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THE GROUNDS OF PARDON

JAMES D. BARNETT*

I.

A pardon, in the most comprehensive sense—including all of its forms—is any relief from the penalty for crime enforceable by law. The grounds upon which pardons may properly be granted are therefore necessarily related to the grounds upon which punishment may be imposed.¹ But, as will appear, this principle has been, to a considerable extent, disregarded.

Although, in the strict legal sense, the pardoning power is vested only in the chief executive, a board, the legislature, or some combination among these,² as a matter of fact many others exercise virtually the same function—judges, juries,³ prosecuting attorneys, informers, police officers, victims of the offense.⁴ Here the chief concern is with the pardoning power in the narrower sense.

“Without such a power of clemency, to be exercised by some department or functionary of a government, it would be most imperfect and deficient in its political morality.”⁵ But there is probably no public function that has been more abused. The consequences of the abuse are notoriously disastrous. In Bentham’s jargon: “From pardon power unrestricted, comes impunity to delinquency in all shapes: from impunity to delinquency in all shapes, impunity to maleficence in all shapes; from impunity to maleficence in all shapes, dissolution of government: from dissolution of government, dissolution of political society.”⁶ Therefore, in consideration especially of the apparent large increase of crime in our day, it is well to review the prevailing notions in this regard, particularly of those actually engaged in the exercise of the pardoning power.

The prevailing practice and theory may be found in the statements official and unofficial, of pardoning authorities, in the decisions of

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¹Cf. W. W. Smithers, *Executive Clemency in Pennsylvania*, p. 106 (1909). On the grounds of punishment see, especially, H. Oppenheimer, *Rationale of Punishment* (1913).

²See C. Jensen, *Pardoning Power in the American States*, ch. 2 (1922).

³“The Jury system is the mitigation of the law.” F. DeW. Wells, *Man in Court*, p. 264 (1917).

⁴Cf. Jeremy Bentham, *Works*, vol. 1, p. 521. See also J. D. Barnett, *American Law Review*, vol. 49, pp. 684-734 (1915).

⁵Ex parte *Wells*, 18 How. 307, 15 Law ed. 421, 424 (1856).

⁶*Works*, vol. 1, p. 530.

the courts, in petitions for pardon and protests against pardon, in the press, in the writings of criminologists, jurists, and others. The subject has, in proportion to its importance, received very little investigation and consideration, and it cannot be said that there is now any accepted scientific attitude in the matter.⁷

"The power of the governor of this state to grant pardons," said a New York court, "is unrestricted by anything save his own conscience."⁸ "What are the precise grounds upon which clemency should proceed? It is easier to ask than to answer this question," said Governor Hill of New York.⁹ Montesquieu thought this "a point more easily felt than prescribed."¹⁰ Perhaps the answer will be somewhat less difficult at least after an examination of a mass of practice and theory from widely scattered sources.¹¹

II.

So far as pardons are considered as coming from the "free grace" of the grantor—"gratuitous" or "motiveless" pardons—as Bentham called them,¹² they of course need no justification. They are their own sufficient reason.

According to the strict theory of law a pardon is wholly a matter of "grace" or "mercy" and not of justice.¹³ It "is not a right given for a consideration . . . but a free gift."¹⁴ "A pardon is an act of mercy flowing from the fountain of bounty and grace. . . . Although laws are not framed on principles of compassion for guilt; yet when Mercy, in her divine tenderness, bestows on the transgressor

⁷See especially W. M. Smithers, *Executive Clemency in Pennsylvania*, ch. 5 (1909). See also Jeremy Bentham, *Works*, vol. 1, pp. 529-30; vol. 9, pp. 600-7; F. Lieber, *Political Ethics*, 2nd ed., vol. 2, pp. 392-400 (1874); D. M. Means, *New Englander*, vol. 34, pp. 60-91 (1875); Attorney General Bonaparté, *Proceedings of the Annual Congress of the National Prison Association*, 1907, pp. 194-205; C. Jensen, *Pardoning Power in the American States*, ch. 6 (1922). A false statement of the grounds of action is at least some evidence as to what grounds are approved by public opinion.

⁸*Andrews v. Gardiner*, 150 N. Y. S. 891, 894 (1914). "A pardon is a gracious act of mercy resting on any ground which the executive may regard as sufficient to call for its exercise." Solicitor General W. H. Taft, in *Opinions of the Attorneys General of the United States*, vol. 20, p. 332 (1892).

⁹North American Review, vol. 154, p. 56 (1892).

¹⁰*Spirit of the Laws*, book 6, ch. 21.

¹¹It should be noted that although the grounds of pardon are, necessarily, here separately discussed, in a particular case of pardon several or even many grounds may be considered together, no one of which would, perhaps, have been effective alone.

¹²*Works*, vol. 1, p. 520; *Theory of Legislation*, Atkins' ed., vol. 2, p. 172.

¹³J. D. Barnett, *Yale Law Journal*, vol. 20, pp. 131-7 (1910).

¹⁴*Pleuler v. State*, 11 Neb. 547, 10 N. W. 481 (1881).

the boon of forgiveness, Justice will pause, and, forgetting the offense, bid the pardoned man go in peace."¹⁵

From time immemorial the identity of the divine mercy¹⁶ and the mercy of the human authority has been very generally accepted. Governor West of Oregon quoted, approvingly,¹⁷ Portia's eulogy of "mercy":

The quality of mercy is not strain'd;
It droppeth as the gentle rain from heaven
Upon the place beneath; it is twice bless'd;
It blesseth him that gives and him that takes;
'Tis mightiest in the mightiest; it becomes
The throned monarch better than his crown;
His sceptre shows the force of temporal power,
The attribute to awe and majesty,
Wherein doth sit the dread and fear of kings;
But mercy is above this sceptred sway;
It is enthroned in the hearts of kings,
It is the attribute to God himself;
And earthly power doth then show likest God's
When mercy seasons justice."¹⁸

So also the potentates of our own day dispense their "mercy." Thus Governor Jeff Davis of Arkansas, who pardoned an average of one convict a day during his term of six years, repeatedly declared: "If I did not show mercy, I would not expect mercy when I bow before the judgment seat."¹⁹ And many other governors have proclaimed the same doctrine.²⁰

In keeping with this view it has very generally been the custom of pardoning authorities to grant the "gracious gift" on holidays and the like—the Passover, Christmas Day, Thanksgiving Day, Washington's Birthday, Fourth of July, Decoration Day, Labor Day, the accession of the king, the king's birthday, the birthday of the Governor of Oklahoma. Likewise, this spirit often affects the courts. "The Christmas spirit pervaded the courts [of New York City] yesterday.

¹⁵*United States v. Athens Armory*, 24 Fed. Cas. 878, 884, 885 (1868).

¹⁶The "fundamental thought" of "grace," according to widely accepted theological theory, is that "the benefit conferred is recognized by giver and receiver alike as not *due*; it is that to which the receiver has no *right*, which has not been earned, or perhaps deserved, but which the giver freely, out of pure goodness, bestows." A. Stewart, in J. Hastings, *Dictionary of the Bible*, vol. 2, p. 254 (1906). See also J. Pohle, *Catholic Encyclopedia*, vol. 6, p. 698 (1909). But as indicated below this doctrine is perhaps more widely qualified by the doctrine of merit.

¹⁷Oregon Journal, Jan. 25, 1915.

¹⁸*Merchant of Venice*, act 4, scene 1.

¹⁹Kansas City Star, Jan. 21, 1907.

²⁰In Spain the form of the king's pardon is: "I pardon this man as God pardons me." New York Times, March 26, 1921.

In several instances offenders facing severe punishment were let off with suspended sentences or light fines. Invariably the court told the offender of a reluctance to send him to prison for a term beginning on Christmas Eve."²¹

"These acts of executive clemency are accepted with general favor, because they appeal to a natural sentiment, and because they are brought to public attention at a season when there is no mood for analysis and criticism."²² Perhaps, generally, the holiday is but the *occasion* for the granting of the gift based upon particular grounds, good or not; but there is "little doubt that the Christmas atmosphere is often availed of to let slip through offenders who could not pass muster under normal conditions."²³ The vicious tendency of this practice has been recognized by some authorities and accordingly abjured. So Governor Withycombe of Oregon declared: "If a man is entitled to a pardon, he is entitled to it regardless of whether or not it is due him during the holiday season. If he is not entitled to it, the fact that it is the holiday season is no reason why leniency should be extended."²⁴ And Governor Richardson of California: "Californians will, I believe, enjoy this sacred day better with the knowledge that a score of murderers, robbers and pickpockets have not been turned loose upon them today. The people, and not the criminal, deserve first consideration."²⁵

So far as the ancient monarchy is concerned the doctrine of executive "grace" is perfectly natural and logical. For the king is the source of all law and all justice, and he, like the divine monarch, may do what he will with his own. "As he [the king] cannot but have the administration of public revenge, so he cannot but have a power to remit it by his pardons, when he judges proper."²⁶ But the absolute monarch, human or divine, has no counterpart whatever in the modern democratic state. In pardoning a criminal, the official, said Attorney General Bonaparte, "is not forgiving his own debtor, one who has trespassed against him, but a public debtor whose trespass has impaired or endangered the happiness of the whole community."²⁷ And he adds: "If I were conscious that I had ever advised the president to exercise

²¹New York Times, Dec. 25, 1924. Conversely, the governor of California postponed an execution because of Good Friday.

²²C. N., Freeman, vol. 4, p. 425 (1922).

²³C. N., Freeman, vol. 4, p. 425 (1922).

²⁴Oregonian, Dec. 25, 1918.

²⁵San Francisco Examiner, Dec. 25, 1925.

²⁶*Dr. Groenvelt's Case*, 1 Ld. Raym. 213, 91 English Reports (Reprint) 1038 (1697).

²⁷*Proceedings of the Annual Congress of the National Prison Association*, 1907, p. 201. Cf. C. C. Cook, *Proceedings of the Ohio State Bar Association*, vol. 12, pp. 177-8 (1891).

clemency for no better reason than because I felt sorry for the prisoner or those interested in him, I should feel that my conduct had differed, indeed, in degree, but not in kind, from what it would have been had I given such advice for a bribe in money."²⁸ So one of the courts has said: "While a pardon is a matter of grace, it is nevertheless the grace of the state, and not the personal favor of the governor. . . . He dispenses the public mercy and grace. . . . The sovereign acts through the governor, but it is none the less the act of the sovereign, and not the personal act of the governor."²⁹ However, it is much better to eschew this metaphysical language altogether, and simply to accept the truth that the delegation of the "mercy of the people" to an agent of the people is an absolute impossibility. The official is two distinct persons in one, but the official and the private individual have been badly confused in practice.

"No matter how firm a stand he may appear to take, no matter what he may think and argue to the contrary," said Governor West, "no man with a heart that pulses rich red blood, no man of real human sympathies can be thrown in direct contact with an unfortunate brother in his hour of distress without responding to those noble instincts which centuries of Christian teachings have implanted in his breast."³⁰ On the other hand, "the prince, in pardoning gives up the public security in favor of the individual, and, by his ill judged benevolence, proclaims a public act of impunity."³¹ When this is truly appreciated by the responsible authority, the conflict between the man and the official agent of society is often extremely intense.

Pity for the offender is naturally increased when his condition is unusually hard—when he is old, feeble, sick, crippled, blind, deaf, poor or friendless; and leniency in such cases is due largely to the feeling of pity alone.

Under any conditions, it is hard for the official to follow Lieber's injunction "never to forget that society and the criminal form two

²⁸Ibid.

²⁹*Montgomery v. Cleveland*, 134 Miss. 132, 98 So. 111, 114 (1923).

³⁰Oregon Journal, Jan. 25, 1915. Commenting upon the practice of his successor, Governor Withycombe, in contradiction to the latter's declaration of policy upon taking office: "I desire at this time to state emphatically that it will be the policy of the governor henceforth to entertain all due respect for judicial decisions, and where judge and jury have passed upon a case and sentence has been pronounced, only under the most exceptional circumstances will I feel warranted in setting aside or seriously modifying such sentence." Inaugural Message of James Withycombe to the Twenty-Eighth Legislative Assembly, 1915, p. 11.

³¹Beccaria, *Essay on Crimes and Punishments*, ch. 46. See also Jeremy Bentham, *Theory of Legislation*, Atkins' ed., vol. 2, pp. 171-2; F. Lieber, *Political Ethics*, 2nd ed., vol. 2, pp. 397-8 (1874).

parties, and one invisible as a whole and unrepresented, the other under sufferance before him and hence engaging his feelings very differently."³² He must, so far as possible, adopt a judicial spirit, as Governor John Jay of New York urged a long time ago. "The power of pardoning is committed by the constitution to the prudence and discretion, and not to the wishes or feelings of the governor. . . . I believe it my *duty* to pardon all who in my judgment ought to be pardoned, and to refuse pardons to all who on principles of sound policy and justice ought not to have them. To pardon or not to pardon does not depend on my will, but on my judgment; and for the impartial and discreet exercise of this authority I am and ought to be highly responsible."³³

The suffering of the offender toward whom mercy is shown was, of course, intended as a deterrent influence when the penalty was prescribed by the criminal law. The doctrine of mercy, therefore, logically requires the anticipation of action by delegated authority, the abolition, by law, of all penalties whatsoever, and the organization of society upon a wholly voluntary basis.

