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The Regenerative Process in Law

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THE REGENERATIVE PROCESS IN LAW

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It is my purpose to talk about the law student—an important person in our society for tomorrow he will be the legislator, executive, administrator, judge, teacher and private counsel on whose judgment its ultimate welfare depends. I would not discount the importance of the scientist, engineer, businessman, soldier, politician, statesman, demagogue, artist, man of letters or the everyday citizen, whatever may be his place in the social order. They too are important. But they and their fortunes ultimately depend upon the protections and controls made available by men of law, and it is the law student who is the chief exponent of the regenerative process necessary for law to fulfill its functions. It is not prestige or power that I would accord to the law student but rather his capacity to comprehend the affairs of his fellowmen and to give them such direction as to provide strength, stability, flexibility and endurance to the social order.

Now for half a century, law students have left the campus to become in one way or another submerged in some national crisis. First, the threat of greedy corporate enterprise to subject the far stretches of our country to a feudal state. Then a world war which so largely nullified the steps taken to halt the aggressiveness of corporate power, followed by the fantastic period of empire building and speculative exploitation which culminated in a prolonged and disheartening depression in the midst of plenty. And another world war to halt the progress made towards establishing a more equable social order, only to be followed by a rebound of massive enterprise and measures of defensive war which now hold our people at such dizzy heights of prosperity, and yet of fear so that no one dare guess what the morrow will bring forth.

The lawyer's labors during this brief period, especially the labors of the young lawyers of the nineteen thirties and forties, are beyond our comprehension. But no one can gainsay the fact that he has been at the very heart of every crisis and of every local storm along the squall lines which followed in its wake. This much we also know that wherever we may live big business has become our next door neighbor, viewed with alternating awe, admiration and fear. Moreover, we know that along with it has come big government, each a necessity for the other, so that

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neither can be seriously impaired and either survive; each subject to every new conquest of the physical world through scientific research and technology and to every little tornado on the political horizon.

The observation need not be labored. The last fifty years demonstrate its truth beyond peradventure. Financial irresponsibility, concentration of corporate power, trade excesses, depression, revolutionary social concepts, political upheavals, wars hot and cold, scientific inventions, discoveries and technologies, and surges from every quarter have rocked and tossed all the governments of the earth and greatly affected the development and administration of their laws. What is true of government is no less true of the institutions of business. Disturbances either in progress or brewing, forever threaten their security.

As the economic order grows in power its struggle to capture the processes of political power increases in intensity. The processes of government are watched with eagle eyes and subjected to the pressures of massive lobbies that reach into every cell of political power. Public relations experts are busy with their polls and surveys that daily feel the pulse of customers and voters. Powerful local, state and national chambers of commerce, labor unions, associations of manufacture, trade and agriculture, each with long purses tirelessly propagandize the public and finance political chests in ceaseless campaigning. Associated with many of these orgnaizations are scores of fungus groups and institutions willing to poison the springs of information and emotions for price or prejudice. Likewise, the operations of the institutions of business are held under the searching eye of government. No emphasis is required to convince anyone that in this struggle for power all the channels of business and government and their tributaries are swollen and choked. Nothing on the economic landscape escapes unscathed. Nothing in government is at rest or at peace.

Little imagination is required to sense the implications for the law student of such a turbulent environment in which he must do his work. Whether enlisted on the side of business or government or of the individual citizen, the problems created by this ceaseless succession of crises, disintegration and regeneration of the institutions about him, seldom remain the same for longer than a day. New alignments of interests are always in the making, the scene of his operations is always shifting. How shall he prepare himself to deal with problems that refuse to stand still? What attitude must he assume? What understanding must he have? What freedom and integrity of judgment? If the law student is the chief exponent of the regenerative process in law whence the source of his power? If there is no solid firmament outside, whence must come

his resoluteness on which he can depend for support? It is my belief that attitude, understanding, freedom and integrity of judgment, power and resoluteness become fused into the character of the lawyer through a prolonged period of discipline, begun before law school but greatly intensified by this studies there and the pressures of his labors and experiences that follow. It is my further belief that the most telling part of this discipline is the comprehension of the factors which have given direction to the endless growth of law through the judgments of lawyers who have gone before.

