UCLA
American Indian Culture and Research Journal

Title
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Permalink
https://escholarship.org/uc/item/58q315s5

Journal
American Indian Culture and Research Journal , 40(1)

ISSN
0161-6463

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Publication Date
2016

DOI
10.17953/aicrj.40.1.rocha-beardall

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Adoptive Couple v. Baby Girl: Policing Authenticity, Implicit Racial Bias, and Continued Harm to American Indian Families

Theresa Rocha Beardall

"It does not require many words to speak the truth."

—Chief Joseph, Nez Perce

In June 2013, the Supreme Court of the United States (SCOTUS) issued a decision in *Adoptive Couple v. Baby Girl*, sparking debate among lawyers, scholars, social service organizations, and Native communities alike. While that debate thoughtfully explores the denial of an enrolled Cherokee father, Dusten Brown, the opportunity to parent his biological Indian child, "Baby Veronica," this essay takes a new approach by revisiting the majority opinion through a social stratification framework. By focusing on social distance and the stratified legal relationships it constructs, this framework challenges the Court's interpretation of the Indian Child Welfare Act (ICWA). The majority opinion hinges its decision upon a few words within two key ICWA provisions. First, the opinion focuses on "continued custody" in legal proceedings concerning Indian children and, second, focuses on the "breakup of the Indian family" to decide whether the termination of parental rights requires evidence of prior remedial family services.[1] The majority opinion finds that neither "continued custody" of an Indian child nor the "breakup" of an Indian family are possible where formal legal custody is absent. Despite claiming strict adherence to statutory construction—a method of

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interpretation used when a disagreement arises over the original intent of a particular statute—the Court reveals its persistent investment in policing American Indian authenticity along social constructions of race.

In order to explore the implicit discussion of race presented here, one must examine *Adoptive Couple v. Baby Girl* through two disciplinary lenses: sociology and indigenous studies. First, sociological theory describes the law as a social institution with values and norms that may behave in a patterned way when the social positions of parties to a case are discernibly stratified. Second, indigenous studies scholarship examines the racialization of American Indians and the politics of cultural authenticity, inviting a nuanced analysis of implicit racial bias in the courts. Through these disciplinary lenses, this essay demonstrates how the majority opinion exerts social control over the definition of an Indian family by creating a "manufactured class of semiprotected ICWA parents."[2] Furthermore, I argue that *Adoptive Couple v. Baby Girl* imposes colonial notions of blood quantum upon the Cherokee Nation's right to determine tribal citizenship and unjustifiably strips the historical significance and expressed intentions from ICWA by creating a narrow class of protected Indian families.

Read holistically, ICWA provides procedures and protections for Indian children, families, and tribes. A narrow reading, however, dangerously alters ICWA's reach by designating its protections applicable to a small class of Indian families. Justice Sonia Sotomayor explains in her dissenting opinion that when the Court disregards "a statute's use of terms that have been explicitly defined by Congress, that should be a signal that one is distorting, rather than faithfully reading, the law in question."[3] Thus, a central aim of this essay is to highlight law as a tool of social control that polices racial authenticity within contemporary tribal communities. Sociologist Donald Black's behavior-of-law framework supports this argument when analyzing power relationships and social distance between legal parties. Therefore, I put Black's theory into conversation with Lenape scholar Joanne Barker's analysis of cultural authenticity and the racialization of American Indians as an erasure of sovereign recognition.[4] Together, Black and Barker problematize the sociolegal complexities of federal Indian law by theorizing instances in which Natives are structurally excluded from protection under the law even before they enter the courtroom. An analysis of these supporting texts shows that the majority opinion in *Adoptive Couple v. Baby Girl* is a tool of social control that undermines congressional action and thereby inflicts continued harm to the stability of American Indian families.[5] In the spirit of Chief Joseph's words, the Supreme Court's short majority opinion exhibits an underlying motivation to severely limit both tribal sovereignty and protection for Indian families.

Case Background: *Adoptive Couple v. Baby Girl*

Adoptive Couple v. Baby Girl sought to clarify two important questions: can a noncustodial parent invoke the Indian Child Welfare Act to halt adoption proceedings to a non-Indian parent, and does ICWA's definition of "parent" include unwed biological fathers? ICWA is central to this case because the biological father of Baby Veronica, Dusten Brown, is a citizen of the Cherokee Nation and opposed the adoption of his

daughter by a prospective non-Indian family. Brown successfully obtained custody of his child from the South Carolina Family Court in September 2011. The South Carolina Supreme Court affirmed Brown's custody and the application of ICWA to this custody proceeding.[6] The Supreme Court of the United States issued its decision in June 2013, concluding that due to Brown's status as a non-custodial parent he could not invoke ICWA and retain custody of his biological daughter.[7]

Baby Girl does much more than interpret the appropriate application of ICWA. The case highlights a significant moment in American history—the 1978 passage of 25 U.S.C. §1901—when Congress publicly recognizes that Indian children are essential to the perpetuation of Native values, teachings, and traditions. Congress understood that "there is no resource that is more vital to the continued existence and integrity of Indian tribes than their children and that the United States has a direct interest, as trustee, in protecting Indian children who are members of or are eligible for membership in an Indian tribe."[8] To remove Indian children from their families is to erase Native peoples from this land altogether.

The June 2013 majority opinion in *Adoptive Couple v. Baby Girl* is unusual in many ways. First, the discussion of racial authenticity in the decision's opening lines is significant to understanding the racialization of American Indians as a political group. In a case to determine the Congressional intent of a statute, Justice Alito begins his opinion:

> This case is about a little girl (Baby Girl) who is classified as an Indian because she is 1.2% (3/256) Cherokee. Because Baby Girl is classified in this way, the South Carolina Supreme Court held that certain provisions of the federal Indian Child Welfare Act of 1978 required her to be taken, at the age of 27 months, from the only parents she had ever known and handed over to her biological father, who had attempted to relinquish his parental rights and who had no prior contact with the child. The provisions of the federal statute at issue here do not demand this result.[9]

The specific notation of Baby Veronica's blood quantum, both by percent and fraction, is only specific to her Cherokee ancestry. We know from the Court that Baby Veronica is at least 1.2 percent American Indian. Her remaining 98.8 percent racial and ethnic heritage is not as thoroughly detailed, apart from the mention that the birth mother "is predominantly Hispanic."[10] Veronica's biological father is an enrolled Cherokee citizen, necessitating the application of the Indian Child Welfare Act to any child custody proceedings involving Veronica. As an ICWA case, strict definitions of "Indian," "Indian child," and "Indian child's tribe" apply. For example, ICWA defines an Indian child as "any unmarried person who is under age eighteen and is either (a) a member of an Indian tribe or (b) is eligible for membership in an Indian tribe and is the biological child of a member of an Indian tribe."[11]

In addition to the significant notation of Veronica's 1.2 percent "Cherokee blood," the Court interchanges this tribal designation for Indian and "Indian blood," muddying important legal and social distinctions of belonging for tribal communities broadly. Moreover, a discussion of tribal affiliation using blood quantum terminology harkens back to a long history of colonial influence over Indian peoples' right to determine

their own tribal membership. Efforts to define an individual's blood quantum attempts to determine "how many parts Indian" someone is in relationship to their non-Indian blood.[12] Determining someone's "Indianness" in this way fails to acknowledge unique and tribally specific perspectives on membership.

