

Keep Law Alive

Keep Law Alive

James Boyd White



CAROLINA ACADEMIC PRESS

Durham, North Carolina

Copyright © 2019
James Boyd White
All Rights Reserved

Library of Congress Cataloging-in-Publication Data

Names: White, James Boyd, 1938– author.

Title: Keep law alive / James Boyd White.

Description: Durham, North Carolina : Carolina Academic Press, LLC, 2019.

Identifiers: LCCN 2019003160 | ISBN 9781531015077 (alk. paper)

Subjects: LCSH: Law—United States. | Law—Philosophy.

Classification: LCC KF389.W45 2019 | DDC 340/.1—dc23

LC record available at <https://lccn.loc.gov/2019003160>

e-ISBN: 978-1-5310-1508-4

Carolina Academic Press
700 Kent Street
Durham, North Carolina 27701
Telephone (919) 489-7486
Fax (919) 493-5668
www.cap-press.com

Printed in the United States of America

To Mary

Contents

Acknowledgments xi

Foreword xiii

ONE + LEGAL KNOWLEDGE AS AN ART: READING (AND WRITING) A STATUTE	3
What Lawyers Know	4
The Lawyer as Writer	7
The Model Penal Code	10
<i>Codifying the Criminal Law</i>	11
<i>Interpretation</i>	12
<i>Putting the Code to Work</i>	14
<i>Conflicts of Discourse and of Purpose</i>	15
<i>Facing Tensions and Contradictions</i>	18
TWO + LEGAL KNOWLEDGE AS AN ART: READING (AND WRITING) A JUDICIAL OPINION	23
<i>Schenck v. United States</i>	25
<i>Abrams v. United States</i>	28
Holmes's Opinion in Dissent	31
<i>The Beginnings of First Amendment Law</i>	34
<i>Difficulty and Paradox</i>	37
<i>An Act of Imagination</i>	39
Legal Knowledge as a Writer's Knowledge	41

THREE - WHAT'S WRONG WITH OUR TALK ABOUT RACE? 45

- Huckleberry Finn* 46
- The Problem of Race-Talk 48
 - The National Narrative* 50
 - What Is Race?* 52
 - The Unique Experience of African Americans* 54
 - Stereotype vs. Malevolence* 58
 - Abstract Judicial Language* 61
 - The "Cost" to the White Student* 62
- How Should We Think about Race? 63
 - Civil War Amendments* 64
 - "State Action"* 66
 - Justice Douglas* 69
 - Which Race?* 71
 - The "Fact" of "Race"* 74
- The Language of War 75

FOUR - TENSIONS DEFINING THE ART OF LAW 81

- Law as Language 82
- Tensions in Legal Thought and Expression 85
 - Between Legal Language and Ordinary Language* 85
 - Between Law and Other Specialized Languages* 88
 - Between Opposing Lawyers* 89
 - Between Competing but Plausible Readings of the Law* 91
 - Between Substance and Procedure* 93
 - Between the Particular and the General* 94
 - Between Law and Justice* 95
 - Between the Past and Present—and the Future Too* 97
- Addressing These Tensions in Writing 97
- Consequences 98
 - The Law Is Not the Rules* 98
 - The Law Is Not Policy* 99
 - The Law Establishes a Set of Possibilities for Original Thought and Expression* 100
 - The Law Is an Art of Mind and Language* 102
- What Does This Mean about Justice? 103

FIVE → LAW, ECONOMICS, AND TORTURE 107

Making the Rich Richer	109
<i>The Consumer Dream and the Ideology of the Market</i>	110
<i>Advertising and Propaganda</i>	112
<i>The Fact of Empire</i>	113
<i>Democracy at Work</i>	115
The Disappearance of Law	115
<i>The Courts and the Law Schools</i>	116
<i>Cost-Benefit Analysis</i>	119
<i>What Law Can Be</i>	120
Dehumanization	122
<i>The Propaganda of Torture</i>	123
“ <i>The Need for Information</i> ”	124
<i>Irrationality</i>	125
<i>Human Slavery</i>	128
Democracy and Empire	130

SIX → DIFFICULTY AND RESPONSIBILITY IN
THE FACE OF EVIL 135

Reading Augustine’s <i>Confessions</i>	138
<i>Translations</i>	138
<i>The Narrative</i>	139
<i>Transformations</i>	140
<i>Failure and Conversion</i>	141
After the Narrative	142
<i>Memory</i>	143
<i>Time</i>	143
<i>Genesis</i>	144
The Modern Lawyer	145
<i>Antigone Voilée</i>	147

