

# Book Reviews

*New Directions in Legal Education: A Report Prepared for the Carnegie Commission on Higher Education.* By Herbert L. Packer and Thomas Ehrlich. New York: McGraw-Hill Book Co., 1972. Pp. xviii, 384. \$10.00.

Reviewed by Abraham S. Goldstein†

The report on *New Directions in Legal Education* was sponsored by the Carnegie Commission on Higher Education at a time of campus ferment.<sup>1</sup> The mood was one of anger and tension growing out of an unpopular war, searingly confusing race relations, and conflicting life styles. It is little wonder, therefore, that Professors Packer and Ehrlich, organizing their ideas from 1968 to 1970 and writing in 1971, would take a sense of "malaise" as their starting point and strike a curiously ambivalent tone. At times, they seem to regard law and legal education as incredibly subtle and complex, a mysterious art not easily mastered.<sup>2</sup> At others, as when they deprecate "doctrinal" or "library" research,<sup>3</sup> they treat law almost condescendingly.

The ambivalence continues as they describe the first year of law school as "a pedagogic triumph,"<sup>4</sup> while characterizing the second and third as a tedious "academic wasteland."<sup>5</sup> They then conclude that

the nature of legal education has been to train students in some basic fundamentals (analysis, legal theory, the general substantive map, etc.) only and that as a result the law school graduate generally is not competent to do *anything* very well. Experience is the real teacher of specific tasks . . . .<sup>6</sup>

They leave the reader with a picture of "disappointed and impatient students [who] interact with increasingly frustrated and confused teach-

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1. H. Packer & T. Ehrlich, *NEW DIRECTIONS IN LEGAL EDUCATION: A REPORT PREPARED FOR THE CARNEGIE COMMISSION ON HIGHER EDUCATION* (1972) [hereinafter cited to page number only].

2. Pp. 60-61.

3. P. 32.

4. P. 31.

5. P. 32.

6. P. 20.

ers and emerge with a patchwork professional education and an ambivalent view of themselves as professionals.”<sup>7</sup>

Though such an apocalyptic mood may spur inquiry, it is not at all conducive to clarity, in either defining problems or proposing solutions. This is particularly true once passions have run their course and education is again perceived as neither a scapegoat nor a panacea for more fundamental problems.

Much of the report builds on this impressionistic and time-bound sense of student dissatisfaction. Yet we are told very little about what students find wrong with their courses or with the law school as an administrative or social unit. Nor are we told what faculty or administrators think on these issues, or whether recent graduates are unequal to the tasks given them by lawyers and judges. Indeed, the report seems almost proudly to assert that “[t]he ‘research’ on which this study is based did not include field studies, questionnaires, or opinion polls.”<sup>8</sup> I do not mean to suggest that empirical research is always essential. But when “malaise” among students and faculty looms so large in pointing towards “new directions in legal education,” the reader is surely entitled to know the bases for the authors’ conclusions, whether their informants were accurately describing mental states not only for 1968-70 but also for the present, and, above all, whether it is in fact true that the law school years move so rapidly from “triumph” to “wasteland.”

Regretfully, the report provides little or no evidence to support its conclusions. It is really an introductory essay, eighty-five pages in length, composed of interesting and provocative observations on subjects as diverse as history, clinical education, finance, the law school and the university, and the nature and length of legal education.<sup>9</sup> It is, therefore, summary in nature and conclusory in tone. Yet the auspices under which the report was written and the high professional reputation of its authors may give it undue influence in current debate about legal education.

The risk is particularly great that too much attention will be paid to the report’s recommendation that law school be reduced to two years.<sup>10</sup> The recommendation seems particularly disembodied because

7. P. 34.

8. P. xvi.

9. The balance of the volume consists of the Carrington Report, prepared by a committee of the Association of American Law Schools in 1971, p. 95, its appendices, and Calvin Woodard’s *The Limits of Legal Realism: An Historical Perspective*, 54 *V.A. L. REV.* 689 (1968), reprinted at p. 331.

This review will address only that part of the Report dealing with the length of legal education.

10. Pp. 77-79.

it does not build upon a detailed consideration of what is being taught or written, where the profession is moving, and whether the schools should move with it. The reader is never taken inside any of the major fields of legal study to assess what teachers are doing and whether their efforts are adequate. As a result, he cannot know the extent to which a facade of unchanging course titles may conceal great, even dramatic, changes in the curriculum. Yet it is true that where criminal law, as little as twenty-five years ago, concerned itself almost entirely with the elements of offenses, it is now both more theoretical and more practical: Students learn not only about the general theories of criminal liability but are also drawn into the administration of criminal law through clinical programs and empirical research.

The same patterns exist in other fields. The property course has become a point of entry for the study of land planning and finance, housing and environmental regulation. "Contracts" has evolved into a rich variety of courses in the commercial field. "Corporations" is now several courses and seminars, including corporate finance, securities regulation, and corporate responsibility. Administrative law is no longer confined to an introductory course in procedure; there are now courses and seminars dealing with its underlying substance: the regulation of transportation, energy, communications, welfare, and education.

