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THE STATE'S GUARDIANSHIP OVER CRIMINALS.

STEPHEN H. ALLEN.¹

The modern civilized state recognizes its duty to care for the insane, imbeciles, drunkards and paupers and by doing so to accomplish the double purpose of protecting both society from injury and the unfortunate members of these classes, themselves, from the suffering which naturally results from their defects and weaknesses. The motives of the state in caring for such persons are purely benevolent and the sole purpose is benefit to all concerned. A materially different attitude, however, is maintained toward moral defectives who are usually regarded as enemies rather than wards of the state. Is there such a radical difference between moral and physical deficiency as to warrant this difference of sentiment when dealing with criminals?

Most of the offenses listed in our criminal codes are clear infractions of the moral law of a somewhat aggravated character; some are mere infractions of governmental requirements based on views of expediency. In some, and perhaps all, of the states there is an unnecessary multiplication of petty offenses, subjecting offenders to small fines or brief deprivation of liberty, but as a whole, probably our criminal codes are satisfactory, in their definitions of offenses, to the consciences of most people. Of the punishments prescribed, however, there is much criticism. The infliction of the death penalty is the substitution of public for private vengeance, and private vengeance appears to be the more excusable of the two. It is a most brutal behest of the state that one of its citizens shall deliberately kill another, who is completely in its power and wholly at its mercy. In the nature of things the criminal who resorts to violence must be overcome by force, but, when resistance is overcome, what should be the attitude of the state toward the culprit? Should the state ever be revengeful or malicious toward any citizen? Ought it not always to act on principles of benevolence, of love toward all humanity, including even its criminals? The practice to which we have long been accustomed is to single out a particular act and try the person charged with it for that offense. If he is found

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guilty a punishment deemed commensurate with that particular offense is inflicted. On the trial the defendant may prove his good character in support of his innocence, but not in mitigation of the punishment.

Both from the standpoint of the welfare and rights of the criminal and of the needs of society, ought there not to be a double inquiry into the particular offense and into the general character of the person charged with it? A prudent parent, in correcting his child, is guided more by the known character of the offender than by the particular act complained of. A private citizen, in determining what his relations shall be with another, seeks information as to his general conduct and purposes. One guilty under certain mitigating circumstances of a serious crime might be employed and trusted with a feeling of security, while another who had never violated any penal statute might be altogether unsafe. Judge Gemmill in the *Journal of Criminal Law and Criminology* well says: "The differences between virtues and vices of men are differences of degree only." Every man, who has a clear perception of his own weaknesses, knows his inclination to do wrong in certain directions. It may perhaps be safely said that no man knows just what temptation, through pressure of want and apparent safety, might induce him to be a thief of the money of one who would not suffer from the loss of it. How few of us refuse to use the advantages the law gives us to force others to give us their hard earned savings without returning any fair equivalent. The crime of the robber, which is deemed one of the highest degree, has its counterpart in the conduct of the land grabber, the usurer, the extortionate surgeon or lawyer and many others that might be named. The embezzler may well claim kinship with the man who betrays the confidence of his creditor and squanders borrowed money, knowing that he cannot repay it. The common thief may well say that his act differs only in degree, but not in kind, from that of the tradesman who gives short weights or measures. The murderer even may point to the captains of industry who needlessly expose their employees or others to avoidable dangers to save expense and increase profits; to the vendors of unwholesome foods and deleterious medicines; to reckless drivers of automobiles in streets and thoroughfares where others are endangered, and numberless others, as exhibiting the same spirit of cruelty and disregard for human life, with no better justification than he has for the commission of a capital crime.

That there are persons who persistently commit crimes of a

certain class every observer knows. Whether we attribute their conduct to an uncontrollable mania, or to a criminal bent, the result is the same. The protection of society requires surveillance and restraint. On the other hand, there are offenders without number who reform themselves, with or without the aid of others, after the commission of a single act which opens their eyes to the danger or immorality of criminal conduct. The fall now and then of someone who has long been regarded as a man of high character does not disclose the fact that many others have stood at the brink of sin and been saved by some fortunate circumstance. There is, indeed, ample basis for true sympathy with criminals in all of us, for, if not criminals ourselves, we are nearly related to them. But this affords no argument against the employment of the most efficient means for their detection and restraint. It ought, however, to cause us to assume some share of the responsibility for crimes which under some circumstances we might have committed, and to aid us in discovering means for saving others, as we have been saved, before they acquire the character of confirmed criminals. The system of registering births, marriages, deaths and convictions of crime through which a full public record of each family is preserved, and of keeping track of those who go from place to place, as is provided in Continental Europe, materially aids the officers in apprehending offenders. Our heterogeneous population, lax family ties and inordinate attachment to personal liberty, interpose many difficulties in the enforcement of the criminal laws not encountered in Europe, China or Japan. A country which allows such a full measure of liberty of action to the individual needs higher standards of morality and a public sentiment which will exercise a moral restraint corresponding in power to the physical restraint of a paternal government.

