THE PAPER CHASE: A REFLECTION UPON PROFESSOR ASAD RAHIM'S THE LEGITIMACY TRAP[†]

PATRICIA J. WILLIAMS[*]

Three years of my tender youth were passed in the bleak-yet-blessed embrace of Harvard Law School. By all measure, I was fortunate: admission was, and remains, the equivalent of Willie Wonka's Golden Ticket. The diploma alone has endowed me with opportunities I might otherwise never have known existed. I am grateful for a lucky life indeed. Nevertheless, reading Asad Rahim's excavation of what he calls "the legitimacy trap" made my head reel and my body ache at the recollection of how savagely enervating were those three excruciating years sacrificed to endless battles royales.

It was fifty years ago. From the day we crossed the sacred threshold of Langdell Hall, the Great Professor's stern legacy wrapped us in its spell. All of us 1Ls were told that thinking like a lawyer meant becoming a "red meat eater". It meant never sleeping. It meant dog-eat-dog. It meant developing a thick skin and just a touch of sadism. While few within those walls ever used language that was explicitly sexist or racist or antisemitic, the rituals of upper-class indirection and clubby masculinity effectuated a slow sifting process that performed precisely such exclusion silently, subtly. It was so calcified it was hard to breathe. No one actually told us we were in training to *be* "old boys"; it was simply the zeitgeist, just the way things were. And if some of us were less skilled at devouring each other whole—i.e., if we never developed "a taste for blood"—well, it took time to appreciate how significantly that might constitute a proxy for exclusion.

Few of us rabbits abiding tentatively on the perimeter realized that merely deflecting from the fight might be seen as a lack of merit. (Paradoxically, as a woman, I did sense that vaulting myself into the fray would be seen as "unbecoming.") Some of us rabbits wouldn't discover until years later the invisible constellations of hierarchy about which we were never told, the layers and layers of manners, money, and intergenerational affiliation that were required to completely "fit in"—no matter how hard we worked or sought to prove ourselves. There were secret societies, for example. Take the Choate Club, an invitation-only cohort of some (but not all) faculty and some (but not all) students. In secret, they held once-a-month dinners to which they invited towering legal and political figures, like a senator, or a name partner in a top Wall Street firm, or maybe the Secretary of State, or the Speaker of the House, or an ambassador whose name might have been in that day's headlines. In 1968,

[†] An invited response to Asad Rahim, *The Legitimacy Trap*, 104 B.U. L. REV. 1 (2024).

[*] Distinguished Professor of Law and Humanities, Northeastern University School of Law.

the Harvard Crimson ran a piece about the public "exposure" of the club's existence and subsequent immediate disbanding, but I heard stories of its continuing to meet secretly at least through the end of the 1970's. For all I know it still exists…

I was shocked when I learned about it (as were those lesser-rung professors who'd been left in a similar dark of exclusion.) I had so worked hard to distinguish myself as at least "game-worthy" in the boxing ring of the classroom. It seemed deeply and unfairly skewed to discover that the student sitting next to me might have shared foie gras and sherry the previous evening with not just our professor and but a Supreme Court justice—indeed maybe the very justice who'd written the opinion upon which I was being interrogated via a cold call. As the article in The Crimson observed:

> [A] secret fraternal order of faculty and students does great damage at a competitive institution which justifies its competitiveness on the accuracy of its system for rewarding merit. Where one decimal point in the grade average means a jump in class rank of twenty places and where a good letter of recommendation from a faculty member can be the difference between two students lumped at the middle of the class, there are few students who would not welcome the chance to fraternize with faculty on a regular basis. This "competitive advantage' of membership is accentuated when other students are considered, and rejected, by both students and faculty. . . . To secretly institutionalize informal social contact between students and faculty, and to bestow membership on those students whose gentility will no doubt profit them, in time, outside the ivory tower, is to taint the ivory tower with a bit too much of the real world.[1]

I arrived in the fall of 1972, part of a class whose members included more blacks and women than it had ever had in its past—but which was still a very small number. There were a couple of Latinos but no Asians of any sort as far as I can recall. Yet even that minimal diversity was perceived as an encroachment; Blacks and women were endlessly interrogated, tested, disparaged, and isolated. I remember one classmate, during a casual walk toward the library, cross examining me about how and where I had grown up, drilling down about scores on every test I had taken since 9th grade, what my parents did, and whether I had grown up in a "freestanding house." In and out of class, the sneeringly cruel potential of Langdell's gladiatorial method was still at its most bruising height.