The doctrine of pardon as "grace" is not only a danger to the public, but it works injustice to those pardoned because of their actual deserts. "A pardon proceeds, not upon the theory of innocence, but implies guilt. If there was no guilt, theoretically at least, there would be no basis for pardon."³⁴ And, logically, the acceptance of a pardon confesses guilt.³⁵ This ancient theory has actually caused the refusal of pardons in our time. Anyway, "no deserving man or woman should be compelled to feel that he owes his release to official favor."³⁶

This confusion of the man and the official in the exercise of public duty and substitution of private for public ends are universally reprobated in connection with every other function of government. Personal considerations in the approval or veto of bills, for example, would never be admitted by the executive, however much he might in fact allow them to influence his action.

³²F. Lieber, *Political Ethics*, 2nd ed., vol. 2, p. 398 (1874).

³³Quoted by D. M. Means, *New Englander*, vol. 34, p. 82 (1875). See also William Paley, *Moral and Political Philosophy*, ch. 9 (1785); Attorney-General Bonaparte, *Proceedings of the Annual Congress of the National Prison Association*, 1907, pp. 200-1. And courts have, heretically, voiced the same view. "The power of pardon is founded on considerations of the public good, and is to be exercised on this ground, that the public welfare, which is the legitimate object of all punishment, will be as well promoted by a suspension as by an execution of the sentence." Green, C. J., *Cook v. Chosen Freeholders of Middlesex*, 26 N. J. L. 326, 233 (1857).

³⁴*Roberts v. State*, 160 N. Y. 217, 54 N. E. 678, 679 (1899).

³⁵*People v. Marsh*, 125 Mich. 410, 84 N. W. 472, 474 (1900).

³⁶C. N., *Freeman*, vol. 4, p. 426 (1922).

Often the penalty imposed by the law upon the offender falls more heavily upon the innocent members of his family—a heart-broken mother, an aged father, a helpless wife and children; and the mercy granted to the offender is really for the benefit of innocent dependents. “On his own account I do not regard him entitled to the least clemency. He has, however, a wife and eight children who are in a destitute condition.”³⁷ “The granting of a pardon in this case will bring comfort to a wife and daughter whose love and devotion have never flagged, and whose affection for a husband and father remains unshaken.”³⁸

It is hard to resist the pleas of these suffering innocents.³⁹ Such suffering has, of course, “nothing whatever to do with the merits of the case.”⁴⁰ “While it may be true . . . that Hammond’s mother is sick, and worries over the imprisonment of her son, and is liable to be injured thereby, yet this is but one of the ordinary accompaniments of crime. It is scarcely ever the criminal alone who must suffer the results of his crime.”⁴¹ But the sin that society commits by failure adequately to care for the innocent dependents of criminals punished for the benefit of society is considered some excuse for transforming the pardoning power into a means of poor relief. So said Governor Goodrich of Indiana: “Is society better off to let this woman [the wife of the offender] struggle on with impossible conditions, the family to be broken up and this man . . . come out embittered against society, or is it better for society to extend clemency, give him another chance in life, return him to his family and permit him to care for them? The mere statement of the situation brings the answer. . . . Just so long as the law for the protection of society continues to deprive the innocent family of its sole support, with no provision for their care, just that long will these cases appeal with great and convincing force to the conscience of the executive, unless he is indifferent to human distress.”⁴²

The social position of the offenders is doubtless often the cause of leniency shown to them by the pardoning authorities as by the courts. “There seems . . . to be a vague belief prevalent amongst us that education and social position diminish instead of increasing moral

³⁷President McKinley, *Report of the Attorney General of the United States*, 1897, p. 183.

³⁸President Cleveland, *Report of the Attorney General of the United States*, 1894, p. 154.

³⁹See especially Theodore Roosevelt, *Autobiography*, p. 314 (1913).

⁴⁰F. Wayland, *Journal of Social Science*, 1884, p. 154. See also W. W. Smithers, *Executive Clemency in Pennsylvania*, p. 170 (1909).

⁴¹*Report of the Advisory Board in the Matter of Pardons*, Michigan, 1894, p. 18.

⁴²*Journal of Criminal Law and Criminology*, vol. 11, pp. 340-1 (1920).

and legal responsibility—that crimes committed by a man on whose training society has lavished all its resources, and whom Providence has raised above want, is somehow less heinous than crimes committed by people to whom all light has been denied, and whose life has been one long struggle with the sharpest temptation.”⁴³ Of course, no such bald doctrine could be avowed by the pardoning authorities, whatever their actual practice; but at times they have come pretty near it: “The boy has a very respectable father,” etc. On the other hand, they have often expressly repudiated the doctrine. “I know of no reason why a millionaire criminal should be treated any differently than a pauper criminal.”⁴⁴ “Many other dangerous criminals . . . have had respectable parents, and we do not deem this a valid reason for granting executive clemency.”⁴⁵

That the individual directly injured by the crime forgives the offender is at times the ground for granting clemency by public authority. “Inasmuch as the offense committed was one that concerned the husband and child more than any one else, and as the husband is willing to forgive and take her back and restore the family relations, it seems to the board that there ought to be no objection to her release.”⁴⁶ Beccaria long ago protested against such action. “This may be an act of good nature and humanity, but it is contrary to the good of the public. The right of punishing belongs not to any individual, but to society in general, or the sovereign. He may renounce his own portion of this right, but cannot give up that of others.”⁴⁷ And the same objection may be urged, of course, against making the punishment of crime dependent upon the action of private prosecutors, since “every

⁴³Nation, vol. 2, p. 713 (1866).

⁴⁴Governor Glynn of New York, press dispatch, Jan. 12, 1914.

⁴⁵*Report of Proceedings of the Advisory Board in the Matter of Pardons*, Michigan, 1903, p. 241. See also Theodore Roosevelt, *Autobiography*, pp. 115-6 (1913). “Governor Donahey [of Ohio] said he wanted the judge to treat his son the same as he would any other person and announced that he would not pardon him.” *Oregonian*, Feb. 15, 1925. “I’m not asking for mercy,” said a black youth to the judge, “but I’m asking for justice. Last week two white boys killed a policeman. They got life. For the same reason I’m getting the rope.” *Oregon Journal*, May 17, 1925.

It may be difficult to distinguish between favoritism and proper “individualization” of punishment. “The suffering endured by one of his former respectability on account of the exposure, disgrace and imprisonment is much more intense than in the case of persons of a less degree of sensibility, who have indulged in the coarser crimes.” *Report of the Attorney General of the United States*, 1900, p. 308.

⁴⁶*Report of Proceedings of the Advisory Board in the Matter of Pardons*, Michigan, 1903, p. 106.

⁴⁷*Essay on Crimes and Punishments*, ch. 46. Cf. Jeremy Bentham, *Works*, vol. 1, p. 521.

person who refuses to prosecute an offense committed against himself" shares in the pardoning power.⁴⁸

It is obvious that all this involves a reversion to the ancient situation in which the distinction between crimes and torts had not developed.

Bentham commended moderation on the part of the sovereign in case of mere attacks on his *amour-propre*.⁴⁹ And thus Governor General Wood recently pardoned a Filipino convicted for having declared, "We Filipinos should use our traditional bolo to cut off the head of General Wood."⁵⁰ And doubtless judges are often moved by the same spirit in pardoning for contempt of court.

The long persistence of the doctrine of grace,⁵¹ to whatever extent, is doubtless due to many causes—tradition, theological analogy, the idea that vengeance is the object of punishment. Pardon is deemed, says Garofolo, "an act nowise inconsistent with the object of punishment, and this is simply because of the unwillingness to understand that the latter is not an act of vengeance, but merely one of the means which must be employed in the struggle against crime."⁵²

But, fortunately, it has usually been impossible to divorce the idea of mercy wholly from that of merit in pardon, human and divine. There is effort to compromise the two ideas in the maxim that "justice should be tempered with mercy";⁵³ but it should frankly be recognized that they are wholly incompatible with each other.

⁴⁸Westminster Review, n. s., vol. 25, p. 403 (1864).

⁴⁹Theory of Legislation, Atkins' ed., vol. 2, p. 171.

⁵⁰New York Times, Jan. 14, 1924; Oregon Journal, Jan. 13, 1924.

⁵¹The persistence of the unadulterated archaic notion appears in this letter (one of several of the same sort) of a repentant poacher to the Oregon state game commission: "Gentlemen: During my life I have broken the fish and game laws of this state. God has saved me, and I want to take this means of telling you and ask your forgiveness." Oregonian, Nov. 11, 1925. See also *ibid*, Nov. 22, 1925.

⁵²*Criminology*, Millar's trans., p. 369 (1914). "If the punishments have not had, for the cause of their establishment, cruelty towards individuals, it is cruelty towards the public to render them useless." Jeremy Bentham, *Works*, vol. 1, p. 520. See also F. Lieber, *Political Ethics*, 2nd ed., vol. 2, pp. 392-3 (1874). "I believe in the Biblical phrase, 'vengeance is mine, saith the Lord,'" declared a mother pleading before a court for the man who killed her daughter. Eugene (Ore.) Register, Oct. 16, 1924.

⁵³"How far mere mercy may be the controlling motive for granting a pardon is a question addressed solely to the conscience of the executive. There can be no just cause of complaint 'when mercy seasons justice' if the act proceeds not from a mere whim, but is approved by an honest and sound discretion. It has been tersely said 'that the very notion of mercy implies the accuracy of the claim of justice.'" Governor Hill of New York, *North American Review*, vol. 154, p. 57 (1892).

III.

The power of pardon may be used for the benefit of the grantor, although, of course, such a motive would never be confessed by him. Says Montesquieu: "So many are the advantages which monarchs gain by clemency, so greatly does it raise their fame, and endear them to their subjects, that it is generally happy for them to have an opportunity of displaying it; which in this part of the world is seldom lacking."⁵⁴ Possibly this was true, to a certain extent, in times when criminal laws partook more of savage vengeance than they do at present; but even then the advantages gained by clemency were probably more than offset by the dangers to the monarch's security.⁵⁵ However that may be, some wholesale pardons at the hands of governors of American states have, apparently, proceeded somewhat upon Montesquieu's ancient theory. But certainly the general attitude of the public at present is hostile to the liberal use of the pardoning power, even when no selfish motives are suspected. "We have grown distrustful of pardons, and with abundant cause, since they have been tossed hither and thither quite as though justice had its fountainhead in the governor instead of in the people."⁵⁶

Some pardoning authorities have, apparently, been guilty of the outright sale of pardons, and many more have been suspected of the same; and "political pulls" and other evil influences have at times affected the administration of pardons as they have that of other matters of government.

IV.

1. An extremely prolific cause of pardons is the failure, real or alleged, of justice in the courts.⁵⁷ The miscarriage of justice for which the executive has found the courts to be more or less responsible and has attempted to correct by some form of pardon includes:

(1) Practical punishment of the (guilty) defendant by long imprisonment before trial, sometimes for months and even years. Such unfortunates should not be compelled to rely upon the discretion of the executive, but positive law should provide, where possible, for proportionate reduction of the sentence.⁵⁸

⁵⁴*Spirit of the Laws*, book 6, ch. 21.

⁵⁵Jeremy Bentham, *Theory of Legislation*, Atkins' ed., vol. 2, p. 172; *Works*, vol. 1, p. 521.

⁵⁶Oregonian, Jan. 13, 1925. See also C. Jensen, *Pardoning Power in American States*, chs. 3-4 (1922).

⁵⁷Cf. W. W. Smithers, *Executive Clemency in Pennsylvania*, ch. 5 (1909).

⁵⁸But see *Code of Virginia*, 1919, vol. 2, sec. 5019, note; *Virginia Law Register*, n. s., vol. 11, pp. 559-60 (1926).

- (2) Failure to provide proper defense—the defendant had no counsel, and none was assigned to him, or counsel was incompetent.
- (3) Allowing the defendant to plead guilty under a mistake.
- (4) Coercion into a plea of guilty, improper selection of the jury, manipulation of the jury.
- (5) Wrongful admission or exclusion of evidence.
- (6) Conviction upon insufficient, unreliable, perjured evidence; verdict not in accordance with the evidence; unfair trial in general; the conviction of those not guilty to the degree of conviction, or conviction of the absolutely innocent,⁵⁹ the insane, feeble-minded, stupid. Very often clemency is granted because only of “grave doubt,” “doubt,” “some doubt,” “uncertainty” as to guilt.

As to executive review of the question of innocence, Governor Pierce of Oregon stated the conservative attitude: “It is the function of the courts to pass upon a man’s guilt or innocence. It is not the function of the executive to again try the case before the convicted man has reached the penitentiary. In the courts all the facts in the case are placed before the jury in an orderly way. The prosecution presents all of its case. The defense presents its case. The facts are all before the jury when it retires to reach a decision. When that decision is reached it will stand, unless there is unusual showing of irregularity or error in the trial. I do not propose to usurp the power of the courts by becoming a trial judge.”⁶⁰ However, it should always be remembered that “the presumption of innocence does not survive a verdict of guilty.”⁶¹ Where evidence is discovered *after* conviction the pardoning authority is really conducting an independent judicial investigation.

