*Open Letter*

# A Future for Legal Education

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A deepening malady marks the present and threatens the future of legal education: not enough of it can be properly described as education, much of it is mere training, and the remainder is neither.

This state of legal education is unexpected when we consider four obvious facts. First, at no other time or place has legal education been better overall than it is today in the United States. Hence, there is no place for nostalgia here. Second, legal thought is not rocket science—it is harder. Consequently, legal education ought to be a seriously challenging, demanding, and exciting intellectual endeavor. Third, law schools select faculty and students from among some of the best intellectual and entrepreneurial talents. These are typically people holding high aspirations for themselves, their societies, and the world at large. Fourth, in law school,

gifted and ambitious individuals encounter one of the best-funded fields of study in the history of universities.

The combination of intellectual and entrepreneurial talent, high aspirations, and resources should lead to extraordinary contributions to the world of ideas and to solving the problems the world faces in delivering on the promises of justice, respect, peace, and prosperity we continue to make each other. Yet, legal education proceeds steadily down the path of merely providing mid-level technical training in an increasingly commodified academic environment.

In this environment, too many of the intellectual and entrepreneurial lions arriving yearly at the steps of law schools are routinely turned into intellectual and social lapdogs through a process that both legitimizes and rewards impoverished thinking about the law and timid engagement with the world's problems. Of course, there are exceptions everywhere, but the general malady of legal education is clear enough to anyone giving it unbiased attention. What explains this ailment? What to do about it?

**The Situation of Legal Education**

The immediate cause of the malady of legal education is the prevailing structural bias of law schools toward three symbiotic attitudes, which I label *practicism*, *minimalism*, and *parochialism*.

*Practicism* is what an education that ought to cultivate a deep and wide foundation for individual and collective achievement in any of the many professions in law degenerates into under conditions of minimalism and parochialism. Practicism is the view that the zones of intellectual, social, political, and economic engagement through the law – such as government, the press, social movements, international organizations, non-governmental organizations, services business, management, industry,

politics, cultural production, science and health, and law firms of all types – are best understood as mid-level technical domains, the relevant know-how for which rests in skillfully operating a relatively small set of legal *tools* in the performance of tasks of low to moderate complexity.

Of course, a lot of legal work is precisely of that nature, and learning how to do it well is important. However, were technical training all there was to law, institutions granting one or two-year technical certificates might be better hosts for this type of instruction.

Now, why would any law school develop a bias in favor of practicism? To understand why, we need to turn to the companion phenomena of minimalism and parochialism.

*Minimalism* is what the ideal of high and diverse scholarly and professional aspiration in law degenerates into under the influence of practicism and parochialism. Minimalism is a multifold phenomenon. First and foremost, it has an intellectual aspect. In this first sense, minimalism is the view that the learning of—and what is to be learned in—law is reducible, first, to socialization into guild-member attitudes and jargon and, second, to learning rules, precedents, and technical notions, all mixed up with an often superficial form of cost-benefit analysis. It might be suggested that, psychologically, many would experience intellectual minimalism as reassuring: as offering an undemanding level of subject-matter mastery that allows those so trained to deploy lawyerly attitudes, language, and technique to arrive at smart answers to contained legal questions.

However, intellectual minimalism is not the same as anti-intellectualism. The self-understanding of those who teach and study the law is that they are highly intellectually motivated and sharp. I agree. What distinguishes intellectual minimalism from anti-intellectualism is that the former views the world and the discourses that seek to make sense of and to engage with it as essentially simplifiable. For example, intellectual

minimalism holds that the intellectual traditions we engage cannot possibly be significantly broader than what the twenty most popular authors have published over the last few decades. Fundamentally, intellectual minimalism considers optional the travails of the legal mind in mastering the traditions of thought it inhabits and in facing fully the complexities of the world. This analytical distinction made, observation shows that intellectual minimalism can easily twilight into anti-intellectualism and back again.

