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THE UNIVERSITY OF CHICAGO

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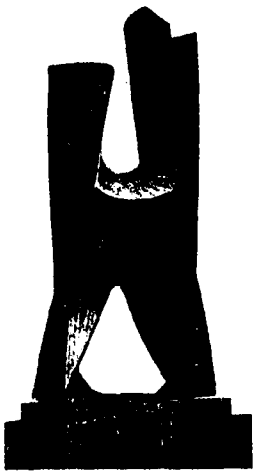
THE UNIVERSITY LAW SCHOOL AND PRACTICAL EDUCATION

Carl McGowan



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THE UNIVERSITY LAW SCHOOL AND PRACTICAL EDUCATION

Carl McGowan*

It is always a distinct pleasure for me to be a visitor at this law school, with whose faculty and alumni I have had so many ties over the years. But I regard it as a very special privilege to be here this time as an incumbent of the Schwartz Fellowship. It was my good fortune to become acquainted with Judge Schwartz during my lawyering days in Chicago, and to appear before him in his court. To know of his deep and wide-ranging interest in all that related to the life of the mind, and of his public and private activities as a lawyer and citizen, was to grasp the meaning of a truly humanist culture. He was a man of Renaissance dimensions, of which his career as a great judge was only one element. Our memories of him invariably evoke the delight we took in his presence among us, and continuously shape our own aspirations.

I conceive of this occasion as belonging wholly to the first-year class — to the neophytes, that is to say, and not to those among us who have already been through the initiation; I hope to keep what I have to say focused upon the former. The present moment is one of some anxiety to me as well as to my audience. The source of that in your case is presumably your preoccupation with the question of sheer survival during the days and weeks ahead, as you confront the rigors of a new intellectual discipline which you have always assumed to be rational, but which your mentors — who, after all, should know — appear determined to demonstrate is not the case at all. My own apprehensiveness derives rather from a concern as to whether I can say anything that will be helpful in your living from day to day with this paradox.

The first — and best — reassurance is that every beginning law student has, and continues to have for some time, the uneasy feelings that are now yours, or shortly will be. The very first class I attended at Col-

*United States Court of Appeals for District of Columbia Circuit. This paper was delivered to the entering students of the University of Chicago Law School on October 5, 1978.

umbia Law School several eons ago ended after fifteen minutes when the first student called upon to recite, after being covered with confusion, slumped to the floor in a dead faint. The rest of us made our way out of the classroom in a bemused state, our minds intent on calculating the mathematical probabilities of whether, it being a very large class and the professor's method being known to involve only one or two recitations per class, we might get through the semester without being called upon at all.

As we assembled for the second meeting of the class two days later, our feelings were very much the same as those of "uncoordinated Little Leaguers standing in various right fields praying that the ball will not be hit to them."[1] As the professor casually selected a name card from the large pack in front of him, the tension was great. As he called out the name, "Mr. Smith," one of our number stood up promptly and said "Mr. Joseph Smith?" The professor, who undoubtedly did not know there were two Smiths in the class and who could not have cared less as to which head was to be laid on the block next, said "Why, yes." To which the student responded "I am Mr. John Smith," and triumphantly sat down, leaving the slower-witted Smith to his fate.

Now, this had, on balance, a curiously heartening effect on the rest of us. Although it suggested ominously that, in terms of intra-class competition, we were on a pretty fast track, certainly as compared with our undergraduate years, it did indicate that, in the student-faculty struggle, there were available to each of us stores of human resourcefulness and ingenuity if we would only cultivate them — using our heads, if you please, instead of wringing our hands. A mind that could plan and function under pressure, as did that of Mr. John Smith, might well, we thought, be capable, if more constructively applied, of grasping the substantive aspects of the subject matter at least well enough to resist obliteration in any Socratic exchange, no matter how vigorously it might be pressed. Indeed, this demonstration of the miracles to be wrought by the human mind when earnestly employed dared us to dream that, later perhaps rather than sooner but surely at some point,

[1]The New Yorker, August 7, 1978, at 17.

we would be able to divine the method behind the seeming madness.

