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## History and Harvard Law School

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# HISTORY AND HARVARD LAW SCHOOL

Bruce A. Kimball\* & Daniel R. Coquillette\*\*

## INTRODUCTION

In their seminal article, Alfred Konefsky and John Henry Schlegel saw institutional histories of law schools as the graveyard of academic reputations.<sup>1</sup> So why write institutional histories? Due to the leadership of Robert Kaczorowski and William Nelson, and the generosity of Fordham University School of Law and New York University School of Law, an important conference took place between July 2 and July 4, 2018, at New York University's Villa La Pietra outside of Florence. The purpose was to encourage good institutional history and to define its value.

We had recently published the first volume of a new history of Harvard Law School, *On the Battlefield of Merit: Harvard Law School, the First Century* (“*On the Battlefield of Merit*”) and are completing another volume, *The Intellectual Sword: Harvard Law School, the Second Phase* (“*The Intellectual Sword*”). This has been a massive undertaking, supported by hundreds of oral histories, invaluable student papers, and colleagues in the ongoing Harvard Law School History Project.<sup>2</sup> It has consumed years of the professional lives of its coauthors. But for what purpose?

There is “[s]o much Harvard history I don’t know about, and would really prefer not to,” remarked Harvard Law School Dean Elena Kagan (LL.B. 1986) in 2008 at the fifty-fifth anniversary of the first graduation of women

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1. Alfred S. Konefsky & John Henry Schlegel, *Mirror, Mirror on the Wall: Histories of American Law Schools*, 95 *HARV. L. REV.* 833, 847–51 (1982). See generally DANIEL R. COQUILLETTE & BRUCE A. KIMBALL, *ON THE BATTLEFIELD OF MERIT: HARVARD LAW SCHOOL, THE FIRST CENTURY* (2015). There are certainly some notable exceptions to the “graveyard.” See generally, e.g., JULIUS GOEBEL, JR., *A HISTORY OF THE SCHOOL OF LAW COLUMBIA UNIVERSITY* (1955); ROBERT J. KACZOROWSKI, *FORDHAM UNIVERSITY SCHOOL OF LAW: A HISTORY* (2012).

2. See COQUILLETTE & KIMBALL, *supra* note 1, at 637–38.

from the school.<sup>3</sup> This remark by Dean Kagan, who became a Supreme Court justice in 2010, demonstrates one kind of challenge in writing about the history of the Law School. Another sort of challenge arises from the myths created by the large body of contentious and dramatic literature, including novels, Hollywood movies, and celebratory and “attack” histories, as we discussed in the introduction to *On the Battlefield of Merit*.<sup>4</sup> Finally, there is the historiographical challenge. Histories of individual educational institutions have often been parochial and contributed little to scholarship outside of the particular institution.

Given this background, *On the Battlefield of Merit* attempted to examine the first century of the Law School in light of related developments in higher education and the nation, while recognizing the complexity of motivations and forces at work. We wrote what Stanford legal historian Robert W. Gordon, in a personal communication, called “an unvarnished institutional history for grownups.”<sup>5</sup> Inevitably, some scholars charged that the book included anachronistic, politically correct criticism of historical events, and others suggested that the book excused or even justified past prejudice concerning the very same events.<sup>6</sup> Nevertheless, we were gratified that a scholarly association, outside of the fields of law and legal education, recognized the work for its original contribution to the history of philanthropy and nonprofit organizations.<sup>7</sup> Still, the question remains, why should one study the history of Harvard Law School?

#### I. WHY DOES THE STUDY OF HISTORY MATTER?

More broadly, why study history at all? This question was also suggested by Justice Kagan, a history major at Princeton University, when she remarked at the bicentennial celebration of Harvard Law School in 2017 that she turned from studying history to law because she “wanted what [she] did to matter.”<sup>8</sup> Indeed, does historical scholarship make a difference? How so? And why

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3. Elena Kagan, *Remarks Commemorating Celebration 55: The Women’s Leadership Summit*, 32 HARV. J.L. & GENDER 233, 245 (2009).

4. See COUILLETTE & KIMBALL, *supra* note 1, at 11–12.

5. This email from Robert W. Gordon to Bruce A. Kimball dated December 23, 2017, is being kept confidential at the request of its recipient.

6. Compare Edward White, *Looking Backward*, WKLY. STANDARD (Jan. 22, 2016, 1:10 AM), <https://www.weeklystandard.com/g-edward-white/looking-backward-2000688> [<https://perma.cc/MYN3-5YNJ>], with Jeannie Suk Gerson, *The Socratic Method in the Age of Trauma*, 130 HARV. L. REV. 2320, 2328 (2017).

7. The Association for Research on Nonprofit Organizations and Voluntary Action awarded the Peter Dobkin Hall History of Philanthropy Prize for 2017 to Daniel R. Coquillette and Bruce A. Kimball for *On the Battlefield of Merit*. See ARNOVA Presents the 2017 ARNOVA Peter Dobkin Hall History of Philanthropy Prize to Daniel R. Coquillette and Bruce A Kimball for *On the Battlefield of Merit: Harvard Law School, the First Century*, ARNOVA (2017), [https://cdn.ymaws.com/www.arnova.org/resource/resmgr/awards/2017\\_Citations/Peter\\_Dobkin\\_Hall.pdf](https://cdn.ymaws.com/www.arnova.org/resource/resmgr/awards/2017_Citations/Peter_Dobkin_Hall.pdf) [<https://perma.cc/3HEB-U3DP>].

8. Michael Levenson, *Supreme Court Justices Reminisce About Their Harvard Days*, BOS. GLOBE (Oct. 26, 2017), <https://www.bostonglobe.com/metro/2017/10/26/supreme-court-justices-reminisce-about-their-harvard-days/cWGQdZMh3cs45xp2ozGuvl/story.html> [<https://perma.cc/LQS9-D4Z8>] (quoting Justice Kagan).

does the history of this particular institution deserve attention? Several private foundations and academic and legal associations repeatedly turned down our applications to support the research for this volume. After all, they said, Harvard is studied all the time, and everything important about the history of Harvard Law School is probably known already. While granting that research on neglected institutions provides important new knowledge, we also believe that our historical inquiry into this law school has yielded significant new findings and insights.

One specific example appeared in the controversy over the Harvard Law School shield during the 2015–2016 academic year. Created for the tercentenary celebration of Harvard University in 1936, the shield's design implied a much older pedigree that eventually led to it becoming the official, ubiquitous emblem of the Law School. Depicting three sheaves of grain standing in a field, the design was based upon the family coat of arms of Isaac Royall, Jr., who died in 1781<sup>9</sup> and bequeathed an endowment that, in 1815, funded the first professorship of law at Harvard University.<sup>10</sup> Royall's wealth came from the family's sugar plantation in Antigua, which was worked by enslaved people under brutal conditions.<sup>11</sup>

The source of Royall's wealth may have been unknown or simply forgotten in 1936, or the design may be another instance of historical depictions ignoring exploited and marginalized groups. In any case, three historical facts were clearly linked through the tercentenary celebration of Harvard University in 1936: the Harvard Law School shield was based on the Royall coat of arms;<sup>12</sup> Isaac Royall endowed the first law professorship at Harvard;<sup>13</sup> and that endowment came from wealth created by enslaved people.<sup>14</sup>

Published in October 2015, *On the Battlefield of Merit* set forth those three related facts. Soon thereafter, students at Harvard Law School began to protest the Law School's widespread use of its shield, while similar protests occurred over the naming of John C. Calhoun College at Yale University<sup>15</sup> and the Woodrow Wilson School of Public and International Affairs at Princeton University,<sup>16</sup> all concurrent with the Black Lives Matter movement. Spanning several months, the ensuing controversy at Harvard Law School was widely reported across the United States and elsewhere in

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9. See COUILLETTE & KIMBALL, *supra* note 1, at 86.

10. See *id.* at 86–87.

11. See *id.* at 81–85.

12. See *id.* at 75–76.

13. See *id.* at 86–87.

14. See *id.* at 81–85.

15. See, e.g., Noah Remnick, *Yale Will Drop John Calhoun's Name from Building*, N.Y. TIMES (Feb. 11, 2017), <https://www.nytimes.com/2017/02/11/us/yale-protests-john-calhoun-grace-murray-hopper.html> [<https://perma.cc/3YMX-Y2C7>].

16. See, e.g., Susan Svrluga, *Princeton Protesters Occupy President's Office, Demand 'Racist' Woodrow Wilson's Name Be Removed*, WASH. POST (Nov. 18, 2015), <https://www.washingtonpost.com/news/grade-point/wp/2015/11/18/princeton-protesters-occupy-presidents-office-demand-racist-woodrow-wilsons-name-be-removed> [<https://perma.cc/4ZV9-XJH7>].

the world.<sup>17</sup> Meanwhile, Dean Martha L. Minow (2009–2017) appointed a committee composed of faculty, students, and alumni, and chaired by Professor Bruce H. Mann, to recommend a course of action in response to the student protests against the use of the shield. That committee recommended, Dean Minow concurred, and the Harvard Corporation agreed in March 2016, that the Law School should “retire” the shield as its “image and trademark.”<sup>18</sup>

This outcome demonstrates that studying history matters because knowledge of the past changes our understanding and evaluations of the present. But that is not the end of the story. Even the history of the seemingly narrow topic of the Harvard Law School shield is more complicated and has more ramifications than was appreciated in 2016. Knowledge of the

