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SMALL SCHOOL.  
BIG VALUE.

# Elena Kagan and the Miracle at Harvard

Kevin K. Washburn

For most of the past fifty years, attending Harvard Law School was a miserable experience for the majority of its students. The tremendous jubilation on acceptance quickly soured after students arrived on campus. While some students took the Harvard experience in stride, recognizing it as the price of admission to the school they had first learned about in *The Paper Chase* or *One L*, many became unhappy during the first year and stayed that way through the rest of their law school careers. To be sure, students appreciated the tremendous opportunities that a Harvard law degree provided, but many were alienated not only from the institution, but even their own classmates, during their time at the law school. This alienation often continued long after law school. To meet a recent Harvard Law grad was sometimes to meet an embittered person who vowed never to give a dime to the institution.

Many of us in legal academia had come to believe that misery at Harvard was inevitable. It seemed to be the natural outcome of admitting 550 very bright students each year and forcing them into a mortal competition for grades and the attention of aloof professors, then for a very limited number of positions on law review, and ultimately for elite clerkships or prestigious law firm jobs thereafter.

During the past ten years, Harvard Law School has been transformed. Current students embrace the institution enthusiastically, appreciating not only the Harvard degree, but the process of earning it. Elena Kagan deserves much of the credit. Kagan led Harvard Law School through this transformation, which is identified here as the “Miracle at Harvard.” Though that attention-getting description may seem inapt in light of the lack of divine intervention, it won’t seem exaggerated to anyone familiar with Harvard’s notoriously toxic culture in the last century.

When I talk about the transformation of Harvard to colleagues around the country, and especially to Harvard Law alums, I have often been met with incredulity. When I have mentioned it to law school deans, I am met with great curiosity as to how the transformation occurred.

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It was careful leadership, hard work, and shrewdly deployed resources that accomplished the “miracle.” This essay is an attempt to offer some proof of the changes for disbelievers, and observations on Kagan’s methods for academic leaders who may want to “try this at home.”<sup>1</sup> Since Kagan has now become a Supreme Court justice, it is my hope that this essay is read as widely as possible. It is my belief that Kagan’s commitment to community should be emulated at other institutions.

### The “Miracle”

Let me first explain what the miracle was not. Contrary to popular media accounts,<sup>2</sup> it was not achieved primarily through the hiring of conservative law professors. This was evidence of the power of Kagan’s leadership and a healthier faculty culture, but this alone was not transformative. Moreover, while Kagan’s thirty or more faculty hires were strong, her overall strategy was imperfect, earning deserved criticism for its lack of diversity. Diversity is an exceedingly important value in legal education and it is difficult to create a truly excellent faculty that is not reflective of diversity. Nevertheless, hers is otherwise a strong hiring record. Kagan accomplished it by earning the trust of her faculty colleagues. She actively listened to their hopes and concerns and helped them to see beyond parochial and ideological interests. But while the hiring was an important success, it is not the miracle that gives this essay its name.

Nor was the miracle accomplished by the recent curricular reforms at Harvard.<sup>3</sup> The law school recently departed from the curriculum first designed by Christopher Columbus Langdell. Harvard’s reforms are focused primarily on the first year. They include modest electives in the first year, a moderate de-emphasis on century-old core common law subjects to create room for electives, and inclusion of two new courses, one on international law and another on administrative, legislative, and regulatory law. Harvard was not the first school to institute such changes and the recent innovations are evolutionary, more than revolutionary. Though important, they could hardly be described

1. The author was a visitor during one year of Kagan’s deanship. As a year-long visiting professor, I had time to observe the institution closely, but with the objectivity of an outsider and with the skepticism of one who has met many unhappy alumni. Much of Kagan’s leadership would have been invisible to a temporary faculty member. Thus, the observations offered here are not particularly insightful; they are the obvious insights that could have been observed by anyone.
2. Laura Meckler, Kagan’s Harvard Stint Could Be Selling Point, *Wall St. J.*, Apr. 27, 2010, available at <http://online.wsj.com/article/SB10001424052748704464704575208562540464720.html>.
3. Harvard’s curricular changes have received much more attention than those at other schools, perhaps in light of its role in establishing the Langdellian model and its continuing place at the pinnacle of American legal education. However, many other schools made similar changes before Harvard did.

as “transformative.” The curricular changes, like the breakthrough in the faculty hiring gridlock, may also be evidence, though, of a healthier and more productive environment among the faculty.

