THE BASIS OF VICARIOUS LIABILITY

I

If a master choose to give orders to his servant, no one can fail to understand why he should be held liable for the consequences of their commission.[1] Nor is the case in substance different when he ratifies his servant's act. To stamp what is done for him with the seal of his approval is tacitly, but obviously, to accept the act as his own;[2] and that is true no less where the ratification is implicit, than where it is expressly made manifest.[3] No one, however, deems it necessary to take objection to liability which is consequent upon a general negligence.[4] I may knowingly employ a clearly incompetent person.[5] I may consciously fail to provide proper means for the performance of the allotted work.[6] I may fail to give my servant information which I know to be essential to the right completion of his task.[7] I may fail to take adequate precautions against the commission of a tort in my presence.[8] In cases such as these, where the master is directly involved, it is essential to any scheme of law that he should be held liable for such damage as his servant may cause.

The problem is far different where express authority does not exist. A state in which it is an accepted doctrine that the sins of the servant may, even when unauthorized, be visited upon the master, has won a tolerable respect for its law. Yet the thing is sufficiently novel to be worth some careful investigation. In no branch of legal thought are the principles in such sad con-

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[1] *Doctor and Student,* I, ix; *Lucas v. Mason* (1875) 10 Ex. 251; *Smith v. Keal* (1882) 9 Q. B. D. 340.

[2] *Bishop v. Montague* (1600) Cro. Eliz. II, 824; *Padget v. Priest* (1787) 2 T. R. 97; *Ewbank v. Nutting* (1849) 7 C. B. 797; *Dempsey v. Chambers* (1891) 154 Mass. 330.

[3] *Goff v. G. N. R. Co.* (1861) 3 E. & E. 672; *Walker v. S. E. Ry. Co.* (1870) 5 C. P. 640.

[4] *Wanstall v. Pooley* (1841) 6 Cl. & F. 910; *Dansey v. Richardson* (1854) 3 El. & Bl. 144; *Cox v. Central Vermont Ry. Co.* (1898) 170 Mass. 129.

[5] *Cutler v. Morrison* (1910) 43 Pa. Sup. Ct. 55; *Martin v. Richards* (1892) 155 Mass. 381.

[6] *Mitchell v. Boston & Maine R. R. Co.* (1894) 68 N. H. 96.

[7] *Fletcher v. Baltimore & P. R. R. Co.* (1897) 168 U. S. 135.

[8] *M'Laughlin v. Pryor* (1842) 4 Man. & G. 58.

fusion. Nowhere has it been so difficult to win assent to what some have deemed fundamental dogma.[9] Nor is this all. What principles—even if of a conflicting kind—have yet emerged are comparatively new in character. They do not go back to that venerable time when Richard I endowed the Anglo-Saxon race with legal memory. There is no trace of them in Bracton.[10] The Year-Books do not aid us.[11] Coke—it seems marvellous enough—is silent upon them; or, at any rate, it is a different tale he has to tell. Our theories come in with the Revolution of 1688, and they bear the impress of a single, vivid personality. So that if they have a history, it is short enough to raise deep questions. And, indeed, it must be admitted that the problems inherent in our principles are very formidable. There is no field of law into which they do not seem to enter. Contract, tort, negilgence—in all of these they have their word to say, and it is a word of growing import for our time.[12] The age has passed when each man might bear untroubled the burden of his own life; to-day, the complexities of social organization seem, too often, to have cast us, like some Old Man of the Sea, upon the shoulders of our fellows. Where, above all the men of Mediaeval England gloried in their own labor, we, or, at least, many of us, take pleasure in dividends that have been vicariously earned. It is an age of abundant service. Vast numbers are working for other men and obeying their commands. Service implies action. A tells B to perform some work. When B's work entails loss to C, what is the relation of A to the transaction? We have maxims and to spare upon this question. *Respondeat superior* is an argument which, like David, has slain its tens of thousands. Its seeming simplicity conceals in fact a veritable hornet's nest of stinging difficulties. It is the merest dogma,

[9] See Mr. Baty's fierce attack in his brilliant, if perverse, *Vicarious Liability* (1915). Dean Thayer in the posthumous paper published in 29 HARV. L. REV. 801 has suggested some interesting possibilities of future development.

[10] *Cf.* Bracton *ff.* 115b, 124b, 158, 171a, 172b, 204b.

[11] Prof. Wigmore in 7 HARV. L. REV. 315 has cited some evidence to the contrary, but it is hardly decisive. The cases which foreshadow the modern doctrine are conceived with special duties. *Cf.* Cowell, *Institutes,* p. 207; *Southern v. Howe,* Cro. Jac. 468; Noy, *Maxims,* chap. xliv. For the general rule, see Rolle, *Abridgment, tit.* Action on the Case, pl. 95; *Waltham v. Mulgar* (1606) Moore, 776.

[12] *Cf.* Dr. Baty's remark that the modern law is injuring industry, *op. cit.* p. 154.

and in no sense explanation. For while everyone can see that the master ought to answer for acts he has authorized, why should he be liable either where no authorization can be shown, or where express prohibition of an act exists? Latin may bring us comfort but it will not solve our problems. Nor is the case improved if we substitute *qui facit per alium facit per se* in its place. Like most of its kind that antique legend is simply a stumbling-block in the pathway of juristic progress. It is one of those dangerous generalizations which shivers into untruth upon the approach of fact. Where another does no more than fulfil your command, you may with accuracy be said to act. That is as legally clear as it is morally unimpeachable. But what of cases where your servant performs acts incidental to your business without express authority for their performance? What of acts done in positive disobedience to command? Can we be said actually to have performed acts which at first acquaintance we are anxious to repudiate? Is Parker, for instance, to suffer if a subordinate officer, who happens to be a genius, wilfully disobeys orders, and puts his glass to an unseeing eye?[13] What is to occur when the servant's action is colored by personal motive? Clarity, it is obvious, begins now to pale into that obscurity where what is most visible is the natural confusion of life. Our vaunted simplicity perishes before the realism of the event. We have, it is clear, to go further than the jingles of legal convenience if we are to arrive at a working hypothesis; unless, indeed, we accept the subtle Pyrrhonisms of a distinquished authority, and assume at the outset a fundamental disharmony between reason and law.[14]

II

We shall be less pessimistic. Our skepticism is the consequence of a too great reliance upon the historic method. We have laid insistence rather upon the origins of law than upon the ends it is to serve.[15] When the history of the modern extension of vicarious liability is examined, no one can question the high

[13] Though of course Parker hoped—and felt—that Nelson would disregard his generous caution.

[14] Mr. Justice Holmes in 5 HARV. L. REV. 14. *Cf.* Paley, *Moral Philosophy,* Bk. III, Pt. I, chap. xi: "These determinations stand, I think, rather upon the authority of the law than upon any principle of natural justice."

[15] Cf. Mr. Justice Holmes' impressive words, 10 HARV. L. REV. 457 ff.

degree of its mysteriousness.[16] We may barely guess what motives underlay the striking and decisive *dicta* of Chief Justice Holt in a series of cases, the more difficult, in that they were not adequately reported,[17] but largely gained their strength from remarks made *obiter,* and from that vivid imagination which enabled Lord Holt to suggest compelling analogies.[18] We see signs of a struggle with the mediaeval doctrine in the partial persistence of the old ideas.[19] Yet, by 1800, the novelties have forced their way to acceptance.[20] The rare genius of Willes and Blackburn makes of them, in some sort, not the least vital contribution of nineteenth-century jurisprudence to the growth of Anglo-American law.[21] It becomes possible to assert that, special authority apart, the duties assigned to a servant give him the power to bind his master in such contracts as come within the scope of his emplyoment.[22] But the law goes further, and makes the master generally liable for his servant's torts so long as they are fairly and reasonably to be traced to his service;[23] though no burden is thrown upon the employer where no such connection can be shown.[24] When the act committed is a crime,

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[16] See Dean Wigmore in 3 *Select Essays in Anglo-American Law,* 474.

[17] *Cf.* Mr. Baty's remarks, *op. cit.* 23-4.

[18] *Turberville v. Stampe* (1697) Com. 459, 1 Salk. 13, Ld. Raym. 264; *Middleton v. Fowler* (1699) 1 Salk. 282; *Jones v. Hart* (1699) 2 Salk. 441, Ld. Raym. 736; *Lane v. Cotton* (1701) 12 Mod. 489; *Hern v. Nichols* (1709) Holt 462, 1 Salk. 289.

[19] *Randle v. Deane* (1701) 2 Lut. 1496; *Naish v. East India Co.* (1721) Com. 421.

[20] *Cf.* the change between *Naish* and *Bush v. Steinman* (1799) 1 B. & P. 404. Blackstone in 1 *Comm.* 429 is suggestive for the trend of opinion towards the middle of the century.

