

Naming and re-categorization in the law

Child abuse as slavery

LEORA BILSKY

Faculty of Law, University of Tel Aviv, Tel Aviv, Israel

I believe we make a mistake when we assume that the categories we use for analysis just exist and simply sort our experiences, perceptions, and problems through them. When we identify one thing as like the others, we are not merely classifying the world; we are investigating particular classifications with consequences and positioning ourselves in relation to those meanings. When we identify one thing as unlike the others, we are dividing the world; we use our language to exclude, to distinguish – to discriminate¹

Introduction

Child abuse as a social problem has gained its name and the attention of scholars, laypersons, legislators and judges during the last four decades. Today, it is understood by many to be a major social problem facing modern societies. Achieving a worldwide consensus about the gravity of the problem over such a short period of time attracts the attention of scholars who are interested in the process of categorization as a means to social reform. Thus, one can find an article investigating changes in the category 'child abuse' in a book dedicated to cognitive theories of categorization.² Likewise, there is historical research documenting the course of constructing 'child abuse' as a social, legal and political category.³ Against this background, it is all the more surprising to find that the legal literature on child abuse has shown

¹ Martha Minow, *Making All the Difference: Inclusion, Exclusion, and American Law* (Ithaca: Cornell University, 1990), p. 3.

² Ian Hacking, "World-Making by Kind-Making: Child Abuse for Example", in Mary Douglas and David Hall (eds.) *How Classification Works: Nelson Goodman Among the Social Sciences* (Edinburgh: Edinburgh University Press, 1992), pp. 180–234.

³ Linda Gordon, *Heroes of Their Own Lives, the Politics and History of Family Violence* (New York, NY: Viking, 1988).

little interest in the complex questions of naming and categorization that the subject raises. This essay takes to remedy the situation by opening the process of legal categorization in general, and the categorization of 'child abuse' in particular, to critical analysis.

The DeShaney case

How does the meaning of a legal category change over time? Is subsuming new fact-situations under a legal category a purely logical-deductive process? If not, what other faculties take part in the process? What role, for example, do analogies, metaphors, narratives and social beliefs play? I choose to study these questions in the context of a concrete debate about the legal categorization of child abuse in American law. More specifically, I examine the question whether 'child abuse' should enjoy the protection of the 'slavery' prohibition in the Thirteenth Amendment of the American Constitution. The occasion for the debate was provided by a human tragedy known as the DeShaney case.⁴ Joshua DeShaney and his mother sued the State of Wisconsin under the 'due process' clause of the Fourteenth Amendment of the US Constitution for failing to protect Joshua against his father's violent abuse. It was proven in court that the department of social services had received a stream of reports about the on-going abuse of Joshua DeShaney by his father, but allowed the reports to pile up without intervening. The dutiful social worker who visited the house and wrote down the details of the reports even admitted on one occasion that she "knew the phone would one day ring and Joshua would be dead." Yet, nothing had been done to prevent this from happening. The abuse ended when Joshua was bitten so brutally that he fell into a coma and suffered brain damage so severe that he is expected to spend the rest of his life confined to an institution for the profoundly retarded. Joshua was just two weeks short of his fourth birthday when he was institutionalized for life. The Supreme Court of the United States rejected the claim by Joshua DeShaney and his mother that the Department of Social Services violated his constitutional rights when it failed to protect him from the violence of his father.

The case was brought under the Fourteenth Amendment. The Fourteenth Amendment is one of the three major amendments to the American Constitution enacted after the Civil War together with the Fifteenth Amendment and the Thirteenth Amendment.⁵ The Fifteenth Amendment guarantees the right

⁴ *DeShaney v. Winnebago County Department of Social Services*, 489 U.S. 189, 193 (1989).

⁵ Lawrence M. Friedman, *A History of American Law* (New York, NY: Touchstone, 2nd ed., 1985), pp. 342–343.

to vote to all citizens without regard to "race, color, or previous condition of servitude." The Thirteenth Amendment abolishes slavery. The Fourteenth Amendment, the longest of the amendments, forbids states do deny "life, liberty, or property" without "due process" [the Due Process clause], or to deny any person "the equal protection of laws" [the Equal Protection clause]. The prohibitions in the Fourteenth Amendment are directed against "state actions" as distinguished from the actions of private individuals. Therefore, the court interpreted the amendment as reaching "only such action as may fairly be said to be that of the States".⁶

In *DeShaney*, plaintiffs claimed that the state's failure to act deprived the child of his liberty in violation of the Due Process Clause.⁷ In order to redress Joshua and his mother, the court would have to overcome two barriers. First, the harm suffered by Joshua was directly inflicted by a private individual (his father), and not by state officials. Second, the State was involved in the case only by its failure to act (inaction) and not because of its own action. Therefore, the only ways to enjoy the protection of the Fourteenth Amendment would have been to point to an affirmative obligation on the State to act, or to show that the state (through its welfare system) assumed responsibility over Joshua's life. These arguments, however, were rejected by the majority of the court who stressed that the harm to Joshua *DeShaney* occurred in the private sphere of his home and was caused by his father.⁸

The court's refusal to extend the protection of the Fourteenth Amendment to Joshua *DeShaney* (by invoking the distinctions between private and public, action and inaction), convinced Akhil Amar and Daniel Widawsky to suggest an alternative route.⁹ They argued that 'child abuse' should be classified under

⁶ *Shelley v. Kramer*, 334 U.S. 1 (1948).

⁷ The importance of applying a constitutional clause to the case derived from the need to show an affirmative duty to act on part of the state, that will lead to the conclusion that the State's failure to act raises a cause of civil action against the State.

⁸ The *DeShaney* court explained that the Clause's language "cannot fairly be extended to impose an affirmative obligation on the State to ensure those interests [life, liberty or property] do not come to harm through other means." The majority stated that "nothing in the language of the Due Process Clause itself requires the State to protect the life, liberty, and property of its citizens against invasion by private actors. The Clause is phrased as a limitation on the State's power to act, not as a guarantee of certain minimal levels of safety and security." The court compared this case, in which it found no state obligation to prevent child abuse, to cases that held no obligation in funding abortions or other medical services [*Harris v. McRae*, 448 U.S. 297] and holdings of no obligation to provide adequate housing [*Lindsey v. Normet*, 405 U.S. 56]. In certain cases, the court has recognized a state affirmative duty to act, arising out of "special relationships" (prison's inmates and patients in public mental hospitals). However, the court explained that these exceptions arise only when the state takes a person into its own custody, holding her there against her will.

⁹ Akhil Amar and Daniel Widawsky, "Child Abuse as Slavery: A Thirteenth Amendment Response to *DeShaney*", 105 *Harv. L. Rev.* 1359 (1992) (hereafter, Amar and Widawsky).

the anti-slavery prohibition of the Thirteenth Amendment instead of under the due process clause of the Fourteenth.¹⁰ They offered their new classification to the courts as a way to overcome the legalistic distinctions, between private and public, action and inaction, that pervade the jurisprudence of the Fourteenth Amendment. As the Thirteenth Amendment does not contain a requirement of 'state action,' it could allow courts to concentrate on the special characteristics of child abuse cases. In particular, this Amendment can be adapted to modern cases of child abuse, where the harm often results from a combination of actions taken by private people and the de facto non-intervention of public officials.

The Thirteenth Amendment, ratified on December 6, 1865, shortly after the Civil War, is a general prohibition of "slavery . . . within the United States". The first section of the Amendment is the global and absolute statement that "Neither slavery nor involuntary servitude, except as a punishment for crime whereof the party shall be duly convicted, shall exist within the United States . . .". Section two ensures that "Congress shall have power to enforce this article by appropriate legislation". Since the institution of slavery was carried by private individuals who enjoyed the protection of the laws, the Amendment does not distinguish between private individuals and state officials. Indeed, the court stated, time and again, that the Amendment "is not a mere prohibition of State laws establishing or holding slavery, but an absolute declaration that slavery or involuntary servitude shall not exist in any part of the United States".¹¹

The Thirteenth Amendment prohibits 'slavery' as such, no matter who its agents are. The amendment can, therefore, address harms to individuals that are characteristic of the age of bureaucracy. These harms are inflicted by private individuals upon other individuals (especially upon the weaker members of society such as children, women and minorities), and sustained through a combination of private violence and the passivity of law enforcement authorities. The welfare state takes upon itself to prevent harms, such as child abuse and violence against women, from happening. The dependency of individuals in the welfare state on the active intervention of state officials to secure their rights blurs traditional boundaries between private and public, action and

¹⁰ Concerning the merits of the court's decision, the authors think that a good argument could be made to include the specific facts of Joshua DeShaney's abuse under the doctrine of 'state action', since the State of Wisconsin granted the father custody over Joshua (Amar and Widawsky, *supra* note 9, at 1364, footnote 17). However, since the authors are concerned with the issue of child abuse in general, and do not want to limit the constitutional protection to cases in which the state grants the custody to the abusive parent, they turn to consider the Thirteenth Amendment.

