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The Legal Imagination and Language: A Philosophical Criticism

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THE LEGAL IMAGINATION AND LANGUAGE: A PHILOSOPHICAL CRITICISM

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> The terms or categories in which a philosophy criticizes its competitors, and its culture, are an essential part of its positive achievement. But we should add immediately that what cannot be caught in those particular terms of criticism cannot be appreciated in that particular philosophy. The characteristic and specific differences of such terms of criticism is a . . . principal way in which . . . various philosophical positions are distinguished.[1]

> [I]f philosophy [is] the world of a particular culture brought to consciousness of itself, then one mode of criticism (call it philosophical criticism) can be thought of as the world of a particular work brought to consciousness of itself.[2]

James B. White's *The Legal Imagination: Studies in the Nature of Legal Thought and Expression*[3] takes upon itself an immense task, namely, investigating and characterizing the position of lawyers and the legal mind in today's world. Not surprisingly, the characterization and criticism of such a book is no less difficult a task or responsibility than that undertaken by the book. In fact, the characterization and criticism of the book and the characterization and criticism in the book—both being acts of criticism—require the same attitude: constant fidelity to the data with which one has to work. In describing and assessing the book, that requirement demands our constant attention to the book and its words, including its structure and their sequence. We must attend to the appearance of the book, how it makes its appearance and how its appearance changes for us, and to the way in which its words happen for us, how they occur to and prompt us—or fail to prompt us. In describing and assessing the lawyer and the legal mind, the requirement of constant fidelity demands our constant attention to what it is like to *become* a lawyer, what it was like before one became a lawyer, and what it is that one becomes in becoming a lawyer. Since so much of becoming and being a lawyer is learning and using the language of the law, we must attend to "the lawyer's use and experience of language" (p. 5). These are our

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1. Cavell, *Existentialism and Analytical Philosophy*, 93 DAEDALUS 946, 948 (1964).

2. S. CAVELL, *The Avoidance of Love*, in MUST WE MEAN WHAT WE SAY? 313 (1969) [hereinafter cited as MUST WE?].

3. J. WHITE, THE LEGAL IMAGINATION: STUDIES IN THE NATURE OF LEGAL THOUGHT AND EXPRESSION (Boston, Mass., Little, Brown & Co. 1973) xxxv, 986 [hereinafter cited as IMAGINATION]. All unidentified page numbers in the text are citations to this work.

"internal" data for characterizing and criticizing the book and its subject.

While one way of characterizing the book is offered by its author—it is a book about "reading and writing" (pp. xix, xxxi)—White does not pretend that we will be illuminated or that the book will be clarified by this characterization. Instead, White is challenging us. Is it possible that this is a book meant for us, that we need instruction in how to read and write? Dare one make such a suggestion, especially of *this* audience? White has made it, and we are invited to discover what White's challenge can be made to mean for us. It is a friendly challenge, in the sense that it is meant to evoke the best response of which we are capable. But it is nonetheless a challenge, and so carries with it the threat of failure inherent in any challenge.

Initially, we are challenged to discover what we can learn and say about the law and the lawyer. But our initial discoveries are meant to lead us to explore, through the very process of such discoveries, what we can learn about ourselves, our potential self-expression and life, both within and without the profession of law. Then, if we find or make our way that far, we might discover what we can learn from the book, and what we can make it mean. Investigation, discovery and criticism is what this book is about. "In asking you to define for the moment the lawyer as writer, to regard yourself in that way, I am asking you not to follow direction and example but to trust and follow your own curiosity; to work out in your imagination various future possibilities for yourself, defined by the real and imagined performances of your mind at its best; and to subject what you discover to criticism and speculation" (p. xxxv).

The task of the book is immense. The task of reading and criticizing *The Legal Imagination* is also immense. This article will deal selectively with the book's riches, in an attempt to develop a few themes to the point where the reader will be compelled to go either to the book itself or off to his own inquiry into the matters examined here. In Section I, I describe in detail some of the phenomena of the law and the contours of the legal imagination isolated and examined in White's investigation, add certain further observations drawn from my experience as a lawyer, and conclude with a statement of the book's central dilemma. In the second section, I discuss certain themes and concepts ("terms of criticism") that I believe are central to a resolution of, and response to, the book's dilemma and White's position; those themes and concepts are shared by, and reveal the book's deep affinity with, one form of philosophy and criticism. Finally, in Section III, I offer some thoughts on one way criticism is

used in assessing a book, which shed some light on the form and tone this article takes.

In sustaining and discharging the duties imposed by the book's task, White appeals to several "external" sources of data: "the literature of the law, . . . literary criticism . . . , [one's] intellectual activity outside the law, and [one's] ordinary experience of life" (p. xxi). These are the touchstones of the book. Throughout this article, I too will appeal to certain external sources of data, as aids in coming to grips with this book. But while Professor White's appeals to data outside one's experience of the law are guided by his experience and understanding of literature and criticism, my "extra-legal" appeals are to a different, albeit related, source—contemporary philosophy and criticism. In this way the article takes seriously White's closing injunction, namely, that the student or reader of the book is to "connect some aspects of [his] own life as a lawyer with some other side of [his] intellectual life" (p. 967), thereby turning his experience of the book into an "invitation to place [one's] legal experience in the context of [his] own mind and its concerns" (*id.*). White proposes that one's response to his book be a voyage of self-discovery and self-definition as much as anything else, with all that such an adventure means and demands and promises. And it is the burden of self-discovery and self-criticism that comprises the obligation this book imposes on us. As usual, there is no other way to fulfill such an obligation than to work our way through it, examining ourselves in its light and testing ourselves against it.

I. Investigating the Lawyer's Position

The preface to the book poses a variety of questions that suggest the book's breadth and depth: "what can we learn and say about the legal imagination? What are the ways in which lawyers and judges traditionally conceive of and talk about experience, and how can these modes of thought and expression be mastered—and perhaps modified—by an individual mind? What are the consequences of learning to function in these ways?" (p. xix). Expressed another way, White is asking, "[w]hat does it mean to learn to think and speak like a lawyer?" (*id.*). Taking that as the book's question, the "readings and the writing assignments can be said to elaborate and complicate that question" (*id.*). They are White's exercises, or devices, within which or by means of which we are to examine and investigate the phenomena of the law, and thereby the lawyer and the legal imagination.

White's work concentrates initially on investigating what the language of lawyers and the law is, and how it is used, "for it is

language that demonstrates the condition of the imagination" (p. 8). Such emphasis on the primacy of language, on language as the key to our investigations of the mind and the world, is not unique. As Professor Hanna Pitkin has said, "concern with [the centrality and significance of language in human life, thought, and activity] has surely increased sharply in our own time, and there seems to be a widespread sense that the study of language may reveal solutions to outstanding problems in the most diverse fields."[4] Within this general trend toward emphasis on language White's work can be placed, since it undertakes "a study of what lawyers and judges do with words, . . . what it is that individual persons in the law in fact do (in particular, what they do with words) . . ." (p. xxxi). The study of language is, for White, the study of the uses of that language and its constituent words; indeed, it is the lawyer's (and judge's and legislator's) *use* of words that in part constitutes the language of the law. In this I find a strong affinity between White's approach and Wittgenstein's emphasis. "Wittgenstein's stress," says Professor Pitkin, "is on language as speech, as something human beings do, as a form of action . . . . [Thus,] language is seen as human activity rather than as a collection of labels for categories of phenomena . . . ."[5] And, of course, Wittgenstein is known for having said that in "a *large* class of cases—though not for all . . . the meaning of a word is its use in the language."[6]

White's emphasis, however, is not on language alone, for he is not oblivious to the need for placing the phenomena of language and its use within their proper context, their world. In so placing them, White distinguishes among the verbal acts of a lawyer ("virtually everything [the lawyer] does—counselling, arguing, brief-writing, negotiating—is done with words" (p. xxxi)), the nonverbal acts of a lawyer ("a lawyer's professional experience and even his professional uses of language are not confined to the use of words. He talks in nonverbal ways as well, all the time—think of the shifts of demeanor the skillful attorney displays in arguing to a jury, negotiating a contract, or cross-examining an expert witness . . ." (p.3)), and the context within which those acts are done ("a world of feeling, thought, and judgment that is never expressed at all," "a world of unexpressed and inexpressible experience" (pp. 3, 5)). Still, it is by investigating the mediator between world and self—language—that

4. H. PITKIN, WITTGENSTEIN AND JUSTICE 2 (1972).

5. *Id.* at 3, 4.

6. L. WITTGENSTEIN, PHILOSOPHICAL INVESTIGATIONS § 43 (G.E.M. Anscombe trans. 1968) [hereinafter cited as INVESTIGATIONS].

White hopes to unfold some of the relations between legal language and the lawyer's world, and between legal language and the lawyer's mind.

A. Phenomenological Investigations of the Language, the Profession, and the Institution of the Law

The Language of the Law. What are some of the characteristics of the language of the law? One characteristic White locates is that the language of the law is "a linguistically separate dialect, with a peculiar vocabulary and peculiar constructions" (p. 6). A second characteristic is its "inherited" and "traditional" nature (p. 7; see also pp. 81,82). A third characteristic is borrowed from Maitland, who called the law "a technical language," with "precise terms" for expressing "precise ideas" (pp. 6, 7; see also pp. 38, 217). Each one of these characteristics tells us something about the language of the law, its use, and our relations to it. White elaborates each of these characteristics in a way that reveals something of the complexity and subtlety of what it means—what it is—to learn the language of the law. Taking the characteristics in reverse order, the following are numbered among the complexities.

If legal language is technical, then that fact alone distinguishes it from ordinary language. That distinction is usually accepted as one of the advantages of legal language over the notoriously vague, ambiguous, and loose ordinary language. A technical language, we think, is a finer, keener, sharper instrument. Thus, we assume that one of the virtues of the language of the law must be its precision. "What, you may ask, is the difficulty with that? Who could possibly regard [precision] as anything but a merit?" (p. 7). But, recalling the mottoes to this article, "what cannot be caught in those particular terms . . . cannot be appreciated . . . ." One of the costs of precision, of a precise language, is its excision. A problem arises when the costs of a precise language are ignored or overlooked. For example, we may be led—as it were, from a myopia induced by the much vaunted power of a technical language—to assume that the facts of the world (or its most important facts) can be precisely stated. We may also be led to believe that precise expressions tell us all we wish, or at any rate need, to know. We may even come to think we know what precision is and when we need it (pp. 217-18). The picture of legal language (or any language) as a precise and clear instrument is based upon a view of language something like the following: "The function of language is to communicate ideas . . . . Language is a machine; efficiency its virtue. It . . . conveys ideas from mind to mind" (p. 7; see also pp. 25, 79). Such a model may be proper for

the languages of mathematics and physics (p. 239), but it does not match or do justice to the complexities and ambiguities of the language of the law. Also, the model seems to ignore the different subject matters and purposes served by such different languages. However, the proponents of the "precise and clear" model of language might argue that theirs is the *ideal* for any language, including the language of the law. But if precision and clarity are the only, or even chief, virtues of any language, if those qualities are all we need, then why have the languages which exemplify so fully those virtues not been universally adopted? Because, White answers, there are limits to what can be said in any language. A specific language not only provides its users with certain specific ways of saying or seeing what they otherwise could not say or see, but also imposes limits on what they can say or see. Not everything that can be said about the world and its inhabitants can be said in one language. White's investigation of the language of the law includes, then, not only its uses but also its control over and relationship with its users and their control over and relationship with it.[7]

White's second characteristic of the language of the law—its "inherited" and "traditional" nature—tells us several things. It indicates that while *our* meaning what we say may be based upon how we use that language, *its* meaning is already secured. "[W]e have a choice over our words, but not over their meaning. Their meaning is in their language; and our possession of the language is the way we live in it, what we ask of it."[8] The fact of inheritance also tells us something about how we are related to the language of the law and how we learn it. "Words come to us from a distance; they were there before we were; we are born into them. Meaning them is accepting that fact of their condition."[9] The language of the law is established and precedes us, so we grow into it. It is passed on, so it connects us with our future as well as our past. It is our inheritance, so we use it or abuse it to our credit or detriment. It is a resource, one which existed before us and which will exist after us; as such, "it gives us the sense that we are part of the past, the true intellectual conservatives, talking now as lawyers did centuries ago" (p. 7). Of course, we have that sense of connection to the past only if we have the sense to recognize what a resource we have inherited. Every language is an

7. For sketches of our relation with language that have the same areas of concern, see *id.*; B.L. WHORF, LANGUAGE, THOUGHT, AND REALITY (J.B. Carroll ed. 1956); M. FOUCAULT, THE ORDER OF THINGS (1970); H. PITKIN, WITTGENSTEIN AND JUSTICE 99-115 (1972).

8. S. CAVELL, THE SENSES OF *Walden* 62 (1972) [hereinafter cited as SENSES].

9. *Id.* at 63.

inheritance and a resource, and its relative richness or poverty will most likely reflect our own wealth or impoverishment.

The accuracy of White's description of legal language as "inherited" is due to the fact that the language of the law is comprised in part by the uses of the law and its words. That part of the inheritance is held in trust and transmitted by the keepers and practitioners of the law—the law schools and the profession itself. Another part of the inheritance is comprised of the words of the language of the law, some of which are inherited themselves from ordinary language and its culture. So to speak of the language of the law as being inherited underscores the fact that it is a cultural framework, constituted by its words and their uses, and learned partially by acculturation. Like any inheritance, the language of the law is learned simply by growing up in a certain family (a linguistic family in this instance). If this seems simplistic or distorted, it is meant to recall for us how many of our childhood experiences consist of introductions to legal terminology and legal thought. We are taught the history of our Constitution and Supreme Court, we hear our parents discussing the law, we watch television news reporting on the law, we have access to various lawyer, police, and criminal characters in books, movies and television. All of these experiences add to our inheritance of the law and its language. Yet we still require some kind of special preparation for a life in the law; thus, we work our way through a maze of legal terms in law school experiences both in the classroom (concrete examples, case-by-case analysis, actual application of the language of the law, and criticism thereof) and out (moot court, bull sessions, clinical legal education). The fact that *some* preparation must be made and that *part* of the process of language-acquisition must be undertaken—or suffered through—shows that legal language and life *are* divorced in some way from ordinary language and life. But how, and in what ways, are they?

If languages are alike in the respect that they are inheritances, they are still very different. Each language, including the language of the law, can be described as "a linguistically separate dialect, with a peculiar vocabulary and peculiar constructions" (p. 6). This means that each is a separate "language system," or realm, or universe of discourse. What is it, then, that distinguishes the languages? In short, I would answer: the realms or worlds they create and identify, their constituent words or terms, their uses—the differences are manifold. What is it, then, in particular that distinguishes the language of the law from other languages?

Identifying the language of the law as a separate dialect and a technical language can be taken to mean that it serves purposes that

are specific and special. Specificity of purpose alone would not distinguish the language of the law from other professional or specialized languages or from ordinary language, because each language, like any medium, can be thought of as a way of doing or accomplishing certain specific jobs in certain ways and as a way of getting through to certain people.[10] (This characterization may require qualification in its application to ordinary language.) The distinction of the language of the law arises, however, from the fact that legal language does or accomplishes jobs that are special; it gets through to people in special positions (p. 126). (The lawyer is "a special sort of writer" (p. 3).) The language of the law is, in a word, *extra-ordinary*.

Recognition of the extraordinary nature of the language of the law requires, I believe, an acknowledgment that that language is divorced from ordinary language and life. Such an acknowledgment is made constantly, though often unwittingly, by laymen and practitioners alike—White locates it in his persistent questioning about what one's non-lawyer friends at a cocktail party would say to some "legalism" (see pp. 9, 10, 56, 83, 217, 239, 645, 728, 806). Why do we find our incomprehension of the (alien) character of legal language so remarkable, and thus remark upon it so often? On its face, it seems plain enough (and unremarkable) that the language of the law is different and distinct. But our remarking on that fact of difference seems related to the often unnoticed fact that legal language is not *completely* different from ordinary language.[11] One can some-

10. *See* S. CAVELL, THE WORLD VIEWED 32 (1971) [hereinafter cited as WORLD]. There Cavell says:

> A medium is something through which or by means of which something specific gets done or said in particular ways. It provides, one might say, particular ways to get through to someone, to make sense . . . .

