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CASES AS FICTIONS: CLINICAL METHODS IN TEACHING AND SCHOLARSHIP

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Introduction

My goal with this article is to draw attention to potential contributions that clinical teaching methods offer to the more traditional doctrinal and scholarly functions of the law school. Clinicians have developed a defined set of pedagogical tools that, over several decades, have expanded to address substantially more than practical skills training. They use specific methods like reflection and client-focused analysis to communicate structural and theoretical lessons about law more commonly seen in traditional doctrinal courses and scholarship. Yet very few, if any, clinical methods have jumped the tracks into these more traditional contexts. As Supreme Court practitioner and law professor Neal Katyal has put it: "[C]linics, despite their many virtues, still do not reach most law students, and their connection to the theoretical law taught elsewhere in the school is often left murky."[1]

This symposium on American Legal Fictions presents a fitting opportunity to help clear the murk. Clinical methods share common roots in realist and critical theories of law. Among other purposes, clinics engage students in the messy unpredictability of case development and client strategies to expose core features of indeterminacy and inequality in the structure of law. Part I uses the

[*] Clinical Teaching Fellow, Georgetown University Law Center. The views expressed in this Article are mine alone and do not reflect the views of my current, past, or future clients, employers, or students. All mistakes and misunderstandings remain my own, too.

[1] Neal K. Katyal, *Hamdan v. Rumsfeld: The Legal Academy Goes to Practice*, 120 HARV. L. REV. 65, 68–69 (2006)*; see also* Katherine R. Kruse, *Getting Real About Legal Realism, New Legal Realism, and Clinical Legal Education*, 56 N.Y.L. SCH. L. REV. 659, 661 (2012) ("Scholarship often fails to connect its behavioral insights to the tasks of legal representation, and draws criticism that social scientific 'law and' scholarship is irrelevant to judges and lawyers engaged in the practice of law.").

idea of cases as fictions as a doorway into indeterminacy and the relationship between theory, teaching, and clinical methods. Part II digs into how clinical methods could contribute to more traditional doctrinal and scholarly functions of the law school and what that contribution might look like. I discuss Carolyn Grose's account of using clinical methods in a doctrinal course to illustrate how clinical methods can apply outside of the direct services context. With that in hand, I turn to Pierre Schlag's critique of the form of modern legal scholarship as a framework for illustrating that greater comfort with clinical approaches to law can offer new and invigorating methods to traditional legal scholarship.

I. Cases as Fictions: Indeterminacy from the Bottom Up

Much of the law is made up of cases, and cases are fictions: abstractions intended to support a specific legal outcome, not necessarily a complete legal explanation nor an accurate reflection of the real-world dispute at issue. Many features of our adversarial process disconnect the outcome of a case from any real sense of legal or factual completeness. This outlook has important implications for how we think about doctrine, a body of law that is built of cases. It is incremental and disjointed, allowing for inconsistencies, exceptions, and errors. This is ultimately the core lesson of legal indeterminacy and a foundational touchstone of clinical pedagogy.

A. The Chicken or the Egg?

Which comes first, the facts that tell you which legal provisions control the case, or the law that tells you which facts are legally relevant? Neither—both are developed step-by-step and side-by-side under the careful control of the adversarial parties. For example, the plaintiff first decides outside of court which claims to plead in the complaint.[2] That initial choice places obvious but remarkably important controls on the entire legal process that follows. The chosen claims, broadly speaking, identify the boundaries of the court's legal and factual inquiry. The judge cannot, for example, look at the facts and say, "wait, this is really a different *type* of case—a different set of laws more accurately applies to the facts plead here."[3]

Instead, we trust the adversarial process to make that judgment.[4] The defendant must either accept or challenge the plaintiff's legal framing, from

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[2] *See* FED. R. CIV. P. 3 ("A civil action is commenced by filing a complaint with the court."). As may be clear from the text, I'm primarily talking about civil lawsuits in this Article, although some of the lessons still apply to the case-by-case development of criminal doctrines as well.

[3] A court can forcefully encourage a plaintiff to amend the complaint, but it's still the plaintiff's choice to do so. *See, e.g.*, Subrina Poupak Sehat v. Progressive Universal Ins., No. 3:14-CV-01433-PK, 2016 WL 2889546, at *1 (D. Or. May 16, 2016) (dismissing complaint without prejudice, denying motions relevant to the initial complaint as moot, and granting leave for plaintiff to file an amended complaint consistent with magistrate's recommendations).

[4] *See, e.g.*, Sherman J. Clark, *To Thine Own Self Be True: Enforcing Candor in Pleading Through the Party Admissions Doctrine*, 49 HASTINGS L.J. 565, 575 (1998)

jurisdiction to the propriety of the claims to the sufficiency of the process.[5] In theory, good fits go to judgment and bad fits are dismissed—which is to say that, with few exceptions, the ultimate legal content of any case is subject to the parties' strategic choices about what claims and theories to plead and defend.[6]

The same is true for the facts. If a case survives motions to dismiss and dodges settlement, it will go through discovery and pre-trial stages, where the parties will fight about what evidence may be considered by the court.[7] A judge will adjudicate disputes about the evidence, but the court itself engages in no fact-finding.[8] Rather, the court engages in fact-choosing within the narratives presented and defended by the parties. Again, we rely on the adversarial process to suss out which facts are relevant and exclude those that are irrelevant.

We use litigation as a proxy for truth, but litigation is chancy in a way that truth is not. Facts that could be excluded may nevertheless remain in evidence for any number of strategic or happenstance reasons that do not amount to reversible error.[9] Likewise, relevant facts that could be included may be left out.[10] Neither law nor facts are safe from these influences. Within the small world of potential legal content available to a case as framed by the parties, the court must operate within an even narrower bandwidth of relevant facts also defined, in large part, by strategy and chance. Somewhere along this thin line of potential legal outcomes, adequate or not, the court must choose a winner.

In this way, cases are fictions. They are not necessarily an accurate or true representation of anything; neither what actually happened in the real world that led to the dispute, nor a complete legal analysis that considers all of what the law has to offer to that particular set of facts. A case will often be both at the same time—an incomplete legal analysis of the skewed narrative offered by the parties.[11]

("Accordingly, we must rely on the adversarial process with respect to pleading just as we do with respect to our system of justice generally.").

[5] *See* FED. R. CIV. P. 12. (addressing specific presentation and waiver of defenses).

