

## EDITORIAL

ONE of the defects in our American system of government, if so superb a confection of the human mind and heart may be said, without indecency, to have any defects at all, lies in the fact that it fails to provide swift and condign punishment for the special crimes of public officials. Even when their wrong-doings take the form of offenses against the ordinary criminal statutes of the realm—as, for example, embezzlement, conversion, blackmail, armed entry, kidnaping or common assault—it seems to be very difficult to bring them under the lash of justice; they enjoy, as it were, an unwritten immunity to criminal process, running with the constitutional immunity of United States Senators, who cannot be taken by the *gendarmérie* while the Senate is in session. The thugs and perjurers of the so-called Department of Justice, during the reign of the Martyr Wilson, committed nearly all the crimes of fraud and violence on the books, and yet, so far as I know, not one of them was ever punished, or, indeed, so much as prosecuted. Several Federal district attorneys, toward the end of that festival of oppression and worse, protested against it publicly, and there were bitter yells from specialists in human liberty and from the relatives, lodge-brothers and creditors of some of the victims, but no Federal grand jury indicted any of the criminals, and no Federal judge condemned them to the hulks. To this day, if my agents are to be believed, the same thing is going on, though perhaps on a more modest scale. Prohibition enforcement officers in all parts of the country are breaking into houses, destroying property, engaging in blackmail in a wholesale manner, and assaulting and murdering citizens almost at their will, and yet one seldom

hears of them going to jail for it, and I know of none who has been hanged.

When it comes to crimes that are peculiar to public officials and that arise out of the nature of their legal status, as bigamy, adultery and wife-beating arise out of the nature of a married man's, the case is even worse. I allude to such special offenses as dissipating the public funds, loading the public rolls with useless and pediculous job-holders, letting contracts and franchises to political and private friends, converting public property to private uses, condoning crimes against the government, and administering the laws in a partial and dishonest manner—all of them impossible to the mere citizen and taxpayer, as default in alimony is impossible to the bachelor. Here the ordinary criminal statutes are obviously ineffective, and of special statutes there are almost none. What was the late Mr. Fall guilty of? His accusers, it appears, had to fall back upon the vague charge of conspiracy, which was not unlike accusing a burglar of trespass. With the general run of official delinquents it is impossible to go even so far. Their crimes have no names, and no adequate punishments. Certain high dignitaries, when taken in gross malfeasances, may be impeached, and most lesser ones, though not all, may be cashiered. But neither punishment is harsh enough to be a deterrent, and neither is swift and sure. Since the first days of the Republic but eight Federal jobholders have been brought before the bar of the Senate on impeachment by the House of Representatives, and of these but two have been found guilty and removed from office. Both of the latter were judges; one was convicted of drunkenness on the bench and the other of corrupt dealings with litigants. Is it

argued seriously by anyone that, during all those years, but two Federal judges have been guilty of such offenses? Is it argued, indeed, that the bench is wholly guiltless of them, and of all other crimes, today?

Many of our sitting judges, as a matter of fact, are obviously unfit for the duties they have to perform. Some of them owe their jobs to litigants who are habitually before them, and others are admittedly beholden to such corrupt agencies as the Anti-Saloon League. Is it maintained that such dubious fellows make competent and respectable judges, or that the clumsy and enormously costly process of impeachment offers a practicable means of dealing with their frequent and flagrant peccadillos? Plainly not. Even when their obscenities upon the bench become publicly scandalous they are protected by the fact that impeachment is essentially a political, not a judicial process, and that in consequence it is excessively slow and uncertain—in other words, by the fact that it lacks the very characters which legal punishment fundamentally needs. It is, as a matter of practice, almost as safe for a Federal judge to take care of his fellow golfers and scofflaws as it is for a Prohibition officer to blackmail a bootlegger or for an agent of the Department of Justice to manufacture perjury against so-called Reds. If he belongs to the party in control of Congress he cannot be impeached for any crime short of highway robbery or piracy on the high seas, and even if he belongs to the minority party the citizen who complains of him must be extremely influential to be heard at all, and extremely rich to meet the heavy costs of prosecuting him. In brief, the remedy against him that is offered by the Constitution and the laws is, in substance, no remedy at all. No matter how grossly he violates his oath and the decencies, he commonly remains upon the bench until some grateful litigant or syndicate of litigants offers him a better job.

