

BOOK REVIEW

NEW DIRECTIONS IN LEGAL EDUCATION†

REVIEWED BY A. KENNETH PYE*

This Report, prepared for the Carnegie Commission on Higher Education by the late Herbert L. Packer, sometime Provost of Stanford University and, at the time of his death, Jackson Eli Reynolds Professor of Law at the Stanford Law School, and Dean Thomas Ehrlich of the Stanford Law School, more closely resembles a well-written introduction to an anthology than a book. Appended are the 1971 Report to the Association of American Law Schools, entitled *Training for the Public Professions of the Law: 1971*¹ (Carrington Report), and a 1968 article by Professor Calvin Woodard of the University of Virginia.² Appended to the Carrington Report are the 1921 Report, also entitled *Training for the Public Profession of the Law*, by Alfred Z. Reed; a review of contemporary reaction to the Reed Report by Professor Preble Stolz of the University of California; and articles by the late Professor Brainerd Currie³ and Professor Lester J. Mazor of Hampshire College.

The book relies heavily on these materials, particularly the Carrington Report.⁴ It summarizes much of contemporary thought about legal education in a cogent fashion and discusses proposals for, and obstacles to, changes. Few of the ideas are new and most have been

† By Herbert L. Packer and Thomas Ehrlich with the assistance of Stephen Pepper. New York: McGraw-Hill Book Company, 1972. 91 pp.; Appendices, 289 pp.

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1. This Report first appeared as "Training for the Public Professions of the Law: 1971," Part One, Section II, *Proceedings*, Association of American Law Schools, 1971 Annual Meeting.

2. C. Woodard, *The Limits of Legal Realism: An Historical Perspective*, 54 VA. L. REV. 689 (1968).

3. B. Currie, *The Materials of Law Study*, 3 J. LEGAL ED. 331 (1951) (Parts I & II), 8 J. LEGAL ED. 1 (1955) (Part III); edited by A.D. Cullison.

4. Many of the ideas in the Carrington Report were suggested earlier in the structure and curriculum studies conducted at Stanford Law School during 1968-69.

discussed widely among legal educators during recent years.⁵ They are presented in a short, highly readable piece that provides both an excellent summary of some of the matters now being debated in the law schools and an excellent introduction for a broader lay audience which may be unaware of either the ferment or apathy which alternately seem to characterize legal education.

The book is narrow in scope, dealing primarily with the structure and financing of legal education. Occasionally the discussion of structure requires reference to curriculum and teaching methodology, but the authors have chosen not to discuss such issues as the selection, promotion and tenure of faculty, the governance of law schools and student participation therein, and admissions policy (except for a statement in the preface that women and racial minorities are inadequately represented in law schools and that much remains to be done about the problem).

The principal thesis is that all law schools are more alike than they are different. All do not provide legal education of the same quality but "all share the same structural features and are bound by that structure."⁶ Specifically, the authors note:

1. [The law schools'] primary mission is the education of students for entry into the legal profession.
2. The faculties of none are primarily engaged in research.
3. None engages in undergraduate education.
4. None offers a professional degree (LL.B. or J.D.) in less than three academic years.⁷

The principal cause of this "sameness" was the rejection by the Bar in 1921 of Alfred Z. Reed's recommendation for a differentiated bar with some members trained to do some things and some trained to do others, with competency enforced by examinations. Instead, the American Bar Association accepted the proposals of a Committee headed by Elihu Root:

1. Before admission to the bar of any state a candidate should be required to have (a) graduated from a law school complying with certain standards, and (b) passed an examination by public authority determining his fitness.

5. A draft of the Carrington Report was discussed at a special conference in Washington in the spring of 1971, and at the annual meeting of the Association of American Law Schools in December of that year. It has been distributed to every full-time law teacher.