The report takes note of some of these developments not by describing them but rather by concluding, quite properly, that the legal profession is becoming increasingly specialized and that a unitary bar is no longer possible.<sup>11</sup> It then presents Bayless Manning's perceptive summary<sup>12</sup> of the qualities of first-rate lawyers: They must possess (a) analytic skills sufficient to surround a problem, surveying it from many different perspectives; (b) substantive legal knowledge, not only in their area of specialization but sufficient to locate themselves and their clients' problem on the general map of substantive law; (c) basic working skills involving writing, research, drafting, and advocacy; and (d) familiarity with the institutional environment, legal and non-legal—courts, administrative agencies, legislatures—and the degree to which one must call upon accountants, psychiatrists, doctors, economists, market analysts, sociologists, or statisticians.

The gaping void in the report is its failure to reconcile its recommendation for compressing legal education with Manning's portrait of the competent lawyer. Such reconciliation would be possible only if we were told which subjects could be eliminated, which skills ignored.

11. P. 11.

12. Pp. 22-23.

The authors avoid the incredible difficulties of this task by telling us what is already undeniable: That it is no longer possible to teach *all* of the law within three years. Having laid this ghost to rest, they make a giant stride to the unverified assertion that “no attempt is actually made to teach the students very much of the doctrine of the subjects they study . . . .”<sup>13</sup> They then conclude that *method* is the key to the educational puzzle and that the real “genius of legal education”<sup>14</sup> lies in teaching first-year students the “method to use in hacking ‘through the underbrush’” of legal rules.<sup>15</sup>

It is probably true that the so-called Socratic method which dominates the first year is especially well suited for training law students. By introducing them to the courts, the case method, and especially the realization that legal doctrine is remarkably open-textured, it sets the stage for them to play out their role as some of the last generalists in an age of specialization. In the first year, they learn to move quickly in and out of complex fact situations, to grasp what is known and what is not in an ever-proliferating variety of fields and a setting that is adversary in nature. What it cannot do is prepare them sufficiently to apply these arts to the wide variety of roles, subject matters, and institutional settings in which they may become involved.

Such preparation obviously depends on something more durable than a “method.” We do attempt in the first year to teach the central ideas underlying legal obligation—in torts, contracts, and criminal law. We try to grasp the central themes of public law and to provide an accurate sense of procedure. In short, we teach the “doctrine” and the “legal principles” which are fundamental to what will follow in more advanced training. Inevitably, however, a first and introductory year cannot provide a framework which is broad enough: A single year simply cannot provide adequate exposure to the many fields of the law, much less to the non-legal disciplines which impinge upon it.

It is the office of the second and third years to give the student the perspectives and skills Manning describes. Properly used, they can dispel the illusion created by the first year, that law is to be equated with the opinions of appellate courts. They should also provide students with a sense of the history and philosophy of law and of the extent to which it is part of a larger system of social control in order that they better understand their role in the social drama and creatively participate in it.

13. Pp. 79-80.

14. P. 14.

15. P. 80.

The proposals for a two-year law school would press law students to crowd this second year with "bread and butter" courses. They would have little or no time or inclination to explore the unusual or the theoretical. They could not do very much with the new clinical and field research programs. They would have little time for legal writing in either the traditional reviews or the newer interdisciplinary journals. And they would certainly be unable to test their interest or aptitude for specialized fields, either in the law school or through their summer work in firms.

The report would solve what it regards as one of the most urgent problems of legal education, the training of specialists, by leaving it to the organized bar. By a curious sleight-of-hand, the report equates such specialized education with "how-to-do-it training"; since law schools allegedly provide such training even less well than they teach "substance," Professors Packer and Ehrlich conclude that the task must be assigned to some other agency.<sup>16</sup> Yet if specialized training is to be taken seriously, it will have to do for the trainees the same things done by the first year for entering students: Lawyers would have to be introduced to a literature and to institutions, to major developmental themes and to the theories underlying them. And yet there will be available to the bar the same limited set of techniques available to the law schools for accomplishing the tasks of instruction: lecturing, engaging in Socratic or other dialogue, dealing with sets of problems, serving some type of apprenticeship.

Plainly, such training will be successful only if there are teachers with the time, the knowledge, and the resources. This is not likely to be found in members of the bar called away from a busy practice to present "how-to-do-it" sessions. It will be furnished only by a faculty and a research enterprise which has penetrated deeply enough into the many fields of law to separate them into their component parts, to capture their dynamics, and to relate them to a larger whole.

It is just such a deeper and broader consideration which American legal education has been engaged in since sociological jurisprudence and legal realism entered the academic lists. Against heavy obstacles—huge classes, small faculties, periodic wars, domestic crises—we have begun to address our fields in systemic terms, treating law not merely

16. P. 14. It is true that the report speaks, almost in passing, about an optional third year as a period of advanced research and writing. But it is given so little attention as to make one suspect it is simply a makeweight; we have no real details as to what will be done with it, who will stay for it, and whether it will be converted into a meaningful research enterprise.

as a professional discipline but also as a potential science, with a theoretical framework about how and at what costs law develops. This broadened conception—which makes “law,” not the practice of law, the primary concern—has coincided with a “legal explosion” which has left law occupying every conceivable aspect of our lives. When this near-infinity of legal rules is placed next to the broadened perspective of what legal study should include, we are left with innumerable permutations and combinations. With so much to know about so many fields of law, with so many points at which those fields intersect with other disciplines and institutions, this hardly seems the time to reduce the length of legal education or to conceive of specialized training in “how-to-do-it” terms.

