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## Have We Lost the Ball?

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## Have We Lost the Ball?

CLARENCE E. MANION

"Our jurisprudence is deeply rooted in religion. Its current miscarriages, both in principle and practice, are traceable in every instance to a perverted modern determination to regard our legal system as a strictly secular instrument for the achievement of purely temporal ends."

AMERICANS ARE DEVOTED to a wide variety of ball games. In every season of the year millions of us are continually congregating to observe the swift, skillfully directed flight of baseballs, footballs, basket balls and golf balls. In all of these contests and exhibitions the existence, nature and condition of the involved ball has become a remote secondary consideration. The ball is taken for granted. We are concerned exclusively with the skill and coordination of the players and their intelligent observance of the rules. Nevertheless, in all of these games it must be admitted that "the ball" is the thing that registers on the score board. I realize that the American Judicature Society is not a playful organization, and that any attempt to make a game out of its most serious pursuits risks a rupture of the very point that I am trying to make. Nevertheless, I submit that our concern with the efficient administration of justice is not unlike the enthusiastic interest of a typical baseball fan in the hitting, running and fielding of his favorite team. What is this thing called justice that is being tossed and thrown around the ever-green field of the law? What are its standard ingredients, and its distinguishing marks and characteristics? The skilled baseball pitcher knows the size, weight and consistency of the ball he throws up to the batter and the slightest change in those constituents would be telegraphed immediately through practiced fingers to the pitcher's brain. There is a continuing and uniform standard for baseballs; consequently, coaches and players may concentrate upon the development of manual and muscular skill along with a study of operational rules. But upon the broad playing fields of justice there is no longer any such uniform standard.

Our Judicature Society is consequently concerned with the efficient dispensation and administration of an uncertainty. In a constantly growing number of important instances, justice has assumed the unfortunate quality of "this to me and that to thee." It is an increasingly difficult business to promote the efficient administration of something that has lost a commonly accepted definition. In such a promotion mere perfection of form does not compensate for the loss of essential substance. While justice may no longer be definable in the vocabulary of the average lawyer, the rampant injustice of our present civilization is unmistakable everywhere and known to practically everybody. This is not surprising and it involves no contradiction. Just as a lie can travel seven leagues while truth is getting on its boots, so also can disease, disorder and injustice make themselves quickly evident to those to whom the real nature of health, peace and justice are wholly incomprehensible. We can undoubtedly improve the situation of justice in our American legal system by correcting obvious and notorious abuses in its administration, but the genuine and sustained health of our American jurisprudence calls for a sharp *accentuation of the positive*. We must shift our concern from the improvement of its methods to a propagation of the principles that underlie American law. A first approach to such a program can be achieved by emphasizing the inextricable association of law and morals in the United States. Our jurisprudence is deeply rooted in religion. Its current miscarriages both in principle and practice are traceable in every instance to a perverted modern determination to regard our legal system as a strictly secular instrument for the achievement of purely temporal ends. This explosive de-naturing of our essentially religious legal system has frustrated the traditional logic of its ancient processes and subjected American

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Address by the dean of the Notre Dame University Law School delivered at the annual meeting of the American Judicature Society in Seattle, Washington, on September 8, 1948.

law to the ridicule of both "liberals" and "conservatives." The statement that we cannot make a silk purse out of a sow's ear is true likewise in its converse. American law was designed to implement the Ten Commandments by underscoring the responsibility of the individual human conscience. Such an implement cannot be tortured into an effective tool for the accomplishment of materialistic totalitarian purposes. It is true that many American lawyers have honestly missed or glossed over the religious implications of our legal and constitutional system, but the resulting mistaken impression is easily corrected.

At every point in our civil and criminal jurisprudence one finds unmistakable evidence that religious faith and religious practices, universally acknowledged for hundreds of years prior to the American Revolution, constitute the base and foundation of our American legal system. Let us take such a commonplace example as the requirement of intention as a prerequisite for guilt in criminal cases. If one person kills another, why is the intention of the killer all-important in the determination of his guilt? As far as the injury to society is concerned, the victim is just as dead and the social loss just as great in an unintentional homicide as it is in the case of a deliberate and premeditated murder.

In his famous Commentaries, published (1765) on the eve of the American Revolution, Blackstone explains it this way:

"Punishments are inflicted for the abuse of that free will which God has given to man, consequently it is just that man should be excused from those acts done involuntarily or through unavoidable force or compulsion. . . . An involuntary act has no claim to merit, neither can it induce any guilt."

