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## Herbert L. Packer Tribute

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# Herbert L. Packer

## 1925–1972

Herbert Packer made great contributions to Stanford Law School, to Stanford University, and to legal scholarship; he received for his achievements some of the highest accolades bestowed by those institutions and his profession. In this tribute to him, the *Review* attempts to reflect the breadth of his contribution.

The four short pieces immediately following were originally delivered at a memorial service soon after Professor Packer's death. Leon Seltzer, his publisher and a personal friend, has written of the man. Richard Lyman, President of Stanford University, and Thomas Ehrlich, Dean of the Stanford Law School, have written especially of Professor Packer's contributions as an administrator and a teacher to the institutions they represent. But it is as a scholar that Packer had his widest impact; Gerald Gunther, a faculty colleague, has written of the scholar.

The greatest tribute to a scholar, however, is not an admiring assessment of his work: it is discovery by successors that his work illuminates other problems and opens other lines of inquiry. Two essays written in honor of Professor Packer by distinguished criminal law scholars pay this tribute. In the first, Dean Abraham Goldstein suggests that examination of the inquisitorial model of criminal procedure can offer further depth to the insights into criminal procedure elaborated in Packer's work. In the second, Professor John Kaplan proposes modifications of the exclusionary rule, a doctrine intertwined with Packer's two models and his concern about nonvictim crime. No doubt these essays will evoke controversy, which itself will continue to pay tribute to Professor Packer.

EDITORS

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From Herb many of us learned new standards of inquiry, the necessity of asking every important question, of insisting on answers good enough to entrust our lives to. And Herb could give us a demonstration of what a life lived that way looked like. And what a glorious sight it was: of a mind—and a heart—fully extended, sensitive, warm, controlled, pregnant with tension, completely engaged. Engaged—that might be the word—a nuance, perhaps, beyond the philosophers' "examined life": the *unengaged* life, I think Herb might have said, required a certain amount of careful scrutiny, if not justification. He demanded of himself—he asked of us—a

performance not merely that stretched sensibility and intellect, but also that was constantly, wholly responsible. It was simply every man's duty to care—and to act. And for those unlucky enough to recognize that perpetual obligation, Herb cheerfully set, out of his New England and Old Testament heritage, new standards of conscience. From that potent dual tradition came that absolute confidence in the capacity of mind to demonstrate not only what was right but what one must do.

I first met Herb in the Old Union dining hall in the spring of 1956. With a kindness I was later to learn was typical, he hailed me, a stranger recently arrived, and asked me to join his table of law school colleagues. My gratitude was submerged by the unexpectedness of his first question. I had under my arm the initial issue of the *Anchor Review*, notable in retrospect chiefly for the excerpt it carried of an American novel, by way of France, by a quasi-new writer named Vladimir Nabokov. Herb, who had already read it with some excitement, asked me if I knew whether the author was by any chance the lepidopterist from Cornell. That was my introduction to the astonishing range of his reading in literature (as well as to Nabokov's academic ties), the solid base of it gained, I later learned, from devouring the New Haven library before he was 14.

The last time I saw Herb we talked about Rawls' provocative new book *A Theory of Justice*; and within a few weeks of Herb's death, my old Shakespeare teacher, Mark Van Doren, died. You will know with what prickling of spine I read—Herb filling my constant thoughts; he loved Shakespeare—a tribute to Van Doren in the *Nation* written by a young colleague who decided to use, of all mind-sprung metaphors, the notion of "justice" to define the special precision and clarity of Van Doren's insights into the poet. Justice was the proper term for that felicity, he said, "for this difficult and elusive virtue, whether found in the right ordering of words or ideas or lives, is an essential measure of man's belief in the perfection, never totally realizable, perhaps, of a life, a society, a work of art." Herb's face swam in my sight, and Shakespeare, and Herb, and Van Doren, and the idea of justice, and I were intermingled in that confused, startling, tingling instant. Herb would have liked that, for he knew how to savor the special fascination of that complex relationship—intimate but hazardous—in which author and publisher explore meaning and context in books as in life. Once, after I had suggested to Van Doren that his book on Shakespeare was too tightly written, he replied: "There is only one way to write. You must trust the reader. But you have to be worthy of his trust."