Upon graduation, I had learned a great deal about the limits of my own endurance, but I began my practice as a trial lawyer quite unprepared for the helping art that is actual representation of clients. I learned that much on-the-job. Later, in teaching, I have spent much of my career glancing in the rear-view

[1] *The Choate Club*, CRIMSON (Apr. 30, 1968), https://www.thecrimson.com/article/1968/4/30/the-choate-club-pto-the-editors/ [https://perma.cc/X3AK-236K] (internal quotation omitted).

mirror, trying to reimagine more relevant and client-centered ways to professionalize legal practitioners.

Thus, in response to Professor Rahim's excellent provocation, I offer only a few short thoughts drawn from that retrospection: As someone who looks back on my own law school experience with a yearning eye for reform, I can cite several individual pedagogues who have inspired remarkable changes to the abstract formalism of Langdell's methodology:

(1) the legendary Derrick Bell, who taught civil rights law using a practice model that engaged students in role-play: performing negotiations, writing briefs, presenting formal arguments, and judging one another. Almost no one was doing that in the 1970's. His was the liveliest and most interactive class I ever took.

(2) the gentle, witty Stewart Macaulay, well-known as a theorist of law-in-action in contract law and past president of the Law and Society Association. I got to know him during my short tenure at the University of Wisconsin, and his philosophy of teaching impressed me at least as much as his ideas about relational transactions in franchising: Macaulay's influence extends beyond the classroom to include every faculty member alongside whom he taught. At his instigation, we of the contracts/business law cohort all met once a week for lunch, to discuss the cases we were teaching, any vexing questions from students, and fresh sources we might wish to include to enhance our collective understanding. This was not only a practice of congeniality; it was an exercise that echoed what practicing lawyers must do anyway. Transposed into an academic practice, it boosted everyone's confidence, provided a well of shared insights and greatly increased mutual respect. It was the committed weekly ritual of it that created a community rare in teaching dry business courses. We became bonded in networks of tiny personal exchanges that were neither competitive nor condescending.

(3) the polymathic Michael Meltsner (law professor, family therapist, novelist, and playwright) also provides an admirable example of someone who has reshaped legal education, in particular through his commitment to clinical offerings, and at a time when few law schools had anything of the sort. Meltsner co-founded the clinical program at Columbia Law School, helped shape Harvard's First-Year Lawyering Program, and, as former dean of Northeastern Law School, helped institutionalize and expand the robust clinical and coop programs that make its curriculum so unique.

At the institutional level, Northeastern remains, in my opinion, the best example of a more practice-oriented form, deploying early on a comprehensively integrated approach to legal education, using coops to incorporate aspects of apprenticeship with the more formal aspects of the classroom as the site of instruction—thus replicating how legal cases and

controversies appear in the real world when a client walks in the door seeking assistance.[2]

In my experience, the other best example of reform in legal education is CUNY Law School. Its founding, in 1983, was conceived as a direct challenge to the Langdellian notion of law schools as feeders exclusively for white-shoe law firms.[3] In concert with Charles Halpern, CUNY's first dean, pedagogical pioneers like Howard Lesnick, John Farago, Rhonda Copelon, Jack Himmelstein, and teams of others came together and restructured the entire first year curriculum to foreground and enable the school's express mission of "law in the public interest."[4] Students were assigned to "houses" or mini-"firms" replicating the dynamic of a law firm. Students worked together on semester-long problems, and hypotheticals patterned after real-life cases.[5] The basic first-year courses of property, contracts, torts, crimes and civil procedure were reconceptualized so that they were team-taught and relabeled. For example, Property and Contracts were co-taught as "Law and the Market Economy."[6] The overlapping interests of Torts and Crimes were re-thematized as "Responsibility for Injurious Conduct." Constitutional Law appeared within the rubrics of "Liberty, Equality, and Due Process" as well as "Constitutional Structures."