Moreover, it must be plain that the

punishment of impeachment and removal from office, or of removal by executive order without impeachment, is usually grossly inadequate. When job-holders become so unbearably corrupt or incompetent that they are actually separated from their jobs, they commonly deserve hanging, or, at the least, long confinement in the hoosegow. Simply to turn them out, leaving them free to aspire to other offices, is as absurd as it would be to limit a burglar's punishment to kicking him out of the house. The case of Denby, the late Secretary of the Navy, is in point. I have no opinion as to the guilt or innocence of the gentleman; I merely recall the fact that he was accused of the very grave offense of dissipating the national property on a colossal scale and imperiling the national defense. It would be difficult to imagine anything more flagrantly anti-social, more thoroughly vicious, more damaging to the common weal; put beside it, such ordinary crimes as arson and manslaughter seemed relatively harmless. Nevertheless, the worst punishment that could be inflicted upon Denby was the banal one of depriving him of his office. It was impossible, for political reasons, to impeach him or even to attempt to impeach him, and so he was simply turned out, with a file of high naval dignitaries saluting him as he left and a great crowd cheering him as he got home. Here cause and effect took on a disproportion that was truly enormous; it was almost as if Czolgosz had been fined \$10 for dispatching McKinley. If Denby was innocent, he deserved the salute and the cheers without the loss of his job. And if he was guilty, if only of negligence, he plainly merited at least a geological epoch in the bastille.

## II

In the immoral monarchies of the continent of Europe, now happily abolished by God's will, there was, in the old days of sin, a far more intelligent and effective way of dealing with delinquent officials.

Not only were they subject, when taken in downright corruption, to the ordinary processes of the criminal laws; in addition, they were liable to prosecution in special courts for such offenses as were peculiar to their offices. In this business the abominable Prussian state, though founded by Satan, took the lead. It maintained a tribunal in Berlin that devoted itself wholly to the trial of officials accused of malfeasance, corruption, tyranny and incompetence, and any citizen was free to lodge a complaint with the learned judges. The trial was public and in accord with rules fixed by law. An official found guilty could be punished summarily and in a dozen different ways. He could be reprimanded, reduced in rank, suspended from office for a definite period, transferred to a less desirable job, removed from the rolls altogether, fined, or sent to jail. If he was removed from office he could be deprived of his right to a pension in addition, or fined or jailed in addition. He could be made to pay damages to any citizen he had injured, or to apologize publicly.

All this, remember, was in addition to his liability under the ordinary law, and the statutes specifically provided that he could be punished twice for the same offense, once in the ordinary courts and once in the administrative court. Thus, a Prussian official who, imitating the daily routine of the agents of our own Treasury or Department of Justice, assaulted a citizen, invaded his house without a warrant, and seized his property without process of law, could be deprived of his office and fined heavily by the administrative court, sent to jail by an ordinary court, and forced to pay damages to his victim by either or both. Our Federal judges, as a matter of everyday practice, issue thousands of injunctions depriving citizens of their clear rights to trial by jury, to the sanctity of their domiciles and to lawful assemblage, all guaranteed by the Bill of Rights. Had a Prussian judge, overcome by *kaiserliche* passion, undertaken anything of the sort in those far-off

days of despotism, any aggrieved citizen might have haled him before the administrative court and recovered heavy damages from him, beside enjoying the felicity of seeing him transferred to some dismal swamp in East Prussia, to listen all day to the unintelligible perjury of Poles. The law specifically provided that responsible officials should be punished, not more leniently than subordinate or ordinary offenders, but more severely. If a corrupt policeman got six months a corrupt chief of police got two years. More, these statutes were enforced with Prussian barbarity, and the jails were constantly full of errant officials.

I do not propose, of course, that such medieval laws be set up in the United States. We have, indeed, gone far enough in imitating the Prussian system already; if we go much farther the moral and enlightened nations of the world will have to unite in a new crusade to put us down. Hints to that effect are not lacking even now; they are heard in England every time the Feather Duster revives the question of the Bahaman rum trade, and in France every time there is mention of the war debt. As a matter of fact, the Prussian scheme would probably prove ineffective in the Republic, if only because it involves setting up one gang of job-holders to judge and punish another gang. It worked very well in Prussia before the country was civilized by force of arms because, as everyone knows, a Prussian judge was trained in ferocity from infancy, and regarded every man arraigned before him as guilty *ipso facto*; in fact, any thought of a prisoner's possible innocence was abhorrent to him as a reflection upon the *Polizei*, and by inference, upon the Throne, the whole monarchical idea, and God. But in America, even if they had no other sentiment in common, which would be rarely, judge and prisoner would often be fellow Democrats or fellow Republicans, and hence jointly interested in protecting their party against scandal and its members against the loss of their jobs. The oper-

