

## Book Review

Pierre Schlag and Amy J. Griffin, *How to Do Things with Legal Doctrine*, Chicago: University of Chicago Press, 2020, pp. 207, \$30 (paper); \$90 (cloth)

Reviewed by Laura E. Little

You gotta love the legal mind. Those lawyers among us who enjoy our work are attracted to taxonomies. To understand a particular area of law, we attack it as a dog does a bone—ultimately creating categories to organize, names for the categories, and explanations for the twists and turns of the area’s decisional law, statutory law, and constitutional underpinnings. It should be no surprise, then, that two talented legal thinkers have put their minds to making a *taxonomy of taxonomies*! The result is an elegant, slim book, co-authored by Pierre Schlag and Amy J. Griffin, both Colorado Law School professors.

Critics may say that lawyers’ tendency to create taxonomies is a source of the fligreed nature of law—making it impenetrable by those not trained in the law. Some may ridicule legal professionals for generating such complexity to erect entry barriers that ensure their own economic well-being, to promote their esteemed role in the social order, and to indulge intellectual play with no regard for its consequence. Whatever the validity of these critiques, consider this response: The tendency to make categories springs from lawyers’ perception that their role is to make sense of the chaos that social and political life creates. Moreover, the complications and fine distinctions one finds in legal doctrine stem largely from a fundamental impulse to create legal rules that are fair—rules that treat similarly situated individuals similarly.

I therefore applaud this book. Like a good soldier in the army of lawyers, *How to Do Things with Legal Doctrine* embraces the task of making sense of social and political chaos. Even more ambitiously, the book also sets about organizing and dissecting our profession’s taxonomies and legal reasoning techniques, which have caused a bit of chaos themselves.

### I. Audience

The book’s audience is likely limited to those teaching law and practicing law. Entitlements and Disablements! Dedifferentiation! Rules versus Standards! These are not concepts with broad appeal.

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*Law Professors*

Yet the book's usefulness for law professors will be great. Legal academics will benefit from the book's efforts to sort through legal knowledge to enrich scholarship and to promote a coherent approach for teaching students to organize legal thought and develop effective lawyering techniques. For those of us who have devoted much of our professional lives trying to think deeply about the nature of law, one of the book's greatest rewards is how it calls out—and exposes—the nature of the analysis that we use instinctively, habitually, and often unthinkingly. We think we are observing deeply, but like all humans we don't always identify all our assumptions and biases. This type of self-conscious knowledge helps enormously to sort through law's mysteries and develop a method for teaching about them.

*Students*

The authors suggest that law students might use the book as a text or a supplemental guide. This is a long shot. To be sure, *How to Do Things with Legal Doctrine* could guide and comfort students as they start to make sense of the torrent of knowledge hurled their way. Law students would also benefit from the book's gift of promoting a self-conscious understanding about how legal doctrine works: As the cover blurbs state, the book could surely assist students in avoiding bad habits of thought and gaining a sophisticated take on the law.

The authors report that they field-tested the book with students in a legal reasoning seminar. However, the cornucopia of newly named ideas packed into the volume would, I believe, quickly discourage all but the most abstraction-oriented students. Despite frequent helpful and concrete examples, the book often presents analytical superstructures that would likely confound students in the midst of handling all that law school demands.

Consider the following typical sentence: “What is at work here is often called *prefiguration*, the performative installation of views and commitments (metaphysical, ontological, moral, and more) of the audience to accept the truths that will be derived therefrom.”<sup>1</sup>

Part of the genius of the volume, but also key to its limitations, relates to the theme of taxonomy. The book constructs so many categories and manufactures so many names for those categories that it cannot avoid dizzying—and alienating—the uninitiated. Take, for example, the following impeccably accurate and insightful discussion of textualism as a form of interpretation:

One challenge lies in identifying the object of interpretation—is it a word, a phrase, a sentence, or just what precisely (the *individuation problem*)? A second challenge lies in respecting the meaning of the entire text

1 PIERRE SCHLAG & AMY J. GRIFFIN, *HOW TO DO THINGS WITH LEGAL DOCTRINE* (2020) [hereinafter *LEGAL DOCTRINE*] at 33.

(*intratextual integrity*). And a third challenge lies in respecting the meaning of texts related to the one interpreted (*intertextual integrity*).<sup>2</sup>

This type of labeling occurs all over the book. While labeling is a handy method to avoid wordiness and to inject order into disorder, it promises to render the book less accessible—or even inaccessible—for most law students.

