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Motherhood Discourse in the Law: Biological Fathers and Third Party Cases

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**MOTHERHOOD DISCOURSE IN THE LAW: BIOLOGICAL FATHERS
AND THIRD PARTY CASES**

A Thesis

Presented to the

Department of Sociology and Anthropology

and the

Faculty of the Graduate College

University of Nebraska

In Partial Fulfillment

of the Requirements for the Degree

Master of Arts

University of Nebraska at Omaha

by

Mary A. Burbach

July, 1997

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THESIS ACCEPTANCE

Acceptance for the faculty of the Graduate College,
University of Nebraska, in partial fulfillment of the
requirements for the degree Master of Arts, University
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ABSTRACT

In an effort to determine how judges define “motherhood” a cluster criticism analysis was employed on twenty seven court opinions. These court opinions stemmed from custody cases between biological fathers and third parties. Results indicated three major themes emerging from the discourse. The themes labeled Lie/Deception and Rejected/Thwarted indicated that mothers are held accountable when they do not live up to the dominant cultural ideology of motherhood. The theme labeled Mother’s Legal Status refers to the debate within law over the equality of men and women in the case of pregnancy.

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Most importantly, I wish to thank my mother, Megan, who has always believed in me and supported me, through every difficulty and joy of life. She is a true example of a person who loves without counting the cost. She is also a living testament of the ideology of nurturant motherhood in action. It is to her, my mother and my friend, that I dedicate this work.

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CHAPTER 1

STATEMENT OF THE PROBLEM AND LITERATURE REVIEW

The goal of this research is to determine how the courts define “motherhood” in their opinions regarding custody cases between a biological father and adoptive parents. Specifically, I am interested in determining what sorts of conditions or behaviors must be exhibited before biological mothers are deemed worthy of making placement decisions in contested custody cases. Since it is the mother who is usually responsible for placing a child for adoption, these sorts of contested cases shed light on how the court perceives biological mothers who find themselves in situations where custody is contested. I analyzed these cases to see how the biological mother is portrayed, and what the court expects of her. This research should shed light on the images of and expectations of mothers as expressed in law.

I identified cases of record¹ in all fifty states and subsequently analyzed cases in eighteen states, those cases which focus on custody disputes between biological fathers and third parties. There are, in general, three scenarios that are seen in these cases with respect to the biological mother. The first is labeled the *Reconciliation* category. Here,

¹Cases of Record - Cases of Record are those opinions in a particular jurisdiction chosen for publication in court reporters.

the unwed biological mother has, for whatever reason, chosen not to tell the father of the child about her pregnancy, the child's birth and her subsequent plans to surrender her parental rights and offer the child for adoption. Occasionally, once the biological father finds out about his child, he and the mother reunite and seek to reassert their parental rights as a married couple. The next scenario is labeled *Remarry* and refers to a situation where the biological mother is no longer married to or involved with the biological father and has married another man. She and her new husband may seek to adopt the child so that the stepfather has parental rights. The final scenario, labeled *Placement*, occurs when an unwed biological mother chooses to surrender her parental privilege and place the child for adoption. In these cases, a biological father may sue for custody of his child(ren) on his own. The biological mother may well prefer adoption, but the biological father may protest and wish to have custody of his child.

These three scenarios make up major preliminary categories for a cluster criticism of the cases. How a woman, often unwed at pregnancy, is referred to in the judicial opinions in various courts of appeal throughout the nation is the focus of this thesis project.

Sociology of Law - Law and Culture

Law is the social mechanism by which people in the United States resolve conflicts that cannot be resolved in another way. Law has the power to coerce those subject to it, as well as having the effect of codifying norms through legal precedent. The purpose of the court is to determine what is just in a case, and to interpret legal

documents and societal values in order to make such a determination. In family law as well as in law in general, judges have great influence in defining the family. Indeed, according to Shalleck:

The law, in its daily operation, helps to construct our concepts of parenthood. By examining the law, we can see the assumptions about parenting embedded within it, the ways the law works to reinforce those assumptions, and the spaces that the law creates to challenge those assumptions (1995: 308):

Law may also be seen to be important due to its effects. Sibley and Sarat remind us of the importance of looking not only at theory, but at the effect of law.

Laws may be human creations and thus apparently malleable, contradictory, and indeterminate, subject to interpretation and reformation. But to the defendant who goes to jail, the law is certainly less malleable and less subject to reinterpretation and more like something one bounces against (1987:168).

Similarly, to the litigants in custody cases, the law is very real in its effects. What it orders and prescribes often has a profound influence on the lives of those involved, and sometimes on society as a whole by the creation of precedent.

Since the law is socially created, it reflects what norms the political and economic elite want to be upheld (Dye, 1990; Domhoff, 1990; Kairys, 1990). According to Fineman (1995) “Law is a crude and limited device and is circumscribed by the dominant ideologies of the society in which it is produced. Existing beliefs and assumptions shape knowledge and understandings, including those about law and law reform” (1997:17). How judges portray biological mothers may say quite a bit about how the political and economic elite conceptualizes the biological mother’s role in society. In family law, especially, judges exercise much discretion (Ruback, 1984:144).

Judges in these cases express the dominant societal view of motherhood and thereby further shape the institution.

In order to provide a theoretical context to this research, I will briefly discuss how feminist legal theory highlights the way in which women, and particularly mothers, are treated within the justice system. If women fit into the dominant conceptualization of what mothers should be via their choices, their ethnicity or their social class, are they treated more positively than women who don't fit into the dominant paradigm? A brief discussion of relevant feminist legal theory provides some answers.

Feminist Legal Theory and Motherhood

Feminist legal theory is a body of work which argues that women are consistently disadvantaged within law, as law legitimates the social hierarchy. Feminist legal theorists insist that law is not as protective of women and their interests as it is of men and their interests. Feminist legal scholars such as Fineman (1995) argue that "patriarchal ideology" continues to be the dominant ideology today:

Even though our social circumstances have altered substantially during the past several decades, patriarchal concepts have remained at the center of how we define and understand all families in our culture (1995:207).

Feminist legal theory offers much background on how mothers are perceived in society and within the law. There are many different issues debated within feminist legal theory and not all can be covered or are truly relevant to this thesis. I would, however, now like to discuss a major topic in feminist legal theory which pertains to this research project.

Special/Equal Treatment

One avenue in which the ideology of motherhood is debated within feminist legal theory is the special/equal treatment debate. This debate questions whether the law should ignore gender and treat men and women exactly the same (equal treatment) or whether women have special needs which should be met in order for them to attain overall equality in the society (special treatment). One area in which this debate has been played out is in the assertion that women should be given special treatment in the workplace, while others fear emphasizing biological differences between the sexes. For example, Herma Hill Kay asserts:

The biological fact that only women have the capacity to become pregnant has been used historically to define women as different from men along social, psychological and emotional dimensions. Those asserted differences, in turn, have served to justify the legal, political, and economic exclusion of women from men's public world. Even now, when the barriers that separate women and men in the work force are breaking down, the uniqueness of pregnancy remains an obstacle to equal opportunity for women (1985:37).

Yet, Kay also sees a need for the law to acknowledge some biological difference between men and women. Such legal acknowledgement should come in the form of validating some sex specific rules in regard to pregnant, nursing or menstruating women (Kay, 1985). And other feminists, such as Martha Fineman, argue that the equal treatment model does not serve women well, not only in regard to the biological difference of pregnancy, but also with regard to patterns of parenting. In custody contests, an assumption of equality between mothers and fathers fails to take account of the typically

greater involvement of mothers in parenting (Fineman, 1995).

Fineman categorizes herself as a postegalitarian feminist. Her position is that the sameness models do not work and that what is needed instead is a “theoretical focus on the role of law in maintaining the existing unequal allocations of societal and economic power between men and women”(1995:41). Fineman admits that an initial adherence to an equality concept might have been necessary in taking the first steps toward trying to change the law and legal institutions, but that equality has proven insufficient as a concept with which to both assess and address the position of women under law (41). Fineman argues that “legal theory must recognize the reality of existing systemic and persistent inequality and move beyond the simplistic equality paradigm, establishing an affirmative feminist theory of difference” (41). Otherwise, dominant ideologies will persist unquestioned.

Ideology of Motherhood

According to Berger (1991) once cultural ideas that have been taken for granted (such as motherhood) are contested, they become ideologies. Such ideologies then become matters of public debate, each side attempting to make a claim to truth and righteousness. Their status as common sense is lost (Hays, 1996). While it is no longer a given, it is important to review the dominant ideology of motherhood due to its potential effect on judicial decision making in custody cases.

According to Marlee Kline, motherhood is understood as “the natural desired and ultimate goal of all ‘normal’ women (Stanworth 1987:14); in other words, a woman must

be a mother before she will be considered a ‘mature, balanced, fulfilled adult’ (Wearing 1984:72; Kline 1995).

According to Fineman (1995), “.. Mother is shared virtually universally in our culture and, is therefore more intimately and intensely personalized than many other symbols” (71). Sharon Hays (1996) asserts that the ideology of intensive mothering, which is child centered, expert guided, emotionally absorbing, labor intensive and financially expensive mothering, is the dominant ideology of motherhood in the contemporary United States (8.) However it has not always been this way. Hays explains:

Not until the “permissive era” did child rearing become child centered in the sense of being explicitly determined by the needs and desires of (innocent) *children*. To put it another way, throughout the nineteenth and early twentieth centuries the explicit goals of child rearing were centered on the good of the family and the good of the nation; the emphasis was on the importance of imprinting adult sensibilities on children from the moment of birth; and it was the making of a proper adult that was understood as the basis for training the child. By contrast, the most striking feature of permissive-era advice is the idea that the natural development of the child and the fulfillment of children’s desires are ends in themselves and should be the fundamental basis of child-rearing practices (1996:45).

Such focus on the child may make the mother who does not exercise her motherly duties accordingly the subject of criticism--since it is her responsibility to raise a child in the most advantageous circumstances possible:

It is not just mother *as anomalous individuals* who are judged harshly against the ideals of motherhood. Motherhood has been ideologically constructed as compulsory only for those women considered “fit”, and women have often been judged “unfit” on the basis of their social location. This has been the case (at various times during the last century and in different places) for disabled women,

Black women, First Nation women, immigrant women, Jewish women, lesbian women, sole support women, poor women, unmarried women, young women, and others. For these women procreation has often been devalued or discouraged. The ideology of motherhood, therefore, speaks not only to gender roles and behavior. It also constructs some locations within social relations of race, class, sexuality, ability, and so on as more appropriate for motherhood than others (Kline, 1995:121, citations deleted).

