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Cass Lake, Minnesota • December 2013

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RECENT HIGH COURT'S DECISION HAS IMMEDIATE CONSEQUENCES FOR NATIVE AMERICAN FAMILIES

By Daniel Morris

On June 25, 2013, The United States Supreme Court issued a final opinion regarding "Baby Veronica" and the Indian Child Welfare Act of 1978; only the second case before the high court since the Act's ratification. This decision already has far-reaching adverse consequences for Native Americans across the country, and especially fathers of Native American children.

The Indian Child Welfare Act of 1978 ("ICWA") was passed in response to the removal and placement of increasing numbers of Native American children into non-Native foster homes, and the mass removal of children and placement in boarding houses meant to assimilate children into "mainstream" American culture. ICWA addressed this crisis head-on, creating federal standards that all states must abide by during child custody proceedings, including the level of services that must be provided to Indian families to reunify and establishing placement preferences for relatives and Native foster homes for Native American foster children.

"Baby" Veronica was born in September of 2009 in Oklahoma and is a member of the Cherokee Nation. Dusten Brown, biological father of Baby Veronica and a member of the Cherokee Nation, was engaged to be married to Veronica's birth mother, not a member of any federally recognized Native American Tribe. Once they found out that she was pregnant, Mr. Brown pressed the mother to marry him, but the relationship soured and the mother cut off all communication with Mr. Brown. Veronica's birth mother asked Mr. Brown if he would relinquish his parental rights, and thinking that she was going to raise Baby Veronica, Mr. Brown agreed to do so by responding through text message (which was later ruled inadmissible by the Court).

Veronica's birth mother then put Veronica up for adoption through a private agency, and handpicked a non-Native

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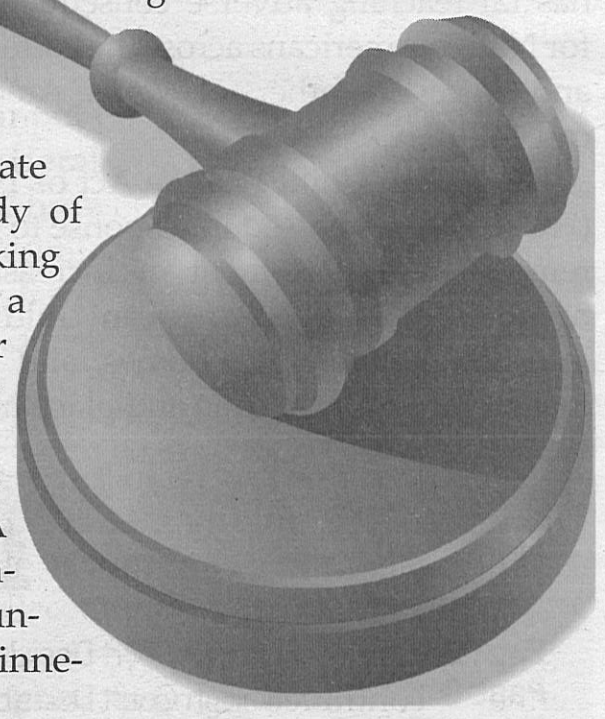
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Brown found out about the adoption within months of Veronica's birth, and objected to the adoption prior to its finalization. Mr. Brown invoked the ICWA, and the Cherokee Nation intervened as a necessary party, as Baby Veronica was a Cherokee member. Every level of the South Carolina court system agreed with Mr. Brown—that the protections of the ICWA applied and Mr. Brown's parental rights could not be terminated. If South Carolina law applied, Mr. Brown would lose his parental rights but the added protections afforded by the ICWA, a federal law, prevent that from happening. Baby Veronica was returned to Mr. Brown at the end of 2011. The Capobiancos appealed to the United States Supreme Court, who issued its ruling in June of 2013. The U.S. Supreme Court determined that the ICWA did not apply to Dusten Brown, a member of the Cherokee Nation, and that the adoption could go forward. The Court based its decision on very specific and technical portions of the ICWA, but it has wide reaching effects to Native American parents across the country.

