A RESPONSE TO PROFESSOR BERGER'S 'IN THE NAME OF THE CHILD: RACE, GENDER, AND ECONOMICS IN ADOPTIVE COUPLE V. BABY GIRL'

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In her intriguing article[1] about *Adoptive Couple v. Baby Girl*,[2] Professor Bethany R. Berger argues that the Supreme Court "participated in a long-standing trend of using children to forward racial, gender, and economic agendas that violate the rights of their birth parents and, ultimately the interests of the children themselves."[3] On the one hand, she delivers an astute critique of the holdings and reasoning of *Adoptive Couple*, pointing out the Court's missteps in interpreting the Indian Child Welfare Act of 1978 (ICWA).[4] While I might have approached the analysis slightly differently, I agree with her core arguments and share her concern that the Court's decision will undermine enforcement of ICWA.

On the other hand, Professor Berger also uses the case as a vehicle to explore adoption and child welfare policies more generally, policies she sees as deeply classist and racist. She provides a damning analysis of the economics and class bias of the American child welfare system and the "adoption industry."[5] While her arguments are provocative, she necessarily skims over complexities when she characterizes such varied targets as Supreme Court case law, the Adoption and Safe Families Act[6], and the Uniform Parentage Act as the result of an over-arching class bias against unmarried mothers and fathers. As her broader critique strays rather far from the issues in *Adoptive Couple,* my comments will focus on her extremely perceptive analysis of the case itself.

The central contribution of Professor Berger's article is its careful dismantling of Justice Alito's majority opinion from a federal Indian law perspective. She shows that Justice Alito's emphasis on Baby Veronica's blood quantum[7]—an emphasis that sets a tone of skepticism and disrespect for the child's Cherokee heritage—disregards the cultural and political meaning of tribal membership.[8] She also demonstrates why the Court's interpretations of 25 USC § 1912(d) and (f) are inconsistent with the

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1. Bethany R. Berger, *In the Name of the Child: Race, Gender, and Economics in* Adoptive Couple v. Baby Girl, 67 FLA. L. REV. 295 (2015).

2. 133 S. Ct. 2552 (2013).

3. Berger, *supra* note 1, at 297.

4. 25 U.S.C. §§ 1901–63.

5. *See* Berger, *supra* note 1, at 336–62. Curiously, Professor Berger does not address the continued over-representation of Native youth in foster care or the pressing need for tribal foster homes, topics that would have related more directly to ICWA.

6. Pub. L. No. 105–89 (1997), 111 Stat. 2115 (codified at 42 U.S.C. § 670 (2012)).

7. *Adoptive Couple*, 133 S. Ct. at 2556 (noting that Baby Girl was 3/256 Cherokee).

8. Berger, *supra* note 1, at 325–36.

overall design of the Act and may lead lower courts to find ICWA inapplicable in situations where Congress surely intended the Act to operate.[9] In holding that the biological father, Dusten Brown, was not entitled to ICWA's procedural safeguards before his parental rights could be terminated, the majority may have opened the door for lower courts to deny ICWA's protections to parents whenever they have not exercised physical or legal custody of the child. As Professor Berger predicts, the ambiguity in the Court's holding has proved problematic already.[10]

Similarly, Professor Berger explains the flaws in the Court's ill-considered holding under § 1915.[11] As she notes, the majority's approach distorts the realities of Indian child welfare practice. The placement preferences have been widely understood to impose a duty on state child welfare officials to search for suitable ICWA-compliant placements.[12] Justice Alito's majority opinion, however, turns this relationship on its head. Under his formulation, the adoptive placement preferences don't apply at all if no formal alternative petition to adopt has been filed. The majority's interpretation effectively eliminates the placement preferences for private adoptions following a voluntary relinquishment–when an alternative adoption petition would be atypical, to say the least.

Professor Berger, however, does not address another danger inherent in the Court's § 1915 holding. If applied to *involuntary* child welfare proceedings, the holding threatens to seriously undermine the effectiveness of ICWA. In a recent decision from the Alaska Supreme Court, the risks inherent in *Adoptive Couple'*s broad § 1915 holding were demonstrated. In *Native Village of Tununak v. State Department of Health & Social Services*, the court applied Justice Alito's reasoning to a case that arose not as a private adoption but within the child welfare system. [13] The court held that the proposed adoption of a Native child by his Anglo foster parents could go forward without the necessary finding of good cause under ICWA because no other formal adoption petition had been filed.[14] In that case the child's maternal grandmother had taken only informal steps to request that she be allowed to adopt but had not filed a formal petition.[15] As noted by

9. *Id*. at 310–16.

