The Legal Imagination

Kenneth Vinson
University of Colorado Law School

Follow this and additional works at: http://ir.law.fsu.edu/lr
Part of the Legal Profession Commons

Recommended Citation
http://ir.law.fsu.edu/lr/vol2/iss4/9

This Book Review is brought to you for free and open access by Scholarship Repository. It has been accepted for inclusion in Florida State University Law Review by an authorized editor of Scholarship Repository. For more information, please contact bkaplan@law.fsu.edu.
BOOK REVIEWS


Reviewed by Kenneth Vinson

If you wish to study law and literature, legal process, legal writing, statutory interpretation or jurisprudence, you could do worse than James White's The Legal Imagination. If you desire all those things rolled up into one textbook, White's unique Imagination is your only option. But White's and Little, Brown's big yellow book, which is harder to describe than obscenity, is, strictly speaking, about none of those traditional law school subjects. In a way White, who practiced law and now teaches, is asking how a human being can become a lawyer without becoming a bloodless, legalistic, have-gun-will-travel son of a bitch—except Imagination puts the question more gently.

Imagination joins a multitude of writings in the law school library urging humanism in the law. The book's uniqueness derives from White's background in literature and literary criticism, out of which he defines "a point of view from which to regard the law. One might even say that this course is an attempt to connect different sides of my own intellectual life, a response to the feeling that the life of the lawyer is somehow set off from all other experience" (p. 967).

Despite the intelligence and humaneness that White has poured into his "reading and writing" book, its poems and literary critiques lack the punch necessary to unlock the LSAT-certified brains that have been programmed by doctors of jurisprudence to receive the black letters. White's is a nice, friendly book for nice, friendly sisters- and brothers-in-The-Law who would cure the law schools' irrelevance by singing psalms in the temple while the moneychangers work on.

A tougher and more direct critic of legal education, Ralph Nader, urges that law schools repent and throw the moneychangers out, that for too long law schools have modeled themselves on Harvard Law School's "brilliant myopia," engineering students into "corridor thinking and largely non-normative evaluation." This "three-year excursus through legal minutiae," says Nader, goes hand in hand with the "escape from responsibility for the quality and quantity of justice in the relationships of men and institutions [which] has been a touchstone of the legal profession." Nader would clean house; White would add Great Books to the law library.

1. Professor of Law, University of Colorado.
2. Professor of Law, Florida State University.
Some students, by working through *Imagination*'s wanderings, may find a personal antidote to the trade school curriculum's overdose of commercial lawyering. I hope so; I have been told by a humanist who slaughters squirrels that there are several ways to skin a squirrel. Yet too often for my taste White is the apologist for legalism, as when he says "one simply cannot write rules in ordinary English" (p. 231). It's nonsense, claims White in a section on "Is the Judge Really a Poet?," to think of a judge deciding the way (s)he wants to, and then afterwards dressing up the opinion in legal language.  

If I had to label White's collection of legal and literary writings, I would call it jurisprudence—a theory of inquiry. White's principal inquiry is how various language systems encompass or filter out the world of feeling, thought and judgment. Must the legal word a prison make? Can a lawyer live and breathe multiple *whereases*, *reasonably prudent persons*, *nolo contendere* and *covenants running upstream*, and stay alive and attuned to something grander than "brilliant myopia"?

Shakespeare, Tolstoy, Bentham, Plato, Lincoln, Keats, Austin, Frank, Hart, Warren, Donne and Burger are just a few of *Imagination*'s contributors. In White's personal comments and questions, he suggests that, not only are you what you eat, you are also what you talk and write.  

I'm reminded of that unfeeling social worker in *A Thousand Clowns* who was so defined, enslaved and dehumanized by his professional jargon. The analogous lawyer would be somebody so smothered by the law's stuffy pile of vacuous words that her (his) range of emotional responses is reduced to the *Restatement* view. A lawyer writing in *Juris Doctor* talks about getting away from it all "to recapture the headiness of not speaking legalese." In law school, what with a jealous mistress and all, I suspect many Eagle Scouts and Christian athletes learn to drink on their way to the Bar.  

White suggests that the student hang on to her (his) creativity and individuality by artistically controlling legal language, "just as the sculptor does with clay and marble. You may feel that you are constrained by your material, as indeed you are. But compare the pianist, who is told what notes to play, in what order, how long and how loud; yet art is surely possible there" (p. xxxv). *Imagination* has much talk of clay, legal craftsmanship and piano players, so much so that I was driven to the television somewhat short of page 986.  