First, the court found that Section 1912(f) of the ICWA does not apply to Dusten Brown, as he never had custody of Veronica under South Carolina law. Section 1912(f) states that "no termination of parental rights may be ordered…in the absence of a determination…that the continued custody of the child by the parent or Indian custodian is likely to result in serious emotional or physical damage to the child." The lower courts ruled that this applied to Dusten Brown, and that the adoptive parents could not move forward with the adoption, since they could not prove that if Mr. Brown had custody of Baby Veronica, that it would result in serious emotional or physical damage. The Supreme Court determined that Mr. Brown never had physical or legal custody under South Carolina law and therefore couldn't have "continued custody" if he never had custody in the first place, so the adoptive parents did not need to worry about this section of the ICWA and the adoption could proceed. The Supreme Court held that the ICWA was only meant to protect intact Native families. As a result of this decision, all Native American parents must establish custody immediately after a child's birth under the local laws of the tribe or the state in which they reside.

Under the laws of the Leech L ake Band of Ojibwe and the state of Minnesota, if two biological parents to a child are not married at the time of conception or birth of a joint child, the mother automatically has sole legal and physical custody of the child. A biological father may sign a Recognition of Parentage form at the birth of the child, or later obtain a genetic test establishing paternity, but this is only half of the battle. Once paternity is established, a father must file a petition in a tribal or state court requesting custody of the child. Without taking the next step of filing a custody action in either Tribal Court or District Court, the biological father does not enjoy the protections of the ICWA that the biological mother automatically does under Leech Lake and Minnesota law.



The ICWA Section 1912(d) also requires "any party seeking a…termination of parental rights to an Indian child… shall satisfy the court that active efforts have been made to provide remedial services and rehabilitative programs designed to prevent the breakup of the Indian family, and that these efforts have proved unsuccessful." The Supreme Court looked at the specific language of "breakup of the Indian family" and again determined that this added protection only applied to existing Indian families; because Mr. Brown never had legal or physical custody under South Carolina law, this section did not apply to him and was not given any remedial services before taking his child from him.

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Finally, the ICWA Section 1915(a) provides for placement preferences of Indian children. "In any adoptive placement of an Indian child, preference should be made to placement with (1) a member of the child's extended family; (2) other members of the Indian child's tribe; or (3) other Indian families." The Capobiancos are non-Native and do not fit within any of the placement preferences. Here the Supreme Court said placement preferences only come into play when competing petitions to adopt are filed. As the Capobiancos were the only party to file an adoption petition, there was no need to look at relatives. If there were relatives or a member of the Cherokee Nation that filed an adoption petition, then the placement preferences apply.

There are several ways for the Supreme Court decision to be tempered. The most certain yet difficult option, based on the political climate and priorities of the body, is for the U.S. Congress to amend the Indian Child Welfare Act to further define "continuedcustody" and "breakup of the Indian family" to include Native American fathers who have not established custody under local laws. The Supreme Court interpreted the ICWA the way they wanted to, and a way to counter that is to further define and correct the decision in the law itself to correct the interpretations. Another difficult but effective fix would be for the state of Minnesota and each tribal government to amend their laws and grant Native American fathers some level of immediate legal custody upon a showing of paternity, whether it be a validly executed recognition of parentage document, a genetic test, or some other standard. This grant of custody could be limited solely to fulfill the standards set forth by the U.S. Supreme Court in the Baby Veronica decision in order to grant biological fathers the added protections of the ICWA.

Legislative change is slow and difficult to achieve. The quickest and most assured way to prevent something like this from happening is for each biological father to establish custody according to the local laws. This can be done immediately. Again, establishing paternity only gets your foot in the door, one still needs to file a petition in tribal court or state court requesting establishment of custody. Relatives and other Native American homes wishing to be a permanency placement for Native American children must now file competing custody or adoption petitions with the court hearing the case in order to be considered under the placement preferences of the ICWA.

The most disturbing aspect of the Supreme Court's decision is that it ignores the clear intent of the ICWA, and the language included in the law itself, found in section 1901(4), "that 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." Unfortunately, what Congress sought to end is exactly the situation that occurred here. Baby Veronica, a member of an Indian tribe, was removed from a fit Native American parent by a private adoption agency and placed with the Capobiancos, a non-Indian adoptive home. It is hard to understand how the Supreme Court could look at that fact scenario and find that the ICWA is not applicable to Mr. Brown and that he is not afforded those protections.

