

LANGUAGE MATTERS

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INTRODUCTION

At a pivotal moment in the charming (although hardly original) film *Notting Hill*,¹ the character played by Julia Roberts, a ravishingly beautiful and blazingly popular actress named Anna, stands alone with the character played by Hugh Grant, a sweet and nerdy bookseller named William. After apologizing for the rudeness with which she has responded to his dogged and well-mannered devotion, Anna seeks to restore their ruptured relationship and to declare what she has now realized to be her true feelings. "I'm just a girl," she says, "standing in front of a boy, and asking him to love her."

In the context of the movie, this line is meant to feel good: Anna has seen the error of her ungracious ways, the tables have finally been turned in William's favor, and the happy ending that loomed over the movie from the outset now seems certain to occur. As a sucker for happy endings and sappy love stories, I *did* feel good, but I also felt distracted. "A girl?" I thought. Earlier in the movie, Anna described herself as being twenty-nine years old. My daughter is fifteen and already seems miles from the girl who used to fit in my lap. Most importantly, did feminists not fight for a long time for women to be called "women"?

Of course, if you change the line, you change the meaning. Try "I'm just a woman, standing in front of a man, asking him to love her." At best, you get the flavor of a grade B bodice ripper romance; at worst, this is soft core pornography. Language matters.

This "girl" thing is troubling. As the film moves from Anna's declaration towards the final reconciliation between her and William, Anna becomes ever less the powerful, self-confident, independent popular icon. William does not immediately agree (as requested) to resume their ruptured relationship, but when he

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1. NOTTING HILL (Universal Studios, Inc. 1999).

finally does, Anna's relieved and grateful smile could be drawn from a 1950s comic book depicting a love-struck teenager who has been waiting to melt into the arms of the man of her dreams. We last see the couple together in the park; Anna lies with her head in William's lap as he reads to her. She is pregnant, and if she is not also barefoot she might as well be. The headline could read, "Megastar Finds Long Sought Happiness as Housewife."

Perhaps my judgment is too harsh. After all, this is only a movie, and a kind of formula piece, at that. Girl meets boy, falls in love, resists, is finally won over and lives happily ever after. This progression has entertained over and over again, in *Philadelphia Story*, in *The Graduate*, in that even more popular Julia Roberts movie, *Pretty Woman*. Why not in *Notting Hill*?

The formula is entertaining. It is also a stereotype. Like many other stereotypes, it may not be inherently or necessarily inaccurate or harmful—women and men do fall in love, overcome obstacles, start families, and what could be wrong with that? Yet the notion that true happiness lies in landing the right man, in marrying him and being the mother of his child—this notion obviously has not been harmless for women over time. The same is true for the term "girl." It is not an inherently or necessarily insulting term, especially when used—not by a man—but by a woman, and about herself at that. And yet the description of women as children has also not been harmless for women over time.

The harmfulness or harmlessness of stereotypes depends in important measure on context, but context is not always something that can be controlled. One powerful insight of contemporary critical thought derives from this observation: Apparently innocent images and expressions can reinforce and entrench offensive ideas. "I'm just a girl standing in front of a boy, and asking him to love her" is just a line in a frothy film. However, it also re-enacts and makes vital in the 1990s a vision of women and love that was taken for granted in the 1950s and that was bitterly fought against beginning in the 1960s. The negative implications may not have been intended or even considered by anyone, including the screenwriters, but no one can dictate whether the viewer sees the end as a formulaic, hackneyed (albeit romantically enjoyable) stereotype or as expressing a deep and abiding truth about the aspirations of all women.²

Another way of saying all this is that visions of women are socially constructed, built from the language in which we speak of them—including whether we call them "girls"—and from the stories we tell about them—including the stories in films such as *Notting*

2. See generally Steven Winter, *The Power Thing*, 82 VA. L. REV. 721 (1996).

Hill.³ The recognition that what we take to be the reality of women's nature (or of gender more generally, or of sex, race, class, and so forth) is not essential or given, but constructed and contested has largely been taken to be liberating.⁴ When, for example, the "differences" that once were thought to justify treating women with less respect than men could be shown to be neither given nor natural, but rather the product of a comparison to an unstated male norm, the justification for the differential treatment weakened substantially, if not altogether.⁵

However, the point of my *Notting Hill* example is that social construction is complex. Consider stereotypes. When we call something a stereotype, we mean to emphasize its artificiality, its distortion, the ways in which it oversimplifies a complex reality. Yet we also know that, for all their artificiality, distortion and oversimplification, stereotypes are part of the mental equipment with which we apprehend and thus further construct the reality of the social world.⁶ Merely labeling an idea "stereotypical" will not necessarily rob it of its power. Even if we could magically rid ourselves of all our current stereotypes, we would not see more clearly into a purer reality. If, as social construction theory teaches, all seeing derives from *some* perspective and in that sense is partial, then all our perceptions are skewed by their starting points—and of course, we cannot think without starting points or "from nowhere."⁷ We may be able to acknowledge the

3. For a particularly clear and helpful explanation of the phenomenon of social construction, with multiple examples, see Lawrence Lessig, *The Regulation of Social Meaning*, 62 U. CHI. L. REV. 943 (1995).

