

# Michigan Law Review

---

Volume 91 | Issue 8

---

1993

## Law Teachers' Writing

James Boyd White

*University of Michigan Law School*

Follow this and additional works at: <https://repository.law.umich.edu/mlr>



Part of the [Legal Education Commons](#), and the [Legal Writing and Research Commons](#)

---

### Recommended Citation

James B. White, *Law Teachers' Writing*, 91 MICH. L. REV. 1970 (1993).

Available at: <https://repository.law.umich.edu/mlr/vol91/iss8/6>

This Symposium is brought to you for free and open access by the Michigan Law Review at University of Michigan Law School Scholarship Repository. It has been accepted for inclusion in Michigan Law Review by an authorized editor of University of Michigan Law School Scholarship Repository. For more information, please contact [mlaw.repository@umich.edu](mailto:mlaw.repository@umich.edu).

# LAW TEACHERS' WRITING

*James Boyd White\**

Judge Edwards divides scholarship into the theoretical and the practical, and, while conceding the place and value of both, argues that there is today too much of the former, too little of the latter. The result, he says, is an increasing and unfortunate divide between the life of law practice and the writing of law teachers. One can understand his complaint readily enough, especially coming as it does from an overworked judge. I myself have had perceptions and feelings somewhat like those that seem to animate Judge Edwards, though I would express them differently: for me the relevant line is not between the "theoretical" and "practical," as Judge Edwards defines these terms,<sup>1</sup> but between work that manifests interest in, and respect for, what lawyers and judges do, and work that does not.

The opposition between "theoretical" and "practical" is, I think, misleading. It is often the most theoretical work that will prove of surprising practical value, often the immersion in practical particularities that will stimulate the most valuable thought of a general kind. Much of the life of the law in fact lies in the constant interaction it requires between the particular and the general, between the practical and the theoretical. The danger to watch out for may accordingly be the turn of mind that focuses on theory alone, dismissive of mere details, or on particulars alone, dismissive of mere generalization.

## I

In thinking about the kind of writing law teachers do, and ought to do, I start with the main mission of law school, where practice and teaching really do meet: the education of future lawyers. This is not merely a training in the application of legal rules, though there are forces within us that would make it so, nor is it simply a matriculation into the world of policy debates, though there are forces that work this way as well. One of the dangers of Judge Edwards' use of the term "doctrinal"<sup>2</sup> in defining the "practical" scholarship of which he ap-

---

\* L. Hart Wright Professor of Law, Professor of English, and Adjunct Professor of Classical Studies, University of Michigan. A.B. 1960, Amherst College; A.M. 1961, LL.B. 1964, Harvard. — Ed.

1. Harry T. Edwards, *The Growing Disjunction Between Legal Education and the Legal Profession*, 91 MICH. L. REV. 34, 35 (1992).

2. *Id.* at 42-43.

proves is that it might be misread to reinforce the first tendency; similarly, the term "prescriptive"<sup>3</sup> might reinforce the second.

In the kind of case with which most lawyers spend most of their time, the application of rules is not a mechanical process but a highly contested one. The issue is which case, statute, or constitutional provision is relevant and, once that is established, how it should be read and understood, alone or in connection with others. On these points we can expect argument both ways, not only about questions of explicit methodology — the relevance of original intention, the admissibility of legislative history, and the like — but also about issues that reach very much farther. For in our culture law is the central medium for the articulation and resolution of the gravest social and ethical questions. It need not be so, even in the common law tradition, as the experience of England demonstrates; but in the immensely pluralistic American world the law is the institution above all others through which we work out our definition of ourselves as a nation, across our deepest differences.

Who is to decide whether states should be free to make abortion criminal, or to impose the death penalty, or to prohibit pornography or expressions of racial hatred? These are dramatic and familiar examples, but in virtually every legal case questions of comparable difficulty and interest are present, if the judge and lawyer have the eyes to see them, for every case involves judgments of the allocation of power within our government, or among citizens, or between citizens and government. Both lawyers and judges are thus constantly called upon to maintain and reform the central institutions of our society; to do this well is a challenge to every capacity for education and wisdom, for it calls upon every ability that is involved in the creation of sound constitutions, in making wise legislation, in just adjudication.

To put it in operational terms, once the reading of a case or statute is seen to involve something other than a mechanistic application of terms, the boundaries of legal thinking broaden enormously. The reading of one case leads to the reading of others, in a potentially infinite series, and not just cases, but history, and the findings of other disciplines as well. The legal mind must find a way to put all of this in some kind of order.<sup>4</sup> More than that, every case presents the question how we should think about it, and about others like it. Every brief,

---

3. *Id.*

4. For example, it should be relevant to any reconsideration of the cases favoring the identification procedure we call the *lineup*, e.g., *Stovall v. Denno*, 338 U.S. 293 (1967), that recent psychological scholarship has suggested that the *lineup* is more prejudicial than the *showup*, in which a single person is presented to the witness, not less so. See Phoebe C. Ellsworth et al., *Response Biases in Lineups and Showups*, 64 J. PERSONALITY & SOC. PSYCHOL. 525 (1993).

every judicial opinion, is wittingly or unwittingly a response to that question. This means that the lawyer needs to be aware of her own modes of thought, critical of them and open to others, ready to reform the very processes of her mind. The demand on the mind here is without limit, and it calls for an education much more complex than Judge Edwards suggests.