Writing in 1834, the English translator of F. K. von Savigny's clearly written manifesto against the codification movement in Europe still felt the need preemptively to note in his Preface that "[a] modern English writer is expected to be so pellucidly clear, as almost to save his readers the exertion of thought. . . ."[1] I suspect that his observation was apt then and might be even more so today. Indeed, sometimes one hears echoed in the halls of law schools the notion that writing must appear clear on effortless reading. This attitude has nothing to do with clarity: it is just a preference for simplicity, rationalized as a demand for clarity. Of course, and to the extent that this is the case, the obsession with "clarity" stands to academic work as "straight talk" does to politics: as a cover for intellectual under-effort and unwarranted simplification of complex matters.

In a second sense, minimalism appears as professional minimalism. In this case, minimalism is the view that the archetypical professional setting for the *use* of what one ordinarily learns in law schools is the corporate law firm. Clearly, professional minimalism overestimates the importance of the corporate law firm with respect to the overall number of law graduates employed by firms and the social impact of those firms. More importantly, though,

[1] Abraham Hayward, *Preface to* FRIEDRICH CHARLES VON SAVIGNY, OF THE VOCATION OF OUR AGE FOR LEGISLATION AND JURISPRUDENCE, at v (Abraham Hayward trans., Legal Classics Library 1986) (1828).

professional minimalism underestimates, with enormous individual and social costs, all the many other settings of legal professional engagement.

Unless resisted, intellectual and professional minimalism end up inviting a hedonistic approach to legal education, allowing too many to evade the exertion of profound learning and to numb the natural anxieties caused by seeing the world as a vast territory for the agency that true legal education cultivates and empowers. The hedonism in question, if one there were, would, in J. S. Mill's terms, not be one of the highest order

Minimalism begets practicism, and practicism legitimizes minimalism. Again, it challenges the imagination to envision minimalism and practicism as having the strength to bend the spine of legal education. Except that to their assistance comes parochialism.

*Parochialism* in legal education is what healthy cultural self-confidence degenerates into, especially in environments plagued by practicism and minimalism. Parochialism is of two types: *parochialism of space* and *parochialism of time*. What unifies the two types is shrinkage. In parochialism, the geographical, historical, institutional, practical, and intellectual dimensions of law are all imagined to be smaller than they actually are.

For an example of parochialism of space, turn to the middle of the 20th century, when the United States and allies emerged victorious from World War II. In the aftermath of the war, the United States experienced a renewed sense of cultural self-confidence. American culture and influence traveled the world, riding on a wealth of military, economic, and geopolitical power. Domestically, the elected branches of government seemed too often unable to provide moral leadership sufficient to address and resolve injustices, old or new, in American society. In that conjuncture, the Supreme Court took the lead in addressing some important national

questions and precipitating reforms. With that, the prestige of the Supreme Court increased, and, accordingly, the federal, especially of course in the Supreme Court, appellate clerkship came to be seen as the high watermark of accomplishment for law graduates aspiring to a place in legal academe. In a legal culture already historically committed to case-law analysis and commentary, the rise in prestige of the federal judiciary brought with it the cult of personality of judges in general and of Supreme Court justices in particular. Fast-forward a few decades, and a significant portion of legal scholarship, commentary, and curriculum in the United States is centered – sometimes with intellectual sophistication and practical relevance – on the country's appellate decisions on matters of domestic law and on the personalities and bench trajectories of appellate decision-makers. In all this, practicism and minimalism meet parochialism of space.

Every political organization should hope to educate a fraction of its members to engage in an aspirationally endless legal dialogue about the foundation and unfolding of the organization. I consider constitutional commentary in the United States to be a fine example of such dialogue, contributing to social cohesion and cultural reproduction over time. In my view, this dialogue should remain unburdened by expectations of transcending knowledge, insight, and imagination. I argue only that such types of around the political hearth dialogue would benefit from enlarging their analytical and discursive capabilities. The best way to achieve that enlargement is to subject future participants of the dialogue to the study of the traditions of high legal thought from which the diluted ideas they will one day deploy originally come from.