<i>Afterword</i>	155
<i>Works Cited</i>	161
<i>Cases Cited</i>	165

Acknowledgments

IT IS A REAL PLEASURE to be able to thank the following friends, who generously read and criticized this book, or parts of it, in draft: Walter Brueggemann, Richard Dawson, Julen Etxabe, Jeanne Gaakeer, Sarah Higinbotham, Martha Jones, John McCausland, Julian Davis Mortenson, Jeffrie Murphy, Pauline Phoa, Jefferson Powell, Jack Sammons, Barry Sullivan, Winnifred Sullivan, Jacobien van Dorp, Joseph Vining, Robin West, and Mary White.

Parts of each chapter have been published elsewhere in somewhat different form and are here reprinted by the kind permission of the publishers. Versions of chapters one and two appeared in “Legal Knowledge,” 115 *Harvard Law Review* 1396 (2002); an earlier version of chapter three appeared in “What’s Wrong with Our Talk about Race?,” 100 *Michigan Law Review* 1927 (2002); a rather different form of chapter four appeared in “An Old-Fashioned View of the Nature of Law,” 12.1 *Theoretical Inquiries in Law*, paper 13 (Tel Aviv University) (2010); an earlier version of chapter five appeared in “Law, Economics, and Torture,” in *Law and Democracy in the Empire of Force*, 265, (edited by me and Jefferson Powell, 2009); parts of chapter 6 appeared in “Augustine’s *Confessions* as Read by a Modern Law Teacher,” 29 *Journal of Law and Religion* 330 (2014); other parts of that same chapter use material from “The Word and the Law,” 41 *Georgia Law Review* 923 (2007), including excerpts from a play by François Ost, *Antigone Veiled* (2004).

I am grateful to Carolina Academic Press for the remarkable cover to this book, which is worth attention. It not only has a beautiful and provocative design, it is founded upon a photograph that has thematic

connections with the book itself. The photo is a picture of the Capitol building in Washington, which we were told was taken in 1865 or thereabouts. That was the year of Abraham Lincoln's second Inauguration, during which he would have given his Second Inaugural Address from the steps we can see in the picture, a moment in our history of which we can all be proud.

A note for the reader: you will notice that sometimes books are cited in the footnotes with no designation of the author, and in those cases, I was the author.

Foreword

MY IDEA IN THIS BOOK is to express my sense of what law is like at its best—how it works, what it offers us, what it requires of us, both as lawyers and as citizens, and what it would mean to lose it. I want to do this at this time in history because, as I say immediately below, I think the law as we know it is subject to serious threats today, threats I elaborate both explicitly and implicitly in the body of the book.

1

The book begins with an immersion in legal thinking of a kind I believe to be of a high and traditional order, and ends with the recognition of another sort of thinking and being which I think may help us live with and respond to the threats I mention.

In it I speak from a world—the world of law and democratic government in which I grew up and was educated and led most of my working life—that is now in peril in our country. This world was built upon the imperfect but real assumption that our polity is a constitutional democracy, based upon a fundamentally reliable electoral process, and that, with all its defects—some of them serious indeed—law is an institution that should be treated with utmost respect as an essential and valuable part of our public world.

My concern here is not with the fundamental features of the rule of law—such as a democratically elected legislature, an independent judiciary committed to respecting authorities external to itself, the requirement that laws be public, the existence of checks and balances designed

to ensure that power is not concentrated in one person or one institution, the principle of habeas corpus that no person should be detained without judicial review of his or her case, the basic requirements of due process of law, the idea of a commonwealth of shared values and interests, the sense that at the heart of every legal case is the question of justice—although every one of these principles is foundational and under serious threat.

A principle I do elaborate is the idea that the work of the judiciary should consist of responsible engagement both with the range of authoritative texts and practices that bear upon the case and with the reality of the world in which the decision will have its life—that is, both with what is commonly called the law and with justice itself. For at the heart of every legal case is the question of justice. As I say in chapter five,¹ I think the Supreme Court of the United States is in danger of losing its commitment to that principle. If so, it will lose its dignity and value as a court as well, becoming just another arena in which political battles are fought out without real regard either to law or to justice.

My aim in this book is not so much to develop the points just made, important though they are, as to define the complex intellectual, ethical, and emotional life at the heart of the law, the life by which the principles I identify are themselves given their life and definition. We could after all have a legal system in which all those principles were nominally affirmed, but which was so crude and thoughtless in its work that they did not in the end mean much after all.

