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## I. Increasing Activity in Law Reform

Painfully slow as the mills of law reform grind, they have moved faster in our generation than in most. This appraisal may seem overly generous to our own day when we reflect on the difficulties and delays encountered in achieving some particular reform. But if we measure progress in another way—comparing what has happened in the last dozen years with what happened in other time periods of similar length—differences emerge.

The most easily documented difference concerns the performance of appellate courts of last resort in reforming private law by candidly overruling precedents. In the last dozen years, there have been more than 100 overruling decisions in the area of tort law alone. This innovative activity has extended to other areas of law as well, though perhaps in fewer instanees, and it reflects a very different general attitude among appellate judges toward their role in law reform. More precisely, it reflects a different attitude on the part of some judges in some courts. For although a slight majority of the courts of last resort in the United States have participated in this movement, less than a majority have rendered more than one major overruling decision. Surely we cannot regard that performance as spectacularly innovative. Yet it is cause for credit—or possibly blame, depending upon one's perspective—that the pace of judicial law reform has been somewhat faster since the late 1950's than it had been before.

## II. Law Reform in the Classroom

Much of the credit for what has been happening recently in appellate courts of last resort should be ascribed to the law schools of earlier decades; law students of the thirties and forties have become appellate judges of the sixties. Perhaps in those earlier decades professors of law in general tended to be more reform-minded than students of the law, who were by-and-large avidly preparing for carcers that offered not only the fulfillment and satisfaction of professional life but also a

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measure of security against the impact of economic crisis—a matter much on our minds as we emerged from the great depression and later from the disruptions of war. But students tended to be optimists about the prospects for building a better world and receptive to thoughtful proposals for change. Professorial criticism of the rigidity of the system of precedent as then administered found its mark in fertile minds.

Seeds planted in those earlier times have just come to flower. That, of course, is one way and perhaps the most significant way in which law schools participate in law reform. Just as the appellate court's greatest contribution to the development of law has been the daily interstitial work rather than the overruling decisions to which I adverted earlier, the law schools' major contribution to substantive law reform has been that kind of sound legal education in which students are stimulated to study and evaluate in a constructively critical way the key ideas of the legal system and all of its principles and rules.

Against this backdrop of great credit to our elder statesmen in the law school fraternity—and to those of our judicial alumni in whose performance we see, through our lenses, indisputable proof of the excellence of their legal education—we may appropriately consider what more the law schools might do to contribute to law reform in the years ahead. Alert to the fact that the law with which law students must deal in the future will differ in many respects from the law of the past and present, we constantly remind ourselves that we are not just teaching substantive law in our substantive law courses. What we are doing, we often say, is teaching students how to think about substantive law. Curiously, however, when in our substantive law courses we focus on the areas that need modification, it has been our common practice to talk much about the substantive need for reform and little about the processes of reform. If we are faithful to the idea that we should teach not just doctrine itself but also how to deal with problems in a thoughtful incisive way, then we should teach not just the needs for substantive law reform but, as well, how to understand and deal incisively with the processes of reform. We should be preparing students to deal with law reform issues of the future and not just those of the present.

If we sometimes find ourselves discouraged about the prospects of our making a contribution to the prompt achievement of substantive law reform, there is at least one area in which we can immediately do something positive—in the effectiveness of our courses as stimulants to constructive thought among students. The attitudes and ideas on law reform that we present to students will set a model for their consideration. Some of our students may make that model their own,

and even improve upon it. This opportunity of the law teacher to encourage an open-minded and constructively critical point of view toward law reform proposals and processes has special significance because as a student one is likely to be relatively free of the ideological vested interests that may come to exercise a compelling influence on his judgment in later years—an influence that is real—even though he acts with the greatest of good faith.

Even that rare man who recognizes that he is opposing needed change because it threatens his economic interests finds it much easier to fight hard when he can do so on the basis of an ideological as well as financial concern. The effect of the ideological interests on one's attitude toward reform is dramatically illustrated in a comment I heard another speaker make recently in a panel discussion concerning automobile insurance reform. Be warned that I am suspected of having a bias on this subject. But perhaps you can take without serious discount my report of the observation of another. In substance, it went this way: "Why would you expect trial lawyers to respond any differently than they have? Would you expect a successful lawyer who for 25 years has been engaged in the trial of personal injury cases and other litigation as a major part of his professional life to stand up and say that the activity to which he has devoted his skill and energy is a key part of the high overhead cost of a compensation system that is too inefficient and wasteful to serve the best interests of society?"