I have already observed how government is tossed about by the storms and disturbances of the economic and political world around us. May we now look more closely at the effects of these storms and disturbances upon the every day courthouse law through which people as individuals and as groups secure their protection? Let us look at law upon its lowest and perhaps its most pervasive level—tort law, for it is here that I feel most at home.

Development of Tort Law

a. *Negligence.*

The area of tort law is always turbulent—never at rest. For example, the industrial revolution of the early eighteen hundreds transformed the very strict medieval remedies of trespass and case for unintended physical harms to person and property into an action of negligence which until about 1860 gave enterprise almost complete immunity from liability to its victims. This marks the most extreme regeneration in the development of the common law. Beginning in the middle 1800s a reaction as expansive but not nearly so violent set in and lasted for more than half a century during which time negligence law was so refashioned that liability of enterprise became exacting. And during the last quarter of the current century negligence law has become so very exacting that in order to prevent liability becoming excessive the appellate courts have been compelled to employ numerous strategems by which they practically assume the whole power of the judicial process. This is especially observable in automobile traffic cases, but not more so than in the liability of the manufacturer for the victims of food and chemical products, and little less so for mechanical products.

The landowner's liability before the 1850s for injuries to highway travellers and to persons who came on his land was practically unknown, but today his liability to travellers who are prejudiced by his operations is severe, and liability to persons who come on his premises is being expanded in nearly all jurisdictions, while the landowner who carries on

operations dangerous to his neighbors is being compelled to surrender immunities which were considered sacred only a few years ago. Likewise the builder, contractor, municipality, charitable hospital and physician, once practically immune for injuries to their victims, are rapidly losing their immunities.

These changes in negligence law are not difficult to account for. The period of immunities was the period of infancy of modern enterprise. The period of reshaping the doctrines of negligence and greater use of jury trial with corresponding extension of liability was the same period in which enterprise found its legs and reached its early maturity. The current period in which most of the earlier immunities of negligence law are being cast aside is the period in which protection of both enterprises and its victims is shared by large segments of the social order. But these developments did not come about without great pressures. It was difficult for the courts to fashion the immunizing doctrines of the early 1800s. It was more difficult for them, even with the aid of legislatures, to re-tool and convert those doctrines to different uses. And most difficult of all for the appellate courts to take them into their own hands as has been done in recent years.

But events have moved rapidly. To the great increase in the use of dangerous machines—the safety factors made available by new designs, expertness of operators, shop arrangements and rules, building equipment and medical services—the increasing prosperity of enterprisers—power to shift losses through price controls and insurance—growth of political power of industrial employees through unions and votes—substitution of taxes for charities in providing for the needs of the victims—development of scientific techniques for making proof—wider visions of legislators, judges and advocates—the broadening of the horizons of legal scholarship and the deeper probing in the teaching of law—and perhaps through a growing appreciation of the moral responsibility for the victims of enterprise—negligence law has responded with considerable faithfulness and promptness, except in the motor vehicle cases and then it is left hopelessly behind. Underneath all these factors one can almost feel the daily swelling of the economic order throughout the period of our national existence.