Second, this federal Indian law case is unusual due to the popular media attention it received. Indian country and mainstream media outlets covered the procedural history of this case extensively. Often times this reporting was faulty in focusing the nation's attention outside the scope of ICWA. The majority opinion itself likely contributed to this misdirection by failing to grapple with the racial discussion to which it alludes in its opening lines, leaving the political status of American Indians and tribal enrollment for a footnote.[13] Furthermore, a focus on blood quantum as a means to determine Indianness actively ignores the Brown family's place within the Cherokee Nation, geographically and culturally.[14]

Media investment in *Adoptive Couple v. Baby Girl*, however, went well beyond general interest in race and racial authenticity. For example, public relations campaigns initiated by friends of the adoptive family were designed to spur public sentiment on mixed-race adoption and "preferential treatment" on the basis of race. In addition to family friends, Christian adoption agencies and advocacy groups such as the Christian Alliance for Indian Child Welfare seized the opportunity to continue their push to unravel ICWA protections for Indian children and families.[15] Meanwhile, traditional media outlets failed to discuss how the legal rights of Indian nations to determine membership are thoroughly entangled within adoption proceedings of Indian children. The popular news coverage during this time was understandably heart-wrenching, yet continued to miss the critical point of tribal sovereignty even after Brown felt compelled to relinquish all legal rights to his biological child so that she could "live a normal childhood that she so desperately needs and deserves."[16]

Dusten Brown, Birth Mother, and the Adoptive Couple

Contrary to popular media reports, Baby Veronica had not been adopted by the Capobiancos, the prospective adoptive couple, at the time of the June 2013 decision.[17] Rather than focus on the particular legal questions presented to the Supreme Court, media coverage instead showcased the Capobiancos' "apparently stable, loving, and nurturing family environment afforded by the couple's economic and heteronormative status."[18] The case history, however, does provide a great deal of facts relevant to the involved parties. Baby Veronica's birth mother became engaged to Brown in December 2008.[19] The two were not living with one another at the time that Brown was informed of the pregnancy. At this point, Brown requested that the two marry sooner than originally planned. The birth mother ended the relationship in May 2009. In June of 2009, the birth mother contacted Brown requesting he choose between the termination of his parental rights and payment of child support. He relinquished his parental rights via text message to the birth mother.

The birth mother decided to put her unborn child up for adoption after the text message exchange.[20] She informed her adoption attorney and the adoption

agency handling the case of her knowledge that Dusten Brown was Cherokee. Baby Veronica's birth records list her as "Hispanic," concealing her Cherokee heritage. In addition, the birth mother checked herself into the hospital as "strictly no report," meaning that if anyone called to inquire about her, the hospital would report that she was not there.[21] As a result, anyone wishing to also inquire about Baby Veronica's birth would be unable to do so. The attorney handling the adoption contacted the Cherokee Nation to verify tribal membership as necessitated by ICWA. The tribe was unable to do so because they were provided with a misspelling of Dusten Brown's name and an incorrect date of birth.[22] Although errors such as misspellings can be an honest mistake, it does raise important questions about the standards to which adoption attorneys and prospective adoptive couples must be held in order to determine an Indian child's tribal status.

The Capobiancos invested emotionally and financially in the unborn child. Present at Baby Veronica's delivery, the couple took the baby into their care almost immediately. The 2013 decision also describes that, "for the duration of the pregnancy and the first four months after Baby Girl's birth, Biological Father provided no financial assistance to Birth Mother or Baby Girl, even though he had the ability to do so."[23] Four months after Baby Veronica's birth, Dusten Brown was contacted for the first time regarding the adoption and signed papers confirming that he did not contest the arrangement. Brown claims he believed he was legally relinquishing his parental rights to the birth mother only and sought the advice of an attorney the following day. After the full intentions of the adoption became clear, he requested a stay of the adoption. Brown sought legal custody, and a South Carolina Family Court concluded that the prospective adoptive couple, the Capobiancos, failed to prove that Brown's custody of Baby Veronica was harmful to the child. Brown was granted custody at this time. The South Carolina Supreme Court affirmed the Family Court's decision, confirming the best interests of the child.[24]

Physical Custody and Indian Children Born to Unmarried Parents

The United States Supreme Court refused the ruling of the lower courts, asserting that provisions of ICWA do not apply[25] because Brown never had legal or physical custody of Baby Veronica. The court cites an Oklahoma child custody statute specific to cases where paternity has not been established. According to the statute, "Except as otherwise provided by law, the mother of a child born out of wedlock has custody of the child until determined otherwise by a court of competent jurisdiction."[26] What the Court fails to reconsider is that by this time tribal membership records for Dusten Brown were confirmed by the Cherokee Nation. Despite his tribal citizenship, the Court continues to privilege the fact that Brown did not have legal or physical custody of Baby Veronica at the time of the initial court proceedings in the South Carolina Family Court. The Court's June 2013 decision simultaneously fails to draw attention to the fact that Brown *did* have continued physical and legal custody of Veronica for the previous nineteen months. Furthermore, the Indian Child Welfare Act does not rest a tribe's interest in their Indian children on the confirmation of "good parenting" or marriage

between a mother and father. Irrespective of a couple's current marital status, ICWA situates a tribe's invested interest in maintaining cultural continuity for Indian children.

The basic case facts are critical to understanding the devastating implications for ICWA's future. *Adoptive Couple v. Baby Girl* has already been decided, leaving many tribal leaders and attorneys in vehement defense of what they understand to be an erosion of tribal sovereignty in Indian family matters. When the US Supreme Court decides an issue concerning tribal nations and sovereignty, it directly impacts the struggle for sovereignty by each individual Indian nation. To combat the erosion of sovereignty, many tribal leaders and Indian attorneys actively work together to keep potentially devastating Indian law cases out of the Supreme Court.[27]

Incomplete Tribal Enrollment Request, Jurisdiction, and Text Messages

Although the decision in *Adoptive Couple v. Baby Girl* is relatively short, a number of additional questions remain unaddressed. First, it is unclear what legal recourse is available to a biological parent when a verification of tribal enrollment is submitted with false information. In this case, the adoptive couple paid for the birth mother to have an attorney assist in the transfer of the Indian child. Second, concerns regarding tribal jurisdiction arise when a birth mother does not initially name the birth father of a child due to his enrollment in a tribal nation.[28] For example, ICWA identifies instances of concurrent jurisdiction between a tribe and a state. One such instance is when Indian children do not reside on their respective tribal reservations. Jurisdiction is statutorily defined, but the specific procedures that might facilitate proper notification and transfer to the tribal court become less clear when tribes are initially presented with false documentation of an Indian parent. Providing false information to the Cherokee Nation left the nation out of the conversation of jurisdiction and transfer. Finally, the legality of relinquishing parental rights via text message in ICWA cases remains unaddressed.

The statutory text of ICWA speaks clearly to the second concern by outlining tribal jurisdiction in Indian child custody proceedings. Specifically, ICWA provides tribes with the legal right to intervene in Indian child family law cases at any stage of the case. Intervening can mean different things in different family law situations, but Section 1911(b) specifically provides tribes with the right to transfer cases to tribal court. It reads:

> In any State court proceeding for the foster placement of, or termination of parental rights to, an Indian child not domiciled or residing within the reservation of the Indian child's tribe, the court, in the absence of good cause to the contrary, shall transfer such proceeding to the jurisdiction of the tribe, absent objection by either parent, upon the petition of either parent or the Indian custodian or the Indian child's tribe: Provided, that such transfer shall be subject to declination by the tribal court of such tribe.[29]

Justice Sotomayor explains in her dissent that the biological father could have petitioned to remove the case to tribal court, but this issue was not raised in the majority opinion.[30] The state court would have been required to transfer the case unless the

birth mother objected, the tribal court declined the transfer, or there appeared substantial reason to the contrary such as immediate danger or threats of such danger to the Indian child. However, neither the discussion of jurisdiction nor the opportunity to transfer the case to tribal court arises in the majority opinion's analysis.