- (7) Imposition of penalties disproportionate to the offense or contrary to agreement between the prosecutor and the defendant.

There are innumerable cases of every description in which sentence has been reduced because it has been considered too severe.⁶²

⁵⁹The commutation of sentence of the innocent, substituted for full pardon on account of improper pressure, is greatly to be condemned. Cf. W. W. Smithers, *Executive Clemency in Pennsylvania*, p. 123 (1909).

⁶⁰Oregon Journal, March 11, 1924. See also Governor Hill of New York, *North American Review*, vol. 154, p. 56 (1892); W. W. Smithers, *Executive Clemency in Pennsylvania*, pp. 122-33 (1909); C. Jensen, *Pardoning Power in the American States*, p. 104 (1922).

⁶¹F. Wayland, *Journal of Social Science*, 1884, p. 153. See also W. W. Smithers, *Executive Clemency in Pennsylvania*, p. 122 (1909).

⁶²The reduction of the time of aged convicts would seem to be justified to the extent that the courts have ignored the matter of age in imposing punishment. “In punishing those who have committed crimes, it is or should be the policy of those executing the law to consider how much or what percentage of the defendant’s life period will be taken by the sentence.” Attorney General Daugherty, *Letter to President*, *New York Times*, Dec. 31, 1921. “You are now past sixty years of age and have not many more years over your head. It is the

As to broken agreements made between the prosecution and the offender concerning the sentence to be imposed upon pleading guilty, clemency has been urged "solely for the sake of the government, which ought to keep faith, even with criminals"⁶³; and it has often been granted.

(8) Lack of uniformity of sentences, in the same jurisdiction or in the same court, for similar offenses and circumstances.

Under present conditions, courts have little in the way of general principles to guide them in imposing penalties. There is not even a generally accepted theory as to the grounds of punishment. "If one judge regards prevention as the primary purpose of punishment, another retribution, and a third reformation, each of the three must pass a different sentence for an offense of the same kind."⁶⁴ And standards in general are lacking. "Even in the most accurate and useful books of practice, to which all look for guidance and assistance during every stage of the criminal proceedings, down to the conviction of the offender, no serious attempt has been made to deal, even in the most general way, with the manner in which the appropriate sentence should be arrived at. . . . The most glaring irregularities, diversity and variety of sentences, are daily brought to our notice."⁶⁵

So often the pardoning authorities essay to correct the inequalities of justice thus arising. Said Governor Chamberlain of Oregon: "The administration of justice is uneven. To illustrate: There are ten judicial districts in the state. A man may be convicted in one of a simple felony, and sentenced to a long term in the penitentiary; while in another, where the crime committed is the same and under almost identical circumstances, the prisoner may be given a very short term. It seems to me that it is a part of the duty of the executive branch of the government to equalize, where conditions warrant, this apparent inequality in the administration of justice."⁶⁶

view of the court quite punishment enough, so far as you are concerned, that you were convicted at all. But public policy requires that a penalty should be imposed." Judge Reynolds of the Washington superior court, *Oregonian*, Jan. 29, 1924. On the contrary, it has been urged: "The cold truth is that it is far more merciful to sentence to death that murderer . . . whose span of life almost is run, than it is to pronounce the same sentence upon the young and vigorous." *Oregonian*, April 18, 1925.

⁶³*Report of the Attorney General of the United States*, 1905, p. 72.

⁶⁴T. Hopkins, *Wards of the State*, p. 206 (1913).

⁶⁵Lord Brampton, quoted, T. Hopkins, *Wards of the State*, pp. 205-6 (1913).

⁶⁶Message of Geo. E. Chamberlain, Governor of Oregon, to the Twenty-fifth Legislative Assembly, 1909, p. 10. Cf. Governor Stanley of Kansas, Nineteenth Annual Meeting of the Bar Association of the State of Kansas, pp. 57-8 (1902); Governor Blease of South Carolina, *Governors' Conference Proceedings*, 1912, pp. 54-5; Attorney General Daugherty, *Letter to President*, *New York Times*, Dec. 31, 1921. Courts at times follow the same principle in dealing with

But, unfortunately, the pardoning authorities have even less than the courts, if that is possible, in the way of standards for their correction of the courts in this regard.

The pardoning power may thus be used to remedy discrimination between rich and poor in the administration of justice.⁶⁷

However, there is real danger that emphasis upon equal administration of justice, as generally understood, may discourage the application of the principle of "individualization" of punishment, which is the only true basis of any rational equality, in favor of the discredited application of "a pound of punishment for a pound of crime." Moreover, such equalization of penalties may benefit the offender to the detriment of society. "The fact that others more guilty than he have escaped is no reason why he should escape also."⁶⁸

Doubtless consideration of the fact that countless offenders against the law are never even caught, much less convicted and punished,⁶⁹ that, indeed, "there is no man but offendeth God and the king almost every day,"⁷⁰ inclines all sorts of authorities somewhat to be lenient to the comparatively few offenders who are unfortunate enough to get into the clutches of the law. Governor West thus justified his liberal policy, in part, by quoting from Montaigne: "There is no man so good, who, were he to submit all his thoughts and actions to the law, would not deserve hanging ten times in his life."⁷¹

(9) Failure to consider or sufficiently to consider the mitigating circumstances of the particular case. So pardon is granted because of the convict's previous good character—"this should aid him now"; or

verdicts of the jury. Said Judge Skipworth of the Oregon circuit court: "Assuming that all three . . . were guilty, Blazier was the least guilty of the group. The other two were acquitted by trial juries. The court must abide by their verdicts. It is grossly unfair that Blazier, under the circumstances, should be incarcerated. . . . It is the judgment of this court that you be imprisoned in the Lane county jail to not exceed six months, and that you be paroled immediately to the sheriff." Eugene (Ore.) Guard., Feb. 2, 1924.

⁶⁷See Governor Goodrich of Indiana, *Journal of Criminal Law and Criminology*, vol. 11, pp. 341-2 (1914).

⁶⁸*Report of the Attorney General of the United States, 1900*, p. 276. "The rich murderer is not executed; therefore nobody should be executed. The poor man is made to go to prison for his crimes, while the rich man in prison is treated with favoritism and indulgence; therefore nobody should go to prison. Because the law is poorly enforced, the remedy is no law, and no-law enforcement. What miserable sycophancy, pitiful sentimentalism!" Oregonian, Feb. 13, 1912.

⁶⁹"There are many men inside the penitentiary who are entitled to consideration, just as there are many men outside the penitentiary who if they had their deserts, would be serving sentences." Governor West of Oregon, Portland (Ore.) Spectator, Dec. 23, 1911, p. 33.

⁷⁰Coke, *Third Institute*, p. 239.

⁷¹Oregon Journal, Jan. 25, 1915.

because he is "not a criminal at heart"; or because of his youth⁷²—"he was young and inexperienced"; because of his ignorance—he was "a victim of his ignorance and inexperience," "illiterate," an "ignorant farmer," "probably did not have a proper appreciation of the seriousness of his act," was a foreigner, or an Indian—"the attorney general was of the opinion that Indians should not be judged by quite the same standard as white people." Clemency has been extended also because the crime was induced by others, or the offender was insufficiently protected from temptation. "It was thought that the government was not entirely free from blame in putting a man so poorly paid and circumscribed in a position of such responsibility."⁷³ Lack of "evil intent" is also cause of much leniency; so is honest voluntary confession and plea of guilty. Often "mitigating circumstances," without further specification, is the explanation of action.

It is well established that "the court may take into consideration evidence as to matters which may be in aggravation or mitigation of the offense, though not admissible on the issue of guilt or innocence."⁷⁴ So it is urged that the mitigating circumstances should not be reconsidered.⁷⁵ However, sometimes the mitigating circumstances were unknown at the time of the trial.

(10) Mistake in law; mistake in sentence or in commitment.

In the correction of the courts the executive is clearly "nothing more than an additional cog in the judicial machinery."⁷⁶ And it is a serious question as to how far executive authorities should go in the exercise of this judicial function—become "one-man juries," "second-

⁷²*Contra*: There is too much feeling by young men that they can take a fling at big crime and then plead their youth and a first offense to escape punishment by means of a parole. The time has come to call a stop to this." Judge Morrow of the Oregon circuit court, Oregon Journal, April 11, 1925.

⁷³*Report of the Attorney General of the United States*, 1921, p. 687. On the ground partially that they were scandalously underpaid by the government, Judge Winslow of the United States district court recently freed four letter carriers who had confessed small peculations, and he received three thousand letters from all parts of the country praising his action. New York Times, Jan. 13, 1925, Feb. 8, 1925. But there are illustrations much to the contrary.

⁷⁴*Corpus Juris*, vol. 16, p. 1297 (1918).

⁷⁵"These are all taken into account by the law, and have been investigated by the judge and jury, and yet sentence has been pronounced. They should not be again brought forward to do away with the sentence that was given in view of them." D. M. Means, New Englander, vol. 34, p. 81 (1875). See also District Attorney S. Myers of Oregon, Oregonian, Jan. 3, 1926.

⁷⁶R. Garofolo, *Criminology*, Millar's trans., p. 369 (1914). Recognized in England before provision was made for appeal in criminal cases. "The home office has gradually developed into a court of review in criminal cases, whenever a formal application is made for the remission of the sentence. But the office acts rather as a court of mercy than as a court of appeal, because the cases wherein the secretary of state sits as a court of review to retry the prisoner, and to set aside verdicts, are exceedingly rare." A. Todd, *Parliamentary Government in England*, Walpole's ed., vol. 1, p. 205 (1892).

trial judges," "super-supreme judges."⁷⁷ The difficulties that here confront the executive are certainly very great. "Think of the governor of the state of New York considering fifteen hundred applications for pardon in a single year, and whether in every case there was a due proportion between the crime and the penalty; examining, of course, all the evidence on both sides; reviewing the testimony and mode of trial in every case, a task requiring great legal knowledge as well as a thorough perusal of the reports. Reflect that he hears evidence only on one side, that there is no prosecuting officer to expose false testimony, and that pardons are asked as personal favors. Consider that all this is but a small part of the duties of a governor, and consider, on the other hand, how long a time the decisions of these cases would take a judge and jury sitting constantly and having no other business to attend to, and decide whether it is likely that justice is furthered by such means."⁷⁸ By reason of the multitude of his duties the executive is often compelled practically to delegate the function of review to others. The fact that he often acts upon the advice of the trial judge and prosecuting attorney—consultation is sometimes required by law—helps to reduce error.⁷⁹ And in some states the pardoning power is vested in a board including judges in its membership.

As in the case of division of authority in other matters of government, the activity of the executive in this judicial matter at times causes both courts and juries to shift some responsibility upon the executive. "Judge and jury sometimes seem to think that no matter what the verdict is, the governor will rectify it if unjust."⁸⁰ "The circuit judge who sentenced him . . . stated in substance . . . that he gave him a stiff sentence, as he makes a practice of doing in such cases for the example, but he did so with the idea that in time the board could take into consideration circumstances and recommend clemency."⁸¹

But the multitude of errors charged to the courts is simply amazing, and, unfortunately, tends to encourage undue liberality in the exer-

⁷⁷The executive may himself decide the case before the courts have a chance. So Governor West once threatened to pardon certain persons if they should be convicted. "I look upon the indictments as most damnable," he said. Eugene (Ore.) Guard, May 22, 1914.

⁷⁸D. M. Means, *New Englander*, vol. 34, p. 76 (1875). See also *ibid.*, pp. 81, 84-6; *Oregonian*, March 14, 1913; October 31, 1925. Compare the relation, in this connection, between the executive and the courts on the one hand, and the relation between the higher courts and the lower courts on the other. W. W. Smithers, *Executive Clemency in Pennsylvania*, pp. 120-1 (1909); *Oregon Journal*, Nov. 8, 1925.

⁷⁹But see the contrary view below.

⁸⁰D. M. Means, *New Englander*, vol. 34, p. 86 (1875).

⁸¹*Report of Proceedings of the Advisory Board in the Matter of Pardons*, Michigan, 1903, p. 90.

cise of the pardoning power. Says a member of a board of pardons: "When I remember that forty-five per cent of the convictions for felonies that have been taken to the Colorado Supreme Court since its organization in 1867 have been reversed, my respect for the power of pardon increases . . . The mistakes of judges are legion, and the ways of juries are past understanding. For one abuse of the pardon power there are a thousand abuses of the convicting power. I have known a judge who, just after sentencing a man, sat down and wrote our board all the mitigating circumstances in the case while they were fresh in his mind and he alive and well, so the convict might have the benefit of it in after years on application for clemency. I have read dozens of communications from judges saying their sentences in specific cases were too severe . . . District attorneys time and again tell us that particular sentences are excessive and thus confess that a well-intended prosecution was transformed into an unintended persecution. It is a very common thing for us to have petitions for clemency from a majority of the jurors who rendered the verdict of guilty in the given case, and such petitions from all twelve jurors is not a novelty."⁸²

And, in spite of the alarming number of criminals, apparently now increasing, who escape punishment altogether, it must be admitted that, at times at least, the environment of the court is conducive to a spirit of savage vengeance. "It is evident that a judge unconsciously is often unduly influenced by the prejudiced atmosphere of a court room and the unreasonable clamor of a community, and hastily inflicts a sentence which in his cooler moments he would not deliberately approve."⁸³ There is ample evidence of this truth especially in the hideous sentences imposed by our own courts during the Great War and the period immediately following.⁸⁴

2. The substitution of the judgment of the pardoning authority for that of the courts has something of its converse in the deference of that authority widely shown to the judgment of those familiar or

⁸²H. B. Tedrow, member of the state board of pardons of Colorado, *Proceedings of the Annual Congress of the American Prison Association*, 1911, pp. 300-1. "The judges and district attorneys are not always the best judges of cases." Governor Sweet of Colorado, Eugene (Ore.) Register, July 18, 1923.