11. J.L. Austin, who was the leading figure in the ordinary language movement at Oxford, found the law to be an immensely helpful source for his investigations and accumulations of data concerning the phenomenology of ordinary language and ordinary life. As Austin put it:

> Our second source-book will naturally be the law. This will provide us with an immense miscellany of untoward cases, and also with a useful list of recognized pleas, together with a good deal of acute analysis of both.

J.L. AUSTIN, *A Plea for Excuses*, in PHILOSOPHICAL PAPERS 135 (J.O. Urmson & G.J. Warnock ed. 1961). But at the same time, Austin recognized legal language as a modifier of ordinary language, which is why he resorted to it *after* he had looked to the standard sources of ordinary language. Thus,

> For [certain specified] reasons . . . obviously closely connected and stemming from the nature and function of the law, practicing lawyers and jurists are by no means so careful as they might be to give to our ordinary expressions their ordinary meanings and applications. There is special pleading and evasion, stretching and straitjacketing, besides the invention of technical terms, or technical senses for common terms. Nevertheless, it is a perpetual and salutary surprise to discover how much is

times confuse legal terminology with ordinary language; the same words—such as "intention," "reasonable man," "contract"—are used in both languages. Nowhere have I found an adequate appreciation or acknowledgment of the extent to which the words of legal language and ordinary language are the same. Nowhere have I found a recognition of the fact that much of the power which the language of the law has for us comes from the power of ordinary language, some of whose terms it has borrowed and now shares. Some words of the law are drawn straight from ordinary language. The basis of legal language in ordinary language (not only in ordinary words but also in ordinary speech and grammatical patterns) is what in the first instance makes the language of the law recognizably a language. That basis also seems to be what makes the language of the law capable of being learned so readily by law students, without the special linguistic preparation required in learning the language of another land. (But I do not wish to deny the real foreignness the language of the law has for us.)

In our studies of the language of the law, we are apt to be impressed by "the propensity of the law to make a language of special meanings . . . , the making of what could be called a technical vocabulary, in which words are given special meanings for special purposes" (pp. 217, 227). This artisanship in the language of the law seems to be another reason why its alien character is found remarkable. The lawyer's use of *these* words in *those* ways is unintelligible to the uninitiated; it appears to be a form of obscurantism, almost perverse. Thus, a layman "will perhaps be even more frustrated by the lawyer's special uses of words he has heard before (for example, 'negligence' or 'equity') than he is by the—to him—meaningless jargon of 'reversions' or the 'Statute of Frauds' " (p. 217; see also pp. 77, 195, 196, 231). The contrast, then, between the language of the law and ordinary language is not made completely explicit by their appearance, in part because of the shared words and structure of the two language systems. Instead, their distinction is due in large part to their distinct uses (see p. 37). One of Wittgenstein's permanent contributions to our understanding of language as a human activity, instrument, and institution, is his emphasis upon the (obvious) fact that words are used differently, and therefore mean different things, in different "language-games."[12] To say that words are used in differ-

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to be learned from the law . . . . .

Id. at 136.

12. This term is taken from Wittgenstein. He used it to identify and examine contexts—ranging from an occasion to an institution—within which words are used. White also makes use of the term (*see, e.g.*, pp. 183-84, 196, 230, 253, 318, 333, 776).

ent ways in different contexts is to allude to a vast complex of human awareness and consciousness; it is to attempt to record in a stroke what it means to speak and understand a language, to express oneself and communicate to others in a variegated world. Part of what it means to speak of the different uses in these two languages of the same words (for example, "intention," "promise," "consideration," "negligence") is to point and appeal to the fact that their *histories*, their *purposes*, their *speakers*, their *audiences*, their *contexts*, and indeed their *worlds*, are different.[13] It may be that *everything* about them, save for their physiognomies, is different.

This description of the language of the law is, and is meant to be, complex; perhaps it is even paradoxical. One wants to assert that legal language is in some way derived from or recognizably a part of ordinary language, and yet it is (obviously) very different from ordinary language. There is no easy or clear way to ease this ambiguity, or tension, partially because our relationship with the language of the law parallels our relationship with ordinary language. It is not at all straightforward, not clear and precise. It is *problematic*.

"The existence of such a professional language—almost a secret way of talking—has most complex consequences . . ." (p.7). One consequence, for example, is that the resources of the language of the law and ordinary language are not the same (p. 50). For example, irony, metaphor, and ambiguity are accessible resources for the user of ordinary language, whereas they are not (ordinarily) for the user of legal language (pp. 57, 76-77, 81, 188). Somewhat analogous resources, however, appear to be available in legal language. For example, the lawyer may resort to "the uses and effects of professional rhetoric" (p. 167 *et seq.*) and something "akin to ironic wit" or "ironic control" (p. 611) in his use of legal language. Facts such as this one may lead to the discovery that it is useless, or at least relatively fruitless, to study the language of the law in isolation. What is worth studying is our *relationship with* the language—our *use* and *control* of the language and its concomitant use and control of us.[14]

13. These differences stem in part from the fact that the law and its language do not claim to speak for everyone everywhere, unlike ordinary language and, perhaps, philosophical assertion. Rather, the law claims to speak for every *citizen*, for each member of its *society*. That is, I believe, the internal justification of the law for taking away civil rights of convicted criminals. They have broken the law, hence they are not members of its world and cannot resort to its privileges and resources. They are, literally, outside the law ("outlaws") and society. *See* IMAGINATION, *supra* note 3, at 425-29.

14. The use in this sentence, and in the preceding and subsequent paragraphs, of the word "with" (rather than "to") to characterize our relationship with our language, is deliberate. White's goal is a relationship *with* language, as an insider. It is to be a personal, intimate,

"For you as a lawyer, the matter of achieving the 'right relationship' with a language is . . . enormously complex. For not only . . . must you find a satisfactory way to describe your place in the universe, to express your sense of what you do, your work itself is a literary activity and you must master the special ways that lawyers talk" (p. 50; see also p. 56).

The achievement of the "right relationship" with the language of the law is White's goal (or his ideal, perhaps), and White describes the achievement of that goal as our learning to assess the law and its language by standing outside of them as well as inside them. "[Y]ou must establish the right relationship with this language—a sense that you are saying the right thing in the right way—both from outside your professional life, as you look at what it means to you and to others, and from inside it, as you try to do your job well" (p. 50; see also p. 54). He also describes the lawyer's goal as recognizing what the language of the law leaves out even while he uses it (p. 81). Stated another way, White is attempting to discover, and to motivate us to discover, "ways of controlling a language by standing outside it and pointing to something else, something the language does not state. These are ways of talking two ways at once. The writer uses a language and at the same time expresses a recognition of what it leaves out" (p. 76). One must understand and use legal language in two ways, as an insider and an outsider; one must fight to control language even while submitting to its inevitable control. (In using language you avail yourself of its inadequacies and dangers as well as its riches and resources.) Only with "dialectical"[15] control—where the

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reciprocal relationship. For example: "when one writes, one chooses a language, a way of talking, a set of implied interests and relationships; and from the outset the essential task is controlling this language, forcing or adjusting it to one's purposes. We examined three traditional techniques of control—metaphor, irony, and ambiguity—each of which could be said to be a way of using a language and recognizing what it leaves out, a way of writing two ways at once. In this way, success for the artist was defined as a relationship with language, as a way of making his words work to his will, differentiating his statement from all others." IMAGINATION, *supra* note 3, at 765. If one spoke of his relationship *to* his language, he would be suggesting a different relationship, one in which he stands outside his language. It would be an impersonal, formalized, asymmetrical relationship. (Compare "My relationship with my wife" with "My relationship to my Congressman.")

15. My use of the term "dialectical" refers to the fact that people, events, objects, facts and the world are multi-faceted. A dialectical view, or stance, recognizes that certain matters have more than one side, that those sides can be hidden or obvious or both, that the various sides of a matter are related and cannot be individually appreciated without being tempered and informed by their partner sides, and that "the facts" almost never speak for themselves but require elaboration, description, and placement within a proper context before they can even begin to speak to us.

> Very generally, a dialectical examination of a concept will show how the meaning of that concept changes, and how the subject of which it is the concept changes, as

user of legal language recognizes the indebtedness of legal language to ordinary language as well as its separateness from ordinary language, recognizes not only its advantages over ordinary language but also its deficiencies and shortcomings compared to ordinary language—can a lawyer or any user of the language of the law truly reconcile his language with ordinary language, his profession with the rest of his existence as a human being.

The Profession of the Law. The life of a lawyer is "a consequence of a common professional education, and it entails an understanding of forms and purposes . . . and [a] knowledge of professional and technical terms" (p. 217). To my mind, one of the most serious (and seriously misleading) indictments to be made against the law and the legal profession (illustrating clearly, I think, the state of the modern world and our position in it) is that the law and the workings of the legal profession are understood to be, and accepted as, inaccessible and unintelligible to the average citizen, who is meant to be its paradigm subject.[16] Lying behind the average citizen's manifest dislike, indeed disdain, for lawyers ("shyster lawyers") is a feeling not merely that they are duplicitous, twisting the law to their own conveniences and enrichment, but also that they take a perfectly good and decent language, recognizable to the layman in its obvious reliance *in some ways* upon ordinary words, and pervert it—they indulge in "double talk" (see, *e.g.*, pp. 182-83, 217). Of course, lawyers will insist that they have done no such thing; or, if the charge is that lawyers have changed the uses of certain words ("twisted" them, in

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the context in which it is used changes: the dialectical meaning is the history or confrontation of these differences.

S. CAVELL, *Kierkegaard's* "On Authority and Revelation," in MUST WE?, *supra* note 2, at 169-70. A dialectical consciousness is one which would enable a person to use the language of the law while recognizing what it leaves out. Similarly, a dialectical criticism will proceed from both within and without the position it wishes to criticize. Stanley Cavell has remarked, with a slightly different emphasis, as follows: "The criticism of religion, like the criticism of politics which Marx invented, is inescapably dialectical . . . because everything said on both sides is conditioned by the position (*e.g.*, inside or outside) from which it is said." *Id.* at 174. (Hanna Pitkin praises Wittgenstein's ability to achieve and hold a dialectical balance in his examination of the world and our language, and their interaction. H. PITKIN, WITTGENSTEIN AND JUSTICE, 22-23, 114, 116, 122 (1972).) *Cf.* IMAGINATION, *supra* note 3, at 293, question 1.

16. One's attitude toward this picture of the law and its relation to the ordinary citizen is, I think, a touchstone of one's conception of law. Is law required for the regulation of the affairs of ordinary citizens, or does it find its basic purpose in responding to the actions of criminals and wrongdoers in general? (*Cf.* IMAGINATION, *supra* note 3, at 541, 645, 682.) If we think of contracts or estate planning, we are apt to say the former; if we think of torts or criminal law, we are apt to say the latter. And I begin to wonder what sense the question makes. (The question is related in form to the question often asked about Freud: Are his studies applicable to the abnormalities of the mind only or to the workings of the mind in general? *See* R. WOLLHEIM, FREUD 16 (1971).)

effect), that they have had sufficient justification for so doing. What is lacking from such self-justification is an account by the lawyers of how so public an institution as the law can have become so private a concern of a few specialists. A corollary to such an account would entail an explanation of how the rest of society's members can feel so alienated from a system which is regularly said to be the very fabric of their society.[17] But lawyers cannot provide such an account or explanation, for they do not understand it themselves.

These remarks do justice neither to the profession of law nor to its critics, for such alienation, such foreignness, is common today, and it deals with more than the law alone. Outsiders (laymen) do not understand professions and professionals, though they normally have

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17. It is worth noting at length that the standard description of law as the "fabric of society" is problematic. In a speech on September 24, 1975, President Ford remarked that without law human society is not possible. Yet, from a Wittgensteinian perspective, it can be argued that the fabric of our lives is made up of countless threads, one of which is law, but the rest of which are such things as language, or "forms of life" (Wittgenstein's term), practices, institutions, customs. (For example: "To obey a rule, to make a report, to give an order, to play a game of chess, are *customs* (uses, institutions)." INVESTIGATIONS, *supra* note 6, § 199.) These natural strands of fiber are what constitute the "fabric" of society; among them, law seems to be a comparatively artifical fiber.

It is in this vein that I cite an extremely provocative essay. "We live in a law-ridden society; law has cannibalized the institutions which it presumably reinforces or with which it interacts. . . . The relation between custom and law is, basically, one of contradiction, not continuity." Diamond, *The Rule of Law versus the Order of Custom*, in THE RULE OF LAW 115, 117 (R.P. Wolff ed. 1971). Diamond's thesis, flatly stated, is that law becomes a cancer when it is resorted to and appealed to in every situation; it becomes our ubiquitous cure-all. But calling upon law at every twist and turn nullifies our ability to assume responsibility for ourselves and our lives, to conduct and carry on our lives in our distinctive ways. We cannot legislate or litigate our problems away, yet currently we seem to be legislating and litigating our lives to death. (One might say that we are destroying our sense of the ordinary with an overdose of the extraordinary.) The proliferation of statutes and lawsuits is not an indication of our achievement of true community but rather an expression of our lack of community. In a review article on *The Rule of Law*, our attention is drawn to "the danger . . . that law will be pressed into service beyond its capacity, not merely to facilitate social life but as a substitute for it" and "that while some technique of controlling the costs of social interaction is needed, there is a paucity of proof that any particular technique is essential." Mazor, *The Crisis of Liberal Legalism*, 81 YALE L.J. 1032, 1045 (1972). Similar observations have been made from a different vantage point.

> In one of the great advertising campaigns of the century, the idea of law—of what came to be called the rule of law—was ridiculously oversold, which led to great confusion in the public mind when it later became clear that ours was a government not of laws but of men and that justice under law was notably unequal.
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> . . . .
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> The better the society, the less law there will be. In Heaven there will be no law and the lion will lie down with the lamb . . . . The worse the society, the more law there will be. In Hell there will be nothing but law, and due process will be meticulously observed.

Gilmore, *The Storrs Lectures: The Age of Anxiety*, 84 YALE L.J. 1022, 1044 (1975). *See* IMAGINATION, *supra* note 3, at 431, 461.

no problem recognizing or identifying them as such. In the case of the law, the average citizen is led by the law's foreignness to dismiss the law, perhaps in frustration, or to deny its importance to his life. But what does such denial mean, what does it cost? The answer is all around us; we have only to look.

The separation between professionals and non-professionals (laymen) is acknowledged in, or by, their "mutual obliviousness." White asks whether that characteristic is "a constant characteristic of relationships between professionals and others?" (p. 15). If it is, it seems due in part to the peculiar smugness, even arrogance, which each student of a profession comes to express sometime during his apprenticeship—and, if he is fully without good sense, for the rest of his professional career. I can recall the power, and perhaps pleasure, I first felt when I came to view the world in legal terms and came to know that those not so trained for the law could not know what *I* knew about the world, simply *because* I had become a member of the profession of the law. The humility that should be attendant upon that smugness rarely seems, strangely enough, to follow. (Humility ought to follow because anyone who learns a profession can say, *mutatis mutandis,* what the lawyer says, and because it is what we *do* from a given position, not the position we have reached, that is important.) The layman is a foreigner or an outsider in the world of the law only because he has not developed the consciousness—or the myopia—of the lawyer.[18] In "imagining the person who does not know what [we] know" (p. 44), are we imagining a mind with which there can be, for us, no communication, no conversation? In becoming a lawyer, what does one become? "As you give yourself a legal education, do you give yourself a mind increasingly unknowable to those around you?" (p. 15; see also pp. 43-44). The danger in becoming a lawyer is that one becomes not only increasingly isolated from others but increasingly *oblivious* of them as well. Paraphrasing

18. Even though the life and experience of non-lawyers is informed with some sense of the legal dimension certain phenomena have or can have, most non-lawyers do not understand what that legal sense is or how it is to be discovered. (Lawyers would do well to ponder the very real depth of such a lack of understanding. *See* IMAGINATION, *supra* note 3, at 928, concerning the question, "What Is the Law and Where Can You Find It?") A recent example of such non-professional incomprehension concerned the Constitution and the impeachment of a President. One might naturally think that the Constitution is a document that ought to be closest and most accessible to the nation it constitutes. Yet the public had to turn to the legal profession for guidance as to what the Constitution said on the matter. The legal community's apparent inability to say what the phrase "high Crimes and Misdemeanors" meant baffled the public. Of course, in response to that bafflement came a surfeit of books by legal scholars in attempted clarification of the matter; of course, they didn't agree. *See, e.g.*, R. BERGER, IMPEACHMENT (1973); C. BLACK, IMPEACHMENT (1974).