Transfer to a tribal court can be key in providing Indian families recognition of their unique cultural and community values. However, the unfortunate reality of Indian child proceedings is that the "implementation, adoption, and enforcement of ICWA protections in status offense proceedings are inconsistent among the states and can be based on highly discretionary ad hoc determinations made by intake officers, practitioners, advocates, and judges without clear legal guidance."[31] The negative and apparent consequence here for tribal governments is that many times tribes are not properly contacted and therefore lack the opportunity to intervene. Whether the error rests with the private adoption attorney, the biological parent, or with a family court judge, it is imperative that thorough training is provided to family service providers to ensure that Indian children and tribes are afforded full consideration of their legal rights under ICWA.

Last, a relinquishment of parental rights of biological children via text message remains suspect. Text messages should not determine the life of an Indian child when the relationship between biological parents has dissolved. In these sorts of arrangements, who is looking out for the best interests of the child and her legal rights under ICWA? Moreover, which of these parties has an interest in properly contacting the Cherokee Nation or the biological father regarding a transfer of venue to tribal court?

The Historical significance of the Indian Child Welfare Act

In 1978, the United States Congress declared that:

> It is the policy of this Nation to protect the best interests of Indian children and to promote the stability and security of Indian tribes and families by the establishment of minimum Federal standards for the removal of Indian children from their families and the placement of such children in foster or adoptive homes which will reflect the unique values of Indian culture, and by providing for assistance to Indian tribes in the operation of child and family service programs.[32]

ICWA was a powerful and progressive move toward preserving American Indian heritage after centuries of federal policy designed to eradicate and assimilate Indian peoples. Specifically addressing the continuity of Indian families, Congress found that the "Indian child welfare crisis [was] of massive proportions."[33] In addition, the Act "recognizes that Indian tribes have unique rights that must be preserved regarding the placement of their children."[34] A close reading of the majority opinion in *Adoptive Couple v. Baby Girl* indicates a stripping of the expressed intent stated here, an example of failing to see the forest for the trees.

Forced Removal and Indian Assimilation as Federal Policy

Historically, the removal of Indian children from their tribal communities and families in the United States began many centuries before the passage of ICWA. Within the last century and a half, the forced removal of Indian children to boarding schools was congressionally funded. Children were not allowed contact with their family, were punished for speaking their own language, and were expected to mold themselves into model citizens by mirroring their white teachers.[35] Often, their hair was cut and they were not permitted to wear any traditional clothing. The philosophy of the time is strongly linked with Captain Richard Pratt's infamous intentions to "kill the Indian and save the man."[36] Undoubtedly, the social distance—fueled by anti-Indian racism—between American Indians and white society was vast.

During the federal era of forced assimilation, American Indians were taken away from their families and tribal communities in an attempt to "make them white," suggesting that whiteness served as an indicator of racial superiority.[37] Education in the early nineteenth century was a Christianizing mission aimed at civilizing those viewed as savage and without salvation. Therefore, "little or no effort was made to incorporate Indian languages, cultures, or histories in the Indian education curriculum. This type of Indian education became the template for future Indian education efforts by the nascent American government."[38] Indian languages and ties back to tribal communities were deemed unnecessary because it was believed that the "red man's" way of life would disappear and give way to the white man's system of civilization.[39] The economic cost of this endeavor was enormous, yet rationalized as a necessary financial expense in order to prevent long-term Indian reliance on the government.[40]

The plight of the Indian family fared no better in the twentieth century. "A 1976 study by the Association on American Indian Affairs found that 25 to 35% of all Indian children were being placed in out-of-home care. Eighty-five percent of those children were being placed in non-Indian homes or institutions."[41] During this time, social workers were known to report neglect when evidence of poverty and financial dependence on government assistance programs could be found in Indian homes.[42] When one evaluates an American Indian home through the lens of a middle-class social worker, a financially poor home implies an unfit parent and an unfit home environment. Tying the meaning of "unfit" to poverty, however, continues the historical breakup of Indian families, which has devastating impacts on cultural continuity today.

As culture passes through people, it is extremely difficult for any community to continue to function and retain its cultural teachings when an alarming number of children are removed. This is particularly true when such removals are unwarranted and abusive. Elders teach children the ways of their people through community and social gatherings. When Indian children have little to no contact with their cultural community, this transfer of key traditional knowledge is not possible.[43] The entire tribe suffers as language, healing songs, spiritual teachings, and legal decision-making strategies become silent over time. Congress grew increasingly aware of its missteps in the Indian assimilation era of the late-nineteenth and first half of the twentieth century and recognized the necessity of keeping Indian families together. Thus, in the 1970s,

Congress declared that its policy would be to promote the stability and necessity of keeping Indian families together.[44]

ICWA's Purpose Defines "Breakup" and "Continued Custody"

The Indian Child Welfare Act was enacted to redress the removal of Indian children. Contrary to this objective, the majority opinion in *Adoptive Couple v. Baby Girl* constructs its entire holding around two key ICWA provisions located in Section 1912 entitled "Pending Court Proceedings." Rather than read the statute holistically, the Court roots itself within the procedural aspects of child custody Section 1912, which includes matters such as the right to court-appointed counsel and the right of all parties to review all documents filed with the court that it uses to reach its decision.

The two specific provisions that the Supreme Court relies upon deserve closer analysis. The first, Section 1912(d), states:

> Any party seeking to effect a foster care placement of, or termination of parental rights to, an Indian child under State law 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.[45]

The second, Section 1912(f), states:

> No termination of parental rights may be ordered in such proceeding in the absence of a determination, supported by evidence beyond a reasonable doubt, including testimony of qualified expert witnesses, 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.[46]

Section 1912(d) requires that termination proceedings seeking to end parental rights of an Indian child first take preventive steps to the contrary. The goal of remedial services and rehabilitative programs is to keep the Indian family together. In addition, the party or parties seeking either the foster placement or termination of parental rights must clearly demonstrate to the court that they have actively pursued these services before any termination may be executed. Section 1912(f) creates a high evidentiary bar specific to any proceedings seeking to terminate parental rights. The evidence must prove as clearly as possible that the continued legal relationship between Indian children and their parent or custodian will likely injure the child. In *Baby Girl*, rather than focus on Section 1912(d) and 1912(f) in their entirety, the Court plucks out "breakup" and "continued custody" to manufacture a reading of ICWA that appears inconsistent with the statute's expressed purpose.

