American Legal Education: Where Did We Come From? Where Are We Going?

by Daniel R. Coquillette

Editor's Note: *This is the keynote address made by Professor Daniel R. Coquillette on the morning of April 19, 2013, at the NCBE Annual Bar Admissions Conference held in Boston, Massachusetts. Professor Coquillette arrived at the Boston Marriott Copley Place conference site at 7:00 that morning only after navigating two police checkpoints and traveling through deserted streets, in the face of a citywide lockdown, as police searched for the second suspect in the Boston Marathon bombings. He began his speech by acknowledging the audience's support in the wake of the bombings.*

Welcome! And *thank you* for coming to Boston. Your support means a lot to us these days. Today is the real Patriots' Day, April 19th, the anniversary of the battles at Lexington and Concord. I was going to start by making a few cute jokes about Patriots' Day, like how it is the day all New Englanders give thanks for Tom Brady and Bill Belichick, but Patriots' Day has this week taken on a new, and grim, significance for us Bostonians, as it has for the people of Waco, Texas, and Oklahoma City.

But, trust me, nothing that has happened will defeat this great city. One of my students passed the finish line two minutes before the bombs, and another has been severely injured. But I promise you this: next year at this time will be an even bigger Marathon, with more runners, and with more Bostonians on the sidewalk cheering! And nothing that has happened will diminish the symbolism of *your* being here, at the birthplace of American freedom, on this historic day. I will return to Patriots' Day, and its deep relevance to *why* you are here—your mission as guardians of the law—at my conclusion.

My topic is to address the historic roots of American legal education, many of which are also here in Boston, particularly in what we call the People's Republic of Cambridge, and to reflect on where we are headed now. Most of you have probably heard of the current "crisis" in American legal education. I recently made the mistake of ordering Brian Tamanaha's blockbuster book, *Failing Law Schools,* from Amazon.com. This means that I have now been bombarded by other suggested books predicting the imminent death of American law schools and the legal profession. I share with you some titles (my additions in parentheses!):

Don't Go to Law School (Unless Your Father Is Chief Justice)

Growth Is Dead, Now What?

The Vanishing American Lawyer

Declining Prospects (for Everybody)

Tomorrow's Lawyers (Will There Be Any?)

The Lawyer Bubble (and Will It Burst?), etc.

There is not a ray of hope!

Now it is true that law school applications are down, from a peak of over 100,000 a few years ago to just over 60,000 now. The result is that law schools have drastically reduced enrollment, down 17% in nearly three years, from over 50,000 to about 37,500. (That figure, incidentally, is the lowest since 1971, and has dropped despite a very large unmet need for legal services among the American middle class and poor.) Responsible law schools are cutting costs.

All this reminds me of a sweet little old lady who ran an antique store in Georgetown. One day I was in there looking at china for my wife, and this lovely lady asked me what I did. "Well," I replied, "I teach new lawyers and then release them onto the unsuspecting public." "Oh," she said, "then you can help me answer a question!" "Sure," I replied. She asked me, "If a divorce lawyer, a products liability lawyer, and a corporate lawyer all jump at the same time from a 20-story building, who hits the ground first?" "I don't know!" I replied. She looked at me with her sweet eyes and said, "Who cares?"

So "who cares" that law school applications are down, and that law schools are cutting costs and cutting enrollments, possibly moving to entirely new models, including two-year curriculums and integrated apprenticeships? This could even be good! And if some law schools go to the wall, and some faculty have to get real jobs, so much the better.

So let me address this question by looking to where we've come from. There have been essentially three great ideas that have made American legal education what it is today—literally the envy of most of the world—and guess what, all three arose less than a mile from this room.

"Oh please," you're thinking! First Tom Brady, then the "Birthplace of American Liberty," and now the "Birthplace of American Legal Education." Does this Bostonian have no shame at all? Well, we Bostonians do admit there are some other law schools in the country, including a pesky little one down in New Haven, Connecticut, of all places, where they go around bragging they are "Number One" because of some stupid magazine. (Talk about pathetic!) But it is actually true that these three great ideas originated here.

> . . . [S]URVIVE HARVARD DID, AND FROM ITS SURVIVAL, ONE MILE FROM HERE, ORIGINATED THE THREE ESSENTIAL IDEAS THAT DRIVE AMERICAN LEGAL EDUCATION. IT IS IMPORTANT WE UNDERSTAND THESE IDEAS BECAUSE, AS GREAT AS THEY HAVE BEEN, EACH CONTAINS WITHIN ITSELF THE SEEDS OF THE TROUBLES WE FACE TODAY . . . .