The critical issue with regard to such training is not whether the law schools can do it better than the bar, but rather whether they should require students to choose their specialties while in law school. The report states flatly, without supporting argument, that “today’s law student is in no position during his years in law school to decide what area he would like to specialize in.”<sup>17</sup> The authors ignore the fact that most students engage in *de facto* specialization in any event—either because the economy dictates it, because they know in some general way what type of work they want to do, or because the law schools present them with specialized courses in certain areas. Moreover, the authors make no effort to distinguish this problem from that of choosing a “major” in college, a practice widely followed at a much earlier age because it is the only way to go beyond a superficial understanding of things.

It is only when we focus on laying the groundwork for specialized training that it becomes apparent how inadequate are the resources of legal education. At every turn, we are confronted with the fact that there are not enough faculty in any particular area to divide up what needs to be done or to duplicate innovative research often enough to allow for error. Where there is empirical work to be done, we find lawyers untrained and others uninterested in doing it. Where we need insights from psychology, economics, or biology, we find those fields so specialized and so little interested in the law that we must do the knowledge-building ourselves.

Identifying such difficulties, however, is quite different from sounding a retreat. We are at an important point in legal education, with

17. P. 14.

some hope of developing clearer theoretical foundations, more firmly rooted in social reality than in the past. But to do this, we need time, resources, and commitment. The proposal for a two-year law school would give up the hope of serious advanced training and scholarship just at the moment it has developed some momentum. It would inhibit innovation and force lawyers into a narrower and more vocational mold. It would be, in short, a serious mistake, based on little more than vague assertions about student discontent in a time which may have already passed us by.

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Reviewed by Louis F. Oberdorfer<sup>†</sup>

My review of *New Directions in Legal Education*<sup>1</sup> must begin with a brief tribute to its fallen author. Herbert Packer's gallant fight against paralyzing illness, and his recent death as he approached what should have been his most productive years, was a grievous loss to his family, his profession, and his nation. He was a noble and loyal friend. His students reflect his sparkling intellect and massive integrity. He came as near as any of his generation to mastering both the occult world of law teaching and that other world more familiar to practitioners, both in and out of government. He was stricken while being battered as the interface between his university and the rising tide of student unrest. His bibliography<sup>2</sup> would distinguish many who were not struck down in the prime of life.

It is a blessing, therefore, that Herb Packer's earlier contribution

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1. H.L. PACKER & T. EHRLICH, *NEW DIRECTIONS IN LEGAL EDUCATION* (1972).  
2. A partial bibliography would include the following: Books: *THE LIMITS OF THE CRIMINAL SANCTION* (1968); *THE STATE OF RESEARCH IN ANTI-TRUST LAW* (1963); *EX-COMMUNIST WITNESSES: FOUR STUDIES IN FACT-FINDING* (1962). Articles: *The Aims of the Criminal Law Revisited: A Plea for a New Look at "Substantive Due Process,"* 44 *SO. CAL. L. REV.* 490 (1971); *Mr. Barzun and Capital Punishment,* 15 *CRIME & DELINQUENCY* 28 (1969); *Symposium on the Supreme Court and the Police: The Courts, the Police and the Rest of Us,* 57 *J. CRIM. L. C. & P.S.* 238 (1966); *Civil Rights and Disobedience to Law: A Lawyer's View,* 36 *N.Y.S.B.J.* 290 (1964); *Making the Punishment Fit the Crime,* 77 *HARV. L. REV.* 1071 (1964); *Two Models of the Criminal Process,* 113 *U. PA. L. REV.* 1 (1964); *Symposium on the Model Penal Code: The Model Penal Code and Beyond,* 63 *COLUM. L. REV.* 594 (1963); *Mens Rea and the Supreme Court,* 1962 *SUP. CT. REV.* 107; *The Case for Revision of the Penal Code,* 13 *STAN. L. REV.* 252 (1961); *Therapeutic Abortion: A Problem in Law and Medicine,* 11 *STAN. L. REV.* 417 (1959); *A Tale of Two Typewriters,* 10 *STAN. L. REV.* 409 (1958).

will not be judged by his last work. The book is, to be fair, incomplete, both in concept and detail. Yet I fear that the thinness of the book is largely a reflection of the failure of the law teaching profession collectively to work and think hard enough about its responsibility to its students, to its universities, to the bar, and to society for the resources which have been entrusted to it. The report of Professor Paul Carrington, which is appended to the book and almost dwarfs it, is the most serious effort at self-evaluation of law schools and their performance. But that report, while provocative and stimulating, has apparently generated more heat than light among the teaching bar.

