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ATTENTIVE READING: A SOUTH AFRICAN EXAMPLE OF LAW IN CONTEXT

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> *Unlike the United States Supreme Court in* Dobbs*, the Majority in this case recognizes that we cannot examine particular laws in their historical context without also examining the society in which those laws developed. … When the Supreme Court selectively examined the history and traditions of this nation, what it observed was the deeply rooted subjugation of women."*
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> - Wecht, J. concurring in *Allegheny Reproductive Health Center v. Penn. Dep't of Human Services,*[1]

INTRODUCTION

Perhaps the time has finally come to acknowledge the usually subterranean battles in legal work over the deployment of historical and social context in law. Lawyers, judges, and legal scholars are always implicitly asking: what are we allowed to consider when we do legal analysis? How should we read and understand law? For too long, revanchist forces have succeeded in claiming ground to characterize the relevance (or, more often, irrelevance) of structural inequality and oppression in law. But tides can always turn. Indeed, for the Supreme Court of Pennsylvania it seems they already have.

The *Allegheny Reproductive Health Center* case ostensibly addresses only parochial questions of state constitutional law. The court concludes that strict scrutiny must be applied to regulations prohibiting use of public funds for abortion care within the state's medical assistance program. Yet the intensively researched majority opinion, and the even more scholarly and forceful concurring opinion, stake out a methodological claim that is clearly intended to have broad impact. The opinion assertively challenges the notion that historical regulation of abortion can be used to support modern-day abortion restrictions (and to conclude that *Roe* was wrongly decided) if the pervasiveness of gender-based oppression is not also acknowledged and accounted for.[2] Without that recognition, as the concurrence rightfully notes

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[1] J-65-2022, *available at* https://www.pacourts.us/Storage/media/pdfs/ 20240129/141953-jan.29,2024-opinion.pdf, concurrence at 58, 67, referencing the majority opinion in *Dobbs v. Jackson Women's Health Org.*, 597 U.S. 2015 (2022).

[2] *Id*. at 86-106 (tracing the historical suppression of women to the state's adoption of its Equal Rights Amendment).

[3] *Id*., Wecht, J. concurring, at 60.

[4] *Id*.

[5] Most closely associated with the jurisprudence of Supreme Court Justice Antonin Scalia but adopted more widely by scholars and jurists in a range of settings. See Antonin Scalia, A Matter of Interpretation: Federal Courts and the Law (1997). Though even textualist-minded scholars concede that it is sometimes necessary to reach beyond words on the page to understand the

"there is no opportunity for the status of women to advance, and no chance to repudiate the nation's discriminatory history."[3] Instead, we are "locked into the gendered hierarchies of our past."[4] In short, the Pennsylvania Supreme Court flatly rejects a cramped conception of legal text to instead embrace a richly developed examination of legal *con*text. The methodological battle lines are now clearly drawn up.

Ongoing and continually active debates about textualism,[5] *Chevron* deference,[6] the role of science and expertise,[7] and so forth make plain what has always been contested in legal interpretation: where do the boundaries of factual context reside, and what can/should readers focus on when reading and understanding legal texts? In many ways such questions remain perennial ones precisely because they defy easy resolution. We certainly cannot hope to settle them in one interdisciplinary essay. We can, however, note that queries about interpretive methodology are not trivial, and they are not neutral. Indeed, they go to the very heart of what it means to think about law. And consequently, what it means to think about our societies, and ourselves.

In the meantime, while lawyers, judges, and scholars wrestle with defining appropriate ways to decide weighty and hotly contested matters of law, we do believe that there is something to be gained from examining the ways scholars in other disciplines read text. Though our disciplines diverge for important reasons, we believe there is something invaluable to be gained not just from borrowing concepts from other academic fields but from seeking to understand and employ their signature methodologies.

Thus in this Article we explore techniques used by literary scholars and ask whether related approaches shed light on American jurisprudential reasoning (spoiler alert—yes, we think they do). To illustrate how such techniques can undergird national constitutional jurisprudence we hold out as

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true meaning of text. For example, see Willaim Baude's Scalia Lecture at Harvard University, described at https://hls.harvard.edu/today/textualism-is-missing-something/.

[6] The two-part test giving primary responsibility for regulation to federal agencies, as established in *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.,* 467 U.S. 837 (1984). Of course the degree to which agencies may interpret their own authority remains a perennially contested issue; one potentially under review this term in the Supreme Court's consideration of *Loper Bright Enterprises v. Raimondo*.

[7] Many observers have commented on courts' seeming ambivalence or hostility to scientific expertise. For a few recent examples see Romany Webb, Lauren Kurtz & Susan Rosenthal, *When Politics Trump Science: The Erosion of Science-Based Regulation*, 50 ENVTL. L. REP. 10708 (2020); Steve Kennedy, *The Supreme Court's Disregard for Science is Somehow About to Get Worse*, SLATE, Dec. 4 (2023), *available at* https://slate.com/ news-and-politics/2023/12/supreme-court-vs-science.html.

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an example some of the context-rich decision making of a notable South African jurist from the bench of her nation's Constitutional Court.

Feminist philosopher Sara Ahmed observes that "doing things depends not so much on intrinsic capacity or even on dispositions or habits, but on the ways in which the world is available as a space for action."[8] It is such a space for action that we want to address. In this introduction of what we term "attentive reading" (not really a new strategy but instead a framework granting readers of law permission to do what we may already do, and see what we probably already see), we argue for the opening up of—or perhaps gaining permission for—intellectual spaces and methodological action for legal scholarship that draws concretely on tools comparatively uncontroversially in the study of literary texts.

We come to the arguments we'll be making through our cross-disciplinary collaborations as scholars who work in the fields of literary and cultural studies with a heavy emphasis on archival research (Sarah) and legal academia (Kris). Primarily, we outline a strain in legal scholarship that takes into account the reading and analytic practices of contemporary literary studies broadly construed.

Though we may use differing nomenclatures in our respective disciplines, contemporary literary criticism[9] uses many of the same approaches as legal scholarship—close reading of excerpted text, consideration of historical context, reference to previous analyses of the same material (in law, that equals precedent). Both these disciplines share some skepticism about when and how it is appropriate to stray from the text they are examining. To what degree does considering context provide valued exegesis, and when must we adhere rigorously to considering only the exact written work for fear of simply second-guessing meaning, or inappropriately inserting the scholar's perspective rather than elucidating the authors?[10]

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[8] Sara Ahmed, *A Phenomenology of Whiteness*, 8(2) FEMINIST THEORY 149, 153 (2007).

[9] "Contemporary literary criticism" is a vague and, more importantly, broad term. There are a large number of current subfields within the discipline (ecocriticism, gender and/or sexuality studies, medical humanities, digital humanities, new materialism, posthumanism, and more) as well as methodological approaches (Marxist criticism, cultural studies, postcolonial studies, material culture, etc.). Moreover, literary scholars are trained in a variety of theoretical interventions and bring any number of those traditions with them to their objects of study. In large part, this multiplicity is intrinsic to our argument. However, we acknowledge the oversimplification that a term like "contemporary literary criticism" entails, even as this term is a necessary shorthand for the plenitude of ways of reading and theoretical tools that current literary scholars engage in, simultaneously or serially.

[10] Though we must be clear that skepticism about deviation from text has different sources and resonances in law than it does in literature. And that the stakes vary tremendously. Literature and other humanities vastly enrich and expand the human experiences they touch, but they only very occasionally define and circumscribe them in the way that law commonly does.

These two academic disciplines do not often interact with one another, and when they do, they proceed as if our projects in constructing meaning of the material we read were quite different.[11] We disagree. We think the work done by professional readers of law overlaps significantly with that done by professional readers of literature. And that the legal scholarship—and perhaps legal decision making—can benefit from embracing those overlaps even as we continue to respect distinctions in the kinds of texts we review.

One important departure in legal and literary scholarship is each field's investment in the definitiveness of any analysis. Specialists in nineteenth-century American literature, for example, will acknowledge that there is no final word on, say, the poetry of Emily Dickinson.[12] There exists no conclusive piece of academic writing that claims to close the book on Frederick

[11] Not that we are unaware of the various alarms over the state of literary studies that emerged in the 1990s and have endured until today. Beyond the internecine battles of the culture wars, debates over what literary criticism is "for" have been a feature of both academic and mainstream writing, from a variety of political stances. *See, e.g.*, STANLEY FISH, THERE'S NO SUCH THING AS FREE SPEECH AND IT'S A GOOD THING TOO (1994); RITA FELSKI, USES OF LITERATURE (2008); THOMAS DOCHERTY, COMPLICITY: CRITICISM BETWEEN COLLABORATION AND COMMITMENT (2016); JOHN GUILLORY, PROFESSING CRITICISM: ESSAYS ON THE ORGANIZATION OF LITERARY STUDY (2022); ROGER KIMBALL, TENURED RADICALS: HOW POLITICS HAS CORRUPTED OUR HIGHER EDUCATION, (1990); Helen Vendler, *Presidential Address 1980* [anthologized as *What We Have Loved, Others Will Love*], 96 *PMLA* 344 (May 1981).

[12] *See*, e.g., CHRISTANNE MILLER. EMILY DICKINSON: A POET'S GRAMMAR, (1987)**;** MARTHA NELL SMITH, ROWING IN EDEN: REREADING EMILY DICKINSON (1992); Paula Bernat Bennett, *The Pea That Duty Locks: Lesbian and Feminist-Heterosexual Readings of Emily Dickinson's Poetry*, in LESBIAN TEXTS AND CONTEXTS: RADICAL REVISIONS, (Karla Jay & Joanne Glasgow, eds.) (1990); Cheryl Walker, *Teaching Dickinson as a Gen(i)us: Emily Among the Women*, 2 THE EMILY DICKINSON J., 172 (1993); Dorothy Huff Oberhaus. *Emily Dickinson's Fascicles: Method & Meaning*," 5 THE EMILY DICKINSON J., 149 (1996); Interior Chambers: Diana Fuss, *The Emily Dickinson Homestead*, 10 DIFFERENCES: A J. OF FEMINIST CULTURAL STUDIES 10 (1998), *'So Anthracite - to live': Emily Dickinson and American Literary History*, 13 THE EMILY DICKINSON J., (2004); Christine Gerhardt, *Emily Dickinson Now: Environments, Ecologies, Politics: Commentary*, 63 ESQ: A J. OF NINETEENTH-CENTURY AM. LIT. AND CULTURE, 329 (2017); Eric Méchoulan, *Breathing Emily Dickinson: inspiration/ expiration*, 52 SUBSTANCE 256 (2023).

Douglass's 1845 narrative,[13] or *Moby-Dick*,[14] or the work of Margaret Fuller[15] or Frances Ellen Watkins Harper.[16] Rather, scholars continually revisit foundational texts. They do so precisely because they believe that there is always more that can be learned from them, and that new perspectives to understanding them can regularly be brought to bear. Even as the centuries

[13] For just some examples, *see* Barry Maxwell, *Frederick Douglass's Haven-Finding Art*, 48 ARIZONA QUARTERLY: A J. OF AM. LIT., CULTURE, AND THEORY 47 (1992); Maggie Sale, *To Make the Past Useful: Frederick Douglass' Politics of Solidarity*, 51 ARIZONA QUARTERLY: A JOURNAL OF AM. LIT., CULTURE, AND THEORY 25 (1995; Jeannine DeLombard, *'Eye-Witness to the Cruelty': Southern Violence and Northern Testimony in Frederick Douglass's 1845 Narrative*, 73 AM. LIT. 245 (2001); Marianne Noble, *Sympathetic Listening in Frederick Douglass's 'The Heroic Slave' and 'My Bondage and My Freedom'*, 34 STUDIES IN AM. FICTION 53 (Spring 2006); Nick Bromell, *'Voice from the Enslaved': The Origins of Frederick Douglass's Political Philosophy of Democracy*, 23 AM. LIT. HIST. 697 (Winter 2011); Rachel A. Blumenthal *Canonicity, Genre, and the Politics of Editing: How We Read Frederick Douglass*, 36 CALLALOO 178 (Winter 2013; Jennifer Lewis, *'From the Slave's Point of View': Toward a Phenomenology of Witnessing in Frederick Douglass' 1845 Narrative*, 65 ESQ: A J. OF NINETEENTH-CENTURY AM. LIT. AND CULTURE, 257 (2019).

