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Talk to Entering Students

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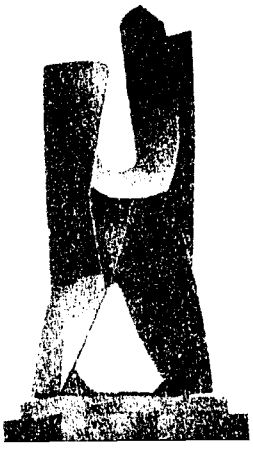

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TALK TO ENTERING STUDENTS*

James B. White**

Others have recently spoken to you about the social and psychological conditions of law school life, and no doubt conversations on that intriguing topic will command your attention for some time to come. What I want to talk to you about today is a different subject. My concern is with what you will be doing in law school intellectually speaking, that is, what are we asking you to do with your minds as you do the work of law school: reading your cases; preparing for class; asking and responding to questions in the classroom; and thinking and talking about legal questions with each other over coffee or lunch. The process may well seem new and strange to you, very different from what you have done in college, and I hope that I can make some remarks that will help to prepare you for it.

I don't want to attribute to any of you the sort of ignorance I once had, but it is possible that some of you think—as many non-lawyers do—that the law is at bottom very simple. I once thought that what the word "law" referred to was, obviously enough, the laws themselves. And I naturally expected that the laws were all written down somewhere to be looked up and applied to life. The rules, once found, were simple enough; the mystery of the law had to do with their location. What mainly distinguished me from the lawyer, I thought, was that he knew where to find the rules and how to be sure he had found all of them. What I conceived of as

*This is a revised version of a talk I gave to the class that entered The University of Chicago Law School in the Fall of 1976. The revision has benefited from the helpful criticism of my colleagues Walter Blum, Edmund Kitch, Edward Levi, Bernard Meltzer, Phil Neal, Geoffrey Stone, Hans Zeisel, and Franklin Zimring. It is my own views, however, not those of an institution, that are expressed here.

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the "application" of the rules was simple enough. You move to a new state and of course you need to obtain a new driver's license and automobile registration. You send for or pick up the appropriate information, and follow the directions until the process is completed. Or take traffic regulations: it is easy enough to understand that you should stop at a stop sign, yield at a yield sign, and the like. The rules are clear enough: you either follow or disobey them.

It is true that the law often works in this simple way, perhaps the vast majority of the time, for in many situations the law is sufficiently intelligible for people to use it easily, and sufficiently fair to occasion no feeling that there is something deeply wrong that calls out for correction. What is more, strongly held values support this simple view of the law: to one raised in a democratic system it seems that this is how the law *must* work. The rules are for my guidance, after all, and they must be intelligible to me. I vote for candidates on the "issues," which are frequently stated in the form of proposed legislation or regulation; to be competent as a voter, which my political system no doubt rightly assumes I am, I must be able to understand the laws. If they are unclear it is certainly not through any necessity but because they have been made so by lawyers, eager to maintain the profitable mystique of their profession.

But this simple view does not account for all the ways in which the law works, and omits entirely what is most interesting, difficult, and important in what we do. Think for a moment what would follow if it were true that the activity of law consisted of nothing more than memorizing certain clear rules and learning where to find the others. First, both law school and the practice of law would be intolerably boring. On the face of it, few things could be more dull than simply memorizing large numbers of rules or learning one's way about a bibliographical system. But the fact is that for many people the study and practice of law are both difficult and fascinating. Second, since the rules that must be

memorized are not invented at the law schools but exist outside of them, generally available to the world at large, there would be no substantial or interesting difference between a good legal education and a poor one. (Indeed, it would not be plain under these circumstances why we should have law schools or formal legal training at all. We could publish lists of rules and examine students on their "knowledge" of them at a bar examination.) And if this view of the law were accurate, there would be little to distinguish a good lawyer from a poor one. But there is general agreement, among those who claim to know, that a good legal education is something important and special, something very difficult to attain; that a good lawyer has capacities and powers the poor one lacks; and that in this field as in others excellence is rare and valuable.

The third consequence of this simple view of the law would be that the case method—"learning the law by reading cases"—would seem bizarre and perhaps sadistic. Why should one read these complicated and difficult cases simply to discover the general propositions for which they stand? But a great many lawyers regard their experience of learning how to read a case as a step of huge importance in their education as minds and as people, involving much more than learning to discover and repeat rules. Some, at least, would say that this training has helped them to find in the material of their daily professional existence a set of puzzles and difficulties that can interest them for life.

