PATRIARCHY AND THE LAW OF ADOPTION: BENEATH THE BEST INTERESTS OF THE CHILD

KATRYSHA BRACCO*

This article explores the nature of adoption, its history and how it has evolved into the current system of Canadian adoption law. Originally adoption existed to serve the interests of the adopting family. Over time there was a shift in attitude, such that adoption was intended to serve the best interests of the child. The author questions the current state of the law, its practices and whether it really serves those whom it is intended to serve. The article critically examines the nuclear family, which the author asserts is at the heart of Canadian adoption law. Finally, there is a brief presentation of psychoanalytic theories of child development which includes an examination of Freud, attachment theory and feminist analysis. This discussion helps both to explain the current system and to challenge its validity. The author raises important questions about the current state of adoption law and its foundations.

L'auteure examine la nature de l'adoption, son histoire et son évolution jusqu'au système instauré par la Loi canadienne actuelle. Initialement, l'adoption existait pour servir les intérêts de la famille d'accueil. Au fil du temps, l'attitude s'est peu à peu modifiée en faveur de l'enfant. L'auteure s'interroge sur la situation présente de la loi, ses pratiques et les bénéficiaires véritables du service qu'elle est censé assurer. L'auteure fournit une analyse critique de la famille nucléaire qui est, selon elle, au cœur de la Loi concernant l'adoption. En dernier lieu, elle présente brièvement les théories psychanalytiques du développement de l'enfant, y compris celle de Freud sur l'attachement et une analyse féministe. Cette discussion permet à la fois d'expliquer le système existant et d'en mettre en doute la validité. L'auteure soulève des questions importantes sur la situation actuelle de la Loi concernant l'adoption et sur son fondement.

---

* Editor's Note: Katrysha Bracco graduated with a B.A. from McGill University in 1987 and an LL.B. from Queen's University in 1990. She commenced studies toward an LL.M. at the University of Alberta in 1991. Her studies and her life were tragically cut short by her death in 1994. Throughout her scholarly career she was involved in volunteer, political and athletic activities. She was an avid member of the Women's Law Forum during her time as a Master's student at the University of Alberta. Her work and her life were guided and enlivened always by a passion for social justice.

This article is a compilation of three draft chapters of her master's thesis on which she was working at the time of her death. This presentation of her work as a single article seeks to bring forward her discussion of the legal construct of adoption and the senses in which it may be seen as designed to further the aims of the patriarchal state by mandating that systems of adoption be structured to rigidly mirror the nuclear family. An examination of the full text consistently reveals her desire to imagine new and different family structures that would meet the emotional and physical needs of family members while freeing them from the oppressive aspects of the patriarchal family. Her concern with psychoanalytic theory also reflects her hope that a better understanding of child development would support new and more liberating systems of family. She did not live to expand upon her ideas of how the law of adoption might be changed so as to facilitate different kinds of family relationships. Her text does, however, reveal a particular concern for the erasure of the birth mother and thus, we may conclude that she would have advocated legal structures that allowed for a closer and more open relationship between the birth mother and the adopted child. Beyond this, her text challenges us to imagine how new family structures might be created and how the legal system might be changed so that it would support rather than inhibit their flourishing.

Her work was enriched by discussions with her colleagues and friends: Kevin Doyle, Heather Paton, Kate Sutherland, her father Mr. Justice John Bracco, her husband Andrea Gambetti, and her thesis supervisors, Lillian MacPherson and Bruce Ziff. The article is full of references to motherhood. This bespeaks the importance in her life of her mother Laura Bracco and daughter Lucia Gambetti-Bracco.

TABLE OF CONTENTS

I. INTRODUCTION 1036
II. WHAT IS ADOPTION? 1037
III. CHANGING GOALS OF ADOPTION LAW 1037
IV. HISTORY OF CANADIAN ADOPTION LAW 1039
V. PROCEDURE AND CRITERIA FOR ADOPTION 1040
A. BEST INTERESTS OF THE CHILD 1041
B. CONSENT TO RELINQUISHMENT AND NOTICE 1041
C. CONFIDENTIALITY AND SEALED RECORDS 1043
D. ACCESS 1043
VI. ADOPTION AND THE PATRIARCHAL FAMILY 1044
VII. THEORIES OF PSYCHOLOGICAL DEVELOPMENT 1048
A. FREUD ON CHILD DEVELOPMENT 1049
B. ATTACHMENT THEORY 1051
VIII. FEMINIST CRITIQUES OF PSYCHOANALYTIC THEORY 1053
IX. FEMINIST CHALLENGES TO SOME OF THE BASIC ASSUMPTIONS OF PSYCHOANALYTIC RESEARCH METHODOLOGY 1054
X. AN ALTERNATIVE VIEW OF CHILD BEARING AND CHILD REARING 1055
XI. CONCLUSION 1056

I. INTRODUCTION

In this article an attempt will be made to critique the scheme of adoption law which exists in the modern west. It is the author's belief that the legal fiction that our system of adoption law creates regarding the birth of a child, the non-disclosure and non-access rules in relation to the child's biological family, are intended to perpetuate the post-seventeenth century notion of the family, namely the nuclear family. The patriarchal and classist roots of the nuclear family will be explored in order to question the validity of such a model in a modern context.

In examining the political and economic justifications for the nuclear family it shall be argued that the nuclear family as the base unit for the larger structure of civil society perpetuates and supports a patriarchal state. It will also be suggested that modern adoption law is informed by a patriarchal model of family relations which treats women and children as property to be owned by the male head of the family. Further, it will be shown that modern adoption law is philosophically inconsistent with the individualist ideals of liberal/patriarchal thought.

The article will examine the psychoanalytic theories which allegedly supported the nuclear family model as the appropriate environment for child development. Early theories of child development were patriarchal in their focus and resulted in strict interpretations of what family structures were appropriate for proper healthy child development. This narrow view of how to facilitate healthy child development is

mirrored in adoption law through the restrictions on contact between adopted children and their birth family, access to information and generally the creation of the legal lie of adoption. It will be argued, however, that modern psychoanalytic theory of child development would permit a far wider range of family formulations than adoption law presently does.

II. WHAT IS ADOPTION?

Heather L. Katarynych has described adoption as:

> a legal creation of a parent-child relationship between individuals who are not biologically related.... The effect of adoption is to place adopted children in the same position they would have had as the biological children of their adoptive parents, and terminate all of the legal ties arising from their relationship with the natural parents.[1]

Adoption tries to replicate the biological family as much as possible. Once the adoption order has been signed the adoptive parents gain all of the rights and responsibilities of biological parents. There are no ongoing requirements for state supervision, scrutiny, or accountability in the adoptive order. Once the order has been made and the appeal process has either been exhausted or has expired, there is no review or variation of the adoption order unless it was procured by fraud.[2] An adoption order provides the maximum legal stability to a caregiver-child relationship where the caregiver is not the biological parent of the child.[3]

III. CHANGING GOALS OF ADOPTION LAW

The practice of adoption dates back thousands of years.[4] According to Sir Henry

---

1 H.L. Katarynych, "Adoption" in N. Bala, J.P. Hornick & R. Vogl, eds., *Canadian Child Welfare Law: Children, Families and the State* (Toronto: Thomson Educational, 1991) 133 at 133.