Part of the argument in favor of reforming our automobile insurance system is that the present system is wasteful as well as unfair and that the activities of lawyers within the system—though proper, respectable and necessary within such a system—are from a larger perspective not responsive to the public interest. If the argument is sound, where will the impetus for its recognition originate? It is not likely to come from the trial bar. And I make this assertion not because of their economic interests, but because of the trial bar's vested ideological interests. This illustration emphasizes the point that one of the major contributions law teachers can make to law reform is to take time in teaching to focus upon law reform and law reform processes.

To make this vague generalization more concrete, let us resort to the painfully slow but pleasurable process we call the case method, focusing on *Bissen v. Fujii*.[1] A sequence of four events led to this exotic Hawaiian litigation. First, on November 12, 1966, the plaintiff, Bissen, and the defendant, Fujii, were involved in an intersection accident—a

1. 466 P.2d 429 (Hawaii 1970).

very ordinary, if not pedestrian, start for litigation. Secondly, on March 1, 1968, the Supreme Court of Hawaii decided the very interesting case of *Loui v. Oakley*,[2] in which the issue was the proper allocation of liability for personal injuries resulting from successive incidents over the course of several years, rather than merely successive impacts in one incident. Refusing to burden the plaintiff with proving the amount of the injury allocable to each incident or to treat all defendants as joint tortfeasors, the court did a bit of innovating and adopted a rule permitting rough apportionment of damages among the successive tortfeasors. In a pregnant footnote to the opinion, Justice Levinson, writing for the court, indicated that he thought it might be time for the court to reconsider the judge-made rule that contributory fault is a complete bar in personal injury actions.[3] Of course he cited the Illinois Court of Appeal's opinion in *Maki v. Frelk*,[4] which adopted a comparative negligence rule for Illinois. At the time *Loui* was decided, the Illinois Supreme Court's reversal[5] of the Court of Appeal's decision in *Maki* had not yet occurred.

The third item in the sequence of events leading to the *Bissen* decision was the filing of the plaintiff's case on July 25, 1968, over four months after the *Loui* decision. The defendant claimed that contributory negligence was a complete bar. Relying upon Justice Levinson's footnote, the plaintiff moved to strike the contributory negligence defense on the ground that the applicable rule in Hawaii was comparative negligence. The trial court denied the motion, and the plaintiff's interlocutory appeal from that denial eventually brought the case before the state supreme court. Meanwhile a fourth significant event had occurred. In its 1969 session, the Hawaii Legislature had adopted the "Wisconsin" or "limited" form of comparative negligence.[6] Under this rule, the plaintiff loses if he is 50 percent negligent, but if he is 49 percent negligent he is entitled to 51 percent of his damages. If he is still less negligent, he recovers proportionately more. The 1969 Act contained a clause making the new law applicable only to those claims accruing after its effeetive date.

The four events leading to the *Bissen* decision were, then, in this order: (1) the accident;(2) the decision and pregnant footnote in *Loui*; (3)

2. 50 Hawaii 260, 438 P.2d 393 (1968).

3. "It may be time to reconsider the applicability of the doctrine of contributory negligence, a judge-made rule, in light of the mores of the day." *Id.* at 265 n.5, 438 P.2d at 397 n.5.

4. 85 Ill. App. 2d 439, 229 N.E.2d 284 (1967).

5. Maki v. Frelk, 40 Ill. 2d 193, 239 N.E.2d 445 (1968).

6. HAW. REV. STAT. § 666-31 (Supp. 1969).

the filing of the pleadings in *Bissen*; and (4) the adoption by the legislature of comparative negligence in its limited form. There are three major positions that the state supreme court might have taken in deciding the *Bissen* case; each is suggested in at least one of the reported opinions. The supreme court could have affirmed the trial court, holding in effect that the old law applied to the case and that contributory fault was a complete defense. On the other hand, it could have adopted the pure form of comparative negligence, as suggested by Justice Levinson's footnote, for application to cases arising before the effective date of the comparative negligence statute. It should be noted at this point that when a law is changed a temporal inequity occurs because cases up to a certain date are decided by one rule and otherwise identical cases of the next day are decided by a different rule. This is part of the price we pay for change. Adopting the second position, however, would result in two temporal inequities—the first caused by the transition from contributory negligence to pure comparative negligence, and the second by the transition from pure comparative negligence to the limited form created by the legislature. The third position open to the court was to adopt the limited form of comparative negligence. In that way the court would create no greater temporal inequity than the legislature had already created, and the result would at least be closer to what they might consider the ideal rule than is the old contributory negligence rule.[7]