¹¹ The Civil Rights Cases, 109 U.S. 3 (1883), 20 [Justice Bradley].

inaction.¹² The Fourteenth Amendment with its double requirement of “state action” seems inadequate to address these modern conditions. In contrast, the Thirteenth Amendment can offer a legal framework to address these types of harms, since it did not introduce these distinctions in the first place. Indeed, the history of the Thirteenth Amendment reveals a striking adequacy for addressing modern cases of child abuse, because the global prohibition of slavery embodied in the Thirteenth Amendment sustains a profound understanding of the inseparability between private and public, action and omission.

Akhil Amar and Daniel Widawsky’s article, “Child Abuse as Slavery: A Thirteenth Amendment Response to DeShaney” argues for a re-categorization of child abuse under the Thirteenth Amendment. Reading the article, we witness the process of a category change in the law. The authors call for an extension of the Thirteenth Amendment anti-slavery prohibition to situations of modern ‘child abuse’ like the one exemplified in the DeShaney case. They claim that their interpretation of the prohibition against *slavery* reflects its original meaning. The reader is invited to examine the meaning of two legal categories, one old (slavery) and one modern (child abuse), and to contemplate their possible intersection. In this respect, Amar and Widawsky’s article raises the difficult question of how legal categories change their meaning over time. The goal of the article is to interpret the legal category *slavery* so that it encompasses cases of modern child abuse. In the process ‘child abuse’ itself acquires a different meaning and is shown to be a problem that extends beyond the private sphere of the family to encompass the public sphere of law and politics.¹³

Changes in legal categories occur all the time, but rarely do we have the opportunity to examine our implicit theories regarding this process of categorization. This is often due to the slow pace at which these changes occur. In contrast, when we try to introduce new members to a legal category that was neglected for a long time, the process of categorization itself comes to the fore. Examining the article from this perspective, one is likely to be surprised by the techniques used by the authors, techniques that frustrate popular expectations about legal categorization. I suggest that in order to understand the logic of the authors’ moves, we should not consult Aristotle’s teachings about categorization but, instead, we should turn to research in the emerging field of cognitive studies. Amar and Widawsky remain silent about the assumptions that inform their work, perhaps, because their project is a practical project of

¹² Martha Minow, “Words and the Door to the Land of Change: Law, Language and Family Violence”, 43 *Vanderbilt Law Review* 1665 (1990).

¹³ For an interpretation of child abuse as a political and not just social problem, see Linda Gordon, *supra* note 3. For a critical discussion of the unsuitability of the private/public distinction to situations of child abuse, see Martha Minow, *supra* note 1.

convincing readers to accept a new categorization. This essay is directed to expose these implicit assumptions about categorization and subject them to critical examination. The examination can enhance our knowledge of one of the central activities of legal reasoning – legal categorization – that has been left, for the most part, unexplored.

Two theories of categorization

Categorization, according to popular understanding, has to begin with the articulation of an abstract definition of the relevant category (the necessary and sufficient conditions shared by every member of the category), and proceed by determining how well the new candidate fits under this definition.¹⁴ Thus, one would expect the authors to provide an abstract definition of slavery under the Thirteenth Amendment, and to argue for the applicability of this definition to cases of modern child abuse. This is not the road taken by Amar and Widawsky. Instead, the authors open the article by invoking social beliefs and common narratives about the meaning of the slavery clause of the Thirteenth Amendment:

The Thirteenth Amendment of the Constitution . . . outlawed the “peculiar institution” of Southern chattel slavery – auction blocks, overseers, iron chains, and all. Yet the Amendment is more than a mere nineteenth-century relic . . . Emancipation did not discriminate by *age*; the Amendment freed minors as well as adults. Nor did the Amendment discriminate on the basis of *familial status*; many slaves in 1865 were mulattos fathered by white slave masters . . . Its sweeping words and vision prohibited not only *forced labor for the master’s economic enrichment*, but all forms of chattel slavery—whether the ultimate motive for such domination . . . was greed (as in the cotton market) or sadism (as at the end of the lash). Finally, the Amendment compelled abolition of even “*private*” *enslavement* perpetuated not by the force of law, but by the violence of master over slave. The *de facto* condition of slavery, the Amendment commanded, shall not exist in America¹⁵ (emphasis added).

Judged from a narrow legal perspective this paragraph is unnecessary because the words of the constitution are not limited to slaves of African origins, nor to adults, nor to labourers. I suggest that the authors’ decision

¹⁴ Edward E. Smith and Douglas L. Medin. *Categories and Conceptions* (Cambridge, MA: Harvard University Press, 1981), pp. 1–2 (the technical term for this approach is the “classical view”).

¹⁵ Amar and Widawsky, *supra* note 9, at p. 1359.

to open the article this way reveals their implicit assumption about the way categorization actually works. Categorization for them is not a mechanical process of matching new fact situations to abstract definitions. Rather, they see legal categories as embedded in social beliefs and popular narratives that endow them with their meaning and give direction to their possible transformations.¹⁶ This means that interpreters of the Thirteenth Amendment of the Constitution, lay persons as well as legal experts, are likely to approach it with prior expectations about the meaning of slavery. These "background stories" are likely to influence their estimation of similarity between old and new members of the slavery category. Any attempt at change, therefore, has to take these expectation into account and to begin by destabilizing the 'imaginary' boundaries that they introduce. This view of categorization can explain the authors' decision to open their article not with a legal definition of slavery, but with a direct attack on the 'official story' (i.e., the dominant narrative) about slavery.¹⁷ They take to challenge this story that depicts slavery as a market institution by introducing 'counter stories', stories that relate the meaning of slavery from the point of view of the slaves, and from the point of view of the participants in the political debate about its abolition. With these counter stories the authors hope to pierce the layers of the 'official story' about the economic aspects of slavery, to reveal it as an institution of dehumanizing domination and violence of one human being over another. This intentional shift in stories can help readers notice similarities between the DeShaney case and a prototypical case of slave-child, both constituting a violent relationship that is supported de-facto by the power of the state.¹⁸

The authors implicitly invoke a theory of categorization, which I shall call the '*cognitive view*' of categorization.¹⁹ This view is critical of the traditional understanding of categorization that emphasizes the role of deductive and inductive logic, over and above analogies, metaphors, and narratives. I shall call the traditional approach that the authors implicitly reject, the '*objectivist view*' of categorization, because it assumes the existence of stable and objective boundaries to categories. While the objectivist view presents categorization as a purely logical process of reasoning, the cognitive view insists on the

¹⁶ Gregory L. Murphy and Douglas L. Medin, "The Role of Theories in Conceptual Coherence", 92 *Psychological Review* 289 (1985).

¹⁷ I adopt the terminology of Delgado about, 'official stories' and 'counter stories'. See Richard Delgado, "Storytelling for Oppositionists and Others: A Plea for Narrative", 87 *Mich. L. Rev.* 2411 (1989).

¹⁸ Amar and Widawsky, *supra* note 9, at 1360, 1384.

¹⁹ Under the roof of cognitive studies in categorization one can find different schools and approaches (for example, the Probabilistic View and the Exemplar View). For the purpose of this essay I treat the different approaches under one roof (the cognitive view), and when necessary for my argument, I point out their differences. For further discussion of the different views, see Smith and Medin, *supra* note 14.

irreducible role of analogies, metaphors and narratives in categorization.²⁰ In their deconstruction of the traditional understanding of the slavery category, the authors intuitively work in accordance with insights from the cognitive theory of categorization. However, when they turn to reconstruct the boundaries of the legal category 'slavery,' they resort to the objectivist view and abide by its requirements. I believe that the shift back to the objectivist view undermines the whole basis of their argument and weakens its persuasive power. I will, therefore, suggest an alternative way for introducing child abuse under the slavery prohibition that is more compatible with cognitive studies. But before going any further, I would like to examine two views of categorization more closely.²¹

According to the *objectivist view*, all instances of a category share common properties. These properties are necessary and sufficient to define the category (criterial conditions), marking its clear and determinate boundaries.²² The act of classification, according to this view, consists of a series of binary decisions: each object does or does not belong in the category. Classifying is understood as an act of deductive and inductive logic whose objectivity is guaranteed by excluding all 'imaginative devices' such as analogies, metaphors and common narratives that inevitably introduce a subjective element to the process.

Works in contemporary *cognitive studies* are critical of the objectivist view of categorization.²³ The process of categorization, they argue, involves a mixture of subjective and objective elements, because every act of classification consists of an interaction between a human being (embedded in her personal history, specific biology, culture, social beliefs, etc.) and the physical world. They argue that classifications cannot proceed in a strictly objective manner, because the world is not divided into 'natural' categories. Instead, they develop a theory of categorization that emphasizes the role of imaginative tools such as analogies, metaphors, and narratives in the process. The connection among members of a category, cognitivists argue, should be understood according to a 'family resemblance' structure.²⁴ They deny that

²⁰ Cass R. Sunstein, "On Analogical Reasoning", 106 *Harv. L. Rev.* 741 (1993).

²¹ It should be mentioned that the authors rely on theories of categorization only at the background of their argument. These theories are not directly introduced or examined in the article.

²² Note, however, that identifying the "necessary and sufficient" conditions for membership does not necessarily imply that the category's boundaries are "clear and determinate", and that there are no hard cases left.

²³ George Lakoff, *Women, Fire and Dangerous Things, What Categories Reveal about the Mind* (Chicago: University of Chicago Press, 1987); Smith and Medin (1981) *supra* note 14; Murphy and Medin (1985) *supra* note 16.

