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## TRIBUTES

### WHAT WOULD JIM DO?: ADDRESSING THE CURRENT CHALLENGES TO LAW AND LEGAL EDUCATION

KELLYE Y. TESTY\*

Thank you to the extraordinary Dean Karen Bravo for her generous invitation as well as her effective leadership for IU McKinney and nationally. I am honored to recognize Jim White, whom I was really looking forward to seeing when I accepted the kind invitation to participate in his lecture series; now, after his recent passing, I am honored to help recognize his substantial influence in legal education. To do so, I have titled my remarks to enable us to discuss the current challenging environment in legal education and to muse upon what Jim might make of it were he here to help guide us.

To begin, I want to share a little bit about my first memory of Jim because it captures, in a way, a lot of what is at stake right now in terms of some of the crossroads that we find ourselves facing. I began my academic career at what is now called Seattle University. I started teaching just one year out of law school at what was then known as the University of Puget Sound. I joined this law school that I had never heard of in a city that I had never been to and started teaching a class I had never taken in law school. That school no longer exists because it was purchased by Seattle University, in a completely shocking transaction where the faculty had no idea it was coming. We got a little slip in our mailboxes one day about a press conference at one o'clock, telling us to cancel class to be there.

One of the things that was shocking at the time is there had not yet been many law school combinations and transactions like that. The faculty had no idea what that would mean for our ABA accreditation or our students' ability to take the bar.

Then, Jim White arrived on the scene. He told us what it meant. He said we could not keep our ABA accreditation, we had to go into provisional accreditation, and we had to re-earn the accreditation under a new institutional

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\*J.D., Indiana University Maurer School of Law, Bloomington, Indiana. Executive Director and Chief Executive Officer, Association of American Law Schools. These remarks were adapted from a speech given on September 9, 2025, at the Indiana University Robert H. McKinney School of Law as part of the James P. White Lecture series.

parent. We were not happy. We wailed, we stomped, we ranted, we went on and on, and Jim just smiled and did not budge. To be honest, we did not like him very much. There was a lot of frustration and fear at that time. Fear does that. It makes you mad. He made us jump through a lot of hoops.

What we did not know then, but we later learned, and I certainly know now, is Jim was right. He was saving us from ourselves. When we had to re-earn accreditation, it made us and our university do the right thing. It made us care about excellence. It made us put the structures in place that would assure our students continued to have an equivalent, excellent education, and that we had the same commitments to excellence that had made us successful in the past. That was what made that transition actually work—and it did work. That school thrives now as Seattle University in ways it never could have under its prior university sponsor. We did figure it out, and we gave Jim an honorary degree to show we held no grudge. But, that function of accreditation that propels excellence for law schools is too often lost.

Right now, it is about to drown. There is too little appreciation for the role of accreditation in promoting consumer protection and institutional excellence. Rather, the accreditation rules are collectively seen as impediments to innovation or “too political.” There is extraordinary pressure on the Council of the ABA’s Section on Legal Education and Admissions to the Bar (the “Council”) right now as an accreditor. Unfortunately, this pressure has weakened the Council at a time when law and higher education are both under attack and most need effective leadership for the rule of law. I am sure Jim would not quite like what he would see were he in the middle of it all. But I know he is going to continue to help us with that in every way he can. On we go.

Let me explain a little bit of what I think Jim might make of it and how we can go forward. Before I do, let me make sure we are on a similar playing field, because I know that everyone does not follow news of the Council and legal education with quite the fervor I do. First, there is a serious threat to the Council’s status as an accreditor recognized by the Department of Education. This started because of Standard 206, which asked law schools to work toward having diverse student bodies, faculties, and staffs. And, as you know, there is a lot of pushback against diversity and equity in our country right now. That has encouraged the federal government to push against the Council because of that standard.

The Council has since withdrawn that standard. It is in abeyance right now. But nonetheless, the Council is often conflated with the larger ABA and its policies despite its independence as a formal matter from the ABA, and the question of the Council’s renewal as the recognized accreditor for legal education by the Department of Education is ongoing. This threat of nonrenewal is most acute for the nation’s fifteen independent law schools, because they depend on the Department of Education authorization of the Council to have federal financial aid capabilities, unless they are also accredited by another

accreditor with Department recognition. For most schools that are part of universities, it really would not matter very much whether the Council had Department of Education authority, because they would be able to continue to issue financial aid under their university's regional accreditation. In some ways, whether that Department of Education authority is withdrawn or not, might not feel that different for most of us in legal education. But, it certainly sends a strong signal and feels like a weakening of the Council.

That is not the end of the threats to the Council, however. Some states have quickly followed the federal government, pushing back on the Council and asking, "Should this state now not recognize the Council as the accreditor for graduates in our state to be able to take the bar?" Texas, Florida, and a couple others have most vigorously begun that process of questioning the Council's authority. One of the things that is uncertain is whether states would recognize other accreditors of law schools but not the Council or just in addition to the Council. Right now, if someone graduates from an ABA accredited law school, they know they can sit for the bar. That tends to help with the portability of degrees, allowing a graduate to go to school, and then work wherever they wish. This is something that those in legal education are all concerned about because it may cause our schools to incur a lot of expenses to comply with more than one set of accreditation rules.

