

# HOW EMBEDDED KNOWLEDGE STRUCTURES AFFECT JUDICIAL DECISION MAKING: A RHETORICAL ANALYSIS OF METAPHOR, NARRATIVE, AND IMAGINATION IN CHILD CUSTODY DISPUTES

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We live in a time of radically changing conceptions of family and of the relationships possible between children and parents. Though family structure is undergoing “a sea-change,”<sup>1</sup> family law remains tethered to culturally embedded stories and symbols. While so bound, family law will fail to serve individual families and a society whose family structures diverge sharply by education, race, class, and income.<sup>2</sup>

This Article advances a critical rhetorical analysis of the interaction of metaphor and narrative within the specific context of child custody disputes. Its goal is to begin to examine how these embedded knowledge structures affect judicial decision making generally. More specifically, the Article’s aim is to help advocates make room for difference and diversity in the lives of families.<sup>3</sup>

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<sup>1</sup> WILLIAM SHAKESPEARE, *THE TEMPEST* act 1, sc. 2 (1623):

Full fathom five thy father lies;  
Of his bones are coral made;  
Those are pearls that were his eyes:  
Nothing of him that doth fade  
But doth suffer a sea-change  
Into something rich and strange.

<sup>2</sup> See Amy L. Wax, *Engines of Inequality: Class, Race, and Family Structure*, 41 *FAM. L.Q.* 567, 568 (2007) (“A grand experiment in living is now underway in our society . . . [but] not all sectors of society have participated equally in the experiment.”). Although the percentage of U.S. children growing up in “traditional nuclear families” has declined dramatically in recent decades, more than ninety percent of children whose parents make more than \$75,000 a year live with both biological parents—the traditional model. *Id.* at 576. On the other hand, nearly half of all children whose mothers had four or fewer years of high school do not live with their biological fathers. *Id.*

<sup>3</sup> See, e.g., MAROUF HASIAN JR., *LEGAL MEMORIES AND AMNESIAS IN AMERICA’S RHETORICAL CULTURE* 197–98 (Westview Press 2000) (suggesting, as he does throughout the text, that critical legal rhetoric be used to “deconstruct the rhetoric of the empowered while helping to find a space for the marginalized to speak”).

The rhetorical analysis indicates that the best interests of the child standard fails to explain child custody outcomes, and the analysis suggests that the cognitive setting for custody disputes—cluttered with outmoded metaphors, simplistic images, and unexamined narratives—interferes with the ability of judges to attend to complex and radical transformations of parent-child relationships. The Article proposes that practicing lawyers and scholars use rhetorical analysis first to uncover the symbols and stories that affect judicial decision making and then to construct arguments that may overcome deeply rooted constraints, help individual clients, and persuade policy makers.

### I. INTRODUCTION: THE META-STORY

To introduce and illustrate my thesis, I'll begin with the Biblical story of Lot's Wife, a narrative that soon became a metaphoric warning of the consequences of the failure to obey. In the Old Testament telling, when God decided to destroy five cities because of the sins of their residents, He sent angels to warn Lot to flee from Sodom. The angels urged Lot to take his family and leave quickly: "Arise, take thy wife, and thy two daughters, which are here; lest thou be consumed in the iniquity of the city. . . . Escape for thy life; look not behind thee, neither stay thou in all the plain; escape to the mountain, lest thou be consumed."<sup>4</sup> As the family fled, despite the warning to "look not behind thee," Lot's wife looked back on Sodom and was turned into a pillar of salt.

By the New Testament, the story of Lot's Wife had been set in stone, her name alone invoking a cautionary image: remember, Jesus said to a follower, what happened to Lot's Wife.<sup>5</sup> Beginning as a narrative account, the story had solidified into symbol. Any re-telling of the story would conjure up settled characters, plot, and moral; any reference to the symbol would impose a set framework for understanding a new situation.

Still, imaginative re-visioning was possible. Remembering what happened to Lot's wife, the Polish poet Wisława Szymborska<sup>6</sup> reshaped the familiar story; in her hands, story and symbol shattered into unexpected images.

#### *Lot's Wife*

They say I looked back out of curiosity.  
But I could have had other reasons.  
I looked back mourning my silver bowl.  
Carelessly, while tying my sandal strap.  
So I wouldn't have to keep staring at the righteous nape  
of my husband Lot's neck.  
From the sudden conviction that if I dropped dead

<sup>4</sup> *Genesis* 19:15–17 (King James).

<sup>5</sup> *Luke* 17:28–32.

<sup>6</sup> Szymborska was born in Poland in 1923, grew up during Hitler's invasion and occupation, remained under the Communist regime, and had her first book banned in 1948. Billy Collins, *Foreword*, in WISŁAWA SZYMBORSKA, *MONOLOGUE OF A DOG*, at x (Clare Cavanagh & Stanisław Barańczak trans., Harcourt, Inc. 2006).

he wouldn't so much as hesitate.

...

I looked back in desolation.

In shame because we had stolen away.

Wanting to cry out, to go home.

Or only when a sudden gust of wind

unbound my hair and lifted up my robe.

...

I looked back in anger.

To savor their terrible fate.

I looked back for all the reasons given above.

I looked back involuntarily.

It was only a rock that turned underfoot, growling at me.

It was a sudden crack that stopped me in my tracks.

A hamster on its hind paws tottered on the edge.

It was then we both glanced back.

No, no. I ran on.

I crept, I flew upward

until darkness fell from the heavens

and with it scorching gravel and dead birds.

I couldn't breathe and spun around and around.

Anyone who saw me must have thought I was dancing.

It's not inconceivable that my eyes were open.

It's possible I fell facing the city.<sup>7</sup>

Szyborska's poem evokes the imaginative process: imagination breaks open the expected, and the poem "shows us the world from odd perspectives . . . from strange angles . . . an inversion of the usual, the habitual."<sup>8</sup> Imagination questions the settled interpretation that a woman became a pillar of salt when she looked back out of curiosity or disobedience. If instead, she looked back involuntarily, or in anger, shame, or desolation, we must reconsider the moral of the story and the implications of the symbol.

This Article focuses on a similar interaction of narrative, metaphor, and imagination in child custody disputes, a context selected because we are so at home with the canons and icons of family law that we hardly see them at all. The conclusion of this examination will come as no surprise: inherited myths and symbols affect outcomes as much as evidence and reasoning.<sup>9</sup> Among the most intriguing stories to emerge are those in which the decision making process follows plots suggested by two master stories (termed "master" stories because they are so tied to our history and

<sup>7</sup> WISŁAWA SZYMBORSKA, POEMS NEW AND COLLECTED 1957–1997 149–50 (Stanisław Barańczak & Clare Cavanagh trans., Harcourt Brace & Co. 1998).

<sup>8</sup> Collins, *supra* note 6, at xiii.

<sup>9</sup> Decision makers in child custody cases may turn to myth and symbol to determine which parent is best suited to win custody because there often is no rational basis to prefer one parent over another. For a discussion of why decision makers claim that the results are compelled by the facts, see Jon Elster, *Solomonic Judgments: Against the Best Interest of the Child*, 54 U. CHI. L. REV. 1, 2–3 (1987).

culture<sup>10</sup>): King Solomon deciding between two claimants to a child<sup>11</sup> and the “sinner” Mary Magdalen showing repentance and being forgiven.<sup>12</sup>

These master stories mix with cultural models of marital families, sacrificing mothers, and wage-earner fathers. The resulting plots begin with an initial steady state in which one marital parent is the virtuous, primary caregiver, and the other is the hard-working, primary wage earner. Trouble arises when one or both parents fail to perform their assigned roles in the family unit—and the judge must make heroic efforts to fix what has been broken and to restore balance.<sup>13</sup>

Family courts’ reliance on these stories and metaphors runs counter to the accepted narrative of progress toward decision making governed by the concepts of gender equality and the best interests of the children.<sup>14</sup> Changing family relationships require legal concepts flexible and complex enough to escape the narrow bindings of master stories and metaphors.<sup>15</sup> Because meaning is constructed and metaphor and narrative are the frameworks of its construction, metaphor and narrative may act as ideological baggage carriers that transport messages without conscious discussion. Yet, even as these frameworks shape and constrain our understanding, they open the way to channel and enable our imagination.<sup>16</sup>

## II. METAPHOR AND NARRATIVE THEORY

Metaphor and narrative structure experience and expression. They shape our perceptions and reasoning processes, often unconsciously, and

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<sup>10</sup> See Michael Goldberg, *Against Acting “Humanely,”* 58 MERCER L. REV. 899, 905–06 (2007). Goldberg uses the term “master story” for stories that “serve as the template for understanding the world and as the tutor for acting in it.” He gives as an example “‘the Christian master story’ and the momentous metaphor to which it gave birth. . . . [B]y revealing ‘the-Divine-at-work’ through his own life’s work, Jesus, God’s incarnation, *by definition* displays for Christians *the* metaphor of ‘humanity at its best,’ thus enabling them to see what it means to act ‘humanely.’” *Id.*

<sup>11</sup> See *infra* notes 184–207 and accompanying text.

<sup>12</sup> See *infra* notes 208–222 and accompanying text.

<sup>13</sup> This sketch of narrative elements relies on ANTHONY G. AMSTERDAM & JEROME BRUNER, *MINDING THE LAW* 113–14 (Harvard Univ. Press 2000).

<sup>14</sup> See *infra* notes 150–167 and accompanying text.

<sup>15</sup> See, e.g., Symposium, *Developments in the Law—The Law of Marriage and Family, Introduction: Nuclear Nonproliferation*, 116 HARV. L. REV. 1999, 2001 (2003) (noting the change in the common family structure—any American family picked at random is more likely to be a non-traditional family than a nuclear family); Martha Albertson Fineman, *Progress and Progression in Family Law*, 2004 U. CHI. LEGAL F. 1, 1 (2004) [hereinafter Fineman, *Progress*] (noting that this area is undergoing rapid change and that “[t]he trick to comprehending this dynamic area of the law is to try and follow the plot inherent in the ongoing rewriting project by understanding both the scripts and the motivations of all the various characters”).

<sup>16</sup> I have explored these ideas in previous articles focusing on the work of metaphor (and metonymy) in lawyers’ briefs and Supreme Court justices’ decisions about corporate participation in the public sphere: Linda L. Berger, *Of Metaphor, Metonymy, and Corporate Money: Rhetorical Choices in Supreme Court Decisions on Campaign Finance Regulation*, 58 MERCER L. REV. 949 (2007); Linda L. Berger, *What Is the Sound of a Corporation Speaking? How the Cognitive Theory of Metaphor Can Help Lawyers Shape the Law*, 2 J. ASS’N LEGAL WRITING DIRECTORS 169 (2004). The former article was part of a symposium sponsored by Mercer Law Review. See also Goldberg, *supra* note 10; Mark L. Johnson, *Mind, Metaphor, Law*, 58 MERCER L. REV. 845 (2007); David T. Ritchie, *The Centrality of Metaphor in Legal Analysis and Communication: An Introduction*, 58 MERCER L. REV. 839 (2007); Michael R. Smith, *Levels of Metaphor in Persuasive Legal Writing*, 58 MERCER L. REV. 919 (2007); Steven L. Winter, *Re-Embodying Law*, 58 MERCER L. REV. 869 (2007).

we consciously use them to frame arguments and agreements. Because of the way the mind works and the culture is constructed, metaphor and narrative are essential, and unavoidable, for persuasion and understanding.<sup>17</sup>

#### A. MAPPING THE WORLD

First, to establish a foundation, following is a brief explanation of the findings reported by the cognitive researchers who study metaphor.<sup>18</sup> According to their research, much of our knowledge is tacit and much of our thinking is unconscious: both information and understanding float beneath the surface, neither consciously acquired nor examined.<sup>19</sup> “[The cognitive unconscious] includes not only all our automatic cognitive operations, but also all our implicit knowledge. . . . Our unconscious conceptual system functions like a ‘hidden hand’ that shapes how we conceptualize all aspects of our experience.”<sup>20</sup> What we know implicitly is unexamined and thus goes uncontested; because it is at work automatically and always, tacit knowledge has a powerful pull.<sup>21</sup>

Cognitive researchers claim that thought processes themselves are metaphoric, not only in the way that we describe them (because of course we must “see” a thought process “as” something else in order to talk about it) but also in the way that they function. In other words, metaphor is both a

<sup>17</sup> AMSTERDAM & BRUNER, *supra* note 13, at 217–45; GEORGE LAKOFF & MARK JOHNSON, *PHILOSOPHY IN THE FLESH: THE EMBODIED MIND AND ITS CHALLENGE TO WESTERN THOUGHT* 128 (Basic Books 1999) [hereinafter LAKOFF & JOHNSON, *PHILOSOPHY IN THE FLESH*].

<sup>18</sup> For background on cognitive theory and research about metaphor, see, e.g., GEORGE LAKOFF, *WOMEN, FIRE, AND DANGEROUS THINGS: WHAT CATEGORIES REVEAL ABOUT THE MIND* (Univ. of Chi. Press 1987); GEORGE LAKOFF & MARK JOHNSON, *METAPHORS WE LIVE BY* (Univ. of Chi. Press 1980) [hereinafter LAKOFF & JOHNSON, *METAPHORS WE LIVE BY*]; LAKOFF & JOHNSON, *PHILOSOPHY IN THE FLESH*, *supra* note 17; STEVEN L. WINTER, *A CLEARING IN THE FOREST: LAW, LIFE, AND MIND* (Univ. of Chi. Press 2001) [hereinafter WINTER, *A CLEARING IN THE FOREST*]; Max Black, *More About Metaphor*, in *METAPHOR AND THOUGHT* 19 (Andrew Ortony ed., Cambridge Univ. Press 2d ed. 1993); George Lakoff, *The Contemporary Theory of Metaphor*, in *METAPHOR AND THOUGHT* 202 [hereinafter Lakoff, *Contemporary Theory*], *supra*; Steven L. Winter, *The Metaphor of Standing and the Problem of Self-Governance*, 40 *STAN. L. REV.* 1371 (1988) [hereinafter Winter, *Standing*]; Steven L. Winter, *Legal Storytelling: The Cognitive Dimension of the Agon Between Legal Power and Narrative Meaning*, 87 *MICH. L. REV.* 2225 (1989); Steven L. Winter, *Transcendental Nonsense, Metaphoric Reasoning, and the Cognitive Stakes for Law*, 137 *U. PA. L. REV.* 1105 (1989).

<sup>19</sup> LAKOFF & JOHNSON, *PHILOSOPHY IN THE FLESH*, *supra* note 17, at 9–15.

<sup>20</sup> *Id.* at 13.

<sup>21</sup> Minus the empirical tone, similar theories have been expressed by rhetoricians and narrative theorists. See, e.g., James Boyd White, *Law as Rhetoric, Rhetoric as Law: The Arts of Cultural and Communal Life*, 52 *U. CHI. L. REV.* 684, 695 (1985) [hereinafter White, *Law as Rhetoric*] (“Like law, rhetoric invents; and like law, it invents out of something rather than out of nothing. It always starts in a particular culture and among particular people. There is always one speaker addressing others in a particular situation, about concerns that are real and important to somebody, and speaking a particular language. Rhetoric always takes place with given materials.”). See also AMSTERDAM & BRUNER, *supra* note 13, at 39 (“[T]here is no mind without culture [and if] culture is anything, it is a network of models of the world, of ways of getting on in it, of tools for thinking and imagining that range from systems of mathematics to genres of storytelling.”); John B. Mitchell, *Narrative and Client-Centered Representation: What Is a True Believer to Do When His Two Favorite Theories Collide?*, 6 *CLINICAL L. REV.* 85, 88–89 (1999) (“It makes complete sense to me that our legal texts float in a sea of varied and often conflicting cultural and historical narratives from which their ultimate meaning is derived. I’ve long since believed that you can’t have meaning outside of context, and that narrative provides the context for our law words.”).

figure of thought and a way of thinking.<sup>22</sup> Metaphors emerge from our interaction with the social and physical environment. They are derived from bodily experience (“balance” keeps you upright; “more is up” because when you pile things on top of each other, the stack goes up);<sup>23</sup> visual images (the “mouth” of the river, the “long arm” of the law); and stories (the Trojan horse, the sword in the stone, the holy grail). Concepts such as “knowing is seeing” and “understanding is grasping” are linked to the way we learn about the world through the senses of sight and touch.<sup>24</sup> Because of the metaphoric process of transferring inferences from one domain to another, we are able to perceive and understand abstract concepts in the same way that we “see” and “grasp” physical ones.

Much logical reasoning appears to be structured imagistically and metaphorically.<sup>25</sup> We make sense out of new experiences by placing them into categories<sup>26</sup> and cognitive frames called schema or scripts that emerge from prior experience.<sup>27</sup> Even the concept of categories is understandable only because we have encountered containers in our interactions with the environment. Because of that experience, we transfer our perceptions and inferences, and we are able to see categories “as” containers, with an interior, an exterior, and a boundary.<sup>28</sup> But for the metaphor of the container, which allows us to gather them up, group them together, and “contain” them, ideas would be marbles thrown at random on the ground.<sup>29</sup>

It follows that categories are made through experience, and not found in nature.<sup>30</sup> The categories that we construct do not fit the formalist model of clearly delineated boxes filled with items that meet necessary and sufficient conditions. Instead, constructed categories are radial structures,

<sup>22</sup> Donald A. Schön, *Generative Metaphor: A Perspective on Problem-Setting in Social Policy*, in METAPHOR AND THOUGHT, *supra* note 18, at 137 (describing metaphor as referring “both to a certain kind of product—a perspective or frame, a way of looking at things—and to a certain kind of process—a process by which new perspectives on the world come into existence”); Lakoff, *Contemporary Theory*, *supra* note 18, at 203 (noting that the word “metaphor” has come to mean “a cross-domain mapping in the conceptual system” while the term “metaphorical expression” means the linguistic expression of the mapping).

<sup>23</sup> Lakoff, *Contemporary Theory*, *supra* note 18, at 240.

<sup>24</sup> WINTER, A CLEARING IN THE FOREST, *supra* note 18, at 55–56.

<sup>25</sup> *Id.* at 56–68.

<sup>26</sup> See generally AMSTERDAM & BRUNER, *supra* note 13, at 19–53, for a more thorough explanation of how categories work, & at 54–109, for a discussion of the use of categorizing at the Supreme Court.

<sup>27</sup> See generally Ronald Chen & Jon Hanson, *Categorically Biased: The Influence of Knowledge Structures on Law and Legal Theory*, 77 S. CAL. L. REV. 1106, 1131–1218 (2004) (describing the literature showing the ways in which categories and schemas are “critical building blocks of the human cognitive process”). Chen and Hanson differentiate categorization as referring “only to the classification of elements, experiences, instances, or arguments into groups” while schemas are applied to the elements in categories to “draw inferences and derive predictions.” *Id.* at 1132. Schemas are “a mental structure which contains general expectations and knowledge of the world”; they are used “to select and process incoming information from the social environment”; and they “guide what we attend to, what we perceive, what we remember and what we infer.” *Id.* at 1133 (internal quotation marks omitted). The authors also discuss scripts, that is, “[an event schema that] help[s] us to understand the different steps or sequence of events involved in a given process.” *Id.* at 1137.

<sup>28</sup> Lakoff, *Contemporary Theory*, *supra* note 18, at 212–13 (“[S]omething can be *in* or *out* of a category, it can be *put into* a category or *removed from* a category. The logic of classical categories is the logic of containers.”).

