THE DAILY ADVERTISER AS COUNSEL FOR JUDGE CURTIS.

A CITIZEN OF BOSTON

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Individual opinion produces little effect; but opinion brought into a focus is able to wrinkle up, and to make itself felt through even the tough hide of a rhinoceros, or the hard skin of a crocodile. The concentration, by the double lens of public meetings and the press, of the scattered rays of popular indignation, begins to make even Judge Curtis, and the clique to which he belongs, feel a little uncomfortable. It has prompted to the interposition between him and this powerful burning glass, of a wet blanket in the shape of three or four columns of the Boston *Daily Advertiser;* but the relief to be obtained by such a palliation will, it is to be apprehended, prove very transient, to be followed, perhaps, by new singings, still more sharp.

Whatever may have been the case, in times past, the notion, that courts and judges are not proper subjects of popular criticism and of public animadversion, is now entertained by a very limited number of very antiquated individuals. Considering the vast range taken by the judiciary; considering how much is involved in the interpretation and execution of the laws; considering that it rests with the judges to say whether they will recognize and execute, as binding constitutional enactments, the acts of the legislature; surely there is no department of the government that demands from the lovers of liberty, and the zealous advocates of human rights, such vigilant watchfulness, such perpetual oversight, such searching criticism, and,—where the intention is apparent to convert this great power into an instrument of despotism,—such bold and unsparing denunciation.

Least of all has Judge Curtis or his advocates any right to expect, that, in a case where the privilege of public discussion is directly brought into question, public meetings and the press will wait in silent submission, without venturing to utter a word, leaving it to his unassisted wisdom and unaided and unsustained conscience and good feeling to say, whether public discussion is to be muzzled or not!

It is not Theodore Parker and Wendell Phillips, alone, who are put on trial by the indictments recently found against them. They are indicted, as it were, in a representative capacity. The pretended law under which those indictments have been found amounts, in substance, to this: That men are to be held personally and criminally responsible, not only for the acts which they do, or which they specifically counsel, and distinctly point out to others, as proper to be done, but for *all acts* which happen to be done by any body, the performance of which might naturally follow from the opinions which they publicly express, and the advice which they publicly give! Whoever declares any act of the legislature unconstitutional, and therefore void, and adds, in the same breath, that unconstitutional laws, the execution of which involves a cruelty and a crime, ought to be resisted to the death—though he recommends no particular act of resistance, which is carried with effect, or even exerts himself to prevent such particular act—is yet, if any such act of resistance happens, to be held personally and criminally responsible for it.

This, we understand to be, when sifted to the bottom, the doctrine of Judge Curtis; and certain it is, that only upon a doctrine quite as broad as this can the indictments referred to be sustained. Now this doctrine, it is evident, goes the entire length of subjecting every man who ventures to pronounce any enactment unconstitutional and unjust, to the danger of being himself indicted as a party to every act of resistance to the execution of the enactment which he thus denounces—since it cannot be denied, that to stigmatize an enactment as unconstitutional and cruel, does tend to provoke resistance to it.

Had this attack upon the right of the public expression of feeling and opinion been hazarded in support of the most necessary and beneficent legislation, it could not have failed to provoke indignant condemnation; and how can any thing less be expected when it is resorted to in behalf of a piece of legislation so utterly abhorrent as the Fugitive Slave Act?

