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

clients on the two ends of the brokerage services they were in the market to sell. But now the customers were unhappy, forcing legal academy 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.

Now, the point is that none of these recent developments, financial crisis or not, would seem even imaginable were it not for the grip of practicism, minimalism, and parochialism on legal education.

## 4 SECOND EXAMPLE

We find another debilitating consequence of the impact of practicism, minimalism, and parochialism in legal education in the way it reacts to law school rankings and to the curricular and pedagogical interventions of lawyers' guilds and other bar regulators around the world.

Indeed, the attention and cooperation that the institutions of the legal academy extend to the rankings created by business media is puzzling. Equally puzzling is that the legal academy continues 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 or recommend legal academic institutions 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, the legal academy tends to rationalize its prostration before both. In the United States, 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, the legal academy convinces itself by the persuasive force of endless repetition that law firms are dissatisfied with the *training* the legal academy offers their students. Second, the institutions of the legal academy 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, the legal academy works 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 public and private funds and

enrolling easily trainable students are the first and most important tasks on which all else depends. Last, 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 the institutions of the legal academy are already contaminated by practicism, minimalism, and parochialism.

## 5 INTELLECTUAL ORIGINS OF THE MALADY OF THE LEGAL ACADEMY: RATIO-HISTORICISM, PRAGMATISM, AND ANTI-FORMALISM

Different parts of the world follow their own paths in making the institutions of the legal academy inhospitable to high legal thought. One element they all seem to share, though, is the growing influence of the model of legal education prevalent in the United States. With this model travels a particular juridical ratio-historicist alliance that emerged in nineteenth-century European legal thought and the version of pragmatism as a worldview and attitude type consolidated in nineteenth- and twentieth-century American jurisprudence and philosophy. It is to those changes in the history of ideas that one must turn, even if briefly, to start to understand the historical roots of the vulnerability of – first, American, and now, global – legal education to biases in favor of practicism, minimalism, and parochialism.

*Ratio-historicism.*The first transnational political masses belong to the nineteenth century. Those masses saw social, economic, and military problems as the product of human agency and choice, and therefore as essentially political problems. (From here on I borrow from Barrozo 2015a; for different aspects see also Arendt 1998 and 2006; Donzelot 1994; Sperber 1994; Tomlins 2010.) Urban and rural workers on both sides of the Atlantic embraced class identities, adopted shared diagnoses of their predicament, and developed a new confidence in their collective power to solve their problems through institutionalized and noninstitutionalized politics. This newly discovered class consciousness was founded on a sense of shared destiny and the denaturalization of immiseration and oppression. One would be ill advised to underestimate the novelty of interpreting personal and collective vulnerability as products of human will – a will that could be galvanized, owned, transformed, and ultimately deployed in favor of the downtrodden. Workers and many intellectuals believed that destiny was in their hands and history at last on their side.

With their entrance onto the political stage, nineteenth-century transnational political masses denounced and often violently challenged the Restoration and post-Restoration constitutional settlements of Western nation-states

and subnational political units. Simultaneously, economic, military, and social crises continued everywhere to weaken further the perception of the stability of social orders in the eyes of the populace as well as of the ruling and intellectual elites. In that context, those elites could not help but feel that they were standing on the precipice of social chaos, a predicament for which they blamed an unbridled and uncultivated popular will. To the waves of democratic expansion, social unrest, political revolutions, economic debacle, geopolitical uncertainty, and war, ruling and intellectual elites of the Victorian Age responded with a deep and sweeping new approach to law and politics. They responded with what I term *The Great Alliance* among historicism, rationalism, and popular will.