<sup>29</sup> This concept draws on the metaphors that the mind is a container and ideas are objects. See, e.g., LAKOFF & JOHNSON, *PHILOSOPHY IN THE FLESH*, *supra* note 17, at 338 & 124–25.

<sup>30</sup> AMSTERDAM & BRUNER, *supra* note 13, at 8–9, 27–28.

radiating outward from a prototype at the center.<sup>31</sup> The closer something is to the prototype, the more it is within the category; the farther away, the less it fits. As a result, when a lawyer or a judge chooses a category within which to classify a legal event or situation, the choice is not a simple matching of what items fit into which boxes, but instead is a “rarely innocent” act of interpretation.<sup>32</sup> Once made, the choice lends an aura of logical inevitability to the legal conclusion that follows the categorization.<sup>33</sup>

Similarly, as we go about our lives, we acquire and construct schema and scripts. For example, we experience movement from a beginning along a path to the end, giving rise to the source-path-goal image schema, which in turn leads to more complex conceptual metaphors such as life as a journey.<sup>34</sup> Mental blueprints like these sort and organize our experiences and acquired knowledge of the world, plugging them into slots in an existing framework and allowing us to assess new situations and ideas without having to interpret and construct a diagram of inferences and relationships for the first time.

At a more complex level, schema and scripts can provide an idealized cognitive model, that is, “a ‘folk’ theory or cultural understanding that organizes knowledge of events, people, objects, and their characteristic relationships in a single gestalt structure that is experientially meaningful as a whole.”<sup>35</sup> The model is not actually found in the world, but is based on what we have come to believe is natural through experience within a particular culture.<sup>36</sup> Providing both shortcuts and stereotypes, these models turn new and unfamiliar situations into the normal and natural course of events.

Cognitive metaphor theory clashes with formalist views of meaning and truth.<sup>37</sup> While formalist views emphasize objective, literal, and linear thinking and view metaphor as “mere” language use that can lead to imprecision or distortion, cognitive theorists argue that metaphor is fundamental to both thought and expression. Moreover, because it requires us to be able to relate one thing to another, metaphor draws on imagination.<sup>38</sup> And because metaphor imaginatively projects one concept onto another and expands understanding of both, it can accommodate individual complexity far better than binary categories and rigid rule structures.<sup>39</sup> In contrast to formalist views of truth, the perspective of cognitive theorists is that whether metaphor is true or false is beside the point—what matters is how metaphor and narrative work, what perceptions

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<sup>31</sup> WINTER, A CLEARING IN THE FOREST, *supra* note 18, at 69–103.

<sup>32</sup> AMSTERDAM & BRUNER, *supra* note 13, at 35.

<sup>33</sup> See, e.g., David F. Chavkin, *Fuzzy Thinking: A Borrowed Paradigm for Crisper Lawyering*, 4 CLINICAL L. REV. 163 (1997).

<sup>34</sup> LAKOFF & JOHNSON, PHILOSOPHY IN THE FLESH, *supra* note 17, at 32–34 & 60–66.

<sup>35</sup> WINTER, A CLEARING IN THE FOREST, *supra* note 18, at 88.

<sup>36</sup> *Id.*

<sup>37</sup> See, e.g., LAKOFF & JOHNSON, PHILOSOPHY IN THE FLESH, *supra* note 17, at 122–29.

<sup>38</sup> WINTER, A CLEARING IN THE FOREST, *supra* note 18, at 65–68.

<sup>39</sup> *Id.* at 68.

and inferences flow from their use, what interpretations they make possible, and what actions and consequences they justify.<sup>40</sup>

### B. TELLING THE TALE

Like metaphor theory, narrative theory reflects a shift away from formalism and toward agreement that interpretive frameworks are always at work to filter and affect what we see and think.<sup>41</sup> Storytelling is said to be central to our ability to make sense out of a series of chronological events otherwise lacking in coherence and consistency:<sup>42</sup> “[w]e seem to have no other way of describing ‘lived time’ save in the form of a narrative.”<sup>43</sup>

Not only do stories make it easier for us to communicate our experiences, they also help us predict what will happen and what we will need to do when we find ourselves entangled in a typical plight.<sup>44</sup> More path than template, narrative forms can become “recipes for structuring experience itself, for laying down routes into memory, for not only guiding the life narrative up to the present but directing it into the future.”<sup>45</sup>

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<sup>40</sup> LAKOFF & JOHNSON, METAPHORS WE LIVE BY, *supra* note 18, at 157; *see also* LAKOFF & JOHNSON, PHILOSOPHY IN THE FLESH, *supra* note 17, at 118–29; WINTER, A CLEARING IN THE FOREST, *supra* note 18, at 65–69.

<sup>41</sup> Richard K. Sherwin, *The Narrative Construction of Legal Reality*, 18 VT. L. REV. 681, 717 (1994). On narrative theory and analysis, *see* DAVID RAY PAPKE, NARRATIVE AND THE LEGAL DISCOURSE: A READER IN STORYTELLING AND THE LAW (Deborah Charles Publ'ns 1991); James Boyd White, *Reading Law and Reading Literature: Law as Language*, in HERACLES' BOW: ESSAYS ON THE RHETORIC AND POETICS OF THE LAW 77 (Univ. of Wis. Press 1985); Jane B. Baron & Julia Epstein, *Is Law Narrative?*, 45 BUFF. L. REV. 141 (1997) (discussing whether opinions, articles, and other legal texts are best understood as narrative); Sandra Craig McKenzie, *Storytelling: A Different Voice for Legal Education*, 41 U. KAN. L. REV. 251 (1992) (offering “a model of the legal storyteller that may be used in the classroom”); Linda H. Edwards, *The Convergence of Analogical and Dialectic Imaginations in Legal Discourse*, 20 LEGAL STUD. F. 7 (1996) (exploring the relationship between narrative and other forms of legal reasoning); Daniel A. Farber & Suzanna Sherry, *Telling Stories Out of School: An Essay on Legal Narratives*, 45 STAN. L. REV. 807 (1993) (evaluating the appropriate role of storytelling in legal scholarship); Brian J. Foley & Ruth Anne Robbins, *Fiction 101: A Primer for Lawyers on How to Use Fiction Writing Techniques to Write Persuasive Facts Sections*, 32 RUTGERS L.J. 459 (2001) (presenting a primer for lawyers in legal storytelling); Binny Miller, *Telling Stories about Cases and Clients: The Ethics of Narrative*, 14 GEO. J. LEGAL ETHICS 1 (2000) (examining ethical issues that arise in “telling real stories about real clients”); Philip N. Meyer, *Retelling the Darkest Story: Mystery, Suspense, and Detectives in a Brief Written on Behalf of a Condemned Inmate*, 58 MERCER L. REV. 665 (2007) (presenting a narrative analysis and suggesting more teaching of narrative persuasion); Philip N. Meyer, *Making the Narrative Move: Observations Based upon Reading Gerry Spence's Closing Argument in The Estate of Karen Silkwood v. Kerr McGee, Inc.*, 9 CLINICAL L. REV. 229 (2002) (exploring how Gerry Spence used elements of melodrama and myth to transform evidentiary argument into story); Philip N. Meyer, *“Desperate for Love III”: Rethinking Closing Arguments as Stories*, 50 S.C. L. REV. 715 (1994) (examining how the closing argument in a criminal trial reflects “a new visual literacy”); J. Christopher Rideout, *So What's in a Name: A Rhetorical Reading of Washington's Sexually Violent Predator's Act*, 15 U. PUGET SOUND L. REV. 781 (1992) (examining the translation of narratives into a legal rule); Ruth Anne Robbins, *Harry Potter, Ruby Slippers and Merlin: Telling the Client's Story Using the Characters and Paradigm of the Archetypal Hero's Journey*, 29 SEATTLE U. L. REV. 767 (2006) (discussing the relationship of myths and folk heroes to everyday lawyering decisions).

<sup>42</sup> AMSTERDAM & BRUNER, *supra* note 13, at 30–31 (noting that but for the narrative, which allows us to gather events together, place them into a story line with a beginning and an end, our lives would be constructed of “One Damn Thing After Another”).

<sup>43</sup> Jerome Bruner, *Life as Narrative*, 71 SOC. RES. 691, 692 (2004) [hereinafter Bruner, *Life as Narrative*].

<sup>44</sup> AMSTERDAM & BRUNER, *supra* note 13, at 117.

<sup>45</sup> Bruner, *Life as Narrative*, *supra* note 43, at 708.

Jerome Bruner differentiates the logico-scientific mode of thinking<sup>46</sup> from the narrative mode: “A good story and a well-formed argument are different natural kinds. Both can be used as means for convincing another. Yet what they convince *of* is fundamentally different: arguments convince one of their truth, stories of their lifelikeness.”<sup>47</sup> Bruner also differentiates the kind of imagination that is useful in the logico-scientific mode, which is “the ability to see possible formal connections before one is able to prove them in any formal way” and which “leads to good theory, tight analysis, logical proof, sound argument, and empirical discovery guided by reasoned hypothesis,” from the kind of imagination that works best in narrative.<sup>48</sup> Narrative imagination works more with human intention and action and “leads instead to good stories, gripping drama, believable (though not necessarily ‘true’) historical accounts.”<sup>49</sup>

Narrative theorists have distinguished three aspects of narrative: theme, discourse, and genre.<sup>50</sup> Theme (or *fabula*) is the timeless aspect, the overarching, seemingly universal “plight that a story is about: human jealousy, authority and obedience, thwarted ambition” while discourse (or *sjuzet*) carries out the more universal theme through plot and language that evoke a particular time, place, person, and event.<sup>51</sup> According to Bruner, the *fabula*, or underlying theme, incorporates three components—the plight, the characters, and their consciousness of the plight—and yields a structure with a beginning, some development, and an ending. As for the different kinds of story plots (or genre), they include “[r]omance, farce, tragedy, *Bildungsroman*, black comedy, adventure story, fairytale, [and] wonder tale.”<sup>52</sup>

Most narratives are structured to begin with a “canonical . . . steady state, which is breached, resulting in a crisis, which is terminated by a redress, with recurrence of the cycle an open possibility.”<sup>53</sup> Following the pentad of Kenneth Burke, a narrative can be analyzed by assessing the relationships among the elements of Act, Scene, Agent, Agency, and Purpose.<sup>54</sup> The Trouble that drives the drama often emerges from an imbalance among the elements or a breach of cultural expectations.<sup>55</sup>

In the classical folktale, Agents did not drive the plot. Later literary developments “moved steadily toward an empowerment and subjective

<sup>46</sup> JEROME BRUNER, ACTUAL MINDS, POSSIBLE WORLDS 12–13 (Harv. Univ. Press 1986) [hereinafter BRUNER, ACTUAL MINDS]. See also AMSTERDAM & BRUNER, *supra* note 13, at 115–17; Bruner, *Life as Narrative*, *supra* note 43.

<sup>47</sup> BRUNER, ACTUAL MINDS, *supra* note 46, at 11.

<sup>48</sup> *Id.* at 13.

<sup>49</sup> *Id.*

<sup>50</sup> Bruner, *Life as Narrative*, *supra* note 43, at 696.

<sup>51</sup> *Id.*

<sup>52</sup> *Id.* at 697.

<sup>53</sup> BRUNER, ACTUAL MINDS, *supra* note 46, at 16.

<sup>54</sup> KENNETH BURKE, A GRAMMAR OF MOTIVES AND A RHETORIC OF MOTIVES xvii–xxiv (World Publ’g Co. 1962) (describing dramatism, which treats language and thought as modes of action) [hereinafter, BURKE, GRAMMAR].

<sup>55</sup> Bruner, *Life as Narrative*, *supra* note 43, at 697 (discussing VICTOR TURNER, FROM RITUAL TO THEATER (Perf. Arts J. Publ’ns 1982)).

enrichment of the Agent protagonist.”<sup>56</sup> The importance of the characteristics attributed to the Agent can be seen in the stories that lawyers tell, from the account that describes the defendant as compelled by circumstance, to the one that makes the plaintiff the hero.

Like metaphor, stories are entangled in culture. Michael Goldberg uses the phrase “master story” to identify a narrative that embodies the history and traditions of a people.<sup>57</sup> Other authors describe the role of myth in constructing social and cultural norms, not only by shaping them but also by supporting particular ways of interpreting experiences.<sup>58</sup> Although story-myths can create and expand meaning, they often substitute “blissful clarity” for complexity.<sup>59</sup> Like automatically acquired metaphors, myths affect our thinking without our noticing the effect, making “even the most historically contingent ideas seem universal, natural, and inevitable.”<sup>60</sup> In this way, they support orthodox views and free us from having to think critically.<sup>61</sup> Myth supports the normative content of legal rules by supplying absolute moral principles and universal rights and wrongs.<sup>62</sup>

To explain its persuasive power, some scholars theorize that narrative is inherent in the nature of our minds or language.<sup>63</sup> Others claim that narrative persuades because it structures the characteristic plights of humans, providing mental models of the ordinary course of events. By doing so, narrative makes experiences understandable and allows the observer to roughly predict the result.<sup>64</sup> Steven Winter writes that narrative is understood because of metaphor; that is, we have constructed an idealized cognitive model of a story that includes conceptual schemas that “serve as a kind of genetic material or template for a wide variety of stories in which the plot structure follows a protagonist through an agon to a resolution.”<sup>65</sup>

Lawyers use narrative consciously and rhetorically, spinning a tale to persuade somebody to believe or to do something. The rhetorical narrative does more than put logical propositions and legal arguments into narrative form; it allows the storyteller to set the scene, establish a time frame, and tap into the listener’s understanding and identification with the characters and their plights.<sup>66</sup> Legal storytelling also takes place beneath the surface.<sup>67</sup>

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<sup>56</sup> *Id.* at 698 (relying on Amelie Rorty, *A Literary Postscript: Characters, Persons, Selves, Individuals*, in *THE IDENTITY OF PERSONS* (A. O. Rorty ed., Univ. of Cal. Press 1976)).

<sup>57</sup> Goldberg, *supra* note 10, at 905–06.

<sup>58</sup> Judith Olans Brown et al., *The Mythogenesis of Gender: Judicial Images of Women in Paid and Unpaid Labor*, 6 *UCLA WOMEN’S L.J.* 457, 457–58 (1996).

<sup>59</sup> *Id.* at 458.

<sup>60</sup> *Id.*

<sup>61</sup> *Id.*

<sup>62</sup> ROLAND BARTHES, *MYTHOLOGIES* 129 (Annette Lavers trans., Hill & Wang 1990) (explaining that myths turn “history into nature” because they “naturalize” facts). See also TERRY EAGLETON, *LITERARY THEORY* 117 (Univ. of Minn. Press 2d ed. 1996) (1983) (claiming that “[i]deology seeks to convert culture into Nature”); Lucinda J. Peach, *From Spiritual Descriptions to Legal Prescription: Religious Imagery of Woman as “Fetal Container” in the Law*, 10 *J.L. & RELIGION* 73, 74 (1994) (describing the relationship between religious symbols and legal views of women).

<sup>63</sup> AMSTERDAM & BRUNER, *supra* note 13, at 114–16.

<sup>64</sup> *Id.* at 117.

<sup>65</sup> WINTER, *A CLEARING IN THE FOREST*, *supra* note 18, at 106–13.

<sup>66</sup> AMSTERDAM & BRUNER, *supra* note 13, at 134–35.

Lawyers and judges argue and decide within a context that is limited, but also illuminated, by experiences and preconceptions derived from the culture's models and myths.<sup>68</sup>

### C. CONTEXT AND IDEOLOGY

Metaphor and narrative are linked; one provides background and foundation for the other. In one sense, all narrative is metaphor—when you tell a story, you are asking the listener to see one thing “as” another or, more often, to see a series of things as related events with a narrative arc or a plot. This “seeing [one thing] as [another]” is the essence of metaphor. Narrative also leads to the shorthand use of metaphors: once a story is embedded in tradition and culture, the die is cast and you no longer have to tell the tale, you can simply use the name of the character or the title of the story as a metaphor, and the plot, characters, and moral will follow, appearing to be logical entailments.

Narratives contain and become metaphors, metaphors emerge from and engender stories, and legal concepts and categories are formed by and understood as both, separately and in combination. To take an example, the legal concept of malice aforethought can be structured and expressed as the story of an angry lover watching from a hiding spot with a weapon in hand, or it can be structured and expressed as the image of a mind as a container full of hate.

In constructing cultural models, and in other ways critical to making sense and creating meaning, metaphor and narrative serve as each other's context. Thus, narrative is understandable because of a cognitive background that helps the reader automatically invoke the kind of tacit knowledge necessary to make sense of it.<sup>69</sup> And metaphor is more explanatory and more persuasive when the reader can place it within the context of the narrative in which it is set.

Metaphor and narrative carry information, values, and beliefs. Just as anthropologist Clifford Geertz wrote that religious symbols provide both gloss for understanding and template for shaping social and psychological experiences,<sup>70</sup> so too do the frameworks for thinking constructed by story and image. In particular, these frameworks for thinking work similarly to religious symbols in serving ideological functions. That is, they serve an integrating or constitutive function by helping to establish meaning and create identity, thus lending legitimacy to groups and organizations and helping construct “perceptions, beliefs and meanings that disguise political interests and distort our understanding of social practices.”<sup>71</sup> In this way,

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<sup>67</sup> *Id.* at 135.

<sup>68</sup> *See, e.g., id.* at 232–39.

<sup>69</sup> WINTER, A CLEARING IN THE FOREST, *supra* note 18, at 106. “Both the storyteller and her audience depend on that background to establish order and meaning.” *Id.*

<sup>70</sup> CLIFFORD GEERTZ, THE INTERPRETATION OF CULTURES 123–25 (Basic Books, Inc. 1973).

<sup>71</sup> Philip C. Kissam, *The Ideology of the Case Method/Final Examination Law School*, 70 U. CIN. L. REV. 137, 143 (2001) (discussing the work of Paul Ricoeur, especially LECTURES ON IDEOLOGY AND UTOPIA (1986)).

metaphor and narrative transmit ideological messages between individuals. Their use as cultural transmission devices helps explain how we unconsciously acquire traditions, values, and ideology.<sup>72</sup>

### III. THE SHAPE OF FAMILY LAW

The historical, social, cultural, and physical forces that shape family law are reflected in and filtered by the myths, narratives, metaphors, models, and images that we use to structure and express our agreements and arguments about families. The accepted story of family law is one of progress toward gender equality and the centrality of children's interests: coverture no longer exists, status no longer determines outcomes, and child custody is decided on the basis of the interests of the child rather than the property rights of the father.<sup>73</sup> Critics tell a different story: the rights of the adult claimants, not the interests of the disputed child, still govern many disputes,<sup>74</sup> when the dispute is between two people with rights, the biological mother and father, courts often favor those rights over the interests of the children.<sup>75</sup> As for equality, one analysis concluded that courts and legislatures were so protective of the rights of fathers that they restricted the autonomy and authority of mothers to protect the mere possibility of "volunteer fatherhood."<sup>76</sup> In this way, according to the author, "family law still sees mothers as draftees who are expected to do all the necessary parenting, and fathers as volunteers who may contribute some nurturing to their children if they so desire."<sup>77</sup>

#### A. THE MASTER STORIES

The master stories of U.S. family law derive from Biblical traditions translated through the English common law. Foremost among these stories is the Biblically derived image of unity between husband and wife.<sup>78</sup> The power of this image of the nuclear family<sup>79</sup> is evident in the claim that the

<sup>72</sup> *Id.* at 147–48 (discussing the work of Jack Balkin, especially J.M. BALKIN, *CULTURAL SOFTWARE: A THEORY OF IDEOLOGY* (Yale Univ. Press 1998)). Balkin recognizes that these tools simultaneously have advantages and disadvantages. BALKIN, *supra*, at 2–3. He discusses "cognitive mechanisms that help produce and fashion beliefs and judgments," including cultural heuristics, *id.* at 173–87, narratives and scripts, *id.* at 188–215, metaphor and metonymy, *id.* at 242–58, and homologies and associations, *id.* at 216–41.

