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### Law, Literature, and the Humanities: Panel Discussion

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## LAW, LITERATURE, AND THE HUMANITIES:

### PANEL DISCUSSION

This panel discussion took place on April 21, 1994, as part of the University of Cincinnati College of Law's 1994 Robert S. Marx Lecture presented by Professor James Boyd White: *The Authority of Law and Philosophy in Plato's Crito*.

#### PANEL MEMBERS:

*James Boyd White*, Hart Wright Professor of Law and Professor of English, University of Michigan.

*Nancy L. Cook*, Visiting Professor of Law, University of New Mexico.

*Judy M. Cornett*, Associate Professor of Law, University of Tennessee College of Law.

*Clark D. Cunningham*, Professor of Law, Washington University.

*Thomas D. Eisele*, Professor of Law, University of Cincinnati College of Law.

*L.H. LaRue*, Professor of Law, Washington & Lee University.

*David Ray Papke*, Professor of Law and Liberal Arts, Indiana University/Purdue University at Indianapolis.

#### DISCUSSION

**PROFESSOR EISELE:** We hope that this convening of a number of different people who have written and taught in the areas of law and literature and law and interdisciplinary studies will give us an opportunity to do a number of different things. One is that we will be able to discuss what we do in the classroom and in our writing and why we pursue law and interdisciplinary studies—why we think they are worthwhile for law students and law professors to pursue. In addition, we also hope that this will be an opportunity for those of you who want to talk about your own experiences, perhaps bringing other areas of your life to law school and applying your background in history or anthropology or science or math or philosophy, to enter into the discussion. This forum is a little less intimidating than the formal lecture yesterday; so, if anyone has questions for any of the panelists here, we hope that you'll feel free to raise your hand and be recognized. After that, we'll just pursue the discussion where it takes us and see what we have to talk about—law and literature, *Crito*, Socrates, or whatever. This is an unscripted presentation. We don't have any formal presentations.

**AUDIENCE MEMBER:** It seems like so much of the law is education, whether you're educating your clients, educating jurors, or educating a judge. But it's not done under the same conditions where these same people may have been students in school. I guess I would be interested in having an interdisciplinary approach, taking some of the ideas from education and bringing them into the law. I would like to ask the panel when you have an idea like that, and I'm sure you've all had a similar one at one point, how do you develop that into an interdisciplinary approach like you've all been successful at?

**PROFESSOR EISELE:** That is a terrific question. The way we were going to begin was to talk about how we taught law and literature and to say a little bit about what we do in law and literature courses. I think that might begin to respond to your question, and if it doesn't, remind us, and those of us who feel confident to respond in other ways, by bringing in other interdisciplinary techniques of teaching, should then respond. Shall we start around the table, Professor Papke?

**PROFESSOR PAPKE:** Well, I can conceive of at least three basic ways to teach a law and literature course, and I can report on what the students seem to enjoy most. The first variety could be thought of as "law in literature." In this variety you would read and discuss stories, novels, and the like in which there were legal characters, trials, and legal themes. A second variety could be thought of as "literature in law." Here you would use legal artifacts, appellate opinions, and the like and perhaps talk about character, persona, metaphor, and theme. And third, one could forget either one of the first two varieties and just put law and literature and anything that looks like law and literature together in various combinations and talk about cultural systems, authority, intertextuality, and the like.

I've taught a law and literature seminar four or five times at my own school, and my students, at least, enjoy most "law in literature" offerings. It is not my favorite, but my students greatly enjoy the opportunity to explore legal characters, legal themes, and what might be called the "justice" issue. With literary works, there is more room to ponder value and conflicting values and to talk with depth about character and life experiences than there is with appellate opinions. The vehicle is there for a type of discussion that the students cannot find in their more traditional classes.