[6] An important exception is, for example, jurisdictional questions, which the court can raise *sua sponte*—on its own. *See, e.g.*, Arena v. Graybar Elec. Co., 669 F.3d, 214, 223 (5th Cir. 2012) ("Federal courts must address jurisdictional questions whenever they are raised and must consider jurisdiction *sua sponte* if not raised by the parties.") (internal edits and quotation marks omitted).

[7] *See* FED. R. CIV. P. 26. (addressing discovery).

[8] There are rare, but popular, exceptions. *See, e.g.*, Frederick Schauer, *The Decline of "The Record": A Comment on Posner*, 51 DUQ. L. REV. 51, 51 (2013) (discussing "Judge Posner's assertion, without embarrassment or seeming reluctance, that he consults factual sources not to be found in the record from the trial court, nor discussed or argued below, nor referenced in the briefs of the parties, nor mentioned in oral argument").

[9] *See, e.g.*, Tuggle v. Netherland, 79 F.3d 1386, 1391 (4th Cir. 1996) ("In general, 'if the defendant had counsel and was tried by an impartial adjudicator, there is a strong presumption that any other errors that may have occurred are subject to harmless-error analysis.' Errors amenable to harmless-error review are 'trial' errors.") (internal citation omitted).

[10] *Id.*

[11] *Cf.* Brian J. Foley, *Applied Legal Storytelling, Politics, and Factual Realism*, 14 LEGAL WRITING: J. LEGAL WRITING INST. 17, 19 (2008) ("When I use 'fact' in this Article, I mean not the facts themselves, but the facts in a lawsuit, in the sense of

B. Fictions, All the Way Up

This fictional, abstracted character of litigation is deeply embedded in our law. It's not a bad thing. It's part of the reason we limit cases to their facts, rule on narrow grounds, and even overrule cases.[12] It reflects the tension between the judiciary's core purpose of coming to an answer—whether or not it's the best answer—and its secondary role of explicating the law. Key to our system of adjudication is a tolerance for error and inconsistency in service of finality.[13] For this reason, a case's skewed—sometimes even erroneous—character does not make it any less authoritative as law.[14] A judgment, though an abstraction, is still just that: binding on the parties, persuasive if not binding on future courts, and another brick in the edifice of American jurisprudence. Split between these two judicial functions, announced decisions in cases are a flawed material for building a coherent structure of law.[15] The key lesson then is that the fictional character of a case is therefore a characteristic of that form of legal authority. Aggregated, a law made up of cases maintains these characteristics: authoritativeness and legitimacy coexist—rely, maybe—on fiction, incoherency, and incompleteness.

To sum, the normal functioning of the judicial process—the series of constraints on substantive legal decisions placed by unpredictable and competing features of strategic adversarial litigation—impacts the structure of the law, meaning the shape and content of what we think of as legal doctrine. As litigation becomes more sophisticated over time, increasing the variety of strategic choices like forum shopping, the frequency of settlement, and even the breadth of individual judges' own strategic affinity for particular facts, theories, or dissenting, the more visible the gaps between authoritativeness and incoherency grow.[16] Even in a litigation-prone society, a mind-boggling number of real-world disputes go unseen by the courts simply for lack of time, money, or know-how. Surely, not every scuffle with a police officer merits a lawsuit. But surely, too,

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what we think happened. The facts themselves are determinate in an ontological sense, but the 'facts' of a lawsuit as argued by lawyers and found by juries are indeterminate in an epistemological sense.").

[12] *See, e.g.*, Jeff Todd, *Undead Precedent: The Curse of a Holding "Limited to Its Facts"*, 40 TEX. TECH L. REV. 67, 74–75 (2007) ("Some decisions are aberrations that simply do not accord with legislation or other decisions. In other words, they are wrongly decided, so a court in a later decision will limit the prior decision to its facts to lessen the prior decision's value as precedent. . . . To some extent, the process of applying prior cases to current litigation already involves limiting the precedential case to its facts.").

[13] *See, e.g.*, SUP. CT. R. 10 (2013) ("A petition for a writ of certiorari is rarely granted when the asserted error consists of erroneous factual findings or the misapplication of a properly stated rule of law.").

[14] *See generally* Charles Alan Wright, Arthur R. Miller, Mary Kay Kane, *Rule 61. Harmless Error § 2883 The Meaning of "Harmless Error"*, 11 FED. PRAC. & PROC. CIV. § 2883 (3d ed. 2016).

[15] Concepts like Ronald Dworkin's "fit" are an attempt to overcome this effect. *See, e.g.*, Ken Kress, *Why No Judge Should Be A Dworkinian Coherentist*, 77 TEX. L. REV. 1375, 1376 (1999) (discussing Dworkin's concept of "fit" and arguing against it.).

[16] *See generally, e.g.*, Lee Epstein, William M. Landes, & Richard A. Posner, *Why (and When) Judges Dissent: A Theoretical and Empirical Analysis*, 3 J. LEGAL ANALYSIS 101 (2011) (discussing dissent aversion).

it's weird that every officer's use of force should be judged by comparison to only the handful of lawsuits lucky enough to receive a published opinion.[17] Nothing about the published-ness of judicial decisions necessarily makes them the best, good, or even correct points of reference in the vast majority of situations.

Hierarchical appellate review ossifies, rather than corrects, this effect. Deferential standards of review harden the influence of the facts in evidence, the claims plead or waived, and the court's individual predilections. As such, these strategic effects have a particularly important influence over stages of adjudication intended to be most generalized and policy-like.

Take, for example, the case *Lujan v. Defenders of Wildlife*.[18] You can read important parts of that case as relying on the Eighth Circuit's choice of which members of the environmental group to quote in its opinion, illustrating the Supreme Court's unique role in making national policy almost despite the messy and competing facts of the cases it hears.[19] In *Lujan*, the Supreme Court held that the environmentalists did not have Article III standing to challenge federal funding decisions that allegedly violated the Endangered Species Act.[20] The decision in *Lujan* is important because the Court used the case to state the definitive test for establishing standing under Article III, which every party seeking to bring any claim in federal court must satisfy.[21]

The plaintiffs in *Lujan* lost because they could not show the first element of the test: injury.[22] Generally, threats "to aesthetic, conservational, and recreational values" count as injuries, and a group has standing if at least one of its members is injured by the challenged action.[23] Defenders provided testimony from its members that they had seen, and intended to see again, the animals and places threatened by the challenged federal action.[24] The Eighth Circuit twice held that the plaintiffs had established standing through the aesthetic, conservational, and recreational interests shown in the testimony of their members, quoting from Ms. Amy Skilbred's and Ms. Joyce Kelly's declarations in its second opinion.[25] The Supreme Court reversed, holding that this testimony

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[17] *See* Vinyard v. Wilson, 311 F.3d 1340, 1348 (11th Cir. 2002) ("Pepper spray is a very reasonable alternative to escalating a physical struggle with an arrestee."). *Compare* Graham v. Connor, 490 U.S. 386, 397 (1989) (discussing the "objective reasonableness" standard) *with* Kitchen v. Miller, No. 1:14-CV-00122-MR-DLH, 2016 WL 7478982, at *7 (W.D.N.C. Dec. 29, 2016) ("The use of pepper spray was also objectively reasonable and not excessive.").

