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THE CRISIS OF LEGAL EDUCATION IN AMERICA

BY HAROLD J. BERMAN*

Address delivered at the Dedication of the James Warren Smith**
Memorial Wing of Stuart Hall, Boston College Law School
April 28, 1984

A dedication such as this is a historic occasion, in a double sense of the word "historic." It looks both to the future and to the past.

As teachers and students, officers, alumni, and friends of Boston College Law School, you are here partly to celebrate a renewal of your own community, your own common purposes. Even an outsider can sense the pride and joy of this occasion, when a community comes together and, in the name of dedicating a building, re-dedicates itself.

Such a re-dedication looks not only to the future but also to the past. Someone has said that a historian is a prophet in reverse. By the same token, a prophet is a historian in reverse: he is concerned with the historical significance of the new age that he proclaims. In reading the signs of the times, he divides the future from the past and thereby helps to orient us toward both.

And so those who wish to dedicate an important new building give it a name, and the choice of that name may tell something about the direction, from past to future, that the community is taking.

I regret very much that I did not have the privilege to know James Warren Smith personally. I know that he was a beloved and a gifted teacher. I know also that he was a person of great public spirit who made many contributions to the Commonwealth and to its legal system. He was devoted to the law — both the law in action and the law as a system of thought. And finally, he was a deeply religious person whose professional life and work, including his teaching, were strongly motivated by his religious faith.

James Warren Smith serves as a source of inspiration, not only in a general sense, but more specifically as a source of strength in meeting the critical problems that have confronted legal education in the United States for the past forty years, and have now brought it, in my view, to a real crisis.

When I speak of a crisis of legal education in America, I do not mean that law students are not studying hard; nor do I mean that law teachers are less diligent or less able than they ought to be or than they were. So far as I can judge, the law students who graduate in 1984 will not be noticeably less skillful or knowledgeable in the practice of law than their predecessors.

* Harold J. Berman delivered the memorial address. On January 1, 1985, Professor Berman became James Barr Ames Professor of Law Emeritus, Harvard Law School, and Woodruff Professor of Law, Emory University School of Law.

** James Warren Smith (1930-1982) had been a professor at Boston College Law School since 1958.

Nor am I referring to the criticism that law students today are not receiving sufficient training in how to serve the public interest. It may be true, as President Bok of Harvard University has written, that we need more educational programs that would prepare prospective practitioners and legislators to expand the delivery of legal services to the poor, to develop new, less expensive and less acrimonious methods of dispute resolution, and to explore new ways to finance efforts to raise industrial productivity and combat pollution, crime, poverty, and other social ills. Nevertheless, our inadequacies in these respects hardly constitute a genuine crisis of American legal *education*, since ultimately the law schools can only play a relatively small part in the achievement of needed reforms in these areas.

The crisis of which I speak is a crisis of attitudes toward law and a crisis of legal thought. Law teachers and law students of 1984 are more one sided, and more mistaken, in their view of the nature of law than were their predecessors in any other period of American history.

We have been overwhelmed by the belief that law is politics and politics in a rather narrow sense: not in the sense that Aristotle meant when he said law is politics, but more in the sense that Max Weber and V.I. Lenin meant when they said that law is politics, namely, domination. It is widely accepted in our law schools that law is essentially something that is made by political authorities, including legislators, judges, and administrators, to effectuate their policies; that law is essentially a means of social engineering; that law is essentially a pragmatic device, an instrument, used by those in power to accomplish their will. Of course law *is* all that. But it is not *solely* that — it is not *essentially* that. What is omitted from the prevailing view is a belief that law is rooted in something bigger than the people who hand it down — that law is rooted in history and in the moral order of the universe.

Of course, law is politics. But law is also morality. And law is also history. Law is not only something that is *made* by those who are in power; law is also something that is *given*. The legislators and judges are not only its masters. They are also its creatures.

In American law schools today, reference is rarely made to the sources of our legal tradition in the religious convictions of our ancestors, both Jewish and Christian. It is simply not mentioned that, historically, all the legal systems of the West emerged in response to a belief in the lawful character of the universe and in the fundamental purpose of law to guide men and women to salvation. The king, said Bracton in the early 13th century, is under the law, and both are under God. At about the same time, in the first lawbook ever written in the German language, the *Sachsenspiegel*, it was said, "God is himself the law, and therefore law is dear to Him." Without the fear of purgatory and the hope of the last judgment, the Western legal tradition would not have come into being.

Admittedly these historical truths, which are not taught today, were also not generally taught in American law schools one hundred or one hundred and fifty years ago. But then they were taught in the homes and in the churches. They were taken for granted. They were part of the public philosophy. Indeed, throughout the nineteenth and into the first decades of the twentieth century American lawyers learned their law chiefly from Blackstone, who wrote that "[T]he law of nature . . . dictated by God himself . . . is binding . . . in all countries and at all times; no human laws are of any validity if contrary to this; and such of them as are valid derive all force and all their authority, mediately or immediately, from this original."

