CAN U.S. LAW SCHOOLS ESCAPE THE LEGITIMACY TRAP?[†]

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In this brilliant article, Professor Rahim sheds new light on a stubborn mystery in legal education: the resilience of outdated and ineffective pedagogical approaches in U.S. law schools. As Rahim notes, scathing critiques of the dominant Langdellian style of teaching in U.S. law schools have appeared over many years, but to little avail. From Llewellyn and Frank through Sturm and Guinier, law teachers have offered incisive, well-grounded evidence of the misguided nature of our standard U.S. law pedagogy. Empirical research has undercut any possible claims as to the superior efficacy of Langdell's approach while also documenting its many deficits. To be sure, the mystique surrounding the idea that Socratic teaching helps students to "think like lawyers" has provided some cover for advocates of the traditional pedagogy. And because the current system preserves and rationalizes existing hierarchies, it also arguably supports—and is legitimated by—larger power structures in the wider society. But Rahim provides a more exact account of how today's persistent dysfunction developed from its origins into the misguided "legitimacy trap" in which we find ourselves. Tracking this path-dependent connection requires detailed analysis of specific practices within institutions (i.e., law schools), within their social contexts, over time.

For his analysis of legitimacy, Rahim draws on research by sociologists.[1] Their sociological framework explains how institutions (and individuals within them) create, validate, diffuse, and widely legitimate specific practices, beliefs, and structures that together stabilize organizational forms. While those forms become so taken-for-granted that they seem natural, they may actually undercut

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[1] The theoretical framework on which Rahim draws is based in a synthesis of social psychological and institutions/organizations research on legitimation at many levels, from individual and group status characteristics through stratification throughout organizations and society. This synthesis draws on a powerful range of empirical approaches, including experimental, historical and economic studies; quantitative analyses of legal cases; research on discourse in professional journals; and event-history methods, among others. See, e.g., studies cited in Cathryn Johnson, Timothy Dowd & Cecilia Ridgeway, *Legitimacy as a Social Process*, 32 ANN. REV. SOCIO. 66 (2006). On legitimacy, see Mark Suchman, *Managing Legitimacy: Strategic and Institutional Approaches*, 20 ACAD. MGMT. REV. 571 (1995).

the stated purposes of institutions, becoming increasingly irrational over time. Rahim's article demonstrates how this legitimacy framework makes sense of our continuing failure to reform legal education.

In particular, Langdell's use of an evolutionary model to deliver "survival of the fittest" in legal education was driven not by pedagogical efficacy, but by a desire to raise the field of law to scientific status within the university, moving away from the lower-status trade schools that had focused on law practice.[2] His approach was initially on its way to extinction precisely because it failed to produce practice-ready lawyers. However, the misfit pedagogy was rescued by emerging Wall Street law firms that, ironically, wanted lawyers untrained in practice, so that those firms could train their own initiates from scratch. What those firms wanted were young men (sic) who had been tried by fire, who had shown themselves able to handle in-class hazing and public humiliation when grades were posted, and who had proven themselves tough enough to survive law schools' purposefully difficult "elimination tournament." These culturally informed values echoing priorities of masculinity fed directly into a similar "Cravath" system in law firms, where manly endurance was valued for its own sake.

As Rahim points out, Harvard was itself in a competition to dominate the law teaching market, and it succeeded in large part by aligning with Wall Street law firms while wiping context and practice out of everything from classroom teaching methods, to casebooks, to hypo-based exams, to a set of standardized first-year law classes that did little to prepare students for the real worlds of lawyers. In Rahim's account, the legitimating moves of a small group of elite men did indeed move from a localized institutional set of practices; through validation in a world of business, law, power, and prestige (heavily skewed in terms of race, gender, and class); to wider dissemination through networks founded on hierarchically based mimesis[3] and homophily. When we track this