[18] Lujan v. Defenders of Wildlife, 504 U.S. 555 (1992).

[19] *Id.* at 563 ("With respect to this aspect of the case, the Court of Appeals focused on the affidavits of two Defenders' members—Joyce Kelly and Amy Skilbred.").

[20] *Id.* at 578.

[21] *Id.* at 560–61.

[22] *Id.* at 564.

[23] *Id.* at 562–63.

[24] *Id.* at 563–64.

[25] Defenders of Wildlife v. Hodel, 851 F.2d 1035, 1043 (8th Cir. 1988); Defenders of Wildlife v. Lujan, 911 F.2d 117, 120 (8th Cir. 1990), *rev'd* 504 U.S. 555 (1992) ("The affidavits of several Defenders' members established that they had visited, and planned to visit again, the endangered species or their habitat in the areas that may be affected by

was not sufficient evidence that these women ever *actually* planned to see the animals and places that they supposedly came to federal court to save.[26]

The key fact was that these women had not purchased airplane tickets. The Court said that concrete plans to go visit the endangered animals would be sufficient, but testimony saying you plan to go see the animals at some point in the future is not enough.[27] You need something more definitive, like airplane tickets. The two dissenting justices in *Lujan*, Blackmun and O'Connor, questioned this distinction, worried that the majority "demand[ed] what is likely an empty formality" because "[n]o substantial barriers prevent [the plaintiffs] from simply purchasing plane tickets" to pursue litigation.[28] Justices Kennedy and Souter, concurring in part, acknowledged that "it may seem trivial to require that Mses. Kelly and Skilbred acquire airline tickets to the project sites or announce a date certain upon which they will return," but that's what happened.[29] Four justices were concerned enough by plane tickets to write about it.[30]

Why hadn't the plaintiffs in *Lujan* purchased plane tickets? Well, one member of Defenders—Mr. Steven Schroer—had purchased plane tickets.[31] And he had also testified to establish standing below.[32] There may have been other reasons why his injury was not sufficient to establish Defenders' standing, but it wasn't because he didn't have plane tickets and concrete plans.[33] The only

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specific agency projects.").

[26] *Lujan*, 504 U.S. at 578.

[27] *Id.*

[28] *Id.* at 592 (Blackmun, J., dissenting).

[29] *Id.* at 579–80 (Kennedy, J., concurring).

[30] Justice Stevens believed that the plaintiffs had standing, but he concurred in the result because he believed the Endangered Species Act did not apply outside the United States. *Id.* at 581 (Stevens, J., concurring).

[31] Transcript of Oral Argument at 27–28, Lujan v. Defenders of Wildlife, 504 U.S. 555 (1991) [hereinafter Oral Argument].

[32] *Id. See also* Defenders of Wildlife v. Hodel, 658 F. Supp. 43, 47 n.6 (D. Minn. 1987) *rev'd*, 851 F.2d 1035 (8th Cir. 1988) (identifying in the initial district court decision the Thai projects Mr. Schroer had tickets to go see as part of the plaintiff's argument for standing). Interestingly, Steven Schroer also appears to have been an attorney for Defenders. *See* Brief of Respondents, Lujan v. Defenders of Wildlife, 504 U.S. 555 (1991). *See also id.* at 34 ("That's the remedy that I'm looking for to protect my own personal interests in these matters.")

[33] *See, e.g.*, Oral Argument, *supra* note 31, at *29–*30:

> MR. O'NEILL: Schroer was to visit a World Bank project, I believe in Thailand, and had a ticket to Thailand, and had a passport at the time of his deposition.
>
> QUESTION: Well, but the World Bank isn't a United States agency.
>
> MR. O'NEILL: No, but the Treasury Department funds the World Bank. The Treasury—and the statute, section 7, deals with any agency action that authorized funds or carries out a project.
>
> QUESTION: Well, this sounds very much like the house that Jack built.
>
> (Laughter.)

See also Hodel, 658 F. Supp. at 47 n.6 (concluding without analysis that World Bank

apparent reason the Supreme Court did not consider Mr. Schroer and his tickets is that the Eighth Circuit, in finding that Defenders had established standing through its members, only quoted from Ms. Skilbred and Ms. Kelly's testimony, not Mr. Schroer's testimony.[34] So, besides a brief mention at oral argument, Mr. Schroer and his plane tickets fell through the cracks.[35]

But who cares, right? The ultimate legal outcome—establishing the universal test for Article III standing—is so far abstracted from the real people and real issues in the case that a potential inconsistency like this is sincerely irrelevant to the case's authoritativeness. Oddities, errors, and inconsistencies, while crucial in the development of cases, are smoothed over by abstraction and remain largely invisible at the doctrinal level.[36] This is the tension that renders cases fictional, neither accurate nor cohesive in any deep sense.[37] The law is

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funded projects do not implicate the Endangered Species Act).

[34] Oral Argument, *supra* note 31, at *27–*28:

> QUESTION: Did she say anything more specific about her plan to return than that, other than that she planned to—as I understand it from the Solicitor General, she said she did not have any definite plan to return. Did she say anything more?
>
> MR. O'NEILL: She said, specifically, I can't return now because of the civil war. And in answer to the question, and for what purpose would you like to go back to Sri Lanka to visit the Mahaweli project, she answered, I'd rather go back to visit the wildlife that live in the area of the Mahaweli project. She did not have a plane ticket.
>
> QUESTION: Well, she not only didn't have a plan[e] ticket, she didn't have any plan, it sounds from that.
>
> MR. O'NEILL: One of the deponents, Steven Schroer had a plane ticket, and had a passport.
>
> QUESTION: Well, did the Eighth Circuit grant him—grant your organization standing on his behalf?
>
> MR. O'NEILL: No, sir, they did not.
>
> QUESTION: Did you cross-appeal?
>
> MR. O'NEILL: No, we did not.
>
> QUESTION: Then I don't think he can be involved in this case.

