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THE PARDONING POWER

Public attention has been recently called to somewhat startling circumstances attending an exercise of executive clemency in Tennessee. A prominent politician of that State, at one time a Senator of the United States, was killed about eighteen months ago either by the son of an intimate, personal and political friend of the Governor or else by the said friend himself, both father and son having taken part in the encounter. The affray grew out of harsh and insulting comments published by the deceased (who was a newspaper editor) on transactions involving the Governor himself, no less than his friend. The Governor was a witness for the defence at the trial, and he did not in any wise conceal his great and natural desire that both defendants should be acquitted. Both, however, were convicted and sentenced to long terms of imprisonment; upon appeal, the conviction of the son was reversed and that of the father affirmed, in each case by a divided court. Within a few minutes after the affirmance of his friend's conviction, the Governor pardoned him, giving as reasons for his action his own belief in the prisoner's innocence, disapproval of the rulings of the trial court and of the verdict and disagreement with the Court of Error.

Not only has there been much criticism of the Governor, but suggestions have been freely made that a power which may be so grossly abused as it is believed to have been in this instance ought to be abolished, or, at all events, that safeguards should be provided against its gross abuse by an executive who may perhaps be a party interested, not to say an accomplice, in the very crime for which he remits the penalty judicially imposed. A few

words may therefore be timely on the reasons which justify the existence of this power and the legitimate grounds for its exercise.

The continued existence of the power of pardon in the executive is due to the fact that the primary purpose of punishment is a strictly practical one, namely, to assure obedience to law. When inflicting punishment, the State looks not to the past, but to the future; not to the individual who has disobeyed and now suffers, but to all the individuals in like case with him who may hereafter fear to disobey by reason of his suffering. The welfare of society depends not on what happens to those convicted of crime, but on what happens as a result of their conviction and chastisement, to its innocent members. All social order is founded upon obedience; unless men can be induced or compelled to do or not to do what they are told by lawful authority, to do or not to do, as the case may be, combined effort, organization, effective labor in any great undertaking, education, security for person or property, in short, civilized society can not exist, and human experience has shown that to assure such obedience, pain, in some form and to some extent, must be made a consequence of disobedience to any individual guilty of it, so that the motive of fear may be added to whatever other motive may, in any particular instance, contend against the temptation to disobey in one whose appetites or passions or real or apparent personal interest point to disregard of the law.

Now, the idiosyncrasies of human character and conduct are so infinitely diverse and so constantly shifting that no merely human lawgiver or judge, however wise and farseeing, could, by any possibility, so adjust the penalty to the offense as to attain this great end of punishment in every case, surely and at the least cost to the community. In the public interest, therefore, there must be some means of meeting exceptional cases, adapting the situation to changed circumstances, and sacrificing minor to attain greater results, when the attainment of both may be impracticable.

The power to pardon exists and can be rightfully exercised only for the public benefit; the wishes and interest of the culprit or of his family or of his friends are altogether immaterial, except in so far as these individuals constitute an infinitesimal fraction of the public affected. The personal sympathies and inclinations of the officer discharging this duty are entitled to no consideration whatever; he is not forgiving his own debtor, one who

has trespassed against him, but a public debtor whose trespass has impaired or endangered the happiness of the whole community. If a governor should grant a pardon because of personal sympathy for the criminal, or for his wife, or for his children, or, indeed, for anybody, his conduct might differ, indeed, in degree, but would not differ in kind from what it would be had he given such pardon for a bribe in money.

There are four appropriate grounds for clemency, namely, injustice of conviction, excessive severity of sentence, satisfaction of the demands of justice and necessity to obtain evidence against other criminals. In the first case, I say "injustice," not "error"; for the executive has, in no wise, the duties of a Court of Appeal, and reasons for a new trial are not reasons for a pardon. If the jury were satisfied with inconclusive proof of guilt, if the court erred in overruling or sustaining demurrers, in admitting or excluding evidence, the remedy must be sought elsewhere; and, if none can be found, after all, no great harm is done, unless, upon its merits, the conviction was not merely erroneous, but unjust. If, however, the convict can clearly and satisfactorily show that he was, in truth, innocent, this fact constitutes a sufficient reason, in the public interest, for his pardon; for nothing tends more surely and strongly to the happiness of any community than assurance to the innocent against unjust punishment; the perpetual and universal dread fostered by an arbitrary and inequitable administration of the criminal law acts as a blight on all forms of prosperity and all forms of progress.

