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THE EMERGING LAW OF SOCIAL RESPONSIBILITY*

Mathew O. Tobriner**

Are there emerging in the law of today concepts of a new and basic character which imperceptibly modify our ideas of tort, contract, governmental and group responsibility? Are fundamental social developments causing these changes? Is the law gradually making an important turn in its long course down the centuries?

There have been such turns before.

If we may encompass the grand vista, and if we may look far backward, we find the law, in an early stage in the Greek city-state, an instrument to maintain a perfectly balanced society—seeking to assign to each individual a status, or place, where he could pursue his life-course as objectively as a planet follows its orbit in the heavens. The Parthenon and the sculpture of Phidias freeze in marble this underlying Greek concept of perfect harmony. Yet this Grecian status quo, and its offspring, Roman law, were exploded into a mass of chartless comets by the barbaric invasions.

A slowly-made feudal law emerged, depending in origin on the Greek concept of status, creating the legal notions of a landlord and tenant, a vendor and purchaser, a bailee and bailor. Spinning out an elaborate web of relationships, this law climaxed in the spiritual and temporal domination of the Church. In the buttress, the transepts, the gargoyles of a Gothic cathedral, and in a Bach fugue, one finds the same lace-like pattern of relation, interrelation and correlation.

But the refinements of feudalism were at least in part made obsolete by an expanding need for commerce born of new invention and discovery. Came the Renaissance, and its fleeting, backward glance at classicism. Then, too, the courts turned back to Roman law, to find the "Reason" which was now hailed as the foundation stone of justice. Contemporaneously, romanticism and classicism produced much of Renaissance art.

With the Industrial Revolution laissez-faire wrote itself on the law-books. The manufacturers of Manchester wanted to be free of the encumbering restrictions of mercantilism and they found their rationalization in the economics of Adam Smith and the political strictures of Burke. These new philosophers proclaimed the function of government and of law to be a withdrawal from society; said Montesquieu, "that government governs best which governs least." And Adam Smith wrote, "the function of justice is the protection of property."

Thus the law of the nineteenth and early twentieth centuries struck down governmental regulation, enshrined freedom of contract and insisted upon individual, if competing and confused, rights. The law afforded scant succor to those not economically strong enough to assert those theoretical individual rights.

The Imposition of Liability

With these massive turns in the development of law, we come now, roughly, to the past half century. This is the period of the breaking up of the era of classic individualism, the growth of governmental regulation and control, the rise of the administrative state, the formation of new centers of power.

* From an address before the student body of the University of Santa Clara School of Law, Fall 1960.
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What will be the role of the law as to these centers of power? We have seen the imposition of new legal responsibilities upon the labor union, which, until comparatively recently, was regarded as a purely voluntary organization. The Labor-Management Reporting and Disclosure Act of 1959 sets up a host of governmental regulations of union internal affairs. Indeed, our California Supreme Court has in the past thirty years described the kind of rules which the union could make, the process it should follow in making them, the procedure permissible in disciplining members, and the measure of punishment. The court has been properly intransigent in its demand that no member be suspended or expelled without notification of the charges of the alleged offense and opportunity to be heard in self-defense, the right to cross-examine accusers and to refute evidence adduced in support of charges. Independent of statute, the court has defined and elaborated the relationships between this private law-making institution and its members.

Will this legal process be followed as to other private law-making groups? Will the employers' present right to discharge from the job be subjected to similar definition? Will the rules and regulations of the factory community itself follow the pattern that has been evolved for the union?

The impact of industrialization and urbanization has not been confined to the inclusion of private groups under the umbrella of public law. Industrialization and urbanization works basic changes in the law of tort. The cases show a widening of the last clear chance doctrine so that the negligence of the injured party will not absolutely bar him from recovery. Res ipsa loquitur has been extended. It is more frequently applied to malpractice cases requiring the physician to explain the cause of the accident or to suffer an inference of negligence. We see the attractive nuisance further and further extended, for instance, in the swimming pool cases. And of course, workman’s compensation itself serves as a significant symbol of the imposition of absolute liability. Many urge, too, that the same concept of liability without fault should be extended to the victims of motor vehicle accidents. Is there a shifting to society of the burden of loss which to the individual is unpredictable, unbearable and total? Are we seeking the outlines of a new concept of social responsibility in the field of torts?

Indeed, the idea of fault, which derives from a moral code, may be almost anachronistic at a time when we use complex machinery in whose management a split-second decision may be fatal. Morality and machinery simply do not mix. Are we coming closer to the feudal idea of absolute liability? Does one handling such machinery act at his risk? If his actions cause harm, is he liable? Does the actor have the opportunity, and obligation, of protecting himself by insurance?

RETURNING TO THE CONCEPT OF STATUS

The law of contracts, too, has responded to industrialization. For example, it has developed rules for interpretation of standardized contracts, or “contracts of adhesion” which raise presumptions against the makers of such contracts.

Finally, another illustration of the legal impact of the administrative society lies in the developing field of due process of law. With the enhancement of the power of the group, the need to define the rights and obligations of the constituent becomes more important. There develops a new individualism, not the old 19th century concept that the individual was constitutionally protected in an alleged freedom from regulation, but the concept
that the individual is protected as a member of the group from arbitrary
group action. Hence the present emphasis upon due process of law as to
government action against the individual in criminal proceedings or in the
administration of multiple governmental agencies.

These illustrations may disclose a deeper trend of change than might at
first appear. It may be that the emphasis upon individualism, which was the
key characteristic of the law of the last century, is being replaced by the
concept of status or relationship. Indeed, the common law has its roots in
the feudal theory of relationship. Its very terminology, flowing from the
relation of lord and serf, rests in notions of other relationships, such as that
of landlord and tenant, vendor and purchaser, bailor and bailee. Perhaps
we are reapplying the concept of status and relation to the complex society
of today.

In the instances set out above, and in whole categories of law, such as
the field of insurance, of contract, and innumerable others, we witness the
development of a law of status and relationship, unique and specific in the
particular field involved. We are passing from an older stage of law, in
which the absolutism of individual right blocked the need for society to
function in groups, to a stage of law in which the absolutism of the group is
being subjected to the right of the individual to live and function in, and
with respect to, the group.

Thus we place a new emphasis upon inter-personal and inter-group
legal relationships and obligations in the place of nineteenth century in-
sistence upon "individualism." The freedom and the consequent irrespon-
sibility of that artificial individualism succumbs, in the second half of the
twentieth century, to less economic freedom and more social responsibility.
The complexity and integration of our industrial society itself compel these
changes in the law. But these new definitions signify, too, a recognition of
responsibility to others, which, in another aspect, represents moral respon-
sibility, morality itself.

The next giant turn in the law may be legal expression of individual and
group responsibility to society as a whole.