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# Forty-five Years Of Law And Literature: Reflections On James Boyd White's "The Legal Imagination" And Its Impact On Law And Humanities Scholarship

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## Forty-five years of law and literature: reflections on James Boyd White's *The Legal Imagination* and its impact on law and humanities scholarship

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### ABSTRACT

This special section of *Law and Humanities* focuses on the 45th anniversary edition of James Boyd White's *The Legal Imagination*: a book that was ground-breaking when it first appeared in 1973 (since it is generally credited as having initiated the 'law and literature' movement) and that remains a hugely important resource today. White's approach to legal scholarship and education - reading law's instruments, its rhetoric and concepts alongside, above, below and in-between literary works and criticism - opened up a new world of intellectual possibilities. Realization of these possibilities has come in the form of the growth and flourishing, not only of law and *literature* but also numerous other intersections of law and the humanities that owe a debt to White. This symposium brings together seven eminent scholars (and readers of *The Legal Imagination*) to reflect on the contribution that White's book made and continues to make to law and humanities education and scholarship. In the order that their essays appear, the authors for this symposium are Elizabeth Mertz, Robert P. Burns, Matthew Anderson, Jack L. Sammons, Thomas D. Eisele, Linda L. Berger and Linda Ross Meyer.

**KEYWORDS** James Boyd White; *The Legal Imagination*; law and literature; law and humanities; 45th anniversary edition; Wolters Kluwer

### Introduction

This special section of *Law and Humanities* focuses on the 45th anniversary edition of James Boyd White's *The Legal Imagination*: a book that was ground-breaking when it first appeared in 1973 (since it is generally credited as having initiated the 'law and literature' movement) and that remains a

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hugely important resource today.<sup>1</sup> White's approach to legal scholarship and education – reading law's instruments, its rhetoric and concepts alongside, above, below and in-between literary works and criticism – opened up a new world of intellectual possibilities. Realization of these possibilities has come in the form of the growth and flourishing, not only of law and *literature* but also numerous other intersections of law and the humanities that owe a debt to White. This symposium brings together seven eminent scholars (and readers of *The Legal Imagination*) to reflect on the contribution that White's book made and continues to make to law and humanities education and scholarship.

Readers may of course not always agree with the particular associations that White makes, and the specific lessons he invites us to learn, from the legal and literary sources that he brings into conversation. We may also debate the extent to which subsequent developments in law and humanities have advanced relevant debates to new positions. But to understand the real and lasting significance of *The Legal Imagination* it is necessary to appreciate the wider and more general lessons in White's writing. At this level, it is clear that the work is not merely an argument or a method. It is, rather, a much deeper re-imagining of legal education, scholarship and practice, and one that seeks to make good a deficit in these practises by effecting a reconnection between them and some basic values and principles. White's broad and inclusive approach to thinking about what makes for a persuasive argument, for good writing and wise judgment – in circumstances of apparently intractable dispute and using language that is inherently given to ambiguity and indeterminacy – continues to stand as an important critique of law's traditional reliance on objectivizing logics, instrumental reasoning and technical knowledge.

The imaginative opening up of and restoring integrity to legal scholarship and education that White advocates and that law and literature approaches have since sought to advance, furthermore engages professional and personal questions about the place of humanity itself within the law. It may be tempting to caricature this as an audacious claim on behalf of law and literature to 'complete' a legal profession that would otherwise be all unforgiving sharp edges (think of the Dickensian lawyers Tulkinghorn (*Bleak House*) and Jaggers (*Great Expectations*)). However there is no denying the sense of revitalization and renewal upon encountering the writings of James Boyd White that comes through in the contributions below. All of the contributors to this symposium are scholars whose own work has in one way or another been impacted or influenced by this encounter.

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<sup>1</sup>James Boyd White, *The Legal Imagination: 45th Anniversary Edition* (Alphen aan den Rijn, The Netherlands: Wolters Kluwer 2018). *The Legal Imagination* was first published by Little Brown in 1973. There have been subsequent abridged editions, but 2018 is the first time it has been republished in its entirety since then, and includes a new Foreword by the author.

The contributions to this collection are organized into two broad sections. The first of these sections comprises four essays that address White's book at the level of its broad ethos and its significance as an education workbook. The second section comprises a further three essays that discuss some more particular aspects of White's approach to reading and teaching law, and the ways in which White engages specific legal instruments, notions and concepts.

We begin then with Elizabeth Mertz's essay 'Reading, writing, speaking, and teaching law: James Boyd White and legal integrity' in which she considers how *The Legal Imagination* offers a critique of an instrumentality that can pervade the reading and 'speaking' of law, and White's promotion of integrity in legal education by way of combining technical legal skills with a 'sense of ethics and humanity'. Then in 'A path to self-awareness', Robert P. Burns characterizes White's approach as being aimed at drawing students away from idealizing objectivity and towards appreciation of the ambiguity and fluidity in legal language. Matthew Anderson's essay 'A book of questions' follows on from this, focusing on the role of law and literature in education – both intended and unintended – and on the use of metaphor and irony in developing techniques in would-be lawyers of 'good writing'. Jack Sammons's essay completes this first section, and he offers some reflections on human rights and the problem of indeterminacy in their application. Sammons compares the role of the judge to that of the poet, and the problems associated with finding meaning in text – the two roles converging in the primacy of the imagination.

The second section begins with Thomas D. Eisele's essay 'Law as a Literature', in which Eisele suggests that White's treatment of law as a form of literature means seeing legal texts and literary ones as similarly 'wording the world', and 'sketching ways to behave' in various contexts. Eisele reviews how White invites students to see law in this way and seeks to convince them to understand law's various forms – wills, statutes, judicial opinions, etc. – as comprising ways of speaking meaningfully about important aspects of our social existence. Then Linda L. Berger in her 'The metaphor of the opinion as a poem' takes White's suggestion that we read judgments as poems (i.e. in terms of their potential to generate new meanings from the apparently familiar) and applies it to particular legal cases. She uses this method to appreciate opinions as humane acts of imagination and understanding. The final essay of this section and for the symposium as a whole is Linda Ross Meyer's 'Charitable interpretation: lessons from *The Legal Imagination*'. Meyer addresses White's invitation to readers to consider what sort of 'conversation' a statute is inviting its readers to have about justice, fairness, rights, harms, and so forth. Exhorting readers to consider the humanity that comes into contact with the statute (rather than simply the latter's 'original' or 'textual' meaning), Meyer considers the implications of White's insistence that

reading a statute humanely means attending to the ‘conversation’ that it implicitly sets up as between executive, legislature and judiciary.

‘Conversation’ is also an apt expression for the evolution of scholarly tradition, involving as it does multiple and various voices and interactions. The conversation that James Boyd White initiated, which has been joined and contributed to by so many others and that continues to shape itself in numerous directions is surely testament to enduring relevance of *The Legal Imagination*. The contributions to this symposium offer a timely reminder of this, but also, we hope, may spark new threads of conversation.

David Gurnham, March 2019

### **Elizabeth Mertz, ‘reading, writing, speaking, and teaching law: James Boyd White and legal integrity’**

The original volume entitled *The Legal Imagination* is a coursebook – a book meant to be used in teaching. As is the custom in such volumes, the main readings are excerpts from other texts. Of course, the selection of those excerpts tells us a lot about the author. *The Legal Imagination* draws on excerpts all the way from statutes and legal cases to poetry and sociology. Students in this course will encounter Charles S. Johnson, sociologist and president of Fisk University, writing on ‘Growing Up in the Black Belt’, side-by-side with the ABA Code of Professional Responsibility. They will try to imagine what light Jane Austen can shed on the sentencing of juveniles in the United States. The selected readings will ask them to roam from ancient Greece to Osawatimie, Kansas – from France during the Terror to Levittown.

But the most direct examples of the author’s voice in this kind of book can be found in the comments and questions and writing assignments connecting the excerpted readings. Here is part of the final writing assignment in the book, a passage in which James Boyd White addresses his student readers:

As you can tell, I have drawn heavily on my own experience of literature and literary criticism in defining a point of view from which to regard the law. One might even say that this course is an attempt to connect different sides of my own intellectual life, a response to a feeling that the life of the lawyer is somehow set off from all other experience. In drawing the connection, one defines a context: the legal life can be understood by being compared. ‘How does the lawyer think and write?’ can be understood by comparing him with others. And of course the reader of literature is used to asking exactly the sort of questions about the use of language that I, for one, have found most illuminating in application to the law.<sup>2</sup>

This passage calls us – along with White’s students – to a profound quest. It does not shy away from the personal, but it speaks of our personal

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<sup>2</sup>James Boyd White, *The Legal Imagination* (Little, Brown & Co 1973) 967.

connections as part of a deep intellectual and ethical puzzle: can we adopt our professional languages while still remaining ourselves? Can those of us who trained as lawyers be true to that calling without giving up too much of our humanity? James Boyd White's work over a lifetime in law and literature has never stopped challenging the limits of this question, whether he is writing of life as a lawyer, literary critic, reader, writer – or perhaps most passionately, as a teacher. I am honoured to be part of this celebration of White's legacy. I write out of gratitude, both personal and professional, for what he has encouraged me and others to dare in our own work.

### *Intellectual integration as a calling*

Like many others, I have benefitted from White's generosity of spirit. After completing my PhD in Anthropology, I held a postdoctoral fellowship at the Center for Psychosocial Studies in Chicago; as part of that experience I was asked to help organize a working group on 'Language and Law' that met at the University of Chicago. For a young scholar, that working group was an exciting but potentially intimidating gathering, composed largely of well-known figures such as Wayne Booth, Michael Silverstein, Milton Singer, John Comaroff, Edward Levi, Cass Sunstein, James Boyd White, and other Chicago faculty – as well as colleagues from the Center like Bernard Weissbourd and Benjamin Lee. For a young woman – and usually the only woman in the room – the setting could be especially challenging. But several people in the group made an effort to reach out to me, the least 'important' person there in socially conventional terms – and one was White.<sup>3</sup> After a presentation I gave, he made a point of coming up to me to offer searching but encouraging comments. And then he startled me by asking something to the effect of: 'You are going to go on to a faculty position after this, aren't you?' (The question presupposed that I would have that choice, a matter about which I was far from certain then, needless to say!) Over the time we were both in that Working Group, White repeated this pointed question several times, conveying a sense of respect as well as a belief in my potential that meant a great deal. And simultaneously, I had the good fortune of beginning a conversation with White's work that continues to this day.

As I delved more deeply into the intersection of language and law in my own work, I became convinced that I needed to receive training in the language of law – much as any anthropologist would need to train in a

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<sup>3</sup>In conventional terms, I was very junior, female, and an outsider to the University of Chicago community, in contrast to everyone else there. (I should add that another member of that seminar, Michael Silverstein, conveyed support and over subsequent years was an unfailingly generous colleague – as he has been to so many others.)



field language.<sup>4</sup> I attended law school and wound up working on the law review, overseeing the process by which student editors selected articles for publication. Among the pieces we published that year was one by White called ‘Intellectual Integration’ – which went on to become the first chapter of his pathbreaking book, *Justice as Translation: An Essay in Cultural and Legal Criticism* (1990). ‘Intellectual Integration’ contains a very honest description of professorial malaise, posed appropriately in terms of reading and writing and language:

Imagine ... that you are a professor in your office, littered with books and journal articles. With what hopes and expectations do you imagine that you turn to them? If you are at all like me do so not with eager anticipation but with a feeling of guilty dread and with an expectation of frustration. For we live in a world of specialized texts and discourse, marked by a kind of thinness, a want of life and force and meaning. All too often we simply skim-read a text, and all too often we do so with a sense that nothing is lost.<sup>5</sup>

What a relief to hear this diagnosis! This arrestingly realistic portrait of what is supposed to be a life happily spent in deep scholarly musings became more and more relevant to me as I advanced into a career alluringly located in the busy intersection occupied by interdisciplinary legal studies.<sup>6</sup> I frequently went back to White’s lament, his worry that today’s academic discourse is too thin and dead and bleached:

We read more widely than our citations reflect; we think more variously than our arguments suggest; ... and our relations with prior texts are more rich and interesting than our bibliographic notes, in their misleading claims to represent what we have read and thought about, are likely to suggest. (Suppose our references were not to the literature we think we are supposed to have read but to the texts we actually have read, and thought about, and wish to respond to: How different would our writing be, in voice and sense of audience, in shape and tone?)<sup>7</sup>

White ends this section of the chapter asking what it would mean to integrate, to put back together, the thoughts and meanings that we segment off when we speak in professional voices. I have carried that question with me for decades, and I suspect I’m not alone.

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<sup>4</sup>The decision was encouraged indirectly by my legally trained co-author, Barney Weissbourd, who told me emphatically that I would not be arguing with him about his interpretation of HLA Hart’s work had I attended law school! (I never did yield on my interpretation of Hart but was deeply grateful to him for pushing me in that way.) The decision also reflected a practical eye on the future as half of an academic couple both of whom needed extra flexibility on the job market.

<sup>5</sup>James Boyd White, *Justice as Translation: An Essay in Cultural and Legal Criticism* (University of Chicago Press 1990) 8.

<sup>6</sup>White points out the limitations and promise of legal ways of approaching interdisciplinary work (ibid 12–20, 46–86). Roughly speaking, he views law as less imperialist than economics, less likely to presume it can translate everything. But he also identifies serious problems with lawyers’ attempts to simply pick up the ‘findings’ or ‘methods’ of other fields. I would add that interdisciplinary research expands the volume and scope of readings and knowledge that we expect ourselves to cover, which is itself a temptation to shallower readings (and frequent despair).

<sup>7</sup>White (n 5) 11.

## Learning legal language

*Justice as Translation* opens by quoting Wittgenstein, in a passage that echoes a recurring theme found throughout White's writings: 'To imagine a language means to imagine a form of life'.<sup>8</sup> In *The Legal Imagination*, White urges law students to imagine the form of life they will inhabit as lawyers – as professionals who use the language of law. What, he asks, are 'the unexpressed assumptions or characteristics of legal discourse'; what are 'the special characteristics of the writer who is a lawyer'; and how might these change depending on whether the lawyer is 'speaking as counselor, advocate, legislator [or] judge'?<sup>9</sup> The first section of *The Legal Imagination* is devoted to the lawyer as writer, and the very beginning of that section focuses on 'learning the language of law'. The process of learning a language, White suggests, offers us a prism through which to view its unexpressed assumptions and special characteristics. What happens when Mark Twain learns to view the Mississippi River through his training as a boat pilot, by contrast with Dickens's view of the same river as a doting tourist – or with LaSalle's unselfconscious description of the Mississippi River basin as part of land he claims for King Louis the Fourteenth of France? Using the professional language of the pilot or the imperialist language of the colonizer changes what we can see, how we can understand, even as we use language to describe the 'same' thing. And law school is where lawyers begin their own shift to a specifically legal 'form of life'.

