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A REVIEW OF THE PARDONING POWER

The power to pardon is but the counterpart of the power to condemn. Since the time when the memory of man runneth not to the contrary, the power to extend mercy has been but a phase of the authority which dispensed justice.

The earliest use of the pardon power is to be found in the practice of the ancient monarchs. In the monarch all the powers of government were concentrated. The smile or the frown of an arbitrary Hebrew judge, a petty Greek tyrant, or a stern Roman Caesar was a prophecy of sentence to come—a smile meant liberty, a frown condemnation. So it is clear at the outset that the power to pardon is inextricably interwoven with the power to administer justice.

Through those long stages of development in which government was largely dependent for its continued operation upon the vigor and force of personalities rather than the inertia of administrative machinery, the pardon power remained in the hands of the monarch or chief of State. True it was limited, at times. The Church's invention of "Benefit of Clergy," removed all ecclesiastical offenders and also all lay offenders against clerical laws from the jurisdiction of civil law and hence limited negatively the action of the secular authorities. De Bracton protested against the wholesale "granting of dispensations" by the English Kings, while the barter of pardons for favors by Richard II played no small part in his downfall.

Strangely enough, when the theory of separation of powers came along, causing its explosion in the political world, the power to pardon was untouched. Either it had not been sufficiently abused to cause an outcry or men had bigger grievances on which their attention was centered. Or men thought to make the power of little effect in the hands of monarch or executive by making its use essentially dependent upon action by other departments of government. Whatever be the reason it seems strange to us that this power judicial in character should have been allowed to remain in the hands of the executive almost unquestioned when most of the powers of that official, judicial or legislative in character, had been stripped from him.

Nor can we agree that this power was left in the executive by design to serve as a check upon other departments of govern-

ment. Examination of our own constitutional convention shows no evidence of the pardon power being discussed in such light. It seems to have been considered as inhering in the executive office and that to permit it to continue to reside there was merely a decision which refused to experiment with a transfer of power which was historically natural rather than a decision which left the power with the executive as the result of a deliberate design.

Such then is a hasty sketch of the development of the pardon power. The power in American government today is concurrently exercised by both Federal and State Governments, but by the very nature of our divisions of governmental authority the pardoning power vested in and exercised by the State governments is, in its effect upon crime and upon society, more important than the same power in the hands of our Federal Government.

Every state in the union provides for some means of extending clemency to the criminal. Justice itself would demand that some means of correcting the errors of the law should be devised. In some rare cases, perhaps, justice would demand mercy where the law condemns to punishment. This possibility every state has cared for by creating the executive power of pardon both in constitution and by statute.

There is, however, a wide diversity among the states in the methods provided for administering the pardoning power. If one undertakes to make classifications of those states whose administrative machinery is somewhat similar, one must make at least ten groups and even wide divergences will be found within these small groups. In thirty-seven states no pardon can be granted to a prisoner without the consent of the governor. This simply means that the governor has the last word in the granting or refusing of a pardon. It does not mean necessarily that upon the governor rests the sole responsibility for extending clemency. In fact, but four states, Arkansas, Tennessee, Virginia, and Kentucky rest the pardoning power in the governor alone. In all other states the machinery of administration varies in complication, although through most of the variations the governor remains the central figure. In only five states can clemency be granted by a board or officer without the consent of the governor. In six more states the governor is made a mem-

ber of a board, a majority of whom must vote in favor of a petition before a pardon can be granted; but in the thirty-seven remaining states the governor must shoulder the final responsibility.

Twenty-three states create advisory boards to act with the governor to consider applications for pardons. It is not mandatory in these states for the governors to accept the advice of these boards nor is his power to pardon limited to their recommendations. The boards simply serve to lift the load of considering the almost endless petitions for pardons from the shoulders of the chief executives. Outside of these twenty-three states wide differences in administration exist. In Rhode Island the pardon power may be exercised by the governor only with the consent of the Senate. South Dakota divides the power between the Governor and a special board. Maine requires the consent of the Executive Council and an advisory board. So the variations continue.

Several limitations on the pardon power become apparent at once upon a study of the state constitutions. In all but seven states no pardon before conviction can be granted. Evidently it was felt that such was unnecessary and was too susceptible of abuse. Twenty-seven states forbid a pardon for treason or impeachment. There is room to believe that because these offenses were largely subject to action by the legislature it would be a subordination of that department to allow the governor to nullify its acts. One other constitutional limitation is almost universal. This is the provision requiring that reasons for the pardon be given. Of course, this does not mean that the reason must be adequate but it does mean that a reason must be assigned, however trivial. Often the reasons for pardons have been absurd and ridiculous. One governor remitted a death sentence because "hanging would do the man no good," another pardoned a man guilty of larceny because "the defendant was about to be married."