---

5. *Id.* at 40.  
7. For an excellent review of *The Legal Imagination* by someone who may have read to page 986, and who, although mildly critical of the book and skeptical of its
nothing wrong with "clay and marble," but I doubt that many Florida State University Law students, except for that handful of legal dissidents and junior bar hippies who attend jurisprudence and law-and-literature seminars, will respond to White's "sculptor." We law types generally prefer crossword puzzles and veer offenses to Picasso and augmented eighths. We are mainly thinking, not feeling, intuitive types. We remember details, and can be terribly logical. We crave order and security. We score well on the LSAT, which means we can score well on first year law exams, which means something the exact nature of which is uncertain. (We do know, according to the uncommon law, that a legal mind is one that can look at an object connected to something else without thinking about the something else to which the object is attached.)

Here is part of White's "Introduction to Your Literary Circumstances." What do you think?

But part of any art is knowing one's materials well, and in this chapter we shall begin to examine the legal language system as it exists, as it comes down to you, made by others for your use. It is the stuff upon which you will work as a lawyer and writer, it is your marble and canvas . . . . The nature of your inherited language shapes your task as a writer much as marble or steel shapes that of the sculptor—perhaps even more, since you cannot choose (as he can) among various materials, and since the language imposed upon you has, beyond its inherent limitations, the quality of defining the habitual expectations, the cast of mind, of the audience with which you will necessarily deal. How are you to come to understand this language that is given you, its secret failings and capacities? How are you to master it, or remake it for the future? What success can you fashion for yourself, as a lawyer and a writer? [P. 81-82.]

Another book that could help law students resist dehumanization is Bishin and Stone's Law, Language and Ethics, a mix of philosophical and legal writings. But students I know who've read Law, Language and Ethics still prefer playing poker with an M.D. to dissecting Plato with a Ph.D.

As a student my favorite law teacher was Leon Green. He has a special magic for breathing life into the legal process. At the University of Texas in the 1950's Dean Green stripped away the black letters so even we silent generation people could see what goes on. Torts, we learned, is no fictional body of rules; it is a process through which women and men exercise government power by making human choices.

value for law students, offers, for the benefit of law professor readers, a closer look at parts of the book, see White, Book Review, 60 Va. L. Rev. 374 (1974).
These choices come from all that stuff of life, including the law, that tugs on human consciences. "Proximate cause" became that "skin of a living thought."

But Dean Green is like Professor White: both are legal gentlemen, and both speak softly in the temple of the law. Perhaps they have a sort of faith ("the substance of things hoped for, the evidence of things not seen") that the bench and the bar will in the end do good. Maybe they remember too fondly a century ago when more lawyers took seriously their duty to protect the public interest. The bar called its members to private and public service. Establishment lawyers like Brandeis catered to a wider constituency than the dollar bill. Superlawyer was not always a dirty word.

The Yale Law School once aimed at developing superlawyers to do super good. Justice William O. Douglas, along with Leon Green, taught at Yale in the late twenties and early thirties when that faculty of legal realists decided it was foolish for the legally learned to continue running the country's institutions by looking (with "detached objectivity") always backward as they step blindly forward. They set out to train human beings to humanely develop a policy-oriented jurisprudence.

Now, forty years later, while Professor White exudes faith, hope and poetry, Douglas throws acid: "My years at Yale disillusioned me concerning the law as an instrument of power for the social good." Douglas remembers he "was, in a way, sorry [he] had turned to law." I suspect Justice Douglas qualified his "sorry" with "in a way" because he knows that wherever he had turned in twentieth century America he would have been a grumbler. (Personally, I'm a believer in selective bitching. My wife goes too far in alleging that I'm a quasi-nag at bridge, tennis, parties, housekeeping and child rearing. As far as the law is concerned, I believe with Justice Douglas it is far better to have bitched and lost, than never to have bitched at all.)

Douglas gloomily recalls the predatory qualities required for practicing law on behalf of the predatory men of finance. The big names in law "were, with few exceptions, attached to men who exploited the system but brought very few spiritual or ethical values to it . . . . (T)hey were mostly shriveled men with no interests beyond the law."
Looking to the law schools, Douglas blasts the "heavy-footed traditionalists" for training mechanics to memorize rules and manipulate them like a deck of cards, without concern for who gets a raw deal. The Yale faculty failed, says Douglas, to make the law school a part of life and of the University; despite some interdisciplinary beginnings, pressure from the bar and alumni eventually pushed the law school into its traditional insulated compartment.  

Were it not for educators like White, Bishin, Stone and Green, and a few recalcitrant students, law school would be one giant Horn-book, authored by the Institute for the Legally Elite, manufactured in Detroit by Nitty Gritty, Ennui & Co., on a loan by Nelson Rockefeller's brother which Nelson Rockefeller knows nothing about. Professor Paul Savoy, in his recent article *Toward a New Politics of Legal Education*, sounds like Justice Douglas when he says: "Teaching how to 'think like a lawyer' . . . [is] but a process of socialization enforced by putting students through some form of suffering and aimed at the production of reliable and predictable people who will be readily assimilated into the Bar Association."  

