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The Invisible Discourse of the Law: Reflections on Legal Literacy and General Education

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THE INVISIBLE DISCOURSE OF THE LAW: REFLECTIONS ON LEGAL LITERACY AND GENERAL EDUCATION*

BY JAMES BOYD WHITE

My subject today is "legal literacy," but to put it that way requires immediate clarification, for that phrase has a wide range of possible meanings with many of which we shall have nothing to do. At one end of its spectrum of significance, for example, "legal literacy" means full competence in legal discourse, both as reader and as writer. This kind of literacy is the object of a professional education, and it requires not only a period of formal schooling but years of practice as well. Indeed, as is also the case with other real languages, the ideal of perfect competence in legal language can never be attained; the practitioner is always learning about his language and about the world, he is in a sense always remaking both, and these processes never come to an end. What this sort of professional literacy entails, and how it is to be talked about, are matters of interest to lawyers and law teachers, but are not our subject here. The other end of the spectrum of "legal literacy" would mean the capacity to recognize legal words and locutions as foreign to oneself, as part of the world of the Law. A person literate in this sense would know that there was a world of language and action called "law," but little

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more about it: certainly not enough to have any real access to it.

Between these extremes is another possible meaning of "legal literacy": that degree of competence in legal discourse required for meaningful and active life in our increasingly legalistic and litigious culture. The citizen who was ideally literate in this sense would not be expected to know how to draft deeds and wills or to try cases or to manage the bureaucratic maze, but he would know when and how to call upon the specialists who can do these things. More important, in the rest of life he would be able to protect and advance his own interests: for example in dealing with a landlord or a tenant, or in his interactions with the police, with the zoning commission, or with the Social Security Administration. He or she would be able not only to follow but to evaluate news reports and periodical literature dealing with legal matters, from Supreme Court decisions to House Committee Reports; to function effectively in positions of responsibility and leadership (say as an elected member of a school board, or as chairman of a neighborhood association, or as a member of a zoning board or police commission). The ideal is that of a fully competent and engaged citizen, and it is a wholly proper one to keep before us.

But this ideal is for our purposes far too inclusive, for however one defines "legal literacy," such a figure possesses a great deal in addition to that: he or she has a complete set of social, intellectual, and political relations and capacities. But perhaps we can meaningfully ask: what is the "legal literacy" that such an ideal figure would have? How could this sort of competence be taught? What seem to be the natural barriers to its acquisition? In the first part of this paper I deal with these questions, but in reverse order: I begin by identifying those features that make it peculiarly difficult for the nonlawyer to understand and to speak legal discourse; I then suggest some ways in which those features might be made comprehensible and manageable, and their value and function appreciated. This in turn will constitute my answer to the first question, i.e., what kind of legal literacy an ordinary citizen ought to have, and how it can contribute not only to the development of social competence but to a true education of the mind and self.

The Invisible Discourse of the Law

It is a common experience for a nonlawyer to feel that legal language is in a deep sense foreign: not only are its terms incomprehensible, its speakers seem to have available to them a repertoire of moves that are denied the rest of us. We neither understand the force of their arguments nor know how to answer them. But the lan-

guage is, if possible, worse than merely foreign: it is an unpredictable, exasperating, and shifting mixture of the foreign and the familiar. Much of what lawyers say and write is after all intelligible to the nonlawyer, who can sometimes speak in legally competent ways. But at any moment things can change without notice: the language slides into the incomprehensible, and the nonlawyer has no idea how or why the shift occurred. This is powerfully frustrating, to say the least.