The interest and alarm manifest in the press and on the public platform over the so-called "crime wave" has focused public inquiry on the relation of the governor and his power to pardon, to the fate of the criminal. There has come to be held by the general public an uneasy feeling that a criminal, captured

and condemned by a process tedious and none too certain at best, will soon re-appear to prey upon an indulgent society again. We are fearful lest our charity has shown itself more ready to serve the interests of the criminal than the society against whom he has offended. And in the light of such an impression, we are investigating the exercise of this power to extend mercy which we have given to our governors.

Is the future of a thief, forger, or even murderer under sentence for his crimes a hopeless one? Is the jail or penitentiary sentence a final rigid prescription which must be taken, however bitter, or can it be evaded? The facts gathered from a few representative states will help us in giving an answer. Are pardons on the increase? Has clemency been granted too freely and have the governors been too lenient? The questions may be answered by cold figures.

In Illinois, which has one of the largest prison populations of any state in the union, only two prisoners were granted pardons by Governor Small. This was an actual decrease over the number granted the previous year. The same year saw only fifty-four prisoners pardoned by Governor Donahey of Ohio. Here again we find that the number of pardons granted in recent years has steadily declined. In Missouri, Governor Baker granted only eighteen pardons and several of these were justified by unusual circumstances which rarely arise. In Indiana the lowest proportion between prison population and pardons granted which had occurred for ten years was achieved in 1926. Governor Fields of Kentucky pardoned seventy-six criminals in 1926 and this included those freed from jails as well as penitentiaries. This number represents a substantial decrease over the records of previous years. The report from Tennessee adds to the list of those states where pardons are becoming rarer. There has been little complaint against the pardon power as exercised by our Governors. The facts cited as representative show that the number of pardons is actually on the decline and this in the face of an ever increasing prison population. The person who carries to a study of this sort the preconceived notion that he will be able to blame the presence of criminals in society upon wholesale releases by our Governors will be disappointed by the virtue and restraint exhibited by our Chief executives.

Although sanity and conscience have characterized the use of this power in nearly all cases, there have been some notable exceptions. One of the charges brought against Governor Walton of Oklahoma in 1924 was his abuse of his power to pardon. Excitement is still resounding over the activities of Mrs. Ferguson, ex-Governor of Texas, who granted over three thousand extensions of clemency in her twenty-four months in office. Inquiries show some discontent in Michigan and there is dissatisfaction in Colorado also but these two states almost exhaust the roll of the displeased. No wild charges that pardons promiscuously and lavishly granted are responsible for continuing the crime wave can be supported, and with the exception of certain notorious "political" pardons, the use of the pardoning power has been cautious and conservative.

But just as a superstitious belief in ghosts will persist in the face of the most intelligent argument so the feeling that something is wrong in the system of handling criminals persists in spite of the evidence just reviewed. The impression is too deeply imbedded in the public mind that society is being preyed upon by those who ought to be in jails and that fault lies at the door of some officer or legal institution for the state of things which prevails. Evidence does show an increase in crime and criminals. Crime is costing society more. Criminals are being constantly sentenced and some if not most of them for repeated offenses. If the governors are not turning them out of the prisons then who or what is responsible for our deluge of lawlessness?

One does not work upon the subject of the pardon power very long before discovering that it is inextricably bound up with the system of paroles. The parole system provides that upon good behavior in prison the convict becomes eligible for release when some proportional part of his sentence has been served. This release usually entails a variable degree of official supervision by prison authorities during a period varying six months to a year. During that period of parole the convict may be imprisoned again for misdemeanors without trial, but on the expiration of a year's observation, let us say, he emerges with society and is lost sight of if he has walked a reasonably straight and narrow path.

On the face of it this would seem to be a very creditable system, that it furnishes an opportunity to the man who has come to himself in prison to go and sin no more without going through the body and spirit breaking effects of a long imprisonment. And indeed, it is not with the theory of the system that we quarrel but rather with its abuse in practice. Let the facts speak for themselves.

The machinery for the operation of the parole system in most of the state consists of a prison and parole board. This board, varying in number from three to seven, functions independently of the governor save perhaps for the legal technicality of securing the Governor's signature to the acts of the board. But for all practical purposes these boards may release on parole any number of prisoners without restraint from any other authority. A prisoner under life sentence in a Kentucky penitentiary becomes eligible for parole at the end of eight years. In New York a "lifer" may be paroled after ten years. In Illinois only six years must elapse before paroles can be granted to those sentenced to spend all their days in prison. The famous pair, Leopold and Loeb, under sentences of life and ninety-nine years running concurrently, would have been eligible for parole, had they behaved themselves, at the expiration of eleven years—both would still be young men. Of course, life or ninety-nine years obviously constitutes the most severe sentence of imprisonment possible and hence it is only natural to discover that shorter periods of imprisonment make the convicts eligible for paroles in a proportionately shorter time. A man given an indeterminate sentence becomes eligible for parole at the expiration of the minimum sentence. Thus a man sentenced for from one to fifteen years is eligible for parole after one year's imprisonment.