As White clearly knew, a close examination of what happens in schooling had also informed generations of social science and linguistic researchers studying education. Inspired by those researchers as well as by White's version of law-and-literature and my own beloved field of anthropology, I myself undertook an intensive linguistic study of law school training.<sup>10</sup> Using 'the somewhat clunky and less than elegant language' and methods of social science, I worked with a research team to analyse tapes, observational notes, and transcripts from first-semester Contracts classes taught at eight different law schools.<sup>11</sup>

While the professors we studied used a variety of styles – from largely lecture to almost conversational – we were able to track shared linguistic features of the language in all of the classrooms. Those features indicated 'a core approach to the world and to human conflict that is perpetuated through

<sup>8</sup>Ludwig Wittgenstein and GEM Anscombe, *Philosophical Investigations, Part I* (Blackwell 1997) §19.

<sup>9</sup>White (n 5) xxxii.

<sup>10</sup>Elizabeth Mertz, *The Language of Law School: Learning to "Think Like a Lawyer"* (Oxford University Press 2007). The study also included interviews with professors and students taking the classes.

<sup>11</sup>The quotation is from my review of *Justice as Translation* in the *Yale Journal of Law & the Humanities*, where I made a case for integrating work from Critical Race Studies and Anthropology into White's vision of law (Elizabeth Mertz, 'Creative Acts of Translation: James Boyd White's Intellectual Integration' (1992) 4 *Yale Journal of Law & the Humanities* 165, 166). I use the quote to indicate a continuing sense of awkwardness over how best to bring the rhetorics together.

U.S. legal language' – one that subtly reoriented students away from considerations of social context and morality.<sup>12</sup> This reorientation is accomplished, not surprisingly, through a quiet shift in habits surrounding reading and talking about texts. Drawing on White's work, I urge legal educators and lawyers to 'take seriously the combined linguistic-cultural-ethical orientation that characterizes law as a field' – and that invisibly drains away vibrancy from a law student's 'form of life'.<sup>13</sup>

But even if we all take this problem seriously, what can we do about it? The question worried famed law professor and legal realist Karl Llewellyn, writing in *The Bramble Bush*, who began his book quoting this short poem:

There was a man in our town  
and he was wondrous wise:  
he jumped into a BRAMBLE BUSH  
and scratched out both his eyes –  
and when he saw that he was blind,  
with all his might and main  
he jumped into another one  
and scratched them in again.<sup>14</sup>

Law students, Llewellyn tells us, are like this unfortunate man, and law school is the bramble bush that, during the students' initial training, scratches out their eyes. They are for a time left blind:

The hardest job of the first year is to lop off your common sense, to knock your ethics into temporary anesthesia. Your view of social policy, your sense of justice – to knock these out of you along with woozy thinking, along with ideas all fuzzed along their edges. You are to acquire ability to think precisely, to analyze coldly, to work within a body of materials that is given to see, and see only, and manipulate, the machinery of the law. It is not easy thus to turn human beings into lawyers. Neither is it safe. For a mere legal machine is a social danger.<sup>15</sup>

Coming from very different directions and times, so many have converged on this important insight, familiar to any reader of White's work as well. Llewellyn, not unlike White, works to build a broader vision of what a lawyer should be: 'a mere legal machine is not even a good lawyer. It lacks insight and judgment. It lacks the power to draw into hunching that body of intangibles that lie in social experience'<sup>16</sup>. A good lawyer, Llewellyn urges us, must eventually return to re-incorporate a new version of humanity. But how?<sup>17</sup>

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<sup>12</sup>Mertz (n 10) 4.

<sup>13</sup>ibid 218.

<sup>14</sup>This seems to be an English nursery rhyme; Llewellyn does not enlighten us as to his exact source.

<sup>15</sup>Karl Llewellyn, *The Bramble Bush: On Our Law and its Study*, Steven Alan Childress (ed) compiled and annotated by Stewart Macaulay (Quid Pro Quo Books 2012 [1930]) 106. I thank Stewart Macaulay for connecting the dots between my own work and that of Llewellyn.

<sup>16</sup>Llewellyn (n 15) 106.

<sup>17</sup>At the end of my own study, I urge those trained in law to reflect on how they might embrace forms of humility that are in some ways the opposite of the technical legal reading to which the first year

### *Scratching our eyes back in again?*

In some ways, Llewellyn is presupposing that it is possible to move past the profound separation of self from soul that he describes as part of the first year in legal education. His proposed remedy has surprising parallels with White's: he pushes his students to read law more deeply during their second and third years of training:

The drama of society: each opinion a human document; each case a human struggle, warm with life; each changing rule of motion of the giant whose hands control your destiny and mine ... I say in these things there is poetry, in these things there is life, in these things there is beauty ...

Go, then, and read – in the law and out. Work at your art, your science, your philosophy – work even at your Mencken, if you must ... But bring the work home again, and merge it with your law ...<sup>18</sup>

What strikes me as I put this text into conversation with *The Legal Imagination* is how much Llewellyn leaves to chance, whereas White picks out a specific pathway. 'Go forth and read' could describe what either of them told us to do at the broadest level – but read what, and how? In the end, Llewellyn is quite pessimistic that most of his students will take the general path he prescribes.<sup>19</sup> The pull of making a living through manipulating technical law – the form of life that this entails – seems to Llewellyn far too enticing. Having lost their sight in the first year, all too few lawyers will wind up scratching their eyes back in again.

By contrast, White's *Legal Imagination* asks students to keep working at this integration throughout their education. He introduces the reading of particular statutes or cases as potentially informed by deeper visions. He asks that students examine what they are losing and gaining at each step: how could you bring a technical and lyrical view of a river together? This profound translation is not easily achieved; it must be fought for at every step.<sup>20</sup> *The Legal Imagination* takes us through many such steps, in their particularity. From many angles, it pushes students to remember the voices of the subjects of

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socializes incipient lawyers (Mertz (n 10) 223). This kind of humility is necessary to any form of 'excellent translation' – of life into law, and back again, as White has taught us.

<sup>18</sup>Llewellyn (n 15) 134–35.

<sup>19</sup>White (n 2) 159.

<sup>20</sup>Exploring the theme of 'translation' in White's work would require another essay; like many, I was inspired by the challenges he posed surrounding interdisciplinary translation. Years later, I joined a group of 'New Legal Realist' scholars who aimed to remind legal theorists of the long and important tradition of attention to human life and on-the-ground injustices within U.S. legal thought. This was in part a response to a flood of work that elevated the 'rational actor', and of course the 'reasonable man' – but also metrics far removed from what social science and narrative told us was actually happening with law in our society. My own modest contribution, straight from my anthropological linguistics background – but also my engagement with White's work – was to stress that we need to pay much more attention to what we lose (or gain) through particular translations into (and out of) law. Elizabeth Mertz, William Ford, and Gregory Matoesian (eds), *Translating the Social World for Law: Linguistic Tools for a New Legal Realism* (Oxford University Press 2016).

law. It's hard to imagine most law students reaching out this far without specific guidance of the sort White provides.

In a later book, *From Expectation to Experience*, White would explore his thoughts on teaching in a more explicit way, again giving us refreshingly honest reflections on how real life in our profession can feel.<sup>21</sup> Here he traces the track of a semester in the classroom, from initial high expectations through the inevitable disappointments, and moves on to talk specifically about his experience in teaching *The Legal Imagination*. He stresses repeatedly that this course is not simply about 'law and literature', but rather deals with 'the activity of a mind that is trying to come to terms with the various languages it is given to use, trying to judge, modify, and control them by an art that is at once intellectual and ethical'.<sup>22</sup> As is usual with White's writing, these chapters inspire and unsettle, prompting us to re-think what we are teaching when we teach 'legal writing' or how to 'read law'. But we have to return to *The Legal Imagination* to find a step-by-step map of what White envisions as an alternative pedagogy, because generalizations leave too much of the path unspecified.

In re-tracing many of the steps of this path as I looked back over the book, it struck me that we need not stick to all of the particular readings or byways that White selected to continue learning from his method, his vision here. Where White turns to ask how the law talks about people – how racial language, for example, works in and through law – we now have generations of scholarship by critical race and intersectional scholars on law. For example, we could read law professor Patricia Williams, writing of legal education but also of law more deeply imagined, digging more deeply into the interpretive world inhabited by 'rights' for those at the margins.<sup>23</sup> The possibilities abound; the urgency of these juxtapositions as integral parts of lawyers' training perhaps never more evident than today.<sup>24</sup>

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<sup>21</sup>James Boyd White, *From Expectation to Experience: Essays on Law and Legal Education* (University of Michigan Press 1999)

<sup>22</sup>ibid 76.

<sup>23</sup>Patricia Williams, *The Alchemy of Race and Rights: Diary of a Mad Law Professor* (Harvard University Press 1991)146–65.

<sup>24</sup>The scope of this essay doesn't leave me room to even sketch most of the possibilities, or of the ground already travelled in efforts to address the perennial problem of finding a systematic way of restoring law students' sight after the first year. The Carnegie Report on U.S. legal education (William Sullivan, Anne Colby, Judith Welch Wegner, Lloyd Bond, and Lee Shulman, *Educating Lawyers: Preparation for the Profession of Law* (Jossey-Bass 2007)) remarked on how little progress we've made in this regard since Llewellyn's time; there are entire literatures now on law student well-being, on the perverse incentives in law training and for law faculties; and on the ways these have arguably contributed to failures within the legal profession as a whole. Stewart Macaulay, in his Introduction to the new edition of *The Bramble Bush*, notes how much more legal education could do were it to incorporate what we now know about the actual practice of law (Stewart Macaulay, 'Introduction: Dodging the Worst of the Thorns on the Bramble Bush' in Llewellyn (n 15) xi–xxi.) Here, again, it's worth noting that White's framework points us to many ways we could do that.

### **Coda: legal integration, legal integrity**

At the end of *The Legal Imagination*, White returns to the question of legal education. Here much of his voice emerges through the questions he asks:

In this course you have examined the activity of the legal mind in several ways: by comparing legal language with other forms of expression; by exploring as best you can what the lawyer does behind the language that he uses; and by analyzing the structure and limits of legal speech and through as a discrete intellectual system. You have come at the law from the inside and from the outside. Having asked yourself how the ‘law’ could be defined as the subject matter of education ... you are now asked to explain how it can be taught and learned. ... Can you tell your law school and its teachers what they should be doing?<sup>25</sup>

By this time in the book, students have seen a myriad of ways that their law schools could be deepening their vision of law – ways to integrate what they know of law as a technique with their sense of ethics and humanity. The intellectual integration that White paints for us is also a way of restoring integrity, as he himself notes:

Finally let me say, as you have no doubt already guessed, that the image of integration I have been trying to get before us is an image not only of intellectual but of social and political life as well, a way of thinking about the relations between people and races and cultures ...<sup>26</sup>

*The Legal Imagination* provides us a map for this kind of integration, as it models a form of life with integrity.

### **Robert P. Burns, ‘a path to self-awareness’**

Approaches to legal education often depend on an implicit view of the nature of ‘the law’ or legal practice. A vision of the law as composed mainly of rules that resolve most problematic situations, ‘the rule of law as a law of rules’, as Justice Scalia liked to put it, will likely emphasize the mastery of large swaths of legal doctrine and some attention to the technical canons surrounding its interpretation. An understanding of law as an effective instrument of policy goals that are created through legislative fiat will likely emphasize the social sciences that claim to provide the most reliable theoretical underpinning for the ‘social engineering’ in which lawyers and judges engage to achieve those goals.<sup>27</sup> In either case, the legal order is a bureaucracy whose agents, lawyers and judges, are bureaucrats who resolve individual cases by applying legal rules or social scientific laws on the social world.

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<sup>25</sup>White (n 2) 938.

<sup>26</sup>ibid 21.

<sup>27</sup>Alasdair MacIntyre, *After Virtue* 3rd edn (Notre Dame: University of Notre Dame Press 2008) 78–87.

James Boyd White's *The Legal Imagination* likewise relies on and embodies a distinctive understanding of law and legal practice that has informed his work from the beginning and which he has expounded over the decades. He tells us in the Preface to the Anniversary Edition of *The Legal Imagination* that the book is 'not in form a jurisprudence book, but it is based upon, and acts out of, a view of law itself, a view that strongly resists current inclinations to reduce law to matters of social policy, or theory, or economics, or politics'.<sup>28</sup> 'Law has its own materials, its own life, and its own way of being[,] ... not a structure but an activity of mind and imagination'.<sup>29</sup> The text is self-consciously not a treatise, but a 'workbook' that allows the reader to become aware of his or her own self-consciousness, a kind of self appropriation, 'the personally appropriated structure of one's own experiencing, one's own intelligent inquiry and insights, one's own critical reflection and judging and deciding'<sup>30</sup> in the process of performing the exercises in the text. This self-understanding provides access to aspects of the legal world that are not otherwise available, that can only be developed by 'performance and implication' because they involve a 'whole cluster of habits of mind and expression' involving 'social practices and definitions, which can be learned and mastered, modified or preserved, by the individual mind'.<sup>31</sup>

The text encourages placing this incipient mastery within the young lawyer's 'larger individual and intellectual life' through the resources that great literature and philosophy offer, but, at least as importantly, through his own experience of social and personal life, the 'ordinary stuff of life[,] ... experiences of his or her own, with the thought that they can provide an analogy or perspective from which to examine the texts and issues before us'.<sup>32</sup> It will turn out that this form of self-consciousness parallels the consciousness of the lawyer and the judge whose minds embrace the distinctive materials and techniques of the law, but also reach for justice. In the case of the judge:

A part of [the judge's] mind will think in terms of legal arguments of the kind we have been discussing, testing them against each other for their force and power. But beneath that layer of the mind is another, an intuitive center, educated by experience and reflection that is really seeking the right decision. The judge knows that her written opinions never express or justify what the center of herself is doing, the secret spring of judgment at her core. This tension cannot be resolved in an a priori way by a rule or principle, but must, like the others mentioned, be lived through in detail and addressed anew every time.<sup>33</sup>

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<sup>28</sup>James Boyd White, *The Legal Imagination: 45th Anniversary Edition* (Alphen aan den Rijn, The Netherlands: Wolters Kluwer 2018) xxii.