Now let me explain what I believe the miracle is. The Harvard Law School is now a happy and engaged community focused on student learning. This is a fundamental transformation of Harvard culture. Several generations of students would not recognize the institution, except superficially, as the one they attended. The miracle is nothing less than the elevation of the core values of the school. The school is now a virtuous leader in legal education and a healthy and constructive academic community

### **How Did She Do It?**

Imagine the challenge: The inertia that Kagan faced was enormous. Harvard is, by far, the largest of the elite law schools in the country, and it has always been the wealthiest. It has a stable of outstanding, nationally-known tenured professors who by virtue of having reached Harvard might fairly be considered among the best and the brightest in the country. One doubts that such success by individual faculty brings much in the way of introspection. Despite living in a dysfunctional environment, life was nevertheless good for the Harvard law professor who did not feel the pain felt by Harvard’s students. It would not be easy to cause an individual professor to change his or her behavior. Moreover, the professors likely did not see the problem as soluble. It was structural. The culture seemed to be a natural by-product of placing numerous bright students in an ultracompetitive environment and forcing them to compete.

As will be shown below, Kagan attacked the problem in a structural manner, reconfiguring incentives, and encouraged development of a community. To be sure, Kagan’s challenge would have been much more difficult to achieve without the law school’s (then) \$1.5 billion endowment. The fact that Kagan had immense resources to bring to bear should not be used to diminish the accomplishment, for Harvard has always been the largest and wealthiest elite law school in the country. I will argue here that she deployed those tremendous resources in a way that had never been done before at Harvard, and in an extremely shrewd and admirable fashion, to refocus the values of the school.

It should not be surprising to anyone that one of Kagan’s key faculty allies in making many of the transformative changes discussed herein, Martha Minow, is now the dean of the school. These changes have reflected Minow’s own pedagogical vision and she was reportedly the chief architect of many of the important changes in student culture.

When I arrived at Harvard, I had come from a fairly dysfunctional law school leadership environment, and I was keen to see how Kagan had managed the political minefield that was necessary to transform the school. At the recommendation of a friend, I vowed to pay careful attention to what the key changes at Harvard had been.

I discovered no silver bullet or any single profound transformative act, but literally dozens of changes, small and large, physical and philosophical. As I began to take note of all of the changes, I soon had a list of many observations about initiatives that had changed and improved the institution and the sense of community there. What each of the initiatives had in common was that all were focused on a specific virtuous theme, namely, that the needs of students in achieving a healthy academic community were paramount and thus should be at the forefront of the Harvard approach. What follows is a loosely organized laundry list of key initiatives.

### **Transforming the First-Year Sections**

To be sure, the most significant changes revolved around the first-year sections. The single biggest ticket item and probably the single most-productive change was the reduction of the size of first-year sections from 140 students to 80 students each. I understand that this change occurred just before Kagan became dean.

Before this development, first-year students attended almost all of their core courses in sections of 140 students. Such sections were larger than the entire first-year classes in some American law schools. To the objective observer, this approach was financially efficient. The school could teach an entire first-year class of 560 students using only four professors for each core subject. Efficiency was costly, however, and very likely contributed to the sense of alienation of each student. Many professors simply cannot learn the names of 140 students in a semester, much less provide personal attention to each individual.

The financial cost of the reduction to 80 students per section was substantial. It required a total of seven sections, and therefore a net increase of three professors for each of the core first-year subjects. Harvard filled this gap by turning to visiting professors. It was a controversial decision. The conventional wisdom in legal academia is that only resident faculty should teach first-year students. Harvard's gamble paid off. In my experience, most students do not know which professors, aside from a handful of the most famous, are residents and which are visitors. In hindsight, the conventional wisdom reflects more the arrogance of law professors than the needs or desire of students. The Harvard students seemed content in the first year to have a smaller class with a visiting professor than a huge class with a Harvard professor.<sup>4</sup>

The use of visitors to supplement the first-year curriculum seems to work well. Students benefit because visiting professors are especially motivated to perform at their best. Many visitors hope for a permanent offer, and the Harvard faculty is known to value strong teaching and to take a certain pride in the quality of the performance in the classroom. Second, most visitors

4. In my experience, there was, if anything, only a very weak preference for resident professors in the upper level classes as well. More than sixty students enrolled in one of my upper division classes and approximately twenty-five in the other, suggesting that the subject matter of the courses was more important to students than whether the professor was a permanent member of the Harvard faculty.

necessarily come from schools where the objective indicia of student quality and the level of geographic diversity are not as high, so they tend to enjoy working with the Harvard students. Finally, it is somewhat easier for the visiting professor to be more engaged with students because the visitor is not distracted by the social commitments and committee assignments that they would have at their home institutions. Most are there to engage themselves deeply in the Harvard experience, and the students are among the members of the community willing to engage them back.