[14] There are far too many analyses of Moby-Dick to try to begin to present a representative sample. Indeed, even the novel's Wikipedia page is of epic length (https://en.wikipedia.org/wiki/Moby-Dick). We could start with Carl Van Doren's initial reconsideration of the novel in his 1921 study *The American Novel*, or D.H. Lawrence's embrace of Moby-Dick in Studies in *Classic America Literature* (1923), or its apotheosis in F.O. Matthiessen's 1941 field-defining study *The American Renaissance: Art and Expression in the Age of Emerson and Whitman* (1941). Over the past century, Moby-Dick has adapted itself to every new form of literary criticism; most recently scholars have explored its relevance to the history of extractive capitalism (*see* Maurya Wickstrom, *Wet Ontology, Moby-Dick, and the Oceanic in Performance,* 71 THEATRE J. 475 (Dec. 2019), same-sex eroticism and the history of whaling (*see* Matthew Knip, *Homosocial Desire and Erotic Communitas in Melville's Imaginary: The Evidence of Van Buskirk*, 62 ESQ: A J. OF NINETEENTH-CENTURY AM. LIT. AND CULTURE 355 (2016); Melville's ongoing role in the US literary canon (*see* Jeffrey Insko *Generational Canons*, 3 PEDAGOGY 341 (2003); national identity (*see* Andrew Hoberek, *Melville, Insurrection, and the Problem of the Nation*, 35 AM. LIT. HIST. 23 (Spring 2023); and nineteenth-century understandings of gender (*see* Sarah Wilson, *Melville and the Architecture of Antebellum Masculinity*, 76 AM. LIT. 59 (2004).

[15] *E.g.*, Elizabeth Lennox Keyser, *Woman in the Twentieth Century: Margaret Fuller and Feminist Biography*, 11 BIOGRAPHY 283 (1988); Susan J. Rosowski, *Margaret Fuller, an Engendered West, and Summer on the Lakes*, 25 WESTERN AM. LIT. 125 (1990); Carolyn Hlus, *Margaret Fuller, Transcendentalist: A Re-assessment*, 16 CANADIAN REV. OF AM. STUDIES, 1 (1995); David M. Robinson, *Margaret Fuller, New York, and the Politics of Transcendentalism*, 52 ESQ: A J. OF THE AM. RENAISSANCE, 271 (2006); Mollie Barnes, *Margaret Fuller's Illegibilities: Afterlives of an Unreadable, Unrecoverable Manuscript*, 50 COLLEGE LIT. 116 (Winter 2023).

[16] *E.g.*, C. C. O'Brien, *'The White Women All Go for Sex': Frances Harper on Suffrage, Citizenship, and the Reconstruction South*, 43 AFRICAN AM. REV. 605 (Winter 2009); Hannah Wakefield, *'Let the Light Enter!': Illuminating the Newspaper Poetry of Frances Ellen Watkins Harper*, 36 LEGACY: A J. OF AM. WOMEN WRITERS 18 (2019); Jim Downs, *et al.*, *A Novel as Archive: A Roundtable on Frances E. W. Harper's 1892 Novel, Iola Leroy, about the Civil War and Reconstruction*, 69 CIV. WAR HIST. 65 (Dec. 2023).

pass, we seem never to never run out of new things to say about the various writings of Shakespeare.

This is not to say that literary scholars subscribe to the cliché that there are no wrong answers when it comes to comprehending a text. Surely there are. Words exist on the page, and they are not infinitely malleable. But it is to say that there are many "right" answers, depending upon the methods a reader is using, what tools she is bringing to bear on a text, the angle from which she reads it.[17] As Rita Felski argues, "our engagements with texts are extraordinarily varied, complex, and often unpredictable in kind."[18] But what seems common in literary analysis is a belief that a multiplicity of approaches to reading a text only enriches our collective understanding of it. And that for important work, there is inevitable value in repeated inquiries and approaches to discerning its meaning.[19]

Are scholars (and jurists) equally open to indefinitely-additive—and potentially competing—strains of textual analysis in law? We certainly think we ought to be, but it is not our usual modus operandi.

It is certainly true that Langdellian methodology, premised in part upon a 19th century notion that study of jurisprudence could elucidate as set of "scientific" principles of law, still endures.[20] But does anyone really believe law is "scientific" anymore? For one thing, science works by testing hypotheses until testing reveals what is knowable and reproducible. Yet it goes without saying that in law, shared circumstances do not always result in the same outcomes (clearly illustrated by the shift from *Plessy*[21] to *Brown*[22], from

[17] An excellent illustration of this model is *Introducing Criticism in the 21st Century*, a sourcebook edited by Julian Wolfreys and designed for undergraduates. In its 2015 second edition, it comprises fourteen chapters on a wide range of theoretical and critical approaches, including affect theory, Deleuzian criticism, ethical criticism, and animal studies. The structure of this book speaks to its underlying logic: each chapter is roughly the same length and although they are gathered under different thematic sections, they are functionally treated as equal in heft and importance.

[18] RITA FELSKI, USES OF LITERATURE, at 8 (2008).

[19] *E.g*. INTRODUCING CRITICISM IN THE 21ST CENTURY at ii, (Julian Wolfreys, ed.) (2d ed. 2015) (observing that "good reading takes place or has the possibility of taking place regardless of the epistemological or interdisciplinary framework withing which it orients itself …[since] (a)ll good reading should be critical.").

[20] For a detailed revaluation of Langdell's argument of the scientific nature of the law, see Nancy Cook, *Law as Science: Revisiting Langdell's Paradigm in the 21st Century*, 88 N.D. L. REV. 21 (2012). For additional background, see WILLIAM P. LAPIANA, LOGIC AND EXPERIENCE: THE ORIGIN OF MODERN AMERICAN LEGAL EDUCATION (1994).

[21] *Plessy v. Ferguson*, 163 U.S. 537 (1896)

[22] *Brown v. Board of Educ. of Topeka,* 347 U.S. 483 (1954).

Bowers[23] to *Lawrence*[24], and from *Roe*[25] to *Dobbs*[26]).[27] Additionally, while the case method in law teaching is still pre-eminent, the intellectual foundation on which it stood has had a shorter shelf-life. By the mid-to-late 20th century the concept of scientific knowledge as transparent and self-evident underwent serious assaults from both philosophical and political arguments that scientific inquiry operates within a series of social and cultural norms: results depend upon the kinds of questions being asked in the first place.[28] The assumption that gender, race, class and other differences had nothing to do with scientific research was not only challenged, but effectively debunked.[29]

Despite these radical and systemic changes, it is still in large part true that legal analysis frequently acts upon an unspoken belief that there exists such a thing as neutral or inevitable and universally agreed-upon interpretation, and that the task at hand is to locate that answer.[30]

There may be good reasons for this. In a common law system, once an answer has been reached in any legal controversy it does in fact become binding legal precedent. We have an inherent investment, then, in wanting judicial holdings to be "correct" and incontrovertible. Lawyers and judges frequently write as if only one interpretation of a text were possible, even though we know that to be simply tactical, or an oversimplification.[31] Law

[23] *Bowers v. Hardwick*, 478 U.S. 186 (1986).
[24] *Lawrence v. Texas*, 539 U.S. 558 (2003).
[25] *Roe v. Wade*, 410 U.S. 113 (1973).
[26] *Dobbs v. Jackson Women's Health Org*., 597 U.S. 597 (2022).
[27] Obviously, we are eliding important doctrinal shifts, and in some instances the incremental decisions paving the way for seeming reversals of Constitutional interpretation. Nonetheless, the history of just these sets of cases as well as many other less famous reversals, makes it hard to conclude that one and only one outcome can be expected from interpretation of the same legal text. Moreover, our analysis above does not even consider the crisis of confidence in the social sciences more generally in the reproducibility of results of various studies. As popular and academic venues have shown, the findings of some of the most influential experiments have been nearly impossible to reproduce, calling into question a number of assumptions within psychology and sociology, as well as in the wider U.S. context.
[28] Hence the so-called "replication crisis," in which many published studies were discovered to be reproducible by subsequent researchers. While some commenters suggest these (lack of?) findings require disregarding accreted knowledge in a variety of fields, others conclude that more careful attention to potential bias there remains room to draw conclusions from hypothesis-generating research. *See*, *e.g*., John. P.A. Ioannidis, *Why Most Published Research Findings are False*, 19 PLOS MEDICINE, 8 (2005) (itself corrected Aug. 25, 2022) *available at* https://journals.plos.org/plosmedicine/article?id=10.1371/journal.pmed.0020124.
[29] *E.g*., *How Sex and Race Affect Academic Research,* THE ECONOMIST, (Feb. 14, 2022).
[30] Given the commonly invoked law school trope that "the answer to everything is It Depends," it seems self-evident that most lawyers, judges, and law professors know this is not true. Yet legal novices often do not. (Perhaps this naïve assumption that there exists one and only one ball explains why law students regularly accuse their instructors of hiding it!).
[31] "As an advocate, the lawyer's job is to use, and argue the relevance of, the interpretive techniques that result in victory. So, skilled lawyers will act as though the interpretive

professors know (and teach!) that advocates actively choose among interpretive strategies to argue for the approach that best supports their clients' desired outcomes.[32] Nevertheless, in reading and writing about and teaching cases we sometimes adopt the very posture of inevitability that their authors probably designed as an intentional and knowing rhetorical move and did not inherently as an irrefutable truth. Even while knowing that there were probably many different ways important legal questions might have been analyzed.

Naturally, we must acknowledge that we are overgeneralizing. After all, isn't the entire field of writing on Constitutional law comprised of scholars considering multiple approaches to difficult legal questions? Certainly. And that is true in at least parts of most other legal academic inquiries as well. Still, we believe lawyers and law professors' necessary focus on cases as development of legal doctrine sometimes obscures the opportunity to study those opinions as *texts*—that is, as significant prose worthing of ongoing examination in construction, context, history, presumed authorial intent, and so forth.

What we propose here is a disarticulation of analysis and outcome;[33] that is, to read legal opinions not purely as answers for individual parties in conflict, or even as doctrinal precedent for future litigation, but as text—expression of idea that can and should be continually (re)examined, learned from, built upon.

One insight we take from literary analysis is the recognition that any product of a given moment, location, or culture is if not inexhaustible (although some certainly are—we won't be running out of different readings of Dickinson or Douglass any time soon), then at least a kind of rich and deep lode of signification, from which any number of readings can be mined.

Further examination, whether complementary or contradictory to current thinking, enriches without automatically needing to erase. Another scholar's analysis of a text need not delegitimate or invalidate mine; rather it renders that text more complex and more multifaceted, opening it up to further exploration. There can be seismic changes in a field with new information or radically new approaches.[34] But on the whole, the work of

technique that results in their victory is the obviously applicable one…" JOEL P. TRACHTMAN, THE TOOLS OF ARGUMENT: HOW THE BEST LAWYERS THINK, ARGUE, AND WIN, 70 (2013).

[32] In fact, law professors routinely teach law students to construct legal arguments in ways that make them seem inevitable and seek to preclude competing or complicating analyses. But we do know that's at least partially fiction, and a consequence of our training in advocacy.

[33] A project we concede is far more appropriate for scholars than it is for the lawyers and judges who *must* respect and work with precedent. Nonetheless, we believe critical analysis of jurisprudence has something valuable to offer them, as well. Enriched examination of the texts we all encounter can only serve to make everyone's work more sophisticated.

[34] Sometimes these changes are accretive, and it is only after there's a critical mass of

literary studies is accretive. What matters is not that an approach be definitive, but that it be persuasive, undergirded by close reading and contextual research.

Of course, this approach takes a legal scholar only so far. Given that their material is often judicial decisions, which (by definition) *are* the last word on laws and regulations, works from legal academia must necessarily traffic in conclusions that are specific and exclusive, and require an end point. At the same time, what seems like a predominant structural necessity can often be the result of a methodological commitment of the field. Yet how might legal analysis be expanded if it comfortably broadened its ambit, delving into the present and the past in more complex ways, arguing from absence,[35] and confidently relying upon rich social context?[36]

We consider these questions in a number of ways. In Part I, we outline the methodology we are commending, through a framework we dub "attentive reading." We discuss the crucial predecessors to this methodology, the Law and Literature and Law and Society movements. In Part II we illustrate how this attentive reading can operate in the U.S., using the widely understood decision in *Plessy v. Ferguson* as an exemplum. In Part III we look to the jurisprudence of South African Constitutional Court Justice Margaret Victor as a real-world exercise in attentive reading via the principle of *ubuntu.*

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scholars who use the same methodology that the emergence of a new way of approaching literature is visible (and often this approach develops within a specific subfield, such as New Criticism and Romantic poetry, or New Historicism and early modern literature, or transhemispheric criticism and American Studies). Other times, there can be one, or possibly a few critical or theoretical texts that recalibrate the discipline in a specific direction across fields or have an outsized impact on literary study in the United States more generally. For example, Michel Foucault's *Discipline and Punish*: *The Birth of the Prison* (1979), or Sandra Gilbert and Susan Gubar's *The Madwoman in the Attic: The Woman Writer and the Nineteenth-Century Literary Imagination* (1979), or Houston Baker Jr.'s *Blues Ideology and Afro-American Literature: A Vernacular Theory* (1984), or Homi K. Bhabha's *Location of Culture* (1994), or Eve Kosofsky Sedgwick's *Between Men: English Literature and Homosocial Desire* (1985), or Judith Butler's *Gender Trouble: Feminism and the Subversion of Identity* (1990).

