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Gender Justice: The Role of Stories and Images

in NARRATIVE AND METAPHOR IN THE LAW

(Michael Hanne & Robert Weisberg eds., Cambridge 2017)

Linda L. Berger and Kathryn M. Stanchi¹

Introduction

If language not only reflects but also creates reality, the language we use to talk about gender needs to change.² Feminists know this. They were among the first to critically examine the illusion that language is transparent,³ and they have taught us that the ways in which we talk about issues affect the ways we think about them. The words we select influence our impressions—and those of our audiences—and thus they limit or expand our later choices. So the language we use to talk about gender—even our choice of whether to say “sex” or “gender”—can lead to progress or it can reinforce the status quo; it can further oppression or advance liberation.

In this chapter, we argue that advocates who thoughtfully engage in metaphor-making and storytelling may alter the law’s conceptions of gender justice, and indeed of justice for all. Feminist methods, rhetorical theory, and persuasion science support this argument. Feminist methods depend on unearthing myths and icons that embody the past; they rely equally on employing memorable stories and images to enlighten us about the present and to envision the future. Similarly, rhetoricians recognize and celebrate the duality of metaphor and narrative:

¹ Kathryn Stanchi wishes to thank Marie Loiseau and Sara Mohamed for excellent research assistance.

² See Joan C. Williams, “Reconstructive feminism: changing the way we talk about gender and work thirty years after the PDA,” *Yale Journal of Law and Feminism*, 21 (2009), 79-117.

³ Iris Murdoch, *Sartre* (Cambridge: Bowes & Bowes, 1953), p. 27 (“We can no longer take language for granted as a medium of communication . . .”). See generally Dale Spender, *Man Made Language* (Chicago: Pandora, 1998); Lucinda M. Finley, “Breaking women’s silence in law: The dilemma of the gendered nature of legal reasoning,” *Notre Dame Law Review*, 67 (1989), 886-910, 888; Andrea Nye, “Woman clothed with the sun: Julia Kristeva and the escape from/to language,” *Signs: Journal of Women in Culture and Society*, 12 (1987), 664-86.

although metaphor and narrative may impose constraining labels, they are essential to generating thought, and especially to finding new ways of looking at problems.⁴ Finally, cognitive science emphasizes that our thinking is governed by the comparisons we make to embedded knowledge frameworks, including the stories and images that have become familiar to us because of our experience and culture.⁵

To explore the power to achieve gender justice by changing how we speak about gender, we begin with metaphor and narrative for two reasons. First, metaphor and narrative are central to the work of constructing common ground between writer and reader, and common ground is essential to establishing the mutual understanding that may lead to persuasion. When, for example, we want to explain something new or unusual, we use concrete images and well-known stories to suggest helpful comparisons that are familiar to both reader and writer. When we want to persuade our readers to perceive and interpret an unfamiliar item in a particular way, in order to achieve a particular outcome, comfortably fitting stories and images may implicitly carry over information, inferences, and expectations from the world we know to the new perception.

Second, and most important for our purpose in this chapter, when we want our readers to take a second look, we suggest alternative stories and images and ask them to fill in the details; we hint at possibilities and nudge the observer to step back, tilt her head, and look again. In this way, we say to our readers, “look, do you see what is really going on here?” When metaphor and narrative are used to frame new information as a part of a coherent and cohesive whole, when the frame is comfortable, and when the reader feels at home, the writer can suggest that the reader consider something new that would not be acceptable if the writer simply presented the

⁴ Kenneth Burke, “The range of rhetoric” in *A Rhetoric of Motives* (University of California Press, 1950), pp. 3-46.

⁵ See generally Linda L. Berger, “A revised view of the judicial hunch,” *Legal Communication and Rhetoric: J. ALWD*, 10 (2013), 1-39.

information and insisted that the reader take note. Using stories and images, the writer is able to shape something new into an accessible shared perspective.

Only metaphor and narrative ask the reader to join the writer in the imaginative work of seeing one thing as another: the Constitution is a living document, burning the flag is speech, a line of precedents is a journey of progress. This quality of shared imaginative work is unique to metaphor and narrative in legal argument (analogy makes a comparison but the writer does more of the work), but it is emblematic of effective fiction. For example, in Colson Whitehead's new book *The Underground Railroad*,⁶ the concept that prompts the reader to join in constructing the narrative is that the underground railroad is not a metaphor for a system of way stations and safe houses that helped slaves escape. Instead, *under the ground*, an actual railroad runs from place to place; railroad stations, conductors, and train cars full of passengers literally exist beneath the earth. In Whitehead's book, the switch from metaphorical concept to literal imagining helps Whitehead achieve the novel's task of "saying what only a novel can say." According to one reviewer, the novel does this through "small shifts in perspective: It moves a couple of feet to one side, and suddenly there are strange skyscrapers on the ground of the American South and a railroad running under it, and the novel is taking us somewhere we have never been before."⁷ The same shift in perspective that leads to re-conception—a shift that takes advantage of metaphor and narrative's ability to say what only they can say—is what we aim to achieve when we use metaphor and narrative for feminist and social justice advocacy.

⁶ Colson Whitehead, *The Underground Railroad* (NY: Doubleday, 2016).

⁷ Juan Gabriel Vasquez, "In Colson whitehead's latest, the underground railroad is more than a metaphor," *New York Times Book Review*, August 5, 2016.

The Uneasy Relationship Between Feminist Persuasion and Argument by Metaphor and Narrative

Metaphor and narrative occupy an uncomfortable space in feminist method. While they are often claimed by feminist theorists as tools for resisting patriarchal language, there is no question that they are also tools of oppression. Some feminists have wondered whether metaphor and narrative are versions of the “master’s tools” that cannot be used to “dismantle the master’s house.”⁸ Others urge that because they have been the tools of hegemony, it is appropriate that feminists co-opt them as tools of resistance.⁹

Similarly, feminist use of metaphor and narrative to resist patriarchy—and in particular patriarchy’s claim on the universal and objective truth—has been a double-edged sword. While these methods have worked many changes and expansions of legal discourse, ironically they have left feminists and other outsider scholars susceptible to the charge that feminists are “politicizing” the objective rules of law.

Turning first to metaphor, the tension is obvious in the feminist scholarship. Metaphor is a fundamental component of what Adrienne Rich referred to as the “oppressor’s language.”¹⁰ Yet others, Rich included, have seen and used metaphor as a liberating strategy for evading the confines of patriarchal language.¹¹ Metaphor is seen by some feminists as “inherently subversive” because of the emphasis on logic and objectivity in patriarchal discourse. Because

⁸ Meryl Altman, “How not to do things with metaphors we live by,” *College English*, 52 (1990), 495-506, 496 (feminism has “both feared and loved metaphor”); see Audre Lorde, “The master's tools will never dismantle the master's house” in *Sister Outsider: Essays & Speeches* (Trumansburg, NJ: Crossing Press Feminist Series, 1984), pp. 110-13.

⁹ See, e.g., Sharon Janusz, “Feminism and metaphor, friend or foe,” *Metaphor and Symbolic Activity*, 9 (1994), 289-300, 290.

¹⁰ Altman, “How not to do things” 496 (referencing both Adrienne Rich and Annette Kolodny regarding the “real world” damage of metaphors about women); see, e.g., Adrienne Rich, “The burning of paper instead of children” in *The Will to Change: Poems 1968-1970* (NY: Norton, 1971).

¹¹ Altman, “How not to do things,” 496.

metaphor makes imaginative and imagistic use of language rather than relying on literal comparisons, its use upsets the fixed “logical” categories of patriarchy.¹² Indeed, metaphor challenges the “logical established frontiers of language in order to bring to light new resemblances the previous classifications [keep] us from seeing.”¹³

For these complex and intersecting reasons, it should be no surprise that feminist writers, as diverse as Audre Lorde and Adrienne Rich and Catharine MacKinnon, often make rich and extensive use of metaphor, expressly to undermine the foundations of patriarchy and patriarchal racism by challenging its epistemology.¹⁴ Think of Catharine MacKinnon’s evocative and powerful statement that women’s “different” voice is not women's true voice but rather women's voice as distorted by patriarchy: “Take your foot off our necks, then we will hear in what tongue women speak.”¹⁵ Or Audre Lorde’s brilliant “Black Unicorn” in which she describes the dilemma of embracing identity within the constraints of cultural norms: “The black unicorn is restless / the black unicorn is unrelenting / the black unicorn is not / free.”¹⁶

Adrienne Rich’s poem, “Aunt Jennifer’s Tigers,” was, for many women, an awakening about the terror, damage, and endurance of patriarchy, but also the resilience of women. Many of us experienced the poem as the kind of powerful jolt of shared recognition that can come only from metaphor:

Aunt Jennifer's tigers prance across a screen,
Bright topaz denizens of a world of green.

¹² Janusz, “Feminism and metaphor,” 291-92.

¹³ Paul Ricoeur, *The Rule of Metaphor: The Creation of Meaning in Language*, (London: Routledge, 1977), p. 197.

¹⁴ Janusz, “Feminism and metaphor,” 291.

¹⁵ Catharine MacKinnon, “On difference and dominance” in *Feminism Unmodified: Discourses on Life and Law* (Harvard University Press, 1987), p. 45.

¹⁶ Audre Lorde, “The Black Unicorn” in *The Black Unicorn: Poems* (NY: Norton, 1978).

They do not fear the men beneath the tree;
They pace in sleek chivalric certainty.

Aunt Jennifer's fingers fluttering through her wool
Find even the ivory needle hard to pull.
The massive weight of Uncle's wedding band
Sits heavily upon Aunt Jennifer's hand.

When Aunt is dead, her terrified hands will lie
Still ringed with ordeals she was mastered by.
The tigers in the panel that she made
Will go on prancing, proud and unafraid.¹⁷

But for every metaphorical articulation that subverts patriarchy, there “lurks another identifiable disempowering articulation.”¹⁸ And when feminists “claim” metaphor as a subversive tool, we risk reinforcing the arguments that demean feminist discourse as illogical, frivolous, and politicized.¹⁹ Positing metaphor as an inherent challenge to the purported objective rationality of patriarchal discourse reinforces the common disparagement of metaphor as meaningless decoration. Not surprisingly, metaphor has been associated with femininity because in the dominant discourse, rationality and logic are male; irrational, emotional and ornamental

¹⁷ Adrienne Rich, “Aunt Jennifer’s Tigers” in *Collected Early Poems: 1950-1970* (NY: Norton, 1995).