[21] The fundamental cases are *Seymour v. Greenwood* (1860) 6 H. & N. 359; (1861) 7 *ibid.* 355; *Goff v. G. N. R. Co.* (1861) 3 E. & E. 672; *Limpus v. Gen. Omnibus Co.* (1867) 1 H. & C. 526; *Barwick v. Joint Stock Bank* (1867) 2 Ex. 259; *Poulton v. L. & S. W. R. Co.* (1867) 2 Q. B. D. 534.

[22] See Fitzherbert, *Natura Brevium,* 120b; *Doctor and Student,* II, xlii; Noy, *Maxims,* p. 58; *Nickson v. Brohan* (1710) 10 Mod. 110; *Hibbs v. Ross* (1866) 1 Q. B. D. 534; *Watteau v. Fenwick Co.* (1892) 67 L. T. N. S. 831; *Langan v. G. W. Ry. Co.* (1874) 30 L. T. N. S. 173, especially the remarks of Bramwell, B.

[23] *Limpus v. Gen. Omnibus Co., ut supra; Stevens v. Woodward* (1881) 50 L. J. (Q. B.) 231; *Dyer v. Munday* [1895] 1 Q. B. 742.

[24] *McManus v. Crickett* (1800) 1 East, 106; *Croft v. Alison* (1821) 4 B. & Ald. 590; *Stevens v. Woodward, ut supra,* 318; *Allen v. L. & S. W. R.* (1870) 6 Q. B. D. 65; *Abrahams v. Deakin* [1891] 1 Q. B. 516.

authorization, important statutory exceptions apart, is still necessary; for the law still places motive at the basis of criminal liability.[25] Yet, even when these limitations are considered, the scope—as Jessel thought too vast[26]—of this extension is indeed remarkable. Almost within a century the doctrines of hallowed antiquity are reversed. No attention, as it seems, is paid to historic antecedent. The whole change is, so one may urge, outstanding proof of the oft-controverted fact that judges can and do make law. Clearly, good reason is essential for so striking a revolution of opinion.

Here is the crux of the problem; for it must be admitted, that so far in legal theory if we have a multiplicity of theories, none has brought widespread satisfaction. Some, indeed, are frankly impossible. It is not very helpful to be told by authority so distinguished as Parke,[27] as Alderson,[28] as Cranworth,[29] that *qui facit per alium* is the basis of the liability; for, as we have seen, that, in strict fact, can be true only where the master's assent is proved. The quasi-scientific mind of Lord Brougham ascribed the doctrine to the fact that "by employing him, I set the whole thing in motion, and what he does, being done for my benefit, and under my direction, I am responsible for the consequences of doing it"[30]—a niggardly determinism which, from its concealed fictions, serves only to darken counsel; and it has the additional demerit of being logically as extensible to the work of an independent contractor, where vicarious liability does not ordinarily apply, as to that of a servant, or agent where it does. Mr. Justice Willes, of whose opinion Mr. Baty seems to approve,[31] grounds our dogma on the fact that "there ought to be a remedy against some person capable of paying damages to those injured."[32] But it is clear that if this is the path

[25] *R. v. Huggins* (1730) 2 Str. 882; *Bagge v. Whitehead* [1892] 2 Q. B. 355.

[26] *Smith v. Keal* (1882) 9 Q. B. D. 351.

[27] *Quarman v. Burnett* (1840) 6 M. & W. 509.

[28] *Hutchinson v. York, Newcastle Ry. Co.* (1850) 5 Ex. 343.

[29] *Bartonshill Coal Co. v. Reid* (1858) 3 Macq. 266.

[30] *Duncan v. Finlater* (1839) Cl. & F. 894, 910. I ought to add that this theory seems to command the assent of Dean Wigmore, 3 *Select Essays in Anglo-American Law,* 536. See Parke's criticism of it in *Quarman v. Burnett, ut supra.*

[31] Baty, *op. cit.* p. 154.

[32] *Limpus v. Gen. Omnibus Co., ut supra.* One has a troubled feeling that Maitland might have endorsed this dictum, 2 P. & M. 533.

the law ought, as a general rule, to follow, it is going to have small concern with justice. The great Pothier ascribed its force to the necessity of making men careful in the selection of their servants;[33] yet it is clear that in the vast majority of cases that have arisen, no such negligence has ever been alleged. Nor will anyone dream to-day of accepting the view of the unctuous Bacon, that the liability arises from our failure to do our own work—a failure permitted by an indulgent law on the condition that we bear an absolute responsibility for such delegation.[34] Sir Frederick Pollock—with far more reason—urges that as all business is a dangerous enterprise, boldness must pay its price.[35] The "implied command" theory has nothing rational about it; it is one of those dangerous and disagreeable fictions which persist as a method from a primitive stage of law.[36] And Maitland has slain the equally hopeless fiction of an imaginary identification of master and servant derived from the jurisprudence of Rome.[37] Nor is the opinion of Lord Holt—which derives a special importance from its historical setting—in any way more adequate. It seemed to him simply a principle of natural justice that where one of two innocent persons must suffer through the fraud of a third, the suffering must be borne by the master who, in employing that third party, enabled the fraud to be committed.[38] The view is little more than that later adumbrated by Lord Brougham, though it is more plausibly arrayed. All torts are not deceits, and it would be difficult, for example, to apply such a test to the situation in *Lunt v. North-Western Ry. Co.*, where the defendant's gatekeeper invited the plaintiff in entire good faith to pass over a railway crossing,[39] or where a tramway conductor honestly, but mistakenly, suspects a passenger of tendering a counterfeit half-sovereign, and

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[33] Pothier, *Obligations* (trans. Evans) p. 72.

[34] *Abridgment* (ed. 1832), *tit.* Master and Servant (K.) iv. 336.

[35] See his paper on Employer's Liability in his *Essays on Jurisprudence and Ethics.*

[36] Below, sec. IV.

[37] P. & M. II, 530. I say this with deep respect, for Mr. Justice Holmes has given his weighty support to this theory, 4 HARV. L. REV. 345-64, and 5 HARV. L. REV. 1-23; but as Wigmore (*op. cit.* 533 n. 1.) has pointed out, his illustrations are mainly derived from West, *Symboleography* of which the relation to the civil law makes it at once suspect.

[38] In *Hern v. Nichols, ut supra.*

[39] (1866) L. R. 1 Q. B. 277.

gives him in charge.[40] Lord Bramwell gave up the law altogether. "I have never been able," he told the Parliamentary Committee of 1876,[41] "to see why the law should be so—why a man should be liable for the negligence of his servant, there being no relation constituted between him and the party complaining." Nor did Mr. Justice Wright attempt any explanation of the law beyond its universality.[42]

III

That universality is notable. The law of a business world is not made for amusement. Some solid reality there must have been in the reasons for its acceptance; and its very persistence in the face of bitter criticism is itself suggestive. We make men pay for faults they have not committed. It seems, on the surface, extraordinary enough; unless, indeed, we are to conclude with Lord Bramwell that the whole thing is nonsensical, or with Sir Frederick Pollock that it is the entrance-fee payable for admission to a dangerous trade. But the rules of law have usually some purpose behind them. Men like Holt and Blackburn are something more than whimsical innovators.[43] The basis of our principles is to be found in the economic conditions of the time. Business has ceased to be mere matter of private concern. A man who embarks upon commercial enterprise is something more—even in the eyes of the law[44]—than a gay adventurer in search of a fortune. The results of his speculation are bound to affect the public; and the state, as the guardian of its interests, is compelled to lay down conditions upon which he may pursue his profession. The emphasis does not lie, as Sir F. Pollock has suggested, in an *ipso facto* danger in business, but in the removal of certain zones of fact without the sphere of ordinary litigation. The basis of the rule, in fact, is public policy. One knows, of course, that "public policy" is a doctrine for which the judges have cherished no special affection. "I, for

[40] *Furlong v. South London Tramways Co.* (1884) 4 J. P. 329; cf. *Charleston v. London Tramways Co.* (1888) 4 T. L. R. 629.

[41] (1887) Cd. 285, p. 46.

[42] Baty, *op. cit.* p. 150. For a valuable general commentary on the tentencies of the modern law, *cf.* Charmont, *Les Transformations du droit civil,* chap. xvi.

