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THE USE AND ABUSE OF THE POWER TO PARDON¹

JAMES P. GOODRICH²

Crime is always linked in the human mind with the idea of punishment. Long before written laws were in existence, men were held responsible for the consequences of their own acts and a rude sort of justice measured out to them.

With the appearance of written codes came the definition of crimes with the appropriate punishment suited to the gravity of the offense. The original purpose of all criminal law until recent years was twofold—to punish the offender and to protect society against a repetition of the offense. Blackstone states that the end or purpose of human punishment is not atonement, or expiation, for that, he says, must be left to the just determination of the Supreme Being. “The end of punishment,” he says, “is none other than to prevent others from committing a like offense.” The only method suggested by this great judge and lawyer to prevent a man from repeating the offense was either to put him to death, or condemn him to perpetual imprisonment or exile.

Once a criminal always a criminal. When a man was convicted of a crime, consigned to prison and given the brand of a criminal, all his after life was without hope of reformation or redemption. The brand of Cain was upon him and the hand of man against him. Through the early history of English jurisprudence and until comparatively recent times the punitive side of the law was emphasized and little or no thought given to its reformative side. During the last century wonderful progress has been made in criminal jurisprudence. Society is more and more directing its “thou shalt nots” from the individual to itself. Hugo’s statement that “society stands convicted with every criminal in the dock,” is found under our complex social conditions to have much truth in it. Society is beginning to realize that while its crimes against criminals are great, its crimes against itself in its method of dealing with them is often greater.

The parole laws, the indeterminate sentence laws, laws giving judges the right to suspend sentence and executives the right to par-

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don and parole offenders, are all evidence of the growing belief that no laws, general in their application as all criminal laws must be, can be administered by the courts alone without working grave injustice in many individual cases.

Thoughtful persons fear that a maudlin sentimentality may go too far in the direction of mercy and lay too little emphasis on the necessity of certain and inflexible punishment for violated law. The exercise of clemency by the executive through pardon, parole or the remission of fine, without any appeal or review of his action is intended to be the last resort to correct injustices that must arise in the administration of criminal laws, which by their very nature are fixed and inflexible in their application.

The power to pardon is one of the oldest departments of governmental function. It seemed to have been exercised by the chief of the tribe to soften the rigor of tribal customs. Side by side with the harsh aspects of the written law appear the king and other rulers exercising the right of pardon, not by any express authorization contained in the law, but by common consent. The king ruling by divine right, deriving his power from God and not from the people, was superior to and above the law and claimed and exercised the right to set it aside when the ends of justice so required.

While the code of Hammurabi, with its long line of statutory crimes, is silent as to the pardoning power and gives no such authority to the king, yet we know that it was one of the kingly prerogatives, for Samsu Illuna, the son of the Great Hammurabi, more than 2,200 years, B. C., pardoned a runaway slave that had, according to the law, forfeited his life in fleeing from his master.

The Mosaic law nowhere gives the kings or judges the right to pardon, yet we know that King David exercised the right. The cities of refuge were established as places where those who innocently shed blood might escape the hands of the avenger. The right of sanctuary was a merciful provision to free the individual from the consequences of his unlawful act.

The Greeks, in Plato's laws, made provision that the prisoner might, after conviction of his crime and an exile of two or three years, be pardoned by a group of citizens, twelve in number, and allowed to return.

During the republic and monarchy of Rome, the power to pardon was freely exercised by the executive as it was by the early English, Scottish and Irish kings.

Before the granting of the great charter by King John, the kings granted pardons and forgave offenses against the law, and, ruling by divine right, not only claimed the right to suspend the law as to individuals, but as to entire classes of individuals. They also claimed that having the power to pardon after the offense, they might grant a dispensation to violate the law with impunity. Controversies arose between king and parliament over this clear abuse of power until finally parliament passed a law abolishing this prerogative of the king, "as it hath been assumed and exercised of late" and denied the pardoning power of the king in the future, "unless parliament shall make provision for such power in the terms of the statute."