A fuller and more critical study than that which Professors Packer and Ehrlich were able to mobilize may well reveal that the curriculum priorities of what the authors term the "elite" law schools are designed more for the benefit and enjoyment of the teachers than the taught. The teachers understandably relish a deep satisfaction from their role in the "pedagogic triumph"<sup>3</sup> which characterizes the response of well-selected first-year law students to the Socratic therapy which is the specialty of "elite" law school teachers. The same intellectual aggressiveness which qualifies these teachers so well as therapists may not, however, adapt itself to the less entertaining task of supervising written work, providing clinical experience for students, solving the financial crisis of university and law school, attacking energetically the justice administration crisis, and other semi-drudgeries. The book exposes, by what it says and what it leaves unsaid, considerable disarray among and between the law faculties as to how the resources and people committed to legal education can be most constructively engaged.

Perhaps my negative reaction to the book is exacerbated by the fact that while I was contemplating this review, I had occasion to read David Halberstam's *The Best and The Brightest*.<sup>4</sup> Halberstam's superficiality seriously discredits his work. Yet, each of the officials demeaned by Halberstam had already been the victim of some of his own revealing memoranda and reports.<sup>5</sup> Each official so exposed was (or, had he attended law school, probably would have been) a prize product of our "elite" legal education system. The brightest and the best were, each of them, trained and moulded in or after school as potential Philosopher-Kings. A serious flaw in the public performance

3. NEW DIRECTIONS IN LEGAL EDUCATION 31.

4. D. HALBERSTAM, *THE BEST AND THE BRIGHTEST* (1972).

5. See *THE PENTAGON PAPERS: AS PUBLISHED BY THE NEW YORK TIMES* (G. Gold, A. Siegal & S. Abt eds. 1971).



of these Philosopher-Kings, as portrayed by themselves as well as by Halberstam, was their failure fully to appreciate and respect the political process and to take properly into account the ultimate wisdom and judgment of the people. Granted there is a vital role in our society for law school trained Philosopher-Kings; but I fear that more of the attention of our law schools than is justified has been devoted to their development and placement. The first-year Socratic process administered by brilliant, self-confident interrogators may fail to nourish, and may indeed discourage, the kind of humility which engenders faith and confidence in the non-elite.

This is not to say that the leaders of the law teaching profession have ignored the various challenges to the validity of their priorities. For example, Professors Packer, Ehrlich, and Carrington face up manfully to the limits of the law schools in staffing the nation's need for legal services. The debate has sometimes focused on the question of whether law schools should be two or three years. There is the view that once law teachers have administered the first-year therapy and added some substantive intelligence to their naturally gifted students, they may well surrender to others outside academia the task of completing the education and training which many students require to satisfy their goals and the needs of their society.

The defenders of the faith contend variously that the therapists cannot finish their treatment nor provide adequate training in specific substantive areas in less than three years, and that clinical experience and training in law school is either overrated, unnecessary, or premature.

I do not profess to know the answer to either that question or the corollary questions which subsume it. I do know, or at least believe, that our profession, including its teaching arm, must continue with greater vigor to re-examine its function and its priorities. I, for one, am not satisfied that providing elite law schools for other than potential Philosopher-Kings would be a waste of talent, or that faculties can safely and fairly continue to offer clinical training on a take-it-or-leave-it basis. I am disappointed at the consistent reluctance of some law teachers to become involved in the teaching of law writing and speaking. Moreover, I have seen no organized, serious, and continuing effort by the law faculties to design mechanisms to redress the cruel imbalance between the legal services available to those who have and the services available to those who have not. The crushing impact of the explosion of litigation on the courts and our whole system of justice has not attracted the spirited interest and attention of many legal

scholars and institutions who could, if they only would, contribute much more to designing and advocating solutions. I fear that (with magnificent exceptions like Herbert Packer) too many law teachers are more interested in their freedom to study, teach, and write what they please than in identifying and fulfilling the needs of students and society for legal training and services.

What Professors Packer and Ehrlich have said was certainly worth saying. What they have left unsaid cries out for energetic and imaginative attention by their peers.

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*Report of the New York State Commission on the Quality, Cost and Financing of Elementary and Secondary Education.* New York: Viking Press, Inc., 1973. Pp. x, 480. \$14.95 (clothbound), \$6.95 (paperback).

*Inequality: A Reassessment of the Effect of Family and Schooling in America.* By Christopher Jencks, Marshall Smith, Henry Acland, Mary Jo Bane, David Cohen, Herbert Gintis, Barbara Heyns & Stephen Michelson. New York: Basic Books, Inc., 1972. Pp. xii, 358. \$12.50.

Reviewed by Chester E. Finn, Jr.†

### I. Equality: Of Opportunities, Treatment, and Results

At the heart of much of our public discourse (and discord) during the last decade has been a fundamental disagreement over the meaning of "equality" as applied to various social problems. Two recent studies carry the debate further in the field of public education and suggest some rather critically important implications.<sup>1</sup>

Probably the most familiar definition of "equality" is that of *equality of opportunity*, the principle that every citizen should be free from

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1. C. JENCKS, M. SMITH, H. ACLAND, M. BANE, D. COHEN, H. GINTIS, B. HEYNS & S. MICHELSON, *INEQUALITY: A REASSESSMENT OF THE EFFECT OF FAMILY AND SCHOOLING IN AMERICA* (1972) [hereinafter cited as JENCKS]; *REPORT OF THE NEW YORK STATE COMMISSION ON THE QUALITY, COST AND FINANCING OF ELEMENTARY AND SECONDARY EDUCATION* (1973) [hereinafter cited as FLEISCHMANN].

non-meritocratic discriminations in pursuing his ambitions.<sup>2</sup> In the public sector, such a principle presumably requires that any government service be provided to every citizen on a strictly equal basis. Hence, at least in the public sector, equality of opportunity soon becomes a second type of equality, *equality of treatment*.<sup>3</sup>

But while theoretically required, equality of treatment may, in practice, be extremely inefficient. In education, for example, a policy of providing precisely identical schooling may actually impede the progress of individuals who begin school with significant differences in ability resulting from genetic or environmental characteristics. The problem thus becomes one of justifying—in some principled way—differentials in the provision of public services.