[35] For an analysis of arguing from inference based on the absence of potentially anticipated facts, see Kris Franklin, *Meditations on Teaching What Isn't*, 66 N.Y.L.S. L. REV. 387 (2021-2022).

[36] Of course we are well aware that this is the kind of work legal historians and other scholars do fairly regularly. But we cannot help but notice that there is often a hint that this is fine for those studying trends in law but should not actively direct contemporary development of legal doctrine. Though the implementation of "historical" understandings of gun restrictions spawned by Justice Thomas's opinion in *N.Y. State Rifle & Pistol Assoc. v. Bruen*, 597 U.S. 1 (2022), gives credence to concerns that history can be deployed in troubling ways. *See* Jacob D. Charles, *The Dead Hand of a Silent Past: Bruen, Gun Rights, and the Shackles of History*, 73 DUKE L.J. 67 (2023).

I. READING ATTENTIVELY IN LITERATURE

The attentive reading we both describe and advocate for is multilayered. Inevitably, it deploys an array of tools simultaneously."[37]

Attentive reading proceeds slowly and carefully. It lingers over sentences, takes in not just the "what" but the "how" of what is on the page. How does the text unfold on the page? What rhetorical strategies are being deployed? What is said directly, and what is merely suggested? What is the voice of the text? What does its author (whether signed or unknown) bring to the project? What rhetorical and structural moves does it make? What cultural context is it operating within? How do history and circumstances affect the narrative? Ultimately, what questions are being asked, and why? Which ones *aren't* being considered, but rather taken for granted?

Attentive reading is simultaneously big picture and small bore. It takes into account the shape of a text (how it might be divided into chapter or sections), how—if a work of fiction—it moves from description to dialogue, how it builds an argument not just from evidence but from unarticulated and implicit understandings of the context in which that evidence operates as well as the vagaries of style and tone, and how it understands and constructs its ideal reader. Attentive reading is also fine-grained, hewing closely to the words themselves, generating not just an analysis of the words themselves, but of the logics and/or aesthetics of those words. Why this word and not that? Why this reference, this citation, this adjective, this punctuation even?[38]

Attentive reading also requires thoughtful attention to factual context (whether actual in legal cases or constructed in fictional work[39]), in addition to the obviously relevant consideration of plot, character and dialogue.

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[37] We are of two minds in terms of using the phrase "close reading," given its echoes in formalist New Criticism, which many regard as the notoriously doctrinaire. At the same time, contemporary critics such as Jonathan Culler, *The Closeness of Close Reading*, 149 ADE BULLETIN 20 (2010)*;* Jane Gallop, *The Historicization of Literary Studies and the Fate of Close Reading,* PROFESSION, 181 (2007) have reclaimed close reading for the 21st century.

[38] Indeed, there are a number of studies of the use of punctuation in writers as different as Emily Dickinson, Henry James, and Toni Morrison. For a few examples, see Indeed, there are a number of studies of the use of punctuation in writers as different as John Milton, Emily Dickinson, and Henry James. For a few examples, see Stephen Hequembourg, Milton's *"Unoriginal" Voice: Quotation Marks in Paradise Lost*, 112 MODERN PHILOLOGY, 154 (2014); John S. Diekhoff, *Milton's Punctuation and Changing English Usage, 1582-1676*, 70 J. OF ENGLISH AND GERMANIC PHILOLOGY 553 (1971; Edith Wylder, *Emily Dickinson's Punctuation: The Controversy Revisited,* 36 AM. LITERARY REALISM, 206 (Spring, 2004); Kamilla Denman, *Emily Dickinson's Volcanic Punctuation*, 1 EMILY DICKINSON J. 22 (1992); Paul Crumbley, *Dickinson's Dashes and the Limits of Discourse*, 2 EMILY DICKINSON J. 22 (1993); Mark Edelman Boren, *More Than a Line: the Unmistakable Impression of Significance and the Dashes of Henry James*, 77 PHILOLOGICAL QUART. 329 (1998); Robin Vella Riehl, *James and the "No-Comma": Punctuation and Authority in "Daisy Miller",* 35 Henry James Rev. 68 (2014).

[39] It's worth acknowledging that these are quite distinct, yet not precisely polar opposites.

As an example, Stephen Crane's novel the *Red Badge of Courage* can be read for its plot (a tentative Union soldier becomes a battlefield leader). It can be read for character development (his encounters with selflessly heroic comrades spurs him toward bravery). It can be read as a meditation on war, or on the meanings of masculinity. But none of this makes any sense if a reader does not grasp 19th-century infantry tactics. In one of the novel's climactic scenes, our protagonist Henry Fleming picks up a fallen color-bearer's flag.

A reader with a contextual awareness might understand that civil war battles commonly relied upon infantry lines backed up by rearward artillery, to be followed by cavalry charges when the opposing lines were weakened. In the crowed melee, lines of soldiers firing rifles were often unable to hear verbal commands. They therefore relied upon aural cues from drums and bugles and were directed by visual cues from flags. Readers who could visualize this form of conflict would immediately grasp that Henry's actions in taking up the signal flag and plunging forward to fight would intuitively grasp that his actions both inspired and moved his comrades and exposed him to grave danger.

Conversely, a reader unfamiliar with this particular kind of warfare would probably just be puzzled about why Henry's decision to pick up the troop's standard mattered so very much. After all, it certainly wouldn't have the same significance in, say, a novel set during the Viet Nam War. The context of line infantry[40] fighting—distinguished from trench warfare, guerilla engagement, and so on—immeasurably shapes the reader's understanding (or not) of the text.

Context accordingly requires deep comprehension of human motivation and emotional response; that is, a kind of intellectual empathy. Kris has written about cognitive empathy before,[41] but it's worth discussing here. In U.S. legal scholarship there has been consideration of empathy in recent decades (sometimes unfavorably).[42] Importantly, this work addresses the

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All lawyers know that "facts" are consciously developed. They must have concrete grounding in what is provable and true. But they are still narratives built craftily by astute lawyers to support client's objectives. Meanwhile the imaginary worlds created in literature do not have to actually exist, but to resonate with readers they must nevertheless seem to have some verisimilitude and sensation of insight into the world we operate within.

[40] For in-depth exploration of line infantry see U.S. WAR DEPARTMENT, THE 1863 U.S. INFANTRY TACTICS, (2002).

[41] Kris Franklin, *Empathy and Reasoning in Context: Thinking About Anti-Gay Bullying*, 23 TULANE J. OF L. & SEXUALITY 61 (2014).

[42] For just a few examples see Thomas B. Colby, *In Defense of Judicial Empathy*, 96 MINN. L. REV. 1944 (2012); Andrea McArdle, *Using a Narrative Lens to Understand Empathy and How it Matters in Judging*, 9 LEGAL COMM. & RHETORIC JAWLD 173 (2012); Susan A. Bandes, *Moral Imagination in Judging*, 51 WASHBURN L.J. 1 (2011). Much of this work was undoubtedly spurred by the controversy over President Obama's comments that in determining who to nominate to replace Justice David H. Souter he would seek a candidate possessing empathy. *See* Janet Hook and Christi Parsons, *Obama Says Empathy Key to Court Pick*, L.A. TIMES, May 2,

practical inextricability of what Supreme Court Justice William Brennan has called the mix of "reason and passion"[43] in judicial thinking. Indeed, emotion is relevant in law and vital to grapple with, whether expressed in the positive (*Lawrence v. Texas*) or the negative (*Dobbs v. Women's Whole Health Clinics*). Yet we are not focusing here on empathy as an affective process. Empathy is not solely an emotional reaction to another's experience, nor the expression of feelings of compassion.

Though empathy may encompass (even prompt) emotional responses, the form of empathy we're invoking here is profoundly conceptual. It is a rich and layered perspective-taking that deeply inhabits the specific standpoints of all persons involved in any issue under consideration. Empathy in its cognitive dimension is what allows a person to comprehend and contextualize the emotions of others; emotions that exist in a large and complex world even as they are not grounded in precisely shared experiences or universal responses. Empathy, then, necessitates intellectually occupying and understanding the subjectivity of others. This notion of empathy as a function of intellect is broadly accepted among empathy researchers, many of whom are neuroscientists who use medical imaging to locate the parts of the brain that are activated by the interpersonal cognitive process of empathy.[44]

Attentive reading both demands and relies upon this kind of empathy. Certainly for all characters fictional or real, but also for authors and readers. Yet insightful empathy need not be solely individualistic. We must also carefully consider the context of actors and their actions. That is, how does the history of racialized brutality predetermine Sethe's terrible choices in Toni Morrison's *Beloved*? Or, is it possible to understand the motivations of the narrator in Viet Thanh Nguyen's novel *The Sympathizer* without a knowledge of the U.S. engagement in Vietnam and the lingering trauma of that conflict for both American and Vietnamese survivors of that war?[45]

2009; *see also* Peter Baker, *In Court Nominees, is Obama Looking for Empathy by Another Name?* N.Y. TIMES, Apr. 25, 2010 (noting that shortly after those remarks were made the word empathy had become "radioactive" in connection with legal decisionmaking).

[43] William J. Brennen, Jr., *Reason, Passion, and "The Progress of the Law",* 10 CARDOZO L. REV. 3 (1988-89).

[44] Specifically within the anterior insular cortex. *See* Xiaosi Gu *et al*., *Anterior Insular Cortex is Necessary for Pain Empathetic Pain Perception*, 135 BRAIN 2726 (Sept. 2012) (using fMRI technology to determine where empathy originates).

[45] Literary critics have explored these questions in depth. For example, see Luanna de Souza Sutter, *Rememorying Slavery: Intergenerational Memory and Trauma in Toni Morrison's Beloved (1987) and Conceição Evaristo's Ponciá Vicêncio (2003)*, 13 CONTEMPORARY WOMEN'S WRITING, 321 (2019); Sima Farshid, *Foucauldian Archaeology of Slavery in Morrison's Beloved*, 5 Internat'l J. of Interdisciplinary Soc. Sciences 303 (2010); Hayley C. Stefan, *Tortured Images in Viet Thanh Nguyen's The Sympathizer & the War on Terror*, 48 COLLEGE LIT. 209 (2021); Rashi Shrivastava, Avishek Parui, Merin Simi Raj, *Memory, Insidious Trauma, and Refugee Crisis in Viet Thanh Nguyen's The Sympathizer (2015)* 15 RUPKATHA J. ON INTERDISCIPLINARY STUDIES IN HUMANITIES 1 (2023).

Literary scholarship simultaneously embraces all of these broader inquiries we have outlined. It is a presumption of literary theorists that texts and their readers are not disembodied entities, existing only to read and be read. Rather, scholars inherently treat literary texts as crafted by people who create meaning. People who lived in particular places at specific moments. Readers' experiences are thus shaped by everything they have already read, what they know and believe, the reading practices into which they have been initiated.[46] It is the work of contemporary literary criticism to combine this attentive, fine-grained reading with an understanding of historical, cultural, and regional context. Indeed, these are inextricable in many ways: the assumptions about how genre works, what kind of texts do or don't get published, the separation between the private (for example, diaries or poetry notebooks) and the public (novels, articles, memoirs), whose voices should and should not be heard, the reasons a text is written in the first place, are to literary theorists as real and immediate as the very words on the page.

Questions about the genesis of a text inevitably require a deep dive into the historical, cultural, and biographical epiphenomena of writing. This is required whether those be the details of concrete production of texts (published and unpublished),[47] processes of publication and reception,[48] constructions of race,[49] historical events—and the sequelae of those events,[50] material objects,[51] expressions of gender and/or sexuality,[52] abstract concepts

[46] What constitutes a reader was the focus of reader-response criticism, which emerged in the late 1960s and was taken up by some feminist critics in the 1980s and 1990s (see, for example, Jane Tompkins, *Me and My Shadow*, 9 NEW LITERARY HISTORY (1987).