⁸³Governor Hill of New York, *North American Review*, vol. 154, p. 59 (1892). See also F. Wayland, *Journal of Social Science*, 1884, pp. 154-5; E. R. Johns, *Albany Law Journal*, vol. 47, pp. 385-6 (1893); Clarence Darrow, *Crime*, p. 265 (1922). "He never would have been convicted had it not been that he was an ex-convict and that an enraged public demanded a victim." Governor West of Oregon, *Oregonian*, Sept. 1, 1914.

⁸⁴The power of granting reprieves to allow consideration of applications for pardon is exercised by both the pardoning authority and the courts.

supposed to be familiar with the circumstances of the offense, and to public opinion.⁸⁵

The recommendation of the judge who presided at the trial,⁸⁶ the prosecuting attorney, the jurors, the witnesses, is very often the only "reason" for pardon assigned. "Obviously," said Governor Olcott of Oregon, "the executive office cannot be familiar with the circumstances surrounding the cases of hundreds of men who are sentenced to the penitentiary or to county jails. The men who best know these circumstances are the judge and district attorney who acted in the cases.⁸⁷ And hence their advice is often followed without question. "I should deny the application for pardon in this case," said President Cleveland, "except for the very earnest appeal made to me by the judge who sentenced the convict. In deference to his opinion and wish the pardon is granted, and because in the face of his emphatic representation I distrust my own judgment, which would lead me to refuse the application."⁸⁸

Likewise the judgment of members of the community affected is widely respected. "The rightfulness of this conviction cannot be questioned. I am moved, however, to advise you to heed the prayer of the great number of supplicants for pardon, who by reason of familiarity with the transactions out of which the offense arose and their thorough knowledge of the offender, take the responsibility . . . of earnestly urging it."⁸⁹

Deference to the judgment of others should be distinguished from deference to "public opinion," although they are likely to be confused in practice. The principle appears in Attorney General Dougherty's attitude in the Debs case. "There is . . . in this particular case of Debs a danger not often encountered, and that is that his prolonged confinement will have an injurious influence on a large number of people who will undoubtedly regard his imprisonment unjustifiable. . . . If this thought affected only a few, it would be immaterial, but undoubtedly a large number of persons will entertain the same view, and since the primary object of punishment is the benecial effect it will have upon society from the standpoint of example, continued confinement beyond a certain period may, under the conditions set forth, be far from beneficial in its tendency in other respects and operate also as an

⁸⁵See W. W. Smithers, *Executive Clemency in Pennsylvania*, ch. 6 (1909)—of special value.

⁸⁶Condemned as uniting departments properly separated, etc. *Ibid.*, pp. 143-9.

⁸⁷Oregonian, Nov. 4, 1919.

⁸⁸*Report of the Attorney General of the United States*, 1896, p. 184.

⁸⁹*Report of the Attorney General of the United States*, 1902, p. 271.

example of extreme and unjustifiable harshness.”⁹⁰ Governor Blease of South Carolina went so far as to say: “I took the position that I was the servant of the people . . . and when a community where a crime had been committed, with the best people, the white people, signing the petition, said that the criminal had been punished enough, I turned him out without regard to criticism.”⁹¹

The principle of this attitude is, apparently, that the members of the community are most directly concerned in the matter and that, therefore, they have a right, if so inclined, to dispense with the punishment of the offender. The principle is at times utterly repudiated. Said Governor Miller of New York: “Nor can I grant executive clemency merely because a great many people have petitioned me to do so.”⁹²

Conversely, public sentiment sometimes keeps a prisoner in jail. Thus Governor Olcott delayed the pardon of two men whom he considered to be absolutely innocent of the crimes for which they were convicted on account of the inflamed state of the public mind caused by recent murders. “I saw at the time of these murders,” he said, “that for the benefit of the prison system, for the benefit of Pander and Branson themselves, and for the benefit of every one concerned it would be a sorry mistake to grant them executive clemency at that time, but upon the return of the public mind to a normal state I would exercise

⁹⁰Attorney General Daugherty, *Letter to President*, New York Times, Dec. 31, 1921.

⁹¹*Governor’s Conference Proceedings*, 1912, p. 53. Further, says a dispatch from South Carolina: “Among thirty-three convicts to whom Governor Blease has extended executive clemency in honor of Thanksgiving Day is William H. Mills a murderer, serving a life sentence. He has been paroled along with fifteen others convicted of various degrees of homicide. Addressing a turbulent crowd of his supporters here last summer, Blease declared he would pardon any convict whom the people wanted liberated. The crowd shouted to release Mills. Blease said that if they would see to it that his bitter political enemy, J. C. Otts, prosecuting attorney of this circuit, was defeated in the primary election he would turn Mills loose. Mr. Otts was beaten.” New York Sun, reprinted in Oregonian, Dec. 4, 1912. Compare the action of Governor Blaine of Wisconsin, F. L. Collins, *Our American Kings*, pp. 111-3 (1924.) This reminds us of the old story: “Now at the feast the governor was wont to release unto the multitude one prisoner, whom they would,” etc. Matthew, ch. 27. “Governor Morrow [of Kentucky], it was said at the state house, took the position that as Whittaker [nominated to office, while in jail] led his opponent by more than one thousand votes, this popular endorsement was sufficient ground for issuing a pardon.” New York Times, Nov. 7, 1920. Where the state has abolished capital punishment public opinion so expressed has been recognized by commutation of the death penalty imposed upon federal convicts in that state.

⁹²New York Times, Jan. 15, 1921. So “courts, by whatever name they may be called, that administer law or deal out justice, are not constituted to yield their judgments to the popular wish. It is their duty . . . to stand up and resist this popular clamor.” P. L. Williams, *Report of the Eighth Annual Meeting of the State Bar Association of Utah*, pp. 31-2 (1905).

clemency in these cases. I deemed it better that these two men should make vicarious sacrifices for a time for the benefit of the large number of men involved."⁹³

Doubtless much abuse in granting pardons would be prevented if the authorities would act upon the principle that "clemency should be extended in no case unless reasonably deemed to accord with the average common intelligence and general sentiments of the people."⁹⁴

The ascertainment of "public opinion" of course encounters the same difficulty here as in other connections. Much reliance is put upon formal petitions containing large numbers of signatures, sometimes running into thousands and hundreds of thousands—of "leading citizens," "prominent people," "good people," "excellent people," "best citizens," "influential people," "business men," "business and professional men," etc. Numerous personal letters also carry great weight. But petitions at least are largely a delusion and a snare.⁹⁵ Moreover, "recommendations are obviously to be obtained according to the state in life of the prisoner and the political and social influence that he can command."⁹⁶ Although at times petitions and letters protesting against contemplated leniency are influential, generally adverse opinion has no proper expression.

3. The infirmity of the law, real or supposed, in relation to both the definition of crimes and the imposition of penalties, has been the cause, expressed and implied, for much practical abrogation of the law by the pardoning authorities. "The pardoning power is a useful one. It answers about the same purposes in the administration of criminal matters that equity does in the administration of civil matters. Equity supplies that wherein the [civil] law by reason of its universality is deficient; and pardons supply that wherein the criminal law by reason of its universality is deficient."⁹⁷ Said Governor Goodrich: "The very nature of criminal law makes such a power vested somewhere essential to relieve the rigor and the cruelty of the law. The law must, in theory at least, apply to all persons alike. It cannot take

⁹³Oregonian, Sept. 12, 1920.

⁹⁴W. W. Smithers, *Executive Clemency in Pennsylvania*, p. 106 (1909). See the whole section, pp. 106-13, and pp. 126-9.

⁹⁵The number of persons who are ready to sign any petition for a pardon or a remission of sentence is, after all, infinitesimal compared with the number who neither sign nor sympathize; but, when we hear of thousands of signatures the number sounds formidable, and is apt to carry, or to be thought to carry, more weight than it deserves." A. Wills, *Nineteenth Century*, vol. 62, p. 893 (1907).

⁹⁶D. M. Means, *New Englander*, vol. 34, pp. 80-1 (1875). See also Governor Blease of South Carolina, *Governors' Conference Proceedings*, 1912, pp. 54-5.

⁹⁷*State v. Alexander*, 76 N. C. 231 (1877).

into consideration the particular individual, nor the defects or injustices that frequently arise in its administration. Cases frequently arise to which no general rule can apply without the gravest of injustices, and the most grievous inhumanity."⁹⁸

It is true that the courts, where the sentence is not wholly determined by law, have authority to take into consideration mitigating (as well as aggravating) circumstances in each particular case in the imposition of sentence—that there is a sort of judicial criminal equity,⁹⁹ but there are limitations, very hazy,¹⁰⁰ beyond which the courts may not or will not go,¹⁰¹ so that there are in fact mitigating circumstances unnoticed by the courts that the executive often feels bound to consider.¹⁰²

It has been *presumed* that, in cases where the law operates too harshly, "had the legislature known of the particular facts, and been familiar with the general surroundings, it would have relieved them of the general terms of the law, and the courts, had they the power, would have excepted them from the particular statute."¹⁰³ And it has been maintained that only when such a presumption arises can the pardoning power properly act. Says Hawkins: "The law . . . seems to have intrusted the king with this high prerogative, upon the special confidence that he will spare only those whose case, could it have been foreseen, the law itself may be presumed willing to have excepted out of its general rules, which the wit of man cannot possibly make so

⁹⁸Journal of Criminal Law and Criminology, vol. 11, pp. 336-7 (1920). See also Aristotle, *Nicomachean Ethics*, Lewes' ed., book 5, ch. 15; Hawkins, *Pleas of the Crown*, ch. 37, sec. 8; Blackstone, *Commentaries*, book 1, p. 62; book 4, p. 397; W. W. Smithers, *Executive Clemency in Pennsylvania*, pp. 100-1 (1909); Journal of Criminal Law and Criminology, vol. 1, pp. 560-1 (1910).

⁹⁹Suggestions for a criminal court of equity. A. E. Popple, Journal of Criminal Law and Criminology, vol. 16, pp. 151-3 (1925).

¹⁰⁰Specific rules are proscribed for judicial guidance in the Philippine and other criminal codes.

¹⁰¹Immediately upon imposing sentence, at times the court appeals for executive clemency. So far as courts practically exercise the pardoning power by suspension of imposition of sentence and even execution of sentence, the same considerations apply as in the case of executive pardon.

¹⁰²*Cf.* Benjamin Harrison, *This Country of Ours*, p. 144 (1897).

¹⁰³Governor Goodrich of Indiana, Journal of Criminal Law and Criminology, vol. 11, pp. 336-7 (1920). See also F. Lieber, *Political Ethics*, 2nd ed., vol. 2, p. 395 (1874); Attorney General Bonaparte, *Proceedings of the Annual Conference of the National Prison Association*, 1907, p. 200; W. W. Smithers, *Executive Clemency in Pennsylvania*, pp. 100-1 (1909). "If the legislator could have known that certain individual cases would or would not be included in the general case in which he would have wished that the punishment should cease, he would act unwisely were he to rely upon any other person for its cessation. . . . But he does not possess this knowledge, unless, in quality of legislator, he acts also in that of a prophet. It follows, therefore, that he must rely upon some other"—the executive. Jeremy Bentham, *Works*, vol. 1, p. 520.

perfect as to suit every possible case."¹⁰⁴ This is in accord with the established view that denies the power of "extensive" and "restrictive" interpretation of statutes to the courts.¹⁰⁵

Doubtless pardons may have been considered necessary and may have been granted where it was evident that the law, in spite of its terms, could not have been actually intended to apply to a particular case; but in the mass of pardons available for examination none seems to have been granted (or requested) for this reason. It would seem that all of the exceptions made by pardon have been exceptions that the legislature had no desire to make, or did not know how to make, with safety to society. For all the operation of the criminal law here involved is notorious, and must, accordingly, be presumed to have been long known to the makers of the law. This is clearly in keeping, again, with the equity of the civil law, which gave relief not only where the remedy of the common law was inadequate, but also in direct contradiction of the express rules of the law.

As will appear, in practice there has been much variation in the application of criminal "equity."

(1) There are a number of offenses punishable by the law about which there can be no doubt as to the *formally expressed* intention of the legislature, but which, at the same time, it is nearly universally recognized, deserve as much leniency as possible, perhaps even absolute pardon.