After the decision was handed down in July, the case was sent back to the South Carolina courts which immediately approved the adoption without a hearing to determine Baby Veronica's best interests. After exhausting all legal remedies in Oklahoma and the Cherokee tribal courts, Dusten Brown was forced to turn over his daughter to the Capobiancos at the end of September, 2013. Baby Veronica had spent the previous two years in the care of her father without incident.

Special Education Protections under Section 504 of the Rehabilitation Act of 1973

By Cody Nelson

Section 504 of the Rehabilitation Act of 1973 is a federal civil rights statute enforced by the Department of Education's Office for Civil Rights. Section 504 was enacted to ensure that students with disabilities have equal access to education and that schools meet the needs of students with disabilities as adequately as the needs of non-disabled students. Section 504 applies to all schools that receive federal funds, and therefore applies to the majority of non-public schools as well as to all public schools.



Section 504 states that, "No otherwise qualified individual with a disability in the United States, as defined in Section 706(8) of this title, shall, solely by reason of her or his disability, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance." (29 U.S.C. 794(a)). Consequently, to apply for 504 protections and services, a student must be "qualified" and be an "individual with a disability."

As defined by federal law, "An individual with a disability means any person who: (i) has a mental or physical impairment that substantially limits one or more major life activity, (ii) has a record or such an impairment; or (iii) is regarded as having such an impairment." (34 C.F.R. 104.3(j)(1)).

The question of whether a student has a physical or mental impairment that substantially limits a major life activity is determined from the basis of an individual inquiry. The regulatory provisions do not provide an exhaustive list of impairments that lead to qualification under 504. It does provide some limited guidance in defining a physical or mental impairment as, "any physiological disorder or condition, cosmetic disfigurement, or anatomical loss affecting one or more of the following body systems: neurological; musculoskeletal; special sense organs; re

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Special Education Protections under Section 504

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spiratory, including speech organs; cardiovascular; reproductive; digestive; genitor-urinary; hemic and lymphatic; skin; endocrine; or any mental or psychological disorder, such as intellectual disability, organic brain syndrome, emotional or mental illness, and specific learning disabilities."

Finally, to qualify the impairment must "substantially limit one or more major life activity." Like with impairments, there is no exhaustive list defining major life activities. Some activities listed as examples include "caring for one's self, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning and working." Further identified activities include "eating, sleeping, standing, lifting, bending, reading, concentrating, thinking, and communicating." Finally, Congress has also included certain "major bodily functions" as major life activities, providing another non-exhaustive list that includes "functions of the immune system, normal cell growth, digestive, bowel, bladder, neurological, brain, respiratory, circulatory, endocrine and reproductive functions." (above information taken from The National Dissemination Center for Children with Disabilities, http://nichcy.org/laws/section504 and great schools, http://www.greatschools.org/special-education/legal-rights/868-section-504.gs).

Each school district is required to appoint a Section 504 coordinator to assist parents, children and the school in determining eligibility. The decision must be made by a group of people including individuals that know the child, who can provide additional context to the evaluations and provide additional information regarding necessary services.

A non-exhaustive list of services available under Section 504 include providing qualified students additional time for homework, class work and tests, grading based on individual progress or effort, test retakes, use of a calculator, frequent breaks, assistance with mobility around the school, and Behavior Intervention Plans (above information taken from the Children's Law Center of Massachusetts, http://www.clcm.org/ed504plans.html).

Finally, it is important to note that Section 504 is separate and distinct from the Individuals with Disabilities Education Act (IDEA), which may provide additional services and protections for students with disabilities. While there are similarities between the two federal laws, there are many significant differences. This article is intended only as an introduction and very broad overview of Section 504, if you feel your child may qualify for services under Section 504, it is highly advisable to contact the Section 504 coordinator at your child's school to begin the Request for Section 504 Review process. Issues and concerns may also be brought to the attention of the Department of Education, Office of Civil Rights, for your state.