¹⁸ Janusz, “Feminism and metaphor,” 290.

¹⁹ Recall Catharine MacKinnon’s anger at the criticism that her anti-pornography argument was metaphorical in *Only Words*: “[T]o say that pornography is an act against women is seen as metaphorical or magical, rhetorical or unreal, a literary hyperbole or propaganda device.” Catharine A. MacKinnon, *Only Words* (Harvard University Press, 1993), p. 11.

language is female.²⁰ Law is certainly not immune to these linguistic stereotypes and feminist legal scholars have been, perhaps rightly, wary of labeling metaphor a uniquely feminist tool.

Narrative method shares some of the same tensions and contradictions. On the one hand, narrative method has been embraced by feminism as a “substantive and methodological challenge” to conventional legal narratives. As Patricia Williams has noted “legal language flattens and confines in absolutes the complexity of meaning inherent in any given problem.”²¹ By introducing different story lines and alternative characterizations, counter-narrative is a way for feminists to fight the traditional constraints on legal storytelling. Like metaphor, narrative method has been celebrated by feminists, and other marginalized groups, as a way of disrupting the conventional narratives, stock stories, and determinations of relevance that are so prevalent in law and that often drive the law’s outcomes.²²

But narrative is hardly an exclusively feminist tool. Law is filled with narrative—not just stories about what happened, but stories about what the law is and what it purports to do. As Linda Edwards has noted, “when we talk about legal authority, using the logical forms of rules and their bedfellows of analogy, policy, and principle, we are actually swimming in a sea of narrative, oblivious to the water around us.”²³ Despite the ubiquity of narrative in law, some judges and legal scholars still view narrative as suspect—as a tool that obfuscates and confounds

²⁰ Janusz, “Feminism and metaphor,” 293. Sometimes, though the feminine is posited as “literal” when “literal” is pejorative. Altman, “How not to do things,” 498-99. Steven Winter pointed out the metaphorical nature of claims that “reason is cold; it is rigorous; it is linear; it is clear; it is felt.” Steven L. Winter, “Death is the mother of metaphor,” *Harvard Law Review*, 105 (1992), 745-72, 749.

²¹ Patricia J. Williams, *The Alchemy of Race and Rights*, (Harvard University Press, 1991), p.6..

²² See generally Kathryn Abrams, “Hearing the call of stories,” *California Law Review*, 79 (1991), 971-1052; Susan Winnett, “Coming unstrung: women, men, narrative and principles of pleasure,” *PMLA*, 105 (1990), 505-18.

²³ Linda H. Edwards, “Once upon a time in law: Myth, metaphor, and authority,” *Tennessee Law Review*, 77 (2010), 883-916, 884; see also Jane B. Baron and Julia Epstein, “Is law narrative?” *Buffalo Law Review*, 45 (1997), 141-87, 144-45.

the goals of law to be transparent, rational, and rule-based.²⁴

The paradox that metaphor and narrative can be simultaneously tools of patriarchy and liberating tools of feminism has led some feminists to see the use of metaphor and narrative as a kind of linguistic power struggle in which the dominant group uses metaphor and narrative to delineate and reinforce the discourse boundaries and the “out group” uses them to break through those same boundaries. Language creates and reinforces conceptions of reality, and the law is replete with narrative and metaphor that create and reinforce patriarchy. For feminists, similarly, narrative and metaphor are the way we “give name to the nameless so it can be thought.”²⁵ Metaphor and narrative are methods of speaking and creating women’s reality. Thus, feminists must put metaphor and narrative to work as catalysts toward change.

Metaphor and Narrative, Together and Apart, in Legal Reasoning and Argument

Because of the uneasy relationship between feminist methods and the rhetorical practices of metaphor and narrative, feminist arguments provide an appropriate setting to explore how metaphor and narrative interact with one another, how they are different, and how they work in legal persuasion. To start with their interaction, stories can be seen as fitting within metaphorical frames,²⁶ and metaphors often emerge from stories, especially stories that have lived long enough to become deeply embedded in the culture. When that happens, as in the metaphor that

²⁴ See Pierre N. Leval, “Judicial opinions as literature” in Peter Brooks and Paul Gewirtz (eds.), *Law’s Stories* (Yale University Press, 1996); Daniel A. Farber and Susanna Sherry, “Telling stories out of school: An essay on legal narratives,” *Stanford Law Review*, 45 (1993), 807-55.

²⁵ Audre Lorde, “Poetry is not a luxury” in *Sister Outsider: Essays & Speeches* (Trumansburg, NJ: Crossing Press Feminist Series, 1984), 37.

²⁶ According to Winter, narrative is understood because it arrives in a metaphoric frame: we have constructed an ideal 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.” Steven L. Winter, *A Clearing in the Forest: Law, Life, and Mind* (University of Chicago Press, 2001), 106-13.

men and women exist in *separate spheres*, the metaphorical image constitutes the distilled residue of the story. Spinning off from the original story, these distilled images take on a life of their own. When we think of Rapunzel, for instance, we see long, blond hair falling from a high window, but we recall little of the sequence of events or the conflict of characters that the fairy tale recounted.

As for their distinctiveness, even as a metaphor may contain the murky half-image of a narrative, the metaphor may also move the story to a higher plane of generality, and thus to a broader application, forming a “loft beyond the particular.”²⁷ While narrative is closely allied with the linear telling of chronological time, metaphor is able to capture the turning points and essential moments of kairic time, “nodal points at which the threads of narrative join and divide.”²⁸ When used as the overall frame for an argument, metaphor often is conceptual (the Constitution is a living document), and narrative frequently is sequential (the steps in the evolution of Constitutional interpretation constitute progress toward justice). As a result, the advocate seeking to argue against the status quo may turn more often to metaphor for the work of “imagining as”—projecting a new conception of how things might be. Narrative’s more frequent use for the advocate of social change, on the other hand, may be to provide an “accounting for”—telling the full story to account for how things are.

Still, these differences do not change the common persuasive power of metaphor and narrative nor do they diminish their ability to work together.

²⁷ Jerome Bruner, *Making Stories: Law, Literature, and Life* (Harvard University Press, 2003), 25.

²⁸ Michael Hanne, “Getting to know the neighbours: When plot meets knot,” *Canadian Review of Comparative Literature*, 26 (1999), 35-50.

The significance of metaphor and narrative in legal argument

Earlier in the chapter, we made a claim for the uniqueness of metaphor and narrative among legal argument frames. Here, we claim that when it comes to validity and effectiveness, metaphor and narrative stand on equal footing with syllogism and analogy. In the previous sentence, for example, we recognize *equal footing* as metaphorical, and we may trace the metaphor's narrative past to debates about the first U.S. Constitution's inclusion of each of the states on an "equal footing."²⁹ There, the metaphor embodied the principle that would govern admission of the Western states to the Union.

Only a few examples are needed to support the assertion that metaphor and narrative are both prevalent and effective in legal persuasion. For instance, after the oral argument before the U.S. Supreme Court in *Zubik v. Burwell* in the spring of 2016, many observers pointed to the attention-grabbing metaphor employed by advocate Paul Clement. Clement told the Court that the government's plan through the Affordable Care Act was to "hijack" the health plans provided by organizations affiliated with religious groups so that the government could make sure female employees received contraceptives.³⁰ Decades earlier, now-Supreme Court Justice Ruth Bader Ginsburg used a perspective-shifting metaphor in the brief she submitted to the Supreme Court on behalf of the female spouse in *Reed v. Reed*, a 1971 case in which the court ruled that an Idaho statute preferring males as the administrators of estates was unconstitutional.³¹ Ginsburg wrote that the "pedestal upon which women have been placed has all too often, upon closer

²⁹ See Clarence B. Carson, *A Basic History of the United States* (Wadley, AL: American Textbook Committee, 1995), vol. II.

³⁰ See Linda Greenhouse, "A Supreme Court hijacking," *The New York Times*, March 30, 2016. During oral argument, several justices picked up on and seemingly agreed that Clement's metaphor was accurate. The Court eventually ordered the parties to seek a compromise. *Zubik v. Burwell*, 578 U.S. ___, 136 S. Ct. 1557 (2016).

³¹ *Reed v. Reed*, 404 U.S. 71 (1971).

inspection, been revealed as a cage,”³² a phrase repeated two years later in the majority opinion in *Frontiero v. Richardson*, where the court held that women who were members of the military could claim their spouses as dependents to receive increased benefits “on an equal footing” with male members of the military.³³ As for narrative, there is increasingly widespread recognition and acceptance of its influence. On both sides of issues ranging from reproductive rights to same-sex marriage, advocates are filing amicus briefs filled with the stories of individuals not in front of the court but designed to persuade the Supreme Court of one perspective or another.³⁴

Remarkably little quarrel remains with the legitimacy of metaphor and narrative in legal reasoning. Beginning at least with the legal realists, judges, advocates, and scholars have recognized that “the purpose of legal reasoning is not to prove to others the truth of a statement of fact, but is rather to persuade others about how the law ought to be interpreted and applied. Although ... logical in form, in substance it is evaluative.”³⁵ Each of the argument frames employed in legal persuasion—metaphor, narrative, syllogism, and analogy—combines facts and law, the raw materials of legal reasoning. And each depends to a greater or lesser extent on similar mental processes: metaphor and syllogism use categorization; narrative and analogy consider setting, plot, and characterization; metaphor and analogy rely on comparison and differentiation; narrative and syllogism are structured sequentially.

³² *Reed v. Reed*, Br. of Appellant, 1971 WL 133596 (U.S.), 21 (U.S., 2004).

³³ Justice Brennan wrote that “[t]raditionally, such discrimination was rationalized by an attitude of ‘romantic paternalism’ which, in practical effect, put women, not on a pedestal, but in a cage.” *Frontiero v. Richardson*, 411 U.S. 677, 684 (1973) (Brennan, J.).

³⁴ See generally Linda H. Edwards, “Hearing voices: Non-party stories in abortion and gay rights advocacy,” *Michigan State Law Review* (2015), 1327-56.

³⁵ See, e.g., Wilson R. Huhn, “Use and limits of syllogistic reasoning in briefing cases,” *Santa Clara Law Review*, 42 (2002), 813-62.

