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THE ACTIVITY OF BEING A LAWYER:
THE IMAGINATIVE PURSUIT OF IMPLICATIONS
AND POSSIBILITIES

THOMAS D. EISELE

Activities emerge naively, like games that children invent for themselves. Each appears, first, not in response to a premeditated achievement, but as a direction of attention pursued without premonition of what it will lead to. How should our artless ancestor have known what (as it has turned out) it is to be an astronomer, an accountant, or an historian? And yet it was he who, in play, set our feet on the paths that have led to these now narrowly specified activities. For, a direction of attention, as it is pursued, may hollow out a character for itself and become specified in a 'practice'; and a participant in the activity comes to be recognized not by the results he achieves but by his disposition to observe the manners of the 'practice'. Moreover, when an activity has acquired a certain firmness of character, it may present itself as a puzzle, and thus provoke reflection; for, there may come a point at which we not only wish to acquire and exercise the skill which constitutes the activity, but may wish also to discern the logic of the relation of this activity (as it has come to be specified) to others and to ascertain its place on the map of human activity.

—Michael Oakeshott, "The Activity of being an Historian"

If law as an activity emerged naively and unpremeditated, as a direction of attention pursued without premonition of what it would
lead to, then by now it has hollowed out a character for itself, as Oakeshott says, and has become specified in a "practice." Having acquired this firmness of character, as Oakeshott further says, law may present itself as a puzzle, thus provoking reflection. Thinking about law in this manner or mood is something that I wish to call "philosophy of law," and this is itself an honorable activity with a character and mannerisms of its own. In law school, we most often call this mode of reflection on law "jurisprudence." It is under the guise of this label that lawyers and philosophers pursue the task described by Oakeshott, where we not only wish to acquire and exercise the skill that constitutes the activity but also wish to discern the logic of its relation to other activities and to ascertain its place on the map of human activity.

Recently a number of people, reflecting on the place of law within the map of human activities, have given us ways to understand law that are different from those in which law has been approached and characterized and placed by traditional jurisprudence. From these people I have learned to think of law as a particular kind of activity, that of a craft or an art. In the following, I first sketch (in sections I-III) this alternative way to think about law, and then consider (in sections IV-VIII) some of the differences between this alternative vision of law and traditional jurisprudence in so far as they both relate or connect us to law.

I. Why Reflect on Law?

I want to begin not by looking directly at law. Whenever one tries, in philosophy, to look directly at this object or that phenomenon, the "thing"—as Wittgenstein warns us—disappears; it proves elusive, and we never can get a grasp on it. Rather, I want to think briefly about why we even bother to reflect on law.

The reason that I most often hear given for taking—or teaching—a jurisprudence course, is that such a course is "broadening" or "enlightening" for the students. These terms of self-congratulation are offered seriously. But what do they mean? They suggest that their speaker conceives of the standard law school curriculum as offering a "narrowing" or "dimming" experience for the students, turning them into narrow specialists (i.e., professionals). Jurisprudence tries to reverse the process, on this view of legal education, to stretch and broaden the law student whose mind has just been neatly narrowed and compressed by the standard, core curriculum. Is this the point of such an exercise?

2. Robin West, among others, has begun the arduous but potentially rewarding task of identifying some of these characteristic mannerisms of jurisprudence. See West, Jurisprudence as Narrative, 60 N.Y.U. L. Rev. 145 (1985).
It cannot be. To think that a jurisprudence course could remedy, and is meant to remedy, the purported lifelessness and drudgery of the core law school courses is, first, to assign it an impossible task—one of warring against its own institutional context. This is hopeless. Second, it is to concede that the institution within which this course takes place has as its pervasive purpose the deadening and stupefying of its students. This describes neither a possible way for humans to learn or teach, nor the actual way that humans live in law schools as I know and understand them.

The idea that jurisprudence courses are meant to be broadening misconstrues what such a course can truly offer students, particularly students in a professional school, who are trying to become professionals. The point of such a course is not to broaden their experience so much as it is to deepen their experience. In particular, it can deepen their responses to the problems and possibilities of the profession that they have chosen. A jurisprudence course can make their responses less superficial and more imaginative professionally, more insightful professionally. Thus jurisprudence proceeds not by introducing law students to new or exotic ways of thought, but rather by bringing their attention back to the problems and ways of the law, and asking them, challenging them, demanding them, to give these problems and ways their complete attention. The idea is one of penetration and immersion, not expansiveness or release.

In asking what the nature of law is and why we should care, jurisprudence asks students to think again about what they are learning when they learn to do what a lawyer does. Thrown back upon themselves and their resources in grappling with the materials and quandaries that jurisprudence can make available to them, these students are expected to see more deeply into the law itself (the nature of its problems and its ways of solving them, its materials and their limits and possibilities), and to see more deeply into themselves (as writers, speakers, readers, arguers; as wordsmiths and problem-solvers). A jurisprudence course, on my view, does not seek to relieve law students from their professional quarrels with the law, but rather aims to place them ever deeper in that crucible of experience and to test their ability, in such a fix, to make something out of the law and out of themselves that approaches adequacy for the one and competency in the other.

I take Stanley Cavell to have spoken truly when he said that philosophy is powerless to prove its relevance to our lives.3 This

3. Cavell's thought is worth presenting in full:
[The philosopher's use of "we"] does not, to use Kant's word, 'postulate' that 'we,' you and I and he, say and want and imagine and feel and suffer together. If we do not, then the philosopher's remarks are irrelevant to us. Of course he doesn't think they are irrelevant, but the implication is that
means that its methods and its results have the relevance they have for us only in so far as we make them relevant, take them to be relevant, find them to be relevant. ‘‘Then what makes it relevant to know, worth knowing? But relevance and worth may not be the point. The effort is irrelevant and worthless until it becomes necessary to you to know such things. There is the audience of philosophy; but there also, while it lasts, is its performance.’’ Jurisprudence is worth the effort when we become hungry for the knowledge it can afford. What kind of knowledge is that?

Some would say that it is sick, desiccated knowledge. It speaks of rules and principles, law and morality, commands and obligations—primary, elemental matters, fundamental human concerns—but in a way that deadens these matters, drains them of their liveliness. It speaks in a theoretical, abstract, dehumanized voice about human matters, and thereby drains them of their natural human interest.

There is much to be said for this criticism of jurisprudence, and in a fine book published three years ago, Philip Soper develops much of this criticism. Modern jurisprudence is dead, he argues. Deceased not in the sense that it literally has passed away from the current scene, but rather in the sense that it has lost its liveliness or contact with life; it lacks vitality. Specifically, Soper says, jurisprudence needs to ask not its traditional abbreviated or truncated question, ‘‘What is law?’’, but the more energizing and inviting question, ‘‘What is law that I should obey it?’’ By linking jurisprudence with political obligation, or by recognizing the links they already have, Soper argues, we can resuscitate the philosophy of law.

I propose to take Soper’s suggestion further. Soper criticizes jurisprudence for failing to make connections; I think of this as a failure of imagination. To make connections between things, to discover and examine their relations, to hold them up for a study of their similarities and differences, requires imagination. It requires the imaginative ability to bring things together in one’s mind, hold them there, and to reflect upon them. By putting things together and taking

philosophy, like art, is, and should be, powerless to prove its relevance; and that says something about the kind of relevance it wishes to have. All the philosopher, this kind of philosopher, can do is to express, as fully as he can, his world, and attract our undivided attention to our own.

6. Id. at 1.
7. Id. at 7.
8. Id. at 7-8, 9-12.
them apart, imaginatively, we examine their possibilities; we see how they relate to one another, how they are or might be related. For at least some philosophers, this is the center of their work—it defines their task and their ambition (and, hence, it defines and limits their relevance). 9

Such work of the imagination is something that I find few students have the stomach for, or a thirst for. Why might this be? I believe that it is because they fail to understand—and we fail to help them see—the extent to which the use of one’s imagination is central to the activity of being a lawyer. Students fail to see that the use of their imaginations is not some silly distraction from the serious business of the law, nor some extraneous way of escaping the demands of their profession, but rather pins them exactly to one of the central demands that their clients make upon them as lawyers. For what the client wants, and what the profession demands, is that each lawyer make use of his or her imagination to make something out of the materials of the law, something that responds to a problem or conflict in the world. They demand something useful to the client and acceptable to the profession.

This necessary skill of calling upon one’s imagination productively can seem so amorphous, so subjective, that one may despair of ever knowing whether or not one has acquired it, or how one can cultivate it. The answer is, of course, that one never knows (in the sense desired). This skill is evinced only in the activity, the work, of being a lawyer. It can develop (or disappear) overnight, or over a year, or over a career. One never knows whether one has the imagination it takes to handle a legal problem successfully until he or she does so. This self-uncertainty is an essential part of the lawyer’s position; hence, the ability to deal with it fruitfully is an essential skill for the lawyer to have. One deals with it imaginatively, by developing the ability to place oneself in the world at a fruitful juncture with one’s materials and talents, and then by making something out of that placement. This is a method by which we can acquire self-knowledge, a knowledge of one’s location in the world (here, in legal culture) and of the meaning of one’s actions in that locale, and hence a knowledge of the self (its character) as currently constituted. “Knowing oneself is the capacity, as I wish to put it, for placing-oneself-in-the-world.” 10 Where does this capacity lead? What does it accomplish?

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We feel as if we had to penetrate phenomena: our investigation, however, is directed not towards phenomena, but, as one might say, towards the ‘possibilities’ of phenomena. We remind ourselves, that is to say, of the kind of statement that we make about phenomena.

Id. (emphasis original).

II. Locating Oneself Within the Activity of Law

In his Inaugural Lecture, "Political Education," Michael Oakeshott characterizes politics as "the activity of attending to the general arrangements of a set of people whom chance or choice have brought together." He then goes on to elaborate this formulation:

Now, attending to the arrangements of a society is an activity which, like every other, has to be learned. Politics make a call upon knowledge. Consequently, it is not irrelevant to inquire into the kind of knowledge which is involved, and to investigate the nature of political education. I do not, however, propose to ask what information we should equip ourselves with before we begin to be politically active, or what we need to know in order to be successful politicians, but to inquire into the kind of knowledge we unavoidably call upon whenever we are engaged in political activity and to get from this an understanding of the nature of political education.

Notice the course that Oakeshott's thought takes here. Since politics is a learned phenomenon, it has a basis in knowledge. This means that an investigation of politics—of the kind of attention to societal arrangements that we call "politics"—includes a study of what is learned in learning politics (political knowledge), and this in turn takes us on an investigation of how politics is learned (political education). On Oakeshott's view, then, political knowledge and political education are part and parcel of political activity: we cannot help but investigate all three if we study any one of them. One might say, then, that the nature of political knowledge and the nature of political education are internal to the nature of political activity, and vice versa. We cannot understand one unless we also understand the other two.

The political knowledge that specifically interests Oakeshott is not, for example, information that we may need in entering politics, nor information that we may require for being politically effective. Oakeshott's focus, rather, is on the kind of knowledge that any and every human being must have in order to be capable of acting politically whatsoever. This means, I believe, that Oakeshott is seeking to study the knowledge that we necessarily have or acquire in coming to enter the form of life that we call "politics."

The nature of such knowledge is difficult to specify, but I take it to be akin to the idea of transcendental knowledge expressed by Kant, and the idea of grammatical knowledge articulated by Witt-
Such knowledge is necessary knowledge, or knowledge of necessities, according to Kant and Wittgenstein. It is necessary in at least two different senses.