One approach is that of providing some minimum level of governmental support so as to protect every citizen from economic harm. The problem, of course, is that once such a standard is established, the level deemed essential can almost always be raised on the somewhat contrary theories that 1) the service in question is effective in reducing societal inequality, but 2) more than the amount presently offered is necessary to remedy the wide gap between the haves and have-nots which continues to exist.

Until very recently, public education was so analyzed. A "minimum standard" was defined in relatively quantifiable terms—student-teacher ratios, per pupil expenditures, and the like—and was continually raised by aspiring parents and avid educators. Yet, despite our good intentions, substantial variances in schooling remained: Suburban school systems maintained a far higher level of services than those of rural or urban America;<sup>4</sup> and within systems "tracking" segregated the talented from the less gifted (or less white), assigning different curricula and teachers to each.<sup>5</sup>

In the mid-sixties, a different type of "unequal" treatment was advanced by the compensatory education programs of the War on Poverty. This more purposeful and perhaps more justified "inequality of treatment" was based on the assumption that the disadvantaged child must be compensated for deprivations in his early upbringing. The primary goal of such programs was to insure that the disadvan-

2. See Michelman, *The Supreme Court, 1968 Term, Foreword: On Protecting the Poor Through the Fourteenth Amendment*, 83 HARV. L. REV. 7, 12 (1969).

3. See, e.g., *Hobson v. Hansen*, 269 F. Supp. 401 (D.D.C. 1967), *aff'd sub nom.* *Smuck v. Hobson*, 408 F.2d 175 (D.C. Cir. 1969).

4. See 2 UNITED STATES ADVISORY COMMISSION ON INTERGOVERNMENTAL RELATIONS, *FISCAL BALANCE IN THE AMERICAN FEDERAL SYSTEM* 5-6, 64-70 (1967).

5. *Hobson v. Hansen*, 269 F. Supp. 401, 511-14 (D.D.C. 1967), *aff'd sub nom.* *Smuck v. Hobson*, 408 F.2d 175 D.C. Cir. 1969).

taged would leave the public schools with the same level of learning—measured by the innumerable tests of educational achievement—as his middle-class rival. The proponents of such programs thus hoped to move public education from mere equality of treatment to a more significant *equality of result*.<sup>6</sup>

However, a number of studies soon challenged the very idea that equality of educational result was achievable. By far the most important was the extensive survey conducted for the United States Office of Education entitled *Equality of Educational Opportunity*,<sup>7</sup> known popularly as the Coleman Report. The Report confronted equal-education warriors with a number of rather disconcerting findings: By the mid-sixties school facilities and resources were already relatively equal within each region of the nation.<sup>8</sup> There were, however, wide variations in student achievement as measured by standardized tests: Minority youngsters scored significantly below white ones; Southern students, below Northeastern ones; lower-socioeconomic pupils, below higher ones.<sup>9</sup> There was also a greater variation in achievement *within* individual schools than *among* them.<sup>10</sup> Finally, variables other than school programs or facilities—notably socioeconomic status—correlated strongly with student achievement.<sup>11</sup> The Coleman Report thus cast serious doubt on the assumed relationship between “school inputs” and “educational quality”<sup>12</sup>—a relationship which was and still is critical to any hope for equality of either treatment or result.

## II. The Fleischmann Report: Equalizing Taxpayers and Students

Resistance to Coleman’s conclusions has, however, been tenacious. Most notably a number of state and lower federal courts—in declaring

6. President Johnson proclaimed his affirmative action program in the following terms: Imagine a hundred yard dash in which one of the two runners has his legs shackled together. He has progressed 10 yards, while the unshackled runner has gone 50 yards. At that point the judges decide that the race is unfair. How do they rectify the situation? Do they merely remove the shackles and allow the race to proceed? Then they could say that “equal opportunity” now prevailed. But one of the runners would still be forty yards ahead of the other. Would it not be the better part of justice to allow the previously shackled runner to make up the forty yard gap; or to start the race over again? That would be affirmative action towards equality.

Quoted in Bell, *On Meritocracy and Equality*, THE PUBLIC INTEREST, Fall, 1972, No. 29, at 44.

7. OFFICE OF EDUCATION, U.S. DEPARTMENT OF HEALTH, EDUCATION, AND WELFARE, *EQUALITY OF EDUCATIONAL OPPORTUNITY* (1966).

8. *Id.* at 8-20.

9. *Id.* at 21-22.

10. *Id.* at 21-23, 330.