[43] I hope to trace in a later paper the early history of *respondeat superior.*

[44] *Cf.* Mr. E. A. Adler's stimulating papers in 28 and 29 HARV. L. REV.

one," said Burrough, J.,[45] "protest . . . . against arguing too strongly upon public policy; it is a very unruly horse, and when you get astride it, you never know where it will carry you. It may lead you from the sound law. It is never argued upon at all but when other points fail." But such an attitude is, in truth, but the prophetic anticipation of the Victorian distrust of governmental interference. It is becoming more and more clear that we may not be content with an individualistic commercial law.[46] Just as that individualism was the natural reaction from the too strict and local paternalism of mediaeval policy—perhaps aided by the inherent self-centredness of Puritan thought[47]—so we are compelled to turn away from every conception of the business relation which does not see the public as an effective, if silent, partner in every enterprise. That is the real meaning of Factory and Employers' Liability Acts as of compulsory education, and the establishment of a minimum wage. It is simply a legal attempt to see the individual in his social context. That, at which we industrially aim, is the maximum public good as we see it. In that respect, the employer is himself no more than a public servant, to whom, for special purposes, a certain additional freedom of action, and therefore a greater measure of responsibility, has been vouchsafed.[48] If that employer is compelled to bear the burden of his servant's torts even when he is himself personally without fault, it is because in a social distribution of profit and loss, the balance of least disturbance seems thereby best to be obtained.[49]

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[45] *Richardson v. Mellish* (1824) 2 Bing. 252; *cf. Wallis v. Smith* (1882) 21 Ch. D. *per* Jessel at p. 266; *Rex. v. Hampden* (1637) 3 S. T. 1293; *Wilkes' Case* (1768) 19 S. T. 1112 *per* Mansfield, C. J.; and above all *Egerton v. Brownlow* (1853) 4 H. L. C. 1 *per* Pollock, C. B.

[46] See the striking remarks of Mr. Justice Holmes in 10 HARV. L. REV. 457, 467, and his speech to the Harvard Law Review Association on Feb. 15, 1913, in *Speeches* (1913) pp. 98-102; above all, his remarks in *Lochner v. N. Y.* (1904) 198 U. S. 45, 75-6.

[47] See Levy, *Economic Liberalism, passim,* and the last chapter of Gooch, *Political Thought from Bacon to Halifax.* For the way in which state regulation has become essential, *cf.* Pic, *Legislation Industrielle* (1908) chaps. ii and iii.

[48] *Cf.* Duguit, *Transformations du Droit Public,* especially chaps. ii and vii.

[49] *Cf.* the remarks of M. Sainchelette in his *Responsabilité de la Garantie,* p. 124: La responsibilité du fait d'autrui n'est pas une fiction inventée par la loi positive. C'est une exigence de l'ordre social.

What, then, we have to ask of ourselves is whether the positive benefits to be derived from the present rule do not in fact outweigh the hardships it may on occasion inflict. We cannot run a human world on the principles of formal logic. The test of our rule's worth must, in fact, be purely empirical in character. We have to study the social consequences of its application, and deduce therefrom its logic. We have to search for the mechanism of our law in life as it actually is, rather than fit the life we live to *a priori* rules of rigid legal system.[50] The way in which the modern conception has grown is, in fact, very comparable to the method by which special liabilities are attached to innkeepers,[51] to those who have wild animals,[52] to those who start a fire,[53] to those who engage as public carriers.[54] The meaning of the legal sword of Damocles forged for their penalization is rightly to be found, not in the particular relation they bear to their charge, but in the general relation to society into which their occupation brings them. In such an aspect as this it may be urged that Holt found good reason for the incisive certitude of his *dicta* in an age which saw so enormous a growth of corporate enterprise. It was, says Dean Wigmore,[55] "a conscious effort to adjust the rule of law to the expediency of mercantile affairs." Something of this, it may be urged, was perceived by Bentham in a passage which has not perhaps received its due meed of attention. "The obligation imposed upon the master," he says,[56] "acts as a punishment, and diminishes the chances of similar misfortunes. He is interested in knowing the character, and watching over the conduct of them

[50] What we have in fact to work out for vicarious liability are the principles indicated by Dean Pound in his various papers, especially in 5 COL. L. REV. 339; 8 *ibid.* 605; 24 HARV. L. REV. 591; 25 *ibid.* 489. A good instance of such application is Prof. Frankfurter's paper in 29 HARV. L. REV. 353.

[51] This social conception is interestingly prominent in the judgment of Crompton, J., in *Avards v. Dance* (1862) 26 J. P. 437.

[52] *Fletcher v. Rylands* (1866) 1 Ex. 265, 3 H. L. 330; and see thereon the comment of Dean Thayer in the article cited above.

[53] *Jones v. Festiniog Ry. Co.* (1868) L. R. 3 Q. B. 733.

[54] Holmes, *Common Law,* chap. v. and Beale in 3 *Anglo-American Legal Essays,* 148.

[55] *Op. cit.* iii, 536. Anyone who reads Professor Scott's *History of Joint-Stock Companies to 1720* will realize the force of this distum.

[56] *Collected Works,* i, 383. The passage occurs in his Principles of Penal Law.

for whom he is answerable. The law makes him an inspector of police, a domestic magistrate, by rendering him liable for their imprudence." Even when we allow for the curiosities of the author's characteristic phraseology, it is yet clear that he has seized upon an important truth. If we allow the master to be careless of his servant's torts we lose hold upon the most valuable check in the conduct of social life.

The real problem in vicarious liability, in fact, is not so much the rectitude of its basal principles, as the degree in which they are to be applied.[57] Nor can we anticipate the manner in which that problem is to be solved. What must strike the observer in the study of the cases is that each is in itself a separate issue; the employer of a railway conductor whose habit it is to kiss the female passengers of pleasing appearance[58] must be dealt with differently from a bank of which the cashier fraudulently induces a customer to accept certain bills.[59] "Each case," says Professor Frankfurter,[60] "must be determined by the facts relevant to it . . . . we are dealing, in truth, not with a question of law but with the application of an undisputed formula to a constantly changing and growing variety of economic and social facts. Each case, therefore, calls for a new and distinct consideration, not only of the general facts of industry, but of the specific facts in regard to the employment in question." The issue in vicarious liability is not different from that in regard to labor legislation. Just as our conception of the constitutionalty of statutes will depend upon the contemporary interpretation of liberty,[61] so the content of the liability enforced at any given moment upon a master for his servant's torts, must be shifted to fit the new facts it will continually encounter. It is not a very serious objection, in this age when incorporation has become but a formal informality, to urge that the growth of the

[57] *Cf.* Prof. Frankfurter's remarks in regard to labor legislation, 29 HARV. L. REV. 367.

[58] *Croaker v. Chicago & N. W. Ry. Co.*, 17 Am. Rep. 504.

[59] *Mackay v. Com. Bank of N. B.* (1874) L. R. 5 P. C. 394.

[60] *Op. cit.* p. 369.

[61] *Cf.* Pound, Liberty of Contract, 18 YALE LAW JOURNAL, 480, and the argument of Prof. Frankfurter in *Bunting v. Oregon* (1916) reprinted by the National Consumers' League in *The Case for the Shorter Workday*, pp. ix-xv. See also the opinion in *Holden v. Hardy* (1897) 169 U. S. 366, and the admirable remarks of M. Pic, *op. cit.* pp. 543-9. They are concepts exactly similar to these which I believe to lie at the base of vicarious liability.

doctrine is a dangerous blow aimed at the stability of property.[62] The doctrine will grow or contract according as the facts to which it is applied seem to warrant growth or contraction. It will have in view, not the history that is to be justified, but the end that is to be attained. It will let the future take care of itself by protecting it against the invasion of dogmas which grow painfully antique. It will strive, in fact, to make elastic that bed of Procrustes in which the client of law too often takes his rest. If, as Best, C. J., remarked,[63] our law is to be "bottomed on plain, broad principles," it is well to see that they do not also, even though unconsciously, include its superstructure. For each age has to begin anew its legal thinking.

IV

The problem of scope of employment[64] has become largely confused by the efforts of the courts to provide, somehow or other, a test of negligence on the part of the master. Thus, masters are to be held liable for their servant's torts when the latter are acting "for the master's benefit"[65] when, as seems to be assumed, he is less careful than we may demand—or in such wise that a probable authority would from the nature of the case have been given[66]—a fiction of implied command being, so far as one can see, relied upon.[67] It seems far easier to attempt a humanist application of public policy to the problems presented by the cases. The fiction of implied authority is so constantly breaking down, it so obviously results in patent anomalies as to be as dangerous as it is unsatisfactory. When we have defined "scope of employment" as consisting in acts incidental or natural to the servant's occupation, we are only on the threshold of our difficulties. For there has been the most widespread divergence of opinion as to what comes within the scope of

[62] Baty, *op. cit.* 165.

[63] *Strother v. Barr* (1828) 5 Bing. 136, 153.

[64] Mr. Baty, in chaps. v-vii of his *Vicarious Liability,* has provided a perfect mine of admirable comment on the cases, to which I am greatly indebted—though it is to be remembered that he enters always from the standpoint of a complete disagreement with the modern law.

[65] *Barwick v. Eng. Joint Stock Bank, ut supra; Dyer v. Munday, ut supra.*

[66] *Atty. Gen. v. Siddon & Binns* (1830) 1 Tyr. 41.