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17. *E.g.*, Harriet Alexander, *Harvard Law Students Campaign for Removal of Slavery Seal*, TELEGRAPH (Nov. 11, 2015, 12:26 AM), <https://www.telegraph.co.uk/news/worldnews/northamerica/usa/11987696/Harvard-law-students-campaign-for-removal-of-slavery-seal.html> [https://perma.cc/AU4K-R39C]; Steve Annear, *Harvard Law School to Ditch Controversial Shield*, BOS. GLOBE (Mar. 14, 2016), <https://www.bostonglobe.com/metro/2016/03/14/harvard-law-school-ditch-controversial-shield-with-elements-from-slave-owning-family/UIYgbyviFdwwGKjexZgWqN/story.html> [https://perma.cc/6DN3-WPSP]; Bamzi Banchiri, *Is Harvard Ready to Abandon Slavery-Linked Seal?*, CHRISTIAN SCI. MONITOR (Mar. 5, 2016), <https://www.csmonitor.com/USA/Education/2016/0305/Is-Harvard-ready-to-abandon-slavery-linked-seal> [https://perma.cc/3U3P-4NLT]; Anemona Hartocollis, *Harvard Law to Abandon Crest Linked to Slavery*, N.Y. TIMES (Mar. 4, 2016), <https://www.nytimes.com/2016/03/05/us/harvard-law-to-abandon-crest-linked-to-slavery.html> [https://perma.cc/7M8A-HPBU]; Barney Henderson, *Harvard Law School to Scrap Crest over Links to Slavery*, TELEGRAPH (Mar. 5, 2016, 1:11 AM), <https://www.telegraph.co.uk/news/worldnews/northamerica/usa/12184260/Harvard-Law-School-to-scrap-crest-over-links-to-slavery.html> [https://perma.cc/4MWA-SQ5X]; Marcus E. Howard, *Harvard to Scrap Law School Seal Associated with Slavery*, REUTERS NEWS (Mar. 14, 2016, 7:50 PM), <https://www.reuters.com/article/us-massachusetts-harvard-idUSKCN0WG2N7> [https://perma.cc/2ZWC-WJL7]; Sara Randazzo, *Harvard Law Drops Slaveholder's Crest; the School's Seal Depicted the Family Crest of a Benefactor and Plantation Owner*, WALL ST. J. (Mar. 14, 2016, 10:28 PM), <https://www.wsj.com/articles/harvard-law-drops-slaveholders-crest-1458008882> [https://perma.cc/GV5D-WNWS]; Susan Svrluga, *The Harvard Law Shield Tied to Slavery Is Already Disappearing After Corporation Vote*, WASH. POST (Mar. 15, 2016), <https://www.washingtonpost.com/news/grade-point/wp/2016/03/15/the-harvard-law-shield-tied-to-slavery-is-already-disappearing-after-corporation-vote> [https://perma.cc/6RMG-BMZB]; *Harvard Agrees to Retire Law School Shield Tied to Slavery*, CBS BOS. (Mar. 14, 2016, 5:10 PM), <https://boston.cbslocal.com/2016/03/14/harvard-retires-law-school-shield-slavery/> [https://perma.cc/W3J7-RFQF]; *Harvard Law School Drops Controversial Emblem in Slavery Row*, DAILY MAIL (Mar. 4, 2016, 1:55 PM), <https://www.dailymail.co.uk/wires/afp/article-3477168/Harvard-Law-School-drops-controversial-emblem-slavery-row.html> [https://perma.cc/3BRJ-3QBF]; *Harvard Law School Drops Official Shield over Slavery Links*, GUARDIAN (Mar. 4, 2016, 10:59 PM), <https://www.theguardian.com/education/2016/mar/05/harvard-law-school-drops-official-shield-over-slavery-links> [https://perma.cc/JDA6-XYR2].

18. Email from Martha L. Minow to the Harvard Law School Community (Mar. 14, 2016), <http://hlrecord.org/2016/03/harvard-to-retire-hls-shield/> [https://perma.cc/E7H8-XX7R]; *see also* BRUCE H. MANN ET AL., RECOMMENDATION TO THE PRESIDENT AND FELLOWS OF HARVARD COLLEGE ON THE SHIELD APPROVED FOR THE LAW SCHOOL (2016), <https://today.law.harvard.edu/wp-content/uploads/2016/03/Shield-Committee-Report.pdf> [https://perma.cc/H987-HJAE]; Letter from Drew Faust, President, and William F. Lee, Senior Fellow, to Martha Minow, Dean (Mar. 14, 2016), <https://www.harvard.edu/sites/default/files/content/Faust-Lee-letter.pdf> [https://perma.cc/H8ZC-XWJT].

historical usage and meaning of that emblem is still unfolding, and, with it, understanding of the present develops as well. While appreciating the reasons for retiring the shield, we also sympathized with “A Different View” expressed by Professor Annette Gordon-Reed (LL.B. 1984), who noted the problems of historical revisionism and was joined in her dissent by Annie Rittgers (LL.B. 2017), both members of the dean’s committee of faculty, students, and alumni.<sup>19</sup> In any event, this example demonstrates how knowledge of the past informs and complicates understanding of even very particular issues in the present.

## II. ISOMORPHISM: A UNIVERSITY PROFESSIONAL SCHOOL

More generally, the history of Harvard Law School matters due to its extensive impact on legal education, on professional education more broadly, and, therefore, on American society. This influence was recognized by historian Robert Stevens, who observed that “Harvard set[] the style” of legal education in the United States at the end of the nineteenth century.<sup>20</sup> This impact exemplifies what social scientists have called “isomorphism”: the process by which new or reforming institutions in a social domain tend to replicate the organizational structures and policies of dominant or preeminent institutions.<sup>21</sup> This replication results in organizational homogeneity among institutions throughout the domain.<sup>22</sup>

To explain this phenomenon, social scientists have developed a theory known as “new institutionalism.” The basic idea is that new or marginal institutions in a given domain need legitimacy in order to establish or advance themselves, and in order to acquire legitimacy, they adopt the organizational structures and practices of the premier and dominant institutions and then embrace them as their own.<sup>23</sup> For example, if a university starts a new business school, copying the organization and practices of Harvard Business School is a safe way to start. Conversely, new or marginal institutions normally dare not deviate from the dominant configuration, lest they appear idiosyncratic and illegitimate. As a result, over time, a great majority of the institutions begin to acquire the same structures and policies, and the domain exhibits isomorphism.<sup>24</sup>

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19. Annette Gordon-Reed, *A Different View*, HARV. L. TODAY (Mar. 3, 2016), [https://today.law.harvard.edu/wp-content/uploads/2016/03/Shield\\_Committee-Different\\_View.pdf](https://today.law.harvard.edu/wp-content/uploads/2016/03/Shield_Committee-Different_View.pdf) [<https://perma.cc/N9WZ-EWPY>].

20. ROBERT STEVENS, LAW SCHOOL: LEGAL EDUCATION IN AMERICA FROM THE 1850S TO THE 1980S, at 51 (1983).

21. See Paul J. DiMaggio & Walter W. Powell, *The Iron Cage Revisited: Institutional Isomorphism and Collective Rationality in Organizational Fields*, 48 AM. SOC. REV. 147, 149–54 (1983).

22. See *id.* at 147.

23. RAKESH KHURANA, FROM HIGHER AIMS TO HIRED HANDS: THE SOCIAL TRANSFORMATION OF AMERICAN BUSINESS SCHOOLS AND THE UNFULFILLED PROMISE OF MANAGEMENT AS A PROFESSION 14 (2007).

24. *Id.* at 14 (defining isomorphism as “the tendency toward homogeneity within organizational fields”); see also Paul DiMaggio, *Interest and Agency in Institutional Theory*, in INSTITUTIONAL PATTERNS AND ORGANIZATIONS: CULTURE AND ENVIRONMENT 3, 14–15

Other explanations are certainly plausible. Perhaps some replicated structures and policies have proliferated among institutions simply because they work. In other words, the structures and policies have functioned effectively to improve education, so other professional schools adopted them. This functionalist explanation has generally been rejected by sociologists studying professions and professional education over the past five decades. Instead, they generally prefer some variant of the “new institutionalism” theory.<sup>25</sup> Nevertheless, we maintain that the drive for legitimacy or status does not fully explain activity that leads to homogeneity.

Whatever the theoretical explanation, *On the Battlefield of Merit* proposed that the organizational homogeneity derived from Harvard Law School began earlier and extended more broadly than what Robert Stevens attributed to legal education at the end of the nineteenth century. We argued, in fact, that the isomorphic influence of Harvard Law School commenced early in the nineteenth century and extended to the structure of the national university professional school. In making this argument, we did not ignore the conflicts and entanglements involving the Law School in the nineteenth century. These included political infighting between Federalists and Democratic-Republicans, profound compromises over slaveholding, the wrenching travail of the Civil War, financial crises and reversals, fierce objections to the Law School’s academic innovations, and exclusion or limited acceptance of individuals not white, male, and Protestant. However, notwithstanding those involutions, we proposed that Harvard Law School pioneered the formation of the national university professional school after its founding in 1817.<sup>26</sup>

This formation comprised three radical innovations, resulting largely from the leadership of U.S. Supreme Court Justice Joseph Story from 1829 to 1845 and Dean Christopher C. Columbus Langdell between 1870 and 1895.<sup>27</sup> First, Harvard Law School originated the nonproprietary, degree-granting professional school located in a university.<sup>28</sup> Second, it aimed to prepare a national elite for the bench, the bar, and public service, and became the first

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(Lynne G. Zucker ed., 1988); DiMaggio & Powell, *supra* note 21, at 149–50; Gary G. Hamilton & Robert Feenstra, *The Organization of Economics*, in *THE NEW INSTITUTIONALISM IN SOCIOLOGY* 153, 172 (Mary C. Brinton & Victor Nee eds., 2001); John W. Meyer & Brian Rowan, *Institutionalized Organizations: Formal Structure as Myth and Ceremony*, 83 *AM. J. SOC.* 340, 346–47 (1977). *See generally* *THE NEW INSTITUTIONALISM IN ORGANIZATIONAL ANALYSIS* (Walter W. Powell & Paul J. DiMaggio eds., 1991).

25. PAUL STARR, *THE SOCIAL TRANSFORMATION OF AMERICAN MEDICINE* 143–44 (1982); *see also* ANDREW ABBOTT, *THE SYSTEM OF PROFESSIONS: AN ESSAY ON THE DIVISION OF EXPERT LABOR* 5 (1988); ELIOT FREIDSON, *PROFESSIONAL POWERS: A STUDY OF THE INSTITUTIONALIZATION OF FORMAL KNOWLEDGE* 28–29 (1986). *See generally* MAGALI SARFATTI LARSON, *THE RISE OF PROFESSIONALISM: A SOCIOLOGICAL ANALYSIS* (1977).

26. *See generally* COUILLETTE & KIMBALL, *supra* note 1.

27. *See id.* at 2–6.