It is in vain for the *Daily Advertiser*, or any other newspaper, to attempt to put those who are to be tried for resisting the execution of the Fugitive Slave Act, on the same level with ordinary culprits. Ordinary culprits resist the law for the sake of some special benefit to which they are not justly entitled, to be derived to themselves or to some other individual in whom they feel a special interest. Resistance to the Fugitive Slave Act grows out of no such private ends. It is a political act. It is a denial of any authority in the government to enact any such law. These Fugitive Slave Act indictments are not proceedings in the *ordinary* administration of criminal justice. As the acts of resistance on which they are founded are protests against the pretended law known as the Fugitive Slave Act, so these indictments themselves, on the other hand, are no better than partisan efforts to bestow on that disgraceful piece of legislation the attributes, authority and respectability of law. Mr. Benjamin R. Curtis, seated on the bench of the Circuit Court, instructing Grand Juries to find indictments, and especially such indictments as those against Messrs. Parker and Phillips for resistance to the Fugitive Slave Act, or instructing Petit Juries to bring in verdicts of guilty, in spite of his silk gown and his title of Judge, is precisely neither more nor less the very same zealous partisan, who, as a practising attorney, solicited and obtained from the late Marshal of this district, the opportunity to give and to print an opinion in favor of the constitutionality of that infamous act. Without, therefore, either controverting or subscribing to the eulogies heaped by the *Daily Advertiser* upon Judge Curtis, in their application to him as a member of a tribunal for deciding ordinary questions of legislation, we must take the liberty to say, that to the point in behalf of which they are urged, namely, the fitness of Judge Curtis to sit as a Judge upon the trial of Messrs. Parker and Phillips, they have no application at all. The very subtlety and ingenuity upon which legal reputations are generally founded are capable of becoming, in the hands of a partisan, deadly weapons of offence; and what partisans will do, the *Advertiser* has itself told us, having, in attempting to draw the portraits of other people, hit off quit a recognizable likeness of Judge Curtis himself! Whatever doubts the *Daily Advertiser* may entertain either as to the fact, or as to any body's real belief in the fact of Judge Curtis's 'unfitness to hold the scales of justice between Messrs. Parker and Phillips, and the government that prosecutes them,' it certainly does not require more than half an eye to perceive, that, in these particular cases, Judge Curtis is not Judge only, but Judge-Advocate also, at once, according to the practice of courts martial,—the sort of tribunal, it must be confessed, best fitted for the administration of the Fugitive Slave Act,—Judge and prosecuting officer as well; in this business, as at the Faneuil Hall Union Meeting, the double, and, in fact, Mr. District Attorney Hallett.

When, again, as to the alleged slander, at which the *Daily Advertiser* is so indignant, that Mr. Curtis bought the office of Judge by his advocacy of the Fugitive Slave Act, which he is now so straining himself and the law to enforce:—*Does the Advertiser* really imagine, will that journal venture to say, that had Mr. Benjamin R. Curtis taken the same pains to find an opportunity for publishing an opinion unfavorable to the constitutionality of the Fugitive Slave Act, that he did publicly to endorse it, he would ever have attained to his present office?

His appointment as Judge, and his advocacy of the Fugitive Slave Act, stand in too close and intimate a relation ever to be dissevered in the public mind, or to leave him, as to prosecutions under this act, at all in the position of an unbiassed and impartial administrator of justice. The opinion, so very little to its purpose, which the *Advertiser* has succeeded in drawing out from Mr. Elizur Wright, as to Judge Curtis's method of trying his case, may serve to satisfy that journal that its own exalted estimation of Judge Curtis's fairness and impartiality is not quite so universal as it seems to have supposed.

We come now to another alleged slander, at which the *Daily Advertiser* is not less indignant, that of 'the construction of juries,'—a phrase quoted two or three times over with special emphasis, and which that journal says 'is no less than a charge that the juries were packed by the Court for the purpose of procuring a conviction.' The *Advertiser* seems very anxious that some citizen of Boston should make this charge over his own signature—an anxiety evinced even to the extent, quite unusual in that journal, of resorting to italics to give emphasis to it. That, perhaps, might be very convenient by way of furnishing an object of attack, so as to draw off attention from the point at issue; but meanwhile, till such object of attack be forthcoming, it will be well enough to inquire whether the charge, as set forth by the *Daily Advertiser*, is not in fact true. In the cases alluded to,—the trials of Mr. Wright and others charged with resisting the Fugitive Slave Act by assisting in the rescue of Shadrach,—were not 'the juries packed by the Court, for the purpose of procuring a conviction'? The Judge allowed nobody to sit on those juries who did not first pledge himself to fling away his own opinion as to the constitutionality of the Fugitive Slave Act, at the dictation of the bench. The tendency, and no doubt the intention, of the question put was, to secure juries of slave-catchers, as, in fact, nothing but a jury of slave-catchers could be relied upon to return a verdict of conviction; and if such juries were not secured, no thanks to the bench for it. No law nor shadow of law, which authorized the Judge to subject the jury to this inquisition, has yet been produced; and if a jury thus picked out is not a jury 'packed by the Court for the purpose of securing a conviction,' we wish the *Daily Advertiser* would take the trouble to state to what cases it considers that phrase can properly be applied.

