Providing Justice for Children in Disputed Adoptions: A Feminist Perspective

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The child's story is remarkably consistent in private disputed adoptions. First, her mother, a young, unmarried woman finds herself pregnant but is unwilling to consider abortion. Her father, young as well, and willing to defer to the woman's decision, is unable to take on the responsibility of a child, and so her mother contacts an attorney to arrange a private adoption. The attorney finds a family desperately eager to have a child, and the biological mother and the family enter into a contract in which she consents to relinquish her child to them for adoption. After the child is born, the biological mother once more agrees to the adoption and, within a matter of days, the baby is within the adoptive family's custody.

At this point, the biological mother revokes her consent. She misses her child, learns that her family would have supported her, and believes that if she had fully understood the situation, she never would have consented to the surrender in the first place. In the meantime, however, the infant has started to become attached to the adoptive family. The "contractually formed structure of contrived kinship" is transformed into a nuclear family with all the affection and caring associated with everyday biological families.

Traditional family law assigns rights to the child and parents, which, at this stage, conflict. The adoptive parents have contractual rights in enforcing the adoption, the biological parents have due process and privacy rights in raising their child, and the

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1. See H. DAVID KIRK, ADOPTIVE KINSHIP, A MODERN INSTITUTION IN NEED OF REFORM 116 (1981), for one woman's personal story of her reasons for surrendering her daughter for adoption in which she discusses family and societal pressures as well as her interest in ensuring the best possible future for her child. Most likely due to her youth, the woman's first concerns were for her own welfare. Her concern for the child was secondary. She later regretted her choice.

2. Id. at 39.

3. Because adoption statutes have the effect of creating new family units, removing rights and obligations from biological families, and transferring the rights and duties to adoptive parents, see, e.g., infra part II.B., these due process rights also eventually vest in the adoptive parents. It is unclear and problematic to determine when due process rights vest in the adoptive parents, however, because custody changes and childrearing begin prior to a final decree of adoption. See infra text accompanying notes 89-96.
child has privacy rights in remaining in a functioning family in order to satisfy her overriding need for continuity. The care and concern that parents give their children through the process of educating them, supporting them, and training them to be members of society strengthen and enhance the community. As such, the legal system grants familial interests constitutional protection. In disputed adoptions, multiple families with divergent interests are involved. Courts attempt to resolve the conflicting rights of the various members of families when deciding to whom to award custody in a disputed adoption.

Attempting to resolve the conflicting rights through the traditional method, however, is an inherently flawed approach. The current legal paradigm of viewing disputes in terms of conflicting rights requires the resolution of problems "through male inquiries formulated from distanced, abstract, and acontextual vantage points." Rights are based on individual autonomy and each person's separation from others in society. Such concern with autonomy is incompatible with resolving adoption disputes. Clearly a child, dependent on his or her parents for survival, is not a fully autonomous individual. By virtue of the fact that adoptions attempt to place children in a family, the relationship, not autonomy, must be valued above the separation and autonomy that rights analysis stresses. Reliance on abstract theory does not produce just results. Justice is more likely when the court expands the facts and relationships that it examines in deciding an adoption. Such an approach, focusing on the relationships and context of each individual situation, is endorsed by feminist jurisprudence.

Feminist jurisprudence approaches the law from the perspective of women. A female perspective of conflict resolution em-

6. Id.
10. Bender, supra note 7, at 12-13; see also Cynthia Fuchs Epstein, Justice and Gender, 79 CAL. L. REV. 577, 582 (1991) (reviewing DEBORAH L. RHODE, JUSTICE AND GENDER (1989)) ("Rights discourse ... is too concerned with the individual and thus is not compatible with ... women's orientation toward collectivity and a web of relationships.").
11. Epstein, supra note 10, at 580 & n.19. Though women clearly have many different perspectives, feminist jurisprudence attempts to draw upon those experiences that are common among women.
phasizes "connection, subjectivity, and responsibility." Whereas young girls tend to develop a morality of responsibility based on psychological and emotional links, young boys develop a system of problem solving that depends upon individuality and separation from others. Feminist jurisprudence draws upon women's approach to morality and conflict resolution, and thus enables the legal system to protect against what women perceive as harms—harms to relationships and connections to others. Traditional patriarchal jurisprudence protects against what society (men) perceives to be harmful—threats to individuality. Individuality is not threatened in disputed adoptions—relationships are. Unlike traditional patriarchal jurisprudence, feminist jurisprudence speaks to the issues surrounding relationships that arise in adoption cases.

A majority of states now use some form of a "best interests of the child" test in resolving custody in disputed adoptions. Such a test can be consistent with a feminist approach when properly applied. The factors that different jurisdictions use to determine the best interests of the child, however, remain varied and inconsistent. Some courts combine a presumption in favor of awarding custody to biological parents with a superficial assessment of the child's interests. Other jurisdictions focus on the notion of psychological parenthood or the affection relationships between the child and the parent figure. This approach values the connection between child and caregiver, examining context and relationships in deciding the custody dispute. This latter approach, a true best interests analysis, thus employs analysis consistent with a perspective that values women's experience.

12. Sherry, supra note 8, at 582; see also CAROL GILLIGAN, IN A DIFFERENT VOICE (1982) (explaining male and female conflict resolution styles).
13. See infra notes 60, 127-35 and accompanying text.
14. Arnold D. Litt, Note, Adoption—Psychological v. Biological Parenthood in Determining the Best Interests of the Child—In re P. & Wife, 3 SETON HALL L. REV., 130, 133 (1971) ("The majority position has been that while caution should be exercised in severing the child-parent relationship, the welfare of the child is the dominant consideration.").
15. See, e.g., In re L.W., 613 A.2d 350, 355 (D.C. App. 1992) ("Presumptively, a natural parent has a right to the companionship, care and custody of his or her children."); see also In re Adoption of BGD, 719 P.2d 1373, 1376 (Wyo. 1986) ("[Biological] parents have the first and natural right to their children."); (quoting In re Adoption of Voss, 550 P.2d 481, 485 (Wyo. 1976)).
16. See JOSEPH GOLDSTEIN ET AL., BEYOND THE BEST INTERESTS OF THE CHILD (1973); see also In re J.M.P., 528 So. 2d 1002 (La. 1988) ("The court should prefer a psychological parent... over any claimant (including a natural parent) who, from the child's perspective, is not a psychological parent.").
This Note explores how feminist jurisprudence serves the ends of justice to the child in custody determinations in disputed private adoptions. It explores whether the children's true best interests are adequately preserved during protracted disputed private adoptions in the current patriarchal, rights-based system. Section I examines the nature and value of an attachment between children and their caregivers. Section II considers the traditional due process rights of the parents and adoptive parents in family settings and adoption statutes. Section III explains different feminist approaches to the law. Section IV identifies the tests courts employ in determining custody in disputed adoptions, and how a feminist approach might address the same disputes. Section V suggests options available to the courts to better ensure a custody determination in the child's true best interests and sets forth the benefits of a feminist analysis. Section VI concludes that currently, under the patriarchal system of rights analysis, it is too easy for the courts to avoid a satisfactory determination of the child's best interests in disputed private adoptions. In order for the courts to be more responsive to the true party of interest, the child, they must focus on the attachment relationship between the child and the parent figure.

I. INFANT-ADULT RELATIONSHIPS

Psychologists accept as a "principle of child development that a warm, nurturing, and consistent relationship between infant and parents is essential for healthy psychological development." An attachment is the reflection of the emotional tie between infant and parents. Infants are not capable of feeling an attachment to caregivers immediately after birth. Rather, an infant's attachment to her caregiver develops gradually during the first few months of life. In the first eight to twelve weeks, an infant does not prefer one caregiver over another because she is unable to recognize faces. Between three and six months, however, the infant learns to recognize faces, begins to prefer individual car-
egivers, and becomes wary of strangers. During this process, the infant develops a "relatively enduring emotional tie to another person" which she demonstrates by trying to be near that person, by expressing sadness and depression when that person leaves, by experiencing joy and relief when the person returns, and by "being oriented toward that person even when not in close proximity." An example of such orientation is listening for the voice of the individual to whom the child becomes attached.

The value of the attachment and affection relationship between an adult and an infant is extensive. The most significant aspect of the relationship is that attachment is a mechanism that meets the infant's immediate survival needs. Attachment grows as a result of an adult's gratification of the needs of the child by feeding, holding, rocking, and caring for the child. Through the affection relationship, the infant is able to communicate with the caregiver, and the caregiver is able to respond to the infant's needs more satisfactorily than anyone else. The tie between the infant and adult enables interaction in the absence of language; the caregiver can identify what the infant desires and is best able to provide the infant with satisfaction. In order to develop, children need to be able to feel some sense of control over their environment, which is provided through the attachment to an adult.

The value of an infant's attachment extends beyond the first survival requirements of the child. A number of studies suggest that the quality of the attachment between infant and caregiver influences the child's later "social, affective, and cognitive development." Children who have secure attachments as infants later display more competence in problem solving, more cooperation

21. "Id.
22. "Id. at 53.
23. "Id.
24. "Id.
25. "Id. at 47-48; see also Nicholas Anastaiow, Attachment Research and Mental Health: A Speculation, in THE DEVELOPMENT OF ATTACHMENT, supra note 19, at 285, 296 (proposing that attachment has "survival value" for infants).
26. "Id. at 48.
27. "Id. at 66-67.
28. See "Id. ("Children need adults as their agents, and children's sense of control depends on the adult's noticing and understanding the children's signals and on their carrying out the necessary reciprocal actions."). Control aids the child by enabling her to predict an adult's response. "Id. at 71.
29. Campbell & Taylor, supra note 17, at 18.
30. "Id. at 17.
with unfamiliar adults, more social competence when interacting with peers, and more "ego control and ego resiliency."

