2017

On the Battlefield of Merit: Harvard Law School, the First Century [book review]

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Walters's use of *Staatsrechtslehre*, Thorburn's appeal to *Rechtsstaat*, Dixon and Stone's urge to look away from the US context and Levinson's conceding disclaimers regarding the American nature of parts of his argument – is valuable and will help strengthen comparative legal scholarship's promise. Otherwise, that scholarship risks falling victim to superficiality and the misreading of conceptual contexts. The book, thus, does more than manage to put the philosophy of constitutional law to the place "at the crossroads of engaged normative inquiry" (p. 6).

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On the Battlefield of Merit: Harvard Law School, the First Century. By DANIEL R. COQUILLETTE and BRUCE A. KIMBALL [Cambridge, MA: Harvard University Press, 2015. xi + 666 pp. Hardback £31.95. ISBN 978-0-67496-766-3.]

Harvard Law School has been the unavoidable presence in American legal education and the American legal profession for well over a century. Today, of the eight sitting Justices of the Supreme Court of the United States, four, including the Chief Justice, are graduates of the school, and one is a former dean. The school's place in popular culture is also significant. It was the setting for *The Paper Chase* (1971), a novel about the life of a law student, which in turn became a successful motion picture and a television series that ran for four seasons in the late-1970s and early 1980s. In 2001, Reese Witherspoon was a Harvard Law School student in the highly successful *Legally Blonde*. The publication of a new history of Harvard Law School is therefore a historically, sociologically and culturally important event. *On the Battlefield of Merit: Harvard Law School, the First Century* is the first of two volumes coming from the work of the Harvard Law School History Project which, for 20 years, has been conducted to document the history of the institution. The results of two decades of work include some new and surprising insights, including a good deal of previously neglected information about women and people of colour. Nevertheless, the reader is likely to close the book with a distinct feeling of anticipation of the next instalment because the ending of this story is an institutional cliffhanger.

The current volume, however, does indeed stand on its own. The authors see in the founding of the school in 1817 three truly radical ideas that inform the story of the next 100 years. First, the professional school within a degree-granting institution was something new. English and Continental universities did not "teach the professional practice of law" and of course the Inns of Court did not grant degrees (p. 2). The second radical idea was Joseph Story's: the creation of a national law school teaching law to young men who would become, in Story's vision, the "Ciceros of the young Republic" (p. 3). Finally, under the first dean of Harvard Law School, Christopher Columbus Langdell, and the university president who hired and supported him, Charles W. Eliot, the school saw itself as the rigorous, demanding trainer of a national legal elite whose salient characteristic was to be high academic achievement. Langdell and Eliot were able to realise the second part of their vision as well: a law school where tuition revenues enabled the hiring of full-time, salaried faculty members. This financial model, which apparently has roots in the Harvard Law School of Joseph Story, was directly opposed to the fee-based compensation of not only law schools, but of other professional schools associated with universities, including the Harvard Medical School (pp. 4–5).

Some of the new information supporting this view of the story of Harvard Law School includes the extensive advertising campaign undertaken at the very beginning under the first two faculty members, Massachusetts Chief Justice Isaac Parker, the first holder of the Royall chair in law (itself a subject of controversy – the Royall family's wealth came from a sugar plantation in Antigua worked by slaves), and Asahel Stearns, an accomplished practitioner. The extensive advertising campaign for the new school was aimed at a national audience and involved much more than paid advertisements: "Newspaper and magazine articles appeared, not just in New England, but all over the Eastern seaboard" (p. 96). All of these "news" stories emphasised the advantages of systematic instruction over the haphazard instruction of the typical apprenticeship and also at least implied that the classroom instruction offered in the new school would go far to make a subsequent apprenticeship much more useful.

