paroled, and in some cases a comparison of success and failure in relation to those characteristics. This is done for several states and for the Federal prisons. The general conclusion reached in this analysis is that parole boards, in a common-sense manner, take these characteristics into account and make selections of parolees on the basis of these characteristics; they question the superiority of a formal prediction system over this common-sense method. The editors may be right or they may be wrong in this judgment, but at any rate they have provided a body of facts regarding the characteristics associated with failure on parole which is a significant contribution to those interested in promoting prediction work. One of the points of emphasis is that the conditions during parole are intimately related to success on parole; for instance, prisoners paroled to live with their wives succeed on parole much more frequently than prisoners paroled to live in rooming houses. The conditions which are related to success are not determined entirely in advance of imprisonment or during the period of imprisonment, but certainly include those prevailing during the parole period.

These volumes have appeared after many delays and much discouragement. The feeling was expressed again and again that they would contain nothing of importance. It is clear so far as the volume on *Parole* is concerned that it is an important volume and should be useful in practical control and in theory.

II

Review of Volume III on Pardon*

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IF 1937 may be taken as typical, more than 60,000 prisoners are released each year from state and Federal penal institutions in this country. Yet of this number, in 1937, only two-tenths of 1 per cent received full pardons. One state (Idaho) accounted for one-third of the total number of such pardons. Thirty-nine jurisdictions (including the District of Columbia and the Federal government) granted two or less full pardons during that year. Even if the number of conditional pardons is added in, the combined total in 1937 still amounts to only 2.5 per cent of those released. There were 1411 conditional pardons in the United States during the same year, but three states (Florida, Virginia, Texas) accounted for more than 1000 of these, and in thirty-three states, the District of Columbia and Federal institutions there were no releases of this type.

These figures are given (Appendix A) to show the relative importance of pardon as a release procedure. One might draw the conclusion from them that the subject of pardon is relatively so insignificant as not to merit much consideration—certainly not a full volume—in a study of present day release procedures. The fallacy of such an assumption would be completely demonstrated by an examination of the present volume.

True Function of Pardoning Power is Clarified

Pardon is both forerunner and source among release procedures. A full understanding of other procedures cannot come without an investigation of the historical development and present significance of pardon. Clarification of the true function of the pardoning power, therefore, is not only intrinsically worthwhile but it is most important in appreciating the functions of probation and parole.

This volume supplies in a most adequate way the need for information in this field. It has the distinction of being the first full-length treatise on this subject in America. The only previous work comparable to it is Jensen's *The Pardoning Power of the American States* (1922), but the present volume is richer in detail, particularly in historical and continental materials. The so-called "practical" man may feel, perhaps, that too much attention is given in this volume to the historical. In pardon, however, as in everything else, we cannot escape our folk-ways. For example, it is well-known that even in recent years pardons have been urged for condemned persons because of some slip in the details of the execution. A grasp of the historical background which this volume affords will lead to more intelligent handling of the situations that arise today.

The principal emphasis of the volume, however, is not with the past but is directed to the way in which the institution of pardon is functioning in

* Members of the editorial staff of the volume on *Pardon* are Wayne L. Morse, Editor-in-Chief; Henry Weihofen, Editor; and Hans von Hentig, Associate Editor. The volume is published by the U. S. Department of Justice (1939) Pp. 823. Copies are for sale by the Superintendent of Documents, Washington, D. C., at 45 cents each.

the United States today—the laws that govern it, the personnel that administer it, and what the courts have had to say concerning its legal implications.

Why Have Pardon at All?

Chapter Two is concerned with a preliminary question: Why pardon at all? Studies of criminal law administration reveal that the machinery acts as a sieve and accused persons are eliminated at numerous stages prior to trial; and even after trial and conviction there are opportunities for review by higher courts and perhaps for a new trial. If a person has passed through all this without being able to dislodge the conviction it might be assumed that he was not entitled to another chance, namely, a pardon by the executive. This feeling undoubtedly influenced the philosophers of democracy in the 18th century. Pardon in their eyes was unnecessary under good laws properly administered in the interests of the people. In France, for instance, after the Revolution, it was thought that the newly inaugurated jury represented the voice of the people and could not make mistakes. In their minds the institution of pardon had become so associated with abuses on the part of the monarchy that it was to be cast out altogether.

The rational argument against pardon is examined further (p. 56). Why should society set up an elaborate machinery for apprehending and punishing those who break laws and set up along with it an institution to undo the work of the first? This, say the opponents of pardon, deprives the criminal law of its deterrent effect, and weakens confidence in the impartial administration of justice without respect to persons. Kant's opposition (p. 57) is based on his theory of punishment in the criminal law. Justice requires punishment—any interference with this natural and righteous order of things must be bad.