Donald Black and the Behavior of Law

On the surface, the majority decision in *Adoptive Couple v. Baby Girl* sought to clarify whether a non-custodial parent can invoke ICWA to halt adoption proceedings to a non-Indian parent and whether ICWA's definition of parent includes unwed biological

fathers. When addressing the questions presented, however, the Court reveals deep historical anxieties over race, ethnicity, and the control of colonial relationships with Native people.[47] These anxieties present themselves immediately as the Court describes Baby Veronica's "Cherokeeness" as a quantitative value of Cherokee blood—as opposed to the uncontested fact that the young girl is indeed an "Indian child" as defined by both ICWA and the Cherokee Nation.[48]

Moreover, the opinion's opening lines indicate that two rationales perform simultaneously within the majority opinion's theater of logic. Onstage, the Court interprets ICWA through narrow definitions of Section 1912(d) and 1912(f), "breakup" and "continued custody" respectively, due to the fact that Brown lacked legal custody of Veronica under state law. Meanwhile, backstage, an unsettled preoccupation with race appears embedded within the language of blood quantum. Exploring both conversations together allows the reader an opportunity to identify how statutory interpretation is substantively informed by a misguided convergence of race and American Indian political status. In addition, this reading reveals how the Court's narrow reading brushes aside the important parent-child relationship built between Brown and Veronica. Born in September 2009, Veronica lived with the Capobiancos until the age of twenty-seven months. Veronica then lived with and was loved by Brown and his family until October 2013.[49] The nearly two years together would surely constitute a breakup of continuous physical custody in any plain meaning of the phrase.

A social strtification framework allows us to fully appreciate the power of the backstage narrative of cultural authenticity that racializes American Indians in order to diminish the unique political status of tribal nations and their inherent tribal sovereignty. According to sociologist Donald Black, the behavior of law is predictable by quantity, style, and direction. Black engages a macro view of societal organization, analyzing law in both a vertical and horizontal dimension within a culture, and through organizational structures that orient parties within a dispute. In this way, the law is a quantitative variable that increases and decreases depending on the setting and dispute. Quantity is measured, for example, in the number of complaints filed, calls to law enforcement, arrests, or hearings.[50] This position suggests that the application of written law may vary depending on one's position within society. Therefore, "law on the books" can greatly differ from "law in action."[51] In order to analyze the social distance and type of law found in *Adoptive Couple v. Baby Girl*, three pieces of Black's larger theory on the behavior of law require introduction.

The Quantity of Law May Vary with Social Position

First, the quantity of law varies with social position and the intimacy of the involved parties. The social position is observable within a community, for example, by examining which party initiates a legal dispute and which party is viewed as upholding normative values within the claim.[52]

The Style of Law Corresponds with Social Control

Second, the style of law corresponds with a mode of community social control, falling into four main categories: penal, compensatory, therapeutic, and conciliatory. Similar to

the quantity of law, style varies across time, space, and community, resulting in hybrid forms designed to address a society's changing legal needs. Black's theories do not seek to address the behavior of the individual, such as the arresting police officer in a dispute, but suggest that the quantity and style of legal actions within a society can explain the behavior of law in that specific time and space.[53]

Social Stratification Can Predict Legal Action

Third, Black makes a significant legal stratification claim that measures the vertical distance between people in a particular community in order to predict and explain legal action. Black explains that law varies directly with stratification; law varies directly with rank or social position; downward law (law applied by elites against those of a lower class) is greater than upward law (law applied from those of a lower class against elites); and upward law varies inversely with vertical distance.[54] Interestingly, Black attempts to distinguish these propositions by analyzing the amount of law and stratification found within numerous indigenous communities.[55]

Stratification and American Indians

Black's analysis of the behavior of law in relationship to social stratification is a valuable tool for examining contemporary legal disputes in the United States. Specifically, Black's analyses measuring downward and upward law are ideally suited for examining the quantity, direction, and stratification present in legal disputes between the federal government and sovereign Indian nations. The behavior of law in *Adoptive Couple v. Baby Girl* demonstrates how the law is a dynamic form of social control with room for implicit racial bias toward American Indians and statutory construction.

Black suggests that highly stratified societies will have more law because legal disputes increase when there is stratification between parties. The social distance can result from social positioning—for example, wealth, which can influence how the case will be resolved. In the instance of American Indians and their relationship to the Supreme Court, the social distance in both position and wealth is quite clear. American Indians consistently rank high among the nation's poor and those who are physically at risk for drug-induced death, infant mortality, and young adult suicide.[56] In addition, tribal legal status as "domestic dependents" pushes tribes to occupy a position within the federal justice system as wards of the state.[57] Although Black's work discusses the behavior of law between two individuals, the propositions he articulates are also applicable to social groups. There are two distinct communities intertwined in the analysis of Baby Veronica: a white family and an American Indian family, the latter a small and routinely underrepresented segment of the nation's population.[58]

In addition to direction, the law varies in quantity. Downward law varies directly with vertical distance, meaning that downward law increases in proportion to the vertical or social distance between parties. The opposite is also true. Upward law varies inversely with vertical distance. Black describes the seriousness of offenses as they relate to the social distance between the parties. He suggests that a person of higher economic or racial status who shoplifts is less likely to be prosecuted than a person of lower economic

or racial status in the United States.[59] Thus, wealth or social position creates an advantage in the direction and severity of the law applied. These privileges are not isolated to the initial application of law, but are persistent throughout the legal process, including access to legal representation or legal pardons. Additionally, Black suggests that downward law is more punitive in style than upward law, which tends to be compensatory.

Applying Black: Social Position, Style, and Stratification

Societal values are embedded within culture and as such can explain other facets of society such as law.[60] In addition to Black's suggestion that it is possible to predict and explain the quantity of law in a dispute, his notion of increased legal scrutiny demonstrates how social status factors in to how society views legal matters, alleged offenders, and the severity of punishment. Black further contends that "an offense by an unconventional against a conventional person or group is more serious than an offense in the opposite direction, with the offender more conventional than the victim."[61] This point is made by referencing nineteenth-century race relations illustrating serious legal injustices for American Indian people involved in disputes with whites. Specifically, Black recounts that crimes against American Indians were so violent and routine that judicial control was impossible. The courts essentially overlooked murder and violence from frontier whites against Indian communities because such communities would not convict white men found to have injured or murdered an American Indian.[62]

Moreover, Black makes the claim that although the cultural distance between whites and American Indians has decreased, Indians are still a cultural minority in the United States and therefore receive more severe sentences than whites. He continues by noting that the American Indian is "more vulnerable to a criminal complaint, arrest, prosecution, or conviction, and to civil proceedings of all kinds. If an Indian is a victim, however, the offense is not so serious."[63] Black's theories succinctly describe the relational distance to which people within a society articipate in one another's lives.[64] One who is marginal or not seen as fully integrated into the social life of the society will be more vulnerable to the activation of law against them.[65]

The Large Quantity of Law Indicates Disparate Social Positioning

The sheer number of cases throughout US history quantifies federal Indian law across time. Specific to *Baby Girl*, the long procedural history and ultimately the US Supreme Court's granting of certiorari indicates a rare and particular measure of law applied to the dispute. The certiorari process is understandably arduous and begins when unsuccessful parties in a lower court requests Supreme Court review.[66] In legal proceedings, law varies with the social position and rank of the parties involved—a social sorting process determined in part by wealth, profession, and citizenship status among other factors. Black examines the historical quantity of law among differently and similarly ranked individuals. His findings suggest, for example, that when one poor person commits serious harm against another, the likelihood of a lawsuit is much lower than if the poor person commits a serious harm to a wealthy individual. Black looks to the American South for a second example, concluding that blacks were historically

punished more severely for crimes committed against whites versus crimes committed against other blacks due to the vertical distance within America's racial caste system.[67]

