Journal of Criminal Law and Criminology

Volume 32 | Issue 4 Article 2

1942

Philosophy of Leniency in Crime Treatment, The

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THE PHILOSOPHY OF LENIENCY IN CRIME TREATMENT

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Those who are charged with the custody and control of persons convicted of crime occupy, in the field of crime treatment, much the same position as do the pathologists in the field of the treatment of disease. After organized society has failed—through its homes, schools, churches, hospitals, industrial organizations and other institutions—safely to integrate certain of its members into its conventional structure, or to protect them against the savage impacts of a ruthlessly individualistic and competitive way of life, it turns over to custodial officers, not merely the physical bodies, but the twisted mentalities or inadequate personalities of its victims; in other words, comparatively speaking, it turns over to them the diseased tissues of the great body of human society.

In doing so, organized society would avoid guilt for its own ignorance, wilfullness and negligence by insisting, first, that those who fail are, themselves, personally responsible for their failures and second, that, given a period of penitence and punishment, they will become able and willing to compete successfully. Perhaps there is a small measure of truth in both contentions. To the extent that it is possible to effect rehabilitation in particular instances, society should be grateful.

But, generally speaking, the greatest role which custodial staffs can play is —like the role which the pathologists are playing in the field of disease control—that of prevention. As Warden James A. Johnston has well said: "I believe our greatest difficulties and our greatest opportunities are . . . in preventing crime in the first instance; in the better use of social and economic agencies."

Operation of Leniency

It is with this thesis in mind that the subject: *The Philosophy of Leniency in Crime Treatment* has been chosen. In using the word *philosophy* I have in mind that definition of the word which speaks in terms of a generally accepted body of knowledge in any particular field of thought. In using the word *leniency* I mean to distinguish between crime treatment which, on the one hand, is based upon sentiment, emotion, and perhaps personal relationships existing between the offender and the person who deals with him, and on the other hand, treatment which is based upon considerations of the protection of society, the rehabilitation of the offender, his preparation for release and eventual re-integration into the social group as a self-supporting, self-respecting individual. Of

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course there is no clear line of distinction between the two, especially in actual operation. Nevertheless, they do serve to indicate well-recognized, even though more or less coalescing procedures. For the purpose of this discussion leniency is a symbol of an attitude, which is widely prevalent; which, I fear, is much more potent in determining the nature of crime treatment than the theories and practices of scientific penology; and which is even more potent in determining the reactions of the various groups in society which cause laws to be passed, taxes to be levied, money to be appropriated and standards to be set for the control of crime. You are all aware that leniency plays a large part in the treatment of crime. As I review some of its manifestations, you will agree, I think, that it is proper to assume the existence of a generally accepted body of knowledge concerning the part which it plays; hence a philosophy.

In its best known phase, leniency functions in the form of the pardoning power or of executive clemency. Historically speaking, this was a source of revenue to the king who sold his grace or pardon to offenders who could afford to pay. In the legal tradition of our country it has been retained in order to make possible an executive check upon possible legislative and judicial excesses in the punishment of offenders. Although in some instances it functions according to this theory, probably in most cases, to a greater or less degree, it is in fact a matter of executive grace. Extreme instances of executive misconception of the nature of the power are found in the mass pardoning of prisoners which has occurred in some states at Christmas time, or when a governor is about to leave office, or when a governor leaves the state and a subordinate officer, serving as acting governor, releases a large group of prisoners.

But, quantitatively speaking, executive pardons constitute a very small proportion of the total of acts of official leniency. Leniency may manifest itself in unwise laxity of prison discipline. Warden Johnston has said on this point:

> "Firm discipline is essential in dealing with prisoners. I mean insistence on absolute obedience to regulations and the orders of those in authority. I would not make a fetish of rules. I prefer reason. But there are rules of reason and reasonable rules, and prisoners should be compelled to obey them; otherwise no progress can be made toward their reformation because chiefest of their faults, perhaps fundamental in crime causes, is disobedience. Records are replete with evidence of their disobedience at home, school, shop, everywhere flouting authority and continuously giving way to their undisciplined desires."

Of course such discipline may be difficult to secure in ill-equipped institutions; where, for example, opportunity for that "honest-to-goodness work" which he so heartily recommends cannot be provided.