This nineteenth-century social media campaign, which continued under Joseph Story in the 1820s and 1830s and, one must assume, later as well, is probably one reason why the school attracted a number of students from the slave states. According to the authors, Harvard Law School and West Point "were the only degree-granting professional schools that drew students from across the nation" in the antebellum period (p. 212). It seems that the school was fulfilling its role as the incubator of a national legal elite as Story and his colleagues and collaborators envisioned. By 1857, however, the number of students from the south decreased by a third (from 30% in 1853 and 1854 to 20%) (p. 259). The authors tell the story of the school during the decade and a half before the Civil War in great detail in part because the "bitter controversies" of the time have been "largely ignored" by previous histories, but also because one inescapable result of the Civil War itself, the death in combat of 111 of the school's students, has been likewise "overlooked" (pp. 286–87).

There is much more to the pre-Civil War history of the school that has never before been told in such detail. The story includes a rehabilitation of Asahel Stearns, who handled the day-to-day operations of the school immediately after its founding, while Isaac Parker, Chief Justice of Massachusetts and the first Royall Professor, gave more general lectures. While most histories have blamed Stearns and to some degree Parker for the almost complete failure of the school in 1827–29, the authors make a convincing case that, whatever the faculty's failings, the more significant cause was Harvard's financial crisis, brought about by the withdrawal of state support by a legislature controlled by Jeffersonian Republican enemies of the Federalist elite that dominated Harvard (pp. 111–12). The conclusion is that Harvard failed Stearns and not the other way around. When Nathan Dane offered to provide the financial support needed to save the school provided that Joseph Story became its head, Harvard had no difficulty "sacrificing" Stearns (p. 114).

The rehabilitation of Asahel Stearns is but one example of how the authors have greatly increased our knowledge of the school before Langdell, but the year of his appointment, 1870, is still the great dividing line in the school's history. Coquillette and Kimball identify five areas in which Langdell introduced reforms: for faculty, the producing of high-quality scholarship based on original research became the required norm; in the classroom, he introduced changes in how law was taught that endure to the present day; he based faculty appointments on academic accomplishment; he based academic administration on "meritocratic structure and policies"; and he transformed the prevailing norms of finance and student recruitment (p. 311).

The "case method" of study which Langdell brought to the classroom has been closely examined and critiqued almost since its creation, but the authors bring a new thoroughness to the discussion by paying careful attention to the teaching notes and annotated teaching materials of Langdell and his colleagues and to student notebooks. Two small but interesting details involve Langdell himself. Student notes show that he began his course in civil procedure in fall 1876 with a "succinct opening lecture outlining the premises and basic steps of civil procedure" – a clear contradiction of the stereotypical linking of Socratic dialogue and case method that this book and other studies should definitively put to rest (p. 443). Also in civil procedure, Langdell taught students about pleading by handing out a statement of facts to four students who then, in teams of two, took opposite sides of the case and pleaded against each other until they came to a triable issue (p. 445). Modern advocates of experiential learning should be proud.

The overarching theme that joins all five of the areas in which Langdell and Eliot brought fundamental change is the dean's emphasis on rigorous academic study of law in a university professional school as the foundation for a just legal system (p. 384). Academic merit is therefore at the heart of Langdell's views of hiring professors, setting the curriculum and admitting, examining and grading students. It has been evident for a long time that the first element of this meritocratic structure took many years to implement. After the appointment of James Barr Ames as assistant professor in 1873, only one year after his earning the LL.B. – a year spent in postgraduate study at the school – the next four appointments to the faculty were of lawyers whose extensive experience in practice was at least as important a qualification as their academic accomplishments, although the details of the those appointments have never been so thoroughly set out as they are here (pp. 389–402). What has not been so well understood is how long it took to manifest the meritocratic ideal in the student body.