In the case of *Adoptive Couple v. Baby Girl*, the social position of Baby Veronica among other legally defined Indians establishes an implicit discussion of race. For evidence, we again look to the majority opinion's opening line outlining Baby Veronica's blood quantum. There the Court lists her birth mother as predominantly Hispanic and critiques the South Carolina Supreme Court's reading of ICWA as disadvantaging vulnerable children "solely because an ancestor—even a remote one—was an Indian."[68] Thus, across a range of racially imagined American Indians, Baby Veronica is perceived to be "not very Indian at all." So to trigger ICWA protections seems an unfair matching of legal protections to perceived legal injustices. Barker speaks to this issue directly in her work on Native self-determination. She argues that the Court challenges Brown's credibility as an authentic Cherokee using a colonial blood-quantum rationale, which in turn challenges Baby Veronica's status. In this way, "Congress and the courts are under no obligation to apply ICWA's mandates which are reserved for those who are 'really' Indian but only 'really' Indian in the racialized terms of blood, not in the legal terms of tribal law."[69]

Furthermore, Black suggests that social position and the intimacy of parties within a legal dispute can vary the quantity of law. In this case, the Court perceives a vast separation in the positioning of the parties in two equally important ways: (1) the position between a well-to-do, educated white family and an American Indian father of questionable intentions, and (2) Baby Veronica's position among racially defined American Indian children deserving of ICWA protections. As suggested by Black's theory, it is the white family that initiates the legal dispute in the Supreme Court. The Capobiancos rally support in upholding values on the adoption rights for "traditional families"—those comprised of a married, heterosexual couple—when the children they wish to adopt do not look "very Indian" under socially constructed racial characteristics. Black describes legal parties as separate, not usually acquainted with one another, and different in their social position within society. What is curious about the underlying establishment of social position via race is the application of blood quantum politics by which to evaluate Indianness. On the one hand, this type of analysis on behalf of the Court signals a misunderstanding or negation of kinship within the Cherokee Nation. On the other hand, a formal reading of "continued custody" and "breakup" indicates an underlying racial logic that intends to police American Indian authenticity in order to deny legal protections designed for Indian families. Moreover, choosing to evaluate individuals based upon blood quantum is what Black might describe as a lack of social acquaintance with one another, particularly because authenticity justified by blood quantum is a colonial construct.

Blood quantum standards traveled across the Atlantic, imposing a social stratification system that persists to this day. Standards of race and racial authenticity were used in early British colonies to outline the "legal status of mixed-race people for various purposes. Initially articulated in terms of the number of generations from an unmixed black or Indian ancestor, colonies and states declared certain persons ineligible to testify in court proceedings, marry whites or other purposes by the amount

of Indian or black blood."[70] As a result, blood quantum is understood as a colonial construct that fails to comport with traditional notions of family held prior to the arrival of Europeans for many communities.[71]

Today, some federally recognized tribes utilize blood quantum thresholds to determine membership eligibility. Among those tribes, minimum thresholds vary. The Cherokee Nation, for example, does not require a minimum percent of Cherokee Indian blood in order to become an enrolled member.[72] Instead, the Nation requires all citizenship applicants to document a direct Cherokee ancestor from the Dawes Final Rolls compiled between 1899 and 1906.[73] This authority to determine tribal membership is central to a tribe's inherent sovereign power, yet remains subject to the plenary power of Congress.[74] Court cases have ruled that Indian nations comprise a "distinct community, occupying [their] own territory, with boundaries accurately described" and can "make their own laws and be ruled by them."[75]

The Style of Law Is Punitive

Second, the style of law in *Adoptive Couple v. Baby Girl* is punitive. Black describes a punitive legal system as one that "prohibits certain conduct, [enforcing] its prohibitions with punishment. In the case of violation, the group as a whole takes the initiative against an alleged offender, the question being his guilt or innocence."[76] Punishment is not meted out solely for criminal behavior. Rather, law may behave punitively toward individuals who engage in behavior deemed undesirable by the Court. For instance, perceptions of "poor parenting" or the use of racial "trump cards" are described negatively in the majority opinion and subsequently factor into the Court's decision to read ICWA in favor of the Capobiancos. Textually, the Court is punishing in three specific ways: (1) its classification of Indian child and Indian parent in a manner that denies Veronica ICWA protections due to her as a Cherokee child eligible for enrollment; (2) its overly literal focus on the meaning of "breakup" in Section 1912(d) and on "continued custody" in Section 1912(f) as opposed to a more holistic reading of the statute discussed by Justice Sotomayor; and (3) the creation of a narrow class of protected Indian families—those that reflect "traditional family" unions with a married, heterosexual couple.

Regarding the classification of parent and child, the Court does not dispute that Baby Veronica is an Indian child as defined by ICWA.[77] Yet she is effectively denied ICWA protections and the right to grow up within her larger Cherokee community because of a narrow reading of "Indian parent" attributed to her biological father. Alternatively, neither the paternity of Dusten Brown nor his enrollment as a Cherokee tribal member is disputed. Instead, the Court argues that there is no preexisting Indian family established by legal custody in either Oklahoma or South Carolina—Oklahoma being the home state of Brown and South Carolina the home state of the Capobiancos.[78] Furthermore, the Court clarifies that at the time of the initial adoption proceedings, Brown did not have physical custody of Veronica either. Thus, the rights of an Indian parent under ICWA cannot be triggered to benefit Brown's reunification with his biological daughter Veronica.

By denying legal protections outlined by ICWA for both parent and child—and more so to the suggestion that the only Indian families at issue within ICWA are intact Indian families—the decision is simultaneously punitive against Brown and Indian families that do not fit traditional expectations of a married, two-parent household led by a mother and a father. Justice Alito does not directly define what he means by "intact Indian families" and instead reads ICWA's consistent use of the word "removal" as evidence that a family must be physically united or whole in order for any part of that family to be *removed*. Alito asserts in the majority opinion that "when, as here, the adoption of an Indian child is voluntarily and lawfully initiated by a non-Indian parent with sole custodial rights, the ICWA's primary goal of preventing the unwarranted removal of Indian children and the dissolution of Indian families is not implicated."[79] Not only does this reliance on the use of the word "intact" deny the important relationship between Veronica and Brown in the nearly two years they spent together in Oklahoma, this construction denies ICWA's intent to prevent the "dissolution of Indian families" broadly.[80] Alito himself describes the design of ICWA to address and prevent "the cultural insensitivity and biases of social workers and state courts" from further eroding Indian families, yet reveals his own biases in the process by failing to appreciate the statute holistically.[81]

Next, the statutory reading of ICWA binds too tightly to the meaning of "breakup" in Section 1912(d) and "continued custody" in Section 1912(f), leaving behind the heightened protections for Indian families within both Section 1912 provisions. Instead of reading the sections or statue holistically, the Court argues that when an Indian parent never retained legal custody of a child, there is no preexisting family or parent-child relationship to continue. This is a narrow reading that buries the intent of the statute to promote stable Indian families, not just those "intact Indian families" that conform to dominant social norms of what constitutes a family worth protecting. With this reading, Brown had no chance of securing prior legal custody unless he had been married to the birth mother or had filed for, and then been granted, custody by a state court. For a variety of socioeconomic reasons, these options are not always possible or desirable. Joanne Barker argues that bias motivates the Supreme Court to protect "the privileges of a heteronormative whiteness [because it is] seen to be threatened by Indigenous legal claims to child custody and care as an aspect of their collective rights to self-determination."[82] In protecting traditionally constructed heteronormative white families, the Court denies the Cherokee Nation's legal right to determine membership.