To the extent that parole and other similar release procedures are used for the discharge of prisoners in situations which do not conform to the standards recently declared by the Attorney General's Parole Conference, to that extent the motive for such discharges is largely one of leniency. This is particularly

true where parole is granted without determining, first, whether the prisoner will probably succeed on parole and, second, whether he can be released with safety to the security of the community into which he goes. In many instances leniency is the controlling motive operating in release on probation. This is revealed frequently by the statement that, "the first offender is entitled to another chance." It is particularly true where probation is used, on such a theory, without an adequate pre-sentence investigation; because in many cases the first offender in one place may have offended repeatedly in other places. Generally speaking, it is true in all cases, because a first offender in court has usually offended many times in a long suffering family or complacent community life. His appearance in court usually results from repeated or flagrant violations of conventions which the family or community will no longer stomach. His capacity to say "I'm sorry;" to abase himself in the presence of the judge; to affect contrition for his misdeeds and to promise tearfully that he will try to do better are highly productive of leniency, just as they have been in the family and in the community before. On the contrary, the bellicose insurgence of one who feels that society has wronged and despoiled him is apt to bring a sentence of imprisonment. Closely related to this situation is that of the probation officer, engaged in supervision. Here is an area of administrative discretion, in which the supervisory officer—depending upon his own emotional stability or lack of it—may exercise leniency or repression in the methods which he uses, largely without interference or control from a busy judge.

But the use of leniency in crime treatment runs much farther back in the chronology of particular cases, than the point at which conviction occurs. Quantitatively speaking there is a much larger percentage of crime treatment prior to conviction than after conviction; for the simple reason that a large percentage of those who commit crime are never convicted and a large percentage are never even prosecuted. Thus, no informed person would seriously challenge the following statement of Judge Claude C. Coffin of Colorado:

> "It is said that the jury is the last vestige of pure democracy. It may be a guard against tyranny and despotic government. Certainly it does, in criminal cases, leave the way open for a man's peers to refuse to enforce a law that to them seems harsh, if they be so minded; and these same peers can, and too often do *approximate and exercise the pardoning power*; . . ." [Italics supplied.]

Neither would an informed person seriously question the fact that this same type of pardoning power is freely used by police and prosecuting officers. One of the major functions of a prosecuting officer is to determine—sometimes with the advice of a grand jury, frequently on his own initiative—whether in a particular case, he shall prosecute, effect a compromise, or refuse to prosecute altogether. One of the major discretionary activities of police officers is to determine whether to reprimand offenders or to report their delinquencies for further action. Frequently, the con-

clusion which the officer reaches depends upon whether the offender meekly acquiesces in his official insolence or whether he resents it and protests in like terms.

Again, the use of leniency as a method of crime treatment runs far back of official action. The victim of an occasional crime may make settlement with the criminal and refuse to complain to the officers of the law. The crime of misprison of felony is thus frequently committed by otherwise reputable citizens, because of a mistaken assumption that it is proper for them to promise offenders immunity from prosecution, in consideration for the return of stolen property or for others forms of reimbursement. Similar procedures may be followed in the case of an embezzling clerk. And many a parent, teacher and minister has used the knowledge of crime commission as a means of persuading or coercing improved conduct, rather than reporting such offenses to public officers, according to the strict letter of the law.

It is equally interesting, in outlining the body of generally accepted knowledge concerning this subject, to consider the reasons which cause the use of leniency in particular cases by particular persons. Generally speaking, we may say that mankind is motivated by two conflicting emotions in its attitude toward criminal conduct. The first of these is a desire for revenge; the second is sympathy for the underdog. Thus, when a person is injured as a result of crime, he desires revenge, or what he may call compensation, or retribution, or satisfaction. If the offense is sufficiently grievous, the prevailing sentiment of the community, or of the State, or even of the Nation, may be one which calls for revenge. On the other hand, the sympathy of the community may be with the offender. This is particularly true where the community identifies itself with the offender and regards him as one who has acted in its behalf. Thus, George Washington, from the official British point of view, was guilty of treason, the most serious offense in the whole category of crime. But, presumably, a large majority of the colonists and, indeed, many of the English people, regarded him as a noble patriot and an inspired leader of men. In lesser cases and in descending degree, the emotional attitude of the community may favor an accused person and as a result may shape the action of police, prosecutor, jury or judge in the use of leniency.

In particular cases a wide variety of reasons may be operative. Parental pride or parental love, religious beliefs or educational principles, medical or psychiatric predispositions are examples of intangibles which may consciously or unconsciously shape action. Sometimes inherited or environmental resentment against official oppression may be the determining factor. Perhaps the motive may be traced back to an honest difference of opinion as to the wisdom of the law, and an inner protest against the social desirability of stigmatizing certain conduct as crime. It is absurd in this connection to assume, as some have done, that criminal conduct can be clearly distinguished from non-criminal conduct

or to assume, as I shall point out later to the contrary, that criminals are a distinct, classifiable group of persons.