White, such "obliviousness of [person to person] has consequences for [life]. It means that [such people] do not learn and change, but continue in set patterns of speech and behavior . . ." (p. 53).

The foreignness, the separation, among the professions is equally evident.[19] What is it that separates them? "[W]hat is happening to us as we learn to use [the language of the law], to function on its terms[?] What does an education into a professional rhetoric, a mastery of a professional activity, mean for one who engages in it?" (p. 167). Is it enough to say that the world, as viewed by different people (different professions), works in different ways? The economist has his "profit maximization," "cost-benefit analysis," "price-elasticity," even "supply and demand"; the stockbroker, his "give-ups," "churning," "odd-lot roundouts." Lawyers and doctors, like all professionals, follow in the same way with their own professional languages. (And, I suppose, if I were an initiate of some occupation or trade such as truckdriving, plumbing, or carpentry, I would be able to cite examples of its special terminology as well.)[20] The terminology of a profession constitutes both the world of that profession and that profession's picture of the world. Every profession uses and in part invents its own particular and peculiar words and terms, its particular terminology. The particular uses of words and terms of a profession are what make that profession's language special or technical; either they are new words, words not found in ordinary language (or if they are found in ordinary language, they have migrated from the profession to ordinary language, enriching the latter) or they are new uses of old words.

Thus, White's description of the language of the law as technical depends in part upon the law's constant and continual use of such terms as *"prima facie," "ratio decidendi,"* "tortfeasor," and "testator." Only occasionally could you find such words outside a legal

19. An example from current events showing the mutual incomprehensibility of professions is the continuing controversy among the medical, legal, and insurance (actuarial) professions concerning medical malpractice insurance. White recognizes this phenomenon by asking "how other professional people seem to differ from [a lawyer], what it is they have that [a lawyer] lack[s]: the dentist, doctor, engineer, auto mechanic, detective, and so on." IMAGINATION, *supra* note 3, at 46. White also draws our attention to this fact in his discussion of the insanity defense and "the professional language of psychology." *Id.* at 336-51. The professions of psychology and the law differ, and the former will not—without modification—be relevant to the latter. "We are in a different [language] game now, and the language by which we explain why someone is to go to jail or not is subject to stresses both greater than and different from our usual explanations of the conduct of others." *Id.* at 329.

20. *See, e.g.*, IMAGINATION, *supra* note 3, at 77; E. NEWMAN, STRICTLY SPEAKING 185-86 (1974) (discussing the different terminologies of non-experts and experts (former athletes) in sports broadcasting); *The Secret Language of the Truckers*, HARPERS WEEKLY, October 6, 1975, at 6.

context or the legal profession. (This is true of some words more so than others: *"prima facie"* is used outside legal contexts relatively frequently; *"ratio decidendi,"* almost never. One might say that *"prima facie"* has migrated to ordinary language.) Another side of the terminology of the law is embodied in the legal profession's reference to certain terms as "terms of art," terms that are used and meant and understood in a special way within the artistic medium (the law) by its artists (lawyers).[21] Such terms can be compared with and contrasted to other words which are used within the language of the law: "negligence," "probable cause," "intention." These are ordinary words, surely, yet they have legal uses outside of—or tangential to—their uses in ordinary discourse and writing (see pp. 217, 228). And then there are words used in both languages (such as "heir," "criminal," and "assault") that seem so ordinary yet so imbued with legal connotations that one does not quite know how to classify them on this spectrum of the ordinary and the legal.

If every profession uses and in part invents its own particular terms, then it seems fully possible for each profession to construct, or discover, a new language or universe of discourse (p. 77). (This possibility is tied to the mysterious yet common phenomenon of a word creating a world.)[22] It is, I believe, the experience of each profession (and ultimately, I suppose, of each way of inhabiting the world, of each position) that it captures and preserves a new world in its newly-created or newly-found words. What is gained is a new relation to the world, a new means of access to it, a new possession (such as we know it) of the world. Thus, each profession requires different acts and perceptions, and requires them in different ways. Each, therefore, is to be differently lived and characterized, because each is differently constituted. In giving us a new means of access to the world and new terms in which to view and characterize the world, each profession gives us as well a new world.[23]

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21. I take seriously the identification of the lawyer as artist. Beyond its obvious points of connection with *The Legal Imagination*, it serves to highlight two facts of the lawyer's position. First, he is alone. He is solely responsible for his work (though not necessarily for his work's relative success or failure in the world). This fate the lawyer shares, more or less, with all professionals. Second, his work is to be evaluated, or judged. And the audience of his work feels it right and proper for it to judge the lawyer's work.

For another conception of the community between artists and lawyers, see MacLeish, *Apologia*, 85 HARV. L. REV. 1505 (1972).

22. SENSES, *supra* note 8, at 110: "[T]he writer of *Walden* is as preoccupied as the writer of *Paradise Lost* with the creation of a world by a word."

23. After writing these remarks, I happened upon very similar remarks, which corroborated my thoughts, expressed by Jerome Frank.

> Paradoxically, we reduce our ignorance by temporarily ignoring—making ourselves ignorant of—the entirety of experience, and by concentrating ("classically," one

The paradoxical nature of our relationship with professional languages and the world is not well understood. One of our most common perceptions of our relation to the world is our seeing the world as separate from ourselves, external to us, governed by its own laws (which we contrast to our man-made laws). Yet we can also have the experience of entering a new world,[24] of a new way of seeing or looking at the world dawning on us. At that point, the world *and* the self change. (They are articulated together.) And we are tempted to say that the world changes when (as) our view of it changes.[25] For even while we wish to say that the world is outside us, outside our conceptions and perceptions of it, we also wish to acknowledge that professions can afford us not only a new appreciation of the world but also a new way of working in it and relating to it. (We acknowledge this fact in our everyday actions toward the professions and the roles they play in our lives.) Seemingly, a new dimension to the phenomena or facts of the world becomes apparent (makes its appearance). Each profession fancies itself—and this is not a fanciful fancy—to have discovered a new level of reality, or a new reality. This will seem—indeed will be—the discovery of a new world.[26] As well, it will be the discovery of new words, which capture and character-

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might say) on selected portions of it. The success of the natural sciences, for instance, depends upon such deliberate, educated, "ignorance." But men err when, "classically," they forget to remember that the ignored portions still exist.

Each specialist group, when functioning as such, in the interest of its special concerns, creates its own sub-universe, its special province of experience and sets up immigration laws which bar "alien" facts from entering. So, to a dentist, a man is a body surrounding his teeth; to an undertaker, a cadaver to be embalmed; to a cytologist, a collection of cells; to a painter, lines and colors and shadows; to a precinct-committeeman, a voter.

Each specialist group, then, has its own limited perspectives, its unique "attentional attitude," its carved-out province with its special presuppositions or "quasi-realities." When functioning specialistically, it restricts itself to but a limited amount of the available complex of events. Only some of the entire "data" of the "natural world" does it regard as "relevant." As a consequence, because it abstracts from the whole of experience, it has its own "fictions" and conventions.

J. FRANK, COURTS ON TRIAL 399-400 (1963). See also note 40 and text accompanying notes 84-86 *infra*.

24. The paradigm profession which expressed a periodic feeling of revolution and the entry into a new world is science. *See* T. KUHN, THE STRUCTURE OF SCIENTIFIC REVOLUTIONS (2d ed. 1970).

25. The world is what meets the conditions of what we call our necessities—whether we have really found them to be ours or not. . . . The universe constantly and obediently answers to our conceptions—whether they are mean or magnanimous, scientific or magical, faithful or treacherous.

SENSES, *supra* note 8, at 95, 110.

26. What is lacking here is a satisfying description of the way in which one's profession, as well as one's culture or personality, re-creates a pre-existent world.

ize the new world, yet which also seem to have been forced or produced by that new world. The needs for new words, or new uses of old words, opens with the discovery that the world of each profession is different.

Without the special terms of the various professions, without the realities they capture, we would miss something in the world, we would miss some of its dimensions. But then, without them, perhaps the world would not be so fragmented. This is the boon, and the danger, of such specialization. Professions (professionals, experts, specialists) encourage in-depth but narrow, divorced glimpses of certain aspects of the world. Their obvious value is in their potential for discovery and focus. Their obvious risk is in their potential for myopic vision and an obsession with *one* view of the world. A true accounting of the world and our place in it includes not only our differences and our specialties but also our community and our common necessities: what we share.

The Institution of the Law. Ordinary language and the languages of other professions do not recognize (that is, do not grant recognition or status to) what the language of the law recognizes and is employed to talk about: the legal relations between people and those between the people and their society. White describes the law "as a sort of social literature, as a way of talking about people and their relationships" (p. 243). He also says: "One reason language is hard to talk about is that it is always a social as well as an intellectual activity. It is not merely a way of communicating information but a way of expressing and managing relations between people" (p. 38). The law and its language can be thought of as making possible a particular way of talking about, even of identifying and creating, people and events in the world.

It is impossible to suggest or detail the richness, complexity, and subtlety of White's treatment of various aspects of the institutional nature of the law. His treatment is a *tour de force* which must be experienced and thought through to be fully apprehended and appreciated. However, some attempt at presenting this central portion of the book must be made. Perhaps we can begin by saying that the *institution* of the law is an *official, artificial,* and *formal* way of dealing with people and events in the world. What can that mean?

The law is official and formal in the sense that the operation of the law depends upon officers or officials in the legal system (judges, legislators, administrators, lawyers) invoking the language of the law pursuant to their specific (official) capacities.[27] The law is artificial

27. This is brilliantly illustrated by a section in *The Legal Imagination* on the death penalty. A Report of the Royal Commission on Capital Punishment states: "the Judge [is] not

and formal in that it continuously relies upon legal fictions (see pp. 151, 156-57, 181). The feeling of unreality, of the law's falsification of life, of caricature (these three themes form the bulk of Chapter Three of *The Legal Imagination*) so often generated in reading the law or in seeing it applied in a particular situation, stems from such reliance. "[T]he law is imbued with fiction to its core . . ." (p. 156). The law is false to life and our experience of life in part because it imposes its terms, categories, and labels on life's phenonema without making use of other sources for characterizing or judging the phenomena. "You are familiar . . . with the ubiquitous personage of the law of torts, the Reasonable Man, and could write a story about him . . . . Would such a story have any life or interest? Compare a similar effort on behalf of the Offeror, the Preferred Shareholder, or the Victim of Robbery" (p. 244; see also p. 151).[28] Another aspect of the artificiality and formality of the law is its semantic rigidity. Whereas, White claims, the "convention of ordinary speech is that critical terms are defined anew each time for the purposes of a particular conversation,"[29] the law "requires a way of thinking and talking very different from what we know in our ordinary speech. It often is

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expressing a private judgment, but [is] merely an instrument of the State" and therefore can "safeguard" himself from any "conscientious objections" he has against the death penalty "by assuming the full cloak of judicial officialdom in pronouncing the sentence" (p. 129). A 1963 Colorado statute declares that "some . . . representative among the officials and officers of the penitentiary" shall be present at any execution (p. 131). Albert Camus proclaims that "when our official jurists speak of death without suffering, they do not know what they are talking about" (p. 134). (The excerpt from Melville's *Billy Budd* (pp. 70-73) also illustrates the point.) The concept is thematic throughout the book. Everywhere, the exercise of the law and the invocation of its powers are controlled by its officers and officials. In a government of laws and not of men, it is the office and not the man which is the center of the government. IMAGINATION, *supra* note 3, at 88-89.

28. See note 23 *supra*. It would appear that White's direction to *compare* the former term with the latter terms is meant to call our attention to the fact that the former is a legal fiction while the latter comprise classes, generalizations or labels (but not fictions). His constant supplying of directions for profitable study and encouraging further comparisons and contrasts clearly indicates that White's position is one of not only a writer but also a teacher.

29. It is difficult to tell whether, in its context, this characterization of meaning in ordinary language is fully meant or is hyperbole with a polemical animus. Few topics have received more attention in contemporary philosophy than the concept of meaning. Professor H.P. Grice, in what I consider to be the most thorough and thought-provoking investigation available, has isolated four distinct, albeit related, notions or categories of meaning: timeless meaning, applied timeless meaning, occasion-meaning of an utterance-type, and utterer's occasion-meaning. Grice, *Utterer's Meaning and Intentions*, 78 PHIL. REV. 147 (1969). *See also* Grice, *Utterer's Meaning, Sentence-Meaning, and Word-Meaning*, 4 FOUNDATIONS OF LANGUAGE 225 (1968); Stampe, *Toward a Grammar of Meaning*, 77 PHIL. REV. 137 (1968). In the quotation accompanying this note, White seems to be thinking only of the latter two types of meaning identified by Grice, but the former two are just as important. See text accompanying note 8 *supra*.

not the case that the law creates a new meaning . . . but that it limits a term to one of many already existing possibilities of meaning and does so with a rigidity incompatible with the conventions of ordinary English. In this sense, . . . [the law is] an artificial way of giving meaning to words and events" (pp. 234-35). Another characteristic of the language of the law is its *conclusory* effect. While appearing to *describe* an act or event, the language of the law in effect often *ascribes* a certain legal status to the act or event (p. 229).[30] For example, while the use of the term "duly" seems to describe how an act was done ("The motion was duly seconded") and therefore seems to be "shorthand"[31] for an enumeration of all the steps in the act mentioned, its use in fact is to state a legal conclusion with respect to the act. Finally, the law seems most fully official, formal, and artificial in its fixation on *the rule*. White characterizes the operation of a legal rule as "reducing what can be said about experience to a series of questions cast in terms of legal conclusions ('legal issues') which must be answered simply 'yes' or 'no'; it maintains a false pretense that it can be used as a language of description or naming, when in fact it calls for a process of complex judgment, to which it seems to give no directions whatever; its terms are given (or appear to be given) rigidly uniform meanings of a kind radically inconsistent with the conventions of ordinary speech; and its crucial terms are almost always imperfect generalities" (pp. 246-47; see also pp. 228-29).

Thus, "the legal language system" speaks "in a set of official voices, reducing people to institutional identities, insisting on the repetition of inherited patterns of thought and speech . . . and reposing an impossible confidence in its fictional pretenses" (p. 758). These attributes of the law—its being official, artificial, formal, rigid and conclusory, its being based upon rules and fictions—can be, and are, summed up by calling the law an institution. The law lives, so to speak, on an institutional level.[32]

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30. As White acknowledges (p. 229 n.5), the classic article in the philosophical literature regarding the notion of ascription in the law is Hart, *The Ascription of Responsibility and Rights*, in LOGIC AND LANGUAGE 151 (A. Flew ed. 1965). For an updated and elaborated treatment of the issues, see Feinberg, *Action and Responsibility*, in PHILOSOPHY IN AMERICA 134 (M. Black ed. 1965).

31. This is one way in which the language of the law has been defended: it is "to save time," legal terms are "short-cuts" serving "the functional needs of practicing lawyers," and such language is valuable therefore on an economic basis, owing to "the efficiency of a specialized vocabulary for an occupational group." Friedman, *Law and Its Language*, 33 GEO. WASH. L. REV. 563-66 (1964). *But cf.* text accompanying note 36 *infra*.

