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

B.J. Jones[*]

Professor Bethany R. Berger's recent article, *In the Name of the Child: Race, Gender, and Economics in* Adoptive Couple v. Baby Girl,[1] takes a somewhat distrustful perspective on the Court's decision. In that case[2] a native father of a child born out of wedlock was not entitled to all of the protections afforded to native parents under the federal Indian Child Welfare Act (ICWA). The decision could be construed as being very limited in its scope and directing state courts not to engage in contortions of language in federal laws to protect the rights of putative fathers, whose rights to object to adoptions appear dubious under state law. Considered that way, the fact that a native father and child were involved in the decision appears somewhat irrelevant. The language in the decision interpreting the substantive placement provisions of the federal law[3] can be mitigated by pointing out that already existing law allows a state court to defer to the wishes of a parent in deciding where to place a native child.

Unfortunately, as Berger points out in her excellent article, such a minimalist approach to the decision ignores the fact that the Court majority displays an alarming ignorance and apathy toward the historical plight of native children and families in this country by rendering a decision that restores the "colonization" mentality of a child welfare and private adoption industry that oftentimes have put the selfish interests of individuals seeking native children over the self-preservation of Indian tribes and families.[4] By cynically citing to the child's blood quantum in the opening salvo of the decision,[5] a fact completely irrelevant to the application of the federal law or the decision itself,[6] as some ipso facto evidence that tribal concerns were

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* Director, Tribal Judicial Institute, University of North Dakota School of Law; Chief Judge, Sisseton-Wahpeton Oyate Tribal Court; Associate Judge, Standing Rock Sioux Tribal Court; Associate Judge, White Earth Tribal Court; Justice, Oglala Sioux Tribe; Justice, Flandreau-Santee Sioux Tribal Court.

1. 67 FLA. L. REV. 295 (2015) [hereinafter Berger].

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

3. 25 U.S.C. § 1915 (2012).

4. *See* Berger, *supra* note 1, at 356 (noting that the ICWA "is contrary to the interests of private [adoption] providers.").

5. *See id.* at 2556 ("This case is about a little girl (Baby Girl) who is classified as an Indian because she is 1.2% (3/256) Cherokee.").

6. The ICWA does not require any fraction of blood in order for a child to be considered Indian. Instead, it 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." 25 U.S.C. § 1903(4) (2012).

somehow trivial in the case, and by completely ignoring the legislative history behind the ICWA and its intended application to so-called "voluntary" placements of native children for adoption,[7] the Court has carved out a category of fathers and, more importantly, the Tribes of these fathers and their children, who do not receive all of the protections of the ICWA.

Berger deftly points out that the decision pitted the same adversaries who initially faced off in Congress over the law: economic interests underlying the behemoth private adoption industry against tribal interests concerned about the displacement of their children.[8] Although tribal interests may have prevailed in Congress in 1978 with the enactment of the ICWA,[9] Berger cautions that the Supreme Court may have recalibrated the various legal and economic interests involved to achieve a result that Congress may not have contemplated when it passed the law. One cannot help but notice that this judicial tinkering of legislative prerogatives appears similar to the rebalancing act the Court engaged in in another case this past term. In *Shelby County v. Holder*,[10] the Court opted to ignore legislative history and find that Congress exceeded its authority by extending the requirements of Section 5 of the Voting Rights Act to States that had historically discriminated against minorities in voting practices.[11]

The Court's analysis regarding the application of the substantive placement preference provisions of the ICWA is even more alarming because the Court, as Berger points out, "completely undermines the statutory requirement"[12] of the law and thus creates a mechanism for private adoption agencies to "evade compliance with the preferences."[13] The preferences have always been the most important substantive provisions of the law because they compelled state courts and public and private entities to ensure that native children who were removed from their nuclear families would not lose their tribal ties. They were also the primary impediment to the private adoption industry facilitating the adoption of native children without the knowledge and consent of Indian tribes. Although the discussion regarding section 1915 is not clear in the decision with regard to its extent,[14] Berger points out that

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7. *Id.* at § 1913 (governing voluntary consent to foster care and termination of parental rights).

8. *See* Berger, *supra* note 1, at 299.

9. Indian Child Welfare Act of 1978, NAT'L INDIAN WELFARE ASS'N, http://www.nicwa.org/indian_child_welfare_act/ (last visited June 3, 2015).

10. 133 S. Ct. 2612 (2013).

11. *Id.* at 2631.

12. Berger, *supra* note 1, at 317.

13. *Id.*

14. The ICWA does not enunciate whether it (1) applies only in voluntary proceedings where

the dangerous precedent set by this language led the South Carolina Supreme Court, on remand, to ignore the fact that family members of the father were more than willing to provide for the child.

Hopefully Berger's prescient powers will prove wrong and the decision will not "eviscerate" major portions of the law.[15] Even if this proves the case, her article sounds the alarm for Indian tribes and families to realize that native families continue to be under constant scrutiny in the state judicial systems and that the strong economic interests opposed to a strict application of the ICWA remain as vigilant as they were in 1978.

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a biological parent who had custody of the child prior to the adoption proceedings expresses a preference for a particular family, or (2) extends to involuntary proceedings where an extended family member has not stepped forward to express an interest in placement.

15. Berger, *supra* note 1, at 316.