I quoted that to Herb when he brought me the manuscript of *The Limits of the Criminal Sanction*, this time arguing for a tighter archi-

ture for part of his book. A whole new dialogue was begun: suggestions casually tossed out, swiftly softened, reshaped, offered again. Editor and author bent their heads together. Designer and craftsman worked their magic. The book was born and made its worldly mark. But we had shared something else, Herb and I—mysterious, of a special worth—partaking, somehow, of university as well as of book, of life as well as of law, of the relationship between conception and performance—that would bear no closer definition. For me, that, too, was Herb.

From his engagement with life—from his insistence that the responsible man must think and act in a way that will benefit the society of which he is privileged to take part—came Herb's particular concern with change in the structure and operations of institutions.

"Maybe," he would murmur, having provoked some of us to thought, "we ought to think about that." And it was clear not only that *we* ought, but that *he* already had. It was now up to us to think through some of the meaning of fact and substance, of context and purpose, and perhaps, then, we would be ready to contribute something to the dialogue. In the meantime, having given us the conversational cue, Herb would wait for us to catch up. He would wait. ("Irony," Lionel Trilling tells us in his newest book, *Sincerity and Authenticity*, "is one of those words, like love, which are best not talked about if they are to retain any force or meaning.")

If I were to settle on one characteristic that defined Herb's personal relationships with family and friends it would be the quality of his attention. For Herb listened—to Nancy, to Annie, to George, to his friends, to his students. And all recognized that offer for what it was. It was the tuning out, Herb knew, that forestalls love. Tune out he never did. With his attention he offered himself, and many outside his family knew the quick warmth of his careful concern: a student, working yearlong with him on his research, expecting in himself only respect, surprised by love; the widow of a distinguished judge, offering Herb some letters he needed in his work, refreshed by the special poignancy of a late new friendship; a young visiting professor, a difficult year begun at an unlucky angle of pain, borne up by an understanding from his colleague that he could only name as sweetness. That, too, was Herb.

So, used as we were to the particular clarity of his insights, the supple strength of his determination, the special warmth of his attention, we were utterly unprepared when nearly 4 years ago that hidden, scarlet flood burst the resilient muscle of his mind, and we waited out the toll and silent measure of destruction. But what was given us was a new dimension of courage. We saw him, by an effort forged of mind and

will, force recuperation—and he was Herb still, mind alert, eyes sparkling (but with a new and piercing beauty), book-devouring, dropping provocative thoughts round us like holiday sparklers.

He wasted no time in testing his regained capacities, with incredible productivity. But Herb's testing of himself was constant, his performance vigilantly clocked. So he could tour Europe and walk his family ragged in the Vatican, or take himself off to distant cities and negotiate alone the miles between hotel and library, or, as he did last summer, mount from island beach to house and back again, and then handle with assurance the nautical charts of a small boat, directions crisp as to heading and wave.

But there were shadows. Those standards of academic performance to which he held us all were *his* standards, and there, where the man of mind makes his home, he felt great burdens on him. One of his new friends wrote to Nancy, adapting a Donne quotation in another context, that he found himself thinking "[here] some great prince in prison lies."

And if, in the end, he decided that the dimension of control and performance was not now his, his first thoughts would be not of himself, but of others. For his life was one long giving of himself, and of that, as of his work, he knew only one measure. We may think him mistaken about his work, but we are not mistaken about the rest: out of an excess of love he made his decision. And his family and his friends know and accept it, for that, that, too, was Herb.

In the end, we shall remember him at the height of his powers—a Herb of imagination and style, joyously engaged, of Mozartian courage—"He was a whistler past graveyards," Nancy said the other day—taking on for us all the challenges, heavy and light, each man-made world lays fully on us, and leaving each place, surprised into a performance it did not know it held, better than he found it. He would want us to remember him for that. And we will—gratefully, we will.