The case of "political offenders" is the most conspicuous. Technically traitors, if they escape the limit of punishment during the period of commotion, they are always, sooner or later, pardoned. Said Senator Carl Schurz, himself a former general in the Union army, in a plea for a general amnesty for all the rebels of the Civil War: "Whatever may be said of the greatness and the heinous character of the crime of rebellion, a single glance at the history of the world and at the practice of other nations will convince you that in all civilized countries the manner of punishment to be visited on those guilty of that crime is almost uniformly treated as a question of great policy and almost never as a question of strict justice. And why is this? Why

¹⁰⁴*Pleas of the Crown*, ch. 37, sec. 8. See also Aristotle, *Nicomachean Ethics*, Lewes' ed., book 5, ch. 15; *State v. McIntyre*, 1 Jones L. 1, 4, 8 (1853); *State v. Leak*, 5 Ind. 359, 363 (1854); W. W. Smithers, *Executive Clemency in Pennsylvania*, pp. 100-1 (1909).

¹⁰⁵Austin, repudiating "the pretended [judicial] interpretation which extends, and the pretended interpretation which restricts," declares that "if judges might abrogate laws, wholly or in part, whenever their actual provisions were not consistent with their grounds, all statute laws would become uncertain, and the cases which they include would be abandoned to the *arbitrium* of the tribunals." *Jurisprudence*, 4th ed., vol. 2, p. 580.

is it that a thief, although pardoned, will never again be regarded as an untainted member of society, while a pardoned rebel may still rise to the highest honors of the state, and sometimes even gain the sincere and general esteem and confidence of his countrymen? Because a broad line of distinction is drawn between a violation of the law in which political opinion is the controlling element (however erroneous, nay, however revolting that opinion may be, and however disastrous the consequences of the act) and those infamous crimes of which moral depravity is the principal ingredient; and because even the most disastrous political conflicts may be composed for the common good by a conciliatory process, while the infamous crime always calls for a strictly penal correction. You may call it just or not, but such is the public opinion of the civilized world, and you find it in every civilized country."¹⁰⁶

In view of the actual practice, should the facts not be frankly recognized by some prospective general legislative enactment?¹⁰⁷

A similar class of offenders, but passive rather than active, are the "conscientious objectors"; and they are treated, accordingly, in a similar manner.

Here, too, should be considered also those who commit offenses, even murder, against others for the benefit of the latter—the girl who kills her lover to put him out of misery, the father who kills his daughter for the same motive—both freed by the jury.¹⁰⁸

Presidents, governors, courts, jurors pardon many less technically guilty persons committing offenses for others: "She violated the [liquor license] law for the sake of her children, who were cold and hungry, and she had nothing with which to buy food and clothing for them"; "he stole food for his wife and children"; the offense of the poor man was "almost justified by the necessities of his situation."

Such offenses are closely related to the so-called "crimes of necessity"—crimes committed in face of overwhelming misfortune, as stealing or cannibalism to prevent starvation, throwing out some of the passengers from the boat to keep it from sinking—generally condoned by the pardoning power if not by the courts. "The *jus necessitatis* is the

¹⁰⁶Congressional Globe, 1871-2, part 1, p. 701 (1872). See also W. G. Hall, *Political Crimes*, ch. 10 (1923).

¹⁰⁷Political offenders are considered below from another point of view.

¹⁰⁸In regard to the latter it was said: "The law but does what the law should do, as the code now runs. It cannot concede to the individual, even in such lamentable circumstances as these, the right to take away a human life. To do so would be hazardous in the extreme. And yet, with a force emphasized by this case and its sadness, we perceive that even the law must recognize an occasional exception, though it defeat its own ends to do so." *Oregonian*, Nov. 10, 1925.

right of man to do that from which he cannot be dissuaded by any terror of legal punishment. When threats are ineffective, they should not be made, and their fulfillment is the infliction of needless and uncompensated evil."¹⁰⁹ Accordingly, some continental codes have excepted such cases from the operation of the general criminal law, although this expedient has been avoided, perhaps as dangerous, in English and American law.¹¹⁰

The acquittal or pardon of offenders obeying the "unwritten law" is probably very widely approved—evidence of dissatisfaction with the *written* law here applicable. Said Governor Comer of Alabama: "The man was convicted for an offense committed in defense of his home. For such offenses as these I believe it right to pardon the offender, so he may return to the continued care and protection of his family."¹¹¹

It is notorious that trial courts (at times) and juries (often) take this same attitude. This fact has been urged as reason why the executive should not act in such cases. Said the Alabama board of pardons: "Too many guilty men escape punishment through a sympathetic and lenient jury. When a jury does mete out a punishment under circumstances of this kind, the pardon power should hesitate to set it aside."¹¹²

However, the unwritten law has actually been enacted into written law in some states.¹¹³

There is of course danger here under any circumstances.¹¹⁴ Moreover, "lynch law" has been vindicated in the same way. Said Gov-

¹⁰⁹J. W. Salmond, *Jurisprudence*, 2nd. ed., p. 351 (1907).

¹¹⁰See especially Blackstone, *Commentaries*, book 4, pp. 31-2; J. F. Stephen, *History of the Criminal Law of England*, vol. 2, pp. 108-110 (1883); C. K. Allen, *Hibbert Journal*, vol. 23, pp. 714-7 (1925); *United States v. Holmes*, 1 Wall. Jr., 26 Fed. Cas. 360, 366 (1842); *R. v. Dudley*, 1 L. R. 2 B. D. 273, 15 Cox C. C. 624 (1884). *Contra*: "The spirit of the law is not intended to place the stigma of a crime upon a man who will commit a theft to prevent his wife and children from starving. The case will be presented to the grand jury as speedily as possible, but I do not see how anyone can find that Curley committed a crime." District Attorney C. J. Dodd of New York, *New York Times*, Dec. 1, 1925. See also William Cobbett; *Poor Man's Friend*, No. 1 (1826).

¹¹¹Press dispatch, Dec. 13, 1907. "Members of the pardon board do not hesitate to say that the defendant should not even have been tried." *Ibid*. See also Governor Vardaman of Mississippi, *Chicago Record-Herald*, July 19, 1907. Similar is the commutation of the sentence of a (technical) murderer acting in accord with ancient tribal custom.

¹¹²*Report of the Alabama Board of Pardons*, Oct. 1-Dec. 31, 1917, p. 20. Cf. W. W. Smithers, *Executive Clemency in Pennsylvania*, pp. 127-8 (1909).

¹¹³See several discussions of the subject in *Virginia Law Register*, vol. 13 pp. 1-11, 75-7, 93-113, 333-4, 728-30, 829, 993 (1907).

¹¹⁴"Hail to that statesman, who will bring the statutes more into accord with the public sense of justice and right without surrendering any precious word or line or principle of the bill of rights." T. W. Harrison, *Virginia Law Register*, vol. 13, p. 2 (1907).

ernor Blease of South Carolina: "I have said it on the stump all over my state that I would never order out the militia and ask the home boys of South Carolina to shoot down their friends and their neighbors to protect a black brute who had assaulted a white woman of our state, and I will never do so. Therefore, in South Carolina, let it be understood that when a negro assaults a white woman, all they want to know is that they have got the right man and there will be no need of a trial, and there ought not to be any need of it in any civilized community."¹¹⁵

That the offense was only a "technical" rather than a "real" violation of the law is often the ground of clemency. Indeed it seems illogical that while, under modernized rules of criminal procedure, the technical violation of the law by the state will not hinder the punishment of the defendant, provided that he receives substantial justice, he cannot be excused by the court because his offense was only technical. The difficulty increases with the increase of specification in the statute law. In various situations of the civil law "substantial" compliance is sufficient. It might be possible to relieve the situation by some further application of the principle now recognized by the law in the "tolerances" of standards of measure and the "days of grace" of negotiable instruments. But, perhaps, this could not be carried very far.

The pardon of one kind of technical offenders, testers of the validity of criminal statutes, would be rendered unnecessary by the general adoption of the declaratory judgment.

"Petty" offenses¹¹⁶ are also likely to be more or less condoned. "The sentence is nominal; the affair was unimportant, and should have been disposed of by a *nolle pros.* of the indictment."¹¹⁷

It is extremely difficult to arrive at anything like a satisfactory

¹¹⁵*Governor's Conference Proceedings*, 1912, p. 54.

¹¹⁶"Equally in the criminal and civil departments of the law, the things whereof it takes or refuses cognizance differ as well in their magnitudes as in their natures. And in some circumstances, it will not notice a small thing; in others, it takes jurisdiction alike of all magnitudes." J. P. Bishop, *New Criminal Law*, 8th ed., vol. 1, p. 117 (1921).

¹¹⁷President Cleveland, *Report of the Attorney General of the United States*, 1896, p. 197. "Information has been received that members of the department are unnecessarily issuing summonses for petty violation of the traffic regulations, causing unnecessary annoyance to the public who drive, and unnecessarily blocking the traffic court with trivial cases which take members of the department from patrol duty. This practice must be discontinued. Arrests should not be made where a summons will answer the purpose and a summons must not be issued where a warning will suffice." Order of Police Commissioner Enright of New York City, *New York Times*, Aug. 25, 1925.

definition of "technical" offenses and "petty offenses." In various applications each is a class of the other.

It is notorious that many kinds of offenses, especially *mala prohibita*, another very indefinite class, escape punishment by reason of the jury's hostility to the law,¹¹⁸ and there is some evidence of a like tendency in the pardoning power.¹¹⁹

The nullification of the law in case of all these less serious offenses might possibly be reduced by vesting jurisdiction over them in some kind of administrative tribunals—"confining the criminal jurisdiction of the courts to those things which can be more fairly described as 'crimes.'" ¹²⁰

The enormity of a law penalizing children too young to appreciate the nature of the offense may be corrected by clemency. "Petitioners were mere children, aged eleven and ten years, respectively when they pleaded guilty [to theft of United States mail] and were sentenced." The attorney general considered their indictment "of very doubtful expediency," and they were pardoned upon his recommendation.¹²¹

It is certain that both judges and jurors (males) are inclined to discriminate very generally in favor of women offenders in the *imposition* of penalties, and pardoning authorities are similarly affected at times in the *removal* of penalties. Said Governor West: "When I saw that woman in the penitentiary (the only one there), it made me sick, and so I turned her loose." Attorney General Daugherty recommended the commutation of the death penalty (granted) "for the sole reason that the applicant was a woman and in order to avoid the spectacle of a woman being executed."¹²² Indeed there is a very general popular sentiment against imposing the death penalty upon a woman no matter how heinous her offense.¹²³ However, there is much opposition to discrimination, in general, in favor of women, and, perhaps, even among women themselves. Thus Governor Hughes of New York declared, in refusing to commute the death penalty in case of a woman murderer: "The law of the state regarding murder makes no distinction between the sexes and a woman who is found guilty of this

¹¹⁸The [Philadelphia] May grand jury refused to return indictments in many liquor cases because its members did not believe in the liquor laws, the foreman declared today in making the jury's final report to Judge Monaghan." New York Times, May 30, 1925.

¹¹⁹Cf. W. W. Smithers, *Executive Clemency in Pennsylvania*, p. 116 (1909).

¹²⁰*First Report of the Judicial Council of Massachusetts*, pp. 30-1 (1925); *Second Report*, pp. 13-28 (1926). For discussion of a distinction between "public torts" and real crimes" see Harvard Law Review, vol. 35, pp. 462-4 (1922).

¹²¹*Report of the Attorney General of the United States*, 1908, p. 74.

¹²²*Report of the Attorney General of the United States*, 1921, p. 691.

¹²³See the discussion by M. Shipley, *Green Bag*, vol. 19, pp. 234-6 (1907).

crime is subject to the same penalty as a man. The law should be impartially enforced."¹²⁴ And Francis Lieber said that discrimination in such cases is a reflection upon the personality of women. "Is then woman not a moral and responsible being, and shall we again disgrace her by holding her inaccountable after she has been raised by positive laws to moral accountability?"¹²⁵ Perhaps the women would be better satisfied if the discrimination should be based upon the avowed principle that generally women do not need the same deterrent influences that are necessary to keep their brothers from going astray.

Leniency of the pardoning power toward convicts who were drunk (where specific intent is not an ingredient of the crime) when they committed the offense, or who ravished women of bad character, may perhaps be considered an unfortunate enlargement of the law of mitigating circumstances.¹²⁶

Ignorance of the law is often ground for clemency.¹²⁷ "While ignorance of the law is no legal defense and does not touch the essence of the offense, yet in a case of this sort it may be that the lesson will be taught more effectively by an enforcement of the law in mercy than in rigor."¹²⁸

There is a popular prejudice against conviction upon circumstantial evidence, and this is at times reflected in executive interference with the sentence so determined.¹²⁹

It is a rule of law that the repeal of a criminal statute (decision

¹²⁴Quoted, W. W. Smithers, *Executive Clemency in Pennsylvania*, p. 171 (1909).

¹²⁵*Political Ethics*, 2nd ed., vol. 2, p. 398 (1874). So Judge Bourquin of the United States district court said: "Women today are demanding all the rights enjoyed by men and must expect to bear the law's penalties equally with men." *Oregonian*, Feb. 8, 1925. And it is reported that when a New York judge declared that "if the prisoner were a man he would send her to jail, but, since she was a woman he would let her go because the indignation of her sex would be aroused if he committed her," he caused great resentment among suffragist leaders. "Discrimination in favor of women was also an insult to women, they said. "To bestow or accept favors is deadening to the moral fibre. Our right is to be judged, not condoned." *Oregon Journal*, July 1, 1913.