Only in the past two generations, in my lifetime, has the public philosophy of America shifted radically from a religious to a secular theory of law, from a moral to a

political or instrumental theory, and from a historical to a pragmatic theory. Law is now generally considered to be simply a device for accomplishing specific political, economic, and social objectives. The tasks of law are thought to be finite, material, and impersonal — to get things done, to make people act in certain ways. Rarely does one hear it said that law is a reflection of an objective justice or of the ultimate meaning or purpose of life. Usually it is thought to reflect at best the community sense of what is expedient; and more commonly it is thought to express the more or less arbitrary will of the lawmaker.

The shift in public philosophy has changed the context in which law is taught. Even when we teach the same cases, the same rules, the same theories, that were taught sixty or a hundred years ago, they have a different meaning. For example, Christopher Columbus Langdell, who in the 1870s collected for the first time cases on contracts, combining the actions of debt, *assumpsit*, and various other forms of action and developing a set of principles of general contract law, taught his students that his science of law had nothing to do with justice. If it was justice they were interested in, one of his followers said, they should go to the Divinity School! But Langdell — or at least his students — did believe in justice, including divine justice; he simply believed also that it had nothing to do with contracts. Now it is very different: today if a professor says that contract law has nothing to do with justice, neither he nor his students are apt to have any idea of what justice is or whether it exists.

But the changes go much deeper. We still use cases, but since there is not a belief in the ongoing historical development of law over generations and centuries, the doctrine of precedent has grown weaker and weaker, and the law that a case stands for no longer seems to have objectivity. It is taught by some that any case can be decided any way — that law is, basically, an argumentative technique. The judge, it is thought, decides on the basis of his political, economic, or psychological prejudices; legal reasons are merely rationalizations. This used to be called "legal realism." Later it was developed into "policy science." In more sophisticated forms it prevails widely in contemporary American legal education, despite some important qualifications introduced by those who stress inherent limitations imposed by the various aspects of what is called "the legal process."

It is interesting, in this connection, to go back over the introductory sections of law school catalogues through the past eighty-five years. The Harvard Law School catalogue of 1900 says that "the design of this school is to afford such a training in the fundamental principles of English and American law as will constitute the best preparation for the practice of the profession in any place where that system of law prevails." This formula, which was repeated annually in subsequent catalogues, was a reference to the fundamental principles of English and American law as they had developed over many centuries. Legal history provided the transcendent quality by which justice was to be found. The 1930 catalogue — Roscoe Pound was dean — is even more explicit: "The school," it states, "seeks as its primary purpose to prepare for the practice of the legal profession wherever the Common Law prevails. It seeks to train lawyers in the spirit of the common legal heritage of the English-speaking people." More recently, however, this sentence has been omitted and instead in the 1970s and until 1982 we have the following: "The school tries to prepare its graduates to deal with legal problems as they arise wherever the common law prevails." What has happened to the fundamental principles? What has happened to the spirit of the common legal heritage? Finally, the phrase "Common Law" lost its initial caps, and in the 1983-84 catalogue it disappeared altogether.

"No law school," said the Harvard Law School catalogue of 1970, "can today teach with certainty the law which will be practiced by its graduates throughout their profes-

sional lives. The school does seek to provide its students with a solid base of knowledge, analytical skills, and insight which will enable them to perform effectively as laws and legal institutions continue to change around them." There you have the contemporary crisis in American legal education. We are unable to identify a common purpose other than training in the kind of "knowledge, analytical skills, and insight" that are needed to "perform effectively" as lawyers. One who has learned to "perform like a lawyer" will be able, we suppose, to analyze any legal problem that may arise in a world in flux, a world in which law is always a means to other ends, a world in which the concepts of an objective moral law and an ongoing legal tradition no longer carry great weight.

The triumph of the positivist theory of law — that law is the will of the lawmaker — and the decline of rival theories — the moral theory that law is reason and conscience, and the historical theory that law is an ongoing tradition in which *both* politics and morality play important parts — have contributed to the bewilderment of legal education. Skepticism and relativism are widespread. Only a few are sure what has to be taught. We go on using cases as the primary material of instruction, but we hardly even teach the doctrine of precedent. We go on offering basic courses in contracts and torts in the first year, but many teachers of these subjects spend a good deal of time proving that there really is no such thing as a "law of contracts" or a "law of torts."

Meanwhile, after taking "basic" courses in the old "common law" (now in lower case) during the first year, the student is confronted with an enormous array of choices. To give an idea of the nature of change, let me say that when I first came onto the Harvard Law School faculty 36 years ago, *all* courses in the first and second year were required, and at least *one* course in the third year was required. In those days there was something called "law" and people knew what it was! Today the 1983-84 Harvard Law School catalogue lists over 240 different courses and seminars — that is, courses and seminars in 240 different legal subjects! We have moved beyond the legal pragmatism of Justice Holmes, who said that law is a prediction of what courts will do, to the ultimate in legal pragmatism, that law is a prediction of what *lawyers* will do. Someone has said of pragmatism that it is fine in theory but it doesn't work in practice.