Savoy says that many bright young people consider law school a place "where old men in their twenties go to die"—the deep-freeze of the emotional life of the university. Lawyers and law students, Savoy says, resist attempts to get in touch with their feelings: "We are desperately in need of room for feeling not only in the development of the law, but in the process of learning law as well. We need what Abraham Maslow calls a 'healthy irrationality' with which to move beyond the limitations of purely abstract and logical modes of thought."  

In his *New Politics*, Savoy describes his efforts at teaching in a new, humane way. I understand, however, that Savoy has left law teaching. So, by the way, has Yale's Charles Reich, who before *The Greening of America*, wrote *Toward the Humanistic Study of Law*. Reich has gone to live in San Francisco. Law schools dislike "healthy irrationality" or any other alien influence. Calls for humanistic and interdisciplinary law studies get a better hearing in undergraduate legal studies departments. When the sterile black letters and the "detached objectivity" of our fictional rule of law drive students to more drink, faculties pacify the malcontents with more clinical courses (and demand larger salaries and greater isolation from the university so that more nitty gritty can be stuffed into "tomorrow's leaders"). Savoy refers to a law

13. *Id.* at 45.  
15. *Id.* at 462.  
16. *Id.* at 466.  
student's thought that "law school teaches students to deal with every conceivable loss, that of an arm, a leg, five dollars, a wife—every one, that is, but the most important, the loss of one's self . . . ."18 Savoy wonders whether there can be any real innovation in legal education in the next 25 years.

On the Law's Dark Side.—Real innovation at the Ole Miss law school was attempted in the 1960's. It failed. I was a part of the Ole Miss faculty that coaxed the Ford Foundation into putting half a million dollars into the law school. Dean Joshua Morse told Ford: "This law school can be tremendously influential . . . . Many of the problems which plague [Mississippi] stem from a provincial outlook. Our students are accustomed to examining every question in light of its impact on Mississippi culture rather than taking a broader view."19

With Ford funds Morse hired Yale-trained instructors, and created a new willingness to listen to outside opinions. Even integrator Bobby Kennedy spoke at the law school, as did black leaders Aaron Henry, Charles Evers and Fannie Lou Hamer.

Thirty law professors from Harvard, Yale, Columbia and NYU spent two weeks each on the Ole Miss campus lecturing on constitutional law and the nature of justice. The students responded well to new courses on political and civil rights, legal services for the indigent, student rights, social legislation, and international law.

Yale's Dean Louis H. Pollak, one of the visiting law faculty, said that the Ole Miss law school "is at the threshold of becoming a focus for the kind of thinking that can bring Mississippi into the 20th century."20 Time praised the law school's new look.

Federal and private grants were awarded to the law school to establish public defender and legal services programs. Proportionately more blacks attended the Ole Miss law school than any other "white" law school in the United States; two black graduates ran for city offices in Jackson. Ebony featured the law school—and Mississippi lawyer M.M. Roberts told his fellow trustees on the segregationist college board he was 'embarrassed by my law school.'21

The North Mississippi OEO Legal Services Program, funded through and operated by the law school, filed a school desegregation suit in Holly Springs (which the United States Court of Appeals for the Fifth Circuit decided in favor of the indigent black plaintiffs). The conservative state bar association, the college board and the legislature

20. Id.
21. Id.
(packed with old Ole Miss law graduates), shocked at this betrayal from within, turned on this alien law school.

The Mississippi state bar worked hard to kill the law school's legal services program. Bar commissioners passed rules saying in effect that unless OEO legal service programs are controlled by local lawyers, the legal services lawyers may be penalized. The bar and legislature eventually pressured and forced legal services out of the law school. Dissenting law teachers were denied a general university raise. Out-of-state faculty recruiting was curtailed. The alien faculty left and the law school's new look reverted to the "detached objectivity" of the rule of Mississippi law.

Legal history names many humane lawyers and legal deeds. Some of my best friends have LL.B.'s. Ten years ago, those marchers and sitters-in who worked to overcome the South's official racism turned for help to legalism, and a few sympathetic federal judges helped crack open the closed society. Most of the Florida State University law faculty publicly opposed Harrold Carswell's nomination to the Supreme Court. Many of the free speech decisions of late have helped slow the process of molding plastic people who will elect plastic presidents. Some dissidents who, loving America on weekends and in odd years, wish neither to leave it nor to burn it, look to the law for salvation. They see Justice Douglas still holding Court against plastic modernity and somehow conclude the long arm of the law can be used to rid America of corporate, political, educational and environmental pollution.