11. *Id.* at 22-23, 330.

12. See, e.g., C.S. BENSON, *THE CHEERFUL PROSPECT: A STATEMENT ON THE FUTURE OF PUBLIC EDUCATION* 22-26 (1965); H. JAMES, J. THOMAS & H. DYCK, *WEALTH, EXPENDITURES AND DECISION-MAKING FOR EDUCATION* 125 (1963).

that financing education through local property taxes unconstitutionally discriminates against poor children by making their education a function of the wealth of their school districts<sup>13</sup>—assumed both that 1) school expenditures are related to educational quality and 2) success in school is related to success in later life.<sup>14</sup>

The Supreme Court in *San Antonio Independent School District v. Rodriguez*<sup>15</sup> has, in turn, questioned both of these views and, in a burst of judicial modesty taken itself—and at least the lower federal courts<sup>16</sup>—out of the debate:

On even the most basic questions in this area the scholars and educational experts are divided. Indeed, one of the hottest sources of controversy concerns the extent to which there is a demonstrable correlation between educational expenditures and the quality of education. . . . Related to the questioned relationship between cost and quality is the equally unsettled controversy as to the proper goals of a system of public education. . . . The ultimate wisdom as to these and related problems of education is not likely to be divined for all time even by the scholars who now so earnestly debate the issues. In such circumstances the judiciary is well advised to refrain from interposing on the States inflexible constitutional restraints that could circumscribe or handicap the continued research and experimentation so vital to finding even partial solutions to educational problems and to keeping abreast of ever changing conditions.<sup>17</sup>

The Court concluded that “the ultimate solutions must come from the lawmakers and from the democratic pressures of those who elect them.”<sup>18</sup> In fact, even before the Court made its suggestion, Governor Rockefeller had appointed a commission to “report on the quality, cost, and financing of elementary and secondary education in New York State, and to make recommendations for the improvement of

13. *Rodriguez v. San Antonio Independent School Dist.*, 337 F. Supp. 280 (W.D. Tex. 1971), *rev'd*, 41 U.S.L.W. 4407 (U.S. Mar. 21, 1973); *Van Dusartz v. Hatfield*, 334 F. Supp. 870 (D. Minn. 1971); *Hollins v. Shofstall*, No. C-253652 (Super. Ct. Ariz., Jan. 13, 1972); *Serrano v. Priest*, 5 Cal. 3d 584, 487 P.2d 1241, 96 Cal. Rptr. 601 (1971); *Robinson v. Cahill*, 118 N.J. Super. 223, 287 A.2d 187 (1972).

14. *See, e.g., Serrano v. Priest*, 5 Cal. 3d 584, 605, 487 P.2d 1241, 1255-56, 96 Cal. Rptr. 601, 615-16 (1971).

15. 41 U.S.L.W. 4407 (U.S. Mar. 21, 1973).

16. *Rodriguez* may not be the end of the school finance cases as state courts are still free to use state constitutional provisions to invalidate their own educational systems. *See, e.g., Robinson v. Cahill*, 118 N.J. Super. 223, 287 A.2d 187 (1972). *See also Note, A Statistical Analysis of the School Finance Decisions: On Winning Battles and Losing Wars*, 81 YALE L.J. 1303, 1320-21 (1972).

17. 41 U.S.L.W. at 4420.

18. *Id.* at 4425.

performance in all these dimensions.”<sup>19</sup> The panel, which became known as the Fleischmann Commission, interpreted their charge fairly narrowly, however, and focused on the policy implications of educational finance.<sup>20</sup>

Their principal recommendation was that New York State, rather than its local school districts, should finance all elementary and secondary schools through a uniform state property tax.<sup>21</sup> Although school administration was to remain a local responsibility,<sup>22</sup> there would be no local discretion with respect to expenditure levels.<sup>23</sup> In fact, one of the most important goals of the Commission was equalizing per pupil expenditures.<sup>24</sup> Such equality would not, however, mean *identical* expenditures:

Equal sums of money shall be made available for each student, *unless a valid educational reason can be found for spending some different amount.*<sup>25</sup>

Such “valid educational needs” would include disparities in student needs or in schooling costs.<sup>26</sup> Moreover, the formula for state expenditures was to include a clearly compensatory factor termed “disadvantage distribution”:

[S]tudents who score at a low level in reading and mathematics achievement [will] be weighted at 1.5, as against a weighting of 1.0 for other children, and . . . the proportion of students so selected [will] be based upon the proportion of third-grade students in each district who obtain marks at or below the third stanine on third-grade reading and mathematics achievement tests . . . .<sup>27</sup>

While the Commission recommended using such additional funds for elementary school expenditures,<sup>28</sup> the school districts would be free

19. FLEISCHMANN at v.

20. *Id.* at vii-viii.

21. *Id.* at 62-63. A second ground for both the cases noted above and the Fleischmann Commission was the equalization of the burden of local property taxes. While this ground has undeniable political appeal, there is serious doubt that the judicial pronouncements thus far would have been issued were taxpayer equality the only value at stake. See Note, *A Statistical Analysis of the School Finance Decisions: On Winning Battles and Losing Wars*, 81 YALE L.J. 1303, n.54, at 1315 (1972).

