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A Law and Literature Approach to Stumped by Debora Threedy

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In bringing a law and literature approach to *Stumped*, I want to clarify at the outset that there is no one such approach. There are different strands of this field and, while there is intersection and overlap, there also are some very real distinctions. In this response, I will begin by identifying questions and issues about *Stumped* that might present themselves from law *in* literature and law *as* literature perspectives. This analysis will be followed by a discussion of the play from a particular law and narrative approach, one that ideologically is allied with feminist jurisprudence and critical race studies. Finally, I will conclude by examining the play in connection with scholarship on the cultural study of law, specifically emphasizing ways in which law and literature mutually constitute one another as opposed to being distinct categories of knowledge.

In the early years of the law and literature movement, the field was divided primarily into two categories, law *in* literature and law *as* literature. Jane Baron, in her article entitled *Law, Literature, and the Problems of Interdisciplinarity*,[1] provided a helpful way to consider the different approaches to the field. She characterized the law *in* literature scholars as "humanist law and lits."[2] A basic premise of this strand of inquiry is that "lawyers should read literature"[3] and, for the most part, literature tended to mean the "Great Books." This strand looked back on a past when part of the culture of being a lawyer meant being well-read. Guiding ideas of humanist law and lits are that literary works can promote identification across differences; provide real-life context to abstract legal rules; and infuse an overly rational field like law with necessary emotion and empathy.[4] Literature also can serve as a vehicle for the moral training of lawyers.[5] In short, literature can bring to law the humanity of the humanities.

The play *Stumped*, read from this perspective, literally humanizes the characters in the legal case that Karen, the law student, is studying. Karen identifies with the woman who has been sterilized (Linda) from the beginning. The case is "from my lifetime. It could have happened to someone I know."[6] In

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* This piece is part of a four-part symposium. *See also* Debora Threedy, *Introduction to* Stumped: *The Story of* Stump v. Sparkman, 81 UMKC L. REV. 787 (2013); Debora Threedy, *Stumped, A Play in One Act*, 81 UMKC L. REV. 791 (2013); Laura T. Kessler, Stumped, *by Debora Threedy: A Legal and Historical Context*, 81 UMKC L. REV. 813 (2013); Aden Ross, Stumped, *by Debora Threedy: A Playwright's Perspective*, 81 UMKC L. REV. 833 (2013).

** Charles Hartsock Professor of Law, University of Cincinnati College of Law. I would like to thank Debora Threedy for inviting me to participate in the symposium and for the privilege of offering interpretations of her creative work.

[1] Jane B. Baron, *Law, Literature, and the Problems of Interdisciplinarity*, 108 YALE L.J. 1059 (1999).

[2] *Id.* at 1063.

[3] *Id.*

[4] *Id.* at 1064.

[5] *Id.*

[6] Debora Threedy, *Stumped, A Play in One Act*, 81 UMKC L. REV. 791, 792 (2013).

the end, she literally takes Linda's place. The play presents the characters and their backgrounds in ways that create identification and sympathy. Moreover, the abstraction of the legal issue—what constitutes a "legal act"—is made concrete. The context, that this act was signing an order that would forever take away a fifteen-year-old girl's ability to have children, adds different layers of meaning to one of the statements in the case, quoted in the play: "[J]udges are not responsible 'to private parties in civil actions for their judicial acts, however injurious may be those acts, and however much they may deserve condemnation . . . .'"[7]

From a humanist law and literature perspective, however, the play raises interesting questions about the "moral" position of the lawyer. While Karen, a lawyer in training, clearly condemns the acts of Linda's mother Ora and Judge Stump, she has this to say about the lawyer in the case:

> I think about that attorney a lot. I don't say this to excuse him, because he's culpable in all this, too. He could have derailed the train wreck that was Ora McFarlin right there. But I see him as this sole practitioner just scraping by, hustling for clients, taking anything that walks in the door—even if it is some crazy lady with a request that he had to know was outrageous. You're supposed to get a guardian ad litem to represent the daughter and you're supposed to have a hearing. I'm still in law school and even I know that. So maybe he's just a bad lawyer. He could have stopped Ora, but he didn't. Still. He wasn't the last line of defense. That wasn't his job.[8]

A humanist perspective, among other things, would explore the significance of this rationalization of the lawyer's acts, the dangers implied in that "Still."