First, for Kant, transcendental knowledge is necessary to a person’s ability to have any kind of experience, of an object or anything, or for a person to be able to conceive of a world at all. Second, for Wittgenstein, grammatical knowledge is necessary knowledge in the Kantian sense just stated, but also in the sense that a person cannot be a fully functioning, normal human being within a particular form of life and still fail to have such knowledge of this necessary element in that form of life. Hence, for Kant, epistemological necessity takes the form of a kind of knowledge required in order for anything to be an object of knowledge or experience for us. Wittgenstein complicates this notion by making this epistemological necessity applicable not only to the objects of our experience (and our world) but also to ourselves. Accordingly, grammatical knowledge is knowledge that is to be acknowledged if it is to be possessed consciously; in acknowledging it, we come to know ourselves as well as our world and its objects of knowledge.

Oakeshott’s interest in political knowledge puts him squarely within this Kantian-Wittgensteinian pursuit of necessary knowledge. (Oakeshott wants to study “the kind of knowledge we unavoidably call upon whenever we are engaged in political activity.”) This kind of knowledge is the kind of knowledge that jurisprudence equally claims to make available—necessary knowledge of law. To the extent, then, that jurisprudence offers or invites a study of legal activity akin to Oakeshott’s study of political activity, it also must offer or invite a study of legal knowledge and legal education (in terms of both lawyers and laypeople). We need to learn both what is necessary to law and what we necessarily know of law. In coming to learn these things, we shall be learning what is required in order for us to have or possess so much as a concept of law, a form of life that we should be willing to call “law” at all.

Oakeshott suggests (in his remarks on politics) how a study of these necessities might be pursued:

Our thoughts on political education, then, might be supposed to spring from our understanding of political activity and the kind of knowledge it involves. And it would appear that what is wanted at this point is a definition of political activity from which to draw some conclusions. But this, I think, would be a mistaken way of going about our business. What we require is not so much a definition of politics from which to deduce the character of political education, as an understanding of political activity which includes...

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a recognition of the sort of education it involves. For, to understand
an activity is to know it as a concrete whole; it is to recognize the
activity as having the source of its movement within itself. An
understanding which leaves the activity in debt to something outside
itself is, for that reason, an inadequate understanding. And if
political activity is impossible without a certain kind of knowledge
and a certain sort of education, then this knowledge and education
are not mere appendages to the activity but are part of the activity
itself and must be incorporated in our understanding of it. We
should not, therefore, seek a definition of politics in order to deduce
from it the character of political knowledge and education, but
rather observe the kind of knowledge and education which is
inherent in any understanding of political activity, and use this
observation as a means of improving our understanding of politics.16

The kind of knowledge that we have about an activity and the
kind of education we receive in an activity are characteristic of that
activity. This means two things: First, they are characteristic of it
(normal identifiers of it); second, they characterize it (represent or
reveal it) to us. In Wittgenstein’s terms, our possible forms of
knowledge of an activity and the various ways in which we receive
an education in an activity are our criteria of that activity. They are
our ways both of identifying that activity and of knowing that
activity. Accordingly, we get to know the nature of an activity not
by defining it (in the traditional sense of giving a definition of a
thing), but exactly by exploring (Oakeshott says “observing”) the
ways in which we learn and practice and talk about the activity.
These connections are the sort of criterial and grammatical intricacies
that Wittgenstein studies in his later philosophy.17

This is one way in which we can come to know and understand
the activity in question. But it also is one way in which we can come
to know ourselves, because the criteria being investigated locate
ourselves with respect to this activity. Wittgenstein’s emphasis on our
grammatical knowledge, necessary knowledge, is in part an emphasis
on the ways we have of relating ourselves to various phenomena or
experiences. These relations or connections are criterial, and they
serve to orient us with respect to the phenomenon or experience (or

16. OAKESHOTT, supra note 11, at 113.
17. Throughout this article, I shall be entering claims about and characteriza-
tions of various philosophers (e.g., Kant, Wittgenstein) that I cannot hope to
support in this place at this time. Since much of my understanding of these
philosophers derives from the seminal work of Stanley Cavell, I have tried to provide
ample citations to his work for those readers who may be interested in testing my
assertions. My thoughts on Wittgenstein’s later philosophy are developed more fully
in my unpublished doctoral dissertation. See T. Eisele, Wittgenstein’s Normative
Department of Philosophy, University of Michigan).
object or activity) being studied. In locating the activity of law by way of such studies, we end up locating ourselves with respect to it, and come to know both at the same time.

This sort of study can take place imaginatively, by examining criterial relations and grammatical connections, and I have said that in jurisprudence the failure to mark such relations or make such connections, as Soper alleges, is symptomatic of a failure of the imagination. I want to enlarge on this. The work of the imagination in making connections among things requires of us a willingness and ability to make explicit the implications and possibilities of our words, our actions, and our lives (here, our lives in the medium of the law). In argument, in analysis, in analogies, in narrative, in examples, in case studies, in legislative histories—howsoever we do it—we explicate our laws, our legal processes, and our legal activities.

These exercises amount to the realization of the possibilities of these materials on many levels. They may encompass the sustained elaboration or application of a particular concept, such as "reasonable man" or "negligence" or "proximate cause" in torts, or "possession" or "perpetuity" or "real covenant" in property, or "offer and acceptance" or "consideration" or "mistake" in contracts. They may encompass the complex development of a rule or doctrine, such as the implied warranty of habitability in housing or the Rule against Perpetuities, with its many interrelated issues and factors. (In terms of the latter, for example, think of the many separate but related questions that can be asked in attempting to realize the implications or possibilities of the language and policy of the Rule: Will the Rule apply to executory interests as well as contingent remainders? What is the meaning of "vest" for purposes of the Rule? Who can be a measuring life or a "life in being"? Shall charitable gifts be exempted from the Rule? Can a court reform a grant or gift so as to bring it into compliance with the Rule?) Or they may encompass the evolution of an entire area of the law, such as the change in conception of the residential lease, "from status to contract to property to modern contract."

Not everything is possible everywhere or at any time. Articulating the implicit relations and possibilities of any human activity is a fragile endeavor, encompassing indefinitely many particulars that are intricately related within the nuturing wholes that we call "activities." And it would be a misleadingly atomistic analogy to say that we are simply trying to put together the pieces of an intricate puzzle. Rather, we are trying to understand the whole of an activity in its autonomy.


and integrity, as its own generator and sustainer of energy, life, meaning, and significance, even while we equally recognize that no activity is an island unto itself. As Oakeshott reminds us, "[T]o understand an activity is to know it as a concrete whole; it is to recognize the activity as having the source of its movement within itself. An understanding which leaves the activity in debt to something outside itself is, for that reason, an inadequate understanding." To understand an activity in its autonomy includes understanding its purpose or point, its reason for being, and its sustaining and possible directions of development. But such understanding also requires a comprehension of its relations with other activities, its similarities to and differences from them, as well as its integration with life as a whole.

Activities function within a particular context or frame, within a particular time and place, within a particular culture, within a particular language, within a particular world, none of which need be substantially articulated for us to participate in them. Nor need any particular one of their possibilities be realized at any time (or ever) by anyone. To be able to participate in them does not require an articulation of their implications, or the realization of any one of their particular possibilities. To know them (in the sense of knowing how to do them) does not require an articulation either. But an articulation of them may help us understand them, and understanding may lead to better mastery of them, better practice. And to understand them, we must make them explicit, which requires that we investigate their possibilities (by acknowledging them, if nothing else). This is very difficult to do but it is the challenge of philosophy.

Soper senses that political theory is implicit in the issues and arguments of jurisprudence, and A Theory of Law articulates some of the political questions implicit in traditional jurisprudential concerns. In this sense, Soper is imaginatively making something out of the possibilities of law and legal theory. However one is struck by Soper's particular arguments and analyses concerning this connection between disciplines, I find his general strategy to be undeniably proper. Jurisprudence, if it is to understand itself and its topic, the nature of law, must connect itself with other concepts and commitments and cares and concerns (i.e., with other human activities and fields). It is only through the discovery of such connections, the imaginative prodding and proposing of such connections, that we actually come to understand law for what it is, just as it is through such a process that we actually place law within the world of human life and activity, and locate ourselves along with it. By imaginatively investigating the implications and possibilities of the activity of law, we locate ourselves within it, with respect to it.

20. OAKESHOTT, supra note 11, at 113.
III. ACTING WITH WORDS BY MAKING MEANING WITH OTHERS

The moral of Soper's strategy (in its application to other fields) is something that I find demonstrated ably by Wittgenstein in his later philosophy, in his grammatical investigations, which consist of tracing and placing the implicit and possible criterial connections between concepts; and by Michael Oakeshott, in his writings about politics, history, and morality, where (for example) he emphasizes our need and ability to elaborate the implications and possibilities of our political lives, which activity of elaboration or articulation he characterizes as "the pursuit of intimations." 21

In its application to law, I find the moral of Soper's strategy demonstrated superbly in the writings of James Boyd White, whose first book is fittingly entitled, The Legal Imagination. 22 This book brings legal forms of life and expression together with forms of life and expression found in literature, philosophy, history, and anthropology, and examines their connections and disconnections, their relations. This juxtaposition reveals some of the conditions of thought and expression under which lawyers work, either shared or unshared with other disciplines. What ends up being sketched is the lawyer's position as a user of language. 23 Knowledge of this position, its conditions and limitations and resources and moves, is necessary for any lawyer if he or she is to master the activity of being a lawyer.

In thinking about the lawyer as a user of language, as a speaker and writer, one may naturally think in terms of literary analogues, and White does so. In The Legal Imagination, he appeals to his experience of literature when he characterizes and contrasts his experience of acquiring the skills and understandings of a lawyer, and he claims that his own reading and understanding of literature informs (and, reciprocally, is informed by) his reading and understanding of law. In another essay, reproduced in his third book, Heracles' Bow, 24 White goes on to say, "The lawyer and the literary critic, as readers of texts, face difficulties and enjoy opportunities that are far more alike than may seem at first to be the case: in a deep sense, I believe, they are the same." 25 I want to examine some

21. Id. at 124, 133-136.
22. J. WHITE, THE LEGAL IMAGINATION (1973) [hereinafter LEGAL IMAGINATION].
23. I have said something more specific about "the lawyer's position" in terms of being a user of language, in an earlier discussion of White's work and contemporary philosophy. See Eisele, The Legal Imagination and Language, 47 U. COLO. L. REV. 363 (1976).
24. J. WHITE, HERACLES' Bow (1985) [hereinafter HERACLES' Bow].
of these difficulties and opportunities now, because it is through a study of them that White furnishes us with some of the necessary knowledge of law that traditional jurisprudence ignores or denies.

The kind of 'action with words' that we shall examine thus covers an enormous range, including in principle all that goes into the management of social life in language, from relations of great intimacy to those of great publicity, such as those that constitute national politics in Athens, England, or America. This means that the kind of text-making that [When Words Lose Their Meaning] is about is not limited to the elevated forms of poetry and history and philosophy and law but includes what happens whenever any of us acts with words in our own lives to claim a meaning for experience or to establish a relation with another.26

White sees the lawyer as someone who acts with words, one whose work is largely a matter of intellectual linguistic products and performances. These performances yield texts; so, in an obvious way, the lawyer is an author. But linguistic acts are also social acts, and White sees this too. They are social acts not only because language itself is social or because the lawyer’s linguistic performances take place in society, but also because they are performances that create, in the text, a social world within which the author relates to his or her readers, and vice versa.