I would like to believe that. Yet my skepticism about the world of lawyers and their magic prompts this caution about the dark side of the law. As the eleventh chapter of Luke makes clear, legal types have long been suspect: "Woe unto you, lawyers! for ye have taken away the key of knowledge: ye entered not in yourselves, and them that were entering in ye hindered." The revolutionary jurisprudence of Shakespeare's King Henry VI was: "The first thing we do, let's kill all the lawyers." Nonbelievers in the law have probably existed ever since lawyers put on robes and wigs, or whatever they first put on to improve the image. The public today is still ambivalent about lawyers. Ignorance of the law, by breeding fear and uncertainty, fosters respect. On the other hand, the respectful layman knows to keep hand firmly pressed against wallet when near a law office.

Of course, the legally hopeful can point to current legal niceties like the young public interest lawyers; to judicial humanists like Douglas

and J. Skelly Wright; to lawyer statesmen like Nader and William Kunstler and Ramsey Clark; to square shooters like John Sirica; and, scattered here there around the land, to lawyers who take seriously their responsibility to do public good.

But these are legal aberrations. The legally learned today practice the same sort of word-magic, usually in support of the same fat-cats and kings, that they did 4000 years ago when they were called priests. "It is lawyers," wrote recently retired Yale law professor Fred Rodell, "who run our civilization for us—our governments, our business, our private lives."

The law, since lawyers own it, is a reluctant progressive. Lawyers are too well paid to manage wealth and power any way but conservatively. Each year a few more law students conclude that their training is morally and intellectually bankrupt, although most law students so succumb to the law schools' brainwashing that they never realize that the vague abstract principles they learn to mouth are not external verities but stuff and nonsense. "[I]t would be fatal," says Rodell, "to the profession—to its self-respect and its solemnity and its power—if any generation of rising lawyers were allowed or encouraged to discover the real truth about the stuff they study."

Learning the lawyers' talk and the lawyers' way of thinking is very much like learning to play bridge:

It requires concentration and memory and some analytic ability, and for those who become proficient it can be a stimulating intellectual game. Yet those who work cryptograms or play bridge never pretend that their mental efforts, however difficult and involved, have any significance beyond the game they are playing. Whereas those who play the legal game not only pretend but insist that their intricate ratiocinations in the realm of pure thought have a necessary relation to the solution of practical problems. It is through the medium of their wierd and wordy mental gymnastics that the lawyers lay down the rules under which we live. And it is only because the average man cannot play their game, and so cannot see for himself how intrinsically empty-of-meaning their playthings are, that the lawyers continue to get away with it.

The legal trade, in short, is nothing but a high-class racket.

There may be some duplicate players who object to characterizing bridge as an empty plaything. But what lawyer can deny the "play-

23. F. RODELL, WOE UNTO YOU, LAWYERS! 7 (1939).
24. Id. at 144.
25. Id. at 15-16.
thing” element in his legal jargon? I’m reminded of when I was a teenage West Texas anti-Communist. When the enemy was among us like a fungus and we had to infiltrate the underground cells over in the Mexican section, we patriots created a secret tongue. We spies spoke Red by adding to every other word a *vich*, *sky* or *vik*. In law school it became a *quasi*, *res*, *lex*, *pro* or *mala*.

For pre-law training, even better than speaking Red was learning how the Bible clearly, logically and beyond a reasonable doubt demands total immersion and weekly communion, and forbids instrumental music in the worship service (all proved by a legal reasoning that Chief Justice John Marshall would envy—or perhaps copied into *Marbury v. Madison*).

On Professor White’s theory that you are what you talk, our mothers in that *Last Picture Show* kind of town sent us to revival and vacation Bible school to learn to speak Jesus. The Word, literally interpreted, saved; learn your basic Bible and be one with Christ. In church buildings, where God personally resided, *HER* (His) name had four awesome letters—*Gawd*. Masters of basic gospel could verbally capitalize the pronouns, just as a master lawyer can say “May it please this HONORABLE COURT.” Some Christian anti-Communists were saved two or three times and had so much practice they could pray in public without even having to think, like when you’ve forgotten the combination on a lock and you have to open it by reflex. If you could really get right with *Gawd* and had the knack for it, you might speak in tongues that only you and the Master Lawyer could comprehend.

But we tough Texans couldn’t talk Gentle Jesus all the time. We also had to learn the language of life’s most important game—football. You are what you talk: “Crack heads” (fight fiercely); “Hit him where he lives” (insert helmet midway between eyes and ankles); “No split-tails, no weeds” (no girls, no tobacco); “Let’s do some popping and show ‘em who the real hosses are” (do it unto the other fellow before he does it unto you). We gridiron Wildcats snarled, spit, pulled on our orange and black armor, “sucked up our guts,” and performed beastly deeds, as do lawyers who grunt “nolo contendere,” “executive privilege,” “depletion allowance” and “sanctity of property” by reflex.