In the development of English law, it was often found necessary to abate the cruelty of its criminal statutes through the exercise of royal clemency. In cases of justifiable homicide the jury although convinced of the innocence of the accused could not so find and the only relief was an appeal to the king. During the reign of Henry III, parliament enacted: "if the justices have before them a man, who as the verdict goes, has done a deed of homicide by misadventure or in self-defense, they shall not acquit him or pardon him. They bid him hope for the king's mercy." The English courts generally held that the right to pardon was an ancient remnant of the kingly prerogatives; since not given to the king by the people, they could not take it away.

While the bare legal right of the king to pardon is still recognized under the English law, yet it is only exercised under the advice of the prime minister. However much King George may sympathize with the Mayor of Cork in his hunger strike, and however greatly he may desire to order his release, yet as he well says "custom forbids," he is but the symbol of the Empire and the real power to pardon rests with the prime minister, Lloyd George.

The American theory of government is that all power is derived from the people. The state is the mere instrument through which the sovereign will of the people is expressed. While the right to exercise executive clemency undoubtedly has come down to us from our English cousins, yet it is certain that had we not inherited it from them, the conscience and sound judgment of the framers of the constitution would have impelled them to have vested such powers in the executive. So we find that the federal constitution vests in the president, as does the constitution of the states vest in the executive the power to pardon, grant reprieves and paroles and remit fines.

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 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, cases where 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.

Our federal and state constitutions do not deal with the pardoning power as a natural prerogative of the executive, as the representative of the executive department of governmental affairs, but simply as an adjunct to the administration of justice, recognized in all civilized governments as necessary by reason of the fallibility of human laws and human courts. While the power to suspend sentence at the time it is rendered is an attempt to make a law general in its terms yield to the requirement of the individual case, yet there is no power in the court to make new statutes, nor to exempt a particular case from the operation of the law. After final judgment is pronounced, the case is closed so far as he is concerned.

The judicial field is circumscribed by the regularity and rigidity of its proceedings. The business of the judge is strictly to apply the law. The business of the executive under our constitution is not to make or apply a law, but to relieve the criminal from the unjust application of the law in a particular case.

"There is," says Bouvier, "a kind of equity which is founded in natural justice, in honesty and right and which arises out of the public welfare. That is called natural equity. It is this higher, more refined and less formal equity that belongs to executive clemency where alone it can be administered because of its elasticity and adaptability of particular application. Under it, state policies, mercy, propriety of a particular case, the prosecution, kind and extent of punishment, the condition, history and future of the convict, and the security of the community, all become material, relevant and capable of weight in a particular case. It arises above the law, the exact consequence of acts prescribed by law will be set aside in view of one more consistent with the demands of justice or morality."

The necessity of the executive having the power to relieve persons convicted of crime from the consequences of their acts was clearly recognized by the makers and builders of our federal constitution.

Alexander Hamilton said in the *Federalist*, in discussing the sub-

ject of the pardoning power: "Humanity and good policy inspire to dictate that the benign prerogative of pardoning should be as little as possible fettered. The criminal code of every country partakes so much of necessary severity that without any easy access to exceptions in favor of unfortunate guilt, justice would wear a countenance too sanguinary and cruel."

Chief Justice Marshall defines the pardoning power to be "a constituent part of the judicial system, the judge sees only with judicial eyes and knows nothing of any particular case of which he is not informed judicially."

The power vested in the executive being without any limitation and his action final, it follows that there can be no rule as to how he shall consider a case, what information he will seek or consider, what weight he will give to the judicial decision, an affidavit, an unsworn statement, a petition or facts within his own knowledge, except such as he may impose upon himself. The constitution vested a discretion in the executive officer; his interpretation of that discretion must be conclusive. The power is a broad one. It is vested in the executive for the benign purpose of relieving the criminal from the rigors of the criminal law whenever the good of society and the welfare of the criminal demands such action. Ever keeping in mind the twofold purpose of all criminal law, to protect society and reform the wrongdoer, it is just as much the duty of the executive to act and extend clemency when the occasion demands as it is for the judge and jury to convict when the facts presented show a violation of the law.

It is just as much an abuse of the pardoning power for the executive to refuse to grant clemency when the facts justify such action for fear of adverse and usually ignorant and thoughtless criticism as it is to grant clemency because of political influence or personal pressure.