It will have been noticed that protection under negligence law is for the physical welfare of the victim and against damage to his property. The changes in the incidence of negligence law from period to period is thus wholly consistent with the welfare of enterprise itself, whether injuries involve the enterprise employee, traveller on the highways of trade and commerce, the customer of the merchant, the adjoining land-

owner, or others who are engaged in the activities of the industrial order. In fact the sharing of the risks of physical injuries has been largely shifted to the entire group through numerous forms of insurance, itself a major business enterprise.

b. *Fraud.*

The pattern is not different in some of the other areas of tort law. The American trader during most of the 1800s was largely immune from liability for his deceit and fraudulent practices. Fraud in the sale of lands, merchandizable goods of every character, gold bricks, corporate stocks, and in the securing of credit and the repudiation of debts placed a heavy burden on enterprise of every type. The remedies provided by law gave slight protection to the victims of fraudulent practices. But roughly in the late 1800s and early 1900s the picture began to change. State Legislatures and Congress set up administrative agencies to ferret out and prevent fraudulent practices, imposed severe restriction upon the fraudulent operations of promoters and traders and provided remedies for their victims. Moreover the courts refashioned their doctrines so as to penalize the trader who profits from fraud and deceit, and in many cases through innocent misrepresentations. Again it will be noted how earlier law corresponded to the rolling back of the frontier and the exploitation of the resources of the country to the end of making fortunes. Self reliance, willingness to take a gamble, grim acceptance of the wiles of the cheat, or perhaps law made on the spot with fist or deadly weapon took the place of the formal processes of the courthouse. Only a people of great resourcefulness could have withstood the losses they suffered through fraudulent exploitation for a full century. But with the firm growth of enterprise, its own interests came to demand protection from fraudulent schemes and practices, and again the law responded. It would be too much to say that the law is adequate against the subtleties of fraud, for the constant reproductive processes of business and government afford new opportunities for the art of those who toil only to spin the webs by which they snare their victims.

It is enough to observe that throughout this period of a hundred and fifty years tort law involving physical and financial hurts incident to the growth of industry and trade was one of constant movement. The lawyers of a later period successively repudiated, improved and refashioned the law of their predecessors. What made them do so? Clearly it was because different environments called for different law in order that the interests of those under the protection of law could be better served. Lawyers were able to sense, if they did not fully comprehend, the welfare of the social order as a whole and respond, some-

times through legislative act, but more frequently through the good sense read into the metaphysical concepts employed by the courts.

c. *Defamation, Privacy, Publicity, Ideas.*

The development and decline of the defamatory tort presents an interesting pattern reflecting the growth of the social order and deserving much greater consideration than it has received. Protection was originally given the individual by the treatment of defamation as a sin under the jurisdiction of the Church, and by the English local courts through severe criminal penalties, such as cutting the tongue out. In both jurisdictions the price of honor was high. Protection of the individual by the common law courts began by the building up of categories covering charges imputing crime or incompetence for business or office. Protection of noblemen and high political persons, and through them the political institution itself, was provided by an early statute administered by the King's Council. The means of defamation were limited almost entirely to vocal communication as gossip, ballads and rhymes. But with the invention and popularizing of the printing press the bloody political and religious strife that characterized the transition of England from feudalism to the status of an empire was intensified and prolonged by the circulation of seditious, treasonable, scurrilous and heretical sheets and pamphlets. The press became a thorn that could not be removed from the sides of Church and State. Royal proclamations, licensing, censorship, indices, suppression and burning of books, and criminal prosecutions followed and lasted until the political life of English government and its Church was firmly established. When the Court of Star Chamber was abolished its jurisdiction fell to the King's Bench and with the abolition of the Ecclesiastical courts complete jurisdiction of defamatory harms passed to the common law courts. Prosecutions for libel persisted throughout the 1700s but gave way during the early 1800s almost entirely to civil actions which in England have continued to be of importance. It was during this period that free speech, freedom of the press and jury trial in libel cases became such stirring political issues. It was also during this period that the curious distinctions were made between actions for spoken and written words. In colonial America there were occasional criminal prosecutions for libel, some attempts at censorship and some book burning. Again at the end of the 1700s there was a period of prosecutions under sedition laws, but now for almost a century criminal actions for libel have been little more than a threat, and reserved for aggravated cases such as the scandal sheets devoted to the sex life of movie celebrities.