2 *Child Welfare Act*, S.A. 1984, c. C-8.1, s. 68(1). However, the use of such a provision is extremely rare. Furthermore, even if the consent to the adoption order was procured by fraud, the Court will not automatically terminate the adoption order but will determine whether it would be in the best interests of the child to do so, especially if the child has been living for a lengthy period of time in the adoptive home and has bonded to the adoptive parents.

3 More legal stability and finality is provided in adoption than in an order granting custody or making an order of guardianship. See D.A. Cruikshank, "The Child in Care" in Bala, Hornick & Vogl, *supra* note 1, 77 at 98-99. A parent or guardian whose rights have not been completely terminated may apply to the court to have the guardianship ended. See *Child Welfare Act*, *supra* note 2, s. 54(3).

4 L. Penrod, *Adoption in Canada* (LL.M. Thesis, Faculty of Law, University of Alberta, 1986) [unpublished] at 15; R. Howe, "Adoption Practice, Issues, and Laws 1958-1983" (1983) 17 Fam. L. Q. 173 at 173; E.S. Cole & K.S. Donley, "History, Values, and Placement Policy Issues in Adoption" in D.M. Brodzinsky & M.D. Schechter, eds., *The Psychology of Adoption* (New York: Oxford University Press, 1990) 273 at 274. See also M.K. Benet, *The Character of Adoption* (London: Jonathan Cape, 1976) at 14; J. Smith & F.I. Miroff, *You're Our Child: A Social/Psychological Approach to Adoption* (Washington: University Press of America, 1981) at 8; G. Abbott, *The Child and the State*, vol. 2 (New York: Greenwood Press, 1968) at 164; A.D. Sorosky, A. Baran & R. Pannor, *The Adoption Triangle: The Effects of the Sealed Record on Adoptees, Birth Parents, and Adoptive Parents* (New York: Doubleday, 1978) at 25-28; Kornitzer,

Maine, adoption is one of the oldest and most widely used of legal fictions.[5] Unlike modern adoption law whose stated goal is to serve the best interests of children, ancient adoption was intended to serve the needs of the adoptive parents.[6] Adoption was used to perpetuate lineage by guaranteeing male heirs in the family and to secure the continuation of ancestor worship ceremonies.[7] However, adoption was also used to ensure the survival of a family business or to care for the adoptive parent in old age. Families were practical units of survival, absorbing or relinquishing members as the needs of the family dictated. In most cultures which practiced adoption, adoptees were usually adult males who were also expected to provide for and care for the elderly adoptive parents in exchange for financial security after the adoptive parents' death.[8]

The earliest known written adoption law, found in the Babylonian Code of Hammurabi, dated approximately 2285 B.C., is startlingly similar to present day adoption laws with the important exception that the paramount purpose of adoption was to meet the needs of the adopting family.[9] The Code required that the adoptee be treated the same as children born into the adoptive family, thereby recognizing the vulnerable status of the adopted child. It specified conditions under which the child may or must be returned to the biological parents and further decreed that a man could adopt a son only if he had no sons of his own. Once the child was relinquished the birth parent could not demand the child back; however, if the child transgressed against the adoptive father, he could return the child to the birth parents.[10]

Securing loyalty to a tribe was an important goal of ancient adoption law. The family was the root structure of the tribe and hence family loyalty translated into tribe loyalty. Adoption provided the ritual by which to extinguish completely any tie to the family of origin and to pledge allegiance to the new family. Any attempt to seek one's origins or question one's identity was seen as disloyal and dangerous to the family and tribe and was usually treated with ejection from the adoptive family.[11] The Romans in particular were concerned with the consolidation of family power and continuance of the male line through the family name.[12] It was this emphasis on social parentage

---

Child Adoption in the Modern World (New York: Philosophical Library, 1952) at 347; and M. O'Collins, "The Influence of Western Adoption Laws on Customary Adoption in the Third World" in P. Bean, ed., *Adoption: Essays in Social Policy, Law, and Sociology* (New York: Tavistock, 1984) 288 at 290-99. The practice of adoption has been identified in ancient Greece, Egypt, India, China, Japan, Spain and Rome, the Teutonic aristocracies, the Celtic clans, the South Pacific, Africa, amongst the Poles, the Slavonic Russians and the Aboriginal communities in Australia, New Zealand and Papua New Guinea. The Hindu Laws of Manu, dated variously 200 B.C. and 100 A.D., but believed to be derived from laws existing as early as 1,000 B.C., also gave legal recognition to the practice of adoption. See L.A. Huard, "The Law of Adoption: Ancient and Modern" (1956) 9 Vand. L. Rev. 743 at 744.

5 H.S. Maine, *Ancient Law* (London: J. Murray, 1907) at 138.

6 Huard, *supra* note 4 at 745.

7 *Ibid.* at 743-44.

8 *Ibid.*

9 Howe, *supra* note 4 at 173-75. See also Cole & Donley, *supra* note 4 at 273-74.

10 *Ibid.*

11 Sorosky, Baran & Pannor, *supra* note 4 at 25-26.

12 Smith & Miroff, *supra* note 4 at 8.

rather than the blood tie which permitted the safeguarding of family power through the use of adoption.[13]

Although, to this day, the family is considered the basic unit of society,[14] the status of the individual vis-a-vis the state has changed dramatically. Where the father or other male head of the family used to have absolute power and control over everyone in his family, gradually the state began to replace the father as the ultimate authority. By the time of Justinian, about 500 years after Christ, the concepts of individual autonomy and civil rights led to a shift in allegiance, loyalty and obedience from the father to the state.[15] Thus, one could say that allegiances shifted from a smaller tribe to a larger tribe. The Justinian code of law reflected such diminishment of the importance of absolute family loyalty by allowing the adoptee to retain the right of inheritance from his or her birth family.[16] Thus legal barriers to the maintenance of connections with a birth family could be relaxed where the concern for securing family loyalty had eased.

Most of Europe developed adoption laws out of the Roman tradition. In England, however, adoption was not officially recognized until 1926. In nineteenth century England the practice of "putting the child out" (as an apprentice or servant) was widely utilized to deal with the problem of orphaned or unwanted children.[17] After World War I, Europe faced a deluge of orphaned and illegitimate children.[18] As families were re-configured it became clear that English law needed to catch up to the social reality of the time. Thus, even the legal recognition of adoption in 1926 was probably due more to the need to give legal structure to a social fact than to a real change in social attitudes about the importance of blood ties.

IV. HISTORY OF CANADIAN ADOPTION LAW

The first Canadian adoption law was passed in New Brunswick in 1873.[19] There was no requirement for the petitioning adoptive parent to be married, but if married both spouses had to petition the court jointly. If the child was over the age of twelve

---

13 Benet, *supra* note 4 at 23. Benet notes in this regard that paternity could be established merely by marrying the mother of a child. It is the attitude expressed in the saying "*pater est quem nuptiae demonstrant*" (the father is he whom the marriage points out) which made adoption possible in ancient Rome. This is in contrast to the Ancient Hebrew law which placed great emphasis on the blood tie with the mother and therefore eschewed the practice of adoption (Smith & Miroff, *supra* note 4 at 8; and Benet, *ibid.* at 28). Islamic culture also did not favour the practice of adoption since it viewed the fiction in adoption as an attempt to deceive Allah, see the *Koran*, xxxiii, 4-6. Also see generally M. Fineman & I. Karpin, *Mothers in Law: Feminist Theory and the Legal Regulation of Motherhood* (New York: Columbia University Press, 1995).

