RACIAL ANXIETIES IN ADOPTION: A RESPONSE TO "IN THE NAME OF THE CHILD: RACE, GENDER, AND ECONOMICS IN *ADOPTIVE COUPLE V. BABY GIRL*" BY BETHANY BERGER

Addie C. Rolnick & Kim Hai Pearson[*]

Two years ago, the Supreme Court decided not to apply the Indian Child Welfare Act (ICWA) to a case in which an unmarried father sought to stop his ex-fiancée from terminating his parental rights and allowing their daughter to be adopted by an educated, middle class, white couple. The father argued that the law applied to his situation because he is an enrolled member of the Cherokee Nation.[1] A cursory reading of the law's text suggests that he is correct.[2] If applied, it would have required adherence to stricter procedural requirements than state law before the adoption could be finalized.

Under the ICWA, a parent's rights cannot be involuntarily terminated in the absence of notice to the parents and the tribe, appointed counsel, a showing that active efforts were made to prevent the breakup of an Indian family, and a finding that continued custody by the parent will harm the child.[3] The father in this case wanted custody of his daughter, and there was no suggestion made at any time that he caused her harm. Application of the ICWA would not have prohibited the adoption outright, but the presence of a stable and loving birth parent who wanted to keep his child would have prevented her adoption under the law. This outcome makes sense. In the absence of harm, prospective adoptive parents are not typically permitted to keep a child, even one they love and have cared for, over the objections of one of her parents. And yet, if the father were not an Indian, state law would have allowed his daughter to be given to another family despite his presence

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1. Adoptive Couple v. Baby Girl, 133 S. Ct 2552 (2013).

2. The law defines "Indian child" as any person under the age of 18 who is a member of an Indian tribe, or a biological child of a tribal member who is herself eligible for membership. 25 U.S.C. § 1903(4). It defines a parent as "any biological parent or parents of an Indian child," but does not exclude an unwed father "where paternity has not been acknowledged or established." 25 U.S.C. § 1903(9). No argument was made in this case that the father did not acknowledge paternity. When he found about the pregnancy, he asked his fiancée to move up the wedding date. After the breakup, he tried to contact her throughout the pregnancy, and he and his family tried to send her gifts and money. He was named in adoption paperwork, and he was asked to sign a form indicating his consent to the adoption before it proceeded. *See* Bethany R. Berger, *In the Name of the Child: Race, Gender, and Economics in* Adoptive Couple v. Baby Girl, 67 FLA. L. REV. 295, 301–04 (2015).

3. 25 U.S.C. § 1912. Even in cases of voluntary termination, consent is not valid under the ICWA unless it is executed in writing before a judge and the judge certifies that the terms and consequences were fully explained to the parent. *Id.* at § 1913.

and over his objections.[4] Because the Court determined that the ICWA didn't apply, this is precisely what happened in the case.

Why didn't the Court apply the ICWA?[5] One answer is that the Court, not seeming to believe or value the father's Cherokee identity, resisted the idea that it could matter in an adoption decision. In her article "In the Name of the Child: Race, Gender, and Economics in *Adoptive Couple v. Baby Girl*," Bethany R. Berger deftly deconstructs the arguments,[6] the majority opinion,[7] and the back stories of the attorneys[8] and the Justices[9] to reveal the way that anxieties about race, and adherence to the modern version of colorblindness, led the Court to "do violence" to the law's text.[10] These racial anxieties ran deep. The very first sentence of Justice Alito's opinion describes Veronica as "1.2% (3/256) Cherokee." By framing the father's Cherokee identity in terms of ancestry, Justice Alito revealed the Court's fundamental investment in the idea that race (defined as equivalent to ancestry, which is how the Court described the father's Cherokee status) is insignificant to identity. As Justice Roberts asked during oral argument, is it "one drop of blood that triggers all these extraordinary rights?"[11]

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4. *See* 133 S. Ct. at 2560.

5. The South Carolina Supreme Court held that the ICWA did apply and that no sufficient showing of harm justified involuntary termination of parental rights. *See* 133 S. Ct. at 2560.

6. Berger, *supra* note 2, at 325–27.

7. *Id.* at 327.

8. *Id.* at 310–11; *see also* Andrew Cohen, *Indian Affairs, Adoption, and Race: The Baby Veronica Case Comes to Washington*, ATLANTIC (Apr. 3, 2013) (describing Paul Clement, the attorney for the guardian ad litem, as seeking to "undermine Congressional authority over the ICWA and all federal Indian law" and linking his arguments in the *Adoptive Couple* case to his representation of a non-Indian gaming client engaged in a legal challenge to Indian gaming rights in Massachusetts).

9. Berger, *supra* note 2, at 330.

10. *Id.* at 318.

11. *Id.* at 327. The Court's skepticism of the ICWA and the value of Indianness was also apparent in the opinion's suggestion that application of the law would disadvantage Indian children by making [non-Indian] people reluctant to adopt them, 133 S. Ct. at 2564–65; Berger, *supra* note 2, at 319 (explaining that this assertion is "implausible"); its reference to the father's argument as an "ICWA trump card [played] at the eleventh hour," 570 U.S. at __ (slip op. at 16); and its wholesale dismissal of any aspect of the father's Cherokee identity outside of ancestry, *see* Berger, *supra* note 2, at 332–33 (detailing the father's family's political, cultural, and geographic integration into the Cherokee Nation, all ignored by the Court). It is also apparent in the way the majority opinion failed to engage *Mississippi Band of Choctaw v. Holyfield*, 490 U.S. 30 (1989), the Court's only ICWA precedent and a case that strongly underscored the importance of the connection between Indian tribes and their children. The Court's dismissive treatment of Indian identity was no doubt fueled by the attitudes of others involved in the case. *See, e.g.*, Brief for Respondent Birth Father, Adoptive Couple v. Baby Girl, No. 12-399, 13 (quoting guardian ad litem's finding that the advantages of "having Native American heritage 'include[ed] free lunches and free medical care and that they did have their little get togethers and their little dances'").