The annual importation of a wide number of visiting professors also benefits the Harvard faculty. Each semester, waves of top professors from throughout the country descend on the law school. Many of the visitors are invited to give workshops during their time at Harvard. Moreover, Harvard facilitates interaction between all professors by providing a no-charge buffet lunch in the faculty lounge most weekdays. The faculty lounge has two large round eight-person tables and several four- and two-person tables. Professors can meet there and take a private table, or go alone and join others at one of the large round community tables, where one might hear Alan Dershowitz holding forth on presidential candidates, or (during my visit) Sandy Levinson on the Constitution. By merely staying home, Harvard professors can meet some of the brightest young talent and even some of the most established senior professors from throughout the country (Catherine McKinnon was another visitor during my stay). In sum, the use of visiting faculty thus serves several faculty constituencies.

The care and feeding of the first-year sections is further served by the appointment of a specific professor, usually a tenured member of the faculty, as a “section leader.” The role of the section leader, who is also a core subject professor, is to think about the larger needs of the students in the section, to plan special events, to coordinate with other section professors, and to be a “go to” person for the students and the professors teaching in the section. From a decanal perspective, the development of section leaders may be one of the most ingenious improvements, because it gives the students a senior person who serves in a role like the one the dean herself might serve at a school with fewer students (and fewer demands on the dean).

Since the section leaders tend to be outstanding teachers and scholars in their own right, this dean-surrogate approach seems to work. It also gives an experienced senior faculty member a much more robust sense of investment in the section, producing a sense of ownership and responsibility. My section leader, Todd Rakoff, helped coordinate several special events for our section during the fall semester, including visits to the section by journalist Jeffrey Toobin, touring on his then-new book, *The Nine*, and Justice Antonin Scalia, both of whom gave brief remarks and then stayed more than an hour taking questions from students in the section. The section leader and the administration generally also encourage each of the section’s professors to take his or her students to lunch in groups of two to seven during the course of the semester. The idea is to give the students a chance to get to know the

professor on a personal basis, and the administration seemed to be willing to reimburse professors for as much interaction as he or she was willing to have with students.

The overall effect of these developments in the first-year sections was to create a real sense of community within each section, and strong institutional structure for the students.

### **The First-Year Orientation Program**

The first moments of a student's law school tenure is a key time in setting the culture of the law school. The most visible evidence of Kagan's leadership occurred during law school orientation.

A week of orientation activities occurs at the beginning of the semester, capped by a separate reception and formal banquet for each section. During the banquet I attended, which was emceed by Kagan, one of the professors gave short remarks designed to tell students a little about the law school experience, reflected in this case by the professor's own memories of the first year of law school. Kagan also formally introduced each of the section's professors, including the spring semester professors, each of whom sits at a different table with a separate group of students. Kagan first met me in person at that dinner, but she introduced me as though she had known me for years.

Dean Kagan began her remarks with words that, coming early in the semester, caused my jaw to drop as my fork hovered over my dessert plate: "I know that you have been welcomed numerous times, but I want to, once again, formally welcome you to Harvard Law School and tell you how glad we are that you are here. I know that you are probably getting tired of hearing it, but this is what we do here at Harvard; we are very welcoming." I recounted these words a few times to great hilarity among colleagues around the country over the next few days, but as I looked around, my cynicism began to disappear and I realized that they might actually be true. Indeed, the welcome speech was so enthusiastic and genuine that her words would have rung hollow and become the stuff of legend if they hadn't been true. In my humble opinion, Harvard generally seems to be meeting the promise inherent in those words.

One lesson here is that the dean must personally work hard to develop a sense of community and must be keenly engaged in the life of the school. Kagan attended the entire reception and dinner for each section. The commitment here was substantial; there are seven sections, requiring her to attend banquets for seven nights in a row. During the section banquet I attended, Kagan mingled with students, asking about their experiences in their first day in class and then opened the dinner remarks by recounting some of the funny anecdotes. Kagan's words had the effect of cementing these special formative and funny experiences in the student's minds so that they will no doubt be remembered for years to come. They also helped her to connect with the students, leaving

the students feeling as though she had been sitting alongside them in their classes and that she shares the inside jokes and memories that students will take with them.

The bonding between students within the section that begins at orientation is enhanced through the rest of the year by the appointment of a small group of students who serve as the “hospitality committee” and who have a small budget to hold parties, or purchase tickets to sporting events at group rates. Attendance at the section banquet also improved my own teaching experience in the spring semester. Having met several of the students at the reception and dinner in September, the chemistry with the students formed much more quickly when my spring semester class began in January.