But it is more than frustrating, for it entails an increasingly important disability, almost a disenfranchisement. At one time in our history it could apparently have been assumed that a citizen did not need to have any specialized knowledge of law, for our law was a common law that reflected the customs and expectations of the people to such a degree that ordinary social competence was normally enough for effectiveness in the enterprises of life. No special legal training was required. But in our increasingly bureaucratic and legalistic world, this seems less and less the case: the frustrated citizen is likely to feel that his life is governed by language — in a lease, in a form contract, or in a federal or state regulation — that he cannot understand. Who, for example, can read and understand an insurance contract or a pension plan? An OSHA or IRS regulation? Yet these govern our lives, and are even said in some sense to have the standing of our own acts: either directly, as in the case of the contracts we sign, or indirectly, as in the case of laws promulgated by officials who represent us. In a democracy this unintelligibility is doubly intolerable, for the people are supposed to be competent both as voters to elect the lawmakers and as jurors to apply the laws, and they cannot do these things if they cannot understand the law.

What can explain this flickering pattern of intelligibility and unintelligibility, the stroboscopic alternation of the familiar with the strange? The most visible and frequently denounced culprits are the arcane vocabulary of the law and the complicated structure of its sentences and paragraphs. This leads some to ask: why can the lawyers not be made to speak in words we recognize and in sentences we can understand? This would enable the ordinary citizen to become competent as a reader of law, and even as a legal speaker. Our political method of democracy, and its moral premise of equality, demand no less. It may be, indeed, that the only actual effect of this obfuscating legal jargon is to maintain the mystique of the legal profession and if that mystique is destroyed so much the better.

Impulses such as these have given rise to what is known as the Plain English Movement, which aims at a translation of legal lan-

guage into comprehensible English. This movement has had practical effects: at the federal level, for example, one of President Carter's first actions was to order that all regulations be cast in language intelligible to the ordinary citizen, and New York and other states have passed laws requiring that state regulations and form contracts meet a similar standard.

If such directives were seriously regarded, they might indeed reduce needless verbosity and obscurity, and streamline unwieldy legal sentences. But even if they succeeded in these desirable goals, they would not solve the general problem they address, for, as I will try to show, the most serious obstacles to comprehensibility are not the vocabulary and sentence structure employed in the law, but the unstated conventions by which the language operates: what I call the "invisible discourse" of the law. Behind the words, that is, are expectations about the ways in which they will be used, expectations that do not find explicit expression anywhere but are part of the legal culture that the surface language simply assumes. These expectations are constantly at work, directing argument, shaping responses, determining the next move, and so on; their effects are everywhere but they themselves are invisible. It is these conventions, not the diction, that primarily determine the mysterious character of legal speech and literature: not the "vocabulary" of the law, but what might be called its "cultural syntax."

In what follows I will identify those features of what I call the "cultural syntax" of legal language that seem to differentiate it most radically from ordinary speech. I will then outline some methods by which I think students can be taught to become at least somewhat literate in a language that works in these ways. Finally I will suggest that this kind of literacy not only entails an important increase in social competence, but itself contributes to the development of mind and attitude that is the object of a general education.

The Language of Rules

Many of the special difficulties of legal language derive from the fact that at the center of most legal conversations will be found a form we call the legal rule. Not so general as to be a mere maxim or platitude (though we have those in the law, too), nor so specific as to be a mere order or command (though there are legal versions of these), the legal rule is a directive of intermediate generality. It establishes relations among classes of objects, persons, and events: "All A are [or: shall be] B"; or, "If A, then B." Examples would include the following:

1. "Burglary consists of breaking and entering a dwelling house in the nighttime with intent to commit a felony therein. A person convicted of burglary shall be punished by imprisonment not to exceed 5 years."

2. "Unless otherwise ordered by the court or agreed by the parties, the former husband's obligation to pay alimony terminates upon the remarriage of his former wife."

Legal conversations about rules such as these have three major characteristics that tend to mystify and confuse the nonlawyer.

The Invisible Shift from a Language of Description to a Language of Judgment

The first of these is that the form of the legal rule misleads the ordinary reader into expecting that once it is understood its application will be very simple. The rules presented above, for example, have a plain and authoritative air and seem to contemplate no difficulty in their application whatever. (Notice that with the possible exception of the word "felony", there is nothing legalistic in their diction.) One will simply look to the facts and determine whether or not the specified conditions exist; if so, the consequence declared by the rule will follow; if not, it will not. "Did she remarry? Then the alimony stops." Nothing to it, the rule seems to say: just look at the world and do what we tell you. It calls for nothing more than a glance to check the name against the reality and obedience to a plain directive.