We might ask, at this point, “What are, for White, the specifically intellectual and social dimensions of linguistic activity (‘acting with words’)?”27 Intellectually, in creating and re-creating texts with meaning, the author is creating a world. Through this imaginative use of his linguistic and cultural materials, the author reconstitutes or re­makes his own language and culture, thereby offering us, in a sense, a remade world (in or through a text). This is an intellectual product; a product of the author’s intellect. Socially, the experience of reading this created text engages the reader with the world of the text and its author. Interacting with the text, the reader enters into a community of two with the author. The author contributes to constructing this community by means of the world that he or she affords us in the text, including a position from which to read it and from which to respond to it. The reader contributes to constructing this community by what he or she does with the opportunities (or disabilities) made available by the text and the author. Either reader or author may be changed by this experience—or both. Hence, according to White, by

27. It may help if I say that, in my reading of White, I understand him to be speaking about the social dimension of the use of language when he speaks about a “textual community” (see, e.g., id. at 14, 278, 280), and about its intellectual dimension when he speaks about a “culture of argument” (see, e.g., id. at 7, 280).
way of the use of language, we necessarily become involved in the constitution and reconstitution of our character (our selves) and our community (our society). (This knowledge of the implications and possibilities of our use of language is something that traditional jurisprudence does not afford us, and it is an example of what I am calling "necessary knowledge." It is necessary knowledge about language and, because law is made out of language, about law.)

To speak in terms of the "reconstitution" or "re-making" of materials can convey an impression of revolutionary rebirth, but such need not be the case with linguistic action. Rather, in thinking about the intellectual and social products generated by such linguistic action, we must not over-emphasize their originality or under-emphasize their debt to their inheritance. An important part of linguistic activity is exactly its revivification of old materials, old thoughts, old words. This is a necessary process; otherwise, language decays or deteriorates naturally whenever it is not being rejuvenated by creative use. This is yet another piece of necessary knowledge revealed by White's work.

In speaking of reconstitution, I do not mean that the writer invents a wholly new and idiosyncratic way of talking but that he finds ways to give new meaning, and sometimes new form, to the terms, structures, and methods of the language he has inherited. He makes a "new language" but not out of nothing; he makes it out of an old language, reconstituting its terms of description and feeling, of fact and value, into new patterns of significance, new movements of the mind.

Of course words lose their meaning. That is what they have always done and will always do. What matters, in the face of this fact, is to understand the reconstitutions of language, character, and community that people have nonetheless managed to achieve in the texts they have made with each other and with us.28

In speaking here of the writer as someone who "finds ways to give new meaning, and sometimes new form, to the terms, structures, and methods of the language he has inherited," White is expressing a vision of the writer as someone who makes explicit that which is implicit in his materials or medium. In my terms, this is a vision of the writer as someone who realizes the possibilities of his or her inherited medium, making connections imaginatively by exercising his or her imagination on materials acquired and possessed through inheritance.

Given this picture of linguistic action in general, let us apply it to someone working within the medium of the law. Consider, for

28. Id. at 283-284, 290.
example, White's description of how a law student might come to study and learn the law:

[T]he way in which law students learn to read cases [is] a way of learning about the world in which they will have to live, . . . . On his first day in school, the law student is given a case, or set of cases, just as they appear in the reports, without further guidance, and is asked to reconstruct them from the beginning. His job is to live over in his imagination the experience of the parties and of the lawyers, asking why this choice or that one was made, what he would have done, and how he would have explained himself. He is given a piece of the world in which he will one day have to make his way, and his task is to figure out what that world is like and how to function within it, all on the basis of extremely fragmentary evidence.29

At this point in White's description of the process of learning the activity of being a lawyer, I want to break into his thought to point out some of the elements that I find there.

First, in the part describing the law student's need to reconstruct the whole from a fragment, I hear an allusion to Henry James' most famous advice to young writers, found in his most famous essay, "The Art of Fiction."30 (White knows this piece of advice and reproduces it in The Legal Imagination.31) James, appealing to experience as a web of possibilities and connections, urges the young writer to work on inferring the unseen from the seen, the whole from the part. This is, after all, what we do anyway, so we might as well practice it explicitly. We can infer on the basis of all the available evidence or all of our experience, but neither of these is ever the "whole" world that we are trying to get to know.32 Instead, we

29. Id. at 9.
31. LEGAL IMAGINATION, supra note 22, at 48-49.
32. This does not mean that there is some other, more "direct" way of knowing the "whole" world of which we are capable, but of which we are somehow failing to avail ourselves. See S. CAVELL, PURSUITS OF HAPPINESS 75-76 (1981):
   [I]n the Dialogues Concerning Natural Religion, Hume, through Philo, . . . had said that 'our experience, so limited in extent and duration, can never provide us with a significant conjecture concerning the whole of things.' It is as if Kant were saying: This formulation puts our problem wrongly from the beginning, it is a false picture of the faculty of knowledge altogether; for 'the whole of things' cannot be known by human creatures, not because we are limited in the extent of our experience, but, as we might say, because we are limited to experience, however extensive. Put it this way: to know the world as a whole, or the world as it is in itself, would require us to have God's knowledge, to know the world the way we more or less picture God to know the world, with every event and all its possibilities directly present. And this simultaneous, immediate intuition of the world is not merely beyond us in fact or in extent; it is not a matter of having more of
always must *construct* or *project* that whole world out of the evidence and experience we have. And—contrary to Hume's attempt to show that any such projection or inference is unwarranted—Kant took as his task the proof that such projection by the imagination was necessary, fundamental. It is a necessary element of our having anything that we could call "experience" (or "knowledge") at all.

In his vast "architectonic" reconstruction of the human mind and human knowledge, its conditions and limits, Kant gives an important place to the imagination. It is indispensable to the human work of knowing. "'[W]e must assume a pure transcendental synthesis of imagination as conditioning the very possibility of all experience,'" Kant speaks of the imagination as the "synthetic" faculty; it is only because of this synthesis, or on condition of this synthesis, that we can claim to have "experience" (or knowledge) of anything. Hence, there is a sense in which Kant's synthesizing faculty of the imagination is truly world-creating, for without its activity we could not experience anything. Without it, we could not experience so much as the world, or anything within the frame of the world. Henry James, in asking the aspiring writer to recognize this fact of our existence, of our limitations, and to make the most of it, is simply bringing this piece of Kant's transcendental philosophy down to earth.

I find these allusions to James and Kant instructive because they help me to place White's words in context. The context I think of, in his description of the law student's learning the law, is that of how a person enters a new world, a new form of life, a new activity. What White is describing for us is the way in which the law student enters into a new world, the new world of the law. To enter it, truly, requires that we *imagine* it, recreate it, project its implications and possibilities from the bare facts and words and texts that we have before us. These are always "fragmentary" in an absolute sense, but need not be in any real or human sense (one, that is, that takes into

something we now have a little of. It is beyond us in principle; human knowledge is not like that. First, because all our knowledge, being a function of experience, is *sequential*; it takes place in time (in history, Hegel will say). Second, because the sequences of experience are categorized in definite ways—in terms of a definite notion of what an object is, of what a cause is—and there is no way to know whether these categories of the understanding are ultimately true of things. All we can say is, they are ours, it is our world.

*Id.* (emphasis original).

35. KANT, supra note 14, at 133 (A 102).
36. *Id.* at 112 (A 78; B 103).
account human conditions and limits; what the true possibilities are).

Here I should say, finally, that White's thrust seems Wittgensteinian through and through (a claim, I take it, that he would not wish to deny). Perhaps the best tag for White's project, his imaginative reconstruction of the activity of being a lawyer, is Wittgenstein's dense epigram, "[T]o imagine a language means to imagine a form of life."37 When Wittgenstein says this, early in the Investigations, he is implying, I believe, that to take a language in our minds and to ponder its resources, its powers (and pitfalls) of comprehension and communication, is to do much more than simply to think about words and their meanings or their combinations. It is to remember these words as being given human projection and human use, and hence entails the imagination of the particular people who use this language. These people use the language to do specific things, so yet another part of this task of imagining the language is our picturing the actions through which and the functions for which these words are used and combined. Then, too, Wittgenstein's task asks us to imagine the context in which these people, these forms whose lives we wish to conceive, use these words to do these things. In other words, we are asked to imagine the world in which these life-forms reveal or display themselves, namely, reveal themselves to be alive, and to show how they inhabit the world they have found habitable, the world that they have made for themselves. All these things and more we must imagine, in imagining a language, and they are a part of what any law student must do if he or she is to enter fully and productively into the life of the law.

Here again is White's description of the law student's progress:

His primary way of giving attention to a case is by arguing it in his head, by examining the resources for making appeals and claims on each side that constitute what we call the law. He or she tests each statement against other possibilities, wondering why it was not done this way or that, asking how things would go if the facts were changed in such-and-such a particular, suggesting a puzzle that will crack open a particular line of reasoning, proposing an innovation, imagining a way to put a point to jury or judge, and so on. 'What would I do with this case?' is his constant question, and it is a complex one; for it is a way of asking simultaneously about many things: about the nature of the resources he is offered by his world; about the way in which he and others can put them to use; about the facts of a particular case; and about his capacity to imagine or to invent new ways of talking that will work in the world he lives in.38

Does this imagine the law student to be a literary aesthete? No, nothing like it. Rather, it imagines the law student, as the lawyer, to

37. WITTGENSTEIN, supra note 9, at § 19.
38. WHEN WORDS LOSE THEIR MEANING, supra note 26, at 9.
be a worker in words, an author and a reader, and it forces us to think about what these truly are. What are they?

White begins *When Words Lose Their Meaning* with this sentence: "Our life is a life of language, and this book is about what that fact has meant, and can mean, to us and to others." This says both everything and nothing. It says everything because our life is, first and last, a life of and in language. But, left alone, unarticulated or unelaborated, this says nothing, because what this fact means to and for us, and what it can mean (its implications, its possibilities), are left unsaid. White knows this, and his second book is meant to elaborate this sentence, working out its significance, making it meaningful. Thus, the action or movement of the book demonstrates White's insight that the life of a text (as the life of language) is as much in its activity or performance as it is in its message or statement. "This book is itself a reconstitution of culture, for in it I have chosen certain texts and arranged them in a certain order and have made, I hope, something new out of my own inherited materials. It is meant to have a shape and life of its own and to work, partly by incorporation and juxtaposition, not only to say something to its reader but to engage him in an activity."40

The activity of writing and the activity of reading are, first, last, and always, for White, linguistic activities, a matter of how we make our lives and ourselves within the medium of language.41 So writing

39. Id. at ix.
40. Id. at 284-285.
41. Throughout this article, I appeal to a notion of law as a medium, and I expect this notion to be problematic. While I am not prepared at this time or in this place to offer a full defense of this conception, I do want to offer at least the following modest defense.

In appealing to the notion of a medium in general, I am harkening back to something that Stanley Cavell said in characterizing film as a medium of the movies:

The first successful movies—i.e., the first moving pictures accepted as motion pictures—were not applications of a medium that was defined by given possibilities, but the creation of a medium by their giving significance to specific possibilities. Only the art itself can discover its possibilities, and the discovery of a new possibility is the discovery of a new medium. 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; in art, they are forms, like forms of speech. To discover ways of making sense is always a matter of the relation of an artist to his art, each discovering the other.