As the English local courts fell into disuse and the jurisdiction of the church courts diminished, the common law courts became so frightened by the increasing mass of scandal litigation that they burdened the defamation suit with numerous jurisdictional and doctrinal absurdities. When the duel was suppressed and the slander-monger was displaced by less offensive methods of communication, the hurts inflicted by gossip and abuse of one's neighbors became too trivial in a congested and highly charged economic and political order to consume the time of so complex a litigation process. Perhaps the only extension of slander law for more than a century is the limited protection given a woman against a charge of unchastity. The slander action is no longer an important tort remedy.

With the extravagant growth of modern means of publication such as daily newspapers, periodicals, books, pamphlets, advertisements, radio, television and moving pictures, one could well imagine the courts clogged with libel suits much as they are with automobile cases. No such catastrophe has befallen the courts. Instead, with the growth of population and the means of communication, libel suits have steadily lost ground, even though the libel formula, stated with many variations, is simple and comprehensive, *i.e.,* the malicious publication of a false charge derogatory of a person's character. The victim need only show publication; malice, falsity and damages are presumed and the defendant has the burden of showing the truth of the charge, if such is his defense. It is said that one publishes at his peril, probably true only in cases of mistaken identity and items published without investigation. The defenses which have been developed to meet this seemingly strict liability make the libel suit the most difficult of all tort actions to maintain, and except in extreme cases it is seldom successful.

Some of the defenses are these. The derogatory statement itself may be greatly reduced by the latitude allowed for ridicule, caricature, abuse, scurrility, vituperation and scathing criticism. If the charge is not libelous on its face, a jury must determine what is meant and whether the charge is libelous, and in many jurisdictions the victim must go further and show special damages, *i.e.,* specific pecuniary loss. A defendant may claim self defense so long as his counter charges are not excessive and are restricted and pertinent to his defense, and he may use the same or similar medium used by the attacker. The medium itself is also immune. If the defendant is a group organization or a member of a group such as a corporation, church, labor union, medical society, or any other group, with or without corporate form, it or its members may make false and hurtful charges against any member of the group or any outsider so long as it is done in good faith within the organization and

for the protection of the group interest. The principle has the widest application, being available in many jurisdictions to newspapers and to officials as members of political groups such as the community, the state or nation, as the case may be.

Likewise newspapers or reporters of any medium may publish fair reports of public proceedings such as court trials, hearings before investigative committees, city councils and boards together with the testimony of witnesses, arguments of participants, public speeches and the like however false the contents of such proceedings and however hurtful to innocent persons they may be. All public officials including lawyers and witnesses have the broadest latitude in what they say or report so long as it is pertinent to the exercise of their functions. Some courts retsrict this immunity to officials of high rank and deny it to officials of low rank unless what is written or said is without malice, though the burden of proving malice is placed on the victim. If a group is libeled it must be a small group, and if less than the whole group, a member must be able to identify himself as the target. If a libel is republished, the republisher may be held but the originator is immune unless it can be shown that he intended that the libel be republished. In addition to these immunities all jurisdictions restrict the time in which suit can be brought to short periods after publication, few beyond two years and some restrict the period to one year. Some of the same jurisdictions limit the victim to a *single* suit brought within one year after the *first* publication, even though it involves mass publication of books and magazines distributed for an extended period. This is in strange contrast to the orthodox common law which allowed as many suits as there were publications of the libel, and each utterance of a libelous publication gave rise to a new action. While broadcasting by radio and television is now rather conclusively considered as libel rather than slander, the liability of the company for libel disseminated by independent sponsors who use its facilities is generally based upon a theory of negligence and practically impossible to maintain.

Fair comment or criticism concerning matters of public concern is one of the most usual defenses made by newspapers and commentators. In many states such comment must be based on facts truly stated, while in others the immunity covers both false charge and comment if made in good faith. The difficulty of determining what is fact and what is comment allows great latitude to a defendant, and if his statements are partially true he is liable only for those parts not true. Retraction, lack of actual malice, and partial truth are very valuable defenses for reducing the damages and in some cases for defeating the action altogether.

