

***THE LEGAL  
IMAGINATION***

***Studies in the Nature of  
Legal Thought and Expression***

45th Anniversary Edition

**JAMES BOYD WHITE**



Wolters Kluwer

Copyright © 1973, 2018 James Boyd White.

Published by Wolters Kluwer in New York.

Wolters Kluwer Legal & Regulatory U.S. serves customers worldwide with CCH, Aspen Publishers, and Kluwer Law International products. ([www.WKLEgaledu.com](http://www.WKLEgaledu.com))

No part of this publication may be reproduced or transmitted in any form or by any means, electronic or mechanical, including photocopy, recording, or utilized by any information storage or retrieval system, without written permission from the publisher. For information about permissions or to request permissions online, visit us at [www.WKLEgaledu.com](http://www.WKLEgaledu.com), or a written request may be faxed to our permissions department at 212-771-0803.

To contact Customer Service, e-mail [customer.service@wolterskluwer.com](mailto:customer.service@wolterskluwer.com), call 1-800-234-1660, fax 1-800-901-9075, or mail correspondence to:

Wolters Kluwer  
Attn: Order Department  
PO Box 990  
Frederick, MD 21705

Printed in the United States of America.

1 2 3 4 5 6 7 8 9 0

ISBN 978-1-4548-9712-5

## CONTENTS

- Foreword to the Anniversary Edition, xxi  
Preface to the Original Edition, xxv  
Acknowledgments, xxxiii  
Introduction to the Student, xxxix

### CHAPTER 1. THE LAWYER AS WRITER

- A. Learning the Language of the Law, 3  
Twain, Life on the Mississippi, 10; Dickens, American Notes, 13;  
Parkman, La Salle and the Discovery of the Great West, 15; Lévi-  
Strauss, Tristes Tropiques, 17; Mailer, Of a Fire on the Moon, 19; Twain,  
Huckleberry Finn, 21; Labov, The Logic of Nonstandard English, 27  
*Writing Assignment 1: A Variety of Languages, 34*  
*Writing Assignment 1, Alternative A: What Do Different Speakers Want  
to Know, 36*  
Questions: Defining a Language System, 37; Questions: Drawing  
Inferences from Speech, 39; Harvard Law Review, With the Editors,  
41  
*Writing Assignment 1, Alternative B: What Has It Meant for You to  
Learn the Legal Language System, 43*  
Question: Who Will You Become? 47; James, The Art of Fiction, 48
- B. Success for the Lawyer and Writer: Establishing the Right Relationship  
with His Language, 49
1. Defining the Relationship Between Self and Language: Troilus and  
Cressida, 51
  2. Traditional Ways of Controlling a Language, 56
    - a. Metaphor, 57  
Blake, The Sick Rose, 58; Conrad, The Mirror of the Sea, 60
    - b. Irony, 64  
Thoreau, Walden, 65
    - c. Ambiguity, 67  
Frost, The Road Not Taken, 69; Melville, Billy Budd, 70
    - d. The Power of the Language Maker, 76

*Writing Assignment 2: Controlling a Language System, 77*  
*Writing Assignment 2 (Alternative): Good Writing, 78*

## CHAPTER 2. THE LIMITS AND RESOURCES OF LEGAL LANGUAGE: AN INTRODUCTION TO YOUR LITERARY CIRCUMSTANCES

Introduction, 81

A. Your Language in a Universe of Languages — A Comparative

Anthology on Death, 83

1. What the Law Leaves Out: The Law Among Other Possibilities for  
 Expression, 84

a. The Georgetown Hospital Case: A Paradigm of Legal Speech? 84  
 Application of the President and Directors of Georgetown  
 College, Inc., 84

b. One Way the Lawyer Speaks About Death: The Will, 89  
 Casner, Will of Richard Harry Black III, 89; Will of Edmund  
 Burke, 94; Thomas, A Refusal to Mourn the Death, by Fire, of a  
 Child in London, 97; Ransom, Janet Waking, 98; Dickinson, The  
 Last Night That She Lived, 99

c. Versions and Conversions of Experience: Imagining What the  
 Law Would Do, 100