4. For the view that social constructionism is *not* liberating, see, e.g., Daniel A. Farber & Suzanna Sherry, *The 200,000 Cards of Dimitri Yurasov: Further Reflections on Scholarship and Truth*, 46 STAN. L. REV. 647 (1994) (discussing how social constructionism may cause "scholars [to] refrain from publishing what they believe to be true when their works would undermine community or otherwise prove politically counterproductive"); Steven G. Gey, *Why Rubbish Matters: The Neoconservative Underpinnings of Social Constructionist Theory*, 83 MINN. L. REV. 1707 (1999) (discussing the role of social constructionism).

5. For the clearest and most lucid explanation of this point, see Martha Minow, *The Supreme Court 1986 Term—Foreword: Justice Engendered*, 101 HARV. L. REV. 10, 13-15, 39-46 (1987).

6. See, e.g., Martha Minow, *Feminist Reason: Getting It and Losing It*, 38 J. LEGAL EDUC. 47, 51-53 (1988). For an account of this phenomenon in cognitive terms, see Steven L. Winter, *Transcendental Nonsense, Metaphoric Reasoning, and the Cognitive Stakes for Law*, 137 U. PA. L. REV. 1105 (1989); Steven L. Winter, *The Cognitive Dimension of the Agon Between Legal Power and Narrative Meaning*, 87 MICH. L. REV. 2225 (1989) [hereinafter Winter, *The Cognitive Dimension*].

7. The quote is from THOMAS NAGEL, *THE VIEW FROM NOWHERE* (1986). On perspective, see Katharine T. Bartlett, *Feminist Legal Methods*, 103 HARV. L. REV. 829, 881 (1990) stating:

Truth is partial in that the individual perspectives that yield and judge

presuppositions with which we make our inquiries, but we cannot do without them altogether, and so our new notions—of women, of others who are demarked as “different”—will in this sense be but new, alternative stereotypes.

This article reflects on the themes just introduced: the way in which language matters, how we use and abuse stereotypes, and, most of all, the liberatory potential of understanding that language and stereotypes (and so much else) are social constructions. My vehicle will be literature, specifically a short story entitled *Counsel for Oedipus* by the Irish author Frank O'Connor.⁸ Literature is a rather obvious site to examine connections between language and the law. Like the idea of social construction, literature has often been touted for its potential to upset what we take for granted, to open our eyes to our unacknowledged assumptions.⁹ In this respect, the law and literature movement shares much with feminist jurisprudence, which has also sought to uncover and to challenge hidden preconceptions—about such matters as truth, objectivity, or gender—that lurk within the law, often to the distinct detriment of women.¹⁰ Indeed the two movements have often drawn from and relied upon each other, so that it is not uncommon to see feminists employ literary works to support or critique claims about legal issues affecting women or to see literary theorists analyze legal materials as “texts.”¹¹ More importantly, there is an interesting

truth are necessarily incomplete. No individual can understand except from some limited perspective As a result, there will always be “knowers” who have access to knowledge that other individuals do not have, and no one’s truth can be deemed total or final.

See also Kim Lane Scheppele, *Foreword: Telling Stories*, 87 MICH. L. REV. 2073, 2090 (1989) (“Observers, even those not directly involved in a dispute, bring with them a conceptual scheme already formed, a set of presuppositions and expectations, that influences what they see and report The ‘neutral observer’s’ point of view is no less a point of view than any other[.]”).

8. The story is anthologized in Frank O'Connor, *Counsel for Oedipus*, in *LAW IN LITERATURE: LEGAL THEMES IN SHORT STORIES* 442 (Elizabeth Villers Gemmette ed., 1992).

9. For a summary of the claims, see generally Jane B. Baron, *Law, Literature, and the Problems of Interdisciplinarity*, 108 YALE L.J. 1059 (1999).

10. See, e.g., Bartlett, *supra* note 7, at 862-63:

Feminists’ substantive analyses of legal decisionmaking have revealed to them that so-called neutral means of deciding cases tend to mask, not eliminate, political and social considerations from legal decisionmaking. Feminists have found that neutral rules and procedures tend to drive underground the ideologies of the decisionmaker, and that these ideologies do not serve women’s interests well. Disadvantaged by hidden bias, feminists see the value of modes of legal reasoning that expose and open up debate concerning the underlying political and moral considerations.

11. See, e.g., Linda R. Hirshman, *Bronte, Bloom, and Bork: An Essay on the Moral Education of Judges*, 137 U. PA. L. REV. 177 (1988). See also Anita L.

structural similarity to arguments made both by adherents of the law and literature movements (whom I shall hereinafter call law-and-lits) and by legal feminists. Both groups tend to identify and to highlight the way legal procedures, language, and concepts operate in ways that are different from conventions operative outside law—in the ordinary world of day to day life, or in the imaginative world of fiction, for example. These techniques of compare-and-contrast have been enormously useful in heightening consciousness of the ways in which, wholly apart from direct commands and sanctions, law operates as a system of social control. On the other hand, as I hope to demonstrate, these techniques are also dangerous, for they have the potential to fix, naturalize, and reify a border separating a domain of “law” from the ordinary realm in which real humans live their lives.¹² They are, in other words, part of the way the concept of law is itself socially constructed by those who would reform it into a kind of evil empire that will forever require reformation. There is no way to notice social construction that does not participate in further social construction, and I want to emphasize that this is a process that cannot be controlled.