14 *Child Welfare Act*, *supra* note 2, s. 5.2(a): "the family is the basic unit of society and its well-being should be supported and preserved."

15 Sorosky, Baran & Pannor, *supra* note 4 at 27.

16 *Ibid.*

17 *Ibid.* at 29-30.

18 H.D. Krause, "Creation of Relationships of Kinship: Persons and the Family" in *International Encyclopedia of Comparative Law Vol. IV: Persons and the Family* (New York: Oceana, 1996) c. 6 at 74.

19 *The Supreme Court in Equity Act*, C.S.N.B. 1903, c. 112, ss. 240-46.

his or her consent to the adoption was required, as well as that of the natural parents or the guardian(s) if the natural parents were dead. The judge was required to inquire into the fitness and propriety of the proposed adoption and to be convinced that the petitioners could bring up and educate the child properly. There was no probationary period, no suitability study or report and, significantly, no secrecy requirements.

The Ontario *Adoption Act of 1921* and its successor passed in 1927 provided the features that were to become essential to the statutes passed in the rest of Canada until after the second World War.[20] This statute introduced the statutory death of biological parents and the rebirth of the adoptee. This meant that the biological parents ceased to have any rights over the child and in fact had no legally recognizable status vis-a-vis the child. The adoptive parents assumed full parental rights and responsibilities towards the child. The adopted child, however, did retain the right to inherit from his or her biological parents. He or she also had the right to inherit from his or her adoptive parents; however, the adopted child could not inherit from kindred within the adoptive family beyond the adoptive parents and their children. It is likely that this limitation on inheritance was due to the persistence of the importance of primogeniture and blood ties to inheritance. It was not until 1957 in British Columbia that the first adoption law was passed which stated that after adoption a child ceased to be the child of his or her biological parents "for all purposes" and "for all purposes" became the child of his or her adoptive parents.[21]

In Alberta adoption legislation was introduced in piecemeal fashion through the 1909 *Children's Protection Act* which addressed foster home placement, the 1923 *Children of Unmarried Parents Act* which introduced legal adoptions, the 1927 *Domestic Relations Act* which incorporated provisions for adoptions and finally the 1944 *Child Welfare Act* which covered both foster care and adoption in one comprehensive child welfare statute.[22] Presently the *Child Welfare Act*[23] is the source of the law in Alberta relating to adoption.

V. PROCEDURE AND CRITERIA FOR ADOPTION

There are four legal aspects of the adoption practice which are of interest and which have far-reaching consequences for the parties involved in an adoption scheme: first, the notion that the fundamental value to be served in the adoption process is the best interests of the child; second, the consent requirements, the procedures for revocation of consent and appeal requirements; third, the sealing of adoption records and confidentiality requirements; and fourth, the restriction or prohibition of access of the biological family to the adopted child.

---

20 S.O. 1921, c. 55; and S.O. 1927, c. 53.

21 *Adoption Act*, S.B.C. 1957, c. 1, s. 10.

22 S.A. 1909, c. 12; S.A. 1923, c. 50; S.A. 1927, c. 5; S.A. 1944, c. 8.

23 *Supra* note 2.

A. BEST INTERESTS OF THE CHILD

The law relating to children has evolved over the years to reflect society's attitudinal changes. Thus, legal policy has moved from a very adult-oriented view of children's place in society to a more child-centred approach. The most profound effect of this shift in attitude is the formulation of the best interests of the child test.[24] This test is significant in that it indicates official recognition of the powerlessness of children within society generally and in the family particularly. In a case of divorce, for instance, parents previously could make whatever arrangements they liked concerning the children. Today judges are legally obliged to review the portions of the settlement that affect the children to ensure that their needs are being sufficiently taken care of. The parents may dispose of almost every other aspect of their lives as they wish, but they are held to a social responsibility to ensure that their children suffer as little as possible from the breakup.

In areas of the law specifically focused on children, such as child protection and adoption, the primary purpose of the law is to address and meet the needs of children who are either at risk in their environment, who have no family to care for them, or who require legal familial re-configuration, as in the case of step-parent adoptions. The best interests of the child test is an attempt to shift mentality from the attitude that couples have a right to have children if they so desire them, to an attitude that every child has a right to a family. The result is that decisions affecting a child have to be filtered through the best interests test in order to ensure that it is the child's needs that are being met rather than those of the adoptive parents or some other party. Of course there are significant arguments which challenge some of the ways in which the best interests of the child test is applied: for example, one might ask whether it is truly the interests of the child that are served by the requirement that adoption be shrouded in secrecy or whether some other interests are being served by such a rule. It has been noted that the requirement of no contact between the adopted child and his or her biological family initially protected the adoptive family from the risks of disloyalty. Given that the historic rationale behind the rule is based on protection of economic and political interest in the strength of established families, scepticism may be required in approaching the claim that the same rule is now supported by the rationale of the protection of the best interests of the child.

B. CONSENT TO RELINQUISHMENT AND NOTICE

In acknowledgment of the fact that an adoption order usually means a complete relinquishment by a parent of all rights, responsibilities and obligations towards the child in question, there are strict statutory guidelines to ensure that the consent given was not precipitous or ill-informed.[25] In Alberta the person who was authorized to give consent for the child to be placed for adoption may revoke that consent within ten

---

[24] D. Barnhorst & B. Walter, "Child Protection Legislation in Canada" in Bala, Hornick & Vogl, *supra* note 1, 17 at 28.

[25] *Child Welfare Act*, *supra* note 2, ss. 56-57.

days of the giving of consent.[26] Until then the consent is considered to be only partly crystallized. If the consent is revoked within that time period the child must be returned to either the person who surrendered the child or the agency which placed the child, whichever gave consent to the placement. Adoption orders may not be set aside after the expiration of one year from the date of the order unless the order was obtained by fraud and the setting aside of the order would be in the best interests of the child.[27]

Section 56(1)(a) of Alberta's *Child Welfare Act* states that an adoption order may not be made without the consent of "all the guardians of the child." The *Child Welfare Act* is silent as to whether the biological father of a child born out of wedlock is entitled to notice of the adoption hearing. The *Domestic Relations Act*[28] states that a man is considered to be a joint guardian of the child if he is married to the mother at the time of the child's birth, or a decree of divorce or nullity of marriage was granted not more than 300 days before the birth of the child. Also, if a man cohabited with the mother for at least one year before the birth of the child, or he married the mother of the child after the birth of the child and acknowledged that he is the father, then he will be a joint guardian.[29] Unless the above criteria are met, the mother of a child born outside of marriage is considered the sole guardian of the child.

A biological father who does not meet the above criteria is still entitled to notice under s. 60(1)(d) of the *Child Welfare Act*. The biological father would be entitled to appear in court and make an application for custody of the child.

However, s. 59(1) of the *Child Welfare Act*, which sets out the documentation necessary to accompany an adoption petition, only requires that an affidavit be filed stating "the name, date and place of birth, gender and parentage of the child, *so far as is known*."[30] If the father has been a real presence in the child's life, then there is an obligation for that information to be presented to the court in order for the court to determine whether or not that person should be notified.[31] So, although consent is not required for the adoption, the fact that biological fathers are given a right to notice in certain circumstances means that they are at least given the opportunity to make a case for custody. Thus, the question arises as to whose interests are being protected by these restrictions on the requirement of the consent of the biological father.