Indeed the ideology of nurturant motherhood is very strong in our society. Competing arguments regarding the ideology of motherhood are almost never deployed explicitly and systematically. Rarely will one find the ideology of nurturing motherhood completely debunked. Rather, according to Hays (1996), the argument tends to take the form of debates over the participation of women in the labor force, the fate of “family values”, the proper responsibilities of fathers, and the effects of day care (14-15).

Rights of Fathers and Mothers in Law

The subject of this thesis--an examination of custody contests that focus on the rights of biological fathers and third parties, as against biological mothers--brings together feminist legal theory and the more general consideration of the ideology of motherhood, as we look at the relative rights of unwed mothers and fathers. An important issue in feminist legal theory is how the legal recognition of paternity by unwed fathers affects women.

Unwed Fathers

This thesis deals with issues of paternity in that the cases I examined are only those where the biological father sued for custody of this child and/or the reinstatement of his parental rights. Sometimes, his claim coincides with the biological mother's

desire. Sometimes the biological father's and the biological mother's interests conflict.

Selma Sevenhuijsen (1992) comments on a difference of opinion in feminist legal theory regarding legal parental recognition of children:

The case of the mother who enforces a legal recognition by the biological father of her child is clearly at odds with the perception of and the normative framework within which the second wave feminists have assessed family law. Feminists in the beginning of this century took the "fallen woman" as their point of reference for their reform proposals. By imposing a duty of maintenance on men, feminists were hoping to install an equal responsibility for the consequences of wrongful sexual acts, while men would be "educated" in this way, and prevented from seductive behavior and extramarital intercourse. In contrast, the main subject position that feminists have invoked since the 1960's in their involvement in the politics of filiation law, is the independent woman who claims the right for autonomous decision making regarding the question of how she wants to organize child rearing. It is in her name that the legal enforceability of rights claims by men on the grounds of mere biological ties has been rejected...(1993:72).

Such discussion in feminist legal theory as to whether unwed women should want the fathers of their children in their lives is relevant to my research. In this perspective, the law, which is dominated by males, is perceived to interfere too often in women's private and reproductive lives and not to intervene enough in women's claims of discrimination in the workplace and in the public sector as a whole. Feminist legal theory is an especially relevant background for those cases where the interests of the biological mother and father conflict.

Unwed Mothers

One of the forms of potentially unfit mothers as suggested by Kline (1995) is the single, or unwed mother. Most of the cases analyzed in this thesis project involved

judicial perceptions of unwed mothers. The children of such mothers were traditionally considered to be illegitimate in English common law, which is the foundation for American law. English common law was based on the hierarchical relations of those who had obligations for others (Master and servant; Husband and wife; Parent and child; and Guardian and ward), therefore, according to Friedman (1995):

These are hierarchical relations, specifying the conditions of dominance, hence the distinction between legitimate and illegitimate children that is so difficult to understand from our modern vantage point. Illegitimate children exist outside relations of hierarchy, those very relations that led to the legal specification of obligation. Children produced out of wedlock are conceived by individuals with no status in the law. Sexual relations between the unmarried were sexual relations among legal equals (the only relevant status being as consenting adults). Sexual relations between husbands and wives were among unequals, and therefore regulated by law (27).

In addition, according to Fineman (1995) the child of a union of unmarried parents was labeled “filius nullius” or son (sic) of no one (79). Since there was no parental obligation toward non marital children, they were not entitled to inherit from their fathers, or initially, from their mothers. But in the United States, laws were passed in the colonies which required fathers to support their illegitimate children, and often custody of the children followed (Fineman, 1995:80).

Unwed mothers also made inroads on establishing their parental rights in the United States. By the end of the nineteenth century non marital children were considered legally to be members of their mothers’ families and had inheritance rights within those families as though they were legitimate (80). As Fineman writes:

This American development was significant. A “new” legally recognized family

unit thus came into being: the unwed mother and her child formed a unit not officially recognized at common law. Unwed mother and child were bound together legally with inheritance implications and the imposition of reciprocal rights and duties enforceable in law, including the right of the mother to custody of the child. Fathers for all practical purposes were not legally or formally a component of the newly recognized unwed family (80).

But, Fineman asserts that today the situation is one where the unwed father is looked to as the solution for the social problems that come from non marital births. “The weight of societal wrath has shifted and seems more directed at unwed mothers, rhetorically cast as the progenitors of a new and great social harm. The law’s objective is to secure his (the unwed father’s) ties with the mother-child unit.

Women of Color

Black women have added their perspectives to the feminist legal discourse by critiquing the law’s treatment of Black women. Black women are faced with a double jeopardy of sorts, with discrimination coming from the statuses of both race and gender. And, sometimes, Black feminists call white feminists to task for ignoring race in their work. Kimberle Crenshaw (1990) cites one of the major problems Black women face in the courts:

Antidiscrimination law is similarly constructed from the perspective of white males. Gender discrimination, imagined from the perspective of white men, is what happens to white women; race discrimination is what happens to Black men. The dominance of the single-axis framework...not only marginalizes Black women but simultaneously privileges the subjectivity of white men (197).

Black feminist critiques of law point out that looking only at race, or gender, or class alone leaves many disenfranchised people out in the cold, and they argue for a multiple

axis framework. This general critique of Black feminists is now tied to motherhood in the work of Vogel.

Vogel (1993) writes that, when considering national maternity policy, white women are conceptualized and treated quite differently than Black, Asian, Latina and other women of color:

For women workers who are white, pregnancy and motherhood have made a fundamental difference. To the extent that all women are viewed as potential mothers, furthermore, these assumptions have provided a basis for treating white women workers categorically as special. By contrast, Black, Asian, Chicana, and other women workers of color have generally been denied the special status deemed appropriate for white women. African American women in particular have historically participated in the paid labor force in high numbers, suggesting distinct assumptions about the relationship between motherhood and employment, the treatment of pregnancy in the workplace, and the division of family responsibilities. In addition, the state has often taken an openly interventionist role with respect to family life in communities of color (40-41)

The “distinct assumptions of the relationship between motherhood and employment”

Vogel refers to is the notion that it is generally seen as undesirable for white mothers to participate in the labor force, while Black mothers and other women of color are expected to work for wages. An example may be the rhetoric that surrounds Black welfare mothers, who are criticized for not working in the labor force. Issues of race must not be ignored when analyzing court cases which involve custody decisions that may rest on images of motherhood and womanhood.

Class

Another important axis to consider is that of class. Fineman (1995) states that “in

recent poverty discourses emanating from a broad spectrum of groups, single mothers have now been lumped together with drug addicts, criminals, and other socially defined ‘degenerates’ in the newly coined category of ‘underclass’. The undeserving status of single-mother families in this context is established partly by their lack of relationship to the work force (either through their own jobs or through their attachment to a male breadwinner) and partly by their asserted role as mothers in the perpetuation of poverty” (108). Such characterizations of poor women sends a clear message about their fitness to be a parental decision maker.

The work of feminist legal theory points out the critical element that association with a male plays in perceptions of women in our society. This suggests that a woman who is associated with a man, and especially the biological father of her child, is more likely to fit into a dominant societal paradigm of motherhood and a more ideal image of womanhood.

Feminist legal theory also suggests that women of color will be treated differently than white women. In addition, women of a lower social class may be treated differently than middle class white women.

I now turn in the following chapter to an examination of the methodological tool used to assess judges’ discourse about biological mothers. Analysis of this discourse may illuminate the world view of judges in their treatment of biological mothers, and thus the definition of women in the legal realm of our culture.

CHAPTER 2

METHODOLOGY

The method of Cluster Criticism was employed to analyze the discourse on motherhood in custody cases between biological fathers and third parties.

Cluster Criticism is a method which falls under the umbrella of rhetorical criticism which is “the investigation and evaluation of rhetorical acts and artifacts for the purpose of understanding rhetorical processes” (Foss, 1989). Since the goal of this research is to determine how judges in custody cases perceive biological mothers, this type of method best allows me to analyze texts and to look for trends and uses of language, as judges describe motherhood. Foss (1989) states that there are two primary reasons to engage in rhetorical criticism. One is to understand particular symbols and how they operate. The other is to make a contribution to rhetorical theory or to explain how some aspect of rhetoric² operates. In this research, my goals are to understand the symbol of “mother” within the context of the law and so to contribute to the understanding of “motherhood” in our legal system and society.

² The term rhetoric will be used in this thesis as it is described in Foss’ (1989) book to mean, “the use of symbols to influence thought and action. Rhetoric is communication.”

Sample of Cases

I analyzed majority and dissenting opinions of those court cases heard between January, 1990 and December, 1995 in which a biological father sued for custody of his child(ren) from a third party. The cases I analyzed were cases of record, or those cases chosen for publication in a court reporter. A reporter is a series of books containing a collection of cases decided and designated for publication by a court or courts (Kunz, et. al, 1989).

I originally identified eighty-eight possible court decisions using the MEGA³ library of the LEXIS computer database. The MEGA library is one of the files on LEXIS that allows the user to access citations of cases in print. The MEGA library lists each state separately. Using this library, I went through all fifty states and the District of Columbia using key words to identify cases. The string of key words I used was, "Adoption and Custody and Unwed Father and Date (aft 12/89 and bef 01/96)."

From an initial review of the cases, forty nine appeared to be relevant and these cases were photocopied from the Westlaw Regional Court Reporters. Of these forty nine cases, twenty seven had codable material and are the basis for the results of this project. The other twenty two cases were discarded due to the lack of information regarding the

³The MEGA file is a one-stop search of all available federal and state case law on the LEXIS service. The state-based MEGA files combine case law from the courts of the state plus case law from the federal circuit for that state and the federal district courts within the state. (LEXIS Product Guide, Vol. 1, Directory of Online Services, 1995 Edition, Dayton Ohio).

judges' perception of motherhood. In these cases, the judge only mentioned the mother in the explication of the facts of the case and no evaluation of biological motherhood was presented.

After a preliminary review of the case citations, I had expected the majority of cases to be *Remarry* cases, with a few *Placement* and *Reconciliation* cases. As it turned out, after reading the cases themselves, I had a majority of *Placement* cases (eighteen cases), followed by *Reconciliation* cases (five cases) and *Remarry* cases (four cases). The analysis is based on these twenty seven cases.

Analytic Method: Cluster Criticism

Cluster Criticism is a method developed by Kenneth Burke to help the critic discover a rhetor's⁴ world view and thus identify motive (Foss, 1989). Cluster Criticism has been done on a variety of topics and mediums including short stories (Marston & Rockwell, 1991); paintings (Reid, 1990); women clergy (Foss, 1984); and Betty Friedan's rhetoric (Avalos, 1983); (Foss, 1996).