### *Practitioners*

Given the dense quality of the book's writing, practicing lawyers may shy away from using scarce time to tackle the book's pages. But they would be making a mistake. This book well deserves close attention from practitioners: Not only does it share a sophisticated view of the forces pushing legal change, but the work also delivers a useful vehicle for practicing lawyers to hone their skills in anticipating that change and in brainstorming on how best to characterize or frame a transaction, a negotiation, a statement to the press, a litigation strategy, a theory of a case, or an argument in a brief.

For the benefit of all who read *How to Do Things with Legal Doctrine*, the book masterfully restates and improves received wisdom on how legal analysis works to create doctrine, but also adds many of its own insights. Take, for example, the chapter describing the process of framing facts and law. This chapter explores some of the more emblematic techniques that a practicing lawyer might use as a handy checklist:

\*Entry-framing: beginning a narrative with issues, problems, actors, agencies, and actions that are appealing to the audience and are strategically placed front and center:

Example: An advocate decides to present a particular transaction—such as a contract for the sale of a home—in a manner that is consistent with audience expectations. For instance, the advocate may choose the following as the initial story to tell: the seller had an emotional attachment to the home (formed in childhood) and the buyer is excited to begin a new life there. Both narratives have potential to draw in the audience, who is likely interested to learn more and to pay close attention as the story continues.<sup>3</sup>

\*Broad vs. Narrow: identifying the time frame:

Example: In a battered-spouse homicide case, the spouse did not kill the partner immediately during or after a violent episode initiated by the dead partner. Instead, the spouse killed the partner after a series of violent episodes, but during a period of calm. Given these facts, the defense of the battered spouse would benefit from using a broader time frame that documents a pattern of trauma and abuse, rather than

<sup>2</sup> *Id.* at 149.

<sup>3</sup> Caveat: The authors do not provide their own examples for each of these techniques. Thus, some examples here come from my imagination and understandings, not from the book's text itself. When an example is drawn from the text, I have footnoted the book for that example.

focusing on a narrow time frame in which it appears that the homicide did not happen during a moment of provocation or heat of passion.<sup>4</sup>

\*Segmented vs. Continuous Transactions: dividing the matter in dispute into pieces or viewing it as a whole:

Example: You have had several alcoholic drinks, all the while knowing the possibility that your 14-year-old child might need a ride home from a friend's house. You think the child will likely not need the ride, but you do not know for sure. Several hours pass after your last drink—and then the child calls asking for a ride. While driving to pick her up, you are in an accident and fail the sobriety test the police administer. In defending you in a tort suit that follows, a lawyer could frame a narrative that begins when the child unexpectedly calls asking for a ride. This time frame would cast your decision to pick up the child in the most reasonable light. Opposing counsel would more likely start the analysis from the beginning, tracing each arguably reckless decision to have yet another drink.

\*Action vs. Omission: describing a party's action as either an act or an omission:

Example: Here's a helpful explanatory example written by Schlag and Griffin:

Consider a rescuer who starts to save a drowning person on a crowded beach (an action) as contrasted with the failure of all beachgoers to rescue the drowning person (omissions). In the first case, we have a distinct act that we can analyze substantively and evidentially for liability or culpability. In the second case, just *what* and *whose* omission do we analyze, and how do we know what to say about it? Nothing happened—the beachgoers just lay there. Perhaps they didn't see the problem. Perhaps they didn't care. A performance, by contrast, always says something. Actions tend to reveal the actor's motivations. A conscious act seems to reveal a certain intention as well as direction. An omission, by contrast, seems mute.<sup>5</sup>

\*Level of abstraction: choosing the most beneficial plane of abstraction with which to present an argument:

Example: In *Regents of the University of California v. Bakke*,<sup>6</sup> a white man claimed that he was denied admission to medical school because of the affirmative action scheme of California's university system. The opposing sides of the dispute used different levels of abstraction in the oral arguments to the U.S. Supreme Court justices: The attorneys for the white man, Alan Bakke, presented the case as a typical, narrow controversy appropriate for

4 This example is a paraphrase of LEGAL DOCTRINE, *supra* note 1, at 35.

5 *Id.* at 38.