²⁴ The basic idea is taken from Ludwig Wittgenstein, see Lakoff, *id.* at p. 16; E. Rosch and C.B. Mervis, "Family Resemblance Studies in the Internal Structure of Categories", 7 *Cognitive Psychology* 573-605 (1975).

there is a common core of criterial properties and argue that categories may be represented in terms of features that are typical or characteristic. In a 'family resemblance' structure one can perceive similarities between representative and nonrepresentative members of a category yet, they need not all share one property. The 'family resemblance' structure, instead, is upheld with the help of imaginative devices.

The category '*mother*' can clarify some differences between the 'objectivist' and the 'cognitivist' views.²⁵ According to the objectivist view it should be possible to identify the necessary and sufficient conditions of the '*mother*' category. A general definition of these conditions can and should be given. For example, '*mother*' can be defined as '*a woman who has given birth to a child*'. The cognitive view, in contrast, does not try to identify the necessary and sufficient conditions for motherhood because it claims that no such definition can possibly cover the full range of cases falling under the '*mother*' category. Therefore, the cognitive approach does not insist on finding the common properties shared by 'biological mothers', 'donor mothers' (who donate eggs), 'surrogate mothers' (who bear the child, but may not have donated the egg), 'adoptive mothers', and so forth. Instead, it tries to identify a 'family resemblance' by virtue of the members relation to a prototypical case in which the different models of motherhood (genetic model, nurture model, martial model and genealogical model) converge.²⁶

Once we encounter the phenomenon of 'family resemblance' (no one property is share by *all* the members of a category), the traditional view has to give way to the idea that some members are better representatives than others (good examples). It also entails a rejection of the belief in the existence of fixed (objective) boundaries to categories that are determined by the necessary and sufficient conditions of inclusion.²⁷ When we compare the explanatory power of the two theories of categorization, we can notice the advantages of the cognitive view in explaining the structure of the slavery category. It seems impossible to identify the necessary and sufficient conditions of 'slavery' in a

²⁵ The example is taken from Lakoff, id., 74–76.

²⁶ Notice that the convergence of the different models in one prototype is not necessary. According to cognitivists who hold the 'exemplar' view of categorization, a category can have a structure of family resemblance consisting of a few exemplars, without there being a single representation of the class of exemplars. For an elucidation of the differences between the prototype view (probabilistic view) and the exemplar view, see Smith and Medin (1981) *supra* note 14, p. 3.

²⁷ Wittgenstein demonstrated that insight on the category "game" to illustrate that there is no fixed and predetermined boundary to it. The category is constantly extended to allow new kinds of games to enter, games that only *resemble* in one way or another previous games, but do not share a common property of 'gameness' with all the other games. See Lakoff *supra* note 23.

way that will encompass all its different historical instances and still provide a meaningful definition.

A more fruitful way will be to identify different models at work under the roof of 'slavery' and trace their family resemblance. There is the '*economic model*' (slavery motivated by economic reasons); the '*racial model*' (relations of domination between a *white* master and a *non white* slave); the '*polygamic model*' (a master having sexual relations with his female slaves); the '*biological model*' (a master who is the biological father of a child slave); and the '*domination model*' (that involves violence and degradation of the slave by the master). In the prototypical case of "slavery," the different models converge. Americans usually draw a picture of a slave who is an adult of African descent, a stranger to his master, working to maximize the master's financial profits, coerced by domination, fear, and the power of law. History teaches that real slaves have often diverged from this prototype: There were slaves who were children, slaves who were the offspring of their white masters and African mothers, or had no African roots altogether, and slaves who were not solely used to maximize their masters' financial profits.

Amar and Widawsky rely on this complex structure of the *slavery* category in demonstrating how each of the elements of Joshua DeShaney's abuse can be found in a master-slave relationship (including the violence of a father towards his biological child, and a custodial relationship of domination enforced de facto by the state). However, when the authors add up the characteristics, they get a Joshua DeShaney – a case that does not match the 'official story' of slavery.²⁸ For this reason, the authors find it important to deconstruct the imaginative boundaries that popular understanding imposes on *slavery*, so that Joshua DeShaney could enjoy the protective roof of the Thirteenth Amendment.

Cognitivists explain that we bring an unarticulated *Idealized Cognitive Model (ICM)* to our categories.²⁹ In the case of *slavery*, this ICM can obstruct the readers' ability to see the similarities between nineteenth century 'slavery'

²⁸ Lakoff uses the term 'folk theories' to describe the background expectations that we bring to our categorization. Lakoff, *supra* note 23. This term connotes a shared understanding about a category, overlooking possible divergence between the stories of different social groups as in the case of slavery. As we shall see, the folk theory ('official story' in my terms) about slavery does not reflect important aspects of the slaves' experience, because it is articulated from the point of view of the dominant group that often focuses on its economic dimensions. See, *Five Slave Narratives* (ed., William Loren Katz) (New York: Arno Press and the New-York Times, 1968). For a further elaboration of the conflict between stories of different social groups, see Delgado, *supra* note 17. Cover demonstrates the multiplicity of stories regarding the meaning of legal categories in his celebrated article, Robert Cover, "The Supreme Court, 1982 Term-Foreword: Nomos and Narrative", 97 *Harv. L. Rev.* 4 (1983).

²⁹ Lakoff, *id.* at 68. An Idealized Cognitive Model (ICM) is a cultural model that we use to help organize our knowledge. For example, when we think of the category of 'bachelors' we add to the abstract definition of an 'unmarried man' an idealized model of the background

and modern cases of child abuse.³⁰ Scholars can define *slavery* abstractly, as power relations, but the reader will tend to add a background picture of an adult African slave performing forced labour of his or her white master.³¹ She is also likely to think of a market system created for economic purposes and enforced by the power of law. The abused child, Joshua DeShaney, may fit an abstract definition of slavery as 'power relationship,' but classifying his case as 'slavery' will not be convincing. Joshua was a white child bitten by his biological father, a father whose actions were considered criminal by the State of Wisconsin. This apparent discrepancy between the reader's background theories about slavery and modern child abuse, convinces the authors to challenge the historical accuracy of the 'official story':

As we shall show in greater detail below, the Thirteenth Amendment in both letter and spirit extends its affirmative protection to a slave even if: 1) the slave is a child, 2) the slave child is the offspring of the master, 3) the slave child has no African roots, 4) the slave child is not used to maximize the master's financial profit, and 5) the child's enslavement is *de facto*, and not *de jure*.³²

The role of analogies

The challenge that the authors face is to make a convincing argument for classifying child abuse under the slavery clause of the Thirteenth Amendment. They cannot ignore the background expectations about 'slavery' that the readers bring with them (even false ones), because as cognitive research, demonstrates, these expectations determine to a large degree our notions of similarity.³³ One of the attributes that are likely to strike many readers as

conditions, that consists of a society with monogamous marriage and a certain marriageable age. An ICM also entails a 'prototype effect': some cases that belong in the category, fit our idealized model better than others, and we feel that such cases are prototypical members. Consequently, 'Tarzan' or the Pope, though certainly "unmarried men", are considered bad representatives of "bachelor" category. *Id.* at 70.

³⁰ Lakoff does not elaborate on the stereotypical nature of many of our ICM's. This happens when the ICM does not just simplify a complex reality but distorts it by preferring the point of view of one social group over another. Thus, an entity can deviate from the idealized cognitive model because it is a bad example of a category but, sometimes, this deviation is due to the fact that the ICM does not fit the actual world. A distorting effect of an ICM is likely to happen when there are conflicting histories, and the history as depicted by a dominant social group becomes the implicit theory behind a legal category. Lakoff, *Id.* The potential biases due to an unfitting ICM are acknowledged by Murphy and Medin (1985) *supra* note 16, at 301.

³¹ For an analysis of the relations between ordinary meaning and legal categories see A. W. B. Simpson, "The Analysis of Legal Concepts", 80 *L.Q.R.* 535 (1965).

³² Amar and Widawsky, *supra* note 9, at 1360.

³³ Murphy and Medin (1985), *supra* note 16.

distinguishing 'slavery' from 'child abuse' is the lack of economic motivation in the latter. In order to challenge this expectation, the authors introduce different analogies that are directed at gradually changing the readers' perception of similarity. In this way, the authors hope to destabilize the imaginative boundaries erected by the 'official story' of slavery and to highlight the similarities between historical slavery and modern child abuse.

The authors invoke a wide range of analogies, among others the analogy between the behaviour of 'antebellum judges' and modern 'child abuse' judges;³⁴ the analogy between 'polygamy' and 'slavery';³⁵ the analogy between 'parent/child relations' and 'master/slave relations',³⁶ and between 'slave law' and 'custody law'.³⁷ Each analogy is developed in order to highlight a different aspect of the similarities between 'child abuse' and 'slavery.' Their goal is to make the readers doubt their prior understanding of slavery and wonder how they had not perceived the similarities to child abuse before. Notice that in order for these analogies to challenge the readers' preconceptions about *slavery*, they should *not* be understood by the readers as mere 'figurative' language. Nor should they be suspected of as being manipulative language chosen to distract the readers from noticing important dissimilarities. For this reason, the authors stress that their choice of analogies is not accidental or manipulative but informed by deeply rooted societal beliefs about slavery in America.³⁸

I would like now to examine more closely the role of analogies in the article. The authors trace back the idea of classifying 'child abuse' under the Thirteenth Amendment to an analogy that was first invoked by Justice Blackmun in his dissenting opinion in the *DeShaney* case. Justice Blackmun analogized between the *DeShaney* court and antebellum judges who denied relief to fugitive slaves.³⁹ The authors take Justice Blackmun's analogy a step further: not only can it explain the failure of the *DeShaney* court, but it can also help illuminate the situation of Joshua *DeShaney* himself. The authors remind us that when the state fails to protect a child against her abusive parent, the child is in a similar position to that of a fugitive slave.