Thus, crime is punishable in and under our law only when the necessary elements of a sin are present in the committer. Now "sin" is a moral concept and consequently it is patent that our criminal courts are "Morals Courts" in the strictly religious connotation of the term "Morals." The "corpus delicti" requires evidence that the injury was inflicted by a "human being." Why? Because only human beings have moral and therefore legal responsibility in and under our system. In searching out the crime the court must find the guilty personal conscience. Unless a guilty conscience is involved there is no criminal jurisdiction.

The same is true of the civil side of our legal system. Our courts entertain suits between persons only. No American lawyer has ever litigated a suit for or against such impersonal non-entities as "labor," "capital," "management," "the underprivileged," "the economic Royalists" or "Wall Street." These impersonal non-entities are frequently indicted in the newspapers but never by a state or federal grand jury.

When the injury complained of in these impersonal, blanket popular and political indictments comes on to be redressed in the courts—if it ever does—the first requisite is to break through the barrier of this confusing class consciousness and find your man. In other words the court must find the guilty personal conscience. The culprit, if there is one, may be a broker, a banker, a laborer, lawyer or a politician, but if there is any criminal guilt—it is and must be shown to be personal.

It is a necessary part of the American system that persons are rewarded and punished for what they do rather than who or what they are. It is more than a coincidence that the rewards of Heaven and the pains of Hell are passed out on the same basis of personal performance. The mere fact that one is an aristocrat or a proletarian gives him no passport through the Pearly Gates; neither does such a status keep him out. In the moral order, reward like punishment is a personal achievement. The same formula is in the warp and woof of our legal system.

Socialism, Communism and Fascism are all based upon the theory of collective responsibility and as such are all directly opposed to the basic American principle of personal-individual responsibility. This collectivistic concept of law and justice is a European institution stemming out of the French Revolution. That revolution generated a centrifugal force which was essentially disintegrating. It tore apart the natural heart, hub and center of European society, namely the personality of the individual human being, and threw the fragments out to the rim of the wheel where the fragments congealed in the form of "classes," "races" and "groups."

Thereafter in European jurisprudence, man lost his precious God-given individuality and became simply a part of the class or group of society into which he was hopelessly frozen.

Thereafter throughout the bloody European regimes of Danton, Robespierre, Napoleon, Hitler and Stalin, the European "citizen" was no longer a "man"; he was an "aristocrat," a "proletarian," a "Kulak" or a member of the "Master Race." This artificial man-made curse of collectivism has plagued the politics and economics of Europe from the French Revolution to the present day. Under this materialistic curse, Europe has marched through an endless procession of wars, pestilence and persecution.

While the French Revolution was brewing the American Revolution was revolving in the opposite direction, generating and integrating a centripetal force which anchored the whole purpose of our law and government in the natural hub and center of society, the personal soul of the individual man. To preserve these God-given rights of this individual God-made man, said the American Declaration of Independence, "Governments are instituted among men."

Thus our system of personal rights, personal duties and personal man-to-man justice was put into direct competition with the socialized class-conscious collectivism of Europe. What has been the result? Forty million people rushed from Europe to America between Washington's first inauguration and 1921 when Congress closed the gates to this tide of immigration.

What the Encyclopedia Britannica calls "the greatest mass movement of population in history" followed in the mad scramble of men and women to get away from the collectivistic European system and into and under the American system of personalized justice. Uncounted millions all around the world now prize, next to life itself, the hoped-for opportunity to come to the U. S. A. where constitutions and laws are made to protect the God-given rights of the individual God-made man.

The very front pages of United States history are replete with evidence of the fact that the leaders of the American Revolution perceived—not taxes or tea-parties merely—but the real juridical issue that they faced in the impending struggle. Pleading the "Rights of the British Colonies," James Otis sparked the Revolutionary struggle in these words:

"To those who lay the foundation of government in force and mere brutal power, it is

objected that their system destroys all distinction between right and wrong; that it overtures all morality . . . leads directly to Scepticism and ends in Atheism. When a man's will and pleasure is his only rule and guide, what safety can there be either for him or against him but in the point of a sword? . . . That the common good of the people is the supreme law, is of the law of nature and part of that grand charter given to the human race (though too many of them are afraid to assert it) by the only Monarch in the Universe who alone has a clear and indisputable right to absolute power *because he is the only one who is omniscient as well as omnipotent.*"

Otis and his generation saw clearly that the only protection against the fallibility of omnipotent government lies in the infallibility of an Omnipotent God. For this logical reason liberty and morality were inseparably linked together throughout every line and letter of the new American legal system.