The best (and most often given) response to this is that Indianness is not race.[12] That is, it's not reducible to a biological classification. Professor Berger makes this point eloquently, pointing out that that the ICWA should have applied because of the child's eligibility for citizenship (and the father's citizenship) in the Cherokee Nation. Her "quantum of Cherokee blood was irrelevant to her citizenship,"[13] and so, contrary to the Court's repeated insistence, her fractional ancestry "was not the reason her father had rights to object to her adoption."[14] Indian tribes have a different relationship with the federal government than any other groups, a relationship based largely on treaties and recognition of nationhood. That is why Veronica's Cherokee-ness mattered in a way that her Hispanic-ness (on her mother's side) did not.[15]

Leaving for a moment the argument, made already by many others, that the Court improperly inserted race into its consideration of an Indian statute,[16] we would like to engage the Court's fears directly. For, although Indians are not identically situated to other racial minority groups, the harm that the ICWA was designed to counteract *was* a racial harm in the sense that the work of severing Indian children from Indian tribal communities was part of an effort to eradicate those communities (defined by law and social practice as racially inferior) by absorbing them via miscegenation and cultural reprogramming. As Professor Berger explains, this practice was directly linked to both the

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12. Berger, *supra* note 2, at 335. In legal terms, Indianness is a political classification that hinges here on citizenship (or eligibility for citizenship) in a federally recognized tribe, not a racial classification. In our view, it makes no sense to claim, as some do, that Indianness has nothing at all to do with race and racism. It is equally a mistake, however, to suggest that the specter of race renders it less of a political status in the sense that the term is used to denote a particular legal history in which the federal government has treated Indian tribes as separate nations and has assumed unique powers to legislate with respect to tribes and indigenous people. *See* Addie C. Rolnick, *The Promise of Mancari: Indian Political Rights as Racial Remedy*, 86 N.Y.U. L. REV. 958, 1026 (2011).

13. Berger, *supra* note 2, at 329.

14. *Id.* The Cherokee Nation does not require members to have any specific fraction of ancestry; members must instead demonstrate descent from a person on the historical tribal rolls. Const. of the Cherokee Nation, Art. IV. Instead of cheering the Nation for removing race from its enrollment criteria, however, the Court seems to be chiding it for relying on nothing but race, and only an "insignificant" fraction at that.

15. *See* Palmore v. Sidoti, 466 U.S. 429 (1984) (prohibiting express consideration of a step-parent's non-white race as a dispositive factor in a custody dispute between divorced parents). Even though disputes about custody are very different from adoption proceedings, courts' attitudes about race filter throughout all decisions that involve questions about the best interests of children, including custody, placement, termination, and adoption.

16. Berger, *supra* note 2, at 325–36; *see also* Alyosha Goldstein, *Possessive Investment: Indian Removals and the Affective Entitlements of Whiteness*, 66 AM. Q. 1077, 1077 (2014); Aura Bogado, *The Cherokee Nation's Baby Girl Goes on Trial*, COLORLINES (Apr. 24, 2014), http://www.colorlines.com/articles/cherokee-nations-baby-girl-goes-trial.

racialization of Indians[17] and colonial efforts to acquire indigenous land and dominate indigenous people.[18] The ICWA is a legal intervention intended to counteract this process. While it may not be a race-based statute, it seems that the Court's skepticism of such an intervention *was* race-based. It is this fear that we hope to interrogate: What is so terrifying about a law that so strongly protects minority families, works to ensure that minority children remain in their communities, and that recognizes the rights of communities to control decisions regarding the placement of their children?

I. DISPLACED CHILDREN

The Indian Child Welfare Act was a response to a particularly chilling history in which generations of Native children were removed from their homes and communities. Sometimes removal occurred with the express intent of annihilating tribal culture and literally handing Native children over to white institutions to be remade.[19] Such was the goal of federally run boarding schools in the late 1800s and early 1900s.[20] There are stories of Native children being kidnapped from their families and taken far away to a boarding school, where they were physically and mentally abused.[21] But there are also stories of parents voluntarily sending their children to school, and of positive educational

17. Berger, supra note 2, at 330 (explaining that the racial boundary between whiteness and Indianness was "deliberately porous" in order to facilitate disappearance, while the racial boundary between whiteness and Blackness "rigidly maintained" in order to increase the supply of slave labor).

18. *Id.* at 330–31.

19. *Id.* at 351 (citing COHEN'S HANDBOOK OF FEDERAL INDIAN LAW § 1.04 (2012)).

20. *See generally* K. TSIANINA LOMAWAIMA, THEY CALLED IT PRAIRIE LIGHT: THE STORY OF CHILOCCO INDIAN SCHOOL (1994) (relating Indian experience of assimilation through boarding school program); MARGARET CONNELL SZASZ, EDUCATION AND THE AMERICAN INDIAN: THE ROAD TO SELF-DETERMINATION SINCE 1928 (1999) (discussing educational programs as a vehicle for assimilation of Indians). *See also* RICHARD H. PRATT, THE ADVANTAGES OF MINGLING INDIANS WITH WHITES (1892) (explaining the goal of the boarding schools to "kill the Indian in order to save the man").

