On the Battlefield *of* Merit

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Winslow Homer (1836–1910), "Prisoners from the Front" (1866). Courtesy of the Metropolitan Museum of Art, New York. There are many recorded instances of Harvard Law School graduates recognizing their classmates in enemy uniform on the picket lines or in prison during the Civil War.

From the Age that is past, to the Age that is waiting before

—"FAIR HARVARD," The bicentennial hymn
of the university (1836)

Preface

Harvard Law School is the oldest continuously operating university law school in the United States, and has long been the most influential and the most complex. Many arguments can be made about its ranking among law schools today, but at the end of its first century, it was absolutely dominant. In 1905, future president and Chief Justice William H. Taft, an alumnus of Yale, called Harvard Law School "the greatest law school in the world."[1]

Even so, the shortcomings of the school have been equally profound, and these have exercised no less influence, given the stature of the school. Ralph Nader has been one of the school's harshest critics, but the whole point of Joel Seligman's aptly named *The High Citadel,* introduced and copyrighted by Nader, is the school's unrivaled influence and dominance of American legal culture.[2] Its wealth, size, and age, its intellectual and ideological labyrinths, the obdurate official "seals" of its institutional records, and even the mythology promoted by prior accounts make this the least accessible of law schools. Foolish, indeed, the historians who try to scale its walls.

So how will we approach this citadel? We are not partisans. We were not invited by the dean, as was Charles Warren by James Barr Ames in about 1900. Nor have we been authorized or supported by the school, as was Arthur Sutherland by Erwin Griswold in the early 1960s.[3] We have no covert or explicit agenda, as did many of the "attack" histories of Harvard Law School published in the decades after 1970. This is meant to be an impartial history, based on a thorough and, we believe, unprecedented review of the extensive primary and secondary literatures. Of course, in Arthur Schlesinger's words, we are prisoners of our own experience, committed to a "doomed enterprise—the quest for an unattainable objectivity."[4] Even a brief review of

the histories of Joel Parker (1871), Charles Warren (1908), the *Centennial History* (1914) authors, Arthur Sutherland (1967), and Joel Seligman (1978) reveals the authors' context and perspective. This is no less true of us.

But, as a former law school dean who has devoted his life to legal education at different law schools and a historian of education who has studied professions and professional education, we may have a bit more detachment than these authors had. In addition, we have used four exceptional resources not available to prior historians.

First, thanks to a major grant from the Spencer Foundation and smaller subsidiary grants, we have completed an oral history with every living major administrative officer and many key faculty and staff employed at the law school through the early 1990s, and many after that point. While most of these oral histories relate to the twentieth century, covered in the second volume, a number have increased our understanding of the nineteenth-century Harvard Law School. As Edward Coke said, "testimony of contemporaries is the strongest proof."[5]

Second, the Historical & Special Collections of the Law School Library (hereafter cited as Harvard Law School Library Special Collections), the largest law library in the world, is unrivaled, and includes the famous "red set," containing the publications and papers of all faculty and an excellent professional staff. Our major grant from the Spencer Foundation strengthened these collections even more, and now many of the important holdings have been digitized and are word searchable, including every catalog of the Law School, the deans' reports, and the student newspapers. Combined with other powerful search engines and the exceptional Harvard University Archives, we have had access to data beyond the dreams of earlier historians of the school.

Third, we have had the collegiality and expertise of our colleagues on the Harvard Law School History Project. Since its founding in 1997, this independent research team has, at different times, included some thirty scholars, both Ph.D.s and J.D.s. It continues to meet today. Finally, and perhaps most important, has been the contribution of our students and research assistants over the past twenty years. Their extensive research papers are listed in Appendix G. Including the perspectives of students and young alumni is a real change from prior histories, and goes far beyond just research assistance. Our constant exchanges with our students have challenged our preconceptions and opened our minds. Those limitations that remain are certainly not their fault. We owe them more than we can say.

NOTES

"Fair Harvard," the source for the dedication in this volume, was written for the university's bicentennial in 1836 by the Rev. Samuel Gilman, Class of 1811. Joseph Story gave a major address at the celebration. My special thanks to my father, Robert M. Coquillette, Class of 1939, who provided the text. No more loyal alumnus lived than he! D.R.C.

1. William H. Taft, "Oration," in Harvard Law School Association, *Report of the Eighteenth Annual Meeting* (Boston, 1904), 15.

2. According to Nader, this influence is exercised through "the broader infrastructure of the Law School—alumni, law firms, corporations, and other constituencies," although the *High Citadel* itself was targeted at pedagogical reform, "that part of Harvard Law School that would most likely invite searching dialogue among students, faculty, administrators, and lawyers across the country." Ralph Nader, "Introduction," xxiv, in Joel Seligman, *The High Citadel: The Influence of Harvard Law School* (Boston, 1978).