³⁴ Amar and Widawsky, *supra* note 9, at 1363.

³⁵ *Id.* at 1366.

³⁶ *Id.* at 1367.

³⁷ *Id.* at 1372.

³⁸ For example, the authors claim that "the vision of 'slave as child' has *deep* legal, linguistic and cultural roots." *Id.* at 1372 fn. 54.

³⁹ *Id.* at 1363, citing Blackmun in footnote 15. It must be noted that although Justice Blackmun suggested the analogy between antebellum slavery and child abuse, he did not develop this line of argument in his decision.

[I]f a child runs away, the state typically returns her to parental custody, just as antebellum judges returned fugitive slaves to their masters.⁴⁰

Polygamy is the second analogy that the authors invite us to consider. The analogy between slavery and polygamy prevailed in the rhetoric of abolitionist speeches against slavery. In referring to this analogy the authors maintain that:

The analogy between slavery and polygamy was neither casual nor merely an expedient political slogan designed to forge an alliance between anti-slavery and anti-Mormon voters. Rather, the analogy was *a deep, almost literal equation*⁴¹ (emphasis added).

The polygamy analogy is used to create a metonymic bridge between nineteenth century slavery and modern child abuse. It does so by highlighting the sexual and familial aspects of slavery and by focusing attention on its domestic sides. Polygamy brings to the fore the treatment of the offspring of the polygamous relations between master and slave – the mulatto children. The readers are reminded that these children, although the biological children of their white masters, were treated as slaves. The analogical cycle is completed when the authors describe the similarities between these slave-children and Joshua DeShaney, child who was treated by his white father as a slave. To strengthen this metonymic bridge the author describe the linguistic usage of treating adult-slaves as children⁴² Finally the analogy between ‘slave law’ and ‘custody law’ is introduced. Both systems, the authors argue, are based upon a-symmetrical power relations sustained by the state. With this background of analogies the authors return to the analogy of their ‘antebellum judges’ saying,

Today, a fugitive or a runaway child will still “be delivered up” to the custody of the parent, unless the state, in order to protect an abused child, refuses to enforce its recognition of parental custody.⁴³

Coherence through metaphors

New works in cognitive theory acknowledge the fact that similarities and family resemblance in themselves cannot fully explain the process of

⁴⁰ Id. at 1364.

⁴¹ Id. at 1366.

⁴² “The men and women who served as slaves understood that they were – quite literally – treated as *perpetual children*, referred to by their *first names* only, or by the generic “boy” and “girl.” Indeed, . . . the vision of “slave as child” has *deep* legal, linguistic, and cultural roots in vast number of slave regimes.” Id. at 1372, footnote 54.

⁴³ Id. at 1372.

categorization.⁴⁴ Similarity, they argue, does not provide enough structure to a category to give it stability and coherence.⁴⁵ Therefore, a number of studies have begun to investigate how similarity itself is constructed and constrained. These studies explain that there is a structure connecting the different members of a category that goes beyond noticeable similarities. Murphy and Medin (1985) argue that in understanding categories, we must go beyond correlation among features of different members to causation and explanation. The connection among the members of a category can be that of cause and effect, a simple script, a metaphoric connection, etc.⁴⁶ I will argue that in the case of the slavery category, its different members are connected through a powerful metaphor that acts as a condensed narrative in giving the category a coherent structure.

The transformation of a collection of 'anecdotal' analogies into a convincing argument depends to a large degree on identifying a coherent structure to 'fill in the gaps.' Coherence is often achieved with the help of metaphors, or more precisely, of 'structural metaphors' (to borrow Johnson's and Lakoff's terminology). George Lakoff and Mark Johnson suggest that much of our thinking is metaphoric in structure.⁴⁷ They examine the role of structural metaphors (as opposed to figurative metaphors) in organizing and ordering the world for us. Structural metaphors, they argue, enable us to find simi-

⁴⁴ Douglas L. Medin and Brian H. Ross, *Cognitive Psychology* 375–381 (Fort Worth, TX: Harcourt Brace College, 1990); Frank C. Keil, *Concepts, Kinds, and Cognitive Development* (Cambridge, MA: MIT Press, 1989); The malaise with older views was nicely summarized by Murphy and Medin who showed that prior theories were unable to account for the relations among features in categories or to explain why the features comprising a category cohere to make a cluster. See Murphy and Medin (1985) *supra* note 16.

⁴⁵ One problem with using similarities to define the boundaries of a category is that similarity is too variable. Without constraints on what is to count as a feature, any two things may be arbitrarily similar or dissimilar.

⁴⁶ Murphy and Medin (1985), *supra* note 16, p. 290; Roger Schank and Robert Abelson, *Scripts, Plans, Goals, and Understanding* (Hillsdale, NJ: Erlbaum, 1977).

⁴⁷ George Lakoff and Mark Johnson, *Metaphors We Live By* (Chicago: University of Chicago Press, 1980). The authors open their book by challenging the dominant view of metaphors:

Metaphor is for most people a device of the poetic imagination and the rhetorical flourish – a matter of extraordinary rather than ordinary language. Moreover, metaphor is typically viewed as characteristic of language alone, a matter of words rather than thought or action. For this reason most people think they can get along perfectly well without metaphor. We have found, on the contrary, that metaphor is pervasive in everyday life, not just in language but in thought and action. Our ordinary conceptual system, in terms of which we both think and act, is fundamentally metaphorical in nature. Id. at 3.

For an earlier discussion of the cognitive role of metaphors in understanding (especially in philosophy), see Hannah Arendt, *The Life of the Mind (Thinking)* (New York: Harcourt Brace Javanovich, 1978), pp. 98–125.

larities and to create meaningful categories.⁴⁸ Structural metaphors fulfill a heuristic role in categorization and have two main functions: ontological and orientational. Ontological metaphors 'objectify' abstract ideas by transforming them into referable and quantifiable entities. For example, the 'time is money' metaphor is built upon an 'ontological metaphor – time as a resource, that allows us to objectify the abstract idea of time. Orientation metaphors give direction to a concept. The 'food for thought' metaphor first objectifies thought: ideas are like food (ontological) and the mind is like a container (ontological), and then, gives them direction: ideas can go *into* the mind (orientational).

What are the structural metaphors that are involved in the category of slavery? An important structural metaphor for slavery is that the 'slave is the *property* of the master'.⁴⁹ The 'property' metaphor, in its different manifestations, underlies many of the analogies in the article. Sometimes the authors refer to the 'property' metaphor explicitly, and on other occasions they only hint at it through their choice of language. For example, the authors explain that fugitive slaves were 'delivered up' by antebellum judges to their masters, because they were considered their masters' rightful property. Again, in the authors' discussion of the 'polygamy' analogy, they remind us that women slaves were treated as the possession of their white masters, as objects to be used and abused. The offspring of these polygamous relations were considered the property of the white masters, who had 'title' over them, just as a newborn calf belongs to the farmer who owns the mother-cow. Finally, throughout the article, the authors use linguistic expressions that refer to the 'property' metaphor in relation to child abuse: 'chattel'; 'possession'; 'title'; 'belong to' and so forth.

⁴⁸ Lakoff and Johnson *id.* at 147–153: "Since we see similarities in terms of the categories of our conceptual system . . . it follows that many of the similarities that we perceive are a result of conventional metaphors that are part of our conceptual system. . . . There may be isolated similarities between love and art experiences that are independent of the metaphor, *but the metaphor allows us to find coherence in these isolated similarities* in terms of the overall structure similarities induced by the metaphor."

⁴⁹ For the purpose of the law, nineteenth century slaves in the U.S. were literally considered the rightful property of their masters. Lawrence M. Friedman, *supra* note 5, at 223–225. However, as we shall see, property also serves as a structural metaphor that connects different models under the slavery category into a coherent whole. One might wonder in what way 'property' is a metaphor and not an accurate description of the legal status of slaves. Indeed, in the nineteenth century the law treated slaves, for many purposes, as the legal property of their masters. But in other respects, such as in criminal law, slaves were treated as persons and punished severely. See, Friedman, *id.* 224. For a discussion of the dangers in using property metaphor to explain human relationships see, Jennifer Nedelsky, "Law, Boundaries and the Bounded Self", 66 *Representations*, 162. For a first person narrative about the harm of being treated like a piece of property see, Frederick Douglass, *Narrative of the Life of Frederick Douglass, an American Slave* (ed., Houston A. Baker, 1982); Patricia Williams, *The Alchemy of Race and Rights* (Cambridge, MA: Harvard University Press, 1991), pp. 216–238.