Law *always* dwells in the space where history, reason, and will meet, with each age celebrating its own particular paradigmatic alliance between them. *Will* in democratic times means popular will. But in the past, it meant divine will, the ruler's will, and so on. In contemporary legal doctrine, *will* is expressed as deference to democracy, to the elected branches of government, to public opinion, to evolving cultural standards, to trends in legislative production, to social movements, to current common knowledge, etc. *History* stands for historical events as they inform the law (such as war as justification for extreme measures), historical tradition (such as legal precedents or, more broadly, legal/political/moral traditions), and historical meaning (such as the original as opposed to the contemporary meaning of constitutions, etc.). In legal doctrine, history appears as a form of argument that appeals to the past as a basis for regulation of the present and the future. *Reason* includes instrumental reason (concern with consequences, expediency, cost-benefit analysis), cognitive reason (science, expertise), and idealist reason (revelation of the true or better meaning and legitimate forms of legal values such as freedom, equality, predictability, justice, and dignity). In legal doctrine, reason appears as a form of argument that appeals to the faculty of reason to chart directions of development for the law.

*The Great Alliance* is just the current paradigm for how history, reason, and will come together in and as law. And it has turned out to be an extraordinarily adaptive, resilient, and attractive settlement process in the form of an intellectually and legally authoritative cognitive-normative-practical vision of law and society. In its most general terms, the nineteenth-century rapprochement of legal rationalism and historicism after their relative polarization in the aftermath of the American and French revolutions started in the first half of the nineteenth century and assumed features attractive simultaneously to common prudential understandings and to the legal thought of the time. During

that formative period, rationalism became increasingly committed to inherited legal frameworks and values as manifestations of reason's cunning operation in the world (Hegel 2003). As consequence, improvised, highly contextual constitutional arrangements were enshrined as ontologically essential by rationality, given the way reason is supposed to operate from within processes of social evolution. Moving from the opposite camp, historicism appealed to the rationalizations of legal reasoning *qua* legal science in order to conceptually tame, systematize, and bestow endurance-cum-adaptability on historically and organically generated materials, leading in the first moment to a formalist jurisprudence of concepts and later to all sorts of social stasis processes (Savigny 1986). However, even more consequential was that the will of the masses acceded to this ratio-historicist rapprochement. Indeed, the transnational political masses bought, especially in the North Atlantic nations, into versions of constitutional veneration able to connect national lore while seeming not to require too great of an intellectual sacrifice. That modern ratio-historicist settlement tamed the *will* of the masses under the influence of authoritative legal thought, conceptions of political morality (including the notion of rights), and a general sense of social evolution. To miss this last piece of the sociological and philosophical puzzle of modern law is to be condemned to see only a distorted and partial image of its making. *The Great Alliance* in law among reason, history, and the political will of the masses in the nineteenth century has provided ever since the conceptual as well as the ideological conditions for the many ups and downs in the history of legal positivism, pragmatism, and reflective equilibrium idealisms.

That all these traditions of twentieth-century legal thought declared war against classical legal thought – as the first generation of *The Great Alliance* jurisprudence is now known (Kennedy 1975) – should not distract us. The hard reality is that under *The Great Alliance* legal rationalism now survives as punctuated reformism, as consequentialism, and as a norm of performative critical discourse; and legal historicism survives as traditionalism, intellectual parochialism, and the precautionary prudence of cost-benefit balancing.

It is difficult to imagine how the institutions of the legal academy would have become inhospitable to the tradition of legal thought had they not been shaped in significant part by the success of *The Great Alliance*, which authoritatively decreed that the heavy intellectual lifting of the tradition of legal thought had reached a comfortable plateau.

*Pragmatism* is a fruitful philosophical school that emerged – influenced by preexisting undercurrents in European philosophy – in the industrializing and urbanizing United States of the nineteenth century. In very general terms,

pragmatism, at both the explanatory and the normative levels, takes a functionalist approach to epistemology and a consequentialist approach to action orientation, at the end connecting both. Also fruitful in its own way, *legal realism* is a school of legal thought that, although not native to the United States, encountered there a reception unlike anywhere else in the world, due in part to the way pragmatism had prepared the terrain for it. Equally in general terms, legal realism takes a functionalist approach to legal epistemology and a consequentialist approach to legal agency (Schlegel 2011). These two schools of thought were closely related in the works, for example, of Oliver Wendell Holmes, Jr. (Wells 1988), and are now mainstream in American legal culture, including in law schools (Desautels-Stein 2014b).

