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Institutional Conditions of Contemporary Legal Thought

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INTRODUCTION: THOUGHT AND INSTITUTIONS

Traditions of high thought require a home to thrive. The modes of sustained, intergenerational, sufficiently self-referential, and cumulative inquiry that we call the high traditions of thought are fragile, collective, transient efforts, constantly under threat of collapsing along with the lives of those of the latest generation engaged in them. Except when they find good and lasting institutional homes.

The activity of thinking is an existential essential – "[e]ven Socrates, so much in love with the marketplace, has to go home . . . A life without thinking is quite possible; it then fails to develop its own essence – it is not merely meaningless; it is not fully alive. Unthinking men are like sleepwalkers" (Arendt 1978: 190–1) – with important social and cultural preconditions and consequences. One important consequence is that the inability to think well lies at the root of the most destructive choices and agency, for "knowledge is no guarantee of good behavior, but ignorance is a virtual guarantee of bad behavior" (Nussbaum 2010: 81). Among its preconditions, good thinking requires access to a medium between the mind and the outside world able to function as tentative evaluative and cognitive lenses. Traditions of thought function as a revisable medium, and as a launching platform for thinking. As cognitive lenses, traditions of thought may certainly conceal and distort, but good traditions of thought reveal more than they hide of the world. As evaluative lenses, traditions of thought are implicated in all sorts of unwarranted apologetics. However, good traditions of thought provide a vista from which to criticize, reconstruct, and point to action in directions that may better self and society. The sociological and historical study of traditions of thought is a reminder of the contingent and fragile nature of what from time to time achieves the ontological status of undisputed reality or the normative status of good or evil.

The point is that sound thinking requires a good tradition of thought to think with, and lasting traditions of thought require an institutional home to inhabit. The dependence of traditions of thought on institutions capable of hosting and fostering their partially self-referential and cumulative intergenerationality is not, however, a unidirectional phenomenon. Hosting institutions and hosted traditions of thought shape each other through complex processes determined by many factors.

Hosting institutions depend as much on the traditions of thought that illuminate and give meaning and direction to their collective activity as traditions of thought depend on them. As collective enterprises cemented by shared meaning, hosting institutions depend for their meaning and continuous vitality on the hosted tradition of thought as much as the latter depends on the former for its intergenerational vitality. Durkheim's insight on the nature of society is equally true of any important institution: "[it] is not constituted simply by the mass of individuals who comprise it, the ground they occupy, the things they use, or the movements they make, but above all by the idea it has of itself" (Durkheim 1995: 425). Important institutions such as those of government and the academy are particularly dependent on traditions of thought for the idea they have of themselves. It is from those traditions that institutions of government or learning derive the meaning and purpose of the "deontic powers" (Searle 2005) that they possess and distribute. In institutions of learning, deontic powers invest meaning in being a thinker and in thinking with a tradition. Without that meaning, few minds ever join the ranks that make high traditions of thought capacious, vibrant, and everlasting; and without that, it is ever more difficult for the rare great thinkers to emerge.

The central factual claim of this chapter is that there exists a chain of dependency that runs from the high tradition of legal thought to the conditions of possibility of justice and democracy in complex societies. This factual claim anchors the normative thesis that the legal academy ought to provide a better institutional home for the long and polyphonic (Kelly 1990; Schiavone 2011) tradition of legal thought that we have inherited. It ought to do so for four reasons connected to the factual claim about chain dependency. First, the tradition of legal thought depends on the institutions of the legal academy for the imaginative augmentation it needs in order to continue to illuminate the problems of self and society and to give meaning and direction to the legal academy. Second, the legal academy ought to provide a good home for the tradition of legal thought because the academy aspires to retain its cognitive point of view, its meaning, and its ability to help chart new horizons for self and society as the world changes. Should the legal academy persist in failing in this mission, the endurance of legal thought and the relevance of

the legal academy will continue to weaken. As the tradition of legal thought continues to be ignored and marginalized in the legal academy, as demands of simplification continue to be placed on legal thought, the intellectual and practical banalization of legal education deepens. Third, the social institution of law itself depends on legal thought and the legal academy for its meaning and vitality, and for the cultivation of the agents who inhabit and operate the legal system. The fourth reason is that social integration, democratic self-governance, and justice in complex societies depend on the social institution of law, which depends on legal education and legal thought. I will return below to this chain of dependency, which is traceable all the way back to the high tradition of legal thought.