<sup>29</sup>ibid.

<sup>30</sup>Bernard Lonergan, *Insight: A Study of Human Understanding* (New York: Philosophical Library 1958) xviii.

<sup>31</sup>White (n 28) xxii.

<sup>32</sup>ibid xxiii.

<sup>33</sup>James Boyd White, 'An Old-Fashioned View of the Nature of Law' (2011) 12 *Theoretical Inquiries in Law* 394.

Lawyers, for their part, are not seeking ‘the single meaning of the statutes, of the judicial opinions, of the regulations, and of other materials of authority’, but ‘are demonstrating the range of possible meanings that these texts may be given’.<sup>34</sup> Because each case is unique, lawyers and judges live ‘at the edge of languages where they can and so break down and where new formulations must be made’ through ‘invention and imagination, constrained as art always is, by her responsibilities to her material and to her world’.<sup>35</sup> Literature has a place in the education of a lawyer, not as providing a theory to resolve individual cases, but because it often brings the reader ‘to the edge of language’, and can respect ‘both a multiplicity of voices and the self that can hear them’.<sup>36</sup> White offers this sober account of the sensibility that emerges from a student’s encounter with his text:

You might sum up the experience this course offers by saying that it is an experience in the collapse of language under strain: the collapse not only of the legal language, but of the other languages you have used ... You have experienced what could be called the central frustration of writer and lawyer, the perpetual breaking down of language in your hands as you try to use it. None of our languages seem to be able to do what it promises, none can bear the stress of our demands for truth and order and justice. Such, it seems to me, are the conditions of our existence.<sup>37</sup>

It is an inescapable feature of our legal practices that our arguments are always about *both* justice and law, White has told us. And so lawyers and judges must grasp not only the ‘semantic meaning’ of a rule, but also, as Marianne Constable puts it, ‘what lies behind the rule, “the poem behind the poem,”’ the reality that can show itself in the law’s practices.<sup>38</sup> These ‘invocations of justice ... reveal the distinctiveness of law’.<sup>39</sup> These intuitions of justice are beyond the ‘propositional view of language so dominant in our legal culture’ but emerge from the tensions among legal materials and the student’s broader intellectual and moral world, itself encompassing many perspectives. It is similar to what Hannah Arendt called ‘reflective judgment’, occurring where I form a judgment ‘by considering a given issue from different viewpoints, by making present to my mind the standpoints of those who are absent’ and so ‘enlarging’ my understanding’.<sup>40</sup>

A recurring theme in White’s work is that the ‘structure of thought and expression, built on a distinct set of dynamic and dialogic tensions’ that is the law is ‘inherently unstable’. This means that each person, lawyer or

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<sup>34</sup>ibid 391.

<sup>35</sup>White (n 21) 108.

<sup>36</sup>ibid 48.

<sup>37</sup>White (n 28) 760.

<sup>38</sup>Marianne Constable, *Just Silences: The Limits and Possibilities of Modern Law* (Princeton: Princeton University Press 2005).

<sup>39</sup>ibid.

<sup>40</sup>Hannah Arendt, *Lectures on Kant’s Political Philosophy* (Chicago: University of Chicago Press 1989).



judge, who speaks in a legal context is responsible for resolving the indeterminacy in the way his imagination best allows and with integrity. Lawyers must take care that their expressions remain 'living', and not lapse into the kind of bureaucratic speech that prevails where no one is responsible – Arendt's 'rule by nobody'.<sup>41</sup> Scientists seeking explanation through disengagement and objectivization distance themselves from their subject. By contrast, lawyers should bring their whole selves to bear on the material both to share their own moral vision and also to learn what the world can teach about right and wrong, the 'ethics already realized' in institutions and practices. The efforts of lawyers can subject the legal materials and the facts to 'the most intense and searching scrutiny' to reveal the 'range of possible meanings that these texts may be given, and using all our powers to do so'. That effort dramatizes how 'the judge will have to make her choice and *have to accept responsibility for it* – not push the decision off on a statute or other text that is read in a conclusory or unthinking way'.<sup>42</sup> Both the lawyer and the judge stand in an imperfect world and any argument or judgment they make is not likely to be fully candid. In particular,

The judge pretends that he is wise and good, and this means that he can be taxed, and by his own standards, when he is not; how much better this is than if he pretended simply to be the representative of a class or ideology or psychological impulse – which would, despite its claims, be no more 'real', but simply articulate a different idealized state. It would be equally a pretense, but not one to build one's life on.<sup>43</sup>

This understanding of the law is strongly countercultural. As Charles Taylor has argued, a central theme of modern culture elevates the objectivizing stance that creates distance between the individual and what he or she seeks to understand. The self who is the subject of the modern enterprise 'gains control through disengagement' which is 'always correlative to objectivization'. 'Objectifying a given domain involves depriving it of its normative force', even if that domain has previously 'set norms or standards for us'. '[O]nce we come to see the world as a mechanism, domain of efficient causation, but without inherent purpose, then we are free to treat it where our main concern is to effect our own purposes. Instrumental reason becomes the only appropriate category, and knowledge can be seen as the basis of power'.<sup>44</sup> That modern objectivizing stance lies at the basis of the bureaucratic domination through knowledge that lawyers and judges may take as their model and that White so resolutely opposes.

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<sup>41</sup>James Boyd White, *Living Speech: Resisting the Empire of Force* (Princeton: Princeton University Press 2006).

<sup>42</sup>White (n 33) 391–93.

<sup>43</sup>White (n 33) 20.

<sup>44</sup>Taylor, Charles, *Sources of the Self: The Making of the Modern Identity* (Cambridge: Harvard University Press 1989)

The exercises and assignments in *The Legal Imagination* draw students into the legal world's form of life. This is done 'not by conceptual elaboration, but by performance and implication, the only way I think it can be done'.<sup>45</sup> They cultivate the kind of self-awareness that arises when they must speak in their own voice, but also engage with materials, legal or literary or philosophical, that come to them from their culture. They experience the responsibility that comes with the resolution they embrace. 'In the course of the book the student is asked to write as lawyer, judge, and legislator, and reflect as a mind and a person on what he has done, to speak in his own voice about his experience of writing and thinking'.<sup>46</sup> The book is designed to allow the student 'to come to productive terms with the nature and limits of legal language in a way that does justice to the workings of their own minds and to the experience of those whom the law may threaten, injure or assist'.<sup>47</sup>

This comes with a distinctive educational advantage.

Law students often have a kind of 'rage for order' that tempts them to elevate the kind of knowledge that is clear and objective. They are often impatient with ambiguity and indeterminacy. They wonder 'what we have learned' from a humanistic approach that relies on a sequence of questions that seek to disclose an awareness that is 'at the edge of language'. This is a perspective that makes it virtually impossible for them to understand the legal world as it is, at least without falling into a corrosive cynicism about that world. It has often been said that the cynic is a disappointed idealist.

This kind of 'workbook, full of questions' as opposed to a 'textbook, full of assertions' has a distinct advantage. The student is active and he is 'asked how he can contribute to this literature of the law – to this world of thought and expression – and in so doing so, how he defined his profession and himself'.<sup>48</sup> My own experience in teaching a specific subject, the Law of Evidence, from a workbook, not a treatise or a casebook, is that students, speaking as lawyers in role, are actively engaged in the constitutive rhetoric that, in the case of Evidence Law, partially makes the trial what it is.<sup>49</sup> The indeterminacy of the rules in the dense complexity of a particular case invites acts of imagination and articulation in the student's own voice. As rhetoricians have always known, that voice must reflect an *ethos* that has the specific kind of integrity that a public person can have. (White tells us that 'this book may be of wider relevance now' because 'its central concern is with integrity – integrity of law, or language, of the individual person – at a time when integrity itself sometimes seems to be threatened as a value'.<sup>50</sup>) Students come to see that the reasonableness of 'the

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<sup>45</sup>White (n 28) xxii.

<sup>46</sup>ibid xxiv.

<sup>47</sup>ibid xxii.

<sup>48</sup>White (n 28) xxvi.

<sup>49</sup>Burns, Robert P., *Evidence in Context* (Boulder: National Institute for Trial Advocacy 2017).

<sup>50</sup>White (n 28) xxvi.

law' resides in an adversarial *practice* that honours the first principle of procedural justice, 'Let the other side be heard!'<sup>51</sup> Each argument can always be better and the understanding that emerges from the opposing arguments is richer for that opposition. The process has a kind of integrity and students, now asked to take the position of the judge, see one resolution as likely to be better, more comprehensive, than the other. This is something students understand because they are participants in the process, they have, as White might put it, invested some part of themselves in that process. They are invited, in just the way White does with much more sophistication, to achieve an understanding discontinuous with the ideal of distance and objectivity that often characterizes the modern academy.

### Matthew Anderson, 'a book of questions'

Where to begin? In the case of *The Legal Imagination* the question is more than rhetorical, for the book is nothing if not a book of questions – wondrous, wonderfully inviting, open-ended questions that inspire the student-reader to find her voice as a legal writer, and, through it, to create her place in the life of the law. And, underwriting it all, White's celebrated vision of the lawyer as artist. Who could resist?

If space permitted I would extend the gesture of the opening and explore what happens when we turn the self-reflexivity of White's own method – the way that he turns and directs his student-reader's attention first towards texts and then towards their own writing – back towards his own text and writing. What do we notice, what can we say about White's voice, his style, his language? What do these elements reveal about his structure of feeling, about how he comes to terms with *his* life in the law as a teacher and scholar? Put differently, what is the stamp of his originality, or what originates with *The Legal Imagination*? It would be a fruitful approach to his text, one that would focus on its integrity – precisely the quality that in his 'Foreword' to the Anniversary Edition he identifies as the central concern of the book.<sup>52</sup> However, I will limit myself, here, to offering a few comments of a general, at once retrospective and forward-looking nature, about why the republication of the book is the cause for celebration and reflection that it is; about how it reads now, as we look back at it forty-five years after its initial publication; and about how what White offers still speaks to us with an inspired understanding of the possibilities of legal education and liberal education, and of Law and Literature as an interdisciplinary movement.

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<sup>51</sup>Hampshire, Stuart, *Justice Is Conflict* (Princeton: Princeton University Press 2001).

<sup>52</sup>White (n 28) xxii.

Though I have a sense of how original White's vision of the lawyer-as-artist was at the time of the first publication of the book, I am not in a position to assess how generative it has been in the field of legal education. However, I can offer three comments about how the book reads today from the perspective of interdisciplinary studies in literature, and more broadly, a commitment to liberal education. First, the book's title unmistakably echoes Lionel Trilling's *The Liberal Imagination*, and behind that Mathew Arnold's vision of the ennobling promise of a cultivated relationship with literature. This is not the place to develop a reading of a possible, implied dialogue with Trilling's text; it would be a rich conversation, not least because it would bring out questions of class and politics that are adumbrated but typically not engaged with directly in *The Legal Imagination*. Trilling writes not only as literary critic, but also as a social and cultural critic for the left in the shadow of Stalinism. He offers a diagnosis of the political consequences of what he sees as the political shallowness and disconnection of the imagination and sensibility of the 'educated class'<sup>53</sup>, which he ties to that class's 'alienation from the most impressive literature of our time'<sup>54</sup>. In *The Legal Imagination*, White writes at a different historical moment, as a teacher invested in the education of law students at a time when the influence of the social sciences, especially economics, in legal education and jurisprudential thinking was increasingly hegemonic. As he says in his 'Introduction To The Student', he offers an invitation to imagine law differently, as an art not a science.<sup>55</sup>

White shares Trilling's exquisite attunement to the lineaments of literary form and style, his sense that a closely felt and practiced connection with literature can be vital as a way to cultivate imagination and feeling in ways that matter. Unlike Trilling, as a reader his approach to literature aligns in key aspects with that of the New Criticism, notably in the way that he foregrounds the tropes of irony, metaphor, and ambiguity. In *The Legal Imagination*, White's focus is on the emergence of the individual student and more on the civic and institutional, rather than the political and societal, implications of an engagement with literature – though in this text as in his other writings he is ever alive to the perils that attend the individual and society alike when the language of law becomes a deadened and deadening language of authority, rather than living, authoritative speech. The difference between the two writers is most palpable on the level of tone. White is optimistic and forward-looking about the possibilities that open up for the individual student as she imagines and prepares for a life in the law; as he observes in the *Preface* to the abridged edition, his voice is 'exuberant' and even 'wild'<sup>56</sup>. (I detect an echo of Emily Dickinson in his usage of the latter adjective.) The terrain of the legal

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<sup>53</sup>Lionel Trilling, *The Liberal Imagination* (New York Review of Books 2008) 99.

<sup>54</sup>*ibid.*

<sup>55</sup>White (n 28) xliii.

<sup>56</sup>James Boyd White, *The Legal Imagination: Abridged Edition* (Chicago: University of Chicago Press 1985) xvi.

imagination isn't that of the body politic of Henry James's 'imagination of disaster'<sup>57</sup>, which Trilling brilliantly anatomizes in his essay on *The Princess Casamassima*. But despite these differences, the author of *The Legal Imagination* would doubtlessly agree with Trilling's pronouncement that '[u]nless we insist that politics is imagination and mind, we will learn that imagination and mind are politics, and of a kind that we will not like'<sup>58</sup> – an admonition that regrettably has lost nothing of its timeliness.

My second comment pertains to the optimism of the tone and orientation of the book, and it leads to a sense of irony. To the extent that *The Legal Imagination* arguably represents an effort to expand the reach of liberal education – to imagine legal education as a form of liberal education – it feels (to me at least) as though it does so from a position that assumes that the good of liberal education is an established faith that can be built upon and expanded. That assumption is no longer a given, if it ever was; today, in many quarters of higher education in the United States, one would first have to do considerable work to create a space for the vision of education that inspires and moves throughout White's text in order to be able to receive the text. And this leads to the sense of a two-fold irony about the text's reception. White could not have anticipated that the text would come to be viewed, as it has been by many, as the seminal text of the 'Law and Literature' movement in legal and literary studies. From the perspective of a commitment to undergraduate Liberal Arts education, the irony is that one of the reasons (there are many) that there has been receptivity in some quarters of our institutional precincts to 'Law and Literature' as an initiative is precisely that the coupling suggests a possible way to *deliberalize* liberal education – or to put it differently, and more bluntly, to make the study of literature relevant (and institutionally viable) by tying it directly to a profession.

