

PREFACE

The task of telling the reader what sort of book he has in his hand is unusually difficult in this case, for this book does not fit easily into any existing category. Since it might be said to have as its purpose the definition of a new subject, or at least a new way of addressing one, it cannot be classified by identifying its subject matter in traditional terms, and any introductory remarks can be at best only suggestive. In what follows, I try to give some idea of how the book can be used to teach a course, but it is also my hope that one can be interested simply in reading it through.

I have sometimes said that this is a course in reading and writing, but the pretense that such a phrase clarifies the subject is at least mildly ironic, since, as you shall see, in my view “reading and writing” could be said to cover the whole of one’s education. Perhaps the title points the way as well as anything might do: what can we learn and say about the legal imagination? What are the ways in which lawyers and judges traditionally conceive of and talk about experience, and how can these modes of thought and expression be mastered — and perhaps modified — by an individual mind? What are the consequences of learning to function in these ways? We shall look at the literature of the law as a literature of the imagination of which such questions can be asked, both directly and by comparing it with other literatures. But we do not stop there, since the student is asked how he can contribute to this literature of the law — to this world of thought and expression — and in doing so, how he defines his profession and himself. For one of our premises is that one is responsible for what one does and writes.

Another way to put it might be to say that the question upon which the course proceeds is this: “What does it mean to learn to think and speak like a lawyer?” The readings and the writing assignments can be said to elaborate and complicate 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 has done, to speak in his own voice about his experience of writing and thinking. He 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. He must judge for himself what these possibilities are. The demand is upon his imagination, his ability to make sense out of what he does by looking beyond it.

As you look at the readings, you will notice that in selecting them I have drawn heavily upon my own reading of literature.* Of course I hope that others will find this material and the lines of thought to which it gives rise of interest, but my purpose is not to claim that a literary education is the only one for a lawyer or for this course: it is to establish a way of looking at the law from the outside, a way of comparing it with other forms of literary and intellectual activity, a way of defining the legal imagination by comparing it with others. The non-legal readings are meant to give us a common sense (if an incomplete one) of what legal literature leaves out, of what others do that the law does not, and to define a context out of which judgments can begin to be drawn and against which they can be tested. In the notes and questions I bring to both sorts of literature some of the concerns of the literary critic, but I hope I do so in a way that the general reader can easily follow. The aim is not to make a systematic comparison between law and literature, to articulate a general theory of literary analysis or anything like it, but to bring to life by the contrast a set of loosely related questions about language and imagination, to open up diverse and competing lines of thought among which choices can be made by the student or other reader. The activity which I mean to encourage in defining as I do the lawyer as writer is an enterprise of the independent intelligence and imagination.

What might appear to be something of an eccentric diversity in the selection of passages has a real purpose: it is a way of urging the student to bring together the various elements of his own education (however disparate they may seem to be), a way of claiming that nothing is irrelevant until it is shown to be. One who knows about biology or mathematics or music ought to be able to draw connections between these activities and the law similar to those I draw between law and literature. The idea is that the law should be compared not just with literature but with anything that the reader knows, that it should be seen as a part of a larger individual and intellectual life. Accordingly, there is one other resource upon which the student is constantly encouraged to draw: his own experience of social and personal life. Again and again he is asked to talk about his life as a lawyer by comparing it with his life as a person, to connect what he is doing with what he knows.

The student, then, is asked to speak out of an awareness of four sorts

* In fact, as later notes will make clear, I ask the student to read Shakespeare's *Troilus and Cressida* in connection with his work in Chapter 1; and in connection with Chapter 3, Jane Austen's *Pride and Prejudice* and Euripides' *Alcestis*.

of material: the literature of the law, the introduction to literary criticism this book is meant to afford, his intellectual activity outside the law, and his ordinary experience of life. The premise upon which we operate is that the activity called the law can be seen as an activity of the imagination, an activity that creates and uses a literature which we are interested in assessing — what is the state of the legal imagination in America? — and to which the student is asked to contribute, feeling free to bring into play anything that he knows or is. The questions and assignments in this book, therefore, do not ask for answers of the sort that the questions in a property book might be said to call for, but rather are meant as occasions for the play of the individual mind and imagination, as invitations to talk. The student is addressed and asked to speak not as a student but as an independent mind.

Although many of the issues with which this book deals — what it means to speak in a language of rules, how the judicial mind connects the particular and the general, and so on — are sufficiently familiar to lead one to the supposition that this is really a jurisprudence book in disguise, I trust you can see why I am reluctant to call it that. Such a name would make claims that I want to avoid — and which would indeed not be warranted — and in any event, the focus of this course is far from the center of usual philosophical discourse. The effort of the book is not to reach conclusions, even tentative ones, but to define responsibilities. The hope is not that a systematic view of life will be exposed, but that the student will come to some new awareness of his place in the world, of his powers and obligations. In every paper he defines himself as a mind, and you might say that this act of self-expression is our real subject. Not a legal writing course, then, but a course in writing.

It might be summed up by saying that the student or other reader is asked to turn and look back on his life and talk about it, to take a position from which he can say that his whole education (including his legal education to date) lies within his ken, and ask: "Where do I go now?" He is asked to collect himself for the moment and imagine his future.

