THE LEGAL IMAGINATION

Studies in the Nature of Legal Thought and Expression

45th Anniversary Edition

JAMES BOYD WHITE

© Wolters Kluwer
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
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
      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
      d. A Primary Distinction in Talk About Death: Humanity and Inhumanity in Speech, 114
      e. Justifying a Language by Its Special Purposes, 126
      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
CONTENTS

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

   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
         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
CONTENTS

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

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
      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
CONTENTS

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


**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


2. Amelioration and Abolition, 463

   Burke, *Sketch of a Negro Code*, 464; Illinois Revised Statutes, 471

   **Writing Assignment 10: The Abolition of Slavery**, 474


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
CONTENTS

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
      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
      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
CONTENTS

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
      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

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

   Griswold v. Connecticut, 712; Problem: Choice of Form Interest-Balancing Versus Rules of Law, 725

   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
CHAPTER 6. THE IMAGINATION OF THE LAWYER

Introduction, 757
A. Is the Judge Really a Poet? 761
      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
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