LEON E. SELTZER\*

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A daunting thing about a tribute to so remarkable a human being as Herb Packer is that no one can hope to capture in a few words the vivid complexity of the man himself. *The Reader's Digest*—not to my knowledge one of Herb's most frequently consulted sources—used to have a regular feature entitled "My Most Unforgettable Character." It would be an

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\* Director, Stanford University Press.

interesting, if unattainable, statistic to know for just how many people Herb would fill that role. Surely for anyone who had anything much to do with him, he would at least be in the running.

That might even please Herb. He was certainly competitive. Not in the sense of having to be Number One, or of getting small and furtive pleasures out of managing to score points against others, or showing them up to their disadvantage. But in the sense that he drove hard, drove himself and others, pushed and pulled and argued endlessly with stubborn or elusive facts, intractable institutions, or obtuse people.

He wasn't the world's most patient individual, and he didn't really consider patience in the face of stupidity or unfairness or muddle a very desirable characteristic. In his last years his impatience grew legendary, and embarrassed us, not so much because he was so impatient with us, but because he was so terribly impatient with himself. A man who had always been able to lay about him with unparalleled command of words, spoken or written, found himself having to conserve this precious resource. The husbanding of it hurt him, and hurt all who knew him well and valued his command of the language, and therefore of the thought processes that lie behind language. Whether consciously or not, I think we all regarded Herb's mastery in analysis and argument as one of those tremendous phenomena, the experiencing of which is a peak in one's life, a glimpse of the hugeness of human potentiality.

Certainly many who worked in University administration with him felt this way. "It was an experience just to work with him, just to see his mind at work," is a remark I have heard often—and while he was very much alive, not as one of those conventional panegyrics that blossom after a hero has died.

It would be idle to pretend that administration was perfectly fitted to Herb. (Somehow one is tempted to put it that way, rather than the other way around. Something to do with a sense of proportion, I suppose.) I doubt if he ever thought very seriously about a career in administration. He took to it because there were things he wanted to see the University do, and things he thought it was either failing to do or doing wrong. This motivated him before and after his service as Vice Provost as much as it did during that time. This, and not ambition for office, led him to become the chief architect of the Academic Senate, for instance. Recognizing that the faculty couldn't function effectively without such a body, he worked tirelessly to create one.

I don't mean to imply that he was a man of nuts and bolts, and administration for the sake of bureaucratic neatness. He was always interested in the machinery of institutions, but as a means to ends that

had nothing to do with machinery. And the ends were not narrowly "progressive" or "reactionary." One of the reasons that he was such a scourge to idealogues of all schools was that he could be radical and conservative by turns, or both at the same time, and not (heaven knows!) because he was confused—confusion and Herb Packer were, as far as I can tell, lifelong and bitter enemies—but because he preferred the discomfort of striving to understand things as they actually are, rather than the slippered ease of having, intellectually, a place for everything and everything in its place.

In the introductory volume of the *Study of Education at Stanford*, that massive work of institutional self-study that was his chief preoccupation during his tour as Vice Provost, there is a fairly representative bit of Packerian practical idealism (whether or not the exact words were his):

We hope, finally, that from our work will come a renewal of the idealism and aspiration on which universities are founded. They are not only places where the achievements of the past are preserved and transmitted to future generations. They are also places where change may be conceived, knowledge gained, and understanding increased, where a new culture may be created and the best in the old renewed. They are not only places where the individual can learn to explore what is beyond his own experience. They are also places where, through the free and disciplined thought of individuals, our general understanding of man may be increased, his world improved and made more humane.

"Free and disciplined thought"—how tragically often one hears freedom and discipline treated as polar opposites and mutually incompatible qualities. Herb Packer worked in the great tradition of Western rationalism, that tradition for which so many thoughtless apologies are now made, and at which so many feckless charges are leveled.

He will not be remembered principally for anything he did or advocated in university administration. It is the universal fate of administrators to be forgotten *as* administrators soon—and no doubt deservedly. He *will* be remembered for those supposedly more fragile things, his words and ideas—matchless combinations of clear and penetrating words; ideas that were as sharply defined and deeply rooted as one is likely to encounter anywhere.