Sixth Amendment Right to Counsel and Implications of Tribal Court Convictions

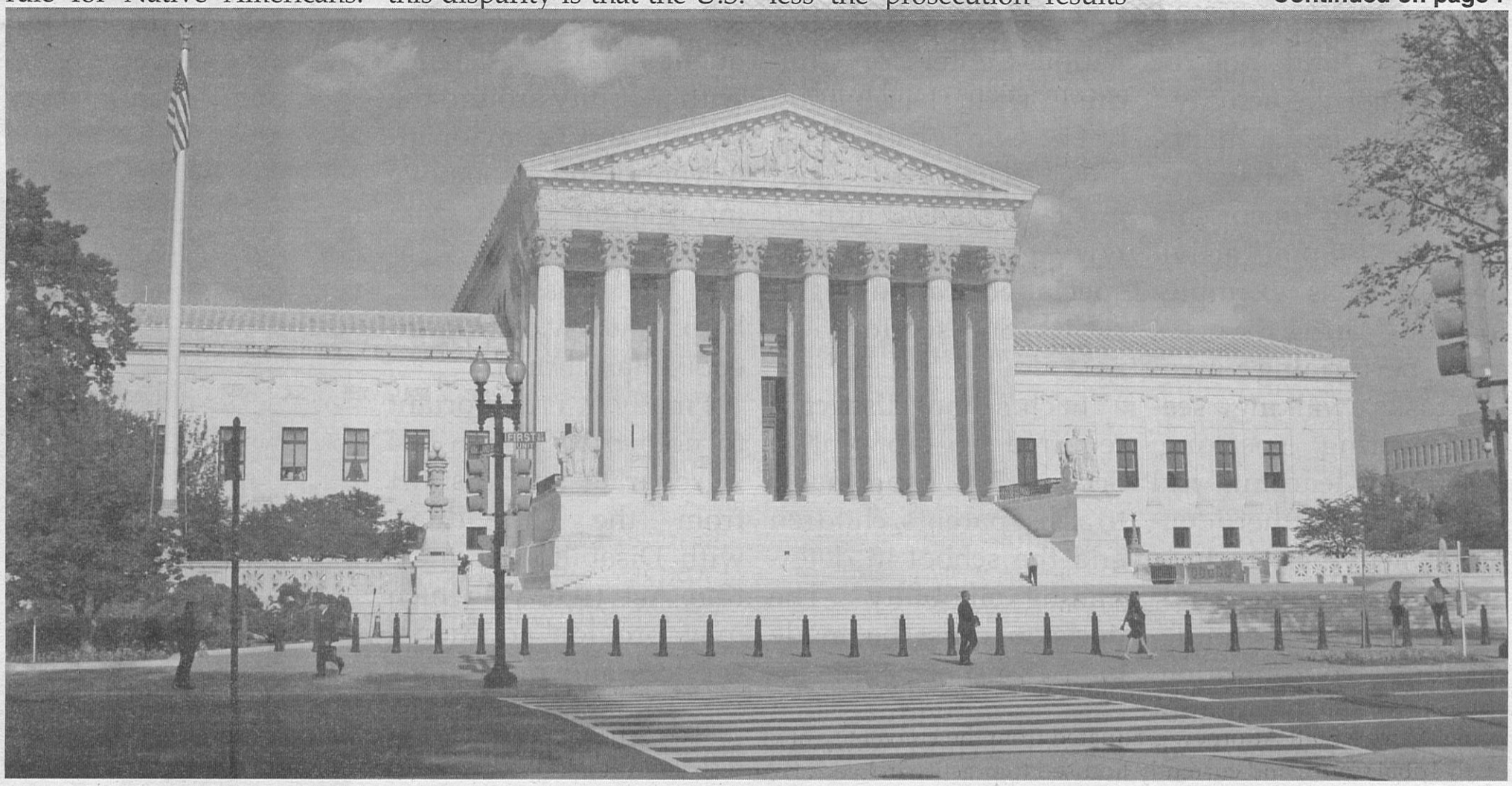
By Christopher Allery

In 1967, the United States Supreme Court in Burgett v. Texas, 389 U.S. 109 held that a prior conviction cannot be used to enhance a defendant's sentence under a repeat offender statute if the prior conviction was obtained in violation of the defendant's constitutional right to counsel. Unfortunately, there is a loophole in the Burgett rule for Native Americans: the Sixth Amendment right to counsel applies to proceedings in federal and state courts but not tribal courts.

If a previous conviction in tribal court does not violate the United States Constitution, it may arguably fall outside the Burgett prohibition and be used against the defendant in a later federal case. The primary reason for this disparity is that the U.S. Constitution, and its various protections for defendants, does not apply to federally recognized Indian tribes as sovereign entities. The Indian Civil Rights Act (ICRA) does apply to tribes but this does not necessarily mean the defendant appearing in tribal court would be entitled to counsel according to the ICRA, 25 U.S.C. §§ 1302. Unless the prosecution results in a term of imprisonment greater than one year, it does not require tribal courts to provide counsel for indigent criminal defendants.