**PROFESSOR COOK:** I sure wouldn't question that. I think part of what you're asking is, for me, a question of integration. There are different parts of our world and parts of ourselves coming together and that is, for me, a big part of the struggle. Unlike most of the people at the table, my teaching has been separated some, as I have taught law and I

have taught legal traditions in literature departments. I have been trying to bring those two things together. It seems to me that first, it is possible to integrate those things, and second, that it is possible to do it in many ways. I certainly bring my legal experience into the classroom in my English courses. But it seems to be more of a struggle to bring literature and literary aspects of ourselves into the classroom and into practice in the legal institutions. I've done it in a number of ways. I've done it in my clinical teaching and I've also done it in classes of eighty or ninety students.

But I think it's also important to remember that education is not just about what I as lawyer or teacher can bring to others—you mentioned educating jurors, educating clients—but that the education works two ways. So one thing I've done in the classroom is to have my students bring in things that matter to them—those pieces of literature or parts of themselves that they think are important—and discuss what the relevance of those things are to what we're doing either as law students or as practitioners. I think that we don't have to divide ourselves. Whether we are called to speak with clients, juries, or whomever, we're people talking with people.

**PROFESSOR CUNNINGHAM:** I think from my perspective you start with a problem, something that engages you; and then your work becomes interdisciplinary because you look around for help. Now for those of us making a living teaching, the easiest way to make a problem become real is to try to teach about the problem. A dress rehearsal for teaching about it is to write about it. I do clinical education, and so I practice law at the same time that I'm teaching, and they come together. Thus, for me, to the extent to which my writing falls within a rough category, it has to do with trying to make sense out of my experience of being a lawyer and how to talk about that experience with other people.

For example, one of Professor White's recent books is called *Justice as Translation*.<sup>1</sup> In it he uses the metaphor of translation to talk primarily about what judges do, but it seemed to me a useful metaphor for thinking about what lawyers do. So I took a case that my clinic students had worked on, and I treated it as if it was a text. I looked at the transcripts of what happened in court, and we had the good fortune of having a video tape of the first meeting with the client. In particular, I studied about ninety seconds of that video tape. I've probably watched it fifty times now or more, sometimes with students, giving it the same kind of close attention. Every time I go back and look

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1. JAMES BOYD WHITE, *JUSTICE AS TRANSLATION* (1990).

at that tape, I come up with something new.

In the course of studying that case, I ended up reading a lot of anthropology, sociology, and discourse analysis because I was looking for help—not because I said, “I want to do something interdisciplinary; let me think of a problem that looks interdisciplinary.” It was the other way around. This is why law and literature is not a hobby for us, as if we wish we were over at the English department having fun! For me it’s just the opposite. I turn to this material because it helps me to work out my life as a lawyer and teacher.

**PROFESSOR WHITE:** In response to your question I just want to second Professor Cunningham. For me the classroom is a wonderful place to think about new and different things. Almost everything I have ever written I have talked about in class first, working it out with my students. And I try to pursue exactly the things you’ve described: how does a lawyer teach a student how to lawyer, teach a client how to lawyer, teach a juror how to lawyer, teach a judge how to lawyer, and how is the teaching different in those types of contexts? In class we try to bring to bear on these questions whatever else we know or can find. If we do this well, then I think the right things will make sense in the class, that good questions will emerge, and that our own thinking will be challenged. Who knows where it’ll go?

My own teaching of law and literature is slightly different from Professor Papke’s. I teach *The Legal Imagination*,<sup>2</sup> which is my first book, as I have done for over twenty years. But this is not a “law and literature” book in the sense of trying to unite two academic fields. In it I’m trying to address questions that arise in the lawyer’s life about how we use language and how we understand the language we are given to use, and I use literature to help illuminate those problems. And I use not only literature, but all kinds of other things like prison rules, rules of etiquette, Dick Gregory’s autobiography, and all kinds of other stuff.

One premise from which I start is that the way in which law students learn law is often in fact not enabling, but the opposite of that. Law students often seem to try to learn by imitation, trying to learn to sound like what they think a lawyer sounds like. When I was in practice I thought that this was also true of a lot of associates of law firms, and even partners. I’d see people desperately trying to be something they were not, to imitate somebody else—dressing like them, talking like them. Such people, or all of us in such a mode, tend to ask not, “What do I think about this in the language of the law?” but, “What

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2. JAMES BOYD WHITE, *THE LEGAL IMAGINATION* (1973).

would a lawyer say about this?" and, "Can I do what a lawyer would do if he were here?" In law school you should be acquiring enormous powers over your own mind and over your language. This should involve a sense of terrific access of capacity, but it often does not.