6. H.L. PACKER & T. EHRLICH, *NEW DIRECTIONS IN LEGAL EDUCATION* 24 (1972) [hereinafter cited as PACKER & EHRLICH].

7. *Id.*

2. A certified law school should require three years of full-time legal education or the same number of hours in part-time study over a longer period.
3. The Council of Legal Education and Admission to the Bar should certify which law schools have complied with the applicable standards, and should publish from time to time the names of those that do and do not comply with the standards.⁸

The result has been the imposition of what the authors call the "Harvard Model" upon all legal education. The characteristic of "sameness" also inheres in teaching methodology with its primary reliance on the case-method and Socratic dialog, supplemented by seminar work and independent research. Even the unique feature of legal education, the student-edited law review, is deemed an essential for respectability by most law schools without regard to whether the quality of their student body or the resources at their disposal will produce a creditable product. Legal scholarship also reflects a narrow frame of reference, usually either involving analysis, synthesis and critique of "legal materials" which are available in the law school library, or the evaluation of empirical data about how the law operates in action.

The authors argue that legal education should and will replace sameness with diversity. Law schools should escape the grip of a single model which has stifled flexibility in the past. The authors predict that there will be more diversity in the future:

We expect that some schools with limited financial resources will concentrate the expenditure of those resources in a few areas in order to maintain the highest standards of educational excellence in those areas. Other more well-endowed schools may continue their past practices of broad curricular coverage. But even these schools, we suspect, will try different approaches and different techniques in legal education.⁹

Such diversity is necessary, in the view of the authors, to meet the changing demands of the legal profession—the expanding need for legal services, the movement towards specialization, and the expansion of the use of paraprofessionals. Diversity should come about by modifying the structures, goals, and methodology of legal education.

The authors urge more law schools to require less than four years of college as a prerequisite for entrance for more students, and urge that two years of law school is adequate for many students.

8. *Id.* at 27.

9. *Id.* at 84.

During the immediate future, most law schools should begin to offer both a two-year and three-year degree program. The first year of law school would continue to be designed to educate "generalists," but with much greater emphasis on "macroissues,¹⁰ as opposed to microissues, of doctrine."¹¹ The authors are not certain whether this change of focus can be managed without sacrificing training in legal analysis,¹² but hope that some schools will experiment. It is unclear what changes should occur in the remaining year (or years). They discuss, without critical comment, the Carrington Report's recommendations which divide upper class offerings into two groups—"intensive instruction," that is, detailed exploration of narrow topics in small classes, and "extensive instruction," or broader areas taught by lecture or audiovisual methods to large groups.

Special attention is devoted to the claims of clinical education, defined as "teaching a law student by having him actually perform the tasks of a lawyer."¹³ They question the classic claims propounded by advocates of the clinical approach that (1) the use of law students will help substantially in providing legal services to those unable to afford them, and that clinical programs (2) teach skills which cannot be taught more effectively in other ways, (3) impart a special "understanding of society," and (4) teach professional responsibility effectively. That clinical programs provide an educational input into the remainder of the law school curriculum is recognized, but viewed only as an incidental benefit. The authors doubt that the increased costs, which they assume will be associated with clinical education,

10. The phrase is that of Professor Alfred Conard. A. Conard, *Macrojustice: A Systematic Approach to Conflict Resolution*, 5 GA. L. REV. 415 (1971). The concept of "macrojustice" entails broadening the scope of legal scholarship by, among other things, borrowing viable methods and systems from allied disciplines. See PACKER & EHRLICH 58.

11. PACKER & EHRLICH 51.

12. It may not be inappropriate to recall Lord Justice Diplock's comments in another context:

I am not a customer particularly interested in those who study law as a liberal education. I must confess, in provoking parenthesis, that I do not regard law as a fit medium of liberal education for those who are destined to practise it. I do not doubt that it can be taught conceptually, philosophically or sociologically so as to give it a liberal flavour but I challenge the claim that to do so results in teaching a student to "think as a lawyer." To think as a philosopher, to think as a sociologist perhaps, but those who practice the law—Judges, Barristers and Solicitors—are concerned with cases rather than with concepts. . . . Of course a practising lawyer needs a liberal education but in my view, which I think is shared by a large proportion of practitioners, the liberal education should come first and the study of law thereafter. Diplock, *Introduction to a Discussion of the Wilson Report*, J. SOC'Y PUB. TEACHERS OF L. 193-194 (1966).