How metaphor and narrative persuade

When we talk about metaphor in this chapter, we are thinking of two general categories.³⁶ The first is the non-literal comparison through which you are asked to shift your perspective and to “see” one thing as another (*Juliet is the sun*, legislation ostensibly aimed at protecting women instead constitutes a *cage*, the teenager who downloads music without paying is a *pirate*). Most of the metaphors discussed in this chapter fall primarily within the first category. The second category is the use of concrete, visual, or figurative images to explain abstract concepts (*justice is balancing*, *life is a journey*). These images make it easier to think about and manage abstract or unfamiliar concepts. If the audience accepts the metaphor that copyrights are “property” like real estate, it will transfer inferences and rules from one concept to the other and certain consequences will follow: like real estate, copyrights can be bought and sold, divided, leased, and even protected against trespass. Similarly, if the teenager who downloads a piece of music without paying is a “pirate,” then that teenager is an outlaw who should be punished.

Like all category distinctions, these are fuzzy, and a metaphor that starts out in one category easily slips into the next. Some characterize the first category as poetic metaphor; its purpose often is to *make the familiar strange* so that the observer will look again. Like poetry, it disorients the observer, opening up new outlooks and shifting views. The second category is characterized as propositional metaphor; its purpose often is to *make the strange appear familiar*

³⁶ We also distinguish conscious and purposeful uses of metaphor, the focus of the chapter, from the automatic and unconscious uses of metaphor well documented by Lakoff and Johnson. See George Lakoff and Mark Johnson, *Metaphors We Live By* (University of Chicago Press, 1980); see also James Geary, *I Is an Other: The Secret Life of Metaphor and How It Shapes the Way We See the World* (NY: Harper, 2012), 3 (“[W]e utter about one metaphor for every ten to twenty-five words, or about six metaphors a minute.”).

so that the observer can more easily understand. Like literal propositional assertions, it suggests a particular reasoning sequence that leads to a desired outcome.³⁷

Whether used to shift perspectives or to encourage large-scale conceptual mapping, metaphor's persuasive power derives from similar thinking processes. First, much of our decision making is governed by tacit knowledge and unconscious assumptions and inferences.³⁸ Because tacit knowledge is automatic and constant, it remains unexamined and uncontested. As a result, invoking a deeply embedded conventional metaphor that calls no attention to itself works on a decision maker in an automatic and unexamined way. Second, thought processes themselves are said to be metaphoric. In other words, metaphor is both a figure of thought and a way of thinking.³⁹ Many metaphors 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 up⁴⁰); 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 directly linked to our learning about the world through the senses of sight and

³⁷ Linda L. Berger, “Metaphor in law as poetic and propositional language,” *The European Legacy: Towards New Paradigms, Journal of the International Society for the Study of European Ideas* (ISSEI) (2013).

³⁸ See, e.g., George Lakoff and Mark Johnson, *Philosophy in the Flesh: The Embodied Mind and its Challenge to Western Thought* (NY: Basic Books, 1999), pp. 9-15. See also Dan M. Kahan, “The cognitively illiberal state,” *Stanford Law Review*, 60 (2007), 101-40, 115 (discussing the “psychological mechanisms that moor our perceptions of societal danger to our cultural values”); John B. Mitchell, “Narrative and client-centered representation: What is a true believer to do when his two favorite theories collide,” *Clinical Law Review*, 6 (1999), 85-126, 88-89 (“our legal texts float in a sea of varied and often conflicting cultural and historical narratives from which their ultimate meaning is derived.”).

³⁹ Donald A. Schön, “Generative metaphor: A Perspective on Problem-Setting in Social Policy” in Andrew Ortony (ed.), *Metaphor and Thought* (2d ed., Cambridge University Press, 1993), p. 137. See also George Lakoff, “The contemporary theory of metaphor” in Ortony, ed., *Metaphor and Thought*, p. 203.

⁴⁰ Lakoff, “Contemporary theory,” 240.

touch.⁴¹ In this way, metaphor helps us to perceive and understand abstract concepts in the same way that we “see” and “grasp” physical ones.

Third, logical reasoning appears to be structured analogically and metaphorically.⁴² We make sense out of new experiences by placing them into categories⁴³ and cognitive frames called schemas or scripts.⁴⁴ As we go about our lives, we acquire and construct increasingly more sophisticated frames. 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.⁴⁵ The resulting mental blueprints provide both cognitively effective shortcuts and unexamined stereotypes.

Narrative’s persuasive power is related. When we talk about narrative in this chapter, we include stories that organize two or more events through time and that, if they are to be effective, resonate emotionally with an audience.⁴⁶ Rather than the “compare” and “categorize” of metaphorical processing, narrative often assigns purpose, sequence, and causation to a series of otherwise-unconnected events. Still, narrative has a similarly tacit and automatic effect. In a successful narrative, once the critical force has been triggered into action, a long line of dominoes collapses as expected.

⁴¹ Winter, *A Clearing in the Forest*, pp. 55-56.

⁴² Winter, *A Clearing in the Forest*, pp. 56-68.

⁴³ See Anthony G. Amsterdam and Jerome Bruner, *Minding the Law* (Harvard University Press, 2002), pp. 19-109 (explaining categories and their use at the Supreme Court).

⁴⁴ See generally Ronald Chen and Jon Hanson, “Categorically biased: the influence of knowledge structures on law and legal theory,” *Southern California Law Review*, 77 (2004), 1103-1254, 1131-1218 (describing the literature showing that categories and schemas are “critical building blocks of the human cognitive process”).

⁴⁵ Lakoff and Johnson, *Philosophy in the Flesh*, pp. 32-34 and pp. 60-66.

⁴⁶ Maksymilian Del Mar, “Exemplarity and narrativity in the common law tradition: Exploring *Williams v. Roffey*,” Queen Mary University of London, School of Law Legal Studies Research Paper No. 139/2013 (available at: <http://ssrn.com/abstract=2247937>).

What Lakoff and Johnson refer to as metaphor's embodiment of human experience has a parallel in the theme of a story that incorporates a seemingly universal plight.⁴⁷ Like conventional metaphors, stock stories provide mental blueprints and cognitive shortcuts.⁴⁸ Because of their familiarity, such conventional narratives make new experiences more understandable, and they allow an observer to predict what will happen next.⁴⁹

How metaphor and narrative contribute to feminist and social justice advocacy

Metaphor and narrative are unique and complex frames for legal argument. They allow the feminist advocate to invite the reader to try on a new or an alternative conception of how things are or how they should be. Stories and metaphors (both perspective-shifting and large-scale conceptual ones) are particularly effective for this purpose because they can make the new or alternative conception appear to be part of a coherent and cohesive whole, and they can provide the reader with a comfortable world in which the reader feels at home. What qualities give metaphor and narrative the ability to say what only they can say?

First, metaphor and narrative play a crucial role in decision making: they reassure us that things hang together, that discrete items are connected to one another in an understandable way.⁵⁰ Cognitive research reinforces our intuitive conclusion that it is easier to make a decision when the evidence and reasons supporting the decision make up a fairly coherent and cohesive package. Metaphor and narrative help us construct that package. The metaphorical process

⁴⁷ Jerome Bruner, "Life as narrative," *Social Research*, 71 (2004), 691-710, 696.

⁴⁸ Amsterdam and Bruner, *Minding the Law*, pp. 30-31.

⁴⁹ Amsterdam and Bruner, *Minding the Law*, p. 117. See also J. Christopher Rideout, "Storytelling, narrative rationality, and legal persuasion," *Journal of Legal Writing*, 14 (2008), 53-86, 55.

⁵⁰ See generally Linda L. Berger, "The lady, or the tiger? A field guide to metaphor & narrative," *Washburn Law Review*, 50 (2011), 275-318.

allows us to gather up our perceptions, group them together, and “contain” them.⁵¹ The narrative process allows us to link a number of essentially disjointed events together, place them into a story line with a beginning and an end, and compose an accounting.⁵²

Second, metaphor and narrative operate with fewer constraints than conventional analogical and syllogistic argument and so are more flexible argument frames. Arguments based on major and minor premises usually must draw on conventional values and beliefs, but the advocate who turns to narrative has the freedom to draw on information and concepts outside the traditional bounds. Stories “can appeal to what is, by convention, still taboo in a culture. Because facts themselves capture and reflect values, what cannot be argued explicitly can be sneaked into a story.”⁵³ In a similar manner, the advocate who turns to metaphor may advance positions without being held to them. When you use a metaphor, the listener usually understands that you have said one thing but that you likely have meant another (Juliet isn’t *really* the sun). When you use an analogy, it is hard to deny that you have explicitly stated that *the corporation is like a person* and so you may have to provide supporting arguments to establish the similarities.

Perhaps most important, flowing from their role in spurring invention by the writer (and unlike analogy and syllogism), metaphor and narrative are persuasive precisely because they are allusive, leaving something to the imagination. When the reader fills in the gaps, metaphor and narrative become joint constructions, creating shared identity and understanding. As Milner Ball has noted, much of “narrative is inherently communal. A story is shared.”⁵⁴ Narrative and

⁵¹ See Linda L. Berger, “Preface,” *Journal of the Association of Legal Writing Directors*, 7 (2010), vii. This concept draws on the metaphors that the mind is a container and ideas are objects. See, e.g., Lakoff and Johnson, *Philosophy in the Flesh*, 338, 124-25.

⁵² Amsterdam and Bruner, *Minding the Law*, pp. 30-31.

⁵³ Gerald P. López, “Lay lawyering,” *UCLA Law Review*, 32 (1984-85), 1-60, 33.

⁵⁴ Milner S. Ball, “Stories of origin and constitutional possibilities,” *Michigan Law Review*, 87 (1989), 2280-2319.

metaphor thus are most effective when the audience is part of the performance, something that happens naturally with long-established images and stories.

Because both rely on seeing one thing “as” another, metaphor and narrative always carry more (or less) meaning than appears on the surface. Mapping is commonly understood as part of the processing of metaphorical meaning, but understanding narrative also depends on transferring characteristics, reasoning processes, and outcomes from one domain (the familiar plot or the source) to another (the current series of events or the target). In the process, some features are highlighted, but others are eclipsed. So when we view an individual woman through the lens of a metaphorical image left behind by a compelling narrative—a Madonna, a Mary Magdalene, a Jezebel—we get more than we consciously know. And we lose much as well: the opportunity for a fuller accounting, a richer understanding, a broader vision of equity.