There are of course many ways to bring the study of law into the liberal arts without imperilling their liberality. On its most basic, least intellectually and pedagogically adventuresome level, 'Law and Literature' can be conceptualized simply as a useful thematic grouping; one does not need to be a specialist in literature to grasp that themes of law, equity, justice, revenge, punishment and scenes of judgment – to name but a few of the common tropes of Law and Literature studies – are at the heart of much literature. In other words, for some of us it can be an institutionally useful way of naming what we already do. (My default, elevator-ride/cocktail party answer when I'm asked by a non-specialist what it is that I do in my teaching and scholarship on 'Law and Literature' is that I focus attention on how questions of law and justice are represented in literature; it seems to do the job.) But I do believe that this interdisciplinary pairing does carry with it both a promise and the

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<sup>57</sup>Trilling (n 53) 60.

<sup>58</sup>ibid 100.

possibility of a risk with respect to liberal education. I say this is from an interested position: my understanding is that the tenure-track line that made my own hire possible was able to clear the internal hurdles to funding at the higher administrative levels of the institution precisely because of the professional – or professional-sounding – orientation of the specialization in Law and Literature for which the position called. (Lines in ‘Literature and Health’ and ‘Literature and Science’ were funded at the same time, under the same auspices.)

This leads to the second irony, or unintended consequence, of the reception and influence of *The Legal Imagination*. In the context of retrenchment and a receding commitment to liberal education, ‘Law and Literature’ – if *The Legal Imagination* is the vehicle – can be a kind of Trojan Horse, a way to insert liberal learning back into the undergraduate curriculum. (Though White intended *The Legal Imagination* as a textbook for an advanced course in law school, I could readily envision incorporating parts of it into an advanced undergraduate Composition course.) Indeed, I know of no text more moved by a love of liberal learning or more practically committed to fostering a developmental experience of it. White imagines the practice of law as a form of practical wisdom, and more specifically, as a skilful, individual practice of excellence in the art of writing. He aims for students to move beyond a merely instrumental command of the rhetorical conventions of the discipline of Law to an embodied, authoritative, individual voice that calls and empowers them to say what they mean, mean what they say, and have something to say – an aspiration that evokes the classical standard of eloquence (logos, pathos, ethos) and expresses as clear and distinct of a commitment to liberal learning as one will find. Whenever I read *The Legal Imagination*, I am returned to what called me to the profession, the love that too often dares not speak its name in Higher Education in the United States: the love of teaching.

This leaves me to offer my final comment about what we might learn further from the text today, specifically with respect to what it offers for an understanding of how to view the enterprise of Law and Literature. If we work empirically, that is, from a set of observations about what the text is and how it operates, then we are led to a series of possible claims, insights, or conclusions about what Law and Literature is and how it originates. (I recognize that there are several sources for Law and Literature as a movement.) First, Law and Literature is a practice of writing, one that imagines the practice of law as an art and the education of the law student as a form of liberal learning. Second, Law and Literature is practice of teaching, one that depends upon a series of relationships: the student-teacher relationship; the relationship between the student and the texts that she is asked to read; and the student’s relationship with her own writing and emergent practice, voice, and style as a legal writer and actor. Third, Law and Literature is a

practice of asking open-ended questions, questions that are neither didactic nor Socratic but heuristic. All three of these aspects of the course that *The Legal Imagination* supports are clear in the assignments throughout the book, but perhaps most notably in the second writing assignment ('Controlling a Writing System' in Chapter 1: The Lawyer as Writer). The assignment has three parts or moments. White asks the student first to 'identify a passage of legal or nonlegal literature which you consider good writing'; then to 'explain your judgment of the passage'; and then, self-reflexively, to ask of their own written explanation '[i]s that good writing as you have defined it? Can you rewrite it so that it is?'<sup>59</sup> He follows this with a paragraph of meta-commentary that opens with a statement in italics that anticipates the student's potential unease with the open-endedness of the method and emphasizes its intentionality:

*If there is one assignment that sets the problem of the whole course, this is it. It could hardly be repeated too often.*

You may feel that you ought to be given more guidance with this question, and in fact some proposed approaches follow shortly. But the essential uncertainty in this and many of the other assignments in this book is deliberate: it is my hope to ask questions that are incomplete, that do not imply an answer, that ask you to finish making the question as you work out your response to it. You are not being asked, that is, to approximate some answer I have in mind, or to write along any set lines at all; instead of telling you what to do, these questions are meant to push you off to make your own way in your own direction. A considerable measure of the energy upon which the course proceeds must come from you. This is an invitation to talk about the writer's excellence in any way that interests you. If you feel at a loss as to how to proceed, the following suggestions may help<sup>60</sup>.

White does subsequently provide suggestions to support and guide the student as she works through the open-endedness of the experience that his questions frame. But it is telling that his comments, in the above, indicate that the student's 'response' entails finishing 'making the question', not resolving it. Indeed, though White may not share Trilling's (pace Henry James) 'imagination of disaster', the following, clear-eyed summative moment, in Chapter 6: The Imagination of the Lawyer, makes plain that an experience of the legal imagination is an ineluctable, existential experience of collapse:

You might sum up the experience this course offers by saying that it is an experience in the collapse of language under strain: the collapse not only of the legal language, but of the other languages that you have used (of psychology, of blame, of social organization, of explanation, of criticism, of paper-writing, and so on). You have experienced what could be called the central frustration of writer and lawyer, the perpetual breaking down of language in your hands as

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<sup>59</sup>White (n 28) 78.

<sup>60</sup>ibid 78–79.

you try to use it. None of our language seems to be able to do what it promises, none can bear the stresses of our demands for truth and order and justice. Such, it seems to me, are the conditions of our existence<sup>61</sup>.

White's answer to the experience of collapse that his text at once represents and reproduces – what one might call the Whitean sublime – has many facets, layers, and dimensions, but there are, as he indicates, two main ideas. First, he proposes that we think of law as 'an imaginative activity and its art a literary one'<sup>62</sup>. Second, a useful way forward for the student-lawyer, as she works to 'finish making the question', is for her to imagine her activity 'rather as the making of a metaphor than as, say, a proposal for a solution or a program'<sup>63</sup>. The emphasis on the positive, constitutive possibilities of metaphor – along with the tropes of irony and ambiguity – for the cultivation of an individual's structure of feeling expresses White's affinity with the New Criticism and runs throughout the book. In the same chapter in which the above-cited assignment appears, White asks the student, '[c]an you see legal language as a metaphor?'<sup>64</sup> Later in the chapter he pushes further, with an implied self-reflexive question that makes plain just how ethically committed White is to his students' flourishing, how much he is willing to claim for the ambit of legal education and for what is at stake in a life in the law:

I hope you have a sense of living a metaphor, and you repeatedly ask yourself whether what you say or do sustains the meaning you try to give it. T.S. Eliot said in a famous phrase of *Hamlet* that it failed as a play because Shakespeare never found an 'objective correlative' in the world of dramatic action that was adequate to his meaning. And we all know people who make noble claims for the meaning of what they do, which we regretfully find unsustainable<sup>65</sup>.

This passage encodes a considerable irony. I am thinking, here, of what the philosopher Jonathan Lear says about irony as the experience of coming up short with respect to ideals that govern or orient our self-conception – an essential experience that we have come to terms with as we practice the art of being human:

The possibility of irony arises when a gap opens between pretense as it is made available in a social practice and an aspiration or ideal which, on the one hand, is embedded in the pretense – indeed, which expresses what the pretense is all about – but which, on the other hand, seems to transcend the life and social practice in which that pretense is made. The pretense seems at once to capture and miss the aspiration. That is, in putting myself forward as a teacher – or whatever the relevant practical identity – I simultaneously instantiate a determinate way of embodying the identity and fall dramatically short of the very ideals that I have, until now, assumed to constitute the identity.<sup>66</sup>

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<sup>61</sup>ibid 760.

<sup>62</sup>ibid 761.

<sup>63</sup>ibid.

<sup>64</sup>ibid 58.

<sup>65</sup>ibid 64.

<sup>66</sup>Jonathan Lear, *A Case for Irony* (Cambridge: Harvard University Press 2011) 11–12.



Lear's words about irony and the example he gives of a teacher are particularly relevant for what they reveal about White as a teacher and the achievement of *The Legal Imagination*. If I read White correctly, metaphor, as both an act of imagination and a trope of writing, is a wise, skilful response that can answer our experience of irony as we live out a relationship with a life of the law and beyond. As we have seen, it is tied to an art of making questions that does not forestall a lived experience of the collapse of language *as* we make, create – the experience of our own coming up short. The irony with respect not only to the above passage but indeed the text as a whole is that *The Legal Imagination* does *not* come up short; rather, it stands as a realized metaphor, the 'objective correlative' to the questions that constitute it. It does not tell; it shows. It demonstrates the integrity that it fosters. It is the precipitate and legacy of a life well lived, for which many of us have been grateful over the years and for which many others to come will now have opportunity to be, too, thanks to republication of the book. To me today, every bit as much as when I first encountered it, *The Legal Imagination* stands as a sublime, astonishing monument, an at once exhilarating and nearly-overwhelming testament to the possibilities of liberal learning: it is living speech. In my view, there is no higher praise.

### **Jack L. Sammons, 'The Legal Imagination and human rights'**

Recently I was asked by a very dear friend to offer a response to a paper by Baroness Onora O'Neil at an international seminar on cosmopolitanism and national identity.<sup>67</sup> I am going to ask you to read four short edited sections of my response here before connecting what I say in these to *The Legal Imagination*:

The human rights community, it has been argued, should seek justification for the universality of most of the rights it proclaims rather than acting, as perhaps has been done, simply on the authority of their adoption by some international organization including of course the United Nations. Their universality must be justified, the argument goes on, because we intended to apply these rights universally. The authority of adoption is not enough for this for there is a difference between the existence of a law and its merits or demerits. This is sensible, yes, but it seems to me that adoption and justification of rights are related matters. Adoptions of human rights as wide spread as these are based at least in part on our experience with these rights including our experience with attempts at justification. Thus, rather than simply an assertion of authority regarding their universality, adoptions by a sufficiently wide consensus, as with the Universal Declaration, can be considered evidence of universality. I don't mean the authority of agreement alone, for there could be a universal right only one person accepts because universality is at least in

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<sup>67</sup>Cosmopolitanism and National Identity Seminar, Australian Catholic University, Convener: Robert Audi, Rome Campus, March 2017. I am deeply indebted to Robert Audi, Mark Jones, Sophie Loidolt, and Martha Nussbaum for their very helpful comments on my response, and to the participants in the Seminar, especially to Sonja Rinofner-Kreidl for our continuing conversations.

part a claim of objectivity or valid intersubjectivity, or some other way of getting to matters of social truth. I do mean, however, that wide spread adoption and agreement is prima facie evidence of the givenness of these rights as universally normative even if politically disputed by some. It is in fact the sort of evidence that any justification, if it is to remain within a social framework, should consider. Thus, adoption of a right as a human right, when it reflects wide spread agreement, is sufficient by itself not to prove universality or even to be considered adequate authority for that, but to create a burden of persuasion on those who would deny its application to particular parties in particular circumstances.

It is important to recognize this, I think, because it is the existence of this burden of persuasion that is both necessary and sufficient to initiate the social institutional process by which we interpret, apply, and explore the justification of rights if we are to do these well: our judicial systems. And the need to focus our efforts upon the mostly neglected judicial role – mostly neglected, that is, other than in international individual criminal prosecutions – will be my main thesis throughout.

One would think then, if we are to be serious about having rights which are universal, the focus of the human rights community would be on this – the courts and the judiciary – and, in fact, there is much work needed, not just to protect the independence of the judiciary, but also to encourage both international and domestic courts to be, in Jeremy Waldron's terms, 'stewards of [this] singular enterprise'.<sup>68</sup> But this focus isn't there at all. In fact, courts and the judiciary are almost entirely ignored in the academic literature much of which conflates law and politics and in doing so inadvertently undermine all claims about human rights as legal rights.

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This sort of social institutional deliberation in which we respect the reasoned commitments of others is a fundamental moral commitment entailed by any set of human rights – adjudication rather than violence. The specific derived rights in regards to this duty include the right to an independent judiciary, both in the sense of being independent from political pressure and judges having the independency of thought judicial judgment requires. (There are many other derived rights we could mention here, equality of access and of standing of the parties before the court – a grant of juridical status best reflecting in an acceptable social and institutional form the fact that human rights are granted to 'persons' – the preservation of the language and the conversation in which arguments are considered, the right to the information necessary for adjudication, the right of justification, the right of publicity of reasons by the courts, and so forth – all of which are required for the integrity of the interpretation and justification – but time doesn't permit elaboration.)

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But is it possible to have judicial interpretation of this sort in regards to human rights? One hears often about the indeterminacy of principles in this regard, an

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<sup>68</sup>Jeremy Waldron, *Human Rights: Universalism or the Integrity of a Common Enterprise?* (September 1, 2016). NYU School of Law, Public Law Research Paper No. 16–48, 13.

indeterminacy which, outside of language games, goes all the way down. The indeterminacy of principles in international human rights, however, is not that different from the indeterminacy of principles in domestic rights. There it is not only not a serious problem but is a serious benefit in denying all finality, making it clear that the social tasks of interpretation and justification are always ongoing and, accordingly, what is of most importance is the preservation of the language and the conversation in which these can occur. Yes, there is more of a shared culture domestically, but that is exaggerated in many cases. What is shared domestically, however, is a judicial culture emerging from the practice of judging. And that is very important to note for our purposes here because, internationally, we are living in a time in which differences among us in regards to *this* culture are less, not greater, than ever before.

One would think then, once again, that if we are interested in addressing the issue of finding consistency in the interpretation of human rights that our initial focus would be on ways of promoting an internationally shared judicial culture and protecting it. There are those who perhaps recognize this potential, but reject it because treating judicial decisions by particular local courts as authoritative would seem to violate the universality that defines human right. But if we are talking about *authoritative* decisions, as opposed to *authoritarian* ones, this doesn't seem true to me. Judgments which are authoritative within the judicial practice, offered in the form of written opinions, are not in tension with the universality of human rights. They are instead the way in which universality is done when it is done as a social matter.