ations of the Department of Justice under Mr. Daugherty, as lately made public, show how this community of interest impedes the flow of justice even now; it would be far more obstructive, manifestly, if job-holders had to execute the laws against other job-holders, and not merely against the friends of other job-holders. Moreover, the Prussian system has another plain defect: the punishments it provides are, in the main, platitudinous and banal. They lack dramatic quality, and they lack ingenuity and appropriateness. To punish a judge taken in judicial crim. con. by fining him or sending him to jail is a bit too facile and obvious. What is needed is a system (*a*) that does not depend for its execution upon the good-will of job-holders, and (*b*) that provides swift, certain and unpedantic punishments, each fitted neatly to its crime.

I announce without further ado that such a system, after due prayer, I have devised. It is simple, it is unhackneyed, and I believe that it would work. It is divided into two halves. The first half takes the detection and punishment of the crimes of job-holders away from courts of impeachment, congressional smelling committees, and all the other existing agencies—*i. e.*, away from other job-holders—and vests it in the whole body of free citizens, male and female. The second half provides that any member of that body, having looked into the acts of a job-holder and found him delinquent, may punish him instantly and on the spot, and in any manner that seems appropriate and convenient—and that, in case this punishment involves physical damage to the job-holder, the ensuing inquiry by the grand jury or coroner shall confine itself strictly to the question whether the job-holder deserved what he got. In other words, I propose that it shall be no longer *malum in se* for a citizen to pummel, cowhide, kick, gouge, cut, wound, bruise, maim, burn, club, bastinado, flay or even lynch a job-holder, and that it shall be *malum prohibitum* only to the extent that the

punishment exceeds the job-holder's deserts. The amount of this excess, if any, may be determined very conveniently by a petit jury, as other questions of guilt are now determined. The flogged judge, or Congressman, or Prohibition officer, or other job-holder, on being discharged from hospital—or his chief heir, in case he has perished—goes before a grand jury and makes complaint, and, if a true bill is found, a petit jury is empaneled and all the evidence is put before it. If it decides that the job-holder deserved the punishment inflicted upon him, the citizen who inflicted it is acquitted with honor. If, on the contrary, it decides that this punishment was excessive, then the citizen is adjudged guilty of assault, mayhem, murder, or whatever it is, in a degree apportioned to the difference between what the job-holder deserved and what he got, and punishment for that excess follows in the usual course.

### III

The advantages of this plan, I believe, are too patent to need argument. At one stroke it removes all the legal impediments which now make the punishment of a recreant job-holder so hopeless a process, and enormously widens the range of possible penalties. They are now stiff and, in large measure, illogical; under the system I propose they could be made to fit the crime precisely. Say a citizen today becomes convinced that a certain judge is a jackass—that his legal learning is defective, his sense of justice atrophied and his conduct of cases before him tyrannical and against decency. As things stand, it is entirely impossible to do anything about it. A judge cannot be impeached on the mere ground that he is a jackass; the process is far too costly and cumbersome, and there are too many judges liable to the charge. Nor is anything to be gained by denouncing him publicly and urging all good citizens to vote against him when he comes up for re-election, for his term may

run for ten or fifteen years, and even if it expires tomorrow and he is defeated the chances are good that his successor will be quite as bad, and maybe even worse. Moreover, if he is a Federal judge he never comes up for re-election at all; once he has been appointed by the President of the United States, at the advice of his more influential clients and with the consent of their agents in the Senate, he is safe until he is so far gone in senility that he has to be propped on the bench with pillows.