22. FLEISCHMANN at 55, 60-61, 86-87.

23. *Id.* at 63.

24. *Id.* at 54-55, 62.

25. *Id.* at 62.

26. *Id.* at 63.

27. *Id.* at 66 [footnotes omitted; emphasis deleted].

28. *Id.* at 67.

to choose between various programs and services.<sup>29</sup> The Commission made other "equalizing recommendations," including tax credits for the poor<sup>30</sup> and the subsidization of high-spending districts until the low-spending ones were "leveled up."<sup>31</sup> But the "disadvantage distribution" was by far the most expensive.<sup>32</sup> The justification for this massive expenditure was that

[b]y investing heavily in the education of low-income children, the state can redress the balance in human capital distribution and, by extension, the future distribution of income.<sup>33</sup>

It is, of course, precisely this "extension" from expenditures to educational achievement (and then to future income) that the Coleman Report had called into question. Such niggling doubts were, however, dismissed by the Fleischmann Commission in what may be the most revealing paragraph of their report:

Because of the lack of experimentally proven data on the learning process, it is currently fashionable in academic circles to assert that more money for schools does not necessarily mean better education. In a very narrow sense this may be true. For example, it has never been proven that a student/teacher ratio of 28 to one necessarily provides better education than a ratio of 30 to one for normal children. But if it is true that minor variations in student/teacher ratios are not highly significant for normal pupils, it is even clearer that substantial differences in student/teacher ratios are of controlling importance in the education of handicapped children. Here the effective ratio is not 30 to one but often five to one. The expense of employing additional teachers for these children cannot be avoided unless we are to relegate a sizable percentage of our present school population to a hopelessly inferior status for the rest of their lives. Apart from these extreme situations, experience tells us that the amount of money expended does make a meaningful difference in the quality of education.<sup>34</sup>

The Commission thus makes one important point by inference: The validity of the Coleman Report and similar studies is limited by the fact that they considered the effects of only minor input variations. This conclusion is, however, hardly beyond challenge. The relevance

29. *Id.*

30. *Id.* at 81-82.

31. *Id.* at 63-65. The estimated cost for "leveling up" to the sixty-fifth percentile for 1972-73 is \$125 million. *Id.* at 66.

32. The estimated cost for 1972-73 is \$465 million. *Id.* at 66.

33. *Id.* at 95.

34. *Id.* at 53-54.

of the learning experience of the handicapped to overall school expenditures is certainly also limited; and a "five to one" student/teacher ratio is far better than that which the Commission recommends for normal children.<sup>35</sup> Moreover, what "experience tells us" about additional school expenditures evidently excludes the "experience" recorded in the surveys of the late sixties. Finally, one might surely expect more than intuition as a reason for spending an additional \$700 million of New York taxes.<sup>36</sup>

It is interesting to note that the Commission's own findings on educational achievement are consistent with Coleman's, in that the central conundrum for both is the fact that student achievement correlates more with the pupil's socioeconomic background than with educational inputs.<sup>37</sup> But the Commission sidesteps this problem with the curiously cryptic contention that "something is wrong with the way our educational system operates."<sup>38</sup> Thus, Fleischmann defends the belief that the educational system is still a primary vehicle for equalizing social inequalities:<sup>39</sup>

[W]hile equality of expenditure in accordance with some reasonable educational standard may not inevitably result in higher quality education, we feel that such equality is the essential first step toward achieving that goal. Without that equality, large numbers of children in districts lacking in financial resources are doomed to inferior educational achievement. Society is fated to assume the ever-increasing burden of supporting those who cannot make their own way in the world.<sup>40</sup>

### III. Jencks: An Alternative Approach

Christopher Jencks and his associates contradict these assumptions. To begin with, they reaffirm Coleman's finding that educational expenditures do not significantly correlate with student achievement.<sup>41</sup>

35. 3 REPORT OF THE NEW YORK STATE COMMISSION ON THE QUALITY, COST AND FINANCING OF ELEMENTARY AND SECONDARY EDUCATION 13.4-13.5 (official ed. 1973).

36. See FLEISCHMANN at 63-67.

37. The biggest problem in the state is the high correlation between school success or failure and the student's socio-economic and racial origins. The higher on the socio-economic scale a child is, the more likely he is to succeed in school. . . . In spite of high expenditures and quality improvements, New York State is not providing equality of educational opportunity to its students as long as the pattern of school success and school failure remains closely tied to a child's social origins.

*Id.* at 4.

38. *Id.* at 25.

39. See p. 1106 *supra*.

40. FLEISCHMANN 55. See also J. GUTHRIE, G. KLEINDORFER, H. LEVIN & R. STOUT, SCHOOLS AND INEQUALITY (1971).

41. JENCKS 109.



Moreover, and more importantly, they seriously challenge the even more sacred belief that student achievement is related to success in later life.