The Story of Burnt Njal, 101; Malory, Le Morte Darthur,  
 104; Clarendon, The History of the Rebellion and Civil Wars  
 in England, 107; Aeschylus, Agamemnon, 109; Adams, The  
 Education of Henry Adams, 110; Macaulay, The History of  
 England from the Accession of James II, 111

d. A Primary Distinction in Talk About Death: Humanity and  
 Inhumanity in Speech, 114

Cromwell, Letter to Colonel Walton, 114; Boyertown Burial  
 Casket Company, Shareholders Report, 117; Manual Outlines  
 “Perfect Sniper,” 118; Hoess, Commandant of Auschwitz, 119;  
 People v. Sherwood, 122

e. Justifying a Language by Its Special Purposes, 126

2. Defining Viciousness in Language and Imagination: The Rhetoric  
 of the Death Penalty, 127

Royal Commn. on Capital Punishment, Report, 128; Colorado  
 Revised Statutes, 130; Camus, Reflections on the Guillotine,  
 131; Furman v. Georgia, 137; Donnelly, Goldstein, and Schwartz,  
 Criminal Law, 142; Dickens, A Tale of Two Cities, 149; Orwell,  
 Shooting an Elephant, 151

3. Complications: False Pretenses and Rhetorical Resources, 153
  - Gibbon, *The History of the Decline and Fall of the Roman Empire*, 153; Hume, *The Life of David Hume, Esq.*, 157; Smith, *Letter to William Strahan*, 160; Thucydides, *History of the Peloponnesian War*, 165; Froude, *History of England from the Fall of Wolsey to the Death of Elizabeth*, 166; Shakespeare, *Romeo and Juliet*, 166
4. Professional Attitudes: Uses and Effects of Professional Rhetoric, 167
  - Joyce, *A Portrait of the Artist as a Young Man*, 168; Proust, *Remembrance of Things Past*, 170; Norton, *The Treatment of a Dying Patient*, 174
  - Writing Assignment 3: Defining by Comparison the Literature of the Law*, 181
  - Writing Assignment 3, Alternative A: The Law Controls the Speaker*, 182
  - Writing Assignment 3, Alternative B: Drafting a Complaint*, 182
  - Writing Assignment 3, Alternative C: A Judicial Opinion in the Georgetown Hospital Case*, 186
  - Writing Assignment 3, Alternative D: The Lawyer's Conversations on Death*, 186
- B. The Voices of the Lawyer, or: What Can You Say in the Language of the Law? 187
  - Problem: *The Sabbatarian and the Military Law*, 188; *Selective Service Act of 1967*, 189
  - Writing Assignment 4: The Lawyer's Conversations*, 192
  - Writing Assignment 4, Alternative A: The Voices of the Judge*, 194
  - Writing Assignment 4, Alternative B: The Lawyer's Conversations on Death*, 195
- C. Organizing Future Experience as a Lawmaker — How a Statute Works, 195
  1. The Statute as a Social Instrument: Establishing the Terms of Cooperation with Your Audience, 198
    - a. One Version of How the Statute Is Put to Work: Stating Issues and Defining Terms, 200
      - Tovey v. Geiser*, 202; *Young Women's Christian Home v. French*, 206
    - b. Three Problems on Defining Terms and Stating Issues, 210
      - Problem: *Stating the Issue*, 210; Problem: *Organ Transplant Statute*, 212; Problem: *Drafting an Abortion Statute*, 213
    - c. The Process of Cooperation Between Writer and Reader: The Statute as a Way of Giving Structure to Conversations, 215

2. A Case and Some Statutes on Wrongful Death, 218  
     Baker v. Bolton, 219; An Act for Compensating the Families of  
     Persons Killed by Accidents (Lord Campbell's Act), 220; Georgia  
     Code Annotated, 221; Illinois Annotated Statutes, 223
3. The Rhetoric of the Statute: How Is Such a Language to Be  
     Controlled? 225
  - a. The Fiction of Relief: Damages and Other Remedies, 225
  - b. Fictions II: The Intellectual Structure of the Statute, 227  
     *Writing Assignment 5: Drafting a Statute on Wrongful Death*, 240  
     *Writing Assignment 5 (Alternative): Other Statutes*, 242

