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## NATURE AND LIMITS OF THE PARDONING POWER.

WILLIAM W. SMITHERS.<sup>1</sup>

It may truthfully be said that no department of government has received so little real study as the exceptional jurisdiction of clemency created by the federal and state constitutions. As the theory was inherited with the common law of England, the assumption has been general that its early English traditional bases of mercy and caprice have remained unmodified. This is an error. Many judicial decisions have indicated its true scope and defined the nature and effect of the charters issued. No court, however, has ever attempted to declare what grounds or motives should prompt the exercise of the pardoning power, nor has any court ever attempted to ascertain or review the reasons for a pardon. Manifestly the exercise of such power would be unwarranted under our scheme of government. The jurisdiction of clemency is far removed from that of the courts. The American theory of democratic government was at the outset stamped with the recognition of the people as the source of all power and a delegation in written constitutions of so much of that power as might become necessary to establish and maintain individual, community and governmental rights. These have in all instances been intrusted to clearly separated legislative, judicial and executive departments. The legislative is endowed with all the power the people would have in primary or original general assembly not specifically reserved or bestowed upon another department. The judicial branch is made the hand-maiden of the people for sustaining the organic purpose and plan and their will as legislatively expressed from time to time. The executive department, however, is clothed with all the discretion of the people as a collective sovereign and is the least restrained of all the branches. Indeed, the chief of the state, for the preservation of the peace and the orderly operation of all other departments of government, is the depository of every power to be implied from the terms of the constitution and not therein limited or specifically vested in other branches. He is the voice and the servant of the sovereign people and represents and ought to exercise all their reserved powers which may be required to carry out their general

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organic declaration. No man or other branch of government can supervise, direct or review his actions; he is not subject to mandamus, injunction, *certiorari*, writ of prohibition or even subpoena in respect of his executive conduct. (14 *Am. and Eng. Enc. of Law* (2d ed.), 1106; *State v. Ward*, 9 Heisk., 100; *Opin. of Justices*, 120 Mass., 600; *Com. v. Commissioners*, 2 P. and W., 517 Pa.; *Com. v. Ahl*, 43 Pa. St., 53; *Hartranft, App.*, 85 Pa. St., 433.) In this vast reservoir of discretionary power the several constitutions have expressly placed the prerogative of clemency, in some instances with restrictions, in others without limitation. It is significant that it has never been overlooked in any scheme of government from the dawn of history. It is born of the realization that human institutions administered by human agencies must always have a *residuum* of imperfection. That tradition has kept abreast of every step in civilization. While the people have delegated their legislative power to constitutional assemblies they have also deposited a general corrective force in the courts. In matters pertaining to the life and liberty of citizens they have likewise lodged an additional power in the executive, intended to be above the law, the legislature and the judges in respect of particular instances where the generality of legislative enactment and the unyielding impersonal course of the courts would work hardship and injustice uncalled for by the general purposes of government.

Said the former Chief Justice Mitchell of Pennsylvania: "The constitution deals with the pardoning power not as a prerogative claimed by divine right, but 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 tribunals." (*Diehl v. Rodgers*, 169 Pa. St., 323.)

In the very nature of things legislatures must enact criminal laws in general terms. It is not possible to conceive a community existing subject to criminal laws of such particularity as to meet every case. "No human wisdom can contrive to make laws which will precisely cover all complex cases that may occur, whatever attention may be paid by the law-makers to the variety of compound cases which they are able to imagine." (Francis Lieber: *Legal and Political Hermeneutics*, 194, ed. 1880.) Nor is the imperfection capable of cure or amendment through construction or application by the judiciary. The judgment of every court is molded by the precept "*Sic scripta est.*" There is no power to make new statutes there nor to withdraw particular cases from their operation. The judicial field

is circumscribed by the regularity and rigidity of procedure in which the party most concerned ever remains an impersonal factor—a mere figure in a problem.

It seems plain, therefore, that there may happen cases which the legislature, had it been cognizant of the particular facts, would have excepted out of the general terms of the enactment, and that the courts, had they the power, would say should not be subject to the specific statute. “The law may be broken and yet the offender be placed in such circumstances that he will stand, in a great measure, and perhaps wholly, excused in moral and general justice, though not in the strictness of the law.” (Story: *II Const. of the United States*, sec. 1494.) The same thought was expressed by Chitty, one of England’s greatest legal scholars: “It must be admitted that there are many cases to which no general rules can apply, where *summum jus* would be *summa injuria*.” (*I Crim. Law*, p. 769, Am. ed., 1836.)