13. PACKER & EHRLICH 38.

will produce a commensurate benefit, and conclude that clinical education is only one of many ideas that deserve experimentation.

Agreement is also expressed with the Carrington Report's conclusions that (a) law schools should not hesitate to provide bar review courses, (b) law schools should provide education to part-time students, (c) some should devote resources to developing training programs for paraprofessionals (although the authors assert that the principal burden of educating paraprofessionals should be on community colleges), and (d) broader programs should be initiated for the study of law by undergraduates.

Of particular significance is their concept of the new directions which scholarship should pursue:

Legal scholarship in this country has passed through two phases. The first was a Langdellian search for scientific principles that could be gathered by an inductive process through analysis of appellate court decisions. In the second phase, legal scholarship concentrated on getting the answers to questions about means of achieving objectives through methodological broadening of the scope of inquiry to center on the facts of the real world. This phase, which we may call the Legal Realist phase, ran into the dead end of being concerned only with means to the exclusion of ends. It made lawyers into mere technicians. The challenge now is to bring the study of law into a position in which it focuses on the goals for which its techniques are used. Adding the broadening of the second phase to the search for principles of the first phase can result in the study of means/ends relationships. This is where allied disciplines can contribute to making law a discipline more receptive to ideas from other fields. Thereby, we hope that law will be enabled to take its rightful place not as a science but as an art that is supported by a distinctive craft. Another way of stating this direction is to say that legal scholarship can become what some law professors are in the university today—capable of addressing themselves to any problem that has a social context.¹⁴

There is obviously much merit in many of these observations. One key recommendation, the two-year law program, seems unlikely to eventuate in the foreseeable future;¹⁵ but other suggestions in the

14. *Id.* at 58.

15. The death of the two-year degree program at the February 4, 1972 meeting of the American Bar Association Council on Legal Education and Admission to the Bar with the deans of the nation's law schools is described in P. Stolz, *The Two-Year Law School: The Day the Music Dies*, 25 J. LEG. ED. 37 (1973). Professor Stolz singles out Dean Sacks of Harvard, Dean Wolfman of Pennsylvania, Dean Sovern of Columbia and Dean Goldstein of Yale for special comment. The blame (or praise) should be more widely distributed. In

book, such as the introduction of the "macrojustice" approach, may pose viable alternatives. There is little doubt that, as the authors indicate, legal education now succeeds in "turning off" a large number of students after the first year (or first semester), but we have known that for a long time.¹⁶ What is not clear is what will "turn them on" and at the same time provide them with the intellectual qualities, attitudes, and knowledge they need to have before they enter the profession.

Some thoughtful observers believe that law schools err in placing their primary emphasis upon the appellate decision rather than upon a factual approach to legal controversies. Such critics do not, however, advocate a return to the generalized empirical approach of the Legal Realist phase, but endorse instead a more particularized dissection of the factual settings which generate litigation. They are not concerned only with the emotional trauma of the student who cannot win at intellectual ping pong with his professor, or with the destructive syndrome which results from a process of constantly tearing apart cases within a rigid frame of reference, without ever "brain-storming" or constructing solutions to the problems which produced the controversies under study. The heart of their criticism is that the Socratic method applied to appellate cases develops only a few of the intellectual traits which a lawyer should possess. Therefore, it should be only an important part of the school educational process—not, as it is now, the cornerstone. Law schools should begin to define what they want to accomplish and what techniques are best adapted to these accomplishments. The answers to these questions will determine the appropriateness of alternative structures.

An adequate reappraisal of the role of the law school requires that a number of issues be confronted directly. Should not an ability to assimilate and evaluate facts be a part of first-year instruction as much as doctrinal analysis? Can doctrine be taught as effectively from simulation models constructed from case files or audiovisual materials as from case books? Should we not teach more of process and less of analysis and synthesis?¹⁷ Why do we not try to provide an equivalent of law journal experience to our weakest students in-

any case the proposal of a two-year law school contained in a revision of the ABA Standards for Accreditation was dropped by the Council following the meeting.