32. The problem we face is that of determining how we can live with the law when we realize that it uses an institutional way of speaking to persons and addressing events for

Perhaps it is commonplace to recognize that the law is an institution, but one of the implications of that fact is that the law recognizes only those facts that matter, that make a difference in its universe of discourse and domain. As well, the law creates some of the facts of its world. These facts can be said to be "institutional facts," in contrast to so-called "brute facts."[33] As Professor Neil MacCormick puts it,

> If law exists at all, it exists not on the level of brute creation along with shoes and ships and sealing wax or for that matter cabbages, but rather along with kings and other paid officers of state on the plane of institutional fact . . . .
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> . . . To take but one pertinent illustration, for every busload of passengers, there exist, in addition to the solid, physical, bus and the stolid, palpable, passengers, as many contracts of carriage as there are passengers. The existence of a contract between each passenger and Edinburgh Corporation is obviously not a matter of physical or physiological fact, nor even indeed of psychological fact.[34]

Institutional facts may be, and usually are, as crucial to our lives as brute facts, but their existence is due to the existence of certain forms of life (institutions) which recognize and constitute those facts.

Professor MacCormick continues with an illustration of how an instance of an institution can be said to come into being:

> It is obvious what makes it possible to know (or, therefore, to say) that such an act brings a contract into existence. What

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everything it encounters. This problem is most clearly broached and confronted when White speaks of "the way institutions talk about people" (p. 299), but it also is mentioned at other points in the text.

> Although there may be occasions where a deliberate restriction of view, a narrowing of concern, is entirely appropriate—talk about the Holder in Due Course, for example, could be said to be a "technical language suited to technical ends"—there are also occasions where the law must deal with matters of the greatest intensity and importance, where nothing should be excluded, occasions that make the most rigorous demands for full expression of the human personality. Two that we shall examine are the judgment of sanity in a criminal trial and the judgment made in sentencing a convicted defendant. In both, the whole person stands before the bar, and the very question the law must face is, "Who is this man?"

IMAGINATION, *supra* note 3, at 245.

33. The literature on this distinction includes J. SEARLE, SPEECH ACTS 50-53 (1969); Anscombe, *On Brute Facts*, 28 ANALYSIS 69 (1957); MacCormick, *Law as Institutional Fact*, 90 L.Q. REV. 102 (1974); Mandelbaum, *Societal Facts*, 6 BRIT. J. SOC. 305 (1955). *See also* IMAGINATION, *supra* note 3, at 348-49.

34. MacCormick, *supra* note 33, at 103-04.

> makes it possible is that the act in question belongs to a class of acts whose performance the law treats as operative to make a contract . . . . To say that a contract exists between parties as a result of certain acts is to adopt one particular frame of reference in terms of which these acts can be considered . . . .[35]

The institution of the law is the frame of reference within which acts and events in the world are treated and considered in legal terms. In addition, the law constitutes a certain world.

> One might say that technical languages are shorthand expressions for what could easily be said in plain English, and that while one cannot say everything in the languages of law or medicine, one can translate into plain English everything that is said in a technical language. If this statement appeals to you, imagine an appellate argument in a tax case carried on in plain English. If it still appeals to you, write out some of the argument.[36]

The suggested exercise can be begun but it cannot be completed. One discovers that some of our concepts are embedded in the world of the law and make sense only within a legal context. The very idea of, for example, a "case" or "court" is unavailable (inconceivable) without the paraphenalia and *Weltanschauung* of the law.

The institution of the law recognizes, as making legitimate claims upon its attention and resources, only claims or demands that are couched in a certain language. This is related to the fact that each profession has its own world and its own vocabulary, and to the fact that entrance into such a world is through the profession's language. (Wittgenstein said: "[T]o imagine a language means to imagine a form of life.")[37] The language of the law controls its speakers in the deepest way, because the powers and resources of the law are available only to those who speak its language (and consequently, only to those who are able to hire someone who can).[38] Is it trite to recall

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35. *Id.* at 104.

36. IMAGINATION, *supra* note 3, at 38.

37. INVESTIGATIONS, *supra* note 6, § 19.

38. Professor White has made this point elsewhere. He observes that the language of the law

> is compulsory in a very practical way. Anyone who wishes to employ the machinery of the law to assert a right or to protect an interest must speak it. He need not mean what he says, of course, but he is nevertheless forced to participate in a rhetorical process designed to express certain more or less clearly articulated values, whether or not he agrees with them.

White, *The Fourth Amendment as a Way of Talking About People*, 1974 SUP. CT. REV. 165, 167 n.3 (1975).

that one's effectiveness as a lawyer depends in great measure upon how well and how completely one learns the terms and language of the law, and how one uses them? Indeed, since the language of the law is the medium of the law, the success or failure of a lawyer will depend upon how well or how dismally he exercises and works out the possibilities of that medium.

The dangers are immediately obvious. So constant are the institution's and the profession's demands of loyalty (or fidelity) to their concepts and their peculiar view of the world, that the practitioner of the art is apt to become blind or oblivious to the law's inadequacies or gaps. If one fact is stressed above all others by White, it is that the law is a profession in which one must be continuously aware of the costs as well as the benefits, and one must continually weigh them. And how is the lawyer to do that, without divorcing himself from the law? For the other danger produced by the institution of the law and the lawyer's dependence on the language of the law, is that if the lawyer attempts to hold himself independent of or aloof from legal language and its categories (its characteristic ways of perceiving and conceiving the world), he will have not only impoverished his practice but destroyed it. "You certainly cannot just chuck out legal language as impossible and remain a lawyer, but you cannot use it undiluted without being absurd" (p. 301). That states one dilemma of the lawyer's position. In White's terms, what is wanted is a way to view the law and its language both from the inside and the outside. The difficulty of achieving and maintaining such a dialectical balance is perhaps the price we pay for being who we are, for living where and when we live.

B. The Central Dilemma: Reconciling Reality and the Legal Imagination

The exquisite misery that White's investigation and presentation reveals is this. Institutions in general and the law in particular speak in one-dimensional ways about people and the world (see, *e.g.*, pp. 299-304). That recognition is central to the entire book. Yet White refuses to deny that institutional language is a "valuable resource" (p. 414). While acknowledging that the "language of institutional disposition is hopelessly and obviously fictional" (p. 413) and that "pretenses seem to be involved in all institutional talk" (p. 414), the question is still asked: "These languages are false, perhaps, but what could we do without them? . . . Can you invent a new sort of institutional talk that does not raise such false pretenses . . . ?" (*id.*). The answer to White's question is not obviously *no*, for, above all, he would want to leave the question *pending*, left to be answered by the

results of our explorations of the question. Yet it seems fair to say that *no* institutional language—none that we now possess—is without its pretenses and fictions (pp. 286-88). They are part of the liability, the cost of talking in institutional terms, of using institutional language. They are also part of the benefit.

> It can even be said that one of the functions of the law is to provide a rhetorical coherence to public life, to compel those who disagree about one thing to speak a language which expresses their actual or pretended agreement about everything else. By compelling agreement in this way the law makes the disagreement both intelligible and amenable to resolution; it establishes in the real world an idealized conversation. I do not suggest that this compulsion is a bad thing—indeed it seems essential unless every case is to raise as a wholly new question how our society and its members are to be talked about—but it does seem important to recognize its force, and that it has both highly creative and highly fictional aspects.[39]

It seems that the law and its language are unable to do justice to our experience of ordinary life; they are no match for the versatility of ordinary language. Yet we seem to have no choice but to reconcile ourselves to the fact that, as humans, we bear and possess institutions and institutional languages. And we use them, for better or for worse.

White will not let us ignore or deny any side of the phenomena of the language, the profession, or the institution of the law. We cannot live without the law, and yet we cannot live with it either (at least, not in our present forms of life). A question is raised by that fact, one which White puts repeatedly to the reader of his book: What kind of world, what kind of life, does the language of the law hold for each of us? What room does it grant us, what limitations does it impose upon us? How is it that we all inhabit the same world (if, indeed, we do), and that as lawyers we inhabit roughly the same role(s), and yet we see and define for ourselves different possibilities, different risks, different gains, different losses? A dialectical control of this tension is called for by White, but few of us know the form such control is to take. That is White's very point—our relation to the law and its language is problematic. It requires our investigation. But, then, the "effort of the book is not to reach conclusions . . . but to define responsibilities" (p. xxi).

The single, most emphasized responsibility winding its way

39. *Id. See also* IMAGINATION, *supra* note 3, at 215-16.

through *The Legal Imagination* is this dilemma of the lawyer: how can he reconcile the demands of reality and the legal imagination?

> In paper after paper, after all, you have been asked to give an account of an event—to tell a story—and then to relate the story, so told, to the world and language of the law. What is suggested now is that this tension between narrative and theory, between fact and law, is the central literary characteristic of the lawyer's life, defining by its demands a special opportunity for him as a mind and a writer. . . .
> . . . We compare law with history, and put the question this way: in literatures of reality such as these, how, by what art, can one reconcile the demands of reality—the pressure for the plain statement of narrative fact—with those of the imagination, with the need to find or create meaning in experience?[40]

No theme or concept or characterization gives more point to, or lies deeper in, the book than this one. It makes its appearance in several contexts.

One context is the contrast between, on the one hand, ordinary life, ordinary experience, and ordinary language and, on the other, the life of the law, the experience of the law, and the language of the law. One reason for the book's numerous selections from literature is their depiction of various experiences and events in ordinary life. White uses these literary selections in two ways: first, they provide data or phenomena from ordinary life against which the law's respon-

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40. IMAGINATION, *supra* note 3, at 860-61. One of the book's excellent descriptions of the lawyer and the process of the law is to be found in this section, and I cannot forbear including it here:

> That he must master theoretical and analytic speech is plain enough, for this is the stuff of most legal reasoning and argument, of law texts and classrooms. This is the language in which rules are proposed, holdings defined, distinctions drawn. It should be equally evident that he must know how to tell a story, and how to listen to one: he starts with the story the client tells him, and questions him about it; he then tells the story over and over again to himself and to others, shifting the emphasis as the case proceeds, constantly varying the terms of his narrative but coming at last to a version (or perhaps more than one) cast in terms of legal conclusion. The lawyer, one might say, begins with his client's story and ends in the court of appeals, arguing a point of statutory interpretation or constitutional law. And the judge must take two or more such arguments—two ways of connecting a particular story with a system or theory that will explain and act upon it—and with their aid fashion his own account, a version that concludes with a judgment or order in legal language, with words that work on the world. The endless possibilities for narrative, the retellings of the story in ever more various terms, come to an end at last with a characterization of experience in the terms of the law, a claim of meaning for which the judge must take responsibility. So it is that one story, one set of experiences, can be connected with others; so it is that the law is made.

Id. at 859.

siveness can be measured; second, the very act of articulating and describing such data produces a response to the experience of ordinary life that is different from the law's response. Thus, it becomes a way of collecting data as well as a way of comparing and contrasting the responses of ordinary language and literature and of legal language to that data. It is a valuable device, used frequently and effectively by White. (A similar device is White's appeal to the imagined response of a non-lawyer friend at a cocktail party. The point of this appeal is to recall what an ordinary person—that is, a speaker of ordinary language—might say or do in an ordinary context in response to a certain legal claim of meaning for an ordinary event or experience.)

There is a second context in which the need to reconcile reality and imagination makes its appearance. It is revealed in the tension created by the conflicting demands of one's self and one's profession, or one's self and one's society, or one's self and the world. White usually calls this the distinction between "the intellectual and the social," but I think of it as showing the distance between the inner and the outer, or the private and the public, or the personal and the social. This form of the need to reconcile reality and imagination is raised by White in this context by speaking of the two lives one can live, that of a person and of a professional. "The ultimate question . . . is what connection you can establish between these two sorts of performance, these two kinds of writing [as an independent mind and as a professional], these two selves that you define" (p. 40). The dichotomy is carried further in the tension revealed between self and society. There is "the danger that the individual character shall become a type, a part of the social world and no more. The full expression of the social world seems to threaten the full expression of the individual mind and personality" (p. 291). Characterizing and criticizing George Eliot's novel, *Middlemarch*, White says that "[t]he novel expresses a tension between the socially ascribed self and the inner self; both are true, neither is sufficient. One way of defining character—by place and role in society—is controlled by the expression of what it leaves out, what it does not recognize. A realization of 'complexity and profundity' is achieved by expressing the self in a state of tension and uncertainty" (*id.*). Significantly, "[t]he heart of this way of writing about people is . . . writing two ways at once" (*id.*).

The question, though, is how such writing is to be achieved. What does it take to achieve a resolution, even if only temporary, of the conflict between the demands of one's self and one's profession? "The activities of the lawyer's life . . . include a process of self-

imagination. For as you work through your life as a lawyer, struggling to put things the right way, to make and defend your claims of meaning—as you choose what you shall say and not say—you work out an identity for yourself, you define a mind and character . . ." (p. 760). How does one reconcile, even if momentarily, "the tension between the life of the self and the institutional statement and regulation of life?" (p. 302). White suggests that one hoped-for resolution will be our leaving room for "a mind that is both individual and typical" (p. 34; see also p. 192); that is, a mind neither so idiosyncratic as to be solipsistic nor so molded and conditioned by external forces as to be cliched and hopelessly mannered. White finds the ideal of such reconcilation in Shakespeare's *Antony and Cleopatra*, where Antony "is spoken of in constantly shifting terms" (p. 297). "Antony is engaged in a pursuit of an imagined self, a process of making his own life and character through his claims to meaning. There is no single true view of him or Cleopatra; the truth shifts constantly as they define themselves anew, for the moment. The play entertains the most enormous possibilities for both, and what we perceive at the end is not the death of an understood or comprehended man, but the extinction of a world of possibilities" (p. 298).

At the very beginning of Section I, I mentioned that White investigated the relations between mind and world and that his investigations were undertaken by looking at the mediator between the mind and the world—language. We have now come full circle in these investigations. It seems that our access to the world and the mind is governed by two media: our experiences and our languages (see, *e.g.*, pp. 46-47). At any time, we are apt to emphasize one, to the other's neglect and our own misunderstanding. Thus, it has been said: "Experience is never limited, and it is never complete; it is an immense sensibility, a kind of huge spiderweb of the finest silken threads suspended in the chamber of consciousness, and catching every airborne particle in its tissue. It is the very atmosphere of the mind . . . ."[41] However, it has also been said: "Language, one might say, is the medium of mind, the element in which our minds dwell as our bodies dwell on earth and in air."[42] But the mind is constituted by both language and experience. And, of course, it is just as accurate to say that our experience and our language constitute our world; they are our calls on it, our connection to it. We possess both the world and ourselves through both experience and language.

41. H. JAMES, *The Art of Fiction*, in PARTIAL PORTRAITS (1888), reprinted in IMAGINATION, *supra* note 3, at 48.

42. H. PITKIN, WITTGENSTEIN AND JUSTICE 3 (1972). *But cf. id.* at 320.

White's deepest goal requires, then, that we achieve not only the right relationship with our language but also the right relationship with our experience.[43] One without the other will not do. In the law, we run the risk of losing our grip on both the language and the experience of ordinary life. (There is such a thing as becoming too professional.) And it is our responsibility to retain a grip on that part of our lives. But how does one do that? How does one reconcile the two? "One cannot by a simple act of decision be what one will: 'For there is no creature whose inward being is so strong that it is not greatly determined by what lies outside it.' The process is one of claiming a meaning and then seeking, always imperfectly, to justify it, of coming to terms with the tension between imagination and reality" (p. 64). The way we reach reconciliation of reality and imagination is by *claiming a meaning* for an event, for our experience (pp. 64, 108-09, 136, 164). But how is that act done in the law, of what does it consist?

> What is to the parties a barroom fight, a dreadful auto accident, or an unsuccessful deal, is spoken of by the lawyers and the courts in terms of other things: cases, statutes, familiar arguments, and so on, and all in the traditional forms of oral and written argument, negotiation, judicial opinion, and the like. This is a way of talking of one thing in terms of another, of life in terms of law, and it could be seen as the central judicial activity. The events—which could be described in ordinary English a thousand ways, and which have a real life of their own outside the law in people's memories and feelings—are converted into a legal matter, and this conversion or metamorphosis is an act of the imagination.[44]

The conversion of an ordinary event into a legal event by putting it in legal terms is a claim to meaning (see pp. 101, 136). The mystery of that conversion process should not be lost on us, for it is "the wording of the world"—it is a changing of worlds. "A fact has two surfaces because a fact is not merely an event in the world but the assertion of an event, the wording of the world."[45] So, in a significant

43. Thus, he should not be taken as claiming that the only way to know the inside of a profession is to know its language. That claim would not be true of some professions: *e.g.*, carpentry, truckdriving, dancing. Each profession has its own experiences and many of those are nonverbal ones. IMAGINATION, *supra* note 3, at 13. But in regard to the law, where language is the medium of the law, knowing the language of the law is central to knowing the profession of the law.

