnik*, in Pennington County, South Dakota op.cit. footnote 3, is but one example. In that case the federal court held that the state court violated federal law, state law, and numerous standard civil proceedings by holding hearings which cursorily deprived Indian parents of their rights and removed thousands of Indian children from their homes in order to place them in white foster homes. [http://rapidcityjournal.com/news/local/local-native-child-case-may-be-bound-for-supreme-court/article\\_55940298-a5f8-580a-aa94-7f3e3502923e.html](http://rapidcityjournal.com/news/local/local-native-child-case-may-be-bound-for-supreme-court/article_55940298-a5f8-580a-aa94-7f3e3502923e.html)

29. See, for example, *Oglala Sioux Tribe v Luann Van Hunnik*, Id. and the disproportionate data cited in footnote 8.

30. Bench Handbook *The Indian Child Welfare Act*, California Administrative Office of the Courts, 2013, pp 14-18.

31. Mukherjee, S., *The Gene: An Intimate History*, Scribner, New York, 2016, at pp. 128, 298-300, 405-406, 485.

32. Op.cit., footnote 17, at p.1.

33. Id. p.2

34. Id.

35. 25 CFR Part 23, Indian Child Welfare Act Proceedings; Final Rule, *Federal Register*, Vol. 81, No. 114, June 14, 2016, at pp. 38777 – 38876.

36. Guidelines for State Courts and Agencies in Indian Child Custody Proceedings; Federal Register / Vol. 80, No. 37 / Wednesday, February 25, 2015.
37. Op.Cit. footnote 35 at pp. 38801-38802.
38. Houston, W., "Report states tribal child custody laws neglected on statewide level," Eureka Times-Standard, 6/27/16; <http://www.times-standard.com/general-news/20160627/report-states-tribal-child-custody-laws-neglected-on-statewide-level> (last accessed on June 28, 2016).
39. <https://www.azcourts.gov/stfcf/>; Center for Families, Children & the Courts, Operations & Services, [forum@jud.ca.gov](mailto:forum@jud.ca.gov); [http://www.tribal-institute.org/WOCG/tribal\\_courtstate\\_court\\_forums.htm](http://www.tribal-institute.org/WOCG/tribal_courtstate_court_forums.htm); <https://www.wicourts.gov/courts/committees/tribal.htm>; see also <http://WalkingOnCommonGround.org>