For an example of parochialism of time, turn to the kind of diet comparativism and internationalism common in legal education in the United States and around the world. The general outlook of parochialism of time is that unique and

amazing transformations mark our time, and that it has become inconsequential to think about law and inexpedient to practice it outside the global legal melting pot engulfing us from all sides thanks to those transformations. All of that seems true. However, parochialism of time preaches that the thing to do in this context is to become conversant with law everywhere, usually through the expedient of sacrificing depth of knowledge of legal thought anywhere. To assist in the enterprise, the posture I describe holds that we need legal education around the world to cluster around recent best practices. With time-parochialism usually comes the belief that hardly anything written about law before the current wave of globalization has any real relevance. In all this, there is a radical presentism, a true parochialism of time. This brand of parochialism enters the world as global and cosmopolitan, but inhabits it as practicism and minimalism gone global.

You may well be thinking that parochialism of space and parochialism of time, as described here, are mutually exclusive. They would be, except, first, where one's parochialism of space happens to make land where some of what is considered best legal practices are thought to come from and, second, where parochialism of time is the prevalent type of comparativism and internationalism.

Today practicism, minimalism, and parochialism reign almost unchallenged in legal education, where their impact is felt everywhere. Here are just two examples of that impact.

**First Example**

The academic study of law carries a double invitation. The first invitation is to join an extraordinary intellectual tradition with ancient roots; the second is to join one or more of the many zones of legal intellectual, social, political, and economic engagement. However, students joining law schools in the 21st century have come to believe, as a result of the structural bias

in legal education in favor of practicism, minimalism, and parochialism, that the academic study of law is about being trained for tasks, thus accepting only a reductionist version of the second invitation. The same institutional bias leads some faculty to believe, in all good faith, that intellectual minimalism with respect to their own scholarly projects and the practicism of coaching students into professional minimalism constitute their primary responsibilities. Despite this troubling understanding of the nature of legal education, until recently many labored under the illusion that all was well (maybe they are already getting back to the illusion?).

While only a portion of those graduating from national U.S. law schools would end up in medium to large size corporate law firms, many more seemed to derive deep psychological comfort from the belief that they all could, if only they wished, become participants in the obviously important provision of legal services to corporations. In this environment, law schools' career services understandably seemed primarily invested in their role as intermediaries between a fraction of their students and the corporate law firm.

That state of bliss came to a halt around 2009–2010 when changes to the employment structure of corporate law firms following the global financial crisis laid bare the flimsiness of one of the foundations upon which the state of bliss had rested. Simultaneously, many law students interpret the high cost of tuition as one of the signs that they were indeed purchasing a type of service: legal training that would not only be moderately challenging and somewhat entertaining but would also culminate in bar eligibility certification and law firm placement. Shell-shocked by changes in the law firm employment picture, law schools reacted by further validating the notion that legal education was a sector of the services market, and that law students and law firms were clients on the two ends of the brokerage services they were in the market

to sell. Only now the customers were unhappy, forcing law schools to compete in divining what would make their clients happy again.

In that employment context, and amid the general ongoing infantilization of higher education, many law faculty seemed to dig the educational hole deeper, seeking more than ever before to reassure customer-students of their practice-readiness. Should they pose any serious intellectual challenge to students, legal academics seemed prepared to show contrition and to rectify matters, often feeling vulnerable to negative customer satisfaction reviews known as "course evaluations."

Now, the point is that none of these recent developments, financial crisis or no, would seem even imaginable were it not for the grip of practicism, minimalism, and parochialism on legal education.

**Second Example**

Another debilitating consequence of the impact of practicism, minimalism, and parochialism in legal education is found in the way legal education as a whole reacts to law school rankings and to the curricular and pedagogical interventions of lawyers' guilds and other Bar regulators.