It should also be reassuring for you to know that more legally seasoned minds than yours have had difficulties with the case method of teaching, to which you will be so heavily exposed during your first year. Only two years after Dean Langdell first introduced that method at the Harvard Law School in 1870, the opposition to it within the faculty, among the alumni, and at the bar resulted in the creation of a new law school at Boston University for the express purpose of providing what was termed "an antidote to the theoretical tendencies" alarmingly displayed at Harvard. And in 1890 when Professor Keener was brought down from Harvard to introduce the case method at Columbia, the entire existing faculty withdrew in protest a year later, and dissident alumni established the New York Law School to enable them to carry on their teaching in the old manner.[2]

I need not perhaps point out that both Harvard and Columbia survived the counter-reformation; and the new schools themselves embraced the case method within a relatively short time. A relevant recent statistic in this connection, I believe, is a poll of Harvard students as to their satisfaction with the quality of teaching at the law school. Of those nearing the end of their first year, 74% professed satisfaction, but the figure dropped to 41% for second-year students, and to 20% for third-year.[3] Since Harvard, like most other schools, employs the case method most heavily in the first year and sharply phases it down thereafter, the merits of that method may become more visible to first-year students as the year goes on than is true in the early weeks.

I suspect that the same may be true of many of you who find the case method frustrating and bewildering in your early exposure to it. In any event, as one of my own teachers at Columbia wrote as long ago as 1951, "In practice the case method has never stood still"[4], and the law schools generally have moved to

[2]Here, and elsewhere, I am indebted to Erwin Griswold's informative and thoughtful article, *Legal Education: 1878-1978*, 64 A.B.A. J. 1051, 1055-56 (1978).

[3]Harvard Law Record, April 28, 1978, at 3.

[4]Patterson, *The Case Method in American Legal Education: Its Origins and Objectives*, 4 J. Legal Ed. 1 (1951).

what seems to be a sensible balance between the case method and other ways of giving instruction in the law. After the first year, you are going to see a great deal of the latter, but it will rest on a strong and solid foundation provided by the case system. Your later life in the law will constantly be characterized by the necessity of analyzing and differentiating judicial decisions, and of formulating verbal responses under pressure, whether you are standing on your feet in a courtroom or sitting down at a negotiating conference. The classroom regimen of the months immediately before you will stand you in very good stead indeed in the post-academic years ahead.

What is, and should continue to be, a support to your confidence is the fact that you are here at all. The ratio of applications to admissions is strikingly high at this law school, and your selection from among so many is in itself a confident prediction by experts that you will be able to cope. Your choice among institutions is a wise one in the sense that your affiliation is with one of those schools that have firmly anchored themselves in a university framework, with all that that implies in terms of the purity and elevation of educational objectives, and their enrichment by ready access to other intellectual disciplines. When President William Rainey Harper of the newly-created University of Chicago quickly turned his attention at the turn of the century to the founding of a law school, he asserted that "Great emphasis will be placed upon the fact that the University spirit is to prevail in the work of the Law School . . ."[5]. That emphasis has persisted from that day to this, and constitutes your guarantee that you have not enrolled in a mere trade school.

Periodically throughout the history of legal education in this country, the University spirit is affected, not to say imperilled, by an upsurge of demands for a greater measure of what is variously termed more "useful" or more "practical" instruction. We appear to be in such a cycle at the moment. The Chief Justice of the United States — to whom all of us are greatly indebted for the extraordinary effort he has made, despite his own heavy judicial burdens, to improve the administration of justice — testifying in London

[5]F. L. Ellsworth, *Law and the Midway* (1977), at 84.

before a Royal Commission inquiring into the state of the legal profession in Great Britain, ventured the assertion that 50% of the American trial bar are incompetent. In his speech to the American Law Institute in May he urged that at least some of the law schools experiment with devoting the third year solely to practical training. In his latest appearance before the American Bar Association in August he stressed the result of a poll recently conducted by the Law School Admission Council. Of the 1600 law school graduates of six schools between 1955 and 1970 who responded to the inquiry, a significant percentage professed dissatisfaction with their legal education because they had not been prepared to do such things as investigate and deal with facts, draft legal documents, counsel with clients, and negotiate settlements. He concluded from this that some form of internship is essential after which certification of competence must be obtained to qualify for trial advocacy.