This catalog of defenses does not indicate all the escapes from a libel action but is sufficient to indicate why individuals hesitate to institute a costly suit against a powerful defendant and why so few suits succeed. The victim with rare exceptions is completely outgunned and there is no equality to be found in or out of court. Moreover, the editor and commentator have become extremely artful in keeping within the bounds of their numerous defenses. It is only in such extreme cases as that of *Quentin Reynolds v. Pegler* that libel litigation pays off. More frequently the litigant who institutes a libel suit undergoes a long ordeal with no satisfaction at the end and with his reputation worse impaired than if he had not instituted suit. A small settlement with retraction is the better wisdom. Perhaps the only significant recent step in extending protection under libel law is the gradual differentiation of trade libel from that of social and political libel, and the extension of the equitable remedy of injunction in behalf of the injured trader. Even here the step has been taken with extreme caution though in England equity may give a remedy against any libel.

Why should protection of the individual's standing in the eyes of his neighbors steadily dwindle while the means of destroying his standing multiply in number and power? The means of publication are capable of reaching every nook and corner of this and other countries almost instantly. They are held under tight controls closed to the individual except upon terms dictated by those who have the power at their command to direct the thinking of the people of every community in the nation. As they come more and more under control of the same mind of corporate and government bureaucracies a basic uniformity of purpose is achieved. People hear and read what managements think important for them to hear and read. The same daily provender, predigested and read for instant consumption is provided without worry as to its purity and largely without responsibility for its effects upon the life and fortune of the individual. Those in control exercise power far beyond the formal processes of government. Individuals may be destroyed and their families and fortunes impaired by publicity without the slightest opportunity to defend themselves or to secure reparation for their injuries. Why is tort law so niggardly with protection to the victim when business and government are so able to pay?

The rationalization offered by the courts in many cases is that it is better that the individual suffer than it is for the sources of information to be muffled or the officials of government subjected to interminable litigation. Whether the reasons are valid or not, it is a fact that officials of government and those of private business who control the means of

publicity can destroy the individual with practical impunity. This is true even though the standing a person builds up through the years is the most dependable and valuable product of his life. And where protection is most urgent, the tendency to restrict a recovery of damages to specific economic loss—frequently impossible to prove—but further reflects the depreciation reputation has suffered in modern society.

Basically perhaps, as American society grew into a group society, free speech and free press were essential for group operations and also for the administration of the agencies of government. In this climate early libel law was as much out of place as was the strict liability of the forms of action for the physical injuries resulting from industry, hence libel law became overlaid by the succession of defenses which I have recited. But the question now is whether with the means of communications so far flung, so instant and so completely under the control of corporate and political bureaucracies, and so completely closed to the individual, the time has not arrived for a refurbishing of the law of libel or perhaps the development of some much more adequate remedy. Does the protection of business and political institutions or other groups continue to require the individual to surrender protection of his community and institutional relations? This is a problem that now awaits the regenerative process of law.

Under the same rationalization given libel law the private affairs of the individual may be subjected to the most searching secret private or public inquiry, and his physical attributes and what people say about him placed of record if official investigators believe them to concern the general welfare. Moreover, the individual's photograph, statements, history and those of his family may be published far and wide, and his most intimate conduct and affairs however humiliating and sickening, exposed if they rise to the level of "news" or "culture" or "education"—concepts for which there are no ascertainable boundaries. The privacy of the individual rests primarily upon his good fortune in not attracting the attention of the government investigator, the news reporter, or those seeking to exploit raw life under the guise of portraying the current state of social culture. It is only when the individual retires to the isolation of his home, office or hide-out that his privacy is protected. Even here he is not always safe from the eye of the camera, the hidden recorder, the intrusions of the debt collector, the tapping of his telephone or the descriptions written by those who wait outside. When, however, the individual's name or photograph or history has publicity value for commercial advertising, in many jurisdictions he may find protection against the appropriation of such value. Aside from physical invasion, this is

about the limit of protection afforded by the tort doctrine of "privacy" given currency by Brandeis and Warren. Even this right of publicity is attenuated for if the individual's personality or performance rises to the level of news, or has cultural importance, his publicity value may be exploited under the thin disguise of some current or public event or as having educational value.