[67] For a vigorous dissent from this attitude, see the remarks of Bramwell, B., in *Wier v. Bell* (1877) 3 Ex. D. 238.

such acts, and no statistical measurement is at all possible. It is clear enough that if a driver employed by a jobmaster fails to keep watch over his customer's goods, that the master ought to pay; for he has held out the servant as capable in the performance of his duties—an obtainment of trust which carries with it a burden of responsibility.[68] But when we explain the decision as based on negligence—after all, a fiction so far as the master is concerned—we have in reality advanced nowhere; for the negligence is that of the servant and the problem is the liability of the master. It surely seems better to emphasize the fact that public policy obviously requires a means of forcing masters to keep continual watch over the conduct of their servants, and it is difficult to see how that end would otherwise be attained. Nor is it difficult to understand why a bank should be held answerable for the faults of its manager.[69] From one point of view, and that the orthodox, it is, of course, possible to attribute the decision in *Barwick* to an "implied authority" on the part of the manager to act on behalf of his bank; but in a wider aspect it is clear, that where loss must occur, more good is likely to accrue from making a bank liable for a mistaken appointment, than from making a corn-dealer suffer for a not unnatural reliance on managerial dignity. The fiction is surely unsatisfactory; for it is hardly possible to suppose that the bank gave its servant authority to act dishonestly. It is surely better to explain the ground of the decision as an attempt to calculate the minimum social loss in a social situation where some loss is inevitable. So too, if a teacher renders her employers liable for an unwise treatment of her charges,[70] it is not because it is part of her duty to act in such fashion as gives rise to penalization, but because the fact of her liability is more likely to prevent the recurrence of the act, than the argument that she was acting for her own benefit and therefore outside her authority; for no child is, on the whole, likely to be deterred from poking a fire at command by the consideration that a court might declare the order outside the implied authority of the teacher.

We do not therefore attempt the definition of the doctrine of implied authority for the simple reason that definition is impossible. We give up the doctrine. It is impossible, for instance,

[68] *Abraham v. Bullock* (1901) 86 L. T. 796.

[69] *Barwick v. Eng. Joint Stock Bank, ut supra.*

[70] *Smith v. Martin* [1911] 2 K. B. 775.

to say just when the occupation of a carter gives him implied authority to make a deviation, and at what point his journey becomes completely independent.[71] A "small détour" must obviously be relative to the day's journey, and it would be interesting to know exactly upon what principles the courts would be prepared to fix the proportion.[72] Nor is the task at all easier when the court refuses to consider the object the servant had in mind when he committed the tort. The manager of a saloon, for instance, is not usually sportively inclined to give his barman in charge (as it turns out erroneously);[73] and to declare that, because in fact the property he was suspected of stealing was safe, the manager could have no authority to act, is straining the bonds of common sense. An authority to have entire control is, in any rational aspect, an authority to act as best seems to fit the cirmustances, and if the measures taken to that end are mistaken, it is yet difficult to see exactly why the master should avoid the liability for the mistake.[74] Into what complications this system of delimination may lead in any tangled issue, the well-known case of *Owston v. Bank of New South Wales*[75] made very obvious.

It may also mistake the clear demands of humanity. A milk-cart was involved in an accident, in the course of which a milk-boy was injured. A bystander offered her assistance to the driver in order to see the boy home safely. The cart started before she was properly settled in it, and she was injured by being thrown out.[76] It seems clear that the driver was acting on the socially admirable ground of ordinary human kindness; and it was not unreasonable, therefore, to expect his employers to be responsible. The court, however, took up an entirely different attitude. *Cox v. Midland Counties Ry. Co.*[77] decided that a station master cannot bind his company for any surgeon's fees

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[71] *Cf. Whatman v. Pearson* (1868) L. R. 3 C. P. 422 with *Joel v. Morrison* (1834) 6 C. & P. 501; and *Patten v. Rea* (1857) 2 C. B. N. S. 606 with *Cormack v. Digby* (1876) 9 Ir. R. C. L. 567. See also the remarkable issue in *Smith v. Spitz* (1892) 156 Mass. 319.

[72] See Parke, B., in *Whatman v. Pearson, ut supra.*

[73] *Hanson v. Waller* [1901] 1 K. B. 390.

[74] *Bowler v. O'Connell* (1894) 162 Mass. 319; *Fogg v. Boston & L. R. R. Co.* (1889) 148 Mass. 513; *Brown v. Jarvis Engineering Co.* (1896) 166 Mass. 75.

[75] (1879) 4 A. C. 270.

[76] *Houghton v. Pilkington* [1912] 3 K. B. 308.

[77] (1849) 3 Ex. 268.

whom the former may summon; and it was, therefore, held by analogy that the acceptance of help by the driver was outside his implied authority. It is good law that a tramway-conductor who too forcibly ejects a passenger renders his company liable in damages;[78] if this occurs on a lonely road, cannot a surgeon's services be requisitioned save at the conductor's personal expense? Such reasoning is surely too pedantic to admit of acceptance. Nor can we place much faith in such a case as *Riddel v. Glasgow*[79] which apparently gives a rate-collector the choice between being disowned if he performs his duty efficiently, and being dismissed if he does not. The connotation of every such case ought surely to be the human circumstances in which it occurs. We are beyond that stage of strict law where men are bound by an empty formalism.

The case is more difficult when ethical defect in the servant's motive is the determining factor in his tort, or where he deliberately breaks his master's command. Here the modern doctrine is very new indeed, for as late as 1800 it was not admitted that wilful tort could be within the scope of employment.[80] Parke was very anxious to limit the liability of an employer to cases where negligence could be actually shown.[81] The origin of the new rule seems to have been the growth of corporate enterprise;[82] and with the classic judgment of Willes in *Limpus v. General Omnibus Co.* it became firmly established.[83] Its principle, in truth, is sufficiently clear. The London General Omnibus Company had given printed orders to its drivers not to interfere with the vehicles of competing companies. The order was wilfully disobeyed, and yet judgment was given against the company. The driver, as Willes pointed out, "was employed not only to drive the omnibus, but also to get as much money as he could for his master, and to do it in rivalry with other omnibuses on the road. The act of driving as he did is not inconsistent with his employment, when explained by his desire to

[78] *Seymour v. Greenwood* (1860) 6 H. & N. 359 (1862) 1 *ibid.* 355.

[79] [1910] S. C. 693; [1911] A. C. 209.

[80] *McManus v. Crickett* (1800) 1 East, 106.

[81] *Sharrod v. L. N. W. R. Co.* (1849) 4 Ex. 585; and see the judgment of Bramwell, L. J., in *Weir v. Bell, ut supra.*

[82] *Cf.* Baty, *op. cit.* p. 85.

[83] *Ut supra; cf.* also, *Ward v. Gen. Omnibus Co.* (1873) 42 L. J. (C. P.) 265; *Pittsburgh C. & St. L. R. R. Co. v. Kirk* (1885) 102 Ind. 399.

get before the other omnibus." He was in no way disturbed by the company's instructions. He pointed out how easy it would be to issue secret orders countermanding them, and for the master thus both to benefit himself, and to keep on the right side of the law.[84] That, surely, is a very necessary and valuable limitation; for were the law otherwise, there would be a positive incentive to employers to use their humble servants as the screen for their wrongdoing. The social object of prevention can only be obtained by an effective and thoroughgoing penalization.

The case is similar when trespass becomes extended to fraud.[85] The attempt to discredit the change on the ground that fraud implies a state of mind on the part of the defendant which does not in fact exist,[86] misses the significant point, that in no case of vicarious liability is moral blame attached to the master. Liability for wrongful arrest is equally clear; for it is obvious that the action is entirely consistent with the scope of the servant's employment unless fiction is to be invoked,[87] and unless we are to be without means for protecting the public from needless suffering.[88] It is clearly simply a social interpretation of negligence. Because a servant does things in the stress of the moment which judicial reflection deems to have been actually unnecessary, there is no reason why the act should not bear its full consequences. One regrets the continual use of the fiction of "implied authority;"[89] but that is no reason why the necessity of the rule should not lead to the discussion of what other reasons may be given for its usage. To narrow liability by considering authority actually expressed is to endanger very

[84] *Ibid.* at p. 539; *cf.* also *McClung v. Dearborne* (1890) 134 Pa. 396.

[85] As in *Barwick.*

[86] See the remarks of Bramwell, L. J., in *Weir v. Bell, ut supra:* "I do not understand legal fraud; to my mind it has no more meaning than legal heat or legal cold, legal light or legal shade." But *MacKay v. Com. Bank of N. B.* (1874) 5 P. C. 394; *Swift v. Winterbotham* (1873) L. R. 8 Q. B. 244; *Brit. Mutual Bank v. Charnwood Forest Ry. Co.* (1887) 18 Q. B. D. 714 have established it firmly. See also Pollock, *Torts* (6th ed.) p. 92 n. d.