White’s book has a Mark Twain piece in which Twain looks at the Mississippi River, first with rapture, then with a snarl. As a steamboat passenger, Twain is overwhelmed by the beauty of the water, the trees, the shadows, the color, the late afternoon sun. But later in life Twain looks at the river as a professional river pilot, and can see only the river’s treachery: faint ripples means hidden rocks or wrecks, a bright sun means wind tomorrow, a floating log shows that the river is rising,
a slanting mark on the water refers to a bluff reef that is going to kill somebody's steamboat. Twain says, "I had lost something which could never be restored to me while I lived. All the grace, the beauty, the poetry, had gone out of the majestic river" (p. 11). Too often a law student comes to law school and loses her (his) grace, beauty and poetry.

That lawyer writing in Juris Doctor talks about how his public interest lawyering was different:

In a crucial sense the dichotomy between "lawyer" and "human being" is indeed greatly lessened. We do not suffer the schizoid existence of defending industrial polluters and institutional landlords full time, while doing volunteer work one evening per week. Or, as a friend remarked when a partner for a large Wall Street firm tried to impress her with the fact that 10 percent of his time was spent pro bono, "I gather then that 90 percent of your work is pro mala." 26

With the legal tribe in all kinds of quasi-hot water of late, now is the time for grace and poetry. Even before Watergate's lawyer-plumbers were flushed out, the tribe was hurting. Bar associations under antitrust fire are quietly having to burn minimum fee schedules. No-fault auto insurance must be rammed down legal throats. Too many people with legal headaches can afford only aspirin. The law school's three-year curriculum includes ethics—for thirty minutes. Bar grievance committees and judicial disqualification commissions continue to hide their work, hoping that charges of coverup and demands for government in the sunshine will go away. A Florida Supreme Court Justice flushes a forbidden utility company memo down the toilet, but the memo floats back up. And Richard Nixon resigns from the California Bar. As Clarence Darrow said, "The trouble with law is lawyers."

Most legal training ill prepares leaders to rationally shape public policy toward the humane goals of an open society. Law schools train in verbal manipulation and foster the notion of the law's "detached objectivity." Yet judges must make policy choices on important social questions. The ambiguous slogans in law books don't give much help. Government in this country demands direction. Whether the governors are lawyers, social scientists, engineers or philosophers, they cannot and should not govern in "detached" darkness (although they could and should get off private payrolls).

When New Deal legal realists like Thurman Arnold and Jerome Frank exposed the legal power structure, they were not crying over the loss of "detached objectivity." Those good liberals simply (and

26. Greenberg, supra note 6, at 28.
openly) preferred the committed subjectivity of their fellow New Dealers. This was when the laissez-faire Justices on the Supreme Court were knocking down FDR's progressive programs—in the name of the law.

Legal realists remind us of the political power that courts exercise, and of the gap between abstract legal formulas and decision. The gap is filled by judicial choices. Legal realists are usually liberals who prefer that law training be aimed toward an open society keyed to human dignity. During the 1930's, when moss-back legalists reigned on the Supreme Court, liberals like Arnold and Frank mixed politics and truth by blowing the whistle on the Court's counterfeit objectivity. Politics was too important to be left to the lawyers.

Since Chief Justice John Marshall concocted that legal fiction about the Constitution empowering judges to veto legislatures, the Supreme Court has generally protected vested interests. For a while, the liberal Warren Court gave human dignity precedence over the claims of property, but the Burger Court is already backing off. Precedent, even for Republican judges, is another legal fiction. The Burger Court, says Eugene McCarthy, is our "worst Supreme Court."

"Nothing doth more hurt in a state than that cunning men pass for wise." Rodell describes the smart games that legal people play:

In tribal times, there were the medicine men. In the Middle Ages, there were the priests. Today there are the lawyers. For every age, a group of bright boys, learned in their trade and jealous of their learning, who blend technical competence with plain and fancy hocus-pocus to make themselves master of their fellow men. For every age, a pseudo-intellectual authority, guarding the tricks of its trade from the uninitiated, and running, after its own pattern, the civilization of its day.  

Huckleberry Finn got a pretty good education in legal cunning when he helped Tom Sawyer, legalist, dig under the cabin where Jim was trapped. Huck's lay mind thought pickaxes would best do the digging job. Learned Tom called for case knives (table knives):

It don't make no difference how foolish it is, it's the right way—and it's the regular way. And there ain't no other way, that ever I heard of, and I've read all the books that gives any information about these things. They always dig out with a case-knife . . . .

