

## Possessive Investment: Indian Removals and the Affective Entitlements of Whiteness

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In its decision on *Adoptive Couple v. Baby Girl* (the “Baby Veronica” case) on June 25, 2013, the United States Supreme Court effectively granted custody of an almost four-year-old child to adoptive white parents over the opposition of her Cherokee birth father and the Cherokee Nation. Delivering the majority opinion, Justice Samuel Alito opened by insisting, “This case is about a little girl (Baby Girl) who is classified as an Indian because she is 1.2% (3/256) Cherokee.”<sup>1</sup> The implication that tribal authority is inordinately based on a suspect racial claim is striking because, in part, the child’s Cherokee citizenship was not in question, and the tribe’s membership criteria are based on descent and not blood quantum. Alito’s focus on the calculated fraction of “Indian blood” is an attempt to misconstrue the political relation of Cherokee citizenship as if it was a matter of race. The majority opinion held that the 1978 Indian Child Welfare Act’s (ICWA) protections against the “breakup of the Indian family” were abrogated when, as Alito put it, the father “abandoned the Indian child before birth and never had custody of the child.”<sup>2</sup> In what follows, I argue that *Adoptive Couple*, and the protracted legal and jurisdictional struggles in its wake, has much to do with the reassertion of white heteronormative rights to possess and to deny culpability for the ongoing consequences of colonization and multiple forms of racial violence in the present moment.

Whiteness in the United States has been historically constituted not only as a form of property but also as the capacity to possess. This capacity to possess has been invested partly through ownership claims to land and people—the proprietary relations of settler colonialism and chattel slavery—and the consequent dispossession that such claims entail. A standard trope of whiteness in the United States since the *de jure* victories of the long civil rights movement is the reversal of injury, a claim of white victimization and the disavowal of contemporary white racial violence and expropriation.<sup>3</sup> The dynamics and

denigrations of racialization are historically specific. The attachments and deployments of white privilege reanimate preceding tropes and repertoires of racialization in ways specific to a particular moment. During the current era of supposed color blindness manifest in what Jodi Melamed theorizes as “neoliberal multiculturalism,” such tropes and repertoires valorize white privilege implicitly by what Lisa Marie Cacho describes as the “differential devaluation of racialized groups.”<sup>4</sup>

Settler common sense today assumes that if there ever was such a thing as US colonialism, it has long since been consigned to the past and does not fundamentally matter in the present.<sup>5</sup> From this perspective, a spectral colonial past persists only insofar as indigeneity remains legible as racial difference. Compounding this professed historical foreclosure, white racial identity is now commonly enacted through the claim that race no longer matters and the fervent insistence that racism persists only as an irrational vestige of a bygone era.

Indians therefore ostensibly vanish twice: first, they are erased as sovereign peoples with rightful claims to the land on which they live or once inhabited, and second, they disappear in the embrace of contemporary multicultural inclusion. In the first instance Euro-American conquest is taken to foreclose the political specificity of indigenous peoples, while in the second the only legible terms of difference are analogous forms of ethnic or racial difference disconnected from particular configurations of power and genealogies of dispossession. It is in this sense that Jodi Byrd argues that “ideas of Indians and Indianness” serve as a “transit” in the self-making of US settler colonialism, where “the Indian is left nowhere and everywhere within the ontological premises through which U.S. empire orients, imagines, and critiques itself.”<sup>6</sup> The problem for settler common sense is, of course, that American Indians continue to be both political entities and living peoples with attachments to place and futurity. Thus, even as antiblack racism continues to play an especially prominent and lethal role in the US racial imaginary, the racialization of indigenous peoples takes on particular significance in the present-day “postracial” articulation of whiteness because of the untimely terms of belonging attributed to indigenous peoples. Whiteness is made to appear unencumbered by the historical weight of racial violence and devaluation through the way in which racialization displaces the specificity and supposedly impossible persistence of indigenous political association.