In practice of course the rule does not work so simply, or not always. Is it "breaking and entering" if the person pushes open a screen door but has not yet entered the premises? Is a garage with a loft used as an apartment a "dwelling house"? Is dusk "nighttime"? Is a remarriage that is later annulled a "remarriage" for the purpose of terminating prior alimony? Or what if there is no formal remarriage but the ex-wife has a live-in boyfriend? These questions do not answer themselves but require thought and conversation of a complex kind, of which no hint is expressed in the rule itself.

Of course there will be some cases so clear that no one could reasonably argue about the meaning of the words, and in these cases the rule will work in a fairly simple and direct fashion. This is in fact our experience of making most rules work: we can find out what to do to get a passport or a driver's license, we know what the rules of the road require, we can figure out when we need a building permit, and so on. But these are occasions of rules-obedience in which no special social or intellectual competence is involved.

One way to identify what is misleading about the form of a legal rule might be to say that it appears to be a language of description, which works by a simple process of comparison, but in cases of any difficulty it is actually a language of judgment, which works in ways that find no expression in the rule itself. In such cases the meaning of its terms is not obvious, as the rule seems to assume, but must be determined by a process of interpretation and judgment to which the rule gives no guidance whatever. The discourse by which it works is in this sense invisible.

The False Appearance of Deductive Rationality

If one does recognize that there may be difficulties in understanding and applying a rule, one may still be misled by its form into thinking that the kind of reasoning it requires (and makes possible) is deductive in character. A legal rule looks rather like a rule of geometry, and we naturally expect it to work like one. For example, when the meaning of a term in a rule is unclear — say "dwelling house" or "nighttime" in the burglary statute — we expect to find a stipulative definition somewhere else (perhaps in a special section of the statute) that will define it for us, just as Euclid tells us the meaning of his essential terms. Or if there is no explicit definition, we expect there to be some other rule, general in form, which when considered in connection with our rule will tell us what it must mean. But we look for such definitions and such rules often in vain, and when we find them they often prove to be of little help.

Suppose for example the question is whether a person who is caught breaking into a garage that has a small apartment in the loft can be convicted of burglary: does a statutory definition of "dwelling house" as "any residential premises" solve the problem? Or suppose one finds in the law dealing with mortgages a definition of "dwelling house" that plainly does (or does not) cover the garage with the loft: does that help? Upon reflection about the purpose of the burglary statute, which is to punish a certain kind of wrongdoing, perhaps "dwelling house" will suddenly be seen to have a subjective or moral dimension, and properly mean: "place where the actor knows that people are living" or, if that be thought too lenient, "place where he has reason to believe that people are living."

Or consider the annulment example. Suppose one finds a statutory statement that "an annulled marriage is a nullity at law." Does that mean that the alimony payment revives upon the annulment of the wife's second marriage? Even if the annulment takes place fifteen years after the marriage? Or suppose that there is another

statute, providing that "alimony may be awarded in an annulment proceeding to the same extent as in a divorce proceeding." This would mean that the wife could get alimony from her second husband, and if the question is seen in terms of fairness among the parties, this opportunity would be highly relevant to whether or not her earlier right to alimony has expired.

The typical form of the legal rule thus seems to invite us to think that in reading it our main concern will be with the relations among propositions, as one rule is related to others by the logical rules of noncontradiction and the like; and that the end result of every intellectual operation will be determined by the rules of deduction.