27. Bacon's Essays and Wisdom of the Ancients 158 (B. Montagu ed. 1900).
After hours of fruitless digging, and his blisters on fire, a light came to Tom's legal mind; and he says to Huck, "Gimme a case-knife." Huck explains:

He had his own by him, but I handed him mine. He flung it down, and says:

"Gimme a case-knife."

I didn't know just what to do—but then I thought. I scratched around amongst the old tools, and got a pickax and give it to him, and he took it and went to work, and never said a word.

He was always just that particular. Full of principle.\(^{30}\)

That's what the law is full of—principle. The judges' Mickey Mouse rationalizations, like the diplomats' empty phrases or the politicians' equivocations, are to be taken with salt. Legal talk has no magic for ensuring that judges will govern intelligently. The public would be better off with less magic and more information about who their governors really are. Then maybe legal wizards would be voted out sooner and replaced with informed, earthy decision-makers keyed to the perspectives of a democratic society. Meanwhile, we foolishly elect or appoint our judges on a nonpartisan platform—so strong is our faith in the legal legend, in the magic of the holy legal word. So far, the law is too unassailable a "truth."

The best public service that law school could provide would be to educate the public as to how the need for lawyers' services could be eliminated in many areas (accident suits, real estate, probate, divorce, etc.). "But why," says the smart lawyer to his in-laws "give the show away?" The Miami Herald, commenting on the flap about Florida State University law school's admission this fall of a released felon, says rather than fret about one felon getting into law school, we should find out "why so many felons have been getting out of law schools in the past."\(^1\)

\(^{30}\) Id. at 291-92.

\(^{31}\) The Miami Herald, August 29, 1974, § A, at 6, col. 1.

Reviewed by William Fleischman

Only one decade ago there was such an explosion of activity in public sector labor relations that there were almost no experts available for consultation and advice. Those considered "expert" were usually persons who had read "something," speculated just a bit on the subject or studied some narrow aspect of the problem. The literature was the newspapers.

Today we can say that, just as the 1960's ushered in the era of the public employee, the 1970's have ushered in the era of the public employee labor relations expert. A subject once relegated to a scant few pages in major labor relations treatises and perhaps to a session at the major conferences now constitutes a "field," with all the concomitant regalia. For those needing to keep abreast of these developments, their problem (which was once, "What is there to read?") is, "Where do I start?" The reader in this position would do well if he or she relied upon Spero and Capozzola to solve the problem. Indeed, I urge that this book become required reading for the law practitioner considering what new work this field may hold; the public employer or employee uneasy or exhilarated over the coming arrangements; the journalists facing the demanding task of interpreting events; those members of the public wishing to become knowledgeable; the legislator shortly to discover that his or her role in meaningful collective bargaining is most delicate; the teachers of labor relations, public administration or business administration in search of a text; and even the judges about to be thrust into the position of interpretors of the new Florida law.

The authors' perspective on the issue has enabled them to write a book that will be useful to many individuals. Most current writers on public sector bargaining confront the problem with a stance either of cautious opposition or grudging acceptance; in sharp contrast Spero and Capozzola assume a stance somewhere between cautious optimism and optimism. They see opportunities; this in itself is distinctive. This perspective of the authors, stated explicitly and implicitly

1. Professor Emeritus, Graduate School of Public Administration, New York University.
2. Professor, Graduate School of Public Administration, New York University.
3. Visiting Lecturer in Economics. Florida State University.
throughout the book, arises from their backgrounds and knowledge as students of politics in the public service field in the past. Both are specialists in the areas of public administration and labor relations. Thus, they neither are labor relations experts now learning what public administration is all about, nor are they public administration experts now learning what labor relations and collective bargaining are all about. Armed with expertise before the fact, the authors went out into the field, gathered new evidence, talked with those on the front lines, and then wrote a book that describes, analyzes and teaches.

Spero and Cappozzola believe that collective bargaining in the public sector may very well have positive efficiency effects. Their discussion of the “scope of negotiation” and the merit system reveal this perspective most explicitly. The ideas they present on these topics are fresh—perhaps even controversial. What is most likely to be considered controversial about the book, however, is the authors’ attitude toward strikes by public employees.