[87] *Moore v. Metropolitan Ry. Co.* (1872) 8 Q. B. D. 36; *Goff v. G. N. R. Co., ut supra.*

[88] I have discussed below the unfortunate limitation of this doctrine through the misapplication of *ultra vires.*

[89] Mr. Baty in the fifth chapter of his book is able to exploit this weakness with great effect.

seriously our control of social life.[90] The employment of a servant to perform certain functions must, on the whole, mean his employment to perform them as he deems best fitted, in his interpretation of his instructions, to serve his master's interest.[91] It is not much consolation to an injured plaintiff to be told that the defendant meant him no harm; for, as Brian, C. J., said more than four hundred years ago, the courts do not try the thoughts of men.[92] We have here, as elsewhere, to follow the broad rule laid down by Shaw, C. J., in a famous case. "This rule," he said,[93] "is obviously founded on the great principle of social duty, that every man in the management of his own affairs, whether by himself, or by his agents, shall so conduct them as not to injure another; and if he does not, and another thereby sustains damage, he shall answer for it." Nor has the application of the rule shown it to be without justification.

And, after all, where the master most needs protection, he obtains it. He is not liable for the acts of his servant which are shown to be clearly unconnected with his service.[94] No master, for example, can possibly warrant the moral impeccability of his servants; and it is not difficult to see why Collins, M. R., should have held that when a servant has in view objects demonstrably and entirely his own, he should, in committing his tort, "have severed his connection with his master, and become a stranger."[95] The phrase is not perhaps of the happiest; it carries the crutch of fiction to sustain it. But everyone can see that it would not be right to hold a master liable for the chance temptations to which an usually reputed

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[90] In *Lowe v. G. N. Ry. Co.* (1893) 62 L. J. (Q. B.) 524. Matthew and Wright, J. J., really take this ground. It is the "must" of a railway porter's position that they consider.

[91] *Cf. Furlong v. South London Tram. Co.* (1884) 1 Cab. and E. 316.

[92] Y. B. 17 E. IV. I.

[93] See *Farwell v. Boston and Worcester R. R. Co.* (1842) 4 Met. (Mass.) 49; and see the admirable remarks of Esher, M. R., in *Dyer v. Munday, ut supra* at p. 746, where he points out the real meaning of the term authority. *Snee v. Trice* (1802) 2 Bay (S. C.) 345 is an interesting example of how a special social situation will enable the master to escape responsibility.

[94] *McManus v. Crickett, ut supra; Croft v. Alison* (1821) 4 B. & Ald. 590; *Hoar v. Maine Central R. R. Co.* (1880) 70 Me. 65; *Garvey v. Dung* (1866) 30 How. Pr. (N. Y.) 315; *Driscoll v. Scranton* (1896) 165 Mass. 348; *Pittsburgh F. W. & C. Ry. Co. v. Maurer* (1871) 21 Oh. St. 421.

[95] *Cheshire v. Bailey* [1905] 1 K. B. 237 at p. 241.

honest employee might succumb—the more so as the temptation is rather the creation of the third party than his own. It may even be suggested that, in this respect, the master has been unduly protected; for when a train conductor hits a boy for jumping on his car, he is doing what he believes to be for his employer's good, and ought duly to make him liable.[96] To use a supposed sudden cessation of authority at the moment when the conductor's unlawful hand descends upon its victim's ear is to strain rationality to the breaking-point. Mr. Baty complains[97] that a consideration of the servant's motive ought alone to be sufficient to save his master from liability. But the truth here is that everything must depend on the surrounding circumstances of the cases with which the courts are called upon to deal. The reliance to be placed upon a coachman,[98] for instance, is different in character from the reliance usually to be placed upon a bank manager,[99] and it is reasonable that a distinction should be made between them; and what is true of a bank manager does not, as it seems, apply to a clerk in a company.[100] The rule must wait on the facts.

What is here suggested is the simple thesis that only a social interpretation of the law will give us a satisfactory clue to the bewildering labyrinth that confronts us. If the judges continue to apply general principles founded on a dangerous and unsatisfying fiction, only confusion of a lamentable kind can result. It is hardly possible, as the case now stands, to avoid a perplexing variety of opinion as to whether any given issue comes within the scope of "implied authority" or not. But it is possible to have sufficient confidence in the good sense of the courts to ask for a frankly communal application of the law. The promotion of social solidarity is an end it is peculiarly incumbent upon the law to promote, since its own strength, and even life, depends upon the growth of that sentiment. The fiction of implied authority is no more than a barbarous relic of individualistic

[96] *Radley v. L. C. C.* (1913) 29 T. L. R. 680; *cf. Central Ry. Co. v. Peacock* (1888) 69 Md. 257; *New Orleans & N. E. R. Co. v. Jopes* (1891) 142 U. S. 18.

[97] Baty, *op. cit.* 109.

[98] As in *Cheshire v. Bailey, ut supra.*

[99] *Com. Bank of N. B., ut supra.*

[100] *Ruben v. Great Fingall Consolidated* [1906] A. C. 439. See also *Houldsworth v. City of Glasgow Bank* (1880) 5 A. C. 317 where the cases are collected.

interpretation. It savors too dangerously of the time when the courts held that they were to do no more than apply a given remedy to a given set of facts concerning John Doe and Richard Roe—with a lofty unconcern for the world at large. We are passing beyond that stage. The meaning to be given to the scope of employment is bound more and more to affect vitally the whole future of industry. It is according as lawyers realize this, that they will be equipped to deal adequately with the facts of life. It is, it is true, an interpretation they may not find in the books. But law is perhaps in need of the stimulus of a freer atmosphere.[101]

V

Such an attitude is the more important when the depersonalization of industry is borne in mind. Machinery and corporate enterprise have effected a revolution the very beginnings of which we are able only dimly to conceive.[102] The old, intimate relation between master and servant can hardly now return. The apprentice no longer marries his master's daughter, for the simple reason that his master no longer has a daughter, or, if he does, that daughter is a corporation who is not given in marriage. The modern business man is either a director or a manager and he sees nothing, often enough knows nothing, of his servants. That is, of course, the natural consequence of the scale of modern commercial enterprise, but it is a consequence of which the results need careful emphasis. And alongside this industrial impersonalism has gone the incredible development of machinery so that, as Mr. Birrell has grimly noted,[103] it is with arms and legs that the courts are largely concerned. Now these corporations, are, in the eyes even of the law, juristic persons,[104] and since they act as an ordinary individual would act in a similar situation, that is to say by agents and servants, it is clearly reasonable, that they should, equally with individuals, be held

[101] *Cf.* Pound, Law in Books and Law in Action, 44 AM. L. REV. 12.

[102] The reader will find in Mr. Sidney Webb's *Towards Social Democracy* (1916) a very brilliant and suggestive sketch of the modern change.

[103] See his *Law of Employers' Liability*, pp. 3-5.

[104] *Cf.* 29 HARV. L. REV. 404 *ff.* The classic treatment of this problem is to be found in Maitland's famous introduction to his translation of *Gierke's Political Theories of the Middle Age.* Generally the fullest and most brilliant treatment is in Saleilles, *La Personnalite Juridique* (1910).

vicariously liable for such acts as those agents and servants may perform. But it has not proved easy to establish this doctrine in anything like its necessary completeness. The law has accepted the concession theory of corporate personality, and the grim shadow of *ultra vires* has fallen athwart the pathway of our needs. "The public," Lord Bramwell has told us,[105] "is entitled to keep a registered company to its registered business," and so a company may not go beyond the powers that have been conferred upon it in its origin. But the public had to be protected from the consequences of corporate enterprise, and the nineteenth century has gradually seen the extension to it of the principles of individual liability. It is so difficult, for instance, for a single individual to run a railway, that it would be intolerable if the mere problem of numbers prevented the attainment of justice. So trover,[106] trespass,[107] and nuisance[108] had all been successfully pled against the corporate person before the first half of the century had passed. Malicious prosecution,[109] libel,[110] fraud,[111] and false imprisonment[112] were little by little compelled to follow.

The hesitations that have been charactristic of our policy lie at the door of our conception of the corporation. So long as we think of it as a fiction created only for certain ends which are legal, the doctrine of implied authority logically prevents us from admitting, that it can be guilty of authorizing illegal acts.[113] Having made it mindless, we are unwilling to admit it guilty of acts which seem to carry with them the stamp of conscious immorality. But immediately we surrender so inadequate a theory, the ground for the extension of vicarious liability to the corporate person is very clear. It acts and is acted for; it must then pay the penalty for its habits. In a world where individual enterprise is so largely replaced, the security of business relationships would be enormously impaired unless we had the

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[105] *A. G. v. G. E. Ry. Co.* (1879) 11 Ch. D. 449, 503. *Cf.* 29 HARV. L. REV. 405 f.