Kenneth Burke advocated the concept of rhetoric as action. Hochmuth-Nichols describes this Burkeian notion:

Embedded in the concept of *act*, as differentiated from *motion*, lies an ethical concept - language is moral in its basis, it contains the choices, feelings, attitudes of originators. It has a dialectical dimension in that it contains in itself the property of transcension, the capacity to separate and unite, name and divide. What language is, not merely what one does with it deliberately,

⁴The term rhetor is defined by Foss as "a human designer, creator, or producer of rhetoric such as a speaker, a writer, an architect, or a film maker.

furnishes the real basis for communication - and language above all else is a weighted, socialized medium, serving to unite or separate. (1968) (*sic*).

In this research the rhetor is identified as the judge who is writing a majority or dissenting opinion. Judges generally evaluate a biological mother's behavior in custody cases, and this research sought to identify patterns in this process.

According to Foss (1989) the purpose of doing a Cluster Criticism is to discover 'associational clusters' or the kinds of acts, images, personalities and situations that go with the rhetor's notions of heroism, villainy, consolation, despair, etc. The equations or clusters that the critic discovers in a rhetor's work generally will not be conscious to the rhetor because it is nearly impossible to be completely conscious of the interrelationships among all the imagery and equations used in one's writing (367). I am interested in what terms go with "motherhood" when reference is made to a biological mother, who, because her child has become the subject of a custody battle between the biological father and a third party, is scrutinized as to her suitability as a mother.

Choosing Key Terms

There are four major steps in a Cluster Criticism: (1) identification of key terms or symbols in the rhetorical artifact; (2) charting of terms that cluster around the key terms; (3) discovery of patterns in the clusters around the key terms to determine meanings of the key terms; and (4) naming of the rhetor's motive on the basis of the meanings of the key terms (Foss, 1989: 367-8).

In Cluster Criticism the key terms are chosen on the basis of frequency or

intensity. For this research however, I am only interested in how judges write about biological mothers in the cases before them, so I only required one key term: “mother”. Then I looked for two things: those words or phrases referring to the biological mother which appeared frequently and those words or phrases which served to make the reader evaluate the biological mother in a particular way, which was an indicator of intensity. According to Foss (1996) a term is considered intense when it appears to be extreme in degree, size, strength, or in the depth of feeling conveyed (65).

Charting of Terms

I noted the terms or phrases that clustered around my key term and the context in which each appears. According to Foss, terms may cluster around the key terms in various ways. They may simply appear in close proximity to the term, or a conjunction such as *and* may connect a term to the key term and another term, suggesting that the one depends on the other or that one is the cause of the other (369).

Finding Patterns

The third step in the process involves the attempt to find patterns in the associations or linkages discovered in the previous charting of the clusters. If a judge often or always associated a particular word or image with the key term, that linkage suggests that the key term’s meaning for the judge is modified or influenced by that associated term (Foss, 1989). It is at this point that an *agon* analysis may help to discover patterns in the clusters that have been identified. In an *agon* analysis, opposing terms are examined. The critic thinks about the terms that the key terms seem to oppose,

suggesting what meaning is *not* a part of and, in fact, is opposite to the meaning of the key term. This also can yield insight into the world view of the rhetor. In this project, it can give insight as to what a mother should not be or do.

Naming Motive

The final step of a Cluster Criticism is the process of naming motive. According to Burke, the way in which a rhetor puts together symbols to create a rhetorical artifact does not just *reflect* motive, it *constitutes* motive (Foss, 1989). Motives are observable through the way in which a rhetor uses rhetoric because the structure of an artifact is the structure of the rhetor's framework for viewing the world (Foss, 1989). In this project then, the rhetoric will be used to illumine each judge's world view by identifying motive.

Analysis and Coding

After all of the pertinent cases were compiled and copied, I classified them into the three categories of *Reconciliation*, *Remarry* and *Placement*. The *Reconciliation* category (N=5) refers to those cases where a biological mother and father reunited and sought reinstatement of their parental rights and custody of their child as a married couple. The *Remarry* category (N=4) consisted of those cases where a biological mother had married a man other than the biological father. The stepfather sought to adopt the child with the biological mother's support while the biological father opposed such an adoption. The category labeled *Placement* (N=18) refers to those cases where a biological mother has sought adoption for her child and the biological father opposes the adoption plan.

I then proceeded to search for clusters of words around the mention of the biological mother in the main body of the written opinion of judges. I developed a chart which listed each case, a section to record judges' discourse on motherhood, and a section to record the biological mother's race, class, age, and occupation, if discernable. I also noted the judge (majority or dissenting) who wrote the opinion.

A major limitation of this research project is that only one coder was used to assign cases to categories and to evaluate and interpret the material. As a minimal assessment of reliability, another graduate student read a sample of five cases (three placement, one reconciliation and one remarry) randomly selected, and derived results coinciding with my own. However, the ideal situation would be one where multiple coders read and evaluated all of the cases.

I now turn in the next chapter to a description and review of the results of the *Placement* cases.

CHAPTER 3

PLACEMENT CATEGORY: RESULTS

The purpose of conducting a Cluster Criticism is to determine what words or phrases go with references to the biological mother. As was discussed in Chapter Two, there were three major categories identified in this thesis: *Reconciliation*, *Remarry* and *Placement* cases. This chapter is an examination of the results elicited by a cluster criticism on the *Placement* cases. Remarks on the results of an agon analysis and on the issues of race and class conclude the chapter.

The *Placement* category refers to those cases where an unwed biological father sues for custody and/or paternity rights of a child who has been placed for adoption by the biological mother. This type of case made up the majority of my sample. A total of eighteen *Placement* cases were analyzed for this project. A complete list of these cases can be found in Table I.

I had expected to find judges' characterizations of the biological mother to be more frequent than they were and to infer an evaluation as to her character or her role. What I found instead was that, for the most part, opinions consisted mostly of a discussion of the law relevant to the particular case. When mothers were discussed, it was most often in reference to their legal status. Judges did not demonize mothers in

these cases, but they did discuss some actions on the part of the mothers that were less than desirable or in dispute. It is these actions which are the basis of the themes I identified.

I found three predominant themes emerging from my analysis of the *Placement* cases. These themes are Lie/Deception, Rejected/Thwarted, and Mother's Legal Status. The theme of Lie/Deception occurred most often (N=12), followed by the Rejected/Thwarted theme (N=10) and Mother's Legal Status (N=8).

Lie/DeceptionTheme

The Lie/Deception theme refers to passages which indicate that the biological mother is a liar or is deceptive in her behavior toward the biological father. In this thesis, the Lie/Deception theme references any lie told by the biological mother that was recounted in the opinion. Therefore, it includes instances in which a biological mother told a lie to keep the child from the father. Those fathers who knew and those who did not know of their child's existence are both included in this category. For example, in the case of Matter of Adoption of Baby James Doe (572 So. 2nd 986, 1990) argued in Florida, the court must decide whether or not to block the adoption of a child born out of wedlock. The natural mother was married to another man but was separated from her husband when she engaged in sexual intercourse with the biological father. She allegedly told him and others that he was the father of the child, and they resided together during the pregnancy. Shortly after the birth of the child the biological mother and father separated. Upon hearing of her intention to place the child with adoptive parents, the

biological father objected and insisted that he had not been given enough notice regarding the proposed adoption. The biological father argued that he had taken measures to show interest in his child, such as filing with the Department of Health and Rehabilitative Services as the natural father and by providing financially for the child. He also had custody of the child for a two week period, until the biological mother took the child back and placed it with adoption professionals. The court found in his favor and Judge Joanos, writing the majority opinion, notes that:

The natural mother then removed the child from appellant's custody, and without his knowledge or consent, relinquished the child for adoption (988).

In Rivera-Berrios v. Adoption Centre, Inc. (617 So. 2nd 1067, 1993) also argued in Florida, the natural mother admitted at a hearing on the motion to vacate the final judgment of the termination of the natural father's parental rights that she had lied because she was involved in another relationship and did not want to have any contact with the biological father. In this case, the judge writing the opinion makes these references to the biological mother's deception:

...Instead, he was led to believe that the mother intended to have an abortion (1069).

The mother in this case led the father to believe she planned to abort this child. In doing so, she prevented the father from paying birth and child care expenses, from visiting the child, and even from filing and acknowledgment of his paternity with HRS. She then compounded this *deception* by *lying* to the court (in her initial affidavit presented at the original hearing) about the father's knowledge of this pregnancy and birth and about her own awareness of the father's full name and address (1070:italics added).

A District of Columbia case, Appeal of H.R. (581 A. 2nd 1141, 1990) focuses on

a biological father who was a citizen of Zaire and a biological mother who was a Peace Corps volunteer from the United States who worked in Zaire. An associate justice of the District of Columbia Court of Appeals, Judge Ferren, states that when the biological mother learned she was pregnant, the Peace Corps evacuated her from Zaire immediately and sent her to Washington D.C. According to the case history presented in the opinion, the biological mother (L.C.) then wrote a letter to the biological father (H.R.) informing him that she was pregnant and that he was the father. Justice Ferren writes that the biological mother wrote the following in her initial letter to H.R.:

She hinted that she planned to have an abortion, saying that what she would have to go through in the United States would exhaust her physically and emotionally and that she would return to Zaire in two weeks. L.C. (the biological mother) never went back to Zaire. In July, a mutual friend of L.C. and H.R. (the biological father) told H.R. that L.C. had had an abortion in Washington D.C. In fact, however, L.C. gave birth to Baby Boy C. in the District on August 5, 1983. Ten days later, L.C. relinquished her parental rights to the Barker Foundation (1144).

It is not clear in the opinion whether or not the mutual friend was a party to the deceptive act of the mother. My interpretation of the situation is that the friend did not know of the biological mother's intent to place the child with an adoption agency.

In an Arizona case, Matter of Pima City Juv. Severance Action (876 P. 2nd 1121, 1994) the child who is the subject of the custody case is the result of a relationship between teenagers. Upon learning their daughter was pregnant, the parents of the biological mother sent her to live with an aunt in Tucson and she was to give birth there. The biological father was unaware of the placement until the child was already in an

adoptive home. Chief Justice Feldman notes in the opinion that:

Before the child's birth, the mother suggested adoption, but the father opposed the idea. Nevertheless, the mother's parents pressured her to place the baby for adoption in Tucson. After delivery, the mother did so *without the father's knowledge* (1125: italics added).

While this court did uphold a finding of a lower court decision indicating that the father had abandoned the child by failing to take meaningful action to support his child once he learned of adoption proceedings, the justices place the blame for the father not having established such a relationship with his child on the biological mother:

However, in this case it was not the state that deprived the father but the child's mother, who gave the child up for adoption without the father's consent (1135).