In my view, and I think in that of my colleagues here, the simple model of the law with which I began is right only in the sense that it describes how the law sometimes works in the world; wholly wrong as a conception of the field of study and practice with which you are about to become engaged. For it is in the main only when things seem or threaten not to work in such easy and direct ways that lawyers are called upon to act. Our primary field of concern is the problematic and complex in the law, not the simple and orderly.

Let me suggest that you regard the law not as a set of rules to be memorized but as an activity, as something that people do, with their minds and with each other, as they act in relation both to a body of authoritative legal material and to the circumstances and events of the actual world. The law is a set of social and intellectual practices that defines a universe or culture in which you will learn to function; like other important activities, it offers its practitioner the opportunity to make a life, to work out a character, for herself or for himself. What you will learn in law school, on this view, is not information in the usual sense, not a set of repeatable propositions, but how to *do* something. Our primary aim is not to transmit information to you, but to help you learn how to do what it is that lawyers do with the problems that come to them. In the course of all this you must necessarily acquire a great deal of information, much of it essential to your training, and some of it will come from your teachers. But the acquisition of such information is incidental, not central. As a professor once said, "I am not a data bank; what I hope to be is a teacher."

Of course the law as an activity can and should be studied—and is studied at this law school—from the point of view of other disciplines. The operations of lawyers and the legal system can be studied by the anthropologist, the economist, the historian, the literary or rhetorical critic, the psychiatrist, the philosopher, the social theorist, and many other specialists. But in studying the law in such ways one is functioning not as a lawyer but as an anthropologist, as an historian, and so forth. What is peculiar and central to your experience in law school and beyond is learning how to participate in this activity not as an academic but as a legal mind.*

*I do not mean to suggest that all of you will or should choose to become lawyers by career. Some of you may have very different goals. But I assume that you all want to learn the law. And what I am saying for all of you is that the most important thing that you can learn here is not what the rules say, but what it is that the lawyers and judges do and should do with the materials of the law.

It might help if you were to compare the process of learning law not so much with your other experiences of the classroom as with your experiences of learning in ordinary life: learning to swim, to sail, to ski, to fly-fish, to understand music or art, to play poker or bridge, or to carry on a conversation at a lunchcounter or a cocktail party. How would you describe what learning to engage in such activities involved for you? To what extent does it make sense to say that what you did was to "acquire information" in the usual sense? What else did you do beyond that?

Let me address one of these analogies. Suppose that you were asked to teach a person how to sail a boat, and that you proceeded by explaining the names of the parts of the boat, how the various parts operated, and the principles on which they functioned. Suppose your student learned to repeat perfectly what you had said. What would he or she know about *sailing*? One summer I tried to teach people to sail that way, and what I found is that even those who could repeat what I said did not understand it; that when they got into a boat and felt it move and shift on the water, the sails shake and fill in the wind, they had no real idea what to do. Of course the information I offered was useful to one who wishes to sail, but it could only begin to be meaningful when he understood something about sailing. I am suggesting that knowing the rules of the law is like knowing the names for the parts of the boat; it is useful information which teaches little about the enterprise itself. Or consider fly-fishing or a golf swing: what do you know when you can explain the structure of the equipment and the principles upon which it is used, when a cast or a swing has been described to you, but before you yourself have tried it? To learn law one must do law. It is the function of our classes to help you learn how to do law.

A more complete analogy may be learning a language. One must of course know the rules of grammar and the meanings of terms, but to know those things is not to know how to speak

the language; that knowledge comes only with use. The real difficulties and pleasures lie not in knowing the rules of French or of law, but in knowing how to speak the language, how to make sense of it, how to use it to serve your purposes in life. One's knowledge of a language, like one's knowledge of the law, is never complete. Again and again one hears new sentences and new terms; one sees, with surprise and pleasure, new operations and new moves. The speaker of ordinary competence himself constantly invents new ways to use the language. It is said that the most effective way to teach a language is to immerse the student in the culture, to start him speaking and talking and reading the language before he "knows" anything about the language. Then it is always a language, and not a scheme, not a subject, that he is learning. It is a similar perception which underlies the way we teach law.

In both language and law, learning has a double focus: if one is to live and act competently in a particular culture, one simply must learn how the language—or the law—is in fact spoken by others, by those whom one wishes to address, to persuade, to learn from, and to live with. But one also wishes to learn how to turn the language, or the law, to one's own purposes: to invent new sentences, to have new ideas, to do new things, perhaps to change the nature of the language itself. Your concern in law school is thus a double one: to learn as completely as you can how the legal culture functions; and to establish a place for yourself in relation to it from which you can attempt to use it in your own ways—in ways that increase your capacities and powers, ways that enable you to speak truthfully to the conditions of the world and to take positions (and offer them to others) which seem to you to be right. In doing all this you will subject your own views and inclinations to the discipline of the inherited culture and the conditions of the world; and you will have a chance, sometimes, not only to maintain but to improve the culture of which you become a part.