3. Charles Warren to Erwin Griswold (September 12, 1946), on file with the authors; Erwin N. Griswold to Arthur E. Sutherland (June 2, 1958), Arthur E. Sutherland Papers, Harvard Law School Library Special Collections.

4. See Arthur M. Schlesinger Jr., "Folly's Antidote," *New York Times* (January 1, 2007). He continued, "History is the best antidote to delusions of omnipotence and omniscience. . . . History is a doomed enterprise that we happily pursue because of the thrill of the hunt, because exploring the past is such fun, because of the intellectual challenges involved, because a nation needs to know its own history."

5. *Contemporanea exposition est optima et fortissimo in lege.* Edward Coke, *Second Part of the Institute of the Lawes of England* (London, 1642), 11.

Out of the ould fields must spring and grow the New Corne.

SIR EDWARD COKE, *First Institutes* (1600), quoting
Geoffrey Chaucer, *Parlement of Foules* (1381)

No one appreciates more fully than myself the general importance of the study of the law. No one places a higher value upon that science, as the great instrument by which society is held together, and the cause of public justice is maintained and vindicated. Without it, neither liberty, nor property, nor life, is for a moment secure. It is, in short, the great elastic power which pervades and embraces every human relation.

JOSEPH STORY, Bicentennial celebration of Harvard University
(1836)

Warn students that I entertain heretical opinions, which they are not to take as law.

CHRISTOPHER C. LANGDELL, "Lectures on Partnership"
(1870)

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Contents

Introduction

"Radical," from the Latin *radix* (root), is not the term that would routinely come to mind in recounting the history of the first century of a school that is today a cornerstone of the legal establishment. But the extraordinary influence of Harvard Law School had its origins in radical thinking, in ideas that went to the roots of preceding institutions and ideologies, pulled them up, and replaced them with something new. As Christopher C. Langdell, the first dean, wrote in his teaching notebooks, "Warn students that I entertain heretical opinions."[1] Above all, three ideas were transformative.

Three Radical Ideas

Legal education before the founding of the Law School in 1817 took many different forms in Europe and America. These included the Roman law–based studies of canon and civilian law at the medieval European universities and the professional training in English common law that flourished in London at the Inns of Court, those quintessential trade guilds, during the fifteenth, sixteenth, and early seventeenth centuries. In addition, the "Vinerian" tradition of teaching the common law as a liberal art gained widespread influence in the 1760s.[2] America also had its own practice of legal apprenticeship that was much more systematic and effective than previously understood.[3] John Adams, James Madison, John Marshall, Joseph Story, and, of course, Abraham Lincoln were great lawyers—trained by apprenticeship. Different kinds of curricula, pedagogies, and precedents therefore existed.

The small group who gathered in Cambridge in 1815 to act on a modest bequest to Harvard College followed none of these paths, however. What

Massachusetts chief justice Isaac Parker, Harvard president John T. Kirkland, and the Fellows of the Harvard Corporation finally created in 1817 was fundamentally new. It was a professional law school within a degree-granting institution: a school that would provide instruction and grant law degrees to college graduates and to nongraduates "admitted after five years study in the office of some Counsellor."[4]

With narrow exceptions, the English and Continental universities did not teach the professional practice of law, and the Inns of Court were not universities and did not grant degrees. Nor did the American proprietary schools, such as Litchfield, which were really expansions of apprenticeship programs in law offices. A professional school of law within a university was a radical idea. Of course, no full-fledged university emerged in the United States until after the Civil War, although many small antebellum colleges took the name "university." In 1817 Harvard enrolled fewer than 300 total students, with 67 seniors in the B.A. course.[5] But the college had recently founded professional schools in two of the three traditional "liberal professions"—Harvard Medical School in 1782 and Harvard Divinity School in 1816. Consequently, it is justified to say that the American university law school is rooted in the pathbreaking foundation at Harvard in 1817 and in the experiments at other American colleges.

The novel law school struggled, however. Within a decade, it appeared to have failed completely. By 1827 merely one or two students were enrolled. The school was saved by Joseph Story and a second radical idea.

In the early nineteenth century, American legal education was profoundly local, with the significant exception of Litchfield, which closed in 1833. A few wealthy, usually Southern, young men would travel to London to attend the Inns of Court, sponsored by doting parents who were unaware that the inns had deteriorated. But that was the exception. Each state had its own laws and legal culture, so apprenticeship was first and foremost local.