As an aside, and only an aside, faulting Defenders for failing to cross-appeal the Eighth Circuit's non-adverse finding that Defenders had established standing in order to "preserve" Mr. Schroer's record testimony seems dubious to me.

[35] *Id.*

[36] Norms like avoidance of "vehicle problems" are intended to shield doctrine from some of the ugly cases. *See, e.g.*, Malcolm L. Stewart, Deputy Solicitor General, *US DOJ, United States Attorneys' Bulletin*, Jan. 2013, at 15 ("The government generally takes particular care to select favorable 'vehicles' for appellate consideration of recurring legal issues. The best vehicles are cases in which the facts present the government's position in a favorable light, maximizing the likelihood that the government's view will strike judges as intuitively fair.").

[37] While I recognize that there are various approaches to what counts as "law," I'm using the term in its fairly colloquial sense to mean sources like cases, doctrines, statutes, and regulations, and not norms or social conduct. *See* Brian Leiter, *American Legal Realism*, *in* THE BLACKWELL GUIDE TO PHILOSOPHY OF LAW AND LEGAL THEORY 28–29 (2003).

made of cases, yet cases are made of more than law. Why, if it's made up of under-informed or incomplete pieces, do we treat doctrine as a cohesive and rational whole? Or, put another way, why are we surprised and frustrated when a case is inconsistent with another or just gets the law wrong? These questions invoke the old, grumpy spirit of legal indeterminacy.

C. Legal Indeterminacy

The basic gist of legal indeterminacy is that the applicable legal sources—like statutes, regulations, and precedent—cannot *alone* explain the outcome in a case.[38] The applicable law, therefore, does not determine the outcome a case. The law is indeterminate. Something else *in addition* to the law is needed to explain the legal result. That something else can be anything—politics, sociology, economics, heuristics, even what the judge had for breakfast, etc.—but the key idea is that there is something more than law at play. Our discussion above identified that strategic features of the adversarial process influence the outcome of a case.[39] Our understanding of cases as fictions is just another example pointing towards the idea of legal indeterminacy.

That said, the concept of legal indeterminacy comes with a lot of baggage. There are "strong" versions of indeterminacy, which go something like: Law is so unexplanatory, so devoid of specific meaning, that any outcome can be considered legally correct in any case.[40] This idea, that legal reasoning is totally unconstrained, is associated with Critical Legal Studies movement, and has mostly been rejected as unhelpful bordering on nihilist.[41] If law is inconsequential, then the entire legal enterprise—including critical theories of law—is pointless.[42] Plus, Fred Schauer has argued persuasively that it's not hard

[38] *Id.*; *see also* Lawrence B. Solum, *On the Indeterminacy Crisis: Critiquing Critical Dogma*, 54 U. CHI. L. REV. 462, 463–66 (1987) (describing the indeterminacy thesis).

[39] Leiter notes that indeterminacy—at least simplistic versions of it, like the ones I'm interested in here—implicitly assumes a narrow scope of legal authorities. *See* Leiter, *supra* note 37, at 5–6. For example, one could argue that strategic features of the adversarial process are, in fact, "law" and thus ours is not an example supporting indeterminacy. Similarly, Leiter identifies that capacious views of "law" like Dworkin's can even incorporate morality, resolving many common supports for the indeterminacy thesis. I've tried to make explicit early in this Part that I'm assuming "law" is limited to commonly recognizable positive sources, like statutes, regulations, and precedent.

[40] Solum, *supra* note 38, at 470–71.

[41] *Id.* at 498 ("My contention is that the strong indeterminacy thesis undercuts, rather than advances, the projects of both internal and external critique. Because the strong indeterminacy thesis calls for disengagement from the form and conventions of discourse that makes legal practice possible, the thesis blunts an internal critique of the law."); Leiter, *supra* note 37, at 6 ("[U]nlike the later Critical Legal Studies writers, the Realist, for the most part, did not overstate the scope of indeterminacy in the law.").

[42] Solum, *supra* note 38, at 498. *See also id.* at 497 ("critical legal scholars have a strong practical motive for belief in the indeterminacy thesis. If one believes that the rules are strongly determinate, but fundamentally wrong, one is left with very little room to maneuver within the limited horizons of legal scholarship. The notion that it is possible to achieve radical results working with the existing body of legal doctrine—because the seeming constraints are illusory—has powerful attraction for those committed to social

to imagine a case where at least one outcome is legally incorrect.[43] So the strong version of indeterminacy has not held up well, and we don't need to worry more about it here.

The "weak" and more widely accepted version of legal indeterminacy acknowledges that law has some role in constraining the ultimate outcome of a case, but argues that there are also other influences at work.[44] Lawrence Solum calls this "underdeterminacy," rather than indeterminacy: the law matters, but falls short of completely explaining the outcome in a case.[45] This weak version of indeterminacy has been critiqued by modern theorists as so obvious, so widely accepted, that it is nearly as unhelpful.[46] But we need not worry about that substantive critique either. We are concerned with (weak) indeterminacy's lasting influence on legal education.

Indeterminacy is helpful to us for two reasons. The first is to illustrate the connectedness of theory, teaching, and scholarship. The weak version of indeterminacy can be traced back to what Brian Leiter identified as the "core claim" of the American Legal Realism movement, and the realists' commitment to indeterminacy can be easily identified as a wellspring of innovation, both in scholarly and educational methods.[47] For example, Karl Llewellyn's irreverent and influential article critiquing canons of interpretation is mostly just a table titled "Thrust But Parry"—and yet it has been cited in over 100 judicial opinions, including a 2016 majority opinion in the Supreme Court,[48] and nearly 800 law review articles.[49] Llewellyn's theoretical commitment that judges were not actually engaged in formal legal argument when they interpreted statutes provided the confidence to break the form of traditional legal argument and make his point in a novel and persuasive way.

Moreover, Leiter credits the realists' indeterminacy for the form of the modern casebook.[50] In the classroom, the realists were reacting to Christopher Langdell's case method, which viewed law as a "scientific" discipline whose principles could be distilled from "observation" of primary source materials—specifically, reading published judicial decisions.[51] Leiter explains that the

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change, but whose professional lives are confined to the academy and not the capitol buildings.").