Indeed, the attention and cooperation that law schools extend to the rankings created by business media is puzzling. Equally puzzling is that law schools continue to surrender their curricular and pedagogical autonomy to venerable – and yet external and often limited by the interests they represent – institutional actors who have historically claimed the prerogative to accredit law schools and to set educational Bar eligibility criteria.

In the current context, media rankings and Bar regulators are instruments of practicism, minimalism, and parochialism in legal education. Of course, law schools tend to rationalize

their prostration before both. The rationalization typically rests on a series of interlocking fallacies. One can start anywhere in the chain of fallacies in order to unravel it. Here is one way to do it in relation to the rankings. First, law schools convince themselves by the persuasive force of endless repetition that law firms are dissatisfied with the *training* law schools offer their students. Second, law schools conclude that as a consequence, they should import into the law curriculum the job training law firms are no longer willing to provide (often for jobs they no longer offer). Third, law schools work to convince their students that they ought to be "practice-ready." However, coaching for practice-readiness is expensive and is ideally inflicted on students who are easily trainable. Fourth, attracting funds and easily trainable students are the first and most important tasks on which all else depends. Lastly, the attraction of funds and trainability potential is predicated on doing well in the rankings, which metrics track trainability and resources. Again, all this would be just another implausible tale were it not for the fact that law schools were already contaminated by practicism, minimalism, and parochialism.

**Four Proposals for Legal Education**

The picture I draw of the current state of legal education is obviously incomplete and highlights only some of the most striking aspects of its malady.

If legal education is to have a deservingly proud future, law schools must expunge from their institutional design and culture the bias in favor of practicism, minimalism, and parochialism, replacing it with a deep commitment to high scholarship and to providing students with the foundations to excel in any of the zones of intellectual and professional engagement in the law. Unless and until that is accomplished, law schools will continue to fail their societies and the world,

the talent they bring together, the resources they command, the tradition of thought they have the fiduciary duty to critically cultivate and expand, and the full range of the professions in law that they are supposed to serve.

Because history is not necessarily fate, I turn now to some first steps that might help law schools get up off their knees and stand tall to face their responsibilities to thought, the professions, and society. The proposals run from the relatively modest and not too difficult for an individual institution to implement to the more ambitious and dependent on collective action on the part of law schools and the American Association of Law Schools.

**First Proposal**

Rankings may be informative, and in the age of indicators they appear to be culturally irresistible. Obfuscated along the way is that in the long term indicators are more constitutive than descriptive of that which they measure. Bearing both fats in mind, law schools should endow a foundation to review and rank them according to standards specifically designed to capture the quality of their contributions both to the grand traditions of legal thought and to the many professions in law. Call this the *Legal Education Peer Quality Assessment*.

The *Legal Education Peer Quality Assessment* would have only four or five tiers, and each law school would initially be placed in one of them. Going forward, there would be no maximum or minimum number of schools in each tier. Ideally, and realistically, there would be no reason why, say in the U.S, over time all law schools would not end up in the first and second tiers.

The foundation producing the assessment would reflect the highest standards of professionalism, insulation from market pressures, integrity, and knowledge in the discharge of the mandate to serve both the traditions of legal thought and the

many professions in the law, assisting in deprograming the bias and in immunizing law schools against practicism, minimalism, and parochialism.

However, law schools should not wait until something like the *Legal Education Peer Quality Assessment* is established to stop providing data to feed the metrics of current business rankings, which only help deepen and perpetuate the malaise of legal education.

To the extent that resistance to the existing business of rankings presents a problem of collective action, the law schools of universities such as Columbia, Harvard, Stanford, and Yale and the AALS have an obvious special responsibility to launch and sustain this initiative. However, no law school is excused from responsibility in this endeavor. In this regard, I am confident that my own law school, Boston College Law School, will meet its leadership responsibilities. I find reason for my confidence not only in Boston College Law School's curricular offerings in legal thought but also in its being situated in a research university that has vigorously resisted another harmful fad in higher education: the flight from the humanities.