In fact the situation could hardly be more different. Instead of each term having a meaning of the sort necessary for deductive operations to go on in the first place, each term in a legal rule has a range of possible meanings, among which choices will have to be made. There is no one right answer to the question whether this structure is a "dwelling house," or that relationship a "remarriage"; there are several linguistically and logically tolerable possibilities and the intellectual process of law is one of arguing and reasoning about which of them is to be preferred. Of course the desirability of internal consistency is a factor (though we shall soon see that the law tolerates a remarkable degree of internal contradiction), and of course in some cases some issues will be too plain for argument. But the operations that lawyers and judges engage in with respect to legal rules are very different from what we might expect from the form of the rule itself: they derive their substance and their shape from the whole world of legal culture, and draw upon the most diverse materials, ranging from general maxims to particular cases and regulations. The discourse of the law is far less technical, far more purposive and sensible, than the nonlawyer is likely to think. Argument about the meaning of words in the burglary statute, for example, would include argument about the reasons for having such a statute, about the kind of harm it is meant to prevent or redress, and about the degree and kind of blameworthiness it should therefore require. Legal discourse is continuous at some points with moral or philosophic discourse, at others with history or anthropology or sociology; and in its tension between the particular and the general, in its essentially metaphorical character, it has much in common with poetry itself. The substantive constitution of legal discourse is of course too complex a subject for us at present; what is important now is to see that this discourse is invisible to the ordinary reader of

the legal rule.

These characteristics of legal language convert what looks like a discourse connected with the world by the easy process of naming, and rendered internally coherent by the process of deduction, into a much more complex linguistic and cultural system. The legal rule seems to foreclose certain questions of fact and value, and of course in the clear cases it does so. But in the uncertain cases, which are those that cause trouble, it can better be said to open than to close a set of questions: it gives them definition, connection with other questions, and a place in a rhetorical universe, and this permits their elaboration and resolution in a far more rich and complex way than could otherwise be the case. Except in the plainest cases the function of the ordinary meanings of the terms used in legal rules is not to determine a necessary result but to establish the uncertain boundaries of permissible decision; the function of logic is not to require a particular result by deductive force, but to limit the range of possibilities by prohibiting (or making difficult) contradictory uses of the same terms in the same sentences.

But you have perhaps noticed an odd evasion in that last sentence, and may be wondering: does not the law prohibit inconsistent uses of the same terms in the same rules? Indeed it does not, or not always, and this is the last of the three mystifying features of legal discourse about which I wish to speak.

The Systematic Character of Legal Discourse and the Dilemma of Consistency

I have thus far suggested that while the legal rule appears to operate by a very simple process of looking at the world to see whether a named object can be found (the "dwelling house," or the "remarriage"), this appearance is highly misleading, for in fact the world often does not present events in packages that are plainly within the meaning of a legal label. Behind the application of the label is a complex world of reasoning which is in fact the real life of the law, but to which the rule makes no overt allusion, and for which it gives no guidance. To the extent that the form of the rule suggests that the controlling mode of reason will be deductive, it gives rise to expectations that are seriously misleading. The real discourse of the law is invisible.

This may seem bad enough, but in practice things are even worse, and for two reasons. First, however sophisticated and complex one's reasoning may in fact be, at the end of the process the legal speaker is required after all to express his or her judgment in the

most simple binary terms: either the label in the rule fits or it does not. No third possibility is admitted. All the richness and complexity of legal life seems to be denied by the kind of act in which the law requires it to be expressed. For example, while we do not know precisely how the "dwelling house" or "remarriage" questions would in fact be argued out, we can see that the process would be complex and challenging, with room both for uncertainty and for invention. But at the end of the process the judge or jury will have to make a choice between two alternatives, and express it by the application (or nonapplication) of the label in question: this is, or is not, a "dwelling house." In this way the legal actors are required to act as if the legal world really were as simple as the rule misleadingly pretends it is. Everything is reduced to a binary choice after all.

Second, it seems that the force of this extreme reductionism cannot be evaded by giving the terms of legal rules slightly different meanings in different contexts, for the rudiments of logic and fairness alike require that the term be given the same meaning each time it is used, or the system collapses into incoherence and injustice. The most basic rule of logic (the rule of noncontradiction) and the most basic rule of justice (like results in like cases) both require consistency of meaning.