The majority opinion in *Adoptive Couple v. Baby Girl* casts “race” as the supposedly improper and anachronistic means through which the birth father, Dusten Brown, and the Cherokee Nation sought to challenge the child’s adop-

tion by the Capobiancos. By contrast, the Capobiancos' claim to Veronica was not made in the name of white privilege but substantiated precisely by showcasing the apparently stable, loving, and nurturing family environment afforded by the couple's economic and heteronormative status. I am in no way suggesting that the adoptive couple was necessarily disingenuous in their expressions of love for the child or that adoption is itself a less genuine means of making family. Rather, I am arguing that this case is symptomatic of the far-reaching contemporary work and entanglement of racialization and colonialism in the United States. Thus the Capobiancos' legal counsel contended that the case was "about whether race, and race alone, can convert someone [the birth father] from a complete stranger to the custody proceedings to the person with a virtual guarantee of custody, and whether race, and race alone, can deprive a young girl of an inquiry focused on her best interests."<sup>7</sup> The statements by Alito and the adoptive couple's attorney are reminiscent of efforts by US policymakers and federal agencies to deny or subordinate the political terms of indigenous sovereignty and reject historical treaty rights by subsuming American Indians as racialized "minority" citizens.<sup>8</sup> American Indians—through legislation such as allotment, termination, and the Indian Civil Rights Act of 1968—are rendered an identity category within the United States rather than members of separate nations that negotiated distinct legally binding political and economic agreements in the form of treaties that remain in force. Yet the statements also seek to undermine the protective gains of ICWA by alleging that unconscionable racial preference and "special rights" have been granted to tribal nations. Indeed, much like the recent US legislation that dismantled key provisions of the Voting Rights Act of 1965 by claiming that the racist practices that necessitated the law were now resolved, support for the 2013 Supreme Court ruling suggested that ICWA was outdated, emphasizing that the law was "nearly thirty years old." That neoliberal, color-blind policymaking dismisses both indigenous and African American rights claims as now irrelevantly racial is as much indicative of their mutually constitutive histories as it is of the violence of their conflation and disavowal.

Although litigation over the adoption began in January 2010, it was not until the adoptive couple Matt and Melanie Capobianco were ordered to relinquish custody of Veronica in December 2011 by the South Carolina Supreme Court's decision in favor of Brown and the Cherokee Nation that the case attracted national attention. Anderson Cooper's CNN program *Anderson Cooper 360* began covering the case, and once the Capobiancos appealed the lower court's decision to the US Supreme Court in the fall of 2012, the couple

was featured on the daytime television talk show *Dr. Phil*. With the denial of their adoption petition by the Charleston County Family Court upheld and custody awarded to Brown, the Capobiancos initiated a social media “Save Veronica” campaign in conjunction with friend and publicist Jessica Mundy. Pointedly condemning Brown and inferring that tribal membership was an offensive archaic remnant, the “Save Veronica” website proclaimed in bold text: “Being a parent isn’t a decision that one can just turn off and on and Veronica is not an historical artifact.”<sup>9</sup>

The Capobiancos’ media presence was tremendously successful. Journalists consistently described them as “ideal” parents. Their virtue and innocence was further affirmed by selective representations of the circumstances under which they first adopted Veronica. News accounts depicted the birth mother, Christina Maldonado, as a loving but forsaken mother who put her child up for adoption to ensure a better life for the daughter she could not afford to raise. She appeared as one version of the stereotypical woman of color whose dire predicament was answered by the beneficence of the white adoptive couple. Indeed, Maldonado is repeatedly identified as “predominantly Hispanic,” which was especially important because the baby’s ethnicity is listed as “Hispanic” on interstate transfer forms that allowed the Capobiancos to take her from Oklahoma to South Carolina without triggering the ICWA provisions against removal. It is also significant for characterizing the separation and custody battle between Maldonado and Brown as a conflict between a woman of color and a man with suspect racial claims, since Brown’s Cherokee citizenship was often depicted in the media as questionable. For instance, National Public Radio’s report on the case began by stating, “Christy Maldonado’s ethnic background is Hispanic” and, in the next sentence, merely that Brown “considers himself Cherokee.”<sup>10</sup> The question of ethnicity and race was displaced onto and emphasized in the dispute between Maldonado and Brown in such a way as to exonerate the adoptive couple and authorize their claims as altogether unencumbered by race.