The child's attachment to an adult is a source of comfort to the child. A major sign of attachment is the infant's ability to physically move to the object of attachment for comfort. In addition, attachment has significant implications for a child's ability to manage separation. The attachment relationship is soothing and calming to the infant when she is tired or stressed. Separation from the object of attachment agitates the child. A child's protest to separation is strongest during the first half of the second year, but continues through the child's second birthday. During the second year, children become more comfortable with separation from the object of attachment, but will regress, behaving as they did during earlier stages of development, if they are separated from their parents or experience other disruption of their attachment.

Psychologists and psychiatrists agree that great risks to the child are associated with the disruption of the parent-child relationship. Considering the adverse effect of separation and the implications of attachment on cognitive and social development, disturbances in the attachment relationship can have severe and detrimental clinical ramifications for the child. When a child's ability to form an attachment prior to the age of three is hindered, he or she may develop "affectionless psychopathy syndrome," which renders an adult unable to feel guilt and incapable of forming significant attachments. This disorder has been associated with early separation and loss. Other potential psychological effects include "criminality, personality disorders, cognitive difficulties, and depression."

32. See MACCOBY, supra note 20, at 53.
33. Id. at 61, 70.
34. Id. at 54-55.
35. Id. at 56.
36. Id. at 61.
38. Campbell & Taylor, supra note 17, at 18.
40. Id.
41. Id. at 510; see also Note, In the Child's Best Interests: Rights of the Natural Parents in Child Placement Proceedings, 51 N.Y.U. L. REV. 446, 450-51 (1976) (explaining that disruption in custody of infants may lead to "problems and delays in the infant's orientation and adaptation to surroundings").
The attachment and affection relationship between an infant and caregiver leads to the formation of a "psychological parent" relationship. There is general consensus among child psychologists that a parent-child relationship demonstrating "mutual interaction between adult and child described in terms of love, attention, basic trust, and confidence" exists and plays a critical role in child development. Biology, however, does not determine the identity of the psychological parent. There is no inherent connection between biology and the psychological relationship between infant and adult. "The newborn does not necessarily need the blood tie adult as parent, but does need an adult who wants her on a continuing permanent basis, an adult who will safeguard her from her own helplessness and from the risks and dangers in her environment." The object of attachment "need not be the biological mother: Adopted children become firmly attached to their adoptive mothers." Biology is, therefore, less relevant than caretaking when determining the existence of an attachment.

The biological connection between a child and the natural parent does not necessarily lead to the psychological parent relationship. It instead creates an "inchoate parent-child relationship" which merely offers the opportunity to create an attachment. Attachment stems from the day-to-day care of the infant and the communication and affection between adult and child; "only a parent who provides for these needs will build a 'psychological relationship to the child ... and will become the psychological parent' in whose care the child can feel valued and 'wanted.'" The relationships between parent and child are the "essential ingredients of the family" which is "our basic social unit ... inextricably associated with survival for children and with the satisfaction of the adult's yearning for closeness and affirmation." The child's best interests are served by remaining in a stable, functioning family where an attachment can evolve

42. GOLDSTEIN ET AL., supra note 16, at 22.
43. Litt, supra note 14, at 135.
45. Solnit, supra note 4, at 496.
46. MACCOBY, supra note 20, at 54.
49. Solnit, supra note 4, at 497.
which will in turn allow for the healthy emotional and cognitive development of the child.\(^\text{50}\)

It is important to note that in adoption situations the initial change in custody from the birth mother to the adoptive family generally occurs long before any attachment between the infant and biological parent has formed. In fact, the custody transfer generally occurs soon after birth, about three months before the infant is capable of forming an attachment, prior to the developmental stage in which an infant can differentiate between faces. One need not be concerned, therefore, that the initial change in custody carries the same potential for harm as later disturbances in the parent-child relationship.

In addition, children are not always irreparably destroyed by separation when mitigating circumstances exist. Children may have multiple mother figures and form new attachments during infancy.\(^\text{51}\) If the quality of the mother-substitute is high, providing love, attention, and affection of the same intensity, new affection relationships can form.\(^\text{52}\) Children can have more than one affection relationship and many factors may mitigate the loss of a parent-figure such as peer relationships, school, family, and adult love relationships.\(^\text{53}\) Though some studies have indicated that the severity of the loss may be mitigated, the context was one in which the children were reunited with the original mother figure, and the recovery was possible when the reunion was within three months of the separation.\(^\text{54}\) The long term effects of such a loss are unclear.\(^\text{55}\) These studies, therefore, do not provide much help in the adoption arena, in which separation and loss of the attachment to the adoptive family is permanent. There is no reunion between the child and mother figure, with the possible exception of limited visitation rights.

II. DUE PROCESS FOR PARENTS

The psychological parent relationship between a caregiver and child raises the interests of the child in remaining with the object

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50. Id. at 499. "The clear implication of the psychological data is that a child's best interests are promoted by the creation and retention of strong and secure ties to a caring parent or guardian." Note, supra note 41, at 451.

51. See Litt, supra note 14, at 140 ("The quality of substitute maternal care was shown to influence the severity of the separation reaction.").

52. Id.

53. See Waters & Noyes, supra note 39, at 512.

54. Litt, supra note 14, at 140.

55. Id.
of affection. Under a traditional analysis, the parents, both adoptive and biological, have due process interests distinct from the child's concern of maintaining the affection relationship. Due process cannot be precisely defined. Rather, it is a continuum which covers an individual's freedom from arbitrarily imposed restraints by the states, and which also recognizes that certain individual interests require increased scrutiny of the state's justification for the restraints. Due process is the constitutional safeguard based upon respect for individual liberty balanced with the demands of organized society. Courts determine a due process right by examining the claim in light of the "relevant precedents and ... the several interests that are at stake."

The current legal system's promotion of due process rights is "premised on the model of an autonomous, fully competitive individual." The value of autonomy and separation reflect the moral development of males which is a process of separating from others by viewing problems in the abstract and applying clear rules that resolve otherwise thorny questions. Rights reflect a male perspective of formality and hierarchy, which is characterized by objectivity, distance, and abstraction. Due process analysis avoids emotions, instincts, and ethics, viewing disputes in a vacuum.

Current masculine jurisprudence values autonomy and protects against intrusion upon an individual's separate sphere. Freedom in current patriarchal jurisprudence means the establishment of rights in each individual so that no other may encroach upon one's individuality. Conflict arises because each individual has autonomy and rights discrete and separate from everyone else, which by definition means that one person's ends are not another's. The entire patriarchal legal system was established to

57. Id. at 1021.
58. Lassiter v. Department of Social Servs., 452 U.S. 18, 25 (1981) (stating that applying the due process clause is not a precise science, but is an "uncertain enterprise").
60. GILLIGAN, supra note 12, at 24-43.
62. Bender, supra note 7, at 33.
64. Id. at 7.
65. Id.
regulate interfering interests rather than to work toward a common goal; rather than utilizing the legal system to ennoble society, the legal system's primary use is to establish a lowest common denominator between interfering individual rights. Once again, this masculine jurisprudence relegates relationships and context to the background, and may even ignore relationships and context altogether.

A. Traditional Jurisprudence of Biological Parents' Rights

The Supreme Court has long recognized that parents have a constitutionally protected due process interest in the care of their children. Justice Rutledge wrote that it was “cardinal ... that the custody, care, and nurture of the child reside first in the parents, whose primary function and freedom include preparation for obligations the state can neither supply nor hinder.”

The Supreme Court elaborated on the due process rights of a parent in Stanley v. Illinois. The Court concluded that a presumption that a father is an unfit parent simply because he did not marry the mother of his children is a violation of the Fourteenth Amendment. Under current Fourteenth Amendment jurisprudence, the government must afford parental rights great respect. This is an individual right, distinct from any other person that might be involved with the child or the child herself. The state will defer to and protect a man's interest in the children he fathered and raised unless there is a compelling contrary interest. The Court exalted a parent's interest “in the companionship, care, custody, and management of his or her children” and described the right to childrearing as “essential” and more dear than property rights. The Court was quick to analogize to property rights, but failed to focus on the child's relationship with her parent. In addition, the Court recognized that parental due process rights arise even in atypical family settings; the Constitution recognizes family rights even where there has been no marriage.

66. Sherry, supra note 8, at 558-59.
67. Id. at 544-45; see also Scales, supra note 9, at 1383 ("Objectivity ignores context.").
69. 405 U.S. 645 (1972).
70. Id. at 649.
71. Id. at 651.
72. Id.
73. Id. at 652; see also Rivera v. Marcus, 696 F.2d 1016 (2d Cir. 1982) (explaining that a woman who was guardian of her two half-siblings had due process rights in the custody of the children; she had a liberty interest in preserving her family).
In *Stanley*, the state argued that the best interests of the child would be served by implementing a presumption of unfitness for unwed fathers. The Court concluded that this presumption, though efficient, comes at too high a cost to the individual's rights. Efficiency is subordinate to one's due process rights. Once the due process right has been established, the quantum of process must be determined. *Stanley* indicates that the process is measured by weighing "the precise nature of the government function involved as well as . . . the private interest that has been affected by governmental action." The state's interest in efficiently seeing to the child's best interests is subordinate to the parent's interest in raising his or her child. The advantage to the state when it utilizes such a presumption, rather than an individualized hearing on the fitness of a parent, is an inadequate justification to refuse a father a hearing when the state is dismembering his family.