21. *See* Maureen Smith, *Forever Changed: Boarding School Narratives of American Indian Identity in the U.S. and Canada*, 2 INDIGENOUS NATIONS STUDIES J. 57 (2001) (analyzing boarding school narratives); Ann Murray Haag, *The Indian Boarding School Era and Its Continuing Impact on Tribal Families and the Provision of Government Services*, 43 TULSA L. REV. 149, 150–55 (2007) (detailing a history of government boarding schools for Indian children); KENNETH LINCOLN, NATIVE AMERICAN RENAISSANCE (1985) (referring to stories of kidnapping); *see also Native Americans File Lawsuit Against Boarding School Abuses*, VOICE OF AMERICA NEWS (Oct. 30, 2009) (describing litigants' claims of physical abuse and neglect in lawsuit against government-sponsored, church-run boarding schools); Gretchen Millich, *Survivors of Indian Boarding Schools Tell Their Stories*, WKAR (Jan. 11, 2012), http://wkar.org/post/survivors-indian-boarding-schools-tell-their-stories (recounting stories of abuse from various schools).

experiences at some of the schools.[22] Like anything else, it is a complicated history that is not easily cabined in a voluntary versus forced dichotomy.

This express assimilation campaign was eventually rejected, but Indian children continued to be removed from tribal communities via state child welfare workers, foster care, and adoption.[23] Although removal was no longer animated by a malicious intent to annihilate Indian culture, it was premised on the assumption that Indian families and, more pointedly, Indian communities were dysfunctional and that leaving children in the custody of their parents or even their extended families and communities would work a harm so severe that child welfare intervention was needed. The bar for showing that removal was necessary was quite low.[24] Children were removed based on vague allegations of neglect or deprivation with very little except for misunderstandings of tribal cultures, devaluation of extended family structures, and racist assumptions about Indian people to back them up.[25]

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22. *See generally, e.g.*, LOUISE UDALL, ME AND MINE: THE LIFE STORY OF HELEN SEKAQUAPTEWA __ (1969); POLINGAYSI QOYAWAYMA AND VADA F. CARLSON, NO TURNING BACK: A HOPI INDIAN WOMAN'S STRUGGLE TO LIVE IN TWO WORLDS (1977); *see also* LOMAWAIMA, *supra* note 20 (recounting stories of positive experiences despite repressive institutional practices at Chilocco in the 1920s and 1930s); *Native Americans File Lawsuit Against Boarding School Abuses*, *supra* note 21 (quoting one attendee from the 1940s who "value[d] the religious training I got there as well as the academics").

23. Berger, *supra* note 2, at 250 (citing LAURA BRIGGS, SOMEBODY'S CHILDREN: THE POLITICS OF TRANSRACIAL AND TRANSNATIONAL ADOPTION (2012)) ("American Indian children, like African American children, became targets for child welfare removals after they began receiving state-financed welfare assistance in large numbers").

24. Brian D. Gallagher, *Indian Child Welfare Act of 1978: The Congressional Foray into the Adoption Process*, 15 N. ILL. U. L. REV. 81, 85 (1994) ("Congress was especially critical of the general standards employed by the child welfare system in determining the necessity of intervention. One survey cited found that ninety-nine percent of the cases involving the removal of Indian children from their families were predicated "on such vague grounds as 'neglect' or 'social deprivation' and on allegations of the emotional damage the children were subjected to by living with their parents." Congress was altogether dismayed at the lack of understanding non-Indian child welfare workers had of Indian family society."). Just this year, South Dakota child welfare officials were found to have adopted procedures facilitating easy removal of Indian children from their homes, violating the ICWA and denying Indian parents their rights to due process prior to removal. Oglala Sioux Tribe v. Van Hunnick, 298 F.R.D. 453 (D.S.D. 2014).

25. Gallagher, *supra* note 24, at n.27, citing H.R.REP. No. 1386, 95th Cong., 2d Sess., at 10 (1978). ("Indian communities are often shocked to learn that parents they regard as excellent caregivers have been judged unfit by non-Indian social workers . . . . For example, the dynamics of Indian extended families are largely misunderstood. An Indian child may have scores of, perhaps more than a hundred, relatives who are counted as close, responsible members of the family. Many social workers, untutored in the ways of Indian family life or assuming them to be socially irresponsible, consider leaving the child with persons outside the nuclear family as neglect and thus as grounds for terminating parental rights. Because in some communities the

Indian children are not the only children who have been involuntarily removed from their parents and communities at disproportionately high rates, nor the only population subjected to wholesale transfer out of their communities and into "good" white homes. Although various minority groups have experienced the removal and/or placement of their children in ways unique to each group and historical moment, there are strong thematic ties in the discourse surrounding childhood displacement that bear exploring. African American and Latino children, especially poor children, are removed from their homes and placed in foster care at higher rates than other children.[26] These statistics speak to involuntary removals, in which child welfare agencies remove children out of a concern that they are being harmed by remaining with their parents. Analyzing the statistics in conjunction with evidence of case-by-case mishandling and mistreatment by child welfare agencies, Dorothy Roberts argues, would lead a person to "conclude that [child welfare] is an institution designed to monitor, regulate, and punish poor families of color."[27]

A generation of adoptees from Korea and China are coming of age in their adoptive homes,[28] most of them with white families and most living in the United States. A younger set of children, victims of the 2012 Haiti earthquake, may have a similar experience in twenty years.[29]

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social workers have, in a sense, become a part of the extended family, parents will sometimes turn to the welfare department for temporary care of their children, failing to realize that their action is perceived quite differently by non-Indians.")