16. See W. Gellhorn, *The Second and Third Years of Law Study*, 17 J. LEO. ED. 1 (1964).

17. This may be embraced in the proposed study of "macrojustice," which the authors discuss. PACKER & EHRLICH 58, 61.

stead of reserving it for those who need the training the least? How can a small school rationally design a curriculum, when some students after graduation will benefit from individualized tutorial programs which characterize the routine in large law firms, while other students will never receive an equivalent experience? How can large schools be expected to provide small group learning experiences, clinical or otherwise, to more than a small percentage of their students?

What will be the impact of the thousands of additional law students upon schools whose libraries, faculties and financial aid resources have not increased proportionately? What reasons suggest that tenured faculty who have been teaching the same courses by the case method for twenty to forty years will now be prepared to transform the structure, curriculum, and methodology of a school in order to determine if the new ideas now being advanced are better than the old way of doing things? Are there ideas being considered in legal education abroad or in medical education from which law schools might profit?¹⁸

This reviewer hoped to see a provocative discussion of some of these issues, but was disappointed. The reasons for the omissions probably are found in the chapter on Financing Legal Education. The authors observe that most law schools are self-supporting and that in many private universities the law school subsidizes other more costly divisions. They do not add that, in some state universities, the law school enrollment and teaching loads are used to generate funds from state legislatures, considerable portions of which are then diverted into other graduate disciplines.

Historically, universities have operated on the premise that legal education is cheap—and it *is* inexpensive as compared with medical education or with any graduate program. It is inexpensive because in no other graduate or professional educational endeavor do professors teach classes of over 100 students who are expected to pay their own way. Even the physical facilities cost less than many disciplines'. Supported research is the exception rather than the rule. Traditionally, law schools have been a good bargain from the viewpoint of the university. But law schools that offer alternative professional tracks, small-group learning experiences, and clinical programs, and that have

18. There is no reference, for instance, to the 1971 Oinrod Report in the United Kingdom. REPORT OF THE COMMITTEE ON LEGAL EDUCATION, CMND. No. 4595 (1971). The Report preceded the publication in this country of an excellent study of medical education. W. ANLYAN, THE FUTURE OF MEDICAL EDUCATION (1973).

a commitment to university-supported research, will be much less inexpensive.

The real issues facing legal education are not whether law schools are going to adopt a clinical model or the Carrington Report, but whether the *present* level of excellence can be maintained in the face of the financial plight of higher education, particularly in the private sector. The authors make passing reference to the general problem, but its special significance for law schools receives much less attention than it deserves.¹⁹

During the last two decades, graduate schools have expanded in large part at public expense. Buildings have been erected without an increase in endowment sufficient to cover maintenance and operation costs. Efforts have been made to broaden opportunities for the disadvantaged, producing an obvious impact on financial aid resources. A galaxy of federal regulatory statutes applied to universities during the last decade has added substantially to administrative costs.

The federal government is now reducing its level of support for graduate education. Wages, utility, and book costs are increasing at an even more rapid rate than is the general cost of living. The cut-back in government contracts and grants is reducing university recovery of overhead expenses. Alumni giving has not recovered fully from the disenchantment brought about by the student disruptions of the sixties. Endowment income is rising, but not at a rate sufficient to offset the higher costs. Already undergraduate education is facing the reality that annual tuition increases cannot continue indefinitely without limiting the number of students who can afford to attend. University administrators are not oblivious to the thousands of first-rate students who want and are willing to pay for a legal education, nor are they unaware that few among the best students are prepared to pay for the kind of education provided by most graduate schools.

In this setting, new proposals which will substantially increase the costs of law schools are visionary at best. Unless private universities make hard decisions to limit the number and size of their costly graduate programs and eliminate some marginal professional schools, many law schools will find that their percentage of available university resources will actually decrease. The weaker law schools, which must depend almost exclusively upon tuition revenues to meet their operational expenses, will pay more of the deficit created by the more ex-

19. Principal reliance is placed upon E. CHEIT, *THE NEW DEPRESSION IN HIGHER EDUCATION* (1971). See also E. CHEIT, *THE NEW DEPRESSION IN HIGHER EDUCATION TWO YEARS LATER* (1973).

pensive divisions of the university, usually through the technique of increased charges for indirect expenses (overhead). The stronger schools (referred to as "elite" by the authors), which often operate at a deficit assumed by a richly-endowed parent university, will experience a decrease in the subsidies which they receive from their university endowments or state funds.