This quality of metaphor and narrative crystallizes the dilemma advocates face every time they choose one approach—or even one word—over another. Every choice forecloses another one. Emphasizing one image means that another will not spring to mind. When you ask the listener to see an individual through the lens of a particular characterization (father provider, master criminal) or to see a series of happenings through the filter of a narrative arc that makes them appear to be related in a particular way (the quest, the detective story), you obstruct an alternative view. As you ask the listener to see one thing, you are also asking the listener *not* to see another.

As this discussion suggests, the advocate for social change should understand when certain kinds of images and stories may be most effective for a particular persuasive task. Because metaphor and narrative connect most readily with an audience when the audience member links them to what is already in her mind, well-known or traditional metaphors and

established stock stories will be processed more automatically. The audience member will accept without thinking those images and stories that are so well known they are virtually unnoticed. On the other hand, novel metaphors and individualized or particularized stories—once the audience is inclined to hear them—will require more reflection and generate more resistance. As a result, they may sometimes lead to changed conceptions.⁵⁵

The disruptive use of metaphor and narrative in feminism and ‘feminist judgments’

To further explore the relationship between feminism and the rhetorical use of narrative and metaphor, we turn to a recent project that combines the theory of feminism and the rhetoric of judicial decision making. The U.S. Feminist Judgments Project is a collaborative project that has resulted in the rewriting of important and influential cases using feminist reasoning. In its first compilation of rewritten cases, feminist scholars and lawyers re-imagined twenty-five critical Supreme Court cases on issues related to gender justice.⁵⁶ The authors rewrote and re-reasoned these opinions, using the precedent available at the time of the original decision, but also bringing to the precedent a feminist perspective and philosophy.

In the examples below, we explore how metaphor and narrative were used in the original Supreme Court opinions (often unconsciously) to create and reinforce traditional assumptions about gender roles and relationships and how the feminist justices used the same rhetorical practices to challenge and undermine the conventional assumptions and stereotypes of gender embedded in the law.

⁵⁵ Linda L. Berger, “Metaphor and analogy: The sun and moon of legal persuasion,” *Journal of Law and Policy*, 22 (2013), 147-95.

⁵⁶ Kathryn M. Stanchi, Linda L. Berger, and Bridget J. Crawford (eds.), *Feminist Judgments: Rewritten Opinions of the United States Supreme Court* (Cambridge University Press, 2016).

The long tail of the ‘separate spheres’ metaphor

The history of the metaphor evoking an image of men and women living out their lives in *separate spheres* demonstrates the long-lasting, tangible effects such an image may have on the law and society. Through time, the metaphor has suggested a dichotomy of men’s and women’s lives: one being mostly public, one primarily private, one going out to work, and one staying in the home with family. This dichotomy has framed legal issues and arguments for centuries.

Among the most memorable expressions of the metaphor was Justice Bradley’s 1873 concurrence in *Bradwell v. Illinois*, the case in which the Supreme Court agreed that nothing in the Constitution, including the new Fourteenth Amendment, precluded Illinois from denying a law license to Myra Bradwell.⁵⁷ The majority’s grounds were legal—admission to practice in the courts of a state was not a privilege or immunity of the citizens of the United States—but Justice Bradley’s concurrence was based almost entirely on metaphor.

Historian Linda Kerber traced the historical roots of the metaphor to prehistoric times: “the habit of contrasting the ‘worlds’ of men and of women, the allocation of the public sector to men and the private sector (still under men's control) to women is older than western civilization.”⁵⁸ Kerber pointed out as well that the public-private divide was “deeply embedded in classical Greek thought,” with women relegated to the private side, while men “lived in both the private and the public mode.” Europeans brought these assumptions with them to America, and in the mid-1800s, Alexis de Tocqueville supplied the image that captured the metaphor. In a description of young middle-class American women, de Tocqueville described the independence they enjoyed until they were married. But when they married, he wrote, “the inexorable opinion

⁵⁷ *Bradwell v. Illinois*, 83 U.S. 130 (1873).

⁵⁸ Linda K. Kerber, “Separate spheres, female worlds, woman's place: The rhetoric of women's history,” *Journal of American History*, 75 (1988), 9-39.

of the public carefully circumscribes [her] within the narrow circle of domestic interests and duties and forbids her to step beyond it."⁵⁹ Kerber credited this sentence with providing both the concrete image of a circle or sphere and the interpretation that the sphere was limiting.

The social-legal-cultural assumptions captured and reinforced by the metaphor exercised significant influence on the law and public policy well into the twenty-first century: "The fundamental reason that working women's pregnancies or disproportionate load of family work creates gender disadvantage is that we still define the ideal worker as someone who works full force and full time, uninterrupted for thirty years straight—that is, someone supported by a flow of family work from a spouse, which most women never receive."⁶⁰

Justice Bradley's concurrence in *Bradwell* demonstrated the powerful metaphor at the root of the majority's apparently syllogistic legal reasoning about legal protections. Justice Bradley asserted that both the law and "nature herself" had established that men and women existed, and would always do so, within separate spheres:

[T]he civil law, as well as nature herself, has always recognized a wide difference in the respective spheres and destinies of man and woman. Man is, or should be, woman's protector and defender. The natural and proper timidity and delicacy which belongs to the female sex evidently unfits it for many of the occupations of civil life.⁶¹

Recognizing that changes had already occurred in the statutes he relied on, Justice Bradley called on higher authority, determining that families had been constituted in a particular way because of both "divine ordinance" and "nature."

⁵⁹ Kerber, "Separate spheres," 10 (quoting Alexis de Tocqueville, *Democracy in America* (New York, 1945), vol. II, bk. 3, ch. 9-12, esp. pp. 201, 211, 214).

⁶⁰ Williams, "Reconstructive feminism," 80.

⁶¹ *Bradwell v. Illinois*, 83 U.S. at 140 (Bradley, J., concurring).

In her feminist revision of *Bradwell*, Professor Phyllis Goldfarb acknowledged the power of the metaphor and attributed its persistence to the long-standing operation of legal norms excluding women from the public sphere.⁶² Questioning the metaphor's factual basis, Goldfarb emphasized that "the boundaries of the separate spheres have been much traversed" over a long period of time by, among others, "slave women, pioneer women, women who settled the frontiers of this vast nation, women who managed lands and businesses while men were fighting the Civil War." Using counter-examples that "disprove" the assumptions underlying the metaphor, Goldfarb charged that the justices had allowed the metaphor and the beliefs it represents to displace the rule of law: "Their expressed belief in a hierarchical social order in which men and women should forever and always operate in separate spheres appears to cloud their Fourteenth Amendment vision."

Outside the rewritten feminist judgment, the separate spheres metaphor continued to play a powerful if implicit and unacknowledged role in U.S. law. Only a few years later, in *Muller v. Oregon*, the Supreme Court—whose members had just decided that men had a right to contract for their labor without the state's intrusion in the infamous *Lochner* decision—determined that women were different and that their greater need for protection allowed the state to limit their working hours. The influence of the metaphor that men and women live in separate spheres is evident in the Court's reasoning, which centers on women's primary role in the private sphere of motherhood and child rearing: "Even though all restrictions on political, personal, and contractual rights were taken away, and she stood, so far as statutes are concerned, upon an absolutely equal plane with him, it would still be true that she is so constituted that she will rest

⁶² Phyllis Goldfarb, "Bradwell v. Illinois," in Stanchi, Berger, and Crawford (eds.), *Feminist Judgments*, pp. 60-77.

upon and look to him for protection.” Both “her physical structure and a proper discharge of her maternal functions . . . justify legislation to protect her from the greed as well as the passion of man.”⁶³

In her *Feminist Judgments* revision of *Muller*, Professor Pamela Laufer-Ukeles thus confronted a legal question that was both framed and constrained by the assumption that men and women operate in separate spheres.⁶⁴ Because of the metaphor, the question in *Muller* became how to equalize the treatment of persons who exist in different spheres, that is, whether to treat women the same as men, or whether to treat them differently because of their perceived differences. The metaphor’s persistence made the male sphere both the norm and the aspiration for *equal* treatment. The metaphor’s dominance diminished the advocate’s and the judge’s ability to imagine and to require a standard that rejected the dichotomy of the spheres.

Decades later, in *Geduldig v. Aiello*,⁶⁵ the Supreme Court allowed California to discriminate against pregnant women in a disability insurance program on the basis that the discrimination was between pregnant and non-pregnant persons, and thus was not based on gender. Professor Lucinda Finley, writing the *Feminist Judgments* opinion, pointed out that the persistent separate spheres metaphor kept women from full participation in the workplace: “Women’s ability to become pregnant and bear children has long been used as a rationale to deprive them of the economic security and independence, intellectual development, societal opportunity and respect that can come from full participation in the workplace.” In particular, Finley pointed to the metaphor’s accompanying “[a]ssumptions and stereotypes about the physical and emotional effects of pregnancy and motherhood, about the appropriate role of

⁶³ *Muller v. Oregon*, 208 U.S. 412 (1908).

⁶⁴ Pamela Laufer-Ukeles, “Muller v. Oregon” in Stanchi, Berger, and Crawford (eds.), *Feminist Judgments*, pp. 83-97.

⁶⁵ *Geduldig v. Aiello*, 417 U.S. 484 (1974).

women in society and the workplace stemming from the physical fact of childbearing, and about the perceived response of women to childbearing.”⁶⁶

As late as 2001, the metaphor was still at work in a lawsuit filed by a father complaining of unfair treatment based on long-standing stereotypes about men’s and women’s roles in caring for children. In *Nguyen v. INS*,⁶⁷ the Supreme Court let stand an immigration statute that required fathers to satisfy more onerous criteria than mothers in order to pass on citizenship to their children born abroad. In her opinion for *Feminist Judgments*, Professor Ilene Durst emphasized the separate spheres ideology underlying the original decision: “The statute as written embodies the unconstitutional presumption that the mother, because of biology, will form ties with the child and ensure that the child forms ties with the United States. In contrast, the presumption is that the unwed citizen father, in the absence of a legal adjudication of paternity, will prefer to abandon or disassociate himself from the child born abroad.”⁶⁸

The separate spheres metaphor—said to have been inspired by nature and divine ordinance—has become embedded in the law by generations of lawyers and judges. To cut short its influence, something more than evidence and argument is needed.

Metaphor’s new eyes

When confronted with a tenacious metaphor whose implicit acceptance has constrained the development of the law, what can the feminist advocate do? In her *Feminist Judgments* dissent, Goldfarb demonstrated that Justice Bradley’s foundational belief that men and women

⁶⁶ Lucinda Finley, “Geduldig v. Aiello” in Stanchi, Berger, and Crawford (eds.), *Feminist Judgments*, pp. 190-207.