The only Nebraska case read was the case In Re Adoption of Kassandra B (540 N.W. 2nd 554, 1995). In this case an unwed and alienated couple had two children. The economic situation of the couple was difficult. After a separation from the father, the mother decided that due to her own financial constraints and the biological father's history of alcohol abuse, she would have to put the children up for adoption despite the father's objections. According to the opinion:

..Bechtold (the natural mother) contacted the K.E.S.I.L. adoption agency (located in California). Knowing she needed Gomez' (the natural father) consent, Bechtold lied to K.E.S.I.L. and stated that she did not know the identity of the children's father(s) (556).

The case of In Re Zacharia D. (862 P. 2nd 751, 1993) is a California case in which a child born with traces of methamphetamine in his blood was declared a dependent of the juvenile court. Wendy, the biological mother, named the man she was

living with at the time (Lee) as the father on the birth certificate. However, nine months prior to Zacharia's birth, Wendy spent two weeks with a prior high school boyfriend, Javan W., and engaged in numerous acts of sexual intercourse with him during this time. Zacharia was born on August 12. On August 13 he was taken into protective custody by the Orange County Social Services Agency. Wendy and Lee pled no contest to the allegations of illegal drug use and child neglect and Zacharia was named a dependent of the court. A detention hearing followed on October the 25th and a pretrial hearing on November 17th in which the couple of Wendy and Lee also pled no contest to the allegations against them as being unfit parents for Zacharia. At the mandatory six month review hearing on March 9th, all parties stipulated that Zacharia's return would create a substantial risk of detriment to his physical or emotional well-being.

In November of the same year, Wendy moved into the home of the natural father (Javan) and his parents. The following is an example of a lie by omission:

According to Javan, Wendy moved in with Javan and his parents. At this time, Javan first learned that Zacharia existed. Javan asked "to see the pictures of (Wendy's) child....and I compared them to mine and we looked identical..." (754).

The court opinion indicates that Javan did not press Wendy until much later as to whether or not he was the father. In the following March, an eighteen month hearing was held, and Javan sought to be tested for paternity. When asked why he came forward in a case where he was not even certain as to when the baby was born, the father replied that he was concerned about Wendy losing her child and he wanted to help her. The state

Supreme Court's judgment in this case upheld a lower court's decision terminating Wendy's parental rights and Javan's entitlement to reunification services and custody of Zacharia. While there is little labeled deception on the part of Wendy, the inclusion of her lack of forthrightness toward the father (and she truthfully may not have known who the father was) in this case is evident.

In the case of Appeal of A.H. (590 A. 2nd 123, 1991) the District of Columbia Court of Appeals considers a trial court's decision which extended a neglected child's commitment to the care of the Department of Human Services on its own motion and over the natural parent's objection.

The child at the center of this case is R.L., whose biological mother placed her with the emergency care section of the Department of Human Services when R.L. was seven months old because she was homeless and could not care for her. At this time the Department of Human Services filed a petition alleging R.L. was a neglected child and indicating paternity was "not established" (125). During R.L.'s two year commitment, her mother made only sporadic contact with her, and R.L.'s court appointed attorney moved to terminate the mother's parental rights. Five months after this motion, the child's putative father, A.H., filed an appearance in the termination of parental rights proceeding. He claimed paternity, offered the mother's current address, and agreed to submit to blood tests. The tests showed there was a 99.03% certainty that A.H. was the child's biological father.

In this case, the father alleges he did not receive notice of the child's neglect

proceeding. The District, on the other hand, alleges he received actual notice of the proceeding by virtue of his ongoing relationship with the mother. Judge Ferren, writing this opinion, notes this dispute and the father's assertion that the biological mother told him their child was dead, by quoting the previous court decision in this case:

Let me be very clear, so that it's understood...I have not factually arrived at a conclusion concerning the father and his absence from this child's life. I have arrived and have announced for the record my belief about the mother which is that she *lied* to the Court. I do not believe that she really and *truthfully believed* that this child was dead. Now, whether or not the father believed it, even cared about it, I don't know. I have not made a decision (132: italics added).

Another example of the portrayal of the biological mother as a liar is in the case of Matter of Juvenile Action No. JS-8490 (876 P. 2nd 1137, 1994). This case was considered by the Supreme Court of Arizona. At issue in this case is a trial court decision which severed the parental rights of an unwed father. According to the opinion, the father had no contact with his daughter until almost four years after her birth, when he responded to the petition by the Arizona Department of Economic Security (DES) to terminate his rights based on abandonment.

Jo Emma, the biological mother, and Ray, the biological father, lived together for six months in 1985 or 1986. They shared an apartment with others, including two brothers Roberto and Juan. Unknown to Ray, Jo Emma was also having sexual relations with Roberto. When Ray found out about it, he kicked them both out of the apartment. At that time, Jo Emma was carrying Ray's child, although he claimed he did not know about the pregnancy. Jo Emma and Roberto moved to Florida with the child, and

subsequently had another child of their own. Eventually, Jo Emma and Roberto separated and Jo Emma returned to Phoenix with her children. She was unable to care for them properly however, and after numerous DES calls, the children were placed in protective custody.

Jo Emma confirmed to DES that Ray was the father of Maria, but gave them no information as to his whereabouts. The Department of Economic Security then initiated termination proceedings for Ray on the basis of abandonment.

About a month before the court terminated Ray's rights, he encountered Jo Emma at a bus stop in downtown Phoenix, where he asked Jo Emma if he was Maria's father.

Judge Feldman then writes that:

Jo Emma admitted that he was (the father), and although she knew Maria was in foster care in Phoenix, she told Ray that Maria was in Oregon with her grandmother. She did not tell Ray that a termination petition was pending, and Ray did not ask Jo Emma how he could contact her or his daughter, now two and one-half years old (1139).

Later in the opinion, Justice Feldman argues that even though Jo Emma lied to Ray, he still should have made more of an effort to establish his rights. The court in this case decided that Ray had done too little too late and affirmed a decision terminating his parental rights. The blame in this case rests on the biological father, but the biological mother shares in it by her deception.

It is quite obvious to state that lying is not a valued behavior in most any social milieu. In the particular instances of biological fathers' lack of initial interaction or interest in their children, the blame is often placed on the biological mother. The

perception or reality that she had lied is dealt with openly and directly in these opinions, and it is not condoned. It is seen as the mother's fault, not solely the father's, if the biological father has lost a potential relationship with his child.

Rejected/Thwarted Theme

The Rejected/Thwarted theme refers to those occasions where it is claimed that a biological mother rejected or thwarted a biological father in his attempts to establish a relationship with his child. That includes those cases where a biological mother knows of a biological father's objection to an adoption, yet proceeds with it anyway. In these cases, it is clear from the opinion that, in contrast to the deception cases, here the biological father knew of the child and the biological mother chose adoption partly out of her disinterest in or anger toward the biological father.

An example can be found in the case of Abernathy v. Baby Boy (437 S.E. 2nd 25, 1993), which was heard in South Carolina. This case involves a couple who were both on active duty in the Navy, although no evidence of their respective ranks is given in the opinion. Mitchell and Julie had a sexual relationship which resulted in pregnancy. The mother informed the father that the child was his. It is stated in the opinion that the father "begged" the mother not to consider abortion and she agreed. The father then had orders for sea duty and he subsequently left the mother with some money and access to a car. He told her that he wanted to discuss the matter more when he got home. The biological mother decided after he had left, however, that she wanted no further contact with the father and, as Chief Justice Harwell writes in the opinion of the court:

When Mitchell (the father) returned in September, Julie (the mother) rebuffed his advances and rejected his offer of marriage. Julie informed Mitchell that she had considered the idea of putting the child up for adoption, but had discarded the notion and would keep the child. Julie thereafter avoided contact with Mitchell, refused his telephone calls, and “was kind of hiding away from him” (27).

The opinion indicates that sometime after Mitchell returned from sea duty, Julie met the prospective parents, the Abernathys, through her roommate. Julie and the Abernathys agreed that the Abernathys would adopt the child. The justices in this case take exception to Julie’s decision and behavior as illustrated here:

...an unwed father’s ability to cultivate his opportunity interest in his child can be *thwarted* by the refusal of the mother to accept the father’s expressions of interest in and commitment to the child (29: italics added).

It is undisputed that Mitchell attempted to provide monetary support to Julie during her pregnancy, but his offers were *rejected* by her. In addition, Mitchell endeavored to keep apprised of Julie’s progress during the pregnancy, but she shielded herself from contact with him, even to the point of complaining to her superiors that Mitchell was harassing her by his numerous telephone calls (29: italics added).

Judge Harwell also writes that mandating strict compliance with the section of the law which requires unwed fathers to promptly and in good faith make sufficient efforts to assume parental responsibility (section 20-7-1690(A)(5)(b)South Carolina) would “make an unwed father’s right to withhold his consent to adoption dependent upon the whim of the unwed mother” (29). It appears that the justices in this case find the unwed mother who rejects an unwed father just as objectionable as an unwed father who does not do his utmost to fulfill his parental duties.

Another example is the case of Matter of Adoption of J.J.B. (894 P. 2nd 994, 1995). Argued before the Supreme Court of New Mexico, this case involved an unwed couple who lived together for ten years and had three children. The two daughters were fourteen and five years old and the son, J.J.B., was four years old. The biological father, Bookert, and the mother, Medina, had serious financial troubles. Bookert had a hard time finding a job that paid more than the minimum wage, and they required food stamps to purchase food. Their economic problems led them to move to a series of towns looking for better employment prospects. They ended up in Tucson, where they stayed with Bookert's brother. Medina was unhappy in Tucson, however, and wanted to leave. In the meantime, Bookert had found employment he and tried to convince Medina to stay. Eventually, though, he bought her and the children plane tickets, gave her money and their remaining food stamps, and Medina and the children went home to Albuquerque, where they stayed with her father.

Bookert called that evening to assure that they had arrived safely. He also sent packages that contained personal items left in Tucson. Two weeks later, Bookert lost his job in Tucson and he returned to Albuquerque. He spent time with his children on the day that he arrived. Medina, however, was angry with him because he had not called her since the first night the family arrived in Albuquerque. The couple argued and she told him she did not want him around anymore. Bookert then went to live with his mother in Hobbs, NM (a town approximately 300 miles from Albuquerque) and told Medina that he would return the end of that month. Bookert attempted to continue a relationship with

his children, but Medina interfered, she would not let the children visit him, or let him into her home.

About a month later, Medina decided to place J.J.B. for adoption. An example of her rejection of Bookert is seen here:

She testified that she was upset with Bookert because they were breaking up, and that she couldn't handle three children. She stated that she didn't tell Bookert what she was planning to do because she was mad at him (997).