And he will be remembered for himself, his energetic, probing, iconoclastic, sharp-witted and sharp-tongued, generous, and passionately rational self.

RICHARD W. LYMAN\*

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\* President of Stanford University.

Herb Packer was a fascinating combination of qualities—often in conflict, always in tension. He was a rational analyst, and an emotional hip-shooter; a long-range campaigner for educational reform, and an academic infighter.

What a glorious classroom performer he was. He came to Stanford with an ability to squeeze out of those whom he taught—whether students or colleagues—all that was within them, and then some. Herb came with that gift, and he developed it to a fine art.

Herb's major work on the School's curriculum was in 1964 and 1965. "Let's not just move the milk bottles around," he would say. "Let's do something important." And he did. He somehow pushed faculty members into giving up some of their most sacred and vested interests—particularly required courses in the second year. His proposals were rooted in a belief that the well-educated lawyer needs to learn more than the law at law school. He needs to gain skills of analysis, abilities to communicate, mental habits of curiosity and skepticism, of objectivity and flexibility. Above all, he must develop standards of excellence. Herb argued that those objectives can be achieved through many subject matters when they are taught with rigor and stimulation, and that student choice makes a positive contribution to learning in law. As he liked to say, he "freed the slaves."

In 1968-69 we were again in a process of institutional introspection that only those in academe can tolerate, let alone accept. Again, Herb was a leader. He had little sympathy for much of what has come to be called clinical education. But he helped to persuade his colleagues that a substantial dose of such training, carefully supervised, was useful as an experiment. More difficult, he helped to persuade them that for some law students a nonprofessional degree at the end of 2 years was also an undertaking worth trying. On these and other structural changes, he succeeded above all in convincing us that if an experiment failed, we would have the collective courage not only to realize that failure but to end the experiment.

Herb led moves for curricular reform at the Law School, but it was not he who compromised or cajoled. That was not his nature. He was a truth-teller. Most of us in universities—institutions dedicated to the pursuit of truth—often tell less than the whole truth, especially when discussing the work of others in academic life. We do not falsify so much as we shade and shape to suit the moment. To do otherwise and to be, at the same time, civilized in dealing with friends and especially fellow faculty is too jarring. Herb was nothing if not civilized. Yet he was able to tell the truth whenever he was asked—often when he wasn't.



He had a kind of pugnacious puritanism about both personal behavior and intellectual rigor that made him unshakable in his convictions about right and wrong, about good work and bad.

He personified the basic soundness of a liberal education. And he brought superb equipment to his tasks—a broad and expanding learning in literature and the arts, a lean and effective prose—sharpened and pared by Nancy. Herb Packer had those qualities in unusual measure, but what made him different was that he was so damn tough, so committed, so honest. The Law School went through difficult times a decade ago. The University went through difficult times more recently. Herb was determined that the School and the University would survive, and they did.

This was the Herb Packer who created the Faculty Senate, who spoke out not only against campus violence, but also against the supposed bases for that violence—and this when silence was so much easier.

He paid a price. He thought sometimes that his foray into University administration was a mistake—that it weakened his ties to his Law School colleagues and his grip on scholarship in criminal law. But what an extraordinary job he did in the *Study of Education at Stanford*.

Herb took on all comers with a plea for intelligence, for the long view, for procedural care and decency. He had an absolutistic commitment to basic values and was a street fighter in defending them. Herb could be intolerant of slow and shallow minds, slashing to those who disagreed with him—particularly friends who compromised when he saw principle at stake. He relished his enemies—less only than his friends—and was stung and stung back whenever he thought that they were standing less than squarely on sound principles. Not necessarily his principles—he did not insist on that. But he did demand that others be uncompromising with their own principles. That brought him into occasional conflict with administrators. Carl Spaeth, Bay Manning, and I were not exempt. But we all stood a little straighter because of him.