As the individual himself is so largely in the public domain, so too, are his ideas, if he lets them be known. If he gives his idea form and expression under copyright or patent or even restricted to his personal use, while the form and expression are protected, the idea itself is released to any one who may give it fresh form and expression. Since new form and expression may be as valuable as the original, the creator may find himself improved out of his creation. The cases are rare in which his genius or artistry is so pronounced that he has the world at his feet. For most part the man of ideas is at the mercy of those who can make commerce of his ideas and must get his satisfaction out of the joy of creating. The most telling observation that can be made in this connection is that any appeal to the law is hazardous, expensive and likely to end in grief. The best protection afforded the creative genius lies either in his own shrewdness in marketing his ideas, bargaining his services, or in the protective wing of some business enterprise that will exploit his ideas for their common good.

d. *Political Rights*

By way of parenthesis may I observe that among the individual's rights none is more important than his relations to the political group—his political rights. Their recognition and their growth in a democratic society are much beyond the limits of this discussion. But nowhere else in the whole realm of law is the protection of the individual's rights against other members of political group so dependent upon the social and economic environment of the particular community and particular time—the right to vote, the right of free speech, the right of a fair trial in the courts, the right of association, the right of non-discrimination in public and private institutional employment, the right to share community services of education, transportation, and amusement, all asserted to be natural or inalienable rights of citizenship. There is no other area where the administration of law is so glaringly immature. Common law and equitable remedies are in abundance but they lie unused. The regenerative process still has much work to do in providing protection for the citizen's political rights.

Summary

Why this limited protection under tort law of the reputation, privacy, publicity value and ideas of the individual? The answers will not be found in explicit legal rule, in legislation or court decision. But the answers are not obscure. How could newspapers, periodicals, books, photography, radio, television, movies, advertising and the massive institutions they support, serve their functions without exploiting the personalities and relations of the individual? How else could the mobility and security required for the operation of business and government be provided? Moreover, nothing else holds such great interest for people everywhere as do other people—what they think, do and say, how they look, dress and act, their triumphs and their tragedies. It is no accident that these means of communication should have been developed or that they should be so largely freed from the exactions of law. Next to food, sex, shelter and security, the power to communicate satisfies man's deepest desires, if in fact it is not basic to all of them. To any one who has read Clarence Day's amusing allegory "This Simian World" it is unthinkable that having developed such vivid means of communication people should deny themselves their satisfactions.

Who would give up the morning newspaper, lurid with tragedy and catastrophe, morbid scandal, partisan political stories, gossip about brides and social affairs, all stuffed between pages and pages of appeals to spend your last dollar? Who would shut out of his living room the convention, circus, college football, the world series, championship fights, the fantastic memory contests, though the hawking of wares threatens his emotional stability? Who would forego the capsule summary and commentary of the news of the day by dedicated reporters, though the wave lengths are also loaded with the poisons of political panderers? The unreal and overdrawn characters of the comics, gunmen, sex and crime intrigues, soap operas, endless hours of non-sense, cheap and vulgar pulps may blight the intelligence and morality of young and old but who, if he could, would eliminate them from our daily lives? Suppose the reputation and privacy of the individual are injured, his intelligence insulted, spiritual sensibilities outraged or dulled, and his creations and values of publicity are appropriated a hundred times a day? What of it? Government must function; citizens must feel secure against communists; goods must be sold; people employed, informed and entertained; creative talents must have outlets; politicians must seek political power; boredom must have escapes and everyone some way to kill time. What other instruments have been invented one tenth so effective for all these purposes?