[2] Darwin's theory was arguably much better suited to application within its original natural scientific field of biology. Academic debates abound over Darwin's own attitude toward "Social Darwinism," the meaning of "survival of the fittest," the contributions of Herbert Spencer, and the specific application of these phrases through history. However, there can be little doubt that a central idea—that social success reflects biological superiority (with citations to evolutionary theory)—has continued to provide ill-founded grist for arguments relegating certain races and classes to lower status while bolstering claims by elites that their status is deserved. *See* STEPHEN JAY GOULD, THE MISMEASURE OF MAN (Rev. Ed. 1996); DOROTHY ROBERTS, FATAL INVENTION: HOW SCIENCE, POLITICS, AND BIG BUSINESS RE-CREATE RACE IN THE TWENTY-FIRST CENTURY 35 (2011); Aaron Panofsky, Kushan Dasgupta & Nicole Iturriaga, *How White Nationalists Mobilize Genetics: From Genetic Ancestry to Counterscience and Metapolitics*, 175 AMER. J. PHYS. ANTHROP. 387 (2021)).

[3] *See* Asad Rahim, *The Legitimacy Trap*, 104 B.U. L. REV. 1, 9-10 (2024) (citing Eva Boxenbaum & Stefan Jonsson*, Isomorphism, Diffusion and Decoupling: Concept Evolution and Theoretical Challenges*, *in* THE SAGE HANDBOOK OF ORGANIZATIONAL INSTITUTIONALISM 77, 79 (Royston Greenwood, Christine Oliver, Thomas B. Lawrence & Renate E. Meyer eds., 2d ed. 2017)).

process using the legitimacy framework, it seems foolish to imagine that the specific contexts and histories in which institutions developed could somehow become irrelevant over time. To the contrary, as Rahim shows us in the instance of U.S. legal education, culturally based skewing may become less visible and more naturalized—but that only hides what is going on, while increasing a sense that the system is working as it should. Thus it is that deeply irrational law school admissions and pedagogical criteria have continued to dominate in a profession that proclaims its desire to be inclusive and fair, as part of a democratic system. Rahim rips back the rationalizations that justify today's dominant forms of law teaching and scholarship as they operate at a far remove from law in action.[4]

Rahim's critique comes at a time when promising efforts at bar reform are similarly highlighting the irrational and exclusionary nature of bar exams—our primary ways of assessing students' readiness for practice. In her recent book on bar admission, Professor Joan Howarth traces a clear line from Langdellian practices to the irrational use of bar exams that have virtually no relation to the practice of law.[5] Like Rahim, she similarly notes a history of irrational criteria for legal education and admission to practice, with a clear exclusionary throughline—which, as historian Robert Stevens remarked, was not truly oriented to producing "a broadly based, technical competent, ethical, social responsible bar, but rather . . . to ensur[ing] the maintenance of the Anglo-Saxon male hegemony."[6] Reading Rahim and Howarth, alongside the many studies they cite, one could surely wonder how the legal profession could ever have bought into such irrational systems. Howarth cites law professor Richard Delgado to the effect that "those in power always make that which they do best the standard of merit."[7] But how do they succeed in doing so?

[4] Rahim's account raises a further question about the intertwined development of Harvard-style legal training and of U.S. law itself. Lawyers and judges trained in the casebook approach can feel entirely comfortable divorcing legal decisions from the equities of cases, from considerations of unequal access to justice, from the ethical foundations that gave rise to particular decisions, or even from justice itself. On corrections to this oversight, see Stewart Macaulay, *Introduction: Dodging the Worst of the Horns on the Bramble Bush*, *in* KARL LLEWELLYN, THE BRAMBLE BUSH: ON OUR LAW AND ITS STUDY at xii-xxi (2012).

[5] JOAN HOWARTH, SHAPING THE BAR: THE FUTURE OF ATTORNEY LICENSING (2023).

[6] Robert Stevens*, The Nature of a Learned Profession*, 34 J. LEGAL EDUC. 577, 583 (1984), cited in HOWARTH, *supra* note 5, at 27.