The property metaphor connects modern child abuse and nineteenth century slaves.⁵⁰ This connection was noticed by an opponent of the Thirteenth Amendment at the time of its enactment. The authors cite excerpts of Rep. Fernando Wood's speech in Congress:

The *parent* has the right to the service of his child; he has a property in the service of that child. A *husband* has a right of property in the service of his wife . . . The *master* has a right of property in the service of his apprentice. All these rights rest upon the same basis as a man's right of property in the service of slaves.⁵¹

Every metaphor has the power to highlight certain aspects of the phenomena it describes and to hid others. The authors want to highlight the aspects of 'power relations' inherent in slavery, which is brought to focus by the property metaphor. To own property means to have control over something. Having a property right in something allows the owner to dispose of it as she likes; she can even destroy her property, if she so wishes.⁵² Property also connotes a sense of asymmetry, not a subject-subject relationship but a subject-object relation.⁵³ This is not to say that the property metaphor dispenses with the popular narratives in which slavery is embedded, it only highlights some features of these narratives and downplays others.

The property metaphor can emphasize the power dimensions of both slavery and child abuse. However, it can also highlight the economic aspects of slavery which set it apart from child abuse. Nineteenth-century slavery was an important pillar of the labour system in America, particularly in plantations

⁵⁰ Paul Ricoeur explains that it is the unique quality of metaphors to create a 'stereoscopic vision' in the reader – the ability to entertain two different points of view at the same time. In applying the property metaphor to twentieth century child abuse the authors create a 'stereoscopic vision'. They allow the reader to feel the tension between the inadmissibility of the concept of property in describing a relationship between two human beings, and at the same time, its adequacy because of the strong resemblance between the situation of a modern, abused child and nineteenth century slavery. The difference between (property as) a concept and (property as) a metaphor, according to Ricoeur, is that in applying a concept to new situations we produce a new kind *above* differences, while in creating a metaphor we produce new kind *in spite of* and *through* differences. Paul Ricoeur, "The Metaphorical Process as Cognition, Imagination, and Feeling", in Sheldon Sacks (ed.) *On Metaphor* (Chicago: University of Chicago Press, 1979) at 146.

⁵¹ Amar and Widawsky *supra* note 9, at 1367, citing, Cong. Globe, 38th Cong., 1st Sess. 2941 (1864) (statement of Rep. Fernando Wood).

⁵² No doubt, the legal system might limit this right in many ways, such as environmental laws, anti-discrimination laws, and so forth. But the popular understanding of property does not allow these occurrences to determine the meaning of private property.

⁵³ There is a legal literature that challenges this view by stressing that every 'property relations' involves a relation between human beings, not a subject-object relations. See, Joseph William Singer, "The Reliance Interest in Property", 40 *Stan. L. Rev.* 614 (1988).

in the South.⁵⁴ An important aspect of having a property right is the ability of the owner to sell his or her property and get its money value in return.⁵⁵ Indeed, nineteenth-century slave-masters bought their slaves in slave markets and could sell them when they had no further need of them.⁵⁶ The economic aspect of slavery, however, is not characteristic of many cases of child abuse.⁵⁷ No doubt, there are children who are forced to work to bring money to their parents, but the more common motivation of child abuse is not economic gain but cruelty. Thus, the property metaphor, which enables us to find similarities between nineteenth century slavery and modern child abuse, also exposes an apparent discrepancy between the two situations.⁵⁸ The problem, in other words, is that members of the category might be related to different dimensions of a structural metaphor, while showing important differences among themselves.

An 'objectivist' response to the discovery of important differences among the members of a category would be either to deny their importance (the 'profit' aspect of property is not the *essence* of the slavery category, nor was it the dominant motivation of slavery⁵⁹) or to move the discussion to a higher level of abstraction in which the inconsistency disappears (to talk about 'power relations' instead of 'property'⁶⁰). Amar and Widawsky, when confronted with the dissimilarities between child abuse and nineteenth century slavery (highlighted by the property metaphor), choose to take the 'objectivist' road out. Before discussing their response, I would like to examine what solutions the cognitive view of categorization can offer to this problem.

⁵⁴ Friedman, *supra* note 5, at 219.

⁵⁵ This is not to say that 'transferability' is a necessary condition for recognizing 'property right'. However, this aspect of 'property' accompanies many of its manifestations and therefore when one uses the 'property' metaphor, she will often bring this aspect to the forefront.

⁵⁶ This aspect of slavery is described by Williams, *supra* note 49, at 3–4.

⁵⁷ Indeed, in legal scholarship a different term is used (sexual exploitation) to connote the economic-sexual aspect of child abuse. For an argument in favour of classifying sexual exploitation as modern slavery see, Geraldine Van Bueren, "Child Sexual Abuse and Exploitation: A Suggested Human Rights Approach", 2 *International Journal of Children's Rights* (1994), 45–59. Amar and Widawsky's approach is more radical, because they choose to focus on child-abuse situations that do not involve aspects of economic exploitation and classify them as modern slavery.

⁵⁸ Lakoff and Johnson discuss a related problem in their examination of the suggested metaphor – 'LOVE IS A COLLABORATIVE WORK OF ART.' This metaphor can highlight the active side of love relations but it is inconsistent with other aspects of love relations that are more passive. Lakoff and Johnson, *supra* note 47, at 141–142.

⁵⁹ Amar and Widawsky, *supra* note 9, at 1378. "Vulnerability to sale is simply one contingent capitalist attribute of the master's near-absolute power over the slave. In a non-capitalist regime, lords might not be permitted to sell their serfs, but that would hardly mean that the system was not a form of slavery".

⁶⁰ *Id.* "Yet as we have already seen, power, domination, and dehumanization are the *essence* of slavery" (emphasis added).

The road not taken

The cognitive approach utilizes the notion of 'family resemblance' to tackle the problem of inconsistencies. Since this view does not insist on identifying a common denominator among the members of a category, it can be more tolerant of the discovery of dissimilarities among the members of a category. According to cognitivists, it is enough to show that different members of the *slavery* category share a family resemblance to 'property' (some share in its power aspects and others in its economic aspects), to retain the coherence of the category. The viability of a category, according to this view, is dependent upon a metaphorical coherence more than on demonstrating an absolute consistency (i.e., there is no unitary description of the category).⁶¹ Indeed, the main role of metaphors in the process of categorization is to achieve coherence in a category rather than consistency.⁶²

Let us examine more closely how the property metaphor creates a metaphorical coherence within the slavery category. Child abuse involves an asymmetrical power relation of domination between an assaulting adult and a victimized child. There are cases, like the DeShaney case, where the state grants custody to the abusive parent and does not interfere to prevent the continuation of the abuse. Many abused children are assaulted by a relative in their own home. The property metaphor captures these familiar aspects of child abuse. This is so because our notion of 'property' assumes that the power and control over the object is held by the property owner and are supported by a legal system that recognizes the property owner's rights over the object. The metaphor works as a condensed narrative that can explain the connections among different instances of child abuse and link them back to the slavery category. Whether a child is physically abused, or sexually molested, or whether she is sent out to work for the profit of her parents, the abuser's claim for secrecy and non-intervention is part of the way we talk in Western society about private property.

⁶¹ The possibility of finding coherence when there are dissimilarities is due to the fact that coherence, unlike logical consistency, admits of degrees. A category can be more or less coherent, but it is either consistent or not.

⁶² What exactly does it mean for a category to have a coherent but not necessarily consistent metaphorical structure? Lakoff and Johnson demonstrate this subtle difference in the category 'love.' "We use the metaphor 'LOVE IS A JOURNEY' to conceptualize our experience of love. However, the different aspects of this metaphor are not always consistent. We might say "This relationship is a *dead-end street*," or "Our marriage is *on the rocks*," or "We've gotten *off the track*." Each of these sentences share in the "journey" metaphor of love, but these are different journeys: 'car trip', 'sea voyage' and 'train trip'. Still, there is a family resemblance between the different experiences because of their connection to the 'journey' metaphor, which makes them fit together". Lakoff and Johnson, *supra* note 47.

Now, the difference between an abstract definition of slavery as “power relations of domination” and the abstractness of a structural metaphor, such as property, is that the former is meant to substitute the concrete exemplars of slavery (by defining a common denominator), while the latter functions only as an additional explanatory device. The property metaphor does not serve as the ‘common denominator’ of the different members of the category of slavery and, therefore, it does not provide a definition. Rather, the different models of slavery share in various aspects of the property metaphor, but cannot be reduced to it. The metaphor can work as the glue that holds together the different exemplars of slavery that we have identified. Indeed, this is the meaning of a family resemblance structure – members share properties with each other but have no properties that are singly necessary and jointly sufficient (defining) for category membership. Thus, the main function of the property metaphor is to hold together the family resemblance structure of slavery, and to help distinguish between representative and less representative members (as we shall later see).

The different exemplars of slavery do not have any one property(!) in common. History teaches that there were masters whose sole motivation was maximization of profit, while other masters were motivated by sadistic impulses and whose attitude towards their slaves did not make much economic sense (dead slaves do not work).⁶³ There were also child-slaves who did not work for the first few years of their lives, and women-slaves who were used solely to satisfy their masters’ sexual whims. In short, any reduction of these different instances of slavery to a sufficient and necessary condition is doomed to be so abstract that it will fail to give any coherent structure to the category.⁶⁴ The different instances of slavery, however, do resemble each other, they all share in some aspect of the ‘property’ metaphor. Each exemplar of slavery highlights different aspects of the property metaphor that brings together members of the category.