28. *See id.* at 2. One exception might be the smaller Harvard Divinity School which had been established in the prior year, 1816. Like some other medical schools, Harvard Medical School had been established at the university much earlier, in the 1780s. However, these early medical schools operated essentially as proprietary schools in as much as faculty compensation was derived directly from tuition revenue, an arrangement that long militated against academic reform in medical education.

university professional school to successfully recruit students from across the nation.<sup>29</sup> Its only rival in national reach was the U.S. Military Academy at West Point, which was not located at a university.

Third, starting in the 1870s, the Law School introduced a “new system” of professional education designed to assess students’ professional merit in terms of their academic achievement.<sup>30</sup> This system included a number of new policies and practices that eventually became standard in national university schools for leading professions: the admissions requirement of a bachelor’s degree, a multiyear course of study, written examinations, rigorous grading, tiered coursework with advanced electives requiring introductory courses, and an inductive system of teaching through Socratic questioning about original sources, which became known as “case method.”<sup>31</sup>

This three-part model from Harvard Law School launched the model of the national university professional school and challenged the accepted historical interpretation of professional education in the United States. Scholars have long maintained that the idea of a “profession”—entailing advanced education in a university professional school—emerged in conjunction with the development of medical schools near the turn of the twentieth century.<sup>32</sup>

This view relied on the belief that medicine was the “prototypical”<sup>33</sup> and “paradigmatic”<sup>34</sup> profession, and that “the rise of medicine”<sup>35</sup> and “the rise of . . . the professions”<sup>36</sup> were interchangeable.<sup>37</sup> For example, in an authoritative article from 1968, sociologist Talcott Parsons wrote that medicine “spearheaded” “[t]he marriage of the university system to the practicing professions in the United States.”<sup>38</sup> Subsequently, even

29. *See id.* at 2–3.

30. *The Harvard College Law School*, MAGENTA, Dec. 1874, at 67; *see also* COQUILLETTE & KIMBALL, *supra* note 1, at 4; Letter to the Editor, *The Harvard Law School*, HARV. ADVOC., Feb. 5, 1875, at 146–47.

31. *See generally* COQUILLETTE & KIMBALL, *supra* note 1, at 384–424 (discussing the creation of the “new system”). For the leading historical account of the introduction of “case method” teaching, see Bruce A. Kimball, “Warn Students That I Entertain Heretical Opinions, Which They Are Not to Take as Law”: The Inception of Case Method Teaching in the Classrooms of the Early C. C. Langdell, 1870–1883, 17 *LAW & HIST. REV.* 57 (1999).

32. *See* BRUCE A. KIMBALL, THE “TRUE PROFESSIONAL IDEAL” IN AMERICA: A HISTORY 303–24 (1992).

33. ELIOT FREIDSON, PROFESSIONALISM: THE THIRD LOGIC 181 (2001).

34. STARR, *supra* note 25, at 28.

35. *Id.* at 79.

36. *Id.*

37. ELIOT FREIDSON, PROFESSION OF MEDICINE: A STUDY OF THE SOCIOLOGY OF APPLIED KNOWLEDGE 4 (1970) (“[I]f anything ‘is’ a profession, it is contemporary medicine.”). For discussions on the success of the medical profession, see LARSON, *supra* note 25, at 19–39; Bernard Barber, *Some Problems in the Sociology of the Professions*, in *THE PROFESSIONS IN AMERICA* 15, 31 (Kenneth S. Lynn ed., 1965); and Everett C. Hughes, *Professions*, in *THE PROFESSIONS IN AMERICA*, *supra*, at 1, 1.

38. Talcott Parsons, *Professions*, in 12 *INTERNATIONAL ENCYCLOPEDIA OF THE SOCIAL SCIENCES* 536, 543 (David L. Sills ed., 1968) [hereinafter Parsons, *Professions*]. *See generally* Talcott Parsons, *The Professions and Social Structure*, 17 *SOC. FORCES* 457 (1939).

sociologists qualifying or rejecting Parsons's theoretical perspective—Magali Larson,<sup>39</sup> Paul Starr,<sup>40</sup> Eliot Freidson<sup>41</sup>—nevertheless presumed the “ideal-typical”<sup>42</sup> or “archetypal”<sup>43</sup> stature of medicine.<sup>44</sup>

Historiography assumed this as well. For example, a leading historical analysis of university business schools by Rakesh Khurana “is directly inspired by Paul Starr’s definitive account of the origins and development of American medicine.”<sup>45</sup> Such historiography cast Johns Hopkins University’s medical school as the pioneering professional school, though it opened only in 1893 with four students and its leadership had already begun to wane by 1915 due to its failure to keep pace with other medical schools in terms of financial resources.<sup>46</sup> In contrast, “Harvard Law School achieved a clearer leadership in the field of legal education than any American institution of learning has ever had in its particular department, with the possible exception, *for a brief period* of Johns Hopkins Medical School,” as Professor Samuel Williston (LL.B. 1888), who lived through these events, remarked in 1940.<sup>47</sup>

*On the Battlefield of Merit* thus advanced the new thesis that Harvard Law School initiated the organizational isomorphism of the national university professional school during the nineteenth century. In our next book, *The Intellectual Sword*, we argue that this organizational influence of the Law School persisted during the twentieth century, but was predominantly confined to legal education, for which “Harvard [d]ecree[d] the [s]tructure and [c]ontent,” as Robert Stevens asserted.<sup>48</sup> More and more law schools adopted the three-year course of study, the admissions requirement of a

39. See generally LARSON, *supra* note 25.

40. See generally STARR, *supra* note 25.

41. See generally FREIDSON, *supra* note 37; FREIDSON, *supra* note 33, at 181–93.

42. LARSON, *supra* note 25, at xiii.

43. *Id.* at 39.

44. Conversely, a scholar who adopts a priori the “very loose definition,” ABBOTT, *supra* note 25, at 8, of professions—occupations that employ expertise in a competition to establish jurisdictional control over work—observes that “[i]t has been easy to mistake American medicine for the paradigm.” *Id.* at 30.

45. KHURANA, *supra* note 23, at 18. Indeed, Kenneth Ludmerer has stated, “For the new educational ideals [in medicine] to be implemented, an institutional revolution was required as well: the proprietary school had to be abandoned, and in its place had to be created the modern university medical school. Between 1885 and 1925, this transition occurred.” KENNETH M. LUDMERER, *LEARNING TO HEAL: THE DEVELOPMENT OF AMERICAN MEDICAL EDUCATION* 5 (1985); see also WILLIAM G. ROTHSTEIN, *AMERICAN MEDICAL SCHOOLS AND THE PRACTICE OF MEDICINE: A HISTORY* 89–116 (1987).

46. KENNETH M. LUDMERER, *TIME TO HEAL, AMERICAN MEDICAL EDUCATION FROM THE TURN OF THE CENTURY TO THE ERA OF MANAGED CARE* 6–7, 55 (1999).

47. SAMUEL WILLISTON, *LIFE AND LAW: AN AUTOBIOGRAPHY* 206 (1940) (emphasis added). For information on comparing the finances, standards, and status of law schools and medical schools, particularly Harvard Law School and Johns Hopkins Medical School, see CHARLES W. ELIOT, *REPORTS OF THE PRESIDENT AND THE TREASURER OF HARVARD COLLEGE 1904–05*, at 39–42 (1906); ARTHUR T. HADLEY, *REPORT OF THE PRESIDENT OF YALE UNIVERSITY AND OF THE DEANS AND DIRECTORS OF ITS SEVERAL DEPARTMENTS FOR THE ACADEMIC YEAR 1901–1902*, at 14–15 (1902); and HENRY WADE ROGERS, *YALE LAW SCHOOL REPORT OF THE DEAN 153–54* (1905).

48. STEVENS, *supra* note 20, at 35.

bachelor's degree, first-year courses in private law, written examinations, rigorous grading, tiered coursework, and case method teaching.

For example, the proliferation of case method teaching early in the twentieth century demonstrates this organizational replication. As of 1890, only Harvard Law School employed case teaching,<sup>49</sup> which was considered an “abomination” by most in the legal profession and in law faculties across the country.<sup>50</sup> By the same token, that “abomination” had come to represent the anomalous “new system” of education that the Law School had developed under Dean Langdell.<sup>51</sup> Because case teaching was emblematic of the Harvard system, any law school's adoption of the case method after 1890 signified that that school was also borrowing other aspects of the Harvard system as well. Hence, the proliferation of case teaching serves as a kind of chemical tracer of the spread of Harvard Law School's organization and policies.<sup>52</sup>

Amid great controversy between 1890 and 1915, 40 percent of American law schools adopted Harvard Law School's emblematic case method, and another 24 percent partially accommodated the method with the clear prospect of complete adoption on the horizon. Of the 36 percent of law schools that still rejected the case method in 1915, the great majority were marginal, less influential, or rapidly losing influence in American legal education, and most of these, such as Yale Law School, would become converts during the next decade.<sup>53</sup> Consequently, legal education in American universities grew increasingly homogeneous based on the model of the preeminent law school.

Indeed, by 1915 the case method movement had mounted into a tidal wave sweeping across the landscape of legal education and coursing into higher education at large. Professors at medical schools were explicitly advocating and adapting case method teaching derived from Harvard Law School, and they were soon followed by those in business schools, from which a modified version spread into many academic fields. What had been considered Langdell's “abomination” in the 1880s had become a legitimate and progressive practice in the pedagogy of American higher education by 1915.<sup>54</sup> Within legal education, this pedagogical development demonstrated the organizational isomorphism based upon Harvard Law School's “new system.”

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49. See *supra* note 31 and accompanying text.

50. THE CENTENNIAL HISTORY OF THE HARVARD LAW SCHOOL, 1817–1917, at 35–36 (1918). See generally Bruce A. Kimball, *Christopher Langdell: The Case of an ‘Abomination’ in Teaching Practice*, THOUGHT & ACTION, Summer 2004, at 23.

51. See *supra* notes 30–31 and accompanying text.

52. See generally Bruce A. Kimball, *The Proliferation of Case Method Teaching in American Law Schools: Mr. Langdell's Emblematic ‘Abomination,’ 1890–1915*, 46 HIST. EDUC. Q. 192 (2006).

53. *Id.* at 192–93.

54. THE CENTENNIAL HISTORY OF THE HARVARD LAW SCHOOL, 1817–1917, *supra* note 50, at 35–36. See generally BRUCE A. KIMBALL, THE EMERGENCE OF CASE METHOD TEACHING, 1870S–1990S: A SEARCH FOR LEGITIMATE PEDAGOGY (1995).