26. DOROTHY ROBERTS, SHATTERED BONDS: THE COLOR OF CHILD WELFARE 54–55, 224 (2002) (documenting overrepresentation of black children in child welfare system, attributing disparity to view of black families as pathological and inadequate, and showing destructive effects of child welfare policies on black families); Dorothy Roberts, *Race and Class in the Child Welfare System*, FRONTLINE, http://www.pbs.org/wgbh/pages/frontline/shows/fostercare/caseworker/roberts.html (noting that, once a child welfare investigation begins, African American children are placed in foster care at nearly twice the rate of whites) [hereinafter ROBERTS, *Race and Class*]; Annette R. Appell, '*Bad' Mothers and Spanish-Speaking Caregivers*, 7 NEV. L.J. 102, 113–21 (2007) (presenting case study of how linguistic and cultural differences can lead to "inappropriate and culturally incompetent child welfare interventions" for Spanish-speaking Latino families); *see generally* CAROL B. STACK, ALL OUR KIN (1974) (arguing that social welfare policies are based on stereotypes of black families as dysfunctional and self destructive and challenging those stereotypes by documenting kinship and child-rearing networks in a poor black community).

27. ROBERTS, *Race and Class*, *supra* note 26.

28. According to the Korean Ministry of Health and Welfare by 2002, an estimated 200,000 Korean children had been placed internationally, most to the U.S. The Evan B. Donaldson Adoption Institute estimates that China has placed 70,000 children in international adoptions.

29. Ginger Thompson, *After Haiti Quake, the Chaos of U.S. Adoptions*, N.Y. TIMES (Aug. 3, 2010), http://www.nytimes.com/2010/08/04/world/americas/04adoption.html. Thompson's article describes the issues raised by post-earthquake adoptions out of Haiti to the U.S., citing concerns raised by child protection advocates. "[T]hose ends [placing them in middle class U.S.

Like some of the Indian children sent to boarding schools, some of these children were "voluntarily" placed—some the children of single mothers with few options, and others the children of families facing such a lack of resources that they believed their children would be better off raised by strangers in another country.

Unlike Korean and Chinese adoptees, and perhaps even more than Indian children,[30] African American children are not transferred into white families so much as they languish in the purgatory of foster care because they are the least desirable in the racial hierarchy of adoption.[31] As Roberts explains, "[m]ost white children who enter the system are permitted to stay with their families, avoiding the emotional damage and physical risks of foster care placement, while most black children are taken away from theirs. And once removed from their homes, black children remain in foster care longer, are moved more often, receive fewer services, and are less likely to be either returned home or adopted than any other children."[32]

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homes] do not justify the means. Rushing children out of familiar environments in a crisis can worsen their trauma… Expediting adoptions in countries like Haiti – where it is not uncommon for people to turn children over to orphanages for money – violates children's rights and leaves them at risk of trafficking." In contrast, adoption advocates expressed concern about temporarily housing children in-country, "attempts to locate the children's biological relatives [would] deny tens of thousands of needy Haitian orphans the opportunity to be placed in loving homes").

30. Berger, *supra* note 2 at 332 ("adoption of Indian children into non-Indian homes has a particularly honored and accepted place in American culture, and the notion of easy and beneficial assimilation of Indian children into white culture helps fuel the desirability of Indian children as adoptees"). While Professor Berger asserts that Indian kids are treated just like white children in terms of racial desirability in adoptions, *id.* at 322, the reality is likely more complicated. As the foster care data in footnote 31, *infra*, suggests, Native American children are over-represented in foster care.

31. Mariagiovanna Baccara & Allan Collard-Wexler et al., *Gender and Racial Biases: Evidence from Child Adoption*, CESifo, Working Paper No. 2921 (2010) (showing that the group which was least preferred by prospective adoptive parents was African American boys); United States Gov't Dep't of Healthy and Human Services, Recent Demographic Trends in Foster Care, Data Brief 2013-1 (September 2013) (showing that despite a marked decline of 47% of African American children in foster care since 2002, they still represent half of the children in foster care; after 2009, Native American children are highest, proportionately, minority group in foster care). Adoptive parents' racial preferences drive the adoption market domestically and internationally. *See* Kim H. Pearson, *Displaced Mothers, Absent and Unnatural Fathers: LGBT Transracial Adoption*, 19 MICH. J. GENDER & L. 149, 165–66 (2012) (describing the shift away from domestic foster care adoptions and towards international adoption because of shortages of white adoptive children, making children believed to be capable of passing as white preferable).

32. ROBERTS, *Race and Class*, *supra* note 26.

II. RACE IN FAMILY LAW

Race is uniquely devalued in family law proceedings,[33] especially adoptions.[34] While many other aspects of a child's identity development may be important factors in whether the law is willing to intervene in parenting decisions, custody, or placement, race is a third rail. As a comparison, courts attend to a child's religious identity, usually by considering the parents' religious beliefs and traditions, even if such attentiveness may violate one of the parent's constitutional rights.[35] Another point of comparison is sexual orientation; in some states parents are prohibited from forcing their gay children to attend conversion therapy.[36] Courts and legislatures make the connection between LGBT children's poor health outcomes, including high depression, substance abuse, and suicide rates and attempts to change their sexual identity development.[37] The law is willing to regulate parenting—normally considered a private sphere—to protect the child from the harm that will come from seeking to change that child's sexual identity. In contrast, the law does not attend to racial identity development, assuming that a child's racial identity is malleable, fungible, and of less significance to a child's innate sense of self than sexual orientation.[38] Courts are not similarly attentive to children who may wish to develop racial identity as an innate, immutable characteristic of their identity, despite having data that suggest some

33. Fountaine v. Fountaine, 9 Ill. App. 2d 482 (Ill. App. Ct. 1956), Palmore v. Sidoti, 466 U.S. 429 (1984), *In* re Davis v. Davis, 240 A.D.2d 928 (N.Y. App. Div. 1997), Ebirim v. Ebirim, 9 Neb. App. 740 (Neb. Ct. App. 2000), Foster v. Waterman, 738 N.W.2d 662 (Iowa Ct. App. 2007) (representative family law proceedings showing how courts measure the value of race, ranging from express non-consideration to a view of race that refers to cultural activities and proximity to racially diverse populations as sufficiently protective of children's racial identity development).