That is the real reason Herb made such an impact on the School and on our lives—he had such guts. True, he was a remarkable mixture of brilliance, intellectual equipment, and philosophic clarity. But it was that certainty of principles and that total commitment to their protection that was unique. Herb could bristle like a porcupine on issues of principle. He was combative, contentious, and stubborn. This sometimes made him hard to live with. But it will be infinitely harder to live without him.

Herb came to Stanford at a time of attack from McCarthyism and

the radical right. He left us amid attacks from the radical left. He stood up to both—even while his closest friends were urging moderation. Someone, he believed, had to speak the blunt truth, and he enjoyed that role. Even when he was wounded, he never failed to speak.

Herb meant so much to so many of us at the School—students, staff, and faculty. He will always be part of the Stanford Law School, just as he is forever part of the lives of those who loved him.

THOMAS EHRLICH\*

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In thinking of Herbert Packer, scholar, I inevitably think, too, of Herb Packer, colleague, and Herb, my friend. That is so not only because I am emotionally incapable of isolating the scholarly strands. It is so primarily because of the predominant oneness, the wholeness of Herb: his qualities were all of a piece. The qualities of the colleague who stimulated to thought and prodded to effort; the qualities of the friend who offered concern and insight, enthusiasm and wisdom—those qualities were in large part the very ones that made for eminence in scholarship. That towering intellect and that grace in expression, that breadth of interest and that depth and originality of analysis, that lucidity and elegance and directness of speech were central, to the scholar and the colleague and the friend.

And that overriding theme of oneness marks not only the personal and professional qualities. Oneness, wholeness, also describes that remarkable scholarly life. On the surface, Herb's writings dealt with a large number of the disparate categories into which a law school curriculum is divided. Some of his early work was in antitrust law. His first major research undertaking dealt with the factfinding process. During most of the 1960's he focused on criminal law. At the end, he was engaged in legal history and judicial biography. Yet these were not truly separate ventures. They were aspects of a single strand that permeated all of his scholarship. For Herb, scholarly efforts, like the curriculum, could not be viewed as airtight compartments. Each undertaking was a specific manifestation of recurrent basic questions in the application of law to social problems: What are our goals? What means can contribute most effectively to those goals? Concern with basic philosophical questions, rigorous probing of assumptions, pragmatic preoc-

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cupation with selecting the most suitable means for the most carefully articulated ends—those are characteristics of all of his writings.

Those are of course the characteristics of the work that brought him the greatest renown, *The Limits of the Criminal Sanction*, published in 1968. But what is especially striking is the pervasiveness of those themes in the superficially quite different earlier works. What are we trying to do? How best do we get there?—those, for example, are the questions that run through that absorbing book published in 1962, *Ex-Communist Witnesses—Four Studies in Fact-Finding*—the result of prodigious research that absorbed most of his energies in his early years at Stanford. And those same themes emerge in remarkably mature form in Herb's earliest monograph, a book written mainly in 1960, *The State of Research in Antitrust Law*. That little-known volume, on a subject that in other hands might have turned into a dreary pedantic catalog, was with Herb not simply a brilliant assessment of work in a particular field, but a commentary on the state of legal research generally. What he found was an extraordinary amount of writing, most of it "hack work," concerned with the immediate and the very specific. What he deplored was the "scarcity in the midst of plenty"—the "absence of work that I think should be done." What he prescribed was research that "needs to be much more academic than it is, by which I mean much freer of the constraints of the moment." And his diagnosis, characteristically, transcended his immediate focus. He said: "[T]he task here as elsewhere for legal research is to explore, with all the equipment at its command, the range of competing goals, to articulate criteria for choice among the possible goals, and to devise methods (including both rules and institutions) for maximizing the desired goals." It is that approach that infused his own work throughout, whether he was talking about evidence or criminal law or legal history.

And it was that approach that made him one of the very small number of truly distinguished legal scholars we have had in the post-World War II years. That is a judgment that rests not on sentiment or on parochialism. It is a judgment that was confirmed when his masterpiece, *The Limits of the Criminal Sanction*, was awarded the highest honor that can be bestowed on an American legal scholar: the triennial Coif Award in 1970, the award made for "a written work evidencing creative legal talent of the highest order."