What kind of thinking and writing gives these principles real life? My own sense is that what law calls for in those who practice it, or teach it, or live with it in other ways, is at heart an art, an art of language and composition. The law in this living sense is not just a set of rules or institutions, but an activity of the mind and imagination—a form of life—that has the value of justice at its heart.

What I say here about law is meant to be an expression of basic fealty and respect, both for what the law has been and what it can be. It is necessarily my own version of the life of the law that is recorded here. I am speaking about law as I learned it and practiced it and taught it. I know

1. See “The Disappearance of Law,” pages 115–22 below.

other lawyers would do it differently, which is a good thing, and I hope some do write books of their own, differences and all.

I am speaking both to lawyers, who will naturally have their own ideas about the life of the law, and to nonlawyers, whom I hope to give a sense of how one person at least understands it. My idea is that this book can be read by students in law school and those considering it, by their teachers, by practitioners, and by people with no legal training or experience at all. This means that sometimes I will give information that is unnecessary for some readers; likewise, I will sometimes ask of the reader something that is easy for the lawyer, hard for the nonlawyer.

The book is written in two voices: the voice of the legal expositor and critic in the body of the chapters, where I mainly speak of the reader in the third person, and the voice in the passages between the chapters, where I ask questions of and invite responses from the reader, whom I here mainly address in the second person, as “you.” I hope these two voices complement each other, even, and perhaps especially, where there is tension between them.

The questions I put at the end of each chapter are meant to offer topics of thought for your consideration, not to call for instant answers. You of course may have questions of your own, in which case I encourage you to write them down. Questions of both kinds, yours and mine, can be something of a guide to future reading and thinking, a kind of tool-kit with which to approach both the chapters that follow and your other experiences of law, past and future.

The idea is that as you respond to the material in the text, both as you first read it and as you respond to my questions or your own, you will be engaging with it as a lawyer might, and thus be in a better position to see what it is we may be losing.

2

It is important to say that the threat to the law I speak of is not an entirely new thing or the work of any one person or group. As I will say in chapter five, some of the movements I deplore have been at work for some time and are quite widespread.

But things do seem to be changing very fast, and it is impossible to predict where we will be when this book is actually published, let alone

two or three years later. We may by then have gone in a very good direction or a very bad one, or may be in a kind of unresolved chaos or worse. My hope is that this book will contribute in a small way to the strengthening of law and democracy, or at least to the preservation of its memory.

3

The first section of the book consists of three chapters on standard legal subjects: the Model Penal Code developed by the American Law Institute, a pair of judicial opinions by Oliver Wendell Holmes, and the way the law talks—and should talk—about what we call “race,” especially in the context of what is called “affirmative action.”

I hope what I say about these topics is valid and useful on the merits and as a matter of legal analysis. But as presented in this book I mean these chapters to have an additional and different kind of meaning, as examples of the kind of legal thought and expression that is now in danger of being lost. They represent, that is, versions of a widely shared activity, the activity of law, that is my real subject. It is that which I hope we can keep alive.

My aim is not only to represent that activity but to stimulate it in the reader. That is, as you read these chapters I hope you find yourself responding to points I make—to lines of argument, tentative conclusions, invocations of legal experience—and doing so sometimes with approval, sometimes with doubt, sometimes in opposition. In doing these things you will be engaging in the activity of law itself, and I hope you will feel that to be important.

For readers who have a legal education and training like my own this may seem familiar, fitting a bit like an old glove; for younger lawyers, and those who are not lawyers at all, it may seem strange and awkward. But even if it does, I still hope you will articulate your views to yourself as you read and do so in ways that engage your mind and imagination. If you do, you will be learning a certain way of doing law.²

2. Over the years I have written quite a lot about what I think excellence in legal thought and writing might be, most recently in *Living Speech: Resisting the Empire of Force* (2006). I could try to summarize what I have said elsewhere, but that would be a cumbersome and unsatisfactory exercise. Instead my object here is to present examples of what I think of as

The first level of the response I hope to stimulate in you as the reader is to think about the substantive legal questions I discuss, engaging with me as a fellow lawyer, even if you are doing this for the first time. The second level of response is to think about what you are doing when you respond, positively or negatively, to what you read—for, as I say, this will be one definition of the activity of law that is my subject. As you read, that is, you will be engaging in your own version of the activity of law, and I hope as you do that you can reflect on its nature and character and value.