10. *See, e.g*., *In re* Alexandria P. v. J.E., 228 Cal. App. 4th 1322, 1344–45 (2d Dist. Ct. App. 2014) (noting ambiguity in *Adoptive Couple* as to whether a father without custody is entitled to the protections of § 1912 but holding that § 1912 was applicable where father had exercised visitation).

11. Berger, *supra* note 1, at 316–18.

12. *See* Guidelines for State Courts; Indian Child Custody Proceedings, 44 Fed. Reg. 67584, 67594 (1979). The recently revised State Court Guidelines significantly strengthen that policy. *See* Guidelines for State Courts and Agencies in Indian Child Custody Proceedings, 80 Fed. Reg. 10146-02, 10157 (2015) (detailing the requirement that state agencies conduct diligent search to seek out and identify placement options).

13. 334 P.3d 165, 166 (Ak. 2014).

14. *Id.* at 168.

15. *Id.* at 182–83.

the dissent, in rural Alaska where villages are remote and legal representation is nonexistent, the requirement that a formal adoption petition be filed may mean that potential ICWA placements will go undiscovered.[16]

My understanding of *Adoptive Couple* does differ from that of Professor Berger in one respect. She portrays Dusten Brown as a fit and loving father who was thwarted by the birth mother and the prospective adoptive parents in his persistent efforts to parent his infant daughter.[17] In her view, the Supreme Court misstated the facts and wrongly characterized the father. The family court findings, however, formed the basis of the record, and those findings clearly indicate that Brown, until he learned of the planned adoption, was at least ambivalent about his own parenting responsibility. As found by the family court, even though Brown knew of the approximate due date for the child, "he never offered to send [birth mother] money to assist with her expenses or for the prenatal care of his unborn child. Prior to being served with the adoption action, he took no proactive steps to protect his parental rights to the child."[18] As noted by the South Carolina Supreme Court, "While Father testified his post-breakup attempts to call and text message Mother went unanswered, it appears from the Record Father did not make any meaningful attempts to contact her. It is undisputed that . . . Father did not support Mother financially for pregnancy related expenses, even though he had the ability to provide some degree of financial assistance to Mother."[19] Thus, while I agree with Professor Berger that Justice Alito's terminology of "abandonment" was unwarranted, Brown's conduct and declarations were not that of a father steadfastly trying to affirm his relationship with his child.

This is more than a factual quibble about the record before the Supreme Court. As recognized by Justice Sotomayor in her dissent, the protections of ICWA must extend to parents of Native children even when those parents fail to live up to an abstract ideal of parenting.[20] Indeed, Congress was aware that the destruction of Native families and tribes by longstanding governmental policies might have damaged one's very commitment to parenting.[21] For that reason, Congress ensured that states

16. *Id*. at 182 (Winfree, J., dissenting).

17. Berger, *supra* note 1, at 301–10.

18. Final Order at 3, Adoptive Couple v. Baby Girl, 133 S. Ct. 2552 (2013) (No. 2009-DR-10-3803).

19. Adoptive Couple v. Baby Girl, 731 S.E.2d 550, 553 (S.C. 2012), *rev'd*, 133 S. Ct. 2552 (2013).

20. Adoptive Couple v. Baby Girl, 133 S. Ct. at 2584 (Sotomayor, J., dissenting) ("Even happy families do not always fit the custodial-parent mold for which the majority would reserve ICWA's substantive protections; unhappy families all too often do not. They are families nonetheless.")

21. *See* H.R. Rep. 95-1386, 1978 U.S.C.A.N 7530, 7534 (heightened procedural protections in ICWA are necessary, in part, because of demoralizing impact on parents of past governmental policies that destroyed families and communities).

could not terminate the rights of parents of Native children without complying with heightened procedural protections. In *Adoptive Couple*, the father initially vacillated in his commitment to his child. Once he learned of the proposed adoption, on the other hand, he was unwavering. At that point, the heightened burden of proof and other procedural protections of ICWA should have operated full-force to preserve his parental relationship with his child. In short, by portraying the father as an almost ideal father, Professor Berger misses the opportunity to make a deeper point about the toll of destructive policies on Native families, the reality of intergenerational trauma, and the essential role of ICWA.