[47] *See*, *e.g*, JONATHAN SENCHYNE, THE INTIMACY OF PAPER IN EARLY AND NINETEENTH-CENTURY AMERICA (2019); MARK ALAN MATTES, HANDWRITING IN EARLY AMERICA: A MEDIA HISTORY (2023).

[48] *See* JANICE RADWAY, A FEELING FOR BOOKS: THE BOOK-OF-THE-MONTH CLUB, LITERARY TASTE, AND MIDDLE-CLASS DESIRE (1999); PRIYA JOSHI, IN ANOTHER COUNTRY: COLONIALISM, CULTURE, AND THE ENGLISH NOVEL IN INDIA (2002); KATE MCGETTIGAN, THE TRANSATLANTIC MATERIALS OF AMERICAN LITERATURE (2023), AMY GORE, BOOK ANATOMY**:** BODY POLITICS AND THE MATERIALITY OF INDIGENOUS BOOK HISTORY (2023).

[49] *See* HAZEL CARBY, RECONSTRUCTING WOMANHOOD: THE EMERGENCE OF THE AFRO-AMERICAN WOMAN NOVELIS (1989); EDLIE WONG, RACIAL RECONSTRUCTION: BLACK INCLUSION, CHINESE EXCLUSION, AND THE FICTIONS OF CITIZENSHIP (2015); MARK RIFKIN, BEYOND SETTLER TIME: TEMPORAL SOVEREIGNTY AND INDIGENOUS SELF-DETERMINATION (2017).

[50] *See* FARAH JASMINE GRIFFIN, WHO SET YOU FLOWIN': THE AFRICAN AMERICAN MIGRATION NARRATIVE (1995); NIGEL SMITH, LITERATURE AND REVOLUTION IN ENGLAND, 1640-1660 (1997); CODY MARRS, NINETEENTH-CENTURY AMERICAN LITERATURE AND THE LONG CIVIL WAR (2015).

[51] *See* ELAINE FREEDGOOD, THE IDEAS IN THINGS: FUGITIVE MEANING IN THE VICTORIAN NOVEL (2006); ROBIN BERNSTEIN, RACIAL INNOCENCE: PERFORMING AMERICAN CHILDHOOD FROM SLAVERY TO CIVIL RIGHTS (2011); KYLA WAZANA TOMPKINS, RACIAL INDIGESTION: EATING BODIES IN THE NINETEENTH CENTURY (2012).

[52] *See* Eve Kosofsky Sedgwick, EPISTEMOLOGY OF THE CLOSET (1990); MAURICE WALLACE, CONSTRUCTING THE BLACK MASCULINE: IDENTITY AND IDEALITY IN AFRICAN AMERICAN MEN'S LITERATURE AND CULTURE, 1775-1995 (2002); ELIZABETH FREEMAN, TIME BINDS: QUEER TEMPORALITIES, QUEER HISTORIES (2010).

such as time[53] or the relationship between the local and the global,[54] political and cultural movements,[55] to name just a few. Literary texts—indeed all cultural products—have a complex relationship to their contexts. On the one hand, they emerge out of a specific set of historical conditions, especially moments of change and rupture (what cultural studies scholar Stuart Hall called a "conjuncture"[56]). At the same time, they also interpret, rework and/or reimagine those conditions through fiction, poetry, drama, autobiography, and the like.

In sum, then, to trained readers of literature the relationship between text and context is dynamic and reciprocal (and not always fully knowable). We want trained readers of law[57] to ask: what would it mean for legal scholarship to embrace this set of practices—a close attention to a text on its own terms coupled with a deep understanding of the historical moment that brought those terms into being, made them possible, and reproduced them through the text itself?

To be sure, we are hardly the first people to raise the possibility of reading law, literary texts, and social/cultural phenomena in relation to each other. Both Law and Literature and Law and Society as academic sub-disciplines have explored how law is not a self-contained set of rules and regulations, but rather part of the world, reflecting and interacting with it. Each takes a different area of study—the humanities for Law and Literature and the social sciences for Law and Society—to reconceptualize "the law" as not unitary but multifaceted, extending beyond lawyers' offices and courtrooms.

Law and Literature emerged as an academic field in the early 1970s, catalyzed by James Boyd White's *The Legal Imagination* in 1973.[58] The early iteration of the movement focused on how to use literature in particular, and

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[53] *See* DANA LUCIANO, ARRANGING GRIEF: SACRED TIME AND THE BODY IN NINETEENTH-CENTURY AMERICA (2007); LLOYD PRATT, ARCHIVES OF AMERICAN TIME: LITERATURE AND MODERNITY IN THE NINETEENTH CENTURY (2010).

[54] *See* PAUL GILROY, THE BLACK ATLANTIC: MODERNITY AND DOUBLE CONSCIOUSNESS (1995); TANYA AGATHOCLEOUS, URBAN REALISM AND THE COSMOPOLITAN IMAGINATION IN THE NINETEENTH CENTURY (2011).

[55] *See* LAWRENCE BUELL, THE ENVIRONMENTAL IMAGINATION: THOREAU, NATURE WRITING, AND THE FORMATION OF AMERICAN CULTURE; JOSEPH ENTIN, LIVING LABOR: FICTION, FILM, AND PRECARIOUS WORK (2023).

[56] *See* Stuart Hall & Doreen Massey, *Interpreting the Crisis: Stuart Hall and Doreen Massey Discuss Ways of Understanding the Current Crisis*, 44 SOUNDINGS 57, 2010.

[57] Clearly here we primarily mean legal scholars. But not exclusively. We believe attentive reading of law is also valuable to the legal profession more generally, and has something to offer those learning and practicing law as well as those involved in making it.

[58] White's importance to the field is illustrated by the publication in 2019 of a special issue of *Law and Humanities* edited by David Gurnham, dedicated to a re-evaluation of *The Legal Imagination*, which, in the words of the issue's editors, "is generally credited as having initiated the 'law and literature' movement" 13 LAW & HUM. 95 (2019).

the humanities more generally, to improve law school pedagogy: to make it less rote, less mechanical, and more connected to how law professor might "re-think what we are teaching when we teach 'legal writing' or how to 'read law.'"[59] White's primary concern was to demonstrate the rhetorical, ethical, and even aesthetic elements of legal practice and legal writing by connecting them to literary texts that expressed intersecting values. This generated, as Ian Ward has pointed out, a tension within the field: did it take as its subject law *in* literature (that is, the representation of the law) or law *as* literature (a method of reading)?[60]

Each of these approaches had its champions, arguing either for the law as existing within a set of narrative and rhetorical conventions, or for using literature that dealt with the law as a way to build empathy and self-awareness in legal practitioners. Richard Posner's 1988 book *Law and Literature: A Misunderstood Relation*[61] (which grew out of a response to Robin West's critique of Posner's theories around law and economics[62]) chose the second route, attempting to define the appropriate parameters of the field, primarily as a takedown of the post-structuralist and deconstructive theoretical practices of the time, attests to the influence of the field: the fact that a major figure in legal academia like Posner felt the need to publish his claim to defining what Law and Literature should and should not do gives a sense of its importance to legal scholarship at the time.

Law and Literature, although not the burgeoning field it once was, endures as an approach to legal and literary texts. Journals such as *Law and Literature* and *Law and Humanities* are robust sites of scholarship, exploring topics as varied as the philosophies of Nelson Mandela,[63] the relationship of Norse myths to law,[64] or literary influences in the writing and judicial philosophy of Benjamin Cardozo.[65]

Nonetheless, while their remit is adjacent to ours, it has a somewhat different function. *Law and Humanities*, for example, describes itself as a kind of supplement to mainstream legal scholarship: its mission statement states that the journal "provides a forum for scholarly discourse within the arts and

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[59] Elizabeth Mertz, *et al*., *Forty-Five Years of Law & Literature: Reflections on James Boyd White's "The Legal Imagination" and its Impact on Law and Humanities Scholarship*, 13 LAW & HUM. 95, 104 (2019).

[60] IAN WARD, LAW AND LITERATURE: POSSIBILITIES AND PERSPECTIVES (1995).

[61] Most recently updated as RICHARD A. POSNER, LAW AND LITERATURE (3d ed. 2009).

[62] And in turn generated a responding critique: Robin West, *Law, Literature and the Celebration of Authority*, 83 N. W. U. L. REV. 977 (1989).

[63] *See* Charles Gelman, *Translator's Introduction*, 26 LAW & LIT. (2014) (prefacing the publication of an English-language translation of Jacques Derrida's *Admiration of Nelson Mandela: or The Laws of Reflection*).

[64] *See* Jeffrey L. Slusher, *Runic Wisdom in Njal Saga and Nordic Mythology—Roots of and Oral Legend Tradition in Northern Europe*, 3 LAW & LIT. 21 (1991).

[65] *See* 34 YALE J. LAW & HUM. (2023).

humanities around the subject of law and is principally concerned to engage with those aspects of human experience which are not empirically quantifiable or scientifically predictable."[66] The editorial of their first issue is even more specific: "The study of law as a humanities discipline is concerned with the capacity of human beings to engage with their environment and reform it by the power of imagination, as expressed through the arts."[67] Similarly, in his field-defining book *Law and Literature*,[68] Ian Ward echoes a related reformist goal, reaffirming the centrality of teaching to Law and Literature, and its capacity to transform the positivist, one-size-fits-all nature of much legal education to create more ethical, more insightful lawyers.

The debates over how the field relates to questions of ethics are, after all, arguments about how the law and legal education intersect with social relations. Law and Society, provides yet another example of a field rooted in the explosion of social scientific research in the second half of the twentieth century.[69] The Law and Society Association, founded in 1964 by a group of legal scholars and social scientists from a variety of fields,[70] fostered work that both deployed empirical research and investigated the wide reach of the law: not just judicial decisions but in schools, prisons, families, and religious institutions. Law and Society is as interested in the lived experience of the law as in the institutions that dispense it, how the law is administered unevenly and often inequitably, and how legal structures adjust to major social and political changes (for instance the end of the Cold War or the explosive effects of the internet).

More recently, Law and Society scholars have paid attention to how social and cultural norms also shape legal structures. The contribution of Critical Legal Studies in the 1970s and Critical Race Theory in the 1980s onwards at least in part unmoored Law and Society from a commitment to empiricism, and forced it to recognize the ways that ongoing racial, class, gender, and other inequities can be stubbornly immune to legal change.[71] In addition, the rise of cultural studies in US academia has diffused into Law and Society: Naomi Mezey's claim that "law is a set of meaning-making practices that exists within and is the product of a particular culture and that culture is a set of meaning-making practices that exists within and is the product of a particular set of laws" decenters the claims the law makes to an inherent

[66] Archived at http://earlymodern-lit.blogspot.com/2006/08/.
[67] *Id*. at viii.
[68] IAN WARD, LAW AND LITERATURE: POSSIBILITIES AND PERSPECTIVES, 3-27 (1995).
[69] For a detailed history of Law and Society as an intellectual movement, as well as the Law and Society Association, see Susan S. Silbey, *Law and Society Movement*, LEGAL SYSTEMS OF THE WORLD: A POLITICAL, SOCIAL, AND CULTURAL ENCYCLOPEDIA VOL. II, 860 (Herbert M. Kritzer, ed.) (2002).
[70] *See* https://www.lawandsociety.org/about-lsa/.
[71] *See*, *e.g*, DERRICK BELL, SILENT COVENANTS: BROWN V. BOARD OF EDUCATION AND THE UNFULFILLED HOPES FOR RACIAL REFORM, (2005).

cohesion and legitimacy.[72] Conversely, just as it has done in other social sciences, cultural studies repudiates the idea that the scholar/writer/researcher is an disinterested observer, and acknowledges the ways that an academic's subjectivity in relation to the object under analysis cannot help but influence their research and writing.

This cursory survey of some "Law and …" scholarship is not meant to be definitive. It is probably not possible, and it certainly beyond the ambition of this article, to capture the breadth of thinking these fields of scholarly endeavor have produced. Rather, we simply want to acknowledge that legal scholars have not ignored the relevance of social context in their explorations of the law and its ramifications. The fields we mention touch on and intersect with the methodology we are outlining here. Law and Literature recognizes the value of using literary critical conventions such as rhetorical analysis and identifying the echoes of figurative language between literary and cultural texts and legal decisions. Law and Society, especially in its most recent incarnation, works through political and cultural specificities to articulate the contexts within which legal structures are generated. We build on this work rather than sharply depart from it.