The Capobiancos and their supporters were consistently able to shape the prevailing narrative in ways that undermined Brown’s credibility and downplayed the broader agenda to which the adoption had become attached. Brown’s deployment to Iraq soon after he was notified of the pending adoption served largely as evidence that he neglected his parental responsibilities rather than indicating either a patriotic duty or an economic necessity that made his enrolling in the National Guard one of his limited employment options. Media coverage downplayed or ignored the Capobiancos’ association with the

evangelical Christian Right adoption movement—a corollary strategy of its anti-abortion agenda—and their relationship with the anti-ICWA Christian Alliance for Indian Child Welfare. As international adoptions to the United States declined from almost twenty-three thousand in 2004 to less than nine thousand in 2012, the Christian adoption movement, along with the private adoption industry, has become increasingly aggressive in seeking to undermine the legal protections in place for Indian birth parents.<sup>11</sup> Rather than examine this significant dynamic of the case, reporting focused on the unfair and tragic situation that confronted the “deserving” couple. The *guardian ad litem* appointed to represent Veronica explained that the Capobiancos were “a well-educated couple with a beautiful home, [who] could afford to send Baby Girl to any private school that they chose and, when she was older, to any college she wanted; and that there was nothing that Baby Girl needed that [they] could not buy for her.” Their connection and commitment to the child were incontrovertible and were likewise confirmed by prospective financial expenditure whereby money becomes proof of the material dispensation of love itself and perhaps even the capacity to properly and responsibly love. They were present at Veronica’s birth and, as was highlighted by news media and legal testimony alike, Matt Capobianco “even cut the umbilical cord.”<sup>12</sup> All in all, the majority opinion and prevailing media accounts suggested that ICWA, the tribe, and Brown were merely shameless obstacles to the couple’s warranted happiness.<sup>13</sup>

*Adoptive Couple v. Baby Girl* is an especially useful example for examining the contemporary valences of whiteness because it provides a focus on the salience of familial intimacy and private life as arenas for colonial domestication and racialized dispossession today. The significance of family, reproduction, and private life in this regard continues long-standing settler state investments in domestication as well as conveying the intensification of neoliberal demands for privatization and personal responsibility. As Mark Rifkin argues, “Heteronormativity legitimizes the liberal settler state by presenting the political economy of privatization as simply an expression of the natural conditions for human intimacy, reproduction, and resource distribution.”<sup>14</sup> Likewise, David Eng shows how “the politics of colorblindness reconfigures whiteness as property to focus critical attention on the private structures of family and kinship as the displaced but privileged site for the management of the ongoing problems of race, racism, and property in U.S. society.”<sup>15</sup> The adoptive couple’s performance of affective (and financial) investment to justify possession and assert injury and loss was especially important in *Adoptive Couple*. Respond-

ing to the question of why the couple should take precedence over the father or paternal grandparents in deciding the child's custody, the adoptive mother Melanie Capobianco declared, "It feels to me like we really want her more than anybody."<sup>16</sup>