### CHAPTER 3. HOW THE LAW TALKS ABOUT PEOPLE — “WHO IS THIS MAN?”

Introduction, 243

- A. Possibilities for the Definition and Expression of Character: The Law  
     Among Others, 246
  1. Character and Caricature, 247
    - a. Being True and False to Life, 247  
 Douglas, A Plea for Better Manners, 248; Forster, Aspects of  
 the Novel, 249; Macaulay, The History of England from the  
 Accession of James II, 251; Macaulay, Notes on the Indian Penal  
 Code, 253; Saki, The Talking-Out of Tarrington, 254; Saki, The  
 Open Window, 256; Hilton, Lawyers at Play, 259; Miranda v.  
 Arizona, 261; Dickens, Little Dorrit, 265; Dempsey, The Apple  
 Falls Close to the Tree, 267; People v. Haney, 268; Hoffa v. United  
 States, 272; Lamb, The Praise of Chimney-Sweepers, 274
    - b. The *Alcestis* of Euripides — A Play About Character and  
 Caricature, 274
    - c. The Uses of Caricature, 278  
 Forster, Aspects of the Novel, 279; Chaucer, The Pardoner's Tale,  
 281; Theophrastus, The Characters, 284; Fiction and Reality in Talk  
 About People: The Truth of Generalization, 286; Pope, Preface to  
 The Iliad, 287; The Form of Solemnization of Matrimony, 288;  
 I. and P. Opie, Children's Games in Streets and Playground, 288
  2. Other Possibilities for the Rendition of Character: Complications,  
 Inconsistency, and Detail, 289  
 Troyat, Tolstoy, 291; Lawrence, Women in Love, 294; Shakespeare,  
 Antony and Cleopatra, 298
  3. The Way Institutions Talk About People — A Fundamental  
 Paradox for the Law, 299

4. Real Talk About Real People: Is There Someone Out There? 304  
Proust, Remembrance of Things Past, 305; Clarendon, The History of the Rebellion and Civil Wars in England, 307; Adams, The Education of Henry Adams, 311
5. Defining Character in Your Own Life and Relationships, 313  
*Writing Assignment 6: Talking About Others, 315*  
*Writing Assignment 6, Alternative A: A Letter of Recommendation, 315*  
*Writing Assignment 6, Alternative B: Problems for a Prosecutor, 316*
- B. Talking About People in a Language of Labels: The Insanity Defense, 317
  1. Proposals and Practices, 319  
American Law Institute, Model Penal Code, 319; The Problem of Defining the Criteria of Irresponsibility, 320; Glueck, Law and Psychiatry, 324
  2. Talk About the Mind: The Fact of Difference, 328  
Marais, The Soul of the White Ant, 329, 331; Marais, The Soul of the Ape, 332; Tinbergen, The Study of Instinct, 333; Ferrin v. People, 335; Dickinson, A Bird Came Down the Walk, 336
  3. Mental Illness: A Medical Problem for Medical Experts? 336  
Washington v. United States, 337
  4. Using Labels by Following Purposes: The Living Language of the Criminal Law, 351
    - a. The Purposes of the Insanity Defense, 351  
Mental Health Act, 352
    - b. The Relation Between Label and Purpose in the Criminal Law: Malice Aforethought, 354  
People v. Conley, 354  
*Writing Assignment 7: The Insanity Defense, 360*  
*Writing Assignment 7, Alternative A: Purposes of People and of the Law, 362*  
*Writing Assignment 7, Alternative B: Drafting Instructions, 363*
- C. Judgment Without Labels — The Sentencing Decision, 363
  1. What Do We Do with Our Freedom? — Existing Law and Practice, 365  
Pennsylvania Statutes, 365; Commonwealth v. Ritter, 367; Glueck, The Sentencing Problem, 376; Talk About People in Terms of Groups, 386
  2. Expressing Judgments of Others: The Sentencing Problem as a Problem of Writing, 388  
Bralove, Wall Street's Hippies, 390; Clarendon, The History of the Rebellion and Civil Wars in England, 394; Zeno, Life, 398;