44. IMAGINATION, *supra* note 3, at 773.

45. SENSES, *supra* note 8, at 43.

sense, we can say that the lawyer looks at an event in the world, at his experiences and his languages, at the terms and the feelings he has it in his capacity to call upon, and then he "words" that event: he claims a meaning for it, one that will be recognized within the institution of the law. Such claims to meaning are, for White, the central activity of the life of the lawyer. "Might it not be suggested that the central act of the legal mind, of judge and lawyer alike, is this conversion of the raw material of life—of the actual experiences of people and the thousands of ways they can be talked about—into a story that will claim to tell the truth in legal terms? To do this, one must master both sorts of discourse (both narrative and analysis) and put them to work, at the same time and despite their inconsistencies, in the service of a larger enterprise. How is this to be done? How can these discordant modes of thought and expression, these incompatible, uncommunicating, sides of oneself, be brought under the control of a single active intelligence? How can they be reconciled, if only for a moment, in a single work of the imagination?" (pp. 859-60).

The answer to that question—to the extent that we have an answer—is shown in this very book. Such reconciliation, such claim to meaning in the face of discordance and tension, requires piecing out our position totally, in the only way we have or know how. We must establish the facts and the phenomena of the life in the law, of the lawyer's position and the legal imagination.

> The human imagination is released by fact. Alone, left to its own devices, it will not recover reality, it will not form an edge. So a favorite trust of the Romantics has, along with what we know of experience, to be brought under instruction; the one kept from straining, the other from stifling itself to death. Both imagination and experience continue to require what the Renaissance had in mind, viz., that they be humanized.[46]

II. THE HUMANIZATION OF THE LEGAL IMAGINATION

> A characteristic remark that Wittgenstein would make when referring to someone who was notably generous or kind or honest was "He is a *human being!*"—thus implying that most people fail even to be human.[47]

In this section, I want to follow up on the suggestion with which Section I closed: imagination (the mind) and reality (the world) must

46. *Id.* at 74.

47. N. MALCOLM, LUDWIG WITTGENSTEIN, A MEMOIR 61 (1958).

be humanized if they are to be reconciled. That is, they both must be made fit for human habitation—we must learn to live within the borders and boundaries of our mind and our world, of our languages and our experience. "For Wittgenstein, philosophy comes to grief not in denying what we all know to be true, but in its effort to escape those human forms of life which alone provide the coherence of our expression. He wishes an acknowledgment of human limitation which does not leave us chafed by our own skin, by a sense of powerlessness to penetrate beyond the human conditions of knowledge."[48] The motto in this section is meant to suggest that the process of humanization must be begun by all of us. But the suggestion only makes sense if one understands that one's humanity is something a person can lose, and gain. In the three parts of this section, I trace some of the terms and themes in *The Legal Imagination* that show us how we might begin to humanize ourselves as lawyers, how we might begin to acknowledge our human limits. But first, I wish to direct attention to the similarity of White's (and a lawyer's) methods and those of ordinary language philosophy, by which I mean their shared concentration on our use of language as a key to our investigations.

Part of the value of *The Legal Imagination* is White's dependence and concentration on the language of the law for providing data and direction to his phenomenological explorations. This continual appeal to our learning and use of the language of the law is a central reason why *The Legal Imagination* has, and will continue to have, a deep and sustained value for those inside or outside the legal profession who wish to understand the lawyer's position and the legal imagination. Such referral and appeal suggest, as well, the fraternity of White's methods with those central to ordinary language philosophy. It is not possible to give a fair account of ordinary language philosophy (much less reveal the lie of such a label) within the confines of this article.[49] Nonetheless, it may be helpful if I provide an example

48. S. CAVELL, *The Availability of Wittgenstein's Later Philosophy*, in MUST WE?, *supra* note 2, at 61.

49. While I use, for the sake of brevity, the label "ordinary language philosophy" in referring to several variants of contemporary philosophical activity, it should be realized: that Wittgenstein's philosophizing cannot comfortably be subsumed under that rubric; that while J.L. Austin's method is thought to be perhaps the purest example of that rubric, he himself offered the label "linguistic phenomenology" to describe his work; and that the type of philosophical activity embodied in Stanley Cavell's work seems to be his own special blend of Wittgenstein and Austin. So the tracing and placing, not to mention naming, of the variant strains of contemporary philosophy are fraught with perils and are not to be ventured lightly or off-handedly.

Anyone interested in the phenomena sketched so baldly here would do well to consult the following: on the rise of "ordinary language philosophy," G. WARNOCK, ENGLISH PHILOSOPHY

of the type of appeal to language that ordinary language philosophy is apt to make.

As I mentioned, the similarity between White and ordinary language philosophy can be located in their mutual claims to be investigating the uses of a language. The assumption is that such investigations lead us to discover more than merely facts about language. For example, J.L. Austin, one of the foremost practitioners of the art of ordinary language philosophy, illuminated more than our language when he told the following story:

> You have a donkey, so have I, and they graze in the same field. The day comes when I conceive a dislike for mine. I go to shoot it, draw a bead on it, fire: the brute falls in its tracks. I inspect the victim, and find to my horror that it is *your* donkey. I appear on your doorstep with the remains and say—what? "I say, old sport, I'm awfully sorry, etc., I've shot your donkey *by accident*"? Or *"by mistake"*? Then again, I go to shoot my donkey as before, draw a bead on it, fire—but as I do so, the beasts move, and to my horror yours falls. Again the scene on the doorstep—what do I say? "By mistake"? Or "by accident"?[50]

In one case (or situation) we say, "I shot him by mistake," and in the other we say, "I shot him by accident," and what is revealed to us by this careful scrutiny of how we use these words is not merely a fact to be noted by the descriptive linguist but a fact that tells us something about how we act in this world. "It is true that [Austin] asks for the difference between doing something by mistake and doing it by accident, but what transpires is a characterization of *what a mistake is* and (as contrasted, or so far as contrasted with this) what an accident is."[51] It is, then, in this way—working from case to case, examining example upon example, elaborating ever more rich descriptions of how we use and choose our words in varying contexts—that ordinary language philosophy proceeds, sometimes even to agreement or to revelation. But the appeal to ordinary language and its uses need be neither final nor definitive to be valuable. Rather, such appeals serve most often to set the stage and clear the ground for further activity, be it philosophical or otherwise. "Cer-

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SINCE 1900 (1969) is highly compact and readable without sacrificing accuracy; for a more detailed and substantial treatment, see J. PASSMORE, A HUNDRED YEARS OF PHILOSOPHY (1957).

50. J.L. AUSTIN, *A Plea for Excuses*, in PHILOSOPHICAL PAPERS 133 n.1 (J.O. Urmson & G.J. Warnock ed. 1961).

51. S. CAVELL, *Austin at Criticism*, in MUST WE?, *supra* note 2, at 104.

tainly, then, ordinary language is *not* the last word: in principle it can everywhere be supplemented and improved upon and superseded. Only remember, it *is* the *first* word."[52]

This description of ordinary language philosophy and its procedure—threadbare as it is—suggests some similarity between that practice and the practice of law. It could be said that lawyers often work in much the same fashion. For example, they tell and retell a story and then see what uses of which terms fit the varying stories (contexts). But in their case-by-case or example-by-example reasoning, lawyers appeal to the use of the language of the law, not ordinary language. That difference suggests that in applying the methodology of ordinary language philosophy, the peculiar constraints, or "rigidity" as White terms it, of legal language may yield results that vary from the application of the same method to ordinary language itself. Another point of comparison between the professions is that the arbiters of the use of the language of the law are not the native speakers of ordinary language; rather, they are the professionals in the law (in particular, they are the courts).[53] Only those trained in the profession and conversant with the language can arbitrate its use. Ordinary language seems more accessible—there is no *special* training or equipment (as compared with science or law) required in order to focus on ordinary language and its use. "[F]or a native speaker to say *what*, in ordinary circumstances, *is said when*, no . . . special information is needed or claimed. All that is needed is the truth of the proposition that a natural language is what native speakers of that language speak."[54] Yet both ordinary language and the language of the law require that one be an initiate, an insider, of the language if he is to be a competent arbiter of it.

As I understand it, ordinary language philosophy proceeds on the conviction that we can investigate and learn about ourselves and the world, about others and about our natural and social groupings,

52. J.L. AUSTIN, *A Plea for Excuses*, in PHILOSOPHICAL PAPERS 133 (J.O. Urmson & G.J. Warnock ed. 1961).

53. I have long thought that the way in which a lawyer searches cases in other jurisdictions for uses of terms or principles or rules that he can apply (or argue for) in his jurisdiction, is similar to the way in which an ordinary language philosopher will search for varying responses to the question, "What should we say when . . . ?" And, of course, varying the example (the "language-game") is like varying the facts of the case: we see how the response, or the rule, changes. However, the similarity ends at the purpose for such exercises. Usually the lawyer is looking for the most advantageous use of a term or principle or rule as applied to his side of an argument or case; usually the philosopher is looking to describe *all* the standard (and non-standard) responses.

54. S. CAVELL, *Must We Mean What We Say?*, in MUST WE?, *supra* note 2, at 5 (emphasis added).

by investigating what we say about ourselves, the world, others, and our groupings (and what we fail to say and what we are tempted to say and what we should say) and by looking at where we say or are tempted to say or should say such things and when we say them. We reveal ourselves and our world in our words (see p. 8) and in particular in our choice of words in a given, specific context. And our words (and the context in which we use them) are as real, as constant, as available and accessible to and among us, as are any phenomena in the world. Whether we choose to avail ourselves of that data, whether we look at what is there, amounts to a choice to acknowledge or deny our route to self-knowledge and knowledge of others and our world.

There are those who will dispute such claims for the availability of our language and its concomitants and for the promise an investigation of them holds. They will say, perhaps, that we are wasting our time on words while we should be studying the world. That response, I suggest, is confused in at least two ways (beyond the obvious fact that language *is* a part of the world). First, the objection mistakes *one* of the tasks of philosophy, and science, as being *the* task of philosophy.[55] While philosophy and science share as one of their points of investigation our relation to and knowledge of nature (the "external world"), such investigation does not exhaust philosophy or philosophical activity. Philosophy can, it seems, become entangled with any matter that pertains to man. (A fact revealed, I think, in our counting philosophy as one of the humanities.) The domain of science, however, is limited to the natural world. Second, the response fails to recognize the fact that "we learn language and learn the world *together*, that they become elaborated and distorted together, and in the same places."[56] Thus, it fails to recognize that "the philosophy

55. In a smart attack on [ordinary language] philosophy, [Bertrand] Russell suggests that its unconcern with the methods and results of modern science betrays its alienation from the original and continuing source of philosophical inspiration. "Philosophers from Thales onward have tried to understand the world . . . ." But philosophers from Socrates onward have (sometimes) also tried to understand themselves, and found in that both the method and goal of philosophizing. It is a little absurd to go on insisting that physics provides us with knowledge of the world which is of the highest excellence. Surely the problems we face now are not the same ones for which Bacon and Galileo caught their chills. Our intellectual problems (to say no more) are set by the very success of those deeds, by the plain fact that the measures which soak up knowledge of the world leave us dryly ignorant of ourselves.

S. CAVELL, *The Availability of Wittgenstein's Later Philosophy*, in MUST WE?, *supra* note 2, at 68.

56. S. CAVELL, *Must We Mean What We Say?*, in MUST WE?, *supra* note 2, at 19. *Cf.* IMAGINATION, *supra* note 3, at 25: "The view that one's values exist outside of and unaffected by one's language disregards the experience of being brought up to say 'nigger,' and ignores the effect of such a word on human relationships. Such a word, defining such a relationship, is

of ordinary language is not about language, anyway not in any sense in which it is not also about the world. Ordinary language philosophy is about whatever ordinary language is about."[57] I do not claim that such statements prove anything; they suggest, however, that it is possible to discover where we stand and how we stand in relation to ourselves, our world, and our language. They also suggest that if we do not like our current standing (position), then it is wholly up to us to do something about that fact. If we recognize that we do not know or understand our relation(s) to our individual words or our language as a whole, and that we do not understand our relation to ourselves or our world, then ordinary language philosophy (as I construe it) is one way of acknowledging that situation and taking action with respect to it. It sets the terms of the problems we face and our responsibility to face them. Nothing more is settled; our work remains. "The philosophy of ordinary language seems to me designed to nudge assumptions into the light of day, not because it demonstrably makes no assumptions of its own, but because there is no point at which it must, or even may, stop philosophizing."[58] That fact is simultaneously liberating (it shows us where to begin) and terrifying (it shows us that *we* cannot call our work over until *it* is finished with us). It fixes our position.

> Our position is to be discovered, and this is done in the painful way it is always done, in piecing it out totally. That the self, to be known truly, must be known in its totality, and that this is practical, is the teaching, in their various ways, of Hegel, of Nietzsche, and of Freud.[59]

A. The Recognition of Position and Person

It is crucial to recognize that White's description and analysis of the language of the law is always entered and sustained in the service of a higher purpose. In the end, his task is the mapping of the consciousness, or the world, of the legal imagination. His investigations of the phenomenology of legal language are also pointed toward helping us understand the lawyer, the user of that language. (This is one way in which White's purpose and technique are akin to those of ordinary language philosophy.)

For example, what is the effect on us of learning legal language?

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a real fact of existence with which one must in some way come to terms."

57. S. CAVELL, *Aesthetic Problems of Modern Philosophy*, in MUST WE?, *supra* note 2, at 95.

58. Cavell, *Existentialism and Analytical Philosophy*, 93 DAEDALUS 946, 954 (1964).

59. S. CAVELL, *The Avoidance of Love*, in MUST WE?, *supra* note 2, at 337-38.

Some of White's deepest themes concern education—its conditions and what it is—and language, and the relation of language to the world and the mind. He tries to find and sketch the lawyer's position, that which is "typical" of all lawyers. "[O]ne strain in a professional education works against the purposes of one's liberal education: not to foster individuality and diversity, but to train into sameness" (p. 14). But he also encourages us to make and sustain a life for ourselves within that language system once we have acquired it (so, other deep themes concern the relation of the self to its language, and to others who are inside or outside the language, and how one conceives of life within the law and how that conception meets or deflects one's conception of the rest of life, outside the legal language system). One side of the summation of this entire investigation comes in White's discovery that we all have and take *positions*, and that the lawyer's position can be characterized and investigated to the same extent as any other position.

One important example of this discovery comes when White remarks that he experienced a "new impression of law practice" when he "finally arrived at a position from which [he] could observe lawyers at work" (p. xxxiv). It is interesting that what he saw anew was the *practice* of law (its work, its prosecution in one's life rather than its acquisition in the classroom) and that his new impression (or perception) came about by his establishing (or "arriving at," suggesting a journey, a route, or a way taken to something) a new point of view or perspective (what White calls a "position"). White's experience seems to have been a revelation. This suggests that not even one's own occupation or profession need be clear to one before entering it and investing one's life in it. What White indicates is that "lawyers at work" (as he came to understand a lawyer's work) did not *appear* to him until he assumed a new position. His world changed when his position changed—a tautology, I would say, albeit a significant one. It reveals a condition of our existence in this world: only certain phenomena are visible from any given position, and to change one's position is to gain or perceive certain phenomena (or certain sides of phenomena) and lose others. As the motto to this article reminds us, "[w]hat cannot be caught in those particular terms of criticism cannot be appreciated in that particular philosophy," or, I would add, cannot be appreciated from that particular position.

