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## Packer & Ehrlich: New Directions in Legal Education

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## RECENT BOOKS

### BOOK REVIEWS

NEW DIRECTIONS IN LEGAL EDUCATION. By *Herbert L. Packer* and *Thomas Ehrlich*. New York: McGraw-Hill. 1972. Pp. xviii, 384. \$10.

The scope of this study for the Carnegie Commission on Higher Education should be understood at the outset of any discussion of its content. Of the 384 pages of the official volume, ninety-one contain the closely written analysis and recommendations of the two distinguished legal educators who are its authors.<sup>1</sup> The remainder of the book reprints as appendices the report of the Association of American Law Schools Curriculum Study Project Committee (the *Carrington Report*) (p. 93)<sup>2</sup> and an incisive interpretation of the intellectual history of legal education by Calvin Woodard (p. 329).<sup>3</sup> Since the *Carrington Report* has its own large attachment of useful appendices, *New Directions* serves, with its other purposes, to bring together and present in a highly visible format some of the most interesting thought in its field.

The inquiry of the Packer and Ehrlich *Study* itself has been sharply limited. It is not directed to the details of curriculum or to teaching methods. It does not deal with the questions involved in the education of more women lawyers and more lawyers from racial minorities, except to "state categorically" that more of them are needed in the profession and that this problem must be met with encouragement, adequate undergraduate education, and money. Nor is it based on any kind of empirical investigation; rather, in common with much of the "research" that emanates from law schools, it is the result of reading, thought, and discussion with colleagues.<sup>4</sup> The latter ingredient is institutionalized here by the use of what must have

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1. The late Herbert L. Packer was Jackson Eli Reynolds Professor of Law, Stanford Law School. Thomas Ehrlich is Dean and Professor of Law, Stanford Law School. The principal authors were assisted by Stephen Pepper, a student at the Yale Law School. Their work will be referred to here as *New Directions* or the *Study*.

2. Originally published as *Training for the Public Professions of the Law: 1971*, in ASSOCIATION OF AMERICAN LAW SCHOOLS, PROCEEDINGS, pt. 1, § 2 (1971) [hereinafter PROCEEDINGS].

3. Originally published as *The Limits of Legal Realism: An Historical Perspective*, 54 VA. L. REV. 689 (1968).

4. It is not my intent to downgrade this classic approach to legal problems. I have stated elsewhere my opinion that this kind of law-school-based analysis has been responsible for "much of the reform or improvement of any consequence which has occurred in our legal system." See Maxwell, *Legal Education and the Proposed National Institute of Justice*, in QUEST FOR JUSTICE (ISSUES FOR CONSIDERATION OF A NATIONAL INSTITUTE OF JUSTICE) 41 (1972). Nevertheless, legal scholars are developing a capacity for empirical study that may have an important role to play in future investigations of legal education.

been a very stimulating Advisory Committee.<sup>5</sup> The *Study* analyzes "structural" problems affecting all law schools, in the light of what is known of the legal profession and its possible evolution.

A starting point for much current thinking about the profession is that the schools are filled with students who have, for the most part, very good academic skills. If they continue to graduate from law school and enter the profession at the present rate, which seems likely, the number of lawyers will double in approximately fifteen years.<sup>6</sup> This prediction is far from exact: lawyers are mortal and fashions in graduate study change. But new law schools and expansions of existing law schools are on the drawing board, and applications would have to drop considerably to affect enrollments unless artificial standards of admission are established. In examining this "numbers problem" the American Bar Association Task Force on Professional Utilization found that "[t]here is no conclusive evidence to indicate that there are now or are likely to be in the foreseeable future more legally trained men and women than can be satisfactorily and productively employed."<sup>7</sup> *New Directions* is even more optimistic: "We tend to think that we can absorb this number of lawyers without straining our abilities. We would like to think that the growth in the legal agenda and the increasing diversity of the profession will result in an equilibrium at a higher level than we have today" (p. 10).<sup>8</sup>