By a vote of four-to-one the Supreme Court of Hawaii affirmed the trial court and applied the old contributory negligence rule. Justice Levinson, the single dissenter, though pointing out arguments for the third position, chose the second because of the weight that he accorded the unequal treatment inherent in the limited form of comparative negligence. He was referring not to the temporal inequity but to the unequal treatment of the 49 percent and 51 percent negligent plaintiffs. He considered this inequity so grave and irrational that he not only chose the pure form of comparative negligence over the "limited" rule but also suggested that the statutory "limited" rule may violate the equal protection clauses of the federal and Hawaii constitutions. Thus, this

7. At this point in this paper, as it was presented orally at the Southeastern Conference of Law Teachers, a poll of the audience was taken. When asked to predict the decision of the court, the audience was almost evenly divided between predicting adherence to the rule that contributory fault is a complete bar and predicting application of a rule of limited comparative negligence like that of the 1969 statute. Only one person predicted application of a "pure" comparative negligenee rule. When asked to indicate how they would have voted if members of the court themselves, the number favoring application of a limited comparative negligence rule like that of the 1969 statute increased to about three-fifths of those voting.

dissent suggests not only that its writer is a little further along the road to participation in law reform than his brethern on the court but also that he may be willing to invoke constitutional grounds for this particular innovation.

This illustration has been a long and perhaps dilatory way of getting around to the main point I want to make. Since most of us now agree that substantive change is needed in the law of contributory negligence, what was once an argument over substantive law has become primarily an argument over process. The contributory-comparative negligence segment of the torts course is enlivened, I think, by introducing this problem of legal process along with the discussion of substantive law. These two things are closely intertwined, and by discussing them concurrently we can better prepare our students for the practice of the future.

It has become perfectly apparent that in the appellate and trial practice of the future the lawyer will have to be alert to the possibility of the court's abruptly changing the law. At the time I was trying personal injury cases during the forties and early fifties, we did not argue in appellate briefs that the court ought to overrule a decision that we disliked. We did our best to distinguish the decision, and even if we hoped that it might be overruled, we did not think it wise to appeal to the court on that basis. Today, however, many briefs argue that an existing rule of law is bad, that other jurisdictions have already abandoned it, and that it should be discarded by the instant court. If this is to be part of the daily appellate practice in some cases, we are not adequately preparing our students for that practice if we fail to deal with the legal processes of law reform as well as its substantive issues.

At this point, I pause for what may seem a diversion—to make two things clear lest contrary inferences be drawn. The first is that for some time now some of our colleagues in law teaching have been offering excellent legal process courses. I am not suggesting that there is any general deficiency in that respect. I am saying, however, that the focus on process should occur in substantive law courses simultaneously with the focus upon substantive issues. Both the process courses and the substantive courses would be improved thereby. The second point is that I am not prescribing how courses should be taught. Nor am I addressing my remarks to the relative merits of the various accommodations that exist in different law schools with respect to the extent to which the faculty as a whole undertakes by persuasion, sanction, appointments policy, or in some other way to influence the subject matter and pedagogy of various courses. I am only suggesting that each professor

might appropriately re-examine what he is teaching in his substantive courses from the point of view of seeking an opportunity to do something that may be useful and exciting and may improve the courses. There may be courses in which the process of reform should not be treated, and there may be professors by whom it should not be taught. Diversity within a faculty and within a curriculum has advantages. I urge simply that we engage in re-evaluation.

There is much material to choose from that is less exotic than *Bissen*—cases that do not pose such intricate points and would not take so much time for classroom analysis. Less complex cases abound in torts and can be found in other subjects as well. For example, changes in the law of nuisance pose good issues for property and torts courses. Controversy regarding the relationship among the Uniform Commercial Code, other statutes, and the concept of strict liability in tort has created good issues for contracts and torts courses. There is a very interesting sequence of Tennessee cases currently developing on the subject of what limitations statute should apply to claims for personal injury based on strict liability or breach of warranty.[8] Each of these areas of development offers an opportunity for a focus on the process of reform simultaneously with the study of the substantive law.

Although we have been discussing what we as law teachers can do, the specific illustrations of law reform to which we have referred thus far concern reforms effected by judges in appellate opinions. Our principal contributions to such reforms are made indirectly through education. Turn now to what law teachers and law schools may do in the classroom to aid the kind of reform that is accomplished by the enactment of a statute.

I submit that by failing in our substantive courses to focus on the problems of drafting a law reform statute we have been missing a grand opportunity for incisive education. Such a focus dramatically presents the relationships among issues of policy, administration, and doctrine. Of course, part of the difficulty here is that a comprehensive problem—automobile insurance reform, for example—is too large. Unless we select representative issues and work on them within some assumed framework, we will find ourselves dealing superficially with a multitude of issues. But there are many not-so-complex problems—the drafting of a comparative negligence statute, for example—that may lend themselves readily to classroom use.