34. *See, e.g.*, ELIZABETH BARTHOLET, NOBODY'S CHILDREN: ABUSE AND NEGLECT, FOSTER DRIFT, AND THE ADOPTION ALTERNATIVE (2000); Solangel Maldonado, *Race, Culture, and Adoption: Lessons from Mississippi Band of Choctaw Indians v. Holyfield*, 17 COLUM. J. GENDER & L. 1 (2008) (analysis about the difference in the legal treatment of racial minorities and Native American children in placement proceedings).

35. Jennifer Ann Drobac, *For the Sake of the Children: Court Consideration of Religion in Child Custody Cases*, 50 STAN. L. REV. 1609, 1611 (1998) (a survey of over fifty cases showed that courts "consider the religious beliefs and practices of parents in determining custody of children"); Ann Laquer Estin, *Embracing Tradition: Pluralism in American Family Law*, 63 MD. L. REV. 540 (2004) (calling for developing a pluralistic approach to family law in response to increasing diversity in religious beliefs).

36. California passed SB 1172 in 2012 and Chris Christie signed A-3371, New Jersey's gay conversion therapy ban, into law in 2013.

37. Tina Susman, *Chris Christie Signs N.J. Bill Banning Gay Conversion Therapy*, L.A. TIMES (Aug. 19, 2013), http://articles.latimes.com/2013/aug/19/nation/la-na-nn-chris-christie-gay-conversion-20130819.

38. *See generally* Kim H. Pearson, *Legal Solutions for APA Transracial Adoptees*, 3 U.C. IRVINE L. REV. 1179 (2013).

transracially adopted children have negative outcomes linked to poor racial identity development.[39]

What would it look like for the law to value and protect a child's racial identity? The National Association of Black Social Workers proposed legislation modeled on the ICWA that would have required states to give "due consideration" to a child's race and established a placement preference first for a blood relative and, if that were not available, for a same-race family.[40] The proposed law would not have prohibited cross-racial adoption; it would have required state agencies to consider race and, like the ICWA, would have required them to follow the established placement preferences absent good cause to the contrary.[41] By establishing a legal preference for placement of minority children in same-race adoptive homes, the law would have forced the child welfare system to acknowledge and attend to the importance of racial identity development in children, and it would have attached legal value to African American and other minority families and communities, the historical devaluation of which has led to the breakup of many families. The law never passed at the federal level, although at least one state adopted similar legislation.[42]

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39. Brief for Adult Pre-ICWA Indian Adoptees et al. as Amici Curiae Supporting Birth Father and The Cherokee Nation, Adoptive Couple v. Baby Girl, 133 S. Ct. 2552 (2013) (No. 12-399); Sueyoung L. Song, *The Relationship Among Culture-Specific Factors, Pubertal Timing, and Body Image and Eating Disordered Symptoms Among Adopted Korean Adolescent Girls* 8 (Aug. 2009) (unpublished Ph.D. dissertation, University of Minnesota) (on file with the author); Hjern et al., *Suicide, Psychiatric Illness, and Social Maladjustment in Intercountry Adoptees in Sweden: A Cohort Study*, 360 LANCET 443 (2002); Nam Soon Huh & William J. Reid, *Transracial Adoption and Ethnic Identity: A Korean Example*, 43 INT'L SOC. WORK 75 (2000) (qualitative study of transracial adoptees' experiences with race).

40. NATIONAL ASSOCIATION OF BLACK SOCIAL WORKERS, PRESERVING AFRICAN AMERICAN FAMILIES: RESEARCH AND ACTION BEYOND THE RHETORIC (1991), *available at* http://c.ymcdn.com/sites/nabsw.org/resource/collection/0D2D2404-77EB-49B5-962E-7E6FADBF3D0D/Preserving_African_American_Families.pdf (describing and reiterating 1986 proposal and reproducing proposed legislation).

41. The placement preferences mimicked those in the ICWA. The proposed bill would have "authorize[d] child-placing agencies to give preference, 'in the absence of good cause to the contrary' to placing a child with a person or persons related by blood to the child, or, if that would be detrimental to the child or a relative is not available, a family with the same racial or ethnic heritage of the child." Indeed, the proposal was put forth as a suggested amendment to the Indian Child Welfare Act. *Id*. at 6.