The balance sheet of the legal agenda presented includes emerging "no fault" in automobile accident compensation and in divorce, balanced on the positive side by "the environment, consumer protection, . . . privacy," and, of course, representation for indigents in the criminal process. The *Study* feels that there is a demand for legal

5. The members were Charles F. Ares, dean of the University of Arizona Law School; Robert F. Drinan, S.J., now a member of the United States House of Representatives and formerly dean of the Boston College Law School; Abraham S. Goldstein, dean of the Yale Law School; Geoffrey Hazard, former executive director of the American Bar Foundation and now professor of law at Yale Law School; and Murray L. Schwartz, dean of the UCLA Law School.

6. See Schwartz, *The Legal Profession in the United States: 1960-1980*, BEVERLY HILLS B.J., Sept. 1971, at 60. A decrease was reported in the size of the class entering in the fall of 1972, but it was apparently the result "of deliberate action taken by the law schools" to offset the impact of the fact "that in the last year or two they had admitted larger than normal classes." Ruud, *That Burgeoning Law School Enrollment Slows*, 59 A.B.A.J. 150, 151 (1973).

7. TASK FORCE ON PROFESSIONAL UTILIZATION, A.B.A., REPORT 6 (1972).

8. For a much less optimistic view of trends in the supply and effective demand for lawyers in California, see T. O'TOOLE, *LEGAL MANPOWER SUPPLY AND DEMAND IN CALIFORNIA* (1972). This report, prepared for the California Coordinating Council for Higher Education, was designed to produce data and recommendations to assist in the decision whether or not to establish additional state-supported law schools in California at this time. It recommended against such a step. Although it found that "there is little question that there are large, unmet societal needs for increased legal services," *id.* at 65, it also found no developed structure for turning such needs into viable economic demands and no certain prospect that such a means would evolve.

services, but that a restructuring of the profession and its economics will be required to make it effective. A hierarchy of legal skills from sublegal and paralegal to certified professional specialist is envisioned, with a much narrower role for the "general practitioner" in between. The Code of Professional Responsibility would have to be adjusted to allow the effective utilization of such institutional changes as group practice and the certification of specialists. As the *Study* recognizes, many elements of this picture are already with us, if only in rudimentary form, and these developments may well mean that "the stage is set for dramatic expansion of needed legal services and for equally drastic changes in the skills required to provide these services" (p. 9).<sup>9</sup> The *Study* looks at legal education in this context.

American law schools are said to share the following "structural characteristics": "Their primary mission is the education of students for entry into the legal profession. The faculties of none are primarily engaged in research. None engages in undergraduate education. None offers its professional degree (LL.B. or J.D.) in less than three academic years" (p. 24). Within this "unitary" structure, the *Study* finds a pedagogic system that is often exciting, but in the end overdone to the point of boredom in classes that are too large, with educational goals that are sometimes obscure to both the teacher and his students. The picture includes continuing flirtations with the behavioral sciences and the humanities and more than a stirring of interest in empirical research for which, as yet, the schools cannot provide an adequate financial base.<sup>10</sup> The backdrop for all of this is the student (and faculty) malaise of recent years, attributed to a "lack of consensus about social policy" with roots in the "secularization" of law. Here the *Study* draws heavily on Calvin Woodard's *The Limits of Legal Realism* (p. 331),<sup>11</sup> which presents the thesis that the evolution of law from "sacred mystery" through various stages of "science" has left legal education "somewhere between the social engineering that the Realist viewed as its proper role and an as yet undefined preoccupation with social policy" (p. 35).

The implications of all this for legal education seem to be more emphasis on legislative and administrative solutions to social problems and less concern with the working out and protection of private transactions, together with more offerings "encouraging speculation about the nature and role of law in any of its variegated forms" (p. 382).<sup>12</sup> These are trends that have been evident in legal education

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9. Page numbers will not be used for every quotation from *New Directions* but I will attempt to locate for the casual reader the pages of this report where a particular idea is developed.