<sup>73</sup> Jill Elaine Hasday, *The Canon of Family Law*, 57 *STAN. L. REV.* 825, 834–54 (2004).

<sup>74</sup> *Id.* at 849–50 (claiming that the key question in suits in which the state seeks to take permanent custody from parents and in disputes between biological parents and third parties is not where the child would be best off, but how do we protect the rights of the parents).

<sup>75</sup> William E. Nelson, *Patriarchy or Equality: Family Values or Individuality*, 70 *ST. JOHN'S L. REV.* 435, 438 (1996) (arguing that "while the overall dominance of men and dependency of women remained constant between 1920 and 1980, the legal relationship of parent and child was transformed . . . [from a focus on] the protection of children . . . [to a focus] on protecting the rights of parents").

<sup>76</sup> Karen Czapanskiy, *Volunteers and Draftees: The Struggle for Parental Equality*, 38 *UCLA L. REV.* 1415 (1991); see also Barbara Stark, *Divorce Law, Feminism, and Psychoanalysis: In Dreams Begin Responsibilities*, 38 *UCLA L. REV.* 1483, 1520–26 (1991).

<sup>77</sup> Czapanskiy, *supra* note 76, at 1458.

<sup>78</sup> Vivian Hamilton, *Principles of U.S. Family Law*, 75 *FORDHAM L. REV.* 31, 53 (2006).

<sup>79</sup> In a study of cross-cultural family organization published in 1949, anthropologist George Murdock used the term "nuclear family" to describe a family that consisted of a married man and woman living together with their children. GEORGE PETER MURDOCK, *SOCIAL STRUCTURE I* (The Macmillan Co.

marital family is still the natural and preferred family unit,<sup>80</sup> even as the number of such families diminishes.<sup>81</sup>

Many family law concepts, including the principle of patriarchy and the importance of procreation, can be traced from the Hebrew Covenant to the Christian tradition.<sup>82</sup> The early Christian Church elevated the importance of conjugal bliss and the family unit; the New Testament explicitly described the married couple as a unit, led by the husband: Paul's letters instruct that husbands and wives "shall become one flesh," but that "the husband is the head of the wife."<sup>83</sup>

Though control of marriage flowed from the Church to the English and Continental monarchies in the Sixteenth Century, the monarchies continued the essential Biblical understandings of marriage and family law. As a result, English marriage laws were similar to the medieval Catholic tradition, continuing to uphold a model that "helped to substantiate the traditional hierarchies of husband over wife, parent over child, church over household, [and] state over church."<sup>84</sup> This state of the English common law was passed on to and mostly accepted by American authorities.<sup>85</sup>

Biblical traditions shaped early English and American concepts of family law, which declared the marital couple a single unit headed by the husband. This concept was reflected in the legal doctrine of coverture, in which the wife was subsumed into her husband's person.<sup>86</sup> Protection of

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1949). Although this type of nuclear family was "recognized to the exclusion of all others" by American society, "[a]mong the majority of the peoples of the earth, . . . nuclear families are combined, like atoms in a molecule, into larger aggregates," specifically, polygamous families and extended families. *Id.* at 1–2. Nonetheless, he found, that the nuclear family "is a universal human social grouping;" whether permanent or temporary, whether combined in some other way: "the husband, wife, and immature children constitute a unit apart." *Id.* at 2–3.

<sup>80</sup> Hamilton, *supra* note 78, at 54–55. For more discussion of the preference, see Martha Albertson Fineman, *Our Sacred Institution: The Ideal of the Family in American Law and Society*, 1993 UTAH L. REV. 387 (1993) (discussing the "traditional family metanarrative" in American legal and extralegal institutions); Linda Kelly, *Family Planning, American Style*, 52 ALA. L. REV. 943 (2001) (discussing the nuclear family image in immigration law); David D. Meyer, *Self-Definition in the Constitution of Faith and Family*, 86 MINN. L. REV. 791 (2002) (arguing that constitutional doctrines embody traditional models of family); Richard F. Storrow, *The Policy of Family Privacy: Uncovering the Bias in Favor of Nuclear Families in American Constitutional Law and Policy Reform*, 66 MO. L. REV. 527 (2001) (arguing that the constitutional law of family privacy favors nuclear families). Similarly, marriage formation was a goal of the 1996 Welfare Act. Proposals to restrict marriage to opposite-sex couples are based on "upholding" the marital family unit.

<sup>81</sup> *Introduction: Nuclear Nonproliferation*, *supra* note 15, at 1999–2000. According to the Census Bureau, married couples with children constituted 23.3% of American households in 2003, down from 26.3% in 1990 and 40.3% in 1970. See JASON FIELDS, U.S. CENSUS BUREAU, CURRENT POPULATION REPORTS: AMERICA'S FAMILIES AND LIVING ARRANGEMENTS 2003 4 fig. 2 (2004). The number of families headed by single mothers increased from three million in 1970 to ten million in 2003; during the same period, the number of single-father families increased from under 500,000 to two million. *Id.* at 7.

<sup>82</sup> Hamilton, *supra* note 78, at 47–51.

<sup>83</sup> *Id.* at 49.

<sup>84</sup> *Id.* at 53 (alteration in original) (internal quotation marks omitted).

<sup>85</sup> The historical and ideological origins of English common law can be traced to natural law principles: "In his seminal Commentaries on the Laws of England, Sir William Blackstone located coherence in the disparate judicial opinions that constituted English common law through principles of natural law." *Id.* at 51. American lawmakers also turned to natural law to mediate tensions between "their religious convictions . . . and their commitment to establishing a country that respected religious liberty." *Id.* at 52.

<sup>86</sup> *Id.* at 53–54.

family privacy further supported the view of the conjugal couple as an impenetrable and indivisible unit.<sup>87</sup> This metaphorical view of the family as a unit, combined with the idea that the male was the head of the unit, historically protected the family from state interference.

1. *The Story of King Solomon: Images of Wise Judges and Sacrificing Mothers*

The story of King Solomon's wisdom is so much a part of the cultural canon that it has been the subject of episodes on *The Simpsons* and *Seinfeld*.<sup>88</sup> A cultural exemplar for mothers who would be good mothers,<sup>89</sup> the story begins when two women, harlots who live together with their babies, come to the king to resolve a custody dispute:

16 Then came there two women, that were harlots, unto the king, and stood before him.

17 And the one woman said, O my lord, I and this woman dwell in one house; and I was delivered of a child with her in the house.

18 And it came to pass the third day after that I was delivered, that this woman was delivered also: and we were together; there was no stranger with us in the house, save we two in the house.

19 And this woman's child died in the night; because she overlaid it.

20 And she arose at midnight, and took my son from beside me, while thine handmaid slept, and laid it in her bosom, and laid her dead child in my bosom.

21 And when I rose in the morning to give my child suck, behold, it was dead: but when I had considered it in the morning, behold, it was not my son, which I did bear.

22 And the other woman said, Nay; but the living is my son, and the dead is thy son. And this said, No; but the dead is thy son, and the living is my son. Thus they spake before the king.

23 Then said the king, The one saith, This is my son that liveth, and thy son is the dead: and the other saith, Nay; but thy son is the dead, and my son is the living.

24 And the king said, Bring me a sword. And they brought a sword before the king.

25 And the king said, Divide the living child in two, and give half to the one, and half to the other.

26 Then spake the woman whose the living child was unto the king, for her bowels yearned upon her son, and she said, O my lord, give her the living child, and in no wise slay it. But the other said, Let it be neither mine nor thine, but divide it.

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<sup>87</sup> *Id.* at 55–56.

<sup>88</sup> On *The Simpsons*, Homer dreams he is King Solomon and is asked to decide between two claimants to a pie; he orders the pie to be cut in half, each man to receive death, and "I'll eat the pie." *The Simpsons: Simpsons Bible Stories* (FOX television broadcast Apr. 4, 1999). On *Seinfeld*, Newman suggests cutting a bicycle in half to settle a dispute between Kramer and Elaine. *Seinfeld: The Seven* (NBC television broadcast Feb. 1, 1996).

<sup>89</sup> Odeana R. Neal, *Myths and Moms: Images of Women and Termination of Parental Rights*, 5 KAN. J.L. & PUB. POL'Y 61, 64 (1995).

27 Then the king answered and said, Give her the living child, and in no wise slay it: she is the mother thereof.

28 And all Israel heard of the judgment which the king had judged; and they feared the king: for they saw that the wisdom of God was in him, to do judgment.<sup>90</sup>

According to the usual reading of this tale, Solomon proposes a solution that allows him to discern the “true” mother of the child, the one who is willing to sacrifice being a mother to protect her child. The true mother yields when Solomon proposes to divide the child in two; the non-mother is willing to live with a part of the child rather than give the child up entirely. The story thus establishes that only a sacrificing mother is a good mother.<sup>91</sup> The sacrificing mother is set in opposition to a woman “so dangerous that she causes the death of her own child and is willing to see a child murdered rather than give up the irrational struggle for possession.”<sup>92</sup>

More than an ideal mother, the story gives us an ideal judge. In its focus on the decision making and good judgment of King Solomon, the story builds a framework for judging. The unemotional and intelligent judge creates a fiction that is designed to and does uncover the truth; the judge’s conclusion must be true (“the wisdom of God was in him”) because nothing other than the truth would justify his threat. In the usual reading of the story, there is no question that the king outwitted the bad mother to unveil the truth, reunited the good mother with her child, and did justice.

In a feminist reading, the story of King Solomon has little to do with justice: its point “is patriarchal wisdom in its starkest, purest form, founded on the construction of self-sacrificial motherhood and control over women whose maternity could otherwise manifest independent sexual and reproductive activity.”<sup>93</sup> In this reading, the story has little connection with truth: Solomon does not recognize that the woman he believes is the true mother may only be the better liar who understands more quickly what Solomon wants to hear.<sup>94</sup>

As will later be discussed,<sup>95</sup> the Solomon story provides child custody disputes with a model for the wise judge, an exemplar of the good mother, and a precedent for making decisions based on the willingness of the disputants to do what the judge asks.

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<sup>90</sup> *I Kings* 3:16–28 (King James).

<sup>91</sup> ELAINE TUTTLE HANSEN, *MOTHER WITHOUT CHILD: CONTEMPORARY FICTION AND THE CRISIS OF MOTHERHOOD* 23 (Univ. of Cal. Press 1997).

<sup>92</sup> *Id.*

<sup>93</sup> *Id.* at 23–24.

<sup>94</sup> From the language of the story, it is not even clear which of the women wins custody of the child. The text of the King James Version does not precisely identify the king’s intended reference when he directed “Give *her* the living child.” *I Kings* 3:27 (King James) (emphasis added). The language is as follows:

26 Then spake the woman whose the living child was unto the king, for her bowels yearned upon her son, and she said, O my lord, give her the living child, and in no wise slay it. But the other said, Let it be neither mine nor thine, but divide it.

27 Then the king answered and said, Give her the living child, and in no wise slay it: she is the mother thereof.

*Id.* at 3:26–27.

<sup>95</sup> See *infra* notes 184–207 and accompanying text.

## 2. *The Story of Mary Magdalen: Symbol of the Repentant Sinner*

Mary Magdalen's is another master story whose traces can be glimpsed in child custody decisions. But the embedded image is a mistaken impression, based on a misreading of the narrative from which it arose. The name conjures a portrait of a woman with flowing red hair<sup>96</sup> who sinned, repented, and was forgiven. This image remains though scholars have insisted for centuries that the "sinner," the woman with flowing red hair mentioned in the gospels, is not Mary Magdalen.

The image of the sinner comes from a passage in the Gospel of Luke, an account in which the sinner's name is never given:

36 And one of the Pharisees desired him that he would eat with him. And he went into the Pharisee's house, and sat down to meat.

37 And, behold, a woman in the city, which was a sinner, when she knew that Jesus sat at meat in the Pharisee's house, brought an alabaster box of ointment,

38 And stood at his feet behind him weeping, and began to wash his feet with tears, and did wipe them with the hairs of her head, and kissed his feet, and anointed them with the ointment.

39 Now when the Pharisee which had bidden him saw it, he spake within himself, saying, This man, if he were a prophet, would have known who and what manner of woman this is that toucheth him: for she is a sinner.

40 And Jesus answering said unto him, Simon, I have somewhat to say unto thee. And he saith, Master, say on.

...

44 And he turned to the woman, and said unto Simon, Seest thou this woman? I entered into thine house, thou gavest me no water for my feet: but she hath washed my feet with tears, and wiped them with the hairs of her head.

45 Thou gavest me no kiss: but this woman since the time I came in hath not ceased to kiss my feet.

46 My head with oil thou didst not anoint: but this woman hath anointed my feet with ointment.

47 Wherefore I say unto thee, Her sins, which are many, are forgiven; for she loved much: but to whom little is forgiven, the same loveth little.

48 And he said unto her, Thy sins are forgiven.<sup>97</sup>

Not until the following chapter is Mary Magdalen introduced in a passage describing Jesus's travels and his followers:

1 And it came to pass afterward, that he went throughout every city and village, preaching and shewing the glad tidings of the kingdom of God: and the twelve were with him,

2 And certain women, which had been healed of evil spirits and infirmities, Mary called Magdalene, out of whom went seven devils,

<sup>96</sup> See, e.g., Titian, *The Penitent Magdalene* (Galleria Palatina, Palazzo Pitti, Florence, Italy) (1531).

<sup>97</sup> Luke 7:36–40, 7:44–48 (King James).

3 And Joanna the wife of Chuza Herod's steward, and Susanna, and many others, which ministered unto him of their substance.<sup>98</sup>

Although these narratives do not conflate the sinner of one chapter with the Mary Magdalen of the next, the mistaken image that they were one and the same was cast in the Sixth Century when Pope Gregory delivered a homily that included this description: "She whom Luke calls the sinful woman, whom John calls Mary [of Bethany], we believe to be the Mary from whom seven devils were ejected according to Mark."<sup>99</sup> In describing this Mary, Pope Gregory said that she had "previously used the unguent to perfume her flesh in forbidden acts" and that what she had previously "displayed more scandalously, she was now offering to God in a more praiseworthy manner."<sup>100</sup> Before, "[s]he had coveted with earthly eyes, but now through penitence these are consumed with tears. She displayed her hair to set off her face, but now her hair dries her tears. . . . She turned the mass of her crimes to virtues, in order to serve God entirely in penance."<sup>101</sup>

In the 1960s and 1970s, re-evaluations of the gospels finally brought about a change in the official view of Mary Magdalen.<sup>102</sup> In the words of a modern sermon: "[C]ertainly [there] is no biblical basis for identifying her as the reformed prostitute or that she had long red hair. The sole characteristic that stands out about Mary [Magdalen] is the fact that she is not identified as the mother or the wife of some man."<sup>103</sup> Still, the embedded myth persists,<sup>104</sup> and as discussed below, the symbol still has power in child custody decision making.<sup>105</sup>

## B. THE FAMILY

Biblical traditions shaped the ideal family in the image of the marital unit. Until the Nineteenth Century, however, the reality of the American family was not the marital unit, but an entire household, with the father as head. In this household, no breadwinner parent left the house to work for money while the other parent stayed home to care for the children. Both parents stayed home, but neither parent focused on child care. Instead,

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<sup>98</sup> *Id.* at 8:1–3.

<sup>99</sup> SUSAN HASKINS, *MARY MAGDALEN: MYTH AND METAPHOR* 96 (Harcourt Brace & Co. 2003) (quoting Gregory the Great, *Hom. XXXIII*).

<sup>100</sup> *Id.*

<sup>101</sup> *Id.*

<sup>102</sup> The contrary view that Mary Magdalen was a devoted follower of Jesus and a chosen witness of the resurrection had been espoused by some scholars since the Sixteenth Century, but only in 1978 did religious authorities officially remove the terms "Maria poenitens" (penitent Mary) and "magna peccatrix" (great sinner) from their association with Mary Magdalen. *Id.* at 388.

<sup>103</sup> *Id.* at 399 (quoting John S. Damm, Sermon at St. Peter's Lutheran Church in New York City, NY (July 22, 1990)).

<sup>104</sup> It has been given credit for creating a compassionate attitude toward prostitution; because the story portrays the belief that prostitutes, or "fallen women," are capable of repentance and salvation, it even led to the formation of Magdalen Societies. A closely allied narrative is the story of Hester Prynne, in NATHANIEL HAWTHORNE, *THE SCARLET LETTER* (Rinehart & Co. 1949). There, Hester gives birth after committing adultery; she refuses to name the father and struggles to care for the child by herself.

<sup>105</sup> See *infra* notes 208–222 and accompanying text.

everyone had to work, including the children and household members who were not related to the parents.<sup>106</sup>

Parental roles began to diverge at the beginning of the Nineteenth Century, with one parent working outside the home for money (performing market work) and the other working inside the home to care for children (performing family work).<sup>107</sup> This distinction between market work and family work, the new “domesticity,” shaped a new concept of family: men left home to work in factories and offices while women stayed home to rear the children and take care of the house. Nature was called upon to support this division: “men ‘naturally’ belong in the market because they are competitive and aggressive; women belong in the home because of their ‘natural’ focus on relationships, children, and an ethic of care.”<sup>108</sup> The new ideal family carried ideological baggage; it became a signal of class for a mother to stay home. Not only did “ladies” not go to work, mothers who stayed home could be devoted to their children’s needs and could help their children become successful and productive.<sup>109</sup>

The concept of the marital family as the ideal family was critical in *Michael H. v. Gerald D.*,<sup>110</sup> when a biological father sought visitation rights with his child. Justice Scalia, writing for the plurality, stated that “California law, like nature itself, makes no provision for dual fatherhood.”<sup>111</sup> Justice Scalia’s image of the ideal family allowed him to depict the plaintiff—the natural father—as an outsider without rights because historical tradition protects the traditional marital family unit as opposed to the biological one.<sup>112</sup>

Like the biological father in *Michael H.*, single mothers with children do not fit the marital family ideal. Linked to images of and beliefs about normal, natural families, the label of “single mother” isolates women based on their marital status and further supports the myth and model of a family as having two parents with the male as the primary breadwinner.<sup>113</sup> The

<sup>106</sup> Joan Williams, *Toward a Reconstructive Feminism: Reconstructing the Relationship of Market Work and Family Work*, 19 N. ILL. U. L. REV. 89, 108 (1998).

<sup>107</sup> *Id.* at 89 (“Domesticity is a gender system comprised most centrally of the organization of market work and family work that arose around 1780, and the gender norms that justify, sustain, and reproduce that organization.”).

<sup>108</sup> *Id.* at 90.

<sup>109</sup> *Id.* at 130–31.

<sup>110</sup> 491 U.S. 110 (1989).

<sup>111</sup> *Id.* at 118.

<sup>112</sup> *Id.* at 123–24. In Justice Scalia’s words:

The family unit accorded traditional respect in our society, which we have referred to as the “unitary family,” is typified, of course, by the marital family, but also includes the household of unmarried parents and their children. Perhaps the concept can be expanded even beyond this, but it will bear no resemblance to traditionally respected relationships—and will thus cease to have any constitutional significance—if it is stretched so far as to include the relationship established between a married woman, her lover, and their child, during a 3-month sojourn in St. Thomas, or during a subsequent 8-month period when, if he happened to be in Los Angeles, he stayed with her and the child.