[43] Frederick Schauer, *Easy Cases*, 58 SO. CAL. L. REV. 399 (1985)*; see also* Solum, *supra* note 38, at 471–72.

[44] Solum, *supra* note 38*,* at 488–95.

[45] *Id*. at 472–75.

[46] *See id.* at 494–95 ("What then is the truth about indeterminacy? There is certainly room for dispute, but as practical boundaries for the debate, three conclusions are firm. First, legal doctrine underdetermines the results in many, but not all, actual cases. That is to say that aside from the easiest cases, aspects of the outcome are rule-guided but not rule-bound. . . . Even in the hardest hard case, legal doctrine limits the court's options.").

[47] Leiter, *supra* note 37, at 6–9.

[48] Lockhart v. United States, 136 S. Ct. 958, 968 (2016).

[49] Karl N. Llewellyn, *Remarks on the Theory of Appellate Decision and the Rules or Canons About How Statutes Are to be Construed*, 3 VAND. L. REV. 396 (1950).

[50] Leiter, *supra* note 37, at 22.

[51] *See generally, e.g.*, Dennis Patterson, *Langdell's Legacy*, 90 NW. U. L. REV. 196, 197–98 (1995) ("There are two elements to Langdell's theory of law. First is his well-

realists shared Langdell's "ambition to make the law 'scientific,' but disagreed profoundly with Langdell over what that entailed." The realists thought that "'judges' published opinions at best hint at and at worst conceal the real non-legal grounds for decision," and so "[t]o really teach the law . . . it was necessary to understand the economic, political, and social dimensions of the problems courts confront."[52] Therefore, modern casebooks include "'Cases *and Materials* on the Law of . . .' where the materials are drawn from non-legal sources that illuminate the non-legal factors relevant to understanding what the courts have done."[53] Thus the realists show how core theoretical commitments about how the law is organized fuel innovations in both educational and scholarly form.

The second reason is to recognize the direct influence that the realists and indeterminacy had on the development of clinical methodology.[54] The realists were some of the first to call earnestly for clinical legal education.[55] And clinical education is, without a doubt, indebted to realism's "distinction between the law in books and the law in action."[56] But as clinical education has taken hold in law schools and matured over time, clinicians have built a methodology that has progressed beyond the core lessons of the realists. Katherine Kruse noted that an "increasingly professionalized corps of clinicians [in an] increasing number of . . . tenure-track positions [with] the same or substantially similar expectations for scholarship as their nonclinical colleagues [have] developed a more sophisticated pedagogy of clinical instruction that integrates theory and practice and helps students generalize from their clinic casework to larger issues of law."[57]

The path of this development has approached what Mark Spiegel predicted in 1987: "If clinical education is a methodology, it conceivably can be used to teach any of the substantive subjects in the curriculum."[58] He suspected that "there is nothing inherently limiting about clinical education other than using the student's performance as a starting point for inquiry," so "clinical education does not require placement in only legal services offices." Actual provision of services "is not inherent in the nature of the methodology."[59]

So the realists and indeterminacy provide not only a crucial touchstone in the development of clinical methods, but also a helpful model for showing how theoretical commitments in clinical methodology can spur innovation in forms of teaching and scholarship outside of direct services clinics. If the legal realists

known assertion that law is a science. The second is his enduring contribution to legal education, the case method.").

[52] Leiter, *supra* note 37, at 22.

[53] *Id.* (emphasis in original).

[54] The crits, too, had important influences on the substance of clinical pedagogy.

[55] Katherine R. Kruse, *Getting Real About Legal Realism, New Legal Realism, and Clinical Legal Education*, 56 N.Y.L. SCH. L. REV. 659, 660 (2012).

[56] *Id.*

[57] Kruse, *supra* note 55, at 676.

[58] Mark Spiegel, *Theory and Practice in Legal Education: An Essay on Clinical Education*, 34 UCLA L. REV. 577, 591 (1987); *see also, e.g.*, David R. Barnhizer, *The Clinical Method of Legal Instruction: Its Theory and Implementation*, 30 J. LEGAL EDUC. 67 (1979).

[59] Spiegel, *supra* note 58, at 591.

focused on the fact that judges are human, clinical methods focus on a similar lesson implicit in indeterminacy that clients and lawyers are human, too.[60] The context and personalities that give rise to and control litigation are crucial elements of the development of doctrine and key considerations of developing meaningful theory as it relates to doctrine and practice.

II. Fictions as Cases: Clinical Methods in the Legal Academy

This section offers two examples of how clinical methods can contribute to the more traditional doctrinal and scholarly functions of the law school. First, I discuss Carolyn Grose's experience using clinical methods to teach her doctrinal Trusts and Estates course. Grose found that methods like individual reflection and client-focused reasoning provided a different and effective methodology for teaching Trusts and Estates. Using Pierre Schlag's critique of modern legal scholarship as a framework, I then use Grose's experience to show how clinicians can bring different approaches to the practice of scholarship. I focus on the specific example of how clinical methods can encourage more personal style in scholarship, which could help reinvigorate and recenter the role of scholarship in the legal academy.

A. Clinical Methods in Doctrinal Courses

In 2013, Professor Carolyn Grose published her experience applying clinical teaching methods to her doctrinal Estates and Trusts course.[61] She identified two methods in particular: Role Assumption and Reflection, as tools to "[c]hallenge [students] to expand [the rules/doctrine] frame to include thick factual narrative—e.g. what are the plot lines here; who are the characters; what is the context?"[62]

Grose applied these methods by requiring her students "[t]o write a creative reflection on the reading assigned for the class, organized around a fictional client (of your creation) and her estate planning issues."[63] During each class, two or three students "read his or her story for that week, as a framework for us to analyze the doctrine."[64] Grose would outline the basic elements of the story on the board and then guide the class in asking "what more they need to know about the client or her situation in order to answer the question she presents."[65]

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[60] Carolyn Grose, *Beyond Skills Training, Revisited: The Clinical Education Spiral*, 19 CLINICAL L. Rev. 489, 511 (2013) ("Jerome Frank noted, and Wally Mlyniec reminds us more recently that 'new lawyers can[not] be taught in isolation from the clients they serve.' Mlyniec goes on to warn that '[i]f lawyers, and thus clinical teachers, are not aware of how human traits and institutional character influence the pursuit of the client's claims and interests, their expertise in the mechanics of legal skills may be insufficient to maximize their client's interests.'").