In a way what started me off was this sense of the pathology of legal education, the misunderstandings that people have about what they are doing in ordinary law courses. People seem to want to convert the process of legal thinking into something very dull. Now I loved practicing law. The reason I loved it was the constant challenge to the mind that the use of legal language and ordinary language involved. I just saw myself as someone who was always trying to make something new through language—I loved doing it that way, and I thought that was true of the more successful lawyers I knew as well. The idea of this course was to make such an image of the lawyer real for the students.

This brings us to face a set of questions. What are the characteristics of legal language? What are the characteristics of good or tolerable or successful uses of legal language? In pursuing these questions I call on literary materials, as samples of people using good languages well. I also call on another set of materials with the same object, mainly the students' own experiences of life, as reflected in their papers. Part of the pathology of law school is that the law student tends to leave 90% of herself somewhere else. In fact, our students are enormously talented, interested, engaged people with rich experience, which they then seem to devalue and cut themselves off from and not use; in this course I ask them to use that part of themselves.

**PROFESSOR LARUE:** I would respond to your question with a comment on language. When you pursue interdisciplinary work of education, you will find different languages. You will find people talking about education. And I think you will also find a powerful notion, which is people's urge not to accept anything as legitimate until it has been retranslated into their own language. So if you say to economists, "put up your umbrella," they will characterize that as cost avoidance. It is both legitimate and illegitimate that they do that.

As a law and literature scholar, a scholar of rhetoric, I call my own course "Law and Language," because that's what I'm interested in, the problem of language. And I think the problem is challenging and one to which you can bring great creativity. Everybody's too busy talking with their own language to then ask the literary question. What kind of language is this? What are its troubles and its metaphors? What is the story being told? In the story, who is the hero? What is the landscape in the story? Is it a landscape that's like a desert or a forest or whatever? Just to see that any set of documents can be talked

about in that way is very promising. I often feel myself, as a constitutional law teacher that I'm most successful as a law and literature teacher, teaching constitutional law, when it's invisible that that's what I'm doing. All of these cases that I teach are full of metaphors and stories. To point out that fact, I ask this: What are the metaphors here? What are the stories? When we read a John Marshall opinion, he tells wonderful stories about the law that most people don't even see as stories. I will not try to discuss Marshall, because that's a complicated example, but let me just take one line out of Holmes, probably a much-quoted line among legal scholars: "The life of law has been experience, not logic." I don't know how many people I know who think that's a proposition and not a story. The law, you've got an object, and it's alive, it's real. It has a life. Its life is a story of onward and upward, as Holmes tells it. I don't know how many stories I've read in Supreme Court opinions and constitutional law articles in which this story of onward and upward is told. And it is told with its heroes, who have their battles and conquests. I always think the medieval questing literature is some of the best for thinking about, when you want to think about constitutional law. That's the kind of problem I think about when I do constitutional law as law and literature, and I offer it to you as a suggestion you might bring to reading educational literature.

**PROFESSOR CORNETT:** I want to address your question about interdisciplinary approaches in the classroom first by saying that I think it is possible to teach any law course using an interdisciplinary approach, but it always helps if your school lets you do that or makes it easier for you to do that. I would like to describe for you the ways in which my school, the University of Tennessee, has institutionalized interdisciplinary approaches to law by instituting an upper division writing requirement that they call the "Perspective Requirement." Many courses that satisfy that requirement have an explicitly interdisciplinary theme to them, such as "Law and Economics," "American Legal History," and "Law and Literature." Now, of course, in one sense it makes it easier for you to teach "Law and Literature" if your institution sponsors that. In another sense, though, when the catalog describes the course as the teaching of fictional works related to law, it can also constrain your teaching. I think that one of the challenges I faced as a teacher of "Law and Literature" was to mediate among the three approaches that have been described in terms of "law in literature," "literature in law," or perhaps what might be called "language or cultural studies." For me, the importance of law and literature is really due to the students' own self-encounter through the reading of litera-



ture, when a student can ask himself or herself Professor White's question, "Can I talk like this the rest of my life?" I think the literature sometimes gets into depicting the culturally particular discourses that have been used in the past to define people. I think that helps us in the present to think about that issue. And of course we're all creatures of history, and we're all just compendiums of discourses that have been spoken in the past and continue to be spoken in the present. So when you do get a collection of works that embody these in a very accessible, palatable manner, it helps us to think about that question.