Any case in the law, or any statute, may create or enforce a medium that we accept as "the law," and it does so by giving significance to one or more of the specific possibilities that the law has at that time. These possibilities for significance,
and reading can always be studied, and always should be studied, in
terms of what they tell us about the central act of language, that of
making meaning out of our experience in and of the world in relation
to others. We approach this problem intellectually by way of the
following set of questions: How do we make meaning? How do we
express ourselves? How do we communicate? How do we make
ourselves, and others, and the world intelligible? These questions are
a perennial part of literary and philosophical studies, and in such a
mode or mood we scrutinize how we use and project and withhold
words, how we make and state and defend claims, how we assert
and refute and elaborate positions—all the whirl of action and
intellect that goes into the phenomena that we call “language” and
“meaning” and “making sense.”

But, as I have said, White also recognizes the social dimensions
of making meaning in relation to others. Here he emphasizes that
linguistic activity has social consequences and implications, which
raise normative questions along lines other than those normative
issues raised above.\(^{42}\)

or signification, are not or need not be known a priori, prior to our experience of
them. See S. CAVELL, THE CLAIM OF REASON 119, 121, 123 (1979). Rather, the
possibility of this particular significance taking place, or taking root, just here just
now, is a matter of discovery and creation best known to—even if not fully
understood by—the artist (in law, the professional, the lawyer or judge). Important,
landmark cases are those cases that manage to capitalize on the legal possibilities
out of which they are wrought and which in turn they wring or rework, refashion.
Hard cases, on the other hand—at least, those hard cases that are said to make bad
law—do not capitalize on their possibilities, their opportunities (perhaps because
their difficulty distracts us from their possibilities).

The problem with the tired old conundrum, “Do judges make or find the
law?”, is that it ignores this facet of the law as a medium, and instead imagines the
law to be a brute fact, either found or made. This presents a false question for
response, and hence ties our hands. To give significance to the possibilities of the
law is equally creation and discovery: we create within a medium by discovering
some of the possibilities for significance of that medium. This means (or suggests
to me) that this activity of creating and discovering meaning through creative and
exploratory engagement with the medium of the law—and not just the law, for the
materials out of which the law is made include materials taken from the world at
large—may be something else altogether. Thus, there is a problem with characterizing
the kind of activity through which a judge or lawyer goes in working with the law
to reach a viable legal solution in terms of either “finding” or “making” law.
—Still, I want to know why these terms suggest themselves to us with such force in
this situation. This is an aspect of philosophical therapy that I have not undertaken
in this article. (I believe that this way of conceiving of law as a medium provides a
reason for denying Ronald Dworkin’s claim that in almost every case, there is one
correct judgment or decision. See Dworkin, No Right Answer?, 53 N.Y.U. L. Rev.
1 (1978).)

White’s conception of law also treats it as a medium of meaning. See, e.g.,
WHEN WORDS LOSE THEIR MEANING, supra note 26, at 284. See also Ball, Of Rocks
and Dams, PVC and Poetry, 36 GA. REV. 7 (1982) reprinted in M. BALL, LYING

42. White acknowledges his debt to Wittgenstein, J.L. Austin, and John R.
ACTIVITY OF BEING A LAWYER

The texts read here have been drawn from a wide diversity of generic types: poetry, history, philosophy, fiction, and law and the less easily classifiable texts by Swift, Johnson, and Burke. But we have read each of these texts in much the same way, pursuing the same questions, drawing analogies and connections between the texts, and so on. This has in part been a way of defining our subject not as poetry or philosophy or law or any of the others but as the general activity of which each of these is a species, namely, the cultural and ethical activity of making meaning in relation to others.43

White's basic recognition is that the activity of writing, as the activity of reading, as the activity of speaking, is human activity. To say this is perhaps only to say that linguistic activities have implications and consequences and intentions and expectations, just as all human activities do. But, as such, linguistic activity is as multi-dimensional, as full of implication and possibility for meaning and significance, as is any other human action or activity.44 What remains

Searle, in so far as his writing reflects a "conception of language as a kind of social action rather than a system of referential tags." WHEN WORDS LOSE THEIR MEANING, supra note 26, at 291.

My reference here to normative questions and issues is meant to prepare the way for a recognition, as I argue later, that the activity of being a lawyer engages us in a variety of normative realms. The lawyer's use of language invokes the norms of language, and these norms need not be either moral or political (although, of course, they may be, and may certainly have moral and political implications). Another applicable normative realm is the aesthetic, and I believe that this is a more important realm for law than is usually recognized. Some few writers on law, however, in their emphases on narrative and normativity, do investigate this otherwise neglected realm of norms and meaning. In addition to White, see, for example, Cover, Foreword: Nomos and Narrative, 97 HARV. L. REV. 4 (1983); West, supra note 2.

43. WHEN WORDS LOSE THEIR MEANING, supra note 26, at 275.
44. See S. CAVELL, Must We Mean What We Say?, in MUST WE MEAN WHAT WE SAY? 11-12 (1969):

What needs to be argued now is that something does follow from the fact that a term is used in its usual way: it entitles you (or, using the term, you entitle others) to make certain inferences, draw certain conclusions. (This is part of what you say when you say that you are talking about the logic of ordinary language.) Learning what these implications are is part of learning the language; no less a part than learning its syntax, or learning what it is to which terms apply: they are an essential part of what we communicate when we talk. Intimate understanding is understanding which is implicit. Nor could everything we say (mean to communicate), in normal communication, be said explicitly—otherwise the only threat to communication would be acoustical. We are, therefore, exactly as responsible for the specific implications of our utterances as we are for their explicit factual claims. And there can no more be some general procedure for securing that what one implies is appropriate than there can be for determining that what one says is true. Misnaming and misdescribing are not the only mistakes we can make in talking. Nor is lying its only immorality.

Id. (emphasis original).
to be seen is the extent to which we prove capable of realizing the meaning that linguistic activity has—especially in the law. (Realizing it both in the sense of awakening to it and in the sense of actualizing it.)

From this conception of the shared activity of lawyers making meaning with others—by acting with words—White derives a new vision of the law, as itself an intellectual and social discipline built upon the intellectual and social dimensions of linguistic activity. This activity, characterized primarily in terms of the constitution and reconstitution of language, character, and community, White finds exemplified in the activity of being a lawyer.

The law is a set of social and intellectual practices that have their own reality, force, and significance. It provides a place that is at once part of the larger culture and apart from it, a place in which we can think about a problematic story by retelling it in various ways and can ask in a new and self-conscious way what it is to mean. Law works by a process of argument that places one version of events against another and creates a tension between them (and between the endings appropriate to each); in doing so it makes our choice of language conscious rather than habitual and creates a moment at which controlled change of language and culture becomes possible. The rhetorical structure of the law makes a place for each party and defines a relation between them by establishing the ways they may talk; in doing this it suggests a conception of justice as equality, for a person may find himself in any of these roles. The method of criticism most appropriate to the law as such is concerned less with the wisdom of a particular policy choice or the rightness of a particular rule or result than with the character that a court, legislature, or other legal speaker gives himself and his institution, the place it defines for others, and the relation it establishes between them. The law is less a branch of the social sciences than of the humanities in that it seeks not to be a closed system but an open one. It learns from the past and seeks new terms for the expression of motives, new forms for the establishment of relations; it is a method of learning and teaching; and its central concern is with the kind of relations that we establish with our inherited culture and with each other when we speak its language.45

Immediately after this summation of his vision of law, White makes clear how he sees his conception of law in relation to many of our current practices of law. He says:

This account of the law is of course not a description of the way every lawyer and judge in fact goes to work or how he conceives of himself, nor is it meant to justify the actual operation and effect of our legal system, let alone our economic system, both of which

45. WHEN WORDS LOSE THEIR MEANING, supra note 26, at 273. See also id. at 313-314 n. 41.
in fact suffer from disgraceful injustices. Rather, I mean to suggest a set of possibilities implicit in the institution and its practices, to define the kind of aim that the lawyer can have for himself.\footnote{Id. at 273-274.}

IV. TRADITIONAL JURISPRUDENCE: LAW AS OBJECT

White's vision connects the law with people by way of their use of the linguistic and cultural resources of law. In making this connection by way of the activities that generate meaning and significance in our legal culture, the world of law is conceived of as a set of intellectual and social practices within the map of human activity.

Writers in traditional jurisprudence have made very different connections with the law, seeing very different possibilities in the law. These writers take law to be something independent of us, a kind of object that we meet in the world. Let me take H.L.A. Hart as a prominent example representing this traditional understanding of law.

Hart characterizes law as a system of rules. His scheme is as follows: Law is an integrated system of what he calls "primary" rules (i.e., duty-imposing rules) and "secondary" rules (i.e., power-conferring rules), which system is based upon a single fundamental rule called "the Rule of Recognition"; this fundamental or "master" rule comprises the criteria of law. To the extent that we accept the criteria enunciated in or implied by this Rule, it authorizes the enactment or declaration of legal rules by certain officials. It is the intersection of such enacted primary and secondary rules, presupposing this "master" rule and its criteria, that marks the emergence of a modern domestic legal system.\footnote{H.L.A. HART, THE CONCEPT OF LAW 48, 78-79, 91-95, 97-100, 107, 111-114 (1961).}

This description of Hart's vision is too spare to convey any of its depth and intricacy, but my hope is that the elements of Hart's legal philosophy are sufficiently well-known and well-settled as to permit such a gesture. Besides, I am less interested here in exploring the details of Hart's vision than I am in studying one of its general features, which is this: What exactly is Hart's vision a vision of? That is, what kind of a phenomenon does Hart's vision make out of the law?

Hart's vision of law, as is typical of the tradition, directs our attention toward an object of some kind (i.e., a system of rules). Much of traditional jurisprudence then becomes an attempt to describe ever more clearly and ever more accurately this particular object—here, the constitutive elements (i.e., the rules) of a legal system and their intricate relations and operations within this system.
This perspective on law implicitly commits us to certain specific models, not only of law but also of reality, knowledge, and language (in the tradition of Descartes, Bacon, and Hobbes), all of which go unnoticed and unquestioned in traditional jurisprudence. Specifically, we are invited to adopt the attitude of the scientist toward law, which commits us to a scientist's vision of the world and our ways of knowing and categorizing it. (At one point, Hart describes himself as being engaged in a task of "descriptive sociology."48) In addition, we are invited to speak in certain ways about law (e.g., in verifiable or testable propositions), as though other ways of speaking do not comport with the nature of law.

This traditional vision of law divorces us from the law in the sense that it makes law an independent object of our world, thereby assuming a distance between us and the law, and assuming a particular model or form of knowledge that we possess with respect to law. This metaphysical and epistemological distance is similar to the distance that exists between us and a material or physical object (e.g., a tree or a tomato, a rock or a river). Traditional jurisprudence assumes this distance in so far as it assumes that law is there to be found, out there in the world, just as a book of rules or a series of statutes is out there. Accordingly, we are put into a relation with the law that mimics our relation with material or physical objects. Law is this thing, out there, that exists separate from us and that we can study or scrutinize at our pleasure.

But this is not right. Here I might appeal to Lon Fuller, who also voices dissatisfaction with the way in which this vision of law relates us to the law. Fuller says that Hart "treat[s] law as a datum projecting itself into human experience and not as an object of human striving."49 Fuller goes on, in The Morality of Law, to claim that "[i]t is truly astounding to what an extent there runs through modern thinking in legal philosophy the assumption that law is like a piece of inert matter—it is there or not there."50 I think I know what Fuller means.