[61] *Id.* at 501.

[62] *Id.* at 504.

[63] *Id.* (alteration in original).

[64] *Id.* at 505–06.

[65] *Id.* at 506–07.

Together the class "fill[s] in gaps," which is the doctrinal lesson.[66] As Grose puts it, "I use the client narrative exercise as a way to get students to perform the analytical challenge of finding and applying doctrine."[67] The analysis starts with the client's goals and moves outward to what legal tools are available in the doctrine. The availability of a specific legal tool is dependent on the presence of both the fictional client's need and the necessary contextual facts.

The method builds on its own momentum. "[A]s the semester progresses, the 'fact-gathering' part of the class gets longer and longer."[68] "[S]tudents' improved understanding [and comfort] . . . with the 'tools' of that doctrine" produce both more detailed client narratives and inevitably more detailed questions to the fictional clients.[69] Grose even encourages her students to stick with the same characters or families throughout the semester, building context and continuity into both the lessons and learning method.[70]

This method is noticeably different to students. By their own account, students began to "read the casebook with my client in mind," taking an "approach to the doctrine that became centered on what I thought a real-life situation would look like [rather than] just thinking about the law in the abstract."[71] One student stated: "[T]he course's emphasis on counseling helped me move beyond the black letter law to think more creatively . . . [and] allowed me to push myself and be able to provide my client with multiple options."[72]

Importantly, this method builds-in lessons about the content and development of doctrine.[73] "[S]tudents learn the . . . complex interdependence of law and fact" and "the essential relationship between facts and doctrine" from the start.[74] They "grasp the idea that they cannot offer legal advice in a vacuum, but rather have to understand the context in which the question arose before providing a legal answer."[75] They "realize how character and setting and context development helps them figure out *how the law applies.*"[76] They are taught early to work "in the aggregate," searching across doctrine for multiple

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[66] *Id.*
[67] *Id.* at 505.
[68] *Id.* at 507.
[69] *Id.*
[70] *Id.* at 505.
[71] *Id.* at 505–06.
[72] *Id.* at 506.
[73] *But see* Gary M. Shaw, *A Heretical View of Teaching: A Contrarian Looks at Teaching, The Carnegie Report, and Best Practices*, 28 TOURO L. REV. 1239, 1262 (2012) ("The criticism that use of appellate opinions does not teach the students anything about the factual complexity and indeterminacy of the cases they will handle as lawyers is inappropriate when applied to new students. Appellate opinions are a way to start students on the road to mastering the relationship of facts and law. They can concentrate on that first skill before moving on to another skill–how to handle factual complexity and indeterminacy.").
[74] *Id.* at 506–07.
[75] *Id.* at 507.
[76] *Id.* (emphasis added).

solutions or a "mixture of tools" to "effect the client's overall intent" rather than finding any one right answer.[77]

This is one way, maybe a good way, to teach the classic law school lesson: that there is no one right answer. But by working outward from client goals and context, students also gain an appreciation for the movement of the law, "a deeper understanding of the impact of human behavior and relationships" — including the behavior and relationship between the lawyer and client—have on the range of potential legal outcomes available in any case.[78]

A focus on client and context, though characteristic of clinical pedagogy, fits doctrinal courses because, as we saw in Part I, a key lesson of case development is structural. As Grose explains, getting students to consider "how the rules apply to their client" is also to "determine whether the rules make sense" in a given context.[79] Critical analysis of which rules apply and why necessarily asks students to "understand how [the rules] fit with each other," building towards "underlying themes" that order when certain rules apply and others do not.

Grose's account allows us to distill generalizable values of clinical pedagogy, distinct from the specific goal of teaching students: working from personal relationships or experiential viewpoints to draw structural lessons about legal indeterminacy; interdependence of law and fact; and human influence on the development of law. This is what I mean by a generalizable clinical method, a structural approach or a way of thinking about law drawn from clinical teaching and lessons in applying that approach. Clinical methods are broadly applicable to legal education and—I think—to legal scholarship.

B. Clinical Methods in Scholarship

Go read Pierre Schlag's critique of modern legal scholarship.[80] It's worth your time and I'm going to spoil some of its effect by talking about it here. Spoiler-alert aside, the gist is that modern legal scholarship is dead partly because it relies on a form of reasoning used in adjudication that constrains necessary academic creativity and freedom. Put most directly, his problem is that form limits function.

Presumably because the legal academy grew out of and studies the practice of law, legal academics instinctively took on the form of the legal brief or judicial opinion and the methodology of precedent and analogical reasoning as their tools.[81] This "legalist" form is, in Schlag's words, "intellectually arrested and arresting."[82] And purposefully so, because the adjudicative form serves a very

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[77] *Id.* at 508.

[78] *Id.*

[79] *Id.* at 505.

[80] Pierre Schlag, *Spam Jurisprudence, Air Law, and the Rank Anxiety of Nothing Happening (A Report on the State of the Art)*, 97 GEO. L.J. 803 (2009). *See generally* 97 GEO. L.J. (2008) (containing several thoughtful and helpful responses to Schlag's piece).

[81] *Id.* at 813. The "why" here—why scholars started using this form—is underdeveloped in Schlag's piece mostly because it is not important to his argument. Schlag wants to dump the form for serious substantive reasons.

[82] *Id.*

specific (and familiar) goal: to legitimize an outcome within a narrow range of legally authoritative sources.[83]

"The thing is that the job description of judges is very different from that of intellectuals," Schlag explains.[84] "Judges work with and within a discourse that has for centuries subordinated truth and edification (in any deep sense of these terms) to the dispensation of justice, the resolution of disputes, the rendition of decisions, the formulation of orders and decrees, and the clearing of dockets."[85] Lawyers and judges take on an artificial form of reasoning from established precedent to desired outcomes for their own purposes. For the judge, the purpose is to legitimize her decision. For the lawyer, it is to provide the judge with a way to legitimize a decision that benefits her client. As we've discussed, neither one of those reasons has that much to do with getting the law exactly right or the facts absolutely correct—and it has even less to do with intellectual creativity. Traditional legal discourse shoots for, as Schlag's interlocutor Robin West puts it, "spamtruths: incontestable, not spicy, easily digestible, the sort of truth that 'goes down easily.'"[86] This reflects that the American judicial method is one of small cautious steps, not epiphany, edification, or hard truth.