In response to these critics it is pointed out that one function of pardon is to take care of those convicted even though innocent. Although rationally it may seem that an innocent person would not go through our criminal law "mill" and become convicted, nevertheless we know that the innocent are convicted; that juries do make mistakes; and that judges and other officials make mistakes. Of course it may be argued that the case of pardon for innocence is an exception and should not really be treated as a pardon at all. Pardon is said to imply forgiveness or remission of guilt—hence if no guilt the whole procedure is an anomaly. The volume observes that it is highly irrational to cast pardons for innocence into the general hopper of pardons because there are many reasons why the general legal attributes of pardon should not be applied to such cases. But be this as it may, the legitimate function of pardon is not restricted to righting the wrongs of our judicial system.

Defects exist not only in the administration of our laws as mentioned, but there are defects in the laws themselves. There are times when the application of the letter of the law leads to absurd and unintended results. The existence of the pardoning power provides a measure of remedying these absurdities. It is not desirable to change our criminal law too rapidly. The existence of pardon power makes it possible to proceed with due caution in the changing of our law and at the same time prevent miscarriages of justice under the law as presently existing.

Pardon may thus lead to the development of the law itself. If it becomes a matter of course to pardon one who kills another *se defendendo*, the next step in legal development is to recognize this as a proper defense to the original charge. There may be pardons for the purpose of reformation also. Every sentence imposed is said to be but a rough estimate of what is necessary for the particular prisoner, taking into consideration a number of factors including his personality, environment, surrounding circumstances of the crime, etc. After a period of years, the original sentence seems unnecessary and accomplishing no useful social purpose. The prisoner ceases to be dangerous, and a pardon not only takes him off the hands of the state, but gives him an opportunity to lead a more normal life. *Reasons of State* as a basis for granting pardons is a sort of catch-all, including general reasons which do not fit into the above categories. Among such reasons of state which retain importance today is the pardon of the person who has turned state's evidence.

With Whom is the Pardon Power Found to be Vested?

Chapter three contains an extensive analysis of the pardon power, looking to see in whom it is vested. The most usual statement, of course, is that the pardon power is inherent in the executive. This proceeds from the notion that in England it was vested in the Crown, being an attribute of the monarchy. This volume proceeds, however, to show the fallacy in this general statement. The true result is said to be (p. 87) that the pardon power is neither inherent nor necessarily an executive power, but is a power of government inherent in the people, who may by constitutional provision place its exercise in any official, board, or department they choose.

In spite of this "true rule" the summary analysis of the repository of the pardoning power (p. 96) shows that the governor in each state does function to some degree in the exercise of this power. In some states he is unaided, in others he acts with the advice and consent of an executive council or a special pardon board. In others he is assisted by an advisory officer, and in three states he is blessed with the advice of both an officer and a pardon board. The relations of the governors and the pardon boards present several variations. In some instances the governor retains the power to act independently of the board's recommendations and even to act without referring the matter to the board at all. In five states the governor can only exercise his discretion after a favorable report by the board. In other states the governor is only a member of the pardon board with one vote, although perhaps his vote may be necessary before there can be favorable action on an application.

In considering the power of legislatures to grant pardons the problem is stated in terms of the *exclusive* nature of the power granted to the governor and assisting officials referred to in the above paragraph. This volume notes that there is surprising disagreement on what would seem to be a fundamental matter—with four possible views claiming support. These views are: (1) The state constitutional provision conferring the pardoning power on the governor (or a board) is *exclusive* and permits of no invasion by the other branches of government; (2) the power so conferred is *concurrent* and does not impair the power of the legislature; (3) the power is *partially concurrent*, the executive alone being able to grant individual pardons but the legislature retaining the power to grant general laws of pardon and amnesty, and; (4) the legislature retains a *supplementary* power to grant pardons in such cases as are not covered in the grant to the executive.

The *exclusive power* theory has the most substantial support in the dicta of courts but it is stated (p. 103) that only one case exists in which a legislative pardon for a specific individual has been held unconstitutional and that at least six cases exist in which such acts were either held or tacitly assumed to be valid. The vice of the exclusive power theory is that it has been made the basis for striking at socially desirable legislation such as probation and parole laws which were not legislative pardons in any sense of the word.

Restrictions and Limitations of Pardon Power

The pardoning power by its nature remains largely unfettered and unlimited. This has been a source of usefulness; it has likewise made possible grave abuses. This has led in turn to attempts at restriction and limitation of the power. These are examined in Chapter Four of our treatise. In so far as these limitations are in the constitutional provisions granting the pardoning power they are effective of course. The most usual restriction of this sort denies the power to pardon in case of treason or impeachment. Legislative restrictions going beyond these, although numerous, are believed by the writers to be unconstitutional and unwise as well. Certain other limitations have been held by the courts to inhere in the pardoning power although not expressed, e.g., that a pardon cannot prejudice private rights. Another important restriction on the governor is the fact that he may be impeached for abusing his pardoning power. The impeachment of Governor Walton of Oklahoma is examined in detail (pp. 150-153) to demonstrate what constitutes an abuse of the pardoning power leading to censure.