In addition, advancement through Harvard, and through the American bench and bar, depended as much on entitlement as on merit. Quite apart from the complete exclusion of women and blacks, young men were ranked at Harvard by a combination of behavioral conduct, social standing, and academic achievement.[6] An essential tenet of the Federalist ideology was that family counted and that civic leadership was passed from generation to generation. Even in the 1910s and 1920s at Harvard, President Abbott Lawrence Lowell—unlike his successor, James B. Conant—saw virtue in family continuity and elite upbringing, and favored limiting enrollment of immigrants and Jews, segregating blacks who did enroll, and barring women altogether from Harvard.[7]

Nathan Dane, a lawyer, statesman, and Harvard College graduate, watched the Law School's decline in the late 1820s with horror. In Dane's opinion, only one man could save the school. In 1811 Joseph Story had become, at age thirty-two, the youngest U.S. Supreme Court justice in history. In 1817 Story had publicly applauded the founding of the Law School, and in 1825 was elected to Harvard's seven-member governing body, the Corporation. Dane donated funds for a second chair and a building, and Story agreed to accept the professorship while retaining his judicial appointment and leaving day-to-day operation of the school to a resident professor.

Despite his origins in Salem, Massachusetts, Story was not a Federalist, but a Republican. He was repulsed, all his life, by hereditary entitlement, but neither was he egalitarian. Jacksonian Democrats could hardly be entrusted with the young Republic, pandering to the lowest political denomination. The answer was not equality—people were not equal in ability—but equality of opportunity. A meritorious elite, chosen for motivation and natural talent, would be the Ciceros of the young Republic.[8]

That was not all. America could no longer survive as a string of colonies along the ocean, only vaguely in communication with each other and deeply divided in professional and legal culture. The Republic had to be a true nation, and this meant truly national institutions, designed to develop a national leadership. Building upon the first transformative idea, Story therefore envisioned a national law school within a university that attracted and educated a national elite for the bench, the bar, and public service. In 1829 this was a radical idea, and it would take generations to achieve in practice. But it was a very powerful concept and remained at the heart of Harvard Law School.

Forty years later, in 1869, the two ideas of founding a professional law school at a university and attracting and training a national elite were not fully realized. Universities were just beginning to emerge in the United States, and their number would gradually increase over the next five decades, supported by the unprecedented economic expansion resulting from the growth of industrial capitalism. Furthermore, long-standing academic customs and practices were hampering Harvard Law School and other university professional schools throughout the country.

Despite the original aspiration, the admissions requirements at Harvard and other law schools amounted to no more than English literacy, unobjectionable character, and perhaps some exposure to a legal treatise or legal practice, although the latter was easily waived. The curriculum consisted of a cycle of introductory courses that allowed students to enter and leave the school at any point during the year. They could do so because there were no written

examinations and no graduation requirements. Students simply attended classes for a year or eighteen months and then received their degree. Actually, paying tuition sufficed, because no one even took attendance. Nor were students inspired to attend out of interest, because the pedagogy of lectures and recitations was notoriously rote and dull.[9] All this was transformed by the third radical idea.

The transformation began in 1869 with the inauguration of Charles W. Eliot, whose presidency would last for forty years. In order to assist Eliot in developing Harvard into a university, the new office of dean was established in the various schools. Recalling "a man of genius"—an older student at Harvard Law School in the 1850s who had advocated a new vision for legal education—Eliot tracked him down practicing law on Wall Street and convinced him to return as Dane Professor and the Law School's first dean.[10]

Christopher C. Langdell was an inspired appointment. Growing up poor as a virtual orphan in the rural town of New Boston, New Hampshire, he did not fit old Boston's Brahmin caste that predominated at Harvard. But Langdell recognized that Story's idea of preparing a national elite through university professional education had not been realized. He also saw that its enemies were social elitism, lack of accountability, and contravening academic customs and policies. Langdell believed that academic study in a university professional school determines lawyers' expertise and, therefore, their effectiveness and legitimacy and, ultimately, the integrity of the legal system itself.[11] Consequently, Langdell's radical idea was that academic achievement in a university law school determines the merit of the national legal elite bound for the bench, bar, and public service.

Devoted to that radical idea of academic meritocracy and supported staunchly by Eliot, Langdell instituted the elements of a "*new system*" of legal education during the 1870s and 1880s.[12] Admissions standards were raised to require a bachelor's degree. The course of study was lengthened to three years, and coursework was sequenced, permitting the teaching of advanced courses. Written final examinations, rigorous grading, and academic requirements for promotion and for graduation were introduced. No longer could students simply register and reside at the school without attending classes. Langdell also famously invented an inductive method of classroom teaching that required students to read legal cases rather than doctrinal exposition in textbooks, to develop their own understanding of the cases, and to state and defend their views while being questioned intensively by the instructor. It was training in legal research and dialectic, not legal rules.