42. *See* National African American Heritage Child Welfare Act, Minn. Ch. 278-S.F. no. 723 (1983), *available at* https://www.revisor.mn.gov/laws/?id=278&year=1983&type=0. The MMCHPA was passed in 1983 (before the NABSW issued its 1986 position paper and proposed legislation). By 1997 the law had been amended several times to replace racial considerations with the best interests of the child standard to bring the law into compliance with federal law MEPA-IEP that prohibited the "use of race or ethnicity as a basis for adoption or foster care placement." Minnesota Legislative Reference Library, Minnesota Minority Child Heritage Protection Act, http://www.leg.state.mn.us/lrl/issues/issues.aspx?issue=mmchpa. Illinois also

We do not intend here to advocate for passage of the NABSW bill. The proposed legislation had many flaws,[43] and we do not necessarily believe that a bill modeled on the ICWA is workable or desirable where the child's community does not coincide with a government entity.[44] We want to focus instead on the response: Congress passed two separate laws specifically *prohibiting* states from weighing race heavily in placement and adoption decisions. The Multi-Ethnic Placement Act[45] prohibits states from denying a person the right to become a foster or adoptive parent "solely on the basis of the race" of the child involved and from "delay[ing] or deny[ing] placement" of any child "solely on the basis of race." Although it permits states to "consider [a child's] cultural, ethnic, or racial background," race is singled out as a factor that cannot be important enough to base a decision on.[46] The Interethnic

considered a similar bill. African American Heritage Child Welfare Act, H.B. 1913 (91st General Assembly 1999–2000).

43. On it's face, the proposal had drafting and coverage problems. It employed the vague term "minority ethnic heritage" to describe the children it would apply to, it failed to set forth guidelines for dealing with mixed-race children, it enshrined a particular version of the interplay between racial and religious identity preservation, and it failed to address the issues presented by "consensual" international adoptions. The proposal's more fundamental flaw, however, is that it was built around two main tools: procedural barriers to removal and placement preferences. Although these were the two provisions at issue in *Adoptive Couple*, they are arguably the least important provisions of the ICWA, which also provides for tribal court jurisdiction over child welfare matters involving Indian children. 25 U.S.C. § 1911. It is the jurisdictional provisions that have had the greatest impact, giving tribal communities control over what happens to thousands of Indian children, including children for whom removal from was necessary because of actual or potential harm.

44. Inter-country adoptions, such the adoption of Haitian children by U.S. families, might present a better parallel because the Haitian government could exercise presumptive jurisdiction over decisions regarding removal and placement of Haitian children. Similarly, the Hague Convention of 29 May 1993 on Protection of Children and Co-operation in Respect of Intercountry Adoption (Hague Adoption Convention) is a system of central government authorities complying with agreed upon guidelines in the protection of children who are removed from home countries and placed in Convention-participating countries. The Convention, like the ICWA, does not ban adoption; instead, it creates child-centric guidelines as procedural protections to value the child's interests in her connection to her community.

45. Pub. L. No. 103-382 (1994).

46. The Department of Health and Human Services has reported that state agencies did sometimes avoid all consideration of a child's race out of fear of violating the law. U.S Dep't of Health and Human Services, Administration for Children and Family Services, Office of Civil Rights, Ensuring the Best Interests of Children Through Compliance with the Multiethnic Placement Act of 1994, as amended, and Title VI of the Civil Rights Act of 1964, available at http://www.hhs.gov/ocr/civilrights/resources/specialtopics/adoption/mepatraingppt.pdf. *See also* National Association of Black Social Workers, Preserving Families of African Ancestry (2003), *available at* http://c.ymcdn.com/sites/nabsw.org/resource/collection/0D2D2404-77EB-49B5-962E-7E6FADBF3D0D/Preserving_Families_of_African_Ancestry.pdf (calling for repeal of MEPA and IEPA).

Placement Amendments strengthened the MEPA's prohibitions by imposing penalties for violating it.[47]

By prohibiting placement decisions based on race, the MEPA stops state child welfare agencies from assigning legal value to race. To the extent that race can be considered, it is viewed as only an individualized aspect of personality development, an idea that has been conceived thinly, even stereotypically, by courts that do address it.[48] Like in the case law governing the use of race in higher education admission standards, the MEPA ensures that race can only be considered as a personal quality and, even then, as one of many factors.[49] At the same time, it prohibits state actors from establishing a legal regime that makes it more difficult to break those families up and, if families are disrupted, re-directs those back into their families and communities wherever possible. In other words, the MEPA prevents states from making a structural intervention to correct for the historical devaluation of minority families and communities that led directly to the transfer of so many children out of them.[50] It also forecloses consideration of the way that *white* race has always operated as a clear plus factor in determining which families were considered the most ideal adoptive placements and how proximity to whiteness has always defined a child's desirability in the marketplace of adoption. The problem is not special consideration of race; it is that race is the only thing that can't be accorded central importance.

The ICWA is an exception to this rule in that it is a legislative regime that changes the procedures governing the breakup of Indian families and the removal of Indian children from Indian communities.[51]

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47. Pub. L. No. 104-188 (1996). The IEP amendments also clarified that the MEPA did not affect the ICWA in any way.

48. *See* sources cited, *supra* note 33.

49. *See* Grutter v. Bollinger, 539 U.S. 306 (2003); Gratz v. Bollinger, 539 U.S. 244 (2003); Fisher v. University of Texas, 133 S. Ct. 2013 (2013).

50. This is also consistent with the cases holding that the goal of undoing generalized past racism is not a sufficiently compelling interest to permit use of racial classifications in the present. Adarand Constructors, Inc. v. Pena, 515 U.S. 200, 227 (1995); *id.* at 239 (Scalia, J.,concurring); City of Richmond v. J.A. Croson Co., 488 U.S. 469, 493–94 (1989) (plurality opinion); *id.* at 505–06 (opinion of the Court); Regents of the Univ. of Cal. v. Bakke, 438U.S. 265, 289–90, 307–10 (1978).