- Jane Austen's *Pride and Prejudice*: Writing About Judgment, 401  
*Writing Assignment 8: Sentencing Judgments — Explanation and Directions*, 407  
 Questions: Cases on Sentencing, 410; United States v. Lewis, 411; R. v. Power, 412  
*Writing Assignment 8 (Alternative): The Judge Defines Himself*, 413
- D. The Language of Institutional Disposition — Insanity, Sentencing, and Others, 413  
 Gerard, Institutional Innovations in Juvenile Corrections, 414  
*Writing Assignment 9: Telling the Truth About an Institution*, 423  
*Writing Assignment 9, Alternative A: Discovering the Truth About an Institution*, 424  
*Writing Assignment 9, Alternative B: Right to Treatment*, 425  
 Parker, The Frying-Pan, 425
- E. How Should the Law Use the Language of Race? The Legal Use of Social Labels, 430
1. The Old Days: The Vicious Use of Racial Language, 432  
 Louisiana Civil Code, 434; Laws of Mississippi, 437; Laws of Alabama, 439; Revised Code of North Carolina, 445; State v. Jones, 447; State v. Hoover, 448; State v. Mann, 451; Dave v. State, 455; Harper, Memoir on Slavery, 456; Hammond, Letters on Slavery, 458; Dew, On Slavery, 460; Lincoln, Address on Colonization to a Deputation of Colored Men, 462
  2. Amelioration and Abolition, 463  
 Burke, Sketch of a Negro Code, 464; Illinois Revised Statutes, 471  
*Writing Assignment 10: The Abolition of Slavery*, 474  
 Yetman, Life Under the "Peculiar Institution," 474; Lincoln, Reply to a Committee from the Religious Denominations of Chicago . . . , 477; Lincoln, Preliminary Emancipation Proclamation, 478; Lincoln, Annual Message to Congress, 479; Lincoln, Letter to Gen. J. A. McClelland, 480; Lincoln, Proclamation of Amnesty and Reconstruction, 481; Fleming, Documentary History of Reconstruction, 482; Myrdal, An American Dilemma, 485
  3. These Days of Reform: The Benign Use of Racial Language, 488  
 Questions: Racial Talk in Modern Law, 490; People ex rel. Altman v. Board of Education, 494
  4. What Is a Race? 496  
 Hernandez v. Texas, 497; Stewart, Negro Dialect in the Teaching of Reading, 500  
*Writing Assignment 11: Using the Language of Race*, 501



- Writing Assignment 11, Alternative A: Race and the School System, 501*  
*Writing Assignment 11, Alternative B: Race and the Law School, 502*  
*Writing Assignment 11, Alternative C: Race in the Judicial Opinion, 503*

## CHAPTER 4. RULES AND RELATIONSHIPS

- Introduction, 504
- A. Using the Rule to Organize Social Experience, 506
1. Learning How to Behave: The Formation and Management of Social Expectations, by Rules and Otherwise, 506
 

Johnson, Growing Up in the Black Belt, 507; The Rules of Amherst College, 512; Amherst College Bulletin, 513; Perry, Williamstown and Williams College, 515; Mayberry v. Pennsylvania, 518; Homer, Iliad, 522; Arnold, On the Discipline of Public Schools, 525; Hughes, Tom Brown's School Days, 527; Scott's Last Expedition, 533

*Writing Assignment 12: The Formation and Management of Social Expectations, 536*
  2. Vagueness, Specificity, and the Rule: The Implications of Form, 537
    - a. What Happens As a Rule Changes Form? 538
 

ABA Canons of Professional Ethics (1908), 538; ABA Code of Professional Responsibility (1970), 539

*Writing Assignment 13: The Form of Ethical Rules, 542*
    - b. The Constitutional Principle of Clarity — and the Practice, 543
 