Traditional jurisprudence treats law as an independently existing object, a physical (or metaphysical) object that exists out there in the world, simply and cleanly unconnected with humans or human efforts and actions, until human beings put themselves into relation with it by choice. One of the problems with this view is that it misconceives our relations with objects (physical or otherwise), as though our relations with the world (physical or otherwise) were more simple and less problematic than they truly are. But, more to my immediate point, this traditional view draws the wrong analogy for law. Law is

48. Id. at vii.
49. Fuller, Positivism and Fidelity to Law, 71 Harv. L. Rev. 630, 646 (1959).
not a physical object; it is a human art or activity. Without being able to explain fully what the relevant similarities and differences are between physical objects and human arts and activities, I believe one possible way of differentiating them is by paying attention to the differences in their modes of origin.

Physical objects result from natural or causal processes in which humans need have no hand. Physical objects come into and pass out of this world unbidden by human beings, or unaided and unabated by human beings. (Of course, people can plant acorns, from which the mighty oak will grow; and we can destroy all manner of physical objects. But a rock or river usually comes into existence without the intervention of human agency or intentions, although on occasion we construct an artificial river.)

Art and activities, on the other hand, "emerge naively, like games [we] invent for [our]selves" (Oakeshott). Products of these arts and activities—e.g., legal rules—are human artifacts, which come into existence only through the will and effort of human beings. Once in the world, it is true that these products or artifacts have a side to their existence much like that of physical objects, since they too use physical materials. Yet they are generated not by nature or causal laws, but by human artistry and action. Also, once generated, artifacts have another dimension to their existence that is unusual (if not unknown) for physical objects: they are attended to with an interest and excitement and absorption generally unknown to natural objects.51 It is one of the purposes of artifacts, one of their functions, to serve in this capacity. They are made to absorb, excite, interest us. Their reason for being is their claim to fulfill this function in our lives, and their ability to do so establishes their right to be called "art."52

So artifacts generally depend upon humans for their existence and for their continued treatment as artifacts. Legal texts, I am claiming, share this status with artifacts along at least two dimensions. First, both artifacts and legal texts (including rules) are utterances; they communicate with us by speaking to us. While physical objects may communicate something to us, while they may mean something to us (e.g., "Those clouds mean rain"), they do so not by speaking to us or uttering anything at all. Rather, we read or interpret them as physical signs, parts of a natural or physical process (e.g., causation). Artifacts and legal texts (as such) are not parts of a natural or

51. There are, of course, some exceptions or limitations to this generalization, such as parks and gardens. Also, I recognize that some people—e.g., geologists, botanists, and even nature lovers—lavish similar attention on physical objects. These exceptions do not blunt the point of my generalization.
52. See S. Cavell, Music Discomposed, in Must We Mean What We Say? 197-198 (1969); see also S. Cavell, The Claim of Reason 119 (1979).
physical process, but rather are parts of an intentional process.\textsuperscript{53} They are intended, meant, to communicate something to their audience.

This fact concerning artifacts and texts as utterances suggests the second aspect that distinguishes artifacts and legal texts from physical objects: they are intentional objects. Their function of communicating something to an audience—which they fulfill by their utterance—is intended, and is the reason for their being (both the reason for their being at all, and the reason for their being as they are). Stanley Cavell describes this intentional dimension of artifacts as follows:

\begin{quote}
[T]he picture of a poem as more or less like a physical object [is false], whereas the first fact of works of art is that they are meant, meant to be understood. A poem, whatever else it is, is an utterance (outer-ance). It is as true to say of poems that they are physical objects as to say of human actions that they are physical motions (though it is perfectly true that there would not be an action unless somebody moved, did something). ... So let me simply claim that apart from the recognition that one's subject, in art, is the intentionality of objects, one will appeal, in speaking of these objects, to sources of organization ... in ways which fail to tell why this thing is as it is, how it means what it does.\textsuperscript{54}
\end{quote}

While it is perfectly true to say that without the physical or material medium that is the basis out of which any artifact or legal text is made, there could be no such artifact or text, this does not mean that therefore the artifact or text just is a physical or material object.

I want these remarks to suggest that the tendency in traditional jurisprudence to treat law as though it were a physical object, independent of us, is misleading and holds dangers for misunderstanding. This way of relating us to law relies upon the reification of law, and while this process of reification is very natural to us, I think that we must resist it here. For law, on my understanding, is not an independent entity, not a system of rules separable from the humans who have made them or from the conditions under which these rules are made, used, and remade or removed. On my view, law is an art or activity, a human form of life. To understand law is to understand an aspect of human life, one way in which humans live (and die), one way that the human being finds to form and


\textsuperscript{54} S. CAVELL, \textit{A Matter of Meaning II}, in \textit{Must We Mean What We Say?} 227-228 (1969).
embody and express its life on this earth. On this view of law, jurisprudence becomes a form of self-understanding, an inquiry into what we do and become when we live in or through the law, or what we fail to do and become when we live outside the law. Hence, to break the relation of law to the humans who find and make and argue about and otherwise work with it, is not an analytic expedient, but an analytic preventive; it hurts rather than helps the process of analyzing the phenomena of law.

V. TRADITIONAL JURISPRUDENCE: LAW AS RULES

For something clear and observable, you may say, I have substituted something obscure and ephemeral. Perhaps. But the latter conception may prove to be more true to our experience and knowledge of law, and more fruitful for our inquiries and investigations. In particular, it is a mistake to think that law as a system of rules is something “clear and observable,” whereas law as an artistic activity is something “obscure and ephemeral.” This contrast of faith in the clarity of one conception of law (as a system of rules) and lack of faith in an alternative conception (as artistic activity) reveals one of the unquestioned assumptions that bolster traditional jurisprudence. Given our confidence in our knowledge of rules, and our lack of confidence in our knowledge of activities, the apparent clarity and certainty both promised and produced by the traditional model of law as a system of rules are understandable.

One reason for this contrast in confidence is that we think we know what a rule is, and we arc not so sure that we know what an (artistic, or any) activity is. We can fairly easily give examples of rules and can state rules, and they often are sufficiently compact and comprehensible as not to disturb our confidence in our ability to construct an adequate jurisprudential theory out of them. Not so with our sense of an activity. First, there is the awful ambiguity of what an activity is, the sheer amorphousness of trying to say what an activity is, or even to describe an activity. White understands this problem:

The first step in working out a way of talking about both reading and writing, for me at least, is to recognize that these, like other human activities—such as dancing, quarreling, playing football, telling a story, even sleeping—are not susceptible to complete reduction to descriptive or analytic terms. Each of these activities engages parts of the self that do not function in explicitly verbal ways, and behind all of our attempts to describe or direct them remains an experience that is by its nature inexpressible. . . . Action of this kind can never be wholly explained, and our talk about these things should reflect that fact.55

55. WHEN WORDS LOSE THEIR MEANING, supra note 26, at 5-6.
We may be able to give examples of activities, but usually we find it difficult to say exactly where the activity begins and where it ends. This ineffability does not seem to apply to rules, which by contrast seem explicit and circumscribed.

I want to pursue further this picture of the relative determinacy and circumscription of rules in a legal system. To speak in terms of law as a system of rules is naturally enough to bring to mind a grid or network of rules, a kind of code. Here it is easy to conjure up the simple image of a booklet containing a set of rules. And sometimes we think of law in this way, as though the law could be identified with a law library, stacks and stacks of books that compose the law. (They compose the medium of the law and a part of its message, but not, by any means, the whole of its message, nor the whole of its activity or performance.)

This is a vision of law as an established code of rules, as though our activity with law consists solely in reading our actions off the prescriptions and prohibitions of legal rules. But there are at least three problems with this vision of law. First, this imagines law to speak with far less ambiguity or equivocation and far more completeness than it in fact does. Second, it equates law and legal activity with a simplistic model of games and game-playing. Third, at best, it understands the law in terms of atomistic or discrete actions, not as an integrated activity involving attitudes, practices, and institutions (i.e., ways of life). I shall deal very briefly with the first two complaints and more extensively with the third.

(1) Rules of law speak not unambiguously or unequivocally, but generally and broadly. They cover a range of possible cases, and thus require that we work with them in applying them to any specific case or controversy in order to find or fashion a resolution that is legally acceptable. In the light of Mr. Justice Holmes' recognition that "[g]eneral propositions do not decide concrete cases," we are encouraged to see the law as a medium that must be coaxed and worked with—its implications and possibilities imagined and realized—before it yields an answer or resolution that both it and we can recognize and accept. This work is part of the activity of law.

(2) In so far as the rules of a game can be said to define and set forth the moves of the game and can be stated in a booklet, then to think of law as comprising a vast booklet setting forth the rules that define moves required, permitted, or prohibited in the law is to think of law as a game. The traditional vision of law as a system of rules seems to imagine law in this way. (Hart repeatedly invokes an analogy between law and playing a game.) Our legal actions, then, are moves in a game defined and controlled by legal rules, and the playing of

57. HART, supra note 47, at 9, 34, 40, 55-56, 136-141.
the law-game is defined and circumscribed by its rules. But there are good and sufficient reasons for denying this view that either human activity or human game-playing is essentially rule-governed or rule-circumscribed. 58 Life and law are more creative and unpredictable than this view imagines.

(3) The vision of law as a code raises yet a third problem. It suggests that all law can be seen or understood on the model of a written constitution or that of statutory codifications. This suggestion is untrue; but, even if it were true, its attraction would depend upon a mechanistic conception of written constitutions and statutory codes. We need to ask: How do constitutions and statutes work?

Both types of document declare rules of law, among other things, and upon some of these rules reasonably discrete acts can be based. But this declaratory function is actually very little of the life that these types of document have. As White has pointed out, a much larger part of their existence goes toward creating and sustaining a rhetorical community in which we find or place ourselves, and with which we work in remaking our community and ourselves. In this sense, the United States Constitution is a rhetorical document in which topics of conversation and debate and argument are located and defined, where various voices and roles are given to various speakers, and various occasions for speech or for silence are established and defined, and so forth. To say that law is merely a system of rules is to misidentify some of the elements used in the rhetoric of the law for the whole of law. Law also includes the rhetorical activity by means of which those elements are used and further elaborated. As White says:

What [the Constitution and statutes] actually do is alter the rhetorical conditions of life for those in whose name they are promulgated and those to whom they speak. . . . [T]he very existence of such a text as [the Constitution] makes available certain kinds of claim and appeal, certain kinds of movement and action, that would otherwise be impossible. . . . At its most successful, an instrument like this can be said to establish the fundamental terms of new kinds of conversation; for it creates a set of speakers, defines the occasions for and topics of their speech, and is itself a text that may be referred to as authoritative. . . . The Constitution works by creating the occasions and warrants for making a certain set of claims, and in this respect it is like the other constitutions we are always making in our own lives, in the form of contracts and agreements, block-betterment associations, and so on. 59


59. WHEN WORDS LOSE THEIR MEANING, supra note 26, at 245.
These documents, be they Constitution or statutes, are rhetorical documents that set the terms and occasions of our legal conversations, perhaps, but they do not dictate what we must say in these terms or on these occasions. And what we say with them—what we do with them—is a part of law: it is part of the activity of law.

The activity of law comes from our being embedded in the medium of law and made or invited or provoked to do something with it. What I mean by this can be illustrated by looking again at Michael Oakeshott's Inaugural Lecture:

The politics of a community are not less individual (and not more so) than its language, and they are learned and practised in the same manner. We do not begin to learn our native language by learning words, but words in use; we do not begin (as we begin in reading) with what is easy and go on to what is more difficult; we do not begin at school, but in the cradle; and what we say springs always from our manner of speaking.60

Oakeshott's idea is that speech is holistic, as are our other activities. The utterance or projection of a word, the making of an argument, the entering of a claim—these speech acts are integrated parts of a larger whole, a manner of speaking, a language, and their character and content proceed from that whole; they are a function of the place that these parts have in this whole.61 If to learn a language is to learn a form of life, as Wittgenstein implies,62 which Oakeshott calls a "manner of speaking," then the law that we generate proceeds not simply from legal rules but from the whole of the medium of law itself. This medium of law includes not only rules but also concepts, language, attitudes, expectations, practices, and institutions.