Justice Breyer, while concurring with the majority, brings critical attention to the risk that the opinion's interpretation of parent may be too punitive and exclude too many fathers.[83] Breyer describes Brown as "an absentee Indian father who had next-to-no involvement with his child in the first few months of her life" but that broadly non-custodial Indian parents may include "some who would be suitable" fathers in future cases.[84] Additionally, Justice Scalia questions the parameters of the meaning of "continued" within "continued custody." He argues that continued may refer both to custody in the past and future, opening the door to expand the class of families outlined by Alito—intact families where there is clear legal custody of Indian children by Indian parents. Scalia goes on to question the demeaning of parenthood by stating, "This father

wants to raise his daughter, and the statute amply protects his right to do so. There is no reason in law or policy to dilute that protection."[85] Thus, the decision creates a very small class of protected Indian families both in the majority opinion and during oral argument.

Social Stratification Predicts Downward Law

Third, the vertical distance described in Black's work exists between individuals, while similar parallels arise in the vertical distance between communities. In the United States, American Indians make up approximately 2 percent of the nation's population.[86] Aside from offensive caricatures in the media, they are largely unseen by mainstream society. Underrepresented economically, politically, and socially, tribal communities are extremely distant from the normative life of the nation-state the Supreme Court seeks to uphold. This level of social stratification may indicate room for implicit racial bias to affect legal decision-making. For example, perhaps neither Baby Veronica nor her biological father appeared "Indian enough" to the justices. Perhaps they failed to satisfy blood quantum expectations of an authentic Indian, however faulty this measure might be. This bias is evident when Justice Alito references playing an "ICWA trump card at the eleventh hour to override the mother's decision and the child's best interests" as well as his overall disagreement with the South Carolina Supreme Court (SCSC).[87]

The Supreme Court continues to stratify the nation when it molds informal pressures, such as implicit racial bias, into formal mechanisms such as law. *Adoptive Couple v. Baby Girl* is an excellent example of this. The Court claims to formally read clauses of ICWA by focusing on literal meanings of "breakup" in Section 1912(d) and "continued custody" in Section 1912(f), yet opens with an introduction of Veronica's Cherokee blood quantum. Why? Joanne Barker offers a helpful explanation of how a court might stray from the task of statutory interpretation. She argues that "Natives must be able to demonstrably look and act like the Natives of national narrations in order to secure their legal rights and standing as Natives within the United States."[88] While the Court does not directly engage how Indians must look or act, the majority opinion *does* trouble the decision with blood quantum, rather than an emphasis on Cherokee enrollment policy through lineal descent. Furthermore, one cannot rule out the possibility that some Justices may in fact be troubled with the "Native look" of both Brown and his daughter. The majority opinion not only glosses over important cultural connections the Brown family has with the Cherokee Nation, but the preceding oral arguments reveal an investment in a racialized construction of what constitutes an American Indian. Indian law scholar Bethany Berger supports this possibility when she writes, "The discussion of race in the oral argument shows that the justices were not [just] concerned about special rights for Indians, but instead about ensuring that those rights remained limited to a small and racially defined group."[89] As a result, the Court fails to thoughtfully distinguish Cherokee enrollment from perceptions of Indian authenticity through blood quantum, demonstrating an underlying racial logic for such a literal reading of "breakup" and "continued custody."

Adoptive Couple v. Baby Girl Polices American Indian Authenticity

American Indians are all too familiar with colonial methods of social control. From the moment of contact with Europeans, Native land, body, and mind have undergone intense pressures to conform to the normative values of the settler-colonial world. Chickasaw scholar Jodi Byrd describes Natives as "the original enemy combatant who cannot be grieved."[90] This keen observation identifies a struggle to conform and bend the Native to a settler imagination that persists today in a variety of settings. Formally, Native peoples are criminalized and incarcerated at alarming rates. Yet informally, Native communities are policed in other ways that simultaneously threaten the safety and stability of Native families. The behavior of law, which is predictive of legal outcomes when parties are socially disparate in an adversarial justice system, helps us to sort out the complexities of formal and informal social control.

The law is a tool of social control, and the decisions issued by the highest court implement this control by the government across the nation. When the US Supreme Court decides a federal Indian law case, these decisions simultaneously impact the lives of American Indian people and the way that others within society understand them as a social group. *Adoptive Couple v. Baby Girl* signals an implicit desire by the Court to steer indigenous peoples into normative perspectives on race, Indian authenticity, and family structure. Alongside social control, vertical distance and stratification between the parties in a legal dispute structure how society will interpret the outcome for each group.

The 2013 decision interprets the congressional intent of ICWA in a manner that denies both its historical significance and the rights of an Indian father to parent his Indian child. Building an argument of statutory construction on the meaning of "breakup" and "continued custody" rather than a more holistic reading of the statute effectively results in the creation of a small class of protected Indian families. I argue that this ideology racializes the American Indian in a way that denies individual protection of one's political status under the law. Moreover, this ideology applies a socially constructed "otherness" to Native people as socially unfit and somehow backward in their approach to forming families. The ideology implies that Indian families involved in ICWA proceedings may not have the "best interests" of Indian children in mind. If this was truly the case, then Indian families would have exhausted all formal channels to acquire previous legal custody of their Indian children.

Joanne Barker explores the social mechanisms under which Native communities are disparately impacted by the law. She writes:

> Within the narrative practices of nation formation, laws that regulate Native status and rights are central in defining the conditions of power for those classified as "white." These laws have worked so concertedly over time to normalize the legal, social, and economic positions of privilege for "whites" over Native lands, resources, and bodies that those classified as white have come not only to feel entitled to their privileges and benefits under the law—in fact, expecting the law to continue protecting those privileges and benefits—but also to enjoy the right to exclude them from nonwhites.[91]

While there are potentially other explanations for the statutory approach used by the Court to determine how and when ICWA can be successfully applied to child custody proceedings for a non-custodial Indian parent, such alternatives are not addressed in the majority opinion. Within the analytical void that is left behind, Barker's careful attention to the normalization of white privilege in the law reveals why the Court might not bother to consider alternative ways to read ICWA in a way that prevents the Capobiancos from successfully adopting Veronica. Similarly, the Court's insistence on the meaning of three words within ICWA rather than the entirety of the statute suggests the plausability that the style of racial bias at work here is not an outright "rejection of racial classifications, but instead . . . the expectation and insistence on the absorption and disappearance of indigenous peoples."[92]

Justice Sotomayor argues much of the same in her thorough dissent, suggesting that other motivating factors may be behind this interpretation of the law. She writes that the Court goes to some length to misread the statute "in order to reach a conclusion that is manifestly contrary to Congress' express purpose in enacting ICWA: preserving the familial bonds between Indian parents and their children and, more broadly, Indian tribes' relationships with the future citizens who are 'vital to [their] continued existence and integrity.'"[93] Indian families, of all types and sizes, are arguably included in the congressional intent of ICWA. In fact, a broad reading of the statute extends the opportunity to raise the next generation of Indian children as both a familial and tribal right. Applying Black's theory on the behavior of law and Barker's work exploring laws that regulate Native rights to uphold systems of power shed important light on how an implicit discussion of race may be signaling a larger legal stratification that denies Native people not only ICWA protections but legal protections broadly.

Conclusion

By bringing together important disciplinary conversations, this essay reconsiders *Adoptive Couple v. Baby Girl* as a demonstration of the United States Supreme Court's sustained interest in maintaining social control over who is and is not Indian under the law. The majority opinion is legally and sociologically challenging. The finding that non-custodial Indian parents cannot use ICWA to prevent the adoption of their Indian children is sadly unsurprising since it aligns with a long legal tradition of Native dispossession, social control, and erasure. Various discussions of Cherokeeness in racial terms suggest that the Court believes there are "special benefits" at stake not applicable to Dusten Brown's Cherokee trump card. These federal protections, however, are not "special benefits." Instead, ICWA provisions are necessary in order to address the historical trauma of forced removal and the intentional breakup of Indian families.