**PROFESSOR EISELE:** My own experience in teaching in this area is very similar to what Professor Cunningham articulated; I became involved in interdisciplinary studies because I felt that there were other works in my life, mainly from philosophy, that I didn't want to give up just by becoming a lawyer or law professor. I know that's one reason that drove me eventually to go back and get a Ph.D. long after it was wise to do that. But I didn't do what was wise, I did what I felt driven to do or what I finally was willing to let myself do.

We use these labels, "law and literature," "interdisciplinary studies," and I think they're fairly artificial because they try to describe something that for us is, how are we going to deal with our lives and our experience and try to make ourselves productive people? In that sense, I use Professor White's book in the "Legal Imagination" course that I teach here. I find it to be an incredibly rich and suggestive compendium from which I select readings and problems that most impress me. I probably have the kind of perspective that Professor LaRue describes—I'm very interested in the reality of language. I think language changes us. I think it sometimes captures us. My guess is that most of my students are not as aware of the reality of language and the extent to which they have accepted a particular linguistic system until they take that course and start questioning and start identifying and seeing language as a reality. That is what begins the course, my interest in language and my interest also in law, because I do see it not as an excuse to avoid law, but in fact as implicating what it is to be a lawyer. To be a lawyer is to be a user of language, a particular language system within other language systems. That's what I want to investigate, and those law students who want to investigate that with me, I'm eager to have them in the class and to start working with them.

What happens in the class is that, while it starts by being driven by my agenda, it ends up being driven by the students' agenda. Somewhere down the line, I may run into what Professor Papke was alluding to: sometimes his students ask about things and want to read things

he's not always interested in. Sometimes my courses get turned into courses where I find that the question doesn't interest me, but it does interest enough of my students that that's what ends up driving the discussion, the dialogue. Professor White has a point about the class being a writing course; so many of these courses depend upon lots of papers being written throughout the whole semester that that's another way in which the students' interests and agendas drive the course. They pick their paper topics; and they write about them; and then once they've explored those things, they suggest other topics and start pursuing them. By the end of the semester what you come up with is a way for a community of people to investigate their interests. For me, that's a real learning environment, and it is often very different based on the particular students in the class. My "Jurisprudence" class this semester is very different from the "Jurisprudence" class I taught last semester. I'm using almost the same materials except for the fact that the people are different, and that's part of the material in the class. It's the same with my "Legal Imagination" course.

**AUDIENCE MEMBER:** As a professor, I am inundated with these terribly written and boring texts. I would love to throw them all out, but can we get away with that? I teach "Commercial Law" and "Bankruptcy," and sure, you might find the occasional wonderful case that leads you, but it's hard to cover the whole course with a wonderful text like that. Do you think we can throw out all those casebooks and start over?

**PROFESSOR WHITE:** When I started teaching constitutional law a few years ago I found the casebooks quite poor as texts for teaching. They are not bad as treatises, but that is what they really are, because what they mainly consist of is little snippets of cases and long notes. More and more casebooks seem to have as their main voice that of the professor describing what the law is. The lesson that our students pick up from such a text, and which I was always trying to resist, is that a large law school class is directly continuous with their undergraduate courses in sociology and political science. What such a course consists of is information, information given to them by their casebook or by the teacher. They are, in turn, supposed to assimilate and organize this information. But, of course, what should really be happening in class is that they should be thinking. The note that says, "Here's what the law is," is not inviting them to think.