Meanwhile, the public ought to be much obliged to the *Advertiser* for a piece of information, which, if true, is important. That journal, in its long article, makes three statements as to matters of fact. Two of these statements have already been contradicted in its own columns,—one of them by Dr. Howe, and the other by Mr. Wright. We hope the third and last,—the one to which we now refer, may not turn out to be equally unfounded. This third statement is, that when Judge Curtis came upon the bench, the jurors of the United States Circuit Court had, by long usage, been summoned entirely from the maritime counties and towns, [a slight mistake, by the way; they were not summoned *entirely*, though they were mainly, from the counties and towns stated,] which practice Judge Curtis reformed by causing a 'Roster' to be made of all the cities and towns in the Commonwealth, so that jurors for United States courts might be drawn in rotation from each, in numbers proportioned to their population—'thus,' says the *Advertiser*, 'infusing into the administration of the civil and criminal law the rural element, which is certainly as favorable to liberty as any kinds as any element of which a jury can be composed.'

It is highly pleasant to hear of any 'reform' carried out by Judge Curtis, and not less so of anything done by him 'favorable to liberty.' But that imperfect equity, no less appropriate to the editorial chair than to the Judicial bench, however often wanting with both, requires the addition, to this history of an important political reform, of some little incidents either unknown to the *Daily Advertiser*, or which, if known, that journal did not think it necessary or proper to state.

Pending the trials of Mr. Wright and others already referred to, the attention of Judge Curtis was called by the counsel in those cases, to the illegal system according to which the juries for the United States Courts were exclusively drawn from a select and limited number of towns. This practice was, as the *Advertiser* states, ancient, and, at its original introduction, it had been a legal exercise of the discretion of the Court. A subsequent statute, however, had required that the method of drawing jurors for the United States courts should be assimilated to that of the State courts, which statute had been overlooked or disregarded in Massachusetts, and the old practice continued. Judge Curtis's attention was called to this fact, and he was requested to discharge the juries thus illegally drawn, and to summon others constituted in a legal manner—which, after argument, he refused to do.

Having found out, however, by experience, that no Boston jurors could not be relied upon to do his bidding, not even in such cases as that of Mr. Wright, in which, unchecked by the presence of counsel, he had the whole field to himself, he has, it seems, if the *Advertiser*'s statement is correct, graciously condescended at last to have his juries summoned according to law,—for which let him have all due credit.

It may be added, in conclusion, that the criminal jurisdiction of the United States courts is an exercise of authority which more than any other requires the supervision of a watchful and intelligent public. In these cases, there is no appeal. The judges, or, as it more frequently happens, the single judge—for, by recent statutes, the District Judge is empowered in such cases to act as Circuit Judge also—are sole arbiters with nothing to keep them within the limit of duty, except their consciences, not always very tender or very enlightened, and the additional and more reliable check of the consciousness of the public eye upon them. The only possible chance for carrying up one of these cases to the Supreme Court of the United States, so as to have the benefit of slaveholding justice and moderation to temper the hot fury of doughface zeal, is the happening of a disagreement on a point of law between the two judges. But Herod and Pilate are too good friends, and understand each other too well, to leave much chance for that ever to happen. It is, therefore, to be hoped that the newspapers and public meetings will rather look to the acts than to the theories of the *Boston Daily Advertiser;* will follow its example of talking, rather than its advice to them to hold their tongues; and so will continue to discuss, with redoubled energy, until it be finally and effectually disposed of, the great question of the freedom of the expression of opinion, and the attempt to put it down by judicial usurpation.

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