I. FRANK O’CONNOR’S *COUNSEL FOR OEDIPUS*

I must at this point insert several disclaimers. First, I have already referred to the law and literature and the feminist jurisprudence movements as if each were a single, monolithic entity. Quite the opposite is true. The law and literature movement encompasses a wide variety of concerns and methodologies; its internal divisions are deep enough to have prompted some to question whether there is a thread strong enough to hold the disparate concerns together.¹³ Similarly, there is not one feminist jurisprudence but many, from “difference” feminism to “dominance” feminism, to “babe” feminism, just to name a few.¹⁴ Nor is there clarity about the identity and nature of

Allen, *The Jurisprudence of Jane Eyre*, 15 HARV. WOMEN’S L.J. 173, 177 (1992), noting that the interaction should work both ways, so that not only can literary theory be used to interrogate legal language and concepts, but “perspectives taken from law can illuminate literary texts.” For essays written from a variety of feminist legal and literary perspectives, see BEYOND PORTIA: WOMEN, LAW, AND LITERATURE IN THE UNITED STATES (Jacqueline St. Joan & Annette Bennington McElhiney eds., 1997).

12. For an argument that this problem is common to many “law and” lit movements, see Jane B. Baron, *Interdisciplinary Legal Scholarship as Guilty Pleasure: The Case of Law and Literature*, in LAW AND LITERATURE 21 (Michael Freeman & Andrew D.E. Lewis eds., 1999).

13. See Baron, *supra* note 9, at 1071-73, 1072 n.65.

14. For one overview, see, e.g., Linda J. Lacey, *We Have Nothing to Fear but Gender Stereotypes: Of Katie and Amy and “Babe Feminism,”* 80 CORNELL L. REV. 612 (1995). For a slightly different overview, describing feminist

the “woman” for whom any of these feminisms speak.¹⁵ In describing the claims and strategies of these movements, I must oversimplify to some degree. I have tried to capture what is typical without engaging in caricature, but as I will develop in this essay, the line can be thin.

Moreover, I am about to engage in practices that look very much like practices I have critiqued elsewhere. Specifically, in the sections that follow, I will summarize the plot of a literary work, and then describe multiple ways in which that work might plausibly be read. I have poked fun at other scholars’ analyses of stories, poems, and novels.¹⁶ Therefore, it is fair to ask why my readings should be treated differently. In the end, only the reader can decide. It may be helpful to point out that, unlike some in the law and literature movement, I do not believe that stories such as *Counsel for Oedipus* have a single meaning for law. If they do have such a meaning, I am not sure I can determine or defend it.¹⁷ I am less concerned with what O’Connor’s story might “mean” than in the way in which feminists and law-and-lits might use it to illustrate claims about the nature of legal language and argumentation. My focus, in other words, is less on the story itself than on reactions various readers have had or might be imagined to have to it. Many of these reactions would come as a complete shock to O’Connor; certainly they came as a surprise to me when I taught the story. Neither O’Connor as author nor I as teacher could fully manage or control the readings of this story. That, of course, is my point.

A. *Counsel for Oedipus: Feminist Manifesto or Sexist Tract?*

On one level, *Counsel for Oedipus* is about litigants who, having seen how the legal system deals with their dispute, call a halt to the litigation described in the story and find their own

jurisprudence’s three “generations,” see Adelaide H. Villmoare, *Feminist Jurisprudence and Political Vision*, 24 LAW & SOC. INQ. 443 (1999).

15. Kimberle Crenshaw, *A Black Feminist Critique of Antidiscrimination Law and Politics*, in THE POLITICS OF LAW: A PROGRESSIVE CRITIQUE 356 (David Kairys ed., 3d ed. 1998); Angela Harris, *Race and Essentialism in Feminist Legal Theory*, 42 STAN. L. REV. 581 (1990); Minow, *supra* note 6, at 47-48.

16. Baron, *supra* note 9, at 1068-70.

17. I have criticized some within the law-and-lit movement for treating literature as if it had a clear message for law, whereas I believe most literary works are not fables and do not carry simple morals. It does not follow from this critique that literature is incapable of being used to teach lawyers or law students. Analogously, one might be skeptical about at least some claims made by the law and economics movement and yet still find it useful in certain instances to use economics in examining law. The question is not *whether* literature (or economics or philosophy or history) can be useful to lawyers, but how.

resolution to the problems that brought them into court.¹⁸ In the story (here comes the plot summary of which I warned you), Nellie Lynam has sued her husband Tom for legal separation on the grounds of cruelty and adultery. "The adultery," O'Connor telegraphs in the story's second paragraph, "was admitted, and all that was needed to prove the cruelty was to put Tom Lynam in the box. He was a big, good-looking man with a stiff, morose manner; one of those men who are deceptively quiet and good-humored for months on end and then lay you out with a stick for a casual remark about politics."¹⁹ Therefore, it appears at the start of the story that Nellie has a lock on the outcome: in addition to Tom's undeniable and undenied relationship with another woman, by whom he has had an acknowledged child, there is the fact that the judge, O'Meara, has "a mother fixation."²⁰ And the direct examination of Nellie by her lawyer Kenefick fills in whatever might still be missing of the cruelty piece. Her testimony details how Tom called her names too horrible to be uttered aloud, and how he literally kicked her out of their house in plain sight of their five-year-old son.²¹ In light of Tom's verbal and physical abuse, how could Nellie lose?