A familiar example demonstrating the requirement of internal consistency in systematic talk about the world is this: "However you define 'raining' the term must be used for the purposes of your system such that it is always true that it either is or is not 'raining.'" Any other principle would lead to internal incoherence, and would destroy the regularity of the discourse as a way of talking about the world. To put the principle in terms of the legal example we have been using: however one defines "dwelling house" for purposes of the burglary statute it must be used in such a manner that everything in the world either is or is not a "dwelling house"; and because the law is a system for organizing experience coherently across time and space, it must be given the same meaning every time it is used. Logic and fairness alike require no less.

The trouble is that these principles of discourse are very different from those employed in ordinary conversations. Who in real life would ever take the view that it must be the case that it either is or is not "raining"? Suppose it is just foggy and wet? If someone in ordinary life asked you whether it was raining out, you would not expect that person to insist upon an answer cast in categorical terms, let alone in categorical terms that were consistent over a set of conversations. The answer to the question would depend upon the reason

it was asked: does your questioner want to know whether to wear his raincoat? Whether to water the garden? To call off a picnic? To take a sunbath? In each case the answer will be different, and the speaker will in no case feel required to limit his response to an affirmation or negation of the condition "raining." One will speak to the situation as a whole, employing all of one's resources. And one will not worry much about how the word "raining" has been used in other conversations, on other occasions, for the convention of ordinary speech is that critical terms are defined anew each time for the purposes of a particular conversation, not as part of a larger system.

What is distinctive about conversations about the meaning of rules is their systematic character: terms are defined not for the purposes of a particular conversation, but for a class of conversations, and the principle of consistency applies across the class. And this class of conversations has a peculiar form: in the operation of the rule all experience is reduced to a single set of questions — say whether the elements of burglary exist in this case — each of which must be answered "yes" or "no." We are denied what would be the most common response in our ordinary life, which would be to say that the label fits in this way and not in that, or that it depends on why you ask. The complex process of argument and judgment that is involved in understanding a legal rule and relating it to the facts of a particular case is at the end forced into a simple statement of "application" or "nonapplication" of a label.

But there is another layer to the difficulty. We may talk about the requirement of consistency as a matter of logic or justice, but how is it to be achieved? Can we for example ensure that "dwelling house" will be used exactly the same way in every burglary case? Obviously we cannot, for a number of reasons. First, different triers of fact will resolve conflicts of testimony in different ways — one judge or jury would believe one side, a second the other — and this builds inconsistency into the process at the most basic level, that of descriptive fact. Second, while the judge may be required to give the same instruction to the jury in every case, the statement of that instruction will to some extent be cast in general terms and admit a fair variation of interpretation, even where the historical facts are settled (e.g., a definition of "dwelling house" as "premises employed as a regular residence by those entitled to possession thereof"). Third, if the instruction includes, as well it might, a subjective element (such as something to the effect that the important question is whether the defendant *knew* he was breaking into a place where people were living), there will be an even larger variation in the applica-

tion of what is on the surface the same language.

In short, the very generality of legal language, which constitutes for us an important part of its character as rational and as fair, means that some real variation in application must be tolerated. As the language becomes more general, the delegation of authority to the applier of the language, and hence the toleration of inconsistency in result, becomes greater. As the language becomes more specific, this delegation is reduced, and with it the potential inconsistency. But increasing specificity has its costs, and they too can be stated in terms of consistency. Consider a sentencing statute, for example, that authorizes the punishment of burglars by sentences ranging from probation to five years in prison. This delegation of sentencing authority (usually to a judge) seems to be a toleration of wide variation in result. But it all depends upon how the variation is measured. For to insist that all burglars receive the same sentence, say three years in jail, is to treat the hardened repeater and the inexperienced novice as if they were identical. That treatment is "consistent" on one measure (burglars treated alike) "inconsistent" on another (an obvious difference among offenders not recognized).

