The Law and Group Ethics

An Address by William T. Gossett, Vice-President and General Counsel, Ford Motor Company, on Tuesday Evening, November 10, 1953, at a dinner for first-year law students, the faculty, and members of the Alumni Board and Visiting Committee.

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Some things about the society in which we live are more apparent to me today than they were when I sat where you now sit, as young students of the law.

One of the more significant of those things is the relation between the law and our moral standards. Over the years I have become more and more impressed with the overriding significance of moral considerations in the questions put to me as a corporation lawyer. And I want to talk to you tonight about the law and ethics, with particular reference to the big economic organizations with which I am in daily contact.

To an extent unrealized and unpredicted during my law-school days, the law today reaches far beyond the morality of individuals, to encompass the behavior—the moral conduct, if you will—of large groups of individuals united in a common interest. Thus, the same standards of ethics and morality generally applied in the Western world to individual conduct are being applied to group conduct, and the formal application of those standards is increasingly to be found in our laws.

Perhaps I should begin with a few basic ideas. Ethics, as I understand the term, considers man as he ought to be. Law, on the other hand, has no choice but to deal with him as he is. Ethics records man's dream of his best self—a beacon in the darkness by which, if he has sufficient wisdom and strength, he may steer his way to self-improvement. Law, however, is said to record the minimum standards of conduct to which, at a given time and place, men may be required to conform.

But despite this apparent gap between law and ethics, their relationship is clear and direct; the law is responsive to our moral sensibilities. It may lag behind somewhat, but it is always tending toward a goal which would be a perfect codification of our ethical standards. Whenever the community becomes conscious of the development of a course of conduct inconsistent with the fundamental principles of ethics, the law soon reflects the fact.

We are all familiar with that basic principle of all codes of ethics, the Golden Rule. For centuries it has had general acceptance as a standard of conduct for the human individual. In most civilizations down through the ages, some version of the Golden Rule has been a touchstone by which men might gauge their conduct toward one another. The idea that we should do unto others as we would have them do unto us is today honored, even when not observed, among all civilized people. Indeed, I understand that, in essence, it is a fundamental tenet of no less than seven of the eleven major living religions of the world.

Our law, as it relates to individual behavior, plainly reflects the influence of that foundation of all codes of conduct. Murder, theft, arson, all the branches of our criminal law; trespass, defamation, assault and battery, and other rules of the law of torts; the law of contracts; all of these show that we have expressed in basic legal principles our expectation that individuals shall conform to the Golden Rule.

Most of these rules developed in a simpler age: simpler in its science, simpler in its economics, simpler in its problems of human relations.

We live in an increasingly complex age. The Industrial Revolution burst open a door to a whole new area of material opportunities for everybody. Within our own time we have seen this area developed with almost miraculous results: the radio and television, the automobile and the supersonic jet plane, radar, nuclear fusion; and the use of huge special-purpose machine tools and the assembly line to bring to hundreds of millions of people a standard of living never dreamed of by even the kings of antiquity.

There is one underlying fact in this evolution that is often overlooked. For my purpose this evening, it is a most significant fact. It is that making the most of these new opportunities was a job that could not be done by any one man or even by many small groups of men working together. The job eventually demanded large aggregations of men working as single units.

From that fact developed the large corporation as we know it today. From that fact there inevitably developed the labor union and "big labor" as we know it today.

What I am saying is that what we now describe as bigness was an inevitable consequence of the Industrial Revolution. But unfortunately bigness did not come to us complete with operating instructions. There were no well-developed rules to govern the conduct of the new group personalities that comprise bigness. In a very real sense, the large aggregations of capital that are big business, and the large aggregations of workers that are big labor, began their operations in a legal and moral vacuum.

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In the beginning at least, the law, as expressed by judicial decision, permitted large business organizations to do almost anything they wanted to do so long as it was within the group’s economic interest. Consider, for example, the Mogul Steamship case, a leading case decided in England in 1892.

A combination of steamship companies, operating between England and the Far East, had acted in concert to freeze out a newcomer in the field, in order to secure the whole of the particular trade for the combination. By offering rebates to all shippers who used its ships exclusively, by cutting their freight rates below cost, and by dismissing any agents who acted for the new company, the combination eventually forced the new company out of business and into bankruptcy. The trustees in bankruptcy brought suit for damages and sought an injunction against future conduct of the same character.