Both CUNY and Northeastern remain wonderful examples of what could be possible in a practice model that foregrounds the skills needed to meet the ethical needs of real clients. But I close with a caution: we are facing a new world of scientism in legal education that presages a transformation as seismic as Langdell's calculated undoing of what came before: the challenge being the redesign of all pedagogies in an era of algorithmic revolution. I wonder whether the scientism of another era has not been replicated by the quantification of legal study and practice via efficiencies of risk calculation, particularly as embedded in ever-more ubiquitously automated decision-making. If "Thinking like a lawyer" actually meant "thinking like a man"; and thinking like a man meant thinking more like a hard scientist—it remains to be seen where "thinking like an algorithm" will deliver us in the annals of justice.

The adherence to rigidly positivistic methodologies, built into the Langellian beginnings of legal education, leaves legal reasoning, in sub-sonar resonances, open to quantification and ideological calculations that are numerical in their

[2] *See Experiential Learning/Co-op*, NE. UNIV. SCHOOL OF L., https://law.northeastern.edu/experience/ [https://perma.cc/4HPN-SP9L] (last visited May 6, 2024).

[3] *See About CUNY Law*, CUNY SCH. OF L., https://www.law.cuny.edu/about-us/ [https://perma.cc/AA2Q-Q8PV].

[4] *See* Charles R. Halpern, *Creating a New Law School*, 3 N.Y.C. L. REV. 233 (2000); John M. Farago, *The Pedagogy of Community: Trust and Responsibility at CUNY Law School*, 10 NOVA L.J. 465 (1986); *Looking Back: 30 Years of CUNY Law's Clinical Program*, CUNY Sch. of L. (Feb. 1, 2016), https://www1.cuny.edu/mu/law/2016/02/01/looking-back-30-years-of-cuny-laws-clinical-program/ [https://perma.cc/67JD-7F2T].

[5] Farago, supra note 4, at 469-70.

[6] *Id.* at 476.

essence. Just think about the hypereconometric structures of the Law and Economics movement. Just so, algorithmic decisionmaking tends to structure epidemiological probabilities as fact. Furthermore, structured platforms and online products like Perusal or Canvas or PackBack are becoming required tools of educational assistance; those products monitor the amount of time a student spends doing the reading—which means that to grade students, more and more of the reading must be done in precise locations online. This translation of time spent reading as flatly reflective of a student's depth of understanding is a newly scientistic quantification of the mechanics of learning. Platforms also can count the frequency of underlining and numbers of marginal notations; and they can structure or require students to talk to one another at least X number of times a week; and it is the algorithm that assigns meaning to those engagements, as grades.

Needless to say, I am cautious about technology's ability to insist upon, and incorporate as evaluative requirements, quantitative metrics that rank students, that count their contributions, that require a baseline of aggressive participation via specific machine-legible acts. This transforms the classroom—or the chatroom, or the online library qua reading room—into a networked surveillance mechanism. It turns space for deliberative exchange, revision, and thoughtful listening into a series of theatrical, formal inscriptions; particular gestural traces are rendered unto the machine. This displaces other forms of deliberation and introduces a pace or a pacing of externally observable participation. In other words, a student can be required to have spent X number of hours, made at least 10 notations or annotations, and have responded Y number of times to Z number of classmates. Preparing for class becomes one big time-sheet. The mechanics of online delivery of status to digital voyeurs is a form of "double consciousness" that norms us by channeling and constraining rather than expanding not only what we are permitted to think, but how we are permitted to think.

I am not doubting that mechanical assistance, any less than typewriters or dictaphones, can be extremely beneficial in either learning or in practice. I merely wish to call attention to the way such technology is becoming dominant—and can be exclusionary in new ways. Its dominance can devalue other means of knowledge production and interpretation. Most worrisome, it may bewilder our most ambitious efforts to expand legal education: this counting of data points is not the same skill as building a case, listening to a client, or figuring out how to speak on behalf of another.