For our purposes the point is this: the requirements (1) that terms be defined not for a single conversation, but for the class of conversation established by the rule in question and (2) that the meaning given words be consistent through the system are seriously undercut in practice by a wide toleration of inconsistency in result and in meaning. I do not mean to suggest, however, that either the requirement of consistency or its qualifications are inappropriate. Quite the reverse: it seems to me that we have here a dilemma central to the life of any discourse that purports to be systematic, rational, and just. My purpose has simply been to identify a structural tension in legal discourse that differentiates it sharply from most ordinary speech.

In addition to the foregoing I wish to mention one other quality of legal literature, which radically distinguishes it from ordinary language: its procedural character.

The Procedural Character of Legal Speech

In working with a rule one must not only articulate the substantive questions that it is the purpose of a legal rule to define — is dusk "nighttime"? Is a bicycle a "vehicle"?, etc. — one must also ask a set of related procedural questions, of which very little recognition is usually to be found in the rule itself. For every question of interpretation involves these related questions: who shall decide what

this language means? Under what conditions or circumstances, and subject to what limits or controls? Why? And in what body of discourse are these questions to be thought about, argued out, and decided?

Suppose for example the question is what the word "nighttime" should mean in the burglary statute; or, to begin not with a rule but with a difficulty in ordinary life, whether the development of a shopping center should be permitted on Brown's farm. It is the professional habit of the lawyer to think not only about the substantive merits of the question, and how he would argue it, but also about (a) the person or agency who ought to decide it, and (b) the procedure by which it ought to be decided. Is the shopping center question a proper one for the zoning commission, for the neighbors, for the city as a whole, or for the county court? Is the "nighttime" question one for the judge to decide, for the jury, or — if you think what matters is the defendant's intent in that respect — in part for the defendant himself? Every legal rule, however purely substantive in form, is also by implication a procedural and institutional statement as well, and the lawyers who read it will realize this and start to argue about its meaning in this dimension too. The function of the rule is thus to define not only substantive topics but procedures of argument and debate, questions about the definition and allocation of competencies to act; the rule does this either expressly or by implication, but in either event it calls upon a discourse that is largely invisible to the reader not legally trained.

To sum up my point in a phrase, what characterizes legal discourse is that it is in a double sense (both substantively and procedurally) constitutive in nature: it creates a set of questions that define a world of thought and action, a set of roles and voices by which experience will be ordered and meanings established and shared; a set of occasions and methods for public speech that constitute us as a community and as a polity. In all of this it has its own ways of working, which are to be found not in the rules that are at the center of the structure, but in the culture which determines how these rules are to be read and talked about.

I have identified some of the special ways of thinking and talking that characterize legal discourse. Far more than any technical vocabulary, it is these conventions that are responsible for the foreignness of legal speech. To put it slightly differently, there is a sense in which one creates a technical vocabulary whenever one creates a rule of the legal kind, for the operation of the rule in a procedural system itself necessarily involves an artificial way of giving meaning

both to words and to events. These characteristics of legal discourse mean that the success of any movement to translate legal speech into Plain English will be severely limited. For if one replaces a Legal Word with an Ordinary English Word, the sense of increased normalcy will be momentary at best: the legal culture will go immediately to work, and the Ordinary Word will begin to lose its shape, its resiliency, and its familiarity, and become, despite the efforts of the draftsman, a Legal Word after all. The reason for this is that the word will work as part of the legal language, and it is the way this language works that determines the meaning of its terms. This is what I meant when I said that it is not the vocabulary of the legal language that is responsible for its obscurity and mysteriousness, but its "cultural syntax," the invisible expectations governing the way the words are to be used.