This should be resonant with Kantians, although you don't need to be one to accept it. There are many ways to present this thought, but let me use the quickest. The potential universality of judicial judgments is the same as the potential universality of all aesthetic judgments because there is an art of the judicial in which its judgments are the product of very disciplined intuitions arising from the materials of the art within an 'enlarging mentality'<sup>69</sup> using 'intuition' here similar to the way Robert Audi does.<sup>70</sup>

What this means is that with each judgment there is a tacit assertion that anyone with sufficient knowledge and experience within the practice, given the same materials and context, and regardless of cultural differences, would come to the same decision. There is, for example, nothing about the music of Beethoven that would exclude someone from any other culture from acquiring through experience and knowledge within the practice of music the capability of hearing, as many do, that each note of the later string quartets was inevitable given what came before and what came after each one, and yet many of these 'inevitable' notes were, for Beethoven disciplined intuitive aesthetic judgments at what seemed to be musical impasses. These intuitions would come upon him, as they do for good and experienced judges trying to be true to their art, as a matter of poesis. Now of course these judicial judgments can be mistaken, there can be judgments in opposition and so forth, for judgments can go wrong. But that's the point. They are part of a communicative process in which we can know what 'going wrong' means and have available to us a

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<sup>69</sup>Hannah Arendt, *Between Past And Future* (New York: Random House 1961) 220. Arendt is expanding on Kant's use of the term.

<sup>70</sup>See generally, Robert Audi, *Moral Perception* (Princeton: Princeton University Press 2013). In the philosophical terms that Audi would use, this reflects his point that normative properties are consequential on (grounded in) non-normative ones, and that access to the grounding ones is universal.

language and conversation for ongoing correction.

What is required here, as you can readily see, is the sharing of a judicial practice. But, of course, judicial opinions turn first not to justification – those are rhetorical aids at interpretation – but to precedents and many turn upon them. But then so will any social institutional effort towards consistency of interpretation for this is very reason we turn to precedents. You cannot, I think, hold on to the evolution of the meaning of words used, to the conversations required for this, or to any integrity in their application without considering precedents. Rather than going on about this, however, let it just lead us to a more general point.

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I have neglected here the problem of enforcement entirely although there is much to say about the efficacy of judgment itself, and I've said nothing for Kantians about why these judicial judgments are aesthetic judgments despite being rule based. Nor have I even mentioned the problem of developing local trust of what may be distant judicial systems or the moral problems created by rights talk. Instead of these, however, I want to conclude quickly with a hopeful note about practices. The judiciary as a practice is not just an enclave against uncertainty, although it can be that. Practices give to us a way of thinking which each practice has on offer.<sup>71</sup> Through their elaboration practices bring things into their own. They 'gather' in Heidegger's wonderfully poetic term, and thus tend to connect to the rest of the community's life in ways such that the practice (and the character it requires) is thought to be worthy. This is an autonomous tendency, only a tendency, a 'gentle law' as Heidegger described it. Nevertheless, through it, the stability of practices tends to become the stability of our lives. What the judicial practice has on offer, I think, can expand over the world in a cosmopolitan manner and offer the best hope we have for integrity within a system of internationally recognized human rights and, out of an increased appreciation for this practice and efforts to preserve it, could come the capability of our living into those rights.

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These sections, as you can see, contain no mention of *The Legal Imagination*. So why offer them here? It is because they are almost unimaginable without Jim's book, derived as they are from what I have always considered the central chapter of that marvelous work: 'Is The Judge Really A Poet'.<sup>72</sup> After agonizing over things I might now wish to say about a book that was formative for me and so many others, I realized what I wanted to say to White is that his work will continue, and I knew of no better way than to offer yet another example of how it has and an implicit suggestion to others of how it might.

There are a few things to note here to make the connections clearer. The conception of law inherent in the response, law as manifesting itself with a

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<sup>71</sup>See Jack L. Sammons, *The Common Good of Practices*, 9 *Fiu Law Review* 69 (2014) and authorities cited therein.

<sup>72</sup>White (n 28) 761–806.

mysterious authoritativeness both beyond us and yet of our own creation, is there in part because if you ask the question ‘What is law if judges are poets?’ you will eventually arrive at something very close to this conception or so it seems to me. And, of course, the central thought in the response, the one linking White’s work to the fundamental problem of the universality of human rights, i.e. ‘The potential universality of judicial judgments is the same as the potential universality of all aesthetic judgments because there is an art of the judicial in which its judgments are the product of very disciplined intuitions arising from the materials of the art within an “enlarging mentality” ...’ is but an extension of White’s thoughts for there is nothing in those thoughts necessarily limiting them to our culture or even to our time.

Note as well that the phrase, ‘judgments are the products of very disciplined intuitions arising from the materials of the art within an “enlarging mentality,”’ can also be considered a description of the judgments in poetry. The Arendtian phrase, ‘enlarging mentality’, was part of her struggle with and against Kant on judgment, but, it seems to me, in this she was moving towards an understanding of the fullness, the synesthetic nature if you will, of good judgment, the one revealing our reciprocal relationship with that which is not self (and therefore more fully human) that one could find more readily in Frost.<sup>73</sup> And perhaps she was saying as well that at their best our truth-aspiring judgments unfold in dialogue with the truth-aspiring judgments of others as they do in law, something one could find more readily in, say, Harlan. Find in both cases, that is, with White’s help.

I could go on with this if space permitted, but I am also sure that if you are reading this and were trained by *The Legal Imagination* you could as well. Consider for one example that both the language of poetry and of law create and depend upon what Robin Skelton described as ‘spatial words’,<sup>74</sup> ones used not to evoke only one or two of their possibilities of meaning, but words that ‘seems to operate as a unity of all [their] power’.<sup>75</sup> Consider for a second, and in regards to precedence, that good poets turn to the ‘materials of the art’ in much the same way that good judges do: not for rigorous conformity to what has gone before (and with it in law a parochialism incompatible with international human rights), for such is the definition of bad poetry, but as a search for that within the tradition, be it of law or poetry, to which fidelity is owed. And consider for a third, and most importantly, that both poetry and law, as White has often said,<sup>76</sup> force the particular upon us, and notice that in this very particularity, this search for what is unique in each human situation in both law and poetry, we can find the core of all human rights.

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<sup>73</sup>For an excellent discussion of judgment in poetry, see, Robin Skelton, *Poetic Truth* (London: Heinemann 1978) 116.

<sup>74</sup>Ibid 6.

<sup>75</sup>Ibid.

<sup>76</sup>See, e.g. White (n 28) 771.

At the end of my response at the conference, one rather well known academician serving as an advisor to the World Bank asked, facetiously, 'And who are these amazing judges, Jack?' The right response is that they are ordinary people trying hard to do well their job as preservers of law. But that 'well' assumes all that White has taught me over the years. I realized at that moment that I could not offer an adequate answer for the difference between us. For human rights issues are not truly matters of rights and duties, although these can be important, but of imagination, of art, and of the alterity which made us and makes us human. They are, that is, matters of poetry. And in this there is the hope that is central to White's work, White's faith, and White's life.

### **Thomas D. Eisele, 'law as a literature'**

There are many ways to think about law. Law can be thought of as the inherited deposit of our societal forms and customs. Law can be thought of as the word of God, made manifest to humans through revelation, or an inspired text. Law can be seen as an instrument, a way to effect social change, or to enforce societal conformity to certain prescribed norms. Law can be seen as a system of rules, or as a schema of rules and principles, or as the sovereign's commands backed by sanctions, or as a series of conditional commands backed by the force of an underlying *Grundnorm*. From time to time, law has been seen (and written about) in these, and many other, ways.

How else might we conceive of law? It may occur to us that law is a way of making sense of life, at least of that substantial subset of life that we call our 'social existence'. We make sense of it by writing about this portion of our lives, our human existence; and these writings in a sense constitute a form of literature. Humans grapple with reality and with existence by wording the world in which they find themselves. As we humans go about our lives and exist within any given society or social set, we find ourselves rubbing shoulders with other humans, and even non-human corporate and collective entities. And we confront governments too. We find ourselves a part of those states, subject to their writs and injunctions and rejoinders. All of this rich social enterprise is a mass of experience: frequently, even obsessively, we find ourselves categorizing it, organizing it into words. Some subset of these words is used within legal texts or forms.

This wording-the-world is an activity of organizing ourselves and others and our multiple actions, labelling actions, integrating them into our lives, to the point where we thereby build and constitute ourselves. This activity also is a way of adjusting ourselves to others and their actions, their wishes, their desires. Sometimes we organize life by issuing rules; sometimes we organize ourselves by following customs; sometimes we organize others by appealing to norms; sometimes we organize our thoughts by searching for

underlying principles; sometimes we interact with others by fiat or command; sometimes we order our lives on conditional or unconditional bases. In ordering our experience, we are making it comprehensible. (Kant would say it could not be experience, could not count as experience, if it were not categorized.) We are making sense of it, and of ourselves, and of our lives, and of the societies and the collectives of which we find ourselves to be members. (Or find ourselves not to be members. Perhaps we find ourselves to be out of bounds, out-laws.)

White asks us to consider law as a literature. He begins his book, *The Legal Imagination: Studies in the Nature of Legal Thought and Expression*, with this idea:

We shall look at the literature of the law as a literature of the imagination of which [certain] questions can be asked, both directly and by comparing it with other literatures.<sup>77</sup>

Seeing law as a literature means that, for example, we might consider the decisions and statutes in a particular area of law to constitute one of the topics to be discussed within this literature. We have, for example, novels of morals and manners in English literature, and other literatures. Might we now consider criminal law or antitrust law or torts to be comprehensible as sketching ways to behave in society, or what constitutes misbehaviour in certain social settings? Similarly, we have books about people's achievements and their social status. Might we usefully consider the law of wills, and contract law, and property law as another literature teaching us ways to achieve certain goals in society, or to gain a certain social status or standing? English and American literature abounds with stories of mergers and acquisitions, of someone being a corporate man or woman, or of not being a so-called 'organization man'. Here too, if we look to the law, we find it speaking of certain entities in society, in trust law, partnership and agency, and corporate law. Is this a literature too? Many novels deal with matters of state, either as an insider or as an outsider, as a proponent or an opponent of a given society or social setting. Similarly, constitutional law and local government law, and even administrative law, give us glimpses of how we can relate to levels or types of government, and of various ways of governing by monarchy or oligarchy or democracy or tyranny. What does it mean to be a citizen or a non-citizen? Even, what does it portend to be a revolutionary, an over-thrower of state and government? In exploring these questions, we may find insight in novels, in poems, in letters, in diaries, in treatises, in cases, in statutes, or in regulations. Is any single literate source definitive or dispositive as a source of illumination in such matters? We may consult Kafka's *The Trial* to tell us about the machinery of the legal system and its approximation towards justice; or, we may gain our knowledge and understanding of such matters

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<sup>77</sup>White (n 2) xix.

by consulting cases and regulations dealing with conflicts of law, civil procedure, and, again, constitutional law. Are they not all literatures of a kind?

One strategy White adopts is to ask the student/reader to assume the role of judge or legislator or administrator, and then to write something as such a person, such an official. This strategy forces the writer to think about what resources are there, by means of which to find one's voice in the role adopted. This question is posed in terms of the genre in which we are trying to speak, trying to write. What resources does *this* form of expression hold? What possibilities, what constraints, what options, what omissions? How are we to effect something in the world legally? How does one own a legally effective voice? White wishes to explore that question. 'In the course of the book the student is asked to write as lawyer, judge, and legislator, and to reflect as a mind and a person on what he [or she] has done'.<sup>78</sup>

The main forms of expression for the literature of the law are genres having their own internal coherence and principles: judicial opinions, statutes, codifications, regulations, letters of legal opinion, advisory opinions, and executive orders. These legal genres are simultaneously forms of expression, forms of experience, and forms of understanding. What they express may be accurate, but it is always partial. The experience they capture may be veridical, but it cannot be comprehensive. The understanding they encompass may be correct, but it cannot be final or complete.

As White puts it, the student/reader who becomes a legal writer 'is asked to see what the lawyer does as a literary activity, as an enterprise of the imagination, with respect to which both success and failure – if he can define them – are possibilities for him [or her]'.<sup>79</sup> Specifically, how does White encourage his reader to consider law as a literature? Here are four specific examples drawn from his book:

- I. In chapter 2, White presents 'a comparative anthology on death'. He begins with the Georgetown Hospital case as a paradigm of how the judicial literature of the law speaks about a particular patient dying. In this respect, we are shown how directors at a collegiate institution, and physicians at a hospital, manage to speak about someone in their care and custody; and we also are shown how judges dealing with the case manage to speak about and to dispose of the issues presented them. What of the patient in that case? What of his or her relatives? How are they spoken of, in what terms, with what care and compassion and comprehension? Do we have eyes to see and ears to hear? Do we have words to effect what happens here? In the same chapter, we are given a series of ways to speak about death, including some wills, but also some poems. How

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<sup>78</sup>ibid xix.

<sup>79</sup>ibid xix–xx.



does the genre of wills (we are asked) allow us, or force us, to speak about someone's death? What does this genre teach us about how someone anticipates and plans for his or her own death? And might wills – or poems – have their own powers of expression, yet also their own limits of expression? Might they enrich our experience of our own mortality, and yet simultaneously impoverish our expression of that experience, when we are trying to cope with the death of others, or our own impending death? What are the perceived strengths and admitted weaknesses of any such genre, as a means of expression and thought and comprehension?