But good scholarship, Schlag argues, needs to be capable of epiphany, edification, and hard truth. Moreover, legal scholarship is generally really bad at influencing litigation.[87] True, some articles and some scholars do influence practitioners and judges' thinking.[88] But the vast majority of academic work goes unread and, for purposes of the actual practice of law, is meaningless.[89] To Schlag, this is just a symptom: Those assuming that the goal of a law review article is to convince a judge are left with an increasingly narrow academic purpose and toolkit.[90] Not only might a well-meaning academic waste her potential on fifty-state surveys and analyses of circuit splits—which, to Schlag the aesthetician, is a bummer—but even a creative theorist will be hard pressed to craft anything mind-blowing using only established authorities and generally accepted principles.[91] It only takes a

[83] *Id.*

[84] *Id.* at 816.

[85] *Id.*

[86] Robin West, *A Reply to Pierre*, 97 GEO. L.J. 865, 866 (2009).

[87] Schlag, *supra* note 80, at 808, 813; *see also* West, *supra* note 86, at 868 n.7 ("Pierre has argued elsewhere and repeats the claim here, that mainstream legal scholarship is not only uninteresting, but that it is also inconsequential.") (*citing* Pierre Schlag, *Normativity and the Politics of Form*, 139 U. PA. L. REV. 801 (1991)).

[88] Ironically, one court has actually cited Schlag's article in a bankruptcy case. *See In re* C & M Properties, L.L.C., 563 F.3d 1156, 1162 (10th Cir. 2009). *See also* West, *supra* note 86, at 868–69 (arguing that Schlag's claim that scholarship does not influence practice "isn't completely true, as Pierre himself notes toward the end of his piece. Legal scholarship affects the way law professors think, the way our students think, the way legal bloggers and their readers think, the way the judges' clerks think, and ultimately the way clients and their lawyers think. And sometimes, Pierre's charge notwithstanding, it affects the way judges think, and occasionally that effect is clearly observable in judicial opinions.").

[89] Schlag, *supra* note 80, at 813.

[90] *Id.* at 821–26.

[91] *Id.* at 823–24 (discussing the production of legally cognizable material, or

handful of scholars to catalogue new cases as they come out; eventually everyone else just runs out of cool stuff to say.[92] Schlag blames this adherence to adjudicative reasoning and legalist form, combined with law schools' endorsement of that form through focus on rankings and scholarly production, for what he sees as the sorry state of the legal scholarship.[93]

That concludes the substance of Schlag's form-based critique, but I want to note just how personal Schlag's delivery gets. Schlag doesn't really have much hope for fixing the things he's identified.[94] His "cheery ending is that it has not always been like this," referencing what Schlag identifies as the three interesting periods of legal scholarship: "the Langdellian systematizations, the realist revolt," and "the 'law and . . .' enlightenment."[95] "Maybe," Schlag offers, "it doesn't have to be like this now."[96] (He has a non-cheery ending, too.)[97]

To get to those endings, Schlag brings up his summer "stint as a swamper with AZRA, a commercial outfit in the Grand Canyon."[98] He talks about the "towering red and yellow walls, the intense play of light and shadow, the stark lines of the encroaching horizons . . . ."[99] About the "rhythm of the river—of getting up early everyday, of going down the river, of making camp and breaking camp . . . ."[100] This experience left him with "one really tiny insight" about legal scholarship: that it's "gratuitous" and "neurotic," like the accumulation of minor crises that fill the lives of many professionals and fall away during a summer spent rafting the Grand Canyon.[101] He compares the entire endeavor of legal scholarship to making bus schedules where, "[w]hen we put out our bus schedule, no buses run": "What we have is an imaginary legal thought shaped by imaginary collective constraints, one of which is the injunction that we should follow those constraints with great rigor."[102] He blames this condition on a series of "intractable conflicts" in the "prototypical needs of the legal academic":

- A need to display great intelligence in a discourse (law) that will ultimately not bear it.
- A need to contribute to disciplinary knowledge in a discourse which is not really about knowledge or truth in any profound sense of those terms.
- A need to say something intellectually respectable within a disciplinary paradigm that we know, on some level, is intellectually compromised.

"LCM").

[92] *Id.* at 821–23 (discussing "case-law journalism").

[93] *Id.* at 826–27 (discussing "rank insecurity").

[94] *Id.* at 831.

[95] *Id.* at 821, 835.

[96] *Id.* at 835.

[97] *Id.* ("It's going to get worse in many ways.").

[98] *Id.* at 831.

[99] *Id.*

[100] *Id.*

[101] *Id.* at 831, 833–34.

[102] *Id.* at 832–34.

- A need to display control over social, political, and economic transactions that are in important senses not subject to control.
- A need to activate moral and political virtue in a discourse that uses both largely as window dressing.
- A need to make one's thought seem real and consequential in a discourse that is neither.[103]

At this point, Schlag has all but abandoned citations.[104] His personal plea is poignant and jarring. Poignant because it provides a meaningful lens for viewing his critique, one that appropriately pulls forward the how the identity of a scholar is wrapped up in the meaning and purpose of his scholarship—or lack thereof. And jarring exactly because it is so different—a vulnerability and appeal to personal identity that feels so out of place in the typical legal discourse of a law review article. In that way, his kind of inconclusive conclusion models the success of his critique. His substantive critique of the legalist form is made more effective by its break away from that form.

One way that greater comfort with clinical forms can contribute to legal scholarship is by reintegrating these kinds of personal and human elements into legal discourse. Schlag's list of needs is unique because he is a scholar critiquing scholarship, but the personal perspective of a scholar can be an effective way of communicating other affirmative legal argument. Take, for example, Patricia Williams's work. Individually, go read and think about her classic piece "On Being the Subject of Property," which engages in a discussion of property law and race through her experience discovering her family's history with slavery.[105] Collectively, consider the words of a tribute to her work:

> She asks us to entertain a level of personal and political discomfort previously unknown to something we might call 'legal scholarship.' . . . Her work makes an argument about the gap—sometimes abyss—that lies between law and justice. But her arguments don't just use the familiar tools of the legal trade—rationality and logic, objectivity and detachment, rules and precedent—rather, her craft relies equally on anguish and self-doubt, indignation and rage, particularity and the personal.[106]

Now look back at Schlag's list. Anguish, self-doubt, indignation. That's it. But look too, to Williams's inspiration:

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[103] *Id.* at 834–35.