At the same time, neither field was developed precisely to engage in the kind of attentive, fine-grained reading we are advocating, a reading practice that imbricates textuality, historicity, and culture, bringing with it the accumulated tools of literary criticism as a discipline.

In what follows, we work through how such a reading practice can operate. There is real value in reading legal opinions using all these interpretive tools.

The work of judges is to decide cases, and the project of law over time in the deciding of those cases is to build binding precedent. But "precedent" as a heuristic calcifies legal decisions into doctrine even as it rarely acknowledges those decisions as products of a specific time and place. Moreover, in research on legal opinions the invocation of precedent too often requires a singular hermeneutic process, by which words are frozen in place and turn into formulations rather than interrogated as rhetorical devices.

II. READING ATTENTIVELY IN LAW

It is axiomatic that legal opinions must be read as *cases* in the sense of juridical determinations. That is, as decisions representing stare decisis for specific litigants while generating doctrinal precedent for future analogizable

[72] Naomi Mezey, *Mapping a Cultural Studies of Law* in HANDBOOK OF LAW AND SOCIETY, 39 (Austin Sarat & Patricia Ewick, eds.) (2015).

circumstances.[73] What would it mean to reread decisions as *cases* in the sense of instances—as emanations of history, culture, racialization, gender, class?

That is to say, what does it mean to read them as written by specific people in specific circumstances, as products of a moment of crisis—a conjuncture—in which their crafters bring to bear the sedimented layers of subjectivity as well as and even as much as a decision that issues, fully formed and yet untouched by circumstance, like Athena from the forehead of Zeus? By convention, legal scholars invoke "the c/Court" unself-consciously, as though it spoke with a united voice (aside from dissents, which we'll discuss below), but we know from experience that whether consisting of an individual judge or a panel of justices, "the court" is comprised of human decisionmakers. People with political and ideological commitments, or at the very least an implicit—or sometimes explicit—sense of how the world is and should be organized.

One decision we might reflect upon here is *Plessy v. Ferguson*,[74] at least in part because it is such an important touchstone that it is one of the few Supreme Court cases commonly introduced to schoolchildren.[75] Certainly, the standard analysis of *Plessy* is immensely valuable: that it cemented almost two decades of legalized Jim Crow legislation throughout the South (and, if we're honest, the North as well), constructing a doctrine that it took another half-century to begin to disassemble. But what happens when we read the majority decision in *Plessy* in an attentive and fine-grained way?

Even the opening narrative explanation of the opinion reveals part of what is at stake. The first "fact" that the syllabus lists is "[t]hat petitioner was a citizen of the United States and a resident of the State of Louisiana, of mixed descent, in the proportion of seven eighths Caucasian and one eighth African blood; that the mixture of colored blood was not discernible in him."[76] Immediately, thereby, the text sets up the rules of engagement. How much "African blood" Homer Plessy has in him, that it is identified as "African" in the first place, given that his Black ancestor was probably born on American soil, that even though his Blackness is "not discernible" (which itself raises any number of questions) he is identified as "colored": these words powerfully suggest the logic of the "one drop" rule that undergirded segregation for decades.

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[73] Though of course, what kinds of circumstances are and are not analogizable is itself the stuff of endless (and endlessly fascinating) inquiry. *See* Cass R. Sunstein, *On Analogical Reasoning*, 106 HARV. L. REV. 741 (1993).

[74] Plessy v. Ferguson, 163 U.S. 537 (1896).

[75] *See generally* Brown v. Bd. of Educ. of Topeka, 347 U.S. 483 (1954) (occurring after and overturning *Plessy*, it is evident that *Plessy* would be taught as a predicate to introducing the even more commonly taught case of *Brown*).

[76] *Plessy*, 163 U.S. at 538.

The word "Caucasian" itself was just entering general discourse.[77] Rooted in German race science in the late 18th century, "Caucasian" as a racial category found its way to the United States via the pseudoscience of craniometry, which argued for correspondences between racial groups, intelligence, and skull size.[78] Although it did not become a popular way of describing white people until the early 20th century, the Court's use of "Caucasian" gestures towards American investment in eugenics and scientific racism that blossomed in the second half of the nineteenth century.

From this unspoken and taken-for-granted racial categorization, it becomes a short road to the heart of the Court's doctrinal conclusion: "[t]he object of the [14th] amendment was undoubtedly to enforce the absolute equality of the two races before the law, but in the nature of things it could not have been intended to abolish distinctions based upon color, or to enforce social, as distinguished from political equality, or a commingling of the two races upon terms unsatisfactory to either."[79] Scholarship unpacking the meaning of the racial invocations to 19th century jurists help augment our comprehension of the case in ways that pure tracing of the opinion's constitutional interpretation cannot provide.

We might look as well at the context in which the decision was written. By the mid-1890s when the case was litigated and decided, the "Lost Cause" narrative was the dominant portrayal of the Confederacy,[80] and the conventional white wisdom about Reconstruction was that it had been a failure (either—for Republicans—a well-meaning one or—for Democrats—a disastrous and destructive one). Union veterans of the Civil War were no longer regarded as heroes who fought for freedom, but instead were frequently represented as money-grubbers, demanding ever-higher pensions.[81] Revisionist narratives of the antebellum South were bestsellers throughout the country: Thomas Nelson Page's novels of "Ole Virginia" deployed the voices of delighted enslaved people who worshiped their enslavers and enjoyed significant sales from the late 1880s onward.[82]

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[77] *See* Carol C. Mukhopadhyay, *Getting Rid of the Word "Caucasian", in* EVERYDAY ANTIRACISM: GETTING REAL ABOUT RACE IN SCHOOL 12, 13 (Mica Pollock ed., 2008).

[78] *See generally* CLAUDIO POGLIANO, BRAIN AND RACE: A HISTORY OF CEREBRAL ANTHROPOLOGY (Brill 2020).

[79] *Plessy*, 163 U.S. at 544.

[80] For a detailed description of the Lost Cause narrative, *see generally* GARY W. GALLAGHER ET AL., THE MYTH OF THE LOST CAUSE AND CIVIL WAR HISTORY (Gary W. Gallagher & Alan T Nolan eds., Ind. Univ. Press (2000).

[81] For a dramatic example of this, *see The Insatiable Glutton* (illustration), *in* Puck Magazine (Dec. 20, 1882) (depicting a white veteran of the war shoving federal money into his mouth with multiple hands)

[82] *See*, *e.g.*, THOMAS NELSON PAGE, IN OLE VIRGINIA (Charles Scribner's Sons 1896) (1887) (consisting of a short story collection which depict the idealized antebellum life); *see also* THOMAS NELSON PAGE, RED ROCK: A CHRONICLE OF RECONSTRUCTION (Charles Scribner's Sons 1898) (depicting a despicable Black politician to represent the supposed horrors of

"Plantation romances" that emphasized a paternalistic view of slavery and pictured Southern plantations as prelapsarian agrarian paradise were also immensely popular.[83]

Even then-contemporary highbrow literature from respected writers like Henry James romanticized the South, portraying Confederate officers as chivalrous, if occasionally irascible, charmers.[84] Finally, the terrorist violence of lynching began its steady rise in the 1880s, disseminating a discourse of Black male animality and sexual license.[85]

In this context, then, the Court's decision in *Plessy* is hardly a surprise. Even the seemingly neutral description of the plaintiff invokes racist regimes of differentiation and segregation. The justices were operating in a political and cultural environment saturated by anti-Black violence, romanticized retellings of the slavery-era South, a thorough and thoroughly negative re-evaluation of Reconstruction, and an almost complete exclusion of Black people from the mainstream political and economic sphere. Justifying the segregation of public conveyances, rather than being a break from previous judicial practice, was an expression of common sense, formalizing what already seemed obvious to the majority of white Americans. Legal readers know this, of course, but unpacking the tropes alluded to in the case does something that simply nodding toward the opinion's date, or to the fact that it was— eventually[86]—overturned, simply does not.

Reconstruction). It is perhaps helpful to note that Page was himself trained as a lawyer. *Thomas Nelson Page*, HARPERCOLLINS PUBLISHERS, https://www.harpercollins.com/blogs/authors/thomas-nelson-page (last visited May 16, 2024). Page was an 8-year-old scion of Virginia gentry when the Civil War broke out, and that after the war his family remained comparatively impoverished. *See id.*

[83] *See* Lucinda MacKethan, *Plantation Romances and Slave Narratives: Symbiotic Genres*, S. SPACES (Mar. 4, 2004), https://southernspaces.org/2004/plantation-romances-and-slave-narratives-symbiotic-genres/.

[84] *See* HENRY JAMES, THE BOSTONIANS (Macmillan & Co. 1886) (portraying, at least somewhat sympathetically, the character conservative former Confederate officer Basil Ransom); *see also* WILLIAM DEAN HOWELLS, A HAZARD OF NEW FORTUNES (Boni & Liveright, Inc. 1889) (portraying the arguments of Confederate-supporting Colonel Woodburn as important to consider "fairly").

[85] For a discussion of the development of this discourse, *see generally* Sharon Stanley, *Unbridled Stallions and Mad Bulls: Masculinity, Race, and Sexuality in Hemispheric Perspective*, 42 NEW POL. SCI. 378 (2020). For probably the most famous example of this image of Black masculinity, *see generally* The Birth of a Nation (David W. Griffith Corp. 1915) (depicting a story in which a mixed-race man attempts to rape a virginal young white woman who leaps to her death rather than submit herself to his desires). For a contemporaneous analysis of the ways that the libel of Black male sexual violence was used to further white supremacy, *see generally* IDA B. WELLS, SOUTHERN HORRORS: LYNCH LAW IN ALL ITS PHASES (The N.Y. Age Print 1892).

[86] And not without considerable yearslong effort, uncertain at the time to produce the desired outcome. For a well-researched history, *see* SARAH GARLAND, DIVIDED WE FAIL: THE STORY OF AN AFRICAN AMERICAN COMMUNITY THAT ENDED THE ERA OF SCHOOL DESEGREGATION

In some ways, this analysis also requires a level of empathy in its cognitive dimensions.[87] As readers, we do not share in the justices' perspective (indeed, we are horrified by it). But it is impossible to closely and attentively read the *Plessy* decision without attempting to understand not just its legal stance, but also the affective territory it claims. This decision is the result of an alchemical brew of contempt, fear, racial animus, and from that, a repudiation of the promise of the Fourteenth Amendment. Moreover, the decision itself reveals an inability—or refusal—of the justices who wrote and signed onto the decision to identify with the plaintiff: what it feels like to be consigned to second-class citizenship; the humiliations Black Americans were subjected to, especially but not exclusively in the South; and the experience of seeing only recently bestowed rights be eroded, first slowly and then all at once.

What we are calling attentive reading gets us where just reading the rhetoric of *Plessy* or understanding its social and political context does not. It is this kind of reading—multidimensional, simultaneously intimately close to the text and surveying its parameters—that we suggest legal scholars and, ideally, practitioners and judges, can be further encouraged to bring to their work.

In the next section, we look at this methodology in practice, zeroing in on a specific site of legal decision-making: the jurisprudence of former South African Constitutional Court justice Margaret Victor. We argue that Victor's attentive, fine-grained reading of the 1996 South African Constitution is intertwined with her commitment to the principle of ubuntu, a concept shared by Zulu and Xhosa speakers, as well as members of related Bantu language groups. Roughly translated as "humanity," *ubuntu* is a complex set of values based in mutuality, empathy, and interdependence, expressed in the Zulu maxim "Umntu ngumtu ngabantu": [a] person is a person through other persons."[88] In many ways, this proverb accords with our definition of

(Beacon Press 2013).

[87] Of course, it should also be self-evident that reading the case well requires affective empathy as well, but many commentators concede that already. Indeed, this may be the primary reason why the case is still so widely taught even though no longer good law.

[88] For a detailed discussion of *ubuntu, see* Aloo Osotsi Mojola, *Ubuntu in the Christian Theology and Praxis of Archbishop Desmond Tutu and its Implications for Global Justice and Human Rights*, *in* UBUNTU AND THE RECONSTITUTION OF COMMUNITY 30 (James Ogude ed., Ind. Univ. Press 2019). There is some debate about the origins of *ubuntu* as a philosophy with a long history in South African freedom struggles. Michael Onyebuchi Eze argues that *ubuntu* was popularized by Desmond Tutu during the Conference for a Democratic South Africa in 1993 so as to provide a rationale for and a mode of legitimation of the Truth and Reconciliation Commission and to emphasize "a deliberate choice to prefer understanding, reparation, and *ubuntu* over vengeance, retaliation, and victimization." CHRISTIAN B.N. GADE, A DISCOURSE ON AFRICAN PHILOSOPHY: A NEW PERSPECTIVE ON UBUNTU AND TRANSITIONAL JUSTICE IN SOUTH AFRICA 15 (Lexington Books 2017).

empathy: a recognition that only by understanding the larger context of experience, location, and decision-making can we fully see meaning.