But now imagine any citizen free to approach him in open court and pull his nose. Or even, in aggravated cases, to cut off his ears, throw him out of the window, or knock him in the head with an ax. How vastly more attentive he would be to his duties! How diligently he would apply himself to the study of the law! How careful he would be about the rights of litigants before him! How polite and even suave he would become! For judges, like all the rest of us, are vain fellows: they do not enjoy having their noses pulled. The ignominy resident in the operation would not be abated by the subsequent trial of the puller, even if he should be convicted and jailed. The fact would still be brilliantly remembered that at least one citizen had deemed the judge sufficiently a malefactor to punish him publicly, and to risk going to jail for it. A dozen such episodes, and the career of any judge would be ruined, even though the jails bulged with his critics. He could not maintain his dignity on the bench; even his own catchpolls would snicker at him behind their hands, especially if he showed a cauliflower ear, a black eye or a scar over his bald head. Moreover, soon or late some citizen who had at him would be acquitted by a petit jury, and then, obviously, he would have to retire. It might be provided by law, indeed, that he should be compelled to retire in that case—that an acquittal would automatically vacate the office of the complaining job-holder.

The present system, as I have said, has lately demonstrated its ineffectiveness on a colossal scale in the great city of Washington, the seat of the First Chief of the Republic and of a hundred thousand job-holders of gradually lessening puissance, from members of the Cabinet down to janitors, messengers and bookkeepers. All efforts to impeach Daugherty failed; when he was got rid of at last it was by a blow below the belt; in the case of Denby, his fellow Republicans of Detroit actually treated his dismissal as a martyrdom, and received him when he got home with a band of music and public prayers. If these eminent men were actually guilty of malfeasance in office they obviously deserved far more rigorous punishment; if they were guilty merely of carelessness and neglect they deserved a severe handling as public nuisances. Under the existing system they got what was virtually no punishment at all; under my system, at the most moderate guess, some bored and impatient citizen, during the long months when they were desperately hanging on to their jobs, would have at least ventured to duck them in the Potomac or set their shirt-tails afire. I doubt that any jury would have convicted him of excess, even if he had held them under while he counted 100,000. The plain people could not make out just what they had done that was immoral, if anything; but there was an almost universal feeling that they were nuisances, and ought to be got rid of. Even if the citizen who, under my system, had laid hands upon them had been convicted subsequently and sent to jail, the weary newspaper readers of the land would have given three cheers for him, and he would have become a formidable candidate for the presidency on the completion of his term. Dr. Coolidge, himself, I daresay, would have had a very friendly feeling for him, and perhaps might have sent him a box of cigars or some White House pies while he was in jail.

I present my system formally to the consideration of the Congress, and offer to explain it in greater detail before a joint

session of both Houses at any time not in conflict with my literary engagements. I am no lawyer, to be sure. I once studied law for a space, but forgot it on closing the books. But I retain enough technic to be convinced that my scheme presents no constitutional difficulties. It violates no constitutional right that I am aware of; on the contrary, it specifically reaffirms the right to trial by jury, now denied in a wholesale and shameless manner by the Federal courts. It sets up no new corps of corrupt and oppressive enforcement officers; it establishes no new jobs; it does not augment the already excessive powers of the police. If there is any lingering taint of injustice in it, then that injustice would be suffered by job-holders, nine-tenths of whom now rob and persecute the rest of us incessantly, and are fast habituating the doctrine that we are *ferae naturae* and have no rights that they are bound to respect. It is a system of criminal law that is democratic in the widest and loftiest sense. It augments the dignity and responsibility of the citizen, and tends to increase his concern with problems of government. It sets higher standards of conduct for public officers than prevail now, and makes corruption and incompetence dangerous. Above all, it breaks down the rigid and unintelligent formalism of our scheme of

punishments, and makes it infinitely more pliant, appropriate and various. We have been tending for years to reduce all punishments to two: fine and imprisonment, the first usually no punishment at all, but a mere bribe to escape punishment, and the second often cruel and almost always ineffective. My scheme would restore to the art of putting down crime something of the fine bounce and gusto that it had in the Middle Ages, when tort and penalty were united by logical, and even, indeed, aesthetic bonds, and a judge who was ingenious, imaginative and original was esteemed. The certainty of punishment would daunt the offender, and the uncertainty of its nature would fill him with dread. Once proceeded against, he would be enormously cautious and conscientious. A Congressman with his ears cut off, you may be sure, would not do it again. A judge, after two or three rocket flights through his courtroom window, would be forced, by an irresistible psychological process, to give heed thereafter to the Constitution, the statutes, and the common rights of man. Even a police captain or a United States senator, once floored with a bung-starter or rolled in a barrel, would begin to think.

I dedicate my plan to my country.

H. L. M.