6 438 U.S. 265 (1978).

judicial resolution—requiring a remedy for a real injury to a real person. The attorney for California, however, highlighted the broader social issue of institutionalized racism presented by the dispute—thus calling for more expansive thinking about the appropriate remedy for a systemic wrong.<sup>7</sup>

\*Theater Metaphor: conceptualizing a trial or underlying factual transaction giving rise to a disputed legal issue in theatrical terms with various actors, scenes, actions, agencies, motivating purposes, and the like, which all can influence the resolution of the dispute:

Example: One side of the gun control debate might take the position that “Guns kill people.” The other side might argue that “People kill people.” Schlag and Griffin explain the dramatic potential of this debate as follows:

The first position (guns kill people) ascribes causality to the presence of an *agency*, which if removed from the *scene*, would prevent the *action*, the killing, from occurring. The second position (people kill people) ascribes responsibility to the agents who will use any *agency* on the scene to produce the *action*, the killing. For the first position (guns kill people), the essential element is the *agency* (the gun). For the second position (people kill people), the essential element is the predisposition of the *agent*.<sup>8</sup>

\*Exit-framing: choosing an orientation that places a legal issue in the most favorable light to the advocate making the argument:

Example: An advocate can begin with an entry frame that highlights the most obvious players to a transaction, presenting a legal transaction in the light most familiar to the audience. But for the end, the advocate might introduce a new, unanticipated character who adds poignant equities and perhaps shifts the legal theory to best serve the advocate’s goal.

Aside from providing a useful guide for brainstorming, these options can empower those seeking to mine the creative opportunities that advocacy provides. By advocacy, I’m referring to more than advocacy in an adversarial setting. The authors’ suggested modes of thinking about how to escape rigid legal categories can be powerfully used to meet a client’s desires and needs in a nonadversarial problem-solving setting. The techniques also deliver insights about how fluid law can actually be. For some, this fluidity may be unsettling, but the message is crucial to understanding how law works and how those trained in the law have instinctively internalized the skill of manipulating facts and arguments.

7 Laura E. Little, *Characterization and Legal Discourse*, 46 J. LEGAL EDUC. 372, 384 n.40 (1996) (citing MAY IT PLEASE THE COURT: TRANSCRIPTS OF 33 LIVE RECORDINGS OF LANDMARK CASES AS ARGUED BEFORE THE SUPREME COURT 311-312 (Peter Irons & Stephanie Guitton eds., 1994)).

8 LEGAL DOCTRINE, *supra* note 1, at 47.

## II. Other Useful Analytical Contributions

### *Baselines*

Also important for developing self-knowledge of the assumptions internalized by legal professionals is that portion of *How to Do Things with Legal Doctrine* that discusses our need to embrace at least some analytical starting points or “baselines” that are neutral “in the sense of non-political, non-value laden, and non-biased.”<sup>9</sup> Certainly the notion that law—particularly common law—is not neutral is not new, but the book usefully explains the stickiness of the neutrality myth and its connection with professionals’ emotional needs. Why do we—legal academics, judges, and practicing lawyers—cling on some level to the neutrality notion? Three answers, the writers contend, readily present themselves: (1) indulging the fear that giving up the notion of neutrality would cause law itself to unravel; (2) promoting the natural tendency of all humans to treat as neutral those norms that we have internalized and accepted as our own; and (3) supporting a “psychological dependence” on the notion that law has a binding character that—once manufactured—somehow distances itself from political choices.<sup>10</sup>

I greatly admire the authors’ connection between baseline choice and interpretation. Interpretation is such a dicey enterprise—particularly in the usual context of interpreting the intent of a collective body, some members of which jockeyed for a way to place in the record some evidence of collective intent. In confronting the difficult task of divining the intent of draftspersons, the interpreter has much room for play. Schlag and Griffin point out many techniques for harnessing the interpreter’s possibilities. As they explain, classic choices might include such baselines as borrowing other areas of law, tradition, customary practice, or history.<sup>11</sup>

### *Legal Distinctions and Rules/Standards*

Also in the category of the book’s thoughtful chapters that review and improve other well-trodden concepts are the following: (1) an analysis of how the legal process thrives on making distinctions (the chapter on this topic uses the compelling, snappy phrase “the fetishism of legal distinction”) and (2) the perennial dispute about whether rules or standards are the most optimum concepts for laying down the law.