"How is this book to be used?" you may properly ask. In the Introduction to the Student, I say that each student is charged with the responsibility of making his own course out of these materials; and although the questions are meant to provide some direction, the same goes for the teacher too. The course is inevitably different each time it is taught, as different personalities, interests, and capacities find expression in it.

But it may be of interest if I say something of what I have usually done. I have the students write a paper each week (due two days before

our two-hour class), usually on one of the writing assignments given in the text. I duplicate portions of these papers without the writers' names, and it is mainly out of these that we make our class discussion. Another teacher might prefer to run a class that meets several times a week, and the emphasis could be on the readings and questions in the book rather than on the papers. Indeed it need not be taught as a writing course at all; and as I say above, I hope the book can be read outside any formal course of instruction.

I have included more writing assignments than can reasonably be done in a semester. This should permit the exercise of the individual teacher's choice and some variety from year to year.* In addition, I do not hesitate to make a writing assignment out of one of the questions not originally intended for written response, or to combine two or more assignments for the same week, or even to have different students write on different questions. And of course another teacher might want to work out his own writing assignments to replace some or all of those included here. Another practice of mine, for what it is worth, is to tell the student that if for any reason he does not wish a particular paper or portion of one to be duplicated, he need only indicate that when he hands the paper in. And since the major purpose of this course is to encourage him to form and work with his own interests, to make his own questions, I begin the course on the understanding that he is free to disregard any assignment if he wishes and hand in a paper on some other topic instead. I also agree to read any writing of any kind that he does during the semester. Not a great many students take advantage of these possibilities, but I am usually pleased when they do. One warning: to build a class around the writing of students is to subject their egos and emotions to considerable strain, especially where the recurring questions are perplexing and important ones — what sort of life can I make for myself as a lawyer? how do I define myself and my future in what I write? — and a class taught this way can work only if its members trust each other, if there is a sense of shared interest and concern. Partly for this reason I encourage the students to talk matters over outside of class and to feel free to read and criticize each other's papers while they are in the process of composition. If the class is too large for the teacher to read every paper, I recommend the practice of having the students exchange papers for written comments before handing them in. This ensures that every paper has a reader, and of course the process of criticism is itself of value. But most of all, it may help create the sense that we are all colleagues here. I do not think this course lends itself to teaching by competitive methods.

* But the book is intended to have a real structure, to carry its reader from one situation to another, and I think it would probably be a mistake to omit Chapters 1 or 6.

From time to time the materials include alternative and (in the Appendix) supplementary writing assignments. The purpose is to increase the choices available to the teacher, student, and other reader, and to make some variation possible from year to year. The distinction between alternative and supplementary writing assignments, while not rigid, is this: alternative assignments might suitably be substituted for the main writing assignments; the supplementary assignments should probably be done in addition to the main assignments, rather than instead of them, because they usually raise questions that are specialized or peripheral to the lines of thought traced out in the text and excerpts.

The book is addressed to the individual student, not to the usual anonymous reader. I find this form of address congenial, in part because it seems to me to be itself a way of teaching: to address someone as an ideal student, as if he were someone he is not (and you are not), is a way of expressing a view of what you are trying to do, of what you wish you both were, and it may exert some pressure in the right direction. That my own voice is somewhat more personal here than is usually the case is a reflection of an attempt to define a candid relationship with the student, not a claim for the value of my own idiosyncrasies. The hope is that the student will respond in kind, that he will be less timid about exposing his own individuality. I hope other teachers will not be inhibited by my tone from exposing their own intellectual personalities, in similar ways, in courses that they teach using this book. One of my purposes is to encourage the student to make a life of his own in the law, to resist the pressures to conform to the expectations of others. I try to record here something of my own attempt to do that as a way of urging him to assert himself boldly. The teacher will have to be prepared to assert his interests and capabilities too, but I think it best not to hide that fact by a pretended objectivity of voice. All I can do is urge him to make a course of his own out of these materials, treating them with no more respect than he thinks they deserve.

I have included many more questions and notes than is typical of the traditional legal casebook, primarily on the grounds that both teacher and student can rightfully ask for more than the usual assistance in working through a book which departs so markedly from the familiar. Also, since one hope is that the student can be asked to read each section of the book on his own with enough understanding and critical judgment to respond well to the writing assignments, it is important for him, as well as for the ordinary reader, that this be a self-teaching book, and the questions are an attempt to make that possible. There is obviously nothing sacred about the lines of questioning I set up, and all readers are encouraged to create and pursue their own, but I do hope that the questions I suggest will prove to be of some interest and assistance.

Although the particular audience addressed by this book is a student who has at least some experience of legal education, I think the book also can be used as an introduction to law either in law school or before. To see how law students are addressed here might be of some educational value to undergraduate students, conceivably even affecting their expectations of their own futures. I also hope that the book may be read by students of literature, who may be interested by the claim implicit here that the activities of the literary critic, his distinctions and concerns, may have significance for the professional lives of practical people.

I would be most interested in receiving any suggestions or criticisms that readers of this book might have, especially those who use it in the classroom.