I take it as one of the facts of life in the modern world that we are defined by our positions, by the positions we take and adopt; and that we recognize and define others by the positions they take and

adopt.[60] For example, throughout *The Legal Imagination*, White emphasizes that the reader of the book must examine his own position and the position of the person being talked about in the book (the lawyer, the judge, the legislator, the student, the layman). That is, one must view the world both from inside and outside one's own position(s) (see, *e.g.*, p. 20), and must recognize one's own views as being just that—views, glimpses of reality, partial perceptions gained from a fixed position. Stanley Cavell has remarked on this condition of our lives: "ours is an age in which our philosophical grasp of the world fails to reach beyond our taking and holding views of it, and we call these views metaphysics."[61] Why this is true of us, and whether it has always been so, is not clear. But it is a condition of our lives today.

White's discovery of position is matched with another insight, each of which complements the other; furthermore, recognition of both is required for the humanization of the legal imagination. In a world where we view one another from our separate positions, how do (can) we maintain our connections? How can we retain our humanity? Part of the answer to that question is—and this will seem paradoxical—by our maintaining our connection with ourselves. For it is in the nature of self-knowledge that whatever it takes for one person to acknowledge himself is the same as what it takes to acknowledge others. But our connection with others requires something further. It requires that we treat others as people, not as things, not as objects. (See pp. 116, 119, 122, 168, and see generally the subject of slaves being talked about as people, as animals, and as things, pp. 430-94.) This requirement is emphasized in White's discussion of Euripides' *Alcestis* (pp. 274-78), where the climax of the play is identified as that point when Admetus changes from a one-dimensional caricature to a complex, multi-faceted character (person). "He is no longer definable as an element in a situation, a part of a problem; he speaks out of more than one relationship" (p. 277). White concludes that "this play is a dramatization of what it means to talk about people in a language of label or caricature. This shows us what the world would be like if such a language told the truth and if we were

60. The very fact that law has become incomprehensible to laymen, those people who are the constituents of the society that promulgates and enforces the law, fairly shouts the fact that in today's world we are encapsulated in our positions. While we may recognize another's position, we are hard put to understand and appreciate it. (The pervasive concern in philosophy, at least since Descartes and certainly quickening since Wittgenstein, for our "knowledge" of "other minds" to show itself, can be understood in one form as a desire to know how one has and gains access to another's position, and how one can be assured of such access.)

61. WORLD, *supra* note 10, at xiii.

fully expressed by a single label, relationship, or experience" (p. 278). What, then, of the language of the law, which might be said to be a language of caricature? White queries whether "the use of caricature entails an essential and corrupting inhumanity, for it teaches us that others are not to be spoken of as people" (p. 273). He goes on to identify the problem of caricature in institutions and institutional language as the following: "Each institution seems to use its particular labels or identities without regard to other possible ways of talking about people . . . . Each person is talked about as if only a particular aspect of his nature mattered at all, as if there were nothing else to be said. Can you think of any institutions that do not take this incredibly simple view of the human personality?" (pp. 299-300). Institutional languages, such as the language of the law, deny the humanity of the persons they serve: that is the insight offered in *The Legal Imagination*. We are being warned that the danger of the language of the law—and, thus, of its correlate, the legal imagination—is its threatened denial of the humanity of people; they are *persons*, not objects. And the danger is clearly there—consider, for example, "the relations between a lawyer and others: client, judge, juror, another lawyer" (p. 314; see also pp. 38-39, 119, 193). Does the lawyer grant them their own positions, their own "ultimate self," personality, or identity? How, if at all, can "one person [treat] another as a person, not as a thing[?]" (p. 314). And if we find we can treat another as a person, then our ability to do so is apt not to be a result of our training or our culture; neither prepares us for that. Why?

> [A]stonishingly little exploring of the nature of self-knowledge has been attempted in philosophical writing since Bacon and Locke and Descartes prepared the habitation of the new science. Classical epistemology has concentrated on the knowledge of objects (and, of course, of mathematics), not on the knowledge of persons.[62]

An answer to the question concerning how one person is to treat another as a person is suggested in the reading of Jane Austen's *Pride and Prejudice* (pp. 401-07), where the comment is made that some of the book's characters fail (as people) where others succeed. "They seem to lack the slightest perception of what every ordinary decent person must perceive about other people; that each is different from oneself and entitled to claims and interests of his own" (p. 403). The

62. S. CAVELL, *The Availability of Wittgenstein's Later Philosophy*, in MUST WE?, *supra* note 2, at 68.

emphasis is on every decent *person* perceiving something (an ultimate self?) that he has in common with other *people*. In White's analysis of *Troilus and Cressida* (pp. 51-56), the tragedy is said to amount to the failure to recognize "that others talk differently, that there is [another] way to talk" (p. 52). This shows "the failure to meet and respond, the failure to organize around differences and similarities of view" (p. 53). My conclusion, gained from my readings of White and Cavell, is that in order to counteract the threat which any institution (including the law) poses for us—the threat of our going dead to our shared humanity (which would be the denial of our responsibility, of our responsiveness)—we must grant others their positions and their views, and we must grant them in a way that recognizes them as prima facie candidates for our respect and consideration. Their status as persons cannot be dismissed or denied, but instead must be acknowledged and dealt with. They are as worthy, and as unworthy, of attention as you and I.[63]

> Understanding from inside a view you are undertaking to criticize is sound enough practice whatever the issue. But in the philosophy which proceeds from ordinary language, understanding from inside is methodologically fundamental. Because the way you must rely upon yourself as a source of what is said when, demands that you grant full title to others as sources of that data—not out of politeness, but because the nature of the claim you make for yourself is repudiated without that acknowledgment: it is a claim that no one knows better than you whether and when a thing is said, and if this is not to be taken as a claim to expertise (a way of taking it which repudiates it) then it must be understood to mean that you know no better than others what you claim to know. With respect to the data of philosophy our positions are the same.[64]

Such recognition is fundamental if one is to understand another person, for it requires a recognition of one's dialectical relationship with (to) another: the other is separate from us (and, thus, a stranger) yet he shares the conditions of our existence (our common necessi-

63. This is not to be mistaken for the claim made by ethical relativism. I understand the claim of that position to be that since there are different positions, a diversity of views, with respect to the morality of any act, ethics is irrational and subjective. This mistakes fundamentally the real power of what is called the irrational and subjective. But, more pertinent for our purposes, it also mistakes a recognition of the diverse positions from which we gather data as, *a priori*, foreclosing the possibility of ever reaching agreement on these matters or of understanding why we disagree. That is not my position here.

64. S. CAVELL, *Knowing and Acknowledging*, in MUST WE?, *supra* note 2, at 239-40.

ties). Such is the discovery of position and person. Our discovery of another's *position* shows us our separateness, that we are separate from others; of course, the discovery of another's position can show us as well what we share (the fact that we each have a position). Our discovery of another as a *person* shows us our sharedness, what we share with others; yet, the discovery of another as a person can show us just how separate we are.

One of the consequences of the recognition of one's dialectical relationship with (to) others is that the lawyer, if he is to be humanized, must try to integrate and accommodate in his life his ordinary language and experience as well as his legal language and experience. The private and the public must be accommodated (pp. 40, 52, 76, 180, 196, 198, 924).[65] The task is the same for the judge and the legislator. Interestingly enough, however, a different twist to that task is set for the layman. He must learn to accommodate the language and experience of professions with his ordinary language and experience. And, after all, this has been the task the jury has faced from time immemorial: how to reconcile the demands and needs of the law with those of ordinary life (pp. 5, 136).

> [W]hat do we mean by decency and humanity, and how can they be achieved? What does it mean, for example, to treat another person as a person and not as a thing, and how does one do it? How does one recognize the humanity of another and not convert him into a fiction, a role, an idea? To what extent is success here a matter of feeling and physical conduct, and to what extent a matter of expression, an art of language?[66]

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65. Thus, White does not allow his recognition of position and person to skew his placement of the phenomena of the world. "Here we come to the paradox: if the first point is that we do not have to take institutional ways of talking at face value, the second is that sometimes we want to do just that, and not in spite of their limitations but because of them. Sometimes it is desirable in every way to use institutional identities, narrow as they are and partly because they are narrow" (p. 301). And again: "The ordinary person comes to see that the official institutional views of mankind are impossible, and does not take them with complete seriousness. Yet he does not utterly reject them, and one might say that an important ingredient of maturity is the ability to live with institutions without ending up sounding like one" (*id*). But the question is: "How does one achieve this? How can a lawyer do so? . . . How can you find a way of using the language without taking it too seriously, a way of expressing or exercising a sense of your own distance from this system?" (*id.*).

66. IMAGINATION, *supra* note 3, at 168. On the topic of the non-recognition of persons by the law, see J. NOONAN, PERSONS AND MASKS OF THE LAW (1976); J. FRANK, COURTS ON TRIAL (1963). The theme of respect for persons can be traced back at least as far as Kant, who, in *The Foundations of the Metaphysics of Morals*, argued that one form of the ultimate ethical rule (the "categorical imperative") was the requirement that we treat people as ends and not merely as means. A contemporary interpretation of Kant's view can be found in J. RAWLS, A

The very fact that such questions and themes can be suggested by and broached within the terms of White's work suggests its depth and breadth, as well as part of its value.

B. Writing and Our Responsibility

Heidegger has said, "We—mankind—are a conversation. The being of men is founded in language."[67] A lawyer, remarks Professor White, is "a special sort of writer" (p. 3). David Mellinkoff, in his *The Language of the Law,* says that "[t]he law is a profession of words."[68] Certainly, language is the medium of the law. But those remarks only go to show that the law is, after all, a human institution, "a human affair, of human complexity, meeting human need and exacting human responsibility . . . ."[69] How is it, then, that the law and its language has become—or has always been—so dehumanized, so devoid of human vitality and warmth? Our responsibility in such matters has been traced by Stanley Cavell as follows:

> Wittgenstein is known for his emphases upon the publicness of language. But his emphasis falls equally upon the absoluteness of my responsibility for the meaning I attach to my words. Publicness is a shared responsibility; if what we share is superficial, that is also our responsibility.[70]

THEORY OF JUSTICE 179-83 (1971). *See also* Harris, *Respect for Persons,* in ETHICS AND SOCIETY 111 (R.T. DeGeorge ed. 1966). The concept of position has been appealed to in Rawls' book by way of his reference to "the original position" of the contracting members of society. *See also* Moline, *On Points of View,* 5 AM. PHIL. Q. 191 (1968). The best and most readily available discussion of Wittgenstein, Austin, Cavell, ordinary language philosophy, institutions, and the importance of positions and persons, is H. PITKIN, WITTGENSTEIN AND JUSTICE (1972).

67. M. HEIDEGGER, EXISTENCE AND BEING 277 (W. Brock ed. 1949).

68. D. MELLINKOFF, THE LANGUAGE OF THE LAW vii (1963).

69. S. CAVELL, *Austin at Criticism,* in MUST WE?, *supra* note 2, at 104-05. Thus, as White suggests at pp. xxxiv-xxxv and by the very form in which *The Legal Imagination* is cast, law is neither a natural nor a social science. It is one of the humanities. Yet many people are fond of speaking in terms of "the science of the law" or "the legal science." Such terms set an ideal which for the law is both impossible and irrelevant.

> The "law is a science" analogy has conditioned our thinking for a long time. It has not only set our goals for us but has dictated our methods of study and research. It has told us not only what we were looking for but how the search was to be conducted. If we can rid ourselves—or if our successors can rid themselves—of the illusion that law is some kind of science—natural, social or pseudo—and of the twin illusion that the purpose of law study is prediction, that will be a clear gain for the future of our law.

Gilmore, *The Storrs Lectures: The Age of Anxiety,* 84 YALE L.J. 1022, 1041 (1975).

70. WORLD, *supra* note 10, at 127. Cavell has also remarked,

> [O]ur words are our calls or claims upon the objects and contexts of our world; they show how we count phenomena, what counts for us. The point is to get us to withhold a word, to hold ourselves before it, so that we may assess our allegiance to it, to the criteria in terms of which we apply it. Our faithlessness to our language repeats our

Law,like language—like any institution—is our *shared* responsibility: we are jointly and severally liable for what the law is, and for what it fails to be.

But the state of the law is, of all of us, primarily the lawyer's responsibility (if only for the reason that citizens and society have ceded their responsibility for it). Connecting this line of thought with White's identification of the lawyer as writer, we might say that one of the conditions or responsibilities of the lawyer's position, which demands each lawyer's fidelity as he knows it, is that the faith of lawyers is, or should be, the faith of writers (albeit special ones).

> This is the writer's faith—confidence that what we are accustomed to call, say, the "connotations" of words, the most evanescent of the shadows they cast, are as available between us as what we call their "denotations." That *in fact* we do not normally avail ourselves of them is a comment on our lives . . . .[71]

The humanized use of a language requires that we understand (from the inside, as it were) the connotations as well as the denotations of that language. On the whole, however, I find that lawyers have no faith in the connotations of their words, that they wish to make their words completely denotative, wholly externalized. Of course, lawyers are right to be deeply concerned with literate craftsmanship, with how words (and readers of those words) go wrong and how to control the responses of others to their drafted documents. But one can never say everything: some things are inexpressible.[72] And one can never anticipate *all* the possible responses to a document, or all the possible decisions or statutes that might obviate a document without being a specific response to it. Yet lawyers will attempt to say everything, to make everything explicit. And they will try to control completely the interpretation and reading of their docu-

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faithlessness to all our shared commitments.

SENSES, *supra* note 8, at 65.

71. *Id.* at 102. Cavell is speaking in particular of Henry David Thoreau but I take the statement to be a comment on a condition of faith imposed on any writer.

72. The fact of inexpressible experience is a constant theme of *The Legal Imagination*, from White's emphasis on "the line that separates the expressed from the unexpressed, what can be said from what cannot" (p. 5) through "new sorts of nonverbal experience" (p. 13) to a point where we "face the inexpressible" (p. 918) and acknowledge that "some men cannot be understood, just as some events cannot be explained" (p. 920). This theme is another affinity between White's work and Wittgenstein's. The most obvious coincidence is in Wittgenstein's remark that "[t]here are, indeed, things that cannot be put into words. They *make themselves manifest*. They are what is mystical." L. WITTGENSTEIN, TRACTATUS LOGICO-PHILOSOPHICUS § 6.522 (D.F. Pears & B.F. McGuinness trans. 1961).

ments by over-compensating (adding extraneous words) or by using so-called "terms of art." At some point, one must give his document over to the public, to some unknown audience in the future that the document happens to find.[73] ("[T]he statute [is] a way of setting things up for the future, . . . a way of organizing future experience . . ." (p. 197).) And at some point the "open-texture" of a document must be acknowledged, must be lived with.

The best lawyers I know value good writing because they know that when words go wrong, things go wrong, plans go wrong, and even the world can go awry. But they also know that the cost of using words is part of our bargain, part of the value of words, and that our dependence upon our language—and our need to be completely faithful to our language and therefore to ourselves—is part of our human responsibility, meeting human needs and demanding human vigilance and work. The wish, and demand, for more than that is not heroic but psychotic.

> [H]ow one talks about another person is really a question of degree, not kind, and the possibilities range from a gargoyle-like exaggeration at one end to some imaginary rendition of the whole person at the other. The task of the writer is to choose his place along that scale with some real understanding of what the choice entails and an awareness of why he made that choice rather than another. The question can then be put this way: how and why are such choices to be made? What ways of talking about people should the lawyer master, and by what art can he do so?[74]

The lawyer's use and experience of legal language will be humanized, I believe, if he comes to appreciate the position he is in—the writer's position. A writer will have at least two problems confronting him at the point of silence—how to break it, and with whom to break it. I read White to suggest that the first problem is resolved when a writer finds his own voice. In this way, *voice* is as central a concept to the book as is *position* (and the two are of course related). "Voice" can be thought of as the human animation of language, or the self inhabiting its language. White observes what he calls "the tone of voice" (p. 38) of a writer, and refers to it later simply as "voice" (p. 40). The subject of voice in writing, and in our experience of reading, is identified in White's reading of *Troilus and Cressida* as the way in

73. *See* IMAGINATION, *supra* note 3, at 648. *See also* Curtis, *A Better Theory of Legal Interpretation*, 3 VAND. L. REV. 407 (1950). See note 76 *infra*.