Interestingly in the case of children who are members of an Indian band, there is a legislative requirement to notify the band of the adoption proposal to ensure that there is not a suitable placement for the child on the reserve. Section 62.1 of the *Child Welfare Act* directs that if the child being placed is believed to be an Indian who is a member of a band, then whether or not the guardian who is relinquishing the child is living on the reserve, consultation with either the chief or the council of the band is

---

26 *Ibid.*, s. 57(1).

27 *Ibid.*, s. 68.

28 R.S.A. 1980, c. D-37, s. 47(1).

29 *Ibid.*

30 *Supra* note 2, s. 59(1)(a)(i) [emphasis added].

31 *H.J.L.* v. *L.A. and R.D.A.* (1986), 1 R.F.L. (3d) 395 at 399 (Alta. C.A.).

required before the adoption petition may be filed. Thus, the law recognizes the importance of fostering the child's particular ethnicity in certain circumstances. No provision is made for children who are believed to be Indian but are not members of a band. It is likely that such a provision became necessary after the widespread removal of children from reserves for placement with white families in the 1960s. This provision is particularly interesting in that, not only does it explicitly address some of the consequences of the legal lie of adoption in wiping out the child's past, but it can also translate into real legal protection for a child's ethnicity, which in other instances is ignored.[32]

C. CONFIDENTIALITY AND SEALED RECORDS

Section 66(5) of the *Child Welfare Act* states that all documents relating to the adoption shall be sealed and shall not be available for inspection by any person except by court order or with the consent in writing of the Minister. The *Act* does permit the release of non-identifying information to the adoptee as long as he or she is eighteen years of age or older. An "interested person,"[33] or an adoptee who has reached the age of eighteen, may place their name upon a register and if a match is made the Minister will disclose the identity of each to the other, however, the Minister must first contact the adoptee and ensure that he or she desires his or her identity to be revealed.[34]

D. ACCESS

Generally, the law does not provide for any access by the biological parent to a child after an adoption order has been made. This has caused some litigation in the area of step-parent adoptions. The courts were initially unsure and inconsistent as to the significance of a voluntary relinquishment for adoption when the adoption would wipe out an access order. For instance, a number of cases in Manitoba and Ontario determined that an adoption order does in fact wipe out any previous access order.[35] When such a problem was addressed in British Columbia, however, the British Columbia Supreme Court determined that because the provincial *Family Relations Act*[36] permits applications for access by any person, a biological parent may apply for access to a child even after the adoption order has been completed if it can be shown that continued access would be beneficial to the child.[37] The result is that this area of jurisprudence is fraught with judicial uncertainty and inconsistency due to the fact that the specific legal regime of adoption has not evolved to deal with even the modern day

---

32 M. Sinclair, D. Phillips & N. Bala, "Aboriginal Child Welfare in Canada" in Bala, Hornick & Vogl, *supra* note 1, 171 at 171.

33 *I.e.* biological parents, adult biological siblings, any adult biological relative who has written consent of the biological parents, a parent under a previous adoption order or if the adoptee is an Indian, an adult member of the Band of the adoptee.

34 *Supra* note 2 at ss. 66(7), 266.1.

35 *Re L.D.E.B.; G.M.Z. and E.G.Z.* v. *T.F.S.B.*, [1981] 1 W.W.R. 152, (sub nom. *G.M.Z. and E.G.Z.* v. *T.F.S.B.*) (Man. C.A.); and *C.G.W.* v. *M.J.* (1982), 34 O.R. (2d) 44 (Ont. C.A.).

36 R.S.B.C. 1978, c. 20.

37 *North* v. *North* (1978), 6 W.W.R. 75 (B.C.S.C.); *Re Pinder and Thompson* (17 September 1982), Vancouver A002311 (B.C.S.C.) [unreported].

situation of step-parent adoptions, much less the possibility of legally open adoptions. Manitoba has responded to the dilemma of access and step-parent adoptions by giving judges discretion to continue an access order in certain circumstances;[38] other provinces have not been so forthcoming.

VI. ADOPTION AND THE PATRIARCHAL FAMILY

Our legal system is peppered with leaps of faith. We call a judge's assessment of the situation based on the testimony of witnesses to be a finding of fact. What the judge deems to be true becomes the truth upon which future consequences are based. It may be that only the parties themselves know what really happened in any given situation before the court. We live with uncertainty in the fact finding process because we somehow realize that it is the best that we can do.

The case of an adoption also engages the judicial power to create legal truth which then stands in for and supersedes lived experience. When a baby is born to a woman there is no uncertainty as to whether she is the mother: we know that this baby came out of this woman. When that woman gives her baby up for adoption, however, the judge, in much the same fashion as in a case of real factual uncertainty, makes a declaration that the baby is not the baby of the woman who gave birth to it. The woman who gave birth to it is deemed to not have had a child and to not be the mother, a different woman is then deemed to have had the child and to be the mother. Leaving aside the issue of what exactly makes a mother for the moment, we must ask, why is the law so intent on erasing the motherhood of one of these women?

Barbara Katz Rothman writes, "[t]hat someone else is mother to her child does not erase the birth mother as a mother: the motherhood of one woman does not cancel out the motherhood of the other."[39] Why then are we so obsessed with doing just that in the legal adoption system in Canada? Who benefits from such a system? What ends is such a system intended to serve? What, as a society, are we saying when we legally enforce this particular model of family re-structuring? What does this say about how we feel about families, what they should look and act like, about motherhood and what it means to be a mother? How does this reflect our feelings about children, what their status is in relation to those who gave birth to them, those who nurtured them, and those who even if they neither gave birth to nor nurtured them were ultimately held responsible for the child's growth and well-being?

In order to fully analyze the implications of the present system of adoption in Canada, it is first of all necessary to examine what, as a society, we mean when we say family. Who benefits by a family having only two parents: one male and one female?

---

38 *The Child Welfare Act*, S.M. 1974, c. 30, as am. by S.M. 1979, c. 22, as discussed in F.M. Fraser & H.D. Kirk, "*Cui Bono*? Some Questions Concerning the 'Best Interests of the Child' Principle in Canadian Adoption Laws and Practices" in K. Connell-Thouez & B.M. Knoppers, eds., *Contemporary Trends in Family Law: A National Perspective* (Toronto: Carswell, 1984) 105 at 118-19.

39 B.K. Rothman, *Recreating Motherhood: Ideology and Technology in a Patriarchal Society* (New York: W.W. Norton & Company, 1989) at 127.

Who would be harmed by a family having more or less than two parents? The consequences of a family having more than two parents in an adoptive context would affect not only the adults involved but the children as well. Inevitably, such restructuring of the nuclear family would also have broad social consequences. It is important, therefore, to examine the historical roots of the nuclear family in an attempt to discover why this particular structuring of the family is deemed to be the most appropriate formulation of family relations in Canadian society.