But the crafty cross-examination of Nellie by Tom's attorney, Mickie Joe Dougherty, demonstrates that Nellie is not what she seemed. "It cannot be pretended," O'Connor tells us, "that, the best day he ever was, Mickie Joe was much of a lawyer or made a good appearance in court."²² But Mickie Joe is a "woman-hater," the "one [sort of] person," O'Connor explains, "who can stand up to a man with a mother fixation."²³ Mickie Joe in this instance is devastatingly effective. Nellie, it emerges, is no paragon of a wife: she fails to cook for her husband, will not go out visiting with him, embarrasses him before his friends, spoils his children to the point where they cannot be cared for by others, and, most tellingly, has refused to have sexual relations with him for over two years. As Mickie Joe's cross-examination proceeds, O'Connor tells us, "You couldn't any longer see [Nellie] the way you had seen her first. Whether it was right or wrong, another picture was beginning to emerge of a woman who was both ruthless and designing and who ruled her great brute of a husband by her weakness."²⁴

18. Paraphrasing literature into other words is inevitably an exercise in working with the second best; I will not pretend to do full justice to O'Connor's sprightly written text.

19. O'Connor, *supra* note 8, at 442.

20. *Id.* at 442. In this respect, O'Connor sees O'Meara merely as a token of a type: "As for judges—every single one that I've known had a mother fixation." *Id.*

21. *Id.* at 443.

22. *Id.* at 444.

23. *Id.* at 446.

24. *Id.* at 446.

Ironically, Tom had not told Mickey Joe of any of this. The misogynistic Mickie Joe has “stumbled on the truth” by sheer intuition, and Tom, meanwhile, is astounded and incredulous that Mickie Joe has discerned so much about his marriage.²⁵ Tom is also furious. Although it is clear to all but Nellie when court adjourns for the day that her case is effectively lost, Tom jumps up and follows Nellie as she leaves. They talk, after which Tom announces that “Nellie and me are settling this between us.”²⁶ Mickie Joe is infuriated to see his incipient legal victory wasted. “A man tries to help you,” he whines, “but it is only talent thrown away. Go and commit suicide in your own way. I have nothing further to do with you.”²⁷ And here is Tom’s response: “There’s a pair of us there I do not know where you got your information, but you can go back to the people that told you and tell them to mind their own business. I won’t let you or anyone talk to my wife that way.”²⁸

What happens in this story? In one reading, what happens is that Tom chooses to exit the legal system because he is disgusted with the law’s inability to account for the kind of pair he and Nellie really are. In this reading, the law is revealed to both Tom and the reader as inadequate to cope with the nuances of real human relationships. When the litigants see how the law portrays them, the categories to which it reduces them, they take matters into their own hands. Relationship triumphs over rule in the end.²⁹

Both feminists and law-and-lits have noted how the legal system, with its formal rules, its tendency to classify, its propensity for zero-sum, winner-take-all solutions, can never quite capture the subtleties of intimate human connections.³⁰ In this sense, the story depicts a form of alternative dispute resolution of which at least relational feminists might approve. Such a feminist might argue that it is better that Tom and Nellie work things out themselves as the “pair” Tom has recognized they are. Many law-and-lits would concur. What I have elsewhere called “humanist” law-and-lits have consistently argued that the law tends to be bloodless, unemotional, and insensitive to context, abstract and

25. O’Connor, *supra* note 8, at 447.

26. *Id.* at 449.

27. *Id.*

28. *Id.* at 449-50.

29. See generally JOHN M. CONLEY & WILLIAM M. O’BARR, *RULES VERSUS RELATIONSHIPS* (1990).

30. For a thoughtful elaboration on the relation between justice and the values associated with the ethic of care, see ROBIN WEST, *CARING FOR JUSTICE* 22-93 (1997). See also Carrie Menkel-Meadow, *Portia in a Different Voice: Speculations on a Women’s Lawyering Process*, 1 *BERKELEY WOMEN’S L.J.* 39 (1985) (exploring how a concern for connection might affect lawyering styles).

inflexible.³¹ Such law-and-lits could easily and approvingly read *Counsel for Oedipus* as being about the limits of law and the superiority of solutions that rest, not on abstract legal categories, but on concrete human connections.

Yet, is it correct to read this story as the expression of ideas congenial to feminism or to law and literature? *Counsel for Oedipus* depends critically upon, and to a degree, is positively composed of stereotypes: the alcoholic abusive husband, the passive aggressive harridan wife, not to mention the mother-fixated judge and the woman-hating lawyer. The story employs these stereotypes, as many readers no doubt picked up from the plot summary alone, in a particularly invidious way. The story can be read to suggest that the undutiful, unmaternal, asexual wife *deserves* to be beaten by her husband. The theme of Mickie Joe's cross-examination is that Tom's adultery and cruelty are both excusable because Nellie brought them on herself by her failure to be the conventionally good wife. "When the court adjourned," O'Connor writes, "Mickie Joe's cross-examination wasn't over, but he could easily have closed there, for even [Judge] O'Meara's mother fixation could find nothing to fix on in the petitioner's case."³²

"*Nothing?*" one might ask. If a woman does not cook dinner for her husband, is it fine for him to kick her? If she is not interested in sex, is he justified in physically throwing her out of the house? Have we learned so little about battering that this story can still make sense to us? Does it not perpetuate the notion that the nonsubmissive wife forfeits her claim to decent treatment? How could a feminist read this story without becoming furious?