III. ATTENTIVE JURISPRUDENCE

As readers of law are well aware, legal structures come from the accretion of sometimes-unacknowledged cultural, social, and institutional expectations. To return to Sara Ahmed: "institutions become given as an effect of the repetition of decisions made over time, which shapes the surface of institutional spaces."[89]

Perhaps this is particularly true of new Constitutions. Embodying, as they are likely to do, a sea change in a nation's governance structure and even its conception of itself, they almost inevitably need to accumulate credibility through repetition and reiteration of the values inscribed within them. In this context, the safest route to take in evaluating the constitutionality of a law or regulation (while implicitly reinstantiating the values animating the Constitution itself) is to strictly adhere to the most formalistic modes of legal reasoning: look closely at the text of the constitution, measure the language of the impugned law against it, consider facts as needed to understand the problem before the Court, and then come to a reasoned decision. Not following this standard methodology could run the risk of inconsistent or even chaotic decision-making and precedent-setting. Worse, it might be seen as hopelessly nonlegal.

Nonetheless, Judge Margaret Victor's constitutional jurisprudence challenges us to expand beyond a narrow mode of fealty to text over context.[90] Her body of work shows us that the temptation to hew to a narrow legal analysis that elides the meaning or experiences of the law's subjects is neither necessary nor complete. To support the South African Constitution's guarantee of "human dignity, equality and freedom"[91] she combines a close reading of the Constitution itself with an insistence on integrating a larger and intersectional perspective in relation to both the letter and the spirit of the Constitution. This perspective provides a wider and deeper view of not just laws themselves, but the historical legacies that they perpetuate: legacies of legislative and social norms drenched in violence, inequality, and dehumanization. Judge Victor deploys attentive reading with a sharpened eye towards context and empathy for people who previously had little access to

[89] SARA AHMED, QUEER PHENOMENOLOGY: ORIENTATION, OBJECTS, OTHERS 133 (Duke Univ. Press 2006).

[90] We came to Margaret Victor's work through involvement in a conference in Johannesburg to honor her on the occasion of her retirement from the bench. Many thanks to Professor Penelope Andrews for inviting us to participate and to Professor Andrews, Judge Victor and other conference participants for providing the spark for this essay.

[91] *See* S. AFR. CONST., 1996.

legal structures, and for whom, in many ways, the 1996 Constitution was written.

Jurisprudential mastery of attentive reading is analogous to the skill of experienced cinematographers: they can move crisply and smoothly between foreground and background, individual actors and larger themes, taking into account the details of the case while, at the same time, taking in the panoramic sweep. Victor's imbrication of fine-grained reading, historical and cultural context, and empathy into her judicial opinions and concurrences takes into account not just laws and the Constitution as written (although she certainly does that); it embraces both the long and difficult history of South Africa and the promise that the 1996 Constitution made to all South Africans, especially the most marginalized.

Victor's signal contribution to South African constitutional jurisprudence combines thoroughly argued textual reason with profound judicial—read: *legal*— empathy. Her interpretation and implementation of the South African Constitution offers a model of how jurisprudence can be imagined.

Of Judge Victor's many opinions, dissents and concurrences, we'd like to focus briefly on three: *Mahlangu and Another v. Minister of Labour and Others*, *Tshabalala v. The State*, and *Centre for Child Law v. Director General: Department of Home Affairs and Others.*[92] Each of these exemplifies her radically attentive jurisprudence: thinking and writing that get at the root causes of both the harm to be remedied and the meanings of the constitutional values that alleviate and make amends for those harms.

A. Mahlangu: Attentive to Context and Intersection

On the surface, *Mahlangu* is a benefits case: the plaintiff asks that the government provide compensation to the survivor of a domestic worker who died in her place of employment as it would for someone killed in a factory or any other workplace. Sylvia Bongi Mahlangu was employed as a domestic worker for 22 years by the same family. In early 2012, she drowned in her employers' pool while no one else was at home. She was partially blind and could not swim, which suggests that she slipped and fell into the pool.

Even in her initial description of the issues to be adjudicated in the case Victor does not limit herself to acontextual legal queries. Instead, she turns expansively to the larger setting of Mahlangu's labor. "Domestic workers," she writes, "are the unsung heroines in this country and globally . . . [yet] domestic work as a profession is undervalued and unrecognised."[93] She then quotes

[92] Despite being South African Constitutional Court decisions, these opinions are not readily available in U.S. legal databases. Therefore, copies are on file with authors and citations will make reference to paragraph numbering in printed editions.

[93] *Mahlangu and Another v. Minister of Labour and Others* 2020 (CC) at 24 para. 1-2 (S. Afr.).

directly from the Constitution, citing its elaboration of the new South Africa's "founding values":

> The Republic of South Africa is one, sovereign, democratic state founded on the following values:
>
> a. Human dignity, the achievement of equality and the advancement of human rights and freedoms.
> b. Non-racialism and non-sexism.[94]

In her decision, Victor attends to the language of the Constitution as she delves into the legacies of apartheid South Africa to explain what she defines as a central issue of this case: why domestic workers were excluded from these benefits in the first place. In many ways, the cultural and historical stakes here are greater than the legal ones. Like the vast majority of domestic workers in South Africa, Ms. Mahlangu was a Black woman. This fact is, as Victor states, not random and it is certainly not inconsequential. Rather, it is the effect, as her opinion points out, of "the intersectional impact of discrimination on domestic workers . . . on grounds of social status, gender, race and class."[95]

Because it is considered women's work, domestic labor is denigrated; because of the low status of this feminized work, it has been relegated to the most marginalized populations, in this case Black women. Such a development cannot be genuinely understood without attentiveness to context. The "indignities" Black women experienced "at the intersection or convergence of multiple oppressions . . . can tell us something about the 'grand design' or brutality of apartheid. Intersectionality indeed becomes a useful analytical tool to understand the convergence of sexism, racism and class stratification and the discriminatory logic embedded in these systems."[96]

More importantly, *Mahlangu* can itself be an analytical and political tool. If we empathically contextualize the conditions that made Ms. Mahlangu's exclusion from the law defining who is entitled to compensation for death or injury at work, we can more complexly understand the legacies of apartheid and the paths that South African society must follow to undo them. *Mahlangu "*might aid us in the quest to make a decisive break from our past towards the establishment of a democratic, compassionate and truly egalitarian society. And intersectional framework therefore enables this Court to shift its normative vision of equality and the 'baseline' assumptions embedded in anti-discrimination law."[97]

The concept of intersectionality that Judge Victor invokes, first formulated by U.S. legal scholar Kimberlé Crenshaw,[98] is central to this

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[94] S. AFR. CONST., 1996.
[95] *Mahlangu*, (CC) at 24 para. 18.
[96] *Id.* at para. 102.
[97] *Id.*
[98] *See generally* KIMBERLÉ CRENSHAW, ON INTERSECTIONALITY: ESSENTIAL WRITINGS (New Press

decision for two reasons. First, it transports jurisprudence to the site of its object of analysis: the lived experience of Black women domestic workers. Intersectionality depends on what anthropologist Kath Weston has called "street theorizing"[99]: the everyday application of analytical categories by those experiencing the facts on the ground. It elevates what Black women in domestic work deeply know: that they and their work are derogated, and that their subordination has wide-ranging interpersonal, social, financial, and structural ramifications.

Second, Victor recognizes that while intersectionality is tacitly intrinsic to the South African Constitution through its guarantees of freedom, equality, and human dignity, regulation and legislation have not caught up to the expansive implications of those constitutional commitments. To live with dignity requires not only receiving equal treatment under the law, but also demands that the reasons for the ongoing denial of that equality be recognized, acknowledged, and remedied. In other words, Victor teaches, even engaged readers of law cannot comprehend how central this seemingly minor case about death benefits is to the entire political fabric of South African society unless they contextualize it with conceptual empathy for the millions of women impoverished and marginalized by the status quo.

At the same time, Victor lingers on the word "dignity"—part of the appeal lodged by the plaintiff and amici—and what it means in this case. In a separate section entitled "Human dignity challenge," she scrutinizes how dignity, not just equality, is a crucial term in this case.[100] She quotes Section 10 of the South African Constitution, "[e]veryone has inherent dignity and the right to have their dignity respected and protected."[101]

Victor methodically defines the downstream consequences of what it means for Mahlangu in particular and domestic workers in general to have their dignity respected. The undervaluation of domestic work as not "real" work (in large part because it is identified with women) is an assault on dignity. The exploitation of domestic workers is an assault on dignity. The exclusion of domestic workers from the Compensation for Occupational Injuries and Diseases Act is an assault on their dignity. The denial of the Constitution's promise of "self-worth and . . . respect for each individual" is an assault on dignity. Since "dignity" is represented in the Constitution as a necessary component of a democratic state, the withholding of dignity from domestic workers makes it clear that they have "not benefitted from democracy."[102]

2017).

[99] *See* Kath Weston, *Theory, Theory, Who's Got the Theory?: Or, Why I'm Tired of That Tired Debate*, 2 GLQ 347, 348-49 (1995).

[100] *See Mahlangu*, (CC) at 24 para. 108.

[101] *Id.*

[102] *Id*. at para. 113-14.

In her concluding paragraph, Victor uses the word "dignity" or "indignity" three times: deciding for the plaintiff "will contribute significantly towards repairing the pain and indignity suffered by domestic workers"; it will adjust South African institutions as to domestic workers "place and dignity in society;" and it "should restore their dignity."[103] Engaging both with the oppressive history of apartheid South Africa towards Black women in particular, and orbiting around dignity as an indispensable nexus, Victor brings a methodological multiplicity and complexity to raise up both the language of the Constitution and the experiences of Black domestic workers.

B. Center for Child Law: Attentive to Culture and History

Judge Victor's layered reading operates powerfully in *Centre for Child Law v. Director General: Department of Home Affairs.* The issue in the case—the state preventing a South African man from registering his baby as a citizen—is the result of a series of interconnected events: a couple (South African man, Congolese woman) married in a traditional Congolese ceremony but not issued a marriage license by the state; the woman of the couple overstaying her visa in South Africa due to advanced pregnancy; the South African authorities not accepting their marriage as legally valid, thus determining that their child was born out of wedlock; the refusal of the Department of Home Affairs to register the baby since the mother was undocumented; the insistence that the child could not be registered by the officially unmarried father or take his last name, rendering her stateless. Moreover, the baby has no access to a parental surname. Since the mother is undocumented, and hence in the eyes of South African law does not exist, the baby cannot take her name. Since the father is not married to the mother and is prevented from submitting a birth certificate, the baby is barred from having his name as well.

Victor zeroes in on one of the central injustices of this case: the invidious distinction South African law makes between married and unmarried couples (the fact that an undocumented immigrant may not receive a birth certificate for her South African-born child is left for another day). Her opinion takes a two-pronged approach, one centered around the child and one concentrating on the father. Both emerge from the same critique. "I do not think it is justifiable," she writes, "to distinguish between children born to married parents and children born to unmarried parents."[104] Unmarried fathers are erased from the child's official identity unless accompanied by the child's mother who attests that he is the father of the child. Fathers may be fathers only with permission and "are stripped of the rights that married

[103] *Id*. at para. 120.
[104] *Ctr. for Child L. v. Dir. Gen.: Dep't of Home Affs.* 2021 (CC) at 31 para. 36 (S. Afr.).

fathers have to register children in their own name as these rights are made conditional and dependent on their relationship with the mother."[105]

The opinion's analysis of underlying social structures, though, extends beyond the fact that this discrimination is based on marital status and gender.

Judge Victor takes on the historical opprobrium visited on unmarried couples, and especially children born outside of wedlock, traditionally derogated as "illegitimate." These values run counter to the Constitution's investment in human dignity. They perpetuate what she calls "the stereotypical norms of the marital family,"[106] as well as the long-standing second-class citizenship of children born to unmarried parents. These unnecessary distinctions deny an unmarried father's right to be recognized as a full parent of his child, disarticulated from his relationship with the child's mother. In a word, they deny him *ubuntu*, the valuation of a person as intrinsically human, entitled to dignity, respect, and communal acceptance.