- II. Later in chapter 2, we are asked to examine how a statute works. White looks at the genre of a statute as one way in which a legislator attempts to organize and define future human experience. The statute as a form of expression is seen as a social instrument that establishes the terms by which the makers of the statute cooperate with their audience, people who are intended to behave in accordance with that statute. A statute can establish such terms of cooperation by defining the issues that are important (and by denying or ignoring issues thought to be irrelevant). What exactly is the matter at hand, the topic or subject being addressed by this particular statute? How does the statute-maker speak to the people who are meant to obey and carry out the statute? This activity of defining terms and stating issues within a statute becomes one way to establish a relationship of cooperation between the statute-makers and the audience for the statute (what White calls 'a way of giving structure to conversations' between the statute-writer and the statute-reader). White also looks at the limits of statutes as a genre or a literary form, in the subsection where he examines certain fictions created by the rhetoric used within a statute. White also asks us in what way this rhetoric can be controlled by us and (implicitly) in what way this rhetoric still manages to control us, or otherwise is beyond our control. (One of the recognized staying-powers of any fictional form is, I suppose, the twin fact that simultaneously we can seem to control it while it still controls us.)
- III. In chapter 3, the main topic is 'the way institutions talk about people'. Here White concentrates most of our attention on how people are spoken about, or labelled, when a case involves a defence plea of insanity. Statutes, the model penal code, the American Law Institute, and cases are consulted in this regard, as are excerpts from Marais and Emily Dickson and others. Yet, after a decision is made in such a case, we also have the sentencing decision, which may or may not be guided by rigid rules and labels. Here again, cases and statutes are examined, as are Clarendon's *History* and Austen's *Pride and Prejudice*. Correctional facilities also come within White's scrutiny, and so too the language of race and racial labels. All of these topics are pursued from

within the perspective of studying the law as a kind of literature itself, and also as compared with other literatures.

- IV. In chapters 5 and 6, we study how judges make and express their judgments in specific cases. We also explore how the judicial opinion explaining the judgments made, can be considered to be its own genre of legal thought and expression. White looks at the relation between judgments and rules, and between judgments and reasons or rationality, and then he presents a formidable case for analysis: *Griswold v. Connecticut*, with its mind-numbing penumbras. The opening portion of chapter 6 then elaborates this problem by asking, 'Is the judge really a poet?' and by comparing and contrasting judicial opinions with several poems. Finally, later in chapter 6, judicial opinions also may be seen as narratives, since they tell a story. This further connection is followed up by studying historical narratives, and comparing and contrasting them with several judicial opinions.

This, in a nutshell, is the core of White's claim that law can be seen and understood as a literature. Students of law may find these connections fascinating; or they may find them unhelpful, unenlightening.

My own experience with discovering White's book came after my time in law school, when I started to practice law in a large Chicago law firm. My reaction to his book was one of heart-felt relief and sudden empowerment. Why?

White's lessons helped me *as a lawyer* to read legal documents and instruments in a more engaged and knowledgeable manner. The book tutored me on what I might expect in any given opinion or statute or advisory letter, and what to look for in each genre of legal thought and expression. It was only when I had that knowledge banked within me, that I came to recognize certain lacks, or oversights, in the writings that daily I had to consume as a legal professional. My engagement with legal materials was enhanced.

My comprehension improved too. Perhaps initially the improved engagement led to the improved comprehension, but eventually the two became mutually supportive and empowering. If we engage better with legal materials, we understand more; and as we understand more, our engagement with those materials becomes more fervid. I am but one witness. For me personally, I can only say that, without the knowledge that I gained from White's book, I felt professionally dead upon graduating from law school. Yet, once this knowledge was gained, I felt professionally vibrant.

I did not stay long in law practice, but over time I did gravitate to law teaching, where I spent 30 years trying to help my students to see law as a kind of literature. With such a view, I believe that law students can become more astute critics of any given legal document. If we learn the internal logic or grammar of a given legal genre, this allows us to better comprehend what any given legal document is doing. Or, at least, what it is intended to do,

regardless of the actual achievement or failure the legal document enacts. Consequently, we can better criticize the document as a legal product.

There is another potential benefit, I believe, that White's *Legal Imagination* makes available to those of us who study and practice law. In a long series of studies comprising section xi of Part II of the *Philosophical Investigations*, Wittgenstein explores what it means to 'see something as something'. Probably the most famous instance he studies is a figure that we can see as an outline of a duck or as an outline of a rabbit. I do not profess to understand all of the lessons or implications of Wittgenstein's efforts here to reach understanding. I do think it worthwhile, however, to remember in this respect that White is not drawing an equivalence between law and literature. White is not claiming an identity between law and literature. He is proposing a way of 'seeing-as', a way of understanding, for whatever clarity and comprehension it may be worth.

Some readers may feel that this suggestion on White's part misleads us; in particular, that it ignores or neglects the politics and the power of law. I for one would not want to see such neglect happen. But might we take White's suggestion as an invitation to reconsider what power there is in any literature? As well, might he also be inviting us to reconsider the politics that may be hidden or implicit within any literary effort or artifact? What do we miss, or neglect, if we fail to see law 'as' a kind of literature? I wonder.

### **Linda L. Berger, 'the metaphor of the opinion as a poem'**

This essay takes up James Boyd White's suggestion that we consider the judicial opinion as a poem.<sup>80</sup> When Professor White made this suggestion in *The Legal Imagination*, he was asking us to think in metaphor rather than analogy. Analogy might support a literal comparison of opinion and poem, but metaphor offers a 'way of asking new questions and expressing new hopes'.<sup>81</sup>

What questions emerge when we think of the opinion as a poem and its author as a poet? The first is a question that accompanies all metaphor, for we know that metaphor is both light and darkness and not in equal parts. Even as metaphor opens imagination, it leads to partial blindness. Thinking of the judge as a poet illuminates the writer, her eye, hand, and voice. As it focuses attention on the author's expression in a text, it is likely to cast shadows over the setting and subjects of the text. Thinking of the opinion as a poem lights up structure, style, syntax, and language, but it could obscure our view of actions and consequences. By highlighting exposition of one perspective, the metaphor may cloak its suppression of others.

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<sup>80</sup>White (n 2) 761.

<sup>81</sup>ibid.

This suggestion is one of the ways Professor White prompted his readers in *The Legal Imagination* to consider themselves as writers ‘who live[] by the power of ... imagination’. The demands on the lawyer’s imagination begin, he suggested, the moment the lawyer meets another person in a legal setting, and asks herself *who is this person?* and *how am I to understand this situation?* To answer these questions, the lawyer exercises her ‘social and narrative imagination’, the imagination that allows her to ‘envision different versions of the future.’<sup>82</sup>

### **Images and imagination**

Embedded metaphors obstruct imagination when we unthinkingly accept their implications as normal and inevitable.<sup>83</sup> The image of men and women living out their lives in *separate spheres* is an ancient example. According to historian Linda Kerber, ‘the habit of contrasting the ‘worlds’ of men and of women, the allocation of the public sector to men and the private sector (still under men’s control) to women is older than western civilization.’<sup>84</sup> Already ‘deeply embedded in classical Greek thought’, the concept was transported to America among the trappings of various European cultures. Writing in the 1880s, Alexis de Tocqueville described young middle-class women in America as independent until married, but once married, ‘the inexorable opinion of the public carefully circumscribes [her] within the narrow circle of domestic interests and duties and forbids her to step beyond it.’<sup>85</sup>

Long-established research and writing practices of lawyers and judges similarly constrict the circle of legal imagination. Professor White asks why the judge goes on writing and why the reader goes on reading after the judge proclaims and the reader grasps a simple statement of the rule. ‘At its best the judicial mind does more than this ... its expression defines and exemplifies an education. ... As for the reader, if the message really were the meaning, he would stop at the West headnotes.’<sup>86</sup> The practice of constructing and categorizing headnotes – a method of classifying legal principles created by commercial publishers to assist in research – assumes that the meaning of an opinion can be reduced to a paraphrase of the legal principles expressed in the case. Although headnotes are neither written by judges nor officially part of any judicial decision, legal readers accept their implicit inclusion because they unfailingly appear at the beginning of judicial opinions available in print and electronic form. These familiar practices and

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<sup>82</sup>ibid 758.

<sup>83</sup>See Linda L. Berger, ‘How Embedded Knowledge Structures Affect Judicial Decision Making: An Analysis of Metaphor, Narrative, and Imagination in Child Custody Disputes’ [2009] 18 S. Cal. Interdisc. L.J. 259.

<sup>84</sup>Linda K. Kerber, ‘Separate Spheres, Female Worlds, Woman’s Place: The Rhetoric of Women’s History’ (1988) 75 *Journal of American History* 9.

<sup>85</sup>ibid 10 (quoting Alexis de Tocqueville, *Democracy in America* (New York 1945)).

<sup>86</sup>White (n 2) 762–65.

conventions influence our unconscious understanding of how the law is constituted.

### **Re-imagined judicial opinions**

A poem helps the mind play with its well-trod patterns of thought, and can even help reroute those patterns by making us see the familiar anew.<sup>87</sup>

Over the last fifteen years, nearly a dozen feminist judgments projects have been initiated around the world. Organized by collaborative groups of legal academics, practicing lawyers, a few judges, activists, artists, and other scholars, the purpose of these projects has been to re-imagine and to demonstrate – by writing shadow or ‘missing’ judgments – how important legal issues might have been decided differently by decision makers who applied feminist perspectives.<sup>88</sup>

Challenging the inevitability of *what is* is the premise of the feminist judgments projects. Although they rely on the facts and law that existed at the time of the original opinions, the opinion writers explore different ways of seeing and saying. Feminist judgments uncover expanded or more specific facts about the dispute or the legal issues involved in the lawsuit itself; they may rely on social and historical facts that place the current dispute into a larger context, on sources of authority other than case law and statutes, or on reasoning methods that grow out of feminist and critical inquiry. Readers who depend on the headnotes prepared by Lexis and Westlaw to understand the meaning of a judicial opinion will find a series of summarized ‘rules’, but they will learn little or nothing about the people or events who became the subjects of the opinion; the larger social, historical, or cultural setting; or the arguments made in the dissenting and concurring opinions. These are among the overlooked components that affect the evolution of the law that have been brought to light by the authors of the rewritten feminist judgments.

One example can be found in the feminist rewrite of *Bradwell v. Illinois*,<sup>89</sup> the United States Supreme Court opinion upholding the Illinois decision not to allow its first woman lawyer to practice her profession. Writing a shadow dissent, Professor Phyllis Goldfarb acknowledged the power of the separate spheres metaphor, emphasized that the metaphor had long been inaccurate for, among others, ‘slave women, pioneer women, women who settled the

<sup>87</sup>Mark Yakich, ‘What is a poem? You read it; it reads you’ *The Atlantic* (25 November 2013).

<sup>88</sup>See Kathryn M Stanchi, Linda L Berger, and Bridget J Crawford (eds), *Feminist Judgments: Rewritten Opinions of the United States Supreme Court* (Cambridge University Press 2016). The Women’s Court of Canada project began in 2004 and published its first six rewritten decisions in 2008. That collection was followed in 2010 by the English collaboration, the Australian project in 2014, the U.S. project in 2016, and the Northern/Irish project and the New Zealand/Aotearoa project in 2017. Under way are an international law feminist judgments project and projects in Scotland, India, Africa, and Mexico.

<sup>89</sup>[1873] 83 U.S. 130.

frontiers of this vast nation, women who managed lands and businesses while men were fighting the Civil War', and moved on to a different legal theory. Her theory: the Fourteenth Amendment had *reconstituted* the United States Constitution. It had reconstructed the nation's governing structure, and in particular the relationship between the federal and state governments and their citizens. At the centre of this new governance structure and understanding of the federal-state relationship, Goldfarb created a new concept: any citizen of the United States should be seen as a *federal citizen* who is entitled to protection by the federal government against state incursions into that citizen's rights.<sup>90</sup> In the original *Bradwell* opinion, the majority followed the narrow view of the Fourteenth Amendment's Privileges and Immunities Clause that the Court had just adopted in the *Slaughter-House Cases*.<sup>91</sup> Had Goldfarb's opinion taken the place of the original, the Fourteenth Amendment might have become the still-missing essential guarantee of a fundamental level of privileges and immunities for all American citizens.

### *Judges are what they write*<sup>92</sup>

After Judge Patricia Wald's death in early 2019, long-time Supreme Court reporter Linda Greenhouse described her as a judge who had 'lived fully not only in the law but in the world'.<sup>93</sup> Before becoming a federal judge, Judge Wald had clerked, worked for a large law firm, stayed home with her children for ten years, practiced public interest law, and been a Department of Justice attorney. When she left the U.S. Court of Appeals for the D.C. Circuit, where she was the first woman to serve as chief judge, Judge Wald served on the International Criminal Tribunal for the former Yugoslavia at The Hague.

Like Professor White, Judge Wald asked why judges write opinions when they could simply announce the results. Judges write opinions, she responded, because explanations are necessary 'to justify our power' and to reassure members of the public that 'the law will apply to all citizens alike'.<sup>94</sup> Although appellate judges write opinions within the context of many constraints, including controlling precedent and their colleagues, Judge Wald emphasized that

judges still use *rhetoric* to maneuver. The way they present the facts, the way they describe rules and standards of review, the way they 'handle' precedent,

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<sup>90</sup>Phyllis Goldfarb, 'Bradwell v. Illinois' in Stanichi, Berger, and Crawford (eds), *Feminist Judgments* (n 9) 60–77.

<sup>91</sup>[1873] 83 U.S. 36.

<sup>92</sup>Patricia M. Wald, 'The Rhetoric of Results and the Results of Rhetoric' (1995) 62 *University of Chicago Law Review* 1371, 1415.

<sup>93</sup>Linda Greenhouse, 'The Kind of Judge We Need' *The New York Times* (New York, 17 January 2019).

<sup>94</sup>Wald (n 92) 1372.

their decisions to write separately or stay with the pack, all provide wide avenues in which to drive the law forward. A judge's individual skill at working these levers of power, and doing so in a way that does not overly antagonize colleagues, continues to have a powerful influence on decision making. That is why, in the end, judges – as well as their words – matter so much.<sup>95</sup>

### *Writing towards discretion*

As Judge Wald put it, judges use rhetoric to drive the law forward in the midst of constraints. Six years after the implementation of the U.S. federal sentencing guidelines, she wrote the opinion for a three-judge panel of the U.S. Court of Appeals for the D. C. Circuit in *United States v Clark*.<sup>96</sup> In the writing, she uncovered a path to discretion, in many ways the heart of judging, despite a statutory scheme purposefully designed to curtail discretion.<sup>97</sup>

After being convicted of possession with intent to distribute cocaine and unlawful possession of a firearm by a convicted felon, Frank Clark was sentenced to 30 years to life in prison. This sentence appears harsh on its face given the crimes, so it seemed reasonable for the lower court to use its discretion to 'depart downward' and sentence Clark instead to 162 months, or 13 and one-half years. But discretion was difficult to justify under the sentencing guidelines. Judge Wald remanded for resentencing.