When a staff member of the adoption agency contacted Bookert to see if he would agree to the adoption, he protested and told the worker he would be in Albuquerque the next day to get his child. When he arrived the child had already been placed with prospective adoptive parents and he was told he would need an attorney if he intended to oppose the adoption.

Two months later, Medina decided to assist Bookert in seeking the return of their child. Thus, their case is an appeal of a lower court decision which affirmed the motion made by the adoptive parents (the Roths) that the child stay in their custody. The Supreme Court did find in favor of Bookert. And it placed part of the blame for this difficult situation on the biological mother, as seen here in the opinion by Justice Frost:

A review of the evidence before the trial court in this case leads but to one reasonable conclusion: Bookert bore little, if any, responsibility for disintegration of his relationship with his son. Although Bookert maintained contact with Medina and the children after the couple separated, he had no forewarning that Medina intended to place the child for adoption (1006).

It appears as though the point is made, even if implicitly, that if the biological mother would have been more reasonable, this particular situation would not have deteriorated

and come into the court system.

Mother's Legal Status Theme

The theme of Mother's Legal Status refers to passages where an unwed biological mother's status in the law is discussed. Usually the justices point out that an unwed mother has a superior right over the unwed father in determining the placement of a child. There are also instances where it is argued that an unwed mother is given unfair preference in being the sole decision maker.

In the case of Matter of Pima City Juv. Severance Action (876 P. 2nd 1121, 1994) argued in Arizona, Justice Feldman cites Karen Czapanskiy's work on parental equality in this manner:

It is hard to imagine a court saying that a birth mother has an "opportunity" to develop a relationship with her child; instead, she bears a responsibility to do so (1129).

Making a distinction between the rights of unwed fathers as opposed to unwed mothers or married parents, Justice Feldman concludes:

An unwed father, on the other hand, has no immediate right to custody and no corresponding, legally enforceable responsibility to provide support unless paternity is judicially established. Thus, an unwed father's parental rights do not attain fundamental constitutional status unless he takes significant steps to create a parental relationship (1129).

Another example of the mothers' preferred status can be found in the case of In Interest of Baby Boy N. (874 P. 2nd 680, 1994). In this Kansas case, a biological mother wanted to place the child with adoptive parents and the biological father wanted to keep the child himself. Judge Lewis, wrote in his opinion about the mothers' ability to be the

sole decision maker as to her child's adoption:

T.M.N. (the biological mother) had standing to sign the second amended petition. Her signature is the only one required (683).

The case of Adoption of Michael H. (898 P. 2nd 891, 1995) concurs with the conclusion that, of the two unwed parents, an unwed mother has the primary legal status. In the majority opinion in this case, argued in California, Justice Mosk notes that unwed fathers and mothers are not equal under the law:

We conclude that an unwed father has no federal constitutional right to withhold consent to an at-birth, third party adoption under our decision in *Kelsey S., supra*, 1 Cal 4th 816, 4 Cal. Rpt 2nd 615, 823 P. 2nd 1216, unless he shows that he promptly came forward and demonstrated as full a commitment to his parental responsibilities as the biological mother allowed and the circumstances permitted within a short time after he learned or reasonably should have learned that the biological mother was pregnant with his child (901).

In addition, the cases of Hiskey v. Hamilton (824 P. 2nd 1170, 1992) in Oregon and Adoptive Parents of M.L.V. v. Wilkens (598 N.E. 2nd 1054, 1992) in Indiana echo the belief that an unwed biological mother has the primary right and responsibility for determining her child's future well-being. In Hiskey, Judge Rossman writes that, "She (the mother) had the right to surrender the child for adoption without the father's consent" (1173). Justice Shepard in Adoptive Parents of M.L.V. writes that, "Only the mother's consent was needed" (1057).

The case of Swayne v. L.D.S. Social Services (795 P. 2nd 637, 1990) is a case argued before the Supreme Court of Utah. The plaintiff in the case is the biological father, who challenged the constitutionality of a Utah code which terminates the parental

rights of the father of an illegitimate child if the father fails to file a timely notice of paternity.

The biological father and Penny, the biological mother, dated and engaged in sexual intercourse in 1985. In September of 1986 Penny discovered she was pregnant. At first the biological father denied paternity, but during the third trimester he acknowledged paternity and held the child out to be his own. While doing this, he also dated other women during Penny's pregnancy and indicated to Penny that he had no plans to marry her. He did offer her a place to stay at his mother's home provided Penny would pay half the rent. His sister also offered to care for the child while Penny was at work.

In March of 1987, Penny told the biological father and his family that she wished to place the child for adoption. The plaintiff protested and suggested that if she did not want the child, she should give it to him. Penny gave birth to the child on June 4, 1987. The biological father was with her for the birth and every day she and the child were in the hospital. During the hospital stay a clerk told Penny that if the biological father wanted to establish paternity, he would need to sign a form before a notary. There is some dispute in the record as to whether or not the natural father knew of this requirement. Penny and the biological father claimed they did not know about the form. It is also noted in the opinion that at the time of the birth, the biological father did not want to sign a form.

Justice Zimmerman wrote a concurring and dissenting opinion in this case in

which the matter of a mother's legal status is discussed:

No matter how uninterested a mother may be in her child, even if she abandons her child immediately upon birth, she need file no formal papers to perfect her parental rights. And her rights in the child cannot be terminated except through a formal judicial proceeding (646).

Justice Zimmerman contends that this fact denies the father equal protection of the laws.

Similarly, in the California case of Adoption of Kelsey S. (823 P. 2nd 1216, 1992), the court insists that an unwed mother should not have any more preference under the law in these types of cases than an unwed father does. Justice Baxter writes in a section on the constitutionally protected interest of an unwed father that:

If possible benefit of adoption were by itself sufficient to justify terminating a parent's rights, the state could terminate an unwed *mother's* parental rights based on nothing more than a showing that her child's best interest would be served by adoption. Of course, that is not the law; nor do the parties advocate such a system. We simply do not in our society take children away from their mothers - married or otherwise - because a "better" adoptive parent can be found. We see no valid reason why we should be less solicitous of a father's efforts to establish a parental relationship with his child (1234: italics original).

Additionally, Justice Baxter writes:

The system also leads to irrational distinctions between fathers. Based solely on the mother's wishes, a model father can be denied presumed father status, whereas a father of dubious ability and intent can achieve such status by the fortuitous circumstance of the mother allowing him to come into her home, even if only briefly - perhaps a single day (1235).

The majority of cases indicate that unwed biological mothers who have no intention of a further relationship with the father of their child(ren) have the primary rights and responsibilities to make arrangements for their child's well-being. If the mother does not notify the biological father, then she is held accountable by some

justices. Ultimately though, the biological father has no legal ties to a child unless he makes some effort to claim the child and to provide support. It is the biological mother who is given parental responsibility.

Race and Class

It was impossible to determine the race of all the mothers in these cases from the case opinions. Often the opinion did list the occupation or make reference to the relative age of the biological mother, but eight of the *Placement* cases gave no indication as to the age or class of the mother. Of the ten cases where age could be determined, four mothers were teenagers, three were in their early twenties, and three were adults of unspecified age.

Four of the adult unwed mothers were unemployed and financially dependent on the government or a private source for support. Of the women whose occupations were listed, one was a waitress, one was in the Navy (her rank was not specified), one was a graduate student and Peace Corps volunteer, and one was a hairdresser, but was unemployed.

While eighteen is a small sample, it is striking that with the probable exception of the graduate student, the women in these *Placement* cases come from the lower part of the socioeconomic spectrum. Middle and upper class women are not represented. Either these types of situations never occur to women in the middle and upper strata of society, or else they find other ways of dealing with these dilemmas that do not involve the courts. The fact that the courts are summoned to make custody decisions for the lower

classes illustrates how the lives of the poor are in many ways determined by the elites in our society.

Agon Analysis

In an agon analysis, opposing terms are examined. In many Cluster Criticisms, the agon analysis reveals what is not valued by the rhetor. But considering these custody cases, it appears the opposite is true. The opposing terms to the key terms or themes identified seem to indicate for the most part what a mother should be or do. The discourse about mothers was negative, and thus an agon analysis indicates the positive valences of the rhetor.

The opposite of lying and deception is to tell the truth. Therefore, unwed mothers should be forthright and honest. Regardless of her emotional, financial or social position, an unwed mother should be forthcoming with the father regarding his paternity and with all other authorities as to the identity of the father.

The opposite of rejecting and thwarting the biological father is to be open and agreeable to him. An unwed mother should allow an unwed father access to his child, should accept his offers of support, and should acknowledge his paternity in a timely manner.

This seems to put unwed mothers' in a difficult situation, when the third major theme of the *Placement* cases is considered: Mother's Legal Status. Since it is primarily the mother who is responsible in law for the welfare of her child, can she always be expected to consult the father of that child before she makes arrangements for the child?

In some of these cases, children resulted from a casual sexual relationship. Occasionally, contact between the mother and father ceases before the child has been born and a mother is uncertain as to where a biological father resides. In some circumstances, a biological mother wants no further contact with a biological father due to abusive behavior or due to her own personal reasons. It can also happen that an unwed father does not want to establish paternity or support once a pregnancy has occurred, but is unwilling to surrender his parental rights. Usually in these cases, if he shows no interest, his rights can be revoked based on abandonment, but the wait that is required for this proceeding is often a long one. Unwed mothers are put in a position where they are primarily responsible for the welfare of a child, but are also often unable to have the final say on the placement of their child due to the need to have the consent of the biological father.

Certainly, the court has a thorny problem to consider in these cases. There are indeed many men who want very much to be good fathers to their children and who should be given notice as to the existence of their children. There are also, however, questions of just how free women are to make to make decisions regarding their children--or the courts to make wise decisions about children's futures. The law is evolving in this area, as courts deliberate the status of unwed fathers and mothers. As unwed fathers gain more legal rights, it will be interesting to see how this affects women's autonomy in choosing the best place for their child(ren) to be raised and cared for.

CHAPTER 4

RECONCILIATION AND REMARRY CATEGORIES: RESULTS

Dominant themes similar to those of the *Placement* cases were found in the *Reconciliation* and *Remarry* cases. While in the *Placement* cases there were three dominant themes, in the *Reconciliation* and *Remarry* cases only two themes appear in each category. The themes found in the *Reconciliation* cases are Lie/Deception and Mother's Legal Status, while the themes found in the *Remarry* cases are Rejected/Thwarted and Mother's Legal Status.