When Harvard Law School opened in 1817, in two rooms of a crummy frame building known—and I am not kidding—as Wiswall's Den, it was the first truly professional law school in America to be founded within a university and to survive. It had all of 11 students. Now for you Virginians here, William & Mary might have been able to contest this honor but for the thoughtfulness of some Union troops, doubtless from Boston, who had the foresight to trash the William & Mary Law School during the Peninsula Campaign and shut it down until 1920. (The janitor still rang the bell every day, but that doesn't count.) Even Harvard Law School, in its early years, just barely survived, sinking to just one student and one really bad teacher, Asahel Stearns, in 1829, the best student/faculty ratio of its history!

But survive Harvard did, and from its survival, one mile from here, originated the three essential ideas that drive American legal education. It is

important we understand these ideas because, as great as they have been, each contains within itself the seeds of the troubles we face today, and, as Mark Twain observed, "History does not repeat itself, but it does rhyme a lot!"

So here are the three big ideas. The first is that legal education should ideally be embedded in a true university. Now we have had some great freestanding law schools, such as the Litchfield Law School, which predated Harvard and William & Mary but became extinct in 1833, but every top-ranked American law school today, including Harvard and Boston College, is embedded in a great university. At Harvard, this came about largely by accident—the bequest of a large sum of money to found a law professorship by a loyalist slaveholder who escaped to England during the Revolution—but once this idea took root, it became a feature of American professional legal education, unique even compared to Europe.

But with this idea came the rest of the ideals of a university, including research agendas and tenure-track faculty. Tenured faculty are called "antiquated" in the new *Failing Law Schools* literature (look, I may be old and bald, but I am not antiquated!). The point, however, is that if law schools are going to be part of universities, they are going to be influenced by university priorities and agendas—which are only partly about teaching and training professionals and are also about pure research and research faculty. Most universities resist having their law schools subject to different rules from their other academic departments, including rules about tenure and publication. Is this good or bad for legal education?

The answer is both. In this century, many universities have assisted law schools in developing the kinds of endowed chairs and research institutes that take some of the burden of research off of student tuition, and almost all university law schools would like to increase their endowed chairs. Of course, some law schools do fund faculty research largely on student tuition, and the direct return to students is arguable. Only a few universities now use their law schools as "cash cows" (the decline in applications will almost certainly put an end to that!).

The most important commodity in any university, however, is faculty time, and to the extent research and publication are valued as much as teaching, students will benefit only indirectly. But my point is that the university priorities and structure existed before legal education and extend to all university departments. It was a great idea to embed American legal education in universities, but its costs are now apparent.

I mentioned that Harvard Law School was down to one student in 1829. The reason is that it could not compete with the prevalent way of learning to be a lawyer: apprenticeship. Recent scholarship, including some of my own, has now shown that the idea that traditional American legal apprenticeship was "catch as catch can" is fake and was probably invented by law professors to give apprenticeship a bad name. The likes of John Adams, Josiah Quincy, Robert Treat Paine, Chief Justice John Marshall, James Otis, Simon Greenleaf, Joseph Story, and Abraham Lincoln were skillful lawyers and proud professionals. They also did not go to law school. They learned by apprenticeship.

The savior of the infant Harvard Law School, and of American university legal education, was Joseph Story, who became a justice of the Supreme Court of the United States at age 32. If there is anybody here younger than 32, you still have a chance, but for now Story holds the record as the youngest justice. Story was brought in to save the school by a

big donor, Nathan Dane, with the secret cooperation of Harvard's president, Josiah Quincy. First they fired Asahel Stearns, who thought he was tenured. Dane endowed a second chair and built Dane Hall, the first real home for the school.

It was Story who had the second great idea in American legal education, and it became his weapon against the competition of apprenticeship. It was just this: law schools do not just exist to train practicing lawyers. They also exist to train the leaders of the Republic—the diplomats, politicians, statesmen, judges, industrialists, and scholars who would be an elite cadre. Story rejected the values of the Federalists, who saw merit in the inherited tradition of great families—imagine a man who, like John Quincy Adams, became president because his father was president!—and he also rejected the egalitarianism of the Jacksonian Democrats, who would have abolished bar exams and put some of the people in this room out of office! Story wanted to train a national elite, chosen on merit only, but an elite nevertheless.