Analysis of Pardoning Procedures

Chapters Five and Six are concerned with the pardoning procedure and with pleading and proof of pardon. In Chapter Five an extensive analysis is made of the laws and practices in the several states regarding applications, investigations and provisions for hearing before the governor or pardoning board. In this same chapter consideration is given to the quaint notion that a pardon is a deed which to be valid must be both delivered and accepted. This ancient dictum seems to have been overruled by the Supreme Court of the United States in 1926, but it is doubtful if the verbiage will soon be rooted out of American jurisprudence.

Distinctions Between Full Pardon and Other Forms of Release

Chapter Seven is most important in pointing out the distinctions between full pardon and other forms of release (and clemency) related to it. This survey includes discussion of conditional pardons, commutation, reprieves, remissions of fines and forfeitures, and furloughs. These are usually considered to be included in the pardoning power of the executive, although some, commutation and reprieves for example, can not be considered release procedures. The conditional pardon is self-explanatory and seems in most instances to be practically the same thing as parole—except that there is no supervision involved. In fact, it is stated (p. 203) that for all practical purposes the conditional pardon is virtually an absolute release. Florida is cited as a state where no parole law

exists and there are numerous conditional pardons with no supervision whatever to see that the conditions are complied with. It is pointed out that the usefulness of the conditional pardon is demonstrated only in those instances where the restrictions on the parole authorities prevent the release of a person who should be released. If the parole laws were sufficiently flexible it is felt that the need for the conditional pardon would cease to exist. The furlough system is given as another example of a bad form of release procedure and one that would be unnecessary under a good parole system (p. 232).

Pardon for Political Offenses

In chapter Eight a complete study of amnesty is presented. It is most thorough and, so far as is known, it stands alone as the only serious study ever made of the subject in this country. With all due respect to the scholarship exhibited one cannot help feeling that the subject is far away from our immediate needs and one may dismiss it rather lightly for that reason. One may be sure that the authors share this desire that amnesty may remain perpetually unimportant—but, if the need should ever arise, here is wisdom aplenty.

Legal Implications of Pardon

Chapter Nine is concerned with more of the legal implications of pardon. Is the person receiving a pardon a "new man"? Has his offense been "blotted out" for any and all occasions? Considerable confusion exists in this field and the authors rightfully complain that this is due in part to the fact that the courts have lumped pardons for innocence with pardons for other reasons and have made no legal distinctions based on the "why" of the pardon. Certain points are clear; the pardoned man usually is restored to his civil rights; his right to vote; to hold office (but not to be restored to office); to serve as a juror. But the fact of conviction may be brought out if the pardoned person testifies in court, and the pardoned offense may be made the basis of divorce proceedings. A pardon does not reinstate an attorney disbarred for the pardoned offense.

Conclusions and Recommendations of the Authors

In Chapter Ten the authors set forth their conclusions and recommendations. They recognize that proper judicial review and effective probation and parole systems should do much of the work now done by pardon agencies and that they could do a much better job. Nonetheless, they assert, there remains a valid field for the pardoning power to occupy. To properly restrict this field two principles should be applied according to the authors:

> *1. Criminal procedure should be liberalized so as to permit reversal of a conviction where new evidence is found indicating that the defendant was innocent.*
>
> *2. All releases on condition of good behavior and under supervision should be under the parole law, and not by conditional pardon.*

To supplement this second principle it is recommended that parole boards should be given full discretion to parole any prisoner deemed worthy.

These conditions being complied with, it is stated that there is still sufficient room for the exercise of executive clemency. Certain situations are enumerated in which it is felt that pardon will continue to be proper. These are: Political upheavals and emergencies; calm second judgment after a period of war hysteria; changed public opinion after a period of severe penalties against conduct later looked upon as less criminal; technical violations leading to harsh results; where immunity is promised for turning state's evidence; cases of later proved innocence; and finally, application for reprieve of commutation.

Organization of Pardon Administration

Concerning the organization of pardon administrations the authors are most emphatic in stating that it should not be combined with parole because the type of investigation made under the two procedures is quite distinct and involves considerations of different sorts. It is recommended that a board made up of officials—other than penal authorities—be retained to assist the governor but that the governor should after obtaining the board's views take any action he wishes. It is recommended that pardon procedure should be simple, thorough, open to the public, free of charge, and finally that it should be adversary in nature with the state (represented by the attorney general) opposing the application in cases where it seems necessary.

In their conclusion the authors state that this analysis of pardon and its administration in the United States is presented in the hope that its findings will make clear the true functions of pardon. It is understatement to say that they have succeeded in their objective. Here is a work which will rank as standard for years to come and no important contribution will be made in the future which does not take its findings into account.