I analyzed five reconciliation and four remarry cases. A listing of these cases can be found in Tables II and III respectively. The small number of these cases limits the conclusions that can be drawn with confidence, but the fact that similar themes emerged from all three types of cases may indicate that the context of whether or not a biological mother has married is not of great importance in determining the sorts of references made to the biological mother. Perhaps this is because the majority of biological mothers in all three types of cases were not married to the biological father at the time of pregnancy and therefore, they are treated similarly by the judiciary.

Reconciliation Cases

Reconciliation cases can be described by the following circumstances. An unwed

couple who had a sexual relationship at some point conceived a child. The couple then experienced some sort of separation and in many cases the biological father did not know that his former girlfriend was pregnant with his child. Eventually the couple reunited and sought custody of their child, who had been placed for adoption.

The major themes identified in the analysis of the *Reconciliation* cases were Lie/Deception and Mother's Legal Status. These themes were described in the chapter on the *Placement* cases.

Lie/Deception Theme

The widely reported “Baby Richard” case is a *Reconciliation* case where the Lie/Deception theme occurred. In Petition of Kirchner (649 N.E. 2nd 324, 1995) the biological mother and father were immigrants from Czechoslovakia living in Chicago. They lived together and planned to get married. After the biological mother became pregnant the biological father left for Czechoslovakia to visit an ill relative. While he was away, another relative of his told the biological mother that he was seeing another woman while he was in Czechoslovakia. Upon hearing this news, the biological mother moved out of their apartment and into a women's shelter, because she had nowhere else to go. She was then encouraged by a friend to offer her child for adoption. Within a day's time, a lawyer for the prospective parents phoned them with news that a baby would be available for adoption. The day after that the biological mother was contacted by the prospective adoptive parents, and arrangements were subsequently made for the adoption to proceed.

Examples of the Lie/Deception theme in this case include these references:

At all relevant times, both the Does' lawyer and the Does were fully aware that Daniella (the biological mother) knew who the father was and that she intended to tell the father that the child died at birth (326).

Through *lies, deceit and subterfuge*, Otto (the biological father) was denied any opportunity to establish any involvement with his child during the first 57 days of his life (328: italics added).

Similar references are found in the dissent written by Justice Miller:

The majority concludes that the Does lack standing under section 601 (b) (2) to seek a custody hearing on behalf of Baby Richard because the biological father did not voluntarily relinquish custody of the child and because the Does participated in Daniella's *deception* of Kirchner (340:italics added).

Daniella willingly gave up her parental rights to the child, agreed to the adoption, and consistently indicated to the attorney for the Does and the child welfare agency investigating the Does that she would not disclose the identity of the child's father. As stated, she will, along with Kirchner, by this court's order, have Richard living in her home. Thus, Daniella's *deceit* is being rewarded and she is able to circumvent her relinquishment of maternal rights and custody by this court's ruling (344:italics added).

Another well publicized case in this category is the case of "Baby Jessica", or, In Re Clausen (502 N.W. 2nd 649, 1993). In this Michigan case the biological mother, Cara Clausen, an unwed mother, gave birth to a baby girl on February 8, 1991 in the state of Iowa. On the 10th of February, Clausen signed a release of custody form and listed Scott Seefeldt as the father. Four days later Seefeldt signed a release of custody form.

On February 25th, the prospective adoptive parents, Roberta and Jan DeBoer filed a petition for adoption of the child in juvenile court in Iowa. The DeBoers were Michigan residents. On that same day, a hearing was held and the parental rights of

Clausen and Seefeldt were terminated while the DeBoers were granted custody of the child until the actual adoption proceedings could be completed.

The adoption never took place. On March 6, 1991, Clausen filed a motion in the Iowa Juvenile Court to revoke her release of custody. She stated in an affidavit accompanying the request that she had lied when she named Seefeldt as the father of the child, and that the child's actual father was Daniel Schmidt. On March 12, 1991, Schmidt filed an affidavit of paternity and on March 27, he filed a petition in the Iowa District court, seeking to intervene in the adoption proceeding initiated by the DeBoers. The couple then married and sought custody of their daughter together.

The majority opinion in this case places most of the responsibility for a long court case (the child lived with the DeBoers for two years at the time of this litigation) and any resultant trauma on the DeBoers. It has little to say about the biological mother.

The dissenting opinion of Justice Levin, however, takes issue with the majority's view and places responsibility on the biological mother:

The sympathetic portrayal of the Schmidts in the majority opinion ignores that it was Cara Schmidt's *fraud* on the Iowa court and on Daniel Schmidt that is at the root of this controversy. If she had identified Daniel Schmidt as the father when she consented to waive her parental rights, before she had a change of heart, he too might have relinquished his parental rights. If Daniel Schmidt had refused to relinquish his rights, the DeBoers would not have assumed custody of the child and this litigation would have been avoided. To fault the DeBoers is unwarranted. Why should they have believed that Cara Schmidt was telling the truth when she said she had *fraudulently* named the other man as the father? (686:italics added).

As his opinion progresses, Justice Levin makes five additional references to Cara

Schmidt's "fraud" and "subterfuge" as being the cause of the tragedy of this case (687-8).

Mother's Legal Status Theme

The case of In Re Adoption of B.G.S. (556 So. 2nd 545, 1990) is a Louisiana case where an unwed sixteen year old girl became pregnant. Her boyfriend offered marriage, but she was not sure if she wanted to marry him. Her parents suggested that she place the child for adoption, and the biological mother acquiesced. The biological father was opposed to the adoption and wanted to raise the child himself.

The biological mother and her mother proceeded with arrangements for an adoption. The biological father attempted to have his name placed on the birth certificate, but was prevented from doing so by the biological mother's parents, who limited his contact with their daughter. Eventually the biological mother acknowledged his paternity and the couple married. Justice Dennis remarks on the power of the biological mother here:

Consequently, the mother of an illegitimate child has the power to deprive the unwed father of his natural parental right to custody and to veto the adoption by withholding his consent. If she does so, the father loses all rights to the child, except in the unlikely event that the court should later find that the adoption is not in the child's best interest (548).

Later in this opinion, Justice Dennis makes the following statement regarding the notion of the necessity of there being a "Neutral Decision Maker" in order for the Due Process Clause to function adequately:

There is no such neutral decision maker in the present case. Under La.R.S. 9:422.8; the person who decides whether the unwed father's rights will be terminated is the natural mother. She is subject to competing physical, mental

and emotional pressures, and she can hardly be said to be neutral. In fact, if a mother wishes to surrender her child for adoption, it is in her best interest to omit the father's name from the birth certificate so that he will be unable to block the adoption. The lack of a hearing, combined with the placement of a decision in the hands of a potentially adverse decision maker, violates the most basic principles of due process under both our state and federal constitutions (556).

The New York case of Robert O. V. Russell K. (604 N.E. 2nd 99, 1992) also includes references to the mother's legal status. This case involves a couple who were living together and who planned to be married. Disagreements arose and they separated. At the time of the separation, the biological mother discovered she was pregnant, but did not tell the father because she feared he would think she was trying to coerce him into marriage.

The biological mother then contacted some friends who agreed to adopt the child. Eventually, the biological mother and father reunited and married. Two months after their marriage, the biological mother informed the father that a child had been born that was his. This occurred eighteen months after the birth and ten months after the completed adoption. The biological father then tried to regain custody of his child, but to no avail, as the courts ruled in favor of the adoptive parents.

Justice Titone, who wrote a concurring opinion in this case, remarks on the legal status of women as parents:

Because of the biological characteristics of the parties to these relationships, it is the women, rather than the men, who are in the unique position to discover whether a pregnancy has resulted. Further, in most instances, it is the women, rather than the men, who hold exclusive power to decide whether or not the other progenitor is to be informed of the pregnancy's existence (106).

Justice Titone writes the following regarding the notion that men and women who are sexually involved should always keep in touch with their former partners, as the law generally supposes they should:

I would submit, most respectfully, that a rule which places the onus on the man to investigate whether a woman with whom he is no longer intimate has become pregnant is simply out of step with modern mores and the realities of contemporary heterosexual liaisons. In this age of readily accessible birth control devices, men have greatly diminished reason, in most circumstances, to suspect that a woman with whom they have been intimate has become pregnant. Accordingly, there is little to prompt them to pursue their former lovers to satisfy themselves on that point. Moreover, a rule that requires men to foist continued contact on women with whom they are no longer involved overlooks women's interest in preserving their own privacy after the relationship has been terminated (106).

Again, Justice Titone writes:

...I would argue that no law could, or should, be written to prevent women such as Carol A. (the biological mother) from making the very personal and human choice to withhold information about their pregnancies from the men who they know are the biological fathers (108).

In these cases, as in the *Placement* cases, the biological mother bears the responsibility for informing the father of her pregnancy. If she fails to do so, some judges accuse her of deception. Others, such as Titone of New York, feel it is her prerogative to use her own judgment. However, if she does not tell the father, then he cannot be held solely responsible for his lack of support and interest in the child. As a result, the power to determine the outcome of an unwed pregnancy belongs primarily to the mother. Some judges believe unwed mothers are fine decision makers, while others feel biological mothers are potentially adverse decision makers in that the emotional

stress of an unwed pregnancy does not elicit solid decision making skills. Similar themes are found in the last category of cases, the *Remarry* cases.

Remarry Cases

Remarry cases are those in which the biological mother has married a man other than the biological father of her child. The biological father then makes a claim for custody or paternity of his child against the mother and her husband. I reviewed four of these cases. The dominant themes in these cases were Rejected/Thwarted and Mother's Legal Status.

Rejected/Thwarted Theme

The North Dakota case of Matter of Adoption of A.M.B. (514 N.W. 2nd 670, 1994) is one in which a couple, Mike and Kim, had a sexual relationship which resulted in a pregnancy. The biological father knew of the pregnancy and attended Lamaze classes with the biological mother. Shortly before the birth, Kim's feelings cooled toward Mike and she asked someone else to be her Lamaze coach. She also avoided seeing Mike and would not agree to his request that the child be given his surname.

After the birth, Kim moved from Minnesota to North Dakota and began attending a university there. Sometime later, she married a man named Robert. The biological father contended that he tried to establish support and a relationship with his child, but was rejected by the mother. In these proceedings, Mike appealed a district court's final decree of the adoption of his biological child by Robert, Kim's current husband. The court affirmed that district court decision, which stated that Mike's consent to the

adoption was not required.

Justice VandeWalle, writing the opinion of the court, does not find the biological mother solely responsible for Mike's lack of attention to his child, but he does point out that she did play a part in his absence:

We agree that the fact Kim shielded herself and the baby from Mike is of substantial significance. Mike testified that during the attempted phone conversations with Kim shortly after Kim had moved to Fargo, Kim had told him to stop harassing her. Kim did not keep Mike apprised of her new address and her unlisted phone number when she moved from her mother's residence. Kim's letter to Mike, written shortly after A.M.B.'s (the child) first birthday and stating that visitation could be arranged, also admonished Mike about harassment. Standing alone, we might be inclined to believe that Mike's lack of contact with A.M.B. was sufficiently understandable, if not justifiable, to conclude that the evidence is not clear and convincing that Mike abandoned A.M.B. (673).