### **Restoring Harvard to the Center of Legal Academia**

A number of the changes have contributed to reinvigorating respectful intellectual interaction at Harvard and making intellectual and scholarly activity a central feature of the law school community. Not the least of this was the development of a large number of annual visitors, many of whom relocate to Cambridge for an entire year. Resident faculty no doubt tend to exhibit better behavior when visitors are present, and this may have heightened the ability to have ideologically diverse professors interacting respectfully. Given that a faculty marches on its stomach and that the sharing of food is an important part of building community, the free lunches in the faculty lounge contributed mightily to the sense of community among faculty, increasing their intellectual interaction. The overall effect for me, as a visiting law professor, was similar to what visiting Rome must feel like for a Catholic. Harvard felt like the center of the legal academic universe.

Another development aimed at increasing the level of intellectual interaction was focused around students through the creation of collaborative workshop courses. In a workshop, which students take for credit, students meet each week or every other week, and participate in a faculty colloquium-like presentation. A professor from Harvard or elsewhere presents a draft paper, which the students will have been required to review in advance and comment on with the professor present. Students must provide written comments in advance of class and engage with the professor in class, just as a faculty would at a faculty workshop. The workshop courses give regular J.D. students a chance to “play professor” and help them participate in a more sophisticated way in the academic environment. In some courses, students also are encouraged to write and present their own papers to their classmates. A half-dozen of these courses met during the fall alone, most of them with fifteen or more students. Some of these are co-taught by two Harvard professors in addition to the visiting professor who presents the paper each class period. The level of student-faculty engagement in such a course is high. Some of the most serious and successful students reportedly go on to teaching fellowships at Harvard, such as the Climenko Fellowship program, and are destined for legal academia.



In sum, through careful structuring, Harvard has been able to give its best students the same experience that students obtain at smaller elite law schools.

Another effort to engage students with professors is the student-reading group. Professors are encouraged to sign up to lead discussions on a range of topics that they find of interest. Reading groups are not for law school credit, are limited to eight students each, and meet only five times a semester, often in informal settings and over food. Legal topics include Shakespeare and the Law, Hurricane Katrina and Disasters, and Films about the Law. Some reading groups are distantly related to the law, and still others are not related at all. More than forty of the reading groups occurred during the year I visited, providing opportunities for less formal interaction between professors and more than 300 students. Professors were modestly compensated or given partial teaching credit for holding such reading groups.

### **Malibu at Harkness Commons**

Many of the initiatives at Harvard seem designed to make Harvard more welcoming and friendly toward students. The notoriously unattractive Harkness Commons has been renovated. It is now a beautiful space, offering a Starbucks-like coffee shop complete with leather couches and a working gas fireplace, two beautiful student lounges, and a huge and airy food court with myriad menu choices. The attractive dining hall on the second floor of Harkness has a lounge with a pool table and flat-screen televisions, and floor-to-ceiling picture windows that look out on a sand volleyball court in warm weather and an ice-skating rink in cold weather.

The effect is to lighten the mood and give students eating or studying in Harkness Commons the feeling that the student can have it all: a Harvard legal education and a Pepperdine experience. And while the volleyball court/skating rink might seem like a gimmick if it was the only gesture toward improving student life, it serves instead as a visible symbol of myriad changes that have improved the student experience. To underline the point, Harvard began offering free bagels, coffee, tea and hot chocolate in classroom buildings for students, faculty and staff each day during the semester.

### **Conclusion**

A few of the changes at Harvard have imposed greater burdens on the professors, but they seem to have been embraced relatively enthusiastically. This has happened primarily for two reasons. First, even the most brilliant individual enjoys being part of something larger than oneself and especially a richer and happier community. Though the value of being part of such a community is difficult to quantify, it is tangible to its members. Second, most of the changes have improved the quality of life at Harvard while appealing to higher values. Good values are indeed important. Finally, many of the changes serve the interests of both students and of professors. It is easier for a professor to teach a class of 80 than 140 and, for most professors, it is more enjoyable.

To a legal academic, Harvard Law School now feels like an academic version of Disneyland, fun and playful with many different types of entertainment. Kagan's leadership was key to this happening. Some of the ideas were likely her own but her real accomplishment as the academic leader was in clarifying the values that should be sought at Harvard and giving a members of the community the tools to insure that those values are embraced.

To be sure, Harvard Law School has resources that would be considered vast riches by almost any other institution. Her reported \$1.5 billion endowment gave Kagan a lot of options. However, she deployed those resources very well, effectively transforming the school.

At Thanksgiving 2007, Dean Kagan invited faculty and staff to stop by a large room in Pound Hall to pick up a gift—a boxed pecan, apple or pumpkin pie. After one picked up one's pie, Kagan invited each person to sit down at a table stocked with small cards and envelopes and to write "thank you" notes to members of the law school community who had been helpful during the previous year. The exercise was a terrific community-building exercise and Harvard Law School owes a very large thank-you note to their former dean.