The Jencks study is in fact directed toward the question of how adults achieve their ultimate positions (measured primarily in terms of income)<sup>42</sup> in American society.<sup>43</sup> In light of the popular mythology that education is necessary, some would say sufficient, for social mobility, the Report's answers are particularly disconcerting:

Neither family background, cognitive skill, educational attainment, nor occupational status explains much of the variation in men's incomes. Indeed, when we compare men who are identical in all these respects, we find only 12 to 15 percent less inequality than among random individuals.<sup>44</sup>

Thus, Jencks clearly concentrates not on equal educational treatment, but rather on equal results in our society. His study group did consider equalizing educational achievement by giving less education to the gifted and more to the less talented. But this arrangement was soon rejected:

We think of "equal opportunity" as implying that everyone should get as much schooling as he wants. Equal opportunity, in this sense, guarantees unequal results.<sup>45</sup>

Three principal conclusions of the Jencks study undercut the very belief that schooling can remedy income inequality. First, the Report concluded that "no measurable school resource or policy shows a consistent relationship to schools' effectiveness in boosting student achievement."<sup>46</sup> Second, as noted above, Jencks found that the "quality" of education as measured by standardized test scores did not correlate with income achievement. Finally, the group found that the factors which do appear to correlate with economic success are largely beyond the reach of public policy.<sup>47</sup>

Jencks is thus dubious of any recommendation that seeks to equalize income through intermediate programs.<sup>48</sup> He concludes that little

42. *Id.* at 209-46. There was also some brief attempt to assess inequality in terms of occupational status (*id.* at 176-208) and job satisfaction (*id.* at 247-52).

43. *See id.* at 11-12.

44. *Id.* at 226.

45. *Id.* at 109.

46. *Id.* at 96.

47. *Id.* at 226-27. One such factor is heredity, to which Jencks devotes a subchapter and a substantial appendix. *Id.* at 64-84, 266-319.

48. *Id.* at 29, 109.

progress towards reducing economic inequality will be made by even “ingenious manipulations of marginal institutions like the schools,”<sup>49</sup> and contends that direct political control over the economy—in a word, socialism—will be necessary to achieve an equitable income distribution.<sup>50</sup>

These conclusions do not, however, lead Jencks to advocate educational budget reductions or abandonment of the schools; rather, he suggests a different approach to public education. Jencks would have schools viewed less as factories for a particular product—educational and hence, economic equality—and more as a place where young people can spend time in a stimulating, pleasant environment.<sup>51</sup> Indeed, Jencks is optimistic, even enthusiastic, about equalizing school expenditures in the name of justice, if not equalizing educational “outputs”:

The case for equalizing expenditures must . . . rest on a simpler logic, which asserts that public money ought to be equitably distributed even if the distribution of such money has no long-term effect.<sup>52</sup>

#### IV. Equalization: At What Price?

Theoretically, the recommendations of Fleischmann and Jencks are not incompatible. A society could equalize school financing, increase school expenditures, and still directly redistribute income. In practice, however, a society with limited resources must choose among these courses. Committed to certain “necessary” expenditures, such as police, defense, or highway programs, it will have a limited reservoir of funds available for specifically reducing inequality. The marginal effect of this “equalizing dollar” will vary among programs. While programs justifiable on other grounds, such as health care, will include some compensatory component, the willingness of the society to tax itself for “equalizing” individual positions is both politically and economi-

49. *Id.* at 265.

50. *Id.*

51. *Id.* at 256. Other commentators have shared this view:

Inequities in the provision of a service as fundamental and as universal as education demand justification, not because they “cause” educational harm but rather because they represent a continuing political insult, a declaration that the poor are not entitled to as much of the larger community’s educational resources as are the rich.

Kirp & Yudoff, *Serrano in the Political Arena*, 2 *YALE REV. OF L. & SOC. ACT.* 142, 144-45 (1971). See JENCKS at 22-23 for conclusion that over their lifetimes, poor children and black children receive a lower proportion of school expenditures than do middle-class and white children.

52. JENCKS 29.

cally limited. A society which expends its "equalizing dollars" on compensatory education is less likely to spend, or continue to spend, large amounts on direct income maintenance.

A society is also limited in its reserves of energy and hope. Jencks' conclusion that public education has borne excessive expectations—which no one realized it could never fulfill—helps explain the high level of support public schooling has received. But if these expectations are now dashed and the schools are no longer viewed as the great leveling force in our society, it seems unlikely that the same level of public funding will be available.<sup>53</sup> This could well be the real import—and the perhaps real danger—of the Coleman-Jencks line.

In the final analysis, both Fleischmann and Jencks alert us to the need to assess public policies in terms of results, not treatment. Their common perception that the public schools are not now delivering equality of opportunity, treatment, or result challenges educators and politicians alike. However, tension among these objectives, combined with the Coleman uncertainties about achieving *any* of them through conventional school or fiscal reform, may well lead us to the conclusion that American society has simply overloaded public education with too many hopes and dreams. It is perhaps this overload, and its implications for education, which must be evaluated before we either invest additional billions in the schools or abandon them for wholly different social strategies.

53. Indeed, Jencks and Coleman are already being cited by opponents of larger school expenditures. See Hodgson, *Do Schools Make a Difference?*, *THE ATLANTIC MONTHLY*, March, 1973, at 45-46. See also *Symposium—Perspectives on Inequality: A Reassessment of the Effect of Family and Schooling in America*, 43 *HARV. ED. REV.*, Feb. 1973, at 37.