Let me return, then, to the model of law as a code. Legal materials less formed and formal than constitutions and statutes draw us even farther away from this traditional model of law and its associated assumptions. Think about that vast body of materials and activity known as the common law. Or, think about the British notion of an unwritten constitution. Or, think about customary law, international law, and many other fields of law. These fields of law (not largely dependent upon statutes) are not properly described as codes or codifications.

A.W.B. Simpson has argued persuasively that the traditional conception of law as a code does not comport with our experience of the Anglo-American legal tradition.63 (As with Soper, I read

60. OAKESHOTT, supra note 11, at 129.
61. The holistic vision of language suggested by Oakeshott is most powerfully expressed, I believe, in Wittgenstein's later philosophy. See Eisele, supra note 17. See also Oakeshott's remark at text accompanying note 20 supra.
62. See text accompanying note 37 supra.
Simpson's criticism to be an indictment of the failure of imagination shown by traditional jurisprudence. Given our knowledge and experience of the Anglo-American common law, Simpson is saying, we cannot imaginatively grasp it as a mere set of rules, no matter how diverse or interconnected.

According to Simpson, the traditional conception portrays all law as though it were statutory in origin and in form. But of course it is not. One of the most significant omissions in such a conception of law, Simpson says, is its inability to characterize or to account for Anglo-American common law. The common law is nothing like a code or codification, nothing like statutory law in origin or form. Simpson claims that the common law is better seen as a kind of customary law, one that exists as a body of traditional ideas received within a caste of experts or professionals.

In Simpson's study of the common law, he attempts to answer two questions: "Can the common law be said to exist at all? If so, in what sense can it be said to exist?" These questions express a skepticism about traditional jurisprudence that I share, because the questions suggest that it is difficult to characterize the common law. This is a difficulty that is not recognized in the speech of traditional jurisprudence, which characteristically speaks of the common law as though it were a body of rules. Simpson is challenging just this picture of the common law, and by doing so he is challenging traditional jurisprudence on a level deeply akin to my own challenge, namely, on the level at which traditional jurisprudence attempts to reify or objectify law as a kind of independently existing (physical or metaphysical) object. Since traditional jurisprudence seems to assume that law is an object qua a system of rules, it sees little problem in its characterization of law. But, for anyone for whom the characterization of law is a problem (such as Simpson or myself), how one speaks about law is a criterion of what one thinks law is.

Simpson pursues his dissatisfaction with traditional jurisprudence by asking what sense general statements of law, general propositions or rules of law, have. He wants to know, What makes such utterances true or false? Are they true or false? He concludes that we cannot

64. Id. at 82.
65. Id. at 80, 94. It seems to me that this valuable reconception is applicable to more than the common law alone. That aspect of law spoken about in the writings of natural law theorists, for example, can be so understood. On this alternative view, natural law is not a set of rules or norms or maxims competing with a set of posited rules, but rather is a congeries of concepts and categories necessary to law and out of which we generate our posited and non-posited rules. I am currently working on a paper in which I develop this alternative view of natural law and some of its consequences.
66. Id. at 78.
67. Id. at 78-79.
verify them by checking their correspondence with identifiable elements (such as rules) that somehow exist independently as objects in the world. This means that, metaphysically and epistemologically, the common law is not divisible in any satisfactory way into rules or propositions of law. Instead, it can be thought of as a medium of traditional ideas, concepts, and expressions extending over many years or even centuries, out of which judges and lawyers generate rules and propositions of law that are, for the time being, accepted (or rejected). The activity of generating these rules and propositions is not a "positing" of them or a "laying down" of them, contrary to the claims of legal positivism. Rather, this activity is a matter of making warranted, acceptable uses of shared legal (and non-legal) materials. Thus, for example, the creation of precedent is not understood by Simpson as being identical with judicial legislation, again, contrary to the claims of traditional jurisprudence.

Simpson's view is holistic, akin to White's and Oakeshott's. Simpson argues that some developments in law are supported by appeal to "non-legal" ideas or concepts. Hence, law takes place as an activity of meaning and significance within a broader conceptual (and normative) context. This "whole" gives law some of the significance that it has. And, rather than the rationality of the law depending solely upon the logical manipulation of legal rules, Simpson argues that the rationality of legal rules depends upon the whole body of materials that compose the common law. In a sense, then, the common law is a kind of language. Rules of law clearly are one aspect of the materials of law, but they by no means exhaust those materials. And, to understand the rationality, the meaning, and the normative force of such rules, we must understand both the ideas or concepts from which they are generated and the processes or activities by which they are generated.

Simpson's conception of law is one in which the emphasis is placed squarely on the conceptual and performative elements of law from which warranted statements of law come. Accordingly, since his emphasis is not on the finished or formalized entities of law—the rules or, more generally, "norms"—but rather is on the materials (traditional ideas) out of which those entities are made, and on the makers (caste of experts) of those entities, I think of Simpson's vision of law as being a vision of law as an artistic activity.

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68. Id. at 85-86.
69. Id.
70. Id.
71. Id. at 87.
72. Id. at 89.
73. Id. at 94.
VI. Traditional Jurisprudence: Its Questions

I have tried to suggest certain ways in which the vision of law offered us by traditional jurisprudence puts us into the wrong relationship with law, making the wrong connections between us and law. I have said that law is neither a physical object nor a metaphysical object (e.g., a system of rules). Instead, I have drawn upon the work of James Boyd White and others to show that we are related to law in ways different from the relations and connections suggested by the tradition. Then why, we may ask, can we become captivated by the vision offered us by traditional jurisprudence?

Part of the attraction of such a tradition is its promise (and production) of relatively simple and straightforward answers to three central problems in jurisprudence. If one believes these problems to be both essential to and inescapable for any adequate theory of law, then one may continue to feel, despite certain misgivings, that this is the best available approach to law that we have.

The three problems for any theory of law are the following. First, and most general, if we are to answer the global question of jurisprudence—"What is law?"—we must be able to identify law. The conception of law as a physical object gives us a model for how to identify law—what we should look for, what we should expect, the normal ways we have of identifying a physical object, and so forth. The companion conception of law as a system of rules promises us both that we can identify the law and that we can identify specific laws—the former is a system of rules, and the latter are the particular rules within the system.

Second, once we have identified law, we want to know why what we have identified as law is law. That is, we want to know why it has the status or identity of law. This I take to be the question that traditional jurisprudence asks, obsessively, in terms of, "What is the nature of legal validity?", or, "What makes law(s) valid?" This really means, or asks, "What makes law law?"

Third, once we have gotten this far, we are in a position to ask the question, "What difference does the validity of law make?" In one form, this question is translated into the question, "What is the nature of legal obligation?" or, "Do valid laws obligate us, prima facie or otherwise?" In another form, this question is transformed into the perennial jurisprudential question, "What is the relation or connection, if any, between law and morality?" This question relates to the validity of law because it asks, "Can moral considerations or concerns invalidate a law that otherwise is or would be valid?" These questions about law and morality seem worth asking only at this point in a theory of law, because it is only after we can identify law (say what is law) and only after we can say what makes law valid (say what makes law law), that we seem to be in a position to say whether or not morality plays any part either in the phenomena we
identify as law or in the conditions and elements that make law valid.

The traditional conception of law as an independent object, physical or metaphysical, promises and produces answers to all of these questions, and does so in a way that we are apt to find satisfying. Hart answers the first question—"What is law?"—by saying that it is, essentially, the union or integration of primary and secondary rules in a system of rules, presupposing the Rule of Recognition and its criteria. His answer to the second question—"What makes law valid?"—is that the authorization of these rules by the criteria of the Rule of Recognition, initially or ultimately, is the basis of their validity. Third, he says that legal validity is not affected by the moral status of a rule, since there is no necessary or conceptual connection between law and morality (except for the core of good sense that Hart acknowledges in the natural law tradition).

It is not clear to me that the alternative vision of law that I have been sketching fares better in answering these perennial questions of traditional jurisprudence. To the first question, "What is law?", the response is that law is a set of intellectual and social practices, an activity engaged in by lawyers and laymen in their joint and several attempts to make meaning out of the materials of law. Perhaps this response is more just or more encompassing than is the response of traditional jurisprudence. But it runs the risk of being too encompassing, and too amorphous. In particular, how are we to distinguish law from other activities of meaning-making? By the nature of the texts or materials used? But then we may ask, What makes those texts or materials specifically legal?

This leads directly into the second question, "What makes law law?" Here too the answer is not obvious from the perspective of the alternative position that I have been sketching. In one guise, this question suggests the questions, "What makes law legitimate?" and "What gives law authority?" To such questions, this alternative position does have something of an answer, because I understand it to see the authority of law to be a matter of the ways in which we generate law, or modify or repeal it. These means of creating law are equally means of creating the authority of law. In other words, these means of creation are a part of what makes law authoritative. This replaces a positivistic concept of authority—whereby the authority of law is derived from the position of the one positing it—with a concept of authority that has both participatory and methodological dimensions—whereby the authority of law is derived from the methods by which it is generated, in concert with a consideration of the people who participate in making the law. (This conception of authority is not original with me.\(^74\)

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74. See J. Vining, The Authoritative and the Authoritarian 146-147,
The third question, concerning the obligatoriness of law and the relation between law and morality, seems equally difficult to answer from the alternative perspective sketched here. The beginning of a response might be made from White's insight that law, being a matter of human activity, with social as well as intellectual dimensions, is as essentially a matter of ethics (and politics and rhetoric and poetics) as it is a matter of anything else. From such a start, one might close the gap between law and morality opened by the traditional, positivistic vision of law (and morality).

The more fundamental point may be, however, that the alternative position does not have direct responses to this battery of questions from traditional jurisprudence. This would show not the irrelevance of this alternative position, but rather its identity. It is a separate vision of the law, one not spawned from within the tradition. Hence, its questions as well as its answers will be different, for its entire conception of law is different. Its difference from traditional jurisprudence means that it will ask different questions of law and perhaps look in different quarters for the answers to its questions. It will find questions to be important and interesting that are unimportant and uninteresting to the tradition. Just this fact about this alternative conception shows it to be both philosophical and revolutionary.76

VII. OUR RELATIONS WITH RULES

One of the great virtues of White's approach to law is that he attempts to place us in relation with law, to see and reveal our connections with law. By placing us in the picture that he paints of law, by seeing law as a human activity, White makes room for humans in a way that traditional jurisprudence does not. (I suggest that this is one reason for the lack of vitality in traditional jurisprudence, as identified earlier by Soper.77)


75. White's four favorite Aristotelian terms for investigating our actions with words—ethics, politics, rhetoric, and poetics—are evidence for the claim that White's chief concern is with our use of language as a human activity. In each of the treatises of the same names as above, Aristotle is concerned with describing and analyzing a specific dimension of human activity, and understanding its logic. In this sense, the Oakeshottian task of mapping human actions is quite traditional, indeed, but only recently has it been revived in twentieth-century Anglo-American philosophy.