The case was carried to the House of Lords. The final decision was that the plaintiff could not recover. The House of Lords said that, although serious harm had been done to the plaintiff through the actions of the combination, this lay within the defendant’s area of legitimate economic interest because it was done for self-advancement and self-protection. The combination of steamship companies, in the opinion of the House of Lords, had “done nothing more against the plaintiffs than to pursue to the bitter end a war of competition waged in the interest of their own trade.”

It is almost incredible that only sixty-one years ago society so readily allowed large corporations to assume such broad rights to fight for private gain.

It applied the same rules to big business that it had applied to the dealings of individuals; and these powerful new organizations accepted the grant without recognizing that great power imposes great responsibility; that freedom of contract and freedom to compete too easily may become abuses when exercised by the strong. And many of these powerful new associations failed to recognize, as the law had not yet recognized, that they could not morally and ethically exercise to the limit the legal rights that had been accorded to those holding less economic power.

I need not recount the abuses of those tumultuous years. As early as 1886 a Senate committee reported on many of them: discriminatory agreements on freight rates, secret rebates, for example.

But even before the House of Lords laid down its conservative ruling in the Mogul Steamship case in 1892, a change in public attitudes toward the methods employed by large corporations was beginning to stir in this country. In 1884 an antimonopoly party appeared; and by 1888 both major parties had become so sensitive to increasing public clamor for reform that they felt obliged to condemn “the trusts.”

The response of the law to this clamor is a familiar chapter in our political history: the Interstate Commerce Act was enacted in 1887; the Sherman Antitrust Act in 1890; and following these, as the needs arose, the Federal Trade Commission Act, the Wilson Tariff Act, the Clayton Act, the Robinson-Patman Act, and a host of other federal and state statutes, designed to curb the power of big business.

Through these statutes, the people made it clear that they expected big business, as they had always expected individuals, to observe the overriding moral principles embodied in basic precepts such as the Golden Rule.

In 1913 the Supreme Court of the United States was presented with a case involving conduct substantially similar to that which had been condoned in the Mogul Steamship case. Several steamship companies joined forces with an Alaskan wharfage company and a connecting railway company to prevent and destroy competition by other steamship companies in the transportation of freight and passengers between the United States and Alaska. The wharfage and railway companies, which were the only ones in the area, granted preferential rates to shipments carried by the defendant steamship companies. The Supreme Court found that the purpose of the combination was “the prevention or destruction of competition” and summarily rejected attempts to justify the defendants’ action, holding that the conduct violated the Sherman Act.

The Robinson-Patman Act illustrates another lifting of the standard of conduct demanded of business in its competitive struggle. It prohibits large companies from using their economic strength to secure price preferences over their competitors. Similarly, under the Federal Trade Commission Act, the Commission has been given broad power to prohibit any conduct which it determines to constitute “unfair methods of competition” or “unfair or deceptive acts or practices.”
By these and other means, our large aggregations of capital have been subjected to an ever ascending standard of conduct in their dealings with other businesses. But there is another field that even more strikingly illustrates the law's demand of ethical conduct from large and powerful groups. I refer to the dealings between management and labor.

The development of law to govern this relationship followed essentially the same course as that affecting dealings between business organizations. Indeed, the problem historically was the same. Big labor, like big business, was an outgrowth of the response of our industrial system to technological developments beyond the contemplation of existing law. The laws governing the relationship between the two, therefore, had to evolve in response to specific trends and events that began to assume commanding proportions in directing the social and economic life of the nation. It was not a matter of labor's being set up in mortal opposition to management, with the law required to act as referee in the death struggle. The nature of the conflict was less dramatic. Here were two great forces let loose by the accelerated evolution of our society, forces that had the same parent and the same potentiality for harm. The role of the law was what the body politic required of it: the reconciling of both forces with the general public interest and with changing mores. In the words of Mr. Justice Holmes, in both cases the law had less to do with any syllogism than with the felt needs of the time, with the climate of public opinion. The general trend of judicial opinion and of legislative action in the labor sphere was a reflection of felt needs already vaguely comprehended—even if not defined—by public opinion.

Thus, in the case of labor, as in the case of big business, the law at first applied was unsuited to newly developing conditions. The rules also had been developed in a less complex age. At the beginning the mere joining-together of employees to present demands was condemned. In the famous Philadelphia Cordwainers' Case, in 1806, a group of Pennsylvania leather-workers were indicted and convicted for just such action. In those days employees were expected to deal individually with employers or not at all. And that too often meant not at all, with the growing size and strength of employers. Thus, the established rule of conduct for employees was submission, as to wages, as to hours, and as to working conditions. The treatment of employees in those days could scarcely have been described as the Golden Rule at work.