While the Court asserts that its decision reads ICWA holistically, I argue that instead it strips away the historical significance of ICWA through a narrow interpretation of intact Indian families. The behavior of this legal decision also indicates disparate social positions between the parties, is punitive in style, and predicts downward law against the Cherokee parent-child relationship due to social stratification. The Cherokee family is stratified in two ways. First, a well-to-do white family is

privileged over the American Indian family. Second, Baby Veronica's Cherokeeness is racialized as insufficient. The extreme legal disadvantage creates undue burdens for the party most heavily stratified within society, persistently placing them in a position of weakness throughout the conflict. However problematic the decision is in its misconceptions regarding the unique political status of Cherokee and American Indian tribal membership, a social stratification framework that explores the behavior of law is predictive of such an outcome.

Notes

1. Indian Child Welfare Act of 1978, 25 U.S.C. 21 § 1912(d) (1978).
2. *Adoptive Couple v. Baby Girl*, 133 S. Ct. 2552, 2578 (2013).
3. Ibid.
4. Joanne Barker, "For Whom Sovereignty Matters," in *Sovereignty Matters: Locations of Contestation and Possibility in Indigenous Struggles for Self-Determination*, ed. Joanne Barker (Lincoln: University of Nebraska Press, 2005).
5. *Adoptive Couple*, 133 S. Ct. at 2559.
6. Ibid., 2562.
7. Indian Child Welfare Act of 1978, 25 U.S.C. 21 § 1901(3) (1978).
8. *Adoptive Couple*, 133 S. Ct. at 2556–57.
9. Ibid., 2558. It is entirely possible that of the 98.8% racial and ethnic inheritance that is unaccounted for, Veronica might also carry important American Indian lineage from either biological parent.
10. Indian Child Welfare Act of 1978, 25 U.S.C. 21 § 1903 (1978).
11. On blood quantum requirements, see Eric Beckenhauer, "Redefining Race: Can Genetic Testing Provide Biological Proof of Indian Authenticity?" *Stanford Law Review* 56 (2003); Margo Brownell, "Who is an Indian? Searching for an Answer to the Question at the Core of Federal Indian Law," *University of Michigan Journal of Law* 34 (2001); Circe Sturm, *Becoming Indian: The Struggle over Cherokee Identity in the Twenty-First Century* (Santa Fe: SAR Press, 2011); Circe Sturm, *Blood Politics: Race, Culture, and Identity in the Cherokee Nation of Oklahoma* (Berkeley: University of California Press, 2002).
12. *Adoptive Couple*, 133 S. Ct. at 2565.
13. Bethany R. Berger, "In the Name of the Child: Race, Gender, and Economics in Adoptive Couple v. Baby Girl," *Florida Law Review* 67 (2014): 35.
14. See "Brief of *Amicus Curiae*, Christian Alliance for Indian Child Welfare in Support of Petitioners," where the Alliance describes ICWA as having racially based preferences that can jeopardize the safety of all children in deciding temporary and permanent child custody placement; http://www.americanbar.org/content/dam/aba/publications/supreme_court_preview/briefs-v2/12-399_pet_amcu_caicw.authcheckdam.pdf.
15. Indian Country Today Media Network, "Dusten Brown Stops Litigation So Veronica Can Live 'Normal Childhood,'" October 10, 2013, http://indiancountrytodaymedianetwork.com/2013/10/10/dusten-brown-stops-litigation-so-veronica-can-live-normal-childhood-151694. Brown states, "The time has come for me to let Veronica live a normal childhood that she so desperately needs and deserves, and that means stopping the ongoing litigation here in Oklahoma. Veronica is only 4 years old, but her entire life has been lived in front of the media and the entire world, and I cannot bear for that to continue any longer. I love her too much to continue to have the spotlight on her. . . . And her safety, happiness and well-being have always been my number one priority."

16. See Aura Bogado, "A Hard Blow to Tribal Sovereignty," *Colorlines*, June 25, 2013, http://colorlines.com/archives/2013/06/supreme_court_strikes_a_hard_blow_to_tribal_sovereignty_in_adoption_case.html.

17. Alyosha Goldstein, "Possessive Investment: Indian Removals and the Affective Entitlements of Whiteness," *American Quarterly* 66, no. 4 (December 2011).

18. *Adoptive Couple*, 133 S. Ct. at 2558.

19. Ibid.

20. Berger, "Name of the Child," 9.

21. *Adoptive Couple*, 133 S. Ct. at 2558.

22. Ibid.

23. Ibid., 2559.

24. Ibid., 2562.

25. Okla. Stat. Ann. tit. 10, § 7800 (West).

26. Gale Courey Toensing, "Indian Law Attorneys' Advice to Tribes: 'Stay Out of the Courts!'" *Indian Country Today*, October 28, 2013, http://indiancountrytodaymedianetwork.com/2013/10/28/indian-law-attorneys-advice-tribes-stay-out-courts-151957.

27. "Initially the birth mother did not wish to identify the father, said she wanted to keep things low-key as possible for the [Appellants], because he's registered in the Cherokee tribe. It was determined that naming him would be detrimental to the adoption." *Adoptive Couple v. Baby Girl*, 731 S.E.2d 550, 553 (S.C. 2012).

28. Indian Child Welfare Act of 1978, 25 U.S.C. 21 § 1911 (1978).

29. *Adoptive Couple*, 133 S. Ct. at 2574.

30. Gonzalez, "Reclaiming the Promise," 131.

31. Indian Child Welfare Act of 1978, 25 U.S.C. 21 § 1902 (1978).

32. H.R. Rep. No. 1386, 95th Cong., 2d Sess. 9 at p 9, reprinted in 1978 U.S Code Cong. & AD. NEWS 7530, quoted in Cami Fraser, Tom Meyers, and Aaron Allen, "Michigan Juvenile Delinquency Cases and the Indian Child Welfare Act," *Michigan Child Welfare Law Journal* 12, no. 2 (2009): 11, doi: 10.2139/ssrn.1656507.

33. Thalia Gonzalez, "Reclaiming the Promise of the Indian Child Welfare Act: A Study of State Incorporation and Adoption of Legal Protections for Indian Status Offenders," *New Mexico Law Review* 42 (2012); Indian Child Welfare Act of 1978: Hearings on S.1214 Before the Subcomm. on Indian Affairs of the H. Comm. on Interior and Insular Affairs, 95th Cong. 1 (1978); B. J. Jones, "Differing Concepts of 'Permanency': The Adoption and Safe Families Act and the Indian Child Welfare Act," in *Facing the Future: The Indian Child Welfare Act at 30*, ed. Matthew L. M. Fletcher, Wenona T. Singel, and Kathryn E. Fort (Baltimore: Michigan State University Press, 2009), 139.

34. See Robert A. Trennert, Jr., *The Phoenix Indian School: Forced Assimilation In Arizona, 1891–1935* (Norman: University of Oklahoma Press, 1988), 65–66.