There exists in original philosophical pragmatism and legal realism a great ambition of the mind, but that aspect of those schools of thought was not mainstreamed in contemporary American law schools and across the world, despite the example of several of their proponents. What came to prevail was a reductionist functionalist approach to knowledge, practice, and policy. Writing in the 1830s about the "philosophic method of the Americans," Alexis de Tocqueville perceptively speculated that "there is no country in the civilized world where they are less occupied with philosophy than the United States . . . To escape from the spirit of system, from the yokes of habits, from family maxims, from class opinions, and, up to a certain point, from national prejudices; to take tradition only as information, and current facts only as a useful study for doing otherwise and better; to seek the reason for things by themselves and in themselves alone, to strive for a result without letting themselves be chained to the means, and to see through the form to the foundation: these are the principal features that characterize what I shall call the philosophic method of the Americans" (Tocqueville 2000: 403).

Tocqueville's account of the defining feature of the American mind is far from complete, and it was not entirely accurate even for the nineteenth century. However, it does seem to capture something important about the fertility of American soil for pragmatism and legal realism. Tocqueville, I venture, speculating myself, would not be surprised by the functionalist orientation that would in our own time render American law schools vulnerable to the hold of practicism, minimalism, and parochialism. In any event, that "philosophic method" is now in the process of becoming universal as philosophical and attitudinal pragmatism.

To clarify, pragmatism and legal realism offer cognitive and practical insights that ought to be welcome among the intellectual and practical concerns of jurists and lawyers everywhere. However, when a diluted functionalist orientation becomes sovereign, it sabotages education and thought. This is

not the place to elaborate further on the matter, but once law is defined as a means to an end and legal thinking is measured against the benchmark of parochialisms of time and space and of expediency, and the tradition of legal thought is considered valuable only to the extent that it provides *prêt-à-porter* or fragments for improvised solutions to real or perceived problems, the conditions of the understanding of which are left untouched by reflection, then the tradition of thought is conceived as an (optional and fragmentary) intellectual Band-Aid. Fragmentation of the intellectual tradition tends to lead to fragmented thinking.

Once again, observers would be hard pressed to imagine how the institutions of the legal academy have become inhospitable to the tradition of legal thought had they not been shaped in part by philosophical pragmatism and the version of pragmatism found in legal realism. Misunderstood in all this is the dependency of legal realism on *The Great Alliance*, and nowhere else is that misunderstanding more at display than in the confused anti-formalism of legal realism.

*Confused anti-formalism* completes the circle of influences that render the institutions of legal education ill equipped to provide in full the institutional conditions for high legal thought.

Modern law dwells – sometimes thriving, sometimes languishing – in the tensions between the facts of functional adaptability and the normativity of structural integrity oriented toward justice; between efficacy and validity; between materialism and idealism. Considerable intellectual energy has focused on the development of a general theory of this tension from various perspectives (Barrozo 2015a; Bobbio 2014; Brunkhorst 2014; Dworkin 1997; Foucault 1995; Fried 1980; Habermas 1999; Hegel 2003; Koskenniemi 2007; Luhmann 2004; Rawls 1999; Unger 1977; Weber 1978). This tension is sometimes denied, but more often addressed by one-sided privileging of functional materialism or normative idealism. Thus, from about the mid-nineteenth century to the beginning of the twentieth century, ideal concerns for the structural integrity and validity criteria of law were deemed to trump material considerations of expediency. However, those ideal concerns soon succumbed to a type of legal formalism (Desautels-Stein 2014a; Hart 1997; Kant 1999 and 2006; Kelsen 1967; Kennedy 1973; Raz 1980; Schauer 1988; Schlag 1991; Stone 2004; Summers 2009; Unger 1986; del Vecchio 1921; Weber 1978; Weinrib 1995) that saw in the historicity of customary norms, in the manifestation of states' will through posited rules, and in the rational aspiration of an internally coherent and gapless system of concepts that turned those norms and rules into a system of law the best way to regulate internally as well as externally the will of states.