*Id.* at 123 n.3.

<sup>113</sup> “Society may now be grudgingly forced to accept single-mother households as an unfortunate byproduct of the social and economic dislocations that characterize the latter part of this century, but they are seldom treated as an acceptable, let alone a desirable family form. . . . The societal aspiration . . .

predominance of the marital family ideal is evident when families are characterized as being “broken” by divorce and when single mother families are characterized as undermining family life.<sup>114</sup> Also suspect are families larger or otherwise differently constructed than the marital family ideal.<sup>115</sup> Despite the image, the reality seems at first glance radically different: “[T]he traditional nuclear family model represents less than a quarter of the family units described in the most recent census data . . . [and it] seems that we are surrounded by new, different types of families, and many of them are raising children.”<sup>116</sup> As already noted, though, the traditional nuclear family is still the norm in some segments of American society, particularly when the parents are well off, well educated, and white.<sup>117</sup>

### C. MOTHERHOOD

The traditional image of the good mother is the Madonna, virtuous, nurturing, and asexual.<sup>118</sup> In modern form, the good mother<sup>119</sup> is warm and giving, prosperous and middle class, and closely attached to a male sexual partner (preferably her husband).<sup>120</sup> Professor Steven Winter refers to the prototypical mother as an idealized cognitive model: “An example is the stereotypical conceptualization of ‘mother’ by means of an idealized cognitive model that assumes natural childbirth by a woman who is married

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. remains to complete the ‘family’ by the addition of a man.” Martha Fineman, *Images of Mothers in Poverty Discourses*, 1991 DUKE L.J. 274, 295 (1991) [hereinafter Fineman, *Images*].

<sup>114</sup> Martha Albertson Fineman, *The Neutered Mother*, 46 U. MIAMI L. REV. 653, 663–64 (1992) [hereinafter Fineman, *The Neutered Mother*].

<sup>115</sup> Families that fit a different model, including the matrifocal extended family, are failed versions of the male-headed nuclear family. Elizabeth M. Iglesias, *Rape, Race, and Representation: The Power of Discourse, Discourses of Power, and the Reconstruction of Heterosexuality*, 49 VAND. L. REV. 869, 904–05 (1996). See also Annette R. Appell, “Bad” Mothers and Spanish Speaking Caregivers, 7 NEV. L.J. 759, 765 (2007): “[T]he definitions of good mothers and fathers are constructed according to dominant cultural norms: married; White; Christian (preferably Protestant); Anglo, and, relatedly, English-speaking; and middle class. In addition, families should be independent and not too deeply embedded in or reliant on extended family, fictive kin, and community or tribal members. In other words, nuclear families are the norm and define the minimum and maximum limits of the appropriate family.”

<sup>116</sup> Fineman, *Progress*, *supra* note 15, at 3.

<sup>117</sup> Wax, *supra* note 2, at 576.

<sup>118</sup> See Peach, *supra* note 62, at 74–76 (discussing Eve and the Virgin Mary, the two dominant women in Christian tradition, as being defined by their sexuality and maternity).

<sup>119</sup> “Mother” has many negative versions. For example, “Neo-Freudians seem more concerned with the ability of the child to extricate himself (and I do mean *himself*) from the clutches of Mother, while liberal feminists are concerned with the ability of women to avoid the psychological and material burdens Mother has placed on them through the generations.” Fineman, *The Neutered Mother*, *supra* note 114, at 654. Other versions of “bad” mothers are passive and subordinate, well meaning but weak, overbearing and invasive, humiliating and overpowering. See Iglesias, *supra* note 115, at 909; see also Marie Ashe, *The “Bad Mother” in Law and Literature: A Problem of Representation*, 43 HASTINGS L.J. 1017, 1029–30 (1992).

<sup>120</sup> See Iglesias, *supra* note 115, at 914–15. See also Jane C. Murphy, *Legal Images of Motherhood: Conflicting Definitions from Welfare “Reform,” Family, and Criminal Law*, 83 CORNELL L. REV. 688, 690 (1998) [hereinafter Murphy, *Motherhood*] (laws embody a stereotype of “a self-sacrificing, nurturing, married, and stay-at-home mother” but assume that “mothers are equal and autonomous wage earners when the law considers mothers’ economic rights and responsibilities”).

to the biological father, and who is also the primary nurturer and full-time caretaker of the child.”<sup>121</sup>

Historical and cultural precedents add details. The Biblical story of Solomon<sup>122</sup> sets an example of good mothers: women who are willing to give up everything for their children. Other Biblical stories proclaim that only women who have obeyed God will receive the special blessing of motherhood, providing another role model for women who are willing to give up advantages and privileges to be mothers.<sup>123</sup> Professor Martha Fineman points out that custody disputes may turn on a definition of a “good parent” as a parent who cooperates to get through the divorce and custody dispute; parents who refuse to cooperate may be considered pathological.<sup>124</sup>

Motherhood ideology depicts mothers as naturally better at being the primary caregiver, physically, psychologically, emotionally, and mentally. And it demands more from mothers: while a father who provides financial support for his family is thought to be a good father, a mother who provides only financial support is seen as having deprived her children.<sup>125</sup> The institution of motherhood has become “a prerequisite for all socially acceptable female adult roles” and for women to lead fulfilling lives.<sup>126</sup> Adrienne Rich writes that the institution has been shaped by unexamined assumptions: “[A] ‘natural’ mother is a person without further identity, one who can find her chief gratification in being all day with small children, living at a pace tuned to theirs; . . . maternal love is, and should be, quite literally selfless.”<sup>127</sup> Motherhood has been further shaped by “[t]he gendered division of labor in which men’s labor is viewed as productive and women’s labor is viewed as nonproductive and the resulting economic dominance of men in families.”<sup>128</sup> This division encourages women to focus on motherhood, reinforcing the institution of motherhood and the economic dependence of women.<sup>129</sup>

The existing ideology generates further myths that influence our views of women. In one study, sociologists found that married mothers were viewed as having the most positive personality traits: they were perceived

<sup>121</sup> See, e.g., Winter, *Standing*, *supra* note 18, at 1385. See also WINTER, A CLEARING IN THE FOREST, *supra* note 18, at 89–92.

<sup>122</sup> See *supra* notes 90–94 and accompanying text.

<sup>123</sup> Neal, *supra* note 89, at 64.

<sup>124</sup> Martha Fineman, *Dominant Discourse, Professional Language, and Legal Change in Child Custody Decisionmaking*, 101 HARV. L. REV. 727, 765–66 (1988) [hereinafter Fineman, *Dominant Discourse*].

<sup>125</sup> Neal, *supra* note 89, at 64.

<sup>126</sup> April L. Cherry, *Nurturing in the Service of White Culture: Racial Subordination, Gestational Surrogacy, and the Ideology of Motherhood*, 10 TEX. J. WOMEN & L. 83, 93 (2001).

<sup>127</sup> ADRIENNE RICH, OF WOMAN BORN: MOTHERHOOD AS EXPERIENCE AND INSTITUTION 22–23 (Bantam Books 1976).

<sup>128</sup> Cherry, *supra* note 126, at 95.

<sup>129</sup> Some feminists of color rejected this conclusion:

Had black women voiced their views on motherhood, it would have not been named a serious obstacle to our freedom as women. Racism, availability of jobs, lack of skills or education and a number of other issues would have been at the top of the list—but not motherhood.

BELL HOOKS, FEMINIST THEORY: FROM MARGIN TO CENTER 133 (South End Press 1984) (quoted in Cherry, *supra* note 126, at 95–96).

as better parents, just as they were more forgiving, caring, warm, generous, and protective.<sup>130</sup> In contrast, never-married mothers were characterized as poor parents and as having less positive personality traits: they were viewed as unpleasant, unhappy, deviant, and more likely to be irresponsible, unintelligent, or drug abusers.<sup>131</sup>

Women who fail to fit the idealized cognitive model of motherhood—unmarried mothers, working mothers, stepmothers, surrogate mothers, adoptive mothers, foster mothers, unfaithful mothers—are not just different, they are failures. If a single mother is not single as a result of death (or an occasional well-justified divorce), she is a bad mother. These mothers are blamed for the problems of their families and, in some cases, of their country or cultural or ethnic group; if single women are poor, it is because immorality has made them poor.<sup>132</sup>

As for working mothers, a working mother is a good mother only if she would rather be at home raising her children, but instead is forced to work for financial reasons.<sup>133</sup> The ideal thus excludes a majority of American mothers. Yet, the image is consistently drawn by the popular media<sup>134</sup> as well as in child custody disputes where working mothers are disadvantaged, especially when they seek financial security or independence by pursuing a demanding career.

Single working mothers face special risks in disputes with fathers who have reconstituted the ideal family by remarrying a woman who stays home and raises the children.<sup>135</sup> In disputes where a mother with custody seeks to relocate for professional or personal reasons, courts may require the mother to choose between relocation and custody.<sup>136</sup> While a father's decision to relocate is viewed as understandable, courts assume "that the mother alone would sacrifice her economic and social interests to maintain her relationship with her [child]."<sup>137</sup> Moreover, even though mothers who work for wages often are viewed unfavorably, mothers who are economically dependent also are at risk of losing custody. State law may require or allow the court to consider the economic circumstances of the parents, but even without such authority, judges may still grant custody to

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<sup>130</sup> Cherry, *supra* note 126, at 103 (relying on Lawrence H. Ganong & Marilyn Coleman, *The Content of Mother Stereotypes*, 32 SEX ROLES 495, 496 (1995)).

<sup>131</sup> *Id.*

<sup>132</sup> Neal, *supra* note 89, at 69.

<sup>133</sup> *Id.* at 65; Murphy, *Motherhood*, *supra* note 120, at 696–97.

<sup>134</sup> E.J. Graff, *The Opt-Out Myth*, COLUM. JOURNALISM REV., Mar./Apr. 2007, at 51; see also JOAN C. WILLIAMS ET AL., CTR. FOR WORKLIFE LAW, UNIV. OF CAL. HASTINGS COLL. OF LAW, "OPT OUT" OR PUSHED OUT?: HOW THE PRESS COVERS WORK/FAMILY CONFLICT—THE UNTOLD STORY OF WHY WOMEN LEAVE THE WORKPLACE (2006) (recounting a series of stories in *The New York Times* addressing this trend, beginning in 1953).

<sup>135</sup> Murphy, *Motherhood*, *supra* note 120, at 697.

<sup>136</sup> Adverse relocation decisions fall most heavily on mothers because most of the parents who seek court approval for relocation are mothers. Courts may view the economic consequences as one of the "natural sacrifices of motherhood rather than shared costs of coparenting." Theresa Glennon, *Still Partners? Examining the Consequences of Post-Dissolution Parenting*, 41 FAM. L.Q. 105, 138 (2007).

<sup>137</sup> Murphy, *Motherhood*, *supra* note 120, at 698 (alteration in original) (quoting Carol Sanger, *Separating from Children*, 96 COLUM. L. REV. 375, 418 (1996)).

the parent who appears to be more stable, more financially secure, or more able to provide advantages.<sup>138</sup>

Finally, although middle-class women are bad mothers if they work, poor single mothers are bad mothers whether they work or not.<sup>139</sup> The early federal programs that supported families with dependent children distributed payments to single mothers as compensation for child care, work that was viewed as beneficial to society.<sup>140</sup> However, by the early 1960s, the focus shifted away from child care, and public benefits began to be linked to the mother's willingness to work outside the home.<sup>141</sup> The political rhetoric reflects (or has created) an apparent consensus that poor women should spend their time working rather than caring for their children.<sup>142</sup> This policy shift mirrors the view that welfare mothers cause social problems: "[L]acking a job means degeneracy; having a child without the ongoing presence of a father means moral deviance; being a mother in these circumstances means nurturing a next generation of pathology; and receiving welfare means being a debit to society."<sup>143</sup>

#### D. FATHERHOOD

The stories and symbols of fatherhood are less developed than those of motherhood. As a result, "Father" often is defined by qualities that are "not-Mother." Where mother is nurturing, father can be distant; where mother stays home to care for the home and the children, father can spend most of his time elsewhere; where mother is sacrificing, father can be focused on his work and ambition. While seen primarily as a moral overseer in the Eighteenth and early Nineteenth Centuries, fathers were viewed as mostly absent breadwinners from the early Nineteenth through the middle of the Twentieth Centuries. Since then, the ideal father has been depicted as a modern, sharing parent and a role model for his male children.<sup>144</sup>

Despite these new demands, fathers are most often referred to in legal rhetoric as the primary wage earners or as the source of funds for family support. Under the law, the primary obligation of fathers, based on biology, is to provide financially for their children. The network of statutes

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<sup>138</sup> *Id.* at 698–99.

<sup>139</sup> See Brown et al., *supra* note 58, at 462 n.20 & 464–65.

<sup>140</sup> Murphy, *Motherhood*, *supra* note 120, at 733.

<sup>141</sup> *Id.*

<sup>142</sup> *Id.* at 733–34. This consensus culminated in the Personal Responsibility and Work Opportunity Reconciliation Act of 1996.

<sup>143</sup> Martha Minow, *The Welfare of Single Mothers and Their Children*, 26 CONN. L. REV. 817, 837 (1994) (quoted in Murphy, *Motherhood*, *supra* note 120, at 736).

<sup>144</sup> According to a report prepared for the Council on Contemporary Families, the new image has some support: "[M]en's absolute and proportionate contributions to household tasks increased substantially over the past three decades," with a doubling of their contribution to housework (from fifteen to over thirty percent of the total) and a tripling of the time they spent engaged in child care. However, women doubled their time spent in childcare and interaction during the same time period, from 1965 to 2003. Oriell Sullivan & Scott Coltrane, *Men's Changing Contribution to Housework and Child Care: A Discussion Paper on Changing Family Roles* (Apr. 2008), <http://www.contemporaryfamilies.org/subtemplate.php?t=briefingPapers&ext=menshousework> (prepared for 11th Annual Conference of the Council on Contemporary Families).

imposing this obligation supports recurring images of the good father as the one who pays the bills, and the bad father as a “deadbeat.”

For many years, the legal definition of fatherhood was not derived from biology, but from marriage: the father was the mother’s husband at the time of birth. This marital presumption assumed that the mother’s husband was both functionally and biologically the child’s father. This presumption served its purpose because it was often true and because it shielded children from the adverse consequences of illegitimacy.<sup>145</sup>

The continued relevancy and adequacy of the marital presumption is questionable. Only one-quarter of American households fit the marital family ideal of married parents with children; the number of single mothers has increased because of higher divorce rates and higher numbers of births to unmarried parents.<sup>146</sup> In addition, new reproductive techniques and new means of genetic testing have complicated the determination of parenthood generally, and fatherhood more specifically.<sup>147</sup> Defining fatherhood based solely on biology, however, seems unsatisfactory. Because it allows “fathers” to set aside their paternal obligations when genetic testing proves they are not the biological fathers,<sup>148</sup> a definition of fatherhood based on biology would fail to protect children or to preserve families.<sup>149</sup>

#### E. THE BEST INTERESTS OF THE CHILD

Throughout U.S. history, marital fathers won custody of their children when divorced or separated from their wives. Mothers did not have the legal right or the economic means to raise children unless they were married to the father.<sup>150</sup> By the 1920s, the courts spoke of equal rights for both husbands and wives when deciding child custody, but often held that the primary right was the father’s. Later, to protect the moral upbringing of the children, courts began to examine moral fault to determine which parent was more fit to obtain custody. That too changed after World War II and growing family instability; judges began to excuse “minor” moral faults such as gambling or isolated adultery.

Without fathers’ rights or moral fault as a guide, judges turned to the maternal or “tender years” preference: mothers won custody because of their natural inclination to nurture.<sup>151</sup> This presumption helped women who fit the model, but women who became wage earners were sometimes found to have no greater claims to custody.<sup>152</sup> From the 1940s to the 1960s, the focus of family law shifted from preserving families to protecting

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<sup>145</sup> Jane C. Murphy, *Legal Images of Fatherhood: Welfare Reform, Child Support Enforcement, and Fatherless Children*, 81 NOTRE DAME L. REV. 325, 326 (2005) [hereinafter Murphy, *Fatherhood*].

<sup>146</sup> *Id.* at 326–27.

<sup>147</sup> *Id.* at 327.

<sup>148</sup> *Id.* at 329.

<sup>149</sup> *Id.* at 329–30 (noting that this standard appears to be an unintended consequence of federal and state welfare reform).

<sup>150</sup> Murphy, *Motherhood*, *supra* note 120, at 693.

<sup>151</sup> *Id.* at 694.

<sup>152</sup> *Id.* at 695 (citing *Watson v. Watson*, 15 So. 2d 446, 447 (Fla. 1943)).

individual happiness.<sup>153</sup> But while judges in paternity cases rarely criticized men who had fathered children out of wedlock, the mothers and their children were condemned.<sup>154</sup>

Meanwhile, the maternal preference came under attack as the women's movement emerged in the 1960s and 1970s. By the 1980s, the best interests of the child standard had prevailed in most jurisdictions. It was joined by the ideal of gender equality in child custody decision making, a concept favored not only by fathers' rights groups, but also by legal feminists.<sup>155</sup> Other statutory and case law changes during this period brought a substantial increase in child advocacy.<sup>156</sup>

Early application of the best interests of the child standards was heavily influenced by Joseph Goldstein, Anna Freud, and Albert J. Solnit, whose interpretations were based on psychological theories of child development. Between 1973 and 1986, these authors published three volumes exploring the meaning and application of the best interests standard.<sup>157</sup> To assure the least detrimental outcome—conceding that such a limited result was the best the decision making process could achieve—they recommended that custody “should be decided swiftly, irreversibly, and without court-imposed visiting rights to the noncustodial parent, thus enabling the child to have a stable, undisturbed relationship with one adult person.”<sup>158</sup>

Partly in response, Robert Mnookin argued that the best interests of the child standard was largely indeterminate in child custody disputes.<sup>159</sup> Although recommending that serious consideration be given to such alternatives as informal adjudication (using a party-selected “judge”) or a random process (for example, a coin toss), Mnookin believed that reform efforts should have a modest aim: helping courts “better fulfill their

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<sup>153</sup> See, e.g., Nelson, *supra* note 75, at 479–509.

<sup>154</sup> *Id.* at 512.

<sup>155</sup> As Professor Fineman wrote, “Gender neutrality is the paradigmatic expression of the values and norms of the dominant legal concept of equality which . . . precludes the consideration of Mother as something different or distinct from father.” Fineman, *The Neutered Mother*, *supra* note 114, at 660. But “Mother has only disappeared rhetorically. In social and extra-legal institutions that embody cultural expectations—idealized and practical—Mother continues to exist and to function. It is the legal discourse, not society, that is now formally Mother-purged.” *Id.*

<sup>156</sup> During the second half of the Twentieth Century, the “best interests of the child” became the standard for child welfare advocates as well as for decision making in child custody proceedings. The Supreme Court’s ruling that children who might lose their liberty in delinquency proceedings were entitled to counsel, *In re Gault*, 387 U.S. 1 (1967), and the federal requirement that some form of representation be provided in child protection proceedings, Child Abuse Prevention and Treatment Act of 1974, Pub. L. No. 93-247, 88 Stat. 4 (codified as amended at 42 U.S.C. §§ 5101–5107), contributed to the increase. Some states allow or require representation for children in private custody disputes. Jane Spinak, *When Did Lawyers for Children Stop Reading Goldstein, Freud and Solnit?: Lessons from the Twentieth Century on Best Interests and the Role of the Child Advocate*, 41 FAM. L.Q. 393, 395 (2007).