35. Richard H. Pratt, "The Advantages of Mingling Indians with Whites," Proceedings of the National Conference of Charities and Correction at the Nineteenth Annual Session held in Denver, CO, June 23–29, 1892, http://quod.lib.umich.edu/n/ncosw/ACH8650.1892.001?rgn=main;view=fulltext. For a description of Pratt's assimilationist philosophy, see Patrick Wolfe, "Settler Colonialism and the Elimination of the Native," *Journal of Genocide Research* 8, no. 4 (2006): 397, doi: 10.1080/14623520601056240.

36. Barbara Ann Atwood, "Flashpoints Under the Indian Child Welfare Act: Toward a New Understanding of State Court Resistance," *Emory Law Journal* 51, no. 2 (2002): 587.

37. Raymond Cross, "American Indian Education: The Terror of History and the Nation's Debt to the Indian Peoples," *University of Arkansas Little Rock Law Review* 21 (1999): 941.

38. See David H. DeJong, *Promises of the Past: A History of Indian Education in the United States* (Golden: Fulcrum, 1993), 108–09.

39. Ibid.

40. *The Destruction of American Indian Families*, ed. Steven Unger (New York: Association on American Indian Affairs, 1977), 1, http://www.nrc4tribes.org/files/The%20Destruction%20of%20Indian%20Families.pdf.

41. Cheyanna L. Jaffke, "Judicial Indifference: Why Does the 'Existing Indian Family' Exception to the Indian Child Welfare Act Continue to Endure?" *Western State University Law Review* 38 (2011): 127.

42. See Lorie M. Graham, "The Past Never Vanishes: A Contextual Critique of the Existing Indian Family Doctrine," *American Indian Law Review* 23 (1998): 1.

43. See Indian Child Welfare Act of 1978, 25 U.S.C. 21 § 1902 (1978).

44. Indian Child Welfare Act of 1978, 25 U.S.C. 21 § 1912(d) (1978) (emphasis added).

45. Indian Child Welfare Act of 1978, 25 U.S.C. 21 § 1912(f) (1978) (emphasis added).

46. Joanne Barker, *Native Acts: Law, Recognition, and Cultural Authenticity* (Durham: Duke University Press, 2011), 6.

47. *Adoptive Couple*, 133 S. Ct. at 2556, 2565.

48. "Adoptive Parents Take Custody of Veronica from Biological Father." *Tulsa World*, http://www.tulsaworld.com/archives/adoptive-parents-take-custody-of-veronica-from-biological-father/article_5eac54ef-c6eb-5a97-b559-667f2bdcf53b.html.

49. Donald Black, *The Behavior of Law* (Bingley: Emerald Group, 2008), 3.

50. Roscoe Pound, "Law in Books and Law in Action," *American Law Review* 44 (1910).

51. Black, *The Behavior of Law*, 4.

52. Ibid., 4–8.

53. Ibid., 13, 17, 21, 25.

54. Black's conclusion that many North and South American tribes have little or no law highlights a separate discussion in the social sciences. That is, often an outside observer will wrongly conclude that there is an absence of law in a Native community when in fact what is absent is Western law. This is an important distinction. See Antonia Mills, *Eagle Down Is Our Law: Witsuwit'en Law, Feasts and Land Claims* (Seattle: University of Washington Press, 1995).

55. Centers for Disease Control and Prevention, "American Indian and Alaska Native death rates nearly 50 percent greater than those of non-Hispanic whites," last reviewed April 22, 2014, http://www.cdc.gov/media/releases/2014/p0422-natamerican-deathrate.html.

56. *Cherokee Nation v. Georgia*, 30 U.S. 1 (1831).

57. See US Census Bureau, The American Indian and Alaska Native Population: 2010 Census Briefs available at http://www.census.gov/prod/cen2010/briefs/c2010br-10.pdf. ("According to the 2010 Census, 5.2 million people in the United States identified as American Indian and Alaska Native, either alone or in combination with one or more other races. Out of this total, 2.9 million people identified as American Indian and Alaska Native alone." In relationship to the approximate United States population in 2010 of 309 million, approximately 3 million of the population self-identified as American Indian and Alaska Natives alone. Roughly 1.7% of the total population.)

58. Black, *The Behavior of Law*, 25.

59. Ibid., 37.

60. Ibid., 69.

61. Ibid., 70.

62. Ibd., 70.

63. Ibid., 40.

64. Ibid., 55.

65. See The Supreme Court Press, "Supreme Court Success Rate on a Writ of Certiorari," accessed April 16, 2016, http://www.supremecourtpress.com/chance_of_success.html. (Four justices must agree to grant a petition for a writ of certiorari. Recent data from 2010 reports that of the 5,910 petitions for cert only 165 cases received grants - yielding a success rate of 2.8%)

66. Black, *The Behavior of Law,* 17.

67. *Adoptive Couple*, 133 S. Ct. at 2565.

68. Joanne Barker, "Self-Determination," *Critical Race and Ethnic Studies Journal* 1, no. 1 (2015): 11-26, doi: 10.5749/jcritethnstud.1.1.0011.

69. Paul Spruhan, "A Legal History of Blood Quantum in Federal Indian Law to 1935," *South Dakota Law Review* 51 (2006): 4–5.

70. For a discussion of "whole bloods" and "half bloods" in thirteenth- and fourteenth-century England, see Frederick Pollock and Frederic Maitland, *The History of English Law Before the Time of Edward I* (Clark, NJ: The Law Book Exchange, 1959), 301-05.

71. *Adoptive Couple*, 133 S. Ct. at 2565.

72. Cherokee Nation, "About Citizenship," http://www.cherokee.org/Services/TribalCitizenship/Citizenship.aspx.

73. "A tribe's right to define its own membership for tribal purposes has long been recognized as central to its existence as an independent political community," *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 72 (1978).

74. See *Worcester v. Georgia*, 31 U.S. 515, 561 (1832) and *Williams v. Lee*, 358 U.S. 217, 219 (1959), respecctively.

75. Black, *The Behavior of Law,* 4.

76. *Adoptive Couple*, 133 S. Ct. at 2565.

77. See S. C. Code Ann. § 63-17-20 (B) (2010) ("Unless the court orders otherwise, the custody of an illegitimate child is solely in the natural mother unless the mother has relinquished her rights to the child"); Okla. Stat., Tit. 10, § 7800 (West Cum. Supp. 2013) («Except as otherwise provided by law, the mother of a child born out of wedlock has custody of the child until determined otherwise by a court of competent jurisdiction»).

78. *Adoptive Couple*, 133 S. Ct. at 2561.

79. Ibid.

80. Ibid.

81. Joanne Barker, "Self-Determination," *Critical Race and Ethnic Studies Journal* 1, no. 1 (2015): 11–26, doi: 10.5749/jcritethnstud.1.1.0011.

82. *Adoptive Couple*, 133 S. Ct. at 2572.

83. Ibid.

84. Ibid.

85. "American Indian and Alaska Native death rates nearly 50 percent greater than those of non-Hispanic whites," Centers for Disease Control and Prevention, last reviewed April 22, 2014, http://www.cdc.gov/media/releases/2014/p0422-natamerican-deathrate.html.

86. *Adoptive Couple*, 133 S. Ct. at 2565.

87. Barker, *Native Acts*, 6.

88. Berger, "Name of the Child," 330.

89. Jodi Byrd, *Transit of Empire: Indigenous Critiques of Colonialism* (Minneapolis: University of Minnesota Press, 2011), xvii.

90. Barker, *Native Acts*, 5.

91. Berger, "Name of the Child," 330.

92. *Adoptive Couple*, 133 S. Ct. at 2555.