But again our standards of ethics eventually asserted themselves. At first it came about by the application of a much more rudimentary principle than the Golden Rule. The courts said, "At least we will not prevent you from joining together and becoming more powerful so that you can deal with your employer on more equal footing." In essence they said, "We cannot stop the fighting, but we will let you try to make the conflict fair." The trend of the law during the next century and a half kept pace with the popular reversal in attitude toward the status of the individual workman and toward the organizations he formed to accomplish his objectives.

Thus, in 1842, the Supreme Court of Massachusetts was called upon to render judgment in a case involving seven members of the Boston Journeymen Bootmakers Society, who had been convicted of organizing a strike against an employer because he had hired, and would not fire, a nonmember journeyman bootmaker. The court, through Chief Justice Shaw, found that what the union members were trying to do was to increase their membership and thus to secure power, which, if exercised for legitimate purposes, was not illegal.

The law of industrial relations was dominated for many years by this very rudimentary principle of fairness. Except for some limitation on the weapons which might be used, the law stood back and said, "Let the best man win." Thus, the developments in the law during those years consisted primarily in expanding the arsenal of weapons allowed to labor.

Fifty years after the Cordwainers' Case—when most American courts had come to accept the right of organized workers to strike for such direct benefits as higher wages and shorter hours—the Supreme Court of Massachusetts had occasion to pass on the legality of picketing. The majority approved an order forbidding the picketing; but Mr. Justice Holmes, in a widely quoted dissent, had this to say:

It is plain from the slightest consideration of practical affairs, or the most superficial reading of industrial history, that free competition means combination, and that the organization of the world, now going on so fast, means an ever-increasing might and scope of combination. It seems to me futile to set our faces against this tendency. Whether
beneficial on the whole, as I think it, or detrimental, it is inevitable, unless the fundamental axioms of society, and even the fundamental conditions of life, are to be changed. ... One of the eternal conflicts out of which life is made up is that between the effort of every man to get the most he can for his services, and that of society, disguised under the name of capital, to get his services for the least possible return. Combination on the one side is patent and powerful. Combination on the other is the necessary and desirable counterpart, if the battle is to be carried on in a fair and equal way.

Here again the simple concept of fairness to which I have referred was at work. The approach was to strengthen the unions, not to raise the standard of either side in its dealings with the other. Both sides were guilty of unfortunate conduct that scarcely could be justified under higher moral standards.

The higher principles embodied in the Golden Rule as yet remained silent in our labor relations law. But eventually they found outlet. The first preliminary step came with the Norris-La Guardia Act in 1932. In some respects it was but a reiteration of the equal-strength idea of fairness, this time by removing weapons from the employer's arsenal rather than giving new weapons to the unions. Among other things, it prohibited the federal courts from enforcing so-called "yellow-dog" contracts or from granting labor injunctions, which had been receiving more and more indiscriminate use. But the act was more than just a rule for the conflict. Concerning the "yellow-dog" contract, it said to the employer, "It is unfair to you, through economic coercion or otherwise, to make your employees agree not to join a labor union. You are interfering with their freedom."

This preliminary step was followed in 1935 by the National Labor Relations Act. It imposed upon employers a comprehensive obligation to respect the Golden Rule in their dealings with organized labor. Whereas the Norris-La Guardia Act barred a narrow type of interference, the Wagner Act by its terms barred all interference with employees' freedom to organize and to bargain collectively; and it imposed upon employers the affirmative duty to bargain with selected representatives of their employees.

Employers thus were forced to learn what many of them had failed to recognize voluntarily—that in the exercise of their economic power in dealing with organized labor, they were subject to the same fundamental ethical standards that govern individual action.

The statute did not purport to deal with the standards of organized labor, which over the years, and particularly under the encouragement of these statutes, grew to embody a power which surpassed that of even our largest corporations. But the Golden Rule is not a one-sided doctrine. When big labor grew so powerful that it presented the same dangers of abuse that big business had presented in earlier years, the people again intervened.

During the early months of 1937 the sitdown strike was first employed. The law responded quickly. The court decisions, both federal and state, uniformly condemned it, as do all the statutory enactments on the question. Irresponsible labor groups received a strong initial lesson that the public expected them, too, to respect the Golden Rule.