<sup>157</sup> JOSEPH GOLDSTEIN, ANNA FREUD & ALBERT J. SOLNIT, *BEYOND THE BEST INTERESTS OF THE CHILD* (The Free Press 1973); JOSEPH GOLDSTEIN, ANNA FREUD & ALBERT J. SOLNIT, *BEFORE THE BEST INTERESTS OF THE CHILD* (The Free Press 1979); JOSEPH GOLDSTEIN, ANNA FREUD, ALBERT J. SOLNIT & SONJA GOLDSTEIN, *IN THE BEST INTERESTS OF THE CHILD* (The Free Press 1986).

<sup>158</sup> Elster, *supra* note 9, at 4.

<sup>159</sup> Robert H. Mnookin, *Child-Custody Adjudication: Judicial Functions in the Face of Indeterminacy*, 39 LAW & CONTEMP. PROBS. 226, 291 (1975). Mnookin also recommended that courts recognize the different functions served in private disputes and in child protection cases. *Id.* at 269–70.

primary obligation, which is to decide, decide promptly, and decide once and for all.”<sup>160</sup>

Assuring gender equality and protecting individual rights were the stated aims, but many legislative changes made during this period failed to further these goals.<sup>161</sup> After examining hundreds of child custody disputes, Phyllis Chesler wrote that judges favor fathers for custody in many situations: when the challenged mother has less money than the father; when she has a career or career demands; when she has remarried or engaged in other sexual practices; when the father has remarried and the mother has not; and when the children are over a certain age or are boys.<sup>162</sup> Other commentators have concluded that mothers are disadvantaged in child custody disputes in the following circumstances: when they are poor, are persons of color, or fail to abide by “hierarchical precepts of parenting”;<sup>163</sup> when a judge perceives that they have placed their own needs or desires before those of their children;<sup>164</sup> when they work;<sup>165</sup> and when they engage in some sexual practices.<sup>166</sup> Finally, while courts often look with suspicion upon a lesbian relationship or view a mother’s new boyfriend as a possible danger or distraction, a father’s new girlfriend may be seen as a source of stability and child care.<sup>167</sup>

#### IV. METAPHOR AND NARRATIVE AT WORK IN CHILD CUSTODY DISPUTES

Once courts and legislatures decided that maternal superiority should not influence custody determinations, judges were required to determine what custody decision would be in the best interests of the child. As recounted by Robert Mnookin in 1975, judicial decision making under the best interests principle is markedly different from the usual model of judicial adjudication.

First, judges in child custody disputes are required to make determinations that are “person-oriented,” rather than “act-oriented.”<sup>168</sup>

<sup>160</sup> *Id.* at 292.

<sup>161</sup> For example, a study of California outcomes showed that despite changes designed to encourage gender equity, the characteristic roles of mothers and father remained different. Moreover, in at least one sense, there was less gender equity after divorce than before, “since mothers continue to carry the major responsibilities for child care and also take over from fathers some of the responsibility for economic support.” ELEANOR E. MACCOBY & ROBERT H. MNOOKIN, *DIVIDING THE CHILD: SOCIAL AND LEGAL DILEMMAS OF CUSTODY* 271 (Harv. Univ. Press 1992).

<sup>162</sup> PHYLLIS CHESLER, *MOTHERS ON TRIAL: THE BATTLE FOR CHILDREN AND CUSTODY* 266 (McGraw-Hill Book Co. 1986). Judges favor maternal custody, Chesler writes, “when the challenged mother is the Virgin Mary.” *Id.* For more on the decline in sole custody awards to mothers, see Maria Cancian & Daniel R. Meyer, *Who Gets Custody?*, 35 *DEMOGRAPHY* 147, 147–57 (1998); Robert F. Kelly, Laura Redenbach & William C. Rinaman, *Determinants of Sole and Joint Physical Custody Arrangements in a National Sample of Divorce Cases*, 19 *AM. J. FAM. L.* 25, 25 (2005); Mary Ann Mason & Ann Quirk, *Are Mothers Losing Custody? Read My Lips: Trends in Judicial Decision-Making in Custody Disputes—1920, 1960, 1990, and 1995*, 31 *FAM. L.Q.* 215, 227 (1997).

<sup>163</sup> Neal, *supra* note 89, at 69.

<sup>164</sup> See *infra* notes 237–245 and accompanying text.

<sup>165</sup> Murphy, *Motherhood*, *supra* note 120, at 696–97.

<sup>166</sup> *Id.* at 699–700.

<sup>167</sup> *Id.* at 699.

<sup>168</sup> Mnookin, *supra* note 159, at 250.

While “act-oriented” rules do not judge litigants as persons, custody disputes based on the best interests standard specifically focus “on what kind of person each parent is.”<sup>169</sup> Unlike the usual adjudication process, custody decisions require predictions of the future, not determinations of past events.<sup>170</sup> Moreover, in typical adjudications, the loser is out of the picture after the decision and cannot affect resulting relationships; this outcome does not occur in child custody decisions.<sup>171</sup> In child custody disputes, unlike the usual adjudication process, the trial court’s discretion is relatively unconstrained by precedent or appellate review.<sup>172</sup> Finally, in contrast to typical adjudication proceedings, the centrally involved party, the child, is often not a full participant.<sup>173</sup> Given these differences, the role of the judge in child custody cases has been characterized as more like that of an administrative overseer,<sup>174</sup> an insight that suggests that different processes and standards should apply.

#### A. COGNITIVE BACKGROUND

What is the cognitive setting within which the family court judge decides a child custody dispute?<sup>175</sup> Although few child custody disputes end in formal proceedings, the proceedings in which legal rules are imposed by judges build the framework for private decision making.<sup>176</sup> In those proceedings, the judge must choose among different interpretations of the facts and competing legal precedents. Like the rest of us, judges draw on embedded knowledge structures, and they tend to turn first to whatever “commonsense background theory [is] prevalent in the legal culture of their era.”<sup>177</sup>

Most judges thus see themselves making decisions within a framework that is conventional and appropriate:<sup>178</sup>

Decisions typically are presented as the inevitable consequence of a careful analysis of the facts and the applicable law . . . . The correct decision and the governing principles are described as discovered, not created, by the judge . . . and are expressed with great certainty, as though there were no room for doubt. . . . [T]his neo-formalist form of jurisprudence—typified by a self-reported experience of constraint, high confidence and singular correctness, all couched in the rhetoric of

<sup>169</sup> *Id.* at 251.

<sup>170</sup> *Id.* at 251–52.

<sup>171</sup> *Id.* at 252–53.

<sup>172</sup> *Id.* at 253–54.

<sup>173</sup> *Id.* at 254–55.

<sup>174</sup> Mnookin, *supra* note 159, at 255. For more discussion of a similar concept, see Andrew Schepard, *The Evolving Judicial Role in Child Custody Disputes: From Fault Finder to Conflict Manager to Differential Case Management*, 22 U. ARK. LITTLE ROCK L. REV. 395 (2000).

<sup>175</sup> An examination of the inherited set of cultural and historical traditions, values, beliefs, and assumptions into which a legal argument falls is the first step in any rhetorical analysis. *See, e.g.*, White, *Law as Rhetoric*, *supra* note 21, at 688–91.

<sup>176</sup> MACCOBY & MNOOKIN, *supra* note 161, at 289–90. In a California study, fewer than two percent of disputes over child custody ended in formal judicial processes. *Id.* at 271–72.

<sup>177</sup> Phoebe C. Ellsworth, *Legal Reasoning*, in *THE CAMBRIDGE HANDBOOK OF THINKING AND REASONING* 685, 686 (Keith J. Holyoak & Robert G. Morrison eds., Cambridge Univ. Press 2005).

<sup>178</sup> *Id.* at 689.

closure—is the predominant, albeit unofficial, mode of judicial reasoning in current American legal culture.<sup>179</sup>

Unquestionably, part of the cognitive setting constitutes the canons of family law,<sup>180</sup> including authoritative texts as well as the “characteristic forms of legal argument, characteristic approaches to problems, underlying narrative structures, unconscious forms of categorization, and the use of canonical examples.”<sup>181</sup> The statutory and case law foundation tells the judge that she has broad discretion because she is the fact-finder in the best position to evaluate credibility and weigh evidence, guided by the broad parameters set by the relevant factors and criteria.<sup>182</sup> This is reinforced by the legal culture’s story of how the law generally works and how lawyers and litigants generally behave, reassuring the family court judge that she is the appropriate person and that the judicial process is the appropriate way to decide child custody. Moreover, because some kind of presentation must be made of the facts on both sides, the judge must serve as the impartial and best judge of the truth, and a decision must be made in favor of one or the other version of the best interests of the child.<sup>183</sup>

Narrative will have other tacit effects. Each person will tell his or her story, through a lawyer or otherwise; this telling will allow each side to buy into the process. The stories will take a familiar form, assuring the judges, the lawyers, and the litigators that the outcome follows as night follows day. Because of the discretion allowed, the judge will be able to

<sup>179</sup> *Id.*

<sup>180</sup> For discussion of legal canons, see generally LEGAL CANONS (J.M. Balkin & Sanford Levinson eds., N.Y. Univ. Press 2000); Judith Resnik, *Constructing the Canon*, 2 YALE J.L. & HUMAN. 221 (1990); Symposium, *Multiple Cultures and the Law: Do We Have a Legal Canon?*, 43 J. LEGAL EDUC. 1 (1993).

<sup>181</sup> J.M. Balkin & Sanford Levinson, *The Canons of Constitutional Law*, 111 HARV. L. REV. 963, 970 (1998). See also Fran Ansley, *Recognizing Race in the American Legal Canon*, in LEGAL CANONS, *supra* note 180, at 238, 242 (the legal canon “cuts across various kinds of materials and audiences, focusing on its role as a source of cultural literacy, a collection of core narratives . . . that Americans tell themselves about the nation’s history and its system of law”); Mark Tushnet, *The Canon(s) of Constitutional Law: An Introduction*, 17 CONST. COMMENT. 187, 187 (2000) (“Any discipline has a canon, a set of themes that organize the way in which people think about the discipline.”); see also AMSTERDAM & BRUNER, *supra* note 13, at 287–88 (results are influenced “by how people think, categorize, tell stories, deploy rhetorics, and make cultural sense as they go about interpreting and applying rules, requirements, and theories”).

<sup>182</sup> For example, section 402 of the Uniform Marriage and Divorce Act states as follows:

The court shall determine custody in accordance with the best interest of the child. The court shall consider all relevant factors including:

- (1) the wishes of the child’s parent or parents as to his custody;
- (2) the wishes of the child as to his custodian;
- (3) the interaction and interrelationship of the child with his parent or parents, his siblings, and any other person who may significantly affect the child’s best interest;
- (4) the child’s adjustment to his home, school and community; and
- (5) the mental and physical health of all individuals involved.

The court shall not consider conduct of a proposed custodian that does not affect his relationship to the child.

UNIF. MARRIAGE & DIVORCE ACT § 402.

<sup>183</sup> This requirement that the judge decide in favor of one side or another is one of the factors that differentiates legal from scientific reasoning. Other differences include the need to make a decision and the finality of that decision, no matter how ambiguous or incomplete the data. Ellsworth, *supra* note 177, at 696. These constraints on the judicial role “encourage categorical thinking and a corresponding distrust of probabilistic reasoning, overconfidence, and a strong dispositional bias in which situational factors and attributional biases are overlooked, and the idea of free will is preserved.” *Id.*

demonstrate wisdom (as did King Solomon), gaining respect and approval for the judge, the process, and the results. Narrative supports the trial court judge in her role as the Agent addressing the Trouble of a “broken” family by fixing it, in the form of a “re-unified,” albeit smaller, family unit. In the appellate court opinion, the trial court judge will be the chief protagonist, and she will be praised for playing the appropriate role of resolving questions of fact.

Symbols and setting further support the character of the trial judge in the custody narrative. The judge’s elevated bench, the robe, and the gavel match the role of listening, questioning, and making authoritative, objective statements. The physical location of the lawyers and litigants, on the stage but below the judge, situates them to present a contest. The courtroom itself may physically appear to be a setting of authority, reason, and truth finding.

The judge’s character, and the broad discretion assigned to that character, encourage the yes-or-no decisions characteristic of the judicial process. Should the judge depart from this role, the lawyers, and perhaps even the litigants, would be disturbed; following the usual narrative path to the natural results allows everyone to understand and perform their roles.

Finally, the individual stories being told by the lawyers and litigants as they compete for the judge’s approval find their way among governing metaphors and models: the family unit as a container to be isolated from and protected against outside encroachment; the bifurcation of home work and world work; the mother as virtuous, nurturing caregiver; the father as primary wage earner; and the wisdom of the judge.

## B. STORIES OF JUDGES AND JUDGING

First among the canons and icons uncovered by rhetorical analysis of child custody decision making is the story and image of King Solomon. For example, in a case from Idaho, the magistrate posed the Solomonic question to parents contending for custody of their three children. The magistrate had been asked to determine the best interests of the three children of Rudy Silva and his ex-wife, Nancy Ann Brown, after their family split in two.<sup>184</sup> When Rudy and Nancy first divorced in 2000, they agreed to equally share physical custody of their children, who were eight, four, and one.<sup>185</sup> At first, the arrangement worked well because the parents worked different nights on the night shift. After Nancy changed jobs, she worked the same nights as Rudy. As a result, Rudy was the primary caregiver, Nancy had little contact with the children, and a daycare provider cared for the children while Rudy worked. Later, the children stayed primarily with Nancy for a time, then went back to an even split. At that point, Rudy had the children on his days off, while Nancy had the children on the days she worked. Nancy’s new husband provided child care as did Nancy’s parents and friends.<sup>186</sup>

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<sup>184</sup> *Silva v. Silva*, 136 P.3d 371 (Idaho Ct. App. 2006).

<sup>185</sup> *Id.* at 373.

<sup>186</sup> *Id.* at 373–74.

When Nancy sought primary custody, the magistrate listened to a day's worth of testimony and then expressed his frustration:

I would encourage both of you to seek changes to your either [sic] employment schedule or the status of your employment. The evidence I've heard so far, I'm gonna be up front with you about, indicates to me that these children don't have two primary parental figures in their lives. You're only available a couple of nights a week. You're available during the one times [sic] of the day that they don't need parents, which is when they're at school, and you're not available at any other time. Your kids have been raised by a step-dad, daycare providers, friends and grandparents. That's who has raised your children so far.

Now you're in front of me asking to be awarded primary custody. And you know what? **It's gonna be probably the first among you who steps up, who wants to be there, available to them when they get out of school, when they're in bed, when they need help with their homework, when they need dinner and when they need breakfast.** You don't want to do that, then this is gonna be a real toss-up, I can tell you right now. It's gonna be very difficult for me to decide. It will be easier for me to decide if one of you has made those changes to your schedule. And if both of you have made those changes, I'll be back to be making a difficult decision, but at least I will know that your children are going to be raised by one of you because right now, no matter what you say and what I've learned from the witnesses, so far, you have close relationships with your children but you're not the one doing the raising.<sup>187</sup>

When the hearing resumed, Nancy told the judge that she was changing her schedule but Rudy said he could not do so.<sup>188</sup> Finding that Nancy's efforts to change her schedule weighed significantly in her favor, the court awarded primary physical custody to Nancy. This decision came despite Rudy's

role as the children's primary caregiver after the divorce; the children's preference to live with him; the fact that he lived in the marital home, enabling the children to attend their original schools when in his custody; his good character, including his civility and control in dealing with outbursts from Nancy; his general habit of consulting with Nancy regarding the children; and his positive influence on his children's manners and demeanor.<sup>189</sup>

Visible traces of the Solomon narrative—the images of a wise judge and a sacrificing parent—appear here as the judge asks for evidence to help him make a difficult decision: Who's going to step up? Which one of you is willing to say that you will sacrifice the most for the children? Despite indications that Rudy was unable to change his schedule if he wished to keep his job, and other evidence that tilted in his favor, the judge awarded custody to the sacrificing parent, the one “who step[ped] up” to say she

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<sup>187</sup> *Id.* at 374 (emphasis added) (internal quotation marks omitted).

<sup>188</sup> *Id.*

<sup>189</sup> *Id.* at 378.

would make sacrifices to win custody of her children.<sup>190</sup> As in the Solomon story, the judge gets credit for weighing the evidence and finding the truth when the only evidence introduced is the willingness of one of the contending parties to say that she will make a sacrifice in the future.

Another visible trace of the Solomon story, the assumption that the decisions of the judge are based on a rational process of weighing the evidence, can be found in opinions supporting the trial judge's use of discretion. Reviewing a trial court decision, the South Carolina Supreme Court<sup>191</sup> explained why the judge's decision should be considered neutral, reasonable, and wise despite his use of language that "seemed" to show bias and prejudice: "In making custody decisions the totality of the circumstances peculiar to each case constitutes the only scale upon which the ultimate decision can be weighed . . . [and] [t]he trial judge, who observes the witnesses and is in a better position to judge their demeanor and veracity, is given broad discretion."<sup>192</sup>

In *Parris v. Parris*, both the family court and the South Carolina Supreme Court expressed concern about the priorities of the mother, Ruth, while appearing to sympathize with the father, Donald. As the Supreme Court put it:

They lived on Hilton Head where Mother, over the years, became one of Hilton Head's leading realtors. Father worked on various real estate projects and commercial ventures but, in recent years, was less financially successful than Mother. In 1990, due primarily to the parties' financial problems, Mother told Father she wanted a divorce.<sup>193</sup>

Although Ruth initially won temporary custody, the trial court granted permanent custody to Donald after a hearing.<sup>194</sup> Ruth appealed, claiming that the trial court's order "reflects a gender bias against working women and a predisposition on the part of the Family Court to award custody to

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<sup>190</sup> The Idaho statute provides that the court shall consider all relevant factors which may include:

- (a) The wishes of the child's parent or parents as to his or her custody;
- (b) The wishes of the child as to his or her custodian;
- (c) The interaction and interrelationship of the child with his or her parent or parents, and his or her siblings;
- (d) The child's adjustment to his or her home, school, and community;
- (e) The character and circumstances of all individuals involved;
- (f) The need to promote continuity and stability in the life of the child; and
- (g) Domestic violence.

IDAHO CODE ANN. § 32-717. In affirming, the Idaho Court of Appeals held that consideration of a parent's work schedule and need for third-party child care is appropriate in a child custody determination to the extent that these circumstances are shown to affect the well-being of the children. This factor may be irrelevant to the custody decision in many cases, but it cannot be said that it will be irrelevant in all custody disputes. This is not to say that a working parent or a parent with a non-traditional work schedule is a presumptively inferior choice. We merely hold that a parent's work schedule may be one factor among many that can assist a magistrate court in tailoring a custody order that will best promote the welfare of the children.

*Silva*, 136 P.3d at 377.

<sup>191</sup> *Parris v. Parris*, 460 S.E.2d 571 (S.C. 1995).

<sup>192</sup> *Id.* at 572.

<sup>193</sup> *Id.* at 571.