Those norms and rules and the conceptual systems that organized them enjoyed the intellectual and political prestige reserved to ratio-historicist achievements such as that of *The Great Alliance*, for they were considered to have both passed the test of time and met the demands of reason and the requirements of state or citizenry consent. More often than not, this type of legal formalism degenerated into formulaic legal analysis and attitudes, or what I call *formulaic formalism* to distinguish it from *constructive formalism*.

Starting in earnest by the end of the nineteenth century, formulaic formalism came under relentless criticism by legal realism, with each generation of jurists ever since aiming to surpass the previous one in anti-formalist credentials. Failing to comprehend the varieties of formalism and the essentiality to law of constructive formalism, anti-formalists fell into the arms of functional materialism. Rather than as a symphonic institution, law was approached as a jazzy patchwork.

However, overriding concerns with functional adaptability and efficacy exact an intellectual price no smaller than that exacted by the formulaic formalism it criticized, and with time it too came to degenerate into its own subtypes of formulaic formalism. In other words, one-sided critics of formalism accomplished no more than replacing one kind of formulaic formalism with another, from the ideal to the material. In any event, as the result of both historical catastrophes and a sense of intellectual plateauing, after World War II the earlier type of formulaic formalism – that centered on norms, rules, and their organizing conceptual system – started to recover some space in legal thought along with a revival of natural law. Enough so that many jurists came once again to experience the tension between functional materialism and normative idealism as an inescapable choice between the functionalism of cost-benefit policy analysis and the normativity of formulaic formalism. In other words, the tension was between stripped-down versions of functional adaptability and structural integrity. And to choose the old formalism of norms, rules, and conceptual edifices over the relatively more recent one of cost-benefit policy analysis again became somewhat acceptable.

The ideological alignment of preferences for one side or the other of the tension varies from context to context, its volatility closely tracking the intellectual limitations of both sides. To settle for either is of course a theoretical and practical mistake. We may well recognize the inherent tension in law between functional needs and ideal aspirations, and yet refuse the terms of the prevailing reductionist version of the tension. But that is not what happened in contemporary legal thought and in the institutions of the legal academy. Institutional constraints and biases – such as practicism, minimalism, and

parochialism – favor increasingly reductionist and one-sided versions of legal thought, including of the tensions that inhere in law.

## 6 FOUR PROPOSALS TO MAKE THE LEGAL ACADEMY INCREASINGLY HOSPITABLE TO LEGAL THOUGHT

The picture I draw of the current state of the institutions of the legal academy as hosts of the tradition of legal thought is obviously incomplete and highlights only some of its most striking aspects. Nevertheless, even this incomplete account raises the question of what to do?

If the legal academy is to earn a future for itself, it must expunge from its institutional design and culture the bias in favor of practicism, minimalism, and parochialism. Unless and until that is accomplished, the legal academy 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.

Because history is not necessarily fate, I turn briefly to some of the initial steps that might help the institutions of the legal academy 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 the legal academy and their associations such as the American Association of Law Schools in the United States.

### *First Proposal*

Rankings may be informative, and in the age of indicators they appear to be irresistible. Obfuscated along the way is the fact that in the long term, indicators are more constitutive than descriptive of that which they measure. Bearing both facts in mind, institutions of the legal academy should create and endow foundations at the national, regional, and international levels to review and rank them nationally and internationally according to standards specifically designed to capture the quality of their contributions both to the grand tradition of legal thought and to the many professions in law. Call this the *Legal Education Peer Quality Assessment.*

To the extent that resistance to the existing business of rankings presents a problem of collective action to the institutions of the legal academy, the most prestigious institutions in each country and the associations of law schools should take the lead, as they have an obvious special responsibility to launch and sustain this initiative.

### *Second Proposal*

The legal academy ought to 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. For this reason, legal academy should reexamine their cooperation with the existing law school accreditation model and with the regulatory systems of bar admissions.

Around the world, and for almost a century now in the United States, the professional association of lawyers and students, the bar associations, condition their approval or recommendation of legal academic institutions 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 courses.

Though well-intended, the influence of the bar has largely contributed to the commodification, banalization, and reductionism of legal education while illustrating the unemancipated status of legal academic institutions. Such incursions on academic autonomy have thus far had the effect of pushing further into legal education the agendas of practicism, minimalism, and parochialism, for they come from limited perspectives of external actors whose partial responsibilities do not sufficiently overlap with the broader responsibilities of the legal academy.