‘Child abuse’ can enter the ‘slavery’ category, because it corresponds to some aspects of the property metaphor (treating the child as a thing, silencing her voice, not interfering with the abuser’s deeds, etc.). Still, the property metaphor, which highlights some important similarities between child abuse

⁶³ Sometimes killing a slave did make economic sense, when one master had many slaves and he would try to terrorize them. For this explanation see, Frederick Douglass, *supra* note 49, at 67.

⁶⁴ This does not mean that there is no place for abstraction in categorization. The property metaphor itself is a kind of abstraction. What cognitivists insist, though, is that these abstractions do not do the work of categorization alone. Together with such abstractions one relies on some typical exemplars (good representatives of a category) as focal points and measures the similarity to them in examining the adequacy of a new member. See, Smith and Medin (1981) *supra* note 14, at 145.

and slavery, cannot eliminate all differences. There are cases of nineteenth century slavery motivated solely by economic reasons and cases of child abuse motivated solely by sadistic desires, two very different motivations.⁶⁵ This does not mean that we will not be able to identify cases of nineteenth century sadistic slave-masters who did not care about 'economic profit,' or modern child abuse cases that are mainly motivated by economic considerations. These difference cannot be avoided, because there is no unitary description of slavery, nor is there only one "good example" of slavery.⁶⁶ Moreover, one metaphor (be it as rich in historical context as the property metaphor) is not likely to explain all the different aspects of a category. The metaphor does help, however, to give a coherent meaning to the category, which can serve in examining the adequacy of new candidates.

I argue that there are many instances, including the present attempt to re-categorizing child abuse under slavery, when the cognitivist approach offers far more powerful solutions than objectivism. Cognitivists have the tools to overcome discrepancies within a category, such as the inconsistencies between forms of economic and domination slavery, housing them comfortably under one roof.⁶⁷ Moreover, by referring to family resemblance we can establish solid grounds for admitting child abuse into the category of modern slavery. In tackling inconsistencies, a cognitivist would first point to the different exemplars of slavery: 'sadistic slavery'; 'polygamic slavery'; 'greed-based slavery'. These exemplars are connected through their participation in the 'slavery as property' metaphor. Instances of sadistic masters share in 'absolute control' aspect of property; instances of polygamic relations are related to the 'domestic' and 'absolute control' aspects of the property

⁶⁵ Focusing on motivation is itself problematic, because it takes as its point of view the master or the parent. Reading slave narratives reveals that an institution motivated by considerations of profitability can look very different for those who experience it 'from the bottom'. The tension between the two perspectives is beautifully captured by Frederick Douglass, *supra* note 49.

⁶⁶ An interesting demonstration of this point is given by Fisher in his discussion of different imagery in the law of nineteenth century slavery. William W. Fisher III, "Ideology and Imagery in the Law of Slavery", 68 *Chicago-Kent Law Review* 1051 (1993). Fisher describes two images of male slaves, which he calls 'Sambo' and 'Nat.' The former is characterized as a childlike, undependable but loyal and unthreatening slave (1057); the latter is known as a savage, fierce, rebellious, and vindictive (1058). The two images sometimes conflict, a fact that can explain inconsistencies in the law of slavery (sometimes treating slaves as things – objects or assets to be bought and sold; sometimes treating them as persons – volitional, feeling, and responsible for their actions) (1055). The property metaphor is more compatible with the 'Sambo' imagery of slaves than with the 'Nat' one.

⁶⁷ One such solution is provided by the 'exemplar view' according to which, a category can have a structure of various exemplars that can not be subsumed under a unitary description of the category as a whole, see Smith and Medin (1985) *supra* note 14, at p. 295.

metaphor; and instances of greedy masters are connected to the economic aspects of property.

However, a metaphoric connection provides only the minimal requirement for the introduction of a new member into a category. A further elaboration of the advantages and limitations of the property metaphor in structuring the slavery category is needed, if the argument for the proposed extension of the category based on the property metaphor is to be convincing. For example, we need to hear more about the relative importance of the 'power aspect' and the 'economic aspect' in nineteenth century slavery. In other words, we have to determine in what ways narratives and metaphors that structure the category are important to understanding its meaning. What makes a metaphor or a narrative a "good" one? This account is missing from the article, because the authors, when confronted with inconsistencies between 'child abuse' and the economic dimension of property, prefer to abandon the cognitivist approach and shift back to the objectivist approach to categorization.

One way of testing the appropriateness of the metaphor would be to apply Murphy and Medin's (1985) five criteria for evaluating the 'theories' (narratives, metaphors, etc.), in which a category is embedded.⁶⁸ First, a theory must be able to *constrain* which properties will be included in a category's representation. Second, it must *simplify* reality. Third, it must create an *internal structure* to the category that will emphasize the mutual constraints among its features. Fourth, it must provide an *external structure* to the category that will fit in with what is already known about other theories and categories. Fifth, it must aid our *inference* process about new members based on the use of the category.

How well does the property metaphor fulfill these functions? We can use Murphy and Medin's characterization of a good 'theory' to evaluate the functioning of the property metaphor in providing an explanatory context for the slavery category. I will concentrate on the last three functions, which we have not touched upon so far in our discussion, as the first two were already discussed in the section about the use of analogies. First, the property metaphor can help explain the *internal connection* among the different models of slavery. For example, it can explain the connection between the 'economic model' and the 'biological model' of slavery. Slaves were bought to work for the master and enhance the master's wealth. Being the master's property, the master enjoyed free access to the slave's body, including forced sexual relations. The offspring of these cases of intercourse were considered part of

⁶⁸ 'Theory' is defined loosely by Murphy and Medin as "any of a host of mental 'explanations,' rather than a complete, organized scientific account." Murphy and Medin (1985) *supra* note 16, at 290. This definition is compatible with our use of the terms narratives and metaphors.

the master's property. The slave-child, being the property of the master, was therefore raised as a slave and in due time began to labour for the master and enhance his wealth even more. Indeed, the property metaphor is so powerful in constructing the slavery category and in explaining the relations among its different instances, that an anti-slavery writer once suggested that the property metaphor had acquired the force of an axiom from which all parts of the system (category) are logically deduced.⁶⁹

Second, the property metaphor can also provide an *external structure* for fitting slavery in together with other social and legal categories. It is especially helpful in smoothing away tensions between popular beliefs about the natural rights of human beings and their violation by the institution of slavery. As explained by the historian David Davis, the institution of slavery exposed a contradiction in America between its self portrayal as the land of freedom and its practice of enslaving human being.⁷⁰ The property metaphor could level off this tension, because it allowed Americans to take slaves out of the category of human beings by viewing them as less than human – as a thing. This move was supported at the time by the emergence of racist theories about the inferiority of the African race.⁷¹

Finally, property metaphor can help identify features of 'child abuse' that can be *inferred* from its location under the slavery category. For example, people who are accused of 'child abuse' often invoke ideas of private property to justify their actions (the child 'belongs to them' and 'the state should not interfere' in their actions).⁷² These ideas are popularly tied to the natural dependency of children, who are perceived as not 'quite' autonomous human beings, and who do not enjoy full liberty from coercion.

In other words, the property metaphor functions well in explaining the relations among the different members of slavery; in connecting popular beliefs about slavery to broader theories about human beings, and to social expectations about a democratic state; and in helping to infer characteristic features of child abuse cases. It remains to be asked whether the property metaphor can help distinguish 'child abuse' from child-parent relations in general. Here, one can rely on ideas about the trusteeship of parents over their

⁶⁹ William Goodell, *The American Slave Code in Theory and Practice* (1853). However, the law did allow certain legal capacities for slaves. See, Fisher, *supra* note 66; David B. Davis, *The Problem of Slavery in Western Culture* (Ithaca: Cornell University Press, 1966), pp. 3–28.

⁷⁰ Davis, *id.*

⁷¹ *Id.* at 23.

⁷² For a critique of these ideas see, Bruce Ackerman, *Social Justice in a Liberal State* (New Haven: Yale University Press, 1980); Yael Tamir, "Whose Education Is It Anyway", 24 *Journal of Philosophy of Education* (1990) 161.

children,⁷³ or the emerging movement of children's rights that challenges the lesser legal status afforded to children.⁷⁴ In any case, identifying the family resemblance structure of a category does not require the drawing of a clear line. It admits of degrees of similarity (fuzzy boundaries). Thus, even if there are elements of parent-child relations that tie in with the property metaphor, their degree of similarity is too weak to link it to any of the slavery exemplars.⁷⁵ Murphy and Medin offer a tentative test to measure these degrees of similarity based on the extent of readjustment we must make in our 'theories' about the world in admitting a new candidate within the scope of a category.⁷⁶ For example, introducing child abuse to our category of slavery does not require much readjustment of general theories about parent-child relations. This is not true of the introduction of child-parent relations in general to the slavery category (where would love, children's rights, etc. fit in?). To sum up, while the cognitive approach cannot offer a definition or mark an absolute boundary to the slavery category, it can give us tools to understand its structure and to introduce new members, such as child abuse.⁷⁷ The cognitive approach offers a way to broaden categories, such as

⁷³ Richard J. Arneson and Ian Shapiro, "Democratic Autonomy and Religious Freedom: A Critique of *Wisconsin v. Yoder*," *Nomos* xxxviii (Political Order) (New York: New York University Press, 1996), p. 365.