The modern western concept of a nuclear family, rather than being a natural and universal institution, is historically and culturally specific.[40] The traditional concept of the nuclear family has only developed since the late seventeenth and early eighteenth centuries, largely in response to the effect of the Enlightenment. Even within western culture the nuclear family was not a universal institution. Slave families and aboriginal families were not structured on the nuclear model.[41] Prior to the end of the seventeenth century the joining together of individuals into a family unit was based on economic and practical considerations.[42] Families were closely integrated with their outside communities and privacy was not especially valued in the family context. At the turn of the century, however, the emotional bonds between husbands and wives and between parents and children were increasing and privacy was becoming valued as the family began to identify itself as distinct from the larger community in which it lived.[43]

The nuclear family came to exist as a culturally and class-specific microcosm of the larger public world.[44] The authority of the father in this microcosm mirrors the authority of the state. Children in the family play the role of the citizen in the state and as such must learn to obey the appropriate authorities. Mothers who step outside of the kind of socialization that will make their child fit into the larger social context are held personally responsible for the malfunction of the child.[45]

Notwithstanding the relegation of mothers to the role of child-rearing, the ultimate authority of fathers in the family was justified by the importance of children's acceptance of the idea that a person can have only one master, the state. An equally powerful mother would undermine that acceptance of authority and introduce the

---

40 Faith Robertson Elliot defines the nuclear family as "a unit consisting of a husband and wife, and their children. This unit is widely thought of as a group based on marriage and biological parenthood, as sharing a common residence and as united by ties of affection, obligations of care and support and a sense of a common identity" (*The Family: Change or Continuity?* (London: MacMillan Education, 1986) at 4).

41 P. Williams, "Alchemical Notes: Reconstructing Ideals From Deconstructed Rights" (1987) 22 Harv. Civil Rights — Civil Liberties Law Rev. 401; P. Monture, "A Vicious Circle: Child Welfare and the First Nations" (1989) 3 C.J.W.L. 1.

42 C. Pateman, *The Sexual Contract* (Stanford: Stanford University Press, 1988) at 27.

43 S. M. Okin, "Women and the Making of the Sentimental Family" (1982) 11 Phil. & Pub. Aff. 65 at 73-74.

44 S. Firestone, *The Dialectic of Sex: The Case for a Feminist Revolution* (New York: William Morrow, 1970) at 9.

45 S. Ruddick, "Maternal Thinking" in J. Trebilcot, ed., *Mothering: Essays in Feminist Theory* (Totowa, N.J.: Rowman & Allanhead, 1983) 213 at 215.

potentially subversive concept of perspective. The concern that children should be socialized into an acceptance of obedience to one master has obvious implications for an adoption scheme which would permit ongoing contact between the birth family and the adopted family.[46]

Enlightenment thought re-defined man as autonomous, rational, and equal. This gave rise to a debate between the patriarchalists and the social contract theorists. The patriarchalists insisted on a society based on the hierarchical notion of a father-right. The social contract theorists disputed the legitimacy of a father-right and instead wanted to define civic culture in terms of autonomous individuals creating social relations by freely contracting with each other according to terms that both parties agreed upon.[47] Feminist theorists have sought to understand the dynamics of this tension. Andrea Nye argues that as philosophically contradictory as democracy and patriarchy may be, "[d]emocratic theory required that the family persist as an institution. Theoretically, the democratic construction of society as made up of competing individuals can only be maintained if non-competing individuals remain in the privacy of the family to be represented by the male head of the family."[48]

Central to the social contract theory that came out of Enlightenment theory of equality is Locke's idea that every man has a property interest in his own person, such that every man can choose for himself what relationships he wants to participate in.[49] It became problematic, however, to maintain domination over women and men excluded on grounds of race or class, while simultaneously seeking to establish a society in which all people are created equal.

The only way to justify the exclusion of women from the public sphere was to identify woman with nature and to create a clear split between nature and culture.[50] Moira Gatens points out that although Hobbes and Locke both admitted that men and women were equal in the state of nature they both consistently claimed that women were naturally inferior in culture.[51] Gatens argues that an adequate response to this divergence requires a close examination of the social contract: the abstract philosophical model for the apparent relations of all modern persons.[52] Gatens notes that "[w]hatever disagreements philosophers have concerning the form and the legitimacy of the social

---

46 This again reflects the ancient concern that contact between the adopted child and his or her natural parents would compromise loyalty to the adoptive family. Sorosky, Baran & Pannor, *supra* note 4 at 25-26.

47 Pateman, *Sexual Contract*, *supra* note 42.

48 A. Nye, *Feminist Theories and the Philosophies of Man* (New York: Routledge, 1988) at 24.

49 Pateman, *Sexual Contract*, *supra* note 42 at 13.

50 C. Pateman, *The Disorder of Women: Democracy, Feminism and Political Theory* (Stanford: Stanford University Press, 1989) at 124. Of course a similar rationale is used to justify the exclusion of racialized men: that is that they are primitive and savage and therefore ill-suited to the responsibilities of citizenship.

51 M. Gatens, *Feminism and Philosophy: Perspectives on Difference and Equality* (Cambridge: Polity Press, 1991).

52 *Ibid.* at 96.

contract, they universally agree that it is entered into by men only. The significance of this is that women are, conceptually at least, still in a state of nature."[53]

As women were tied to the hearth because of their childbearing functions, and because family relations became characterized by ties of love and affection, it became possible for men to justify women's exclusion from equality and the public world. The rationalization was that "the interests of the family are totally united" and, therefore, husbands and fathers could be trusted with best representing the interests of women and children in the public world.[54] The old patriarchal order based on the notion of a father-right was thus replaced with a different kind of patriarchy based on the fraternity of men.[55] The nuclear family arose in large part through the split between the private realm of the family and the public world of civic life, which was necessary to deny to women full participation in the public world, and which meant that the man's need to control the parameters of the nuclear family became important.

If, in fact, the model of adoption which erases the motherhood of one woman in order for another woman to become a mother is explicitly or implicitly intended to protect and perpetuate the modern nuclear family as created by a liberal/patriarchal state, then it is important to establish that the structure of such a model is consistent with liberal/patriarchal ideals. Modern western society is based on the liberal social contract notion that all individuals are free and autonomous beings, and that social order and relationships are formed by these individuals freely contracting with each other. Despite the fact that a social contract is an abstract philosophical construct, it is possible to argue that, in an adoption context, the birth mother and the adoptive parents create a contract. In that contract the birth mother gives up her baby which then becomes the child of the adoptive parents. Any rights which would normally arise from the relationship of the birth mother and her child are extinguished and those rights are transferred to the adoptive parents.

It is not a new legal concept to treat children as the property of their parents. In this context the child is the property which is the subject of the contract between the birth mother and the adoptive parents and which is literally passed from one party to the other. The problem in reconciling the political theory, which is the larger context in which this transaction takes place, and the adoption legal scheme which regulates such a contract, arises in relation to Locke's liberal premise that each person has a property interest in themselves.[56] What happens to the contractual relationship between the birth mother, the adoptive parents and the child, as the subject of the contract, when the child attains an age when she is mature enough to assert a property interest in herself?

As a society we have deemed that children are not sufficiently intellectually, emotionally, rationally or morally developed to make decisions on their own behalf. Such a distinction is essentially the crux of what we call childhood as opposed to

---

53 *Ibid.* at 96.