¹²⁶"If this man [petitioner for release] should again succumb to the appetite for strong drink, the best place for him and the safest place for the people is where he is." *Report of the Advisory Board in the Matter of Pardons*, Michigan, 1894, p. 38. "Practically every plea [for the pardon of a rapist] has . . . alleged the prior delinquency of . . . [his victim]. Under the laws of our state such prior delinquency cannot be set up as a defense to the crime." Governor Pierce of Oregon, *Oregonian*, Nov. 29, 1925.

¹²⁷And see W. W. Smithers, *Executive Clemency in Pennsylvania*, p. 115 (1909). This may be considered by the court in the mitigation of punishment.

¹²⁸*Report of the Attorney General of the United States*, 1904, p. 118.

¹²⁹Unwillingness to permit a life sentence to be executed upon a convict condemned by a single magistrate (United States consular court) was cause for commutation in one case. *Report of the Attorney General of the United States*, 1889, p. 254.

that the law is unconstitutional here has the same effect) or the reduction of the penalty of the statute is of no avail to the convict once execution of sentence has begun, at least after the expiration of the term of court when sentence was imposed; and this has caused the exercise of clemency. "Ex post facto laws are prohibited because it is unjust that a man be punished for an act that was not punishable at the time it was committed. A rigid application of this principle would require that a man suffer the penalty attached to his offense when he committed it. . . . But it is not necessary to press this to an extreme. The law-making power could have easily inserted in the changed law a provision that offenders under the old law should be set free after they had served the shortened term."¹³⁰

(2) There are other offenses, regarded as essentially evil and properly punishable, but as demanding clemency because the penalty prescribed by the law is considered to be excessive or otherwise improper.¹³¹

A long line of governors of Kansas practically commuted the death penalty by refusing to sign the requisite death warrant. Governor Walton of Oklahoma declared: "Regardless of the criticisms that may be hurled at me, I have the legal authority to say that no man shall die in the electric chair or by the hangman's noose in this state, and that is my resolve."¹³² Other authorities have enforced the law although obnoxious to them. Said King Oscar of Sweden: "Regardless of my personal views as to the justice and expediency of the death penalty in general, it is my firm conviction that I have no right, by exercising the pardoning power in cases of this character, to override a law which has been adopted by the common consent of king and parliament."¹³³ And Governor West thus accepted the defeat of his campaign against capital punishment: "Hanging is all wrong. It is a medieval, barbaric practice. But the people of this state voted last month against the abolition of capital punishment. In letting these

¹³⁰D. M. Means, *New Englander*, vol. 34, p. 83 (1875). Pardon for violation of the neutrality laws after the United States became an ally of the belligerent concerned involves much the same principle. Practical increase of the penalty by removing a federal convict from one state prison to another where good conduct received less credit had to be met in the same way until the enactment of the uniform good-conduct law in 1902. *Report of the Attorney General of the United States*, 1903, p. 857. A pardon issued to validate an illegally suspended sentence is really but the substitution of one form of pardon for another.

¹³¹*Cf.* W. W. Smithers, *Executive Clemency in Pennsylvania*, pp. 122ff (1909).

¹³²*New York Times*, April 8, 1923. "The Emperor Maurice made a resolution never to spill the blood of his subjects. Anastasius punished no crimes at all. Isaac Angelus took an oath that no one should be put to death during his reign." Montesquieu, *Spirit of the Laws*, book 6, ch. 21.

¹³³Quoted, R. Garofolo, *Criminology*, Millar's trans., p. 370 (1914).

men hang, I am obeying the mandate of the people. They asked for this."¹³⁴

The reprieve of the death sentence until the legislature or the people may have a chance to abolish it, granted by some governors, necessarily involves an unfortunate contusion of legislation and administration, and leaves the result uncertain.¹³⁵

"Citizenship" pardons are often granted, sometimes as of course, to remove the disabilities remaining after sentence has been served.¹³⁶ By general law in some jurisdictions the full execution of the sentence operates as an absolute pardon.

Governor Donaghey of Arkansas pardoned hundreds of convicts because of his opposition to the convict-labor system of the state, and likewise pardons have been granted to prevent deportations.

Under our system of government the same act may constitute an offense against more than one unit of government, and hence, in effect, a man may be punished more than once for the same offense. Double punishments have been prevented by pardon. "It seemed unjust that he should serve two terms for one act." In accord with this principle double punishment for the same act in violation of statute and municipal ordinance is prohibited in some jurisdictions.

Fines are often remitted because of the poverty of the offender.¹³⁷ Such action is rendered less necessary by the adoption of a general law for relief of convicts upon taking the "poor debtors' oath."¹³⁸

Pardons or commutations are very often granted because the minimum penalty imposed by law is considered too severe. Indeed in such cases juries often refuse to convict. "The trial judge . . . stated

¹³⁴Oregon Journal, Dec. 13, 1912. See also Governor Miller of New York, New York Times, Jan. 15, 1921.

¹³⁵"In this way the people of the state will act as a jury. There will be plenty of time for discussion of the proposition before next November, and all who vote for it will go into the polling booths with their eyes opened to the fact that they are either voting to aid in hanging these men or to save their necks." Governor West of Oregon, Oregonian, Jan. 5, 1912. "These miserable wretches will be used as a bogey to frighten the people into voting down capital punishment." Eugene (Ore.) Register, Jan. 1, 1912. See also W. W. Smithers, *Executive Clemency in Pennsylvania*, pp. 124-31 (1909).

¹³⁶Sometimes the purpose is to allow the convict to be used as a witness, and not for his own benefit, as indicated below.

¹³⁷The release of a prisoner in order that he may harvest his crop, etc., very frequent, or to work out his fine, involves the same principle.

¹³⁸"He had property, so could not conscientiously take the poor debtor's oath, but was unable either to sell his real estate or borrow money on it." *Report of the Attorney General of the United States*, 1922, p. 443. Other plans, proposed, to prevent discrimination against the poor are the abolition of all punishment by fine, and the creation of a "sliding scale" of fines applied in accordance with amount of income. There is some positive authority for the court's consideration of the pecuniary circumstances of the defendant in determining the sentence.

that he would have awarded a shorter term of imprisonment had he been permitted by the statute."¹³⁹ The elimination of the specific minimum penalties would reduce the necessity of pardons.

The original penalty often becomes greatly increased by reason of effects of imprisonment on the convict not contemplated in the sentence. Disease, both physical and mental, quite commonly results from confinement, and often can be relieved, if at all, only by release from prison, frequently granted for the purpose. "It is not the intention of the law in punishing these prisoners for the offense of robbery to cause their death," said Attorney General Knox.¹⁴⁰ However, such unfortunate results are not uncommon,¹⁴¹ and it is to be presumed that the legislators have always been aware of this fact. Necessity for pardon in such cases is at least reduced by adequate provision for prison hospital facilities.¹⁴² To guard against deception, or for other reasons, paroles are sometimes granted instead of absolute pardons.

"There is a sort of prevailing notion among the people, or some classes of them, that any prisoner ought not to die in prison, but that he should be released whenever his illness is believed to be fatal. Such people argue that the public interests cannot suffer if the prisoner should be allowed to die outside of prison walls, and that the dictates of humanity require that himself and his friends should be spared the alleged disgrace of such an ending of his life."¹⁴³ Pardoning authorities are quite generally so affected and pardons are often granted accordingly.¹⁴⁴ However, in case of life-termers the sentence doubtless

¹³⁹"A new way of extending clemency has been discovered by Municipal Judge Tazwell, to be used in cases where some punishment is thought deserved, but in which the minimum penalty of the law is thought too severe. This is to postpone the case till about the time when the punishment is deemed sufficient, then call it up and dismiss it." *Oregonian*, March 6, 1912. "At present . . . judges hesitate to send a young man, who has committed his first crime unless the crime be heinous, to the penitentiary. . . . However, youthful offenders must not go scot free, but must be made to pay the penalty and I believe this can be done by having more misdemeanors in our code." Judge Skipworth of the Oregon circuit court, *Oregon Journal*, April 26, 1925.

¹⁴⁰*Report of the Attorney General of the United States*, 1902, p. 244. Cf. F. Lieber, *Political Ethics*, 2nd ed., vol. 2, p. 399 (1874); W. W. Smithers, *Executive Clemency in Pennsylvania*, pp. 171-2 (1909). Wounds received at arrest, etc., have received like consideration.

¹⁴¹"As for ill health, it must be remembered that few people are as healthy in prison as they would be outside; and that there should be no discrimination among criminals on this score; either all criminals who grow unhealthy should be let out, or none." Theodore Roosevelt, *Autobiography*, p. 464 (1913).

¹⁴²Governor Hill of New York, *North American Review*, vol. 154, p. 60 (1892).

¹⁴³Governor Hill of New York, *North American Review*, vol. 154, p. 60 (1892).

¹⁴⁴Governor Hill suggested that permanence of release might be conditional upon failure to recover, but said that this "might seem to be a questionable

contemplates death in prison. But this objection cannot be asserted in case of others, because a "fatal illness during a short term is an unexpected event."¹⁴⁵

Release from prison (only temporary sometimes) to prevent childbirth there is probably as much for the benefit of the child as of the mother.

To the extent that any of the abrogation of the criminal law is desirable, the law itself should, as far as practicable, be amended by general legislative enactment rather than left to the arbitrary discretion of executive authorities. Criminal law and criminal equity should be "fused." "Clemency . . . should be excluded in a perfect legislation."¹⁴⁶ In most cases the remedy is obviously simple, but in others the difficulties are considerable, to say the least. But, doubtless, so far as the absence of effective legislation is not due to mere inertia, it is due, to some extent, to "superabundance of caution." So probably it has always been. An illuminating illustration occurs in the ancient English law, according to which, although the court found that the defendant had committed homicide "in his defense or by misfortune," he needed a pardon to save him. "Then by the report of the justices to the king, the king shall take him to his grace if it please him."¹⁴⁷

However, the criminal law, as all other law, will always be imperfect, and there will therefore doubtless always be required some exercise of criminal equity. "The alternate appearances of law and equity as the mutual checks and corrections of one another are lasting and not transitory phenomena."¹⁴⁸

V

1. That the convict has "thoroughly reformed," is "deeply penitent," "has learned his lesson,"¹⁴⁹ is well established ground for par-
exercise of power, and at least a violation of propriety. North American Review, vol. 154, p. 61 (1892).

¹⁴⁵Governor Hill of New York, North American Review, vol. 154, pp. 60-1 (1892). Paroles to permit attendance at a mother's funeral, etc., come under the same principle.

¹⁴⁶Beccaria, *Essay on Crimes and Punishments*, ch. 46. "Clemency is a virtue which belongs to the legislature and not the executor of the laws; a virtue which ought to shine in the code, and not in private judgment." *Ibid.* See also Jeremy Bentham, *Works*, vol. 1, p. 520; vol. 3, p. 283; vol. 9, pp. 36-7; *Theory of Legislation*, Atkins' ed., vol. 2, p. 173. Cf. W. W. Smithers, *Executive Clemency in Pennsylvania*, pp. 106-18, 124-9 (1909).

¹⁴⁷W. S. Holdsworth, *History of English Law*, vol. 3, p. 257 (1909); J. F. Stephen, *History of the Criminal Law in England*, vol. 3, pp. 36-40 (1883).

¹⁴⁸S. Amos, *Science of Law*, pp. 57-8 (1875). See also R. Pound, *Columbia Law Review*, vol. 5, pp. 20-35 (1905).

Pardoning or neglecting to prosecute offenders against "archaic" ("obsolete") laws or laws rendered by fault of the government impossible of performance can hardly be considered an abrogation of the law.

¹⁴⁹"In the hope that he has repented and reformed."

don. Good conduct *outside* prison walls is of course best evidence of reformation; and this has been recognized in the pardon not only of convicts who have served their sentences or who have been paroled, but also those who have been fugitives from justice. Good conduct *inside*, which often is the only available evidence, is very inconclusive, since the environment of the prison has greatly reduced opportunity for criminal conduct. "The pardon board says that they [convicted of offenses against women and girls] reformed—that they behaved themselves while in prison. Of course they did, locked up behind prison walls, where there were no women or little girls.¹⁵⁰ The good conduct may be the result of mere hypocrisy. "Good conduct in prison consists of nothing more than quietness and obedience, and these qualities the object of securing a reduction of punishment would make it worth while to feign."¹⁵¹ And experience has shown that the most hardened criminals are most likely to earn a reduction of sentence under good-time provisions of law.¹⁵²

Release is often dependent upon the prospect of wholesome environment for the released prisoner, especially suitable employment.

Some atrocious crimes seem to be the result of inherent evil disposition that is impossible of reformation. But criminals so affected belong, logically, to some sort of an insane asylum rather than to a penal institution.