Two Special Kinds of Legal Rules, 544

*Writing Assignment 13; Alternative A: Reconciling Constitutional Principles and Practices, 545*
    - c. Rules and Happiness: An Impossible Combination? 546
 

Ripley, Letter to Emerson, 546; Constitution of Brook Farm, 547; More, Utopia, 550; Levitt and Sons, Homeowner's Guide, 552; Shakespeare, The Tempest, 554; Neill, Summerhill, 555; Pfaff, Reconciliation Agreement, 558

*Writing Assignment 13, Alternative B: Rules for Marriage, 565*
    - d. What Are Rules Good For? 566
 

*Writing Assignment 13, Alternative C: What Are Rules Good For? 566*
- B. Where Several Must Cooperate — The Art and Craft of Making Rules, 566
1. Setting the Terms of a Complex System: The Prison as Example, 567
 

Texas Dept. of Corrections, Rules, 567, 568; Colorado State

- Penitentiary, Rules, 571, 572; Wisconsin State Prison, Rules, 575; Wisconsin Correctional Inst., Responsible Living, 578
2. Drafting Institutional Rules, 579
    - a. Increasing Confidence: Having Rules Work Both Ways, 580  
Illinois Unified Code of Corrections, 580
    - b. Are There Any Limits upon the Principle That Rules Should Work Both Ways? 583  
Rule of St. Benedict, 584
    - c. Rules as a Way of Talking to People: Addressing One's Audience, 585
    - d. Particular Difficulties That Prison Rules Must Face, 586
    - e. What Remains to be Done After Your Rules Have Been Formulated — Controlling the Terms of Cooperation, 589  
*Writing Assignment 14: Drafting Prison Rules, 593*  
*Writing Assignment 14, Alternative A: Rules for a College, 595*  
*Writing Assignment 14, Alternative B: Labor Contract, 595*
  3. How Should the Courts Speak to the Police? A Study in Institutional Relations, 595
    - a. Watts and Miranda: Finding Just the Right Way to Say "Involuntary," 596  
Watts v. Indiana, 596; Miranda v. Arizona, 603; Questions: Attitudes Towards the Police, 605; Questions: Attitudes Towards the Suspect (I), 608; Attitudes Towards Confession, 608; Questions: Attitudes Towards the Suspect (II), 610; Questions: Attitudes Towards the Legislature — Choosing the Appropriate Form for a Rule, 611  
*Writing Assignment 15: Rules for the Police, 614*  
*Writing Assignment 15, Alternative A: The Exclusionary Rule, 614*
    - b. When and How Should a Court Enforce the Constitution by an Injunction Against the Police? 615  
Wilson v. Webster, 615; Question: In What Circumstances Should a Court Issue an Injunction Against the Police? 616; Hernandez v. Noel, 617; Question: How Should an Injunction Be Framed? 617; Wheeler v. Goodman, 618; Houser v. Hill, 620  
*Writing Assignment 15, Alternative B: Enjoining the Police, 621*

## CHAPTER 5. JUDGMENT AND EXPLANATION: THE LEGAL MIND AT WORK

Introduction, 623

- A. The Place of the Rule in Legal Judgment, or: What Does the Good Judge Do with the Law — Cheat? 625