Concentration on the instrumental character of law — law as a means, whether a means of social control in the broad sense, or a means of effectuating specific policies, or a means of maintaining power, or whatever, but always as a means, never as an end in itself — has contributed, I believe, to the fragmentation of the law school curriculum. If law is essentially an instrument of politics, there is very little in society to which it is alien, and by the same token there is very little in law that is unique or required. Its nature is shaped by the other ends which it serves. It tends to become, therefore, an infinite series of practical solutions to social problems.

Under these circumstances, it should not be surprising that in recent years a group of law professors has emerged that is demanding a thorough and open "politicization" of law teaching. These critics ask the law schools to devote themselves, on the one hand, to exposing the fundamentally exploitative — and also the inherently self-contradictory — character of all law, and, on the other hand, to transforming our existing legal system into an instrument of rapid social change in the direction of an egalitarian society. Since for them "law is politics" — in the Weberian or Leninist sense — some of them advocate the open use of militant political tactics in order to "seize power" (as they put it) within the law school community. Thus the dominant pragmatist, instrumental, and utilitarian theory of law has paved the way for the emergence of a band of revolutionaries who combine nihilism with utopianism.

It would be a mistake, however, to suppose that the crisis of American legal education consists of this radical attack upon the liberal establishment. The heart of the crisis, in my view, is not in the radical attack but in the liberalism that is being attacked. For two generations liberalism has taught that law is essentially a pragmatic instrument of public policy. The legal process as a whole has been reduced by this to what in reality is only one of its major aspects. Now the pragmatists are being hoist, so to speak, by their own petard.

Obviously, the problems that are being confronted in American legal education today, including the crisis of legal thought, are part of a much larger movement of history. The traditional Western beliefs in the structural integrity of law, its ongoingness, its religious roots, its transcendent qualities, are disappearing not only from the minds of law teachers and law students but also from the consciousness of the vast majority of citizens, the people as a whole; and more than that, they are disappearing from the law itself. The law itself is becoming more fragmented, more subjective, geared more to expediency and less to morality, concerned more with immediate consequences and less with consistency or continuity. The historical soil of the Western legal tradition is being washed away in the twentieth century, and the tradition itself is threatened with collapse.

In part, the crisis of legal education is due to the radical centralization and bureaucratization of economic life, of which socialism in one form or another is an aspect or a consequence. Whole new branches of public law have emerged in areas such as taxation, securities regulation, administrative law of a dozen different kinds. Also the radical changes that have taken place in constitutional law during the past 30 years have had enormous repercussions throughout the law. The center of gravity of the legal system has shifted, and the background of legal ideas, the very style of legal thinking, which was characteristic of previous centuries seems to be increasingly irrelevant. We have moved from an individualistic to a collectivistic age.

If what we are experiencing in the 20th century — in many countries — were, indeed, only an economic and a technological revolution, or even only a political revolution, we should be able to adapt our legal institutions and our system of legal education to meet the new demands placed upon them, as we have done in revolutionary situations in the past. After the American and French Revolutions of 200 years ago, after the English Revolution of 350 years ago, after the Lutheran and Calvinist Reformations of the early sixteenth century, after the Papal Revolution (the Gregorian Reformation) of the late 11th and early 12th centuries, the law eventually caught up with the changes and legal science, legal education, adapted itself to them. Our difficulty, however, is greater than in the past. Today we are threatened by a deep cynicism about the law, which has penetrated all classes of the population. And it is this threat that makes the crisis of legal education so important — and so acute.

The story is told of a man who was hanging on the limb of a tree extending over a canyon. He could not raise himself onto the limb and gradually his grip grew weaker and he looked up to the heavens and called, "If there is anyone up there, please help, help!" A voice came booming out over the canyon, "I am here. I can save you if you have faith." "Yes, yes, I have faith. I will do anything," shouted the man. "If you have faith you will let go of the branch," said the voice. The man looked out over the canyon and then turned again to the heavens and shouted, "Is there anyone *else* up there?"

It may be impossible to restore the ancient Judaic and Christian foundations of our legal tradition. But it is important, first, to recognize that it is the disappearance of those religious foundations that gives power to the convictions of the utopian nihilists — power possibly to overcome the superficial utilitarianism of the liberal establishment. The skept-

tics, especially, should feel some nostalgia for a time when justice seemed sure and history had meaning. Let them, at least, cry out, "Is there anyone *else* up there?"

Second, we must restore the integrity of our jurisprudential heritage. We must re-combine the separate strands of legal thought that were once wound together: positivism, natural-law theory, and historical jurisprudence. It is a recognition of the historical dimension of law, in my opinion, above all, that we must re-capture in order to restore the creative tensions between politics and morals. We shall not achieve social justice without a strong sense of legality, and we shall not recover a strong sense of legality without an integrative jurisprudence that finds the sources of our law not only in politics but also in history, in human nature, and in the universe itself.