**Second Proposal**

For law, law schools constitute both the institutional home for legal thought and the premier place for the education of those seeking to enter one of the many professions in law. As already mentioned, the intellectual, professional, and social responsibilities of law schools are many and multifaceted. For this reason, law schools should reexamine their cooperation with the existing law school accreditation model and with the federal and state regulatory systems of Bar admissions.

For almost a century now, the professional association of lawyers and students, the American Bar Association (ABA), conditions its *approval* of law schools on their meeting certain

standards. Such standards continue to evolve over time, and currently run the gamut from the structure of the careers of law teachers to what goes on in the curriculum and pedagogy of law teaching.

The ABA is so comfortable and confident in its authority over legal education that it has recently named a committee the "Task Force on the Future of Legal Education." Reflecting the findings of this committee, the ABA is once again changing accreditation requirements. Springing from the same old functionalist approach to legal education, the new "learning outcomes" standard (Standard 302 of the ABA's Standards and Rules of Procedure for Approval of Law Schools) is designed to capture, in the language of the Task Force report, "services, outcomes, and value delivered to law students." Though well-intended, this change would deepen the commodification, banalization, and reductionism of legal education while illustrating the unemancipated status of law schools.

However, law schools have so far failed to resist this proposal, no doubt because, whatever else may be true for law schools and law graduates about accreditation standards, the consequences of failing to receive ABA approval are profound in the current circumstances.

There is nevertheless more. In addition to the ABA accreditation model, Bar admission regulators raise their own varying curricular and pedagogical requirements that law graduates need to meet in their studies in order to be eligible for Bar admission.

Once again, should law schools fail to offer in their curricula everything on the checklist for Bar admission, or should students fail to check the items on those lists, the consequences for them in the current circumstances would likely be quite significant.

Unsurprisingly, such incursions on law schools' academic autonomy push further into legal education the agendas of

practicism, minimalism, and parochialism, for they come from the well-meaning but limited perspectives of external actors whose partial responsibilities do not sufficiently overlap with the broader responsibilities of law schools. However, the principal problem here is less the source of these incursions and more the fact that law schools allow them to happen.

What is needed here, as elsewhere in legal education, is a good dose of institutional pride, gravitas, and understanding on the part of law schools of their broad responsibilities, without which they will feel no impetus to change their current unemancipated circumstance.

At this late hour, however, it would likely be impractical for law schools to completely break free from the interference of accreditors and Bar regulators. Law schools should focus therefore on immediately establishing a clear limit to those influences, and over time seek their full emancipation from them.

With that in mind, a possible initial step for law schools and the AALS would be to embrace the requirement of Chapter 3 of the American Bar Association's 2014-2015 Standards and Rules of Procedure for Approval of Law Schools to the effect that *"A law school shall maintain a rigorous program of legal education that prepares its students, upon graduation, for admission to the bar and for effective, ethical, and responsible participation as members of the legal profession."* (Standard 301)

However, the acceptance of Standard 301 should come with the interpretative stipulation that law schools understand and welcome the *recommendation* in Standard 301 as inspiration for curricular and pedagogical designs and practices intended to prepare graduates to the many legal professions, in the plural, and as compatible with their responsibilities toward the traditions, also in the plural, of legal thought and the broader society.

The other detailed curricular and pedagogical

interventions of Chapter 3, including Standard 302, ought to be repudiated by law schools as undue influence. The repudiation includes Standard 302, b, 1, whose reference to "legal theory" gets lost in a one-sided framework committed too profoundly to the agendas of practicism and minimalism.

For the same reasons, law schools should not accept any further change in curriculum and pedagogy for the purpose of chasing the moving targets of accreditation and Bar eligibility criteria.

Once emancipated from their current capitis diminutio, law schools would gain the ability to develop autonomous and fruitful cooperative relationships with professional guilds and regulators of access to professions, including the ABA and Bar admission regulators.