1. Rules and Justice: Plato's View, 625
  - Plato, *The Statesman*, 625; Plato, *Theaetetus*, 629; Plato, *The Republic*, 631
2. The Process of Judgment and the Rule, 642
  - Questions: Making and Expressing Judgments, 642; Burke, *Speech to the Electors of Bristol*, 645
  - a. Judgment and the Rule in the Law: The Nature of Equity, 646
    - Aristotle, *Nicomachean Ethics*, 647; Maitland, *Equity*, 648; Maine, *Ancient Law*, 651
  - b. Judgment and the Rule: Outside the Law, 656
    - Fowler, *Dictionary of Modern English Usage*, 656; Post, *Etiquette*, 660; Johnson, *Preface to Shakespeare*, 664; Hooker, *Of the Laws of Ecclesiastical Polity*, 670
    - Writing Assignment 16: Excellence in Judgment and the Use of Rules*, 683
    - Writing Assignment 16, Alternative A: Are Rules Always Tentative?* 685
    - Writing Assignment 16, Alternative B: The Place of Rules*, 686
- B. Making a Language of Judicial Criticism: How Should We Talk About Legal Judgment? 686
  1. Talk About the Working Mind: Metaphors, Plain Speech, and the Language of Rationality, 688
    - a. Can You Find the Music in the Law? 688
    - b. A Famous Metaphor: Plato's Cave, 689
      - Plato, *The Republic*, 689
    - c. The Language of Rationality: The Mind as Machine? 694
      - Bentham, *The Principles of Morals and Legislation*, 695; Fuller, *The Forms and Limits of Adjudication*, 698; Commn. on the Third London Airport, Report, 700; Whorf, *The Relation of Habitual Thought and Behavior to Language*, 706
    - d. The Language of Judicial Rationality: Two Examples, 707
      - Freund, *Rationality in Judicial Decisions*, 707; Cardozo, *The Nature of the Judicial Process*, 711
  2. An Example for Analysis: *Griswold v. Connecticut*, 712
    - Griswold v. Connecticut*, 712; Problem: Choice of Form Interest-Balancing Versus Rules of Law, 725
  3. Alexander Pope's *Essay on Criticism*: A Model for Judicial Criticism? 728
    - Writing Assignment 17: The Enterprise of Judicial Criticism*, 733
    - Writing Assignment 17, Alternative A: Excellence in the Judicial Opinion — Rationality and Beyond*, 734
    - Writing Assignment 17, Alternative B: What Do You Approve Of?* 734

*Writing Assignment 17, Alternative C: Explaining a Decision, 735*  
*United States v. White, 736*

## CHAPTER 6. THE IMAGINATION OF THE LAWYER

Introduction, 757

### A. Is the Judge Really a Poet? 761

1. The Message and the Rule: What More Do We Find in the Poem and Opinion? 762  
     Boulton, *The Language of Politics in the Age of Wilkes and Burke*, 763
2. Reading the Poem: The Education of the Imagination? 766  
     Frost, *The Constant Symbol*, 766; Frost, *The Figure a Poem Makes*, 770; Frost, *Design*, 780; Frost, *Directive*, 780; Donne, *The Sun Rising*, 783; Marvell, *To His Coy Mistress*, 785; Herbert, *The Pulley*, 786; Browning, *Up at a Villa — Down in the City*, 787; Dickinson, *Our Little Kinsmen*, 790; Thomas, *Fern Hill*, 791; Wordsworth, *Upon Westminster Bridge*, 793; Keats, *To Autumn*, 793; Whitman, *Out of the Cradle Endlessly Rocking*, 795
3. More on the Judicial Opinion and the Poem, 800  
     *Writing Assignment 18: The Judicial Opinion as a Constant Symbol*, 804  
     *Writing Assignment 18 (Alternative): What Beyond Paraphrase?* 805

### B. The Activity of Argument, 806

1. A Classical View of Rhetoric: Ethos, Pathos, and Logos, 810  
     Aristotle, *Rhetoric*, 810; Carlyle, *The French Revolution*, 815
2. What Is at Stake Here? Argument Over What a Case Involves, 822  
     Douglas, *Springfield Speech*, 823; Gregory, *Nigger: An Autobiography*, 843
3. The Mystery of Persuasion, 845  
     Shakespeare, *Macbeth*, 846
4. The Cost of Argument: The Mind of the Sophist, 850  
     Clarendon, *The Life of Clarendon*, 853  
     *Writing Assignment 19: The Legal Argument*, 856  
     *Writing Assignment 19, Alternative A: The Quarrel and the Argument*, 856  
     *Writing Assignment 19, Alternative B: Argument as a Form That Destroys*, 856  
     *Writing Assignment 19, Alternative C: Making Up and Changing Your Mind*, 857  
     *Writing Assignment 19, Alternative D: The Art of Argument*, 857