A commission constituted by the Judicial Conference of the United States to consider the desirability of propounding standards for admission to practice before the federal courts has recently recommended that a national bar examination be instituted as a prerequisite to such admission. That examination will cover specified subjects related to federal practice; and, in addition to success in that examination, the applicant must show that he or she has had four trial "experiences" involving some combination of actual participation in state or federal trials, simulated trials in law schools, attendance at continuing legal education programs, or supervised observation of federal court trials.

It is evident, of course, that a project of this nature cannot, any more than could the so-called Clare Committee which was given a similar mission by Chief Judge Kaufman of the Second Circuit Court of Appeals, logically avoid the specification of the courses which must be taken in law school. And if the federal courts move in this direction, the state courts will inevitably follow, raising the spectre of the determination of the curricula of the law schools by a widely-varying group of judges whose legal horizons are inevitably bounded by their immediate concerns

with what is going on in their courts.

At the Judicial Conference of the D.C. Circuit not long ago, we gave the members a chance to react to the Clare Committee proposal by scheduling a debate between Mr. Clare and Dean Sovern of the Columbia Law School. When the Dean had finished his devastating dissection of the Committee's report and the floor was opened for discussion, not a single voice was raised, and we moved on to the next item on the agenda satisfied that neither the bench nor the bar in our circuit saw any need to pursue this approach.

Parenthetically, I see that, in one of his first official communications to his constituency, the new president of the American Bar Association has said that, in the laudable interest of cutting costs so as to reduce fees to clients, he was initiating "a new effort to encourage the teaching of law office management skills in law schools."[6] Surely attendance at one law faculty meeting, followed by a visit to a few law professors' offices, should be enough to demonstrate that this is a hollow dream at best.

Although I do spend a lot of time reading trial transcripts, as an appellate judge I am obviously not situated as well as a trial judge to form impressions about the degree of incompetence of the trial bar. I did note, however, that a questionnaire sent by the Federal Judicial Center to the Federal judges showed less than a majority of the district judges as believing there is a serious problem. And Dean Griswold has, in the article I referred to earlier, suggested that those judges who are complaining may, in view of the steadily heightening bar admission requirements of the last 50 years, "be unaware of the improvement in the average quality of the practitioners before them, and the inadequate ones may stand out more clearly."[7]

Although obviously one incompetent trial lawyer is too many, in this field, as in others, we confront the necessity of having to define our priorities. I find it hard to believe that the professional competence of its bar is even remotely close to the top of the scale of the present priorities of the federal judicial system, and I should be loath to have anything but the most

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[6]Tate, President's Page, 64 A.B.A. J. 1313 (1978).

[7]Griswold, *supra* note 2, at 1061.

demonstrable and urgent need result in action which would impair the capacity of university faculties to determine the objectives and content of university education, in law as elsewhere.

Talk about the necessity of an internship for trial practice comparable to that required of medical school graduates seems to me to overlook the fact that we do not lack internships for law school graduates who want to be litigators. The United States Attorneys, the Department of Justice, the public defender agencies, the state, county, and municipal law offices, the civil legal aid societies — all and more have been a training ground for a long time comparable to the hospitals in the medical field. It is not as if there were simply no opportunities for learning by doing in litigation except as the law schools provide them.

The young law school graduate with a good academic record can ordinarily get actual litigation training in public agencies of the kind I have mentioned — and they have done it and are doing it in large numbers. Many of the country's most competent trial lawyers have followed that path to their present eminence, and it is a training which no law school of distinction either can or should try to equal.

That eminence rests upon two essential bases — one is the training which a good law school gives all its students in basic legal concepts, close and searching analysis, and the imaginative formulation of legal theory to serve the client's interest; the other is experience in actual litigation derived from having been in trial often enough to feel at ease in a courtroom and to be alert to the tactical problems which invariably arise. No trial lawyer can be really competent if he does not have both. We should be wary of diverting the law schools from their highly satisfactory performance of the one when superior instruction in the other is as readily available as it now is.

My objection is not necessarily to a required internship as such before a lawyer can start representing private clients in the trial courts. It is rather that the university law schools should not be called upon to provide it at the expense of the more fundamental and essential legal training which only they can —

and do — give.

I confess to considerable wonderment about law school graduates — at least of a university law school — who would register dissatisfaction because they had not been trained in the negotiation of settlements or how to deal with their clients. They sound to me very much like people with no personal aptitude for law practice who are blaming it on their law schools. The nature and content of the education provided at a university law school should not be transformed for the hopeless task of making them different people from what they are.