The Court essentially devised an equation to calculate Mr. Stanley's due process interest. The rights were decided through a masculine process of abstract logic, ignoring context and the relationship between Illinois, Mr. Stanley, and his children. The Court was constrained by the due process explanation that parents have individual rights in their children. The individuality of due process eliminates the role of the relationship between children and parents. This relationship, however, is the core of the child's world. The child, however, is not a part of the due process calculus except as a right of a parent. The Court could have reached the same substantive decision, awarding custody to the father, by addressing the importance of the parent-child relationship. The decision based on process abstracts the child out of the Court's consideration. The focus on due process enables the Court to ignore the child's emotional and developmental future.

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74. *Stanley*, 405 U.S. at 647, 653 n.5.
75. *Id.* at 656 ("The Constitution recognizes higher values than speed and efficiency.").
76. *Id.* at 650-51 (quoting Cafeteria Workers v. McElroy, 367 U.S. 886, 895 (1961)).
77. *Id.* at 658. But see *Michael H. v. Gerald D.*, 491 U.S. 110 (1989), in which a California statute presumed that the husband of the mother is the father of the child, absent a showing of his infertility. The Supreme Court found that the overriding social policy in protecting the family unit takes precedence over the biological father's interest. *Id.* at 119-20; see *infra* notes 83-85 and accompanying text (explaining that biology alone does not create a fully vested liberty interest). In addition, the putative biological father's interests were still protected in that the statute allowed him to make a showing that he had an interest in the child that merits visitation. *Id.* at 115-16.
78. See *supra* notes 59-67 and accompanying text.
Though clearly establishing a parental due process right, Stanley did not address situations in which there are more substantial countervailing interests. Such a countervailing interest may be the child's best interests. Quilloin v. Walcott involved a biological father who provided neither financial nor emotional assistance in raising his child nor took any steps to legitimize the child. He claimed that utilizing a best interests test in the adoption proceeding of his child did not adequately protect his parental due process rights. The Court concluded that the child's countervailing right of living in a stable family unit, which was already in place, did not violate the father's due process rights. The state could allow the adoption because the child's rights were at least equally as important as the father's. The Court reached a result that protected the relationship between the child and caregiver, but the decision balanced rights rather than valuing the relationship on its own.

The father, in a situation like Quilloin, may be characterized as an innocent victim. His parental rights were terminated based on the child's rights, not on his own due process interest in his family. He apparently did nothing to warrant the termination of his parental rights. Such a characterization, however, is constitutionally inaccurate. In order for a parent to possess a due process right in the family, more than a mere biological relationship with the child is necessary. The father must display a commitment to the child by actively participating in supporting and raising the child. The biological connection allows the father a chance that no other man has to establish the relationship, and thus the due process right, with the child. The Court may look to the relationship, but it does so only to find a right. It is not the relationship that the Court protects; the due process right remains the core of the Court's analysis.

80. Id. at 249.
81. Id. at 254.
82. Id. at 255. In addition to the child's best interests, the state's interest in protecting the relationship between husband and wife may be another countervailing interest sufficient to outweigh a biological father's due process interest. The Court prefers presuming legitimacy to allowing a stranger to the marriage to claim parental rights over a child of the marriage. Michael H. v. Gerald D., 491 U.S. 110, 119-20 (1989).
83. Lehr v. Robertson, 463 U.S. 248, 261 (1983) ("[T]he mere existence of a biological link does not merit ... constitutional protection.").
84. Id.
85. Id. at 262 (If the father "grasps that opportunity and accepts some measure of responsibility for the child's future, he may enjoy the blessings of the parent-child relationship.").
An inchoate parental relationship is given some constitutional safeguards. The courts award notice, at a minimum, to allow parents an opportunity to form a parental relationship. The state, however, need not go to unfettered lengths to ensure that each putative father be aware of his child's adoption, because the father's inchoate parental rights cannot interfere with the other significant interests in the adoption process, such as the privacy of the mother, unnecessary controversy, or threatened finality of adoption decrees.

B. Due Process for Custodial and Pre-Adoptive Parents

One of the deficiencies of a rights analysis is that it leaves open the question of when due process rights vest in the custodian of a child. Custody alone is not parenthood but foster parents and prospective adoptive parents do have some limited due process interests in the children whom they are raising. Foster parents do not have the same degree of liberty interests in the children placed in their homes as biological or adoptive parents because the relationship is finite. From the beginning of the relationship, foster families know their relationship with the children is likely to end because such a termination is established clearly in both the state statutes and the contracts executed by the foster parents. According to masculine jurisprudence, the expectations and privileges surrounding the relationship are determined by state law because the foster relationship is a creature of state law.

Families embarking on adoption, however, have expectations and rights different from foster families. Adoptive parents are awarded custody of the child before the legal status of the child is transformed, thereby giving public sanction to the new family unit. Pre-adoptive parents do not expect their relationship with the child to end, but "[t]o the contrary, the very motive of the

86. Id. at 263.
87. Id. at 264.
88. Id.
90. Drummond v. Fulton County Dep't of Family & Children's Servs., 547 F.2d 835, 857 (5th Cir. 1977) ("[T]he foster parents having a close familial relationship during the first years of [the] child's life and the child himself have a protectable interest under the Fourteenth Amendment which cannot be denied them without due process of law.").
91. Id.
92. Kynes v. County Dep't of Pub. Welfare, 600 F.2d 693, 698 (7th Cir. 1979).
prospective adoptive parents, as well as the State, is to secure a life-long relationship between the adoptive parents and the child." before the adoption is finalized, pre-adoptive parents have rights no other person has, such as the right to petition to finalize the adoption. The prospective adoptive couple, therefore, has a constitutionally protected interest in the child, though limited.

The key word with respect to the prospective adoptive parent's liberty interest is "limited." As such, the state's interests in the child's welfare may supersede those of the adoptive parent.

The State, not the parents, is empowered by statute to watch over the best interest of the child ... the state agency may terminate the placement at any time the agency finds such a move would be in the best interest of the child. Thus ... the relationship between the State and the child must be considered paramount to the relationship between the prospective adoptive parents and the child.

The state cannot claim such a paramount relationship with the child over the child's relationship with his or her natural or adoptive parents. Once the parent-child relationship is formed legally, the state's interests are no longer dominant. Therefore, "the parent-child relationship, whether natural or formalized through adoption, properly forms the core of the constitutional notion of 'family'.'"


The adults' due process rights are just a portion of the tools used in the current system to determine custody. Statutes also establish rights. To protect birth parents' rights, the birth parents' consent must be given freely to ensure the validity of the adoption. In addition, contractual rights yield to superior due process rights in raising children. Adoption statutes, therefore, tend to allow a birth parent a period of time in which to revoke consent to the surrender.

95. Id. at 1185.
96. Id.
97. Id. at 1186.
98. See supra text accompanying notes 69-73.
100. See supra note 3 and accompanying text. States appear to consider that adoptive parents' due process rights do not vest until there is a decree of adoption, rather than when custody changes.
An overview of several states' adoption statutes indicates several different approaches in statutory consent provisions. Some allow a natural parent to revoke consent only within a certain period of time. Usually, there is a statutorily defined number of days or a requirement that the revocation be before either a final or interlocutory decree of adoption. Some states within this category phrase the statute negatively, indicating a disapproval of revocation. The shortest period is ten days and the longest is forty-five.

Another approach is to disallow revocation altogether, unless the revoking party can show fraud, duress, or some cause for invalidating consent. Two states explicitly deny any presumption in favor of the biological parents. Only one state allows an absolute right to revoke consent, but limits the time period to fifteen days.

Most states include some consideration of the child's best interests in the adoption statutes. In these states, the revocation must be before a decree of adoption, and will be granted only if the court finds that removal from the adoptive family is in the best interests of the child. Statutes, however, do not define

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101. See, e.g., Md. Code Ann., Fam. Law § 5-311(c) (1957) (stating that consent may be revoked "within 30 calendar days after the required consent to an adoption is filed under this section, or any time before a final decree of adoption is entered, whichever occurs first").

   (a) No consent described ... may be revoked by the consenting party:
   (1) After the entering of an interlocutory decree.
   (2) After the entering of a final order of adoption when the entering of an interlocutory decree has been waived ....
   (3) After 30 days from the date of the giving of the consent ....


105. See Ind. Code Ann. § 31-6-5-3(1) (Burns 1994) ("[C]onsent is permanent and cannot be revoked or set aside unless it was obtained by fraud or duress, or unless the parent is incompetent."); see also Or. Rev. Stat. § 109.312(2)(b) (1991) ("T]he consent for adoption may not be revoked unless fraud or duress is proved with respect to any material fact.").