Moreover, even if it is absolutely certain that the prisoner has completely reformed and is no longer a danger to society, pardon may, nevertheless, have to be delayed. Said Attorney General Daugherty: "Very frequently, so far as the individual is concerned, all the objects of reformation and promises of good citizenship are accomplished the very hour the prisoner enters the penitentiary, and considered by himself alone might, with safety, be relieved from further imprisonment. To do so, however, would not effectuate the object sought to be accomplished by reason of the sentence imposed, and that is the deterrent effect resulting as a matter of example to others by reason

¹⁵⁰Quoted, *Oregonian*, Feb. 2, 1923. "Joe Lark's brother wuz a burglar fer years, an' jest because he didn't rob any banks, or shoot anybuddy, or steal any autos while he wuz in prison, they let him out fer good behavior." Kim Hubbard, *Liberty*, Nov. 14, 1925, p. 19. See also Eugene (Ore.) *Guard*, Nov. 13, 1925. Even *promise* to reform has aided toward release.

¹⁵¹R. Garofolo, *Criminology*, Millar's trans., p. 210 (1914). See also F. Lieber, *Political Ethics*, 2nd ed., vol. 2, pp. 399-400 (1874).

¹⁵²F. Wayland, *Journal of Social Science*, 1884, p. 154.

of his imprisonment."¹⁵³ But, probably very often, the release is made without any thought beyond the good of the convict.¹⁵⁴

However, "if a criminal is really reformed, so that, as he goes forth, he preaches by his conduct the law that once he destroyed, he is one of the best helps of society against transgression."¹⁵⁵

Convicts have been released from prison not only *because of* their supposed reformation, but for the *purpose of* their reformation. "Clemency would appeal to the best that was in the applicant, and strengthen his moral character." This is especially the case where good environment and honest employment await the released convict. That the environment of the prison is, unfortunately, often conducive to the further degradation of the prisoner rather than to his reformation, especially in the case of young offenders, is at times the cause of release.¹⁵⁶

When the sentence is too severe the convict may be released even though it appears that he has *not* reformed. "It is doubtful," said Attorney General Griggs, "whether if now released he would have any stronger power of resistance to temptation than he had, and yet the punishment of four years seems to be rather long for such an offense."¹⁵⁷

2. Whether the convict has reformed or not, a change in his physical condition may make him no longer dangerous to society. "No harm would result from such clemency [to the convict fatally sick], as he was reduced to a condition which left little likelihood of his again becoming a menace to society."¹⁵⁸ Moreover, it may be questioned whether the spectacle of the punishment of criminals in such a condition would have any deterrent effect upon others.

3. Atonement, that is to say, "satisfaction or reparation made for wrong or injury, either by giving some equivalent or by doing or suffering something which is received in lieu of an equivalent,"¹⁵⁹ is often the basis of clemency.

Thus clemency is frequently extended to thieves of various sorts upon their returning the stolen property, or making good the loss to

¹⁵³Letter to President, New York Times, Dec. 31, 1921. See also Attorney General Bonaparte, *Proceedings of the Annual Congress of the National Prison Association*, 1907, pp. 196-7.

¹⁵⁴See especially the admission of the Oregon parole board in report of a committee of the Oregon State Bar Association, Oregon Journal, Feb. 18, 1923.

¹⁵⁵T. Woolsey, *Political Science*, vol. 1, p. 351 (1877).

¹⁵⁶"Quite a number . . . were boys under twenty years of age, to whom the penitentiary would be but a school of vice." Acting Governor Ritner of Oregon, Oregon Journal, Jan. 21, 1923.

¹⁵⁷Report of the Attorney General of the United States, 1900, p. 270.

¹⁵⁸Report of the Attorney General of the United States, 1923, p. 400.

¹⁵⁹Century Dictionary and Cyclopedia, revised ed., vol. 1, p. 366 (1911).

the government or the individual. "It seems more important to me," said Governor West, "that the victims of the affair should be provided for than that the criminals be punished."¹⁶⁰ It is sometimes enough that the offender has simply done all in his power to make restitution. "He sacrificed his entire fortune, before indictment, in order that the creditors of the bank might be paid, and was untiring in his efforts to aid the authorities in straightening out the affairs of the bank."¹⁶¹ It seems to make no difference whether the compensation comes from the offender himself or rather, vicariously, from relatives, friends, or others.

When the offense has created no loss or damage at all to compensate, leniency has likewise been shown.¹⁶² Even the fact that the offender himself made no profit out of the crime, that "there was no commercialism present," brings similar treatment.¹⁶³

An offender's marriage to the woman he seduced or to his "white slave" has likewise won release.

Such treatment of criminal offenses, of course, obliterates the fundamental distinction between criminal offenses and merely tortious acts. The arrangements for such compensation at times look very much like the downright purchase and sale of pardons.

Moreover, atonement may be made by rendering valuable service to society upon conviction. Thus, assistance to the state in the prosecution of other offenders is quite generally regarded as entitled to consideration. "Petitioner pleaded guilty and assisted the government in every way he could in expiation of his crime." Assistance in the administration of the prison is also often thus rewarded—defending the keepers in a prison mutiny,¹⁶⁴ and in preventing escapes, aid in maintaining order, courageous action in case of fire, extra service as engineer, etc., and other services. So convicts' poetry, painting, sculpture, music, aid to science, military service while fugitive from justice, have also earned reward.

¹⁶⁰Eugene (Ore.) Register, Dec. 27, 1914.

¹⁶¹*Report of the Attorney General of the United States*, 1913, p. 341.

¹⁶²The remission of a forfeiture where the prisoner was brought into court after recognizance was forfeited hardly involves the same principle. "The United States has no equitable right to profit by this forfeiture." *Report of the Attorney General of the United States*, 1903, p. 113. The law is defective here.

¹⁶³Of course "the punishment [of a crime] may be out of all proportion to the benefit gained by the commission of the crime, and never has any logical relation to it." Counsel, in *State v. Eastern Coal Co.*, 29 R. I. 254, 70 Atl. 1, 6 (1908).

¹⁶⁴"It may be urged that such conduct . . . must be encouraged in order to promote good discipline in the prison. If this is true, a liberal reward in money might be offered, but the principle is a wrong one." D. M. Means, *New Englander*, vol. 34, p. 80 (1875).

“But if,” as Bentham says, “by the impunity given, the sanction of the laws be weakened, and crimes consequently multiplied, the pardon granted to criminals is dearly paid by their victims.”¹⁶⁵

Where the meritorious services were rendered before the commission of the crime they are often considered, retroactively, as atonement *after* the crime has been committed, and so entitling the offender to reduction in or relief from punishment. Said Governor Clement of Vermont, in pardoning his predecessor immediately upon sentence: “Your services to the state of Vermont were second to those of no other governor. While I accept the action of the honorable court, nevertheless, on account of the great and valuable service which you have rendered to Vermont and the suffering which you have endured by reason of your indictment and trial, I grant you an unconditional pardon and restore you to full citizenship in this state, which in the past has so highly honored you.”¹⁶⁶

Military service has received abundant recognition in this connection—the offender was an old soldier, he served throughout the Civil War, he was in the thick of the fight at Argonne Forest, etc., etc. Attorney General Knox advised the President: “He [an ex-service man] approaches you as a supplicant for pardon, asking that his brave deeds and shattered health be accepted as atonement for the crime of which he stands legally convicted. The history of the world is full of circumstances where transgressions of the law in cases of the gravest character and consequences have been condoned by signal public service in time of war or great emergency.”¹⁶⁷ “We, the jury, find the defendant not guilty, and that fighting at San Juan covers a multitude of sins.”¹⁶⁸ And vicarious atonement is possible here also. Thus a court of the state of Washington suspended sentence indefinitely in the case of a grandson of Clemenceau, “out of respect to the grand old man.”¹⁶⁹ The contrary idea was recently expressed by Governor Pierce: “Nearly all the petitioners base their plea for

¹⁶⁵*Works*, vol. 2, p. 200.

¹⁶⁶New York Times, Nov. 6, 1920. “Perhaps Governor Clement gave some weight to the consideration that his state would be humiliated by having one of its ex-governors in jail.” *Ibid.*

¹⁶⁷*Report of the Attorney General of the United States*, 1909, p. 288.

¹⁶⁸Military service has even included among “mitigating” facts by courts! Compare veterans’ preference under civil service laws. *Contra*: To a plea for clemency for a veteran on his war record by his attorney “the [United States district] judge remarked that the man should have kept the laws of the nation he was glad to defend.” Oregon Journal, Jan. 1, 1924. “If I am guilty,” said a veteran, “I want to go to jail, the same as any other man.” Quoted, Oregonian, April 14, 1913. Cf. W. W. Smithers, *Executive Clemency in Pennsylvania*, pp. 169-70 (1909).

¹⁶⁹Eugene (Ore.) Register, April 22, 1925.

clemency upon their sympathy for the father of this young man and recite the wonderful work he has done for the fallen in the years past. No citizen of Oregon appreciates more deeply than I do the great debt which we owe to this grand man for his life's work among us, yet as governor of this state, under oath to see that our laws are faithfully executed, I cannot consider pleas based upon sympathy for the parents."¹⁷⁰

Last, the expiation of the offense through the suffering of the convict, without any service at all rendered to society (unless the satisfaction of the desire for vengeance), is often ground for his relief. "He had suffered enough"; "all the best years of his life have been passed in confinement"; "he had been . . . disgraced, humbled broken, expelled from the ministry and his church."¹⁷¹ The same motive is doubtless often present in granting clemency to convicts who are old, sick, crippled, blind. Likewise the vicarious atonement of the suffering mother, children, wife is also at times here efficacious.¹⁷²

The whole doctrine of retributive punishment here involved has, of course, been long discredited by criminologists and others,¹⁷³ but no doubt is still most widely accepted by the people. The vengeful spirit shown toward political prisoners of the Great War is discouraging evidence of this fact. However, doubtless often the idea of reformation is implied in that of expiation.¹⁷⁴

¹⁷⁰Oregonian, Nov. 29, 1925.

¹⁷¹A defendant has even pleaded (unsuccessfully) the payment of large earlier fines in mitigation of a later offense. And "despite pleas that he had spent more than half his life behind the bars and had only a few more years to live, John Branton, sixty-three years old, . . . got a five year sentence yesterday from United States District Judge Benjamin C. Dawkins." *New York Times*, July 7, 1925. "It is not our custom to show much clemency to men who have been in prison so many times." *Report of the Advisory Board in the Matter of Pardons*, Michigan, 1904, p. 184.

¹⁷²"This is said to be the first time here [Springfield, Mass.] that a husband has taken upon himself the jail penalty for his wife's offense, though instances have not been wanting in which the court has afforded the husband the opportunity to do so." *New York Times*, Jan. 29, 1924. See also the offer of an ex-governor of Michigan to take the place of an ex-governor of Indiana in the penitentiary! *Ibid.*, Jan. 24, 1926.

¹⁷³"Laws for the punishment of crime shall be founded on the principles of reformation, and not of vindictive justice." Constitution of Oregon, art. 1, sec. 15 (1859). "Vengeance does not or at least should not enter into a case." Attorney General Daugherty, *Letter to President*, *New York Times*, Dec. 31, 1921.

¹⁷⁴The idea of penance is said to be "that he who sins must repent and as far as possible make reparation to divine justice. Repentance . . . is thus the prime condition on which depends the value of whatever the sinner may do or suffer by way of expiation." E. J. Hanna, *Catholic Encyclopedia*, vol. 11, p. 618 (1911). Of course this principle cannot apply in case of *past* consideration.

4. "Time concludes all things," and so, as the commission of a crime recedes into the past, it ceases, more or less, to have reality for the present and to justify the penalty prescribed by the law. This has appeared especially in leniency shown to offenders who have long escaped punishment. "It was believed that to enforce the sentence after so great a lapse of time would serve no good purpose." This principle is recognized in the enactment of "statutes of limitations," which prohibit, under certain circumstances, prosecution after the lapse of a number of years. Doubtless the same idea largely accounts for the shortening of the term of long-time convicts, whatever other considerations may at the same time be effective.

This "forgetfulness" of crime may be bound up with a presumption of the reformation of the offender during the intervening years. "In all this time, either he has committed similar offenses, or he has not. If he has not, he has reformed himself, and the purpose of the law has been answered without punishment; if he has, he has been punished for subsequent offenses, and the discipline he had stood in need of has been already administered to him at a time when he stood more in need of it than he can be supposed to stand at present."¹⁷⁵

5. Changes in political conditions are recognized as a ground of pardon in the wholesale release of political and military offenders after the close of a war or rebellion. "A nation at war cannot tolerate interference with its war, and in defining interference it must draw the line to leave no question of its own safety. But the war is over, and the nation must consider the nature of the offense. . . . The war has passed, and it may be assumed that the danger has passed with it. Further imprisonment of political offenders is unnecessary cruelty."¹⁷⁶ Likewise, that various criminal practices of which the offenders were guilty have been broken up generally in the community, in part by their conviction, has been considered good ground for their release. "The lawless environment which surrounded them has largely disappeared and has been succeeded by respect for law and order."

However, the possibility of the recurrence of similar conditions, accompanied by similar offenses, supports the contrary attitude. So Attorney General Daugherty said: "It is true that the war is over, and as a result of a great conference now being held in this country we have every reason to hope that such a calamity will never occur again, and yet . . . the unexpected may happen and we might

¹⁷⁵Jeremy Bentham, *Works*, vol. 1, p. 522.