<sup>194</sup> *Id.*

Father due to her full-time career.”<sup>195</sup> The appellate court disagreed, saying that the record revealed that Donald had played “a more active role in the day to day activities of the child. Although Mother assumed some of the parental responsibilities, Father was more actively involved in Maxfield’s daily life.”<sup>196</sup>

As for the claim of bias, the appellate court found that “[t]he preponderance of the evidence clearly supports the Family Court’s ruling.”<sup>197</sup> Having found a logical basis for the ruling, the court dismissed Ruth’s assertion

that certain language in the Family Court’s order reflects a gender bias against women. Specifically, Mother contends language characterizing her as a “very determined, easily angered career woman” who is “perceived in the business community as an aggressive competitive individual” demonstrates the Family Court’s bias against awarding custody to working mothers. We disagree. The adjectives describing Mother’s work ethic are gender neutral and would apply equally to a male parent.

We agree with Mother that the fact she is “aggressive” and “career oriented” is not, standing alone, relevant to a determination of custody. However, when considered in the context of the amount of time Mother spent with Maxfield on a daily basis, her work habits are highly relevant. Although not the sole factor, the amount of time a parent spends with the child has traditionally been a relevant consideration in determining which of two fit parents receives custody. Work habits necessarily impact upon this consideration. Where, as here, the record reveals a pattern of one parent as primary caretaker and the other parent as the primary wage earner, it would be incomprehensible for a court to disregard this fact in awarding custody.<sup>198</sup>

As for the language used by the trial court judge, it had been taken out of context, the appellate justices held, and they “caution[ed] the Family Courts to use the utmost circumspection in phrasing orders to ensure that the language is not susceptible of connotations such as those imputed by Mother here.”<sup>199</sup> The family court judge was presumed to have judged wisely based on the “facts” before him, though he may have spoken rashly.

A different consequence of Solomon-inspired deference to trial judges’ use of discretion is illustrated in a well-known California Supreme Court case finding a mother’s work responsibilities to be irrelevant to custody decisions. In *Burchard v. Garay*,<sup>200</sup> the trial court judge had awarded custody of two-and-one-half-year-old William Garay, Jr., to his father. The California Supreme Court reversed the award four years later.<sup>201</sup> According to the California Supreme Court opinion, William was born after “a brief liaison” between his mother and father. William, the father, refused to

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<sup>195</sup> *Id.* at 572.

<sup>196</sup> *Id.*

<sup>197</sup> *Parris*, 460 S.E.2d at 572.

<sup>198</sup> *Id.* at 572–73.

<sup>199</sup> *Id.* at 573.

<sup>200</sup> 724 P.2d 486 (Cal. 1986).

<sup>201</sup> *Id.* at 493.

believe that he was the father when Ana, the mother, told him she was pregnant. After the birth, Ana took on child care, worked two jobs, and continued with nursing training. She brought a paternity and child support suit when William, Jr., was about six months old. William was found to be the father, and William and Ana briefly tried to live together as a family. After Ana refused William's request for visitation rights, both sought exclusive custody.<sup>202</sup>

According to the Supreme Court opinion, the evidence showed that both parents would be able to provide adequate care, yet the trial court had awarded custody to the father, apparently on the basis of three considerations:

The first is that William is financially better off—he has greater job stability, owns his own home, and is “better equipped economically . . . to give constant care to the minor child and cope with his continuing needs.” The second is that William has remarried, and he “and the stepmother can provide constant care for the minor child and keep him on a regular schedule without resorting to other caretakers”; Ana, on the other hand, must rely upon babysitters and day care centers while she works and studies. Finally, the court referred to William providing the mother with visitation, an indirect reference to Ana's unwillingness to permit William visitation.<sup>203</sup>

The Supreme Court criticized the lower court's “reliance upon the asserted superiority of William's child care arrangement,” suggesting that the rationale showed “insensitivity to the role of working parents.”<sup>204</sup> Moreover, the court noted that Ana had been the primary caretaker from birth to the date of the trial court hearing: “We have frequently stressed, in this opinion and others, the importance of stability and continuity in the life of a child, and the harm that may result from disruption of established patterns of care and emotional bonds.”<sup>205</sup>

The *Burchard* decision is often cited as showing the courts' increasing awareness, at least in some jurisdictions, of changing circumstances in family life; the court reversed a decision that appeared to discriminate against a single working mother.<sup>206</sup> Nonetheless, by the time of the Supreme Court decision, William, Jr., had been in his father's custody for four years, meaning that a change in custody might bring about the kind of disruption the Supreme Court feared.<sup>207</sup> Moreover, even though the California Supreme Court decision reversed the lower court, the lower court decision—and its rationale that single working mothers were inferior to stay-at-home second wives—was for at least four years part of the background context within which other working mothers were negotiating and litigating child custody disputes.

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<sup>202</sup> *Id.* at 487.

<sup>203</sup> *Id.* at 488.

<sup>204</sup> *Id.*

<sup>205</sup> *Id.* at 493.

<sup>206</sup> The court noted that fifty percent of mothers and almost eighty percent of divorced mothers were working mothers at the time of the decision. *Burchard*, 724 P.2d at 492.

<sup>207</sup> *Id.* at 493.

## C. IMAGES OF MOTHERS, FATHERS, AND FAMILIES

Child custody decisions metaphorically turn on images of families and the individuals within the family. Narratives of sacrificing mothers and female sinners, echoes of the Solomon and Magdalen stories, can be uncovered in many child custody disputes. A rare example that explicitly acknowledges the embedded stories is the 1946 decision in *Clair v. Clair*,<sup>208</sup> a New York case.

From the beginning, the court has a story to tell: “This motion . . . illustrates vividly that the tragedies, the sorrows, the griefs and casualties of war occur not alone on the battlefield, the oceans or in the air.”<sup>209</sup> All the evidence shows that “society as a whole, and particularly innocent children, pay and pay bitterly for the stark brutality, the sheer madness, the insanity and inhumanity of man to man characterized by the word war.”<sup>210</sup> The young mother was married at fourteen and became a mother at fifteen; her husband was inducted into the service, she was left alone, and

[t]he inevitable happened, a usual concomitant of conflict, defendant, a mere slip of a girl, longed for companionship. She met pretended, flattering friends. She was beguiled by false allurements of tinsel, glitter, lights and the glamour and fanfare of war. She left her home in a village in the mountains and strayed into a large city, where she misbehaved, and disregarded the usual peacetime social conventions, with the tragic result that she was obliged to bare her body to the scalpel of the surgeon, removing forever the possibility of bearing a child again.<sup>211</sup>

Although the father was absent, he was awarded permanent custody of the child, an award that would take effect when the war was over or he was discharged; meanwhile, the maternal grandmother took temporary custody.<sup>212</sup>

At the time of the hearing, the young mother had a new life and a new marital family unit: “She likewise has remarried and to a man fully conversant with her past. He is a young man in love with defendant and her little child, Christine . . . His character is excellent. He earns good wages working for a doctor and supports defendant in a modest home, ample for both.”<sup>213</sup> And she had repented:

The testimony reveals defendant has repented of her follies and mistakes and has conducted herself for the past two years in an upright, respectable manner. Her minister, mother, family physician and others so testify. Christine . . . is a healthy, normal, happy and contented child in her present home . . . It would be . . . erroneous . . . to impose and cast forever guilt upon defendant’s shoulders alone for the disastrous consequences which followed an unholy and unhappy alliance and a

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<sup>208</sup> 64 N.Y.S.2d 889 (N.Y. Sup. Ct. 1946).

<sup>209</sup> *Id.* at 890.

<sup>210</sup> *Id.*

<sup>211</sup> *Id.*

<sup>212</sup> *Id.* at 890–91.

<sup>213</sup> *Id.* at 891.

marriage of convenience and upon inherent weakness of human frailty. Defendant committed sins of passion but not of evil purpose. So did Mary Magdalen and Hester Prynne as have countless others before and after them.<sup>214</sup>

All that was left was to forgive: the court modified the initial grant of custody to the husband and awarded custody to the child's maternal grandmother, who lived next door to the mother.<sup>215</sup> Using the guide of "what is best for the child's welfare," the court determined that "[t]he child will continue to lead [her mother] to a better life and persevere, but taken away to New Mexico, will, in my judgment, in all probability crush her hopes for a better future."<sup>216</sup>

In a more recent case, *Linda R. v. Richard E.*,<sup>217</sup> the trial judge appeared unable to forgive the conduct of the mother and awarded custody of the couple's twin nine-year-old daughters to their father. Linda and Richard met when Richard was attending medical school and Linda was in nursing school, and they married in 1974.<sup>218</sup> Until 1983, Linda worked as a nurse, substantially supporting the family. Both parents emphasized their roles in child rearing during the first year of the children's lives. The appellate court rejected the trial court's conclusion that the wife "'has been more or less a 'remote control' mother, having an interest in her children's welfare, but leaving the actual rearing, at this point in their lives, to the father and a housekeeper'" and found that the record revealed instead that "the wife's hours spent in pursuit of a career outside the home are decidedly fewer and more flexible than those spent by the husband, as recognized by the Supreme Court."<sup>219</sup>

As for evidence of sin, the appellate court criticized the trial court for allowing "extensive testimony, including some from a private investigator, regarding a relationship between the wife and 'her lover,'"<sup>220</sup> According to the appellate court, the evidence did not support the trial court's finding that "the wife's alleged relationship with another man resulted in her absenting herself from the children 'at a time when they [were] in great stress from the impending breakup of the marriage' and reflected the wife's 'misplaced priorities and her somewhat less than selfless devotion.'"<sup>221</sup> Instead, the appellate court said there was no evidence that the wife's alleged relationship with another man affected the children. Moreover, the appellate court said that the trial court appeared to be holding mothers and fathers to different moral and sexual standards, citing its "improper" refusal to allow the wife's attorney to pursue questions about parallel activities by the husband.<sup>222</sup>

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<sup>214</sup> *Clair*, 64 N.Y.S.2d at 891.

<sup>215</sup> *Id.* at 891-92.

<sup>216</sup> *Id.* at 891.

<sup>217</sup> 561 N.Y.S.2d 29, 30 (N.Y. App. Div. 1990).

<sup>218</sup> *Id.*

<sup>219</sup> *Id.* at 31.

<sup>220</sup> *Id.*

<sup>221</sup> *Id.* (alteration in original).

<sup>222</sup> *Id.*

Embedded images affect fathers as well. In *Young v. Hector*,<sup>223</sup> the mother and father married in 1982, at a time when the father was an architectural designer and the mother was an attorney in her own firm in New Mexico.<sup>224</sup> Their daughters were born in 1985 and 1988. In June 1989, as the parties had agreed, the mother and two daughters arrived in Miami, and the mother began work with a mid-sized law firm. The father stayed behind in New Mexico until October 1989; he then moved to Florida and studied for and passed the Florida contractor's examination. From the 1989 move until the fall of 1993, the children were cared for by a live-in housekeeper and by the mother; the father was frequently away for months at a time.<sup>225</sup>

By the time the father returned to Florida in the fall of 1993, the mother had accepted a partnership with a large Florida law firm at a salary of \$300,000 annually.<sup>226</sup> The children were in school, and the mother had employed a housekeeper, Hattie, between the hours of noon and 8:00 p.m. One month after his return, the mother asked the father for a divorce.<sup>227</sup>

Separated but living with the mother, the father became more involved in the activities of his two daughters, now eight and five, primarily after school on weekdays between 3:00 and 6:30 p.m.<sup>228</sup> The father maintained that he was the "primary caretaker" in the three years before this proceeding.<sup>229</sup> As the appellate court put it, "The trial court viewed this contention with some degree of skepticism as it was entitled."<sup>230</sup>

[Father's attorney]: Who picks the kids up?

[Father]: Either Hattie or I. Typically, it's me. If I am tied up, whether it's a meeting or whatever, or if I go somewhere like your office, way up in North Miami Beach, and I don't get back in time and I thought I would, I can call Hattie and say, "Hattie, please pick up the children." She does. She picks them up frequently.

[The Court]: Is Hattie there five days a week?

[Father]: Yes sir. She comes at noon every day. She cleans the house in the afternoons. She prepares the dinners. The kids eat. We eat. I eat with the children every day typically at 6:30. She cleans up after that. She'll draw a bath for Avery and she leaves at eight o'clock in the evening five days a week.

**[The Court]: Maybe I'm missing something. Why don't you get a job. [sic]**

[Father]: Well, because my background is architecture. That's my degree, but when I graduated, they did not have computers. Today, it's computer dominated and I'm computer illiterate.

. . .

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<sup>223</sup> 740 So. 2d 1153 (Fla. Dist. Ct. App. 1998).

<sup>224</sup> *Id.* at 1159.

<sup>225</sup> *Id.* at 1159-60.

<sup>226</sup> *Id.* at 1160.

<sup>227</sup> *Id.*

<sup>228</sup> *Id.*

<sup>229</sup> *Young*, 740 So. 2d at 1161.

<sup>230</sup> *Id.*

Previously, because of the number of hours Ms. Hector worked, I filled in. Ms. Hector has a secretary that handles her whole life at the office and in a sense I was the secretary that handled her whole life at home and took care of the children.

[The Court]: But you've got a nanny doing that.

[Father]: No sir, I don't believe you can buy parents. Nannies can pick up. They can drop off.

**[The Court]: Why [sic] do you need the nanny for, if you're there doing it?**

[Father]: She cooks. She cleans. I could do a lot of that. Typically, people that have incomes of over a quarter of a million dollars or \$300,000 can afford the luxury of having help, hired help.<sup>231</sup>

The appellate court rejected the father's suggestion that the trial court's questions about the father's work and need for a nanny were evidence of gender bias or of an image of the father as breadwinner and the mother as caretaker. Instead, "[g]iven the undisputed large financial indebtedness of this couple, the trial court's inquiry about the need to employ a full-time nanny was both logical and practical."<sup>232</sup>

The finding of trial court wisdom took a long and twisted path in *Young v. Hector*. First, the trial court judge awarded custody to the mother and alimony to the father. The District Court of Appeal reversed, but later agreed to rehear the case en banc. On rehearing, a majority of the Court of Appeal held that the trial court had not acted on the basis of bias and did not abuse its discretion in awarding custody to the mother.<sup>233</sup> As the majority put it:

Given a choice between the mother, who maintained constant steady employment throughout the marriage to support the children (regardless of the amount of her income), and the father who unilaterally and steadfastly refused to do the same, the trial court's designation of the mother as custodial parent cannot be deemed an abuse of discretion.<sup>234</sup>

The majority further explained its rationale: "[O]nce the trial court makes this decision and the decision is supported by substantial competent evidence, we recognize that the trial court's determination should not be lightly second-guessed and overturned by an appellate court merely reviewing the cold-naked record."<sup>235</sup> The trial court's wisdom derives from its

unique advantage of meeting both parents prior to making its decision. Thus, the trial court, unlike an appellate court, is entitled to rely, not only upon the record evidence presented, but upon its mental impressions formed about each of the parents and their respective parenting strengths and weaknesses. Moreover, trial judges sitting as triers of fact in these proceedings are not required to shed their common sense and life's

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<sup>231</sup> *Id.* at 1161–62 (emphasis added) (internal quotation marks omitted).

<sup>232</sup> *Id.* at 1162.

<sup>233</sup> *Id.* at 1164.

<sup>234</sup> *Id.* at 1162–63.

<sup>235</sup> *Young*, 740 So. 2d at 1164.

experiences when they don their black robes to preside over these proceedings.<sup>236</sup>

As for mothers, a series of interacting metaphors and stories can be examined in *Rowe v. Franklin*,<sup>237</sup> where Kimberly Rowe challenged the trial court's award of custody of her five-year-old son to his father. Kimberly and Donald got married in 1987; their son was born seven months later. When the boy was three and one-half years old, Kimberly left with the child. The parties agreed that the child would at least temporarily remain in the mother's custody. About five months later, Kimberly moved from Ohio to Kentucky (about two hours away); at first, the move was supposed to be for the summer.<sup>238</sup>

At the end of the summer, Kimberly sought court permission to relocate in Kentucky with her son. She had a new boyfriend, she was pregnant, and she was going to law school.<sup>239</sup> Eighteen months after the separation, after hearing testimony from the parties and from experts, the trial court judge ordered a change in custody to Donald.<sup>240</sup> What were the trial court's reasons?<sup>241</sup>

First, the trial court drew on the metaphor of "roots" to characterize Kimberly and Donald's former marital residence as "home." Even though the trial court acknowledged evidence that the child was doing well in Kentucky, the court found that

[u]ntil Dec. 1991, the child lived in the marital residence which is presently occupied by [father]. He is most familiar with the surroundings, the neighborhood, the people in the neighborhood, etc. [The child] has roots in his home in Cincinnati and but for his mother's move to Kentucky, it appears that his home would be one of stability. He has family here both maternal and paternal. He has friends here. He has friends of both parents who care for him here. The only adjustment necessary for [the child] here is that his mother would not be here.<sup>242</sup>

The trial court's conclusion was that the mother and the child did not have substantial roots in Kentucky, a conclusion that the appellate court said was not justified by the record.<sup>243</sup>

Next, the trial court categorized the new family in Kentucky as "not-home." The trial court described the child's new home as consisting of

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<sup>236</sup> *Id.*

<sup>237</sup> 663 N.E.2d 955 (Ohio Ct. App. 1995).

<sup>238</sup> *Id.* at 956.

<sup>239</sup> *Id.*

<sup>240</sup> *Id.*

<sup>241</sup> The appellate opinion quotes at length from the trial court opinion. The appellate court concludes that

the trial court's findings of fact and conclusions of law reflect that it abused its discretion not for those specific reasons set forth in the mother's brief, but because we are convinced that the trial court did not consider in its analysis of the child's best interests whether the mother's conduct had a direct adverse impact on the child when it transferred custody and designated the father as custodial parent. We find significant the trial court's apparent judgmental attitude toward the mother's life choices.

*Id.* at 958.

<sup>242</sup> *Id.* at 959 (alterations in original) (internal quotation marks omitted).

<sup>243</sup> *Franklin*, 663 N.E.2d at 959.

a mother who is attending law school, working part-time for the Kentucky National Guard, mothering an approximate six (6) month old child, dating a man (the father of her new child) who apparently spends a lot of his time at her house but lives elsewhere and is substantially financially dependent on this man. This Kentucky home has required tremendous adjustment on the part of the child and the evidence indicates that more adjustment must be made in the future.<sup>244</sup>

Further, the trial court found that the mother, Kimberly, failed to match the ideal mother of the Solomon story. The trial court questioned whether the mother's decisions were in the best interests of the child and whether she placed her needs before the child's needs. Although

[p]ersonal accomplishments and career goals are obviously worthwhile undertakings . . . this child has paid a price. . . . In summation, this Court questions the priorities of Ms. Rowe. The number of poor choices made by Ms. Rowe as to the best interests of [the child] coupled with her personal agenda indicates to this court that she may not be as committed to [the child's] best interests as she should be.<sup>245</sup>

Moreover, the mother's new relationship failed to match the marital family ideal. As the appellate opinion described the trial court's concern, the boyfriend "became involved with the mother . . . shortly after his separation from his wife"; he should have been "allowed some time 'to settle down or regroup'"; and he "had not experienced the 'culture shock' of daily life with two small children."<sup>246</sup> As to stability, the trial court concluded:

With Ms. Rowe, stability has been hard to come by. Since December of 1991 as Ms. Rowe has experienced personal problems, the child has had little stability. The current situation, though on its face appearing to be stable, is based on many factors that are questionable. The many "what ifs" regarding Ms. Rowe's, Mr. Adams, and [the child's] future cause great concern to this court.<sup>247</sup>

The Court of Appeals chastised the trial court for seeming to impose its own values: a best interests determination does not "provide the court *carte blanche* to judge the rights and lifestyles of parents by nonstatutory codes of moral or social values."<sup>248</sup> In considering parental lifestyles,

any state interest in competing lifestyles and accompanying moral values which affect child custody would most equitably be served if limited to a determination of the direct or probable effect of parental conduct on the . . . development of the child . . . as opposed to a determination of which lifestyle choices made by a parent are "correct."<sup>249</sup>

The Court of Appeals nonetheless noted that allowing broad discretion at the trial court level raised the "Solomon problem": if the trial court

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<sup>244</sup> *Id.* (internal quotation marks omitted).