54 Okin, *supra* note 43 at 74.

55 Pateman, *Sexual Contract*, *supra* note 42 at 24-25.

56 J. Locke, *Two Treatises of Government* (New York: Hafner Pub. Co., 1969).

adulthood; the ability to make well-informed, rational decisions that are likely to be in our own interests. We have legislated many areas concerning the ability of children to look after their own interests. There is an age before which it is illegal to have sexual relations with a child, regardless of whether the child consents to the activity: the child is deemed not to be capable of choosing what is in her or his best interests. A minor is not legally able to marry unless she has the permission of her parents, and without such permission the marriage is voidable because her property interest in herself is considered not developed enough for her to be able to contract on her own behalf. Certain actual property exchanges or sales made by minors are voidable for the same reasons. Prostitution per se is not illegal, in part because the liberal state has difficulty interfering with the supposed right to do what you will with your own body: again, your property interest in yourself. Child prostitution, however, is banned outright.

In the situation of adoption the question then arises as to what happens to the adopted child's property interest in herself when she reaches the accepted age of majority? Information about herself is still denied to her on the basis of a legal state-sanctioned contract, which was made about herself as property, between her birth mother and her adoptive parents. The state itself prevents the contract from being breached by any of the parties. The child's racial or cultural heritage, her medical and social heritage, the circumstances of her birth and all the information about her blood relations is all information that can be — and usually is — denied to her by law, regardless of her now mature age and regardless of the desire of any of the parties to breach the contract. The state itself prevents the parties to the contract from breaking their contract. In order to be consistent with Locke's idea that everyone has a property interest in themselves, which in the modern context is deemed to accrue to the individual when he or she reaches age of majority, should there not be some change in the status of the original adoption contract at this time?

VII. THEORIES OF PSYCHOLOGICAL DEVELOPMENT

The social arrangements that we structure for ourselves say something about how we view ourselves in the world. They tell us that we need nurturing while we are young, that we need companionship when we are adults and that only a select group of people should fill those needs for us. In other words, we have already accepted implicitly that we are socialized beings because we choose particular social arrangements to facilitate what we consider to be the development of appropriate socialization. It is important, therefore, to understand which theories of how we develop psychologically influence the arrangements we make to facilitate that development. If we impose certain rules which constrain or encourage particular forms of family structures on a society because we have accepted certain theories of human development, and those theories can be shown to be suspect, then there is space to argue that consideration should be given to legally accepting other arrangements of family relations.

The history of some of the dominant psychoanalytic theories as they relate to child development will now be reviewed briefly. There will be an examination of how psychoanalytic theories regarding children's attachment to others and their ability to separate and individuate have evolved over the years. It will be shown how early

theories of child development were patriarchal in their focus and resulted in strict interpretations of what family structures were appropriate for healthy child development. This narrow view of how to facilitate healthy child development has been mirrored in adoption law through the restrictions on contact between adoptees and birth families, access to information and generally, the creation of the legal lie of adoption. An attempt will be made to demonstrate that modern psychoanalytic theory and its approach to healthy child development would support a shift in the legal approach to adoption. Once the sexist, classist and biologically essentialist assumptions underlying the work of many of these theorists are exposed and subsequently contrasted with more recent theories of child development, the argument can be made that the nuclear family is not necessarily the only appropriate model for child-rearing.

The intention here is to demonstrate that the strict rules surrounding adoptive family arrangements are rooted in now out-dated notions of human psychological development. These notions may well have been a good start at the turn of the century in developing a concept of psychoanalytic theory, but when examined with a critical eye, as interesting and historically important as they may be, some are found greatly wanting in so far as their ghosts may still cause some legal restrictions on the kinds of families that people are able to create.

A. FREUD ON CHILD DEVELOPMENT

The western world has been greatly influenced by Freud's theories on who we are and how we develop. Feminists and post-modernists have challenged almost every aspect of Freud's work. Such critics have pointed out that regardless of the value of his ground-breaking work on the unconscious, his perspective was biologically essentialist, sexist, heterosexist and paid scant attention to the role of social context in influencing human development. It is important to recognize, however, the pervasive influence Freud's theories have had, to be able to distinguish in the legal context what remnants of such turn-of-the-century theories exist and how the law can be assisted to evolve in order to better play the role that it takes in shaping human relations and consequently human development.

Freud's work on the pre-Oedipal and Oedipal stages of development is of particular interest as it is this area which most influences how the law restricts or encourages certain forms of human interactions. He believed that as they develop children pass through distinct and identifiable psychosexual stages. Although the first few years of a child's life were important, for Freud the crucial developmental stages occurred at about three or four when the child underwent the Oedipal and castration complexes. The way in which the individual copes with each of these stages will then determine the eventual adult temperament of the person.[57] Rosemary Tong has summarized Freud's analysis of the sexual stages of childhood which were considered crucial to healthy psychological development:

---

[57] R. Tong, *Feminist Thought: A Comprehensive Introduction* (Boulder: Westview Press, 1989) at 139.

> Freud's argument ... was that children's sexuality is "polymorphous perverse" — that insofar as the infant is concerned, its entire body, and especially its orifices and appendages, is sexual terrain. The infant moves from this type of "perverse" sexuality to "normal" heterosexual genital sexuality by passing through several stages. During the *oral* stage, the infant receives pleasure from suckling his/her mother's breast and also the next best thing, his/her thumb. During the *anal* stage, the two- or three-year-old child particularly enjoys the sensations associated with controlling the expulsion of his/her faeces. During the *phallic* stage, the three- or four-year-old child discovers the pleasure potential of the genitals and either resolves or fails to resolve the so-called Oedipus and castration complexes. At around age six, the child ceases to display overt sexuality and begins a period of *latency* that ends around puberty, at which time the young person enters the *genital* stage characterized by a resurgence of sexual impulses.[58]

The result of successful passage of the child through these stages is heterosexual adulthood.[59] The Oedipus complex, the desire to have sexual intercourse with the mother and kill the father, and the castration complex, the fear that in retaliation for his son's feeling towards his wife the father will castrate the son as he must have castrated the penis-less mother, are the two crucial states which play a key role in the development of healthy males. For boys it is the successful resolution of the Oedipus and castration complexes, evidenced by submission to the father, which triggers the development of the superego and the socially necessary ability to submit to the strictures of the public, social world. To the extent that the superego is the internalization by the son of his fathers' social values it also represents the son's internalization of his father's patriarchal social conscience.[60]

For girls a switch must be made from the female as love object, the mother, to male. When a girl realizes that she does not have a penis, which she recognizes as superior to her smaller and insignificant clitoris, she begins to envy the male for possessing a penis and blames her mother for not providing her with one. It is because of the daughter's resentment of her mother's failure to give her a penis that she comes to look to her father as a love object. She will now also begin to hate her mother for being a rival for her father's affections. In the healthy female the love for the father and the desire to possess a penis eventually evolves into the desire to have a baby.[61]

For both boys and girls it is the successful resolution of the Oedipal and castration complexes which turns them into moral civilized adults. For boys, however, the extra trauma that the castration complex causes them, through the real fear of physical harm, is what pushes them to become more inexorable, independent and impersonal than girls or, in other words, a more driven and morally conscious citizen.[62] Inevitably and incontrovertibly then, according to Freud, "anatomy is destiny."[63]

---

58 *Ibid.* at 140.

59 *Ibid.*

60 *Ibid.* at 140-41.

61 *Ibid.* at 141.

62 *Ibid.* at 143.