¹⁷⁶Quotation from *New York Globe*.

unavoidably and unexpectedly be drawn into another war. . . . The reason for continued enforcement of sentence still acts as a very necessary example to others in order that in any future contingency they may not be tempted to disregard their duty as citizens and defy and hamper the government in its extremity, in the hope and with the belief that all will be forgiven as soon as peace is declared. There is, therefore, no valid ground for clemency in the foregoing argument."¹⁷⁷

6. Where there are "a multitude of delinquents,"¹⁷⁸ especially during and after wars and rebellions, pardon is an effective means of restoring social peace. So Alexander Hamilton said: "In seasons of insurrection or rebellion, there are often critical moments, when a well-timed offer of pardon to the insurgents or rebels may restore the tranquility of the commonwealth."¹⁷⁹ And, later, Senator Carl Schurz: "In advising a general amnesty it is not merely for the rebels I plead. But I plead for the good of the country, which in its best interests will be benefited by amnesty just as much as the rebels are benefited themselves, if not more. . . . As the people of the north and of the south must live together as one people, and as they must be bound together by the bonds of a common national feeling, I ask you, will it not be well for us so to act that the history of our great civil conflict, which cannot be forgotten, can neither be remembered by southern men without finding in its closing chapter the irresistible assurance: that we, their conquerors, meant to be and were after all, not their enemies, but their friends?"¹⁸⁰ In such cases, as Bentham says, "the power of pardoning is not merely useful—it is really necessary."¹⁸¹

7. Pardons in one form or another are often granted that have no relation whatever to the grounds of punishment.

¹⁷⁷*Letter to President*, New York Times, Dec. 13, 1921.

¹⁷⁸Jeremy Bentham, *Works*, vol. 1, p. 529. And in the opposite case: "One lonesome traffic violator appeared before Municipal Judge Ekwall Thursday. His plight touched the judge's heart and he was dismissed without sentence." Oregon Journal, Dec. 19, 1924.

¹⁷⁹Federalist, Dawson's ed., no. 73 (1788).

¹⁸⁰Congressional Globe, 1871-2, part 1, pp. 702-3 (1872).

¹⁸¹*Theory of Legislation*, Atkins' ed., vol. 2, p. 172. "Even granting that these men [political prisoners] are dangerous citizens, the most dangerous place for them to be is in jail. . . . If they were liberated they would be comparatively harmless, no matter how they talked. So long as they are confined they are dangerous, no matter whether they are guilty or not. These men should be released, not so much for their own sake as for the sake of the rest of us." Quoted from Chicago Herald and Examiner. This same purpose of promoting social peace has been the ground of pardon in cases of disturbances by the Indians.

Thus, there is really no clemency present when a prisoner is pardoned, as is often the case, in order that he may be deported. The same principle is involved in pardoning convicts upon condition that they leave the state, and in the "skidoo" sentences commonly imposed by police courts. Such action is "certainly a disregard of the comity that should prevail between communities."¹⁸² It works both ways. "A general policy of expulsion towards the recipients of executive clemency in one state is likely to induce a similar course in another state by way of retaliation."¹⁸³ It certainly is conducive to the multiplication of criminals. It "means shorter sentences for criminals than the courts ordained, and it means a roving population of criminals. The process is to operate in one state and, if they are caught, serve a few months until they are pardoned, then go to other states to renew their unlawful careers."¹⁸⁴

Inadequate facilities for keeping prisoners have at times at least accelerated their release, and so has the cost of their confinement. "He better be supporting himself instead of the state doing it."¹⁸⁵

Prisoners have been released because of the injurious effect of their presence upon other prisoners. Thus prisoners infected with contagious diseases have been released, and even prisoners whose moral influence upon the other inmates was bad. "He will probably be less harmful outside of the institution [reform school] than he may be in it."¹⁸⁶

Clemency is often extended in order to obtain the services of the convict for the benefit of the state. The most common illustration is the pardon, or more often, the omission of prosecution of an offender in order that he shall "turn state's evidence" or otherwise aid in the conviction of other criminals.¹⁸⁷ "The advantages are," said Beccaria, "that it prevents great crimes. . . . It also contributes to prove that he who violates the laws . . . will also violate private com-

¹⁸²D. M. Means, *New Englander*, vol. 34, pp. 78-9, 81 (1875).

¹⁸³Governor Hill of New York, *North American Review*, vol. 154, p. 53 (1892).

¹⁸⁴*Oregon Journal*, Dec. 22, 1924.

¹⁸⁵So saving of expense is ground for judicial leniency. "The trial of these cases will consume so much of the court's time and add expenses to the already overburdened taxpayers of the county that the court is inclined to be lenient and will exhibit real clemency to those defendants who plead guilty before the court." Judge McIntyre of the court of general sessions of New York City, *New York Times*, April 26, 1921.

¹⁸⁶*Report of the Attorney General of the United States*, 1909, p. 254. "Taylor's unruliness has had a bad effect on the other prisoners," the Indiana board of pardons said when they advised the governor to release him. Press dispatch, April, 1913.

¹⁸⁷Strictly speaking, the convict's right is generally "equitable" only, but at least in Texas the law fully protects him.

pacts."¹⁸⁸ Or, as Attorney General Bonaparte put it, "anything promotes the public welfare which tends to make lawbreakers distrust and fear each other."¹⁸⁹ But all such action is subject to grave abuse.¹⁹⁰ Moreover, the practice "authorizes treachery, which is detested even by the villains themselves; and introduces crimes of cowardice, which are much more dangerous than crimes of courage. . . . Besides, the tribunal which has recourse to this method betrays its fallibility, and the laws their weakness, by the assistance of those by whom they are violated."¹⁹¹

Pardons granted, often, in order to remove the common-law disability of convicts as witnesses are rendered unnecessary by statutory removal of the disability for which there never was any good reason.¹⁹²

Likewise, convicts have often been released from prison upon condition of entering the military service in time of war; and other social service has also been thus obtained.

If such policies are to be followed, care must be taken, as Bentham insists, that "the good reasonably to be expected" from the services rendered "be of sufficient magnitude to overbalance whatsoever evil may reasonably be apprehended from the impunity thus conferred."¹⁹³

Sometimes pardons are granted, as Bentham phrases it, to secure "the amity of foreign powers."¹⁹⁴ For example, President Coolidge recently granted a pardon at the request of the Mexican embassy, "in the interest of international comity."¹⁹⁵

A curious inversion of clemency is the pardon or commutation of a convict's sentence in one jurisdiction so that he may be delivered for punishment for a graver offense in another jurisdiction. "Certainly, there is no expectation on the part either of the public or of lawmakers that the power to pardon or to commute should be used to make a punishment heavier."¹⁹⁶ Pardon has also been granted for one offense in order to punish for a more serious offense in the same jurisdiction. But this is probably not necessary to attain the object. Where capital punishment has been abolished by law without a saving clause, it has

¹⁸⁸*Essay on Crimes and Punishments*, ch. 37.

¹⁸⁹*Proceedings of the Annual Congress of the National Prison Association*, 1907, p. 204.

¹⁹⁰Attorney General Bonaparte, *Proceedings of the Annual Congress of the National Prison Association*, 1907, pp. 204-5.

¹⁹¹Beccaria, *Essay on Crimes and Punishments*, ch. 37.

¹⁹²*Cf.* D. M. Means, *New Englander*, vol. 34, p. 84 (1875); Attorney-General Bonaparte, *Proceedings of the Annual Congress of the National Prison Association*, 1907, p. 203.

¹⁹³*Works*, vol. 9, p. 601.

¹⁹⁴*Works*, vol. 9, pp. 600-1.

¹⁹⁵*Report of the Attorney General of the United States*, 1924, p. 376.

¹⁹⁶*New York Times*, Dec. 1, 1925.

been necessary to commute the death sentence in order that the convict should not go wholly unpunished. In all such cases commutation is the proper form rather than absolute pardon (sometimes used for the purpose); for the latter will not be accepted by the convict conversant with his legal rights.

VI.

It is certainly anomalous that the grounds upon which the individual may be punished by the courts are specified, however inadequately, with ever-increasing minuteness of detail, by statute law, while the grounds for the dispensation of the punishment by the pardoning authority are left entirely to his own discretion. It has been contended, indeed, that "the pardoning power is so peculiar that to hedge it about defeats its very purpose."¹⁹⁷ But it would seem that the same principle, however difficult the application,¹⁹⁸ is involved here that is involved in the limitation of administrative discretion in general. Arbitrary power is contrary to the general spirit of modern democratic institutions.¹⁹⁹

As indicated above, pardon in the criminal law has been compared with equity in the civil law. Early equity was the product of the king's or chancellor's "conscience" unrestrained by law. And so Selden could say: "Equity in law is the same that the spirit is in religion, what every one pleases to make it. Sometimes they go according to conscience, sometimes according to law, sometimes according to the rule of court. Equity is a roguish thing. For law we have a measure, know what to trust to. Equity is according to the conscience of him that is chancellor, and as that is larger or narrower, so is equity. 'Tis all one as if they should make the standard for the measure, we call a chancellor's foot. What an uncertain measure would this be! One chancellor has a long foot, another a short foot, a third an indifferent foot. 'Tis the same thing in the chancellor's conscience."²⁰⁰

¹⁹⁷H. B. Tedrow, member of the Colorado state board of pardons, *Proceedings of the Annual Congress of the American Prison Association*, 1911, p. 304. "We cannot see how, with safety, the discretion of the governor in the case of the parole or pardoning power can be limited." Committee of the Oregon Bar Association, *Oregon Journal*, Feb. 18, 1923. And see opinions discussed in C. Jensen, *Pardoning Power in the American States*, ch. 6 (1922).

¹⁹⁸On the limitation of administrative action in general, see E. Freund, *American Political Science Review*, vol. 9, pp. 666-76 (1915).

¹⁹⁹"When we consider the nature and the theory of our institutions of government, the principles upon which they are supposed to rest, and review the history of their development, we are constrained to consider that they do not mean to leave room for the play and action of purely personal and purely arbitrary power." *Yick Wo v. Hopkins*, 118 U. S. 356, 30 Law ed. 220, 226 (1886).

²⁰⁰John Selden, Table Talk, "Equity" (1689). Pardon compared with early equity for variableness. J. M. Mathews, *Principles of American State Administration*, p. 1201 (1917).

However, this situation has changed. With the growth of binding precedent the arbitrary power of the court has gradually been limited by general rules; in American phraseology, the chancellor's foot has been "standardized." The present uncertainty as to the content of criminal equity should likewise be removed so far as possible.²⁰¹ The discretion of the pardoning power should be limited by positive rules of law, based upon such considerations as the foregoing. As Bentham declared, the legitimate grounds of pardon are "all of them capable of being, and all of them ought to be, specified."²⁰²

It is not here suggested, however, that the courts should have the power to review executive action, however specifically the grounds of pardon might be enumerated. But it does not follow that limitations would be any more ineffective in this direction than in case of other so-called "political questions," the determination of which by the executive is final.²⁰³

Although at present it is required in some jurisdictions that a statement of the "reasons" for action shall be made in each case of pardon to the legislature, often the report is not published, often the statements throw little or no light on the matter,²⁰⁴ and often no report whatever is made. So that it is true in many places that the pardon prerogative "is usually exercised for reasons unknown to the people."²⁰⁵

²⁰¹"Few men who have been members of the [Pennsylvania] board of pardons since its institution in 1874 have given any special study to the bases of action nor do the records show any very definite line of reasoning or consistent and continuous application of rules. In truth, the reasons assigned in very many recommendations appear strained, illogical, unfounded and capricious; in some others, they are marked by the most accurate and comprehensive conception of the power of clemency." W. W. Smithers, *Executive Clemency in Pennsylvania*, p. 157 (1909).

²⁰²*Works*, vol. 9, p. 37. See also *ibid.*, vol. 1, p. 521; D. M. Means, *New Englander*, vol. 34, pp. 79-80, 83 (1875); C. C. Cook, member of the Ohio board of pardons, *Ohio State Bar Association Proceedings*, vol. 12, p. 179 (1891); C. Jensen, *Pardoning Power in the American States*, ch. 6 (1922). "It cannot be presumed that he would be moved by mere caprice or purely quixotic considerations." *Andrews v. Gardiner*, 150 N. Y. S. 891, 894 (1914).

²⁰³"It is, indeed, quite true, that there must always be lodged somewhere, and in some person or body, the authority of final decision, and in many cases of mere administration the responsibility is purely political, no appeal lying except to the ultimate tribunal of public judgment, extended either in the pressure of public opinion or by means of the suffrage." *Yick Wo v. Hopkins*, 118 U. S. 356, 30 Law ed. 220, 227 (1886).

²⁰⁴"Upon the recommendation of the trial judge," etc., is all the information given in innumerable reports.

²⁰⁵*World's Work*, vol. 25, p. 382 (1913). "Profiting by the experience of Governor Mead [of Washington] who was severely criticized for his many pardons, Governor Hay has given orders that no information, concerning pardons shall be made public from his office or the prison board." Press dispatch, March 16, 1909. "Governor Hart [of Washington], disregarding precedent long established and closely followed by former administrations, has determined that in the future fullest publicity will be given all petitions for the exercise of the pardoning power." *Oregonian*, March 28, 1920.