When George Mason, author of the Virginia Bill of Rights, which was the model for all similar bills later annexed to subsequent American constitutions, discussed the subject of "rights," he knew where to find his predicate. "All acts of legislation apparently contrary to natural rights and justice are in our laws, and must be in the nature of things, considered as void," he argued in *Robin v. Hardaway*, (1772. Jefferson's Reports Vol. I). Then he continued: "The laws of nature are the laws of God, whose authority can be superseded by no power on Earth. A legislature must not obstruct our obedience to him from whose punishments they cannot protect us. All human constitutions which contradict His (God's) laws we are in conscience bound to disobey. Such," concluded Mason, "have been the adjudications of our courts." He cited Coke's report of Calvin's Case and Bonham's Case which had stated the same principle in extended form. This was the basic principle of English Common Law justice that Parliament cast overboard in 1688 in favor of its own absolutism and applied to America in 1776. The Founding Fathers cast their lot with the principle and dared to repudiate Parliament. American law alone thus preserved the continuity of Coke's doctrine:

"The law of nature was before any judicial or municipal law and is immutable. The law of nature is that which God at the time of the creation of the nature of man infused into his heart for man's preservation and direction; and this is the eternal law, the moral law,

called also the law of nature. And by this law, written with the finger of God in the heart of man were the people of God a long time governed before the law was written by Moses, the first reporter or writer of law in the world. God and nature is one to all and therefore the law of God and nature is one to all." (Calvin's Case, 7 Coke's Reports 13 (a) 77 Eng. 392)

When we were in the thick of the argument with Parliament over this point, Blackstone was publishing this projection of the same doctrine in his Commentaries:

"This law of nature being coeval with mankind and dictated by God Himself, is, of course, superior in obligation to any other. It is binding all over the globe in all countries and at all times; *no human laws are of any validity if contrary to this and such of them as are valid derive all their force and all of their authority mediately or immediately from this origin.*" (Blackstone's Commentaries Book I, Introduction)

The foregoing quotation laid an accommodating groundwork for the language of the Declaration of Independence. American law and government were thus joined upon the firm foundation of God's creative purpose. As late as 1892 (Church of the Holy Trinity vs. United States, 143 U.S. 457) the Supreme Court of the United States summed up the association of law and morals in America with a complete documentation of our history from Columbus to Kaskaskia and from the Mayflower Compact through the Declaration of Independence into the constitution of the last state then admitted to the Union. Very recently, the present Supreme Court of the United States has seen fit to discuss this same subject again, reaching the unprecedented conclusion that henceforth God and morality must be separated from the affairs of State by an impenetrable wall of separation. (People of Illinois Ex rel McCollum vs. Board of Education, 69 S. Ct. 461) The Court neglected to tell us what dis-

position we are to make of all the religious documents described in Church of The Holy Trinity v. United States (supra). Inferentially, the decision excises the Declaration of Independence and the constitution of practically every State of the Union as trespassers upon its newly erected "Wall of Separation." Expressly, it dogmatizes the modern determination to secularize American law and government. It tells us categorically that what we have treated as a silk purse is in reality a sow's ear and henceforth must be so regarded.

What has happened in the administration of justice in America between 1892 and 1948? I venture to say simply that we have "lost the ball" and in losing the ball we are in grave danger of losing the game. If we rule God and Morality out of our constitutional system, the thing that remains will neither produce justice nor preserve freedom. It is possible to take the oxygen out of a glass of water but what remains will not quench your thirst, and in like manner, a Godless system of American law will not quench man's age-old thirst for true liberty. When God goes out of any system of justice, a vacuum is created which sucks in a tyrant to take God's place. Without God there is no logical way in which to justify the existence of any inviolable personal right, and when "rights" are thus indefensible, lawyers are at the same time outmoded. It is commendable to promote efficiency and economy in the administration of justice, but remember that the most exacting and punctilious service will not save a dinner where all plates and platters are empty. The last great banquet of law and justice on the face of the Earth is now scheduled to become a mere Barmecide feast. It will take the intelligence and energy of able American lawyers to save it.

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We have tried too long to get supermen to operate our clumsy political machinery. The new idea is to create a civic system which ordinary human beings, such as succeed in private business undertakings, can operate with reasonable success.  
—Herbert Harley