⁶⁷ *Nguyen v. INS*, 533 U.S. 53 (2001).

⁶⁸ Ilene Durst, “Nguyen v. INS” in Stanchi, Berger, and Crawford (eds.), *Feminist Judgments*, pp. 473-84.

existed in separate spheres was metaphorical rather than factual. But even if not supported by evidence, well-entrenched metaphors are difficult to overcome. We are unlikely even to talk about the metaphor's existence or its meaning as long as we all share the same unspoken understanding. We are equally unlikely to question the reasoning and results that flow naturally from the associations accompanying the metaphor. Moreover, as discussed earlier, the influence of the separate spheres image has been felt not only in the judicial decision making process, affecting legal outcomes as in *Bradwell*, but also in the persistent narrowing of subsequent legal questions.

Cognitive psychology and rhetorical theory suggest that if the advocate is able to imagine and employ a novel metaphor (one that begins on a common ground of familiarity or recognition and then shifts a couple of feet to one side), her audience may be better able to consider an alternative reasoning process.⁶⁹ Thus, if such a novel metaphor is accepted—not as a substitute but as an alternative—its use may disrupt unconsciously expected outcomes.⁷⁰

Confronted with the seemingly “natural” metaphor of separate spheres, Goldfarb imagined and employed several novel metaphors. Together, these metaphors constructed the foundation for an alternative reasoning process. Remember that a novel metaphor may be a new conception or a new expression or both, but often it is simply the use of an already-familiar comparison in a new context. Rather than calling attention to itself, as would the suggestion that a corporation is a tiger, a novel metaphor is immediately recognized as something familiar but requiring further thought (for example, a corporation's speech is a manufactured product).

Goldfarb's novel metaphors were these: the new Fourteenth Amendment had

⁶⁹ Berger, “Metaphor and analogy,” 147.

⁷⁰ Paul Ricoeur, *The Rule of Metaphor: Multidisciplinary Studies of the Creation of Meaning in Language* (University of Toronto Press, 2004), p. 233.

reconstituted the Constitution. In this way, the Fourteenth Amendment had reconstructed the nation's governing structure, and in particular the relationship between the federal and state governments and their citizens. At the center of this new governance structure and understanding of the federal-state relationship, Goldfarb created a new concept that sounded familiar: any citizen of the United States should be seen as a *federal citizen* who is entitled to protection by the federal government against state incursions into that citizen's rights.

Acceptance of Goldfarb's novel metaphors would have reconfigured the Supreme Court's reasoning. In the original *Bradwell* opinion, the majority had followed the narrow view of the Fourteenth Amendment's Privileges and Immunities Clause that the Court had just adopted in the *Slaughter-House Cases*.⁷¹ If Goldfarb's novel metaphors had been accepted, the Fourteenth Amendment would have been seen instead as a guarantee to all citizens not only of equality but also of an entitlement to the privileges and immunities accruing to any federal citizen. These new metaphors did not seek to change minds about the lives of men and women. Instead, they set up an "ah-ha" moment for the audience: every federal citizen is entitled to the same fundamental rights.

Goldfarb began by constructing a new perspective on the Reconstruction Amendments:

This term marks the Court's first occasion to give meaning to America's new national structure, as enshrined in three Constitutional amendments adopted in 1868 in the aftermath of our terrible and protracted Civil War. Designed to alter the political dynamics of our union, these Amendments establish fundamental freedoms protected by federal power.

Thus, the amendments had both the explicit purpose and the concrete result of changing the

⁷¹ *Bradwell*, 83 U.S. at 139 (following *Slaughter-House Cases*, 83 U.S. 36 (1873)).

structure and functioning of the nation's governments.

As Goldfarb developed the foundation for a reconstituted national government, she spelled out the “not yet five-year-old text” of Section One of the Fourteenth Amendment, which includes the statement that “No State shall make or enforce any law which shall abridge the privileges and immunities of citizens of the United States,” along with the now-more-familiar due process and equal protection guarantees. These moves framed the legal argument in a different way and took it in a wholly new direction:

What is the meaning of United States citizenship? The second sentence of Section One bears at least part of the answer: citizens have privileges—freedom to do things—and immunities—freedom from state restrictions in exercising their privileges. In short, the Privileges and Immunities Clause tells us that citizens like Bradwell have rights that all states—while showing regard for equal protection and due process of law—must protect. In sum, through the operation of the Fourteenth Amendment, the Constitution now restricts state governments, not just the federal government, from impeding civil rights and individual liberties.

Here, Goldfarb created substantive protections for federal citizens by establishing the Privileges and Immunities Clause as prohibiting state infringements on those rights.

Goldfarb fleshed out the figure of the *federal citizen* by tracing the history of the privileges and immunities clause and emphasizing that the freedoms long thought to be encompassed in citizenship include the “fundamental civil rights found in common law,” that is, “protection by the government”; “the enjoyment of life and liberty”; “the right to acquire and possess property”; and the right to “pursue and obtain happiness and safety.” In particular, Goldfarb concluded, one of the primary rights of citizenship is the “right to pursue a livelihood,”

as Bradwell was asserting.

Goldfarb's careful legal arguments cleared the way for audience acceptance of her metaphorical framing of the Fourteenth Amendment as reconstituting the structure of the national government and of the purpose for doing so:

Beyond oppression by a centralized power, such as the British monarch that America had overthrown, the circumstances that led to the Civil War taught us about decentralized oppression by states as well. Because recent experience has shown that federal power can serve as a check on state tyranny, the Fourteenth Amendment deliberately recalibrates the relationship between the federal government and the states... I trust that Congress meant what it said when it undertook to grant federal constitutional protection of individual rights from trespass by the states. In the aftermath of the Civil War, the turbulent circumstances in our nation warrant this important constitutional innovation.

Through her use of novel metaphors, Goldfarb cast the just-adopted Fourteenth Amendment, a product of the Reconstruction era, within a much larger frame than had the original majority in *Bradwell*. Within this frame, the Amendment *reconstituted* the national governance structure to ensure that both the Constitution and the federal government could exercise authority over the states. And this authority was to be exercised to guarantee all federal citizens, whether women or men, full entitlement to the privileges and immunities that are due to all citizens of the United States.

When legal arguments and decisions are confined by unthinking acceptance of the separate spheres metaphor, both the advocate and the judge are likely to respond to arguments like those made by *Bradwell* and *Muller* by seeking to equalize rights across the spheres. The

male sphere becomes both the expectation and the aspiration of a successful argument. This might be considered to be progress of a sort. But both the argument and the outcome preclude legal and social actors from imagining a different sort of interpretation of what the Constitution guarantees: a fundamental level of privileges and immunities for all American citizens.⁷²

Making the invisible visible

Having long critiqued the law for placing limits on storytelling that erase outsider perspectives, feminist scholars have employed storytelling as a tool to expand the law's narrative to include those marginalized by law. It is no secret that the judiciary is not a diverse body—as a matter of race, gender, sexuality and class. This lack of diversity has a significant, practical impact on the law.

One result of the lack of diversity is to narrow the facts considered relevant or significant in judicial opinions. Judges have a great deal of latitude in choosing what facts to include in the narrative of a case and how to frame and describe them. Like all human beings, judges see facts through the lens of their own experiences and beliefs and that lens can affect and distort how the judges write the narrative of the case. The stories and narratives of judicial opinions will reflect the limited experiences and worldviews of this non-diverse body of writers. Moreover, the law, made by generations of non-diverse judges, will also constrain the scope of the facts expected or allowed to be considered. As a result, the factual narrative of judicial opinions can erase certain perspectives and reflect the influence of stock stories and stereotypes.

In a continuous loop, as judges write factual narratives that erase or distort outsider

⁷² See, e.g., Martha Albertson Fineman, “The vulnerable subject: Anchoring equality in the human condition,” *Yale Journal of Law and Feminism*, 20 (2008), 1-23, 23 (“Equality must be a universal resource, a radical guarantee that is a benefit for all.”).

perspectives, the distorted narratives become law's "official story," and those "official stories" will drive future determinations of legal relevance, which will in turn cement that original distorted story as the "true, objective" legal story. Law's "official stories" have a lasting power in a system, like ours, grounded in precedent. And, often, the story drives the application of the rules. Think of the reasonable person and how that stock legal character has influenced the law, often to the detriment of outsiders. As we noted earlier, once the story has been framed and told a certain way, the dominoes will fall in a particular order.⁷³

As a result of this continuous loop, the narratives of judicial opinions will often omit entirely facts about race, gender, and sexuality because those facts are "irrelevant" to the official story. And facts that contribute to a stereotypical image of a group may be included without qualification or reflection. This narrative process has a tremendous impact on the law and its resolution of cases. This impact is felt keenly by groups historically marginalized by the law and underrepresented in the judiciary. As an example, one of the most enduring fictions embraced by the law is that of neutrality and objectivity—particularly with regard to race and other status identities. In metaphorical terms, the law is said to be "color blind." Apart from its obvious historical inaccuracy, this fiction contributes to the law's inability to consider implicit bias or historical context in determining outcome in cases involving race, gender and other marginalized groups. It often means that facts about racism and even the race or status identity of the parties are left out as irrelevant, and therefore marked as marginal.

The law's refusal to recognize the relevance of race or gender, for example, can often make it easier for biases and stereotypes to infect the law and its reasoning. The very pervasiveness and systematicity of metaphor and narrative that allow us to see "one aspect of a

⁷³ Baron and Epstein, "Is law narrative?" 142.

concept in terms of another” also will “necessarily hide other parts of the concept.”⁷⁴ The less detail a narrative gives us, the more likely we are to fill gaps in our knowledge with stock stories or stereotypes. Again, here, consider the “domino” metaphor of story—once we erase race from a story, for example, readers might assume that the parties are white, and draw certain conclusions from that. Erasing race from an opinion can also insulate judges from scrutiny about bias, because readers might not know that race is even at play in the case. When an opinion is “color blind” on the surface, it also allows judges to avoid real introspection about the dangers of implicit bias by giving them plausible deniability (“I can prove race didn’t matter to me because I didn’t even mention it in the opinion”).