51. The ICWA can be justified even under the Court's narrow approach to racial remedies under several theories. The primary approach is that Indian classifications are political ones that depend on a person's relationship to a recognized tribe, so Indian classifications are not governed by the law on racial classifications. Even acknowledging that Indian legal status often overlaps with Indian racial status, tribes have clear membership rules, recognized leadership, and federally-acknowledged legal institutions that make them uniquely able to exercise authority over removal and adoption proceedings. Furthermore, even if the Court were to apply strict scrutiny to Indian classifications, the harm that the ICWA was meant to counteract was so direct, specific, and well documented that a racial classification could permissibly be employed to remedy it. Rolnick, *supra* note 12, at 995–96 (explaining different legal theories for

It forces state courts to acknowledge a child's Indianness, putting the responsibility on the child welfare system to determine whether someone is an "Indian child" and to contact the child's tribe.[52] It establishes a preference for tribal control over the proceedings by requiring states to transfer jurisdiction to the tribal court unless the tribe does not or cannot accept it.[53] When the case remains in state court, it forces the actors (from caseworkers to judges) to carefully justify removal and placement outside the child's community by adding heightened requirements for removal and termination[54] and establishing a hierarchy of placement preferences.[55] Most importantly, the ICWA recognizes that the relationship between tribe and child is not simply one of personal identity or self-esteem, but is in fact the key to the continued existence of the tribe, which is in turn a fundamental aspect of the child's "best interests."[56]

It bears reiterating that the ICWA's intervention is structural,[57] not substantive. It doesn't require a particular outcome, and none of its barriers are absolute. A child can still be removed, and a parent's rights terminated, if there is a showing of harm. A court can depart from the placement preference for good cause. Instead, it tilts the process in favor of keeping the child in the tribal community in order to counteract the strong historical advantage accorded to white parents that resulted in contests for children that Indian parents (and tribes) often lost. It prevents a court from doing precisely what courts did for decades: removing a child from her family and community, placing her with a white family in another state just because that new family seems better, and offering only a cursory justification for the decision.

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upholding Indian legislation); CAROLE E. GOLDBERG, WHAT'S RACE GOT TO DO WITH IT?: THE STORY OF MORTON V. MANCARI, IN RACE LAW STORIES 237, 238, 257 (Rachel F. Moran & Devon Wayne Carbado, eds., 2008); Carole Goldberg, *American Indians and "Preferential" Treatment*, 49 U.C.L.A. L. REV. 943, 955–58 (2002); *see also* MATTHEW L.M. FLETCHER, ICWA AND THE COMMERCE CLAUSE, THE INDIAN CHILD WELFARE ACT AT 30: FACING THE FUTURE 29 (2009) (arguing that the Indian Commerce Clause provides a constitutional basis for the ICWA).

52. 25 U.S.C. § 1912 (c).

53. *Id.* at § 1911 (b).

54. *Id.* at §§ 1912, 1913.

55. *Id.* at § 1915 (preference for placement with members of the child's family, members of the child's tribe, and other Indian families, in that order).

56. *Id.* at § 1901(c). The Court's only prior ICWA decision, *Holyfield*, underscored this aspect of the law by holding that the tribe's interest (and the child's future interest in its connection to the tribe) could outweigh an Indian parent's fully informed attempt to circumvent its provisions. The *Adoptive Couple* opinion erases this aspect of the law, characterizing it as nothing more than a law protecting the individual interests of minority parents.

57. Rolnick, *supra* note 20, at 1042–43 (describing the ICWA as a structural intervention that "explicitly acknowledges the link between the individualized effects of Indian racialization and the political rights of tribal governments").

III. WHITENESS AND IDEAL PARENTHOOD

Last year, Jennifer Cramblett sued Midwest Sperm Bank for mistakenly delivering sperm from an African American donor resulting in a biracial child.[58] The case is a wrongful birth action, and it makes out a claim for damages based not upon the fact that Cramblett and her partner do not love their daughter (they do), but upon the loss suffered by a family who expects to be all white and then loses that status. In her complaint, Cramblett alleges that she "must relocate to a racially diverse community with good schools."[59] Her complaint implies that there is a legal harm that should be remedied for her inability to remain near her "all-white community [and] all-white, and often unconsciously insensitive family" because of her daughter's "irrepressible" differences.[60] In other words, the complaint explains that being part of her white community has legal value and that having to move to a more "diverse" area would entail a quantifiable cost. Some of this cost is material: Cramblett and her partner moved to the all-white town because its schools are better, and they must now send their daughter to potentially worse schools because they understand that being the only African American child at this "good" school will harm her even more. White communities—their schools, their associations, their distance from non-white communities—are valuable in this equation. The unspoken implication that follows is that non-white communities are not.

The *Cramblett* complaint exemplifies the differential valuation perfectly, but one need not even use such a far-flung set of facts to see it. It is readily apparent in the rich history of removing Korean, Chinese, American Indian, Haitian, Latino and African American children from their homes and placing them in (or leaving them in search of) good white homes. It is also apparent in the way the potential adoptive parents were described in *Adoptive Couple v. Baby Girl*. Media accounts describe them as "ideal" parents, emphasizing their educational pedigree and economic status.[61] The majority opinion

58. Complaint for Wrongful Birth and Breach of Warranty, Cramblett v. Midwest Sperm Bank (Cook County, Illinois Cir. Court, Sept. 29, 2014).

59. *Id.* at 7.

60. *Id.* at 6–7.