What I have said may perhaps suggest an explanation of what we call the "case method" of learning law, that is, by studying actual cases in which the law can be seen in action rather than by memorizing general principles or rules. It is true that the cases you will read in your courses can usually be said to stand for one or more propositions of law, and cases are often referred to that way by a lawyer writing a brief or by a judge in his opinion. But it is not primarily to learn those propositions of law (which may indeed be, in your view or that of others, erroneous) that you read those cases. Cases in your casebooks are offered to you as the occasion for individual and collective thought, as genuine problems for the mind and heart. Each opinion is the final stage of a complicated series of legal events. You are asked to reconstruct these events in your imagination so that you can participate in them at second hand; pretending now that you are the seller, now the buyer, now one of the lawyers, now the other, now a judge, now a legislator. "What would I have done here and why?" is your constant question and test.

This experience can be regarded as an idealized apprenticeship, as an intellectual training in the experience of the law, and it has its roots in our traditions. As you may know, it was once the custom in this country for a lawyer to learn the law by doing it, as a clerk or apprentice to an established lawyer. One can of course learn to do the law that way, and such a training has many merits for one who wishes to learn the language of the law. But the material which comes into any one lawyer's office is not selected or structured to train the student in a wide range of activities; and one is stuck with an early and necessarily untutored choice of a single instructor. The idealized or imaginary apprentice system which the case method entails thus has the advantages of coverage, structure, and, may it also be said, unreality. The mistakes you make as you first try to do law are, under this system, harmless ones.

Your apprenticeship is idealized in another,

perhaps to you less attractive, way, for your teachers are not themselves primarily engaged in the busy life of clients and cases—though most of them once were—but are people who think about and participate in the law in a different way, as what we call writers or scholars. We cannot, as a group, pretend to offer you what seasoned and experienced practitioners would, and perhaps it is appropriate to say something of what we think we can offer. What our position gives us is the chance to stand back from the world of detail and practice and to try to find something to see in it, something to say about it of a more general and worked out kind than would likely emerge from the press of a life in practice. At this school it is widely felt that good teaching requires a critical and creative engagement with the subject taught, for it is only when the teacher can regard the material as meaning or exemplifying something, as a field for the operation of his or her independent intelligence, that it becomes in any but a mechanical way teachable. Our writing is, among other things, the record of our engagement with the law, an engagement of a more general and reflective kind than we enjoyed in practice. We hope that this engagement will deepen our engagement with you.

We do not purport to be able to teach you everything you want to know, as lawyers or as people. It is of course true that, if you apply yourself, there are many things you will be able to do and do well when you graduate. But our function cannot be to create maturely competent practicing lawyers, for no one has figured out how to do that in three years. Perhaps our object in this respect could be said to be to prepare you to make the most of your actual experience of the law at work in the world when the time comes, to see more and learn more than you otherwise would. If you go into law practice in a firm after law school you will find that the apprenticeship system continues, for a good law office puts a very high priority on teach-

ing its young, and a recent law graduate has a great deal to learn.

To return to your present situation: what does the conception of the process of law school I have outlined above mean for you? What should you do, for example, when you read a case? What sorts of questions should you expect your teacher to ask of you, and how should you prepare to respond to them?

The first thing to understand is that the judicial opinion that you read in your casebook is the last stage of a long and complicated process. This kind of literature, which will form the bulk of your first year reading, is the cultural deposit or artefact left behind by weeks or months or years of work by actual people in the real world, from which it is your task to learn—to figure out—as much as you can about the activity of law. It is a little as if you were given the last chapter of a novel and asked to imagine what went before. A prodigious task.

In my view, the best way to proceed is chronologically. Begin by trying to reconstruct from the opinion, so far as you can, the facts that occurred in the real world before any lawyer was brought into play. Tell the story chronologically, without any terms of legal conclusion. You should try to create a movie of life, a story of the experience of ordinary people in the ordinary world. Reflect in your story how each of the participants would characterize the events in his ordinary language. This is the experience upon which the law will be asked to act in its peculiar and powerful ways, and for which the various people of the law will claim particular—and competing—legal meanings.