It also might make it more confusing for students in terms of where they go to school, where they can practice, and so on. Because state Supreme Courts hold the power to recognize the Council as the authority, they are the ultimate accreditor of law schools. These courts in each state now are going to be under pressure to look at this question and decide what the state wants to do about licensing lawyers and permitting graduates to sit for the bar. That is something to keep an eye on.

The Council is certainly feeling the pressure both from the federal government and state governments, but also from state courts. To be fair, the Council has not always made the best case for itself lately. There has been a lot of controversy with standards that it has proposed. Some of those standards are about experiential learning, such as how many credits for clinics and other forms of experiential learning should be required. Some of the controversy has been around whether or not to require admission tests. Other controversy has surrounded a standard called 405C, and whether more faculty than just tenured faculty should have what is called security of position, which would enhance their employment opportunities and sense of freedom to participate in faculty governance. Thus, there have been a lot of controversial standards pushed forward in a short amount of time that have made many criticize the Council as over-regulating law schools and stifling institutional pluralism.

One possible reason that the Council has been under more criticism from law schools is that over the past decade it has taken away a lot the processes Jim had put in place. Let me give you one example. Jim was great in understanding how much work it takes to accredit law schools, and that the process had to be

professional and well done. So, he set up committees and processes where the volunteers that were doing that work actually had time to really think about it and do it well. Likewise, he set up committees and processes for the Council to really think about the standards, what they should say or not say, and get input on them in a transparent way. Some of those processes and structures were dismantled about a decade ago in a consolidation of some volunteer structures. As a result, well-meaning people are trying to do their best, but they are not getting the input, data, and time to do their best work. We would profit from rethinking how that process is structured to have more open dialogue, more transparency, and more input. Process is important not only for its own sake, because it makes people feel heard and included, but when you have a good process, you often end up with a better result substantively. Jim knew this and we need to relearn it.

Related to this is another factor that is affecting the Council and law more generally. And this is one, as lawyers, we ought to all be very worried about. There is an anti-law sentiment that is prevalent, amazingly, even among lawyers. In many ways, it sometimes comes down to seeing law as a cost, just an impediment that gets in the way of doing whatever we want to do, instead of being a process that helps assure fair and transparent results for more people. This is something that we are hearing a lot about right now, that the standards are just regulatory burdens in the way of innovation. Jim would find it worrisome that not only are businesspeople or government officials making that argument, but so are legal educators and lawyers. That is not to say that either Jim or I are “anti-innovation.” You can have innovation within bounds of fair play. We need a balance. We do not need just innovation. We need innovation that is just. We need innovation to make things better, not a free-for-all. Right now, there is a lot of sentiment against the Council as a monopolistic barrier. While both Jim and I would be all for reforming standards to find the right balance that will help schools follow their own missions, it is a trope to criticize a national standard for being a monopoly – we don’t need a fragmented patchwork of multiple standards that law schools must comply with. The very nature of a clear legal rule is that there is one, not many.

Finally, I want to share one other thing that I think is a serious concern for legal education overall. This issue is also pushing quite legitimately against the Council right now. That is the incredible access-to-justice gap in our world. If you look at most state courts, there are so many unrepresented litigants. There is such a wide gap in the number of people who need legal representation but do not have it. That undermines the credibility of the entire project of law and legal education when those kinds of gaps persist and widen. There is a lot of pressure on the Council and all legal educators to meet that somehow. So, some say, “Council, get out of the way and let schools just admit more students and graduate more lawyers so that the justice gap can be met!” This is a difficult position because I want that justice gap to be met just as much as everyone else. However, I am not sure a solution that merely allows more law programs to

graduate more lawyers is necessarily going to get us there. Right now, there is surging demand for legal education, but there is also a really nice fit between the number of graduates and the number of jobs. It is one of the healthier ratios now than it has been for a long time. So, it is not clear that there would necessarily be employment when those gateways opened up even more. This requires a much closer look.

One possible solution to explore is creating additional professionals who can supplement the work of licensed lawyers in providing legal services. Perhaps every legal service does not have to be completed by someone with a JD licensed to practice. Perhaps, the legal profession should disaggregate law like medicine does, so that we are not asking clients to go to the JD lawyer for everything, but instead some legal professional that can supplement the practice. Just like I would be worried if my actual doctor was going to take my blood, I would rather have someone trained in phlebotomy. Some states are permitting some legal services to be performed by licensed professionals that can help meet that justice gap.

In short, the ABA Council has a lot coming at it from many directions. As a result, when you have all that pressure coming at you, you do not tend to be out there trying to take aggressive positions to help others too much. You are trying to play good defense and lay low. Unfortunately, that stance is coming right at a time when law schools and legal education really needs leadership, and particularly from an entity that is in the position of authority that the Council has historically held.

