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On the Battlefield of Merit: Harvard Law School, the First Century, by Daniel R. Coquillette and Bruce A. Kimball

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On the Battlefield of Merit: Harvard Law School, the First Century. By Daniel R. Coquillette and Bruce A. Kimball. (Cambridge, Mass.: Harvard University Press, 2015. Pp. xi, 666. $39.95.)

We have long needed a serious history of the Harvard Law School. *On the Battlefield of Merit* is the first of a projected two-volume work designed to fill this need. This first volume is an exhaustively researched, reader-friendly book that tells much that was not generally known about the origins and early development of this major American institution. Taking advantage of Coquillette's knowledge of colonial and early nineteenth-century history and expanding on Kimball's of the late nineteenth-century history of universities and his work on Langdell, the book paints a rich understanding of the way that a once modest, regional law school became the most important one in America.

The story begins with a 1781 bequest that took thirty-five years to realize and even then barely provided sufficient income for one professor who, being a judge, could only teach part time. A second practitioner teacher was paid solely out of tuition, this at a time when few law schools existed and almost all lawyers learned their law as apprentices. These first teachers at the school were not very successful; indeed, the school nearly failed. However, the next pair of teachers, Supreme Court Justice Joseph Story and practitioner Simon Greenleaf, attracted in part by a second endowed professorship and a new law school building, righted the school and began to build a broader profile for it, drawing students from the mid-Atlantic and southern states. A third professorship was added after Story died and Greenleaf retired and the three new faculty members attempted to insulate

the school from the growing ructions over slavery, the Civil War, and Reconstruction. These years were of stasis rather than decline as had previously been thought. Starting in 1869 with the appointment of Charles W. Eliot as Harvard's president and in 1870 with that of Christopher Columbus Langdell as dean, the Law School underwent a slow but continuous revolution. What had always been a school where admission required only that students have a good classical education, a law degree could be earned with only twelve to eighteen months of residency, classes could be taken in any order, no exams were given, and instruction had slowly moved from the text and recitation to lectures punctuated with questions delivered by practicing or retired lawyers and judges, After Langdell's appointment, admission required students have a four-year degree from a reputable college, three years of residency for a law degree, carefully sequenced classes, rigorous exams with expectations of high achievement, and instruction featuring questions and answers about appellate cases led by academic scholars with modest practice experience. Surprisingly, the more stringent the program became, the more students from all parts of the country came to what had become a national law school.

As an author whose work on law school histories ("Mirror, Mirror on the Wall: Histories of American Law Schools," *Harvard Law Review* 95 [1982]) is explicitly acknowledged in telling this remarkable story, it is perhaps ungracious of me to object that while Coquillette and Kimball do a fine job of paying attention to two of the absences that my colleague Fred Konefsky and I noticed in law school histories—the social life of a law school and the general trends in society—their understanding of the third, ideology, leaves a bit to be desired.

An ideology is like the water in which fish swim or the air, birds fly; it is the set of ideas that people take for granted as the way their world is organized, the residue left over after matters of opinion seem to be settled. And so, the call "ideology" often is heard when some people wish to assert that the matter is not, or at least should not be, settled at all. Often, those who choose to defend the taken-for-granted return that call. Historians need to pay attention to the ideologies of the past, as well as those of the present (sometimes known by the gentler name of "presentism") that often signal little more than "right thinking." *On the Battlefield of Merit* has problems with both varieties of ideology. Three examples suffice.

First, the opening of the Harvard Law School was made possible by a bequest of Isaac Royall, Jr., the wealthy owner of a sugar plantation

on the island of Antigua and of slaves who worked it. Royall lived graciously in Massachusetts for about thirty-five years, all the while being served by slaves that his father had brought when the family fled Antigua in the aftermath of a slave rebellion. Since slavery had been held unconstitutional in Massachusetts the year Royall died—though still legal in Antigua—it might have been interesting to learn what the Harvard Corporation or its Overseers thought of accepting property from a slaveholder. Instead, we are told that the members of Harvard's governing bodies who accepted the gift were conservative Federalists and Unitarians, that two less tainted individuals who had attempted to make a similar bequest had unfortunately been unable to do so, and that a slave owner was "hardly the ideal founder of a school devoted to the study of law and justice" (p. 75)

Second, one of the highlights of this book is a taut recounting of discord at the Law School before, during, and after the Civil War. Northern and southern students fought out their disagreements in a forum designed to help them understand legislative procedure. The ferocity of their arguments led the school's three professors to impose a rule forbidding the discussion of slavery, though later two of them had spirited public disputes about the constitutionality of Lincoln's Emancipation Proclamation, his suspension of the writ of habeas corpus, and Reconstruction. These two professors earlier had come to realize that the appointment to the faculty of a well-known abolitionist was impossible in 1848. Yet six years later, the university's governing bodies terminated the appointment of a lecturer who was unsympathetic to slavery, though not abolitionist, but who as a federal commissioner ordered the return of a slave under the Fugitive Slave Act. And yet, after having detailed this history of the school's situation in the late 1860s, we are reminded that arguments "for racial justice . . . would take more than a century to be vindicated" (p. 281)

In these two instances, the authors' summative comments, which could be called presentist, represent an ideology (one I happen to share) that unfortunately acts to impede a fuller recognition of the troubled and conflicting disputes within the governing bodies of Harvard, its faculty, and its students. An understanding of them might better explain why, for a century after a bloody, awful war and three constitutional amendments, only a modest part of longed-for social justice objectives had been achieved.

My third example is much simpler. In the years following Langdell's appointment as dean, there was a long, low intensity fight over

whether professors should be experienced practitioners, such as Langdell himself, or rather recent graduates who had done well in law school, which Langdell argued was better. Earlier, I noted how this fight ended, but what is interesting is how the authors describe it as a choice between "professional experience" and "academic merit." This is a loaded construction; "professional merit" would have been a fairer presentation of one of the choices. However, setting aside matters of fairness in debate, the assumption of the proposition that "merit" is dominated by consideration of an ordinal distribution that sums exam grades or any other competitive results while perfectly ordinary in our world, is best understood as deeply ideological, as a marker of who won an argument. Alternative measures of merit with respect to potential for teaching are all around us: normal rather than ordinal distributions, astuteness in practice, degree of suspicion of the "legal," which is to say "bureaucratic," ordering of life ("politics" in a word), possession of other professional orientations than law, and even questions of gender, class, race, ethnicity, or religion. Most possibilities to which the authors regularly call attention are absent from the list of concerns in Harvard Law School's first hundred years. Defining merit may have been the problem, not the solution.

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