Insights are plentiful in both chapters. Take, for example, the discussion of “found” property in the legal distinctions chapter. Characteristically, Schlag and Griffin begin by pointing out three separate categories of found property: “abandoned property, (2) lost property, and (3) mislaid property.”<sup>12</sup> From that

9 *Id.* at 59.

10 *Id.* at 62.

11 *Id.* at 55.

12 *Id.* at 74.

point, the authors then explain “[i]n simplest terms, a finder is entitled to keep abandoned property, is entitled to lost property against everyone except the owner, and acquires no right in mislaid property.”<sup>13</sup> Lawyers, law professors, and (especially) note-taking students love this type of simple triad. Understanding that sentiment gets us closer to understanding why distinctions are in fact a cerebral fetish for lawyer. Schlag and Griffin bring out an additional, truly practical point by showing how these distinctions are not “self-executing.”<sup>14</sup> To make good use of these distinctions, legal thinkers must analyze them through a set of facts. The proper approach for this law/distinction/facts analysis is not always obvious. Thus, Schlag and Griffin observe, the analyst must also understand what facts are most pertinent to deploying the distinctions accurately. As the authors show, the key concept in handling the property distinctions is the owner’s intent: That’s the focal point for an advocate in order to determine how to ensure that the most advantageous distinction disposes of a problem.

#### *Cluster Logic*

To its great credit, the last stand-alone chapter synthesizes—and renders accessible—the work of Duncan Kennedy, Chaim Perelman, and Lucie Olbrechts-Tyteca on structuralism and post-structuralism. The chapter uses a rubric that Schlag and Griffin name “cluster logic.” For many, Kennedy, Perelman, and Olbrechts-Tyteca have authored heady, often off-putting works. Schlag and Griffin translate their complex analysis into a readily comprehensible chart, and . . . yes (alas) . . . new taxonomies for understanding cluster logic. The cluster-logic chapter aims to demonstrate resemblances among fields of law without regard to “thematic similarities across doctrinal fields.”<sup>15</sup> To this end, the chapter identifies nineteen clusters of legal categories, such as form/substance; public/private; formalism/realism; theory/practice; process/outcome; and rules/standards. The categories relate to each other. Consider the following example:

[W]hat are the relations of formalism/realism to rules/standards? Well, first, formalism is roughly to rules as realism is to standards. How so? Well, we might say that formalism is the *projection* of the rule form to the *plane of theory* (or conversely, we might say that the rule form is the *projection* of formalism to the space of a *legal directive*). And we might say that realism is the projection of the standard form to the plane of a theory (or conversely, we might say that the *standard form* is the reduction of realism to the space of a *legal directive*).<sup>16</sup>

<sup>13</sup> *Id.*

<sup>14</sup> *Id.*

<sup>15</sup> *Id.* at 157.

<sup>16</sup> *Id.* at 160–61.

Putting together these clusters was well worthwhile for a couple of reasons. First, the work unveils the relationship of other, more impenetrable, yet important philosophical concepts such as Wittgenstein's notion of family resemblances and John Lighton Synge's efforts to expose the propensity of systems to run on circular foundational assumptions.<sup>17</sup> Second, the work shows that apparently disparate doctrinal categories actually share similar patterns of analysis and overlapping views of human society. As such, the clusters not only provide a matrix for understanding how law is put together, but also—in the process—help to dispel a sense of anomie or hopelessness that can arise when trying to make sense of apparently incompatible legal contractions. Legal thinkers—whether they be judges, lawyers, or academics—routinely confront a reality of two apparently conflicting legal rules. The clusters—and their relation to one another—help to reconcile what at first glance appears irreconcilable.<sup>18</sup>

### *Tying Together the Strands of the Matrix*

Final kudos go to the authors for developing a matrix for combining the various categories of doctrinal analysis explored in the book. This is an enormously challenging enterprise given both the reality that legal doctrinal methods are octopus-like, spanning all human problems and attempts at rational governance as well as the authors' own production of multiple categories for understanding this diversity.