- C. The Narrative Imagination and the Claim of Meaning, 858
1. Telling a Story and Saying What It Means: Addressing an Incompatibility of Discourse, 861
    - a. Narrative and Analysis: The Differences Elaborated, 862
    - b. The Force of Narrative: A Pressure Towards the Inexpressible, 863
    - c. How the Story Begins: The Complicating Choices of Shape and Direction, 866  
Dickens, *Little Dorrit*, 870
    - d. The Ending as Cliché: Controlling Narrative Conclusion, 872
    - e. The Force of Narrative: A Pressure Towards Falsehood? 875  
Tolstoy, *War and Peace*, 875
  2. Reconciling the Demands of Imagination and Reality: The Historian as Model for the Lawyer? 878  
Macaulay, *The History of England from the Accession of James II*, 879; Hume, *History of England*, 881; Macaulay, *The History of England from the Accession of James II*, 882; *The Nature of Historical Narrative*, 883
  3. The Creative (the Delusive?) Imagination, 889  
Gibbon, *The History of the Decline and Fall of the Roman Empire*, 889; Burke, *Reflections on the Revolution in France*, 893; Marvell, *An Horatian Ode upon Cromwell's Return from Ireland*, 898; Jonson, *The Alchemist*, 902
  4. Placing the Private Self in a Narrative of the Public World: Clarendon's *History of the Rebellion*, 903
    - a. The Narrative, 905
    - b. Putting the Question: How to Live in Such a World? 919  
*Writing Assignment 20: Reconciling the Demands of Reality and Imagination*, 925  
*Writing Assignment 20, Alternative A: Telling a Story and Saying What It Means*, 925  
*Writing Assignment 20, Alternative B: Placing the Private Self in the Public World*, 926  
*Writing Assignment 20, Alternative C: Rewriting an Old Assignment*, 926  
*Writing Assignment 20, Alternative D: The Historian and the Lawyer*, 926

## CHAPTER 7. THE EDUCATION OF THE LAWYER

Introduction, 927

- A. Defining Our Subject Matter — What Is the Law and Where Can You Find It? 928  
De Burgh v. De Burgh, 928

- B. How Is the Law to be Learned? How Taught? 937  
 Abram, Educating the Lawyer as Policy-Maker, 938; Ascham,  
 The Schoolmaster, 943  
*Writing Assignment 21: The Lawyer's Education, 947*

## APPENDIX: SUPPLEMENTARY WRITING ASSIGNMENTS

- 2-1: What Is a Good Conversation? 951  
 Oliver, *The Endless Adventure*, 953
- 2-2: Student-Talk and the Lawyer, 955
- 2-3: Metaphor and Cliché, 956
- 2-4: Translation, 957
- 2-5: Parody, 957
- 4: Giving Advice, 958
- 5-1: Making Directions Clear and Precise — More on the Statutory  
 Rule, 959
- 5-2: A Judicial Opinion on a Statute, 960
- 7: Explaining Behavior, 961
- 17-1: The Mind of the Judge, 961
- 17-2: A Document That Teaches, 962
- 17-3: Drafting an Opinion in *Robinson v. California*, 962  
*Robinson v. California*, 963
- Major Writing Assignment, 967
- Bibliographical Note, 968
- Index, 971

## *FOREWORD TO THE ANNIVERSARY EDITION*

This book is an Anniversary Edition of the original version of *The Legal Imagination*, published forty-five years ago this year.

I am honored that the publishers want to make this book available once more, and to do so in its original form.

The Preface and Introduction to the Student do a fine job of introducing the book, and I need not repeat here what is said there. But a few remarks may be welcome, as a matter of orientation.

This book was originally designed to teach law students how to “write,” that is, to come to productive terms with the nature and limits of legal language in a way that does justice to the workings of their own minds and to the experience of those whom the law may threaten, injure, or assist. This is its main mission, but it has a greater reach than this, for it confronts issues that are also present in other professions and ways of life. I think it can thus be read not only by people of the law, but by anyone with an interest in language and power, in writing as a way of thinking and creating, or in culture as a reality and force.