The necessity for some measure of forgiveness and for tempering justice with mercy is shown by a consideration of the effects of rigid enforcement of the *lex talionis*. The simplicity of the rule, "life for life, eye for eye, tooth for tooth, hand for hand, foot for foot, burning for burning, wound for wound, stripe for stripe" (Exodus xxi: 23, 24, 25), and its seeming justice, have commended it to people like the ancient Babylonians and Hebrews, yet the frightful spectacle of maimed culprits is shocking to all sympathetic people. To disable men for useful employments tends to their moral degradation and imposes an added burden on society. It is manifest that the public interest requires not only better conduct but increased efficiency from the criminal. Instead of cutting off the hand or putting

out the eye they should be trained to do better service. The activities of offenders should be checked only as they are exerted in wrong directions. The whole problem of reformation is the substitution of useful activities for harmful ones. It is the every-day task of prudent persons to turn their children from dangerous and destructive activities to safe and constructive ones. The task of society in dealing with its wayward members is similar. Reason and kindness are best wherever they can be employed successfully. Force and restraint must be resorted to when clearly necessary, but mere vengeance, never.

The Brahman and Buddhist religions teach that every act has its direct and certain effect on the status of the soul of the individual, and that every crime must be expiated and atoned for by good deeds; that no matter how low one falls he must climb back; that misery and suffering will attend him until he purges himself of all his wickedness. While we may discredit the means thus recommended for attaining perfection, there is much in the fundamental doctrine worthy of acceptance.

The savagery of a criminal code under which boys were hung for petty larceny is no longer tolerated, but there are still many survivals of the fierce and brutal spirit of vengeance in our criminal laws, accompanied by total exemption from punishment of many serious faults.

Is it impossible to deal with each offender according to his needs, or must we still adhere in some measure to the spirit of the *lex talionis*? Is it wholly impossible, when a man is tried for crime, to ascertain what manner of man he is and why he has committed the crime, as well as the mere fact of guilt or innocence of the particular charge? Would such an inquiry tend to complicate the issues and prolong the trials?

If it be said that an inquiry into the general character and conduct of a defendant is impracticable, it may be answered that similar inquiries in great numbers are made every day in connection with business transactions of all kinds by the parties interested; that in most cases there is no difficulty in ascertaining what a person's general character is; that the inquiry is not more complicated than, or essentially different from, one into the question of his sanity, or into the conduct of the parties in a divorce case. The essential fact that ought to be developed at every criminal trial is what manner of man is he who is accused. This being ascertained, the next question should be what must be done with him for the protection of so-

ciety and his own welfare? Is it not because vengeance is still the purpose of the law that defendants usually receive so much sympathy? If the purpose of the state were altogether benevolent, would not the friends of the culprits be more inclined to help than to hinder conviction and would not some criminals voluntarily submit to public discipline for their own betterment?

If, instead of condemnation to hard labor in close confinement for a fixed period as punishment for any one of a long list of wholly dissimilar acts, a system of treatment adapted to the character and needs of the culprit were authorized and full inquiry allowed into the habits and environments of the defendant, would not the much needed certainty of results in criminal trials be greatly promoted? Why not utterly discard our absurd technical forms of criminal indictments and informations and in their place allow a charge that the defendant murdered A and that he had also murdered B, C and D, stating time and place of each murder? Why not try a professional burglar, robber, pickpocket, shoplifter or swindler on a general charge that he is one, with a bill of particulars if required, giving the instances? Society is concerned in the question whether the defendant is a criminal needing attention. It is utterly disgusted with technical hair-splitting that shields criminals by false and wholly artificial rules of procedure.

The state should protect the law-abiding public from injury by criminals and also the innocent against groundless prosecutions and unmerited punishments. Under a military despot a multiplication of formal requirements in procedure tends to stay the hand of the oppressor and mitigate the evils of tyranny, but we are a free people, desiring only the public good. The constitutions of the United States and of the various states contain provisions prohibiting the issuing of warrants without complaint on oath. Indictments by a grand jury are also required by the federal constitution and by the constitutions of most of the states in prosecutions for felonies. The constitutions of some of the states require the use of certain formal words, which serve no real purpose in defining the offense, such as, "contrary to the form of the statute" or "against the peace of the state," the latter being a common law requirement also. Based on the constitutional requirements and the technical rules developed in England as it emerged from the semi-savage age of the Plantagenets, we have a long chain of arbitrary rules which serve no purpose except as dark alleys in which, if not properly guarded, a prisoner may escape from the clutches

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of the law. Where an indictment is required it must be found by a grand jury, constituted substantially as the law provides and with the concurrence of the requisite number of jurors, at a term of the court having the requisite jurisdiction, held at a time and place authorized by law. "An indictment found by a grand jury at a term of court held at a time unauthorized is a nullity and so are all proceedings thereon" (22 Cyc., 196). It must appear on the record that the indictment was found by the grand jury to be "a true bill," that it was returned by the grand jury in open court and filed as a part of the record. These preliminaries serve no substantial purpose beyond that of guaranteeing good faith in making the accusation. In many cases they do not accomplish even this, and an indictment is sometimes based on the malice of a cowardly witness, who makes his false charge before the grand jury in secret. The fundamental error in the logic of appellate courts which reverse convictions for errors in the preliminary proceedings on which the trial is based, lies in the want of connection between these matters of form and the justice of the conviction. The purpose of all the rules governing the presentment of a defendant for trial is to shield the innocent from the annoyance of a false accusation. If guilt is established at a fair trial, what can it matter how or by whom the charge was made?