Though neither famous nor known for establishing a new legal principle,<sup>98</sup> her opinion reroutes the familiar pattern after opening with the facts about Clark's arrest and prior felonies. In a lawful search, the police found 'drug paraphernalia, a quantity of rocks of 'crack' cocaine in ziplock bags totaling 9.22 grams and a 9-mm pistol in a dresser drawer'. Clark was twenty-seven when he was arrested for the current offence. His three prior felonies? 'At age eighteen, Clark committed manslaughter, reportedly in defense [*sic*] of his mother'. Shortly thereafter, '[w]hile nineteen and awaiting trial on the manslaughter charge, Clark committed an armed street robbery in which he stole \$ 11, a watch, and jewelry'. The third felony took place 'three years before the arrest underlying the present conviction [when] Clark was convicted of attempted distribution of a \$ 20 'rock' of cocaine'.<sup>99</sup>

Judge Wald detailed the grounds for Clark's requested downward departure from the sentencing guideline: 'he was the oldest of six children of a young, unemployed, alcoholic mother on public assistance' and there was evidence that he 'was physically abused throughout his childhood'. His father

<sup>95</sup>ibid 1419.

<sup>96</sup>[D. C. Cir. 1993] 8 F.3d 839.

<sup>97</sup>See David Yellen, 'Saving Federal Sentencing Reform after Apprendi, Blakely and Booker' [2005] 50 Vill. L. Rev. 163.

<sup>98</sup>The opinion is most-often cited for Judge Wald's rejection of the lower court's reasoning that the District of Columbia's unique status, where the United States Attorney was also the local prosecutor, justified a departure.

<sup>99</sup>Clark (n 96) 840–41.

had been killed ‘when he was an infant, and his siblings were fathered by various other men. At age eleven, Clark was already a repeat runaway from home. He had numerous encounters with the juvenile criminal justice system as a teenager and was repeatedly committed to juvenile residential institutions’.<sup>100</sup>

When Judge Wald came to the final grounds for the district court’s decision, its reliance on Clark’s childhood circumstances, she encountered one obstacle after another.<sup>101</sup> First, the district court had not used the ‘magic words “lack of guidance as a youth.”’ Still, the court did cite the ‘special circumstances’ of Clark’s life and those circumstances included violence and an absence of adult guidance. Thus, Judge Wald wrote, the district court’s ‘final ground for departure appears to be based on a combination of Clark’s status as a child victim of domestic violence and an almost total lack of parental (or other) guidance in his youth’.

A more serious problem appeared. Shortly *after* the sentencing by the trial court, the federal sentencing guidelines were amended to eliminate the offender’s youthful circumstances – circumstances exactly like the ones relied on by the lower court – as a ground for departure from the guidelines. This amendment had not been raised by either party on appeal, but it certainly would come up at resentencing. Would the amendment apply retroactively? The standard for non-retroactive application is whether the new guidelines would ‘effect any pertinent substantive change that disadvantages the defendant’, and Judge Wald emphatically responded ‘yes’. The amendment ‘removes a substantial amount of judicial discretion to depart downward. Even though Clark had no assurance at the time of his offense [*sic*] that the district court would depart downward because of his severely disadvantaged childhood, the possibility of such a departure existed. [The new provision] *unconditionally removed* that opportunity...’<sup>102</sup>

Even though the amendment did not apply retroactively, there was still a question of whether the district court properly relied on Clark’s childhood circumstances. A court may depart only in an ‘atypical’ case. On remand, the district court would be required to find ‘some plausible causal nexus between the lack of guidance and exposure to domestic violence and the offense [*sic*] for which the defendant is being sentenced’. Beyond that, Judge Wald suggested, the lower court could go further: it was also free to consider ‘whether a nexus exists between the circumstances of Clark’s childhood and his *prior* criminal offenses [*sic*], for purposes of

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<sup>100</sup>ibid.

<sup>101</sup>ibid 844–46.

<sup>102</sup>ibid 844.



determining whether the seriousness of his criminal record is overrepresented'. For example,

If ... the court finds that Clark's exposure to domestic violence and childhood abuse significantly affected his predisposition to commit his first two crimes, which occurred when he was eighteen and nineteen years old, the district court could discount his career offender status. Absent the first two crimes, Clark would not have committed the requisite two prior felony drug or violence-related offenses necessary for designation as a career offender, ... and the district court would have additional support for a departure under the overrepresentation prong ....

Finally, the district court may want to contemplate whether Clark's childhood exposure to domestic violence is sufficiently extraordinary to be weighed under [another provision] which states that mental and emotional conditions are not ordinarily relevant in determining whether a sentence should be outside the applicable Guidelines range. ... We recognize that several of our sister circuits have indicated that [this provision] allows courts to consider childhood abuse as a basis for departure in extraordinary circumstances.<sup>103</sup>

Though it would apply narrowly, Judge Wald's opinion provided an education in the use of discretion.

### **Writing with discretion**

Writing with fewer constraints, but continuing to justify and reassure, Judge Wald dissented in *Princz v. Federal Republic of Germany*.<sup>104</sup> First, she established the context with the story of Hugo Princz. When World War II began, Princz was a sixteen-year-old American Jew trapped in Czechoslovakia, and when America entered the war:

...the Nazis seized Princz, his parents, his three brothers, and his sister as enemy aliens.

... forcibly transporting them to the Maidanek concentration camp in Poland, where Princz and two of his brothers were torn from their parents and sister. Princz believes that German officials murdered his parents and sister at the concentration camp in Treblinka; he never saw them again.

... the Nazis transported Princz and his two brothers to the concentration camp at Auschwitz.

... they stripped Princz of his personal identity—tattooing him with the number '36 707' and requiring him to wear a prisoner's uniform with 'USA' stenciled on the front.

... The Nazis then 'leased' Princz and his brothers to I.G. Farben, a German chemical cartel, which enslaved the three brothers at a facility known as

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<sup>103</sup>ibid 845.

<sup>104</sup>[D. C. Cir. 1994] 26 F.3d 1166, 1176 (Wald, J., dissenting).

Birkenau.... Princz was subjected to the unimaginable horror of watching officials intentionally starve them to death at the Birkenau 'hospital'.

... In October 1944, Princz was again transferred to the immediate custody of the Nazis and forced on a death march to Dachau, where he was enslaved as a laborer in the underground Messerschmidt airplane factory.

... Forced onto a cramped cattle train headed toward a mass execution in the Alps, Princz survived only because of the intervening German surrender.<sup>105</sup>

After the war, Princz unsuccessfully sought reparations from Germany, but was denied them because of his American citizenship. In 1992, he filed suit against Germany in a United States federal court. The district court denied Germany's motion to dismiss for lack of subject-matter jurisdiction under the Foreign Sovereign Immunities Act (FSIA). The Court of Appeals majority, in an opinion by then-Judge Ruth Bader Ginsberg, found that FSIA provided immunity.

Judge Wald's dissent argued for retroactive application of FSIA, which was enacted in 1976 and is the 'sole means of obtaining jurisdiction over a foreign state defendant in federal court'.<sup>106</sup> But the opinion's revelation lies in Judge Wald's discussion of Germany's implicit waiver of foreign sovereign immunity.

Here is her explanation: FSIA's general rule is immunity, followed by exceptions including cases in which the state 'has waived its immunity either explicitly or by implication'. Germany implicitly waived its immunity by engaging in the 'barbaric conduct alleged in this case ... specifically by violating the *ius cogens* norms of international law condemning enslavement and genocide'.<sup>107</sup> These norms are 'accepted and recognized by the international community of States as a whole'. Why are these fundamental?

What could be more fundamental than an individual's right to be free from the infliction of cruel and sadistic terrors designed with the sole purpose of destroying the individual's psyche and person because of the national, ethnic, racial, or religious community to which he belongs? What could be more elementary than a prohibition against eviscerating a person's human dignity by thrusting him into the shackles of slavery?<sup>108</sup>

Next, her justification and reassurance, examining the evolution of the doctrine of foreign sovereign immunity and undermining the majority's reasoning:

Granting a foreign sovereign immunity from jurisdiction has always been a matter of grace and comity, and is not required by the United States Constitution. ... The Supreme Court first broached the question of foreign sovereign immunity in 1812, when it stated that states enjoy 'exclusive and absolute' jurisdiction over their own territory. ... While Justice Marshall's seminal opinion is

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<sup>105</sup>ibid 1176–77.

<sup>106</sup>ibid 1178–79.

<sup>107</sup>ibid 1179.

<sup>108</sup>ibid 1180.

most often cited for the proposition that foreign sovereigns enjoy virtually absolute immunity from suit in United States courts, ... , the decision in fact focused on the *exceptions* to exclusive territorial jurisdiction, which stem from a state's explicit or implicit consent to be intruded upon. ... Such consent derives from the interest in interstate relations, 'which humanity dictates and its wants require'. ... Even in the early nineteenth century, therefore, states recognized that, to facilitate international relations, they must on occasion allow infringements on their exclusive territorial jurisdiction.<sup>109</sup>

Finally, she tied international law to United States law: '[U]nder international law, a state waives its right to sovereign immunity when it transgresses a *ius cogens* norm'. And under United States precedent, whenever possible, 'we must ... interpret United States law consistently with international law'.<sup>110</sup> Thus, because there was no indication that Congress intended to exclude such a waiver,

the only way to interpret the FSIA in accordance with international law is to construe the Act to encompass an implied waiver exception for *ius cogens* violations. Congress did not intend to thwart the opportunity of an American victim of the Holocaust to have his claims heard by the United States judicial system. Because I cannot agree that the FSIA requires us to slam the door in the face of Hugo Princz, I dissent.<sup>111</sup>

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When I read the *Bradwell* dissent, the *Clark* majority, and the *Princz* dissent through the metaphorical prism of the poem, each becomes an instance of a judicial author working within the constraints of the law but asking new questions with the benefit of distinctive sources of light. These readings reassure me of the power of the legal imagination to construct alternative versions of the future.

### **Linda Ross Meyer, 'charitable interpretation: lessons from *The Legal Imagination*'**

*The Legal Imagination* is one of those books I can keep by my bedside and each time I open it, I appreciate a familiar passage with new insight, because the book outstrips my intellectual journey and always meets me where I've just arrived. In revisiting James Boyd White's masterwork this time, I was struck anew by the discussion of 'The Statute as a Social Instrument: Establishing the Terms of Cooperation with Your Audience'.

I come to this section of *The Legal Imagination* with some frustration. For decades now, interpretive theorists have hectored judges to look only at

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<sup>109</sup>ibid 1181–82.

<sup>110</sup>ibid 1183.

<sup>111</sup>ibid 1184–85.

the ‘plain meaning’ or ‘original meaning’ of constitutions and statutes, on the ground that this interpretive method is the only one designed to keep judges in their proper place. For an interpreter to stray from textualist methodology in order to consider ‘morality’ or ‘justice’ is, according to the method’s most vociferous proponents, for a judge to act *ultra vires* or even to self-deal, as though allowing ideals of fairness to intrude on one’s interpretation of legislation or constitution were just as nefarious as taking a bribe or committing treason.<sup>112</sup>

But certain passages in White’s chapter on statutes reminded me that textualist and originalist interpretive theory often ignores that judges and legislators are partners in a relationship: ‘the one who organizes experience in language makes a claim for social as well as intellectual creation’.<sup>113</sup> White calls on us to think about the *relationship* between the statute-maker and the statute-applier and its ‘degree of trust’.<sup>114</sup> As a statute-drafter, ‘what terms of cooperation will you seek to establish with your judges and lawyers, and how will you do so?’ (198)<sup>115</sup> In a helpful analogy, he says:

Perhaps it would help you get a sense of what I mean by ‘managing the terms of cooperation’ to draw an analogy to the relationship between cookbook and cook: the greatest cookbook in the world is no guarantee of a good dinner, and doubtless some recipes are so bad that even a fine cook cannot save the meal. The success of the dinner, with which they are both concerned, depends on the existence of some comprehensible process of cooperation between them.<sup>116</sup>

But that ‘comprehensible process of cooperation’ cannot be reduced to a rule requiring ‘plain language’ or ‘original meaning’ interpretation, as White, drawing on Wittgenstein, gently leads the reader to see. In a series of cases and statutes involving wills, White probes the problem often posed by a devise to a ‘survivor’ in cases of simultaneous death, pointing out that the ‘plain language’, or a narrow statement of ‘the issue’ in the case as a simple factual uncertainty about who survived whom, is rarely ‘what is *really* at issue’ in the sense of fair or desired distribution of assets upon death. Instead of focusing ‘the issue’ on the meaning of a particular statutory term, White suggests ‘that we conceive of a statute as a way of setting up conversations among its users, as a way of giving structure to an activity of statement, question, response, and argument among people of the law’.<sup>117</sup> To think of a statute this way, one must first, says White, ‘have a good idea who the

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<sup>112</sup>*Obergefell v Hodges*, 135 S.Ct. 2584 (2015) (‘But what really astounds is the hubris reflected in today’s judicial Putsch’.) (Scalia, J., dissenting).

<sup>113</sup>White (n 2) 198.

<sup>114</sup>*ibid.*

<sup>115</sup>*ibid.*

<sup>116</sup>*ibid.*

<sup>117</sup>*ibid.* 215.

participants are'.<sup>118</sup> He notes that 'the special relationship between the legislator and his audience permits a great deal to be left unsaid'.<sup>119</sup> And the drafter of the statute should be thinking about 'what sort of conversations among lawyers and judges do you want to give rise to? What questions do you want these people to ask, what concerns do you want them to have? What have you done to ensure that what you want to happen will happen?'<sup>120</sup>

As I mused on these passages, I thought of how less-narrowly conceived forms of statutory or constitutional interpretation, that do consider fairness and justice in interpreting both legislation and constitutions, are governed by White's questions.