I have made no revisions or updates or changes of any kind. This book is a facsimile of the original. It has many of the virtues of a young person’s book and I am glad we are not changing it.

Does this mean that it is out of date, irrelevant to contemporary concerns, in the law and out of it? I do not think so. Certainly most of the substantive legal questions raised in the book are still with us: the use of racial language, the proper way to think about abortion and the death penalty, the insanity defense, discretionary sentencing, the standards and values by which we should judge a judicial opinion, the nature of equity, and what it means to try to create and live by a system of rules. It is true that the rules of law on some subjects have changed,

but I think the fundamental questions at issue are still with us. This is even more plainly true of the broader issues relating to language and character and culture.

I think in fact that this book may be of wider relevance now than when it was first published, for its central concern is with integrity — integrity of the law, of language, of the individual person — at a time when integrity itself sometimes seems to be threatened as a value.

This book is not in form a jurisprudence book, but it is based upon, and acts out of, a view of law itself, a view that strongly resists current inclinations to reduce law to a matter of social policy, or theory, or economics, or politics. Law has its own materials, its own life, and its own way of being. It is — certainly from the point of view of lawyer and judge — not a structure but an activity of mind and imagination.

I develop this view here, not by conceptual elaboration, but by performance and implication, the only way I think it can be done. But I can say this much: I think law is not merely a system of rules and principles, nor is it reducible to policy choices or class interests, but is rather what I call a language, by which I do not mean just a set of terms and locutions, but a whole cluster of habits of mind and expression. It is an enormously rich and complicated system of thought and expression, of social practices and definitions, which can be learned and mastered, modified or preserved, by the individual mind. The law makes a world. It is our task to acquire the art of reading and speaking the language of that world.

Beginning on these assumptions, *The Legal Imagination* asks such questions as these. How can one possibly begin to manage a discourse that is based on something as apparently crude as a legal rule, which in the nature of things always includes what it does not want to include and fails to include what it wants to include? How one can sensibly talk to a prosecutor, jury, and judge, when the statute under which your client is charged seems to remove every issue of what might be called justice? How does the law talk about people, and how should it do so, in comparison especially with the literary artists who know how to do this? How does the law use the language of race, rooted as it is in our



world-historical crime of racial slavery, and how should it do so? How does the law talk about insanity and sentencing in the criminal law, and how should it do so? What do we mean by “judicial reasoning,” and when is it good, when bad? and so on.

In all of this I am imagining the law as a system of expression, a language and a set of practices, that can be learned and used — and must be transformed, in large ways and small, if justice is to be done.

The reader is invited throughout to compare legal texts with others, drawn from high literature, from history, from philosophy, from psychology, and from the ordinary stuff of life. Likewise, the questions ask the reader repeatedly to call upon experiences of his or her own, with the thought that they can provide an analogy or perspective from which to examine the texts and issues before us.

This means that the book is not a standard text book, full of assertions, but a kind of work book, full of questions. The questions are invitations with which I hope both the student and the general reader will want to engage.

In these ways the book establishes a conversation with the student, a conversation which the general reader can overhear and participate in at second hand. This is easier than might be thought because the questions asked of law students can be seen, with very little change, to speak as well to any person who seeks to use the materials of his or her culture to speak to others and to manage relations with the people he or she addresses — that is, to all of us.

The heart of this book is the relation I try to establish with its readers, both students and others: at once demanding and supportive, imaginative and realistic, serious and comic. I hope its emphasis on the individual mind, individual experience, and individual responsibility will be seen to be of particular value today.

One embarrassment I have not been able to remove is the remorseless use of the male pronoun to refer to all human beings, and I wish I could change them all to include women as well as men. I make no defense of this practice, except to say that it was standard in those days. But that could be said about lots of bad things.

There are also sensitive discussions here about the horrors of racial slavery and our national efforts to respond to that legacy, which may be difficult for the reader, especially if taken out of context. I hope I have not spoken in ways that were careless or unaware, but if I have I hope the reader will be forgiving, and hear a youthful voice behind the words, attempting to lead the discussion in a good direction.

*J. B. W.*  
2018