[106] *Smith v. Birmingham Gas. Co.* (1834) 1 A. & E. 526.

[107] *Maund v. Monmouthshire Canal Co.* (1840) 4 M. & W. 452.

[108] *R. v. G. N. R. Co.* (1846) 9 Q. B. 315.

[109] *Citizens' Life Ass. Co. v. Brown* [1904] A. C. 423, 436.

[110] *Whitefield v. S. E. R. Co.* (1858) 27 L. J. (Q. B.) 229.

[111] *Barwick v. Eng. Joint Stock Bank, ut supra.*

[112] *Eastern Counties Ry. Co. v. Brown* (1867) L. R. 2 Ex. 259.

[113] This seems to be Mr. Baty's view. *Op. cit.* p. 69 *ff.*

means of preventing a company from repudiating its servants' torts.[114] The reason is not that companies are well able to pay; for it is not the business of law to see that a debtor is solvent, but to provide a remedy for admitted wrong.

The enforcement of such vicarious liability is more urgent for another reason. The dissolution of individual business enterprise into the corporation system has tended to harden the conditions of commercial life. The impersonality of a company employing say five thousand men is perhaps inevitable; but in its methods of operation, it tends to be less careful of human life, more socially wasteful than the individual has been.[115] But its consequences to society are equally momentous, and we dare not judge it differently.[116] It is necessary, for instance, to see to it that we have pure food and unadulterated milk, and it can make no difference to us whether the offender against our requirements be individual or corporate.[117] It is only by enforcing vicarious liability that we can hope to make effective those labor laws intended to promote the welfare of the workers;[118] for it is too frequently the corporation that evades the statute or attempts to discredit it.[119] It is useless to argue that the responsibility rests upon the agent; for it is unfortunately too clear that men may act very differently in their institutional relations than in their ordinary mode of life.[120] The London Dock strike of 1911 suggested that a man who in his domestic capacity will display all the most amiable sentiments of an

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[114] *Cf.* Gierke, *Die Genossenschafts Theorie und die Deutsche Rechtsprechung,* 801-3, and especially Loening, *Die Haftung das Staates,* p. 89. See also Pollock, *op. cit.* at p. 127.

[115] For an interesting suggestion that it should therefore be judged differently, see M. D. Petre, *Life of G. Tyrrell,* II, 482.

[116] *Cf.* C. D. Burns, *The Morality of Nations,* chaps. i and xi.

[117] *Pearks etc. v. Ward* [1902] 2 K. B. 1, and *Chuter v. French* [1911] 2 K. B. 832; *Stranahan Bros. Catering Co. v. Coit* (1897) 55 Oh. St. 398—a very striking case.

[118] Ruegg, *Law of Employer and Workman in England,* Lect. iv.

[119] Anyone who studies the REPORTS OF THE CHIEF INSPECTOR OF FACTORIES IN ENGLAND, or the BULLETINS OF THE BUREAU OF LABOR, especially No. 142 of 1914, which deal with the enforcement of legislation, will be impressed by this state of affairs. For statistics as to the part played by the great corporations in the extension of the Fourteenth Amendment to labor legislation, see Collins, *The Fourteenth Amendment and the States.*

[120] See an interesting little essay by Father Tyrrell on the corporate mind in his *Through Scylla and Charybdis.*

average retired grocer will, when acting for a great dock company, show himself immovable and unrelenting. But if he injure society in his activities it is surely clear that means must be at hand to render his principal responsible. That, at any rate, was the basis of the great judgment of Farwell, J., in the *Taff Vale* case.[121] No one supposes that trade union officials will commit torts unless there are trade unions for which to commit them. There may be special reasons for taking the trade unions outside the ordinary law,[122] but that is not to say that the acts would not otherwise be corporately tortious in character. No one can deny, for example, the reality of those entities we call England and Germany. Not only do they act, but persons act on their behalf. It seems then socially necessary to make them bear the burden of a policy for which they are at bottom responsible.[123]

Nor is the case at all different when the association we attempt to make corporately liable happens not to have chosen the path of incorporation. There seems no reason in the world why a technicality of registration should be allowed to differentiate between societies not in essence distinct. Yet as the law now stands active participation is essential to such liability.[124] Here contract has betrayed us; for we regard the voluntary association as no more than a chance collection of individuals who have agreed to perform certain acts; and they could not, of course, assent to the commission of illegalities.[125] "Because," says Mr. Baty,[126] "William Sikes is a bad man, Lady Florence Belgrave is not to be taxed with abetting burglary if she sends him soup." But it is not the soup to which anyone—except Mr. Sikes and the philosophers of the London Charity Organization Society—will object; the problem is as to the establishment by Mr. Sikes of a fund which, though subscribed for legal purposes, is yet used in an illegal manner.[127] No one really desires to attack the private fortunes of associated individuals; but it

[121] [1901] A. C. 426.

[122] See Mr. and Mrs. Webb's remarks in their introduction to the 1911 edition of their *History of Trade Unionism.*

[123] See 13 JOUR. OF PHIL. PSYCH. & SC. METHODS, p. 85

[124] *Brown v. Lewis* (1896) 12 T. L. R. 455.

[125] *Cf.* 29 HARV. L. REV. 417 *ff.*

[126] Baty, *op. cit.* 52.

[127] As for instance, the money subscribed to arm the different volunteer armies in Ireland recently.

is eminently desirable that means should be had of getting at the funds they collectively subscribe, when legal—or illegal—results flow from their collective action. If a religious order which has not been incorporated chooses to have the services of an architect, the mere fact that its members are scattered, and had never contemplated the use made of their subscriptions by their representatives, ought not to hinder the architect from securing his rights by a representative action.[128] If an unincorporate aggregate acts as an individual body, it is surely good sense, it ought no less surely to be good law, to give it bodiliness.[129] That is why one can sympathize with decisions such as that in *Ellis v. National Free Labor Association*,[130] or, conversely, with that in *Brown v. Thompson and Co.*[131] The same is true of the liability of clubs acting through their committees. No one imagines that the committee of a football club would, as a group of respectable and individual householders, erect a grand stand; and if that stand collapses, a technicality of registration ought not to defeat the ends of justice.[132] An unincorporate individual is an unity for the fiscal purposes of the state;[133] it is difficult to see why its social needs should be refused a similar protection.

VI

The basis of modern legislation on employer's liability and workmen's compensation is very similar in character. Both represent the typical modern reaction against mid-Victorian individualism. It is interesting to note the somewhat curious divergence in the attitude of lawyers and economists to these problems. To the economist, the necessity of such legislation is abundantly evident. It is simply that the needs of the modern state require that the burden of loss of life, or personal injury in industry, shall be charged to the expenses of production, shall

[128] *Walker v. Sur* [1914] 2 K. B. 930.

[129] See, for instance, the amazing remarks of Lord Halsbury in *Daimler Co. v. Continental Tyre Co.* [1916] 2 A. C. 307 at p. 316. Maitland might never have written so far as this view of the nature of a corporation is concerned.

[130] [1905] 7 Fac. 629.

[131] [1912] S. C. 358.

[132] *Brown v. Lewis, ut supra,* and see also *Wise v. Perpetual Trustee Co.* [1903] A. C. 139.

[133] 48 & 49 Vict. c. 51; *Curtis v. Old Monkland Conservative Association* [1906] A. C. 86.

be borne, that is to say, by the employer.[134] He knows well enough that eventually the cost will be paid by the community in the form of increased prices, but that is something it is not unwilling to pay. It is realized that if a workman is compelled to take upon himself all the risks of his employment, the results will be socially disastrous. For the real social unit at the present time is not the individual but the family. It is not merely the single worker who is employed; his wages in reality represent the maintenance of those who are dependent upon him. From the standpoint of public policy, therefore, for the employer to assert that risk must lie where it falls is simply impossible. We cannot allow the certificated managers of collieries to kill their miners with impunity.[135] If the carelessness of a porter breaks a scaffolding upon which a carpenter is standing, his family ought not to starve through his injury.[136] The need of the modern state is most emphatically that the welfare of the workers should be the first charge upon industry.[137]

But the law has approached the problem from so entirely different an angle as to place the workman in a peculiarly unfortunate position until a fairly recent time. It was considered essential that when a servant undertook employment he should accept all the risks of service. To do otherwise, said Abinger, C. J.,[138] "would be an encouragement to the servant to omit that diligence and caution which he is in duty bound to exercise on behalf of his master." There is a long history behind the enunciation of that pathetic self-reliance; though as a legal fact Lord Esher has told us that it became good—or bad—law "principally through the ingenuity of Lord Abinger in suggesting analogies in *Priestley v. Fowler*."[139] As a fact it was grounded upon a series of most questionable hypotheses. There could not

[134] For characteristic economic opinion, see Seager, *Principles of Economics*, p. 601; Taussig, 2 *Principles of Economics*, 334; 2 Chapman, *Work and Wages*, 401; Schaffle, *Theory of Labor Protection*, xiii; Carlton, *History of the Problems of Organized Labor*, p. 304; Seager, *Social Insurance, passim;* Eastman, *Work Accidents and the Law;* Barlow in 7 ECONOMIC JOUR., 345; and 11, *ibid.* 354; Willoughby, *Workingmen's Insurance*, p. 327; and above all, the classic eleventh chapter in Webb, *Industrial Democracy*, especially Vol. II, pp. 387-91.