Perhaps these worries are overdrawn. There is a reading of the story in which it is the stereotypes and the way in which stereotypes get things wrong—that educate Tom and Nellie both to see their relationship more clearly. Unlike the reading with which I began, in which Tom already knows something about his marriage that the law cannot quite grasp, in this reading the law's mischaracterization helps Tom come to see his relationship in a different way. By walking away with Nellie, Tom says in effect, "we may be an abusive husband and a passive wife, but yet we are not only this; we are, to emphasize these words again, 'a pair.'" Stereotypes flatten unruly contours; to see oneself depicted as a stereotype is also to see the dimensions that have been omitted, dimensions perhaps not previously apprehended. Tom's calling a halt to the proceedings could reflect an understanding that there is more between him and Nellie than he had appreciated. This

31. See, e.g., Baron, *supra* note 9, at 1078-81.

32. O'Connor, *supra* note 8, at 449.

reading renders *Counsel for Oedipus* once again palatable to both feminists and law-and-lits, for both movements are critically concerned with the effects of stereotypes.

On the other hand, there is yet an alternative reading that supports feminists' worst fears. In this reading, Tom is embarrassed because, at the trial, other people come to know the details of his relationship with Nellie. Recall that Tom, unaware that Mickie Joe simply guessed the details of his marriage, enjoins Mickie Joe to "go back to the people that told you and tell them to mind their own business."³³ The trial testimony demonstrated that he received far less from his wife than a husband should expect to receive. He had to get his own meals, do his own shopping, search for sex outside his own house. He ends the trial and takes Nellie back so there will be no further public disclosures, but the end of the trial does not guarantee the end of the abuse. Indeed, the story's conclusion re-enacts one of the most frightening aspects of abusive relationships, that is, that they are difficult to escape and are re-entered with the apparent willingness of the victim.³⁴ The law, in this reading, underwrites Tom's abusive behavior because in court both spouses have learned that Nellie's failures as a wife positively warrant physical punishment. If she does not satisfy him in the future, they both know he is sanctioned to beat her for it.

B. Which Reading?

What are we to make of these conflicting readings? One interpretation is that they support what proponents of law and literature have asserted for a very long time: literature is a rich, multi-faceted and provocative source through which to view law. Although that assertion may have merit, part of the richness being celebrated is the multiplicity of possible readings, and here the many possible readings conflict. While it is easy and probably correct to say that no one of them is *the* right reading, some are not benign. It hardly advances the cause of women to teach a story about law's formality that inadvertently endorses the proposition that battering is either inevitable or justified. What should be done about these non-transformational readings?

Can the negative readings of *Counsel for Oedipus* be ruled out by setting the story in historical context? Frank O'Connor was born in Ireland in 1903, and his short stories were largely written and published between 1945 and 1961.³⁵ Perhaps one can make

33. *Id.* at 449-50.

34. See Martha R. Mahoney, *Legal Images of Battered Women: Redefining the Issue of Separation*, 90 MICH. L. REV. 1, 34-43 (1991).

35. The biographical information presented here is drawn from 8 THE NEW ENCYCLOPEDIA BRITANNICA 869 (15th ed. 1998); THE CAMBRIDGE BIOGRAPHICAL ENCYCLOPEDIA 709 (David Crystal ed., 1994); CHAMBERS

sense of the less pleasant aspects of *Counsel for Oedipus* when one considers that even the “women’s liberation” or “women’s rights” precursors of contemporary feminism had yet to come on the scene when O’Connor wrote. Besides (and understand that I have my tongue in my cheek here), O’Connor was Irish, writing about Ireland. Surely it is possible for the reader to read the story, in light of the time and place in which it was written, as one about Irish rural society, or about marriage and the law, and not as one about “battering,” a term O’Connor had likely never heard applied to women.

Still, context may not entirely tame the sexist implications of the story. O’Connor seems to want the reader to be ambivalent about Tom’s decision to decline the freedom the law was about to grant him and instead to remain with Nellie. The story closes with Mickie Joe musing, as he watches Tom and Nellie depart together:

that never would they see justice done to a man in a court of law. It was like Oedipus. You could not say whether it was the Destiny that pursued the man or the man the Destiny; but you could be quite sure that nothing in the world would ever keep the two of them apart.³⁶

Of course, these are Mickie Joe’s sentiments, and it is not clear whether O’Connor means the reader to take them literally or ironically. Still, setting the woman-inevitably-bests-man theme in historical perspective only underscores the extent to which generalizations about gender that today would raise hackles were, in O’Connor’s day, used without the slightest embarrassment or self-consciousness.³⁷

Yet although historical context may not exactly exclude—and may even support—the sexist rather than the feminist readings of *Counsel for Oedipus*, it may still be well to keep context in mind if we have to decide among readings. This point was brought home to be my students, who offered a reading I never anticipated. They read *Counsel for Oedipus* in a seminar ponderously titled “Ethical Perspectives on the Practice of Law.”³⁸ The course explores the ethical dimensions of the most apparently technical and prosaic

BIOGRAPHICAL DICTIONARY 1387 (Melanie Parry ed., 1997).

36. O’Connor, *supra* note 8, at 450.

37. The opening of the story only confirms this point:

To sit in court and watch a case between wife and husband is like seeing a performance of Oedipus. You know that no matter what happens the man hasn’t a chance Even the man’s own counsel will be ashamed of him and envy counsel for the wife, who, whatever she did or didn’t do, has the ear of the court.

Id. at 442. While in one sense, O’Connor’s story is about the ways in which this is not true, but it works only by turning the stereotype around, not by rejecting or challenging the stereotype.

