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THE CASE OF WAR PRISONERS.

We complain of unrest, and we have been quick to denounce the authors of dissatisfaction; but have we taken the pains to ascertain just what the cause of this attitude may be? Inquiry would no doubt show that the percentage of wilful wrongdoers is very small, and that they are therefore not to be regarded as a serious menace to our institutions. The danger lies rather with people who are not wilfully wrong, but who are disturbed by their inability to understand or to justify the course of the Government. That such a state of mind exists is natural. We have just emerged from a war during which absolutism reigned; and we find it difficult to work back to a state of peace. There are those who are reluctant to lay down the arbitrary authority; and there are others who submitted readily enough to that power but who now react and demand, not only a restoration to pre-war rule, but a correction of hardships or wrongs that were imposed during the struggle.

It will hardly be disputed, for illustration, that prosecutions during the war were affected by prevailing excitement. It goes without saying that every stage of the proceedings from the grand jury room to the final judgment of the court was subjected to such influence.

The report made some time ago by such men as Dean Roscoe Pound, Professors Zachariah Chaffee, Felix Frankfurter, Tyrrell Williams and eight other well-known members of the bar, and the hearings had in the Senate and in the House upon that report and in support of the resolution for general amnesty of war prisoners, establish beyond reasonable question, two things: First, that the conduct of the Department of Justice has frequently disregarded fundamental rules of constitution and law. Second, that court proceedings have very often been characterized by high-handed methods; by disregard of essential right; and by sentences which defy every standard that would be accepted in normal times.

It may be conceded that during a war the Government must resort to severe measures. There is no time for refinements. It is necessary not only to control those who threaten mischief, but it is also proper to deter others who may harbor similar plans. In other words, the rule of necessity prevails. But for that very reason every effort should now be made to correct unnecessary hardship, and to restore normal rules. As in war time, every doubt is resolved in favor of security; so now every reasonable doubt should be welcomed for the exercise of magnanimity.

In Great Britain sentences in cases of war offenses were so moderate that they expired virtually with the war, and presented no occasion for the exercise of amnesty. British justice may therefore claim the proud distinction that the spirit of equity and even mercy restrained and guided these proceedings from the inception.

It is reported that other countries adopted a similar policy. In France the complaint is now openly made that even enemy prisoners are being subjected to unnecessary and unjust sentences. In our country only a few offenders have been pardoned, and, so far as the public can judge, these pardons were prompted by consideration for individual offenders, and do not suggest a basis for a general policy.

The first appeals for pardons were of course made by members of the prisoners' families. Their fate is serious and even tragic,—calculated to arouse profoundest sympathy; and justified by only the gravest necessity. Friends of these prisoners likewise interceded. They were no doubt associates who are unable to reconcile the fate of their comrades with the accustomed standards of justice.

Finally, facts and arguments were advanced by men and women who were not moved by personal consideration, but who speak in the name of traditional justice. They have apparently made careful inquiry. They have expressed definite opinions. Their conclusions are entitled to serious attention, because they present an issue of gravest consequence. Infinitely more than the fate of so many unfortunate men, women and children, is involved. Our whole administration of justice has been challenged.

The administration of our law is based largely upon tradition and precedent. If it be true that sentences imposed during the war rest upon over-zealous prosecution, upon fear or partiality induced by abnormal excitement, upon hasty or timid conclusion by juries, or upon undue manifestations of patriotism in the imposition of sentences, then it is of first importance to the general public, as well as the prisoners, that these inequalities be corrected.

There is abundant authority for such inquiry by the executive branch of the Government. For illustration, in 1912 there was brought to the attention of the Department of Justice and the President of the United States, the case of Willard N. Jones, who had been indicted and convicted in two cases for defrauding the United States of public lands. The sentence had been affirmed upon appeal; but the defendant had not served any part of his term. It was made to appear to the satisfaction of the authorities that the defendand did not have a fair and impartial trial, because of "the improper manner in which the jury box was filled from which

the jury was drawn, and the probability that witnesses had been intimidated." Upon this ground alone the Attorney General recommended a pardon, and the President granted it. This action seemed drastic. There was no suggestion that the defendant was innocent. It was not proved that the jury had been intimidated. The pardon was really based upon the one ground that the jury box was unfairly filled. Upon that ground alone a man confessedly guilty of a grave fraud upon the Government was pardoned to vindicate the administration of law.