The automobile kills its 40,000 per year and inflicts more than a million serious injuries; its hurts are gruesome and naked to the eye. The deadly toll continues to rise; still adequate remedies of law lag far behind. But the hurts to reputation, privacy, publicity, the taking of another's ideas, and the blight of moral sensibilities are not naked to the eye; they seldom inflict losses that can be calculated on a blackboard; they are seldom gruesome; their influence on the welfare of the individual and of the social order is difficult to trace; they are profitable to exploit and extremely interesting to the victim's fellow beings; their cruelty is ignored. Here also the law lags and we must await its regenerative process to provide adequate remedies. Perhaps we must wait for a long time for the law is never more virtuous than the people who live under it.

Something deeper than anything I have expressed may lie behind the attitude of the courts in so severely limiting the protection of law to those whose reputations are injured, spirits degraded, and whose privacy, ideas and values of publicity are appropriated. This something is very difficult to get at. But it is like this. The thinker, philosopher, scholar, teacher, writer, preacher, politician, poet, court-fool, dancer, actor, musician, painter, sculptor and artist of every character is historically a pensioner and not infrequently a mendicant, whose talents were supposed to be the gift of the gods for the glorification and adornment of those who held political power and harvested the riches of the earth. The artist has lived in a world apart, freed from many of the conventions of his fellowmen, with great license to take from the domain of thought and culture anything he found, and to weave it into his own creation for those who might get profit or enjoyment out of it. Even so he has felt the pangs of persecution, hunger and degradation beyond that of other men. It is only recently that his talents through the institutions of education, culture, religion and commerce have been brought into the market place. And it is here that the protection of law has so timidly and belatedly entered upon the scene. The protection provided however is largely for the institution and not for the artist himself. The notion still hangs on that the men of spirit who express the aspirations and innermost life of other men, expose their myths and shame their hypocrisy, are somehow outside the range of the dollar mark; that their gifts are the inheritance of mankind to be shared freely and not to be fenced out of the public domain except as the interests of commerce may require; and that their heads are beneath the protection of law.

Significance for Law Students

However adequate or deficient the law, wherever one may travel in the area of torts, he finds that the ancient landmarks have been moved and that the new land marks are conveniently temporary. Who can say where they will be found tomorrow? What significance does this endless disintegration and reintegration of tort law have for the law student? It means I am sure that we can assume that the same regenerative processes are found in other areas. Consider the pressures that brought our Supreme Court to bend its dogmas to the necessities of the great depression, and those twenty years later which have arisen from the rediscovery of the Bill of Rights. Indeed we know that the area of public law has suffered such attritions and avulsions that the basic divisions of departmental powers and the lines between federal and state governments are sometimes difficult to recognize. Notice also how trade and commerce have assumed new forms and practices far beyond the understanding of the lawyer of the 1800s. Historically stable, with the exploitation of mineral deposits, the conquest of air space, the needs for water and the growths of cities the protective walls of feudal property law have been shaken and cracked. The reforms of judicial and administrative procedures are chronic. The processes of criminal law are under constant re-examination and realignment. Wherever you look, obsolescence is obvious, repairs, reconstruction and new construction are under way. If there be doubts about these observations they may be quickly confirmed by examination of any digest, statute book, discarded text and casebook of only a few years ago. The corrosion of time works the same wonders in law as it does in architecture, dress, medicine and other creations of men. And these regenerative forces are not restricted to our own country. You find them over the whole face of the earth wherever business and govrnment are known and of whatever character.