The power of the executive to remove a particular case from the application of the law is a sacred trust and in the administration of that trust neither fear, favor nor affection should influence him in the slightest degree. Often the very nature of the law makes executive action necessary, unless the spirit of the law is to be perverted. In Indiana we have the usual penalties of fine, imprisonment and deprivation of the rights of citizenship. Under the federal law, and in many of the states, if a person is fined, after serving thirty days in prison, on filing an affidavit of no property, the prisoner is released. In Indiana no such provision obtains and the result is, in effect, imprisonment for debt. Two men are convicted of the same offense and are given time and a fine. The one has property with which to pay his fine and at the

end of his time goes free; the other is without money to pay his fine and must serve one day for each dollar of fine. This results in a case that where a sentence of six months and \$500 fine has been assessed, the prisoner is compelled, when without money to pay his fine, to serve more than two years, a result that is inhuman in its application, makes the punishment most severe upon the poor and friendless, a conclusion certainly not contemplated by the legislature which enacted the law.

I have seldom remitted a fine, but whenever a prisoner, having served his time, can secure employment and is willing to pay from his wages \$1.00 per day on his fine, I usually parole him, restore him to his family and permit him to pay his fine outside prison walls. The result has justified such action, for out of over 100 such conditional paroles, I have had to revoke the paroles for failure to make the payments in but five cases. I have formed a few rules simple in their application for my own guidance in the exercise of the pardoning power.

First, I will not consider any case of a second offender, nor of a life prisoner, referring all such cases to the pardoning board.

Second, I will not consider any case where it is within the power of the trustees of the institution in which the prisoner is confined to grant a parole.

Third, I will not consider any case where a man's prison record is bad or where he has previously violated a parole.

Fourth, the prison officials and the judge trying the case are usually asked to recommend the extension of clemency in each case.

In passing upon an appeal for clemency, the presumption should be kept in mind that the statute invoked was intended to apply and that the judge acted properly and with correct result. For this reason, if for no other, the judge and prosecuting attorney should be consulted before the exercise of executive clemency; not that their judgment should be final, but charged as they are with the responsibility for the enforcement of the law, knowing the local conditions and the surroundings and situation of the criminal, their advice in the matter should be given due weight.

Quite often a judge will at the time of pronouncing the sentence, believing that the minimum penalty fixed in the statute is too severe when applied to the particular case, state to the prisoner that he will, when a certain part of the sentence has been served, recommend clemency. With few exceptions such recommendations are followed. The enlightened opinion of today recognizes the vital necessity, in the

administration of the criminal law, of the power to meet the changes and particular situation which no legislature can foresee.

When we realize that more than thirty-five per cent of criminal cases are reversed on appeal and how often innocent men suffer because of their poverty; when we know from the records that ninety-six and one-half per cent of first offenders paroled by the executive observe their parole and earn their discharge; when we see how often the great burden of the punishment, the shame, disgrace and suffering falls upon the innocent family, it will bring to us a clearer understanding of the responsibility that rests upon the executive in the exercise of the pardoning power.

It cannot be said that no consideration should be given by the executive to the family and the surroundings of the criminal. The very purpose of lodging the pardoning power in the executive is to relieve exceptional situations where it is to be presumed that the legislature passing the law might have fixed a different penalty had it been familiar with the facts. I illustrate what I mean by two cases that came before me this week—one, the wife of a criminal, came into my office with six children, the youngest five months of age and the oldest ten years. Her husband had been sent to prison for from one to five years for stealing chickens, leaving her with the six children without any property whatever, except the household goods. Living with her was her widowed mother sixty-five years old and the sister nineteen years old, the latter a stenographer earning eighteen dollars a week and the sole bread winner of the family, except that the wife and mother were doing washing at the house and adding to the earnings of the sister. The total income of this family of ten was less than thirty dollars a week. The mother became ill, could no longer wash and in her distress the wife appealed for clemency for the husband who has been in prison for eight months. She said if her husband was not released she would not be able to keep the family together, but would be compelled to place them in an orphan's home. The former employers of the criminal had in writing offered him back his job at six dollars a day if released.

I claim that this is a plain case for executive clemency. It is the man's first offense. Apparently he had lived a correct life up to that point when sickness in his own family, according to his statement, led him to commit the theft. Is society better off to let this woman struggle on with impossible conditions, the family to be broken up and this man at the end of three months more come out embittered against society, or is it better for society to extend clemency, give him another chance

in life, restore him to his family and permit him to take care of them? The mere statement of the situation brings the answer.