A second major strand of the law and literature movement is law *as* literature. Baron characterizes scholars who focus on this aspect of the field as "hermeneutic law and lits."[9] This strand brings methodologies to the law from literary theory and criticism, and its basic premise is that interpretive methods conventionally applied to literary texts also can be applied to legal texts.[10]

This approach, as applied to *Stumped*, might involve reading the case it is based upon, *Stump v. Sparkman*,[11] as a text. Analyzing the case as the crafted narrative that it is, one would pay attention to the gaps (what is not said) and the rhetoric (how things are said). For example, the opinion begins, "This case requires us to consider the scope of a judge's immunity from damages liability when sued under 42 U.S.C. § 1983. The relevant facts underlying respondents'

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[7] Stump v. Sparkman, 435 U.S. 349, 356 n.5 (1978) (quoting Randall v. Brigham, 74 U.S. (7 Wall.) 523, 537 (1869)).
[8] Threedy, *supra* note 6, at 799.
[9] Baron, *supra* note 1, at 1064-65.
[10] *Id.* at 1065.
[11] 435 U.S. 349.

suit are not in dispute."[12] The opinion then provides a summary of those undisputed facts. But what determines which facts are considered relevant? What is left out of this legal telling?

From this law and literature approach, one might also highlight how the story is told in a certain way, specifically drawing on the authority of history and precedent, ways in which legal discourse bolsters its own authority. As support for its decision, the Court explains, "The governing principle of law is well established and is not questioned by the parties. As early as 1872, the Court recognized that it was 'a general principle of the highest importance to the proper administration of justice that a judicial officer, in exercising the authority vested in him, [should] be free to act upon his own convictions, without apprehension of personal consequences himself.'"[13] Reading the opinion in this way and then exploring the intertextual connections between the case and the play illumines how *Stumped* engages with and critiques the legal case, *Stump v. Sparkman.*

A third law and literature approach focuses on law as narrative.[14] While there are many aspects to a law and narrative approach, in this response, I will focus on the connections among law, literature, and feminism, specifically how narratives like *Stumped* perform feminist jurisprudence.[15]

First, in keeping with a central tenet of feminist jurisprudence,[16] the play's focus is women's experiences, not legal abstractions. The fact that a girl has been involuntarily sterilized is at the forefront. The "legal act" that led to Linda's inability to bear children is never minimized or obscured.

Also, the play is a form of consciousness-raising.[17] In the nineteenth century, women writers critiqued the law in novels and other "outlaw" texts because they were a *public* forum available to them.[18] For much of the century, women were not allowed to be judges, lawyers, or legislators, so literature was a

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[12] *Id.* at 351.

[13] *Id.* at 355 (alteration in original) (quoting Bradley v. Fisher, 80 U.S. 335, 347 (1871)).

[14] *See* Baron, *supra* note 1, at 1065-66.

[15] While feminist legal theory is a varied movement with disparate strands, I will discuss important, shared features of feminist jurisprudence, specifically emphasizing women's narratives, raising consciousness, and creating new knowledge. *See* NANCY LEVIT & ROBERT R.M. VERCHICK, FEMINIST LEGAL THEORY: A PRIMER 13 (2006) ("[The] schools of feminist legal theory are also drawn together by the methodologies they use, such as consciousness-raising, revealing gendered assumptions and unmasking patriarchy, the use of stories and the political implications of personal experiences, an emphasis on voices not represented in the dominant tradition, contextual reasoning that focuses on particulars of experience, and asking questions about the gendered impact of policies or laws.").

[16] *See id.*

[17] *See id.*

[18] *See* Kristin Brandser Kalsem, *Looking for Law in All the "Wrong" Places: Outlaw Texts and Early Women's Advocacy*, 13 S. CAL. REV. L. & WOMEN'S STUD. 273, 281-82 (2004) ("[T]he nineteenth-century novel was not only a very popular form of women's writing but also an important public legal forum for women throughout the course of the century. By providing a space where women's stories could be told and read, by calling into question the law's authoritative claim to 'truth,' and by creating new knowledge through the shared telling of women's lived experiences, these novels performed what today we would call 'feminist jurisprudence.'").

means to bring "outsider" perspectives to, and illuminate what was wrong with, the law.[19] While novels and plays are not the same cultural forum that they used to be, with television, movies, and the internet garnering a much larger audience, it is interesting to consider potential audiences for *Stumped* and the consciousness-raising that it could perform.