TEACHING LEGAL LITERACY: THE METHOD OF A POSSIBLE COURSE

Thus far I have been speaking to you as a lawyer to nonlawyers, describing those features of legal discourse that most mark it off from ordinary speech and make it difficult to understand. Now I wish to speak to you differently, as one teacher to another, and ask what kind of knowledge of this language can best be the object of an advanced high school or college writing course. What kind of legal literacy is it possible to help a nonprofessional attain? How can this best be done?

As I have made clear above, I start with the idea that literacy is not merely the capacity to understand the conceptual content of writings and utterances, but the ability to participate fully in a set of social and intellectual practices. It is not passive but active; not imitative but creative, for participation in the speaking and writing of language is participation in the activities it makes possible. Indeed it involves a perpetual remaking both of language and of practice.

To attain full legal literacy would accordingly require that one master both the resources by which topics are argued in the law and the set of procedural possibilities for argument that are established by the law, from the administrative agency to the jury, from the motion to strike to the writ of mandamus. Literacy of this sort is the object of a professional education and requires full-time immersion in the legal culture. It obviously cannot be attained in a high school or college course.

But this does not mean that nothing can be done to reduce the gap between the specialized language of the law and the ordinarily

literate person. While one cannot make nonlawyers legally literate in the sense of full and active competence at law, one can do much to teach them about the kind of language law is and the kind of literature it produces. I think a student can come to understand, that is, something of what it means to speak a discourse that is constitutive and procedural in character and founded upon the form we call the rule. The successful student will not be able to practice law, nor even follow the lawyer in all of his moves, but he will have some knowledge, both tacit and explicit, of the kind of expectations the lawyer brings to a conversation, the kinds of needs and resources he has, and the kinds of moves he is likely to make. If what is at first invisible can be seen and understood, legal discourse will lose some of its power to frighten and to mystify. One will of course still experience a lack of comprehension, but these experiences will more often occur at expected moments and be of expected kinds. This means that one will be more confident about what one does comprehend, more certain about the moments at which one is entitled to insist upon clarification, or upon being heard. All this can come from an understanding of the legal system as a constitutive rhetoric based upon the rule.

But how is such an understanding to be created? An explicit analysis of the sort I have sketched above will be of little assistance to most students, for it proceeds largely at the conceptual level and literacy involves knowledge of a very different kind. (A student could learn to repeat sentences describing the rhetoric of the law, for example, without ever having any real sense of what these sentences mean.) Of almost equally limited value for our purposes are most courses in the structure and nature of our government, for once again the student often learns to repeat what he hears without any sense of what it means (think of the cliches about "checks and balances," for example, or the "imperial presidency"). Courses that attempt to teach students legal substance are often not much better, for knowledge of the rules does little good unless the student understands something of what it means to read and write a discourse based on rules. Besides, it frequently happens that the topics chosen are those of current popular interest, like abortion or the death penalty, where legal discourse (at least at the Supreme Court level) is not very sharply distinguished from ordinary political and journalistic talk.

More promising than the foregoing, or useful perhaps as a possible supplement to them, would be a course that asked students to write not about the law, but about analogues to the law in their own lives. The idea would be that they would become more competent

not at law itself, but at law-like writing, and that this would teach them much not only about the law, but about themselves and their world.

What I have in mind is something like the following. Suppose students were asked to write a series of assignments about an aspect of their own lives that was regulated by rules — say their athletic team, or the school itself, or their apartment house, or their part-time jobs. These rules could be examined from several different perspectives. First, for example, students might be asked simply to reproduce the rules governing parts of their lives. Without overtly burdening the students with the knowledge, this assignment would raise very sophisticated and interesting questions about the nature of rules in their social context (for example about the relation between written and unwritten rules). One might ask the students: "In what form do these rules appear in the world? Are they written and published, and if so where? How do you know that these rules apply to you? Are they all the rules that do apply, and if so how do you know that? If the rules are not written and published, how do you even know what the rules are? Why do you suppose they are not written and published?" Or: "What exceptions are there to these rules, and how do you know?" And so on. Similar questions could be raised about the relationship between rules and authority: "Who promulgated these rules, and upon what authority? How do you know? What does it mean to have authority to promulgate rules of this kind?" And so on.