An emphasis on the apparent irreproachability of the Capobiancos' feelings eclipsed the long history of the removal of indigenous children from their families that ICWA was intended to counteract.<sup>17</sup> Although Brown occasionally shed public tears, throughout their countless media appearances the Capobiancos were emphatically and unequivocally bereft. The spectacle of their grief elided all else. The immediacy of their anguish appeared to preempt the perhaps incomprehensible immensity of violence, abuse, and terror through which US settler colonialism—and the colonialisms that preceded it—has targeted Native peoples. During the 1820s and 1830s, Chief Justice John Marshall's Supreme Court decisions had also rendered the Cherokee Nation a proving ground for settler jurisprudence and the legal justification for indigenous removal. *Johnson v. M'Intosh* (1823) expanded the "doctrine of discovery" as an inherited prerogative of the United States that weakened indigenous sovereignty and divested American Indians of legal title to their land. *Cherokee Nation v. Georgia* (1831) further diminished indigenous sovereignty by defining Native peoples as "domestic dependent nations" essentially subsisting "in a state of pupillage. Their relation to the United States resembles that of a ward to his guardian."<sup>18</sup> The case also established the doctrine of federal trust, which maintains that, as with the relationship of a ward to its guardian, Native nations are not competent to manage their own affairs. This juridical insistence on domestication, dependency, and supervision remains in force even as it has been qualified by subsequent legislation providing limited forms of Indian self-determination.

Legal precedent worked in tandem with various other forms of violent displacement and lethality. In this context, because white seizure of the lands of Cherokee and other Southeastern tribes was supposedly inevitable, Lewis Cass, governor of the Michigan Territory and future secretary of war under President Andrew Jackson, wrote in 1829: "The best interests of the Indians require their removal beyond the Mississippi."<sup>19</sup> The "Trail of Tears" that followed the Indian Removal Act of 1830 began with the expulsion of the Choctaw Nation in 1831 and continued through the brutal trek that resulted in the deaths of nearly one-third of the Cherokee in 1838. By the late nineteenth century, the genocidal US military campaigns against Native peoples slowly gave way to purportedly benevolent programs for assimilation. In 1892,

for instance, Captain Richard H. Pratt, a veteran of the Indian wars and the founder of the Carlisle Indian Industrial School, advocated: “Transfer the savage-born infant to the surroundings of civilization, and he will grow to possess a civilized language and habit.”<sup>20</sup> US boarding school policy was perhaps most explicitly an effort to destroy tribal cultures and ways of life between the 1880s and the 1930s, but the number of Native American children in boarding schools continued to grow—as well as the forms of physical, psychological, and sexual abuse endemic to those institutions—until reaching an estimated peak enrollment of sixty thousand in 1973. During the 1950s and 1960s adoption initiatives increased significantly as a parallel mechanism for Indian removal. By the 1970s, with projects such as the Adoption Resource Exchange of North America underway, between 25 percent and 35 percent of all Indian children in the United States were being taken from their families and placed in foster care or adoptive homes of almost exclusively non-Indian families. These were the circumstances ICWA responded to.

That the majority opinion in *Adoptive Couple* thus hinged the ruling on Brown’s lack of “continuous custody” seems particularly ironic given this extended history of Indian removal. Yet, whatever the self-serving demands of settler colonial jurisprudence, such projects remain incomplete and precarious. As Daniel Heath Justice argues, “Europeans and their Euro-western descendants have predicted the end of the Cherokees and others for centuries, but our fires burn brightly still. . . . Today, as yesterday and tomorrow, our fire survives the storm.”<sup>21</sup> The contemporary national and international political economy of adoption is predicated on the extremely uneven distribution of resources, vulnerability, and desperation.<sup>22</sup> In the case of “Baby Veronica,” not only does the solipsism of white emotional life prevent an acknowledgment of white culpability in the overdetermination of such differential conditions, but the Capobiancos can claim affective entitlement because they are not encumbered by the consequences and continuation of such economies of dispossession. As the liberal capacity to possess, whiteness in this sense is made by perpetual taking and justified by tears at the prospect of not having.

#### Notes

1. Supreme Court of the United States (SCOTUS), “Opinion of the Court,” *Adoptive Couple v. Baby Girl*, 570 U.S. (2013), No. 12-399, June 25, 2013, 1.
2. *Ibid.*, 2.