38. I co-teach this course with my Temple colleague, Richard K. Greenstein.

decisions lawyers make—how they define their clients' legal problems, how they frame issues, how they discuss facts, and so forth.

Since the students were reading the story for a course on legal ethics, they focused on the conduct of the lawyers. Mickie Joe, they pointed out, never obtained Tom's permission to, in effect, expose and humiliate Nellie. While lawyers have a certain latitude under most ethical codes to determine what tactics will be used in furtherance of the client's ends, this decision, in many students' eyes, crossed the line; the humiliation of Nellie was less a "tactic" than an end in itself for the woman-hating Mickie Joe, and ends are for the client, not the lawyer, to choose.³⁹ Mickie Joe, the students argued, should have told Tom of his plans, and proceeded only if Tom agreed. In this reading, Tom took matters into his own hands not because the legal system—its procedures and rules—were unsuited to the nature of the dispute at hand, but because his lawyer behaved in a manner to which Tom had never consented and of which he disapproved.

Surely, we should be dubious whether the students' reading would even make sense to O'Connor. Assuming authorial intent to be relevant to anything, it seems unlikely that O'Connor wrote with an audience of ethically sensitized lawyers in mind. Nor would the typical reader of *The New Yorker*, where many of O'Connor's stories were first published, be aware of distinctions between "tactical" and other kinds of decisions.

Still, the students had a point. That point did relate to the course, though we had not meant them to focus on technical compliance with ethical rules. I could not say their reading was wrong or unfair, for in the story Tom is furious with Mickie Joe and does not feel the latter truly represented him. And yet, their point seems wholly unconnected to the one O'Connor intended to make.

Considering what O'Connor probably did *not* have in mind when he wrote *Counsel for Oedipus* helps demonstrate how context pre-determines what we will find in a story. It reminds us that we read through the window of our own preoccupations. What the story is about in some measure depends on the framework through which we read it and the concerns with which we approach it. The students' highly technical, compliance oriented reading exemplifies this phenomenon—in an ethics class, they read for ethics. One should hardly be surprised or embarrassed, then, that

39. See, e.g., MODEL RULES OF PROFESSIONAL RESPONSIBILITY Rule 1.2 (1998) (stating that "[a] lawyer shall abide by a client's decisions concerning the objectives of representation . . . , and shall consult with the client as to the means by which they are to be pursued."). The Comment states that "the client has ultimate authority to determine the purposes to be served by legal representation." *Id.* at cmt. 1.

feminists might read for portraits of women. Yet it is beneficial to be aware of this phenomenon. It is impossible to read the story pure, unfiltered by any concern, point of view, or interest.

II. "LAW" AND "LIFE"

Context can help the reader see how starting points and background assumptions affect what she or he takes from the story. Will this awareness tame the more dangerous, sexist readings to which the story is subject? It is not yet entirely clear. Let us return to those earlier readings of *Counsel for Oedipus* that treat the story as one *about* the connection between stereotypes—and legal argumentation. These readings have a feminist cast in that they highlight a gap between the complexity of actual experience and the relative simplicity with which experiences tend to be portrayed by those who have not actually shared them. These readings would also find favor among those law-and-lits who compare the subtlety with which events are portrayed in literature to the relatively cruder portrayals in legal and similar fora.

In *Counsel for Oedipus*, Nellie's lawyer, Kenefick, not only elicits example after example of Tom's verbal and physical roughness, but he presents Nellie—or has Nellie present herself—in a manner calculated to play to Judge O'Meara's mother fixation. For example, Kenefick depicts Nellie as being too demure to repeat aloud the names her husband called her and too weak to resist her husband's great physical force. On direct examination, Tom is the quintessential lout; Nellie is the quintessential wife, mother, and victim. When it is his turn, Mickie Joe Dougherty turns the tables not only by showing that Nellie is not what she had seemed, but that she is a very different type—selfish, lazy, and manipulative.

All of these types fit what Gerald Lopez has called a "stock story"; a large explanatory picture suggested by a small number of telling details.⁴⁰ Every reader carries around an ample array of these stories; they are part of the cognitive equipment with which one reduces and thereby copes with the complexity of the world.⁴¹ The tactics employed by Kenefick and Dougherty are realistic in that lawyers in fact often employ "stock stories" both in order to telegraph information when there is no time to put it directly into evidence and to invoke appealing, positive images. Effective cross-examinations show, as did Mickie Joe's, that the facts do not fit the story, and that a different, less flattering story may be more apt.

40. Gerald Lopez, *Lay Lawyering*, 32 UCLA L. REV. 1, 5-6 (1984).

41. See Winter, *The Cognitive Dimension*, *supra* note 6, at 2234 (describing how "unconscious structures of thought" are invoked "automatically and reflexively to make sense of new information.").

“Stock stories” are in many ways just reasonably sophisticated stereotypes. Like all stereotypes, they accurately capture some, but not all, aspects of a person or situation.⁴² What leaks out of the confined boundaries of the “stock story” or stereotype is the “good stuff,” the facets of personality or relationship that are unique or unusual, that make individuals individual. One way of understanding what happens in *Counsel for Oedipus* is that Tom cannot stand to see either himself or Nellie as a caricature, so he opts out of the legal system of artificial “types” to live his “real” life.