Other practices by big labor had developed over the years that violated the moral sense of the community; for example, the secondary boycott, and so-called "featherbedding"—that is, forcing an employer to hire more employees than he needs or particular craftsmen that he does not require.

Perhaps the extreme of abuse was reached in Hunt v. Cramboch, where a union, out of personal antagonism for a member of a trucking partnership, drove the firm out of business by forbidding any union members to work for it. The union knew that the only haulage available was for concerns already committed to dealing only with unionized truckers. In an action brought by the trucker under the Sherman Act, the court found for the union. It conceded, though, that "had a group of petitioner's business competitors conspired and combined to suppress petitioner's business by refusing to sell goods and services to it, such a combination would have violated the Sherman Act."

The Taft-Hartley Act was the corrective measure adopted in 1947. It is not my purpose tonight to discuss the controversial provisions of that law or to suggest that it has disposed finally of the problem of controlling union conduct. It did impose upon labor unions an obligation in diverse fields to respect the rights of others, both employers and employees. Secondary boycotts and featherbedding, to revert to the illustrations I have mentioned, both were prohibited. In addition, whereas the Wagner Act imposed on employers the obligation to bargain in good faith with the unions, the Taft-Hartley Act followed up with the correlative requirement that unions act in good faith in bargaining with employers.

The act went beyond merely the relations between
unions and employers and between unions and employees; it showed the importance of the Golden Rule in the relations of labor unions among themselves. It prohibited a strike or boycott for the purpose of forcing an employer to recognize a union when another union has been certified as the representative of the employees—the so-called jurisdictional strike.

Finally, the act recognized big unions as entities which should be responsible for their actions, subject to suit and liable for breaches of their undertakings.

In thus wielding their legislative power, the people seemed to say to large corporations and to labor: "Now you are big. We needed your size to get things done. But the time has come for you to get adjusted to one another and conduct yourselves like civilized human beings, conforming your actions to the principles of ethics generally accepted for individuals."

I would like to go back for a moment to the individual and his code of conduct, considered on the basis of legal rights. So accustomed are we to talk about our rights as individuals that we tend to forget how we attained those rights. Actually, every "right" we have was bought and paid for by granting a similar right to others.

Primitive man started with unlimited rights—the right to everything he could get and the right to keep it as long as he could hold on to it. He could kill; he could rob; he could plunder; and he did. But he also ran the constant risk of being robbed and killed himself.

At some point during the long struggle man began to realize that he was a creature of warring instincts within himself: a thing of good and a thing of evil—evidenced both by a desire to kill and a desire to love—an urge to tear things apart and an urge to create.

Quite aside from the natural inclination of man, as the creature of God, to accentuate the good in him and subdue the evil, he undoubtedly was motivated by considerations of expediency to do so. Thus he was led to take the next step: he began to see that he could live longer and more happily if he loved more and hated less. For, when he loved, he stood a good chance of getting love in return; and, when he hated, he got back hate and violence with interest. Thus, the parallel code was evolved.

Many years later Solon the Athenian law giver extolled the virtues of the code in these terms:

Such power I gave the people as might do, Abridged not what they had, nor lavished new, Those that were great in wealth and high in place My counsel likewise kept from all disgrace. Before them both I held my shield of might, And let not either touch the other's right.

As I have suggested, one of the great accomplishments of our time has been to formulate rules that require of enormous aggregations of people the same kind of moral conduct that is expected of each individual in the group. Adjustment of these rules to meet the changing needs of society is by no means complete; on the contrary, it is a never ending process, a process in which most of you will have a part if you are to meet your full responsibilities as members of a noble profession.

The millennium has not been achieved. But the principle is well established, I think, that, when either management or labor habitually acts in a manner inconsistent with the standards of conduct that have been generally accepted for individuals, the people will take appropriate action to correct the situation; that society will not tolerate, on the part of a group, action that it finds intolerable in the individual.

Group morality may lag behind individual morality, but it must follow and be shaped by it in the end. Little by little we realize that our own hopes and destinies are irrevocably linked to the hopes and destinies of our fellowmen.

May I conclude in the words of Mr. Justice Holmes:

I do not pin my dreams for the future to my country or even to my race. I think it probable that civilization somehow will last as long as I care to look ahead—perhaps with smaller numbers, but perhaps also bred to greatness and splendor by science. I think it not improbable that man, like the grub that prepares a chamber for the winged thing it never has seen but is to be—that man may have cosmic destinies that he does not understand. And so beyond the vision of battling races and an impoverished earth I catch a dreaming glimpse of peace.