A stark example of the erasure of race in a judicial decision is the opinion in *Meritor Savings Bank v. Vinson*,⁷⁵ the first hostile work environment sexual harassment case decided by the United States Supreme Court. The majority opinion never once mentions the race of the parties. Readers would not know from reading the opinion that both the victim, Mechelle Vinson, and the supervisor accused of sexual harassment, Sidney Taylor, were African American, and that both worked in a predominantly white corporate environment. The reader would also be unaware that Vinson grew up in poverty and violence, had been pregnant as a young teenager, and had held a series of low-paying, low-skill jobs before Taylor, an older, successful middle-class African-American man, offered her the opportunity to work at the Bank. None of these facts were part of the law’s official story of the case.

Professor Angela Onwuachi-Willig, rewriting the majority opinion in *Meritor*, expanded the facts to show, more deeply, how the intersection of race, class and gender influenced the interaction of the parties and the analysis of the legal issues. Whereas the Supreme Court ignored

⁷⁴ Lakoff and Johnson, *Metaphors We Live By*, p. 10.

⁷⁵ *Meritor Savings Bank v. Vinson*, 477 U.S. 57 (1986).

the race of the parties as irrelevant, Onwuachi-Willig confronted race head-on, explicitly presenting it as central to the legal issues. As Onwuachi-Willig wrote:

Similarly, as this particular case involves an African-American female complainant, this Court must analyze this claim against the backdrop of a long history of sexual assault, rape, and harassment of African-American women as well as the history of African-American women's extreme vulnerability to sexual misconduct in the workplace and otherwise, both by white and non-white men. Historically, African-American women were viewed as so loose, sexually promiscuous, and lacking in sexual morality that they were deemed legally unrapable.⁷⁶

Because the original Supreme Court opinion in *Meritor* erased any mention of the race of the parties, embracing the shibboleth of the law's colorblindness and objectivity, stereotyped stock stories and metaphors of women infected its narrative and, ultimately, its analysis. The common racialized gender tropes of the sexually promiscuous woman and scorned woman underlie several of the Bank's arguments that were ultimately accepted by the Court. For example, the Court found relevant the Bank's evidence and arguments about Vinson's alleged sexual fantasies, sexually provocative dress and anger at Taylor's rebuffing of her advances.⁷⁷ Because the Court did not acknowledge the relevance of race or racism in the case, it was easier for these metaphorical stereotypes to implicitly influence the Justices' view of the facts and law. Moreover, by explicitly

⁷⁶ Angela Onwuachi-Willig, "Meritor Savings Bank v. Vinson" in Stanchi, Berger, and Crawford (eds.), *Feminist Judgments*, pp. 303-21.

⁷⁷ This trope also surfaced in the Clarence Thomas/Anita Hill hearings, showing its long history and tenacity in the law's "official story" of Black women. That many Congressmen credited this "scorned woman" story in the Hill case shows that Onwuachi-Willig's warnings were spot on.

endorsing that this racially and sexually stereotyped evidence undercut Vinson's credibility and claims, the *Meritor* opinion enshrined these narratives—the sexually promiscuous Black woman and the angry, vengeful Black woman—as truth, reinforcing them as the law's "official story" of what sexual harassment is and how women, particularly African-American women, are. It is a cliché that those who ignore history are doomed to repeat it, but *Meritor* is an excellent example of how those who ignore race and deny the power of racialized gender stereotypes in the law are doomed to succumb to them.

Onwuachi-Willig used narrative to confront the damage of the racialized gender tropes underlying the "official story" of *Meritor* by revealing the race of the parties and thereby making clear that race is and was relevant. By bringing the intersection of race and gender to the forefront of the narrative, Onwuachi-Willig forced the law to confront its own biases. She refused to let the law make Mechelle Vinson into a stock character. Instead, she gave us enough detail to make Vinson a real, three-dimensional human being and challenges us to understand her motivations and fears given her history and the history of our law and culture.

Onwuachi-Willig explicitly recounted, for example, that Vinson's failure to report Taylor's behavior for two years might very well have been the product of the intersection of Vinson's race, gender and class. She described in detail the invidious intersection of centuries of racism and sexism that has caused African-American women to be both statistically more likely to be sexually assaulted or harassed, less likely to report it and less likely to be believed when they do report. By presenting an alternative narrative for Vinson's failure to report, Onwuachi-Willig undercut the stock narrative of white

patriarchy, which attributed Vinson's late reporting to her promiscuity or vengefulness.

We can see the work of metaphor in Onwuachi-Willig's counter-narrative as well. Onwuachi-Willig was in a difficult position because she must combat the race and gender stereotypes within an opinion that does not mention race at all. Moreover, she had to speak about an experience unique to African-American women in a way that a white male audience might understand. Metaphors are part of her arsenal here. For example, Onwuachi-Willig used bell hooks' metaphor of "dirty laundry" to describe the complex and conflicting feelings Vinson might have had about reporting Taylor. In addition to the conflict of reporting her boss, a successful African-American man, to his mostly white supervisors, Vinson also faced the dissonance of having to report an African-American man for sexual harassment, a charge that plays into damaging stereotypes about African-American male sexuality.

The "dirty laundry" metaphor is not novel language, of course—its genesis is a 19th century French proverb. But as we note above, a conventional metaphor can be transformative when used in a novel context. The significance of Onwuachi-Willig's use of the metaphor is that it refers to the burdens of racism in a United States Supreme Court opinion—a venue in which the existence of racism is rarely explicitly acknowledged, and often denied.

Onwuachi-Willig's use of the familiar metaphor in the new (and unexpected) context explodes the myth of "colorblind" law. "Dirty laundry" links the burden of keeping quiet about sexual harassment to labor traditionally done by African-American women, capturing artfully that it is African-American women who primarily confront this unique dilemma. The metaphor shows us that it is African-American women who must

do the unpleasant and onerous work of cleaning and hiding the dirty laundry. It also captures racial stereotypes by connecting sexuality, and particularly the sexuality of African-American men and women, with dirtiness, something shameful that must be hidden. It reaches for shared understanding with the common human experience of wanting to hide shameful facts but gives a new layer to this experience. In this way, it powerfully aids the overall narrative of the opinion in making the experience of African-American women and their experiences visible in law.

Onwuachi-Willig's narrative, and its attendant metaphors, make Vinson a three-dimensional human being and undercuts the law's relegation of Vinson to a stereotype. It encourages the law and its actors to see sexual harassment for the complex puzzle of human behavior that it is. Her narrative shines a light on the implicit biases that might have infected the story and the rationale and takes steps to change the law's official story about African-American women and sexual harassment.

Speaking the unspeakable

A related feminist use of narrative involves speaking about and uncovering topics about which the law refuses to speak openly because of its adherence to a somewhat old-fashioned modesty about what is proper to speak about in professional company. These topics include sex and sexuality as well as racism and rape. This modesty and forbearance exact a significant cost. The power of the law is, in part, the power to make things exist, both in law and the wider society. When the law ignores a concept, the concept can become invisible or unspeakable.

Because of the domino effect, the law's failure to confront facts related to sex, sexuality, race, racism, and misogyny can change the outcomes in cases involving these issues. More than a

few commentators, for example, have noted that the law's shying away from facts about homosexual sex can have a limiting effect on the law's impact, even in cases where the court finds in favor of sexual freedom.⁷⁸ Because homophobia is often based in disgust and fear of certain sexual acts, the law's failure to speak about these acts only contributes to the phobia.

In her essay critiquing the reasoning of *Lawrence v. Texas* for its coy treatment of the sexual behavior involved, for example, Professor Mary Ann Case points to two other cases notorious for their evasion of the sexual issues at the heart of the legal issue: *Oncale v. Sundowner*⁷⁹ and *Griswold v. Connecticut*.⁸⁰ In the *Oncale* majority opinion, Justice Scalia famously refused to detail the disturbing facts at issue in that case, asserting that the details were irrelevant to the legal issues and would tarnish the "dignity" of the Court. Similarly, in *Griswold*, the sex was "hidden under the covers of the marital bed."⁸¹

The feminist judgments in these two cases, by contrast, confront the details of the sexual acts at the heart of the cases.

In her rewrite of *Oncale*, Professor Ann McGinley asserted outright that it is important to detail the explicit acts of sexual harassment perpetrated against the petitioner in that case, Joseph Oncale.⁸² There are a number of important reasons for this. First, the Court's hiding behind "dignity" means that the reader never knows the egregious acts committed in that case, which included the forced insertion of a bar of soap into Oncale's rectum. For McGinley, it is important to shock people into awareness and to hold the harassers accountable. The notion that merely

⁷⁸ See, e.g., Mary Anne Case, "Of 'This' and 'That' in *Lawrence v. Texas*," *Supreme Court Review*, 55 (2003), 75, 79 ("transparency is not something we associate with polite discussions of sex").

⁷⁹ *Oncale v. Sundowner Offshore Svcs.*, 523 U.S. 75 (1998).

⁸⁰ *Griswold v. Connecticut*, 381 U.S. 479 (1965)

⁸¹ Case, "Of This and That," 77-78.

⁸² Ann McGinley, "Oncale v. Sundowner Offshore Services" in Stanchi, Berger, and Crawford (eds.), *Feminist Judgments*, pp. 414-425.

writing about these acts damages the Court’s dignity reinforces stereotypes about victims of sexual assault and harassment and encourages feelings of shame—the Court is essentially saying “it makes us feel dirty to talk about what happened to you.”

Second, it is important to emphasize that the details are, despite Justice Scalia’s disclaimer, legally relevant, because as Justice Scalia himself notes later in the opinion, a critical element of sexual harassment is the severity of the conduct. Indeed, in *Oncale*, Justice Scalia addresses severity when he warns that it is important not to “mistake ordinary socializing in the workplace—such as male-on-male horseplay or intersexual flirtation” for discrimination. A common narrative (and metaphor) in sexual harassment is that complainants are “thin skulls”—over-sensitive prudes who complain about harmless sexual banter and want a sanitized, politically correct workplace devoid of any fun. Professor McGinley’s use of expanded narrative undercuts that stock story of sexual harassment.

McGinley’s explicit detailing of the sexual abuse against *Oncale* changes the tone and color of the legal analysis. It puts the minimizing “horseplay” warning in a very different light. In the absence of the detail that McGinley provides, the reader might wonder how serious the behavior was in *Oncale*. By euphemizing what *Oncale* suffered (Justice Scalia calls it “subjected to sex-related humiliating actions”), the majority invites the reader to fill in the blanks herself. The addition of the “horseplay” warning further undercuts how the reader might view the seriousness of what *Oncale* endured. The word “horseplay,” itself a metaphor that calls forth an image of frisky colts, is a diminishing and euphemizing term especially as applied to sexual harassment and assault. McGinley’s version of *Oncale* makes the “horseplay” warning seem out of place and inappropriate in a case that involved such a serious sexual assault.