77. See Soper, supra note 5, at 1.
Traditional jurisprudence, on the other hand, treats law as an independent object, physical or metaphysical, from which we are divorced or separated. It does this even in so far as it pictures law as a system of rules, because it pays insufficient attention to our knowledge and use of rules. In so doing, it fails to account accurately for the implications and possibilities that inhere in our relations with rules. I now want to examine this divorce more fully in the specific context of how we do in fact relate to rules, including legal rules.

My allegation may seem surprising, and unfair, especially in the light of the achievement of H.L.A. Hart, who more than any other modern philosopher of law has lavished attention upon the idea that law is a matter of rules. Hart argues that rules are essential to a legal system; without "the idea of a rule," he says, "we cannot hope to elucidate even the most elementary forms of law." In particular, it is the union or integration of primary and secondary rules that provides the key to the study and understanding of law: "[W]e shall make the general claim that in the combination of these two types of rule there lies what Austin wrongly claimed to have found in the notion of coercive orders, namely, 'the key to the science of jurisprudence.' . . . We accord this union of elements a central place because of their explanatory power in elucidating the concepts that constitute the framework of legal thought."

Chief among the legal concepts elucidated by this union of rules is that of obligation. For Hart, as for traditional jurisprudence generally, it is a problem to explain how law obligates us. We want to explain how law is something more than state coercion, state orders backed by threats of state force. It is primarily for its clarification of the obligatoriness of law—and, thus, in general, of the normativity of law—that Hart concentrates on "the idea of a rule" in his analysis of the concept of law.

This concentration leads him to emphasize that a legal system is paradigmatically the union or combination of primary and secondary rules, a fact that he thinks elucidates not only legal but also political concepts. Hart notes:

If we stand back and consider the structure which has resulted from the combination of primary rules of obligation with the secondary rules of recognition, change and adjudication, it is plain that we have here not only the heart of a legal system, but a most powerful tool for the analysis of much that has puzzled both the jurist and the political theorist.

Not only are the specifically legal concepts with which the lawyer is professionally concerned, such as those of obligation and rights,

78. HART, supra note 47, at 78.
79. Id. at 79.
validity and source of law, legislation and jurisdiction, and sanction, best elucidated in terms of this combination of elements. The concepts (which bestride both law and political theory) of the state, of authority, and of an official require a similar analysis if the obscurity which still lingers about them is to be dissipated. The reason why an analysis in these terms of primary and secondary rules has this explanatory power is not far to seek. Most of the obscurities and distortions surrounding legal and political concepts arise from the fact that these essentially involve reference to what we have called the internal point of view: the view of those who do not merely record and predict behaviour conforming to rules, but use the rules as standards for the appraisal of their own and others’ behaviour.

I agree with Hart that we must account for law’s normativity if we are to differentiate law from mere force or power (his “gunman situation writ large”). But I do not agree that the idea of a rule, nor even the idea of the union or integration of different types of rule, gives us sufficient materials from which to construct such an account. Instead, I believe that the additional elements needed for a vision of law adequate to its normative dimensions come only if we appreciate law’s connection with the humans who create (and destroy) it, and its connection with the activities and contexts that give it both life and direction.

Legal rules cannot be understood in a vacuum, and they do not in themselves form a “system” that bears life or activity. (This truth is acknowledged in law school courses concerned with “The Legal Process” or “Legal Reasoning,” since their aim is to describe the contexts in which legal rules operate.) Legal rules alone, outside of their contexts, can be unintelligible. What we further require is an understanding of the processes that generate them, the activities in which they are applied and to which they are applied, the forms of life in which rules have their point or purpose, and so forth. To isolate rules as the only important aspect of law, or as the sole significant constituent of law, is to ignore exactly the contextual elements of law that give rules point and meaning (i.e., their significance and importance), and hence their normativity (one aspect of which is their obligatoriness).

These are many assertions that I have made about rules in the law, and my readers have a right to know on what I base them. These are lessons I have learned about rules and the law in part from my own experience in the practice and teaching of law, but also in part from others.

For example, A.W.B. Simpson, in the article cited earlier, suggests that common-law rules are inherently amorphous because they derive

80. _Id._ at 95-96.
81. _Id._ at 80.
from a process that leaves them open to several different formulations, none of which is univocally "correct" or "authentic." Here I differ with Simpson slightly (if I properly understand his point), in the sense that I believe that the announced rule in a judicial opinion is authoritative, prima facie. That is, the court's expression does display a form for the announced rule that is prima facie to be accepted or rejected by practitioners and citizens alike. Only, I agree with Simpson that these formulations of the common law need not be conclusive. Instead, they are defeasible. Any lawyer has the power to defeat them in so far as he or she can reformulate them, can show that the court did not mean what it said or need not have said what it said. Any lawyer, then, can use the accepted professional techniques of the common lawyer (so well-itemized by Llewellyn in his book, The Common Law Tradition83) to vary the utterances of the law, by casting them into a better form. It is a task that need never end, although some formulations (e.g., Professor Gray's formulation of the Rule against Perpetuities84) seem to take and stick for centuries—longevity enough even for the most rule-skeptical realist.

But the broader point—acknowledging that lawyers can do this, that they have this power—is that this power comes from these particular techniques being applied within the medium in which they work. That is, these techniques are embedded in an institution (as Llewellyn or Wittgenstein might have said), and only so embedded can they be used for the formulation and reformulation of legal rules. This activity of defeating or revising the formulation of legal rules is a major part of the "common-law process."

Llewellyn, Simpson, and White have all helped us understand aspects of the common-law process.85 On my reading of them, they suggest a double dimension to this process. Along one line, any case that ends in a judicial opinion and that, hence, embodies at least one holding, cannot be understood solely or wholly in terms of the rule for which the case may be said to stand. This rule takes on importance and significance only in so far as it is connected with the context of the entire text and the entire case. The rule issues from this process and is not intelligible when shorn of this context. What is missing is its point or significance—the exact aspect of the rule that is meant

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82. Simpson, supra note 63, at 88-90.
to solve some specific legal problem. The procedural and textual constituents of the rule give it point and meaning.

Along a second line, according to these writers, cases fit together into a series or string, and any rule of law for which any series or string of cases stands again cannot be understood short of embedding it within the historical and dialectical sequence of cases. In addition, each case can change over time in terms of its meaning or significance, depending upon how it fits into the string of cases of which it is a part. This change can come about simply as a consequence of adding a new case to the string of cases, because this addition creates a new context in which to read and apply the old cases forming that string.

So, both within a single case and within a series of cases, any legal rule for which either stands is unintelligible shorn of such contextual elements. And the normativity of the law, or the normativity of legal rules, is a function of these techniques embedded in these practices and institutions. Hence, legal norms are normative in so far as they are a part of the medium of law, a part of its processes and methods and institutions and traditions. (They also are a matter of attitude, but more about this below.) Norms of law are embedded in the activities of law, and are not intelligible outside of an understanding of these matters.86

I said above, parenthetically, that the normativity of legal rules depends in part upon matters of "attitude" as well as context. What I mean by this is that their normativity is a function, in part, of the attitudes of a rule's utterer and of the utterer's audience (which attitudes may not be the same and may in fact conflict). Stanley Cavell, in discussing the logic of normative utterances, speaks of this factor as being the "mode of presentation,"87 and it is meant to speak to that aspect of normative utterances that concerns the relation that exists, or is created, by one person confronting another and issuing or receiving utterances.

I take the issue of the attitude toward law, or the "mode of presentation" of law, to be under scrutiny (consciously or not) in those positivistic and non-positivistic writings that debate whether or not law is the command of a sovereign to his or her subjects.88 Hart gives some attention to this matter directly in his consideration of

86. On the subject of normativity within a medium or within a narrative, I again am relying upon my unpublished doctoral dissertation, a major motive of which is to show that Wittgenstein's later philosophy is based upon such an understanding of norms within the medium of language. See Eisele, supra note 17. See also Cover, supra note 42; P. Bobbitt, supra note 74.


Austin, but also when he discusses "the internal aspect of rules," which he finds so crucial to an understanding of the normativity of law. Since this is a central aspect of Hart's understanding of legal rules, and since it concerns our relations with legal rules, I want to consider in some detail a number of implications of Hart's notion.

1. It is reasonably clear from The Concept of Law that Hart means his key phrase to refer solely to the fact that we humans tend to, or can, internalize our rules or norms.\(^89\) They are ours in the quite literal sense that we incorporate them into ourselves and our actions, using them in our construction of the world and ourselves. But this is not the only implication, or even the most important implication, that the "internal aspect of rules" has, and I want to point out at least four more possible senses in which the internality of rules is important to our relations with law and, hence, important to its normativity.

2. We can turn the sense of Hart's phrase around by saying that rules incorporate us as much as we incorporate them. That is, the form and sense of a rule (as any expression) has something of its author in it, as a part of it. We put a little bit of ourselves into everything we say (and do). How, otherwise, could we identify people by means of the things they say and do? In addition, however, regardless of who authors a particular rule, in adopting or accepting it, in abiding by it, the rule absorbs us as much as we absorb it. By this I mean to point to the fact that we conform ourselves by acting and operating within a rule. I speak metaphorically here, as though any rule creates a space within which we can live, work, and act. (It does.) A rule makes possible certain forms of human action, certain forms of human living, that otherwise would not be possible. But for the rule, these forms of action and life would have no form, no mold in which to take place. (I recognize here, happily, a debt to Hart's conception of secondary, power-conferring, rules.\(^90\))

3. Rules have internal aspects (or relations) in yet three more respects. Let me focus on two of them now. First, they are internally related to the text in which they grow—be it a language, an opinion, or whatever. Here I am thinking that a rule is internal to the text that generates it, or in which it is generated, and that the notion of text, or context, can be elaborated to extend to the whole of the language. Rules take form and give expression and make sense only within a greater context, and hence are related internally to this context. (This is at least one implication of my readings of Llewellyn, Simpson, and White.)

If the meaning of a rule is context-dependent, then the meaning of a legal rule depends upon its (legal) context every bit as much as does the meaning of any rule. Thus, in teaching law, we try to

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89. HART, supra note 47, at 55-56, 86-88.
90. Id. at 27-28, 30-31, 40-41, 79, 93.
impress upon our students (with varying success) the need to understand the entire opinion or text out of which the rule speaks, be it statutory, constitutional, administrative, or judicial. It is not sufficient for comprehending a legal rule that one knows it by heart; memorization is the least of our concerns. Rather, what is required is that we know what the rule means, and we learn this by placing the rule within its text or context and seeing what it means then and there. This situationally-specific reading is done constantly in the law; it is the life-blood of legal practice. Only by understanding the places and functions and occasions of our legal rules can we understand them, their meaning for us (we who are always located within a particular here and now).

(4) Second, rules are internally related to the activity or process through which they are generated. One can conceive of this activity in many different ways—from the process of argument in an opinion, to that of analysis, to that of reasoning or rationalizing, and so forth, all the way to the entire common-law process itself. All of these activities that generate rules are forms of life. And the rules cannot be understood apart from an understanding of the activities within which and by means of which they are generated.

