

PREFACE

I

In its original form this book was cast as a course book for law students. It asks, and is intended to help, them to become literary and cultural critics and to learn to apply their talents of analysis to the discourse of the law, both as that discourse is employed by others and as they themselves put it to work in their own writing. In the process of abridgement I have removed much of the more technical legal material, with the aim of rendering the book more readily available to the general reader. In its present form, I believe, it asks nothing significant of its reader for which a legal training is necessary.*

Of course this book is still formally addressed to a "law student," but I trust you can take that as the sort of fiction that it is — a bit as though this were an epistolary novel, perhaps, in which the reader is one of the characters — and I hope that you may even take some pleasure and interest in what happens to this "reader" as the text progresses. My object in this book is to make a place for myself and to help my reader do likewise, a position from which the world, and our contributions to it, can be seen and judged in a new way. The book is meant to lead the law student away from the law to such a position, which must be largely of his or her own making. For other readers, it does not seem to me to matter much whether they approach it from the legal side or from some other direction: from that of literary criticism, for example, or certain sorts of anthropology or sociology or philosophy or history, or indeed, perhaps most fruitfully of all, from the experience of ordinary life.

In speaking to the law student, then, I am taking advantage of an audience, an occasion, and a relationship to give particular meaning — a local habitation — to certain large and interactive themes about language and culture and the individual mind, themes that are often

* I do hope that lawyers and law students can read this abridged edition, as well as the original one, with interest and profit. But the original edition gives considerably fuller treatment to the issues raised here, and it gives attention to others as well — the structure of the statute, the nature of judicial criticism, the ethics of legal argument, the way rules construct reality, the nature of institutions, the history of equity, the law of slavery and race, and so forth.

addressed in terms too far removed from actual life. In the conversation this book establishes with “the law student” I accordingly mean to speak, not to the law student alone, but to the general reader as well, and not only about legal language and legal art, but about language and art more generally.

In making this abridgement I have focused in particular on three concerns: (1) The way different languages (and different uses of language) constitute different cultures, communities, and selves. In this sense, this is a work of cultural or ideological criticism. (2) The significance of different ways of talking about other people: as objects, caricatures, instruments (as “means to an end”) or as centers of autonomy and value (as “ends in themselves”). This aspect of the work is political and ethical in concern, though not in terminology. (3) The possibilities of different forms of speech or expression: of the judicial opinion or the poem, for example, or of the narrative, in the law and out of it. Here the criticism is both formal and cultural: the major focus of interest, and the central value, is the life of the imagination working with inherited materials and against inherited constraints.

The reader may notice that I say almost nothing about what is called “literary theory” in the book or in this preface. The main reason for this is that I think general argumentative theorizing about reading and writing to be of rather limited value and that one’s best explication of one’s critical attitudes lies in the actual performance of critical writing. Readers interested in such questions may wish to turn to my two later books, *When Words Lose Their Meaning* and *Heracles’ Bow*, in which I work out a general way of reading more fully than I do here.

II

One part of my subject is of course the law, and perhaps it may be of some use, especially to the nonlawyer, if I say a word about the conception of law at work in this book.

The dominant view of the law in the English-speaking world today is positivistic and rule-focused: law is seen as a system of rules emanating from a particular sovereign to a population bound by it. This view, with its quasi-scientific overtones—the original proponent of the “case method” of legal instruction thought that judicial opinions could be studied like plants to discover laws of regularity, which were themselves “the law”—is itself a response to an earlier view, usually called the natural law tradition, in which the conceptions of justice and law were fused rather than separated. In this tradition law was regarded as an object of reverence, a source of authority external to the will (or mere preference) of those momentarily in political power.

Both positivist and natural law theories conceive of law as a distinct social and cultural entity with a structure, life, and importance of its own. In today's law schools, however, the idea of law itself is under attack, and from at least two directions. One branch of the intellectual right, for example, wishes to reduce law to policy, and policy to cost-benefit analysis of a kind that counts as values only items in which a market exists. This view regards the market, when functioning correctly, as the only—or only democratic—determinant of value. The premises of this view are naturally atomistic and materialistic; and in assuming against all experience that a dollar to a rich man is of exactly the same value to its possessor as a dollar to a poor man, it is deeply biased towards those who already have wealth. The market is a democracy only on the principle of one dollar, one vote. From the left the attack is much vaguer: law is reduced to the expression of class interests, usually in a rather gross and unanalysed form; law is always illegitimate when the class structure it reflects is unfair, which of course it always is. The proposed remedy is community—an ideal I certainly share—but the specific recipes sometimes seem rather authoritarian and intolerant.