⁷⁴ Michael Wald, "Children's Rights: A Framework for Analysis", 12 *U. of California*, 255-281 (1979).

⁷⁵ Like any statement about the meaning of a category, this one should not be taken as conveying the 'objective' meaning of slavery. The cognitive view of categorization does not assume the existence of a stable boundary to a category. In our case, it might be that in a few years time some aspects of children-parent relations that are not considered child-abuse today will be considered candidates for the slavery category. A cognitive approach expects such changes. However, since the cognitive view links categorization to coherence theories it has a conservative tendency built into it. Radical changes in categorization do not often cohere with popular narratives about the meaning of a category. This does not mean that such changes should not be tried, but a cognitivist will point to the difficulties and resistance that such re-categorization is likely to confront. For a discussion of the conservative tendency in 'coherence theories' see, Margaret Radin, "The Pragmatist and the Feminist", 63 *S. Cal. L. Rev.* (1990) 1699, 1710. For an elaboration of ways to tackle these difficulties in feminist struggles see, Kathryn Abrams, "Ideology and Women's Choices", 24 *Geo. L. Rev.* 761 (1990). One way to confront these difficulties with the tools of cognitive theories is to rely on 'counter-stories' (stories from the bottom) such as narratives of slaves, minorities, women and children. This is, indeed, part of the agenda of the emerging school of narrative legal scholarship. For a good example of this type of writing see, Williams, *supra* note 49. For a further discussion see, Leora Bilsky, "The Narrative Turn in Legal Scholarship" (J.S.D. dissertation, Yale Law School, 1995) (on file with author).

⁷⁶ Murphy and Medin (1995) *supra* note 16, at 312.

⁷⁷ There have been a number of recent articles applying the Thirteenth Amendment in other contexts. See Douglas L. Colbert, "Challenging the Challenge: Thirteenth Amendment as a Prohibition Against the Racial Use of Peremptory Challenges", 76 *Cornell L. Rev.* 1 (1990); Jennifer L. Conn, "Sexual Harassment: A Thirteenth Amendment Response", 28 *Columbia J. of Law and Social Problems* 519 (1995); Neal K. Katyal, "Men Who Own Women: A

slavery, without too many distortions in our world view, and can, therefore, be utilized by people committed to social reform.

An objectivist approach

Let us return now to the authors' decision to rely on the objectivist view in response to the discovery of dissimilarities between child abuse and slavery. The authors offer a definition of slavery that would encompass modern child abuse under the protective roof of the Thirteenth Amendment:

But what, precisely, is "slavery"? For our purposes a good working definition of "slavery" is "A power relation of domination, degradation, and subservience, in which human beings are treated as chattel, not persons."⁷⁸

They argue that their definition captures the *essence* of 'slavery'.⁷⁹ This definition, however, also introduces the objectivist view of categorization, a view that relies heavily on abstract definitions (identifying the necessary and sufficient conditions of a category). Indeed, in order to provide an all encompassing definition of slavery, the authors have to abstract away the historical baggage of slavery that they were so careful to articulate.

Implicit in this definition is a rejection of the idea that "slavery" depends necessarily on adulthood, biological otherness, race, forced labor, or state action.⁸⁰

This is the 'objectivity correct' definition, since it is free of any cultural, historical or contextual baggage.⁸¹ Indeed, historical contingencies, according to this view, can only obscure from sight the true essence of the category. Implicit in this definition is a suggestion to the reader to re-evaluate her understanding of *slavery* by separating the stories, myths and folk theories from the 'objective' core of slavery. *Slavery*, when stripped of its contingent appearances, stands naked as "power relations." This highly abstract and de-contextualized definition marks a sharp contrast to the authors prior

Thirteenth Amendment Critique of Forced Prostitution", 103 *Yale L. J.* 791 (1993); Andrew Koppelman, "Forced Labor: A Thirteenth Amendment Defense of Abortion", 84 *Nw. U. L. Rev.* 480 (1990); Joyce E. McConnell, "Beyond Metaphor: Battered Women, Involuntary Servitude and the Thirteenth Amendment", 4 *Yale J. L. & Feminism* 207 (1992); Lea S. VanderVelde, "The Labor Vision of the Thirteenth Amendment", 138 *U. Pa. L. Rev.* 437 (1989).

⁷⁸ Amar and Widawsky, *supra* note 9, at 1365.

⁷⁹ Id. at 1378 "power, domination, and dehumanization are the *essence* of slavery" (emphasis added).

⁸⁰ Id. at 1365.

⁸¹ But see the authors' second thoughts as expressed in footnote 18, id. at 1365.

emphasis on metaphor and historical analogies in the deconstruction of 'slavery'.⁸²

Adhering to the objectivist method of legal classification requires that the authors identify the essential properties of the slavery category and draw its boundaries accordingly. The authors' broad and de-contextualized definition of slavery, however, presents some serious problems of line drawing.⁸³ The definition of slavery as power relations is large enough to encompass many power relations that society considers legitimate.⁸⁴ Hence, the need to draw a line that will distinguish 'child abuse' from other legitimate 'power relations'.

But how can we recognize the *true* slave child, as distinct from the free child? ... unlike a free adult, a free child is customarily subject to the custody, control, and guardianship of another.⁸⁵

The answer that the authors offer to this question is unsatisfactory. They suggest that the line between legitimate power relations and slavery should be drawn according to state law (criminal law). In other words, since 'child abuse' is forbidden by the laws of Wisconsin, it should be considered a power relationship that amounts to *slavery*.⁸⁶ Stated at this abstract level, the argument is far from being persuasive. The Constitution, and especially the Thirteenth Amendment, is meant to protect individuals even when the states fail to do so.⁸⁷ Slavery, was *enforced* by state law. It is rather strange to make

⁸² The reduction of 'slavery' to an abstract definition is at odds with the very reason that the authors give for preferring the Thirteenth Amendment over the Fourteenth Amendment. As one can recall, the authors suggest that it is precisely the thick context of slave stories that make the Thirteenth Amendment so appealing. Amar and Widawsky, *supra* note 9, at 1385. ("A plaintiff's story is most compelling when cast in terms of the constitutional provision that best captures the victim's plight. In Joshua's case, this provision is not the *overworked and abstract language of the due process*, but the more evocative words of the Thirteenth Amendment. The story of Joshua DeShaney recalls the stories narrated by those slaves whose plight gave rise to the Amendment") (emphasis added).

⁸³ It should be recalled that the problem of boundary drawing caused by the "state action" requirement of the Fourteenth Amendment convinced the authors to turn to the Thirteenth Amendment in the first place. However, their abstract definition of slavery re-introduced the problem of line drawing.

⁸⁴ Including parent-child relations in general.

⁸⁵ Amar and Widawsky *supra* note 9, at 1374.

⁸⁶ *Id.* at 1377. It must be noticed that the authors also offer a substantive test for 'slavery' according to the 'interest of the child'. As long as the custodian is acting according to the best interest of the child, the power relations will not fall under slavery. Since it is very hard to conduct this test, the authors offer to rely on state criminal law.

⁸⁷ Notice that state laws in the nineteenth century often prohibited the killing of slaves. However, evidence law, and the practices of law-enforcement officials were such that there was little chance that a white man would be accused, let alone convicted, under these laws. See, Friedman, *supra* note 5, at p. 226; Douglass, *supra* note 49, at p. 68.

modern *slavery* dependent upon the will of state legislators. Moreover, it is not clear from the article whether all “power relations” that are forbidden by law, such as domestic violence, should enter the Thirteenth Amendment, and if not, how they are to be distinguished.⁸⁸

An implicit cognitive approach?

With a definition of slavery as power relations, ‘child abuse’ can enter the slavery category. Having offered their definition of slavery, the authors turn to substantiate it with conventional legal proofs such as legislative history and legal precedents. The only noticeable change in approach lies in the introduction of ‘slave narratives’ as part of their evidence. However, the ‘slave narratives’ section comes last, and there is no discussion of its unique contribution to the argument. The reader, who is left to make sense of this mixture of evidence is likely to relegate the ‘slave narratives’ to the traditional role of personal accounts in legal scholarship – mere anecdotes.

Notwithstanding the authors’ external endorsement of the objectivist approach at the ‘reconstruction’ stage, an abstract definition cannot do the work of categorization. By putting aside the metaphors and narratives that provide a coherent structure to the slavery category, the objectivist approach leaves us with a meaningless definition. The bewildered readers are left with no sense of direction to help distinguish among the different types of ‘power relations.’ The authors are aware of the problem and understand that they cannot afford to give up the context altogether. Indeed, a closer examination of the proofs that they use to substantiate their objectivist definition, reveals that the cognitivist approach is not entirely abandoned. Underneath the authors’ rhetoric of ‘objective’ proofs, one soon discovers the work of familiar analogies, metaphors, and ‘stories from the bottom.’ Yet, the authors fail to acknowledge the role of these devices in their re-categorization.