74. IMAGINATION, *supra* note 3, at 288.

which we identify and characterize a speaker (pp. 51-52); the subject is raised again in the form of "The Voices of the Lawyer" (p. 187); it becomes one of White's terms of criticism when he says of the characters in Euripides' *Alcestis* that they "are labels . . . not voices . . . . They have no insides" (p. 275; see also pp. 248, 290); and it appears as a resolution of the writer's problem with silence in the form of "achieving . . . a position from which you can speak" and finding "your own voice" (p. 686). Finding one's voice is the same as coming to know oneself; it is the discovery (or revelation) of the self.

Voice not only is important in understanding what a writer does, it is also helpful in evaluating what a writer (a speaker) has done. In one of his assigned exercises, White requests the reader-student to write about the same event in three different language systems. It turns out to be "not an exercise in lexicography . . . but an invitation to express what you hear when you listen to other people talk" (p. 34). It is an invitation to examine another's voice, his self. The challenge "is upon your imagination, your capacity to understand and express how someone else thinks and speaks about his experience" (*id.*). Meeting that challenge is not at all easy, and just because a writer has met it before in no way ensures that he can or will meet it once again. But good writers achieve it again and again in their writing.

The constancy of this challenge is, I believe, the constancy of the need to acknowledge others. We are *always, continually,* called upon to recognize others and grant them their positions. Doing so requires treating them as persons, which, I take it, requires *fair-mindedness*. At the culmination of the book, with White's extended examination of Edward Hyde's *The History of the Rebellion and Civil Wars in England* (p. 903 *et seq.*), Hyde's voice, which White characterizes as commanding respect in part because of its "extraordinary fair-mindedness to others" (p. 918), becomes the central topic of examination. And writing at its best becomes the possession and exercise of a fair-minded ("dialectical") voice. "The force of [Wittgenstein's] mode of composition depends upon whether the interlocutors [in his mini-dialogues] voice questions and comments which come from conviction, which are made with passion and attention, and which, as one reads, seem always something one wants oneself to say, or feels the power of. If they do, then their voices cannot, in any *obvious* way, be criticized or dismissed."[75]

75. Cavell, *Existentialism and Analytical Philosophy*, 93 DAEDALUS 946, 957 (1964).

The second problem confronting the writer is, with whom will (can) he break silence? How will he call upon, or create, his audience?[76] The answer comes in the writer's definition and location of his audience, which amounts to his placing of himself, his work, and his reader (pp. 37-39). (White discusses some particular placement problems for the statute writer and his audience (pp. 198-200, 585).) Where the writer places himself will depend upon where he finds his voice. Where he finds his voice will depend upon where he finds that he can reveal his self. But where he places his reader will decide whether, and by whom, his voice will be heard. Finding one's audience is the same as discovering others. And somewhere in between its maker and its audience will be the work's placement.

In this instance, I would locate this book's position by saying that it is written by a teacher and it takes its audience, its reader, to be a student and one of its central topics to be teaching. The book is directly dedicated to Theodore Baird, one of the author's teachers, and indirectly dedicated to all of White's students—which class should include the book's readers. It consists not only of readings but of exercises, questions, directions for profitable study, writing assignments, alternative and supplementary assignments, dialogues with the student, description; all are attempts, devices, and strategies to get the reader thinking about the law and its problematic state (or our problematic understanding of it). We are continually required—if we are to read this book the way it is written—to *respond* to the author, and, eventually, to respond independently to the law itself, to *our* problems with the law. And part of our response to this book is specifically required, by the book's very terms and the author's exercises and writing assignments, to be our writing. White locates and tests our responsibility by testing our writing. He tests our ability to find our own voice and our fair-mindedness in hearing the voices of others. How humanized a response does his test evoke?

C. Education and Educative Friendship

While the reader's position initially is that of the student, the stage to which he grows by the end of the book is that of the critic

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76. [T]o say that language expresses a relationship is a distorting simplification, because language does more: it helps shape the relationship for the future. The writer not only meets the expectations of his audience, he states expectations of his own and, by doing so, makes claims and demands that will have to be accepted or resisted.

IMAGINATION, *supra* note 3, at 39. *See* WORLD, *supra* note 10, at xv; SENSES, *supra* note 8, at 11.

(pp. 50, 57, 733).[77] The critic's position demands that he learn the inside and outside of the position he is judging, *before* he can judge. Since White asks his reader to look at the law and the legal imagination both as a lawyer (or, for the student, as a prospective lawyer) and as a person (a human being who lives his life on levels other than the practice of law), we are being asked to become critics of, *inter alia*, our own lives. Hence, our criticism of the law and the book becomes self-criticism, self-scrutiny. For the first time, perhaps, White's deepest questions (Who will you become? How will you balance the demands of your profession and the demands of your life?) strike home to us, where we live. I do not claim to be able to answer such questions, nor does White. However, I do claim that one cannot live comfortably with them and yet one cannot ignore them—or can only at great expense. But what, then, is the expense of learning the law?

Part of White's answer to this question can be said to be illustrated in his book: this book is his expression of what it is, and what it costs, to learn the law. Throughout his book he details the learning process as a process by which, and in which and through which, a person changes his position. A person who "has the capacity to move to a new position from which the old self can be regarded and rejected" (p. 405) is a person who can learn, who can be educated. And White speaks of the "experience of learning" as being a change "into a new position," a change which in an important sense is "a qualification of both positions, even the concluding one; for to show how you came to a particular way of seeing things is to recognize something outside it, as well as the possibility that you may once more move on" (p. 100). Later, when White concentrates on the writing and criticism of judicial opinions, he remarks that "the movement of [an] opinion . . . ought to be one of education: expressing a change from one attitude, one way of seeing things, to another, by an expansion of understanding" (p. 802).

Education means change. (But we have so often taken education to mean *progress*.) "The very idea of an education, if it means anything, means a process of change—of self-improvement, it is hoped . . ." (p. 9; see also pp. 43, 277-78, 731). White's summation of this

77. That we, the readers and students of this book, are supposed to become critics under the book's influence, is announced at its very beginning. White remarks that he attempts to create an environment within which can grow the feeling that "we are all colleagues here" (p. xxii). We are accepted by the author as his equals, hence he *puts* us (as it were, by a process of ascription) in the position which the critic must work to achieve. However, we lose the privileges of that position if, once put there, we fail to answer to its responsibilities. By the time we reach the other end of the book, we are supposed to have become self-sustaining critics.

theme comes in his recognition that learning something has its costs as well as its benefits, its losses as well as its gains. No change is without its costs; no lesson is all gain and no loss. A recent writer has recognized this fact in a particularly accurate passage:

> [He] remembered a line from Thoreau: "You never gain something but that you lose something." And now he began to see for the first time the unbelievable magnitude of what man, when he gained power to understand and rule the world in terms of [dualistic] truths, had lost. He had built empires of scientific capability to manipulate the phenomena of nature into enormous manifestations of his own dreams of power and wealth—but for this he had exchanged an empire of understanding of equal magnitude: an understanding of what it is to be a part of the world, and not an enemy of it.[78]

White's central insight is that learning the language of the law has its peculiar benefits and costs, and that we can *account* for those credits and debits if we are sensitive enough and sensible enough to know the worth of what we gain and what we lose by becoming lawyers. (For example, White first describes "The Activity of Argument" (p. 806 *et seq.*) and then counters that description with "The Cost of Argument: The Mind of the Sophist" (p. 850 *et seq.*).) That is why White finds it important, indeed crucial, to investigate the legal imagination: each of his students, his readers, must come to grips with the phenomenology of the imagination traced in *The Legal Imagination*. Why? Because each person will have his own accounting system and his own weights and balances, and each person will have the ultimate responsibility of deciding whether the life as traced in White's phenomenological investigations holds the room he needs in which to live. Not everyone can or should be a lawyer (or a doctor or a plumber). White asks: should *you* become one? If so, what kind will you become, make yourself into? "Your question, which the course as a whole is meant to elaborate, is this: how will you, you personally, as an independent mind, respond to and attempt to control the pressure of your training in the law?" (p. 9). "Can you stand outside the legal language system and look at it? Can you stand far enough back from your legal education to ask, 'What am I becoming?' " (p. 10). It is a *choice* for each of us to make, and we make it in one way or another.

It is White's sense of the gravity of this choice that controls his placement of his audience; he speaks to the student in all of us (p.

78. R. PIRSIG, ZEN AND THE ART OF MOTORCYCLE MAINTENANCE 372 (1974).

xxiii). It is also this sense of gravity that makes him speak of the course (of the book) as consisting of a search for and investigation of one's responsibilities, rather than a presentation of conclusions or theses. Thus, the form of the book—perhaps obvious from the form this article has taken—is based upon a testing of the reader's responses, of his ability and willingness to place himself on the mark and put himself to the test. It is an excellent example of and model for what "case books" could be[79]—less the so-called "Socratic method" and more the value of real questioning, comparing, juxtaposing, and describing all of the routes and ways open to us in approaching and investigating the law. The book encompasses many "speech acts"[80] (one might say, it takes the life of the lawyer to *be* a series of speech acts), and brings each to bear in its particular way on the characterization of the lawyer's position.

But what of the law student's position? White gives the problems of legal education less direct treatment than the lawyer's position, but he does not ignore or deny the demands of the student's position. In particular, White relates the position of the student to the position of the reader. "Good writing . . . works directly on its reader and changes him" (p. 803). Good writing is good teaching. Good reading is an experience, one that invites learning or understanding. Therefore, "one consequence of reading of this sort is not only an increased understanding of what lies outside oneself, but a change in the reader himself, an expansion of sympathy or an opening of a new capacity to perceive" (*id.*). White acknowledges and locates the student's (the reader's) responsibility for his own education (pp. xxi, 40, 82). And he ends the book with a section on teaching (pp. 943-47). However, White focuses upon one relation as surpassing all others as the basis of learning: friendship (pp. 922, 925; see also pp. 20-21, 25-26). This may well be his deepest sounding of the concept of position, for it calls to mind the possibility that seemingly irreconcilable positions (for example, student and teacher) can relate to one another on as intimate a level as friendship. It recalls, as well, that each member of that pairing owes the other the recognition accorded by acknowledging him as a person (p. 314). White thinks of friendship and education as helping someone (it is related to the act of giving someone advice, pp. 958-59), as being willing to show another person how

79. "I have encountered no other book in which the 'case method,' that traditional staple of American legal education, has been so effectively used." Weisberg, *Book Review*, 74 COLUM. L. REV. 327 (1974).

80. *See* J.L. AUSTIN, HOW TO DO THINGS WITH WORDS (J.O. Urmson ed. 1962); J. SEARLE, SPEECH ACTS (1969).

to do something (it is related to cooperation between two parties, pp. 198-200), as being able to converse successfully (it is based on that which makes for a valuable conversation, pp. 764, 951-53). But ultimately it consists in having the strength and wisdom to grant another person his separateness, his strangeness (as an "independent mind," pp. xxi, 314). Strangers become friends, and friends become strangers. And we must learn to accept both. Such acceptance requires our acceptance of change, which means our acceptance of loss and gain, and the existence of different worlds (or different views of the world) and others.

On this matter, there is no more moving passage in the book than the selection from Mark Twain's *Life on the Mississippi* (pp. 10-12). Twain writes of his experience and education as a riverboat pilot on the Mississippi. "The face of the water, in time, became a wonderful book—a book that was a dead language to the uneducated passenger, but which told its mind to me without reserve, delivering its most cherished secrets as clearly as if it uttered them with a voice. And it was not a book to be read once and thrown aside, for it had a new story to tell every day . . . . There was never so wonderful a book written by man; never one whose interest was so absorbing, so unflagging, so sparklingly renewed with every reperusal" (p. 11). What response is left after such appreciation, such a feeling elegy? Twain surprises us. Without banality or sentimentality, he records the other side of his experience of education. "Now when I had mastered the language of this water, and had come to know every trifling feature that bordered the great river as familiarly as I knew the letters of the alphabet, I had made a valuable acquisition. But I had lost something, too. I had lost something which could never be restored to me while I lived. All the grace, the beauty, the poetry, had gone out of the majestic river!" (*id.*). Nothing could be more human than that: a change in consciousness—an education—had produced a gain and a loss.

> [A]ny relationship of absorbing importance will form a world, as the personality does. And a critical change in either will change the world. The world of the happy man is different from the world of the unhappy man, says Wittgenstein in the *Tractatus*. And the world of the child is different from the world of the grown-up, and that of the sick from that of the well, and the mad from the un-mad. This is why a profound change of consciousness presents itself as a revelation, why it is so difficult, why its anticipation will seem the destruction

> of the world: even where it is a happy change, a world is always lost.[81]

White pushes us to question the exact meaning of Twain's loss. "What has Twain really lost: the poet's view of the world and the river, or the sentimentalist's? Can this passage be read as the story of growing out of a childish way of thinking and talking?" (p. 13). It can, if one understands "childish" to mean a certain stage in one's life. But one must not think he has thereby entered a *criticism* of that way of thinking and talking. He has only described it, set it in its proper place—nothing more. For it is a stage on life's way, through which one passes; and one passes through it only by means of growth and maturity. Growth and maturity are central to education (pp. 277-78, 301), and we must learn to take that fact of our lives seriously. "Wittgenstein and Kierkegaard take seriously the fact that we begin our lives as children; what we need is to be shown a path, and helped to take steps; and as we grow, something is gained and something is lost. What helps at one stage does not help at another; what serves as an explanation at one stage is not serviceable—we could say, it is not intelligible—at another."[82] Likewise, each person is unable (constitutionally unable) to see what he might otherwise see if he were in a different position, at another stage. What works in one position or at one stage does not necessarily do the job when one's position or stage has changed. "Each stage has its own mode of communication, and an individual in one stage cannot use the explanations which serve in another."[83] We are outsiders to one another; if we are to gain access to another stage or position, we must understand it as an insider does. This condition of our lives provides one way of identifying and investigating the lawyer's position. "What are the lawyer's questions, his remarks, his habitual processes of mind? What sorts of explanation does he demand or accept?" (p. 9).

This insight leads, I believe, to another insight. The deeper point of the emphasis in *The Legal Imagination* and in a motto of this article, on the translation of experience into one's own terms and on the importance of identifying the terms in which an event is cast or an object is criticized or described, is the following. By casting an event or object in terms we know, we *homogenize* it; we translate—or convert—its heterogeneity into something we can assimilate. But

81. S. CAVELL, *Ending the Waiting Game*, in MUST WE?, *supra* note 2, at 118. See text accompanying notes 22-26 *supra*.

82. Cavell, *Existentialism and Analytical Philosophy*, 93 DAEDALUS 946, 970 (1964).

83. *Id.* at 971.

such a process of conversion means, *inter alia,* that we no longer recognize that the event or object is *other;* that it is a stranger to us, separate from us. The conversion that comes about in what White terms "the lawyer's claiming a meaning for an event" is a conversion of the world ("the wording of the world"). It translates an event or object into that which may *then* be recognized by (may be recognizable to) the law as being legally relevant.[84] Such translation is a large part of the power a lawyer (or any professional) wields—and it may be a force for good. Such translation is the process of the humanization of reality. Yet for every claim to meaning we make, we deprive the world in some way. We deprive it of its inhabitants. We must realize that if we are to humanize our imagination as well as reality, then at some point in maintaining our human balance, we must acknowledge the separation and equality of the world and its objects. (For example, *do* trees have standing?)[85] The world and its objects, persons and their experiences, cannot—will not—be converted without a loss accruing to ourselves; this warning is central to the book.[86]

What, then, is the process of the humanization of the imagination? It is the process of education; the process of change and growth; the growth to a stage where one can acknowledge others, in their separateness, as strangers.

> To allow the world to change, and to learn change from it, to permit it strangers, accepting its own strangeness, are conditions of knowing it now.[87]

They are also conditions of living in the world now. To view the world from a revealed position, yet to acknowledge one's privacy and unknowability to others, and therefore the fact that others are strangers to you as you are a stranger to them, is to permit the world strangers. This insight connects with Stanley Cavell's remark that our grasp of the world is limited to taking views of it.[88] Not only is that true, but we also constantly *review* and *re-create* the world. Yet despite our seeming power over it, we must grant to the world its separateness (which separation is inevitable, at least so long as we exist in our

84. See note 40 and text accompanying note 44 *supra;* as to the notion of the translation of an event or experience, see Nemerov, *Speaking Silence,* 29 GA. REV. 865 (1975).