When I speak of the use of leniency by police, prosecutors, juries, judges, probation and parole administrators and governors, I do not mean to say that all such officers make an improper use of leniency. Many fine officers well understand the difference between leniency and crime treatment; many fine officers are making highly commendable records in the exercise of the important discretionary powers with which they are vested. Nevertheless, the Attorney General's Survey of Release Procedures, as well as our own experience, teaches us that the situation is far from satisfactory in many respects and in many places. In the case of officials who do exercise leniency improperly, they may do so because of pressures, political in character, or of similar pressures from social, church or fraternal organizations. On the contrary they may act because of honest, though mistaken, convictions that considerations impelling to mercy may promise success and rehabilitation, without danger to society. In the case of police officials it may be merely that resentment against prosecuting attorneys and judges for freeing previously arrested offenders has produced a determination to take the law into their own hands; a determination which is worked out by the anomalous combination of vituperation and leniency, which gives freedom to the offender and vicarious satisfaction to the officer. In the case of prosecuting attorneys it may be no more than a canny selection of cases most susceptible of successful prosecution, with an eye to the official "batting average" of convictions and acquittals; or it may be merely a matter of laziness in avoiding difficult and time-consuming trials against high-pressure defense lawyers. The jury which acquits may do so because of resentment against a browbeating prosecutor or against a police department which it suspects of using the third degree. The judge who discharges a defendant may have in mind the delinquencies of his own youth and the acting-governor may have a Jehovah complex with only limited opportunity to work at it.

Results of Leniency

We come now to a consideration of some of the results which flow from the improper use which is made of leniency in crime treatment. Obviously, great discrepancies may result between cases in which, for one reason or another, leniency operates and cases in which it does not. Where leniency is substituted for parole preparation and careful selection of parolees, the probable result is failure on parole; with consequent disillusionment of the public; justified protests from police, prosecutors and judges; and loss of prestige on the part of those qualified parole officials who are trying to reestablish the concept of parole as a valid part of the treatment process. Where leniency is substituted for thorough pre-sentence investigation and careful selection of probationers, the results are similarly destructive. A boy who escapes punishment because

of effective intervention based upon parental love may be a much more dangerous risk to society than the one who has no parent, and lacking effective intervention goes to the penitentiary. One man may serve a long sentence because he went to trial without a lawyer, while another may go free because a prosecutor elects not to proceed, in a no more doubtful case, against a defense lawyer with an impressive record of acquittals. The man who can summon no support in his time of crisis—financial, social, political, fraternal, family or otherwise, is much more likely than others to receive the brand. The man who can summon no such support in time of crisis is most apt to be the poor, ignorant, inept man, with long ears or flat feet or other pseudo-scientific stigmata of inadequacy and degeneracy. The man who commits a popular crime which brings to him the sympathy of the community is most apt to be the popular and persuasive type of person; the man who commits the unpopular type of crime is most apt to be the unpopular, unpersuasive type of person. For, indeed, a popular leader of the type of Huey Long may persuade a majority of the voters to place him in such a position of power that no misconduct can find him out; while his luckless followers—after his departure—may tread the dismal path to dishonor and imprisonment.

I realize, full well, that some of the things which I am saying are unconventional and that, taken as a whole, they may seem to present a rather appalling picture. Certainly the picture as thus seen departs a long way from the conventional assumptions that this is "a government of law and not of men;" that all men are equal before the law; that crime is a fixed concept; that criminals are persons to be classified on a basis of stigmata and thus rationalized out of the disturbing reality of individual conscience and community consciousness.

But if the truth lies outside conventional lines, then, particularly in these trying times, it is much better that the truth be spoken by one who is a friend of our present order and who desires its preservation, than by one who uses the truth to attack, and hopes thus to destroy the institutions of our civilization. I reject, definitely, the idea that in a democracy such truths should be concealed or avoided. He is no friend of our way of life and our philosophy of government, who leaves half-covered, to be dug up by incendiaries, unpleasant facts such as those which I have just summarized. If we are willing to recognize—unpalatable as it may be—the body of information which I have just outlined; if we are willing to face, honestly and frankly, the implications which result therefrom; we may be able to step forward with reasonable assurance, in developing and using effective procedures for improvement. And this brings me to the concluding, and constructive portion of this discussion.