This defiance of *ubuntu* operates even more intensely for the child, who is in effect erased from her family of origin and stigmatized by so-called illegitimacy. Such a liminal status is imposed on the child by "outmoded legal terminology which goes to the core of dignity and equality."[107] Equally importantly, a child has her own identity that confers the same rights as every other citizen, one of which is to be free from discrimination on the grounds of social origin. Again, Victor's analysis digs into the roots of this discrimination: the intersectional social marginalization of people by race, gender, class and nationality, among other factors. Moreover, the especial vulnerability of this child's mother, an undocumented immigrant, is not just a detail: it is crucial to understanding the stakes of the case.

The thread that binds these arguments together is, for Victor, the question of naming. Being able to register a child with his own surname is the defining signifier of parenthood for the father and access to an official identity for the child. The lack of a surname also has bureaucratic ramifications. Section 9 of the 1992 Registration of Births and Deaths Act states that "[n]o person's birth shall be registered unless a forename and a surname have been assigned to him."[108] Unregistered children do not exist in the eyes of the state; they exist in an administrative limbo, stateless and unnamed.

In her opinion, Judge Victor repeatedly recurs to a parent's right to bestow a surname upon their child. Sections 9 and 10 of the Registration of Births and Deaths Act make a clear distinction between married and unmarried couples in this respect: for married couples, a child takes the father's surname and for unmarried couples, the mothers. A surname is more than an identifier. Family names suture individuals to selfhood under the

[105] *Id*. at para. 52.
[106] *Id*. at para. 72.
[107] *Id.* at para. 69.
[108] Births and Death Registration Act 51 of 1992 (G. 13953) Ch. II § 9(6) (S. Afr.).

state, so to have no surname is an additional delegitimation of the baby's existence as a citizen and potential state actor.[109] At the same time, the Act requires that a child's parents' marital status be advertised by their surname: section 9 of the Act directs that the child of a married couple will take a father's surname, whereas section 10 compels the mother to give a child her surname, unless the father is there, attests to his paternity, and claims a shared investment in the raising of the child.[110]

Victor's investment in surnames, and her emphasis on surnames as serving a combination of personal, familial, institutional, and governmental functions lays the groundwork for her larger argument: that a patriarchal culture prioritizes identification with a father to give a child a legitimate (in both meanings of the word) identity. A surname is not simply a requirement of bureaucratic regulation or a sign of belonging to a family. Rather, it reflects and reproduces a long-standing pattern of patrilineality that is itself a holdover from the male dominant, white supremacist apartheid regime.

She builds this analysis gradually, beginning from the monopoly that marriage has on assigning a child a surname: "I do not think it is justifiable to distinguish between children born to married parents and children born to unmarried parents for the purpose of regulating what surname may be given to a child."[111] But rather than claiming a male right to property in a child—a signal characteristic of patriarchy—Victor couches her argument in rights of access to naming, and by extension parenting, a child, the current practice of which discriminates on the basis of marital status, sex, and gender.[112] Victor characterizes this access as a positive good not just for the father but also for the child, who has the "right to bask in the parenting of *both* parents, irrespective of their marital status."[113]

At stake, too, is not just a man's "indignity of having his child registered as being born out of wedlock,"[114] but the discriminatory environment that marriage as an exclusionary institution generates. (Note here that Victor's rhetoric represents an important shift in perspective—away from the adult male as paterfamilias, and toward the child as valued individual person.)

Moreover, Victor points out the binarized gendering of marriage runs counter to the South African Constitution's claim to "equality" and "non-sexism," since "a gender-neutral and marital-neutral approach to the process of registration of a child's birth enhances substantive equality by abolishing

[109] Victor argues for state membership as a human right: "As children have a fundamental right to be registered immediately after their birth to acquire a nationality, it is not in the best interests of a child to be rendered stateless." *Ctr. for Child L.*, (CC) at 31 para. 21.
[110] *See id.* at para. 3 and 19.
[111] *Id*. at para. 36.
[112] *See id.* at para. 42-43.
[113] *Id*. at para. 46 (emphasis added).
[114] *Id*. at para. 53.

gendered and sexist stereotypes that regard women, and women alone, as responsible for the care of children."[115]

In addition, it threatens what, as we have seen, is Victor's primary commitment to the maintenance of human dignity for all of South Africa's inhabitants. *Ubuntu* is crucial to this process. She quotes *S v. Makwanyane*, the 1993 case that overturned the death penalty in South Africa, which invoked *ubuntu* as "a concept that 'recognises a person's status as a human being entitled to unconditional respect, dignity, value and acceptance' from the community."[116] From this statement, she reasons, we can conclude that "when we diminish the worth of even one segment of society, all of us lose a portion of our humanity."[117]

At this point, Victor dilates her argument from a negative analysis of the patriarchal investment in surnames to a positive invocation of *ubuntu*. Where patrilineality constructs a community defined by hierarchy and inequity, *ubuntu* insists on a family and community based in mutual assistance and equal value. Preventing an unmarried father from giving his child a surname is a relic of apartheid and "perpetuates the societal stigma attached to unmarried couples and their children. It deems [the father's] bond with his child as less worthy," since it can be grounded only in love and care rather than patriarchal ownership.[118]

Victor next turns her attention to the term that is the source of this invidious distinction: "out of wedlock." In effect, she argues "out of wedlock" is merely a euphemism for "illegitimate," a term that in its very meaning abrogates human dignity. At issue is the "supremacy of a married couple in comparison to unmarried couples,"[119] which stigmatizes both the couple and their children. Indeed, "penalising the child is an ineffectual, as well as an unjust way of forcing parents to comply with stereotypical norms of the supremacy of the marital family."[120] Finally, she cites an earlier case, *Bhe v. Magistrate, Khayelitsha*, which dealt with inheritance rights for children born outside a man's state-recognized marriage, but within an indigenously permitted polygynous family. *Bhe* traced the stigma against extra-marital children to a Dutch colonial practice in which such children were linked legally and by name only to their mothers.

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[115] *Ctr. for Child L. v. Dir. Gen.: Dep't of Home Affs.* 2021 (CC) at 31 para. 55 (S. Afr.).
[116] *Id*. at para. 65 (quoting *S v. Makwanyane* 1995 (3) SA 391 (CC) at para 328 (S. Afr.)). Strikingly, one of the primary reasons for the then-interim Constitutional Court in overturning the death penalty was that it "was used in the past to conduct judicial killings against freedom fighters and opponents of the apartheid system." Press Release, Chrispin Phiri, Ministry of Just. & Corr. Servs. (Sept. 4, 2019) (on file with author), https://www.justice.gov.za/m_statements/2019/20190904-DeathPenalty.pdf.
[117] *Ctr. for Child L.*, (CC) at 31 para. 65.
[118] *Id*. at para. 67.
[119] *Id*. at para. 70.
[120] *Id*. at para. 72.

In this decision, Victor weaves an ever-expanding spiral of argument. She starts with a single word and concept, the surname, scrutinizing its various significations. She then expands her reach in an analysis of how surnames have been assigned according to marital status and gender. As she further limns the circumference of the social, political, and regulatory work that surnames do, she draws within the ambit of her argument an *ubuntu*-based case against not just the discrimination against the children of unmarried couples, but the cultural primacy of marriage at all. And in her final move, she both expands the context to the colonial (and by extension apartheid) past and reconnects it to the initial question of surnames.

It's striking, then, that the dissent, written by Mogoeng Mogoeng, adopts exactly the legal reasoning that Judge Victor's methodology implicitly rejects. Taking what in the U.S. might be classified as a rigidly textualist approach, the dissent argues that the terms of ruling legislation unconstitutional must be limited to laws whose terms would be "unduly strained" when measured against the Constitution. Parliament is the branch of government invested with legislative authority, and courts should assume that it has "carried out its legislative functions, alive to the spirit, purport and objects of the supreme law of the Republic and for the greater good of the populace."[121] More to the point, in Mogoeng's view, Victor's practice of multifaceted attentive reading is imposing meaning unintended by laws, rather than simply following "their ordinary grammatical meaning, construed with due regard to the objects and purport for their enactment."[122] According to the dissent, then, while it's true that there has been long-standing discrimination against unmarried couples and the children born to them, that was not the intention of the measure under consideration.

Thus, Mogoeng insists upon what he sees as a close reading of the statute and the Constitution and does not see them as in conflict. However, he interprets the Constitution not on its own terms but in the shadow of the legislation under review. To him, "out of wedlock" and "illegitimate" are simply neutral terms with specific and knowable legal ramifications. They need not be understood as words that are inextricable from a signifying chain encompassing the power of patriarchy and the subordination of women (or, perhaps, they have precisely the correct amount of patriarchal content[123]). In

[121] *Id*. at para. 97 (Mogoeng, J. dissenting).

[122] *Id*.

[123] On this topic, Mogoeng's tenure on the Constitutional Court was not without controversy. While a passionate supporter of the separation of powers (*see, e.g.*, *UDM v Speaker of the National Assembly* 2017 89 SA (CC) at para. 2, 63, 69, 93 (S. Afr.)), Mogoeng had a much rougher record in cases brought for claims of gender-based violence. As a High Court judge in Bophuthatswana, he cited the "tender approach" of a man convicted of raping a fourteen-year-old girl as the rationale for imposing a lighter sentence than the one initially determined by the trial judge. *See Sebaeng v. State* 2007 16 (SA) at para. 4, 5, 6 (S. Afr.). In other cases, he claimed that intimate partner rape was not as serious as stranger rape. *See*

contrast with Victor's practice of attentive reading, Mogoeng's interpretation is textual formalism at its most unengaged.

C. Tshabala: Attentive to Gender and Power

The last case we want to consider intervenes directly in the debate between formalist and contextualized jurisprudence. The facts of *Tshabalala* are brutal. A group of men terrorized a neighborhood by breaking into homes, looting, assaulting the residents and raping several women. Since not all the men were actively engaged in physical sexual assault—instead some were acting as lookouts for the others—the defendants argued that they should not be accused of rape; at worst they were accomplices.

The majority opinion in the case made clear that since rape is a crime not of sex but of targeted, gender-based violence, all the men involved were equally guilty of rape even if only a few of them actively sexually assaulted women. It argued that rape "perpetuates gender inequality and promotes discrimination"[124] and hence is explicitly in contradiction to the Constitution.

What's fascinating about this decision is that although it cites the issues of gender-based violence, it does not really look to the preexisting definitions of rape that were grounded in the prerogative of men over making and enforcing laws and the erasure of women's experience and understanding of the threat of male sexual assault, nor to how these notions made this violence possible in the first place. In her concurrence, by contrast, Judge Victor dismantles how rape as a crime had a specific and inflexible definition instantiated by male legislators, for whom it was primarily an offense against men's property interest in women (as well as an expression of male dominance), not against a woman's dignity and bodily autonomy, let alone women's right to live without fear of male sexual violence. Bringing to bear feminist theory and historical analysis, she argues that "sexist gender norms were embedded in our law of rape and were an obstacle to conviction" of the defendants.[125]

In Victor's context-driven reading, rape is more than the physical sexual assault of a single woman by a single man. It is, rather, an existential threat to women's access to "dignity, equality, security or safety" that the misogyny bred in a patriarchal society imposes on women of all ages and conditions (in this case, the youngest was fourteen and one woman was visibly

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Moipolai v. State 2007 53 (SA) at para. 23 (S. Afr.). Additionally, that a man who lashed his girlfriend to his car and dragged her fifty meters at "a fairly high speed" was not fully responsible for his actions because he "showed remorse . . . was provoked by the complainant and the complainant did not sustain serious injuries." *See State v. Mathibe* 2001 8 (SA) at para. 1, 5 (S. Afr.).

[124] *Tshabalala v. State; Ntuli v. State 2019 (CC) at 48* para. 53 (S. Afr.).

[125] *Id*. at para. 83.

pregnant). At the same time, Victor deepens the context of her analysis, taking into account that violence against women is inflected by the race and class of both the perpetrator and the victim. Moreover, she ponders the shift in South African feminist (and perhaps implicitly white) communities towards "crime control and the proper conviction and incarceration of men."[126]

While this is only speculation, we suggest that Victor's ambivalence towards a pro-law-and-order response to sexual violence is not disconnected from on the one hand the high levels of incarceration of Black men under apartheid, and on the other the accumulation of evidence of the racialization of incarceration in the US. Given Victor's investments in African American feminist theorizing and her connections to US legal academia, it would be surprising if she were not familiar with the series of works by Black female intellectuals on the racism inherent in mass incarceration in this country.[127] It is telling, then, that she concludes the section of her concurrence, "*The discourse of rape in South Africa,*" with the observation that "high prison sentences alone will not solve the scourge of rape."[128] Unlike the apartheid regime that preceded it, Victor argues, South African democracy cannot prosecute and incarcerate its way out of sexual systems rooted in group ownership of all women by all men, and the sense among Black South African men that one of their few routes to a sense of empowerment is by visiting violence on women.