### **III. Missing Elements and Wishes for Future Work**

This observation about illuminating multiple strands of analysis brings up one disappointing omission from the book. The book does little to reckon directly with the frequent quality of legal doctrine to present several (sometimes baffling) analytical options for resolving an issue—options that proceed on parallel tracks, but all of which could independently solve the problem. This quality appears in all forms of law, but is particularly prevalent in common law, since courts produce common law in the litigation process over which they do not have absolute control. Why did a court choose one analytical path to resolution when others are equally appropriate? At least a start for explaining this mystery is the role of advocates in articulating issues and courts' inclination to embrace the adjudication principle that a judge should stick to the issues that advocates present and avoid reformulating the case according to the judge's fancy.

First Amendment law is particularly emblematic of law's tendency to develop parallel paths to resolution. As developed largely by the U.S. Supreme Court in interpreting the Constitution, First Amendment doctrine contains a tangle of overlapping analytical options. In reading a First Amendment decision, one may reasonably wonder why the Court resolved the case using one line of

<sup>17</sup> *Id.* at 157–58.

<sup>18</sup> CHAIM PERELMAN & L. OLBRECHTS-TYTECA, *THE NEW RHETORIC* 414–15 (John Wilkinson & Purcell Weaver trans., 1971).



cases rather than another. Just a few examples of First Amendment doctrines that can often replace one another include generic content-based analysis, the fighting-words doctrine, hate speech doctrines, the secondary effect doctrine, and public forum analysis.<sup>19</sup>

Were Schlag and Griffin to use their analytical work to explain law's tendency to create multiple strands of doctrine, they would invaluablely aid legal thinkers, who must grapple with why these multiple, overlapping doctrinal strands exist and how one should choose among them. Throughout the book, Schlag and Griffin weave an optimistic and calming message: Yes, law is comically complicated and contradictory, but able legal thinkers can explain and understand these tendencies. (This message is particularly compelling in the chapter on clusters described above.) The authors also highlight that this quality in law provides a creative opportunity.

Creative opportunity is, I agree, an important message to celebrate: How lucky we are—as legal thinkers—to be engaged in a remunerative, useful profession that allows us both intellectual rigor and an opportunity for creative thinking! We can be in the driver's seat! Legal thinkers should powerfully harness this message to explain why we confront parallel and overlapping strands of doctrine that could resolve one legal problem, and to guide our choice of which strand would be best to pursue.

The opportunity that lawyers enjoy placing an imprint on doctrine perhaps best explains the multiplicity of options in various forms of law: The lawyerly brains that structure a transaction, draft a statute, or develop a theory of the case in litigation are the engines that drive the ultimate form of the law created. (And of course, those lawyerly brains all worked differently.) To be sure, the authors touch directly on this role for lawyers when they explain baseline selection. Schlag and Griffin argue that the particular norm chosen as a starting point can significantly affect the outcome of a dispute or a transaction. Some baselines are specific (e.g., the minimum age for a person to be the U.S. President); others are vaguer and thus more malleable (e.g., the U.S. Constitution's reference to "private property").<sup>20</sup> The authors significantly stress the autonomy of attorneys to "advocate for a favored baseline."<sup>21</sup> To be fair, I also note that the chapter on framing legal arguments also builds on lawyers' unique power to choose the appropriate characterization of a legal problem.

My idea here is that the explanations and analysis in the book could be deployed to develop and explain methods of dealing with a multiplicity of doctrinal options, a particularly troublesome aspect of many parts of law. I see this as a missed opportunity for empowerment to add to this deeply insightful

19 For a detailed explanation of how to use these doctrines and analyses independently or in combination to resolve one dispute, see LAURA E. LITTLE, *FIRST AMENDMENT: EXAMPLES AND EXPLANATIONS* 273–82 (2021).

20 *Id.* at 53.

21 *Id.*

“how to” book for understanding and using legal doctrine. And that is my hope for a future project for the Schlag and Griffin partnership.

Presumably one could identify other aspects of legal doctrine that the authors could have discussed. But that might undermine much of the book’s appeal. In just over 200 pages, the authors have presented salient descriptions and fine-tuned analysis of the major—and many of the minor—acrobatics of legal doctrine.

Again, this is an elegant, useful volume. I highly commend it as a good read.