10. See Cavers, "Non-Traditional" Research by Law Teachers: Returns from the Questionnaire of the Council on Law-Related Studies, 24 J. LEGAL ED. 534 (1972).

11. See note 3 *supra* and accompanying text.

12. Woodard, *supra* note 3, at 737.

for some time, and it is difficult to believe that they will be brought closer to fruition for most students if the two-year option,<sup>13</sup> recommended by the *Study*, becomes a reality.

The chief new element on the law school scene, clinical education, draws mixed reviews. The *Study* finds its chief benefit to be the sharpening of interest in the traditional offerings, but wonders if this does not simply suggest "defects in a curriculum that seems to need so badly a transfusion of motivational energy." As to skills-training, providing legal services, and sensitizing students to societal realities, the conclusion is that the costs exceed the benefits. Packer and Ehrlich do not, however, write off clinical education entirely: "We prefer to think that the path of improvement lies in experimentation with many modest ideas, one of which is clinical education" (p. 46).<sup>14</sup>

In its brief and mostly approving review of the *Carrington Report*, *New Directions* points to other "modest ideas" with which the *Report* urges experimentation.<sup>15</sup> The thrust of the *Report* is to encourage the escape of legal education from planning blinded by what it calls "the romantic illusion of a unitary bar" (p. 157).<sup>16</sup> This escape would be accomplished in part by reorganizing the legal education process in a "standard curriculum" that could be completed in two years and a third-year "advanced curriculum," which would initially serve as a "holding operation" until bar requirements were adjusted, but would evolve into some form of specialized training. An important element of the proposal is the development in law schools of various one-year curricula of limited focus that would produce high-level paraprofessionals who would practice independently in some matters. *New Directions* notes and approves the *Carrington Report's*

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13. See text accompanying notes 15-18 *infra*.

14. It is interesting to note that the remarkable Report of the 1968 Committee on Curriculum of the Association of American Law Schools, written by its chairman, Professor Charles J. Meyers, finds far more potential in clinical education. This is particularly notable because the Meyers paper seems to be the intellectual forebear in several important respects of both the *Carrington Report* and *New Directions*. Although finding that legal education was "too rigid, too uniform, too narrow, too repetitious and too long," it suggested as a remedy that "much of the third year and part of the second would consist of supervised clinical experience." The kind of clinical program described, "greatly expanded beyond legal services to the poor," with "[i]nternship programs in government, law offices, and business concerns . . . coordinated with academic work," is now emerging in a number of schools. Professor Meyers predicted, however, that this and other reforms could not be sustained at the "present levels of financial support for legal education." See ASSOCIATION OF AMERICAN LAW SCHOOLS, PROCEEDINGS, pt. 1, § 2, at 7 (1968).

15. Although *New Directions* helpfully includes the page numbers of the *Carrington Report* for the material that is being discussed, these are the original numbers, which are not carried through in the reprinting of the *Carrington Report* in the appendix. Perhaps it is too late to correct this mechanical error in another printing, but it somewhat reduces the benefits of having the *Carrington Report* reproduced in this volume.

16. PROCEEDINGS, *supra* note 2, at 67.

enthusiasm for the potential contributions of legal education to undergraduate study and post-J.D. preparation for legal scholarship heavily weighted toward the attainment of interdisciplinary research ability.

Such programs bear a relationship to what *New Directions* calls "legal education's . . . challenge to strengthen itself as the general-purpose field of study in American universities . . ." (p. 55). Working to meet this challenge would also "bring the study of law into a position in which it focuses on the goals for which its techniques are used" (p. 58).

The relationship of these challenges to the subject matter of *New Directions'* last chapter, *The Length of Higher (Legal) Education*, is manifest. The *Study* states the choices with clarity:

[E]ither (a) diversify the three years so that the student acquires the rudiments of an understanding not merely of what has hitherto been understood as "the law" but of the interrelations of social knowledge with the law or (b) reduce the minimum time-serving requirement to two years with a resulting emphasis on doctrinal analysis. [P. 80.]