The feminist and law-and-lit friendly readings just described turn on Tom and Nellie’s resistance to formal, categorical portraits. However, in these readings, it is not entirely clear whether it is the law that Tom rejects, or the stereotypes. Is the conflict, in other words, between rules or law on one side, and relationships or “real life” on the other? Or is it instead between one way of seeing life, a way that reduces it to lifeless forms, and another, which insists on its unruly vitality?

One might ask, does law not *always* reduce, flatten, and categorize, so that there is no real choice between rejecting law and rejecting stereotypes? This question is a pivotal one, highlighting a certain ambiguity in the claims made by feminists and law-and-lits alike. If law *always* reduces the complexity of the lived world to mere stereotypes, then the compare-and-contrast strategies which both feminists and law-and-lits have employed to demonstrate problems in legal conceptualizations and procedures are doomed to failure. The same is true of the strategy—sometimes associated with feminism and sometimes with law and literature—of using fictional or actual, literary or legal (if a distinction exists) stories to expose the artificiality of the law’s depictions of the world in general and women in particular.⁴³ Both the legal storytelling and the law and literature movements have drawn a fair amount of criticism; some would say more than their fair share, especially with respect to legal storytelling.⁴⁴ Mercifully, the debates need not be rehashed here. What is worth noting is that if legal analysis *requires* oversimplification, if it *necessarily* relies on stereotypes, then it will not help to point out, as the compare-and-contrast and the storytelling techniques are

42. For a demonstration, using examples from the context of law school hiring, see generally Richard Delgado, *Storytelling for Oppositionists and Others: A Plea for Narrative*, 87 MICH. L. REV. 2411 (1989).

43. See, e.g., Vicki Schultz, *Telling Stories about Women and Work: Judicial Interpretations of Sex Segregation in the Workplace in Title VII Cases Raising the Lack of Interest Argument*, 103 HARV. L. REV. 1749 (1990).

44. Probably the best known of these critiques is Daniel A. Farber & Suzanna Sherry, *Telling Stories Out of School: An Essay on Legal Narratives*, 45 STAN. L. REV. 807 (1993).

designed to do, the ways in which law omits or distorts various aspects of women's lives. At worst, the law will simply ignore the lessons that the contrasts and stories are offered to impart. At best, it will incorporate the lessons into new, but still oversimplified and flat, depictions.

It seems more accurate and more sensible to understand the projects of legal feminism and of the law and literature movement as reflecting a belief that law *can* better reflect lived experiences—especially the experiences of women. At the very least, law can reflect the multiple ways in which those experiences might be described. Under this view, it makes sense to try to compare legal and nonlegal depictions of events, to tell stories, and to read literature. The alternative accounts may correct the law, interposing for a stereotypical view one that is more true to life. They may also reveal the manner in which various conflicting visions of life compete for acceptance.⁴⁵ But only a view of law as at least susceptible to change renders coherent the compare-and-contrast and the storytelling strategies of feminism and law and literature.

The rhetoric of both movements has, however, obscured this more logical presupposition. As they describe it, law never actually seems to change. It always requires the correction of new stories; it remains in perennial need of the edification of literature. No matter how often law's stories are exposed for their incompleteness or slant, no matter how often Shakespeare or Melville is invoked to demonstrate some point of legal obtuseness or blunder, law remains incomplete, slanted, and obtuse—a perpetual enemy force. Law must be capable of reformation, or why read *The Merchant of Venice*, *Billy Budd*, or the first person accounts of those whose experiences do not match the “authorized story” that underlies various legal rules and statutes?⁴⁶ But somehow law is never actually reformed, or symposia such as this one would, like the state under communism, ultimately wither away for lack of need. How can this be?

The beginning of an answer to this question requires more careful attention to what is meant by the term “law” when used in contrast or conjunction with terms such as feminism, literature, or language. The very idea of examining the multiplicity of languages

45. These two tasks reflect different epistemological premises. For an explanation, see generally Jane B. Baron & Julia Epstein, *Is Law Narrative?*, 45 *BUFF. L. REV.* 141, 171-73 (1997).

46. Exactly what should be read is a matter of some controversy. See, e.g., WEST, *supra* note 30, at 195 (discussing the canon and outsiders); Judith Resnik, *Changing the Topic*, 8 *CARDOZO STUD. L. & LITERATURE* 339 (1996) (discussing the canon and women); RICHARD WEISBERG, *POETHICS AND OTHER STRATEGIES OF LAW AND LITERATURE* 117-23 (1992) (defending the traditional canon).

within the law assumes a divide between the “inside” of law and a domain that is not “within,” but somehow “outside” the law. Contrasts between law and literature, and between literary and legal uses of language, assume a similar divide between domains. The inside/outside divide structures several of the aforementioned proposed readings of *Counsel for Oedipus*, in which the story turns on the fact that the depictions of the Lynams’ marriage *inside* the courtroom, that is, *inside* the law, diverge from the marriage as it exists or is experienced outside the legal realm.

One danger of not attending to how we draw the divide between what is inside and what is outside law is that, at least rhetorically, the tendency seems to put everything undesirable on the law side. For example, when contrasted with literature, law tends to be portrayed as amoral, technical, mechanical, and above all, doctrinal, while literature is portrayed as the opposite: morally uplifting, subtle, and emotional. But, we are all aware of aspects of law that are highly moral (and flexible and nondoctrinal), while some literature is extremely unemotional and exemplifies rather than condemns dangerous values. Similarly, legal language is often portrayed as dry and insensitive, in implicit contrast to language outside legal contexts, which is presumably rich and nuanced. However, some legal language (think of Cardozo’s famous decisions) is obviously rich and nuanced, while language outside of law is often dry or insensitive.