## III. FINANCIAL ISOMORPHISM

In addition to the thesis about organizational replication, *On the Battlefield of Merit* broke new ground by probing university finances, which have generally been neglected in historical scholarship about professional education. We found that the development of university professional schools and the adoption of the “new system” of academic merit entailed four financial innovations. These became critical policies in the financial homogeneity—the attributes of financial isomorphism—among national university professional schools.

First, Harvard Law School adopted a new mode of compensating faculty beginning in the 1820s. Remuneration of faculty shifted from a proprietary model—whereby students paid tuition directly to the instructors—to a salaried model, whereby students paid tuition to the institution, which then paid a set annual salary to the faculty.<sup>55</sup> This dramatic change, we argued, severed the direct link between faculty income and academic policies, prompting faculty of university professional schools to attend increasingly to academic merit in making decisions.<sup>56</sup>

Second, Dean Langdell sought to hire young scholars to the faculty of the Law School rather than highly successful professionals, and this change generated much opposition.<sup>57</sup> Most of the Law School’s constituents argued vehemently that a leading professional school should recruit its faculty from the ranks of eminent professionals, as proprietary schools had done.<sup>58</sup> But Langdell and a few others at Harvard maintained that the faculty of a university professional school devoted to academic merit should consist predominantly of scholars, not practicing professionals. Though the attributes of each group were debated on principle, the controversy was resolved on financial grounds during the 1880s and 1890s.<sup>59</sup>

Initially, in the 1870s, the Harvard President and Corporation were persuaded to hire successful professionals by those advocating this approach, notwithstanding the Law School’s “new system” of academic merit.<sup>60</sup> But attempts to hire such practitioners largely failed because accomplished professionals could make much more money in their own practice than even Harvard could afford to pay in salary.<sup>61</sup> The antebellum shift to a salary model of compensation thus influenced this hiring issue that arose in the 1870s. Then, given the failure to recruit distinguished professionals, the university leaders decided to hire scholars, especially young ones, who required less remuneration than the practitioners.<sup>62</sup> Finally, the university

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55. COQUILLETTE & KIMBALL, *supra* note 1, at 160.

56. *Id.* at 389–98.

57. *Id.* at 398.

58. *Id.* at 400–01.

59. *Id.* at 397.

60. *Id.* at 389–98.

61. *Id.* at 395–97.

62. *Id.* at 398.

rationalized the decision publicly in terms of promoting academic merit, although this principled rationale had been rejected at the outset.<sup>63</sup>

Third, the Law School introduced a new financial strategy, or model, for university professional schools. The prevailing proprietary model for schools of law, medicine, and other professions in the nineteenth century relied on low costs and low standards. With few exceptions, proprietary schools charged relatively low tuition, had few admission requirements, and required scarcely any academic work or evaluation.<sup>64</sup> The underlying financial logic was that professional study demanded little investment in money or work from students, but provided some value. The poorly prepared graduates could open a practice and make a living, since licensing standards were so low. Meanwhile, the faculty could profit from running a school as an adjunct to their practice. Given these incentives, there was no way to change this arrangement according to the economic reasoning at the time.

But Langdell and Harvard President Charles W. Eliot (1869–1909) conjectured that a high-cost, high-standards model would be financially viable because better trained graduates would be more employable, so ambitious and talented students would therefore seek to enroll.<sup>65</sup> During the 1870s, the Law School made the gamble and introduced more demanding admission standards and academic requirements and tripled tuition.<sup>66</sup> Students had to work harder and pay more to do it. Most observers in the legal profession believed this was financial suicide. But in the 1880s, Harvard Law School graduates began to get the best, highest-paying jobs in the leading urban law firms and emerging corporate law practices.<sup>67</sup> Talented, hardworking students thus flocked to the Law School.

Fourth, the high-cost, high-standards model not only worked, but led to prosperity, as the growing student body paying high tuition produced a sizeable annual surplus. In the proprietary model, this would have gone into the pockets of the faculty, but under the salaried model, the surplus accrued to the Law School. Hence, by 1895, Harvard Law School became the wealthiest university professional school in the nation.<sup>68</sup>

Our new book, *The Intellectual Sword*, proposes that the financial homogeneity in leading university professional schools, derived from Harvard Law School, continued within legal education during the twentieth century.<sup>69</sup> But now we argue that this development was highly detrimental to law schools. The problems began in the first decade of the twentieth

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63. *Id.* at 389–402.

64. *Id.* at 413.

65. *Id.* at 415.

66. *Id.* at 413–14.

67. *Id.* at 415.

68. *Id.* at 559 (discussing the “enormous cash reserve” and the “distinctly prosperous” position of Harvard Law School).

69. Reference to the history of the second century of Harvard Law School is based on research associated with our forthcoming work, *The Intellectual Sword*. See generally BRUCE A. KIMBALL & DANIEL R. COQUILLETTE, *THE INTELLECTUAL SWORD: HARVARD LAW SCHOOL, THE SECOND PHASE* (forthcoming 2019).

century, when a wealthy Harvard Law School made a series of incredible missteps and impoverished itself.<sup>70</sup> Then, under Dean Ezra R. Thayer (1910–1915), the Law School fell into the debilitating syndrome of tuition dependence, which included high enrollment, a high student-to-faculty ratio, and relatively little external support from philanthropy, subsidies, or endowment income.<sup>71</sup> These factors had yielded huge annual surpluses at the end of the nineteenth century, but, concomitantly, they made the Law School vulnerable in two respects.

On the one hand, Harvard Law School became heavily dependent on tuition to meet its annual expenses, particularly after constructing an immense new building, Langdell Hall. On the other hand, the Law School's large annual revenue from tuition created the illusion of prosperity. Harvard presidents, therefore, did not regard the Law School's tuition dependence as a problem, though they did so for every other school and department at Harvard. Unlike all other departments and schools, the Law School did not need endowment income, philanthropy, or subsidies to sustain it, these presidents believed. The syndrome of tuition dependence worsened under Dean Roscoe Pound (1916–1936) and then plagued the administration of Dean James M. Landis (1937–1946).<sup>72</sup> The syndrome deepened further under Dean Erwin N. Griswold (1946–1967)—though he wished to escape it and vastly increased the Law School's income—and Dean Albert M. Sacks (1971–1981) then struggled under the same pressures during the 1970s.<sup>73</sup>

Meanwhile, leading university schools in other major professions recognized and avoided the syndrome of tuition dependence during the first half of the twentieth century, as seen at Harvard and Columbia universities. Hence, during the twentieth century, Harvard Law School initiated a detrimental financial isomorphism in legal education, whereby law schools “must live from hand to mouth,” as both Dean Pound and Dean Griswold lamented in 1919 and 1962, respectively.<sup>74</sup> If preeminent Harvard Law School depended so heavily on tuition reaped from huge classes, how could other law schools justify appeals for endowment, philanthropy, or subsidies at their universities? Law schools therefore found it much more difficult to secure external support, compared to other major professional schools. Even Harvard Law School did not run a truly successful fundraising campaign until the late 1980s.<sup>75</sup> Only a few exceptions to this syndrome existed in legal education. The leading one was Yale Law School.<sup>76</sup>

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70. COQUILLETTE & KIMBALL, *supra* note 1, at 559–67.

71. *See generally* KIMBALL & COQUILLETTE, *supra* note 69.

72. *See generally id.*

73. *See generally id.*

74. ROSCOE POUND, THE HARVARD LAW SCHOOL 16 (1919). Pound's phrase was later picked up by Dean Erwin N. Griswold. ERWIN N. GRISWOLD, REPORT OF THE PRESIDENT OF HARVARD COLLEGE AND REPORTS OF DEPARTMENTS: LAW SCHOOL 395 (1962) (“Through the years, we have lived from hand to mouth in most of these areas.”).

75. This information is based on a confidential interview with Scott G. Nichols conducted in December 2010 by Bruce A. Kimball and Kenneth Leung.

76. *See generally* KIMBALL & COQUILLETTE, *supra* note 69.

Surviving—while constrained by the syndrome of tuition dependence that prevailed throughout legal education—required an abundant and growing number of smart, well-educated, and hardworking applicants. Law schools were vulnerable to any significant decline in the number of such applicants at some future time. These schools could scarcely imagine such a moment throughout the twentieth century, but they were highly vulnerable just the same. The seeds of that vulnerability were planted at Harvard Law School early in the twentieth century and cultivated in succeeding decades.<sup>77</sup>

#### IV. THE INTELLECTUAL SWORD

Beyond constraining finances, the syndrome of tuition dependence exacerbated, even fostered, the combative and competitive culture at Harvard Law School that, by way of metaphor, supplies the title for our second volume, *The Intellectual Sword*.<sup>78</sup> In fact, the ask-and-give-no-quarter ethos at Harvard Law School arose concurrently with the realization after 1907 that prosperous Harvard Law School had impoverished itself. Only then did the

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77. After the Great Recession of 2008, the market for new Juris Doctorate degrees sharply contracted, and the pool of talented applicants to law schools shrank rapidly across the nation. In the five years following 2008, annual applications to law schools plummeted from over 100,000 to 60,000. Students who did enroll began taking on substantially more debt, and many law schools struggled to maintain their academic standards while balancing their budgets. Precipitating this crisis in legal education was the combination of high enrollment, high tuition, a high student-to-faculty ratio, a relatively low endowment, and little external support. As Professor Coquillette noted,

The result [wa]s that law schools . . . 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.

Daniel R. Coquillette, *American Legal Education: Where Did We Come From? Where Are We Going?* B. EXAMINER, June 2013, at 44, 45; see also LAW SCH. SURVEY OF STUDENT ENGAGEMENT, HOW A DECADE OF DEBT CHANGED THE LAW STUDENT EXPERIENCE: 2015 ANNUAL SURVEY RESULTS (2016); Ronald G. Ehrenberg, *American Law Schools in a Time of Transition*, 63 J. LEGAL EDUC. 98, 109 (2013); Brian Z. Tamanaha, *Is Law School Worth the Cost?*, 63 J. LEGAL EDUC. 173, 173 (2013).