What is needed here, as elsewhere in legal education, is a good dose of institutional pride, gravitas, and understanding on the part of the legal academy of its broad responsibilities, without which law schools will find no impetus to change their current unemancipated circumstance. The institutions of the legal academy should therefore establish clear limits to the influence of the bar. Once emancipated from its current *capitis diminutio*, the legal academy would gain the ability to develop autonomous and fruitful cooperative relationships with professional guilds and regulators of access to professions, including the bar in each country.

### *Third Proposal*

The institutions of the legal academy everywhere should create a required yearlong course on legal thought. Call this the *Foundations of Legal Thought* course. The talented and ambitious minds arriving every year at the legal academy ought to be offered an opportunity to engage critically with the tradition of legal thought. Wide adoption of *Foundations of Legal Thought* would likely send tectonic signals throughout legal education around the world, and this may well be the most important initiative to start immunizing faculty and new generations of students against legal education's structural bias in favor of practicism, minimalism, and parochialism.

Naturally, schools and scholars would adopt different conceptions of *Foundations of Legal Thought*. For example, some may emphasize canonical works selected from the ages and places of legal thought, while others may focus on groundbreaking contemporary works from around the world. The important task to keep in mind is to connect students to intellectual greatness in law.

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 constitute the large majority of requirements for first-level law degrees (the LL.B., the J.D.). However, just imagine the possibilities for those components of legal education once they are taken out of the shadow of practicism, minimalism, and parochialism, and once the students who come to them have had their knowledge and educational agency deepened and broadened by a year spent with intellectual greatness in law. There are good reasons to expect that many prospective law students, likely the strongest among them, would be appreciative of the legal academy's unwillingness to deny a home for the traditions of legal thought.

### *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, basic law degree programs will, in the immediate future, continue to operate under constraints that limit their role in the critical study and expansion of the tradition of legal thought. How to react to such difficulties?

One answer is that legal academy should turn, as almost every other department of the modern research university does, to doctorates as aspirational institutional islands of scholarly ambition and excellence. These programs should look for prospective doctoral students without regard to the place or language of their initial legal education, tapping into global pools of talent. Again, as almost every other department of the modern research university does. These new doctoral programs in law should hold their students accountable for gaining a critical understanding of legal thought in general and for mastering the legal-thought 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.

## 7 CONCLUSION

The central factual claim of this chapter is the interdependence of high tradition of legal thought, the institutions of the legal academy, the social institution of law, and social integration with normative self-governance oriented toward justice. This claim supports the normative thesis that the legal academy ought to provide an institutional home for the long and polyphonic tradition of legal thought. The institutions of the legal academy, I argued, fail in that responsibility. Aspects of the design and culture of the institutions of the legal academy that contribute to its inhospitality to high legal thought were explained. I named those aspects *practicism*, *minimalism*, and *parochialism*.

Legal thought and legal academic institutions shape each other, thus raising the question of what elements of the tradition of legal thought have made the institutions of the legal academy in the United States and around the world increasingly vulnerable to practicism, minimalism, and parochialism. Gesturing toward an answer to this question, this chapter turned to the ratio-historicism of *The Great Alliance*, to the intellectual impatience and reductionism of philosophical pragmatism and legal realism, and to confused anti-formalism. The chapter last turned to four proposals for beginning to make the institutions of the legal academy hospitable to the high traditions of legal thought.

This chapter did not advance a model of legal thought to shape the institutions of legal education away from its current predicament. It is not that attractive models do not already exist. The problem is that they will not have an opportunity to influence the institutions of the legal academy until these are made even a little more hospitable to complex, demanding, high intellectual endeavors. It is good, though, to know where to head, for "no wind," Montaigne reminds us, "serves him who addresses his voyage to no certain port."

As individuals, we live between past and future, tradition and will, remembrance and hope, beginning and end. And so do our societies. For individuals and societies, the present is a very solitary place and the future arid and opaque without traditions of thought for company.

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