The university law school, like any other institution, does not exist in a social vacuum, nor is it an ivory tower. A distinguished law school dean in this state has recently observed that the uniqueness of such a school derives from the fact that "it faces in two directions: inward toward the university, with its interest in the intellectual life and its concern for the transmission and development of knowledge through research and teaching, and outward toward the law in action as opposed to the law in books."[6] There are, as he wisely notes, tensions that inherently flow from this condition.

No university law school of which I am aware, notably including this one, has been oblivious of these tensions or failed to move towards their accommodation by clinical programs and other methods of expanding the law school experience beyond the walls of the classroom. Virtually all of the law clerkship applications I receive from university law school students reveal summer employment by law firms or public agencies. The essential thing is that a rational balance between the inward and outward facings of the university law school be not disturbed by the forced intrusion of purely professional interests from without.

It is by such a standard that all of us with a stake in maintaining legal education in the United States at its present and longstanding extraordinary level of excellence should measure the current discontents. And no one has a bigger stake in that regard than you here this evening who are at the very threshold of

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[6]Cribbett, *Report to the Chancellor for 1977-78*, College of Law, University of Illinois at Champaign-Urbana, p. 2.

your full-time and formal period of legal education. I hope most earnestly that you will not let the siren song of practicality lure you towards the rocks of knowing where to file a lawsuit but unable to conceive a sound theory upon which to base it. You can learn the first within an hour after you are in your own or somebody else's law office; if you cannot do the second by the time you leave this school, you will in all likelihood never be able to. In speaking of legal education, it is not unacceptably paradoxical "to adhere," as Walter Gellhorn has put it, "to the belief that the theoretical is indeed the practical — and is, in any case, the justification for a university program."[9]

It is also important for you to know that the current clamor from your elders about professional incompetence does not speak with a single voice. There are many lawyers and judges who stand apart from it, and who, in particular, do not accept any assumption that such problems as may exist can and should be solved by departures in legal education which, far from being new, threaten a return to the 19th century when legal education was imprisoned in practicality and awaiting liberation by the universities.

A most distinguished federal trial court judge in New York City, Marvin Frankel, has vigorously exposed the weaknesses of the solutions being urged and the danger they pose to our university legal education. Judge Frankel has written:

> The paths to professional excellence are and must be multifarious. The effective lawyer or judge, as we must all know, is compounded of concern, wisdom, energy, and judgment, not prescribed hours of training or other mechanical accomplishments. The several proposals now being pressed for narrow and compelled conformities are largely beside the point. Not that lawyers and judges don't need all the education they can get. We do, and we tend in numbers to demonstrate an awareness of the need. What is not shown to be needed is some particular species of universal gimmicks for the promotion of competence. And it is not unfair, I

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[9]Gellhorn, *Preaching That Old Time Religion*, 63 Va. L. Rev. 175, 177 (1977).

> submit, to label as gimmicks the narrow-gauged, partial, inflexible prescription of courses or attendance hours as conditions of admission or good standing.[10]

Erwin Griswold, now flourishing in private practice after his long and distinguished academic career at the Harvard Law School, has emphasized that one of the great virtues of university law school education has been the flexibility and mobility it has given its graduates to move into all sectors of the law and the other areas of endeavor in which it is put to work. "All experience," says Dean Griswold, "shows that law students have little conception of what they will be doing five years, ten years, thirty years in the future.... The homogenization of the law schools... gives all students and lawyers a more nearly equal opportunity, not only at the beginning, but at later stages, as opportunities, often unexpected, may develop."[11]

Finally, Professor Francis Allen, in a thoughtful essay written in 1976 when he was president of the Association of American Law Schools, has warned of anti-intellectual elements in the current impatience with the alleged insufficiencies of practical content in the law school curricula. Shrewdly observing that the pressures for more so-called useful instruction come not alone from judges and lawyers outside the law schools but from within as well in the persons of students who wish to be upon graduation instantly effective in the pursuit of social or personal objectives peculiar to themselves, Professor Allen concludes that the "preservation and extension of an intellectually-based and humanistically-motivated legal education is the greatest challenge facing American law schools."[12]

Stating the challenge in that way does not imply that it is to be met by unyielding academic resistance to clinical programs and other means of projecting the student's vision and experience beyond the classroom. In my court at the present time at least

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[10]Frankel, *Curing Lawyers' Incompetence: Primum Non Nocere*, 10 Creighton L. Rev. 613, 634 (1977).