It also must mean that similar influences must have been operative in the training of the law student and so they have. Any one acquainted with law schools over a period of thirty or forty years can attest the changes that have come about for the preparation of the student. Physical facilities, administrative organization, libraries and curricula of modern law schools bear slight resemblance to those of the early years of this century. Faculties have a different type of personnel, objectives and techniques. In short, the law school is so closely tied in with all the world about that it cannot escape its turbulence and its growth. Nor should we desire that it should. On the contrary, the glory of the law school should be that it is at the center of every storm that strikes the

social order and it must be prepared to ride out the storm if it is to serve its function.

Finally, it means that it is imperative for the law student to gain a full appreciation of the regenerative processes of the social order, its institutions, and its law. He comes to law school with considerable understanding of the world in which he lives. But whether much or little if he will but attend he will find how clearly the problems of his fellowmen whether as groups or individuals, as presented to courts, legislatures and administrators, reflect the regenerative processes of all institutions of every character. His microscopic study of the contested cases considered in his courses will disclose even more clearly the day to day regenerative processes of the law.

I have often wondered at the anxiety expressed by many concerning the dead hand of legal precedent. Rather should they marvel at its creative power. Give us a pair of precedents and in a few years we shall have a book full, each with the capacity of reproduction. Precedents are the seeds of the law and nothing so quickly displaces the parent stalk as does its own seeds. It is through precedent that the law responds to the living world. Whether the response shall be adequate may well depend upon its choice and use, but that in turn depends upon the lawyer, judge or administrator whose power it is to make the choice. As the desires of people grow and proliferate endlessly requiring the protection of law, conflicts must be adjusted, modifications made of old rights and old law. There is no place to stop. Stare decisis is an illusion. It can exist but momentarily other than in a dead society. In a world of living, restless, venturesome and inventive people the work of the law and of lawyers is never done.

It may be observed that lawyers who have the power to respond to the large scale problems of social change to great degree are the rare men of our profession. The list of those who as legislators, executives, judges, practitioners and teachers so qualify is not long. While they lived they were not considered safe men to follow. The institutions of business, government and of education for most part seek safe men—men who have ideas but whose thinking is under strict control. The lines of their labors are sharply drawn and while there are many new problems they are usually new only in detail. They require regenerative thinking but only on small scale, the molecular process that Holmes talks about. Most law school students will acquire enough creative power to satisfy the demands of their professional employment. They will seek and find employment and live and work within the accepted and traditional confines of some firm, government department or private institution much as do the grad-

uates of other divisions of a University. They will be anxious to please those with whom they work and especially those in authority above them. They will delight to contribute to their firm or employer the full extent of their powers and would as soon think of suicide as to advocate or project an idea or change that might threaten the welfare of the institutions they serve. They work to improve but not to impair, displace or destroy. They are entitled to great respect for there could be no enduring society without their loyalty to the institutions they serve. If they are not the salt of the earth, they are the toilers that husband the soil that gives abundant life season upon season. They are the happy and complacent people of our profession who accept things as they are and make the best of them. They are good citizens. They need no defense.

The students for whom I desire to say a closing word, however, are the one percent or less who get fired up about the world outside and the inadequacy of the law to bring it under control or meet its problems and who become the intellectual and spiritual troublemakers of the social order—those not satisfied with things as they are and who devote their creative power to change even though it impair, displace or destroy an accepted practice or institution. They are the impatient, contentious, probing, rebellious spirits who sit in their own seats of judgment and condemn the practices and institutions of their fellowmen; the idealists, the reformers, the dangerous men who today corrupt the youth, and tomorrow are the heroes of history; those who when the house falls in and others panic somehow seem prepared, or at least have the courage to take over and restore the social equilibrium. From their ranks come those at first villified and sometimes crucified, and then later sanctified. They are the leaven that keeps our institutions in ferment and the social order in a process of constant regeneration. Whether in law or elsewhere, they are the forces within the waves, the winds and the storms that remake and replenish the social order with life everlasting. They are the spirits that created big business and big government and all of their by-products which give rise to the problems that necessitate law, and law schools and law students.