8. A recent case in the series is Layman v. Keller Ladders, Inc., 455 S.W.2d 594 (Tenn. 1970); *see* Note, *Statutes of Limitations: Their Selection and Application in Products Liability Cases*, 23 VAND. L. REV. 775 (1970).

The argument is often made that comprehensive law reform cannot be effectively accomplished by courts on a case-by-case basis. In the *Vanderbilt Law Review*'s symposium on the comparative negligence problem,[9] Professor Leflar made a distinctive contribution when he collected comparative negligence statutes and analyzed them to determine the extent to which they left questions of detail to the courts.[10] Leflar found that every statute enacted has left questions of major significance unanswered. When we focus sharply and incisively on legislation, we begin to see that even when the prime source of reform is a statute, much is still left to the cooperation and participation of the courts. Recognizing this, we begin to ask how precise the framework should be and to what extent some questions should be deliberately left to the courts. This is a useful and instructive technique for examining issues of substantive law reform, and it can be utilized within any course in the curriculum.

## III. Other Contributions to Law Reform

This article has focused primarily on the contributions to law reform that a law professor can make through his teaching. I would not wish to be understood, however, as either discouraging or downgrading the many other kinds of contributions to law reform that law teachers, law students, and law schools have opportunities to make. I do wish to suggest briefly what some of these opportunities are and what special problems they may raise for law schools and their personnel.

Few, if any, would question the propriety of an individual's engaging in law reform activity, including lobbying, "on his own time." And most would agree that if he makes it clear that he speaks only as an individual and not for an institution, he should have this freedom even though he happens to be a professor of law, a student of law, or even a dean.

Questions of propriety quickly surface, however, when we consider institutional encouragement or support for the law reform activities of the institution's faculty, or its students. I suppose that as long as participation is limited to study and research, everyone would agree that it is proper. Even though it may be difficult to draw the fine line between educating and engaging in a propaganda campaign to influence legislation, I suppose most people would agree that the dissemination of

9. James, Kalven, Keeton, Leflar, Malone & Wade, *Comments on Maki v. Frelk—Comparative v. Contributory Negligence: Should the Court or Legislature Decide?*, 21 VAND. L. REV. 889 (1968).

10. *Id.* at 920-27.

results of faculty or student research is proper. Also surely it is proper to place those results before students as part of the course materials when the subject matter is within the scope of the course. But I suppose also that institutional funds and facilities should not be used, for example, for a professor's campaign for enactment of a draft statute that his research has led him to recommend. Where is the line to be drawn between these different means of spreading information about his research and recommendations? Any single law professor, and a fortiori any group, can quickly devise a spectrum of hypotheticals for which answers will be debatable.

In recent years, our institutions have become more sensitive to these problems. As much in a spirit of confession as in a spirit of rectitude, however, we may observe that the prime reason for concern has not been excessive zeal of the members of our faculties in law reform activities. More often we have been troubled by the controversial activities and proposals of our students. Even when we can persuade them, or most of them, that preserving the freedom of the university from political controls is a higher value than any that can be realized by using the university for political ends, we encounter difficulties in formulating useful guidelines for the institution and its faculty and students.

Obviously there are some limitations. It is rather clear, I believe, that the institution itself should not be behind a law reform movement. It probably should not even be behind a movement for reform in judicial administration. I can see that one might distinguish between the interest of a law school in reforming the administration of the law and its interest in reforming the substantive law itself. But I question the validity of the proposition that administrative reform is severable from substantive reform. I doubt that there is any reform in judicial administration that does not impinge upon some vested economic or ideological interest. Once you start advancing a proposal that impinges upon those vested interests, you are engaged in politics. One thing seems clear to me; in order to preserve some of the highest values of the whole system of legal education, we must keep the law schools out of politics.

Time imposes its limitations too. And even within those bounds in which one can appropriately say he is using "his own time," there are problems of another kind. One must be concerned about entanglements that may affect his objectivity. Today some of us are tempted with opportunities to write for a fee, or an honorarium if you please, in support of special groups and points of view. Even when one accepts such an invitation, believing that the point of view he expresses is entirely consistent with his own, I think he has to be concerned about whether the

entanglements may in the long run affect his judgment and impair his usefulness both as a teacher and as a contributor to law reform.

These remarks barely suggest the nature of the problems we encounter, as law teachers, when we become involved in that type of law reform activity that looks to statutory enactments. There is one further problem that it seems appropriate to note—a problem we must encounter even in a modest undertaking to focus now and then on issues of law reform in our teaching. Surely we should attempt to be as *constructively* critical of a student's proposal with which we heartily disagree as we are of one with which we have sympathy. We should demand that of ourselves. In consequence, we will sometimes stimulate ideas that we heartily dislike. But that, I suppose, is the fate of any good teacher.