78. The full quotation from the concluding paragraph of Learned Hand's book, *The Bill of Rights: The Oliver Wendell Holmes Lectures*, provides context on the word "sword":

More years ago than I like now to remember I sat in this building and listened to—yes, more than that, was dissected by—men all but one of whom are now dead. What I got from them was not alone the Rule in Shelley's case, . . . or what law determined whether a contract has been made, . . . or in what jurisdictions a corporation is "present." True, I did get those so far as I was able to absorb them, but I got much more. I carried away the impress of a band of devoted scholars; patient, considerate, courteous and kindly, whom nothing could daunt and nothing could bribe. The memory of those men has been with me ever since. Again and again they have helped me when the labor seemed heavy, the task seemed trivial, and the confusion seemed indecipherable. From them I learned that it is as craftsmen that we get our satisfactions and our pay. In the universe of truth they lived by the sword; they asked no quarter of absolutes and they gave none. Go ye and do likewise.

LEARNED HAND, THE BILL OF RIGHTS: THE OLIVER WENDELL HOLMES LECTURES 77 (1958). This quotation was also printed on a bronze plaque in 1959 in the Ames Courtroom, Austin Hall, Harvard Law School. See *News of the School*, HARV. L. SCH. BULL., Feb. 1959, at 9, 10.

infamous “Paper Chase” begin.<sup>79</sup> Professor Edward H. “Bull” Warren (LL.B. 1900) famously, and approvingly, endorsed the shift in his book *Spartan Education*.<sup>80</sup> The fierce competition and aggressive pedagogy at the Law School were reinforced by what Kim Townsend has called the pronounced “manly” culture at Harvard University.<sup>81</sup> In academic terms, this Harvard “manliness” reached its apotheosis in the Law School.

During the tragic deanship of Ezra Thayer, the faculty deliberately began trying to flunk students out of the Law School and treating the attrition rate as an index of its academic quality. This initiative was led by Thayer and Pound, both of whom had joined the faculty in 1910. In the years after Thayer’s death in 1915 through the end of World War I, the academic pressure abated due to the turmoil of the period. But during the 1920s under Dean Pound, the sword of attrition was unsheathed and wielded again even more vigorously as the Law School made more financial missteps.

During the 1920s and 1930s, the academic culture and the constrained finances of the Law School started to reinforce each other. The financial pressure exerted by the syndrome of tuition dependence worsened the combative and competitive academic culture. The Law School had to admit more students in order to pay bills, and then had to fail more students in order to maintain academic standards. By the late 1930s, the detrimental interrelation between the Law School’s finances and its academic culture and policies was explicitly recognized in various studies and reports. But President James B. Conant (1933–1953) did not support change, and Dean Landis was preoccupied with matters outside of the Law School.

After a hiatus in the tumultuous 1940s, the interaction of the financial and cultural forces intensified once again during the tenure of Dean Griswold. In fact, these two forces became more deeply enmeshed, notwithstanding Griswold’s shift toward assessing the academic quality of the student body based on admissions selectivity rather than the attrition rate. During the 1950s and 1960s, the success of an alternative model—both in finances and academic culture—presented by Yale Law School began to pressure Harvard Law School to change its academic policies. But serious reform, financially and culturally, commenced only under Dean Derek C. Bok (1968–1971) and then slowed under Dean Sacks, partly because the syndrome of tuition dependence still limited reform. In fact, the syndrome strangled the Law School ever more tightly because tuition rose sharply between 1948 and 1981, and the Law School became increasingly dependent on the revenue generated by high tuition.

Meanwhile, the ask-and-give-no-quarter ethos contributed to the failure of the Law School to recruit more students and faculty who were not white, male, and Christian. The exclusivity on which the Law School prided itself

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79. See generally Bruce A. Kimball, *Before the Paper Chase: Student Culture at Harvard Law School, 1895–1915*, 61 J. LEGAL EDUC. 31 (2011).

80. See generally EDWARD H. WARREN, *SPARTAN EDUCATION* (1942).

81. KIM TOWNSEND, *MANHOOD AT HARVARD: WILLIAM JAMES AND OTHERS* 22–24 (1996).

discouraged inclusivity. These factors therefore reinforced each other: the debilitating financial syndrome, the Spartan culture, and the resistance to diversifying its demography. Hence, the Law School's record of recruiting Jews early in the twentieth century, and women and people of color throughout the period, is dismal. This interaction among the three factors was then complicated by the social and political upheavals that buffeted the Law School during the twentieth century.

Hence, we also examine the Red Scare hysteria that began in 1919. The first Red Scare was prompted by the specter of the Bolshevik Revolution in Russia and the advance of Communism in eastern Europe, by the immigration of thousands of eastern Europeans into the United States, and by the resurgence of unionism in manufacturing industries that made 1919 "the most strife-torn year in United States history."<sup>82</sup> The 1920 census then reported that, for the first time, at least half of the nation's 105 million people were living in "urban" communities with a population of 2500 or more.<sup>83</sup> During 1920 and 1921, a severe postwar recession hit, and unemployment skyrocketed to over 19 percent.<sup>84</sup> All these changes and problems stoked fear toward others that led to vilifying immigrants, many of whom had settled in cities. Consequently, Congress—urged by Senate majority leader Henry Cabot Lodge<sup>85</sup> (LL.B. 1874)—enacted the Emergency Immigration Act of 1921<sup>86</sup> and the National Origins Act of 1924,<sup>87</sup> which severely curtailed immigration.<sup>88</sup>

The spreading fear of foreign and left-wing influence also prompted a series of "trials" in the 1920s involving individuals at Harvard Law School, particularly Zechariah Chafee, Jr. (LL.B. 1913), Felix Frankfurter (LL.B. 1906), and President A. Lawrence Lowell (LL.B. 1880). Furthermore, President Lowell severely restricted the enrollment of nonwhite students at Harvard, absolutely forbade the enrollment of women, and sharply reduced the enrollment of Jewish students and employment of Jewish faculty. Concurrently, the jurisprudence of Harvard Law School and teachings of Roscoe Pound were challenged, or eclipsed, by the new movement of legal realism and the empirical study of social influences on law.

The decade of the Great Depression presented formidable challenges for all of American society.<sup>89</sup> Between 1929 and 1932, U.S. industrial

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82. See JAMES R. GREEN, *THE WORLD OF THE WORKER: LABOR IN TWENTIETH-CENTURY AMERICA* 68 (1980).

83. See LYNN DUMENIL, *THE MODERN TEMPER: AMERICAN CULTURE AND SOCIETY IN THE 1920S*, at 11 (1995).

84. *Id.* at 120.

85. DAVID J. GOLDBERG, *DISCONTENTED AMERICA: THE UNITED STATES IN THE 1920S*, at 14 (1999).

86. *Id.* at 50, 152–53.

87. *Id.* at 140, 159–63.

88. See *id.* at 152–53, 159–66; see also DUMENIL, *supra* note 83, at 8–9; GREEN, *supra* note 82, at 105.

89. See generally ANTHONY J. BADGER, *THE NEW DEAL: THE DEPRESSION YEARS, 1933–1940* (1989); DAVID M. KENNEDY, *FREEDOM FROM FEAR: THE AMERICAN PEOPLE IN*

production dropped in half, and unemployment increased sixfold. In 1932, a vicious deflationary cycle commenced, revealing that President Herbert Hoover's cautious economic remedies were totally inadequate. This led to the overwhelming victory of Franklin Roosevelt in the presidential election and a "new deal for the American people."<sup>90</sup> Harvard Law professors Felix Frankfurter and James Landis played central roles in Roosevelt's administration and recruited many colleagues and new graduates from the Law School to join them, one of whom was Alger Hiss (LL.B. 1929).

Meanwhile, Dean Pound achieved a very different kind of notoriety. Nazism was rising in Germany, spawned partly by the worldwide economic depression. In the mid-1930s, Dean Pound accepted a major honor from the Nazi regime, and rebutted criticism of that regime, as publicly reported and condemned in the press in the United States and abroad. In addition, our new archival research in Germany and in the files of the Federal Bureau of Investigation at the U.S. National Archives disclosed that Pound was entertained by leading Nazis during his trips to Europe in the 1930s, and that he defended and advocated for a Nazi advisee and assistant at Harvard Law School before, during, and after the Second World War.

The second Red Scare began after World War II in the late 1940s and culminated in the demagoguery of Wisconsin Senator Joseph R. McCarthy from 1950 to 1954. *The Intellectual Sword* examines how the widespread fear and controversy engaged those associated with the Law School. In particular, it reveals how the legal doctrine about invoking the Fifth Amendment right against self-incrimination was famously reinterpreted at the Law School and how the crisis of McCarthyism cost at least two students their membership in the *Harvard Law School Record*, the *Harvard Law Review*, and the Legal Aid Bureau. Remarkably, those two students appear to be the source of the doctrinal reinterpretation of the Fifth Amendment, although Dean Griswold has been credited, and accepted credit, for that jurisprudential innovation.

Meanwhile, the Law School was radically reforming its admissions policies. These reforms included the shift from a threshold approach, where an applicant who met a certain level of academic attainment was entitled to admission, to a selective approach, where the Law School selected among all applicants by comparing their credentials. This reform had begun at liberal arts colleges during the 1920s and then diffused into graduate education in the 1930s. Harvard Law School was late in reforming, compared to the rest of higher education institutions.

But the Law School was even later in another respect. At the dawn of McCarthyism, only five law schools in the United States excluded women. One of them was Harvard Law School, whose faculty voted in 1949 to admit women, as they had in 1899, 1909, 1910, and 1942. But only in 1949 did the Harvard Corporation finally approve the change. *The Intellectual Sword*

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DEPRESSION AND WAR, 1929–1945 (1999); ROBERT S. MCELVAINE, THE GREAT DEPRESSION: AMERICA, 1929–1941 (Three Rivers Press 2009) (1984).

90. KENNEDY, *supra* note 89, at 98 (quoting Franklin Roosevelt).

analyzes these admissions revolutions, as well as the courageous persistence of the women students despite the ambivalent, if not hostile, reception by the Griswold administration. Also examined is the experience of the few Latino and African American applicants, and the belated efforts to attract them to the Law School in the 1960s.