106. One is Minnesota. See supra note 103. The other is Alabama. See Ala. Code § 26-10A-14(d) (1975) ("The court shall not apply any presumption or preference in favor of the natural parents in reviewing an action . . . .").

107. Tenn. Code Ann. § 36-1-117(b) (1991). The adoptive parents may file a petition showing cause why the child should not be returned to the natural parents, at which point "[t]he court shall award the guardianship of the child in accordance with the child's best interest." Tenn. Code Ann. § 36-1-117(f)(6).

108. See, e.g., Alaska Stat. § 25.23.070(b) (1986) ("[C]onsent to adoption may be withdrawn before the entry of a decree . . . within 10 days after the consent is given . . . [i]f withdrawal is in the best interest of the person to be adopted."); see also Haw. Rev. Stat. § 578-20(b) (1985) (stating that there can be no withdrawal without "express approval
what the courts should examine in determining the best interests of the child.\textsuperscript{109}

The statutory backdrop for disputed adoptions does not provide a uniform or even a clear method of determining whether the adoptive or biological parents should have custody of the child. Consent is not absolute. In some states, there is no need to show cause for revocation, but simply a time restriction within which a biological parent may revoke consent. The time during which a biological parent may revoke consent leaves the child in "legal limbo." The biological parents have relinquished their rights but may reclaim them, the adoptive family has accepted obligations but is not yet protected, and the child is in the custody of the adoptive family where an attachment may be forming.\textsuperscript{110} This aspect of the traditional approach may thwart the formation of attachment relationships.

In other states, even after a decree of adoption is entered by the courts, a showing of fraud will invalidate the consent.\textsuperscript{111} The statutes do not identify who must perpetrate the fraud in order to invalidate consent. Clearly, if the adoptive family has exercised some undue influence or duress over the biological parents, a claim of fraud should stand. If, however, the fraud was committed by some third party such as the biological father or a family member of the natural mother, and the adoptive parents are not a party to the fraud, their detrimental reliance on the consent should estop a claim that fraud invalidates consent. In addition, of the court ... that such action will be for the best interests of the individual to be adopted); MONT. CODE ANN. § 40-8-112 (1993) (providing that consent may be withdrawn only if "the best interests of the child will be furthered thereby"); N.H. REV. STAT. ANN. § 170-B:10 (1991) (providing that consent may not be withdrawn "unless the court finds ... that the withdrawal is in the best interest of the person to be adopted"); N.D. CENT. CODE § 14-15-08.2 (1991) (allowing consent to be withdrawn after notice if "the withdrawal is in the best interest of the individual to be adopted"); OKLA. STAT. ANN. tit. 10, § 60.10.A (West Supp. 1994) (allowing withdrawal of consent only "if [the court] finds that the best interest of the child will be furthered thereby"); S.C. CODE ANN. § 20-7-1720 (Law. Co-op. Supp. 1993) (disallowing withdrawal of consent except when the court finds that the withdrawal is in the best interests of the child and that the consent ... was not given voluntarily or was obtained under duress or through coercion").

\textsuperscript{109} The exception is Rhode Island, where the courts are directed to "give primary consideration to the [child's] physical, psychological, mental, and intellectual needs." R.I. GEN. LAWS § 15-7-5(b)(2) (1956); see also UNIF. MARRIAGE & DIVORCE ACT § 402. 9A U.L.A. 581 (1988) (explaining that the child's best interests are determined by examining inter alia the child's wishes, the interaction of the child with her parents, siblings, or others who have a significant relationship with her, and the child's adjustment to her home, school, and community).

\textsuperscript{110} See Hilderbran, supra note 47, at 1230.

\textsuperscript{111} See, e.g., OR. REV. STAT. § 109.312(2b) (1989).
the statutes that focus on fraud do not all include time limitations. To secure the best interests of the child, even if consent were obtained through fraud, if a certain amount of time has passed, the child's attachment to the adoptive family will have developed and great harm will be caused by allowing the claim of fraud to proceed.

Finally, in those states that qualify revocation on the best interests of the child, little or no guidance is provided as to the test to determine the best interests. In fact, the statutes do not focus on the child. In such states it is possible for the courts to overlook the attachment between infant and adult and to disregard the psychological parent role in determining custody. In the absence of statutory guidelines delineating the legal criteria necessary in determining the best interests of the child, courts may avoid focusing on the child and instead may rely on a parental fitness standard, focusing on the parenting skills and abilities while ignoring the child's psychological developmental needs. A parental fitness standard tends to favor biological parents. Regardless of the approach, the current statutory formulations do not adequately protect the child's developmental and psychological needs.

III. A Feminist Approach

The current patriarchal jurisprudence is particularly problematic in adoption cases because it frequently ignores the attachment relationship between the child and the caregiver. Current analysis focuses on the individual due process right of the parent but ignores the relationship between the child and the caregiver. The abstraction of due process allows no room for the importance to the child of the psychological parent relationship. A legal paradigm that would concern itself with the relationship would be more useful. Feminist jurisprudence can provide a framework in which to examine these relationships. A feminist approach to the law is woman centered, from a woman's perspective. This approach scrutinizes the law and its relationship to society from

112. See, e.g., IND. CODE ANN. § 31-6-5-2 (Burns 1994).
113. See supra notes 37-41 and accompanying text.
114. See Note, supra note 41, at 454, 448 (“Under the parental fitness standard, the natural parent's right to custody, based on the biological tie between parent and child, is deemed to be superior to all others in the absence of a showing of unfitness.”).
a female point of view. Feminist jurisprudence protects values that are important to women and reflects women's experience.

No single, uniform method of feminist analysis of the legal system exists. Rather, several schools have developed, each seeking to remedy certain deficiencies in the patriarchal legal system.

The first of the various feminist approaches is the equality theory. The equality theory advances a uniform standard of justice for all people. Equality doctrine attempts to improve the position of women by using civil rights statutes and the Constitution, and applying law in a gender-neutral way. Though this doctrine may have been useful in certain settings, such as the fight to receive equal pay, the equality theory has a limited use. The theory is based on a "false neutrality" which ignores the tension between legal equality and sexual difference between women and men. This perspective works within the "terms and structures of the status quo."

Acceptance of the status quo can be harmful to true equality because it relies on a system in which "social power and physical security are unequally distributed between the sexes." Legally, equal treatment of women does nothing to advance women who have been systematically excluded from the lawmaking process. Accepting the status quo looks toward the "end" of formal equality rather than taking context into account. Equality theorists are more concerned about ensuring that a decision is legally equal. They look to a preordained conclusion rather than determine a conclusion that advances women because of the context of the dispute. The equality approach already has chosen an outcome; it does not provide a method of examining new situations. As a result, the equality theory does not transfer easily to situations in which the distribution of rights is not the central


117. See West, supra note 63, at 60 (Current jurisprudence does not protect the "values women hold, the distinctive dangers from which we suffer ... because legal theory ... is about actual, real life, enacted, legislated, adjudicated law, and women have, from law's inception, lacked the power to make law protect, value, or seriously regard our experience.").

118. For a more detailed analysis of feminist legal theory, see, inter alia, Bender, supra note 7; Epstein, supra note 10; FEMINIST LEGAL THEORY, supra note 61; West, supra note 63; and FRUG, infra note 120.

119. Epstein, supra note 10, at 577.

120. MARY JOE FRUG, POSTMODERN LEGAL FEMINISM 4-5 (1992).

121. Id. at 8.

122. Fineman, supra note 115, at 35.

123. FRUG, supra note 120, at 30.
question. In an adoption setting, for example, the child and her attachment relationship are the most important issues, not whether rights are distributed equally among the adoptive and biological parents. In resolving a disputed adoption, the equality approach, like the patriarchal system, would enable a court to avoid protecting the child by focusing on rights.

A second theory of feminist jurisprudence, proposed by Catharine MacKinnon, is the dominance approach. This school of feminism describes sex discrimination in terms of power—men have it and women do not. Dominance feminism describes "the systematic relegation of an entire group of people to a condition of inferiority." MacKinnon argues that the patriarchal system "contributes to the maintenance of an under class ... because of gender status." The dominance approach tries to free women from social subordination.

The dominance approach, however, also has a limited usefulness. Because not all disputes are conflicts between one who has been systematically denied power and one who exerts dominance, the principle is not clearly analogous to adoption questions. In the adoption setting, male and female genders are on both sides of the dispute. One woman will "win" and one will lose. Similar to the patriarchal approach, the dominance approach does not speak to the correct questions. Adoption is not about oppression or intrusions into one's individuality, which are the questions both dominance and patriarchy address, but rather, it is about the establishment and maintenance of a family.