<sup>245</sup> *Id.* at 960 (alterations in original) (emphasis omitted) (internal quotation marks omitted).

<sup>246</sup> *Id.* at 961.

<sup>247</sup> *Id.* (alterations in original) (internal quotation marks omitted).

<sup>248</sup> *Id.* at 956.

<sup>249</sup> *Franklin*, 663 N.E.2d at 957.

abused its discretion, the case should be remanded because the “trial court is better equipped to examine and weigh the evidence and to make the decision concerning custody.”<sup>250</sup> Of course, remand itself presents problems: “Due to the time since the trial court designated the father as the residential parent, a second change of custody may now well be detrimental to the child’s adjustment despite the initial error. On the other hand, . . . remand may well effect nothing more than a charade resulting in the ‘same ultimate finding.’”<sup>251</sup>

Given what rhetorical analysis reveals in these examples of child custody decision making, the next Section will explore alternatives for individual families and their advocates.

## V. IMAGINE: QUESTION, RE-FRAME, RE-WRITE

As they settle in our minds, narrative and metaphor transform storylines and frameworks into universal and natural concepts. These concepts influence not only the arguments made within the legal system, but the operation of the system itself.<sup>252</sup> Within this system, one of the “story metaphors” we live by is an image of King Solomon derived from the Biblical narrative: judges are wise, unaffected by emotion, and discerning about underlying character; they probe deeply into doctrine and weigh all the evidence before they apply the rules without fear or favor.<sup>253</sup> Even as contemporary legal scholarship smudges this image, we tell the tale of rational and objective judges as if we believe that facts can be “established” and legal rules can be “found,” articulated precisely, and applied with certainty.<sup>254</sup> By providing a rhetorical template, the myths and metaphors of Solomon-like judges, attorney champions, open marketplaces, and level playing fields assure us that the system works.<sup>255</sup>

Given the criticism of the best interests standard, many reform proposals have been advanced.<sup>256</sup> Rather than discussing substantive

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<sup>250</sup> *Id.* at 962.

<sup>251</sup> *Id.*

<sup>252</sup> See WINTER, A CLEARING IN THE FOREST, *supra* note 18, at 332–39 (discussing metaphors of “the law” as an object that can be “broken” and “found” but also as a “person” that can be obeyed or disobeyed and the implications of those images).

<sup>253</sup> See, e.g., Brown et al., *supra* note 58, at 459–60.

<sup>254</sup> *Id.* at 460.

<sup>255</sup> *Id.*

<sup>256</sup> Joint custody fell from favor when researchers indicated that its effect on children’s wellbeing varied with the amount of continuing conflict between the parents. See Suzanne Reynolds et al., *Back to the Future: An Empirical Study of Child Custody Outcomes*, 85 N.C. L. REV. 1629, 1648–51, 1676 (2007).

Mandatory mediation is plagued by concerns that the mediation process will be distorted by power and financial imbalances. For the opposing view, see especially Fineman, *Dominant Discourse*, *supra* note 124; Martha Fineman & Anne Opie, *The Uses of Social Science Data in Legal Policymaking: Custody Determinations at Divorce*, 1987 WIS. L. REV. 107 (1987). Opponents argued that mandatory mediation would lead to fewer physical custody awards to mothers because mediators and the mediation process would favor joint physical custody. At least one recent study indicates the opposite result. Reynolds et al., *supra*, at 1633. An earlier study of the outcome of California’s mandatory mediation requirement indicated that it resulted in slightly higher instances of joint physical custody, but that the requirement contributed to settled custody disputes. MACCOBY & MNOOKIN, *supra* note 161, at 289–90. Like a prenuptial agreement, mandatory mediation could take place before, not after, a family is severed. See, e.g., Elster, *supra* note 9, at 45.

reform, this Section will explore the use of rhetorical analysis to overcome some of the difficulties created by the best interests standard.

The rhetorical perspective doubts that rules are discovered, facts are known, and the results of legal reasoning are sure and certain.<sup>257</sup> Instead, the rhetorical perspective supposes that legal results are underdetermined by legal rules and that what we mean and what we are understood to mean are incompletely conveyed by the language that we use.<sup>258</sup> From the rhetorical perspective, narrative and metaphor provide not only the foundation and frame of the current structure, but also the sketches and scaffolding to build differently.<sup>259</sup>

#### A. QUESTIONING AUTHORITY

The best interests of the child standard has been criticized almost since adoption because its indeterminacy invites the use of cognitive shortcuts; these shortcuts include stereotypes and biases as well as the scripts and models left behind by metaphors and stories. If there is no evidentiary basis for deciding that one custodial arrangement is better than another,<sup>260</sup> and if the parents are unable to agree on what is best for their family,<sup>261</sup> judges will look to their own images of ideal families to assess the families who come before them.<sup>262</sup> Solomonic influences complicate family court

The American Law Institute recently adopted an approximation rule, which would set post-separation physical custody as a proportion of the time spent performing caretaking functions before divorce. AM. LAW INST., PRINCIPLES OF THE LAW OF FAMILY DISSOLUTION: ANALYSIS AND RECOMMENDATIONS § 2.08 (Am. Law Inst. Publishers 2002). Other suggestions have included adoption of a primary caretaker presumption, as discussed in Fineman, *Dominant Discourse*, *supra* note 124, at 770; a “stated interests of the child” standard; a return to the maternal presumption; and even random decision making (flipping a coin), Elster, *supra* note 9, at 40–43.

<sup>257</sup> During the last twenty to thirty years, scholarship in many different fields has concluded that “reason”—especially as considered in opposition to “rhetoric”—has shortcomings. *See, e.g.*, STANLEY FISH, *Rhetoric, in DOING WHAT COMES NATURALLY: CHANGE, RHETORIC, AND THE PRACTICE OF THEORY IN LITERARY AND LEGAL STUDIES* 471, 485–94 (Duke Univ. Press 1989) (discussing disciplines in which rhetoric has been “on the upswing”); Gerald Wetlaufer, *Rhetoric and Its Denial in Legal Discourse*, 76 VA. L. REV. 1545, 1549 n.14 (1990) (discussing a range of ideas related to the “epistemological consequences of rhetoric”).

<sup>258</sup> AMSTERDAM & BRUNER, *supra* note 13, at 287.

<sup>259</sup> WINTER, A CLEARING IN THE FOREST, *supra* note 18, at xiii (legal actors need “something like a cognitive map of the cultural models and other social constructs that animate thinking and decisionmaking among lawyers, judges, and laypersons alike. This task requires a set of tools quite different from the analytic skills and normative theories that dominate the study of law today.”).

<sup>260</sup> Elster, *supra* note 9, at 43–44.

<sup>261</sup> *See* MACCOBY & MNOOKIN, *supra* note 161, at 291–92 (stating that the primary lesson to be learned from the indeterminacy of the best interests standard in private custody disputes is that the parties should be encouraged to resolve the issues themselves).

<sup>262</sup> Deciding whose custody is in the best interests of the child requires the judge to distinguish between good and bad family settings, situations, and parental roles. Lee E. Teitelbaum, *Family History and Family Law*, 1985 WIS. L. REV. 1135, 1156 (1985).

Although preconceptions, biases, and stereotypes affect all decisions, the indeterminacy of the best interests of the child standard provides little to offset those influences. *See, e.g.*, Katharine T. Bartlett, *Child Custody in the 21st Century: How the American Law Institute Proposes to Achieve Predictability and Still Protect the Individual Child’s Best Interests*, 35 WILLAMETTE L. REV. 467, 470 (1999) (discussing standard in context of initial custody disputes); David L. Chambers, *Rethinking the Substantive Rules for Custody Disputes in Divorce*, 83 MICH. L. REV. 477, 478 (1984) (arguing for primary caretaker presumption for young children instead of open-ended best interest test); Elster, *supra* note 9, at 7, 11 (calling best interest standard “indeterminate, unjust, self-defeating, and liable to be overridden by more general policy considerations” and suggesting that parents’ interests should be relevant to dispute).

decision making: parents may be unduly persuaded to say what they believe the decision maker wants to hear, and decision makers may be unjustifiably persuaded that their determinations are fact-based and rational.<sup>263</sup>

Even though few child custody disputes are decided by judges (most are settled by the parents), the accumulation of judgment establishes floors and ceilings for out-of-court negotiations.<sup>264</sup> Decisions that require parents and children to conform to outmoded images constrain the space within which other parents must bargain and negotiate.<sup>265</sup> Moreover, if trial judges are out of step, appellate review provides limited correction. Even when the losing parent has the time and money needed to appeal and win, that parent will go without custody for years while the appeal is pending, a circumstance that will make the appellate court reluctant to order a change in custody even if the trial court abused its discretion.<sup>266</sup>

If family court decisions are influenced by embedded knowledge structures, including master stories and cultural models that do not accommodate new realities, how can lawyers counter those influences? Social psychologists point out that it is extremely difficult to persuade people to adopt a view that conflicts with what they already know. Once the “biasing effects of schema” have been raised, minds can be changed only when we present them with evidence that is (1) relevant but (2) inconsistent with pre-existing knowledge structures (3) in circumstances in which the audience can attend to the evidence (that is, when their minds are “not too cognitively busy”).<sup>267</sup> Even then, new evidence leads to a change of mind only on occasion, and even on those occasions, the change is usually slight.<sup>268</sup> Once an unconscious and automatic knowledge structure has been activated, judgments are more likely to be based on assumptions derived from categories and schemas than on evidence of individual characteristics.<sup>269</sup>

Some techniques may overcome the mind’s natural tendency to take shortcuts by plugging information into already-known slots. We can consciously try to avoid embedded knowledge structures by taking information out of context, adopting an unusual or unfamiliar perspective

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<sup>263</sup> Just as the key to Solomon’s decision was the good behavior of one of the two mothers claiming the baby, parents and judges may believe that the claimants’ behavior during custody proceedings is relevant to questions of custody. Elster, *supra* note 9, at 5. Judging fitness for custody by demeanor during the custody dispute clouds the relevance and credibility of any statements introduced and “creates a dangerous incentive for strategic behavior.” *Id.* at 6.

<sup>264</sup> MACCOBY & MNOOKIN, *supra* note 161, at 282 (noting that the standard may not be as uncertain as suggested because of the social norm that mothers should be the primary caretakers).

<sup>265</sup> See Murphy, *Motherhood*, *supra* note 120, at 702.

<sup>266</sup> In the words of one parent’s attorney, “there are so many factors and they are so subjective that you just know you are going to have an enormous cost [in litigation] and the outcome is going to essentially be an arbitrary decision by someone who doesn’t know anybody who may have got it wrong and there is not recourse because it is all factual and so . . . [n]o court of appeals is going to overturn it.” Ray D. Madoff, *Lurking in the Shadow: The Unseen Hand of Doctrine in Dispute Resolution*, 76 S. CAL. L. REV. 161, 174–75 (2002) (quoting an interview with an attorney in Boston, MA).

<sup>267</sup> Chen & Hanson, *supra* note 27, at 1228–30.

<sup>268</sup> *Id.* at 1231.

<sup>269</sup> *See id.*

or lens, moving from our initial view to a more general or more specific view, creating a new category, seeking out contradictory information, or taking a contrarian view.<sup>270</sup> These approaches have the “new eyes” benefits of what Amsterdam and Bruner call “making the familiar strange,”<sup>271</sup> and what bell hooks terms an oppositional perspective.<sup>272</sup>

Imagine a contrarian view applied to what has been the embedded default position for child custody disputes: the best interests of the child, rather than the rights of the parents, should determine the outcome; the parents should be treated the same no matter what their current circumstances or their prior responsibilities; therapeutic approaches are more appropriate—no, litigation processes are the better fit;<sup>273</sup> the quicker and more determinate the process, the less harm to those involved. Consider some of the possible alternatives.

First, who should decide: the children, the parents, the “family,” a social worker, a child psychologist, a minister, a judge, a mediator, a panel of community members? In what forum should the decision be made: in the family home, on neutral ground, in an expert’s office, at a community forum, in a courtroom? If a judicial process is selected, should mediation be mandatory? Should the parties be represented by themselves, by counsel, by guardians? Which parties should be represented? How should their representation be provided?<sup>274</sup> What roles should their representatives play?

What kinds of decision are expected or allowed? What is the range of acceptable results? When might the range of acceptable outcomes include “no decision,” none of the above, no “yes or no” decision, or “no decision at this time”? When should the decision be made: when the parent-child relationship begins, before the adults separate, after they separate, in conjunction with the separation, isolated from the separation? How should the decision be made? What factors should be the focus: the rights of the parties, the contributions of the parties, their needs, their resources? Which principles should have priority: equality or neutrality, fairness or justice, stability or growth, compromise or finality?

In what circumstances should the court defer to the wishes of the parties: for example, enforcing children’s choices and any prior agreements

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<sup>270</sup> We can “constantly recategoriz[e] and relabel[] information, paying close attention to situation and context.” *Id.* at 1235–36 (discussing ELLEN LANGER, *MINDFULNESS* 61-79 (1989)).

<sup>271</sup> See, e.g., AMSTERDAM & BRUNER, *supra* note 13, at 1 (the concept is discussed throughout the text).

<sup>272</sup> HOOKS, *supra* note 129, at ix–x (preface). According to hooks, those in the margins of contemporary culture are more able to invent new images and representations. By looking from the outside in and from the inside out, they can better see and imagine alternative views.

<sup>273</sup> For the argument in favor of therapeutic approaches, see Janet Weinstein, *And Never the Twain Shall Meet: The Best Interests of Children and the Adversary System*, 52 U. MIAMI L. REV. 79 (1997). For a contrary view, see Fineman, *Dominant Discourse*, *supra* note 124, at 769–70.

<sup>274</sup> See, e.g., Steven K. Berenson, *A Family Law Residency Program? A Modest Proposal in Response to the Burdens Created by Self-Represented Litigants in Family Court*, 33 RUTGERS L.J. 105 (2001) (proposing a residency program to help offset the influence of the high cost of legal representation in increasing the number of self-represented litigants in family law cases).

among the parties?<sup>275</sup> When should the court forego speed: when might a quick decision be harmful or based on insufficient or ambiguous evidence?<sup>276</sup> When might the court decline finality: when might a temporary solution better serve those involved? When might the court consider values other than promoting stability and minimizing disruption: when might the potential for growth and change over time be of greater importance?

## B. REFRAMING THE PROBLEM AND POSSIBLE SOLUTIONS

In the early 1980s, Elizabeth Janeway pointed out that the idea of an individual having the sole responsibility for child-rearing is the most unusual pattern of parenting in the world.<sup>277</sup> Still, the idea is so embedded in our culture—mother as caregiver, father as wage earner—that it seems the preferred solution in the ordinary course of things. Once advocates or policy makers are able to imagine alternatives, rhetorical analysis can be used to discover underlying conceptual frames and devise more accommodating ones.<sup>278</sup>

As metaphor theorist George Lakoff suggests,<sup>279</sup> a problem does not present itself with a particular face and frame. Instead, problems are constructed by people who are trying to make sense of complex or troubling situations: the resulting constructions can exert unintended control over the range of our imagined responses.<sup>280</sup> By describing a “breakdown” in family structure, rather than “change,” “evolution,” or “growth,” we turn demographic trends into social problems.<sup>281</sup> In the child custody context, when we talk about families that have “split up” or about “single,” “working,” or “welfare” mothers, the words we choose lead to seemingly natural solutions: we need to repair the family; marry off the mother; get some mothers back to nurturing; and, paradoxically, get other mothers back to work.

<sup>275</sup> See Linda Jellum, *Parents Know Best: Revising Our Approach to Parental Custody Agreements*, 65 OHIO ST. L.J. 615 (2004) (advocating that states require courts to defer to parental agreements regarding custody).

<sup>276</sup> An allied problem with the current process is that temporary custody decisions are often made with minimal evidence; once in place, they acquire the added weight of stability.

<sup>277</sup> ELIZABETH JANEWAY, *CROSS SECTIONS* (William Morrow & Co., Inc. 1982). Janeway argues that the concept isolates children and parents from each other and from society, wage earners from spouses and children, children from the work world, children from persons of different ages, families from people of different backgrounds, and family members from kin and neighborhoods.

<sup>278</sup> For more on creating new metaphors, see MICHAEL R. SMITH, *ADVANCED LEGAL WRITING: THEORIES AND STRATEGIES IN PERSUASIVE WRITING* 219–48 (Wolters Kluwer 2d ed. 2008); George Lakoff & Mark Johnson, *Conceptual Metaphor in Everyday Language*, 77 J. PHIL. 453, 481–83 (1980).

<sup>279</sup> Lakoff garnered much attention, and some criticism, for his proposals to similarly “reframe” major political questions around metaphors that would lead to different means of reasoning and concluding. See GEORGE LAKOFF, *MORAL POLITICS: HOW LIBERALS AND CONSERVATIVES THINK* (Univ. of Chi. Press 2d ed. 2002); GEORGE LAKOFF, *DON’T THINK OF AN ELEPHANT: KNOW YOUR VALUES AND FRAME THE DEBATE—THE ESSENTIAL GUIDE FOR PROGRESSIVES* (Chelsea Green Publ’g Co. 2004).

<sup>280</sup> See KENNETH BURKE, *THE PHILOSOPHY OF LITERARY FORM: STUDIES IN SYMBOLIC ACTION 1* (La. State Univ. Press 1967) (“Critical and imaginative works are answers to questions posed by the situation in which they arose . . . [The strategies that we adopt to encompass the situations] size up the situations, name their structure and outstanding ingredients, and name them in a way that contains an attitude towards them.”).

<sup>281</sup> Fineman, *Progress*, *supra* note 15, at 16.

Problem construction is shaped, not only by metaphoric frames, but also by the stories we use to describe “what is wrong and what needs fixing.”<sup>282</sup> Because these stories shape our recognition of the problem, they control the directions we tend to follow in solving it. So, for instance, when a father is described as a “deadbeat dad,” the Trouble driving the plot can be overcome by requiring him to pay his debt and meet his financial obligations, rather than by requiring him to take responsibility for parenting his children; when a mother is characterized as “aggressive” and “career oriented,” the conflict is resolved by declaring her role to be that of primary wage earner, rather than the caregiver who should win custody.

Although metaphors and stories shape problem construction, they support problem reconstruction and problem solving as well. Donald Schön gave an example of the use of metaphor to resolve problems<sup>283</sup> when he described the way that manufacturers of synthetic-bristle paintbrushes might have imaginatively determined how to make their paintbrushes work more like natural-bristle ones. Once they realized that the paintbrush could be “seen as” a pump, they could redesign the synthetic bristles to work in the same way.<sup>284</sup>

To reframe the problem and its possible solutions in child custody disputes, we might begin with different ways of viewing “the container” (as well as “the things contained”)<sup>285</sup>—that is, the parameters set by the processes typically used for resolving disputes, the metaphors we use for the law and lawyers’ work.<sup>286</sup> Lawyers advance and defend positions, win or lose arguments, plan strategies, and stay on target, mostly without questioning that Argument is War.<sup>287</sup> Among others, Milner Ball has suggested that changing our view of “the law” would change how lawyers think about what they do. According to Ball, the dominant metaphor for law pictures it as a bulwark, “defensive, adamantine, . . . static, pretentious. . . . It is all limits and divisions and bringing to a halt.”<sup>288</sup> Rules and policies are concrete, “an unyielding edifice of noetic brick.”<sup>289</sup> This view

<sup>282</sup> Schön, *supra* note 22, at 138.