The facts speak for themselves. Governor Fields of Kentucky allowed the recommendations of the Parole Board in five-hundred and forty-seven cases in 1926. This represents almost one-third of the total prison population. In 1925 five hundred four paroles were granted out of a total prison population of one thousand six hundred seventy-three. The Illinois board released two thousand seven hundred two prisoners during the biennium from 1924-1926, and actually received only two thousand five

hundred ninety-five. Ohio released in 1926 fifty-nine per cent. of the number of prisoners received. Yet this was a huge decrease over the releases the board had previously made. In 1923 a high water mark for paroles was made with one hundred thirty-four per cent. releases. This means simply that there were actually turned out of prison in that year thirty-four per cent. more prisoners than were taken in. The figures from other states are almost equally amazing. New York, Indiana, Missouri, as representative states astonish one with the lavishness of their prison releases.

Of course, if it can be shown that to release these large numbers of convicts is to restore to society this number of useful men, then the parole system should be praised and not condemned. But we fear its effects are just the opposite; that it is responsible for deluging society with these irresponsible and lawless who have caused our widespread impression of social disorder. Almost uniformly twenty per cent. of those released on parole violate them within the year or half-year period. Of the remaining eighty per cent. the number who conduct themselves circumspectly until all semblance of official surveillance has been withdrawn and then turn to crime once more cannot be calculated but probability would place the estimate high.

A recent statement by Mr. Clabaugh, chairman of the Illinois Board of Paroles, admits that as high as forty per cent. of those released on parole are known to violate them. In commenting on this state of affairs in Illinois Judge Kavanagh, of Chicago criminal court, said, "If present conditions remain during the next five years more than one hundred ninety thousand people will have their homes or stores broken into, two hundred twenty-five thousand others will be robbed, fifty-five thousand to sixty thousand living, loving and useful citizens will be assassinated. Most of the criminals who will do these crimes are in prison waiting to get out."

It needs scarcely a second glance to assure even the most careful investigator that here is the leak through which the dregs of a prison population are filtering back into society. Silently, continuously, unknown, the parole system has poured its masses of criminals upon us to murder and pillage. For every two or

three criminals whom we succeed in capturing, another is released.

Naturally the question arises that if this is the true explanation of the problem we are trying to solve, why has not such an obvious solution been hit upon before, and having been hit upon why has not some remedy been provided? The explanation seems to lie in the administration of the state government. The spotlight of publicity is focused upon some parts of the government illuminating those offices so brightly that the incumbents' every move is observable. But the brightness of the light thrown around the governor's chair, for example, leaves the other offices in even darker obscurity. Hence those acts not directly associated with the central and dramatic figure of the governor are likely to be overlooked entirely by a public none too well educated in dealing with its officials.

In a majority of the states, the granting of paroles is left, save for a technical connection with the executive power, exclusively in the hands of a board with power to grant or deny releases. Few people know of the existence of such boards. Nothing is known about their composition, their activities, their powers. We have grown accustomed to look to the governor for pardons, and indeed we must still look to him for actual pardons, but under the parole system pardons are no longer necessary. The publicity attending the granting of pardons by the governor is avoided by giving paroles. One pardon granted by the chief executive at the state capitol will attract more attention than a dozen releases made by an obscure and unknown board working in the shadows of the prisons. One example is sufficient.

In her two years as governor of Texas Mrs. Ferguson granted over three thousand extensions of clemency. In Texas however, the board of pardons also acts upon paroles and the Governor grants the latter as well as the former. A tremendous storm of public criticism arose over such a wholesale release of criminals. The publicity attending the Governor's office made every parole seem important. Yet at the same time in Illinois and covering the same period of time, the parole board released two thousand seven hundred two prisoners while the Governor actually pardoned only two. If in Illinois the paroles had been

executive acts as clearly as in Texas, is it unreasonable to suppose the same storm of public indignation would have resulted?

Our conclusions may be summarized briefly. The number of actual pardons granted by our governors is decreasing. The parole system is dumping criminals upon society at an alarming rate. The parole system makes pardons unnecessary by accomplishing the same results without the attendant publicity and responsibility. Until the system of paroling can be put under the observation of the public, and until greater accountability can be secured from it, the present unsatisfactory conditions must be endured.

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