63 S. Freud, "The Passing of the Oedipus-Complex" in R. Pieff, ed., *Sexuality and the Psychology of Love* (New York: Collier Books, 1963) 176 at 180.

A child matures into a psychologically healthy adult by undergoing these complexes which require specific *dramatis personae*: mother and father, heterosexual man and woman. The familial conditions that were required for these processes to occur created the kinds of family arrangements that were psychologically acceptable and necessarily limited. Clearly, since Freud considered it crucial that a male child successfully resolve the Oedipal and castration complexes in order to develop into a morally mature adult male, single parenting or homosexual parenting would be inappropriate.

B. ATTACHMENT THEORY

Attachment theory is now widely accepted in psychological and psychiatric communities to be a leading model for child development in the area of formation of relationships to others.[64] Attachment theory examines human object or love relationships.[65] This theory was pioneered in the 1950s and 60s by John Bowlby who used an evolutionary-ethological method to study "human infant-mother attachments."[66] Significant to the development of attachment theory was the recognition that the "infant's tie to the primary caregiver ... could not be explained solely in terms of cognitive and socioemotional milestones."[67] This approach was a breakthrough in the psychoanalytic study of human development because it explained some previously inexplicable behaviour of infants.[68]

The fundamental premise of attachment theory is that children form internal working models[69] of themselves in response to their relations with others.[70] As Bretherton points out, infants require an external source or a caregiver to act as an "auxiliary ego" or a "self-regulating other who can help set priorities."[71] With these working models, which are constructed in the course of interacting with the physical and personal world, the individual is able to perceive and interpret events, create plans and predict future outcomes.[72]

Bretherton explains the idea of attachment:

> Human newborns are capable of a variety of signaling behaviors that elicit caregiving and other social responses from adults and that provide feedback regarding the success of caregiving interventions. In

---

64 I. Bretherton, "New Perspectives on Attachment Relations: Security, Communication, and Internal Working Models" in J.D. Osofsky, ed., *Handbook of Infant Development*, 2d ed. (New York: John Wiley & Sons, 1987) at 1061.

65 *Ibid.* at 1062.

66 *Ibid.* at 1061.

67 *Ibid.*

68 *Ibid.*

69 *Ibid.* at 1066.

70 J.P. Allen, J.L. Aber & B.J. Leadbeater, "Adolescent Problem Behaviors: The Influence of Attachment and Autonomy" (1990) 13 *The Psychiatric Clinics of North America* 455 at 457.

71 Bretherton, *supra* note 64 at 1093, citing R. Spitz, *The First Year of Life* (New York: International University Press, 1965); D. Stern, *The First Relationship: Mother and Infant* (Cambridge, Mass.: Harvard University Press, 1977).

72 Bretherton, *ibid.* at 1066, citing J. Bowlby, *Attachment and Loss Vol. 1: Attachment* (New York: Basic Books, 1969) [hereinafter *Attachment Vol. 1*].

> the course of the first few weeks and months, these infant social behaviors become more complex and coordinated. At the same time, infants begin to direct them preferentially toward specific caregiving figures. However, it is only during the second half of the first year of life that an infant's proximity- and interaction-seeking behaviors become integrated into a coherent behavioral-motivational system, organized around a particular figure or figures who perform the role of secure base and haven. It is the preferential activation of this proximity- and security-regulating system with respect to a small hierarchy of caregiving figures and its resistance to "refocusing" to which the term *attachment*, as formulated by Bowlby (1982) and Ainsworth (1973) is properly applied.[73]

It is apparently around the age of seven to twelve months than an infant's attachment behaviours are organized into what is called a motivational system of proximity and security regulation which the child uses in order to safely explore its world.[74] The development of attachment in this period is important to an argument for adoption reform because studies have shown that infants between the ages of seven and twelve months who were moved from a foster home to an adoptive home displayed far greater distress, as displayed by increased crying, clinginess, apathy, and eating and sleeping disturbances than infants who were similarly moved before the age of six months.[75]

The infant uses the attachment figure as a secure base for exploration and as a haven for safety when a danger is perceived.[76] The child's attachment system monitors the location of the attachment figure, or in legal terms, the primary caregiver, as he or she explores at increasing distances from the attachment figure.[77] If a questionable situation arises, the child will engage in information-seeking behaviour, such as referencing the caregiver's face to determine her assessment of the situation.[78] If the situation is perceived as dangerous by the child or is indicated to be so by a response of the caregiver, the child will seek proximity and possibly physical contact with the caregiver. The caregiver's response, whether reassuring and calming or resulting in the caregiver removing both of them from the situation, is a lesson for the child in coping behaviours.[79] Bretherton contends that:

---

73 *Ibid.* at 1062-63.

74 *Ibid.* at 1063.

75 *Ibid.* at 1063, citing L.D. Yarrow, "The Development of Focused Relationships During Infancy" in J. Hellmuth, ed., *Exceptional Infant*, vol. 1 (Seattle: Special Child, 1967) 427.

76 *Ibid.* at 1064.

77 *Ibid.* at 1064-65.

78 *Ibid.* at 1065, citing each of the following: J.J. Campos & C.R. Stenberg, "Perception, Appraisal and Emotion: The Onset of Social Referencing" in M.E. Lamb & L.R. Sherrod, eds., *Infant Social Cognition* (Hillsdale, N.J.: Erlbaum, 1981) 273; R.N. Emde, "The Prepositional Self and its Affective Core" (1983) 38 *The Psychoanalytic Study of the Child* 165; S. Feinman & M. Lewis, "Social Referencing at 10 Months: A Second-Order Effect on Infants' Responses to Strangers" (1983) 54:4-6 *Child Development* 878; M.O. Kinnert *et al.*, "Emotions as Behavior Regulators: Social Referencing in Infancy" in R. Plutchik & H. Kellerman, eds., *The Emotions in Early Development* (New York: Academic, 1983) 57.

79 *Ibid.* at 1065, citing I.J. Bretherton, "Young Children in Stressful Situations: The Supporting Role of Attachment Figures and Unfamiliar Caregivers" in G.V. Coelho & P.I. Ahmed, eds., *Uprooting and Development* (New York: Plenum, 1980) 179.

> [s]ensitive responding by the caregiver to infant signals relevant to stress and exploration in the first year of life appears to create the kind of relationship and communication patterns (based on working models) that allow the dyad to negotiate attachment-autonomy issues harmoniously and effectively in the second year of life.[80]

The most significant feature of the attachment figure is an ability to show the infant that he or she is acceptable in the eyes of the attachment figure, as well as being emotionally available and supportive.[81] Thus a "child who experiences ... attachment figures as primarily rejecting may form a complementary internal working model of the self as unworthy" just as a "child who experiences [the attachment figure] as emotionally available and supportive will [develop] an internal working model of the self as competent and lovable."[82]

Attachment theory contends that it is necessary for children to have a primary or secondary attachment figure physically close and emotionally available during infancy and later as the child develops. The "mere knowledge that an attachment figure is potentially accessible" is sufficient to allow the child an ongoing feeling of strong and pervasive security.[83]

VIII. FEMINIST CRITIQUES OF PSYCHOANALYTIC THEORY

Feminist theorists have devoted volumes to the structures of marriage and motherhood, the restrictions placed on women because of biology and gender, the process of genderization and just about every other aspect of human life related to how and why women and men live the way they do. The focus here will be on those critiques of psychoanalytic theory which are most directly relevant to restrictions on or prescriptions for family structures as a result of a particular psychoanalytic theory. Rather than arguing in favour of women's inherent equality to men a certain degree of agreement on this point will be assumed and the long-held assumption that women are inherently better care-givers for children or naturally intended to take on such a role will be challenged. Furthermore, there will be an examination of the consequences which flow from such assumptions when assessments are made with respect to what children's needs are and how they are to be met.