A third feminist jurisprudence promotes an "ethic of care," a legal system premised on women's values of relationships and connections. Such a legal system is feminist because it reflects women's approach to problem solving, instead of men's approach. Women make moral judgments based on caring and responsibility rather than rights and abstractions. Young girls develop emotional and psychological links to others early. This

125. Id.
128. Id. at 828.
129. Scales, supra note 9, at 1380.
130. Shaughnessy, supra note 59, at 3.
approach could benefit the legal system by stressing the need to strengthen relationships and build community.\textsuperscript{131}

Carol Gilligan developed the theory of the ethic of care after researching the different approaches to moral dilemmas among males and females of various ages. For example, when an eleven year old boy and girl were asked if a man should steal a drug necessary to save his wife from cancer, the boy replied that the man certainly should steal the drug because a life is more valuable than the medicine.\textsuperscript{132} The girl, on the other hand, answered that the man should not steal the drug, but should find another way to save his wife, perhaps by borrowing the money. She feared that the man would be caught and sent to jail, eventually leading to further harm to his wife.\textsuperscript{133} The boy saw the moral dilemma as a logical problem, essentially a mathematical equation. Because a life is worth more than medicine, the theft is justified.\textsuperscript{134} The girl, however, viewed the dilemma as a more complex web of relationships, focusing on the wife's continued need for her husband's care rather than the single event of obtaining the medicine.\textsuperscript{135} Moral dilemmas for young girls focus on long-term effects on relationships and the effects of the relationships on the players' lives. The dilemma for young boys is more individual and immediate, and easier to calculate with abstractions of logic. Where men prize individuality, women value more communitarian systems.\textsuperscript{136}

A legal system based on an ethic of care requires a contextual interpretation of disputes that examines people's interconnection and responsibility.\textsuperscript{137} This jurisprudence need not merely set a minimum standard of conduct that is within the law, but may also be used to elevate society.\textsuperscript{138} A legal system based on caring recognizes that all choices have an effect on other people, so that we all must act to avoid harm to them.\textsuperscript{139} Such a legal system uses principled decision making to promote interests that patriarchy ignores.

The ethic of care, like other feminist approaches, is vulnerable to criticism. Some feminists warn that it may be advocating a

\textsuperscript{131} Id. at 3, 13.
\textsuperscript{132} Gilligan, supra note 12, at 25-26.
\textsuperscript{133} Id. at 28.
\textsuperscript{134} Id. at 26.
\textsuperscript{135} Id. at 28.
\textsuperscript{136} Sherry, supra note 8, at 544-45.
\textsuperscript{137} Bender, supra note 7, at 31.
\textsuperscript{138} Id.
\textsuperscript{139} Id. at 32.
position that harms women. The emphasis on caring encourages people to inordinately value traditional domestic roles, excusing self-sacrifice without addressing the fact that some women may not be able to achieve a more respected position in society by following this standard. An ethic of care may result in less empowerment for women and continued dependence on men because it keeps women in caretaking positions, such as the "mommy track." In addition, caring may be feminine simply because men have valued women for that role. Caring would not, therefore, be part of feminine nature, but rather would be the result of subordination.

Though the ethic of care may risk criticism from others in the feminist movement, it nonetheless provides a useful tool. The sex-related differences in women's approach to moral problems allow critiques of the dominant interpretation of the law. In an adoption context, an ethic of care specifically addresses relationships and connections. The child's relationship and connection to his or her caregiver is central to the child's emotional and psychological development. An ethic of care provides an analysis that recognizes, values, and preserves attachments. As such, an ethic of care addresses the specific issues in disputed adoptions that the patriarchal system ignores. Whereas the masculine system primarily is concerned that all parties receive process, this feminist approach assures that the just, moral result is achieved.

IV. Case Law Regarding Disputed Adoptions

Because adoption statutes are ambiguous as to the protection due the child and courts are bound by due process, the best interests of the child are not central to adoption decisions in the patriarchal system. Opinions address the best interests standard, but in practice do not appear comfortable applying it. Courts avoid making final determinations of the child's best interests, either by grounding the decision in parental rights or by essentially implying a presumption. This approach is possible because the courts may focus on conflicting rights rather than on the

140. Frug, supra note 120, at 48.
141. Id. at xiii-xiv.
143. Frug, supra note 120, at 40.
144. See supra notes 37-44.
145. Scales, supra note 9, at 1385.
A feminist approach based on the ethic of care would allow courts to address the relationship between the child and the caregiver.

A. Decisions That Serve the Child's Best Interests

Many custody disputes during adoption proceedings arise because the biological mother attempts to revoke her consent to the surrender of the child by alleging fraud or duress. One such case from the Supreme Court of Louisiana, In re J.M.P., discusses which circumstances vitiate consent, what the courts should consider when a biological parent attempts to revoke her consent, and how to determine the child's best interests. The biological parents' consent to the adoption must be voluntary and informed. The parent must understand that in surrendering the child for adoption, her parental rights cease.

Such consent, however, is invalid in certain circumstances. The court reasoned that the act of surrender is essentially a contract; therefore, error, fraud, and duress invalidate consent because they nullify other agreements. The court defined fraud as a misrepresentation or an omission intended to obtain unjust advantage for one party or to cause the other party to suffer a loss. To fall within this definition, the misrepresentation must involve a fact that has substantially influenced the parent to consent to the surrender. The surrender of the child is also invalid when it is obtained by duress that would occasion a reasonable fear of unjust and significant injury to the parent's person, property, or reputation. These contractual justifications for a claim of invalid consent are affirmative defenses the natural parent may raise when the adoptive parents attempt to enforce the surrender agreement. Because these justifications are affirmative defenses, the natural parents have the burden of proving the fraud or duress.

147. Id. at 1007.
148. Id.
149. Id. at 1008.
150. Id.
151. Id. Courts rarely find circumstances clear enough to vitiate consent. An example of fraud that would render consent invalid is if the lawyer managing the adoption overtly lies to the biological mother about the terms of the consent agreement. In re BGD, 719 P.2d 1373 (Wyo. 1986).
152. In re J.M.P., 528 So. 2d at 1008.
153. Id.
When the biological parent attempted to revoke consent to the surrender, the court in *In re J.M.P.* inquired into the best interests of the child. Revocation does not necessarily halt the adoption if proceeding with the adoption is in the child's best interest. Louisiana did not delineate the precise scope of the best interest standard under the private adoption statute, but followed the premise of maintaining the individual human dignity of the child. The court defined the most important factors in determining the child's best interests as: "(1) Whether each person seeking custody is fit to be the child's parent; (2) Whether either of the adoptive parents has a psychological relationship with the child; and (3) The natural parent's biological relationship with the child."

The Louisiana Supreme Court followed an approach consistent with an ethic of care when it reasoned that a custody award to a psychological parent was preferred over a stranger to the child in order to avoid unnecessary risk of harm to the child. Louisiana followed the scientific community's definition of psychological parenthood, looking for the parent figure who has "day-to-day interaction, companionship, and shared experiences." The court recognized that "continuity of parental affection and care provides the basis for the child's sense of self-worth and security." This decision examined the context and the relationships between the caregiver and the child. By using a contextual approach to reward and maintain relationships, the court followed a model consistent with feminist jurisprudence.

When no such relationship has been formed between the child and the adoptive parents, however, the court would follow a presumption in favor of the natural parents. The court placed a high value on family, which reflects an ideology that the natural parent-child relationship should remain intact unless it would

154. Id. at 1012.
155. Such a lack of specificity is typical of most state adoption statutes. See supra notes 108-114 and accompanying text.
156. *In re J.M.P.*, 528 So. 2d at 1012-13.
157. Id. (maintaining that a parent is fit so long as he or she would not "endanger the health of the child under minimum standards for child protection").
158. Id. at 1013.
159. Id.
160. See supra notes 42-44 and accompanying text.
161. *In re J.M.P.*, 528 So. 2d at 1013.
162. Id. at 1014.
163. See supra notes 128-42 and accompanying text.
164. *In re J.M.P.*, 528 So. 2d at 1015.
subject the child to physical or psychological harm. The court would not award custody to the biological parents if it determined that the adoptive parents were the psychological parents because removing the child from the psychological parent would cause the child harm. The preference for the biological parents remains, however, within the court's calculations.

As evidenced in the result of the J.M.P. case, an absolute prescription, the presumption in favor of biology, is inappropriate in the determination of child custody. This presumption illustrates a major flaw in patriarchal thinking: a willingness to apply abstract rules rather than inquire into the realities of the situation. The court decided that the lower court "did not determine whether there was a substantial psychological relationship ... between the child and the adoptive parents and gave no apparent weight to the child's biological relationship to the natural mother"; therefore, the court remanded the case for further fact-finding on this issue. The court made no mention of the quantum of psychological relationship necessary. If a relationship existed at all, the adoptive parents should be awarded custody, and no preference need be given to the biological status of the natural parents. The court essentially did not follow its own rationale by deferring the final decision. The consideration of the biological relation interfered with justice. This child was over two years old and had been living with the adoptive parents since birth at the time the opinion was written. The court, therefore, should not have been reluctant to find and validate a psychological parent relationship. Clearly, the child's day-to-day needs were met not by the biological mother, but by the custodial adoptive parents. Remanding for further fact finding did nothing but unnecessarily delay the final adoption decree. The focus on the rights of the biological parents only served to delay the adoption and divert attention away from the child.