In the fall of 1967, Dean Griswold stepped down to become U.S. Solicitor General, and it is widely agreed, even by Griswold himself, that he got out just in time. By 1967, dissatisfaction with the combative culture of the Law School, discontent over the underenrollment of women and people of color, the demands for justice by the civil rights movement, and the protests against the Vietnam War were all beginning to erupt at Harvard. Soon after Griswold departed, the Law School figuratively exploded, along with the rest of Harvard University, between 1968 and 1971. This period encompassed Derek Bok's tenure as dean, and his skill in managing the crises led to his elevation to the presidency of Harvard University in 1971.

During the administration of Dean Sacks (1971–1981) in the ensuing decade, Harvard Law School made small progress on student enrollment and faculty hiring of both women and people of color. The Law School did better than the average law school accredited by the American Bar Association. Yet, as Archibald Cox (LL.B. 1937) said aptly in another connection: “In comparison to other law schools, we probably do fairly well. [But] leaders make the ideal their standard.”<sup>91</sup>

At the same time, the breadth and depth of extracurricular opportunities and clinical programs available to students greatly expanded during the Sacks administration, offering students alternative ways to survive and thrive within the “Spartan culture” of the Law School. The faculty also made an extensive study of the formal curriculum through a committee headed by Frank I. Michelman (LL.B. 1960). The committee's final report offered innovative solutions to academic concerns and long-standing student complaints, but ultimately failed to yield any substantive change due to internal squabbles and political disagreements among the faculty that deepened into cavernous divisions over Critical Legal Studies in the 1980s.

*The Intellectual Sword* concludes its historical coverage by examining the early 1980s, a decade when the very idea of professions was under siege in American scholarship and culture. This attack marked a significant turn in the broad movement of professionalization in the United States, in which Harvard Law School had served as an exemplar.

This broad professionalization movement was first launched during the Progressive Era that extended roughly from 1890 to 1920. Responding to problems arising from the nation's economic and industrial expansion that began after the Civil War, Progressivism attempted to stem political corruption and to remedy social ills and injustices arising from industrialization, urbanization, and immigration. Emphasizing expertise,

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91. This quote is from a confidential memorandum from Archibald Cox to the Harvard Law School faculty dated January 13, 1960. The following section draws upon a student research paper, which is kept confidential at the request of the student.

efficiency, and large organizational systems, Progressives led cities and towns across the country to build school systems, fire departments, police departments, water systems, and sewage systems for the first time. Meanwhile, John D. Rockefeller, Andrew Carnegie, and other industrialists sold their empires, established foundations, and made huge benefactions to higher education.

In the words of sociologist Paul Starr, these developments in the Progressive Era were “inseparable from the rise in status and power of professionals in new occupations and organizational hierarchies.”<sup>92</sup> The reason was that Progressive ideology closely fit the meaning of the term “profession” that had developed over the prior three centuries in America.<sup>93</sup> By the 1890s, the term “profession” had come to denote a dignified vocation pursued by persons who employed sophisticated expertise acquired through higher education, organized themselves into a strong association or guild, and espoused an ethic of serving others.<sup>94</sup> This understanding of “profession,” denoting those three fundamental attributes, was then idealized during the Progressive Era.<sup>95</sup> As early as 1894, the president of the American Bar Association, among many others, extolled “The True Professional Ideal.”<sup>96</sup>

In the 1890s, the preeminence of Harvard Law School, like Johns Hopkins University School of Medicine, coincided with the emergence and idealization of professionalism. This coincidence magnified the stature of the leading university professional schools, particularly in law and medicine, which appeared to stand in the vanguard of social, educational, and national development. Through the early 1960s, professionalism, professions, and professional schools ascended ever higher in status and authority. More and more vocations sought to claim the title of “profession,” and this proliferation prompted a scholarly literature on the “minor professions”<sup>97</sup> and the “semi-professions.”<sup>98</sup> Scholars even began to anticipate “The Professionalization of Everyone.”<sup>99</sup> Culminating this trend in 1968, sociologist Talcott Parsons published a canonical article in the *International Encyclopedia of the Social Sciences* declaring professions to be “the most important single component in the structure of modern societies.”<sup>100</sup>

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92. STARR, *supra* note 25, at 19. See generally KHURANA, *supra* note 23, at 19, 23–192 (discussing the professionalization project which led to the emergence of business schools between 1881 and 1941).

93. KIMBALL, *supra* note 32, at 301–03.

94. *Id.*

95. *Id.*

96. John F. Dillon, *The True Professional Ideal*, 17 ANN. REP. A.B.A. 409, 409 (1894); see also KIMBALL, *supra* note 32, at 1–2.

97. See Nathan Glazer, *The Schools of the Minor Professions*, 12 MINERVA 346, 346–47 (1974).

98. See generally THE SEMI-PROFESSIONS AND THEIR ORGANIZATION (Amitai Etzioni ed., 1969).

99. See generally Harold L. Wilensky, *The Professionalization of Everyone?*, 70 AM. J. SOC. 137 (1964).

100. Parsons, *Professions*, *supra* note 38, at 545.

The bloom of the professional ideal withered during the late 1960s and 1970s. Commensurate with widespread social and political upheaval and “the debunking spirit of much American social science” in this period, praise of professions turned to disdain.<sup>101</sup> Their authority, status, and seeming invincibility made them inviting targets for critical scholarship. In fact, “the very idea of profession was attacked, implying, if not often stating, that the world would be better off without professions.”<sup>102</sup>

During the 1970s, critical scholars anathematized Parsons and “unmasked” his theory of structural functionalism for putatively legitimating the power of elites. Indeed, “power” became the watchword of the new theorists of professions during the 1970s. These debunkers viewed professions purely as “market organizations attempting the intellectual and organizational domination of areas of social concern.”<sup>103</sup> Led by Eliot Freidson, critical sociologists took aim primarily at medicine.<sup>104</sup> In general, their strategy seemed to be that, if the medical profession could be taken down, the entire oppressive professional edifice would be brought to its knees.

Critical scholars also began to “unmask” law, the legal profession, and Harvard Law School as the agents of elite interests. But it is important to see that such attacks were occurring across the entire professional complex, including university professional schools. As a result, all the professions seemed to be undergoing “proletarianization.”<sup>105</sup> Some scholars anticipated the “deprofessionalization of everyone,” including lawyers.<sup>106</sup> Indeed, after being weakened by the critical sociologists in the 1970s, the logic of professionalism began to capitulate to the logic of business and the marketplace in the 1980s and 1990s.<sup>107</sup> Doctors’ practices and lawyers’ firms were increasingly corporatized.

#### CONCLUSION

*The Intellectual Sword* ends in the early 1980s as Harvard Law School and the entire domain of law and legal education were coming under attack amid the social, political, and economic turmoil in the United States. At the same time, the Law School struggled to cope with the interaction between the

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101. KHURANA, *supra* note 23, at 10; *see also* KIMBALL, *supra* note 32, at 317–22.

102. FREIDSON, *supra* note 25, at 28.

103. ABBOTT, *supra* note 25, at 5–6; *see also* FREIDSON, *supra* note 25, at 28; STARR, *supra* note 25, at 143–44. *See generally* LARSON, *supra* note 25.

104. *See generally* ELIOT FREIDSON, DOCTORING TOGETHER: A STUDY OF PROFESSIONAL SOCIAL CONTROL (1975); ELIOT FREIDSON, PROFESSIONAL DOMINANCE: THE SOCIAL STRUCTURE OF MEDICAL CARE (1970).

105. ABBOTT, *supra* note 25, at 18; FREIDSON, *supra* note 25, at 119. *See generally* Martin Oppenheimer, *The Proletarianization of the Professional*, 20 SOC. REV. 213 (1972).

106. *See generally* Marie R. Haug, *The Deprofessionalization of Everyone?*, 8 SOC. FOCUS 197 (1975); Robert A. Rothman, *Deprofessionalization: The Case of Law in America*, 11 WORK & OCCUPATIONS 183 (1984).

107. FREIDSON, *supra* note 25, at 197–98; *see also* KHURANA, *supra* note 23, at 291, 317. *See generally* BRIAN Z. TAMANAHA, FAILING LAW SCHOOLS (2012); Ehrenberg, *supra* note 77; Tamanaha, *supra* note 77.

financial constraints imposed by the long-standing syndrome of tuition dependence, the competitive and combative academic culture that had become its hallmark during the twentieth century, and its legacy of failing to encourage the enrollment of students and hiring of faculty who were not white and male.

Our research continues, and we had originally intended to bring *The Intellectual Sword* to the beginning of the twenty-first century. But several factors prompted us to stop at this earlier point. First, the book was becoming quite large, and we did not want to pare back our findings in earlier chapters or to shortchange the closing decades of the twentieth century. Second, as the subject moves closer to the current day, the dangers of presentism and partiality become more acute.<sup>108</sup>

Third, we have encountered increasing difficulty in conducting archival research in the libraries of Harvard University. In 1986, the distinguished historian Ellen Schrecker, observed that “Harvard is one of the few American universities to keep its archives closed to scholars.”<sup>109</sup> In fact, Harvard seals its records far longer than, for example, the twenty-five-year stricture that the U.S. government applies to its agencies, such as the Federal Bureau of Investigation and the Central Intelligence Agency.<sup>110</sup> Harvard’s official and administrative records are sealed for fifty years and records pertaining to individuals who worked or studied at Harvard for eighty years.

Before the centralization of Harvard’s libraries in 2012, these seals were applied with discretion at individual libraries, and records known to be sensitive were closed. But archivists generally tried to make materials available to researchers. Hence, it was possible to conduct research on many subjects of interest while consulting more recent materials than the seals allowed. But in 2012, Harvard centralized its library system through “a strategic reorganization” in order to “improve[] a fragmented system by promoting University-wide collaboration.”<sup>111</sup>

This centralization was soon followed by stricter, uniform enforcement of the university’s seals on archival materials. By 2014, our research assistants

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108. This change is graphically illuminated by the 1980–1981 Law School “Faculty and Staff” photograph, the last of the deanship of Albert Sacks. Three rows behind Sacks is Daniel Coquillette, his first appearance in a Harvard Law School faculty photograph. From 1981 on, Coquillette was “on the scene.”

109. ELLEN W. SCHRECKER, *NO IVORY TOWER: MCCARTHYISM AND THE UNIVERSITIES* 198 (1986).

110. See Scott Shane, *U.S. to Declassify Secrets at Age 25*, N.Y. TIMES (Dec. 21, 2006), <https://www.nytimes.com/2006/12/21/washington/21declassify.html> [<https://perma.cc/X576-8HHW>].