One would have thought that the "challenges" previously stated dictated alternative (a), but the *Study* states that "the trouble is that no one has been able to say in any detail how such a curriculum relates to the practice of law" (p. 80). One thing to which it does relate was suggested earlier by the *Study* as an explanation for the current high demand for legal education: "[M]uch of the increase in interest is due to the allure of law as the generalist's entry into careers that offer an opportunity to contribute to the making, the execution, or the reform of social policy" (pp. 56-57). A fairly successful attempt to state how a diversified curriculum relates to the practice of law was made by former law dean Bayless Manning and quoted with apparent approval by the *Study*. Among the characteristics of the "educated first-class lawyer," Dean Manning noted an

ability to comprehend the non-legal environment of the problem at hand, to evaluate the impact that non-legal considerations will have upon the outcome, and to perceive the ways in which the knowledge and insight of non-lawyers can be mobilized and brought to bear. Every legal problem arises in its own unique setting of economic and political considerations, historical and psychological forces; each legal situation raises its own problems of data accumulation, ordering, and weighting. [P. 23.]<sup>17</sup>

Of course, it is probable that the "educated first-class lawyer" who

17. Quoting Address by Bayless Manning before the Western Assembly on Law and the Changing Society, June 12, 1969, *American Legal Education: Evolution and Mutation—Three Models*.

is the subject of Dean Manning's analysis is produced most often by what the *Study* characterizes as the "elite schools." These schools tend to have the resources that enable them to enrich creatively their three years to make the students' presence there far more than "time serving." In fact, the *Study* states that it is in these schools "that the added elements of legal education come nearest to being present." Yet, the *Study* believes "that some of the elite schools are ready to press for" the two-year minimum residence requirement for the professional law degree, feeling, with justification, that "[i]n their first year they now teach very successfully what is currently the main component of legal education: the method and the rationality of the professional" (p. 81).

The *Study* recognizes what could be characterized as the paradoxical nature of this position: "The elite schools are probably in the best position both to shorten their minimum time to two years and to benefit from having three years with which to experiment" (p. 81). Nevertheless, it reaches the conclusion "that the case has been made for the bar to reduce its three-year standard to a two-year standard."<sup>18</sup> The *Study* is not recommending the adoption of this idea for all law schools or all law students in a particular school. It is saying that this option should not be precluded by the formal requirements for admission to the practice of law. The conclusion is supported by the "conviction that the unitary bar is crumbling," and the need for diversity in the future to meet the diverse needs of society for legal services and the varying educational objectives and capacities of the students that will come to law school. "In our view, it will be a better allocation of resources with a better production of legal talent if some students attend law school for two years, some for three, and some for four or even more" (pp. 84-85). If these results would flow from the adoption of the *Study's* recommendation, few would rise to oppose it.

Yet, the *Study* itself asks questions which it does not answer but which, when asked, even without answers, should create doubts in the mind of one asked to accept and implement its recommendations regarding the required length of legal education. Unfortunately, until these recommendations are tried on a fairly large scale, the questions can be answered only by virtue of personal experience on related matters and educated guesses. The questions (p. 82), together with my answers, are as follows:

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18. The new standards of accreditation proposed by the most recent American Bar Association Committee on the subject had a two-year option in their original form. For the story of how this option was lost and for a highly persuasive brief in its favor, see Stoltz, *The Two-Year Law School: The Day the Music Died*, 25 J. LEGAL ED. 37 (1973). The idea was opposed by most law school deans, including the deans of Harvard, Pennsylvania, Columbia, and Yale, to whose arguments Professor Stoltz's paper is primarily addressed "because they seem to me big enough to take it. Furthermore, they should have known better." *Id.* at 41 n.16.

"Will law schools generally, or at least some of them, eliminate the liberal, cultural courses in favor of a rather rigid program?" They will not eliminate them if they are able to require them in the two years available. This will depend in part on whether or not bar examinations will be reduced in scope. If they are not, students in states where the bar examination presents a serious barrier to admission will probably successfully resist much of a "liberal, cultural" nature that is not built into the more prosaic offerings.