### ***Who are the participants in this conversation? What is their relationship? What is left unsaid or assumed by the relationship?***

If Miss Manners were to write a guide to statutory interpretation, she might start just here, accepting (graciously) White's invitation to consider the proper forms of polite engagement that govern relations between legislators and judges. (She might also accept White's invitation to expand the metaphors in which we think of law, moving from sporting images of balls and strikes, to images of etiquette and cooking.) In imagining what Miss Manners might make of the polite traditions of judges as they interpret and apply the work of legislators, many of which 'go without saying',<sup>121</sup> I put forward a few 'propositions:

#### Assume good intentions

Miss Manners always assumes others are operating with the best of intentions. To do so is to treat them with respect, to make the best of a difficult situation, and to model, always, proper conduct. Judges should do, and usually do, the same. This rule of charitable interpretation is apparent in several old-fashioned doctrines of statutory and constitutional interpretation. For example, if Congress writes a criminal statute that includes no *mens rea* element, the Court will often supply one, because the Court will assume that Congress did not intend to allow innocent persons to be convicted.<sup>122</sup> If Congress writes a statute that might be construed to violate a constitutional right, the Court will do its best to 'avoid' the constitutional issue, by adopting a

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<sup>118</sup>ibid 216.

<sup>119</sup>ibid 217.

<sup>120</sup>ibid 218.

<sup>121</sup>*Bond v United States*, 572 U.S. 844, 857 (2014) ('The notion that some things 'go without saying' applies to legislation just as it does to everyday life').

<sup>122</sup>*United States v X-Citement Video, Inc.*, 513 U.S. 64 (1994); *Staples v United States*, 511 U.S. 600 (1994).

construction of the statute that is plainly within constitutional bounds.<sup>123</sup> If a procedural alteration can correct a constitutional error while still supporting the apparent purposes of the legislation, the Court will adopt a saving construction of an unconstitutional statute rather than strike it down.<sup>124</sup> And even if Congress writes a statute, or if the President issues an executive order, that is sound on its face, but is intended as a subterfuge to violate a right, the Court will often uphold it nonetheless, except in circumstances where the very intent of Congress or a state legislature creates a stigmatic harm, or upon further proof that the statute is being applied in an unfair way. For example, in *Trump v. Hawaii*, the Court set to one side President Trump's anti-Muslim tweets and comments in upholding an executive order decreeing a temporary ban on travel to the United States from several countries. The Court explained:

'Plaintiffs argue that this President's words strike at fundamental standards of respect and tolerance, in violation of our constitutional tradition. But the issue before us is not whether to denounce the statements. It is instead the significance of those statements in reviewing a Presidential directive, neutral on its face, addressing a matter within the core of executive responsibility. In doing so, we must consider not only the statements of a particular President, but also the authority of the Presidency itself'. 'We ... will uphold the policy so long as it can reasonably be understood to result from a justification independent of unconstitutional grounds'.<sup>125</sup>

The Court's 'politeness' at times borders on wilful blindness, yet were the Court to presume coequal branches were acting badly, without evidence of unfair results, respect would soon be gone. Miss Manners might say that it is only by being respectful of even the disrespectful that respect becomes deeply embedded in a constitutional and social tradition.

Originalists and textualists are often provoked to dissent in such cases; after all, the Court is not reading the text 'accurately'.<sup>126</sup> Yet by assuming

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<sup>123</sup>*Bond v United States*, 572 U.S. 844 (2014)(construing the 'chemical warfare' statute not to include a jilted spouse's smearing of skin irritants on her rival's mailbox, in order to avoid a weighty constitutional question concerning the reach of the President's Treaty Power); *National Federation of Independent Business v Sebelius*, 567 U.S. 519, 562 (2012)(reinterpreting the individual mandate as a tax in order to avoid holding the provision unconstitutional, quoting Holmes, 'The rule is settled that as between two possible interpretations of a statute, by one of which it would be unconstitutional and by the other valid, our plain duty is to adopt that which will save the Act'.)(Roberts, CJ).

<sup>124</sup>*United States v Booker*, 543 U.S. 220 (2005)(plurality)(severing provision of the Sentencing Guidelines that violated the 6th Amendment); *National Federation of Independent Business v Sebelius*, 567 U.S. 519, 562 (2012)(severing unconstitutional Medicaid-stripping provision).

<sup>125</sup>*Trump v Hawaii*, 138 S.Ct. 2392, 2418, 2420 (2018). See also, *Crawford v Marion County Election Board*, 553 U.S. 181 (2008)(refusing to presume bad intentions in a facial challenge to voter ID law); *Shelby County v Holder*, 133 S.Ct. 2612 (2013)(refusing to presume Shelby County's improvements in black voter participation were due only to the specter of the Attorney General's power to strike down discriminatory voting requirements).

<sup>126</sup>See *Bond v United States*, 572 U.S. 844 (2014)('The meaning of the Act is plain ... The Court does not think the interpretive exercise so simple. But that is only because its result-driven antitextualism befogs what is evident'.)(Scalia, J., dissenting.); X-Citement Video, 513 U.S. 64, 80–81 (1994)(There is

Congress's good intentions, the Court is demonstrating respect for a coordinate branch of government in a way that Miss Manners, and I suspect Professor White, would approve.

One important corollary of this respect for other branches is that the judiciary must, in interpreting the intentions of coordinate branches, be able to say what is good about good intentions. Not punishing the innocent, for example, is a principle of justice that the Court is attending to when it 'reads in' *mens rea* requirements. Providing people with a chance to be heard is a principle of justice that the Court is attending to when it 'reads in' procedural prerequisites. One cannot show respect to others without implicitly following standards of justice (or manners) that 'go without saying' and also, therefore, go beyond the text.

Don't be a scold; don't be a wise guy

Miss Manners never scolds. Miss Manners seeks to correct others' behaviour by example only, never by harangue, or by snide comments. Miss Manners will also quietly ignore small errors and interpret another's inarticulate comment charitably, and would never, for example, point out to someone who greeted her with a kind 'Good Morning' that it was, in fact, afternoon. Likewise, judges should refrain from lecturing Congress about its grammar, or sending legislation back to Congress with red marks for revision. Traditional forms of judicial interpretation always interpret statutes in light of their apparent purpose and in the context of other law, disregarding clearly 'absurd' readings that would cause the legislation to fail, even if such readings would be 'plain'.<sup>127</sup> Judges should not, Miss Manners would say, employ plain language to mischievously misapply statutes in an Amelia Bedelia fashion.

Again, such decisions often provoke textualists and originalists to complain that the judiciary is legislating, fixing and amending statutes instead of merely applying them. They argue that the Court must read the language as written, even if it means that Congress has to go back to the drawing board and get its grammar right, this time.<sup>128</sup> This view hardly supports democratically-enacted legislation, but instead reflects hypercritical legal pedantry. Miss Manners would not approve. No one likes a wise guy.

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no way in which any of these cases, or all of them in combination, can be read to stand for the sweeping proposition that 'the presumption in favor of a scienter requirement should apply ...' *even when the plain text of the statute says otherwise*.) (Scalia, J., dissenting).

<sup>127</sup>*King v Burwell*, 135 S.Ct. 2480, 2492–93 (2015) ('A provision that may seem ambiguous in isolation is often clarified by the remainder of the statutory scheme ... because only one of the permissible meanings produces a substantive effect that is compatible with the rest of the law'. [citation omitted] Here, the statutory scheme compels us to reject petitioner's interpretation because it would destabilize the individual insurance market in any State with a Federal Exchange, and likely create the very 'death spirals' that Congress designed the Act to avoid'.)

<sup>128</sup>See *King v Burwell*, at 2504 ('This Court, however, has no free-floating power "to rescue Congress from its drafting errors"'. [citation omitted]) (Scalia, J., dissenting).

### ***What conversations does the statute or Constitution encourage us to have?***

Equally important, and rarely considered by either text-only or originalist interpreters, is White's second question: what sort of conversation does the statute or Constitution encourage us to have? White uses the case of *Tovey v. Geiser*<sup>129</sup> to illustrate how conversations can be poorly directed and focus on the 'wrong' issue. After the tragic death of the Prestons by asphyxiation, the husband's devisee and the wife's heirs litigated about which grisly details of the death scene were more likely to indicate that one potential benefactor survived the other. The 'conversation' structured by the court had nothing to do with the intentions or expectations of the Prestons, the fairness to living relatives, the effect of a will executed before the Prestons were married, and above all allowed no respect for the dead. The Prestons became, in the court's discussion, only bodies, with lung capacity, syphilis, and limbs arranged just so. Only the jury, whose verdict effectively divided the inheritance between the warring branches of the family, seemed wise. White, aware as always of his own relationship to his own reader, does not rant or lecture the reader about the case (as I have just done), but invites the reader to imagine and engage in a differently-directed conversation. He asks 'could you draft a statute for this case that would increase the chances of a proper statement of the issue?'<sup>130</sup>

White's example led me to think of another, from my own experience. I was serving as a law clerk when the federal sentencing guidelines first came to be implemented in federal district courts in California. I had spent half of my clerkship year watching traditional sentencing hearings, in which the conversation was often primarily between the defendant and the judge. The judge would remind the defendant of the seriousness of the crime, the harm to the victim, and the damage to others. The defendant would have the opportunity to apologize directly and to speak about his efforts and intentions to reform. The proceedings were profoundly human, personal, and emotional. Letters from community members were read by defence counsel; victim impact statements were read by prosecutors. The attention and course of discussion was fixed on culpability, harm, remorse, restitution, and reform.

Just after the federal guidelines were instituted, these sentencing hearings changed dramatically. The defendants said nothing. The main purpose of the hearing became to settle questions of statutory interpretation – whether a state conviction for assault in the third degree would be considered to add one or two points to the criminal history score; whether a gun was 'brandished' or merely 'held', whether sales of two different drugs would be considered separate crimes with consecutive sentences, or only one crime. And

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<sup>129</sup>150 Kan. 149 (1939).

<sup>130</sup>White (n 2) 206.



so on. The ‘conversation’ had shifted from culpability, apology and atonement, to cryptic definitional disputes; from a focus on the defendant, to a focus on the lawyers and the statutory terminology. Never were the statutory purposes of sentencing invoked or discussed, the discussion became technical, dry, and incomprehensible to most people in court.

In observing more recent sentencing hearings, my impression is that, as the federal sentencing guidelines have become both more familiar and no longer mandatory, previously ‘excluded’ conversations about remorse and reform are, in many courtrooms, readmitted as relevant. In part this change is the result of the *United States v. Booker*<sup>131</sup> decision, which requires the sentencing court to consider, in each case, not only the technical points of the guidelines, but whether the sentence they give also reflects the statutory purposes of sentencing – proportionality between crime and sentence, rehabilitation, community safety, etc. The statutory details still direct part of the conversation, and in important ways that direction ensures attention to considerations of fairness across federal cases, but now these points can be addressed without foreclosing the core, individualized, and more human conversations about reconciliation, restitution, and rehabilitation that are supposed to be at the heart of sentencing.

What can will contests and sentencing hearings teach us about constitutional interpretation? Judges need to ask what kind of conversations the Constitution invites us to have. In interpreting the Constitution, we should always have the grand mission of the preambles and Declaration and structured balance of power before us. The framers were not just trying to set up a system of rules, but a system of good government, and they believed that government should conform to important moral ideals like liberty, equality, anti-corruption, balanced power, and procedural fairness. The idea that we should or even could interpret the Constitution without opening our conversations to allow these principles to be debated and discussed is the real betrayal of our relationship with the founding generation, not some failure to discern the original meaning of particular words (too often yanked from their context and cranked through an eighteenth-century dictionary in a retranslation exercise worthy of Google Translate). Courts interpreting the Constitution have from the beginning considered the effect of their interpretation on the balance of power among the branches and levels of government, as well as the durability and workability of the constitutional design.<sup>132</sup> They have given scope to constitutional rights in light of deep-seated ideals of

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<sup>131</sup>*United States v Booker*, 543 U.S. 220 (2005).

<sup>132</sup>*M’Culloch v State of Maryland*, 17 U.S. 316, 407, 415 (1819) (‘we must never forget that it is a *constitution* we are expounding’. ‘Necessary’ in the ‘necessary and proper’ clause must be not be interpreted narrowly to mean ‘essential’ or ‘absolutely necessary’, because the Constitution was ‘intended to endure for ages to come, and consequently, to be adapted to the various *crises* of human affairs’.)

fairness and right.<sup>133</sup> They interpret the Constitution in light of the goals of constitution-making and in light of the respect for human dignity, equality, and liberty that animated the project, assuming, as Miss Manners suggests, that the Framers had the best of intentions, even though we know they sometimes did not (ahem ... slavery ... ahem).

In like fashion, statutory interpretation should be guided not just by assigning meanings to words, but by imagining the larger conversation about justice that the statute is inviting us to have. What evils does it ward off? What good was its object? What competing goods does the statute negotiate?

White's teaching has always been centrally about not losing our humanity when we become lawyers. *The Legal Imagination* guides its own readers, gently. It questions, suggests, exposes, rather than lecturing, proving, and arguing. In doing so, it assumes the best intentions of its readers. It shows (as well as telling) its full respect for readers' intelligence and freedom, encouraging them to pay close attention to see for themselves how ways of speaking and writing law can dehumanize ('defendants', 'decedents'), degrade ('inmates', 'slaves'), distance ('euthanize', 'procedure'), denature ('cohabitante'), evade ('constructive notice') and derail ('pleading formalities') important human conversations about justice. (590ff) It does this by reminding us of the power and richness of language and inviting us to practice writing and speaking thoughtfully, so the language of the law does not crush the human spirit, but channels and amplifies it. And White calls us as lawyers to say the law in language that shows law's power to respect others, and to direct legal conversations to matters that matter. In legal interpretation, he asks us to be polite, charitable interpreters, who treat legislators and constitution-writers as reasonable (even if they aren't) and just (insofar as possible). That requirement of charitable interpretation necessarily requires judges to address questions of justice, not merely syntax.

## Disclosure statement

No potential conflict of interest was reported by the author.

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<sup>133</sup>In *District of Columbia v Heller*, 554 U.S. 570 (2008), for example, the 'right to bear arms' in a state militia is read broadly as a right of self-defence; in *Griswold v Connecticut*, 381 U.S. 479 (1965), and *Pierce v Society of Sisters*, 268 U.S. 510 (1925), prohibitions against unreasonable searches and seizures and on the quartering of soldiers in private homes were read to indicate constitutional concern for individual and family liberty, autonomy, and privacy; in *Loving v Virginia*, 388 U.S. 1 (1967), and *Obergefell v Hodges*, 135 S.Ct. 2584 (2015), the Court drew on constitutional ideals of equal protection and liberty to ban restrictions on marriage.