61. Addie Rolnick and Kim Pearson, *Adoptive Couple v. Baby Girl Blog Series*, PRAWFSBLAWG, http://prawfsblawg.blogs.com/prawfsblawg/2013/07/adoptive-couple-v-baby-girl-4-of-4-whiteness-and-ideal-parenthood.html; *see* Andrew Knapp, *Veronica's Adoptive Parents Frustrated After Winning Legal Fights, Not Seeing Results*, POST AND COURIER (Aug. 8, 2013) (human interest story featuring the adoptive couple's home and family life); *Broken Home: The Save Veronica Story*, CHARLESTON CITY PAPER (Sept. 26, 2012) http://www.charlestoncitypaper.com/charleston/broken-home/Content?oid=4185523 (human interest story with details about the adoptive couple's income status "'People try to portray us as these rich people, but I was working at an auto body shop at the time,' says Matt, who now

emphasizes how they supported mother and baby "emotionally and financially" during the pregnancy and how the adoptive father "even cut the umbilical cord."[62] The tenor of both the opinion and most of the media coverage was one of sympathy for a family who had done everything right and yet was facing the loss of a child they loved. This narrative ignores the preceding loss faced by the father, the tribe, and the baby at the moment she was placed for adoption. It ignores the fact that children have attachments to their families and communities and in this sense are not free for the taking, no matter how deserving the adoptive family.

In the contest over who could provide a better home for the baby, the adoptive couple had a built in advantage because they were white, educated, upper class, and Christian. Historically, this advantage has been strong enough to overcome even the presumption in favor of biological parents' rights to raise their children. Instead of counteracting this imbalance, South Dakota state law shored up the adoptive parents' advantage (as state child welfare laws have historically done) by according the biological father the same status as another prospective adoptive parent, erasing the existence of a birth parent whose rights could possibly trump even the most ideal adoptive home. ICWA's enhanced procedural protections would have tipped the scales back

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works for Boeing. Before this custody case, the couple poured their income into seven unsuccessful in vitro fertilization attempts and then the legal and travel expenses of finding Veronica's birth mother, a Mexican woman living in Oklahoma. 'We scraped our money to do the adoption in the first place,' Melanie says. 'We saved and borrowed for that.'"); Robert Barnes, *Baby Veronica's Loved Ones Wait for the Supreme Court to Weigh In*, WASHINGTON POST (Apr. 14, 2013), http://www.washingtonpost.com/politics/baby-veronicas-loved-ones-wait-for-the-supreme-court-to-weigh-in/2013/04/14/7138b5f0-a526-11e2-a8e2-5b98cb59187f_story.html (quoting Chief Justice Jean Hoefer Toal, "Adoptive Couple are ideal parents who have exhibited the ability to provide a loving family environment for Baby Girl"); Robin Abcarian, *Legal Battle Over Native American Girl Comes to a Poignant End*, L.A. TIMES (Sept. 24, 2013), http://articles.latimes.com/2013/sep/24/local/la-me-ln-legal-battle-baby-veronica-native-american-20130924 (the child's birth mother's "adoption attorney found an older, childless couple in Charleston, S.C., who wanted to adopt. The couple, Matt and Melanie Capobianco, were present for the baby's birth—Matt cut the umbilical cord."); Suzette Brewer, *Cherokee Nation Mourns as Veronica is Returned to Adoptive Family*, INDIAN COUNTRY (Sept. 24, 2013), http://indiancountrytodaymedianetwork.com/2013/09/24/cherokee-nation-mourns-veronica-returned-adoptive-family-151418 ("Time will tell what the ultimate outcome will be for Veronica, who will undoubtedly be given the best of what the Capobiancos can afford in terms of education and the trappings of an older, upper middle income childless couple."); *Cf.*, Andrew Cohen, *Indian Affairs, Adoption, and Race: The Baby Veronica Case Comes to Washington*, ATLANTIC (Apr. 12, 2013) ("Some of the elements of the case, sadly, harken back to the bad old days of dark stereotypes about Indians. The adoptive couple, who've relentlessly argued their case in the court of public opinion by appearing on television with the likes of Anderson Cooper and Dr. Phil, have been widely portrayed as the innocent victims of the story. Meanwhile, Baby Veronica's father has been largely portrayed as little more than a shifty, good-for-nothing drifter.").

62. 133 S. Ct. at 2558.

toward balance, but the Court—hiding behind its fear of making race significant—neutralized its force by holding that it did not apply to the father's situation.

In a case with many disturbing angles, this easy erasure of a stable, loving birth parent may be the most frightening. The record is rife with facts showing at best ineptitude and at worst deliberate efforts to circumvent the law.[63] As a result, by the time the case reached the courts, the baby was two years old and had lived her whole life with her adoptive parents. Her initial placement with the birth parents was characterized as completely voluntary (on the part of the mother), and the father's claim to his own child appeared as an "eleventh hour" disruption.[64] In holding that the ICWA's protections against involuntary termination did not apply to a father who had never had custody, the Court drew a line between the involuntary removal of Indian children from their families, which the law was designed to stem, and an adoption "voluntarily and lawfully initiated by a non-Indian parent with sole custodial rights."[65] This dichotomy between voluntary and involuntary child welfare proceedings is, of course, too simplistic.[66] It misses the way that racial hierarchies continue to structure ideas about who deserves children, influencing even decisions that are nominally voluntary, such as private adoptions.

63. Adoption agency notes show that the mother at first refused to name the father because she thought his Cherokee enrollment would complicate the adoption. When the agency finally provided notice to the tribe, his name and identifying information were misstated in the letter, leading the Nation to respond that they could find no enrollment records. The mother refused contact with the father and his family during the pregnancy and maintained strict secrecy during the birth itself. The father was not notified of the planned adoption until several months after the baby had been placed with the adoptive family and the adoption petition had been filed. Berger, *supra* note 2, at 302–06.

64. 133 S. Ct. at 2565.

65. *Id.* at 2562.

66. Professor Berger describes the "shift toward easy adoption and away from rights of biological parents," including both mothers and fathers, that has characterized state child welfare law. Berger, *supra* note 2, at 343–50.