The implicit cognitive view can be traced in the most traditional of proofs. For example within the “*Legislative History*” section, we find citations of analogies that were made by legislators who compared slavery to polygamy:

By license of Polygamy, one may have many wives, all bound to him by marriage-tie, and in other respects protected by law. By license of Slavery,

⁸⁸ The authors emphasize that the Thirteenth Amendment does not extend to ‘family relations’ as such, Amar and Widawsky *supra* note 9, at 1376. (“By necessity we must fashion . . . a test . . . whether custody over a child looks like the “family” system the Amendment was designed to protect, or the “slavery” system it was designed to prohibit.”) This means that the authors would have to walk a very fine line between stressing the Thirteenth Amendment’s goal of strengthening the family and their own notions about the ‘domestication’ of slavery, which allows them to extend the Thirteenth to child abuse and possibly to domestic violence.

a whole race is delivered over to prostitution and concubinage, without the protection of any law. Surely, Sir, is not Slavery barbarous?⁸⁹

Likewise, within the “*judicial interpretation*” section, the authors facilitate a shift from one narrative of slavery (economic exploitation) to another narrative (power domination):

[In a] system of dominance and degradation the master may treat the slave as a *possession* rather than as a person [emphasis added].⁹⁰

Finally, and most importantly, the authors devote a section to “*Slavery Through Slave Eyes*”.⁹¹ After the ‘proofs’ from legislative and judiciary history, the authors make a disruptive move, away from mainstream legal reasoning. In this section, they introduce slaves’ personal accounts and voices. This section, I believe, carries an enormous weight in the process of persuading the readers. Here we encounter the famous Frederick Douglass as a slave-child through excerpts from his diary. Earlier in the article the authors constructed a fictional ‘slave child’ – Joshua Frederick Douglass, a composite of Frederick Douglass and Joshua DeShaney, and only at this late point they introduce the real Frederick Douglass.

Our first encounter with Frederick Douglass is almost imperceptible. He appears in a footnote as the author of one of the diaries that are cited in the article. Thereafter, the authors begin invoking Frederick Douglass the ‘slave-child’, as a point of reference to be compared with the abused child, Joshua DeShaney. Because of this subtle transition, the readers are likely to perceive the role of the imaginary Joshua Frederick Douglass as only *supplementary* to conventional legal proofs. I believe that the opposite is true: the imaginary Joshua Frederick Douglas, alongside other devices of narrative and imagina-

⁸⁹ Amar and Widawsky, *supra* note 9, at 1366, citing a speech before the Senate made by Senator Charles Summer. See also, “[L]ike the patriarchs of old, our men live all in one house with their wives and their concubines; and the mulattoes one sees in every family partly resemble the white children.” *Id.* at 1367 (Citing the Southern diarist Mary Boykin Chesnut.) It is interesting to note that this citation is found under the “legislative history” part, though it is an artful use of narratives of the time (diary) and belongs naturally to the section of “slavery through the slave’s eyes”.

Note that in the political debate about slavery in the nineteenth century, the analogy to the much despised polygamy was invoked to convince people of the evil of the institution of slavery. Amar and Widawsky rely on the same analogy but use it in the opposite direction. Beginning with the much despised ‘slavery’ institution, they analogize it to polygamy, and to abusive familial relationships in general.

⁹⁰ *Id.* 1369–70; see also, “Theoretically, modern slavery rested . . . on the idea of a slave as instrument – a chattel, a possession, a thing, a mere extension of his master’s will”, *id.* 1370, citing Eugene D. Genovese, *Roll, Jordan, Roll* (1976) at 4.

⁹¹ Amar and Widawsky, *ed.* at 1370–1372.

tion, contribute more to the persuasiveness of the authors' argument than any of the conventional 'proofs'.

Let me explain my last point. Why is the introduction of Frederick Douglass so important to the persuasiveness of the argument? Research by cognitive scholars shows that the main devices in the transformation of categories are imaginative.⁹² Narratives, metaphors and analogies, they explain, carry a cognitive role in human understanding, because they help us organize the world into meaningful categories, and allow us to transfer their meaning gradually.⁹³ With the story about the fictional slave-child, Joshua Douglass, the authors focus the reader's attention on the power aspects of slavery. When the reader finally encounters the real Frederick Douglass, the grounds have been prepared to connect Douglass' story to the story of Joshua DeShaney. To strengthen this connection, the authors cite from Douglass' diary paragraphs that recount his experiences as a slave-child:

The whisper that my master was my father, may or may not be true . . . the fact remains in all its glaring odiousness, that slaveholders have ordained, and by law established, that the children of slave women shall in all cases follow the condition of their mothers.⁹⁴

Traditional legal material like court decisions is put aside, and the stage is overtaken by stories from slave diaries and oral histories. These stories open for us a window to the world of fear and powerlessness, as slaves recount their experiences. It is interesting to notice how analogies are created through the use of diaries. The main analogy, which we have already mentioned, is between Frederick Douglass and Joshua DeShaney, but there are others too. For example, the authors cite from Katie Rowe's diary who describes the cruelty involved in slavery in her recollections of her master's chilling threats:

Them Yankees ain't gwine git this far, but iffen they do, you all ain't gwine git free by 'em, 'cause I gwine free you before that. When they git here they gwine find you already free, 'cause I gwine line you up on the bank of Bois d'Arc Creek and free you with my shotgun!⁹⁵

⁹² Lakoff and Johnson, *supra* note 47, at 139–146.

⁹³ This point was made earlier by Hannah Arendt, *supra* note 47. See also Paul Ricoeur, "Metaphor and the Central Problem of Hermeneutics", in *Hermeneutics and the Human Sciences*, 165–181 (1981).

⁹⁴ Amar and Widawsky, *supra* note 9, at 1371, citing Frederick Douglass, *supra* note 49.

⁹⁵ *Id.* at 1371, citing, *Lay My Burden Down: A Folk History of Slavery*, at 103–104 (Benjamin A. Botkin ed., 1945).

Rowe's diary account is compared to another 'modern' diary, written by Loreta, an abused child:

I was six or seven when [father] got out a big machete and said he was going to kill us all.⁹⁶

Reading these diaries reminds us how much the 'official story' about the legal category of slavery lacks the concreteness of stories about the life experience of slaves, which can also serve as focal points (exemplars) in articulating the harm of modern child abuse. Sympathetic listening and imaginative recollection are needed, greatly needed, when we try to understand our legal categories, especially when we attempt to bring to life a legal category that has been neglected for such a long time.⁹⁷

The authors' concessions to the 'objectivist' view have their price. *First*, the authors have to devote space, time and energy to discuss issues that become problematic only under the 'objectivist' view. Thus, for example, they struggle to identify the 'objective' essence of *slavery* and to refute possible objections to their suggested definition. As we have already explained, 'cognitive' theories hold that categories exist without 'shared properties' or 'stable boundaries'. The definition that the authors struggle to uphold is, therefore, an unnecessary effort. *Second*, and more importantly, these efforts replace a much needed discussion of the ways by which the 'slavery' category can be changed and adapted to today's world. As we have seen, cognitive theories do not maintain that 'anything goes' in the process of categorization. Rather, they try to identify the constraints that actually give the category its shape. A cognitive scholar who investigates a category will search for these constraints, in history, culture, myth and popular narratives. Needless to say, this kind of analysis can be found nowhere in the article. *Third*, the authors' approach has the unfortunate result of preserving the inferior position of the 'poetic devices' in legal scholarship. Literary devices, which are employed throughout the article, are, relegated to the status of 'helping devices' in the service of 'real' legal proofs. The employment of narrative and metaphor is not presented as a breakaway from traditional legal reasoning, but only as a supplementary device to scientific like analysis of legislative and judicial materials.

⁹⁶ Id. at 1372.

⁹⁷ Compare to Hannah Arendt's call for the dismantling of dead metaphors by connecting them back to the stories and social context in which they were first conceived. See Arendt, *supra* note 47.

Conclusion

Legal scholars often regard attempts at re-categorization as magic devices that can affect social change overnight. In legal scholarship not much thought has been given to the question of how to achieve *effective* categorization, as opposed to mere rhetorical exercises. There is a huge gap between the practical knowledge that has been acquired by legal scholars over the years about categorization, and the theoretical formulations that they tend to give to this knowledge. The prevailing view in legal scholarship is one that can be tracked back to Aristotelian writings about categorization, one that requires the discovery of a necessary and sufficient condition for membership in a category. This view has been subjected to a serious criticism by scholars in cognitive studies and has been replaced by a modern understanding that takes into account the social and historical context in which the categorization is made. This modern understanding of the importance of the audience (i.e., the social beliefs that the readers bring with them to the text) is well known in legal discourse. Still, legal scholars who work on the front line of social change feel obliged to adhere to the rituals of the objectivist view. I think this choice is unnecessary and wrong headed, because it forces the writer to engage in empty rhetoric. More importantly, it allows her to avoid confronting the difficult questions of how to affect changes in social beliefs and understandings. I believe that once this ritual is abandoned, legal scholars may begin to profit from the knowledge that has been acquired by cognitive theory. Moreover, they will be able to bring their rich practical experience to further develop the theory and enhance our understanding of social change. Together, the theoretical and practical knowledge about categorization can help us confront more effectively the evil of child abuse.