This rule was good then and should be good now. There are war prisoners in the penitentiary whose offenses as charged were trifling, compared to the one for which Willard N. Jones was convicted. There are men in the penitentiary in whose cases the evidence was so technical and so inadequate that under normal conditions it is doubtful whether any judge would have permitted their cases to go to the jury. Practically all the war prisoners are men whose sole offense consisted in careless or dangerous speech, but the sentences run up to twenty years or more. There is one man who enjoys the best possible reputation as a workman, but who serves a term of ten years, and has been fined $30,000 upon the showing that he was affiliated with the I. W. W., and that he had written for a publication which had not even been denounced by the Government. This in spite of the fact that he and his whole organization were pro-ally. The enormity of his case is not exceptional. But apart from the precise showing of technical records, the important fact is that these men were tried under conditions of abnormal excitement; and that they should now have the benefit of dispassionate and fair consideration.

The demand has been made for a general amnesty of all prisoners. This was refused by the Department for the good reason that pardons should be granted with discrimination. They should not go merely to express the magnanimity of the

Chief Executive, but they should be tested by the merits of each individual case. For such an inquiry the Department of Justice, considering all its other burdens, may not be adequately equipped. But assuming this to be true, what is there to prevent members of the bar from performing this work? A mere reading of the reports that have been made, and of the statements submitted to the Senate and House Committees by individual members of the bar, can leave no doubt that the general public, and certainly all lawyers, are put upon the inquiry. The obligation would appear to be clear. It is said that during the war lawyers in some parts of the country refused, and even agreed among themselves, to decline to represent any person charged with an offense under the espionage law. It serves no purpose at this time to discuss such an attitude, however difficult it may be to reconcile it with the oath that every lawyer has to take. But the halting attitude of lawyers during the war does serve to put upon them now the double obligation to lend their aid to vindicate the administration of justice, to redeem our pledges of liberty, and to relieve unfortunate victims of the harsh policy of war necessity. No court is in a position to impose a just sentence unless and until the accused has had a full and fair hearing. The very condition to a severe sentence is a judicial inquiry into the facts. That it was not possible for one reason or another to have such hearings in a large percentage of war cases goes without saying. Every impartial observer knows that conviction was in the air, and that the spirit of intolerance and denunciation invaded every sphere of life. It should have been accepted as the first duty, particularly of lawyers of position, to go to the defense of any one accused, in times of unnatural disturbance. So is it the duty of the law fraternity now to insist, either at the call of the Department, or by independent action, upon an investigation, in order that actual facts may be established. The entire proceedings should be uncovered. The public mind

should be satisfied that the sentences imposed were just then and are just now, or that they are unjust. In the latter event it should be urged in the interest of the public and of the accused that those sentences be modified or abated by executive action. More is involved than the granting or withholding of executive clemency. What is needed is public understanding and approval. Nothing would so potently serve to set the controversy at rest, to relieve the war prisoners, or to disarm constantly growing criticism of their detention, than a clear recommendation by a competent disinterested body of lawyers.

We trace most of our system of law to England. We have derived from England much of the inspiration that has guided us in the administration of that law. There is danger that we neglect the real teachings of that system and that spirit. If there be those who would complacently satisfy their conscience with the belief that these cases are only of private concern, and should be left in the hands of such assistance as these victims could at the time command, they would do well to go back to the original source and inspiration of our law. All such evasions of responsibility are met by a single statement made by Lord Erskine, the greatest advocate, as well as the first forensic orator, who ever appeared in any age. In his defense of Thomas Paine, he, too, was pursued by calumnious clamor; but he did not yield, for this was his answer:

"Little indeed did they know me, who thought that such calumnies would influence my conduct. I will forever, at all hazards, assert the dignity, independence, and integrity of the English bar, without which, impartial justice, the most valuable part of the English constitution, can have no existence. From the moment that any advocate can be permitted to say that he will or will not stand between the crown and the subject arraigned in the court where he daily sits to practice, from that moment the liberties of England are at

an end. If the advocate refuses to defend, from what he may think of the charge or of the defense, he assumes the character of the judge; nay, he assumes it before the hour of judgment; and in proportion to his rank and reputation, puts the heavy influence of perhaps a mistaken opinion into the scale against the accused, in whose favor the benevolent principle of English law makes all presumptions, and which commands the very judge to be his counsel."

It is not necessary to comment upon this language. Its truth is self-evident.

Fortunately we may look to great men in our own country for similar conduct. Alexander Hamilton met intolerance and demagogism with the same courage and determination when he defended the rights of loyalists under our treaty with England at the close of the Revolutionary War.

Who will say that the men who serve war sentences would now be confined if their defense had been addressed to a public opinion awake to the spirit of Erskine and Hamilton? And if that be true, how can lawyers hesitate to move for the correction of injustice to the victims, and for the vindication of the administration of law?

Unless our law be administered in that spirit, no constitution, with all its solemn guaranties, no proud utterances about the blessings of our country, and no boast of freedom, in declaration of platform, can save us from well deserved loss of our treasured liberty.

CHARLES NAGEL.