There is little hope for implementation of many of the proposals discussed in the book unless the law schools can generate alternative sources of institutional funding and persuade university administrators not to use it for other purposes. The authors suggest several potential sources for exploitation: law schools are admonished to develop various supporting constituencies—the legal profession, employers of law school graduates, nonlawyers, corporate benefactors, foundations and the federal government. Most law schools have been trying with limited success for some time to persuade lawyers to provide annual support and capital gifts. The task of attracting long-term support of substance from corporations and nonlawyers is even less likely to be successful. Foundations rarely provide general support, as distinguished from special project aid, and are leery of support which deals with "political" issues—and much of the kind of value-oriented scholarship recommended by the authors inevitably will do so. Support to legal education from the federal government has been slight and largely in the form of special project support,²⁰ construction funding, and student loans. Special project support is both *de minimis* and highly specialized; construction grants have ceased; and the Administration has proposed to terminate National Defense Education Act loans and to substitute government guaranteed programs which entail appreciably higher interest rates. To my knowledge no one in government has suggested federal scholarships to law students beyond the limited funding made available to disadvantaged law students under the Council on Legal Education Opportunity (CLEO) program.²¹

20. The authors refer to the National Science Foundation and the National Endowment for the Humanities, but inexplicably ignore the Office of Economic Opportunity and the Law Enforcement Assistance Administration which have been the sources of substantial funds. There is no mention of the proposed National Institute of Justice, or the failure of its proposed predecessor, the National Foundation of Law.

21. CLEO is a joint enterprise of the American Bar Association, the Association of American Law Schools and the Law School Admissions Council. Funding has been provided by the Office of Economic Opportunity. The Education Amendments of 1972 amended Section 963(a) of the Higher Education Act of 1965 to provide for individual stipends of \$2800 "for persons of ability from disadvantaged backgrounds . . . undertaking . . . professional study." Section 963(b) provides for a payment of 150% of the stipend as a "cost of education"

A second proposal is to finance legal education through increased borrowing. This is already being done. Several types of programs are recommended: university loans, government-guaranteed loan programs, and deferred tuition. Duke Law School, for example, has all of these programs in operation, and alumni subsidization of commercial loans in addition; but it is clear that there comes a point at which many students cannot, will not, or should not borrow more money, even in exchange for an excellent education.

The authors also suggest that law schools or universities should borrow, pay back the interest (presumably out of tuition) and continually refinance the principal. One may wonder how long a bootstrap operation of this kind can continue before much of current tuition income is charged to servicing the debt of previous generations of students. The authors' suggestion that lenders might forego part of interest payments as charitable contributions suggests a higher level of beneficence on the part of West Coast banks than seems to be found among their Southeastern cousins.

In short, the financial dilemma is a major problem facing legal education today, and little can be expected in the way of fundamental change until it is alleviated. Greater diversity may occur, but it may be diversity caused by cutbacks of programs due to financial exigency, rather than as a consequence of academic decisions. Certainly any movement toward cutting the number of years (and thereby the tuition paid by students) will meet resistance from many law schools even if the Bar could be persuaded to accelerate its assimilation of some 150,000 new lawyers during the next six years.

My principal criticism of the book is its failure to emphasize these external restraints, or the internal reality that change must be accomplished by agreement among faculty members—many of whom think legal education now is vastly better than any other kind of education offered in the university, and are reluctant to tinker with a proven product. Nevertheless, the book performs the valuable function of informing higher education of law school problems, and providing the periodic stimulation which law professors need to remind them, not too gently, that criticism of legal education cannot always be answered by the response, "We have always done it this way."

allowance to the institution attended by the fellowship recipient. Only \$1,000,000 was authorized to cover the costs of stipends and "cost of education" allowances.