According to Spero and Cappozzola, the blanket “blunderbuss” prohibitions against public employee strikes merely perpetuate the myth that such strikes are usually more disruptive and dangerous to the public health, welfare and safety than are private employee strikes. Moreover, penalties for striking have proven ineffective. The experience of New York shows that not only do strikes continue despite such penalties, but also that there is no evidence to suggest a correlation between the penalties and the dangers presented by strikes. Perhaps most importantly, Spero and Capozzola suggest, the enactment of these penalties tends to lead the public employer to believe that he can avoid a serious collective bargaining effort. The employers seem to develop the impression that victory in collective bargaining is achieved primarily by strike avoidance—at all costs. Strikes naturally draw the public’s acute attention to everybody’s dirty linen, including the employer’s, and, knowing this, the employer too often seeks any means to settle—and perhaps even gives the store away. The authors argue that strike alternatives—fact-finding, mediation and arbitration—imposed as solutions to impasse tend to lull us all into a false sense of security:

---

Compulsory arbitration does not deal with or remove the causes of impasses. . . . The power contest and irresponsibility were not eliminated but only suspended, and legally mandated peace may well have bred further irresponsibility by having removed responsibility for reaching a mutually acceptable decision. [P. 297.]

The authors report that many experienced public employers now desire a relaxation of the strike prohibitions.

The authors' permissive attitude toward strikes does not arise from a philosophic bias that it is unfair to prohibit public employee strikes. Nor are they pessimists about the prospective utility of alternative procedures. Indeed, because of their incisive understanding of collective bargaining as a political process, Spero and Capozzola predict that the experiences of the public sector with these other procedures can be lessons for the private sector.

Here I am compelled to editorialize. Both explicit and implicit in many past discussions of public sector labor relations has been the assumption that a dichotomy existed between collective bargaining in the private and the public sectors: "Whatever collective bargaining is in the private sector, in the public sector it is, will be and must be different." In large part this assumption can be traced to public sector people—employers simply hoping that it won't be the same ("otherwise it might be tough"), public employees suffering from superiority complexes ("if we continue to be treated as ordinary workmen, we will act like them"), and, in too many cases, public administration experts and politicians possessing very little understanding of collective bargaining. Although somewhat bemused by this, private sector experts also have contributed to this belief with arguments such as the following: "In the private sector both employers and unions are checked by market pressures, while in the public sector there is no market. Ergo, the strike weapon is inappropriate in the public sector."5

The flaw in this syllogism lies in the implicit assumption that because strikes can be analyzed as economic phenomena they therefore are economic phenomena. This flaw has been exposed by observers who calculated the costs both to union members and employers in specific strike situations and who discovered that by every reasonable estimate both parties lost. For example, this country's copper industry strike in 1968 can hardly be considered a strike which someone "won" in economic terms. That strike was A Kind of Economic Holy War.6 Whatever it was originally, the strike became principally a

---


political conflict. It is fair to say, in fact, that almost all long strikes are “holy wars.” Collective bargaining is a political process, a process requiring astute management if the strike in which all lose is to be avoided. Experienced observers of collective bargaining therefore agree that when impasse develops, both parties in the negotiating process must be very careful about the way and the extent to which they “go public.” “Going public” accelerates the holy war tendency—thus, when the holy war does develop, the experts chorus, “They’re locked in!” Sustaining the metaphor, the experts agree that settlements between the parties are much more akin to a “treaty of peace” (p. 296) than the result of a search for truth.7

The relevance of this to public sector labor relations is twofold. First, if collective bargaining in the public sector is more political than collective bargaining in the private sector, the dangers of the “holy war” problem will be greater in the public sector. Parenthetically, this implies that we should view recent public sector strike experiences as an indication of success rather than failure. Rather than ask how we have failed, we should ask, “How is it that we have been so successful?” The point, however, is that by definition the parties in public sector collective bargaining will have a greater tendency to “go public” and therefore get “locked in.” The market constraints presumably operating in the private sector are absent in the public sector. It follows that strike avoidance in the public sector requires a greater degree of political sophistication than does strike avoidance in the private sector. But what do the experts generally say about the use of strike-alternative procedures to solve impasses in the private sector? More often than not they claim that the alternative procedures enable the interested parties to escape their responsibility to solve the underlying causes of the impasse. Surely this possibility must be as great in the public sector. Spero and Capozzola conclude:

The basic problem is restoration of services without denigrating the law; but the law, by concentrating on punishment, defeats the prime objective of restoration.

... The result [of the absolutist strike ban approach] has been the enactment of a spate of unenforceable laws and regulations,

7. “It must be realized that collective bargaining, under a system where the Government does not attempt to control the results of negotiations, cannot be equated with an academic collective search for truth—or even with what might be thought to be the ideal of one... The system has not reached the ideal of the philosophic notion that perfect understanding among people would lead to perfect agreement among them on values.” NLRB v. Insurance Agents’ Int’l Union, 361 U.S. 477, 488-89 (1960) (emphasis added). See also A. Cox, LAW AND THE NATIONAL LABOR POLICY 80 (1960).
which have in effect substituted incantations against evil in place
of a search for practical efforts toward solution. [P. 316.]