I would like to go back to something very old fashioned, in which the students have several complete cases and a series of questions, with nothing else to tell them what the law is. The questions should help them work their way through the case. This can produce a class that is

very interesting, consisting mainly of the response of students to the questions. Then law is actually being learned in the classroom by the students, who are active, not passive.

**PROFESSOR PAPKE:** I sense in your question the suggestion that there is something mildly subversive about law and literature courses and that this subversiveness isn't just a matter of challenging the reign of casebooks. Several people here talk about how this kind of teaching seems to well up and seems like the natural thing to do. We should also acknowledge that there is kind of an oppositional relationship with mainstream, dominant legal education. I remember when my own faculty first approved the law and literature course. We had a full faculty meeting, and one of the items on the agenda was a vote on the course listing. No one voted against it, but I noticed, looking around the room, that a lot of people could not get that hand up, and that continues. I think a lot of students feel this way too. I try to disabuse the students of this very quickly, but they have a sense that when they come into a course about law and literature, this will be soft and warm and comfortable and cuddly, as opposed to law, which is hard and scientific and so forth. I try to break down that kind of thinking, but it is there nevertheless. When you put law into these different contexts, you demystify law, and in that sense there is a subversiveness vis-à-vis the traditional teaching of the law. It is not so much a matter of ranking the laws versus literary prose. It's a matter of putting law in juxtaposition with other kinds of discourse. In doing so, you make clear that the law is only one kind of discourse. That's different than when the law is on a pedestal by itself.

**PROFESSOR COOK:** In terms of throwing away law texts altogether, I think I would say no. For me the problem with them is that the law text is too limited. One of the driving forces for my work is law practice, which brings in questions of context and perspective. If you only see the law as the *Crito*, if you have only that to announce what the law is and nothing of what surrounds it, then you do not have the whole picture. I look around the room, and I see that we have a whole room full of well-educated people, probably almost entirely economically privileged people, by and large, people without color. We need to address that and to begin to address some of the other ways in which certain subcultures have not been included in our discourse. Some perspectives that come from literature and from other disciplines help to give the picture a fuller perspective.

**PROFESSOR CUNNINGHAM:** One of the things that always struck me as peculiar about legal education is that you could get through three years of law school without reading any great person in the law. You could

get through without reading Oliver Wendel Holmes, for example. One cannot imagine becoming a sociology professor without ever having read one word of Karl Marx, whether or not you agree with him. It would be inconceivable. The structure of our legal education sends a very powerful message about what we think matters. We also, by and large, do not teach what we write—law review articles. When law textbooks do use law review articles, they usually appear as extended footnotes to a case—like the law review articles we hate, where there are two sentences on the top and footnotes for three pages. So you've got a little bit of case and lots of footnotes; something isn't right.

It seems to me the way lawyers write as advocates, the way judges write opinions, and the way law review articles are written do have something in common. What all of those voices are saying is: "What I'm saying is entirely correct and nothing you can say can persuade me to the contrary." And what an awful way that is to write. I do understand why lawyers talk that way. You could not stand in front of the Supreme Court and let the judge or your adversary persuade you that your client's position is wrong and ought to be different. Professor White and other people have accented how judges, unfortunately, have carried that to an extreme. They, too, write as if, of course, there's only one way, which means the dissenters are ignorant or crazy or dishonest. And so the carrying of that advocate's voice to the judge may itself be a problem. But then when we write that way as authors in law reviews, that is really awful. But I have found with law review editors that when I try to write in a different way, they have an initial reaction to change my "maybes" and my "shoulds" and my "perhapses," to take them out and put everything in this declarative, assertive voice. That is a culture that we law professors may attack, but that we are ultimately responsible for.

**PROFESSOR LARUE:** One of the courses I teach is "Legislation," in which I do statutory drafting and interpreting, and I have used commercial law materials in that context. One of the things that I felt interested in was the different ways of stating the same thing and the astonishment I get that statutory changes are often presented as though something new was being said. I became very interested in the drafting of the Uniform Commercial Code (UCC) and the difference between the way Article II is worded and the way Article IX is worded. I searched around for more and more evidence on how many different ways there were to write statutes, and I actually concluded that the UCC was a good model, especially Article II. The whole commercial law area is a very ripe field for this sort of investigation.