**Third Proposal**

Law schools should create a required six-credit year-long course on legal thought. Call this the *Foundations of Legal Thought* course. The talented and ambitious minds arriving every year at law schools ought to be offered an opportunity to engage critically with the traditions of legal thought. Wide adoption of *Foundations of Legal Thought* would likely send tectonic signals throughout legal education, and this may well be the most important initiative to start immunizing new generations of students against legal education's structural bias in favor of practicism, minimalism, and parochialism – a bias that very early in their law school years starts to weigh down students' talents and aspirations.

Naturally, schools and scholars would develop and continue to evolve different conceptions of what should be included in *Foundations of Legal Thought*. For example, some may emphasize canonical works selected from the ages of legal thought, while others may focus on groundbreaking contemporary works. The important task to keep in mind is to

connect students to intellectual greatness in law before their aspirations and expectations are stunted by curricula compromised by the structural bias discussed above.

The study of traditional doctrinal content as well as guided role-playing activities – whether actual or simulated – are essential components of a good legal education, one that respects distinct learning styles and cultivates a range of capacities while often serving underserved individuals and groups. Those components of legal education will continue to be the large majority of requirements for first-level law degrees. But just imagine the possibilities for those components once they are taken out of the shadow of practicism, minimalism, and parochialism; and once the students that come to them have had their knowledge and educational agency deepened and broadened by a year spent with intellectual greatness in law.

Law schools are communities of jurists and exceptionally talented – even if seriously under-representative of the full range of professions in law – legal professionals receiving and educating new generations of jurists and legal agents. This community should be critically grounded in the traditions of legal thought and serve the many forms of intellectual, social, political, and economic engagement in the world for which the study of those traditions provides an exceptionally firm foundation. There are good reasons to expect that many prospective law students, likely the strongest among them, would be appreciative of law schools unwilling to compromise the highest education standards because of perceived market pressures.

**Fourth Proposal**

Feasible as the three first proposals are, the prevailing bias in favor of practicism, minimalism, and parochialism may already have created habits of mind too tenacious to dislodge

in the short term and, concomitantly, may have too severely undermined the sense of possibility in legal education. Furthermore, J.D. programs will, in the immediate future, continue to operate under constraints that limit their role in the critical study and renewal of the traditions of legal thought. How to react to such difficulties?

One answer is that law schools should turn, as almost every other department of the modern university does, to doctorates as institutional islands of scholarly ambition and excellence. Those islands should be sufficiently insulated from the structural bias that plagues the rest of legal education to enable them, eventually, to disseminate the will and ability to truly learn about the law to the rest of legal education.

One is tempted to say that there already exist signs of the influence of practicism, minimalism, and parochialism in some doctoral programs. Like the detectable tendency of many VAP and other pre-teaching fellowships and preparation programs, doctoral programs in law risk becoming a Fordist environment with a hyper-focus on strategies – sometimes as crude as how to write the "right" type of article, how to play the "article placement game," or how to fill out law teaching application forms – on how to obtain teaching positions in law. Law schools should therefore aim to recruit a critical mass of scholars and to create or reform their existing doctorates to reflect a commitment to high scholarship above all else.

The new doctorate in law should tap the global pool of talent. These programs should look for prospective doctoral students without regard to the place or language of their initial legal education. The new doctorate should discard the parochial requirement that applicants have completed an LL.M. in the United States. Schools that fail to do so should at least abandon the hyper-parochial requirement that applicants have completed their own LL.M. programs. Again, that is what every other department of the modern university already does. These new doctoral programs in law should hold their

students accountable for gaining a critical understanding of the foundations of legal thought in general and for mastering the foundations of their particular fields. Doctoral students should understand that whatever else the doctorate is about and wherever they will employ their learning, they constitute the next generation of the critical and inventive keepers of a long tradition of thinking about society and self in the grand and sophisticated ways of legal thought.

This *open letter* does little more than to denounce the predicament of legal education and outline a way out of it. I hope that those who read it found in its pages a profound commitment to the promise of legal education and an invitation to think carefully and constructively about it.