The prejudices and biases of the age played a role. Unlike other American law schools, Harvard found no place for women in this period – a result the authors link in great part to the general cultural fear of feminisation of men, and a fear that Langdell felt particularly strongly (pp. 496–99). Anti-Catholicism played a part in keeping Catholic colleges and universities off the list of "approved" institutions whose degrees were accepted by the law school as valid admission credentials (pp. 499–508). A prosopographical study of the small number of students of colour who attended before 1910 shows that all attained high levels of academic achievement, although apparently there was room for only one distinguished student of colour at a time. In 1890, a university-wide faculty committee chose two black students, W.E.B. DuBois and Clement Morgan, both graduating from the College that year (Morgan would go on to earn the LL.B. from the law school), to be among the six student commencement speakers. Law professor James Bradley Thayer resigned from the committee in disgust when it was decided to drop Morgan because, as Thayer put it, "someone else was black" (pp. 537–38).

Theses lapses in the meritocratic ideal (or perhaps hypocrisies) are painfully unsurprising. But what is surprising is the degree to which the student body as a whole failed to embody the very ideal at the core of Langdell's vision. Throughout the 1890s and the first decade of the new century, the school's student body included many who left voluntarily or otherwise before completing the degree and many whose approach to law study was at best casual, although, for a variety of reasons, failure to complete the course of study does not seem to have greatly diminished employment opportunities (pp. 586–88). Ironically, many of these less than committed students were the very Harvard College graduates whose presence the deans of the school, starting with Langdell, used in the annual reports "to measure

the academic quality of the student body" (p. 578). The authors believe that the presence of "weak students" helped to alleviate "anxiety, resentment, and depression over academic performance" among the student body as a whole (p. 580). The importance of these "academic buffers" is demonstrated by an analysis of competition for a spot on the *Harvard Law Review*, then, as now, a distinction conferring both status as well as material rewards, among the 233 students who entered in 1902. Fifty-two did not graduate. Thirty-six were Harvard College seniors combining the last year of undergraduate and the first year of legal studies: these were notoriously indifferent law students and unlikely to be serious candidates for a place on the *Review*. That left 145 students to fill the 18 places on the journal. But, from those 145 students, the authors then subtract their estimate of the number of uncommitted students as well as those students happy not to earn the best grades. Hence, the authors conclude that "about a quarter to a third of those actually trying to make the *Review* achieved the honor in the early twentieth century" (p. 591).

When this view of the academic environment is seen alongside the school's serious financial difficulties (its large surplus having been consumed in the construction of a new building named after Langdell), the appetite is sharply whetted for the second volume of this history. How did the school recover and reach that pinnacle of prestige and influence alluded to the beginning of this review? Told with the same careful detail and meticulous attention to sources found in the current volume, the second half of the story will be fascinating indeed.

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Privacy, Due Process and the Computational Turn: The Philosophy of Law Meets the Philosophy of Technology. By Mireille Hildebrandt and Katja De Vries (eds.) [Oxford and New York: Routledge, 2013. xiv + 256 pp. Paperback £89. ISBN 978-0-41564-481-5.]

In the rapidly developing world of technology, it is unusual to find a book that has a shelf life longer than just a few years, but this anthology has not lost any of its relevance since its first publication in 2013. Its prescience may be due to the depth of knowledge of its contributors, several of whom are leading scholars, such as Mireille Hildebrandt, Helen Nissenbaum and Bert-Jaap Koops. In this slim volume, they cover a vast territory, delving into pressing ethical dilemmas along the way. The volume offers not a detailed investigation into technical rules, but sweeping explorations of possible legal solutions and shortcomings of data protection, privacy and due process that may govern our oncoming smart environments. In so doing, they never lose sight of their original question, set out at the beginning of the preface: "How do we co-exist with the 'perceptions' of machines that anticipate, profile, cluster or classify?" At its core, this is a book about the tension between the human being and a computational turn that brings us ever closer to a world of artificial intelligence.

One strength of the anthology is that none of its contributors falls for the temptation to rehash familiar arguments for or against the regulation of new technology. Instead, they delve into the quagmire of often difficult ethical matters, such as Martijn van Otterlo's discussion of the implications of algorithmic data profiling or Antoinette Rouveroy's thoughts on the limitation of critical thinking following a "computational turn" by which individuals no longer will be addressed "through