My general response is like Professor White's; the problem with

most casebooks nowadays is that they don't have enough legal material. They don't really present the richness of legal discourse. I'll end my comment with a quotation from the Louisiana Civil Code; it is the part of the code dealing with definitions of property and what could be sold, and they of course go through all the classifications of property, and then they say that one thing you can sell is an expectancy. Well, what's an expectancy? What's the statutory definition of expectancy? The statutory definition of expectancy, as defined by the Louisiana Civil Code, is "as the fisher sells the haul of his net before he throws it." This is one of the few times I know of where a code writer used a metaphor, knowing that it was a metaphor and knowing that the metaphor would be better than an analytical statement. Now I happen to find statutory language to be generally full of metaphors, but written by people who don't know that's what they're doing.

**PROFESSOR CORNETT:** Well, this comes from the person who actually uses the word "perhaps" in her contribution to the symposium; I am teaching two rules courses this semester, "Legal Ethics" and "Civil Procedure II," and the despair of a teacher who has to teach two rules courses with legal material is beyond belief. I do want to say that I agree with Professor Cook about context, and again, to insist a little bit on the importance of history, even the cases we read in our textbooks are not all equal. I had a student the other day who said to me, "You know, I wish that they had told us our first semester that not all of these cases were still valid." The way they're presented in casebooks so often is on an equal footing, and you don't see the dialogic relationship the materials have to one another. So I feel that the more historical context we get into when we study any area, the better off we are going to be.

**PROFESSOR EISELE:** I'm not interested in throwing away those casebooks entirely because, if we did, I wouldn't survive. In my "Property" and "Estates and Trusts" classes, I think I have some very useful texts. They are not necessarily put together the way I would put them together, but they are very helpful. Now, what I do in my classes is to concentrate on the opinions. I agree with Professor White that many times these opinions are edited in a way that I am not really pleased with, and especially as I go through different editions, sometimes the editors so slim down the cases that they lose any kind of flavor, any kind of contextual material. But I spend a lot of time in my classes dealing with the language of opinions and statutes, when they are applicable and so on. In that sense, I feel I am bringing the same perspective I have in "Jurisprudence" and in "Legal Imagination," which is an emphasis on language and what it does to us, to "Property" and

“Estates and Trusts.” Do we appreciate what is being said here? Why do they characterize the person this way, and why are they phrasing the rule this way? What reasons do they give? This is what we spend a lot of time in my classes doing.

The second thing I do is talk about the facts. My students know that I have this favorite phrase: “The facts drive the law.” And because of that, I keep asking them to tell me the story of the case. Professor LaRue made the point that cases are based on stories. Professor White makes this point in so many of his writings. I try to pursue the question: What story are we telling here? What story does the majority tell? What story does the dissent tell? The reason I keep pushing my students to tell me more about the facts is because my students often pretend that the facts don’t count—they just want to cite me a rule and maybe give me a reason, and that’s it. So, in my so-called substantive courses, I am doing much the same thing as in my jurisprudence courses: talking language and talking about stories.

**PROFESSOR COOK:** I want to pick up on Professor Eisele’s mention of how the facts drive the law. It seems to me that the important thing he is saying, and I think a very important part of Professor White’s evaluation of the *Crito*, is that facts are being left out or ignored. It is not just the facts of the case that the majority is writing about; it is not just the facts of the case that the dissent is writing about; we have a huge universe of facts that none of us know anything about. One of the things that I really liked about Professor White’s approach to the *Crito* was his emphasis on the subtext. He asks what time of day is it? how is it that *Crito* got into prison? what’s the favor he gave to the jailer? why is it that he doesn’t wake Socrates? how did they feel about each other? and all of those things are in fact part of the text. And I think that is also what Professor Eisele was saying about the way you look at cases--that what is omitted is part of the text too, and that is what matters to us.