You will probably discover that your knowledge of the facts is less than complete. Ask yourself what additional facts you would like to know, and why. Here you can pretend that you are a lawyer representing one of the clients, and ask yourself what questions you would put to him about what happened. This is, after all, what a lawyer does when a client comes into his

office and tells his story. The client believes he has told the whole thing. The lawyer examines and reexamines the story, asking questions and more questions until he is satisfied that he has "enough" to enable him to turn to his books; what he reads there will suggest new questions, to which the answers will suggest new lines of legal inquiry, and so it goes, a jostling between the facts and the law throughout the life of the case. You can at least begin this process with every case you read.

The next stage of reconstruction is to ask (so far as you can determine from the opinion that you read) what each lawyer did, why you think he did that, and what you would have done in his place. One lawyer, for example, initiated the judicial process by filing a complaint, which necessarily rests upon one or more legal theories. What were the legal theories? Are these the legal theories that you would have asserted? Is he properly in this court rather than another, and why, if he had a choice of courts, did he choose this one? What relief does he seek and why? How else might you have acted on behalf of the plaintiff in the case? After the first lawyer acted, the second lawyer responded by filing an answer or motion in response to the complaint. How did the second lawyer respond? What would you have considered doing and why? Could the lawyers have anticipated their difficulties by sound planning or more skillful drafting? Is there a negotiated solution they seem to have overlooked? You are asked to put yourself in the place of each of the parties and each of the lawyers and ask yourself how you would have behaved, how you would have interpreted and responded to the events which underlie the case.

Almost all of the judicial opinions in your casebook are explanations of decisions reached in appellate proceedings. In these, an appellate court is asked to approve or disapprove the decisions made by a judge at the trial of the case (or at some stage prior to trial). The evidence available to you on these matters is often

skimpy, but you should try, so far as you can, to reconstruct the course of the proceeding whose result is in question on appeal. Can you figure out what each lawyer did? How would you have acted in his place? What actions of the trial court are claimed by the appellant to be erroneous, and why? Can you see other actions which you would have designated as error on appeal? On what theory would you have done so?

The appellant's designations of error usually define the issue or issues on appeal. Frequently the issues so defined will be stated by the court, and the arguments of counsel summarized, explicitly or implicitly. At this stage ask yourself: what arguments would you have advanced for each side? Why? How do you evaluate the arguments you would make?

At the end you read an opinion that explains the judgment in the case, and here you face the hardest questions of all: How would you decide this case? How would you explain and defend your judgment? At this stage, the process of the law is no longer, if it ever was, a matter of rhetorical skill and intellectual deftness. It is a matter of judging right and wrong, better and worse, of coming to terms with the necessity and difficulty of judgment. The simple question—"How should this case be decided?"—presents a puzzle and a challenge that can occupy a life.

You can take it, then, that part of your training in this school is a training in a special kind of reading. Not "reading for the main idea," as you may have learned in high school, and certainly not reading for maximum content acquisition in the minimum time, but reading as a species of thought, with a reconstructive and critical imagination. What can you see here, we ask, and what can you make of it? What seems at first easy enough becomes, as you study it, perplexing; simplicity becomes complicated. This should not surprise you. A football game—or a single move in it, say a block or a tackle—is simple enough to the mere fan, complex indeed to the coach or scout; beauty in music is one thing to the ordinary listener, quite another to the cri-

tic or performer or composer. So it is with a case, read not as an exemplification of a rule, but as a deposit of the processes of the world in which experience continually frustrates expectation, in which facts and arguments seem inexhaustible and inconclusive. So it is with a statute or regulation, read not as the statement of a general idea, but with a critical and inventive eye for the problematic case which will expose uncertainty or incoherence in what may at first seem a plain and clear statement.

In your classes you can expect your teachers to ask you to describe as accurately as the materials permit what happened at each stage of the process by which a case was made, how the lawyers behaved, and what you would have done in their place. It is especially important for you to understand and to be able to state clearly the arguments made by each lawyer on appeal, and to see where each could be said to be defective.

The arguments you present in class will be met by other students and you will be asked to respond to what they say. It is thus not enough for you to state the issues and arguments as the lawyers and judges do; you must be prepared to suggest new lines of thought, new arguments, and to find new defects. You must be prepared to present your own resolution of the difficulties you see, not only with a responsiveness to the claims of these parties, but with a sensitivity to the meaning of the case, as you would decide it, for parties and lawyers and judges in future cases, including those who will try to plan their affairs in legitimate ways to avoid litigation in the future. You are responsible at the moment for the case as a whole.