I hasten to add, however, that its heart lies in the mastery of the activities of the legal mind traditionally thought essential: reading cases and statutes, making arguments about their meaning, organizing complex and somewhat contradictory material into coherent wholes, and so on. Mine is not an argument against traditional legal education, but for an especially comprehensive and demanding version of it. Learning to "read a judicial opinion" is not a "skill" to be "mastered" in the first weeks of law school, before one gets to the really important matter of deciding what kind of society we should have; learning to read a judicial opinion well, and criticizing it intelligently as an ethical and political performance, as well as an intellectual one, is a task for a lifetime.

Often associated with calls for more "practical" education and writing is an image of the law as a series of tasks to be performed more or less correctly, an image that I think is deeply debilitating. It reduces legal education to a training in skills and to the acquisition of information, and it reduces the practice of law itself to a kind of bureaucratic process. Our students often want to see it this way, because what they have demonstrated competence at, often stunningly, is learning how to perform assigned tasks, and they want to assimilate both law school and law practice to the same model. It becomes our duty as teachers to resist that impulse. At its best, a legal education is a training of a very different kind, in which one learns that in law very little is done simply "right" or "wrong"; that the lawyer must perpetually make choices in circumstances of radical uncertainty; and that the central capacity of the mind of the lawyer is therefore her judgment. Instead of a training in the performance of set tasks, law school should offer an education in a sense of intellectual and ethical responsibility: responsibility for the operations of one's own mind, and for the judgments one reaches; responsibility to the law itself, and to the judge or jury — or other lawyer — one addresses; and responsibility in another sense too, for the lawyer as such always acts on behalf of another, to whom she is responsible.

The vision of law as the application of rules, and of law school as devoted to learning rules, in this way collapses. But in its place often arises another, in my view equally flawed, idea that the law can be seen

as a set of social choices, law school as a training in policymaking, and legal scholarship as a branch of applied social science. Of course when a case is thought about more fully it often becomes increasingly open to decision either way, and the considerations of policy and prescription become increasingly relevant. Yet in the lawyer's life the question is almost never one of pure policy, pure choice; the heart of her experience is facing a choice where respect must be paid to decisions made by others. Which decisions, how much respect, and why? These are the central questions of legal thinking; they are essential to the maintenance of the law as a constituted system of authority. To erase them, by thinking of a question as one of pure policy, as if there were no authoritative context of judgments made by others, is to destroy the essence both of law and of legal education.<sup>5</sup>

For these reasons I think the law cannot be reduced to economics or history or sociology or any other discipline. But I think it should establish productive relations with each of those named and more. By its nature the law is a discourse that calls upon others, all the time, as anyone who has ever cross-examined a technical expert knows. It creates a space in which other languages can be heard, their findings and judgments employed. But they are always subject to the constraints of each other and of the law itself. Nothing is unexamined in the law: the economist or surgeon who testifies in court discovers that what would go unchallenged in his professional home must here be explained and defended. He must speak in a language that he will find foreign; or, perhaps more accurately, what he says will be translated into such a language. There is often loss here, of course, but there is also gain, for the law teaches those who use it, and those who observe it carefully, how we might live in a world of many languages, many ways of thinking and talking. Sometimes the example it sets is no doubt a bad one; but the possibility at least exists that the law could teach us excellence in this cultural and political domain, if we were up to the challenge it offers.

The education of the lawyer should therefore involve training in the process of translation by which this part of law lives, the art by which the lawyer can learn from other fields and disciplines yet at the same time criticize them. It is right that our writing should be concerned with these things as well. It is as part of a highly practical legal

---

5. I think here of a conversation I once had with an economist colleague. I focused on the intellectual and rhetorical context of legal judgment — the texts that guide and restrain decision, the difficulties of their interpretation, the ethical and cultural significance of the text in which the judgment was explained, and so forth. My colleague emphasized the complex policy choice he saw the case as presenting. At the end we found ourselves wanting to say to each other exactly the same thing: "That's all very interesting, but what does it have to do with law?"

education that a law school should have people trained in law and many other disciplines, thus enabling it to train its students in the processes by which one language, one discipline, can be put against another, at once tested and testing, for this is an activity in which the good lawyer should be highly competent.