[104] He does continue self-aware, contrarian character citations. You need to read the whole piece to get it. *See, e.g.*, *id.* at 830, n.62 ("HOW can he say that??!!! There he goes again—contradicting himself. Unbelievable. This is what he said and I'll have to paraphrase here because, frankly, I'm a whole lot better than he is at making things clear. He says he's trying to train me (get that!) . . . he's trying to train me to deal with uncertainty in intra-professional conflict. He says that's why he brought me into the picture in the first place. Absurd: I am an autonomous footnote.").

[105] *See generally* Patricia J. Williams, *On Being the Object of Property,* 14 SIGNS 5 (1988).

[106] Katherine Franke, *A Tribute to the Work of Patricia Williams*, 27 COLUM. J. GENDER & L. 1, 1 (2013).

> Let me turn to the story of how *On Being the Object of Property* launched the personal trajectory that brings us to this point. When I wrote this essay for which I have become so notorious, I'd been a trial lawyer for five years, and a law professor for another seven after that. I was lonely and miserable in my chosen profession [partly because] there [were very] few women and virtually no women-of-color in legal academia. When I began teaching in 1980, as best as I have been able to determine, I was one of six of women-of-color [in legal academia] in the entire United States: four African Americans, one Latina, and one Asian American. Things were to change rapidly in the next decade, but they hadn't at that point. Given all this, in 1987 I decided to chuck it all, go back to school, and get a Ph.D. in English. I was going to wipe the slate clean, start over, try something that wasn't so seemingly insurmountably an exclusive gentleman's preserve. [107]

Williams explains that she found her voice in how a specific rhetorical form she discovered in English courses—the American Jeremiad—reverberated with her background growing up in Boston. So it's not just personal anguish, self-doubt, and indignation, but scholarly anguish, self-doubt, and indignation, too. *That's* it.

Drawing together Williams and Schlag shows us that a personal perspective can contribute to legal scholarship in two meaningful ways. First, substantively: their work, and Williams's work in particular, is an example of how a personal, narrative form can draw out new arguments, perspectives, and issues in worn legal debates and discourses. Without a client, scholars are offered a unique vantage on legal issues, including the opportunity to draw on both their personal experiences and the experiences of others to sharpen and highlight the human features of law.

Second, greater comfort with personal narrative can help contribute to grounding the purpose of legal scholarship. Many, Schlag included, have questioned the utility of legal scholarship by noting that neither practitioners, judges, nor even other scholars use the vast majority of it.[108] But Erwin Chemerinsky has candidly noted that one important purpose of legal scholarship is developing the individual author's character, knowledge, and expertise.[109] Even if nobody else reads it, the scholarly process is an important piece of both making the author a better teacher and developing the body of work that can generate—either individually, as a whole, or by building towards the next idea—a meaningful contribution to the practice and understanding of law.[110]

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[107] Patricia J. Williams, *Reflection*, 27 COLUM. J. GENDER & L. 52, 52 (2013).

[108] Schlag, *supra* note 80, at 813.

[109] Erwin Chemerinsky, *Why Write?*, 107 MICH. L. REV. 881, 882–83 (2009) ("Ideally, scholarly writing offers insights that are useful to others, but at the very least, it helps the author understand an area better and clarify his or her thoughts. Frequently, that greater knowledge and understanding helps in teaching as well."); *see also id.* at 894 ("What we write about determines what we read, what we think, with whom we communicate, and how we are understood by others.").

[110] *Id.*

A more personal approach to legal scholarship can help highlight this purpose, placing the scholastic endeavor on more stable grounding and adding weight to the value of a scholar's individual growth—what Chemerinsky describes as "an act of self-definition," and what Williams describes as "the complex ritual of mirroring and self-assembly."[111] In this light, it's worth turning back to an answer Schlag offers early on in his critique:

> [W]hat is the point of doing legal scholarship? My answer? You have to bring the point with you. Just as a lawyer needs to have a client in order to have a case, you need to bring something to legal scholarship to make it worthwhile. Because, unless you bring meaningful existential commitments to the practice of legal scholarship, it will have no point.[112]

Personal contributions in scholarship are, by their nature, new, alive and recurring. Emphasizing a particular scholar's engagement with a theory, or a particular individual's experience with the law, offers vital, unique, and endless insights to even old debates. Which is fitting, because almost all legal debates are old, recurring, and in constant need of new perspectives. Clinical methods, by recognizing movement from individual and personal experience into law, are well suited to these kinds of contributions.

Conclusion

One of my professors told our class that most lawyers are frustrated novelists.[113] That may be true, but that's not what I'm saying. There is a deeply human element of law and its application that invites explanation and criticism from a personal and narrative perspective. That may also be true,[114] but that's also not what I'm saying. I'm saying that analytical approaches drawn from clinical teaching methods are well suited to communicating these kinds of narrative and personal perspectives in doctrinal and scholarly contexts. This valuable and powerful connection between personal perspective and law is an example of how clinical methods not only "connect," as Katyal put it, but contribute "to the theoretical law taught elsewhere in the school."[115]

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[111] Chemerinksky, *supra* note 109, at 893; Franke, *supra* note 106, at 1 (quoting PATRICIA J. WILLIAMS, THE ALCHEMY OF RACE AND RIGHTS: DIARY OF A LAW PROFESSOR 229 (1991)).

[112] *See* Schlag, *supra* note 80, at 808.

[113] *Cf. id.* (legal scholarship is a "genre" that has "no more of a point (in fact quite possibly less of a point) than other genres—say, the novel or the poem.").

[114] *See, e.g.*, Anne E. Ralph, *Not the Same Old Story: Using Narrative Theory to Understand and Overcome the Plausibility Pleading Standard*, 26 YALE J.L. & HUMAN. 1 (2014) (applying "narrative theory" to critique a legal pleading standard); *see also* ROBIN WEST, NARRATIVE, AUTHORITY, AND LAW (1993) ("[T]he traditional and not-so-traditional critical methods of the humanities, including the reading and interpretation of literature, the telling and hearing of stories, and the development of a capacity for empathizing with the experiences of others, might constitute one means of pursuing a rich understanding of human nature and, therefore, a partial means of developing criticism of law from a genuine moral perspective.").

[115] Katyal, *supra* note 1, at 68–69.