One may have to face the unpleasant possibility that the reification of law in the contrasts between law and literature, legal and nonlegal language, and the like is part of what helps construct law as a domain in need of reconstitution and reform. If legal language is powerful, if it matters how the law “speaks,” then the same must be applied to those who talk about law, and about law’s talk. The more feminists and law-and-lits point to the ways in which law is constructed to ignore the needs and interests of outsiders, the more the movements’ rhetoric constructs the legal domain as one in which these needs or interests *cannot* be taken into account. This is the control problem I mentioned earlier: there is no telling where all this talk of social construction will take us. We seem, despite ourselves, to be culturally invested in a vision of law as a cold and foreign domain that, as in *Counsel of Oedipus*, can never quite connect to the world with which we are familiar.

A second danger of not being careful about how we define law for purposes of contrasting it with literature, nonlegal language, etc. is the danger of unduly narrowing what we think of as “law.” Statutes, cases, and administrative regulations are clearly “law,” and one would similarly label the conduct that occurs in courtrooms, police stations, and law firm offices as “legal.” However, law is not confined to obviously “legal” spaces. As the

law and society movement emphasizes, it exists all over,⁴⁷ where we drop our coins in parking meters, make our marriage vows, pay our minimum credit card balances, assert that the irritating words uttered by our bosses at work constitute sexual harassment, or tell our neighbors to keep off our property.⁴⁸ Ignoring these important sites in which law operates unnoticed but powerfully makes it easier to draw contrasts: if one thinks only of the law in courts and statute books, the gap between law and life will naturally seem huge. If one insists on seeing the law that infuses daily life, then the gap narrows substantially. Indeed, it is unclear that “gap” remains the correct metaphor. One may need to consider whether the categories “law” and “ordinary life” are not two ways of describing a single set of experiences, rather than two altogether separate categories. However, if this redescription is accurate, some of the cherished dichotomies of the feminist and law and literature movements will need to be rethought. “Sterile” law can no longer be opposed to “rich” literature; nor can we easily compare depictions of women in law to those in ordinary life (since law is “in” that ordinary life).

III. WOMEN AND GIRLS

It will not do to treat as socially constructed only those images, concepts, and procedures of which one, for whatever reason, disapproves, while treating as natural or “real” those one wishes to interpose. When law’s artificiality is contrasted to experiences described as more “real,” it is legitimate to ask, “more real in what sense?” If one is to take social construction seriously—and it should be added that many on both the left and the right think that this is a very bad idea indeed⁴⁹—one must be willing to question not whether but how our own “real” experiences are themselves socially constructed.

In addition, social construction does not happen only in law, and law is not the only agent of social construction. The comparisons and contrasts of feminism and of law and lit are among the many notions that participate in constructing the social

47. See Austin Sarat, “*The Law Is All Over*”: Power, Resistance, and the Legal Consciousness of the Welfare Poor, 2 YALE J.L. & HUM. 343 (1990) (discussing how the welfare poor have a strong knowledge of the law yet are subject to its power).

48. For a rich description of the multiple sites in which law might be seen to reside, see PATRICIA EWICK & SUSAN S. SILBEY, *THE COMMON PLACE OF LAW* (1998).

49. From the left, see Catharine A. MacKinnon, *Law’s Stories as Reality and Politics*, in *LAW’S STORIES: NARRATIVE AND RHETORIC IN THE LAW* 232 (Peter Brooks & Paul Gewirtz eds., 1996). From the right, see GERTRUDE HIMMELFARB, *ON LOOKING INTO THE ABYSS: UNTIMELY THOUGHTS ON CULTURE AND SOCIETY* (1994).

world.⁵⁰ The world of law they would construct is a world about which we ought to have our doubts. Do we want a world of law that is forever separate and fallen?

Of course, if tomorrow we ceased to compare and contrast and to tell stories, we would not thereby escape participation in the forces of social construction. Furthermore, we will not be better able to “control” the effects of whatever alternative strategies we might develop.

With all this in mind, let us return to Julia Roberts’ “I’m just a girl” line from *Notting Hill*. Referring to a grown woman as a girl does call up stereotypes from another time, as described at the outset of this article. Yet, the term “woman,” especially when used self-consciously, may call upon other, more recently-generated stereotypes—of pushy, edgy females who never lighten up and who cannot take a joke, either. There does not seem to be any language in which to talk about women that does not replicate the problems we are trying to talk our way out of.

My own view is that this apparent paradox is not actually a problem. We may be able to think, or to speak, ourselves into a clearer view of where we stand (and do not stand) in the social world, but we should not aspire to stand outside the social world. We must speak of ourselves somehow, in some words, and any account of those words that is nuanced enough to be interesting or useful is likely to resist reduction into anything like prescription. Recently, I have noticed that many of my students—women as well as men, and feminist women at that—refer to themselves and their friends as “girls.” Should they not have the same privilege to decide what they should be called that we feminists from a slightly different generation claimed for ourselves to decide what they should be called? It could be, then, that the choice between “girl” and “woman” is less about transformation than aesthetics. Aesthetics are by no means trivial. In a world where all is constructed, aesthetics matter.

50. I will not here assess whether they are even a fraction as powerful as the notions that come to us, say, from television advertising.