By invoking *ubuntu*, Victor is invoking the core concepts on which the 1996 South African Constitution is based. This is very different from the founding concepts of the U.S. Constitution, with its emphasis on individual freedoms, especially "freedom from." In Judge Victor's words, "*ubuntu* conveys our fundamentally interconnected nature as human beings and how, when we diminish the worth of even one segment of society, all of us lose a portion of our humanity."[129] This vision seems to be particularly South African. But there is no reason that a Constitutional law seeking to understand and support freedom, equality and human dignity, and to take into account the reality of the lives it intersects with, cannot be compatible with United States law even with its differently articulated set of rights.

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[126] *Id*. at para. 91.
[127] For just a few examples prior to this case was heard by the Constitutional Court, *see generally* ANGELA Y. DAVIS, ARE PRISONS OBSOLETE*?* (2003); *see also* RUTH WILSON GILMORE, GOLDEN GULAG: PRISONS, SURPLUS, CRISIS, AND OPPOSITION IN GLOBALIZING CALIFORNIA (Univ. of Cal. Press 2007); *see also* MICHELLE ALEXANDER, THE NEW JIM CROW: MASS INCARCERATION IN THE AGE OF COLORBLINDNESS (The New Press 2010); *see also 13th* (Kandoo Films 2016).
[128] *Tshabalala*, (CC) at 48 para. 92.
[129] *Ctr. for Child L. v. Dir. Gen.: Dep't of Home Affs.* 2021 (CC) at 31 para. 65.

CONCLUSION

We do know we need to include some key caveats.

As we mention above, the histories of the South African Constitution and its various political commitments are quite different from those of the United States: because of the South African Constitution's roots in a liberation struggle defined by the fight for racial and other kinds of equality and its focus on counteracting the profoundly patriarchal and hierarchical apartheid regime,[130] its definition of rights is far more specific[131] and in some respects more far-ranging.[132] Principles of *ubuntu* are baked into the South African Constitution, whereas the framers of the American Constitution were more concerned with protecting individual rights from extraneous intrusion and less focused on the equality and potential of all people with a concomitant recognition of the humanity and dignity of all.[133] And of course we recognize the pitfalls of having recourse to non-U.S. legal sources and the controversial history that practice has brought with it.[134]

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[130] *See* S. AFR. CONST., 1996. The preamble to the 1996 Constitution reads:

> We, the people of South Africa,
> Recognise the injustices of our past;
> Honour those who suffered for justice and freedom in our land;
> Respect those who have worked to build and develop our country; and
> Believe that South Africa belongs to all who live in it, united in our diversity.
>
> We therefore, through our freely elected representatives, adopt this Constitution as the supreme law of the Republic so as to
>
> > Heal the divisions of the past and establish a society based on democratic values, social justice and fundamental human rights;
> >
> > Lay the foundations for a democratic and open society in which government is based on the will of the people and every citizen is equally protected by law;
> > Improve the quality of life of all citizens and free the potential of each person; and
> > Build a united and democratic South Africa able to take its rightful place as a sovereign state in the family of nations. *Id.*

[131] *See id.* (reflecting a specific commitment to anti-sexism and anti-racialism in their Bill of Rights located in Chapter 2 of the South Africa Constitution).

[132] *See generally id.* (this is best exemplified by the definition of citizenship and the reach of the franchise in each text).

[133] *See*, *e.g.*, U.S. CONST. art. I, § 2, cl. 3 (excluding Indigenous Americans and counts enslaved people as three-fifths of a person for the purposes of political representation); U.S. CONST. art. I, § 9, cl. 1 (extending the international slave trade until 1808); U.S. CONST. art. II, § 1 (establishing the Electoral College); U.S. CONST. art. IV, § 2 (requiring the return of self-emancipated people).

[134] Additionally, its controversial history as a source of U.S. jurisprudence. *See generally* William H. Pryor Jr., *Foreign and International Law Sources in Domestic Constitutional Interpretation*, 30 HARV. J.L. & PUB. POL'Y 173 (2006).

Our purpose here is to use Judge Victor's contextual jurisprudence as a shining example of the methodological approach available to readers of the U.S. Constitution. The goal of this article is to mitigate the claimed mandate of un- or under-examined historical context as the final word in assessing the meaning(s) of important legal writing. We want commentators instead to approach legislation and legal interpretation as part of an ongoing, shifting set of conversations that emerge from multiple sources. And to do so with a critical awareness of historical inequities that we would not wish to continue in the modern day. Indeed, we would argue that such an approach is not less, but *more* scholarly, even within the context of legal analysis, and acknowledges that legal decisions are not free-standing texts.

Of course, it is a truism of the legal world, and a truth of the law, that precedent grows and shapes over time, and that as readers we bring new approaches and insights. And we understand that the stakes in using this methodology in relation to Constitutional law are high: they have the potential to affect the lives of every American.[135] At the same time, the dominant style of Constitutional scholarship often operates within the logic of a zero-sum game, in which divergent comprehensions of the same important and rich source material are narrated, not as additive, but often as contradictory and mutually exclusive.[136]

In our definition of the term, attentive reading requires that scholars bring to bear multiple perspectives. They deploy a complex approach to what qualifies as "correctness" or truth, all while never presuming to have reached an end point to sophisticated reading of important texts and ideas.

This does not mean we have to identify or even agree with all possible interpretations or scholarly perspectives—we hope our analysis of *Plessy v. Ferguson* makes that clear. Indeed, we would argue that decisions that seem especially egregious require a deeper engagement with historical, cultural, and rhetorical context. They tease out the conditions of possibility for such a decision, and pinpoint where and how the opinions—the text—are composed. After all, "the court" is not a singular force of legal expertise, but rather a congeries of preconceptions, historical phenomena, cultural expressions, and personal investments.

In this context, we invoke again the centrality of empathy in the methodology of attentive reading—not just empathy for the litigants or their

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[135] Although, this remains true whether we acknowledge context or do not. In which case, isn't it simply better to acknowledge and account for context—more honest, more ambitious, more *moral*—it is inevitable.

[136] Exemplified in part by the debate over whether Biden-nominated Supreme Court Justice Ketanji Brown Jackson could legitimately consider herself an "originalist" with respect to Constitutional interpretation. *See* Adam Liptak, *Justice Jackson Joins the Supreme Court, and the Debate Over Originalism*, N.Y. TIMES (Oct. 10, 2022), https://www.nytimes.com/2022/10/10/us/politics/jackson-alito-kagan-supreme-court-originalism.html.

opponents, but rigorous embrace of multiple perspectives, and a deep comprehension of how the current state of affairs is forged by the relations of power (and disempowerment) and how any given decision will unfold in heterogeneous ways.[137] Attentive reading demands being aware of the swirl of language, history, and culture while still maintaining fidelity to the text at hand. While legal scholars are already expected to rely on their knowledge and comprehension of multiple decisions, the precedents that made those decisions possible, and the ways those decisions were developed and deployed as over time, we also want a consistent legal academic practice that lingers as much in and under the soil from which a decision sprang as its visible development, branches, and fruit. One that never believes cases have been exhaustively considered, only that they have been concluded.

Certainly, as the Pennsylvania justices whose opinions opened this article show, there exist American legal scholars, lawyers, and judges who dig into that soil. Margaret Victor simply provides us with some helpful examples to show what attentive jurists may be capable of seeing. We fervently hope that more readers of American law follow that lead.

We want readers of law not to shy away from contextual approaches to analyzing legal questions, nor to feel compelled to downplay or apologize for doing so. Instead, we hope to see the reading of law take on the never-finished and therefore always-incomplete sensation the literary theory trains for critical reading of any text.[138]

An oversimplified but instructive example: it is possible for anybody to pick up, read, and enjoy the many volumes in the *Harry Potter* series.[139] In addition, there is a subculture that has grown up in the course of the decades since the original books were published. Many children and adults have a deep knowledge of the Potter-verse: memorizing spells; cataloging the various

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[137] A good example of a lack of empathy in legislation was the 1994 crime bill. Rather than understanding the sources of the increase in violent crime, the needs of the communities in which this violence was having the greatest effects, the ways that the primarily racist discourse around the crack epidemic played out in the popular imagination, or how the contraction of access to education for incarcerated people gave them fewer paths away from criminal activity, the bill espoused a "get tough on crime" attitude. Combined with the Anti-Drug Abuse Act of 1986, which established asymmetrical penalties for possession of crack and powdered cocaine, the bill had major implications for Black and brown defendants. For a nuanced analysis of the bill's ramifications (even if its conclusions remain contestable), *see* Rashawn Ray & William A. Galston, *Did the 1994 Crime Bill Cause Mass Incarceration?* BROOKINGS INST. (Aug. 28, 2020), https://www.brookings.edu/articles/did-the-1994-crime-bill-cause-mass-incarceration/.

[138] For a recent example, *see generally* BARBIE (Mattel Films 2023) (drawing from both contemporary culture as well as both traditional embrace and longstanding resistance to Barbie dolls, thereby making us rethink what the character of Barbie can be).

[139] The Harry Potter series consists of seven volumes, the first of which was released in 1998. *See generally* J.K. ROWLING, HARRY POTTER AND THE PHILOSOPHER'S STONE (1997) (published in the U.S. as HARRY POTTER AND THE SORCERER'S STONE).

fantastical creatures who appear in the books and films; analyzing in depth the major and minor characters' biographies and actions; entering into debates over the interpretation and significance of events; gathering at conferences to share insights and sell merchandise. Some are deeply invested in the series' author, J.K. Rowling, and have engaged in sometimes vitriolic disputes about her political stances, especially and most recently her statements questioning the validity of transgender people's self-identification.

But although this expertise is impressive and requires a great deal of study, self-discipline, imagination, and commitment to community values, it does not constitute all there is to know about the world of *Harry Potter* or, for that matter, J.K. Rowling. Rowling wrote the original novel in the context of a Britain that had been under the control of the Conservative Party since 1979, most of it during the premiership of Margaret Thatcher.[140] In the *Harry Potter* books we can see both the influence of and resistance to the Thatcher era: on the one hand, an investment in inborn excellence regardless of upbringing, and on the other a championing of communal bonds (in sharp contrast to Thatcher's famous claim that "[t]here is no such thing as society," instead [t]here are individual men and women and there are families and no government can do anything except through people and people look to themselves first").[141] Indeed, we might see the whole world of Hogwarts as a riposte to Thatcher's claim that "there is no alternative" to capitalism and the free market: tuition is wholly covered by the Ministry of Magic,[142] for example.

More importantly, though, attentive reading of the *Harry Potter* books equips us to read texts that are more complex, more nuanced, and more challenging. Finding the nuance in *Harry Potter* can move us toward ever more demanding texts like Octavia E. Butler's also-fantasy genre work *Parable of the Sower*.

Just as legal scholars can point to both leading cases that define doctrine in contrast to more workaday decisions that apply legal existing rules to specific facts, readers of literature often implicitly distinguish enjoyable texts from the classics that merit repeated critical review. The former can be an immensely pleasurable and compelling to read; the latter offers significant intellectual reward to readers who engage in both fine-grained analysis of the written word, and deeply contextual comprehension of structural inequality and the tragic portents of climate change.

There is absolutely nothing wrong with appreciating text without looking deeply into subtext.[143] It is simply not what sophisticated readers and

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[140] Thatcher was the leader of U.K.'s Conservative Party from 1975-1990 and Prime Minister from 1979-1990.

[141] Interview by Douglas Keay with Margaret Thatcher, Prime Minister (Sept. 23, 1987).

[142] *See* Charlotte Alter, *J.K. Rowling Says Hogwarts is Free*, TIME (July 17, 2015, 4:13 PM), https://time.com/3963231/j-k-rowling-hogwarts-harry-potter/.

[143] Sometimes a cigar is just a cigar.

scholars seeking to interrogate and understand the world around them should be content to do. As readers of both law and literature, we should always have the most straightforward reading available.

But we mustn't end there—the world of contextual interpretation is open for so very much more.