[11]Griswold, *supra* note 2, at 1062.

[12]Allen, *The New Anti-Intellectualism in American Legal Education*, 28 Mercer L. Rev. 447, 461 (1977).

60% or more of the indigent criminal appeals are briefed and argued by law students under faculty supervision. This benefits the bar, the court, the students, and, not least, the clients who are receiving devoted and effective representation; it certainly adds a meaningful dimension to law school education.

The question remains one, however, of a proper balance between the traditional university law school teaching which has served us so well and remains critically essential, on the one hand, and outward-looking recognition of what is happening in the legal world beyond the academic groves, on the other. Much of that latter burden in virtually all areas of law, including the highly specialized fields, is presently being carried by the phenomenal growth industry of continuing legal education after admission to practice, to which many law schools are making a contribution, along with bar associations and private enterprises. With the multiplication of educational resources of this kind, relief is afforded from the pressures on the law schools to divert their energies from the essential teaching and research functions which only they can provide in a climate which is neither that of the marketplace nor the political forum.

The idea of a university, to use Cardinal Newman's phrase, has very vital implications for the study of law, as of anything else. It has nothing to do with tricks of the trade which may effectively confuse an opposition witness who is doing his best to tell the truth, or hang a jury. Those of you who come to understand this fact as you grope your way through the confusions ahead will have taken a first and essential step towards being a truly competent lawyer in whatever legal setting you may one day, probably to your own great surprise, find yourself. I do not ask that you be wholly passive and unquestioning about the form of the legal education you will be receiving here. I do suggest that most of the questions currently being raised about legal education are not grounded in any demonstrable crisis, and are relevant only to what are now, and should remain, the fringe areas of any legal education that is true to the university spirit.

I turn now to the questions which it seems to me you should be asking as you examine during the next

three years the product of the legal system as it is presently functioning. As some of your elders at the bar are professing concern at the way you will be spending your time here in school, it surely is not amiss for you to scrutinize carefully what they are up to. Since they seem mainly concerned at the moment as to whether you will be adequately equipped to win each case you take to court for a client, perhaps a good place to begin is with the workings of the adversary system itself.

Judge Frankel, after more than twelve years of presiding over adversary trials, is voluntarily leaving the bench with many questions in his mind on this score. His last big case was a prolonged anti-trust suit which ended in some disarray with one of the senior lawyer participants pleading guilty to a criminal contempt charge for having made a false statement under oath to the judge in order to promote what he conceived to be a tactical advantage of his client. This incident brought to a head a growing feeling that the adversary trial, constituting a game played for high stakes, is putting intolerable pressures on lawyers to play that game in any way calculated to win the prize.

Apart from such a dramatic incident as this one, many thoughtful lawyers and judges are beginning to wonder if there are not to be found, in at least some areas of human affairs, better, and certainly more expeditious and less costly, methods of dispute resolution. The American Bar Association has mounted a major inquiry to this end. Judge Learned Hand long ago observed, after many years of experience as both a trial and an appellate judge, that he could conceive of no greater disaster happening to him as an individual than to become involved in a law suit. And there is quite evident at the moment a rising popular concern, on the part of large corporations as well as less powerful members of the public, with the functioning of our system of justice in its adversary trial aspects. That alone, in my submission, is a reason why the present insistence that the law schools give more practical instruction in how to try — and win — law suits is untimely at best.

The private adversary contest tried before judge or jury is not, of course, the only contributor to the rising torrent of litigation flooding the courts. In the

court on which I sit, 81% of all the cases filed in the last statistical year consisted of civil litigation involving the federal government; and the major part of those cases came on direct review from federal agencies without the intervention of the federal trial court. Indeed, many of them involved essentially policy decisions of general and prospective application made by the agency, under delegated authority from Congress, in proceedings which are essentially legislative in nature.