PURE EXPERIMENTAL APPRENTICESHIP COULD NOT MEET STORY'S VISION OF THE PROFESSION AS MORE THAN A TRADE. FUTURE LEADERS NEEDED TO KNOW LEGAL HISTORY, COMPARATIVE LAW, INTERNATIONAL LAW, AND LEGAL PHILOSOPHY, AS WELL AS HOW TO FIND THE COURTHOUSE. THIS VISION HAS INSPIRED ALMOST EVERY LAW SCHOOL IN AMERICA.

The idea was fabulously successful. Students flocked from all over the new nation, and enrollment went from one student when Story arrived to over a hundred when he died. Right now, Story is in a tomb you can visit in the Mount Auburn Cemetery, but to have a presidential election between two graduates of his school, and to have the winner be sworn in by a third, would be the vindication of his dream. (And, I must loyally add, our Secretary of State came from Boston College Law School!)

Pure experimental apprenticeship could not meet Story's vision of the profession as more than a trade. Future leaders needed to know legal history, comparative law, international law, and legal philosophy, as well as how to find the courthouse. This vision has inspired almost every law school in America. You will not find many deans who will say their goal is to train plumbers, not architects. But again, like university education, this agenda contains its own problems. It is visionary, and as such it is inefficient in teaching "nuts and bolts law," and it can seem irrelevant to what new lawyers do, particularly if they can't get jobs. The *Failing Law Schools* crowd thinks that only the top tier of American law schools should have Story's vision, and that the others should give it up.

Now among the most common suggestions today to improve American legal education are to permit taking the bar examination after two years, to permit students to start law school before obtaining their B.A. (thus also potentially saving a year of tuition), and to require a year of apprenticeship upon graduation. This may come as a shock to you, but for most of its first century Harvard Law School was a two-year school linked, in the case of almost every student, to at least one year of apprenticeship. And no undergraduate degree was required for admission—hence the degree of Bachelor of Law (LL. B.)! And Story's tuition would really please Tamanaha: $100 a year, the equivalent of about $2,690 a year today.

This school, once on its feet, not only survived but became the national standard in the new

Republic and well into the Civil War. Incidentally, at this time of the Civil War Sesquicentennial, it is not widely known that Harvard Law School was second only to West Point in producing leaders of the Confederacy. There were 350 students from the Deep South at the school in the 1850s, and 286 fought for the Confederacy—11 as generals, 16 as colonels, and 27 in the government of Jefferson Davis. Forty-eight died, as opposed to 52 for the Union. As director of the Harvard Law School History Project, I suggested that we put up the portraits of our 11 Confederate generals in the library, maybe in time for Newly Admitted Student Day, and was told to go back to my office.

Now comes the third, and last, great idea. The Civil War—which devastated all of America's law schools—left Story's national vision in tatters. A returning veteran, wounded three times, named Oliver Wendell Holmes, Jr., wrote in a journal that Harvard Law School would be "close to worthless," except "no school is completely worthless." Into this gap came a poor boy from New Hampshire, Christopher Columbus Langdell. His great idea was that law was a science, capable of being taught to large classes using cases as the empirical data, as we study chemistry, and that teaching law students to think in a formal, disciplined way could be achieved in classes of 135 through Socratic interrogation and competitive exams. He established everything my students hate about law school: (1) required examinations, (2) rank in class, (3) grade-on law reviews, (4) Socratic teaching, and (5) impenetrable case books. He also adopted a required B.A. for admission and a required minimum three-year curriculum. There was no "experiential" curriculum whatsoever.

Of course, it is Langdell's vision of legal education that is particularly under attack today. But we cannot blame Langdell for cost. His large Socratic classes and formal curriculum permitted a faculty/student ratio of 9 professors for 850 students, a nearly 1 to 100 ratio, and tuition was very low, even adjusted to today's dollars. Indeed, I may look ancient, but it wasn't the Jurassic Period when I went to law school, supported, like many of my classmates, by my spouse, who worked as a secretary. In 1970, I paid all of $2,100 in tuition, or $12,400 in today's dollars, not $52,350. There were just 40 faculty for 1,600 students.