The desire to convert legal questions into questions of policy is powerful in all of us, partly because it is agreeable to pronounce upon the way we think the world should run, partly because it enables us to evade the true difficulties that legal thought requires. It is much easier to think of general solutions to general problems, or particular solutions to particular ones, than it is to do what the law requires, which is to think of the particular in terms of the general, the general in terms of the particular. Much of the discipline of law teaching in fact lies in the duty to avoid these opposing simplifications: the reduction of law to the mechanical application of rules or to mere political choice. A true legal education makes both impossible: the first, as one is trained to see the ambiguities and complexities in what first looks simple; the second, as one is trained in the institutional and procedural character of all legal thought. And what is true of the student's education should be true of the teacher's, as that occurs both in the classroom and in our writing.

What I am describing is in my view a key part of the ethical character of legal training and legal work, to which Judge Edwards rightly draws attention. Legal education can be a real education, of the greatest value both personally and professionally, partly because it is a training in the respect due to others; partly because it teaches us that in almost every case reasonable and decent people can take radically opposing views, and therefore that our opinions are not eternal truths; partly because it insists upon the authority of procedures and institutions, which it in this way constitutes and maintains; partly because it perpetually tests and surprises the mind by exploring the limits of our discourses and imaginations, as the law is seen to be one language among many.

\* \* \*

It is as an educational institution that the law school exists first and foremost. Its center is the education of our students, but this requires continuing education on our part, partly at the hands of our students, partly in interaction with each other, both in conversation and in writing. I do not think of the law school as a think tank on policy questions or as a research institute for the profession, but as a community of individuals engaged in the process of their own legal

education. I think our work should accordingly be evaluated by the way it defines the law, and how it can be done well and badly; by the forms of thought and life it holds out as entitled to respect or authority; by the kind of education it reflects and offers to others.

## II

From this perspective many kinds of writing can be of very great value; likewise, there is no kind of writing that is by virtue of its *genre* automatically entitled to our approval. Think of the treatise, for example: it can be dull and mechanical, in which case it is simply an index to cases or other material; or it can meet every standard suggested above. To think of my own school, it is one of the real distinctions of the institution that so much fine treatise writing is in progress here. Case books too, perhaps even more obviously, might teach their readers that law is a mechanical or simpleminded process, or reduce it to a set of policy choices. Yet they may also introduce their readers to a life of virtually unlimited challenge to the mind and imagination. And work that is explicitly about the nature of legal thought, if itself of high quality, can be of the greatest practical value.

Here is a point at which much interdisciplinary work can be of special interest: not simply in reporting findings that can be used by the law, but in exhibiting modes of thought that the lawyer or judge might employ, or resist. This is the great contribution of law and economics, for example; it offers a method of analysis that can be of great value, but only if its limits are understood and subjected to the discipline of law. History similarly offers the lawyer not only knowledge about the past, but, equally important, access to modes of thinking about the past. This is an essential part of every lawyer's life, for the lawyer is a constant historian both of the law and of the social context in which it occurs. Likewise literature, and the study of ordinary language, can illuminate choices lawyers make in the stories they tell, the arguments they make, the ways in which they define themselves and others.

There is much that can be relevant to the life of the lawyer, and to his professional education and competence, that does not take the form of what Judge Edwards calls "doctrinal" work. It is not the only task of the law teacher to tell lawyers and judges how particular cases should be argued or decided. Surely it is right for law teachers to address basic questions of political theory, or social attitude. And it is hard to know at the outset what line of thought will ultimately prove valuable, including in a practical way, as the history of feminist scholarship strikingly suggests. Moreover, it is possible and proper to write

to lawyers or judges not only about a particular professional issue they face, but about the character of the life we share as lawyers, much more fully conceived: to write to the person behind the role, as an independent mind. To take a recent and, from Judge Edwards's perspective, perhaps an extreme example, think of Milner Ball's book *The Word and the Law*.<sup>6</sup> There is no doctrine in this book. Its heart is the development of an explicitly theological position; it contains readings of *Isaiah* and *Mark*, as well as of literary texts, such as *The Sound and the Fury*;<sup>7</sup> yet it brings all this material to bear on a question that should be central for every lawyer, judge, law student, and law teacher: whether it is possible to lead a life in the law that is essentially good.

One could go on indefinitely, illustrating the point that it is not the generic character of the work that makes it valuable or valueless, but its intellectual and ethical quality. But to be of value to the law it is essential that the work in question express interest in, and respect for, the possibilities of what lawyers and judges do. There are tendencies in modern scholarship and teaching of a different kind, which would supplant legal thought with forms of social science or with a kind of purely political discourse. This is a point at which I share Judge Edwards's disquiet. Yet these tendencies too have value, at least of this kind: in challenging the intellectual, ethical, and political structure that is our law, they call for a defense from the rest of us. This is healthy enough; but in my view the defense needs to be made more vigorously and widely than has so far happened. It is possible that the defense will fail, and law as we know it disappear, which I would regard as a tragedy beyond contemplation.

---

6. MILNER S. BALL, *THE WORD AND THE LAW* (1993).

7. See *id.* at 108-13 (*Isaiah*); *id.* at 106-08 (*Mark*); *id.* at 82-90, 129-30 (WILLIAM FAULKNER, *THE SOUND AND THE FURY* (Modern Library 1929)).