How Criminal Laws Originate

Recognition of the fact that these great impelling human attitudes are now existing and have always existed should warn us that careful reexamina-

tions of our criminal law is in order; to determine how much of it which was emotionally produced in earlier days is sound and useful under present conditions. I have earlier repudiated the pseudo-scientific concept that criminal conduct can be clearly distinguished from non-criminal conduct or that criminals are a distinct, classifiable group of persons. Apart from the mysteries, the imputations of sacredness or of divine origin—the totem pole phases of criminal law—which were devised to give a more powerful sanction to its administration, substantive criminal law is no more than a collection of rules of human conduct which have been devised from time to time by law makers, in response to the real will of the community in some cases, and in response to voluble minorities in many others. How far it departs from divine origin may be suggested by the fact that several of the ten commandments are not embodied in the criminal law and that in its truest form crime is an offense against a temporal government, with which, I suspect, divinity has little concern.

Surely it is not too much to ask the pseudo-scientists to look about them; to see criminal law in the making; to realize that, as Sanford Bates remarked some years ago, approximately seventy-five percent of the inmates of Federal penitentiaries were there for the commission of crimes which were not crimes fifteen years before. The typical situation in criminal law making today is that an aggressive minority, seeking to change a social or economic situation, secures the passage of a law, which contains a penal provision deliberately designed to put teeth into its enforcement. Is it necessary to look for stigmata to find the reason for criminality in a situation such as was described by a speaker in the City of San Francisco, a few years ago? On one day, he said, it constituted criminal conduct to carry a flask of whiskey in his pocket, but very commendable to carry a gold coin. One year later it was a crime to possess the gold coin and at least non-criminal to carry the whiskey.

Two groups in a community, of almost equal number, struggle through a bitter campaign to determine whether certain conduct shall be proscribed and punished as crime. One side prevails; the other side loses. Some of the losers are good sports and agree to abide by the verdict. Some are poor sports but nevertheless agree to abide by the verdict. Some refuse to abide and violate the new law. Of these, some are caught; and of the latter some who have long ears, or flat feet, or hollow chests are punished. Are they criminals because they have stigmata, or because a sincere, earnest group of citizens in the community has persuaded the majority that it is time, in the development of their civilization, to lift the bars a little higher against certain conduct? It is here that leniency comes into operation, as a compromise against the rigors of unexpected and perhaps undesired results.

Recognition of the philosophy of leniency should prompt us, also, to be humble in the face of new developments and new proposals and less tenacious of

the areas which we as professional and social workers have pre-empted. One of the beneficial results of the philosophy of leniency in crime treatment, is the restless dissatisfaction which it produces with present methods. That there is substantial justification for this point of view is apparent from the fact that in spite of the continually increasing effectiveness of methods of detection, apprehension, and prosecution, crime still continues to increase both in volume and in seriousness. Out of this restless dissatisfaction has come the drives for the juvenile court, for probation, for psychiatric clinics, for parole, for scientific penal treatment; for improved professional personnel; for better equipment and for more reliable information concerning causes and results. A striking recent example is the youth-justice-authority act recently adopted in California.

Closely related to this type of social development is the willingness of highly qualified persons to give generously of their time and energy in order to secure such new legislation and to make possible such new experiments, for balancing the pressures of life against the proscriptions of the law. Great names are associated with each great new development such as that of the juvenile court, of probation and of parole; just as great names are associated with new developments in other fields of political and social life. But as the new development finds its place in the social or governmental structure, lesser men come along, who pre-empt the new device, who settle into a small routine of security and, like the squid, attempt to besmirch and scuttle each new development, with exactly the same arguments and methods as the small-minded people who years before attempted to scuttle the devices of which they are today so proud.

Surely it is not necessary for me to go farther. The cause which I am pleading is that of understanding, of tolerance, of co-operation, in the ever developing soundness and effectiveness of our civilization. I do not disparage the philosophy of leniency; I merely recognize its existence, its potency, and its symbolic character, in guiding us upon our way. It provides a starting point from which may come realization of our need for more intensive research into the springs of human conduct; more intelligent provision of standards to control such conduct; better personnel in the administration of such standards; and realization also of the vital need for co-operation in our various efforts toward these ends.

"In men whom men condemn as ill, I find so much goodness still; in men whom men pronounce divine, I find so of sin and blot, I hesitate to draw the line between the two, where God has —*Joachin Miller.*

"We prosecute the man or woman who steals the Goose from off the Common, and let the greater felon loose, who steals the Common from the Goose." —*G. K. Chesterton.*