"What will be the actual impact of the two-year option?" It is my guess that it will be adopted by most schools as the standard requirement for the first professional degree soon after it becomes available. It will result in serious curriculum examination and some attention will be paid to teaching methods, but the net result will be to squeeze out some recent innovations that seem desirable.

"Will all law schools immediately adopt the option?" In the answer above I said *most* schools. Some will undoubtedly hold out for a time. An attractive alternative would be the reduction of the undergraduate requirements, thus allowing students to achieve the J.D. in six years, with three of these years in law school. However, since this is already possible in most states and since a three-year undergraduate minimum has the backing of both the *Carrington Report* and *New Directions*, the competitive position of the schools adopting this alternative would not last long. Five years over-all would become the standard course. The five-year trend would obviously accelerate if the three-year baccalaureate degree became common.

"To what extent will the two-year option increase the flow of new lawyers into the market? As we have already indicated, the number of lawyers in this country will dramatically increase over the next decade without any change in the length of legal education. Will the two-year option make a problem of oversupply even more serious? Or does it rather point to a solution for the serious lack of legal services in many sectors of our society?" No one knows for sure, but it is likely that the two-year option, which will probably become the five-year J.D., will make the problem of oversupply even more serious. So far as I know, no one has come close to solving the equation that results from the development of "no fault" in automobile accident compensation and in family law, balanced by the expansion of the right to counsel in criminal cases and the emergence of such fields as environmental law (p. 8). There are hopeful signs, such as the bar's increasing concern with the possibilities of prepaid legal service plans and group practice. Although the poor responded enthusiastically to the provision of free legal services, it is not clear that the middle classes will be willing to pay the premiums required for a viable legal insurance program. It may be that, even if people

are willing to pay in advance to have a lawyer when needed, not many more lawyers will be utilized, for the process may involve a continuing routinization of many legal procedures so that they can be more efficiently performed by paralegal personnel under the management of lawyers. None of this, of course, should have any bearing on whether a person who is to be characterized as a lawyer and given the exclusive right to perform certain kinds of services ought to receive his basic education in three years or two, except insofar as the emerging shape of the profession and the kind of services it renders requires a new structure of education. The *Carrington Report* and *New Directions* have certainly succeeded in nailing the question to the law school door. The numbers problem ought simply to increase our sense of urgency in answering it.

“Will many law schools, particularly the state-supported ones, feel compelled to increase the number of students admitted in their first- and second-year classes to offset those who decline the option of remaining for a third year? Or will the two-year option offer a real opportunity for law schools to move toward better third-year instruction with a better student-faculty ratio?” If the answer to the first of these questions is no and the answer to the second yes, an extremely interesting prospect emerges: a third year of law school in which students—under no compulsion but the pursuit of excellence and, possibly, the hope of some form of advanced certification—are given individual and small-group attention with the opportunity for closely supervised clinical training, adapted, if necessary, to meet particular needs and interests. Among these students would be practicing lawyers returning to pursue a specialty. Some resident faculty with recent experience as practicing specialists would be needed in such a program. If the number of authorized faculty positions were to remain the same and the number of students actually in school were to decrease, the kind of a situation that I have described could be supported. I do not unequivocally answer the first question yes and the second question no, but I would expect some pressure to admit more students and some reluctance to continue to fund faculty positions when they fell vacant. This pressure might be stronger in state-supported schools, but one has only to read the chapter on financing legal education in *New Directions* to learn that the money problem has not been solved in the best of private universities so far as the teaching of law is concerned. There is another factor, not really brought out by the question, that might be a matter of importance. There would be great and justified pressure to use any excess faculty manpower to better the lot of the students in the two-year J.D. program. This tendency might well be offset by a plan such as that proposed in the *Carrington Report* for full-cost tuition

(pp. 158-59).<sup>19</sup> I am convinced that demands for more educational service would be affected by the fact that the people making them would eventually pay for them out of their professional income. I do not know, however, whether this market consideration would improve or deter sound, creative educational planning on the part of students or schools. A career spent mostly in state universities has left me attached to the notion that subsidies for education, even when many of the recipients are middle-class youth, can be a sound governmental policy paying public dividends well beyond the obvious individual benefits to those who are willing to devote all those years to higher education.