McGinley’s detailed facts derail the myth that what we often call “horseplay” is harmless

behavior. She shows that what the Supreme Court and other federal courts often downplay as “rough-housing”, “hazing” or “horseplay” can be harassment “because of sex” because it serves to establish masculine boundaries and force a workplace to conform (or continue to conform) to a traditionally macho masculine culture.

Finally, for McGinley, the details of the sexual abuse suffered by Oncale uncover something legally significant about the nature of sexual harassment as a way of policing gender in the workplace. In her view, it is highly relevant that the abuse of Oncale was a way of “feminizing” him, to the extreme of simulated rape. To McGinley, these facts reveal a truth about sexual harassment: that it is not necessarily (or even usually) born of sexual desire, but rather is a complicated fusion of sex, sexuality and aggression in which sex is the means through which hostility is expressed toward those who violate traditional gender boundaries. This is a significant addition to the law, as federal courts have struggled with sexual harassment cases because of the persistent belief that sexual harassment is a manifestation of sexual desire.⁸³

Professor Laura Rosenbury’s rewrite of *Griswold* is another example of using factual narrative to speak the unspeakable in law and culture.⁸⁴ Her approach to *Griswold*’s narrative is unabashedly explicit in talking about the centrality of sex and sexual pleasure to life and liberty. By explicitly tying the legal issue in *Griswold* to issues of sexual pleasure, she revealed the contraceptive ban in *Griswold* for what it really was: the intentional suppression of sexuality, particularly women’s sexuality, through patriarchal, misogynist laws. Rosenbury’s opinion is bold and positively joyful in its explicitness about sexuality and its importance in the constitutional guarantee of liberty.

⁸³ See Vicki Schultz, “Reconceptualizing sexual harassment,” *Yale Law Journal*, 107 (1999), 1683-1805.

⁸⁴ Laura Rosenbury, “*Griswold v. Connecticut*” in Stanchi, Berger, and Crawford (eds.), *Feminist Judgments*, pp.103-13.

Rosenbury wrote:

Access to contraceptives ... is a necessary prerequisite for many men and women who seek to engage in mutual sexual activity in order to develop their identity, to deepen their relationships, or to simply experience pleasure and release. By criminalizing all use and distribution of contraception, the state of Connecticut has foreclosed this important aspect of liberty or made it unduly risky, therefore limiting individuals' liberty to interact with others in the ways they desire. Although some individuals may choose to develop their identity and relationships through the abstinence urged by the state, others will choose to do so through sexual activity. The state may not use its coercive power to limit this choice.

The sexual explicitness of Professor Rosenbury's opinion is not just narrative window-dressing. It is legally significant. *Griswold*, like the reproductive rights cases, centers on the role of law in regulating the adverse and unintended consequences of sexual activities, particularly for women.⁸⁵ Yet none of these cases—not *Griswold*, *Eisenstadt* or *Roe* and its progeny—face up to the centrality of sexuality, and patriarchal suppression of women's sexuality, to the legal issues in those cases. The regulation of contraception and abortion are intricately intertwined with our cultural views of women's sexuality as shameful, even evil,⁸⁶ as something to be hidden and suppressed—and as something for which women should be exposed and punished by being forced to endure unwanted pregnancy. The revulsion toward, and attendant suppression of,

⁸⁵ Susan Frelich Appleton, "Toward a 'culturally cliterate' family law?" *Berkeley Journal of Gender Law and Justice*, 23 (2008), 267-337, 275.

⁸⁶ Lynne Henderson, "Getting to know: Honoring women in law and in fact," *Texas Journal of Women and Law*, 2 (1993), 41-73, 43; bell hooks, *Ain't I A Woman: Black Women and Feminism* (South End Press, 1981), pp. 110.

women's sexual nature underlies much of the law relating to human sexuality and has a serious impact on rape and sexual harassment law. Yet *Griswold* scarcely mentioned sex.

When women's sexuality as a healthy, normal aspect of women's humanity is unspeakable and unspoken in the legal and cultural discourse, the gap is too easily filled by stereotypes like the Madonna/whore that are essential to the maintenance of patriarchy.⁸⁷ By acknowledging the centrality of sexuality and sexual pleasure to the legal issue at hand, Rosenbury paves the way for a future of sexual liberty in which women's sexual agency is celebrated and recognized as a core aspect of liberty, not punished and co-opted.

Like Onwuachi-Willig in *Meritor*, Rosenbury used multiple metaphors to buttress her narrative. As commentator Cynthia Hawkins DeBose wrote, Rosenbury's opinion took sex and women's sexuality out of the "dark recesses" to which law had relegated them. Dismissing the conventional notion of sex as dirty or shameful, Rosenbury sees sex as a beautiful process – of discovery, of human development. The Connecticut contraceptive ban at issue in *Griswold* exemplified the view of sex as a mechanical act purely for the purpose of procreation; in this view woman's sexual pleasure is irrelevant at best. In contrast, sex in Rosenbury's opinion is a journey of "individual discovery" and "development." Rosenbury also counteracted the narrow traditional view of appropriate sexual behavior by writing of sex as an expression of personal identity and self-actualization: "[s]exual exploration and pleasure" is an "important aspect of individual identity and self-expression." The metaphors in the feminist *Griswold* are of both types: they force us to see one thing as another (sex as a journey of discovery and identity) and figurative images to explain abstract concepts (sexuality as personal evolutionary process).

⁸⁷ Susan Ekberg Stiritz, "Cultural cliteracy: Exposing the contexts of women's not coming," *Berkeley Journal of Gender, Law and Justice*, 23 (2013), 243-66, 249-53 (describing the treatment of women's sexuality as a kind of "discursive clitoridectomy").

The metaphors are, in part, what give the opinion its joyful, playful tone with regard to sex. But these happy metaphors also do the serious important work of laying bare the law's complicity in the oppression of women's sexuality and the damage that oppression has wrought in all areas of jurisprudence. Rosenbury's metaphors of discovery and identity make women's sexual pleasure visible and important. By framing sex beyond the mechanical, as a critical and natural process of human development and identity, Rosenbury makes her point that choices about sexuality are a core aspect of personal liberty. If sex is a mechanical, somewhat distasteful part of humanity, meant to be suppressed and secret, it is quite difficult to see it as a fundamental right. In Rosenbury's framing, sex is central to human development, a source of joy to be celebrated, making it that much easier to see it as a fundamental liberty right shared by all people, men and women alike.

Claiming sexuality as a core liberty interest – not just acceptable, but essential to humanity – has the potential for wide-ranging effects on jurisprudence critical to women's rights as well as LGBTQ rights. Like the “dirty laundry” metaphor, Rosenbury's metaphors challenge us but also bring us together as human beings. Abortion jurisprudence, rape jurisprudence, sexual harassment law; all would look very different in a world in which the Supreme Court had acknowledged women's sexuality and basic humanity.

Constructing audience identification through emotion

In this final section, we focus on the emotional dimensions of narrative and metaphor.⁸⁸

⁸⁸ See Paul Ricoeur, “The metaphorical process as cognition, imagination, and feeling,” *Critical Inquiry*, 5 (1978), 143-59 (proposing that metaphor blends cognitive, imaginative, and emotional dimensions). Some scholars are reluctant to emphasize the emotional impact of narrative because doing so seems to support a once-common view that narrative is “a vehicle of emotion, opposed to logic and reasoning.” See, e.g., Peter Brooks, “Narrative transactions—Does the law need a

Emotional resonance connects an audience with an image or a story through shared feelings. In narrative, an audience is more receptive to an author's invitation to identify with and enter into a story when, in Walter Fisher's terms, the story "hangs together"—it is coherent and cohesive—and when the story "rings true"—it matches up with what the audience member already knows to be true in the world.⁸⁹ In metaphor theory, a novel metaphor is thought to effectively forge an initial link between concepts that are remote from one another when their emotional tones resonate with each other.⁹⁰

For feminist and social justice advocates, emotional resonance is one of the attributes that helps move audience members to different vantage points, a shift that may lead to changes in their beliefs or attitudes about specific issues. Transfer of metaphoric meaning, for example, requires audience attention and then *uptake* from the audience (in other words, recognition of a surface familiarity or similarity before moving to deeper levels of interaction). Researchers have found that when individuals are "absorbed into a story or transported into a narrative world," the story may affect their beliefs and attitudes. This sort of narrative transportation is enhanced by melding together elements of attention or focus, images, and feelings.⁹¹

How might emotional resonance work in legal argument? The U.S. Supreme Court's decision in *Brown v. Board of Education* provides a possible example. In *Brown I*, with little

narratology?" *Yale Journal of Law and the Humanities*, 18 (2006), 1-28, 2.

⁸⁹ Walter R. Fisher, "The narrative paradigm: An elaboration," *Communication Monographs* (1985), 347-67, 349.

⁹⁰ See, e.g., James R. Averill, "Emotions as mediators and as products of creative activity" in J. Kaufman and J. Baer, eds., *Creativity across Domains: Faces of the Muse* (Mahwah, NJ: Erlbaum, 2005), pp. 225-43 ("the way I feel about lawyers may 'resonate' with the way I feel about broccoli. [The] two resonating tones [may lead] to the formation of an original link between the otherwise remote concepts to which these feeling tones were experientially attached. For example, 'Lawyers are the broccoli of the judicial system.'").

⁹¹ Melanie C. Green and Timothy C. Brock, "The role of transportation in the persuasiveness of public narratives," *Journal of Personality and Social Psychology*, 79 (2000), 701-21.

directly helpful precedent or legislative history to rely on, Chief Justice Earl Warren declared that segregated schools were inherently unequal and hence unconstitutional.⁹² The opinion relied in part on social science research; key components of the research and the court's reliance on it have been consistently criticized.

