The Play’s the Thing . . . .

Jonathon B. Chase*
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To use a metaphor, there are in law critics, playwrights and actors. What I have found most fascinating is that law schools have been and continue to be dominated by critics, those who for one reason or another have turned away from that which the vast majority of their students seek to learn and to be.

Further, not until recently did the better law schools do anything for these aspiring playwrights and actors but teach them how to be critics. That, fortunately, has changed dramatically (I am permitted at least one bad pun) in the past few years, and we have witnessed a burgeoning of clinical and trial practice offerings in law school curricula. Students are being introduced to the skills of the actor.

To clarify, lawyers need first to understand the law, which, as we realize, is not a body of information, but is a process, an evolving enlightenment, a movement towards understanding fundamental first principles through analysis. All lawyers must be critics. But lawyers are not usually hired to be critics; they are hired to solve problems and resolve disputes. It is with respect to the latter function, dispute resolution, that what I have referred to as the skills of the actor come into play (I could not resist it). These are generally communication skills, the art of personal manipulation (not necessarily a pejorative term) in interviewing, counseling, negotiation, mediation, and trying cases. It is these skills which law schools are finally beginning to teach1 — as well

1. Although I had hoped to avoid footnotes altogether, a few are necessary. How else could I cite my forthcoming article in the Vermont Law Review? See note 4, infra. There has been much written recently summarizing, reviewing, and further exploring recent developments in legal education. See, e.g., R. STEVENS, LAW SCHOOL: LEGAL EDUCATION IN AMERICA FROM THE 1950S TO THE 1980S (1983); Feinman and Feld-
they should.

But law schools do not do enough to teach the playwright. By that, I mean the creative problem solver, the planner, the builder, the drafter, the large case litigator (as distinguished from the trial lawyer). The manipulation of rules and principles (as distinguished from people) to solve problems is what I have found most exciting professionally. Further, as one who is by nature combative, problems presented by litigation have been for me the most exhilarating. But planning an estate, a business venture, drafting a contract, a statute, a consent decree are all places where theory and practice converge, and problem solving generally is what I would like to see us do more of in legal education.

There are two immediate changes in how law schools traditionally do business that I think are needed. First, we need more diversity in our faculties so that there is a mix of critics, actors and playwrights. Second, there needs to be respect and appreciation for what each does and should do.

Unlike other disciplines, such as history, philosophy or mathematics, I have never yet met a law professor who chose her graduate training as a path to the academy. People go to law school, by and large, to become lawyers or, at least, to keep options open. But they do not, again by and large, do so to become law professors. The appeal of teaching comes later and, usually, as a result of disaffection with the world of practice. That disaffection is too often reflected in a negative attitude towards and disdain for the practice and practitioners that is projected on to students and that perpetuates an unhealthy distance between those who practice and those who teach.

It is also my experience that most law professors do not have the temperament or inclination for creative problem solving. We are adept at taking a court’s opinion apart, but less so in seeing how it might be used as part of the lawyer’s arsenal. We can identify weaknesses in an idea or proposed solution but do not often help in suggesting improvements or solutions themselves. We can tell you well why not, but not often how to. We are critics. What we do is important, but it is not

enough.

In order to prepare our graduates to be creative problem solvers (and I think we can), we need more creative problem solvers on our law school faculties. We need more people who are actively engaged in creating. How is it we are so remarkably different from medical schools? Is there anyone anywhere teaching cardiology who does not practice cardiology?

I do not mean that we need necessarily to add more experienced practitioners to our faculties, though it would be good to have a few such persons. Even younger people with little practice experience can be encouraged through consulting to remain actively engaged at the frontiers of the practice. I do not suggest that such people spend their valuable time with the mundane or the routine but that they be a resource to the bar to assist with the complex and with first impressions.2 Further, they should engage their students in the process.

Although it may be conceit, I think my students in the constitutional law courses I teach understand the subject better by my relating to them how developments in constitutional law can be exploited in the solution of a client’s problem. Reading Great Atlantic & Pacific Tea Co. v. Cottrell3 as just one of the Commerce Clause cases in a constitutional law casebook is not nearly so interesting as seeing how that case can be used to challenge the constitutionality of requiring mutual reciprocity in professional licensing.4 It brings the case alive and helps students to learn to think prospectively, creatively.

I also alluded above to the need for greater respect for what a diverse faculty does and should do. What we do now is absurd. Almost the exclusive route to tenure at law schools is through traditional law review publication. That is the coin of the realm. Even if a particular school were enlightened enough to recognize other forms of contribution, a young professor hoping to build a reputation in the academic world generally would be ill-advised not to give serious consideration to building currency with universal exchange value.

We do need traditional scholarship. But we do not need it exclusively from everyone. Just as artists-in-residence at large universities are expected to create, so also should we expect and value the same from some of our colleagues. It is a waste of very limited resources to

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2. There are also revenue producing opportunities in such arrangements.
I certainly believe that all members of a law school faculty, in addition to doing fine work in the classroom, should engage in some professional activity which brings recognition to themselves and to their law school. But professional recognition should not be limited to that from within the academy only; it should extend to the legal world at large. Thus, being recognized as an expert in a particular field of practice should also be encouraged and valued.

All members of the legal academy should do some traditional, scholarly work. It is demanding and satisfying. But other work of excellence should also be recognized. Litigating a case of first impression, drafting new legislation, creating new forms of property, developing new trial or dispute resolution techniques or new approaches to legal education are of equal value and should be equally rewarded. Anything new, shared and related to law should qualify as scholarship under traditional requirements for tenure. What weight such work should be given can depend upon a number of variables.

I value excellence and care greatly about seeing things done well and properly. I also have an academic love for the law and take great pleasure in discussing recent developments in the law with my colleagues. I am not suggesting for a moment that standards be compro-
mised or lowered. But I also love being a lawyer, testing ideas in the laboratory of the legal world in which our graduates are to function.

Law schools have become divorced from the profession their students seek to join. It is not at all clear how that was permitted to happen. Perhaps it is attributable to elitism. Law school professors, by and large, tend to be graduates of the most prestigious law schools and tend to replicate their own law school experience. That experience may well be adequate (although I have serious doubts) for the top graduates of those schools, who will receive postgraduate education in large firms; thus, the system tends to perpetuate itself. Even students going into large firms, however, do not need three years of rigorous casebook exercise honing analytical skills. All students training to be lawyers need exposure to the profession itself. That is most certainly true of the vast majority of law school graduates embarking on a general practice in a small-to-medium-sized law firm in which there is an immediate expectation of client and courtroom responsibility.

It is time for the chasm between the academy and the practice to close and for the critics to make room for and welcome the playwrights and the actors.
DOONESBURY by Garry Trudeau

JOANIE, ARE YOU STILL WAITING TO HEAR FROM THE LAW SCHOOL AT BERKELEY? YES, AMONG OTHERS.

JOANIE, WHAT IF THAT'S THE ONLY SCHOOL YOU GET INTO? WOULD YOU MOVE TO CALIFORNIA? YES, I SUPPOSE SO.

IT MEANS THAT MUCH TO YOU? YOUR AMBITIONS ARE SO IMPORTANT THAT YOU'LL LEAVE ALL YOUR FRIENDS AT WALDEN TO WHOM YOU MEAN THE WORLD? Zinker, I...

WHY, JOANIE, WHY? IS A LAW CAREER SO SEDUCTIVE THAT YOU'RE WHEELING TO WALK AWAY FROM THOSE WHO LOVE YOU AND...

I GUESS SOME PEOPLE JUST PREFER LITIGATION TO CAVorting...

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