111. *University Offers Voluntary Retirement to Library Employees*, HARV. MAG. (Feb. 13, 2012), <https://www.harvardmagazine.com/2012/02/library-employees-offered-voluntary-retirement-package> [<https://perma.cc/ZR63-SKD9>]. Another stated purpose of the “strategic reorganization” was to “improve[] a fragmented system by promoting University-wide collaboration” and “enable Harvard to invest in innovation and collections, make decisions strategically, reduce duplication of effort, and leverage the University’s buying power.” *Id.* The “strategic reorganization” and “reduc[tion of] duplication” in 2012 were accompanied by early retirement offers to 275 of the 930 full-time employees of the Harvard libraries, many with long years of service. *Id.*

were being denied access to all Harvard-related files dated later than 1963, per a fifty-year seal, and even older files were subject to a search by archival staff to determine if the files contained any materials pertaining to individuals, which would trigger an eighty-year seal.<sup>112</sup> This shift toward strict and uniform enforcement made research on issues after the mid-1960s much more difficult than it had been previously. In fact, we have found that sources from Harvard Law School that were previously accessed and cited by historians, such as Morton and Phyllis Keller and Justin O'Brien, are now sealed and unavailable to us and other researchers.<sup>113</sup> Many of the papers written by our own research assistants prior to 2012 quote and cite sources that are now sealed to researchers.

The deans of Harvard's various schools are authorized to make sealed materials available at their discretion, but all of our requests for access were denied, even when we agreed and arranged to have an archivist review materials before we saw them. In fact, it appears that Harvard's professional schools are extending the seals beyond those mandated by the Harvard Corporation.

For example, in 2013, Harvard Law School sealed all of the minutes of the faculty meetings, which began in 1871. Without those minutes, which we consulted before 2013, writing *On the Battlefield of Merit* would have been impossible. According to one of our colleagues working on the history of Harvard Business School, the fifty-year seal is interpreted there to mean fifty years after a dean ends his or her tenure. So the early administrative records of a dean who served twenty years are effectively sealed for seventy years. Such an embargo would have obstructed all of our research about Erwin Griswold. Similarly, a collection of student records at Harvard Business School running, for example, from 1927 to 1942 is considered sealed for eighty years after 1942. Hence, the records from 1927 are sealed for ninety-five years. This embargo would have obstructed our research and findings about Roscoe Pound and Nazism.

In effect, it appears that centralizing the Harvard libraries has led to shifting from the traditional approach of promoting access to archives to obstructing it. Moreover, the motivation apparently is not protecting privacy, but exercising proprietary control over records. This new approach seems profoundly ironic in light of Harvard Law School's historical role in reforming the proprietary model of professional education and in advancing—however haltingly, partially, and imperfectly—academic values and open, informed debate. The need for Harvard Law School's intellectual sword, despite all of its drawbacks, has not diminished, at least in regard to this new approach.

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112. Details regarding access to archived Harvard-related files were discussed with the authors via email in November 2014.

113. See generally, e.g., MORTON KELLER & PHYLLIS KELLER, MAKING HARVARD MODERN: THE RISE OF AMERICA'S UNIVERSITY (2d ed. 2007); JUSTIN O'BRIEN, THE TRIUMPH, TRAGEDY AND LOST LEGACY OF JAMES M. LANDIS: A LIFE ON FIRE (2014).

On July 29, 2018, the *New York Times* published a front-page article on Harvard, titled “‘Lopping,’ ‘Tips’ and the ‘Z-List’: Bias Lawsuit Explores Harvard’s Admissions Secrets.”<sup>114</sup> The article focuses on Harvard College admissions, but the topics, including the definition of elites, problems of ethnicity, diversity, and gender, and issues of admissions philosophy are found throughout the pages of both *On the Battlefield of Merit* and *The Intellectual Sword*. At the conclusion of the article, the Dean of Harvard College, Rakesh Khurana, who is cited frequently in our work, made the following observation: “I have a great deal of humility knowing that someday history will judge us . . . . I think that’s why we are constantly asking ourselves this question: How can we do better? How could we be better? What are we missing? Where are our blind spots?”<sup>115</sup> Good institutional histories enable us to answer these central questions. They are the ultimate strategic planning tool. But, most importantly, as Dean Khurana recognized, they teach wisdom and humility.

APPENDIX: TRANSCRIPT\*

JUDGE GUIDO CALABRESI. I knew Pound, and in my judgment, he was always a fascist, but he was not a racist any more than many Americans of that era were. He went to Italy in the early twenties and found that most of the people who were considered serious scholars were pure formalists. They were formalists because this was a defense against fascism: if the law could not change, you could fight fascist attempts to change the law. And the Italian legal system did that to considerable benefit and to protect all sorts of people. Pound was shocked because he was at that time a legal sociologist and the legal sociologists in Italy were fascist hacks. And Pound was scholar enough to recognize that and didn’t like that. There was one man, however, who was a great scholar and had the greatest library in the world, and he was able to do that because he was totally fascist; he even became minister of education. Pound stayed with him every time he went to Italy and made him a member of the American Academy. The reason I know all this is that this man, Giorgio Del Vecchio, is the only fascist in my family. We ostracized him until we made peace with him when he turned ninety.

Now here’s the thing—Giorgio Del Vecchio was of a great, great Jewish family brought to Rome by Titus. They became his slaves and tutors; it’s the part of my family we are most snobbish about. And Roscoe Pound knew, and it didn’t bother him one way or the other. He said again and again that

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114. Anemona Hartocollis, Amy Harmon & Mitch Smith, ‘Lopping,’ ‘Tips’ and the ‘Z-List’: *Bias Lawsuit Explores Harvard’s Admissions Secrets*, N.Y. TIMES (July 29, 2018), <https://www.nytimes.com/2018/07/29/us/harvard-admissions-asian-americans.html> [<https://perma.cc/M9AT-AZ9G>].

115. *Id.* (quoting Rakesh Khurana, Dean, Harvard College).

\* This discussion followed Professor Coquillette’s presentation of this Article at the Symposium. The transcript has been lightly edited. For a list of the Symposium participants, see Matthew Diller, *Foreword: Legal Education in Twentieth-Century America*, 87 FORDHAM L. REV. 859 (2018).

fascism is good enough for these people. I think what happened with Germany was simply an extension of that. Pound thought Nazism was fine.

You've got to put that in the context in which the presidents of Harvard, Yale, and Columbia at that time were racists of the worst sort. President Angell of Yale actually wrote that if we could have something like what happened in Armenia in New Haven, Bridgeport, and Hartford, we might be able to save our Nordic race.<sup>116</sup> In other words, kill off all the Italians, blacks, Jews, and so on. Probably Irish too. I mean, no doubt about that. Harvard took Jews who were fleeing Germany and made them professors; Yale did not. There was not any Catholic or Jewish professor in Yale College until 1946.<sup>117</sup> Fortunately, the Yale Law School was very different.

Finally, Landis, one of the greatest scholars ever. The tragedy of people from that generation who went into the New Deal and then fell apart—William O. Douglas, Fortas—I don't know what was going on, but Landis was not the only one who had problems. To show how great Landis was, in his article about statutes as a source of law<sup>118</sup> he suddenly turns it around and says how statutes can be brought up to date when conditions change.<sup>119</sup> He talks about how nineteenth century wrongful death statutes allowed children and next of kin to recover.<sup>120</sup> At first, they were interpreted to prohibit recovery by illegitimate children.<sup>121</sup> But as attitudes toward illegitimate children changed, the statutes were reinterpreted to cover them.<sup>122</sup> Then he has a footnote, which is fascinating, that there were some states that updated the statutes as to next of kin but not as to illegitimate children.<sup>123</sup> All were Southern states and the out-of-wedlock children were mixed race.<sup>124</sup> In other words, their attitudes hadn't changed and so the law was not updated.

PROFESSOR WILLIAM NELSON: But the question I want to ask is, what made it possible for Guido and John to do the changing? Is it simply what we can see listening to them at the table, the enormous intelligence and charisma of the two of them, or were there conditions on the ground, and what were those conditions?

JUDGE CALABRESI: The conditions of the schools were such that change could be made. You've described New York and what could be done

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116. See Leon A. Jick, Book Review, 60 *NEW ENG. Q.* 614, 616 (1987) (reviewing DAN OREN, *JOINING THE CLUB: A HISTORY OF JEWS AND YALE* (1986)) (quoting Angell, "It seems quite clear that if we could have an Armenian massacre confined to the New Haven district with occasional incursions into Bridgeport and Hartford, we might protect our Nordic stock almost completely.").

117. See MARCIA GRAHAM SYNOTT, *THE HALF-OPENED DOOR: DISCRIMINATION AND ADMISSIONS AT HARVARD, YALE, AND PRINCETON, 1900–1970*, at 265 n.10 (1979) ("Paul Weiss was the first Jew to be hired by Yale as a full professor; he taught philosophy from 1946 to 1962 and was appointed Sterling Professor in 1962.").

118. See generally James McCauley Landis, *Statutes and the Sources of Law*, 2 *HARV. J. ON LEGIS.* 7 (1965) (originally printed in *Harvard Legal Essays of 1934*).

119. *Id.* at 15–16.

120. *Id.* at 17–18.

121. *Id.* at 34 n.36.

122. *Id.* at 34 n.37.

123. *Id.* at 18.

124. *Id.* at 34–35 n.39.

there. The history of Yale Law School is separately different and provided a background that allowed somebody like me to become dean and to do things. Let me tell you about the Harvard background. I visited Harvard the year Derek Bok became dean and it was going to be the year of troubles, so he decided to have a faculty retreat in the Berkshires. During a discussion of the question of student voting at faculty meetings, Detlev Vagts stated that the day students voted was the day he would leave the faculty. Everybody was silent until Frank Michelman said, “Detlev, you don’t mean that.” If someone had said something like Detlev did at a Yale faculty meeting, four people would have made rude remarks about what Vagts said. Instead, at Harvard, no one says anything. When we got in the car to go home, three senior faculty members said, “Frank, you shouldn’t have said that, that was a rude statement, we don’t disagree with anybody in open faculty.” And I thought, this place is going to explode.