This fourth aspect of the internality of rules tells us something important about legal education. To master a field of law, one needs to know not simply the rules of that field but also the ways in which the rules are used. This means, in practice, that one needs to know something more about the field or activity itself. Mastering a field of law is more than mastering its relevant rules. One must understand what the rules are used for and how they are used to advance or defeat various purposes and principles; this means learning what the field is about, what its purposes and roles are or may be, what its possibilities are, how they relate to the human beings who are looking to this field for relief or respite or advice or protection or escape. To master language, the same task must be undertaken: Knowing (memorizing) the words is not sufficient (although it is necessary) for mastery. Cavell makes this point:

To summarize what has been said about this: In ‘learning language’ you learn not merely what the names of things are, but what a name is; not merely what the form of expression is for expressing a wish, but what expressing a wish is; not merely what the word for ‘father’ is, but what a father is; not merely what the word for ‘love’ is, but what love is. In learning language, you do not merely learn the pronunciation of sounds, and their grammatical orders, but the ‘forms of life’ which make those sounds the words they are, do what they do—e.g., name, call, point, express a wish or affection, indicate a choice or an aversion, etc. And Wittgenstein sees the relations among these forms as ‘grammatical’ also.91

Of course, this kind of learning normally does not take place in an instant but rather is something into which every normal human infant matures, at his or her own rate. Legal professionals mature at various rates, too, in their understanding of and appreciation for the purposes and roles of the law in our lives. Accordingly, their knowledge of legal rules is similarly variable, in so far as we are speaking about their capacity for using them well.

These last two senses in which there is an internal aspect of rules—they are internal to their (con)text and internal to the activity that generates them—seem to me to be more important internal aspects of rules than the one emphasized by Hart. Each implies that we make sense of rules and use rules, within and without the law, by way of techniques and procedures and strategies and structures (texts and contexts) that are familiar to us from our experience with ordinary language and literature. In law, we are dealing with a "language of rules," as White puts it,92 but here the emphasis must be at least as much on "language" as it is on "rules."

What this holistic vision of rules indicates is that rules have relations with many things, including ourselves, and an understanding of any particular rule is dependent upon understanding (at least some of) its many relations with those other things. This fact in itself—the many relations of rules—is one of the matters of "necessary knowledge" about which jurisprudence should teach us. This is a part of our necessary knowledge of rules, what they are and how they function. We not only cannot deny such knowledge; we must (and do) employ it in our understanding of rules (consciously or not). It is the kind of knowledge that Wittgenstein calls "grammatical knowledge."93 We may not know (and in many situations certainly will not know) the particular relations that any rule has with us or its (con)text or the activity by which it is generated. But we do know that each rule must, necessarily, have such relations and that we cannot understand any rule without understanding these relations.

(5) I have not yet spoken about the fifth aspect of the internality of rules.94 It is this last aspect that relates most directly to my point.


93. See text accompanying note 15 supra.

94. It may be useful to list the five ways in which rules have an internal aspect:

1. They are internalized (accepted) by us.
2. They internalize (incorporate) us.
3. They are internal to a (con)text.
4. They are internal to an activity or a medium (a "form of life").
5. They are internal to a relationship between their author and audience.

To my knowledge, Hart speaks about only the first of these five ways when he speaks in terms of the "internal aspect of rules."
made earlier about the attitude we have toward a rule of law (its "mode of presentation") and its consequent normativity. This ties in with my earlier discussion of White's work, where he suggests that any text should be understood in terms of the relationship it creates or embodies between its author and its reader. Similarly, I suggest, any legal rule should be understood in terms of the relation that it creates or embodies between its author and its reader. We might ask, then, of any legal rule: How does it relate the law-giver with the law-receiver? Here, as in any literary relationship, the relationship is not one-directional or one-dimensional. The reader is as involved as the writer in the constitution and reconstitution of his materials, of the text and the textual community it generates (or fails to generate). From this perspective, the jurisprudential discussion of law might be brought back to the idea (omitted from most traditional jurisprudence) that any rule may be read not so much to presuppose a pre-existing relationship between utterer and utterer's audience, as to create or reconstitute a relation between them. The giving of a rule, we might say, instantiates a relation between author and audience, or at least offers such a relation to them, if they know how to accept it and work with(in) it. Consequently, I believe, the normativity that any legal rule has or comes to have is in part dependent upon the nature of this instantiated or offered relation—what it is, what it can or does become.

VIII. AN AESTHETIC APPROACH: LAW AS ART, LAW AS ACTIVITY

I was saying earlier that I wanted to stay the natural urge, encouraged by the traditional, positivistic conception of law as a system of rules, to reify the law. I oppose the reification of law not because I think the law is somehow unreal, and not because I think the law fails to exist in the world somehow, but rather because the reification of law (e.g., as a system of rules) suggests the wrong kind of reality for law in this world. To think of the law as being an object—either physical or metaphysical—is to ascribe to law the wrong kind of reality and the wrong kind of existence. This ascription creates an analogy between objects and law that does not hold. Another way to put it would be to say that this ascription or analogy presents the wrong kind of model for law; it is misleading and, thus, it skews our vision and our expectations of law.

What, specifically, is wrong with this model of law? My suggestion has been that to talk about law as an object naturally leads us to think in terms of physical objects, and then all of the familiar associations that we have with such objects—what we know about them, how we come to know them, and so forth—inundate us. We

95. See text accompanying notes 27-28 supra.
tend to transfer the relations that we have with physical objects to our relations with law. Then we try to make law fit their mold, which it cannot do; hence, we become disappointed in law, as though it had failed us (whereas, what has happened is that we have failed it, naturally). We become dissatisfied with law because it does not permit the kinds of knowledge (by which I mean, the forms and methods and modes of knowledge) permitted us by physical objects. This fact of the difference between law and physical objects is signaled to us—though not always recognized by us—by the now common acknowledgment that law is not and cannot be a science, especially not a natural science but also not a social science (the latter of which models its epistemological methods and goals on those of the former).

Law is not a physical object, nor is it akin to one. Neither is law a rule or system of rules. And, even if law tends to become embodied, in part, as a system of rules, traditional jurisprudence has misconceived what rules are and how they work (that is, how they relate to us and we to them). What my remarks amount to, I believe, is a claim that law is not independent of humans. That it ever could be conceived to be otherwise, may seem a mystery, but I read traditional jurisprudence to have treated law exactly as though it were independent of us. This conception has misconstrued law and misled us in ways and about matters that we are only beginning to appreciate and assess. I hope that I have made a contribution to this work of assessment.

I also have been trying to show that, given the work of a number of people, we can see law as being something other than independent of us. On this alternative view, law consists of artistic activities and their products—that is, not only the rules of law but also the practices, institutions, experiences, and language by which and in which such rules are made, applied, repealed, and denied. Law includes the activities through which law is created or made and by which law is maintained, modified, repealed, affirmed, etc. Given that human actions and activities are not physical objects as trees or rocks are, nor physical processes or causal phenomena as lightning or gravity are, and also given that human activities are not reducible to their results or products, we are mistaken to treat law as either a physical or metaphysical object—a mere result or product.

An artistic activity issues in an utterance with an intentional dimension that physical objects and causal phenomena do not have. On this view, law becomes connected both to humans and to its

96. This is true of natural law as well as positive law, even if (as I claim) natural law is to be thought of as the necessary conditions and limits of law. I hope to make more clear this conception of “natural law as necessary” in the paper mentioned in note 65 supra.
appearances and places within human contexts and forms of life. The law is not a phenomenon separate from us and our participation in it. We cannot know this art or activity and its artifacts without also knowing its audience and its artists. (This is an attempt to acknowledge "the hard Berkeleyan-Kantian truth that an event in which we participate is not knowable apart from our participation in it."97)

The emphasis that traditional jurisprudence places on rules in the law can be traced to its concern with the normativity of law. How are we to account for the normative claim that law makes on us? Philip Soper has argued that this is the fundamental issue of jurisprudence today, and that the epistemological emphasis of traditional jurisprudence improperly distracts our attention from the moral-political issue of how law obligates us.98

Practitioners of traditional jurisprudence have pursued the question of the normativity of law along one line of development only, namely, in terms of the obligatoriness of law (as a moral-political problem). No doubt, it is important, even crucial, for us to understand the obligatoriness (or non-obligatoriness) of law, of our rules of law. But obligation is not the only normative value that law has. To call the law "normative" is to say, I believe, that law is a medium, a collection of ways for human beings to act, and that law provides us with norms of human action or activity. It does this not only in the sense that it affords us already determined modes of human action, already determined and specified ways of acting, but also in the sense in which law affords us the materials by which we can construct or invent or discover new ways of acting, new modes of human activity. (And, of course, I mean nothing invidious by the term "new," because it is also a part of the fecundity of law to offer us the opportunity to discover or reinvent old ways of acting, old modes of human activity, ways and norms that had been alive to humans in the past but, for whatever reason, are lost to us for the time being until we reclaim them from the fund we call "history" or "tradition.")

Norms come in all shapes and sizes, all forms and functions, and they need not be either moral or political. Some legal norms are aesthetic. Our over-emphasis on the moral dimension of norms, and on their political dimension, leads us to neglect their other normative dimensions;99 it also reinforces the moralization and politicization of law, as though law could only be measured along either or both of these normative dimensions, and must otherwise be neutral, value-free. On my understanding, however, norms are specifications of the

98. SOPER, supra note 5, at 7, 9-11, 19, 101.
99. See, e.g., Coyne, Beyond Rules: Mapping the Normative, 18 AM. PHI.
ways in which we do things, the ways we have for accomplishing efficient and effective human actions, the ways we have of reaching and achieving our goals and purposes. To say that all norms are either moral or political or both is wrong, yet such a view seems implicit in much of the jurisprudential talk about the normativity of law.

The assumption in traditional jurisprudence is that we need to explain or account for why and how we follow laws. To show why and how a certain rule of law obligates or binds us is a prima facie reason for following it. The problem with this model of law and legal rules is that the questions that citizens and legal professionals ask of the law do not all reduce to the question, "How am I (or how is my client) to follow this rule, and why should I (or he)?"

What else might be asked of law and legal rules? We ask of law not only, "What must I do?", but also, "What can I do?" We ask, then, not only about what is required by law, or what is permissible by law, but also about what is possible within the medium of law. We may legitimately wonder how we are to do what we want to do, and thus may look to the law for assistance in constructing ways of achieving what we desire. This is an aesthetic approach to law, because it assumes law to be an artistic medium of expression and communication, a way of making sense and creating significance in the world. Also, it insists upon the creativity and criticism of law from within an appreciation that these values are to be achieved—and can be achieved—only through an attention to craft, to craftsmanship and professional technique.

This aesthetic approach to law asks not "How am I to follow the law?", but, "What can I do with the law? How can I work with it?" This is the professional's question, to be sure, but it also is a question that citizens can ask. It sees the relation between humans and the law not as a passive or submissive one, but rather as a participatory and active one. We wish to work with it, not allow it to have its way with us.

The question of how law binds us, how it obligates us—the extent to which it does—is important, but I doubt that it is exhaustive of the fundamental questions that can be asked about the normativity of law. In fact, I take the problem of legal obligation to be only one among several problems of legal normativity. Since normativity is a concept that concerns human action and activity—its forms and methods, its intentions and purposes and goals and accomplishments and failures and consequences—I consider the more fundamental question of jurisprudence to be: "What is the nature of law such that we can undertake the actions and activities within it that we in fact undertake?" In this respect, I am looking for an account of law as a medium of human life, thought, and action. Such an account would have to understand law as one field of human activity among many, and would have to locate it accordingly.
I am claiming that law itself is an activity, an activity of artistry. Oakeshott suggests a way of fruitfully pursuing such a conception. While it is clear that a part of our legal knowledge and legal education is expressed in and by the rules of law that we study, it also is clear that these rules are not sufficient in themselves to produce or represent our knowledge of law or of an education in the law. To know the activity of the law, we shall have to know how we teach it, how we learn it, and how we practice it. Thus, among other things, to learn what law is, which puzzles us, we shall have to learn what the activity of being a lawyer is, a still more puzzling matter.