A later Louisiana case is more responsive to the child's best interests. In re Baby Boy Smith also had its origins in a claim

165. Id.
166. Id.
167. Id. at 1016.
168. Id. at 1013-14.
169. Id. at 1013-15.
170. Id. at 1022.
171. On remand, the adoptive parents were awarded custody and leave to file for a final decree of adoption. Pontiff v. Behrens, 536 So. 2d 424 (La. 1989). Remanding, therefore, accomplished nothing more than further delaying the final custody determination.
of invalid surrender, but the Court of Appeal of Louisiana quickly disposed of that argument, citing that the biological mother was not subject to any duress, had the benefit of counsel, and testified that she knew she would not automatically be awarded custody if she revoked her consent.\textsuperscript{173} Her attempt to revoke consent was timely, however, so the court of appeal needed to determine the best interests of the child in order to decide if the adoption could go forward or if the revocation of consent would be allowed.\textsuperscript{174} The court had the aid of a licensed psychologist who testified that a disruption in the bonding process that takes place between child and caregiver during the first year of life would likely doom the child to “eventually develop interpersonal relationship problems.”\textsuperscript{175} Another expert concurred that the child had formed a bond with the adoptive parents and that removal of the child from their custody would be “catastrophic” and could lead to “incredible problems in [his] emotional and social development.”\textsuperscript{176} The court followed the \textit{J.M.P.} rule on ascertaining the best interests, and concluded that there was no error in the lower court finding that the prospective adoptive parents and the child had formed an attachment. The court reasoned that, therefore, the attachment should not be severed lest it harm the child.\textsuperscript{177}

Expert witnesses contributed to the quality of the decision in the \textit{Baby Boy Smith} case. The importance of psychological parenthood was not an intellectual abstract, but was discernible from the context of that specific child’s development.\textsuperscript{178} The court could not have postponed a determination of the child’s attachments as it did in the \textit{J.M.P.} decision. The court addressed the interconnection between the caregiver and the child, recognizing it as something to be legally protected. Such reasoning is consistent with the goals of feminist jurisprudence, as it extends the protection of law to the historically undervalued relationship between the child and the psychological parent.

B. Decisions That Avoid the Child’s Best Interests

Illinois courts have not used the best interests of the child in adoption disputes and have failed to protect the relationship

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\item \textsuperscript{173} \textit{Id.} at 146.
\item \textsuperscript{174} \textit{Id.} at 147.
\item \textsuperscript{175} \textit{Id.} at 148.
\item \textsuperscript{176} \textit{Id.}
\item \textsuperscript{177} \textit{Id.} at 148-49.
\item \textsuperscript{178} \textit{Id.} at 148.
\end{itemize}
\end{footnotesize}
between the child and the psychological parent, as seen in the recent case *In re Baby Boy Janikova.* Though the intermediate appellate court decided custody based on the child's best interests, the Illinois Supreme Court reversed, on the grounds that the lower court "wholly [missed] the threshold issue" by dwelling on the best interests of the child. The court decided that parental rights were more important than the child’s best interests in determining custody. The Illinois Supreme Court decision is a perfect example of the damage a court can do to a child by ignoring her interests, by being too wrapped up in the patriarchal system to understand that the child's relationship was precious and worthy of legal protection.

The intermediate court, on the other hand, appeared to use a model that, like a feminist model, based the analysis on the child and his relationships. The appellate court defined the child as the "real party in interest" and as such, his interests were superior to any others, including biological and adoptive parental rights and interests. The court allowed no exception to the principle that the child’s interests are paramount—"a child’s best interest is and must remain inviolate and impregnable from all other factors, including the interests of the parents." The court did not use a balancing test. Rather, it stated that when the interests of the child and parent conflict, "the rights and interests of the parents must yield."

While adamantly endorsing the best interests standard, the appellate court did not precisely define nor follow a set of guidelines to implement the standard. Rather, the court took a common sense approach: "there comes a point when we should not be ignorant as judges of what we know as men and women." Essentially, the Illinois Appellate Court found that the child bonded with the adoptive parents and that it would be detrimental to dissolve that relationship. Considering the fact that the baby was placed with the adoptive parents when he was four days old and had lived continuously with them ever since that

179. 638 N.E.2d 181 (Ill. 1994).
182. *Id.*
183. *Id.* at 182.
184. *Id.*
185. *Id.*
186. *Id.* at 654.
placement, removing him from his home and family and the only parents that he had ever known would not further the best interests of the child.\textsuperscript{187}

The decision is a recognition of psychological parenthood, valuing the attachment between the child and the caregiver over biology. The decision is "a recognition in the law that it takes more to being a parent than being one of the sexual partners to the physiological formation of a child."\textsuperscript{188} The Illinois Appellate Court recognized, valued, and protected the attachment relationship between the child and his psychological parents. By identifying the relationship as superior to other interests, the court used an ethic of care. The context and connection between the child and psychological parent was cardinal to the decision; the decision, therefore, was consistent with feminist values.

The court needed no further basis for enforcing the adoption once it determined that it was in the baby's interest to remain with the adoptive parents, because the court emphatically placed the best interest of the child above all other potential interests.\textsuperscript{189} The court itself said that there was no exception to the supremacy of the child's interests.\textsuperscript{190}

After concluding that it was in the interests of the child to remain with the adoptive parents, the court found that the biological father was unfit so that his consent was unnecessary to the adoption.\textsuperscript{191} The court declared him unfit because he never confronted or wrote to the mother about the birth, never contacted the physician caring for the mother or delivering the child, never expressed concern for the welfare of his child, nor tried to name the baby.\textsuperscript{192} The mother, however, refused to identify the father and later lied to him, telling him that the baby died.\textsuperscript{193} When the father began to suspect that the child had survived, he left the mother messages indicating his suspicions, and investigated her residence looking for signs of the child.\textsuperscript{194} He discovered the adoption more than two months after the child had been born. After this discovery, he sought to intercede in the adoption with the aid of an attorney.\textsuperscript{195}

\textsuperscript{187} Id. at 650, 653-54.
\textsuperscript{188} Id. at 653.
\textsuperscript{189} See supra text accompanying notes 181-85.
\textsuperscript{190} In re Baby Boy, 627 N.E.2d at 653.
\textsuperscript{191} Id. at 654.
\textsuperscript{192} Id.
\textsuperscript{193} Id. at 650.
\textsuperscript{194} Id. at 650-51.
\textsuperscript{195} Id.
Such behavior is not that of an unconcerned parent. The father was poor and a recent immigrant to the United States.\textsuperscript{196} He was uninformed of the birth and surrender of his child. He had no reason to seek the aid of a lawyer within the first thirty days after the child’s birth as the court would have required of a fit parent.\textsuperscript{197} The finding that the father lacked interest and concern in his child\textsuperscript{198} is disingenuous and inconsistent with the father’s behavior. He looked for signs of the baby, and when he finally was apprised of the situation, he took action.

One can only conclude the court felt the need to find an alternate reason for allowing the adoption to stand. The court was uncomfortable with interfering in parental rights despite its endorsement of the best interest standard. The court was intellectually dishonest as to the fitness of the biological father. It did not have to address that issue in order to adequately address the real party in interest. By its own rule, the court need not have gone further than finding that the baby was best served by remaining with the adoptive family.\textsuperscript{199} It is tragic that the father was lied to and lost his child through no acts of his own, but that tragedy does not overcome the supremacy of the baby’s interests.\textsuperscript{200}

The tragedy also enabled a court to ignore the child. On appeal, the Illinois Supreme Court decided that the child was irrelevant to the decision.\textsuperscript{201} Rights analysis compelled the court to focus on the father’s due process instead of the child’s emotional and psychological well being.\textsuperscript{202} The deficiencies of the rights analysis as opposed to a feminist ethic of care are clear. Rights-based decisions consider children the property of their birth parents, without inquiring into their interest in growing up in a loving, caring home.\textsuperscript{203} The damage to the child in this case cannot be underestimated. Denis Donovan, Director of the Children’s Center for Developmental Psychiatry in St. Petersburg, Florida, says of the child in the Illinois case, “His world is the world in which he

\textsuperscript{196} Id. at 649.
\textsuperscript{197} Id. at 654.
\textsuperscript{198} Id.
\textsuperscript{199} See id. at 652-53.
\textsuperscript{200} See id.
\textsuperscript{201} In re Baby Boy Janikova, 638 N.E.2d 181, 182 (Ill. 1994) (concluding that the father’s parental interests were improperly terminated, and thus the appellate court was wrong to dwell on the best interests of the child).
\textsuperscript{202} Id.
\textsuperscript{203} Ann Scott Tyson, Rival Parents Clash over Adopted Child, CHRISTIAN SCI. MONITOR, July 18, 1994, at 7.
has grown up ... forcing the child to leave his family would mean the total disruption and turnover of his world."204

The people of Illinois have expressed great displeasure with the Illinois Supreme Court's analysis of the father's rights overtaking the child's. In the weeks following the decision, hundreds of people called the Illinois Supreme Court criticizing the decisions and begging the justices to reconsider.205 Even the governor of the state attempted to intervene by requesting a rehearing. He eventually called a special session of the legislature in order to reform Illinois adoption laws, and required a hearing on the best interests of the child.206

The Illinois Supreme Court also lacked an understanding of the attachment relationship. Instead of perceiving the relationship between the adoptive parents and Baby Boy as a caring relationship in which the parents tended to the child's psychological needs and emotional development, the court interpreted a best interest standard as requiring a decision to be based on the financial resources and the educational background of the parents.207 Those criteria are not part of the best interests calculus; instead, the psychological parent relationship is determinative of the best interests.208

A decision using an ethic of care would not have totally disrupted the child's world. The feminist approach would have examined the context of his world, and preserved the important relationships.209 Part of the context may have been that the biological father wanted to provide a loving, nurturing home for his child, but transcending the father's plans would be the child's reality of being in a loving, nurturing home and experiencing attachment relationships that were inestimably important to his psychological and emotional well being.210 The feminist ethic of care would have elevated the relationship between the child and adoptive parents and protected it from threats to the relationship.211

204. Id.
205. David Bailey, Public Importunes High Court in "Baby Richard" Adoption Case, CHI. DAILY L BULL., July 8, 1994, at 1.
206. Tyson, supra note 203, at 7.
207. Id.
209. See supra notes 128-36 and accompanying text.
210. See supra notes 37-44 and accompanying text.
211. The negative response by the people of Illinois to the decision points to their desire to elevate and protect the relationship between the child and adoptive parents. See supra notes 205-06 and accompanying text.
The most famous of the recently disputed adoptions, the Baby Jessica case, *In re Baby Girl Clausen*, was another decision that ignored the best interests of the child. Using a masculine preference for process, the Baby Jessica case was decided on procedural grounds. The Michigan Supreme Court denied jurisdiction to modify an earlier Iowa decision terminating the adoption. In doing so, the court addressed Jessica’s best interests and due process rights in family life, but dismissed the due process claim and Jessica’s petition for lack of standing.