[135] *Howells v. Landore Siemens Steel Co.* (1874) L. R. 10 Q. B. 62.

[136] *Morgan v. Vale of Neath Ry. Co.* (1865) L. R. 1 Q. B. 149.

[137] This point is well worked out in Mr. Hobson's *Work and Wealth.*

[138] *Priestley v. Fowler* (1837) 3 M. & W. 1 at p. 7.

[139] Birrell, *Law of Employer's Liability*, p. 25.

be, so the law held, where master and servant are concerned, any mutual liability not based on a personal fault of the former, since the servant knowingly and willingly undertook the risks of service. But this is not only the merest fiction of a peculiarly vicious kind. It created also one law of negligence for strangers and another, far less stringent, where masters were concerned.[140] The results involved were patently unjust and discriminated unduly; and it was natural that the first efforts of the trade-unions after their legal recognition should have been devoted to the destruction of the fellow-servant doctrine.[141] This, after much effort, they were able to accomplish in England by the Employers' Liability Act of 1880.[142] Judicial interpretation has moreover explained that, in this context, the maxim *volenti non fit iniuria* ought to mean in reality just nothing at all.[143] The work thus admirably begun was supplemented and completed in the Workmen's Compensation Acts of 1897 and 1906. The effect of that legislation is perfectly clear. In certain specified cases it imposes upon the employer the liability of providing compensation to a workman or the dependents of a workman who is either killed or injured in the course of his employment. It is noteworthy that this method of social insurance is not confined to England alone but, in some form or other, is common to the continent of Europe.[144]

In this country, however, much of the old legal attitude has survived, and the situation has become complicated by problems of constitutional interpretation.[145] Such statutes, says Judge Smith,[146] "are in direct conflict with the fundamental rule of modern common law as to the ordinary requisites of a tort"; and he points out that the modern conception is really akin to the mediaevalism which apportioned blame irrespective of motive.

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[140] *Cf.* Webb, *History of Trade Unionism*, p. 350.

[141] The sequence Reform Act 1867, Trade Union Acts 1871-6, Employers' Liability Act 1880 is surely very significant; see Webb, *loc. cit.*

[142] 43 & 44 Vcit. c. 42.

[143] *Smith v. Baker* [1891] A. C. 325.

[144] Mr. A. P. Higgins in his *Law of Employers' Liability* has discussed the continental attitude.

[145] Mechem in 44 AM. L. REV. 221, and Smith in 27 HARV. L. REV. 235, 344, are very typical of this. *Cf.* the weighty remarks of Freund in 19 GREEN BAG 80, and 2 AM. LAB. LEG. REV. 43; and of Lewis in 38 ANN. AM. ACAD. POL. SC. 119. See also the remarkable judgment in *Ives v. So. Buffalo Ry. Co.* (1911) 201 N. Y. 271.

[146] 27 HARV. L. REV. 238.

But it may be questioned whether the statutes were ever intended to throw any light upon the theory of torts. That at which they aim is simply, for social reasons, to secure the worker against the dangers of his employment in the belief that it is more advantageous for the burden to fall upon the employer.[147] It does not base that burden upon tort at all. On the contrary it withdraws it from the ordinary concepts of law by making it statutory. It places a statutory clause—the provision, in certain cases, for accident—as one of the conditions a master must observe if he wishes to engage in business.[148] The liability is made to arise not from any tort upon the part of the master, but upon the inherent nature of the modern economic situation.[149] It is not claimed that the master ought to pay because he gets the benefit of his servants' work,[150] any more than under the old doctrine of common employment the judges would have argued that the workers ought to pay because they had the privilege of being employed.

The fact is that eighty years have passed since *Priestley v. Fowler,* and our social ideas have not stood still in that interval. The state has been brought to ask itself how the safety of the workers and their families may be best assured, and it has returned its answer. It is unnecessary to attempt to bring the theory under any of the old maxims of vicarious liability.[151] The dogma underlying it may be new or it may be old; we need not be greatly concerned either at its novelty or its antiquity. The question to which we have to reply is a very different one. The test of our rule is whether it affords the protection that is intended. Much of the real problem is obscured by discussion of a supposititious case of an individual employer and a free and independent workman—without real existence in the industrial world we know—and then asking, if the former is to be responsible for accidents where no fault is anywhere to be discovered, and if the logic of the law of torts is thereby to be destroyed. We cannot sacrifice social necessity to the logic of

[147] For more drastically adverse criticism of the principle see Mignault in 44 AM. L. REV. 719; Hirschfeld in 13 JOUR. SOC. COM. LEG. 119; and seemingly, Prof. Dicey in *Law and Public Opinion,* pp. 281-2; *cf.* Holmes, J., in 207 U. S. 463, 541.

[148] *Cf.* Pound, 25 INT. JOUR. OF ETHICS, p. 1.

[149] Just as special liabilities are attached to carriers, etc.

[150] As Prof. Mechem seems to think, *op. cit.* 227, 241-2.

[151] As Judge Smith is anxious to compel us to do. 27 HARV. L. REV. 254.

the law of torts. The crux of this problem is the economic need of preventing the cheapening of human life,[152] and to that end our law must shape itself. We need not fear very greatly that the imposition of such liability on building contractors, for example, will force them out of business;[153] for the cost of labor has a convenient habit of expressing itself in terms of price. Nor can we rest content with the suggestion of a distinguished jurist[154] that it is expedient to let accidental loss lie where it falls. That may be an admirable maxim in the case of a stricken millionaire; but it is of too hard consequence where the sufferer has needy dependents.

It seems, on the whole, a better policy to set our faces firmly forward, and shape the character of our law by the ends it has to serve. In such an aspect, if we admit that the state has the right, on grounds of public policy, to condition the industrial process, it becomes apparent that the basis of the vicarious liability is not tortious at all; nor, since it is withdrawn from the area of agreement, is it contractual. It is simply a statutory protection the state chooses to offer its workers. Whether, as such, it so discriminates against the employing class, as to come within the scope of measures contemplated by the Fourteenth Amendment, is another and a very different question. If we believe that it is not an infringement of libery to read its meaning in its social context,[155] we shall perhaps be in no doubt as to the rightness of a negative response. We shall then argue that no other possibility in reality exists at the present time. We have to minimize the loss consequent upon the needs of life. The principles of law must be subordinate to that effort.

VII

There seems no valid *a priori* reason why the operation of our principles should cease at that border where tort becomes crime. *Actus non facit reum nisi mens rea* may be admirable in a state of nature; but it will not fit the facts of a complex social structure. So that we need fear no difficulties at the outset. The case is of course obvious where the crime is performed upon

[152] *Cf.* Hutchins & Harrison, *History of Factory Legislation*, 254 *ff.*

[153] *Quinn v. Crimmings* (1898) 171 Mass. 255, 258.

[154] Holmes, *The Common Law*, 94 *ff.*

[155] 3 Green, *Coll. Works*, 379.

specific authority,[156] or is the natural and inevitable consequence of the servant's business.[157] The real problems, as in the case of civil liability, arise where the doctrine of implied authority begins to pale its ineffectual fire before the difficulties it has to confront.

Everything, it is clear, depends upon the nature of the crime. We shall not easily, for instance, charge a corporation with murder; but if a company's servants, acting for their master's benefit, send a gatling gun mounted upon an armored train through a village at night,[158] it is necessary to enforce adequate penalties against the source of such a crime. Again, we have statutes regulating the sale of liquor which are notoriously difficult to enforce. It is found essential, in these cases, to insist on the full responsibility of the licensee if the law is to be of any avail.[159] Lord Alverstone, indeed, has endeavored to formulate certain canons by which the breach of law may be tested;[160] but they can hardly be said to have much practical worth. The point at issue in this class of crime is simply and surely the enforcement of the law, and it may generally be suggested that the necessities of the case do not admit of our enquiring too closely into the delicate niceties of the situation.[161] Society has not usually suffered from a reasonable vigilance towards saloon keepers. And the same rule holds good when we pass the narrow line from drink to cards.[162]

We must have our food protected; and that, irrespective of the vendor's motive. It is here not merely a question of whether knowledge on the master's part may be assumed,[163] or whether the provision of food is so dangerous an occupation as to require special diligence,[164] but simply that the consequences of the alternative to a stern treatment are too serious to be admissible.