3. See, e.g., George Lipsitz, *The Possessive Investment in Whiteness: How White People Profit from Identity Politics*, rev. ed. (Philadelphia: Temple University Press, 2006); Jeffrey R. Dudas, *The Cultivation of Resentment: Treaty Rights and the New Right* (Stanford, CA: Stanford University Press, 2008); Aileen Moreton-Robinson, "Writing Off Treaties: White Possession in the United States Critical Whiteness Studies Literature," in *Transnational Whiteness Matters*, ed. Aileen Moreton-Robinson, Maryrose Casey, and Fiona Nicoll (Lanham, MD: Lexington Books, 2008).
4. Jodi Melamed, *Represent and Destroy: Rationalizing Violence in the New Racial Capitalism* (Minneapolis: University of Minnesota Press, 2011); Lisa Marie Cacho, *Social Death: Racialized Rightlessness and the Criminalization of the Unprotected* (New York: New York University Press, 2012), 17.
5. I borrow the phrase "settler common sense" from Mark Rifkin, *Settler Common Sense: Queerness and Everyday Colonialism in the American Renaissance* (Minneapolis: University of Minnesota Press, 2014).
6. Jodi A. Byrd, *The Transit of Empire: Indigenous Critiques of Colonialism* (Minneapolis: University of Minnesota Press, 2011), xix.
7. *Amicus Brief for Guardian ad Litem, as Representative of Respondent Baby Girl, Supporting Reversal, Adoptive Couple v. Baby Girl*, February 19, 2013, 58.
8. Circe Sturm, *Becoming Indian: The Struggle over Cherokee Identity in the Twenty-First Century* (Santa Fe, NM: SAR, 2011); and Joanne Barker, *Native Acts: Law, Recognition, and Cultural Authenticity* (Durham, NC: Duke University Press, 2011).
9. [www.saveveronica.org/veronicas-story/](http://www.saveveronica.org/veronicas-story/).
10. Quoted in Aura Bogado, "The Cherokee Nation's Baby Girl Goes on Trial," *Colorlines*, April 24, 2013, [http://colorlines.com/archives/2013/04/the\\_cherokee\\_nations\\_baby\\_girl\\_goes\\_on\\_trial.html](http://colorlines.com/archives/2013/04/the_cherokee_nations_baby_girl_goes_on_trial.html).
11. Kathryn Joyce, "The Adoption Crunch, the Christian Right, and the Challenge to Indian Sovereignty," *Public Eye* 78 (Winter 2014): 2–8, 17–18.
12. SCOTUS, "Opinion of the Court," 4.
13. Addie Rolnick and Kim Pearson, "Adoptive Couple v. Baby Girl" (Parts 1–5), June 30–July 2, 2013, <http://prawfsblawg.blogs.com/prawfsblawg/>.
14. Mark Rifkin, *When Did Indians Become Straight? Kinship, the History of Sexuality, and Native Sovereignty* (New York: Oxford University Press, 2011), 25.
15. David L. Eng, *The Feeling of Kinship: Queer Liberalism and the Racialization of Intimacy* (Durham, NC: Duke University Press, 2010), 6.
16. South Carolina Supreme Court, *Adoptive Couple v. Baby Girl*, Case No. 2009-DR-10-3803, September 13, 2011, 188.
17. Matthew L. Fletcher, Wenona T. Singel, and Kathryn E. Fort, eds., *Facing the Future: The Indian Child Welfare Act at Thirty* (East Lansing: Michigan State University Press, 2009).
18. 30 U.S. (5 Pet.) 1, 17.
19. Lewis Cass, "Removal of the Indians," *North American Review* 30 (January 1830): 91.
20. Captain R. H. Pratt, "The Advantages of Mingling Indians with Whites," *Proceedings of the National Conference of Charities and Correction at the Nineteenth Annual Convention, Denver, CO, June 23–29, 1892* (Boston: Press of G. H. Ellis, 1892), 56.
21. Daniel Heath Justice, *Our Fire Survives the Storm: A Cherokee Literary History* (Minneapolis: University of Minnesota Press, 2006), 219, 220.
22. Laura Briggs, *Somebody's Children: The Politics of Transracial and Transnational Adoption* (Durham, NC: Duke University Press, 2012).