Anchored in hospitable institutions, modes of sustained inquiry are able to accumulate into intergenerational edifices of high thought, with open vistas, their thematic universe, normative aspirations, conceptual architecture, ontological and causal complexes, and so on. When a tradition of thought has a good institutional abode, it does not stale. Confident and vibrant, the tradition of thought reaches out, engaging and making its own the contributions, themes, and methods of other traditions, while sharing with them in turn its own imaginative and cognitive powers. Internally, when well-hosted institutionally, traditions of thought develop both a powerful ethos of constructive self-criticism and an ever-greater ambition for knowing, understanding, and imagining. In all this, institutions themselves are instilled with the force of thought.

History confirms the dependence of high traditions of thought on academic institutions. Try to imagine, counterfactually, the setback for the possibility of a civilization concerned with both science and justice if the work of Aristotle had not found a home and creative successors in the medieval university. Imagine the ultimate fate of the ancient Greek sparkle of critical thinking – and with it the dialectic between *credo ut intelligan* and *intelligo ut credam* in new Platonisms and Aristotelianisms – had it not been given a home in the medieval university from Abélard's prescholastic commitment to reason to the scholastic method of problem formulation, *quaestio*, *disputatio*, and *determinatio*. Imagine the development of Western, and ultimately global, law without the home that Roman law, codifications, and commentary found in the same medieval university (Berman 1983; Kelly 1990; Schiavone 2011; Weber 1978). Of course, all that seems distant to us, as the weight of the present and the pull of the future seem to compress the past into an opaque lump. It is worth remembering, though, that in the thirteenth century the scholastic Aquinas was a "bold thinker [who] also aroused the hostility of many colleagues and also a number of influential prelates. He was the kind of

attractive and controversial European intellectual who could not fail at once to illuminate and also to trouble intellectual and religious circles" (Le Goff 2005: 131).

More generally even, in large and small ways, individuals and cultures inhabit traditions of thought, both high and low, and walk daily on the paths they open. If this anthropological universal needed proving, it should suffice to challenge the doubter to imagine self, society, and the world without using any of the constitutive blocks of the traditions of thought developed in the natural sciences, historiography, theology, philosophy, mathematics, astronomy, the novel, and more, including the tradition of skepticism about the possibility of knowledge and understanding.

1 LEGAL THOUGHT IN THE LEGAL ACADEMY

Ultimately, the force of any tradition of thought will depend on internal and external forces. Internal to the tradition of thought, its longevity and vitality will depend on the reflective strength built into it. Externally, traditions of thought depend on tangible points of support in society and culture.

Among traditions of thought, high legal thought stands out as carrying an enormous reflective potential as it provides a medium for thinking that opens to the mind vast, at once micro and macro, practical, cognitive and normative territories while sustaining a constructive commitment to self and society. In societies as complex as ours, high legal thought offers the best chances for our ability to critically understand roles and praxes and to prescribe changes to the institutional and cultural "formative contexts" that script those roles and praxes (Unger 2004).

I have pointed out the interdependence among traditions of legal thought, the institutions of the legal academy, democracy, and justice in complex societies. The stakes in this chain of interdependence are made higher by the fact that law is indeed the central institution of complex societies. "[I]f a society is subject to a legal system, then that system is the most important institutionalized system to which it is subject. The law provides the general framework within which social life takes place" (Raz 1997: 120–1). Put differently, "[w]e live in and by the law" (Dworkin 1997: vii). To express the point with greater sociological rigor, the social institution of law constitutes the deepest and most expansive shared practice and meaning structure of social integration and reproduction in complex societies (Giddens 1986; Shapiro 2011). Considered in its ideational and agential aspects, "[l]aw is two things at once: a system of knowledge and a system of action" (Habermas 1999: 79). The accumulating knowledge and the cognitive point of view of the institution of law are created

from and as inventions in the traditions of legal thought. Correspondingly, the possibility of meaningful legal agency and of imposing normative meaning on states of affairs present and future, that is, of the types of agency and situations collectively interpreted to have legal meaning and consequences, is also dependent on and conditioned by the high traditions of legal thought and their lower, diluted operational versions. Law and legal thought reach into the future only because they reach from the past. Only when law and legal thought are able to bridge "immanent order and transcendent criticism" (Unger 1977: 241) can complex societies be nested within law and unfold as stable and yet constantly changing normative endeavors in self-government and justice.