In Interest of J.W.T. (872 S.W. 2nd 189, 1994) is a Texas case where a couple who were living together conceived a child. The biological mother, Judy T. was married to another man, but was waiting for a divorce to go through, at which time she planned to marry the father of the child, Larry G. Larry was acknowledged as the biological father of the child and made several payments for obstetric care.

Judy eventually reconciled with her husband and they dismissed their divorce action. Since the biological mother was married, her husband was the presumed father of the child.

The court of appeals reversed a trial court decision indicating that Larry lacked standing under the Texas Family Code to bring any action regarding the child named in the opinion as J.W.T. In this case, the Supreme Court of Texas affirmed the court of .

appeals reversal based on the notion that the trial court violated the due course of law guarantee in the Texas Constitution. Justice Doggett delivered the opinion of the court and states that “two constitutionally protected interests are involved in this case - parenthood and preservation of the family - and they are in conflict” (199). Justice Doggett also points out that:

When a biological father acknowledges his responsibility to help support the child and has made every reasonable effort to establish a relationship with the child, he is entitled to assert his interest in the child, notwithstanding the opposition of the mother and her husband (199).

Mother’s Legal Status Theme

The case of B.H. v. K.D. (506 N.W. 2nd 368, 1993) highlights the theme of gender-based classifications. In this North Dakota case, Justice Neumann, writing for the majority, comments on the differences between unwed mothers and unwed fathers:

Differences between men and women are the very foundation of the classification. Here, they are obvious. The woman carries the child through pregnancy...The entire classification within the act is premised on this basic and obvious distinction, it is not invidious, but realistically reflects the fact that the sexes are not similarly situated in the circumstances. Men do not bear children and give birth to them (376).

Justice Meschke, dissenting in this case, makes a statement regarding the equality of unwed mothers and fathers:

The female parent should no more be able to select the father after conception than to consent to adoption by wholly excluding the genetic father from the parental role (384).

In these two contrasting opinions, the strain between equal and special rights for women is evident. Some judges indicate that due to women’s special circumstances,

they should be given the primary right to choose the future home of their children.

Others insist that women and men should be equal under the law and therefore that a woman has no more say than a man has regarding the placement of their child.

Race and Class

As in the *Placement* cases, it was impossible to determine the race of any of the biological mothers in the *Reconciliation* or *Remarry* cases.

The class status of the women in the *Reconciliation* cases was unknown for four of the cases. In one case, however, it was stated that the biological mother was financially dependent upon her boyfriend, was an immigrant to this country, and was studying to become a beautician. While it is difficult to be certain, it appears all the women except for one in the cases were adults. There was one teenager among this group.

In so far as the *Remarry* cases go, there was one college student, and the rest of the women were indistinguishable by class or age.

Since the major themes are the same in the *Reconciliation* and *Remarry* cases as they were in the *Placement* cases, it is not necessary to repeat the results of the agon analysis here. Instead, I will turn to the conclusion of this research.

CHAPTER 5

DISCUSSION AND CONCLUSION

In this chapter I will discuss the limitations of this research. Then, I will review my expectations as to what feminist legal theory suggested I would find in judicial discourse on biological motherhood. I will then compare what I expected to find with what I actually found in my review of the twenty seven opinions. Following this will be a review of the agon analysis and discussion of what these results reveal about how judges contribute to the social construction of motherhood. In addition, I will discuss the biographies of some of the judges presented in my findings. Finally, I will conclude with my own interpretation of what this research can tell us about how judges present motherhood in these custody cases between biological fathers and third parties.

Limitations

While the sample size (N=27) is a limitation to keep in mind, the consistency of the results across case types strengthens the conclusions that can be drawn based on this sample.

One limitation of this research is the difficulty in determining the demographic characteristics of the biological mothers discussed. While I was able to note that many of the mothers belonged to the lower socioeconomic spectrum, I could not distinguish race through court opinions.

A final limitation is that the selection of categories and the coding of the court cases was done by only one coder. Multiple coders would have strengthened this research by insuring greater reliability.

Feminist Legal Theory

In chapter one of this thesis, I stated that feminist legal theory suggested that the inclusion of a man in an unwed mother's life was an important factor in how judges might refer to her in the discourse of their opinions. The results of this thesis, however, show that in these court cases it was not all that important whether the biological mother was involved with a man or not. The occurrence of the same basic themes (Lie/Deception, Rejected/Thwarted, and Mother's Legal Status) in all three categories of cases (*Placement*, *Reconciliation* and *Remarry*) indicates that unwed mothers are portrayed in a similar fashion notwithstanding their current marital status.

Feminist legal theory indicated that women of color would be treated differently than white women. As was discussed in chapter three and four, it was impossible for me to determine the race of the mothers on the basis of a court opinion. Therefore, I cannot draw any meaningful conclusions about race based on this research.

In so far as the differential treatment of women based on class suggested by feminist legal theorists, it appeared in this project that perhaps only one or two of the twenty seven mothers discussed in these opinions was a member of the middle class. The rest seemed to be from the lower part of the socioeconomic spectrum. A few women were homeless, and it appeared that for many financial difficulties were part of

the impetus which led the biological mother to place her child with an adoption agency. No actual numbers were given in these court cases that assure us that the majority of these women from the lower economic class, but a review of the facts of the case gives the reader this indication. Because of the skewed nature of the data regarding the mothers' class status, it is impossible to draw conclusions.

The fact that there is not a more balanced sample is itself worthy of note. Perhaps middle class and upper class women never experience situations such as these women experienced. A more likely explanation however, is that middle class and upper class women have other ways to resolve conflicts of this nature. This research suggests that it is the poor who are subject to the dictates of the legal system, which is primarily composed of political and economic elites.

Feminist legal theory suggested the dominance of the ideology of nurturant motherhood in our society. In this research I did not find the ideology of nurturant motherhood presented. Not only was it not used to judge women, but it wasn't even in the picture. Additionally, it is significant that nearly half of the cases originally identified as being relevant (N=22) were discarded because no mention was made of the biological mother at all in the opinion. Nor did having a man seem so important to the results, since the three types of cases, involving different male-female relationships, evidence the same themes. Thus, these results challenge some of the major points asserted by feminist legal theory.

This research does show that mothers have some advantages in the law--though

judges vary as individuals on how they feel about this and as a collective whole are quite ambivalent about this. This ambivalence seems to stem from the biology of reproduction, which gives women a lot of power to determine the outcome by withholding or manipulating information about the pregnancy.

While the specifics turned out differently than I thought, it may be that feminist legal theory provides a context for how judges view mothers in these cases. This context takes the form of a “moral mother” concept, in which deceptiveness is bad and mothers are judged negatively for such behavior. It follows that many of these mothers have thwarted males directly and intentionally. Or else, through deception, they have blocked them from actualizing their potential parental rights. The woman’s acts of this sort seemed to have been negatively judged. We do not know how this negative evaluation compares to what might be said about fathers in custody cases (eg. child support). Perhaps women as mothers are expected to evidence more idealized behavior. It is just that it is the moral mother (the woman of good character) rather than the nurturing mother who appears in the law as represented by these cases. In order to ascertain if judges apply this standard of honesty to others, such as in other types of family cases or in cases involving corporate wrongdoing, further research is necessary.

There appears to be little consensus among judges as to how much discretion a biological mother should have in making the decision about where her child should grow up. Some judges state that mothers are capable of making such decisions, and, considering the fact that only women can give birth to a child, it is her decision to make.

Others argue that a woman should include the man in every part of the decision making process, and should acquiesce to his wishes should they be different from hers. It appears therefore, that in this time of changing gender roles and characterizations, there is confusion in the legal realm as to how biological mothers should behave. Some prefer a more traditional model where a biological mother follows the biological father's wishes. Some insist that women have special legal privileges in cases of unwed pregnancy and that, due to this, men are disenfranchised in the decision making process. Some think that a woman's special legal status is as it should be. The fact that there is such uncertainty and debate over a woman's proper legal status shows how quickly the law is evolving in this area of family law.

It is interesting to note that this tension reflects not only the conflict between men and women for control of their offspring but that it also reflects tensions within the feminist movement between "difference" and "equality" feminists.

The following is a review of the results of an agon analysis of the major themes which emerged from this thesis.

Agon Analysis

In an agon analysis, opposing terms are examined. Since the rhetoric in this study was primarily negative in nature, an agon analysis reveals what a rhetor should be or should do. This is contrary to the findings of many cluster criticisms where an agon analysis indicates what is not valued by the rhetor.

In this thesis, two of the three major themes were appropriate for an agon analysis. These themes were the Lie/Deception theme and the Rejected/Thwarted theme. The third theme of Mother's Legal Status did not produce any opposing terms to analyze, but it will still be discussed below regarding what it indicates about judicial decision making.

The theme identified as Lie/Deception referred to any indication in the opinion that the biological mother lied to keep the biological father from expressing his interest in his child. The opposite of lying is to tell the truth. Therefore, biological mothers should be forthright and honest. An unwed mother should be forthcoming with the father regarding his paternity and with all other authorities as to the identity of the father.

The theme identified as Rejected/Thwarted referred to any action recounted in the opinion which indicated that the biological mother rejected the father's wishes to care for the child himself. The opposite of rejecting and thwarting is to be open and agreeable to the wishes of the biological father. An unwed mother should allow an unwed father access to his child, should accept his offers of support, and should acknowledge his paternity in a timely manner.

The third major theme, Mother's Legal Status, brings to light the debate over the legal status of biological mothers. Since it is primarily the mother who is responsible for the welfare of her child, the issue is whether she can always be expected to consult the father before she makes the appropriate arrangements to secure her child's well-being. For example, if a biological father cannot be found to relinquish his parental rights, or if

a biological mother has some reason to fear the father and does not want contact with him, a delay may occur in the child's placement. This places a burden on the mother who is seen by the law as the primary decision maker, but who at the same time cannot have the final say on the placement of her child. Potentially, this puts women in a very difficult situation. This conflict also led to judicial reflection on the law that sometimes had negative implications for women's competence.