I also hope for a third level of response, which is that you will raise your eyes from the page and ask yourself what it means for you and for our country and its life that the questions raised here are thought about as they are in the material you read, and in your own responses to it, that is, in the way of law. This is to ask what it means that we are part of a widespread legal culture, in which myriads of similar questions are constantly being contested and thought about and resolved in something like the way displayed here.

The law that I am hoping we can keep alive is a whole way of thinking and acting with each other. It is present in every state, every city, every courthouse, every law office, making up a web of connections that provides much of the informal constitution of our country.

How does the mode of thought set forth here, in which you yourself will engage, define and shape our public life? Who are the actors here—judges, legislators, the Framers of the Constitution, lawyers—and what is the character of their relation with each other? With what degree of respect or skepticism does the good judge approach a statute, say, or contract? With what fears and hopes? Who do the human actors become when they adopt these roles? Who are we as citizens and lawyers: how are we talked about, how are we spoken to? How are these identities defined by the practices of legal thought I am trying to define?

What does it mean to live in a world like this? If it is lost, what will be lost?

legal excellence, which I mean to offer to you as an experience from which you can work out your own sense of it. Of course I do reveal my views, but I mean them only as suggestive. It is important to the life of this book that you engage with it in a way that makes the questions your own.

Take for example the first chapter: what does it mean to live in a world in which there is a private organization called the American Law Institute which sees its responsibility as reforming the law, and doing so with the desire to make it more intelligible, more coherent, and more just? Here the subject is the criminal law, perhaps its most important branch: what does it mean that it is talked about as it is in this Model Code? What does it mean that judges and legislators have, are really required to have, the kind of knowledge that is the subject of this chapter?

Chapter two shifts focus from legislation to judicial action, trying to explicate two opinions by Justice Holmes in such a way as to identify the nature of his extraordinary achievement. In chapter three I address the question of “affirmative action,” showing how I at least would define the questions presented by this practice and how I would try to resolve them. Here in particular I am implicitly inviting you to criticize what I am doing, because in that very criticism you will be acting out of your own sense of what the law should be.

The remaining three chapters continue to address and modify these questions. They consist of a brief chapter defining the art of the law as the art of confronting and living with a certain set of tensions; a chapter outlining the threats to which I think law has been subject for some time now; and a chapter in which I define the kind of education of mind and character that I think is needed if we are to survive the present crisis of democracy and law.

I think of law and democracy together because in our country I think they are so intertwined as to be different facets of the same reality. All of our law has its roots in democratic institutions which derive their authority, directly or indirectly, from what we call “the people.” On the other side, democracy works through the law, again directly or indirectly. That is the only way it can work. In a real sense we cannot have our democracy without our law, or our law without our democracy. It is in fact this combination of law and democracy that gives us our national character and identity.

This is not equally true of every democratic state. Think of France, which has its own deep culture upon which the French can base their collective identity even through periods of invasion, puppet governments, and new and different constitutions. Much the same can be said of Italy and Greece and maybe many other countries too. But for us, it is

our peculiar national combination of democracy and law that makes us who we are. It is our national culture and identity.

4

This means that when our law and democracy are threatened, everything we are and care about is threatened too.

In all of this I am moved partly by something said by the journalist Sarah Kendzior, who has studied the emergence of dictatorial regimes and thinks the future of our democracy is a bleak one:

Write down what you value; what standards you hold for yourself and for others. Write about your dreams for the future and your hopes for your children. Write about the struggle of your ancestors and how the hardships they overcame shaped the person you are today. Write your biography, write down your memories. Because if you do not do it now, you may forget.³

It is in this spirit that I have put together this book. I hope that it will be a record—more than a record, an experience—of some of the ways in which law could still be imagined and understood and talked about in our country at a time when we began to be aware that this could all be lost. I also hope that by the end I have suggested ways in which, even in disaster, we can still live with the law and do so in ways that will keep some of its essential quality alive.

As must be obvious, I do not mean this book to be either exclusive or exhaustive. Quite the contrary, this is just my own version of a complex institution, a set of practices, at a moment when they seem threatened. I hope others will offer their own, using their own examples. This is a collective activity. We need each other to create ways of remembering who we still are and what we still value.

What I hope comes through more than anything else is the love I have for the law that I am trying to make real for my reader. It has been a blessing to be able to spend my life doing it.

3. “We are Heading into Dark Times,” *De Correspondent*, November 18, 1916.