85. *See* Dawson, *Tongues in Trees,* 23 HARV. L. SCHOOL BULL. 14 (Spring 1975); Stone, *Should Trees Have Standing?—Toward Legal Rights For Natural Objects,* 45 S. CAL. L. REV. 450 (1972); Tribe, *Ways Not to Think About Plastic Trees: New Foundations for Environmental Law,* 83 YALE L.J. 1315, 1347 (1974).

86. See text accompanying note 78 *supra.*

87. SENSES, *supra* note 8, at 117.

88. See text accompanying note 61 *supra.*

present condition). Such an acknowledgment will allow the world to change and ourselves to change, and that latter change will be a change of position. In other words, it will be our growth, our education.

We may learn from anything, and we may learn nothing. Nothing is guaranteed us. But little is, *a priori,* denied us.

> When Socrates learned that the Oracle had said no man is wiser than Socrates, he interpreted this to mean, we are told, that he knew that he did not know. And we are likely to take this as a bit of faded irony or as a stuffy humility. What I take Socrates to have seen is that, about the questions which were causing him wonder and hope and confusion and pain, he knew that he did not know what no man can know, and that any man could learn what he wanted to learn. No man is in any better position for knowing it than any other man—unless *wanting* to know is a special position. And this discovery about himself is the same as the discovery of philosophy, when it is the effort to find answers, and permit questions, which nobody knows the way to nor the answer to any better than you yourself.[89]

III. The Book and its Criticism

> Do you see how this book, in making the demands it does upon one who wishes to read it well, offers its reader an education? Can the same be said of any legal literature you know?[90]

Humanization of the lawyer and the legal imagination requires the tracing, location, and proper placement of the workings and snags of the legal system, the legal imagination, and the lawyer's position. That is, the legal imagination and the lawyer's position are to be understood by examining the phenomena that reveal them. White does that by investigating the possibilities of phenomena in the world of law;[91] in particular, by examining the actual and potential uses of the language of the law. So in *The Legal Imagination,* the law is

89. S. Cavell, *Foreword: An Audience for Philosophy*, in Must We?, *supra* note 2, at xxviii. See text accompanying note 64 *supra*.

90. Imagination, *supra* note 3, at 407. (White is speaking here of Austen's *Pride and Prejudice*.)

91. In that respect, compare White with Cavell's description of Wittgenstein's practice:

> Wittgenstein investigates the world ("the possibilities of phenomena") by investigating what we say, what we are inclined to say, what our pictures of phenomena are, in order to wrest the world from our possessions so that we may possess it again.

World, *supra* note 10, at 22.

comprehended in terms of how humans (lawyers, judges, legislators, and laymen) use or fail to use or misuse it and its language; and in terms of how they use its multifarious forms (including: the rule, statute, case, precedent, regulation, and citation). White's effort is an attempt at "total veracity," at placing the facts of life in, or the phenomena of, the world of law as exactly as they can be placed. It is only through such investigation and placement that the common necessities of the framework of the law, and of our lives within that framework, will be revealed. "*[A] priori* conditions are necessities of human nature; and . . . these *a priori* conditions are not themselves knowable *a priori*, but are to be discovered experimentally; historically, Hegel had said."[92] Their discovery will, I believe, be part of the humanization of reality and the legal imagination.

At the opening of this article, I held in abeyance any attempt to characterize quickly *The Legal Imagination*. I did so because we lack, to a large extent, well-developed or discriminating terms of criticism for capturing and examining with facility the ways in which writing and reading take place, take their places in the world and our lives. It is one of White's purposes in the book to stimulate an examination of our (often sadly lacking) critical terms. Indeed, at several points he emphasizes the need to be conscious of one's terms of criticism and to constantly evaluate them (pp. 687-88, 694-95, 722-23). And a new appreciation of criticism's difficulties is one of his purposes in the book. But such lack of terms of criticism and such difficulties were not my only reasons for holding in abeyance the tempting urge of the critic to tell his audience quickly, and glibly, what the book under discussion is and what it is about. Instead of giving in to that temptation, I have tried to keep it in check while allowing time for a description of the book to unfold and establish itself, allowing us time in which to get to know this book. Getting to know a book requires much the same thing as criticizing a book, because both require letting the book talk to us, letting it tell its story on (and in) its own terms, letting it have its say. But once a book has spoken, once we have granted it its speech, once we have gotten to know a book, how are we to criticize it?

Criticism entails the evaluation or judgment of another, be it a person, position, work, or whatever. But criticism is not only judgment or evaluation; it is also *description*. One might think of the practice of human criticism as requiring two activities—understanding and justification. A critic must understand (from the

92. SENSES, *supra* note 8, at 93-94.

inside, as it were) the person, book, statement, or position he is criticizing; and he must justify (from the outside, as it were)[93] the critical object and his criticism. And the aim of genuine criticism is to contribute something, either in understanding or in justification. In this way, the practice of criticism has—or should have—as much a positive thrust as a negative one. Appreciation, as well as depreciation, appropriately applied, are what are called for in criticism.[94] Bertrand Russell conveyed something like this idea when, during his own act of criticism, he remarked,

> In studying a philosopher, the right attitude is neither reverence nor contempt, but first a kind of hypothetical sympathy, until it is possible to know what it feels like to believe in his theories, and only then a revival of the critical attitude, which should resemble, as far as possible, the state of mind of a person abandoning opinions which he has hitherto held.[95]

A moment ago I referred to the difficulties of criticism. Criticism, at least as recognized in Wittgenstein's and Cavell's work, is now doubly difficult, or difficult in a new way.

> [In Wittgenstein] one is . . . met by a new philosophical concept of difficulty itself: the *difficulty* of philosophizing, and especially of the fruitful *criticism* of philosophy, is one of Wittgenstein's great themes . . . .[96]

Criticism which proceeds from (at least one form of) contemporary philosophy attempts to understand from inside any position which it undertakes to criticize.[97] So the initial difficulty of such criticism is how to go about gaining entrance into a foreign position. An inside understanding of, as well as entry into, a position requires that attention be paid to the words used from, or in, that position. One way to investigate and trace ourselves is always available to us as our lan-

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93. "[J]ustification consists in appealing to something independent . . . . [I]f I need a justification for using a word, it must also be one for someone else." INVESTIGATIONS, *supra* note 6, §§ 265, 378.

94. Concerning the current practice of philosophy and criticism, Stanley Cavell has remarked, "[T]he profession as a whole has forgotten how to praise, or forgotten its value. (In emphasizing that criticism has been the life of philosophy from its beginning, I do not wish to camouflage what is genuinely disheartening about its present. I mean merely to remember that criticism *need* not be uncomprehending, nor always entered out of enmity.)" S. CAVELL, *Foreword: An Audience for Philosophy,* in MUST WE?, *supra* note 2, at xxi.

95. B. RUSSELL, A HISTORY OF WESTERN PHILOSOPHY 39 (1945).

96. S. CAVELL, *The Availability of Wittgenstein's Later Philosophy,* in MUST WE?, *supra* note 2, at 45. See text accompanying note 75 *supra.*

97. See note 15 and text accompanying notes 64, 76 *supra. Cf.* H. PITKIN, WITTGENSTEIN AND JUSTICE 313-14 (1972). This is not to say that understanding from the outside is unnecessary; only, that alone it is insufficient.

guage. Attention to the words used from a position leads to the discovery of the person who used the words (who said, and meant, what was said) in that particular context.

> In all cases [the philosopher's] problem is to discover the specific plight of mind and circumstance within which a human being gives voice to his condition . . . . [S]pecifically the issue is one of placing the words and experiences with which philosophers have always begun in alignment with human beings in particular circumstances who can be imagined to be having those experiences and saying and meaning those words.[98]

What kind of criticism is that? It is philosophical—or dialectical—criticism. (It could also be called "human criticism," for it attempts to discover the human behind the work or word.) It studies, and holds together, different ways of speaking, different voices, different positions, different persons. And such criticism tries to grant to each one of those its own peculiar correctness—for that position, in that frame of mind.

> It will seem that these remarks put the ordinary language critic at the mercy of his opposition—that a test of his criticism must be whether those to whom it is directed accept its truth, since they are as authoritative as he in evaluating the data upon which it will be based. And that is true. But what it means is not that the critic and his opposition must come to *agree* about certain propositions which until now they had disagreed about . . . . What this critic wants, or needs, is a possession of data and descriptions and diagnoses so clear and common that apart from them neither agreement nor disagreement would be possible—not as if the problem is for opposed positions to be reconciled, but for the halves of the mind to go back together.[99]

This, then, is the "double" difficulty of ordinary language criticism. One not only tries to understand a position from the inside—which is difficult enough—but in so doing one must grant the value of that position and thus must grant the value of that which is to be criticized. The fact that criticism is now doubly difficult suggests that another position or person (in particular, its or his seriousness) can

98. S. CAVELL, *Knowing and Acknowledging* and *The Avoidance of Love*, respectively, in MUST WE?, *supra* note 2, at 240, 270.

99. S. CAVELL, *Knowing and Acknowledging*, in MUST WE?, *supra* note 2, at 241.

no longer be dismissed out of hand (*a priori,* if you will). We no longer know at a glance what is important or not, what is seriously or facetiously meant, what is—or will be—of value to our lives. And so our attention seems to be demanded by everything—and by nothing. What is the solution to this dilemma? The individual, short-term solution requires, I suggest, one's tracing out completely the phenomena and facts of each particular matter, each particular problem, as one knows or discovers them. A long-term resolution would be quite another matter.

> The sickness of a time is cured by an alteration in the mode of life of human beings, and it [is] possible for the sickness of philosophical problems to get cured only through a changed mode of thought and of life, not through a medicine invented by an individual.[100]

The form of criticism I have been describing seems to me to require, and to constitute (when properly practiced), the critic's acknowledgment of (another) position and person. Accordingly, it is to be expected that, as Cavell warns, the ambition, not to mention the practice, of ordinary language criticism frequently comes to grief. "But [such criticism] provides the particular satisfaction, as well as the particular anguish, of a particular activity of philosophizing."[101] Such activity is not for everyone; not everyone will find it congenial or attractive or useful or fruitful. But for those who do participate, the particular responsibilities which such an activity exacts carry with themselves their own particular satisfactions and rewards.

My reading of White's emphasis on the tension we must bear if we are to control the language and the institution of the law, if we are to respond to the demands of reality and imagination, is based upon this conception of the practice of criticism. We will not understand the law, and we will not be able to criticize it, until we know it from the outside and the inside. "[O]ur sense of the paradox of institutional speech [suggests] that the very 'institutional' qualities that we have seen to be so dangerous give the language great value when it works as a system of manners or social regulation; and even beyond that, that the grand claims of institutional speech, its impossibilities, and even its caricatures contribute to making it an imaginative and verbal resource essential to any understanding of ourselves as members of a community" (p. 303). As members of the legal

100. L. WITTGENSTEIN, REMARKS ON THE FOUNDATIONS OF MATHEMATICS 57 (G.E.M. Anscombe trans. 1967).

101. S. CAVELL, *Knowing and Acknowledging,* in MUST WE?, *supra* note 2, at 241.

community, it is our responsibility to learn how to use the language of the law while recognizing what it leaves out.

But what are our responsibilities with respect to this book? There are two that I can name. First, we must give the book the time and attention and care it demands and deserves. After all, it is only fair that White and his book receive considerate and cautious handling from our hands similar to that which the law receives from him and his book. As a critic and reader of such a book, each of us must give enough time to himself—as well as to the book—to discover its differences and what it has to say. White cautions us against thinking the book is something it is not (for example, it is not "a jurisprudence book in disguise" (p. xxi)). In fact, he says the book cannot be classified in traditional terms (p. xix). But, then, in what terms can it be classified? Even more mysterious is White's statement that the "effort of the book is not to reach conclusions . . ." (*id.*). Someone might ask why, then, are we to read this book?

Late in *The Legal Imagination,* White relates the following moral:

> When asked on the first day of classes why they were reading the *Iliad,* and urged to be honest, freshman humanities students said that they wished to be exposed to our rich classical heritage or to learn about another civilization, or that they hoped to become better and wiser people, or that they did it because it was assigned and they had to, or because they trusted their teachers and felt they ought to, or perhaps because they expected to enjoy it. What their teacher suggested then about the *Iliad,* I suggest now about the judicial opinion: that while all of these responses may be true, none of them begins a valuable conversation, none opens up a line of inquiry and learning of the kind we hope for. What is needed is a literary response—such as, "I read it for its meaning" or "I read it to see what he has done" or perhaps "I read it to learn why one reads"—a response that directs attention away from descriptive or conclusory phrases, away from ulterior motives and hopes, towards the document, the writing; a response that carries us to the activity expressed in the poem or opinion itself.[102]

The point of reading—and of viewing, watching, witnessing, and therefore of criticism—is itself, and not something ulterior. It is an experience. By that, however, I do not mean to deny that such activi-

102. IMAGINATION, *supra* note 3, at 764.

ties can and do teach us things: for example, how to learn something, how to respond to something, how to be instructed by something. Only, I wish to say, the true critic, as the true reader, does not read a book or attend a performance or view a work on the assumption that he knows all about it beforehand or has seen it all before; rather, he comes to experience *this* work. A critic comes to read or attend or view something out of a fundamental motive or need: he participates because such activities answer, or meet, a condition of his life. Nothing more can, or need, be said about that motive. Yet after such an experience, the true critic seems compelled to relate it to others, as though he can fully assess and possess his experience of the work only in sharing it (comparing it, matching it) with others. Such activity is both epilogue and prologue to the critical object or event. It completes the critic's experience of the object or event even while it "directs attention . . . towards the document, the writing . . . ." Criticism is, simultaneously, postscript and prolegomenon. One responsibility, then, of every student, reader, and critic of the book is to read the book well, to read it truly; and to share his experience of it with others. That responsibility, as I envision it, has molded my response to the book and accounts for the form that response has taken—this article. It embodies, I hope, an act of understanding.

The second responsibility we owe to the book is different yet related. It embodies, or would embody, an act of justification. The book makes clear that its challenges are to be prosecuted as best we are able, within or without White's guides and questions and exercises. What matters most is how much the course of discovery can be made to mean to us. Thus, White says that while he has defined "a point of view from which to regard the law" (p. 967), the reader is not to feel compelled to adopt it. Rather, the reader must learn to "speak in his own voice about his experience of writing and thinking" (p. xix) and thereby "come to a new awareness of his place in the world, of his powers and obligations" (p. xxi). The book makes this demand on our lives, our futures. "One of my purposes is to encourage the student [reader] to make a life of his own in the law, to resist the pressures to conform to the expectations of others. I try to record here something of my own attempt to do that as a way of urging him to assert himself boldly" (p. xxiii).

That is the final challenge of the book. "The tension between one's view of oneself and the recognition of one's place in a larger system of life seems fundamental to human experience. The good and bad possibilities of institutional language are intimately related, and the language of the law is institutional if any is. How is such a language to be understood and controlled? That question does not

call for an answer in words, of course, but in the way one responds as writer and speaker to the difficulties one perceives" (pp. 303-04). White is absolutely clear that this response is only begun and prepared by reading his book, and the book's readers and students have the assignment (the responsibility) of continuing the work begun by White. The conclusion of our assignment will not be a passing grade, a brilliant paper, or even a review article. The conclusion—if there is a conclusion to change and growth and understanding and one's education—will be shown in our lives, in the way we live, or refuse to live.

> What has to be *accepted,* Wittgenstein says, is forms of life. This is not the same as saying that our lives as we lead them —in particular, for Wittgenstein, our lives of theory—must be accepted. What it says, or suggests, is that criticism of our lives is not to be prosecuted in philosophical theory, but continued in the confrontation of our lives with their own necessities.[103]

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103. Cavell, *Existentialism and Analytical Philosophy*, 93 DAEDALUS 946, 963 (1964) (emphasis in original).