It is the question of "all those years"—the value of the way in which they are now spent, and the alternatives that are available—that is put in issue by *New Directions* but not answered to my satisfaction. The *Study* argues that the result of its major "modest change," the optional two-year curriculum, would be a needed diversity to meet the public's demands on an increasingly varied and stratified profession. I hope that I have made it clear that I do not oppose diversity. I think that including different levels of education within law schools may, among other things, help to maintain some semblance of professional, rather than commercial, performance standards in the delivery of legal services.<sup>20</sup>

I am not convinced, however, that the model that *New Directions* proposes will bring about either healthy diversity or better legal education. But I do think that more than polemics is now required of those who wish to maintain the status quo in legal education as far as the three-year structure of law school requirements is concerned. What we are teaching, for what purpose, and by what method should be subjected to the best analysis that can be brought to bear in the light of what we can learn from those who are studying the profession<sup>21</sup> and, for a change, from those who are studying the educational process itself.<sup>22</sup>

If it is really true, as the *Study* states, that at the present time "no attempt is actually made to teach the students very much of the

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19. See PROCEEDINGS, *supra* note 2, at 68-70.

20. See Address by Richard C. Maxwell before the Southeastern Conference of the Association of American Law Schools, Aug. 22, 1972, in 25 J. LEGAL ED. 90, 93 (1973).

21. See O. MARU, RESEARCH ON THE LEGAL PROFESSION, A REVIEW OF WORK DONE (American Bar Foundation 1972).

22. "The principal shortcoming of American higher education is not uncritical acceptance of, or slavish adherence to, the latest 'truth' demonstrated by the scientific establishment; it is the nearly universal neglect of such information, and active resistance or rejection when it is introduced." A. CHICKERING, EDUCATION AND IDENTITY 339 (1969). Some productive communication between law teachers and people engaged in studying the learning process is occurring. See, e.g., R. KEETON, PROGRAMMED PROBLEMS IN INSURANCE LAW iii (1972), acknowledging suggestions from Dr. Russell W. Burris, Director of the Center for Study of Programmed Learning, University of Minnesota.

doctrine of the subjects they study," but rather, that "they are taught over and over again in the variously named classes the same method to use in hacking 'through the underbrush'" (pp. 79-80), the two-year curriculum is overdue. I may not understand exactly what I am accomplishing in my classes, but I do not recognize most of it in this description. We ought to have more precise information on what we are doing with our students' time and be able to relate it to goals of legal education of fairly general application in the modern world before we make any long-range structural changes.

*New Directions* concludes with an affirmation of the importance of the autonomy of the individual faculty member:

In the end, of course, a law school's strength is not in the structure of its programs or even in the substance of its courses. Rather, a law school's strength is in the capacity of individuals on its faculty to shape their own careers and their own views of what legal education is all about. That capacity, when reinforced by mutual respect, ensures that a law faculty can make a contribution to the development of legal education. At all costs, that capacity should be protected. [P. 85.]

The programs of legal education that we have built on the foundations of this philosophy have been, I think, in many cases among the best offerings of the American university. This is not, however, in my opinion, a sufficient basis on which to meet the challenges, such as those raised in *New Directions*, that have been presented to American legal education in recent years by some of its ablest practitioners. We cannot leave the substance of our demands on our students' time to judgments reached in the course of faculty career development, no matter how able or mutually respectful are the protagonists in that process. Most of us think we know what we are doing individually and we make a great effort to make it worth our students' time. We must try to find out what we are doing collectively as educators because our impact on our students is collective. We may then decide to do something different within the present structure or we may decide that we can produce whatever educational results we are capable of in less than three years for many students. Personally, I am not yet sufficiently satisfied with the diagnosis to acquiesce in surgery.

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