The play itself addresses a general lack of knowledge about the issue of involuntary sterilization, with Karen commenting, "I never realized how many women had been involuntarily sterilized until I went to law school and read their cases. You don't hear about them. I tell my non-law school friends and they have no idea what I'm talking about."[20] But the play also presents an opportunity for consciousness-raising to law students.

Critical race scholars such as Margaret Montoya have written eloquently about their experiences as law students, feeling that they needed to mask parts of themselves, frustrated because key facts seemed "irrelevant" in discussions of legal doctrine.[21] In *Stumped*, the law student is particularly outraged by the facts of this case; she feels a personal connection to the issue,[22] but it still is very possible that *Stumped v. Sparkman* could be discussed in a remedies class under the topic of immunities with little at all said about the issue of involuntary sterilization. All that might be analyzed and considered "relevant" is what constitutes a "judicial act."

Stumped, read alongside the legal opinion that literally is a part of its own text, would help to address this problem. It tries to fill in some of the silences by infusing other facts, more troubling facts, into the story—such as the judge's own prejudices: "She was poor white trash, and her daughter was going to turn out the same. Just keep replicating the same problem. Look. The socially unfit are a drain on this country."[23] While we do not know what the judge actually thought, and fiction is always fiction, the play brings to light questions that do seem as if they should be relevant to the legal analysis.

Because if the judge *was* biased in the way the play suggests, would the majority opinion still find the relevant precedent to be the cases holding,

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[19] *Id.*

[20] Threedy, *supra* note 6, at 802.

[21] Montoya highlights her own "masking" experience in her criminal law class at Harvard. Margaret E. Montoya, *Mascaras, Trenzas, y Grenas: Un/Masking the Self While Un/Braiding Latina Stories and Legal Discourse*, 17 HARV. WOMEN'S L.J. 185, 201-02 (1994). The class was discussing the case of *The People of the State of California v. Josefina Chavez*, where a Latina woman was being tried for manslaughter after the baby she birthed was found dead, hidden underneath a bathtub. While the students were discussing "what it meant to be alive in legal terms," Montoya struggled: "For two days I sat mute, transfixed while the professor and the students debated the issue. Finally, on the third day, I timidly raised my hand. I heard myself blurt out: What about the other facts? What about her youth, her poverty, her fear over the pregnancy, her delivery in silence?" *Id.* at 202. *See also* PATRICIA J. WILLIAMS, THE ALCHEMY OF RACE AND RIGHTS: DIARY OF A LAW PROFESSOR 55-56, 216-17 (1991).

[22] Threedy, *supra* note 6, at 802 ("And it's still legal. Involuntary sterilization is still legal. What happened to Linda could happen today.").

[23] *Id.* at 806.

"'[j]udges of courts of superior or general jurisdiction are not liable to civil actions for their judicial acts, even when such acts are in excess of their jurisdiction, and are alleged to have been done maliciously or corruptly.'"[24] Might such an analysis lend more support to the dissent's comments: "false illusions as to a judge's power can hardly convert a judge's response to those illusions into a judicial act . . . . A judge is not free, like a loose cannon, to inflict indiscriminate damage whenever he announces that he is acting in his judicial capacity."[25]

Narratives bring to law stories that have been excluded, voices and perspectives that have not been heard. Narrative can supply information about how the law actually functions in the real world. Also, multiple stories and viewpoints call into question ideas about the law's objectivity and its claim to a univocal truth.[26]

Finally, I will consider *Stumped* from a cultural interpretation of law approach, highlighting certain key ideas set forth in Naomi Mezey's article, *Law as Culture*.[27] Defining culture as "a set of shared signifying practices that are always in the making and always up for grabs,"[28] Mezey argues for the importance of examining "the complex entanglement of law and culture."[29] As a methodology, she proposes employing thick description[30] "to locate the slippage and elision between the two"[31]:

> This interpretation employs "thick description" to give a complex account of the slippage between the production and the reception of law and legal meanings, of the ways in which specific cultural practices or identities coincide or collide with specific legal rules or conventions, thereby altering the meanings of both. In the slippage between a law's aims and effects, you often see this collision of cultural and legal meanings.[32]