It is thought that the strike ban approach lets the public off the
hook; in reality, more often it simply lets the employer and the union
off the hook. The apparent need to avoid public sector strikes leads
us to believe that we can substitute “search for truth” procedures for
collective bargaining. Thus, one Florida newspaper made the follow-
ing comment about a recent police strike in Baltimore (incidentally,
a strike settled—in spite of heavy legislative penalties—by a promise of
“no reprisals”): “None of these disorders should occur under Florida’s
collective bargaining law, with its detailed procedures and heavy
penalties for striking.”

In Spero and Capozzola’s view, however, too often the hasty retreat
to “detailed procedures” in strike avoidance simply has the effect
of turning the spotlight off the dispute: “Compulsory arbitra-
tion is basically a legal solution to a complex problem in human rela-
tions, and trying to ‘legislate a bit of compulsion’ is a complicated
and dangerous business” (p. 296). They conclude: “The crucial ele-
ment is to avoid the events and attitudes that precipitate strikes—
statutory changes are only the beginning and can only eliminate the
artificial legalisms that currently impinge on the public employment
relationships” (p. 319). The authors are optimists about the spot-
light effect of collective bargaining. They can be considered to be
saying, “Look, a policy emphasis on absolutist strike avoidance can
only have the effect of burying the political conflict. For many, this
is comforting; they have failed to understand the consequences of
this position. It would be much healthier to uncover the conflict for
all to see and understand.” Although many will read this as pure,
simple pro-unionism, it is not. Such a biased reading assumes that most
strikes reflect union strength and that unions generally win strikes.
These assumptions are unwarranted. A strike (like a tango) takes two
parties; just as many employers because of weakness settle rather than
face a strike, many unions strike because of weakness. The public em-
ployees’ ultimate employers, the public, can develop a holy war attitude
just as easily as can the immediate employer. Organizations pressing
their luck may win a battle, but ultimately they will surely lose the
war. At that point the road back into the public’s confidence will be
long and hard.

The one issue on which I would join the authors relates to a
question that is uppermost in many minds: What precisely are the

8. Tallahassee Democrat, July 15, 1974, § 1, at 4, col. 2 (emphasis added).
public employees' goals? Spero and Capozzola have emphasized the popular view that the public employees seek only redress. This theory holds, in effect, that changes in the pecuniary and nonpecuniary conditions of work for public employees have lagged behind improved conditions and benefits for private employees. Thus, when the explosion of militancy came in the 1960's and public employees pressing employers with the strike weapon seemed predominantly interested in pay increases, many observers thought that the cause of the strikers' discontent was a prior deterioration in the public employees' relative income position. The weakness of this theory is that no one has yet been able to uncover any significant evidence of such a lag—at least with regard to pay increases.

Assuming that there really was a lag in the very important non-pecuniary conditions of work, there is, nevertheless, an alternative and, in my view, more viable and predictive explanation for what has been happening. This view emphasizes the public employees' perception that they do not need the old parity, but rather a new parity between public expectations and benefits conferred on employees.

In the 1960's the public began looking to the school house for solutions to all our social ills. By implication, we also expected more of the teachers. Today we can look back and realize that we were asking for miracles—but ask we did. The disruption of the 1960's also put great pressure on policemen. Not only did we ask them to handle that pressure, at the same time we demanded that they become social scientists. And while the police officers roamed the battlefields, hopefully armed with new techniques of psychology, group dynamics and, of course, a greater understanding of the law, the firemen roamed as unarmed medics.

Ultimately these new attitudes had to alert these employees to the gap that had developed, and was continuing to grow, between what was expected of them and their level of compensation. This theory is inapplicable to some public employees, but for those to whom it is appropriate it predicts continued militance until the time that the public either lowers its expectations of public employees or a new parity is established. Given the public belief that more should be expected from the employee while less should be expected of the taxpayer, perhaps our only hope is that the public employees will finally admit defeat. This theory also has implications for the view that the alternative procedure is a search for truth. As difficult and delicate as it may be to use fact-finding, mediation and arbitration productively in either private or public disputes, where does the "truth" concerning a new parity or reasonable public expectations of police officers, teachers and firemen lie?
The authors chose to avoid discussing such theoretical questions as the one raised above. I believe that they could, and perhaps should, have given greater emphasis to such questions. The response to this criticism, however, would have to be either a different or a much longer book. But this work is lengthy, and my criticism is already partially answered by its extensive bibliography. This is the book we need now; it is informative, interesting and provocative. Written particularly for those unfamiliar with public sector bargaining and with the intent to juxtapose myth and reality, the book is a success. It should not be ignored.