For the purpose of exploring the quality of narrative transportation, however, the often-maligned “dolls study” may productively be viewed as an influential collection of stories about schoolchildren that conveyed memorable images and may have evoked shared feelings. Nearly sixty years earlier, in *Plessy v. Ferguson*, the Supreme Court had belittled the argument that Black children were emotionally harmed by segregation.⁹³ As one way to counteract that statement, the so-called “dolls study” was one component of the social science research introduced as evidence in several of the cases consolidated in *Brown*. In one of those cases, Dr. Kenneth Clark testified about the questions he asked of sixteen Black children in 1950 in Clarendon County, South Carolina. Considered as narrative, Dr. Clark's testimony invited audience members to *try on* what it felt to be a child in a segregated school. The answers conveyed a world that presumably was much different from the one the justices inhabited.⁹⁴

Dr. Clark testified that he had conducted the tests the previous week at a local elementary school, showing the children Black and white dolls that were identical in every way except their skin color, and asking a series of questions. Dr. Clark began with “Show me the doll that you

⁹² *Brown v. Board of Education*, 347 U.S. 483 (1954).

⁹³ *Plessy v. Ferguson*, 163 U.S. 537, 551 (1896) (“We consider the underlying fallacy of the plaintiff's argument to consist in the assumption that the enforced separation of the two races stamps the colored race with a badge of inferiority. If this be so, it is not by reason of anything found in the act, but solely because the colored race chooses to put that construction upon it.”).

⁹⁴ Bruce Hay explored Dr. Clark's testimony “as a piece of experimental theater,” concluding that the images left behind were “unforgettable.” Bruce L. Hay, “The damned dolls,” *Law and Literature*, 26 (2014), 321-42, 333.

like best or that you'd like to play with," and moved next to "Show me the doll that is the 'nice' doll," and "Show me the doll that looks 'bad.'" The questions continued: "Give me the doll that looks like a white child," and "Give me the doll that looks like a colored child." Finally, Dr. Clark asked the children to "Give me the doll that looks like a Negro child," and "Give me the doll that looks like you." The testimony continued:

Q. "Like you?"

A. "Like you." That was the final question, and you can see why. I wanted to get the child's free expression of his opinions and feelings before I had him identified with one of these two dolls. I found that of the children between the ages of six and nine whom I tested, which were a total of sixteen in number, that ten of those children chose the white doll as their preference; the doll which they liked best. Ten of them also considered the white doll a "nice" doll. And, I think you have to keep in mind that these two dolls are absolutely identical in every respect except skin color. Eleven of these sixteen children chose the brown doll as the doll which looked "bad."⁹⁵

The research on narrative transportation suggests that particular combinations of audience focus, imagery, and feelings can transport the audience into the world of the narrative. Considered as narrative persuasion rather than as proof, Dr. Clark's testimony seems likely to have prompted his audience to venture at least briefly into radically different settings.

⁹⁵ In *Brown*, the Court agreed with a lower court that "[s]egregation of white and colored children in public schools has a detrimental effect upon the colored children." Citing the Clark study, among others, the Court also said that "[w]hatever may have been the extent of psychological knowledge at the time of *Plessy v. Ferguson*, this finding is amply supported by modern authority." *Brown*, 347 U.S. at 494–95.

In her *Feminist Judgments* revision of the opinion in *Loving v. Virginia*, Professor Teri McMurtry-Chubb wove stories together with stark images drawn from history. The emotional responses evoked by the stories and images resonate with the emotions brought to bear in the legal reasoning that comes late in the opinion.⁹⁶ In the original opinion, Chief Justice Earl Warren determined that Virginia's statutes barring marriage between Blacks and whites violated the Constitution's due process and equal protection guarantees.⁹⁷ Reading the statutory language alone was sufficient to reveal that there was no reason for these laws except to maintain white supremacy.⁹⁸

McMurtry-Chubb began her feminist revision with a much more detailed and particularized version of the facts than that contained in the original opinion:

Mildred Delores Jeter, the unnamed African American spouse of the plaintiff in this action, grew up in Central Point, Caroline County, Virginia. Richard Perry Loving, the White man who had become Ms. Jeter's friend through childhood and adolescence and later her husband, also grew up in Central Point, Caroline County, Virginia. This particular locale in Virginia is known for its White and African American residents' habitual practice of interracial coupling and creating children of both European and African descent.

In this opening, McMurtry-Chubb invited the audience to begin to identify with Mildred Jeter and Richard Loving. Her depiction of the couple and their circumstances shortened the distance between the parties and the court, bringing into more familiar territory a marriage and a family

⁹⁶ Teri McMurtry-Chubb, "Loving v. Virginia" in Stanchi, Berger, and Crawford (eds.), *Feminist Judgments*, pp. 119-36.

⁹⁷ *Loving v. Virginia*, 388 U.S. 1 (1967).

⁹⁸ *Loving*, 388 U.S. at 11-12 ("The fact that Virginia prohibits only interracial marriages involving white persons demonstrates that the racial classifications must stand on their own justification, as measures designed to maintain White Supremacy.")

that would have seemed unusual to Supreme Court justices at the time. Mildred and Richard were childhood friends who had grown up together in a small town in Virginia. In that small town, there was a practice of “creating children of both European and African descent”; in other words, the Lovings’ relationship was customary and not unusual in that “particular locale in Virginia.” Through her use of normalizing terms, McMurtry-Chubb established an initial point of contact.

The individualization and particularization of the Lovings continued:

Mildred Jeter and Richard Loving’s friendship began when Mildred was 11 and Richard was 17. The friendship became a courtship and then a romance, consummated and subsequently memorialized by the birth of the couple’s son Sidney Clay Jeter on January 27, 1957. Just over a year later, Mildred became pregnant with the couple’s second child. At 18 years of age and approximately five months into her pregnancy, Mildred travelled with Richard to Washington, D.C., and on June 2, 1958, the two married legally.

Through these details—likely to have been deemed legally irrelevant—McMurtry-Chubb continued to build audience identification: the Lovings’ story is familiar, a story of the progression of love and marriage between friends, culminating in pregnancy and marriage when the young woman was still a teenager. So far, nothing unusual has happened.

But then the Lovings went home: “They travelled back to Caroline County, Virginia where their marriage was illegal.” Like any newly married couple, they stayed with Mildred’s parents for a few days. And “[o]n ... their tenth day as newlyweds, the two were roused from their marriage bed and arrested on charges of violating Virginia’s anti-miscegenation laws.” McMurtry-Chubb did not emphasize the racial and gender distinctions in what happened next,

simply recounting that the white male, Richard Loving, was released on bail, while the young Black pregnant woman, Mildred, stayed in jail for another four days. According to McMurtry-Chubb's opinion, Mildred gave birth to the couple's second child five days before her hearing was scheduled.

Having established a setting in which the reader came to know the Lovings as individuals, but at the same time, through the lens of a familiar love story that took a sudden and unexpected plot turn, McMurtry-Chubb next detailed the seemingly ordinary facts that became an indictment charging the Lovings with violating Virginia law. The indictment stated:

[T]he said Richard Perry Loving, being a white person and the said Mildred Dolores [sic] Jeter being a colored person, did unlawfully and feloniously go out of the state of Virginia, for the purpose of being married, and with the intention of returning to the State of Virginia and were married out of the State of Virginia, to-wit, in the District of Columbia on June 2, 1958, and afterwards returned to and resided in the County of Caroline, State of Virginia, cohabitating as man and wife against the peace and dignity of the Commonwealth.

If McMurtry-Chubb has moved the audience into the narrative world of the Lovings, both the exact words of the indictment and the verbatim words of the trial judge will elicit an emotional response. McMurtry-Chubb detailed the trial judge's suspension of the Lovings' sentence based on a condition—that the Lovings leave Virginia and not return—and while making this statement:

Almighty God created the races white, black, yellow, malay, and red, and he placed them on separate continents. And but for the interference with his arrangement, there would be no cause for such marriages. The fact that he

separated the races shows that he did not intend for the races to mix.

From there, McMurtry-Chubb continued to weave new stories with the one left hanging. The Lovings went to live in the District of Columbia, had a third child, and Richard continued to commute back to Virginia for work. In the nation's capital, the Lovings' story became an increasingly significant component of the larger American narrative of progress toward racial justice. While the Lovings were living in the District of Columbia, the civil rights movement was in progress, and one of Mildred's relatives advised her to write to Attorney General Robert F. Kennedy. Kennedy encouraged her to enlist the help of the American Civil Liberties Union (ACLU).

When McMurtry-Chubb returned to the Lovings' story, she next adopted the point of view of Mildred Loving, including the full text of the letter she sent to the ACLU:

Dear Sir,

I am writing to you concerning a problem we have. Five years ago, my husband and I were married here in the District. We then returned to Virginia to live. My husband is White. I am part Negro and part Indian. At the time we did not know there was a law in Virginia against mixed marriages. Therefore we were jailed and tried in a little town of Bowling Green [Virginia]. We were to leave the state to make our home.

The problem is we are not allowed to visit our families. The judge said if we enter the state within the next thirty years, that we will have to spend one year in jail. We know that we can't live there, but we would like to go back once and awhile to visit our families and friends. We have three children and cannot afford an attorney.

We wrote to the Attorney General, he suggested that we get in touch with you. Please help us if you can. Hope to hear from you real soon.

Yours Truly,

Mr. and Mrs. Richard Loving

After accounting for the story of the Lovings in the facts section of the opinion, McMurtry-Chubb turned in her legal argument to unsparingly honest depictions and images of what marriage and family life meant in the context of slavery. Unlike Chief Justice Warren's reliance on the language of the statute alone (and what he assumed everyone knew about the history of Virginia), McMurtry-Chubb's specificity about the historical record made inescapable the tie between the statute and Virginia's goal of maintaining white supremacy.⁹⁹

By weaving together the Lovings' story with the narrative arc of history, the narrative persuasion of the feminist judgment may reach the reader in a different way. The audience's emotional responses to the story of the Lovings and to the history of Black men, women, and children during slavery must include sorrow, anger, sympathy, bitterness, guilt, and fear. To the extent that the audience members are transported into the world that is formed by these emotions and images of the Lovings and the men and women who were denied marriage and family lives by slavery, they may change their beliefs and attitudes.

We have neither the time nor the space to tell the full story or to paint the whole picture. What's more, the story is still developing and the picture not yet finished. Much remains to be done. What the feminist judgments demonstrate is that judges with diverse experiences and

⁹⁹ Some of the judgment recalls Cheryl Harris's stunning examination of whiteness as property. Cheryl I. Harris, "Whiteness as property," *Harvard Law Review*, 106 (1993), 1707-91.

perspectives will fill in the gaps differently, both in conception and expression. Through metaphor and narrative, advocates can help judges hear different voices and perceive new possibilities. They show us a brief glimpse of the future: how the story might unfold and how the picture might be revealed.

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