<sup>283</sup> *Id.* at 137.

<sup>284</sup> *Id.* at 139–43. To use metaphor to resolve problems, Schön suggested, the problem solver must attend to new features and relationships of the situation, and then rename the pieces, regroup the parts, reorder the frameworks, and try to “see” one situation “as” other situations. *Id.* at 150–61.

Schön’s advice is akin to the metaphor-generating advice of Kenneth Burke: “If we are in doubt as to what an object is . . . we deliberately try to consider it in as many different terms as its nature permits: lifting, smelling, tasting, tapping, holding in different lights, subjecting to different pressures, dividing, matching, contrasting, etc.” BURKE, GRAMMAR, *supra* note 54, at 504 (discussing metaphor, metonymy, synecdoche, and irony in connection “with their role in the discovery and description of ‘the truth’”). Similarly, John Dewey wrote that “[t]he elaborate systems of science are born not of reason but of impulses at first sight and flickering; impulses to handle, move about, to hunt, to uncover, to mix things separated and divide things combined, to talk and to listen.” JOHN DEWEY, HUMAN NATURE AND CONDUCT: AN INTRODUCTION TO SOCIAL PSYCHOLOGY 196 (Henry Holt & Co. 1922).

<sup>285</sup> See Lakoff, *Contemporary Theory*, *supra* note 18, at 212–13.

<sup>286</sup> For a discussion of the effect of metaphors in legal education, see David T. Ritchie, *Who is On the Outside Looking In, and What Do They See?: Metaphors of Exclusion in Legal Education*, 58 MERCER L. REV. 991 (2007).

<sup>287</sup> LAKOFF & JOHNSON, METAPHORS WE LIVE BY, *supra* note 18, at 3–6.

<sup>288</sup> MILNER S. BALL, LYING DOWN TOGETHER: LAW, METAPHOR, AND THEOLOGY 27 (Univ. of Wis. Press 1985).

<sup>289</sup> *Id.* at 24.

of law as a bulwark exists within an entire family of metaphors, which Ball labels Fortress America: “The metaphors kin to law as bulwark tend to the individualistic and competitive: life as struggle, society as contract, politics as battlefield or marketplace, and nature as resource.”<sup>290</sup>

When law is viewed as a structure, the job of lawyers is to find or describe and apply that structure.<sup>291</sup> In contrast, viewing law as a medium would change the way lawyers approach the work of argument. Viewing law as a medium, arguments would have value not because they correspond to “an external, objective truth but [because of] their legitimate persuasiveness. What counts is the audience and the substantive manner of reaching them.”<sup>292</sup> Law as a medium also would fit within a cluster of allied metaphors and images: the flow of dialogue, the eddying of arguments, and the distilling of opinions would make law a medium of solidarity.<sup>293</sup> And the result could be “something other than victory for one party and defeat for the other.”<sup>294</sup>

Problems in child custody are framed by common cultural stories and images: marriage is in Trouble, families are broken, mothers put themselves first, fathers fail to pay.<sup>295</sup> Reform proposals also draw on common frames, including ideographic concepts such as equality and neutrality<sup>296</sup> and metaphoric concepts such as balance (as in the compromise of joint custody) or line-drawing (as in the approximation proposal of the ALI).<sup>297</sup>

Reframing solutions might begin by considering alternative dispute resolution mechanisms and processes sketched earlier as well as appropriate roles for the various decision makers. Next, advocates should consider ways to reframe the container which holds the family, envisioning combinations based on similarities or relationships other than biology or marriage.<sup>298</sup> Rather than extensions of the husband-wife relationship, we might include various extensions of the parent-child relationship, including

<sup>290</sup> *Id.* at 120–21. In this family of metaphors, humans are in conflict: “They seek achievement through a struggle in which each tries to master himself, his fellows, and his world. Fulfillment lies in competitive success. Wealth distinguishes winners from losers. Because individuals (nations, corporations) pursue their own interests and because resources are limited, the war of each against all is always near at hand.” *Id.* at 121.

<sup>291</sup> *Id.* at 45.

<sup>292</sup> *Id.*

<sup>293</sup> *Id.* at 122–23.

<sup>294</sup> BALL, *supra* note 288, at 133.

<sup>295</sup> Professor Fineman argues that we have misidentified the problem when we say that “marriage is in trouble” or characterize a mother and child alone together as an incomplete family. Instead, she writes, the real problem is that “we expect marriage to be able to compensate for the inequalities created by and within our other institutions.” Fineman, *Progress*, *supra* note 15, at 25.

<sup>296</sup> See Michael Calvin McGee, *The “Ideograph”: A Link between Rhetoric and Ideology*, reprinted in CONTEMPORARY RHETORICAL THEORY: A READER 425 (John Louis Lucaites et al. eds., Guilford Press 1999) (discussing ideographs, or words that signify and “contain” a unique ideological commitment, such as liberty, freedom of speech, property).

<sup>297</sup> See *supra* note 256.

<sup>298</sup> See Naomi R. Cahn, *Reframing Child Custody Decisionmaking*, 58 OHIO ST. L.J. 1, 36 (1997) (taking on the somewhat different task of reframing parents, the author examines these options for defining who is a parent: biology; the “mother-child dyad”; intent (most often used in the context of surrogacy); biology or adoption plus care or nurturing; and explicit recognition that a child might have more than two parents with “rights”).

extended, matrifocal, and patrifocal relationships, not to mention polygamous relationships. Rather than the image of a family formed by the unity of husband and wife, the basic family unit might be seen as consisting of parent and child, or more specifically as mother and child.<sup>299</sup> Or the “family unit” could be viewed as a place in which all adult caregivers share equally in all aspects of parenting.<sup>300</sup>

In place of a nuclear family made up of atoms that have been broken or split apart when child custody is in dispute, we might view the family as a growing organism, one that has been divided, but prospers; or as an evolving system of relationships, one that changes, adapts, and adds new layers. Similarly, instead of casting the mother as caretaker and the father as breadwinner, we could envision all the adults with emotional, physical, or financial care-giving relationships with the children as having multi-dimensional roles in a broader network of responsibility.

Suppose a lawyer wants to help his client keep primary custody of her daughter Mary. The client has a full-time, low-paying job, and Mary is cared for during the day by other caregivers. The more affluent former spouse has remarried and re-formed a “family”—the word “family” a metaphor here for the “nuclear” family that includes a married husband and wife, one or more children, and a division of responsibility between wage-earning and care-giving. The contrast between the “nuclear family” and the single-parent family of client and child will make the smaller family seem inadequate or incomplete, and the client will lose the contest of beneath-the-surface images.

To combat this, the lawyer may be able to persuade the decision maker that other images of parent-child relationships are more relevant. For example, Mary is growing up within a family network that consists of parent, child, extended family members, paid caregivers, friends, and neighbors; and Mary’s family is not a closed unit, but a living system. These symbols and images can be woven implicitly through arguments and testimony: “Mary’s mother cares for her family’s needs by working. Mary’s family is large, including her aunt, cousins, and grandmother as well as close friends and neighbors. Mary spends her after-school hours with a caregiver whose family lives in the neighborhood; at other times, family members and family friends share in caring for Mary.”

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<sup>299</sup> Professor Fineman points out that historically the relationship between the mother and father affected the characterization of other family members; for example, the status of children depended on whether their parents were married. Fineman, *The Neutered Mother*, *supra* note 114, at 664. According to Professor Fineman, reframing family as a Mother-Child unit would take into account the centrality of motherhood to our image of women, Fineman, *Images*, *supra* note 113, at 276–77, and it would be accompanied by reforms that would make it possible for women to fulfill their maternal responsibilities on their own, Fineman, *The Neutered Mother*, *supra* note 114, at 660–62. Finally, it would be presented as a positive alternative, unlike the current characterization in which “[a] woman and her children ‘alone’ are considered an *incomplete*, and thus a deviant unit.” Fineman, *The Neutered Mother*, *supra* note 114, at 664.

<sup>300</sup> Professors Karen Czapanskiy and Barbara Stark advocate the use of images of the “egalitarian family” and “gender-neutral parents” to shift some of the burdens of mothering to fathers and liberate mothers. Czapanskiy, *supra* note 76; Stark, *supra* note 76. Others have criticized the proposals promoting gender-neutral parenthood. See Iglesias, *supra* note 115, at 985–86.

### C. REWRITING STORIES

Advocates who use narrative must think about what stories to tell, what master stories and archetypes exert underlying influence, and the respective roles of lawyer and client in telling the client's story.<sup>301</sup> Like metaphor theory, narrative analysis is a tool for uncovering and discovering.<sup>302</sup> By calling attention to the "narrative transactions performed within the law," narrative analysis opens up what was unseen and unconscious in a judicial opinion.<sup>303</sup> Further, narrative analysis can help lawyers recognize that when they frame issues, select and present facts, and even when they select and characterize plaintiffs, they can contribute to outmoded myths and metaphors or they can create or draw on competing or reinforcing stories and images.<sup>304</sup>

Because embedded narratives represent past stories and events, they cannot be proven "wrong." Rather than merely critiquing outdated stories, advocates must discover or imagine alternative accounts. By invoking individual situations and contexts, imaginative advocacy can overcome constraining stereotypes and enable lawyers and judges to more closely examine actual experience.<sup>305</sup> In this way, advocates may overcome some of the preconceptions about nontraditional families, many of whom have been excluded from culturally embedded stories or have been required "to tell belittling and demeaning stories about themselves" to "fit into the square boxes of comfortably available legal categories and conceptions."<sup>306</sup>

Just as the poetic imagination of Szyborska split open the story of Lot's Wife, ingrained stories need not be the permanent boundaries of imagination. Not only can old stories be reviewed and rewritten, but narrative can transform audiences by allowing them to experience other worlds.<sup>307</sup> In this way, narrative imagination allows advocates to encompass "the complexity, diversity, and fluidity of human experience" in legal argument.<sup>308</sup>

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<sup>301</sup> See, e.g., Miller, *supra* note 41.

<sup>302</sup> Narrative analysis is an "analytic instrument[] in [the] toolkit that might actually be of some use with the legal plumbing." Peter Brooks, *Narrative Transactions—Does the Law Need a Narratology?*, 18 *YALE J.L. & HUM.* 1, 26–28 (2007).

<sup>303</sup> *Id.* "It is so ordered," the opinion of the Court typically concludes, letting us understand that the Court has delivered a narrative of order, one that itself imposes order, and, more generally, that narrative orders, gives events a definitive shape and meaning." *Id.* at 26. The opinion can be analyzed as a narrative written to persuade an audience that its story is "true" and correct and that each new episode fits into a master narrative about what courts do. *Id.* at 27 (citing *Planned Parenthood v. Casey*, 505 U.S. 833, 866 (1992)).

<sup>304</sup> Brown et al., *supra* note 58, at 537–38 (discussing a race-based claim as reinforcing the mythology that welfare mothers are primarily African Americans and an argument that the failure to conform to "society's mores" made the plaintiffs politically unpopular as invoking the myth that welfare mothers are immoral). See also *id.* at 538 (complaints that the toxic workplace constitutes gender-based employment discrimination support maternal mythologies that women's primary function is reproduction while "[t]he use of gendered quasi-rape myths to challenge abuses of power in the workplace can also depict women as victims in need of the law's protection").

<sup>305</sup> *Id.* at 539.

<sup>306</sup> Mitchell, *supra* note 21, at 93–94.

<sup>307</sup> WINTER, *A CLEARING IN THE FOREST*, *supra* note 18, at 123.

<sup>308</sup> Or, as Robert Cover wrote, rules, institutions, and conventions are a small part of the normative universe: "No set of legal institutions or prescriptions exists apart from the narratives that locate it and

As an example of how narrative might help the decision making process better accommodate individual circumstances, consider the theme of a narrative and how an advocate might re-envision the underlying plight, the characters, and their consciousness of their plight. Rather than the typical theme that divorce is a tragedy for lovers or a battleground for combatants, an advocate could depict the theme as a challenge to overcome common obstacles by parties working together or as a passage to a different stage in the life of a family.

Similarly, Burke's pentadic analysis might guide advocates to more flexible narratives by changing the relationships among the narrative elements of Act, Scene, Agent, Agency, and Purpose. In the usual child custody narrative, the Scene or the setting is the breakup of a marriage; that setting often controls the other elements of the story. If the Scene is the breakup of a marriage, the primary Agents or actors most likely will be viewed as Husband and Wife, their Acts will be those associated with a breakup, and their Purpose will be to bring about an ending, not a beginning.

Instead, the story could be reconfigured so that the dominant element in the pentad is the Purpose of preserving relationships between the children and the many important people in their lives. With that Purpose dominant, the Agents would include the parents (rather than the Husband and Wife), the children, and all the other individuals who have important relationships with the children. These Agents would be engaged in Acts designed to preserve relationships rather than interrupt them. The Agents would be likely to seek out Agencies (or means) for keeping the dispute between two family members from disrupting other important relationships.

As another example, the story's dominant element could be the Scene of childhood; the important Acts would be the ones that help the children move through the process of growing into young adults. If this were the Scene and the Acts, the Agents would encompass more than Husband and Wife; instead, they would include the children and all those involved in their growing up. Their Purpose would be to support the growth of the children, a significantly different purpose from the original one of ending a marriage.<sup>309</sup>

Just as the lawyer might help his client keep primary custody of Mary by re-framing family images,<sup>310</sup> the lawyer might tell different stories about the custody dispute: "While living with her mother, Mary learns math from

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give it meaning. . . . [U]nderstood in the context of narratives that give it meaning, law becomes not merely a system of rules to be observed, but a world in which we live." Robert M. Cover, *The Supreme Court, 1982 Term—Foreword: Nomos and Narrative*, 97 HARV. L. REV. 4, 4–5 (1983).

<sup>309</sup> Once having re-envisioned the story, the revision project may involve an explicit offer of evidence to support the alternative storyline. In a report suggesting alternatives to counter the recurring mass media narrative that educated women are opting out of the work force, Joan Williams and her co-authors illustrate this explicit approach to re-storytelling. WILLIAMS ET AL., *supra* note 134. Recognizing that it is not enough to say that the old narratives are wrong, they provide new evidence to support an alternative account. Based on this new evidence, the authors argue, the real storyline is that mothers have been "pushed out by workplace inflexibility, the lack of family supports, and workplace bias against mothers." *Id.* at 7.

<sup>310</sup> See *supra* Part V.B.

her aunt, cooks with her grandmother, and finds out what it means to be a teenager from her cousin. Mary has become independent, confident, and responsible as she grows up among family members, neighbors, and friends.”

## VI. CONCLUSION

Based on an assessment of the work performed by metaphor and narrative in child custody disputes, this Article concludes with an optimistic prediction: when underlying stories and images fail to account for change, rhetorical analysis and lawyerly imagination can make a difference. Such optimism should be expected from the rhetorical perspective because it is both practical and constructive.<sup>311</sup> It recognizes that interpretation is unavoidable, that humans construct meaning, and that real-life context affects our understanding of abstractions.<sup>312</sup> From this perspective, metaphor and narrative are neither eloquent nor abnormal uses of language; they are the foundation for understanding and persuasion. Seeing the dark side,<sup>313</sup> uncovering embedded metaphor and narrative in legal arguments, is important, but much more so is their potential for illumination. We cannot comprehend or convey ideas without them, let alone persuade or reach agreement.

If the meaning of legal texts depends on metaphoric and narrative constructions, it is important to discern “what interpretive frameworks are

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<sup>311</sup> As for the practical claim, “[t]he . . . lawyer’s life would be one of quiet desperation if the work consisted merely of delivering a list of issues and a record to a court that would decide cases without regard to the quality of advocacy.” Charles A. Bird & Webster Burke Kinnaird, *Objective Analysis of Advocacy Preferences and Prevalent Mythologies in One California Appellate Court*, 4 J. APP. PRAC. & PROCESS 141, 149 (2002).

As for the constructive claim, see RICHARD RORTY, CONSEQUENCES OF PRAGMATISM (ESSAYS: 1972–1980) 166 (Univ. of Minn. Press 1982) (“Our identification with our community—our society, our political tradition, our intellectual heritage—is heightened when we see this community as *ours* rather than *nature’s*, *shaped* rather than *found*, one among many which men have made.”). *But see* Stanley Fish, *The Anti-Formalist Road*, in *DOING WHAT COMES NATURALLY*, *supra* note 257, at 1, 25–26 (concluding that “we live in a rhetorical world” but that the consequences are few).

Rorty differentiates between two ways of thinking: “The first [what Fish labels as foundationalist] . . . thinks of truth as a vertical relationship between representations and what is represented.” The second is the rhetorical view, which “thinks of truth horizontally—as the culminating reinterpretation of our predecessors’ reinterpretation of their predecessors’ reinterpretation. . . . [I]t is the difference between regarding truth, goodness, and beauty as eternal objects which we try to locate and reveal, and regarding them as artifacts whose fundamental design we often have to alter.” RORTY, *supra*, at 92.

Individual perspectives as well as culturally acquired values and belief systems have much to do with whether foundationalism or rhetorical theory resonates with the reader as more or less “true” and more or less “good.” See Gerald B. Wetlauffer, *Systems of Belief in Modern American Law: A View from Century’s End*, 49 AM. U. L. REV. 1 (1999). Wetlauffer describes six different “operating systems” that he says are currently functioning in legal discourse—formalism, realism, legal process, law and economics, positivist, contemporary critical theory. The great divide is between the Grand Alliance of the Faithful (formalism, legal process, law and economics, and legal positivists) and the League of Skeptics (legal realists and contemporary critical theorists). *Id.* at 59–77.

<sup>312</sup> Talking about law and arguing about differing interpretations is the way we constitute community: rhetoric is “the central art by which community and culture are established, maintained, and transformed.” White, *Law as Rhetoric*, *supra* note 21, at 684.

<sup>313</sup> The term comes from John B. Mitchell, *supra* note 21, at 91 (discussing narrative’s “darkside:” “I have no trouble believing that laws that superficially appear neutral are often only so because they are structured around embedded stories which justify the outcome—outcomes which favor those who have the power to dictate the defining narratives.”).

at work in specific legal contexts” so that we can develop competing or complementary rhetorical moves.<sup>314</sup> This Article represents an initial foray into the undergrowth of stories and symbols that interfere with the ability of courts and judges to address individual diversity and complexity. Because metaphor and narrative can solidify and shatter pre-judgments, blind and enlighten decision makers, they constitute both the problem and a process for overcoming it.<sup>315</sup>

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<sup>314</sup> As Amsterdam and Bruner state, “[p]erhaps the most powerful trick of the human sciences is to decontextualize the obvious and then recontextualize it in a new way.” AMSTERDAM & BRUNER, *supra* note 13, at 4.

<sup>315</sup> In Bruner’s words:

My life as a student of mind has taught me one incontrovertible lesson: mind is never free of precommitment. There is no innocent eye, nor is there one that penetrates aboriginal reality. There are instead hypotheses, versions, expected scenarios. Our precommitment about the nature of a life is that it is a story, some narrative however incoherently put together. Perhaps we can say one other thing: any story one may tell about anything is better understood by considering other possible ways in which it can be told.

Bruner, *Life as Narrative*, *supra* note 43, at 709.