Reasons for clemency on the second ground exist partly because the laws do not always leave to the court enough discretion in the matter of penalty, partly, because the most careful and conscientious judge can not always inform himself fully as to all facts material to determine the proper punishment of the convict before he pronounces sentence. Since, as has already been said, the principal end of the criminal law is to ensure obedience to the sovereign, it is ordinarily more important to make punishment swift and certain than to make it notably severe; and its efficacy as a deterrent depends more on its being disagreeable than on its being injurious to the criminal. Some measure of social waste necessarily attends the infliction of any penalty, so that *ceteris paribus*, a moderate penalty, if effective, is to be preferred to a harsh one. For all these reasons, the power to pardon is sometimes exercised with salutary effect to mitigate the

severity of recent sentences; although, unless the court's discretion is fettered by the statutes or unless the circumstances are altogether exceptional, to fix the penalty for a crime is, ordinarily, the duty of the judge, not of the executive.

It sometimes happens that, although the sentence, when imposed, was not disproportionate to the offence, yet the endurance by the culprit of a part only of the penalty attains the ends of punishment and makes the remission of the remainder advisable in the public interest. I call this a "satisfaction of the demands of justice," but the term must be understood in a strictly practical sense, that is to say, as meaning only the fulfilment of all the purposes properly sought in the criminal's punishment. In passing upon the propriety of a pardon asked on this ground, the considerations most relevant are the character of the crime and the surroundings of the prisoner when he committed it. If the offence betrayed only the recognized infirmity of human nature in the mastery of conscience and will by sudden and overpowering passion, more particularly if the culprit had little in his education and surroundings to help him to resist temptation; if, when he fell, he was poor and ignorant, friendless and unhappy; these facts weigh in his favor when the executive is asked to lighten his penalty. On the other hand, if, in his disobedience to law, he showed mere unnatural depravity, or else cool premeditation, hypocrisy or treachery, or if he offended while enjoying the best blessings of human life, if he had a devoted wife, affectionate and dutiful children, a fair education, a good reputation and many friends, then he is a dangerous as well as an unworthy member of society and the example of his crime is peculiarly pernicious.

The last appropriate reason for the exercise of clemency is found in the occasional necessity of obtaining evidence from one wrongdoer to secure the conviction and punishment of another. In certain forms of crime, such as bribery and conspiracy, in which more than one person must be concerned, the precise facts usually lie in the knowledge of the guilty parties only, and it is often very difficult, sometimes quite impossible, to secure adequate proof against any unless one of them can be induced to testify. The intrinsic difficulty of dealing with cases of this character has been artificially augmented in this country by constitutional and statutory prohibitions against compelling any one to furnish evidence incriminating himself. These prohibitions now serve not to protect innocence, but to shelter guilt, and, so

long as they shall bind our courts, public officers must deal with the problems they create or render more perplexing; one solution to these problems is occasional immunity for criminals who "turn State's evidence." It must be remembered that, in a case of this character, the question presented is not whether of two law-breakers one shall be punished or both, but whether one shall be punished or neither; the net result of refusing total or partial immunity to one of the guilty parties may be that all of them will snap their fingers at justice. Moreover, anything promotes the public welfare which tends to make lawbreakers distrust and fear each other; the old adage as to what happens "when thieves fall out" illustrates the benefit to society flowing from the constant dread of banded wrongdoers, lest some one of their number "give away" the rest; and this dread grows the stronger the more frequently it is shown to be well founded. It is true that an offender who becomes a State's witness is usually repaid by an omission to prosecute, not by a pardon; nevertheless, such a service is not infrequently alleged as a reason for clemency, and the pardoning power provides the executive with the means to make good any assurance it has given such a witness or any reasonable hopes it has encouraged him to cherish.

The exercise of any form of executive clemency for whatever purpose is undoubtedly open to grave abuse; responsibility to public opinion for its employment to proper ends should be strict and carefully defined; he who holds and uses or he who advises the holder how to use so delicate and far-reaching a power as that of pardon must be ready at all times and to all legitimate critics to render a just account of his stewardship.

For this very reason, the power and the responsibility for its use or abuse should always belong to one man, and that man the one entrusted with the enforcement of the laws, or, in other words, to the chief executive alone. If they be divided with a Board of Pardons or some officer or body of the like functions, criticism is diluted and public opinion is confused.

The people of a great American State or of the American Union, like any other employer of labor, ought to so distribute the work of its servants that for whatever of this work is well or ill done or not done at all there shall be always someone known, certain and at hand to answer; if two or three or half a dozen public officers or sets of public officers must take part in a public act, the people's blame is spread out too thin, the people's anger is

too largely wasted, to really tell when this act is omitted or ill done. Let us have always some person or body and, as far as may be, one man, one man with no "ifs" or "buts" to qualify this responsibility, *one* man whom all know to be *the* man who might have done and ought to have done otherwise, to hold answerable when aught goes amiss; in urging thus much, I point a moral taught by all the lessons of American history.

Charles J. Bonaparte.