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## WHO'S THE FATHER?

NAOMI CAHN & JUNE CARBONE\*

When couples manage to be close enough to conceive a child, but not close enough to determine the child's future, who gets to decide when they disagree: mother, father, state courts, or a tribe? The litigation that produced the Supreme Court decision in *Adoptive Couple v. Baby Girl*<sup>1</sup> demonstrates why we are no closer to a definitive resolution of what to do when parents do not share assumptions about how to raise their child.

Dusten Brown and Christy Maldonado, the biological parents in the case, had known each other since high school and were engaged to be married when Maldonado found out she was pregnant.<sup>2</sup> Brown, then serving in the U.S. Army,<sup>3</sup> did what many would consider to be the "right thing": he proposed moving up the wedding date.<sup>4</sup> According to Maldonado, he also told her he would not provide support unless they were married.<sup>5</sup> Maldonado was offended.<sup>6</sup> She thought that it was wrong to marry for money or to condition support on marriage<sup>7</sup> and broke off the engagement. When she subsequently texted Brown to ask whether he wanted to pay support or give up his parental rights, he opted for the latter.<sup>8</sup> It did not help that he was stationed four hours away, preparing to deploy to Iraq, and rarely communicated with Maldonado face to face.<sup>9</sup>

Maldonado, who had two children from an earlier relationship, decided to place the child, now known as "Baby Veronica," for adoption with a couple in

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<sup>1</sup> *Adoptive Couple v. Baby Girl*, 133 S. Ct. 2552 (2013).

<sup>2</sup> *Id.* at 2558; Allyson Bird, *Birth Mom Explains Adoption Decision*, POST & COURIER, Mar. 23, 2012, <http://www.postandcourier.com/article/20120104/PC1602/301049905>.

<sup>3</sup> Brief for the United States as Amicus Curiae Supporting Affirmance at 4, *Adoptive Couple*, 133 S. Ct. 2552 (No. 12-399), available at <http://www.justice.gov/osg/briefs/2012/3mer/1ami/2012-0399.mer.ami.pdf>.

<sup>4</sup> *Adoptive Couple*, 133 S. Ct. at 2558.

<sup>5</sup> Bird, *supra* note 2.

<sup>6</sup> *Id.*

<sup>7</sup> *Id.*

<sup>8</sup> *Adoptive Couple*, 133 S. Ct. at 2558.

<sup>9</sup> See Bird, *supra* note 2.

whom she had confidence.<sup>10</sup> Brown, who showed no interest in the child until he received the adoption papers almost four months after Baby Veronica's birth, then sought custody.<sup>11</sup> He explained that his earlier agreement to terminate his rights was based on his belief that the mother would be raising the child herself.<sup>12</sup> But his reasoning did not really matter because, as it turns out, he had no rights to consent to the adoption under state law, much less to seek custody.<sup>13</sup> Brown had not lived with Maldonado or Baby Veronica or held out Baby Veronica as his own, nor had he provided support to Maldonado during her pregnancy; his offer to marry her and then support her was irrelevant.<sup>14</sup>

Strip out the Indian Child Welfare Act (ICWA) from *Adoptive Couple*, and these facts illustrate the national lack of agreement on what makes someone a parent. South Carolina, like many other states, sets limits on when nonmarital biological progenitors are given rights.<sup>15</sup> Moreover, in charmingly antiquated language, South Carolina law provides that "the custody of an illegitimate child is solely in the natural mother."<sup>16</sup> Even if the adoption had been brought in Oklahoma, where Baby Veronica was born, Brown's choice to condition financial support upon marriage would still have precluded him from any right to consent to the adoption.<sup>17</sup> States like Missouri, on the other hand, go to greater lengths to recognize parental rights on the basis of biology.<sup>18</sup> The ICWA, which seeks to promote tribal interests through greater recognition of biologically based rights,<sup>19</sup> differs less from many state laws today than it did at the time it was passed.