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[156] *U. S. v. Nunnemacher* (1876) 7 Biss. 111.

[157] As in the case of a bookseller's assistant dealing with a libellous publication. *Wilson v. Rankin* (1865) 6 B. & S. 208, *per* Cockburn, C. J.

[158] Lippmann, *Drift and Mastery*, p. 80.

[159] *State v. Fagan* (1909) 74 Atl. (Del.) 693.

[160] *Emory v. Nolloth* [1903] 2 K. B. 264.

[161] *Cf.* however, *Com. v. Riley* (1907) 196 Mass. 60.

[162] *Crabtree v. cole* (1879) 43 J. P. 779; *Bond v. Evans* (1888) 21 Q. B. D. 249. The remarks of Stephen, J., on the strange decision in *Newman v. Jones* (1886) 17 Q. B. D. 132 are particularly noteworthy.

[163] *Nelson v. Parkhill* (1892) 20 Sc. Sess. Cas. 4th Series, p. 24; *Brown v. Foot* (1892) 66 L. T. N. S. 649.

[164] *R. v. Dixon* (1814) 3 M. & S. 11.

Arguments as to the reality of a corporate mind[165] pale into insignificance before the problem of public health. We are, here, beyond the stage where it is sufficient to know that reasonable care was exercised. It is essentially the consequences of action with which we have to deal,[166] for where public policy has such vital ends to serve it cannot rest content with the easy fatalism of good intention.[167] We dare not risk the nullification of our needs. We authorize the master to sell in set fashion, and if the law is broken he must take the consequences.[168] Cases such as these must clearly stand upon a special footing. "Where the statute," says the court in an Irish case,[169] "creates a direct and unqualified duty, the person obliged to perform the duty cannot escape under the doctrine of *mens rea.*" Protection were otherwise an impossible task.

Parallel with such a situation is the law in regard to libel. It has been long and well settled that a master—in the absence of statutes to the contrary—is responsible for the criminal libels committed by his servant without his knowledge or consent.[170] Those who have the control of books and newspapers in their hands have a weapon too powerful to bear no more responsibility tha nthat of guilty intent. It is not merely, as Tenterden, C. J., argued, that the proprietor of a bookshop or of a newspaper ought to pay because he enjoys the profits of the enterprise,[171] the fact is, that damage by publication is very largely an irreparable damage,[172] and that the law must protect the interests of personality as best it may.[173]

Nor ought the corporation to avoid responsibility on the ground

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[165] *Pearks v. Wood* [1902] 2 K. B. 1; *Chuter v. Freeth* [1911] 2 K. B. 832.

[166] *Cf.* however, *Kearley v. Taylor* (1891) 65 L. T. N. S. 261 for a case where distinct disobedience to express orders was held an admissible defence.

[167] See the judgment in *Hosford v. Mackey* [1897] 2 Ir. 292; *Lehman v. Dist. of Columbia* (1902) 19 App. D. C. 217.

[168] See the very able judgment in *State v. Kettelle* (1892) 110 N. C. 560, and that in *Com. v. Savery* (1887) 145 Mass. 212.

[169] *Fitzgerald v. Hosford* (1900) 2 Ir. Rep. 391. *Cf.* the judgment of Channell, J., in *Anglo-American Oil Co. v. Manning* [1908] 1 K. B. 536.

[170] *R. v. Williams* (1774) Lofft, 759; *R. v. Topham* (1791) 4 T. R. 126; *R. v. Alexander* (1829) Mood. & M. 437.

[171] As is well shown in the *Mylius* case.

[172] *R. v. Gutch* (1829) Mood. & M. 433.

[173] The limitation of 6 & 7 Vict. c. 96 should be noted.

that it is mindless.[174] Such a view has long been regarded as untenable. No one would dream of accusing a corporation of adultery, but there are offenses clearly to be attributed to it where the act is directly performed by its servants. "We think," said a strong court,[175] "that a corporation may be criminally liable for certain offences of which a specific intent may be a necessary element. There is no more difficulty in imputing to a corporation a specific intent in criminal proceedings than in civil. A corporation cannot be arrested and imprisoned in either civil or criminal proceedings; but its property may be taken either in compensation for a private wrong, or as punishment for a public wrong." Those people would agree that common sense is on the side of such an attitude. It would be intolerable if corporate enterprise did not imply corporate responsibility. It is the determining factor in the action of the servants who commit the crime on its behalf; so, in a long series of cases, the rule has been extended from the analogy of the individual.[176] We have not yet, indeed, been able to make criminal negligence extend to the point of manslaughter;[177] though perhaps it may be suggested that with the admission by an Australian court of corporate *mens rea*,[178] there are real possibilities of progress. It is not until we have admitted the necessity of completely equating group-action with individual action in its social aspects that we can remain content. It is, indeed, a happy augury, that this line of thought should have been declared constitutional by the Supreme Court of the United States.[179] It is difficult to take very seriously the plea of Mr. Baty, that "even if the results of summary process are not very serious, they involve in the minds of ignorant persons a certain amount of discredit."[180] Law is not made to suit the wrong notions of ignorant persons. The real problem is simply whether we dare afford to lose such

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[174] Holt, C. J., in 12 Mod. 559 (1702); *State v. Great Works Milling & Mfg. Co.* (1841) 20 Me. 41.

[175] *Telegram Newspaper Co. v. Commonwealth* (1899) 172 Mass. 294.

[176] Misfeasance in *R. v. Brim. & G. Ry. Co.* (1842) 3 Q. B. 223; obstruction in *R. v. G. N. Ry. Co.* (1846) 9 Q. B. 315; under the Lotteries Act in *Hawke v. Hulton* [1909] 2 K. B. 93 are typical examples.

[177] *R. v. G. W. Laundry Co.* (1900) 13 Manitoba, 66; *Union Colliery Co. v. Queen* (1900) 31 Can. Sup. Ct. 81.

[178] *R. v. Panton*, 14 Vict. L. Rep. 936.

[179] *N. Y. C. & H. Ry. Co. v. U. S.* (1908) 212 U. S. 481.

[180] Baty, *op. cit.* 219.

hold as we possess over the action of groups in the affairs of social life—the more particularly in an age predominantly associational in character.[181] It is, for the most part, a commercial problem consequent upon the dissolution of individual industrial action.[182] Its solution in the future must depend upon our manner of interpreting the business function.[183]

VIII

What has been here attempted is, in fact, a part of the sociological analysis of law. We do not sufficiently realize how greatly our legal ideas have been affected by their peculiar relation to the history of landed property. Primitive jurisprudence concerns itself, for the most part, with the protection of individual rights. Certain men are blameworthy; they have invaded the property of other men. It is then necessary to obtain protection against them. That ancient but tenacious individualism is in truth the coronation of anarchy; and the time comes when a spirit of community supersedes it. But either because that notion is prematurely born, or else because it is inadequately translated into terms of actual life, it results in the cramping of single-handed effort. It passes away; and the consequence is the beatification of *laissez-faire*. But it becomes increasingly evident that society cannot be governed on the principles of commercial nihilism. To assume that freedom and equality consist in unlimited competition is simply to travesty the facts. We come once more to an age of collective endeavor. We begin the re-interpretation of law in the terms of our collective needs.

Novelty for our principles, we may not in some sort deny; though, in truth, if it is by history that we are to be judged a plethora of antiquarianism might not be wanting.[184] But it is on different ground that we take our stand. It is our business to set law to the rhythm of modern life. It is the harmonization

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[181] This is especially true of the United States. *Cf.* De Tocqueville's remarks in *2 Democ. in America, 97 ff.* (trans. Reeve, 1889) which are even more accurate at the present time.

[182] Perhaps also of great ecclesiastical corporations, *cf. Brown v. Montreal* (1874) 6 P. C. 157. Something of the same issue is involved in *First Church of Christ Scientist, Applic. of* (1897) 6 Pa. Dist. Ct. 745, and the similar application in 205 Pa. 543.

[183] *Cf.* Mr. Justice Brandeis in his *Business a Profession, passim.*

[184] *Cf.* the articles of Dean Wigmore cited above.

of warring interests with which we are concerned. How to evolve from a seeming conflict the social gain it is the endeavor of law to promote—this is the problem by which we are confronted. We would base our legal decisions not on the facts of yesterday, but on the possibilities of to-morrow. We would seek the welfare of society in the principles we enunciate. We have been told on the highest authority that no other matter is entitled to be weighed.[185]

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[185] Holmes, J., in 8 HARV. L. REV. 9.