[7] Richard Delgado, *Rodrigo's Tenth Chronicle: Merit and Affirmative Action*, 83 GEO. L.J. 1711, 1721, cited in HOWARTH, *supra* note 5, at 29. As Howarth and many others have pointed out, bar exams lack fundamental validity: they are not based in any empirical research on the skills actually needed in law practice. The fact that they provide handy numbers for ranking people, based in time-limited paper-and-pencil testing, does not substitute for careful links between testing and practice. Happily, there is now a mounting pile of empirical evidence on which to base decisions about training and testing. *See, e.g.,* NEIL HAMILTON, ROADMAP: THE LAW STUDENT'S GUIDE TO MEANINGFUL EMPLOYMENT (3rd ed) (2023); DEBORAH JONES MERRITT & LOGAN CORNETT, BUILDING A BETTER BAR: THE TWELVE BUILDING BLOCKS OF MINIMUM COMPETENCE (2020); THIADORA ANN PINA, LAURA JACOBUS

Professor Rahim shines a powerful light on why highly abstract forms of testing, rankings, scholarly products, and teaching in legal education—all far removed from the realities of law practice—have acquired a mantle of legitimacy despite their dysfunctional effects.[8] Time and ideology have hidden the exclusionary, historically specific roots of today's legal education. Erasure of social context and power from the "objective" conversation in and beyond law classrooms has not levelled the playing field, as Rahim's article teaches us. That erasure has merely left lawyers, law students, and law professors less equipped to handle the challenges arising from the changing landscapes of law and society.[9]

& RUPA BHANDARI, ESSENTIAL LAWYERING SKILLS (2021); Michael Frisby, Sam Erman, Victor Quintanilla, *Safeguard or Barrier, An Empirical Examination of Bar Exam Cut Scores,* 70 J. LEGAL EDUC. (2022); Joan Howarth & Judith Welch Wegner, *Ringing Changes: Systems Thinking About Legal Licensing*, 13 FIU L. REV. 383 (2019); Deborah Rhode, *Legal Education: Rethinking the Problem, Reimagining the Reforms*, 40 PEPPERDINE L. REV. 437 (2013); David Wilkins, *Professional Ethics for Lawyers and Law Schools: Interdisciplinary Education and the Law School's Ethical Obligation to Study and Teach about the Profession*, 12 LEGAL EDUC. REV. 47 (2001).

[8] As Rahim demonstrated in his fascinating study of raced discourse in legal education, white students feel encouraged to talk about race, while Black law students who comment on race feel discounted as "unintellectual." Asad Rahim, *Race as Unintellectual*, 68 UCLA L. REV. 632, 661 (2021). His research further revealed the way current pedagogy alienates students concerned with diversity—by using materials denuded of social context and by discouraging conversations on issues such as race as "taking away class time." *Id.* at 673.

[9] This perspective turns the debate about affirmative action on its head, as it is the students admitted through the current system, with its layered history of rewarding social privilege and capital, who are receiving special treatment. Like Rahim, Professor Bennett Capers shows how inherited practices and values in U.S. legal education, "the numbers, the architecture, the what, and the how we teach," work together to create spaces that are not neutral racially. Bennett Capers, *The Law School as a White Space*, 106 MINN. L. REV. 7, 41 (2021). Linguistic anthropologists would add that the "unmarked" racial space—the space of the majority, generates a mirage of neutrality through its backgrounded character (as did "unmarked" male gender in times gone by (use of "he" and "man" for everyone)). We specify or mark the parts of the legal academy that include people of color, women, and/or other outsiders: "feminist legal theory," "critical race theory"—but not "white and/or male theory" for the assumed center: that remains unmarked "legal theory" or "jurisprudence." Use of marked forms itself sends a message: this is not the center, this is not "legal theory" *tout court*. That quiet system in and of itself delivers affirmative action—preferential treatment for those in the unmarked centers. Anthropologist Zora Neale Hurston and sociologist W.E.B. Du Bois explained this long ago, had "we" in the unmarked center thought that we needed to read them. W.E.B. Du Bois, *The Souls of White Folk*, *in* W.E.B. DU BOIS WRITINGS 923-938 (Nathan Huggins ed., 1920); Zora Neale Hurston, *How It Feels to Be Colored Me.* (available at https://www.thoughtco.com/how-it-feels-to-be-colored-me-by-zora-neale-hurston-1688772) (1928). Rahim offers a measured, unblinkered history to help the profession see through the fog that has hindered reform.