The Eighth Circuit Court held in United States v. Cavanaugh, 643 F.3d 592, 593 (8th Cir. 2011) that uncounseled tribal court convictions could be used against a defendant in federal court for the pur-

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a defendant under a habitual offender statute. In discussing the District Court's reasoning, the Cavanaugh Court stated: "The court also noted



at some length the shortcomings of tribal justice systems caused by a lack of resources, the ongoing lack of resources to overcome these shortcomings, the evolving relationship between federal criminal jurisdiction and tribal jurisdiction, and the changes in the general policies of the United States towards tribal justice systems over the decades. The court ultimately concluded that, although uncounseled tribal misdemeanor convictions could result in actual incarceration in tribal facilities, such incarceration involved no violation of the United States Constitution because the Bill of Rights and the Fourteenth Amendment do not apply to Indian tribes and because the Indian Civil Rights Act does not impose upon tribes a duty to provide counsel for indigent misdemeanor defendants. The court held, nevertheless, that such convictions could not be used in federal courts to prove the elements of a criminal offense because the right to counsel applies in federal courts and because use of such convictions would, essentially, give rise anew to a Sixth Amendment violation by imposing federal punishment, in part, based upon the uncounseled conviction." The Court went on to discuss the validity of the underlying convictions within this context.

The Cavanaugh Court further discussed the right to counsel as it relates to the pre-constitutional and, separately, inherently sovereign status of tribes: "[a]ccordingly, if a tribe elects not to provide for the right to appointed counsel through its own laws, Indian defendants in tribal court have no Constitutional or statutory right to appointed counsel unless sentenced to a term of incarceration greater than one year." In a case of this type in tribal court, unless the tribes' Code provides for defendants to have the right to counsel, indigent defendants who are sentenced to a term of incarceration of less than one year have neither a Constitutional nor a statutory basis for exercising their right to counsel.

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The result, from the relevant line of cases, is that Native Americans are likely the only group of defendants where any prior underlying uncounseled convictions could be used in a federal prosecution of a habitual offender statute where the prior convictions without counsel are used to establish elements of the habitual offender or recidivism statute in question. On the one hand, this shows respect for the tribal justice systems because the federal courts treat these prior uncounseled tribal court convictions with the same reliability as prior federal or state court convictions (under the Constitutional requirements) would be treated. On the other hand, the convictions have been obtained in the absence of counsel and are being used to subject the defendants to prosecution under a habitual offender statute, no doubt with increased penalties as a result of any conviction under such a statute.

There is also the issue, and it is at least related, where some tribes provide lay advocates to defendants but not necessarily licensed attorneys. These advocates are no doubt well versed in how to best proceed within their own tribal court systems, but may not have any idea about the federal or state court consequences, collateral or otherwise, of admissions and convictions in the tribal court. These advocates may be experts at giving legal advice within the tribal court system on their respective reservations but the collateral consequences and hazards outside justice systems may be outside that area of expertise.

In either situation, the defendant may not be properly advised on the consequences of both pleading guilty/being convicted and possible liability under federal statutes escalating charges based on prior conduct including tribal court convictions. There is also some natural tendency for lay advocates and defendants to not take into consideration what happens outside of the tribal jurisdiction in terms of consequences—both because the tribe and federal government are separate entities entirely and because of the uneven nature of federal prosecution in Indian Country. The situation also underscores the need for tribes to provide licensed attorneys providing defense where necessary, preferably in similar situations as the U.S. Constitution would provide for such counsel, or in even more situations.

This is particularly important considering the federal sentencing structure and how it functions in federal criminal cases. There is no shortage of accounts of defendants sentenced to lengthy sentences for conduct that they would have received a much lighter sentence for within the state court system, for example. Federal sentencing, even against the wishes of the judiciary, has trended toward a sentencing structure that employs mandatory minimum sentences for certain offenses, regardless of mitigating factors. When Indian defendants are subjected to this sentencing, along with its non-discretionary minimums and maximums, and that is coupled with convictions that are acquired without the benefit of counsel, the unfairness of such a system is apparent.

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