**PROFESSOR PAPKE:** You should never be deceived by that paragraph at the beginning of an opinion that presents itself as “the facts.” These words are really nicely constructed mini narratives of what somebody thought happened, or what was important in what happened. Those of you who have been clerks for judges will know that the facts are often the last thing to be written in an appellate opinion. The judge may sometimes say to the clerk, “Will you work up the statement of facts for the beginning of the opinion?” In many ways, the facts of an appellate opinion are driven by the holding, rather than vice-versa. We seduce our classes if we teach appellate opinions as if the facts were fixed and set as a starting point.

**PROFESSOR CUNNINGHAM:** At the beginning of every Supreme Court opinion there's a syllabus and a footnote that says the syllabus isn't part of the decision. I haven't practiced law in Ohio, but it strikes me that in the Ohio Supreme Court the opposite is the case. The Ohio Supreme Court publishes a syllabus that is the holding and legal precedent, and what follows is not. I have never read a law review article about how that works. It seems to me that is a very profound experiment. Certainly from the perspective that Professor White works from, that ought to be impossible, and I wonder what has happened. And of course one wonders why then anything is published by the Ohio Supreme Court other than the syllabus.

**AUDIENCE MEMBER:** I think that is true, and the justices spend a lot of time working out that syllabus, and the syllabus is the law. I am not aware of any other court that does that.

**PROFESSOR CUNNINGHAM:** Is there any scholarship about this?

**AUDIENCE MEMBER:** Yes, there is, but I can't cite to any specifically. There are at least two or three articles on this.

**PROFESSOR WHITE:** It is a practice in some ways similar to that of the civil law. A civil law court will produce what looks to us like no judicial opinion at all. It will say, "Here is the rule; the rule covers the case." The case is described in terms of the rule, and so you say, "Well of course it does when you put it that way."

I think one of the questions for the non-civilian is, where is the law really? If it's not here, where is it really? The answer to that varies from place to place, but in some countries there will be an official recorder who will produce something a little bit like the judicial opinion, in which he explains what the decision was all about, what the arguments were and so on; also there will be law professors' articles on the cases. All of this creates a context in which the lapidary and conclusory statements of the court are imbedded.

**AUDIENCE MEMBER:** In listening to you, I remember that Karl Llewellyn had a "Sales" book in which he edited out everything but the facts so that it was an entire casebook with just facts.<sup>3</sup> No rationality or any of that would be in the casebook. I agree with all of you about the facts; in fact, that's the most interesting part of the cases, but it's not interesting enough. I really agree with Professor Cunningham about getting some great text into the core curriculum; to go along with three years of reading appellate opinions and the notes in the

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3. KARL N. LLEWELLYN, *CASES AND MATERIALS ON THE LAW OF SALES* (1930).

casebooks, we need to assign books or at least excerpts from books that are better written than appellate opinions are.

**PROFESSOR WHITE:** You are saying two things, one of them about the use of excerpts. One of the terrible things about casebooks is that they will give you a piece of Aristotle, a piece of Plato, a piece of Kant, and then you're supposed to invite your students to say, "Well, Kant's view . . ." We do not know that, and the students know we do not know it; we are teaching them very bad intellectual habits of superficiality when we do that.

My main complaint is that in the usual casebook the student is learning passively. It seems to me that the modern casebook is moving in the direction of converting law into a subject taught as information, where the information is reported, rather than presented as a set of puzzles that require the student to become active in a way that's related to her future career as a lawyer.

**PROFESSOR CORNETT:** I want to pick up on something Professor Eisele said about his manner of teaching "Property." It has been my experience that when you argue against the text, perhaps in modelling, students resist this approach, perhaps for the very reason that Professor White points out—they prefer to be passive learners.

**PROFESSOR EISELE:** My students will frequently ask, "Why did you even assign this text? You seem to disagree with it." But that's okay—you can disagree with it, and in fact that is part of what I am teaching. But you are right, there is resistance.

**PROFESSOR WHITE:** One of the psychological characteristics of law students and professors is a yearning for authoritarian regimes. They want a text that tells them what the story is so they will know it, and then they will have the authority of that text; so they'll be able to turn to other people and say, "That's what you do."