It was Herb himself who had presented that Award 3 years earlier to his predecessor recipient, Grant Gilmore of Chicago. And Herb's words of presentation then, in 1967, aptly describe his own remarkable achievement. "In the end," he said, "there are only a handful of truly exceptional

works," works that are more than "merely competent," works that are more than "merely meritorious." What Herb said of Gilmore's is pre-eminently true of Herb's own work: it "exhibits the singular power of the single human mind, not likely to be matched by any team or committee or task force, to impose a kind of order on unruly and recalcitrant facts, to see a piece of reality in a new way." And, again in Herb's own words, so apt for his own masterpiece: he exhibited "a lucidity and a grace in this, as in his other works, that stands as a reproach to those who think that style is somehow separate from substance. The mind at work in these pages is fastidious, ironic, aristocratic. These are not qualities that are much in vogue today; they are qualities that are worth celebrating when brought, as here, to the solution of significant legal and intellectual problems."

That remarkable style—above all, that capacity to see reality in a new way—was precisely what Herb brought to everything he touched, most especially *The Limits of the Criminal Sanction*. That classic was the culmination and the best example of the renewed engagement of first-rate talent in an area of law long in the doldrums. Herb accomplished that with an approach that suggests the shallowness of much of the debate in law faculties. To him, the question of whether we need doctrinal work or empirical work was an empty one. As he said as early as his antitrust research study, we need *both*: we need the field studies, and, despite the plethora of trivial doctrinal excursions, we need better, more basic, doctrinal work. He himself led the way in the "return to doctrine" in criminal law with a number of articles, most impressively in the 1962 *Supreme Court Review*.

Herb had similar contempt for questions as to whether we need more "purely legal" work, or whether we ought to be interdisciplinary. He demonstrated that the best scholarship does not see that as a choice—that it is possible to be a first-rate, careful, disciplined legal technician and, at the same time, a broad-gauged, profound scholar. *The Limits of the Criminal Sanction*, as he himself described it, drew "on law, on philosophy, on economics, and on some of the behavioral sciences." His approach, he said, was "somewhat old-fashioned." But it was old-fashioned only in the sense that the probing of the deepest questions with the greatest breadth has long been among the loveliest albeit rarest achievements of civilized man.

Because of Herb's book, a generation of legal scholars, and generations of law students, see reality in a new way. The articulation of competing values, the assessment of the range of solutions, the thrust toward decriminalization—all those impacts are permanent ones. The probing analysis of "what the criminal sanction is good for," the lesson that "we

must ask 'what' and 'why' before we ask 'how'—those contributions have become not only enduring parts of our thinking about criminal law, but permanent benchmarks of what scholarship in the grand manner can be.

The characteristics of that scholarship are evident: above all, the capacity to stand back from the immediate, to take the embracive view of means and ends, with full command of the technical details, but with secure focus on the larger picture. What is not so apparent is that a deep faith lay at the roots of that scholarship in that pragmatic, problem-oriented man. There was a faith in the John Stuart Mill ideal to which he paid homage in *The Limits of the Criminal Sanction* and elsewhere—the liberal belief in “human freedom,” the liberal concern with “the quality of life for free men.” It was a liberalism that was often misunderstood. At the beginning, there was the attack from the right: *Ex-Communist Witnesses* was dedicated to Carl Spaeth, for “steadfast support in times of trial.” Later, there were similarly misguided attacks from the left. But the faith of the liberal, and its enduring manifestation in the prodigious scholarly output, survives those attacks.

And conjoined with that liberal's faith was another basic belief—the belief in the power of reason. In his introduction to *The Limits*, Herb asked—“Are there rational arguments to which rational men can respond rationally?” His book, he said, was an attempt to give an affirmative answer. It was an attempt that succeeded superbly well. That faith of the liberal, and that profound commitment to the capacity of reason, informed all of Herb's scholarship. We can pay no greater tribute to Herb than to affirm our allegiance to that faith and that commitment that are his ultimate bequests to us all.

GERALD GUNTHER<sup>\*\*</sup>

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