With the height of the stakes properly understood, the question arises as to how good a host the legal academy currently is to the tradition of high legal thought. Any attentive observer would detect in the legal academy a deepening malady that marks its present and threatens its future: little of what goes on in it can be properly described as an education in legal thought; much of it is mere training, and the remainder is neither. The perils of this situation visit upon not only the institutional conditions of legal thought and the viability of legal education: there are also perils to the very social institution of law. With the social institution of law in peril, the conditions of possibility of self-governing social orders oriented toward justice are at risk (Perju 2010).

This current 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. Hence, this is no case for nostalgia. Second, high legal thought is not rocket science – it is harder. Consequently, legal education ought to be a seriously challenging, demanding, and exciting intellectual endeavor in legal thought. In other words, the institutions of the legal academy ought to host well the high traditions of legal thought. Third, legal education selects faculty and students from among some of the best intellectual and entrepreneurial talents. These are typically people holding lofty aspirations for themselves, their societies, and the world at large. Fourth, in legal academy, 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, lofty aspirations, and resources should lead to extraordinary contributions to the universe of ideas and to solving the problems the world faces in delivering on the promises of knowledge, creativity, justice, respect, peace, and prosperity we continue to make each other. Yet, the institutions of legal education seem to proceed steadily down the path of merely providing mid-level technical training in an increasingly commodified academic environment that makes itself increasingly inhospitable to the traditions of legal thought.

Developing a structural model for intergenerational high thought, R. Collins concludes that "[t]he most notable philosophers are not organizational isolates but members of chains of teachers and students who are themselves known philosophers, and/or of circles of significant contemporary intellectuals" (Collins 2000: 65). From the medieval university through the creation in the nineteenth century of the modern disciplines-based research universities to our disciplines-combining universities, any minimally complex tradition of thought has found a home in the institutions of the academy and given the academy its animating spirit. It is within legal academic institutions that chains connecting teachers and students and circles of legal thinkers are formed, giving their thought social currency over time. In this respect, today's legal academy is failing.

In this environment, too many of the intellectual and entrepreneurial lions arriving yearly at the steps of the legal academy 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 institutions of the legal academy as hosts for the tradition of legal thought is clear enough to anyone giving it unbiased attention. What explains this ailment? What are its roots in legal thought itself?

2 THE SITUATION OF LEGAL ACADEMIC INSTITUTIONS

The immediate cause of the malady of legal education and of the type of legal thinking it privileges is the prevailing structural bias of legal academy in favor of three symbiotic attitudes, which I label *practicism*, *minimalism*, and *parochialism*. [1]

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, nongovernmental 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.

[1] From here on I borrow from Barrozo 2015b.

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 past 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 Friedrich Karl 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" (Hayward 1986: v). I suspect that his observation was apt then and might be even more so today. Indeed, sometimes one hears echoed in the halls of legal academy 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: 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 legal academy 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, 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 United States where, in the middle of the twentieth century, the country 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 higher knowledge, insight, and imagination. I argue only that such types of domesticated 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.

For an example of parochialism of time, turn to the kind of diet comparativism and internationalism increasingly common in legal education 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 academic institutions, where their impact is felt everywhere. Here are just two examples of that impact.

3 FIRST EXAMPLE

The academic study of law carries a double invitation. The first is to join an extraordinary intellectual tradition with ancient roots; the second, to engage professionally in one of the many zones of legal intellectual, social, political, and economic activities. However, students entering the legal academy in the twenty-first 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 into the illusion?)

Using the United States once again as an example, while only a portion of those graduating from national law schools would end up in medium to large 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 in the United States around 2009–10, when changes to the employment structure of corporate law firms following the global financial crisis laid bare the flimsiness of one of the foundations on 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 of the moderately challenging and somewhat entertaining type leading to bar eligibility certification and law firm placement. Shell-shocked by changes in the law firm employment picture, legal academy reacted by further validating the notion that legal education was a sector of the services market, and that law students and law firms were