Yesterday I received a letter from which I quote:

"I am writing you concerning and pleading for my husband and family. He is in prison and as it is so hard for us to get along without him, and I have been trying to come to see you personally, but as it costs so much and I have not enough to get on, only just what I work and get, and that is not very much. My husband was sentenced the nineteenth day of June and was taken away from us without leaving me any money. I have four children to care for, the oldest ten years and an invalid; the others eight, five and three years. I don't feel like I am able to work and keep the home together and keep my children in school. You know children must be kept in school, and I have to work ten hours a day and I walk two miles each way to my work and then come home and do my housework to keep my children in school and my family together. I am not stout, but the Lord has been merciful with me, for I have stood the work and worry so much better than I ever thought I could. Now, my husband did wrong and should never have taken the \$50 that he did, but he is not paying back one penny where he is, and if you will let him out I and myself are willing to work every way and try to pay every cent of it back."

These two cases are typical of hundreds of cases that come before the executive. Seventy-six per cent of those applying for clemency do so without intervention of lawyers, many times because they are too poor to employ them. 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.

After nearly four years of experience and a careful study of the whole question, I am fully convinced that the public interest is best served, the reform of the prisoner more certainly attained and the welfare of the family and the immediate community advanced by a liberal but discriminating use of the pardoning power than by its harsh and restricted use. Mistakes will be made, men occasionally will be released who should have served their full time, but for every mistake so made scores of men will be restored to society never again to transgress the law, many families united and made happy, the just demands of the law satisfied and society benefited by such a policy.

The pardoning power is the most sacred, the most difficult of all executive functions. It is intended to be used to temper justice with mercy, to be so applied that while society shall be protected and the majesty of the law vindicated, its weight shall not fall on the individual and his family in such manner as to embitter them toward society and

cause them to feel that the law does not apply with equal weight to all persons. Some hold that the power is one that should seldom be exercised and then only in exceptional cases where facts that become known after conviction throw doubt upon the justness of the verdict of the court. That the frequent use of the pardoning power brings the courts into disrepute, dispels fear of the law, encourages an increase of crime and creates a spirit of Bolshevism and unrest among the people, I do not believe. If the law fell with equal weight upon everyone, if high and low, rich and poor who are guilty of its infraction, alike suffered its penalty, there might be some reason for insisting that the guilty should in all cases pay the full penalty of the law; but too often in this state I have seen the law applied with unequal weight, seen men of high estate surrounded by influential friends violate the law with impunity and go unwhipped of justice, seen public officials charged with the execution of a high trust violate the law, betray their trust, embezzle public funds and when discovered, because the official or his bondsmen made restitution, be permitted to go unpunished, while men in places of power and influence have shielded them. At the same time men who have committed some petty offense, but are without money or influential friends to protect them, have the full penalty of the law inflicted on them. It is most difficult through our local courts and juries to secure the prosecution and conviction of men of high social, financial and political standing who violate the law.

It is this situation and not the liberal but discriminating use of the pardoning power that creates unrest, anarchism and Bolshevism, and a conviction that the law means one thing to the man of low estate and a far different thing to a man of high estate. We need everywhere a new baptism of respect for law and order and a more insistent demand that the violation of law, when detected, shall be followed by sure and swift punishment regardless of the station in life of the offender. Because of the nature of the jurisdiction, the opportunity for favoritism, selfish interest political consideration and caprice and the impossibility of reviewing the decision, the exercise of the power is likely to excite unreasonable complaint.

In the very nature of the case the people must trust largely to the good faith, the honesty of purpose and discretion of their public servants if they are to have a government worth anything. They cannot have an efficient government if they do not allow a large freedom in its movement, and honest and honorable men will not be attracted to the public service, or will hesitate to discharge their full duty if they

are always to be suspected by the people and charged with improper motives in the administration of its affairs.

After a careful survey of the record made during the past four years in my own state, during the trying years of the war and the unsettled period that followed, observing the effect upon the persons and the families of those to whom clemency has been extended, I have no hesitation in saying that more errors have been committed where clemency has been refused than where it has been extended.