The students could then be asked to talk about the ways in which questions arising under their rules should be resolved. What problems of meaning do these rules present? How should they be resolved, and by whom, acting under what procedures? Perhaps here a teacher could reproduce one or two sets of rules the students had provided, and think up imagined situations where the application of the rules would be problematic. (After one or two such assignments, the students could be asked to do it themselves.) This would present the students with the difficulty of thinking in terms of a system meant to operate with constant or consistent — or at least apparently consistent — definitions over time, for they can be led to see that the way they resolve the meaning of the rules in one case will have consequences for others. This involves an extension both of imaginative and sympathetic capacities, and a complication of the idea of fairness. It might also begin to teach them that in difficult cases the meaning of the rules cannot be seen in the rules themselves but must be found elsewhere: in the resources and equipment one brings

to thought and argument about the questions. What is more, since these resources are partly of our own invention, it is right to ask how they can be improved. Finally, depending on the particular system of rules, this method may lead the students to think in terms of procedures and competences: why the judgment whether a particular player is "trying hard" (as required by a rule) is a matter for the coach, not for the players (or vice versa); why the umpire's decision that a pitch is a strike or a ball must (or must not) be final, and so on. Or one might consider rules governing life in a cooperative apartment, and the procedures by which decisions should be made when there are real differences of opinion about the necessity of roof repair, the costs of heating, and so on.

Finally, students could be asked to draft rules of their own devising, whether regulations or contractual provisions, and submit them to collective criticism. This could be a real lesson in the limits both of language and of the mind, as the student realizes how little power he actually has to determine how his words will be given meaning by others and how little he can imagine the future that his rules are intended to regulate.

All of this could be done with materials from the student's own life, without the use of legal terms or technicalities. It need not even be done in Standard English: the student's writing (or talking, if these assignments were done orally) should indeed reflect the way people actually speak in his own world. One important lesson for us all might be the discovery that it is not only in the law, or only in the language of the white middle class, that community is constituted, or that argument about justice proceeds.

To do this with material from the students' own lives would tend to make the process seem natural and immediate, within their ordinary competence. But in the process they should be introduced to questions of extraordinary depth and sophistication: about the construction of social reality through language (as they define roles, voices, and characters in the dramas they report); about the definition of value (as they find themselves talking about privacy or integrity or truthfulness or cooperation); about the nature of reasoning (as they put forward one or another argument with the expectation that it cannot be answered, as they try to meet the argument of another, and so on); and about the necessarily cooperative nature of society (as they realize that whatever rules they promulgate can work only with the assistance of others and must work equally for all people and all cases); and so on. They might learn something of what it means that the law seeks always to limit the authority it

creates. They might even come to see that the question, "what is fair?" should often include the qualifications "under this set of rules, under these procedures, and under these particular circumstances." It might be a good thing at this stage to read as well some actual legal materials: a statute, a judicial opinion, a piece of a brief. If I am right in my expectations, after working on rules in their own lives the students would find this material more complex, more interesting, and more comprehensible — also perhaps more difficult — than before. This would itself be an important demonstration of legal literacy, and a direct manifestation of the student's increasing competence as an educated citizen.

The law itself can be seen as a method of individual and collective self-education; as a discipline in the acknowledgement of limits, in the recognition of others, and in the necessity of cooperation. It is a way in which we teach ourselves, over and over again, how little we can foresee, how much we depend upon others, how sound and wise are the practices we have inherited from the past. It is a way of creating a world in part by imagining what can be said on the other side. In these ways it is a lesson in humility. Of course a professional training is no guarantee of such an education — far from it — but it is not a prerequisite either. What I mean to suggest in this paper is that a training in the analogues of law that are found in ordinary life, if done in the right way, can be a stage in such a development: that this kind of legal literacy may be a true part of general education.