The focus will be on how feminist critiques have challenged the notion that women are intrinsically better care-givers for children, and that the optimal growing environment for a child is a nuclear family (consisting of a man and a woman who are married to each other, in which the man works and the woman stays at home and raises the children). There is no intent here to argue that a single parent household, for instance, is the optimal growing environment for a child. There is merely a wish to point out that what may be so optimal about a nuclear family is that, in this culture, it

---

80 *Ibid.* at 1086.

81 *Ibid.* at 1067, citing J. Bowlby, *Attachment and Loss Vol. 2: Separation* (New York: Basic Books, 1973).

82 *Ibid.* at 1067.

83 *Ibid.* at 1065, citing Bowlby, *Attachment Vol. 1*, *supra* note 72.

may simply be the most economically efficient way for a family to ensure that a maximum number of the family's individual and collective needs are met. In other words, just because the nuclear model of a family has the easiest time of meeting some basic needs that children may have, it does not necessitate that such a model should be prescriptive in any way with regard to the family relationships which people make by choice and which the government may regulate, such as adoption.

Juliet Mitchell argues that Freud's theory of child development is usefully understood as an account of how each individual comes to acquire patriarchal law and how this acquisition can then determine psychic structure.[84] Mitchell argues that Freud's analysis of the psychology of women must not be read either as prescriptive for the status of women or as justification for women's suffering under patriarchy. Rather, Mitchell feels that Freud's theories can usefully be used as an apt description of the inevitable consequences for psychic development under patriarchal social relations.[85]

Thus, while Freud's theories of child development may accurately describe the way children develop in a patriarchal nuclear family, they do not provide an argument for why such a family structure is essential to healthy development. Indeed, as we have seen, attachment theory, independent of any feminist analysis, debunks the idea that healthy development of children is fundamentally linked to the sorts of heterosexual dramatic tensions that Freud describes.

A difficult and important question is whether the focus on the importance of the relationship between the child and the mother in attachment theory is also a reflection of patriarchal assumptions. In attempting to answer this question it is important to consider whether the research methodology of attachment theory carries with it its own set of sexist assumptions.

IX. FEMINIST CHALLENGES TO SOME OF THE BASIC ASSUMPTIONS OF PSYCHOANALYTIC RESEARCH METHODOLOGY

Nancy Chodorow and Susan Contratto challenge the perspective from which good mothering/parenting is evaluated.[86] They focus on mothers in particular rather than on children or families specifically, as it is primarily mothers who do the bulk of childcare and who are held responsible for deviant or inappropriate children. So, instead of trying to critique and provide alternative answers to studies which purport to examine the effects of good and bad mothering, they simply raise some extremely important issues which they, and this author, feel should always be kept in mind. Chodorow and Contratto argue that if the standard for what is "good-enough" mothering is based on the child's perceived or indicated needs, there is a risk that mere wants may be

---

84 For a discussion of penis envy from this perspective as envy of male power see E.F. Kittay, "Womb Envy: An Explanatory Concept" in Trebilcot, *supra* note 45, 94.

85 J. Flax, *Thinking Fragments: Psychoanalysis, Feminism, and Postmodernism in the Contemporary West* (Berkeley: University of California Press, 1990) at 158.

86 N. Chodorow & S. Contratto, "The Fantasy of the Perfect Mother" in N. Chodorow, ed., *Feminism and Psychoanalytic Theory* (New Haven: Yale University Press, 1989) 79.

confused with real needs. Setting a standard for mothering based on this perspective may create a form of parenting which creates a more demanding child who is less accepting and accommodating of others.[87] Chodorow and Contratto do not try to argue that early childhood development is unimportant to the eventual evolution of a healthy psyche, but rather point out the bias that has resulted because of the assumed crucial importance of this early period to the exclusion of all other phases and factors in a person's life. They argue that because post-Freudian psychoanalytic theory has emphasized the early mother-infant relationship so heavily and further assumed that this early relationship is crucial to later psychological development, the early relationship between mother and child has grown in importance, not necessarily because it is truly the most important phase, but because research which ignores the other phases in a child's life keeps reinforcing this assumption. The danger is that such an exclusive focus can lead to a psychological determinism and reductionism which maintains that what occurs in this early period "determines the whole of history, society and culture."[88]

X. AN ALTERNATIVE VIEW OF CHILD BEARING AND CHILD REARING

Caroline Whitbeck takes an essentialist approach to motherhood. She maintains that the so-called maternal instinct is likely not a product of socialization. She argues that women's bodily experiences with pregnancy, labour and breast-feeding may in fact create such an instinct.[89] However, even if this is true, which it may well be, it does not refer to or answer the issue as to the most appropriate model of the family in which to bring up a child, if indeed there is only one, and it certainly does not address the domination of women and children by men. In fact, if anything, because her theory does not speak to such an issue it can be accused of naiveté and criticized for failing to recognize that, even if women's nurturing capacities are instinctive, such instincts have been used to reduce women to that element alone.

Even if one were to accept that the best care-givers for young children are women who nurture them first within their bodies, experience the strong physical bond created by carrying the child within for nine months, give birth, and finally feed them with their own bodies, that does not lead to the conclusion that women's function in society should thus be limited. An alternative view would be to regard this special ability of womanhood as one of the most important functions that an individual can perform within and for the benefit of society and not the only function of womanhood. Further, the importance of this function should be protected by protecting women's ability to move between child bearing and child care on the one hand, and the traditionally defined public sphere on the other, with as few, if any, penalties as possible. This of course requires quite a radical transformation in view of the operations of the public world, but then, why not?

---

87 *Ibid.* at 89.

88 *Ibid.* at 89. Contratto and Chodorow draw support for this point from D. Dinnerstein, *The Mermaid and the Minotaur* (New York: Harper & Row, 1976); N.O. Brown, *Life Against Death* (New York: Vintage Books, 1959); and L. deMause, ed., *The History of Childhood* (New York: Psychohistory Press, 1974).

89 C. Whitbeck, "The Maternal Instinct" in Trebilcot, *supra* note 45, 185 at 185-98.

XI. CONCLUSION

What is important to keep in mind from all of this is that when we determine what a child will need in order to develop psychologically in a healthy way, we are already imposing, to a certain extent, what the meaning of the symptoms will be when those conditions are not met. This is not to say that there cannot be some sort of objective criteria which we use to set standards for child care and societal and legal standards for appropriate environments for children. Such criteria are of course necessary if we are to create any sort of rational, defensible and consistent scheme for legislative intervention into people's lives. The point is perhaps that we should use such studies as informative tools rather than as gospel to be rigidly adhered to without questioning what biases may be inherent in any particular assessment of a situation.

Even if psychoanalytic theory can better inform us of the nature and order of our development, and probing feminist analyses of those theories can add to the complex picture that is created, we are far better off when we attempt to determine how to properly govern ourselves to maximize the beneficial aspects and minimize the negative.