**PROFESSOR PAPKE:** To quote Devo, a postmodern rock-n-roll band, "Freedom of choice is what we have. Freedom from choice is what we want." One of the most popular members of my faculty is a fellow who uses all appellate opinions and leads his class in a sort of soft Socratic dialogue on each appellate opinion. And then he will say at the end of each appellate opinion, "Now, class, the substantive essence of this opinion is . . ." Everybody writes that down, and every other year, when he is eligible, he is chosen the best teacher by the student body.

**PROFESSOR WHITE:** There just ain't no justice in this world!

**PROFESSOR CUNNINGHAM:** In preparation for the Roundtable, Profes-



sor Eisele wrote a subject list, and the general topics are so tough that they almost deserve to appear in a separate symposium. One of the things that he asked was, "Is there a lesson in what Professor White teaches that you particularly like, or of which you are critical?" I'll try that one. Particularly in Professor White's more recent writing, I think that the primary protagonist is the protagonist that you find in most legal scholarship: the judge. It is as if we are primarily interested in training future judges. That's understandable, from a law professor's point of view. My own reaction is to try and transfer that approach to the lawyer as protagonist. In connection with this point is something that even refers back to *The Legal Imagination*, where Professor White identifies tension between the voices of the lawyer as self and as professional. He asks readers, "How are you going to work out this tension?" His answer is, "through writing." It is by writing that we work out these problems. I am kind of a bookish person, too, so that rings a chord with me. But I think that that answer is a little narrow. I suspect most lawyers don't write very much. In fact their world is an oral world. Where there are opportunities to do the kind of writing that Professor White treasures, that is the world of appellate lawyers, big firms, and judges; and most lawyers are not called upon to write in that way.

So the criticism I have is that there may be an unnecessary sense that this sort of law and literature stuff is at some very high plane, at an intellectual level and a literary level. And then there is a sort of grungy world where most of us practice law. In fact, I don't think that is what Professor White said about practicing law—he loved practicing law. But I would like to see that appreciation of law practice come back to our scholarship, perhaps more than it does. One client's world, the case that the one client brings to you, is probably richer than Holmes. That, for me, sustains my clinical works. Many people may think, "Gosh, these are just not very interesting cases," but they are incredibly interesting because of your personal contact with someone typically in a moment of crisis in their lives. A whole world opens up, particularly if that client is from a disadvantaged situation. The techniques and the approaches that all of us are talking about are incredibly valuable in helping to respect and understand that person. To me that is the best part of being a lawyer. There is just not much of that world in law school, because in law school the protagonist is the judge.

**PROFESSOR WHITE:** May I respond? I agree with most of what Professor Cunningham says, particularly at the end. When I was in practice, I remember asking myself who seemed to be a really good lawyer, and who did not, both in the sense of being successful and in the sense

of leading a life I'd like to lead. It was the unsuccessful in both senses who saw little of the case in front of them. It was the good lawyer, the imaginative lawyer, who saw more in the case than the other person. I have always believed that the argument that you have to go to a big firm in a big city in order to find intellectually challenging practice is wrong. I think you should be able to find an intellectually challenging practice of the highest kind anywhere in the country; in fact, the more you're presented with human particulars the more profoundly challenging it's likely to be.

In defense of my emphasis on writing, all I can say is that I think it is important to understand what you say and what you do with words. In *The Legal Imagination* I use "writing" to cover all use of language, so that a lot of our attention is on what we do in oral contexts. I use actual writing up on paper as an opportunity to do in slow motion what we elsewhere do quickly and instinctively. Our interest is in every confrontation we have with language.

As for the emphasis on the judges, it is understandable. It is the judge to whom we ultimately imagine ourselves speaking; when you're a lawyer and a client comes into your office you always have in your mind that somewhere down the road you may have to present this to someone who's going to decide between your client and somebody else. In this way you are always thinking about the judge as a possible audience. This means that the lawyer's own thought processes are shaped by her conception of what a judge will be. If we ask how we imagine ourselves arguing at our best to the best judges, this requires us to think what the best is about.

**PROFESSOR EISELE:** We have come to the end of our time. I want to thank the panelists. It has been a wonderful discussion.