Law schools, too, are under many pressures. One of them is not because there are not enough students. That was certainly a problem after the Great Recession, where law schools saw enrollments really decline. Conversely, applicants to law schools were up last year by around twenty-five percent and are up again this year. This past year was the highest number of applications in fourteen years. There is a definite positive trend line in terms of people applying to law school. There are multiple reasons for that demand, including the high visibility of law in the news, the rational flight to graduate and professional education when the employment market is tight, and the downturn in other fields such as technology.

The high demand for the JD does not mean that schools are on easy street. Budgets are tight due to losses of university grants in science and medicine as well as the loss of international student enrollment due to migration and other government restrictions. Further, the “discount rate” for most law schools has grown exponentially in recent years, meaning that the school must give back in financial aid a large portion of its tuition price. That helps reduce costs for students but also constrains school budgets for hiring faculty and staff and other vital needs.

In addition to the cost pressure law schools experience, other pressures include technological advances such as AI. Schools have moved to embrace AI to help students learn how to use it in education and as new lawyers. The

“practice readiness” of new lawyers goes beyond AI, as law schools are pressured to bridge the gap in early career mentoring of lawyers by helping them hit the ground running. There are probably six or seven things that any dean hears in any given six month period that their law school is supposed to be doing more of—but quicker and for less cost—including more ethics, more experiential learning, more marketing and client relations training, more technical literacy for the students, more writing skills, more communication skills, more business literacy for the students, on and on. Cram that all into three years or less and make sure everyone passes the bar on the first try too!

Finally, I want to note that one of the big pressures on law schools right now is just that there is a lot of pressure on law. I mean, open the papers, and you will see challenges to judicial independence and very little tolerance for legislative compromise. We live in a polarized world. Law schools are facing more and more unrest in terms of trying to foster civil discourse and respect for working across differences and finding ways to mend viewpoints and get to a result that all of us can live with. That brings a lot of friction in the day-to-day in classrooms and in almost everything that law schools do. Higher education in so many states, Indiana included, is facing more government and board desire to control what have traditionally been dean and faculty decisions about governance and curriculum. This pressure, too, is very deep right now in our nation.

In sum, there is no lack of examples of areas in which law schools are feeling heat right at the same time that the Council is itself feeling a lot of pressure. What would Jim White say about all this if he were here? What would he do about it? I think Jim would do what he often did do. He would simply put his shoulder to the wheel and keep pushing. There is a lot to be said for understanding that a lot of the pressures that is felt and experienced by the profession are cyclical. It is very easy to think that when you are in a difficult time that there has never been a time like this, right? We hear the phrase “now more than ever” now more than ever. A lot of things are “unprecedented,” but are they?

The Association of American Law Schools just celebrated its 125th anniversary. As I look back at the history, there has been a lot of pressure. On us, on law schools, on the Council, on the ABA, and on our states and nation. I am not discounting that some of our current reality is deeply concerning and that we should be in any sense complacent. But I do think that law is worth defending. Jim would stand up bravely and defend it. He would do what he often did, maybe with a smile, but not budging, just like he did when he came into my law school to tell us we were no longer accredited.

Focusing on the quality of legal education in this nation is something that legal educators must continue to do. I work with all the deans across the nation, and I often say, “stay in your seat and keep pushing.” Like Jim would, we must put our hands on the boulder anywhere we can and try and do the right thing. It is a revolutionary act right now to just keep educating lawyers committed to

justice, committed to the rule of law, committed to values that have kept us strong through the many different political times that we have been in. I am hopeful that we might be able to build some unity across a shared commitment to the rule of law, which should not be a partisan issue. Jim White was good at building alliances, at talking across differences, at talking to people outside of academia. He worked with judges, lawyers across the country, people in other disciplines and fields, and presidents and provosts. That is something that we really need to do to build that kind of leadership for cross-sector collaboration. It is very hard when feeling a lot of pressure to lift your head up to do that work. But that is something else that Jim would say is an incredibly important point for us to do.

The other thing that he would remind us of is that American legal education continues to be the envy of the world. That is often not well appreciated. Yes, law schools are going through a lot right now, but they have never been collectively better. There is so much good happening in our law schools. Anytime you start to feel a little down about what is going on out there, go out and talk to those students and see what is happening in the schools. Innovation is alive and well. So much is moving forward in wonderful ways. There are 175 member schools of AALS. There are about 200 accredited law schools. There is a ton of strength in that list. If you go to many other countries, you may have two or four or five very strong law schools, and a lot of law schools that are not strong. Accreditation has helped us build that excellence in the United States, and it is deep. That is so critical if considering higher education as a means of social mobility and an opportunity for people from all walks of life to get an excellent legal education and thereby contribute to their communities. We need to keep that excellence a broad one. Jim would very much support that.

Finally, more than anything, I think what Jim would do is say, “Let's keep this torch for equal justice and excellence burning.” Law needs to continue being a cornerstone of justice, democracy, and progress. Is it perfect? No. Do we make mistakes as lawyers? Are there ways we could balance things differently? Of course. That is part of what law is there to do—to mediate when there are differences. I believe, and I think Jim believed and would continue to, that it is still our best pathway to a just world that promises human flourishing, not just for some, but for all.