In this book I am not interested in arguing with any of these views but in setting forth a view of my own. I do this less by conceptual presentation than by exemplification and implication, the only way I think it really can be done at all. But I can say this much here about my position: I think that the law is not merely a system of rules (or rules and principles), or reducible to policy choices or class interests, but that it is rather what I call a language, by which I do not mean just a set of terms and locutions, but habits of mind and expectations—what might also be called a culture. It is an enormously rich and complex system of thought and expression, of social definitions and practices, which can be learned and mastered, modified or preserved, by the individual mind. The law makes a world. And the law in another sense, as the profession we teach and learn and practice, is a kind of cultural competence: an art of reading the special literature of the law and an art of speaking and writing—of making compositions of one's own—in this language. It is a branch of rhetoric, and one of my aims in this book is to work out some sense of the kind of rhetoric it is: the structures of legal thought and expression. Of course the law is not just language, for it is in part about the exercise of political power. But I think the greatest power of law lies not in particular rules or decisions but in its language, in the coercive aspect of its rhetoric—in the way it structures sensibility and vision. How can this power be faced and responded to by one who is doomed, or privileged, to speak that language throughout his or her professional life?

III

For me the law is an art, a way of making something new out of existing materials—an art of speaking and writing. And, as I say in the introduction below, this book accordingly addresses its law student reader “as an artist.”

But to speak of art is to imply the possibility of critical judgments—about one’s language, one’s compositions, one’s culture and one’s community—and how can one who is, like all of us, partly shaped by one’s culture, pretend to make such judgments with any degree of confidence? Where can we stand to see and to judge? This question states one of the central issues of our day, and I have no easy answer. This book is in fact intended to help the reader work out a response for herself, and in an important sense that is the only response that matters. But as you read you will notice two basic concerns at work in what I say, and these express certain sets of values. The first of these is an interest in the character that a speaker gives herself, her audience, and those she talks about. To what degree does a speaker recognize the experience of others, their autonomy and their difference? Are other people collapsed into formulas and caricatures or are they treated as independent centers of meaning and value? And as what kind of person does she define herself? This is at one level a kind of intellectual or aesthetic concern, but it is ethical and political as well: what kinds of justice can there be in a world in which some people are reduced to objects of manipulation by others, or where their stories are erased? The implications of this line of thought—which is obviously not original with me but simply reflects the most traditional strains of western ethical nonutilitarian thought, at least in the Christian era—are plainly subversive of certain kinds of dehumanizing modern institutions and practices, both in the law and out of it. But for me, as I make plain below, the law can to some degree be regarded as an institution that is founded on the principle of recognizing others, in large part by giving them a chance to tell their stories and have them heard.

The second interest is in the process of integration or composition: the putting together into coherent wholes of what would otherwise be fragmentary or broken. This concern runs through various aspects of life: in the life of the individual, the integration of the private and the professional, of feeling and thinking; in a particular text, the integration of the particular and the general, of unity and contradiction; in the world of culture, the integration of different forms of expression, from poetry to law. (The structure of this book is indeed intended to exemplify one version of this kind of integration: I ask you to read it not as an anthology but as a composition.) The implications of this emphasis are likewise subversive of certain established practices, especially of some

academic thought and writing; but once more, I think, the law can be seen as a method of integration, a way of putting together different voices, different languages, into a single composition; a way of comprehending two opposing sides and what can be said in favor of each.

IV

This is also a teaching book and the view of education at work in it is, naturally enough, related to the view of law I have just summarized. For me a real education is never the acquisition of information or data, but always a learning how to do. It is an engagement in an activity, and the activity always means more than can be said. We learn to do, by doing; then we must learn to think about what we have done. In this sense an education is always introspective. The subject of this book's teaching is writing, and the idea of writing at work here is not as a kind of learnable technique or technology, a method of manipulation, but as an art of making: making language, character, and community, making a culture and a world. Writing in this sense can only be taught by giving another an opportunity to write, not by training in rules and forms, and this book is meant to offer a set of such opportunities. Law, as you can see, is for me a kind of writing, at its heart less an interpretive process than a compositional one. The central task for the lawyer from this point of view is to give herself a voice of her own, a voice that at once expresses her own mind at work in its best way and speaks as a lawyer, a voice at once individual and professional.

To examine one's learned activities is to discover that one already knows infinitely more than one can express, for no activity, even the simplest, can be wholly explained or understood. Students in formal courses often think that what they already know is irrelevant to the work of the classroom. But actually, in any good course, it is not merely relevant but central. One aim of the writing assignments in this book is to encourage the student to think and write about aspects of her ordinary life that are analogous to what she is learning in law school: in this way she may learn that she already "knows" much of what she is to learn. In this sense education really is, as Plato said, a kind of remembering; remembering not a life before birth, but a life that still goes on below the surface of conscious thought and attention.

The idea at the heart of this book is that a legal education can be a liberal education: a training in the ways one can learn from one's own experience and acquire experience of a new and better kind; in the ways one can learn from one's culture and contribute to it; in the ways one can live with an increased awareness of the limits of one's knowledge and mind, accepting ambiguity and uncertainty as the condition of life. This book is meant to summarize my own education at a certain stage,

and offer it to the reader, not as an example to be imitated but as a statement from one person to another: here is the best that I can do; what can you do?

In making this abridgment I have made no changes in the text but merely selected certain sections for inclusion, with the aim of making the core of the book more readily accessible to a general reader. This means that the voice of the text is more youthful and exuberant, perhaps more wild, than my present voice; also that it occasionally speaks in ways (especially in its universal use of male pronouns) that I would now change. But the earlier self that made this book perhaps has something to teach, and I thought it best to leave its voice alone.

J. B. W.