The Moral Mother

While lying and rejection are not socially condoned in most any milieux, the results of this agon analysis lead me to suggest the following hypothesis. It appears as though it is especially important for mothers not to lie or be rejecting of their former partners. The judges' "motive", in Burke's terminology, emerges in the language they use about lying and deception. The ideal of the "moral mother", or the mother who imparts the proper values to her children, seems to be particularly applicable here. Ruth Bloch (1978) writes that "Although women were (in the mid-nineteenth century) also idealized as virgins, wives and Christians, it was above all as mothers that women were attributed social influence as the chief transmitters of religious and moral values"(101). This cluster criticism on the discourse of judges concerning biological mothers suggests that women, when they become mothers, are expected to live up to the idealized image of the "moral mother."

When mothers lie, deceive, thwart or reject, it seems to these judges as something which must be corrected so as to maintain the social order. Mothers are supposed to

display and impart values the dominant culture holds dear, such as honesty, fairness, and cooperation. It appears that the dominant ideology of motherhood requires that women rise above their human failings when they become mothers. However, further research is necessary in order to determine if this standard applies only to women as mothers or if it applies to others as well.

It is partially because of this idealization of the moral mother that women have been given primary legal status. There seems to be a suggestion in some opinions that for the most part, women, because of their physical ability to give birth and their moral sensibilities, are the primary parent. It may be ideal for an unwed father to show an interest in his child and to assume his share of the responsibility for his child, but it is not assumed that he will. For an unwed mother, however, it is assumed she will make the proper choices, and if she fails, she is called to task for it. The biological mothers in these cases were criticized for their behavior because they did not live up to the ideals of our society.

Biographies of Judges

In some of the opinions I read it was not clear which judge actually wrote the opinion. I was able, however, to identify seventeen judges whose opinions are cited in chapters three and four of this thesis. The Martindale-Hubbell Law Directory is a comprehensive listing of attorneys in the United States. The directory lists when an attorney was born, when s/he began her/his legal education and the institutions of higher education which s/he attended. In so far as higher education is concerned, justices were

either educated at an Ivy League university, or at a prestigious university in their home state.

All of the judges quoted in this thesis who could be identified and located in the Martindale-Hubbell Law Directory were male. Thus, as feminist legal theory asserted, it is men who are in the positions of power and who, in the legal realm, make important decisions which can profoundly affect people's lives. It is also important to note that it is men who are evaluating women and biological motherhood in the courts. It is impossible to speculate as to whether or not female judges would produce a similar discourse, but until there are more female judges sitting on state courts of appeals and supreme courts, we will never know.

The average year of birth of the judges identified was 1934, which would make their average age today sixty three years old. Securing an appointment to any state's highest court requires a career that evidences much achievement and maturity. Considering that the majority of the justices identified were born before 1940, however, it is of note that there is much debate on what an unwed mother's legal status should be. There does not seem to be any generational bias on the part of the judges quoted in this research, as judges in the same age range take different points of view on mothers' legal rights. There is, however, a fairly strong sentiment among the judiciary as to the necessity of appropriate behavior on the part of the biological mothers.

Table IV lists more detailed biographical information on the judges quoted in this text.

Directions for Future Research

In order to explore the hypothesis presented that women are judged by “moral mother” ideology when they give birth, further research is needed. A comparative study of men and women in custody cases where the parents are divorcing would be useful in this regard. Perhaps when the issue of child support is considered divorcing fathers are subject to similar judicial characterizations.

Another direction for future research would be to do this research on cases that occurred in the past and in the future. It would be interesting to note how the results might be different if the time period under review were 1970 to 1975 or, when the time comes, from 2010 to 2015. Additionally, the time frame under examination could be for varying lengths of time.

Other ways to examine images of motherhood in third party custody cases would be research on media coverage of the most well-known cases in order to determine public sentiment on motherhood. In addition, research which focused on the transcripts of court cases such as these would elicit a rhetoric that might be far different from the written opinions of judges. Such research could illumine how other interested parties in the legal profession conceptualize motherhood.

Finally, actual interviews with unwed mothers and with members of the judiciary associated with cases of custody contested by third parties would produce more extensive data on race, class, occupation and age. In addition, an interview format would allow the researcher to ask direct and in depth questions which this research could not do. It would

go beyond the texts of cases to elicit the perspectives of the principal parties.

Conclusion

While limited, this thesis provides evidence of the debate on gender equality in law. Although it failed to find support for some central tenets of feminist legal theory, it suggests some ways in which the ideology of motherhood might be perpetuated. While little attention was devoted in these cases to nurturance or to the mothers' parental competence per se, moral standards for mothers were apparent. Mothers are held to a high standard of honesty and deference to the interests of others, a cultural ideal that may or may not be uniformly applied to all adults.

Many judges also evidenced uneasiness about the power of mothers to control placement of the child through their superior legal rights and through their control over information.

As more women enter the judiciary and as other groups compete to get their interests advanced, the image of "mother" in law may change. The direction of change is unpredictable given the tension between special and equal rights in feminism; moreover, not all women judges will have a feminist perspective. Viewpoints of minority judges, female or male, may add further complexity to this realm.

TABLE I
PLACEMENT CASES
(N=18)

Arizona

Matter of Pima City Juvenile Severance Action

876 P. 2nd 1121 (1994)

Supreme Court of Arizona

Judge: Feldman

Matter of Juvenile Action No. JS-8490

876 P. 2nd 1137 (1994)

Supreme Court of Arizona

Judge: Feldman

California

Adoption of Michael H.

898 P. 2nd 891 (1995)

Supreme Court of California

Judge: Mosk

Dissent: Kennard

Adoption of Kelsey S.

823 P. 2nd 1216 (1992)

Supreme Court of California

Judge: Baxter

In re Zacharia D.

862 P. 2nd 751 (1993)

Supreme Court of California

Judge: Arabian

District of Columbia

Appeal of A.H.

590 A. 2nd 123 (1991)

District of Columbia Court of Appeals

Judge: Ferren

District of ColumbiaAppeal of H.R.

581 A. 2nd 1141 (1990)

District of Columbia Court of Appeals

Judge: Ferren

Dissent: Belson

FloridaIn re the Matter of Adoption of Baby James Joe

572 So. 2nd 986 (1990)

District Court of Appeal of Florida, First District

Judge: Joanos

Rivera-Berrios v. Adoption Centre

617 So. 2nd 1067 (1993)

District Court of Appeal of Florida, Fifth District

Judge: Griffin

In re Adoption of Baby E.A.W.

647 So. 2nd 918 (1994)

District Court of Appeal of Florida, Fourth District

Judge: Hersey

Concurring: Pariente

Dissent: Klein

IndianaAdoptive Parents of M.L.V. v. Wilkens

598 N.E. 2nd 1054 (1992)

Supreme Court of Indiana

Judge: Shepard

KansasIn Interest of Baby Boy N.

874 P. 2nd 680 (1994)

Court of Appeals of Kansas

Judge: Lewis

Nebraska

In re Adoption of Kassandra B.

540 N.W. 2nd 534 (1995)

Supreme Court of Nebraska

Judge: White

New Mexico

Matter of Adoption of J.J.B.

894 P. 2nd 994 (1995)

Supreme Court of New Mexico

Judge: Frost

Oregon

Hiskey v. Hamilton

824 P. 2nd 1170 (1992)

Court of Appeals of Oregon

Judge: Rossman

South Carolina

Abernathy v. Baby Boy

437 S.E. 2nd 25 (1993)

Supreme Court of South Carolina

Judge: Harwell

Utah

Swayne v. L.D.S. Social Services

795 P. 2nd 637 (1990)

Supreme Court of Utah

Judge: Hall

Dissent: Zimmerman

West Virginia

Smith v. Abbot

418 S.E. 2nd 575 (1992)

Supreme Court of Appeals West Virginia

Judge: Brotherton

TABLE II
RECONCILIATION CASES
(N=5)

Illinois

Petition of Kirchner

649 N.E. 2nd 324 (1995)

Supreme Court of Illinois

Dissent: Miller and McMorro

Louisiana

In re Adoption of B.G.S.

556 So. 2nd 545 (1990)

Supreme Court of Louisiana

Judge: Dennis

Michigan

In re Clausen

502 N.W. 2nd 649 (1993)

Supreme Court of Michigan

Judge: Cavanagh

Dissent: Levin

New York

Robert O. v. Russell K.

604 N.E. 2nd 99 (1992)

Court of Appeals of New York

Judge: Titone

Matter of Raquel Marie

Matter of Baby Girl S.

559 N.E. 2nd 418 (1990)

Court of Appeals of New York

Judge: Kaye

TABLE III
REMARRY CASES
(N=4)

Massachusetts

C.C. v. A.B.

550 N.E. 2nd 365 (1990)

Supreme Judicial Court of Massachusetts, Hampden

Judge: Nolan

Dissent: O'Connor

North Dakota

Matter of Adoption of A.M.B.

514 N.W. 2nd 670 (1994)

Supreme Court of North Dakota

Judge: VandeWalle

B.H. v. K.D.

506 N.W. 2nd 368 (1993)

Supreme Court of North Dakota

Judge: Newmann

Dissent: Meschke

Texas

In Interest of J.W.T.

872 S.W. 2nd 189 (1994)

Supreme Court of Texas

Judge: Doggett

TABLE IV
BIOGRAPHICAL DATA ON JUDGES QUOTED

Arizona

Chief Justice Stanley G. Feldman

Born: 1933

Highest Degree from: University of Arizona

California

Justice Stanley Mosk

Born: 1912

Highest Degree from: Southwestern University School of Law

Justice Marvin Baxter

*unable to find biography

District of Columbia

Justice John M. Ferren

Born: 1937

Highest Degree from: Harvard University

Illinois

Justice Benjamin K. Miller

Born: 1936

Highest Degree from: Vanderbilt University

Indiana

Chief Justice Randall T. Shepard

Born: 1946

Highest Degree from: Yale University

Louisiana

Justice James L. Dennis

Born: 1936

Highest Degree from: Louisiana State University

Michigan

Justice Charles L. Levin

Born: 1926

Highest Degree from: University of Michigan

New Mexico

Justice Stanely F. Frost

Born: 1942

Highest Degree from: George Washington University

New York

Justice Vito J. Titone, Jr.

Born: 1929

Highest Degree from: St. John's University

North Dakota

Justice Herbert L. Meschke

Born: 1928

Highest Degree from: University of Michigan

Justice William A. Neumann

*unable to find biography

Chief Justice Gerald W. VandeWalle

Born: 1933

Highest Degree from: University of North Dakota

Oregon

Justice Kurt C. Rossman

Born: 1932

Highest Degree from: Northwestern College of Law

South Carolina

Justice Harwell

*not listed as a current member of the Supreme Court

*unable to find biography

Texas

Justice Lloyd Doggett

Born: 1946

Highest Degree from: University of Texas

Utah

Chief Justice Michael D. Zimmerman

Born: 1943

Highest Degree from: University of Utah

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