At the core of these differences is the question of how to align parental behavior with the promotion of the child's interest in stable and secure

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<sup>10</sup> *Id.*

<sup>11</sup> *Id.*

<sup>12</sup> *Id.*

<sup>13</sup> See OKLA. STAT. tit. 10, § 7505-4.2(C) (2011) (listing as an exception to the parental consent requirement for adoption the father of a child born out of wedlock, when the child is placed for adoption within fourteen months of birth and the father has not exercised his parental rights, including financially supporting the child); S.C. CODE ANN. § 63-9-310(A)(5) (2008) (requiring the father to have "openly lived with the child or the child's mother" for six months before the placement and that he "openly held himself out to be the father" or that he "paid a fair and reasonable sum, based on the father's financial ability, for the support of the child or for expenses incurred in connection with the mother's pregnancy").

<sup>14</sup> See OKLA. STAT. tit. 10, § 7505-4.2(C); S.C. CODE ANN. § 63-9-310(A)(5).

<sup>15</sup> S.C. CODE ANN. § 63-9-310(A)(5).

<sup>16</sup> *Id.* § 63-17-20(B).

<sup>17</sup> OKLA. STAT. tit. 10, § 7505-4.2(C).

<sup>18</sup> MO. ANN. STAT. § 453.030 (West 2002) (granting a consent right to any man who is presumed to be the father or who is willing to establish paternity).

<sup>19</sup> 25 U.S.C. § 1903 (2012) (defining parent as "any biological parent," including unwed fathers so long as paternity has been acknowledged or established).

relationships. It is hard to see the impact of this interest in the *Adoptive Couple* litigation, as a twenty-seven-month-old Baby Veronica was transferred from the adoptive couple who raised her to a father she had never met,<sup>20</sup> then abruptly ordered returned to that couple after the conclusion of the case.<sup>21</sup> Historically, parenthood has been linked with marriage in order to promote greater stability. A father who did not marry the mother received no legal recognition, even if he lived with and supported her.<sup>22</sup> Professors Kathryn Edin, Ronald Mincy, and Laura Tach described parenthood as a “package deal” for men that linked legal recognition and assumption of the parental role to a man’s relationship with the mother.<sup>23</sup>

Today, fathers and mothers may assume parallel parental roles without any prerequisite relationship with each other.<sup>24</sup> The result makes the forging of shared understandings, the coordination of parental conduct, and the resolution of legal rights and responsibilities dramatically more difficult. Earlier fatherhood cases involved men who either had or wanted a continuing relationship with the mother as well as the child.<sup>25</sup> Kathryn Edin and Timothy Nelson’s new book<sup>26</sup> illustrates a somewhat different model of father-child relationships. The low-income fathers they study often do not know the mother very well when she becomes pregnant, and the relationship frequently does not survive the birth. Yet the men are thrilled to be fathers, adore the child, and seek ongoing contact regardless of the status of their relationship with the mother.<sup>27</sup> Edin and Nelson highlight, however, that “[i]n a startling reversal of the way gender typically operates in American society, unwed childbearing seems to offer mom, and not dad, all the power: ‘it’s her way or the highway,’ in the words of one father.”<sup>28</sup>

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<sup>20</sup> *Adoptive Couple v. Baby Girl*, 133 S. Ct. 2552, 2559 (2013).

<sup>21</sup> “*Baby Veronica*” *Handed over to Adoptive Parents, Cherokee Nation Confirms*, CBS NEWS (Sept. 24, 2013, 1:04 AM), [http://www.cbsnews.com/8301-201\\_162-57604299/baby-veronica-handed-over-to-adoptive-parents-cherokee-nation-confirms](http://www.cbsnews.com/8301-201_162-57604299/baby-veronica-handed-over-to-adoptive-parents-cherokee-nation-confirms).