Although our court, both by congressional design and by virtue of its location, carries the heaviest burden of this kind of litigation, all of the other circuits are in the business as well; and you will be exposed to many such cases in the next three years. They tend to be cases of great complexity and difficulty, involving, as they frequently do, highly specialized and technical areas of knowledge. But the difficulties, for me at least, have increasingly become aggravated by nagging doubts as to whether some of the regulatory schemes are necessary at all, and, even if they are, what the role of the courts should be, if any, in sitting in judgment upon the results. The whole of the legal process adds up to a tremendous deployment of time and resources which arguably could be either dispensed with altogether or put to better use. This kind of administrative litigation has become a major preoccupation of the practising bar; and, again, the overall costs are enormous.

The fact seems to be that we, as a people, have a considerable talent for devising regulatory machinery to deal with new and significant developments in trade and commerce. At the same time, we appear to have no capacity whatever to dismantle or redesign that machinery when the passage of time either eliminates the problem or alters its character. A classic example of this is the field of transportation where all the signs for some years now have pointed towards the need for a massive injection of competition. The railroads, which long ago lost their monopoly dominance, continue to be closely regulated. The motor carrier industry, not having monopoly characteristics to begin with, has been given them by a regulatory scheme which is as unnecessary today as it was when it was first imposed forty years ago.

The only bright spot at the moment is air transportation, and that is due to the appointment not much more than a year ago of one of those theoretical and impractical university professors as chairman of the Civil Aeronautics Board. By persuading the Board to move in the direction of allowing greater freedom to the carriers to engage in rate competition and to undertake new routes, he appears to have demonstrated to Congress that deregulation is desirable, and legislation of significant proportions to that end is on the very verge of becoming law. Larger numbers of passengers have been travelling at lower fares, and carrier earnings are up, causing the industry in the main to face forward with enthusiasm towards the rolling back of the regulatory shelter.

From the judicial standpoint, the happy prospect looms that the courts may be spared the complicated route cases, for example, in which the Board, not being able to decide them by flipping a coin as between the equally qualified applicants, has had to devise other rationales for justifying the choice of one over another. Also cast into limbo will be rate cases which involve carrier-proposed reductions — not increases — and where the challenges come not from the consuming public but from the competitors.

There is also the passion which the law seems to breed in initially unsuccessful litigants for an endless series of higher levels at which their causes can be pressed, and the readiness of legislators to gratify it. Not long ago there was a case in our court involving recently enacted coal mining legislation where the ultimate question was whether, in the language of regulations issued by the Secretary of the Interior pursuant to statutory authority, the bathhouse was conveniently located to the mine head. Now I am sure that if I were either a coal miner or a mine owner adversely affected by a field inspector's ruling on this score, this would be an issue of consequence that I would like to be able to take to some impartial and expert authority for a further look.

What Congress had in fact provided in this regard was a full evidentiary hearing and adjudication by an administrative law judge in the Interior Department; full appellate review within the Department, including consideration by the Secretary or a board designated by him; a review of that determination by a cir-

cuit court of appeals; and, finally, the opportunity to seek further review in the United States Supreme Court. This strikes me as resort to legal processes run riot. I cannot believe that the Republic would fall or the foundations of our liberties be demolished if an issue of this kind is resolved once and for all at a much earlier stage, and arguably without the aid of the courts at all.

It is for anomalies of this kind, in what you are continually being told is that intensely practical world outside the university, that I hope you will be on the look-out as you read your cases. That busy world tends to accept things as they are, but it is the business of university people to say that the Emperor has no clothes on if he hasn't. The law and its processes have been put to geometrically increasing uses in this century, and legislation and litigation have come to be relied upon very heavily for the accommodation of a vast array of political and social problems, some of which may not lend themselves comfortably to such modes of resolution. A first look at the system by fledgling law students may conceivably be a clearer and more penetrating look than that of those who have been living within it for a long time.

Three years lie ahead for you in this lively, restless, probing, speculative, and skeptical world of the intellect that is a university. They will afford you an unparalleled opportunity to look at — and beyond — the system of law as it is now operating. If you are alert, and responsive to the university spirit, you will undoubtedly see some areas where there is too much law, and some where there is not enough. The practical world, in my view of it, needs those perceptions far more than it does your intensive training here in law office management or settlement strategy.

OCCASIONAL PAPERS

FROM

THE LAW SCHOOL
THE UNIVERSITY OF CHICAGO
1111 EAST 60TH STREET
CHICAGO, ILLINOIS 60637

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