PRESIDENT EMERITUS JOHN SEXTON: It was in this period you are discussing, Dan, that NYU was a mediocre university and a less-than-mediocre law school. Felix Frankfurter actually spent a day at NYU Law School and later said it was perhaps the worst law school in the United States.<sup>125</sup> You talked about Roscoe Pound staying too long as Dean (twenty years);<sup>126</sup> Frank Sommer served as NYU Dean for twenty-seven years until he retired in 1943.<sup>127</sup> By then he had reduced the full-time law faculty to three people; the rest were adjuncts.

But, even though the university was by and large a mediocre place in the 1930s, it incarnated New York City’s openness. And, out of this openness came a welcoming charity: independently, two department chairs—applied mathematics and fine arts—wrote to German Jews offering them tenured appointments. Out of this grew two NYU jewels—the Courant Institute of Mathematics and the Institute of Fine Arts. Once they became established in a place that was far less good than they were, they built protective moats around themselves and argued for autonomy and independence. Today, they both are among the finest departments in the world, but they could not be as good as they are without substantial subsidy from the university. This links directly toward our next discussion on finance.

JUDGE CALABRESI: This is so different from other universities. Now, as I say, the Law School at Yale was likewise different, but the university was not. Recently a dean found the letter that was sent when my father got a fellowship to Yale; it is the most insulting letter you can imagine. It said someone has given us money so I guess we invite you, do not think you can stay, you will stay for this time and are not allowed to do this that or the other because we don’t want people like you. Now, as it happened, we managed

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125. See *Felix Frankfurter Dies; Retired Judge Was 82*, HARV. CRIMSON (Feb. 23, 1965), <https://www.thecrimson.com/article/1965/2/23/felix-frankfurter-dies-retired-judge-was/> [<https://perma.cc/7Y5Y-TAL9>].

126. See *HLS Deans*, HARV. L. SCH., <https://hls.harvard.edu/about/history/hls-deans/> [<https://perma.cc/CZZ8-BEPF>] (last visited Nov. 15, 2018).

127. See *Frank H. Sommer, Ex-Law Dean, Dies*, N.Y. TIMES, Aug. 20, 1957, at 27.

to stay, but that was not NYU. You have to put Harvard in that context where it was probably a little better than Yale, which was certainly better than Princeton.

PROFESSOR NELSON: Landis and Pound were both significant, substantial men of remarkable ability. As I said last night at dinner, we have the two great deans of the second half of the twentieth century here with us. Both of them transformed their schools; they took charge of places that were substantially better when they left than when they took charge. What is fascinating about Pound and Landis is that they didn't succeed in doing that.

PROFESSOR DANIEL COQUILLETTE: That's a very good point. With Pound, the faculty got fed up with him because he essentially believed that the LL.B. program should stay just as it was under Langdell and Ames. He put all his efforts and his own advanced thinking into the graduate programs. The faculty got so upset that they asked the university president, not Pound, to appoint a committee to study the curriculum. Pound fought any change. Landis wanted change, but he was frustrated by alumni and was a terrible fundraiser. He thought he couldn't go to the people he had regulated when he was at the SEC and the FTC and ask them for money. He was not going to ask the corporate lawyers for money; he thought that would violate his integrity. So, he didn't raise any money and left the Law School in a really tuition-dependent state that made change in the LL.B. program impossible.

PROFESSOR ROBIN WEST: I was just going to ask you to respond to Guido's point about context.

PROFESSOR COQUILLETTE: We're telling the facts the way they are. But naturally we have to say this is what the environment was like. So we try to do that with Pound—we say that the university was welcoming German military officers, Hitler's press secretary came back for his reunion because President Conant said anyone could come for their reunion, Jewish demonstrators were arrested, and President Conant refused to intervene on their behalf. So you have to see Pound against that background. But I still think the book says Pound's position was wrong. He could have been on the cutting edge of history, but he wasn't.

PROFESSOR KENNETH MACK: The question about Pound is whether he was an anti-Semite or just a sort of authoritarian? Sounds like he's just an authoritarian. If so, how can he think of the New Deal as he does? When it comes to the New Deal, he thinks of himself as Lord Coke.

PROFESSOR COQUILLETTE: Yes, he's opposed. He thinks that Roosevelt is dangerous.

PROFESSOR MACK: So, for instance, there's a question in the 1930s of whether or not Harvard Law School is going to hire a second Jewish professor. Nathan Margold is proposed at one point. Where is Pound on that?

PROFESSOR COQUILLETTE: Pound was not anti-Semitic and we have records of his helping Jewish graduates in the 1930s. But he was a coward

in dealing with President Lowell, who was anti-Semitic and racist.<sup>128</sup> Lowell told Pound that the Law School had a Jewish quota of two and, if they employed Margold, they were not going to get another Jewish slot. Frankfurter thought Pound should have fought back and never forgave him for failing to do so.

PROFESSOR MACK: I have a second question about Pound's relationship with a few black students at Harvard in the 1920s and 1930s. Many came for graduate study and wrote dissertations. Who did they work with?

PROFESSOR COQUILLETTE: My guess is that they worked with the liberal faculty that Pound appointed in his first ten years.

PROFESSOR MACK: Somebody can go read those dissertations and find out.

PROFESSOR COQUILLETTE: Based on this session, we're going to be making changes in the manuscript.

JUDGE CALABRESI: Even at the end of his life, Pound was more complicated. The bad parts of Pound are certainly there. But when I was first on the Yale faculty, a trial lawyers' association set up the Shulman Lecture, named for a Jewish friend of Frankfurter who had become dean at Yale. They asked us to ask Pound, who was in his nineties, to give the first lecture. He was terrible—so old he didn't know what he was saying. But from their point of view, he was pro-jury and against courts that were narrow in what they would do, so there was a side of him that remained the Roscoe Pound of the beginning.

PROFESSOR ROBERT KACZOROWSKI: When I was doing research on Fordham and reading secondary sources on racism, quotas, etc., I found that elite law schools were trying to maintain their elite status as white Anglo-Saxon Protestant bastions. When Fordham one year reached a Protestant enrollment of 20 percent, the dean said, "we've arrived." The quotas I found were not simply against Jews, they were against Catholics. In the early twentieth century, Harvard Law School would not accept applicants from Catholic colleges or Irish from Boston.

JUDGE CALABRESI: Yale College did not have a Catholic or Jewish full professor until 1946.<sup>129</sup> The head of the French department was always a native-speaking Frenchman, but a Huguenot. They didn't know there were Italian Protestants, the Waldesians, so the head of the Italian department was never a full professor. When I told them about the Waldesians, they responded as if maybe we can have a head of the Italian department. It was that conscious. I don't think we have any idea of how much these universities were elite Protestant.

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128. JOEL SELIGMAN, *THE HIGH CITADEL: THE INFLUENCE OF THE HARVARD LAW SCHOOL* 59 (1978) ("According to one Pound biographer, 'Others shared Frankfurter's disgust that Pound, the most powerful dean at Harvard, failed to wage a vigorous campaign when Lowell objected, on two occasions, to appointing Jewish scholars to the law faculty.'").

129. See *supra* note 117 and accompanying text.

PROFESSOR COQUILLETTE: The way admissions worked at Harvard Law School was if you were on a list of accepted universities, you were admitted.<sup>130</sup> They originally put Georgetown on the list, but when B.C. and Fordham said why aren't we on the list, they took Georgetown off. You could still qualify by taking a special exam, but very few got in that way. They controlled it by which colleges they put on the list. When Lowell said to Pound, "We need to keep the number of Jews down to 12 percent," Pound could have said: We're not doing too bad, there's only 14 percent. But he said: You have to understand, Lowell, we have open admission here; the only way we can control the number of Jews at the Law School is by who we put on the list.<sup>131</sup> Yale, Princeton, Williams are good. But they couldn't put on the list Brooklyn, NYU, or other schools with a large number of immigrants. The operation of the quota system was indirect. When Landis put an end to this and introduced scientific admissions, that was the end of the de facto quota system. That was a thing Landis achieved.

JUDGE CALABRESI: The quotas of Yale and Princeton would just flip over to Harvard Law School. Harvard Law School took advantage of quotas from the colleges they wanted to draw from so they could have a quota without having a quota.

PRESIDENT EMERITUS SEXTON: There's an interesting side to this. My high school teacher, a poet and Jesuit priest, Daniel Berrigan, in 1956 wrote on a blackboard in Brooklyn the Latin words, "*extra ecclesiam nulla salus*" ("outside the church there is no salvation"). When I asked him if that meant my best friend Jerry Epstein would not go to heaven, Father Berrigan answered, "Unless you baptize him, he won't go to heaven." In 1959, when a classmate wanted to apply to Dartmouth, the school would not send his transcript to Dartmouth. We weren't allowed to apply to a non-Catholic college unless it was a military academy. His parents insisted, and the school did send the transcript, but they made my classmate come and pick up his diploma the day after graduation; he could not graduate with us. Fifty years later he told me he never went to mass again. It's complicated when a group we say is excluded is, at least in part, excluding itself. I am speaking of exclusion based on religious grounds (at least for Catholics), of course, not exclusion on other grounds. Bill Buckley had written *God and Man at Yale*,<sup>132</sup> which the last time I was in New Haven was still in the window of the Yale bookstore. He argued that if you did well at such a place, you would lose your soul.<sup>133</sup>

JUDGE CALABRESI: This notion about who is in and who is out, yes that was the Catholic heresy because it was wrong but it was repeated all

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130. COQUILLETTE & KIMBALL, *supra* note 1, at 499 ("The new standard limited admission to those holding 'respectable' degrees specified on a list in the annual catalog.").

131. *Id.* at 608 (explaining that the university had quotas for Jewish students until the end of Lowell's presidency).

132. See generally WILLIAM F. BUCKLEY, JR., *GOD AND MAN AT YALE: THE SUPERSTITIONS OF "ACADEMIC FREEDOM"* (1986).

133. See generally *id.*

over. The notion we are in, you are out, and each one excluding the other is unfortunately part of the American tradition.

PRESIDENT EMERITUS SEXTON: This mutuality is not true of women and blacks. Let's be clear about that.

JUDGE CALABRESI: That's right.

PRESIDENT EMERITUS SEXTON: But these religious lines get complicated.