<sup>22</sup> June Carbone, *The Missing Piece of the Custody Puzzle: Creating a New Model of Parental Partnership*, 39 SANTA CLARA L. REV. 1091, 1092 (1999).

<sup>23</sup> Laura Tach et al., *Parenting as a Package Deal: Relationships, Fertility, and Nonresident Father Involvement Among Unmarried Parents*, 47 DEMOGRAPHY 181, 181-84 (2010).

<sup>24</sup> Carbone, *supra* note 22, at 1094; see JUNE CARBONE & NAOMI CAHN, MARRIAGE MARKETS: HOW INEQUALITY IS REMAKING THE AMERICAN FAMILY (forthcoming 2014) (manuscript at ch. 10); June Carbone & Naomi Cahn, *The Triple System of Family Law*, 2013 MICH. ST. L. REV. (forthcoming 2013).

<sup>25</sup> See Carbone, *supra* note 22, at 1149 (finding that in the majority of high-profile fathers’ rights cases, the father sought a relationship only after the mother rebuffed his efforts to reestablish a relationship with her).

<sup>26</sup> KATHRYN EDIN & TIMOTHY J. NELSON, *DOING THE BEST I CAN: FATHERHOOD IN THE INNER CITY* (2013).

<sup>27</sup> *Id.* at 17.

<sup>28</sup> *Id.* at 214.

Fathers cannot look to the law for more consistent treatment or encouragement. In most jurisdictions, fathers will be liable for child support on the basis of biology alone, whether or not the mother facilitates their access to the child.<sup>29</sup> In determining custodial rights and in granting the ability to object to adoption, states vary enormously. Some identify the child's interests in contact with the father solely on the basis of the biological tie,<sup>30</sup> while others, like South Carolina, give uninvolved fathers no rights at all, regardless of the biological tie.<sup>31</sup> Moreover, even in the jurisdictions that make it easier for fathers to seek custodial rights, the men still need to establish paternity, which can be expensive and time consuming without the mother's cooperation, and hire an attorney if necessary to enforce a subsequent custodial order.<sup>32</sup>

*Adoptive Couple* differs from the more typical case primarily in the support the tribe offered Brown to realize his rights as a parent.<sup>33</sup> The ICWA, however, does nothing (and should not be expected to do much) to answer the larger question: When does a biological father have an obligation to assume a parental role, and under what circumstances does the legal mother have an obligation to accept him when he does?

These questions, rather than the ICWA debates, frame children's interests. In the last ICWA case to reach the Supreme Court, the tribal court that won jurisdiction over the Indian child's determination of custody put the child's interest first in the subsequent litigation.<sup>34</sup> In contrast, the South Carolina courts, both in initially transferring custody to the father and then changing it back to the adoptive parents, have treated Baby Veronica as no more than a pawn. It is time to recognize that a parent who is nowhere to be found at the time a child establishes critical emotional ties cannot later undo the determination of legal parenthood, and at the same time, courts must recognize that biological fathers and mothers may be confused about what, precisely, is the right thing to do to help them protect their rights.

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<sup>29</sup> *Id.*

<sup>30</sup> MO. ANN. STAT. § 453.030 (West 2002).

<sup>31</sup> S.C. CODE ANN. § 63-9-310(A)(5) (2008).

<sup>32</sup> See EDIN & NELSON, *supra* note 26, at 214.

<sup>33</sup> *Adoptive Couple v. Baby Girl*, 731 S.E.2d 550, 555 (S.C. 2012).

<sup>34</sup> Solangel Maldonado, *Race, Culture, and Adoption: Lessons from Mississippi Band of Choctaw Indians v. Holyfield*, 17 COLUM. J. GENDER & L. 1, 17-18 (2008) (describing the holding of Choctaw Tribal Court Judge Roy Jim as "balanc[ing] the Tribes' interest in keeping tribal children in tribal communities against the children's interests in continuity and stability" with the latter ultimately proving to be more important in the ruling).