

editor's note: This paper was transcribed from a handwritten cursive copy with various difficulties. For a perfect rendition, the reader might wish to consult the original, itself a copy, in the volume entitled *Literary Club Papers*, Dec 20, 1890 to May 30, 1891)

A Dangerous Innovation in Criminal Law

In the administration of criminal law every advantage is on the side of the accused. He alone may obtain testimony from any quarter of the world. The state is powerless to procure any testimony beyond its own border. The actual eyewitness of a murderer may step across the state line, and no power either of the state or of the United States, can compel their attendance for the prosecution of the criminal. The defendant himself – naturally a most valuable witness for the state, is exempted from the duty of telling what he knows about the crime, but may, on his own behalf, after learning the testimony against himself, exhaust his ingenuity in contacting a plausible story to mislead the jury.

All error committed by the Court or Jury, intentional or otherwise, favorable to his defense and resulting in acquittal, are irreversible; while the record is scrutinized after the conviction to detect some flaw that may result in a new trial and another chance to raise a reasonable doubt in the mind of some unreasonable juror. The principles and machinery of the law, suitable to the environment of our forefathers, petrified by constitutions and adored by a conservative people, are wholly inadequate to protect society against the progressive criminal of modern times. An exceedingly small percentage of the guilty who have stumbled into the custody of the non-partisan police, are so unfortunate as to miss all the avenues handsomely provided for their escape. When, however, a conviction had been secured, and the unlucky prisoner, failing in all his advantages, was finally committed to the penitentiary under sentence of death, preparatory to execution, until recent times society could feel some relief, and an assurance that they would soon be rid of one more monster. Not so at the present day. By recent usurpations of the Executive department this last hope of an afflicted people is fast fading away. The pardoning power of the governor is insensibly being transformed into jurisdiction by the criminal. The final judgment and sentence of the Court is becoming nearly the equivalent of an indictment by the Grand Jury. Hope no longer forsakes the criminal at the portals of the penitentiary. What was the end of the law is now the beginning of jeopardy. Certainty of punishment, the only effective influence upon the criminal classes, and the only safeguard of society, is not felt until life is [extinguished] upon the scaffold.

The prospect of obtaining justice upon the trial before this self-constituted appellate tribunal, is not reassuring to the public.

The vigor of the prosecution is relaxed. The immediate victim of the murder is dead and forgotten. His family and friends have exhausted their available means in the prosecution before the court. No person officially represents the state. Any body and every body may champion the cause of the prisoner. We have seen a distinguished prelate bring to his aid the prestige of a deputy in that church “which in the age of iron burst forth to crush the great and raise the low.” In the same case a detective with his well-known method, was procuring affidavits by the bucket full.

The precautions found necessary by centuries of experience to detect falsehood are wanting and the cause is tried and retried by a novice who is much more keenly sensitive to the criticisms of politicians than the demands of Justice. The usual gush of sentiment over the fate of an un-hung murderer is always present, and the unavoidable possibility of punishing an innocent man is made the pretext for appeal, from misdirected sympathy on every side. A popular newspaper of this city, while admitting that the notorious murderer, Isaac Smith, has been convicted by circumstantial evidence as strong as ever before produced, urges his pardon on the grounds that he has already been sufficiently punished by a few months imprisonment.

He has been respited eight times by the same governor who modified the judgment of the court in the case of Charles Blythe, by a commutation of sentence resulting in imprisonment for less than a year as the whole punishment for one of the most cruel and brutal murders on record.

One of the last official acts of Gov. Foraker's was the pardon of a murderer who within a few days thereafter killed another man, and is now at large waiting and watching no doubt for another victim.

The establishment of the Board of Pardons for the recommendation of Executive Clemency has contributed largely to the feeling that every convicted felon must have another chance of acquittal.

The power which was intended to be exercised upon extraordinary occasions only, is unduly extended by the action of a Board, to hear the complaints of every convict who may chance to have a reasonable doubt about his own guilt. The natural tendency of the existence of such a Board is to invite a rehearing in all cases of conviction, as a matter of course. It is of interest to the Republic that there should be an end of litigation in civil cases; much more does the welfare of the State demand a speedy and final determination of the fate of the criminal. In the administration of retributive justice, it may be well that

“While the lamp holds out to burn
The vilest sinner may return”

but in the infliction of punishment to deter the commission of crime, such flattering sanction is subversive of the end and even of all penal laws.

The governors too should be made of sterner stuff. If they are to act as court and jury, the trial should at least proceed decently, and in order. The repeated respites of late evidence a reluctance to act and a weak indecision that reduce the administration of criminal law to a mockery. The ninety and nine guilty men whose continued existence is so much preferable to the loss of one innocent man, have received far too much tender consideration. It is true some concern should be manifested for those who have not appeared in the roll of criminals. Let justice be tempered with mercy, and let no generous sympathy for the real woes of humanity be abated, but give us men in the Executive Chair, who, under imperative sense of duty, like Samuel of old, “hew Agog in pieces before the Lord in Gilgul.”

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