All of this may be a most frightening prospect to you. How can you evaluate what the lawyers did when you haven't even been to law school yet? How can you substitute your opinion for that of an experienced and competent judge? Of course you can not expect yourself to function at the beginning as an accomplished lawyer. But you are asked to learn by doing, just as one

learns a language by speaking it. Of course, your first efforts will be halting, you will misunderstand things, you will make errors. That is not your fault; it resides in the nature of things.

Your teachers know all this, and while you may sometimes understandably feel that the persistent and impossible demands of the classroom are intended to operate as a sort of boot-camp discipline or hazing exercise, that is not our purpose at all. The cases are hard for us as well as for you, sometimes I think harder for us than for you; our task is to lead a conversation, by question and observation, which will expose the difficulties of our common circumstance, the perplexities that do not at first appear. It is important for you to know that these are perplexities for all of us, and that your teachers have no handy solutions to purvey. To the extent that our own views on the merits of particular questions obtrude with indecent plainness, you are encouraged to give them no more weight than they in your view deserve; to treat them, that is, just as if they were the views of a fellow student, which indeed they are. The difference between your teacher and you, after all, is only that he has read the case more often, thought about it longer, and has a somewhat larger set of legal materials to bring to bear on it. He has no patent from above that will guarantee his being right. And you can have no assurance, whatever he says, that he will not change his mind. The legal mind is marked, one might say, by an odd combination of three things: a capacity to organize the materials of argument, with great force, on either side of a question; a willingness to reach and state a conclusion; and an openness to persuasion that one is wrong. Law school is among other things an experience of making up and changing your mind. Behind all the rhetorical force is a deep sense of the tentative.

The truth is that there are no experts in the law, in the sense that there are no persons upon whose judgment you may rely without understanding it; each of us is responsible for what he

thinks and says, and it is no discharge of your duty to repeat to your professor what he has told you he thinks. You must make your own way.

It may or may not be comforting to hear this, but the sense of inadequacy and isolation which you should have as you now contemplate this process will always, in one form or another, be with you. One never knows all the law; one never feels wholly confident about any step taken in the law. The lawyer lives in an uncertain and indeterminate world, and his profession is to survive and flourish in it. To return to the sailing analogy, while you are sailing you can no longer plant your feet firmly on the ground, and proceed by certain steps in a certain direction; but you can sail a boat on the water.

There is another way to put my point. The sense of isolation you now have is in large part the burden of acknowledged responsibility for what you do with the law. That sense of responsibility—which will be most acute when you find yourself making real decisions which actually affect the property, lives, and interests of other people—is central to the experience of the lawyer. I hope you feel it now. One way to state what I urge upon you is this: take the view that you have now spent the last day of your life as a "student of a subject" in the ordinary sense, as a student whose education is the responsibility of a school. Put your school days behind you. From this day on, you are a professional person, responsible alone for your own education; for the improvement of your mind; and for the judgments that you make in the world you will inhabit. What this means in practical terms for you as a new law student is that you should work hard on your cases, in the way suggested above, rather than looking for answers elsewhere. You should participate in class, both directly and imaginatively; if you are not asked to respond to a question, pretend that you are. When another person speaks, ask yourself how you would respond to him. Don't be afraid

to be foolish or to be wrong; when your concern is how you can function in the law, there is nothing to be gained by hiding what you are. When you talk with other students about the law outside of class, try to talk as colleagues, teaching each other outside of class as you learn in it.

I would now like to make a general remark about the view of legal education I have offered you. On the one hand it is, as I have just suggested, a genuinely professional education, in which you are asked to function as a professional from the first day you begin. You are asked not only to do what a professional does, but to have the attitude a professional has and to meet professional standards. In order to survive and succeed in the world defined by what lawyers do, you must learn how to do those things well. In that sense, you are all asked to learn the same thing: the conventions of that branch of our culture which consist of the activity of law. But, as I have defined it, your legal education is not merely a professional education. It is also a liberal education in the deepest sense. Our ultimate concern is not with your competence at imitating what others do, at learning the moves the lawyer must know; but with the development of your own capacities, sensitivities, and styles, based on a just recognition of the powers and limits of the human mind. As you work through the material of the law, now and later, you make judgments and choices, you write and say sentences, that fashion a character for yourself out of experience. You will learn both how to function in an inherited culture, as a member of it, and how to function at the same time as yourself. How you do this, as I have said, is your responsibility; our task is to offer you a world in which you can begin to work out your own double identity, as lawyer and as mind.