One of the most prolific sources of reversals is the extreme nicety required in stating the offense. The purpose of an indictment is to notify the defendant of the charge made against him and to inform the court as to the case to be tried. In an indictment for murder it is necessary to charge an intent to kill, that the killing was done with malice aforethought, feloniously and wilfully, deliberately and premeditatedly. It must set out what weapon was used, how it was used and how it produced death. If the weapon used was substantially different or if the fatal blow was struck in a substantially different manner from that charged, the variance is fatal and a conviction cannot stand. Among the chief reasons given for requiring a definite statement of the precise offense are that without it the court cannot pronounce the proper sentence under the law and the judgment rendered on it would not be a full protection against a future prosecution. These reasons are valid so long as we adhere to the system of measuring out a quantity of punishment deemed equivalent to the size of the crime. So long as the leading purposes of the law are vengeance and frightful examples to deter others from committing like crimes, much strictness will be looked on by lawyers and many laymen with favor. When the state deals

with its habitual criminals as it does with its insane and other defectives, for the purpose of promoting their welfare, the necessity for so much nicety will cease. The theory on which we now prosecute persons charged with crime is, with some exceptions, that there must be a clear segregation of the acts connected with the offense charged from all other misdeeds and that the prosecution must stand or fall by the proof relating to those acts. This method has some foundation in reason as to the person guilty of but one offense. Doubtless there are many who, after living many years without having committed a serious crime, do deeds which shock the whole community. Probably a great majority of the homicides are committed by those who have never done or attempted the like before. Crimes which are due solely to the impulses of passion are often single offenses. Is it not the fact, that so many of the crimes are the work of single offenders, that leads to our segregation of offenses in charging crimes, and are not the acquittals which shock the public almost invariably acquittals of single offenders, or persons whom the jury believe to be so? If a majority of the crimes were committed by those who had never offended before, and never would again, if left unpunished, it may be said that the public ought not to overlook the crime, because to do so would be to encourage others to give way to their passions. Under the prevailing system in most jurisdictions the alternative is conviction and a definite measure of punishment in the penitentiary, or forgiveness of the offense in some form and no punishment. That no grave crime should be wholly overlooked seems clear, but it is not clear that a vindictive punishment must follow conviction as a frightful example to deter others from doing the like.

A sentence of the culprit to the penitentiary for a fixed period, to be then turned loose hardened in crime by the schooling of the penitentiary, is not an intelligent treatment of his case. The sentence of the drunkard or petty offender to the rock pile or the work house for a few days may be repeated times without number without any permanent gain, while more judicious treatment, adapted to his character and needs, might cure the fault in those who can be reformed, and afford permanent protection against the incorrigible. There is about as much diversity of character among adult criminals as among children, and the same necessity for intelligent treatment of each according to his peculiarities.

The general welfare of society will best be promoted by the cure of criminal tendencies, where a cure is possible, and the in-

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terposition of permanent barriers between the public and those who are so depraved that reformation is impossible.

The Chinese emperor, Kaung Hee, in his prefectory edict to the penal code of China said "The chief ends proposed by the institution of punishments in the empire have been to guard against violence and injury, to repress inordinate desires and to secure the peace and tranquility of an honest and unoffending community." To accomplish the purpose expressed by Kaung Hee, of guarding against violence and injury, some must be forcibly restrained of their liberty, but what of the repression of inordinate desires? If there be any one human characteristic that is peculiarly American it is inordinate desires. For the imperial clan in China there is exemption from punishment; for the over rich in America there is no legal exemption but actual immunity. Conviction and punishment of those who combine to swindle by wholesale and gather spoils by millions under our system is practically impossible. Our nets may catch and hold the small fish, but the great sharks easily pass through. Could they as easily escape under a free investigation into their general course of conduct as they do from a technical indictment for a particular act?

When a trial is for the purpose of enabling the court to "adjudicate criminal cases in accord with the social and physical needs of the offender, which in the long run is directly equivalent to the best financial and moral protection of society" (report of Committee A, American Institute of Criminal Law and Criminology), we shall have started on the road to the permanent elimination of crime. When the state intelligently and in a spirit of true kindness (not weak sympathy), performs its full duty, most of those who are now criminals will become useful citizens, and the rest will be permanently restrained from following their criminal specialties.