Two weeks after she was born, on February 25, 1991, the adoptive parents, the DeBoers, acquired custody of Jessica and filed a petition for adoption. One week later, the mother, Cara Clausen, revoked her consent to the adoption and admitted to having lied about the father’s true identity. One month after custody changed hands, the correctly identified father petitioned the Iowa courts to intervene in the adoption. On December 27, 1991, an Iowa district court denied the DeBoers’ petition to adopt Jessica because there was no finding that the biological father’s rights were terminated or that he had abandoned the child. Lacking abandonment, Iowa was not required to inquire into the baby’s best interests. The DeBoers’ Iowa appeals resulted in affirmations of the original finding that the biological father had not surrendered his rights; thus, the DeBoers’ rights as guardians were terminated in December of 1992. The same day that their guardianship was terminated, the DeBoers requested in Michigan, their state of residence, a temporary restraining order and petition to enjoin the Iowa custody order, or in the alternative, to modify it to award custody to the DeBoers. By the time the Michigan actions reached their final appeals, it was the summer of 1993, two and one-half years after custody originally changed.

Michigan decided that under the Uniform Child Custody Jurisdiction Act (UCCJA) and Parental Kidnapping Prevention Act

213. Scales, *supra* note 9, at 1385.
214. *In re Baby Girl Clausen*, 502 N.W.2d at 652.
215. *Id.*
216. *Id.* at 652-54.
217. *Id.* at 652.
218. *Id.*
219. *Id.* at 652-53.
220. *Id.* at 653.
221. *Id.*
222. *Id.*
223. MICH. COMP. LAWS ANN. § 600.651-.673 (West 1981).
(PKPA), it had no jurisdiction to alter the Iowa decision and must enforce it. The UCCJA was designed to determine when a state may take jurisdiction from another state and when a state may modify another state's custody order. Iowa properly exercised jurisdiction over the original claim and the PKPA "emphatically imposes the requirement that sister-state custody orders be given effect." States must recognize custody determinations if made within the confines of the uniform acts. The Michigan courts were obligated to give full faith and credit to Iowa's valid judgment.

The purpose of the UCCJA and PKPA is to "avoid jurisdictional competition" of the sort in which the DeBoers were attempting to engage. The explicit legislative purpose for the PKPA was to prevent "the disregard of court orders, excessive relitigation of cases, [and] obtaining of conflicting orders of various jurisdictions," because the result otherwise is "harm to the welfare of children and their parents or other custodians." The Acts give priority to certainty and stability following a policy that, in disputes rife with injustice, consistency eliminates injustice to the greatest extent possible.

Michigan valued certainty and procedure over relationships and context, and thus, the best interests of Jessica. The DeBoers attacked the Iowa decision as contrary to Michigan policy because it involved no best interests hearing. The Michigan court declared that it was consistent with state policy to avoid a hearing on the child's best interests because the previous cases recognize some situations in which such a hearing is unnecessary. In addition, because the DeBoers did not have a legally recognized claim to custody, they had no right to a best interests hearing.

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226. Id. at 655.
227. Id.
228. Id. at 656.
229. Id.
232. Id. at 658, 660.
233. Id. at 660.
234. Id. at 661-62. For example, if the biological father establishes a custodial relationship or has supported the mother or the child, his parental rights may not be terminated regardless of the child's best interests. Id.
235. Id. at 662.
Context and the connection between Jessica and the DeBoers were ignored in favor of the patriarchal abstraction of rights. The specific situation of the DeBoers and Jessica was irrelevant to the court's analysis.

Jessica, through her guardian ad litem, petitioned the court for a best interests hearing based on her interest in a family relationship with the DeBoers. Michigan recognized that children have a due process interest in the family, but did not recognize it as independent from the parents' rights. The court held that a parent's due process rights are congruous with the child's interests unless the parent is unfit. A parent's right to custody, therefore, is not to be disturbed, even if contrary to the child's explicit preferences and interests. While professing that the best interests of the child were of the greatest importance, the court continued, "we never have interpreted such [a] rule so as to deprive a parent of the custody of his or her child, unless it was shown that the parent was an unsuitable person to have such custody." In addition, the court noted that "minors' rights to independently assert rights regarding their custody and care" are limited.

The court claimed that there was a concurrence of interests between Jessica and her biological parents. Jessica had not seen her biological parents, however, for over two and a half years. Her interests had become intertwined with the DeBoers' lives. They were the people who cared for her daily needs; the biological parents played no part in Jessica's daily life. When a child is in the custody of a third party,

any prior relationship with the biological parent deteriorates to the point that it is supplanted by the latter relationship. A child may ... look upon the third party as his true parent. At this point, a return of custody to the natural ... parent ... would work considerable emotional harm on the child.

236. Id. at 665.
237. Id.
238. Id. at 666.
239. Id. (quoting Liebert v. Derse, 15 N.W.2d 720 (Mich. 1944)).
240. Id. at 667.
241. Similar to In re Baby Boy Janikova, 638 N.E.2d 181 (Ill. 1994), Jessica's biological father did not know of her birth or the fact that her biological mother had surrendered parental rights. In re Baby Girl Clausen, 502 N.W.2d at 652. He too appears to be an innocent victim. His desire to have a relationship with his child should not be cavalierly terminated, but the focus must remain on Jessica. The fact that the biological father is "innocent" is an inadequate justification for him to prevail.
It was impossible for the biological parents to be psychological parents, as they had been absent from Jessica's entire life. Her best interests, therefore, could not be served by awarding custody to the absent biological parents. Jessica's interests had diverged from those of her biological parents. The court preferred the adults' due process rights over any consideration of the relationship between the child and caregiver. By saying that the interests of Jessica and her biological parents were the same, the court, in effect, denied that Jessica had any protectable interest in the relationship with her psychological parents.

The Michigan Supreme Court's preference for the biological parents is archaic and projects a sense that the child is a "sub-person over whom the parent has an absolute possessory interest." This preference is a clear flaw in the patriarchal system for deciding custody disputes. The best interests test is the most widely used and well-accepted analysis to resolve custody disputes. This analysis leads to both a legally and morally superior claim for the child. In addition, the purposes of the uniform acts were not furthered in this case. Though aimed at protecting the child, the court's application of the PKPA, by focusing "exclusively on the concerns of competing adults, as if this were a dispute about the vesting of contingent remainders, reduces the PKPA to a robot of legal formality with results that Congress did not intend." An overly precise approach to the UCCJA turns the child into a "pawn" in a "jurisdictional chess game"; instead, when exercising discretion within the boundaries of the UCCJA and PKPA, a court should consider their underlying policies which aim to ensure a stable right to custody in the best interest of the child, as well as the exact words of the statutes. By refusing to inquire into Jessica's best interests, the court failed to further these goals.

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243. See supra notes 47-48 and accompanying text.
244. See supra notes 48-50 and accompanying text.
245. In re Baby Girl Clausen, 502 N.W.2d at 669 (Levin, J., dissenting).
246. Id.
247. Id. at 670.
248. Id. at 671.
249. Id. at 670-61 (citations omitted).
250. In a final appeal to the United States Supreme Court, Justice Stevens denied Jessica a best interests hearing, claiming that the relationship between the child and the DeBoer's developed "after it became clear that they were not entitled to adopt her .... [C]ourts are not free to take children from parents simply by deciding another home appears more advantageous." DeBoer v. DeBoer, 114 S. Ct. 1 (Stevens, Circuit Justice 1993) (alteration in original) (quoting In re B.G.C., 496 N.W.2d 239, 241 (1992)). In this statement, Justice Stevens acknowledged that Jessica's best interest was to remain with her adoptive family, but ignored that conclusion in favor of rights analysis.
Ironically, the UCCJA and PKPA, which were designed to ensure procedural certainty to resolve disputes with finality for the child, instead have the opposite effect. They allow the destruction of deep attachments, as with Jessica DeBoer. Such an adverse outcome results from a rights-based approach. By ignoring context and relationships, which a feminist approach would have examined, courts are able to frustrate the stated goals of maintaining and protecting the parent-child relationship. Intuitively, it is clear that the feminist approach would not have this problem. Not only would the goal of the law be the maintenance of a parent-child relationship, but it would also be the basis for the decision. The central factual question would be whether and with whom there is a psychological parent relationship. The UCCJA and PKPA use a totally different analysis from the feminist model. By their nature, the UCCJA and PKPA do not focus on the child, but on the jurisdiction of courts in deciding matters regarding the child.251 When courts ignore the child's interests and address jurisdictional questions, one cannot expect that decisions will be favorable to the child.