So what is my point? The three great ideas of American legal education, all invented within a mile of here, continue to dominate our thinking. And why not? As a distinguished visiting Chinese law professor auditing my class observed, "Everybody says American legal education is in trouble, but it is the envy of the world! We are copying it now in China, and so are law schools in Japan and South Korea! Are we wrong?" The ideas of having legal education embedded in great universities; of envisioning law schools as more than trade schools, but the source of the leaders of our nation—and, I would add, the world; and of defining legal education as a demanding analytical science that teaches men and women how to think: these are great ideas, and to abandon them in a moment of panic about declining applications is absolute folly. We must address the dilemmas inherent in each of these ideas—and, historically, the accelerating cost of legal education today is not an essential part of any of the three—but these three great ideas are invaluable parts of the heritage of the rule of law in America.

Now, back to the 19th of April. As a boy, I grew up in Lexington, where the first battle was fought. The battle was fought exactly two hours ago, at about 6:30 a.m., on this day. I was a Boy Scout, and one of

my Boy Scout activities was to act as a guide to those visiting the battlefield. But some days, no one came, and I stood there alone, with my brochures, in the morning mist. There was Buckman Tavern, where the men met, still looking out on the scene, and the Old Belfry, which rang the alarm, still standing on a lonely mound.

On those mornings, I could almost see the little ragged line of farmers, maybe as few as 38 of them, with their crude flintlocks. Their leader, Captain John Parker, an invalid dying of tuberculosis, was standing out in front. (His voice was so weak, the men could hardly hear his commands.) And I could hear the throb of drums from over the Arlington hills as the British regulars pulled into sight, 700 strong, crack light infantry backed with the legendary grenadier guards, their officers on great chargers, immaculate scarlet uniforms, rank upon rank of the Empire's finest. Major John Pitcairn, the British commander, ordered them to fix bayonets. He then rode up to Parker and yelled at the ragged group, "Disperse, you damn'd Rebels. Throw down your guns!" The American militia looked to Parker for orders. In an almost inaudible voice he issued one of the great commands of American history. "Stand your ground. Don't fire unless fired upon, but if they mean to have a war, let it begin here."

Someone fired. And then a broadside from the British regiments. Down went 18 men: 7 were instantly dead. The rest fled for shelter. Jonathan Harrington, whose house still stands looking over the battlefield, had left his wife with his gun, minutes before. Now he crawled, covered with blood, to his own doorstep, and when she opened the door, he died at her feet, the eighth fatality. Standing alone in the mist, I slowly realized that the grass beneath my feet had been soaked in blood, the blood of Patriots.

And why did they not just disperse? What held them there, facing death? We historians know! Their detailed deposition letters, diaries, and accounts of the battle survive and tell the story.[1] They stood there because they believed in the rights of Englishmen, the right to property, the right to freedom from intimidation, the right to have democratically elected leaders who alone could tax or imprison them. One of the Minutemen, Prince Estabrook, was a slave, and he was severely wounded, fighting for the rights that would be, for him and his race, only a distant dream.

These are *legal* rights. As President Gerald Ford said on the battlefield at the 200th anniversary, "These are sacred rights." All Americans must protect them, but we lawyers have a special duty. We are, in Joseph Story's words, "the Sentinels of the Republic."[2] We, the legal profession, are the special guardians of these sacred, inalienable public rights, and you are the guardians of the profession.

It may seem like a big jump from that ragged line on Lexington green to the future of legal education and our profession, but, in fact, the two are deeply, inextricably bound together. As Longfellow wrote, "… [t]hrough the gloom and the light, / The fate of a nation was riding that night;…." The fate of our nation still hangs on the rule of law. And it was for exactly that, the rights that make us free, that our forefathers laid down their lives that bright spring April morning, right here, exactly 238 years ago.

Thank you.

NOTES

1. See the classic accounts: DAVID HACKETT FISCHER, PAUL REVERE'S RIDE (Oxford University Press 1994); ALLEN FRENCH, THE DAY OF CONCORD AND LEXINGTON (Little, Brown, and Company 1925); ROBERT A. GROSS, THE MINUTEMEN AND THEIR WORLD (Farrar, Straus and Giroux 1976); and Mary B. Fuhrer,

The Revolutionary Worlds of Lexington and Concord Compared, 85 NEW ENGLAND Q. 18 (2012).

2. See Story's inaugural speech as Dane Professor of Law at Harvard in 1829. JOSEPH STORY, MISCELLANEOUS WRITINGS 503–548 (William W. Story ed., C.C. Little and J. Brown 1852).

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