In *Stumped*, an important area of slippage, where law and culture become entangled, is in relation to gender rules and roles. For example, cultural ideas

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[24] Stump v. Sparkman, 435 U.S. 349, 355-56 (1978) (quoting Bradley v. Fisher, 80 U.S. (13 Wall.) 335, 351 (1871)).
[25] *Id.* at 367 (Stewart, J., dissenting).
[26] As Christine Krueger argues, however, narrative is not always "intrinsically suited to outsider advocacy"; it is important to analyze connections between law and literature in specific historicized contexts. See CHRISTINE L. KRUEGER, READING FOR THE LAW: BRITISH LITERARY HISTORY AND GENDER ADVOCACY 3 (2010).
[27] Naomi Mezey, *Law as Culture*, 13 YALE J.L. & HUMAN. (SPECIAL ISSUE) 35 (2001).
[28] *Id.* at 37.
[29] *Id.* at 35-6.
[30] Mezey defines "thick description" as "the rendering of 'piled-up structures of inference and implication' that give contingent meaning to gestures, acts, rituals, things." *Id.* at 60 (quoting CLIFFORD GEERTZ, THE INTERPRETATION OF CULTURE 7 (rev. ed. 2000)).
[31] *Id.* at 38.
[32] *Id.* at 58.

about women clearly influenced the judge's "legal act" and the Supreme Court's decision. The Court opinion highlighted the following language in summarizing the petition filed by Linda's mother and approved by Judge Stump:

> Linda had been associating with "older youth or young men" and had stayed out overnight with them on several occasions. As a result of this behavior and Linda's mental capabilities, it was stated that it would be in the daughter's best interest if she underwent a tubal ligation in order "to prevent unfortunate circumstances . . . ."[33]

Cultural ideas about appropriate behavior for young women like Linda clearly influenced legal decisions in this case.[34]

As the plays reminds, though, the law also very much has affected culture. In describing *Stump v. Sparkman*, Karen states, "It's not some old moldy case from the nineteenth century, when women were lumped with children and imbeciles."[35] Here, the play makes historical reference to a woman's common law disabilities under *coverture*[36] and signals an intertextuality with earlier feminist critiques of women's subordination under the law, specifically Frances Power Cobbe's 1868 article entitled *Criminals, Idiots, Women, and Minors*.[37] Specifically, Cobbe argues:

> At the head of this paper I have placed the four categories under which persons are now excluded from many civil, and all political rights in England. They were complacently quoted last year by the *Times* as every way fit and proper exceptions; but yet it has appeared to not a few that the place assigned to Women amongst them is hardly any longer suitable.[38]

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[33] Stump v. Sparkman, 435 U.S. 349, 351 (1978).

[34] Judge Stump also seems troubled by the idea of Karen, another young woman, being a lawyer. While he comments on her inappropriate attire (her pajamas), there seems to be more to his strong accusations: "And who are you to challenge my ruling? . . . You think you can be an attorney? Don't make me laugh. You're nothing but an imposter, play-acting the part of an attorney." Threedy, *supra* note 6, at 807. His comments clearly have gendered implications for Karen, who immediately begins to question herself, specifically querying, "Maybe I don't have the balls to be an attorney." *Id.*

[35] *Id.* at 792.

[36] *See* 1 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 430-32 (Neill H. Alford, Jr. et al. eds., Legal Classics Library 1983) (1765-1769). In the section of the *Commentaries* entitled *Of Husband and Wife* (Book 1 Chapter 15), Blackstone sets out the legal effects of marriage, which included the disabilities of *coverture*. Upon marriage, for example, a woman was generally prohibited from entering into a contract, making a will, or suing on her own behalf. Husbands, in order to keep their wives under control, also had the right to physically chastise them.

[37] Francis Power Cobbe, *"Criminals, Idiots, Women and Minors," in* "CRIMINALS, IDIOTS, WOMEN AND MINORS": VICTORIAN WRITING BY WOMEN ON WOMEN 90 (Susan Hamilton ed., 2d ed. 2004).

[38] *Id.* at 110.

One cannot help but wonder, in reading this 2010 play *Stumped*, which has much to say about all four of these categories—criminals, idiots, women, and minors—how long efforts to remedy the injustices that so impassion the woman law student in the play will continue to be stumped by the ways in which law and culture continue to perpetuate these associations.