V. OTHER OPTIONS TO BETTER PRESERVE THE CHILD'S BEST INTERESTS

What could the Michigan and Illinois Supreme Courts have done? The courts' hands were not tied. The courts could have protected the attachment relationships. In Baby Jessica's situation, this protection would have been possible through a finding that the PKPA and UCCJA authorized Michigan to exercise jurisdiction over the dispute because it was the child's home state.252 The PKPA defines the child's home state as the home where the child lived with the parent or parent-figure for the six consecutive months prior to the proceeding.253 Congress specifically intended to protect family relationships as opposed to biological relationships with such a definition of home.254 Michigan could easily interpret the PKPA to confer jurisdiction, and, therefore, determine custody on the merits, by focusing on Jes-

251. In re B.B.R., 566 A.2d 1032, 1041 (D.C. 1989) (holding that though the "key figure in [the] woeful drama" is the child, the decision is not regarding the child's fate, but rather which court will have "ultimate responsibility for making that determination").
253. Id.
254. Id.
sica’s attachment to the DeBoers and her interest in remaining with them.

Similarly, the Illinois Supreme Court could have used a best interests analysis in which the child is the true party in interest. Under such an analysis, no other interest may take precedence over the child’s. The courts could have allowed the children to intervene. Under a traditional analysis of standing, the children have a legally cognizable interest in the outcome. To have standing in a dispute, a party must show that he or she personally suffered an injury resulting from the actions of the other party. A favorable decision must be likely to compensate the injury. The injury must be particular and real, not hypothetical. In determining if a party has standing, the court must consider if the injury is too abstract or inappropriate, if the causal link between the defendant’s behavior and the plaintiff’s harm is sufficiently related, and if relief for the harm is too conjectural. Advisory opinions are disfavored; by requiring a party to have standing, courts enforce the policy that questions to the court will have a precise application, “not in the rarified atmosphere of a debating society.”

Children in disputed private adoptions clearly have standing. For example, they can identify the precise and individual harm of being removed from psychological parents and placed with strangers with whom they have no attachment. Such a result will cause harm to the children’s ability to form new relationships and may impair their development, and this harm is directly linked to the actions of the parents. There is no question that the children merely have an abstract injury only tenuously related to the behavior of other parties to the dispute. A child has standing to enter the fray, and her claims and interests must be addressed by the court. When the child’s needs are not addressed, as in the Baby Jessica and Baby Boy Janikova cases, the decisions are not only harmful to the child, but unconscionable. The party with the most at stake in the dispute is ignored. The party whose life and well being depend on the court is overlooked as having no interest in the outcome.

255. See supra notes 179-87 and accompanying text.
257. Id.
259. Id. at 752.
260. Valley Forge, 454 U.S. at 472.
261. See supra notes 37-41 and accompanying text.
In addition to recognizing that the child has standing, the court should put the disputed adoption on an expedited schedule. The court should elevate result over process, as is done in an ethic of care model. Delays and prolonged conflict in resolving custody disputes are contrary to the best interests of the child. Some courts recognize compelling financial reasons as adequate hardship to justify an expedited proceeding. If financial reasons are sufficiently compelling to merit expedited proceedings, surely a child's future is also a compelling reason. Other courts are more reluctant to grant emergency relief that modifies the "first-in first-out" system, rarely finding exceptional need or urgency. In truly working towards the best interests of the child, however, a court should recognize the exceptional need for urgency. The child's abilities to form attachments and develop emotionally are in jeopardy when the proceedings and appeals are delayed. In order to enable the child to develop, there is exceptional need for quick resolution. The child's future should not be decided at the same speed as a securities fraud conflict or an injury compensation dispute.

Courts are reluctant to rush decisions in complex litigation with profound implications on the parties. A custody dispute could fairly be described as such a multi-issue case with lasting effect on both the parties and third parties. Though one would like to ensure that courts take care with all decisions, haste could threaten the care taken in reaching the conclusion. The urgency of the child's developmental needs, however, outweighs the concerns of carelessness. The child would be served best by a swift determination of custody so as to enter into a lasting attachment as early as possible. The interference with autonomy and individual rights is not as great a danger as the interference with the child's relationship.

262. Scales, supra note 9, at 1385.
263. Melissa Douthart Philbrick, Agreements to Arbitrate Post-Divorce Custody Disputes, 18 COLUM. J.L. & Soc. PROBS. 419, 425 (1985) ("A child's exaggerated sense of time magnifies the emotional impact of any delay.").
266. See supra notes 37-44 and accompanying text.
267. See, e.g., In re Investigation into Gen. Order Forty-Five, 542 A.2d at 289 (denying a motion for expedited adjudication).
268. See Philbrick, supra note 263, at 461 ("As in any judicial system, there is a risk that the perfect solution will not be reached in every case.").
269. Tyson, supra note 203, at 7.
Expedition need not result in careless decisions. A new option for speeding up the process of resolving custody disputes is necessary. Some commentators have recommended greater reliance on arbitration and other forms of alternative dispute resolution.\textsuperscript{270} The lack of finality with these methods, however, remains a problem.

Furthermore, in some cases, alternative dispute resolution is not practical because the parties are unlikely to approach the bargaining table willing to compromise.\textsuperscript{271} The solution in such cases is to continue to hear adoption disputes in traditional courts while closely managing the litigation. Implementing a litigation structure with limited time for discovery, hard-and-fast deadlines, and early trial dates would reduce dramatically the time of litigation.\textsuperscript{272} Although procedural options and mandatory measures to quicken the pace of adoption litigation may create some risk of unfairness in that a full range of litigation strategies may be limited,\textsuperscript{273} such a risk is justifiable to ensure the child's best interests. The dispute must be resolved with an eye toward finality before the child's attachment to the custodial family becomes too solid. Ideally, the dispute would be resolved before the child turned three months old. This time frame, however, may be unrealistic in light of overburdened courts. In order to protect the child, the dispute should be resolved within three months of revocation of consent. Revocation would occur before the child turned six weeks old. Custody would then be settled either prior to any attachment having formed, or so early into the formation of attachment that the child would not suffer great developmental disruption.\textsuperscript{274}

VI. CONCLUSION

Patriarchal jurisprudence addresses intrusion into one's autonomy. This intrusion is not a relevant issue in a disputed adoption. The masculine approach to law overlooks children in disputed adoptions because they are not fully autonomous individuals. The dangers unique to infants therefore are not addressed by the patriarchal system.

\textsuperscript{270} Philbrick, supra note 263, passim.
\textsuperscript{272} Id. at 439.
\textsuperscript{273} Id. at 442.
\textsuperscript{274} See supra notes 20-21, 37-39, 101-02 and accompanying text.
The dignity of the child should be the paramount concern of the courts in adoption disputes. Neither the biological nor adoptive parents should be presumptively more deserving of custody. Instead, the courts must examine the relationship between the child and the parent. A true best interests test would focus on keeping the child with her psychological parent. The quality of the tie between the child and the family should be the chief interest in determining custody. If the child has not yet formed an attachment to the adoptive family, there would not necessarily be any added harm by granting the biological family custody. Indeed, if no attachment has formed while the child has been in the care of the adoptive family for some months, that lack of attachment may be an indication that the adoptive family is not adequately seeing to the needs of the child. In such a situation, a finding of unfitness is justified. The child’s interests would surely be served by removing the child and awarding custody to the family eagerly seeking to see to his or her needs. Such situations, however, appear to be rare in the case law. Generally, the child has formed some attachment to the adoptive family. Under such circumstances, the child should not be removed from the object of attachment. Protecting the psychological relationship would be consistent with the feminist model of altering the legal system to employ an ethic of care.

Though some decisions may be reached on grounds other than the child’s interests, such as the jurisdictional basis for the Michigan decision in the Baby Jessica case, courts should not avoid the question of the child’s interests. Although it may be a more factually difficult determination, courts must not shy away from the hard decisions. The legal system is a powerful tool that can be used to protect those who are not important in the patriarchal rights analysis, such as children. An ethic of care would be more responsive to the children. Factors such as the time in which a child has been in the custody of the adoptive parents, the quality of attachment between the child and the family, and the age of the child all enter into a feminist analysis. A court that consciously diverges from the child’s interests reaches an unconscionable decision. The child is more likely to have an affection relationship with the parents who have been caring for him or her than the parents who are biologically responsible for his or her presence.275

275. If the dispute is resolved quickly enough, before the child is three or four months old, the attachment to the custodial parents will still be fairly weak. Thus, the infant would suffer less harm by a change in custody than if the resolution occurred after the first five to six months of her life. See supra notes 19-24, 47-55 and accompanying text.
Children's interests are not always served by returning them to their natural parents in disputed adoptions. The current legal system is bound by constitutionally protected rights of biological parents to raise their children. Due process rights obscure the true issue. Society has a responsibility to its children to protect their attachment to their caregivers. A legal system that acknowledges this responsibility will protect the relationship from intrusions that may sever the connection between child and caregiver. A legal system following a feminist jurisprudence, using women's experiences and values as a model for the law, will best serve the child.