There are also defects, some of which are inherent in every system of criminal jurisprudence, and others that are peculiar to trials by jury. Jeremy Bentham pointed out some of these: “Is there, or could there be devised, any system of penal procedure which would insure the judge from being misled by false evidence or the fallibility of his own judgment? No. \* \* \* Judges will continue fallible, witnesses to depose falsehood or to be deceived.” After referring to the weakness of circumstantial evidence by reason of chance or arrangements, instances of even confessed guilt of crimes never committed and undoubted cases of innocent persons being convicted, he proceeds: “When the pretended crime is among the number of those that produce antipathy toward the offender, or which excite against him a party feeling, the witnesses almost unconsciously act as accusers. They are the echoes of the public clamor; the fermentation goes on and all doubt is laid aside.” (Bentham: *Principles of Penal Law*. Works, vol. I, p. 449, Bowring ed., 1843.) Chancellor Kent said: “Under the most correct administration of the law men sometimes fall a prey to the vindictiveness of accusers, the inaccuracy of testimony and the fallibility of jurors.” (Kent: *I Com. on Am. Law*, 283.) Judge Story, in his great constitutional treatise, approvingly uses the words of Kent and adds to the fallibility of jurors that of courts. In the course of time there have been improvements, but the history of the criminal law reveals a long, persistent and oftentimes discouraging struggle to overcome brutality, ignorance, vagueness, partisanship and blind prejudice, and it has taken centuries to establish the present enlightened safeguards. (Stephen: *Hist. of the Crim.*

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*Law of Eng.: II Select Essays in Anglo-Am. Legal Hist.*, 443.) The system is admittedly still in evolution toward that ideally perfect state which must ever prove illusory because of human limitations and the fundamental error of dealing with the crime instead of the criminal. No theory of criminal procedure will ever produce the results rationally desirable until crime is dealt with by individual study and treatment of the offender and the old, impersonal, mechanical and manifestly ineffectual method is abandoned. However, until the movement that is rapidly gaining force to this end shall have been legislatively and judicially recognized the jurisdiction of executive clemency must be maintained and exercised in the light of the traditions which have produced the existing system of criminal law. It must continue to be the ultimate resort for the administration of natural equity in exceptional cases which by reason of the generality of legislative enactments and the imperfections of human tribunals fall within the reserved discretionary power delegated to the executive by the people, a power which, by its very nature and the manner of its delegation, was intended to be and is above the law, the legislature and the courts. Said the great Gibson, Chief Justice of Pennsylvania: "It is certain that so much of the prerogative as appertained to the King by virtue of his *dignity*, is excluded by the nature of our government, which possesses none of the attributes of *royalty*; but so much of it as belongs to him in the capacity of *parens patriae*, or *universal trustee*, enters as much into our political compact as it does into the principles of the British constitution." (*Com. v. Baldwin*, 1 Watts, 54.) It is by virtue of this doctrine that the executives of the federal and state governments have been invested with the pardoning power. The people have thereby reserved to themselves the right, to be exercised by their unfettered agent, to avoid the legislative will, reverse the verdicts of juries and nullify or modify the judgments of courts in exceptional cases. It is the common and honest admission of human weakness, the recognition of human fallibility, the cry of human compassion. It is a confession of imperfect wisdom and voices mankind's universal repugnance to the ir retrievable and the irrevocable. It is the cautionary protest of the multitude against unanticipated and cruel consequences of governmental deficiencies. Whenever a case by its attendant data comes within the relieving remedy of this exceptional jurisdiction the beneficiary is no longer hampered by the ancient and exploded theory of admitted guilt and sovereign grace which in ancient times required a pardon to be pleaded on bended knee. (See *Com. v. Lockwood*, 109 Mass., 322.) On the contrary it

is now conceded under American constitutions that an application for clemency is of legal right, whether based upon a claim of innocence or excessive punishment, and that a moral duty is imposed upon the executive to afford relief if a rational interpretation of all the data marks the case as entitled to remedy by that higher justice which planes above all positive law, all civil procedure and all civil equity, for such is the people's will. It is not a question of guilt or innocence alone; clemency is not trammled by terms which belong to the judicial branch of the government. Every circumstance pertaining to the event and the individual is relevant in *foro clementiae* which is beyond all rules of legal procedure, legal maxims and formalities, and in which doctrines like *Ignorantia legis non excusat* have no place. By this advanced view of the power the old, illogical position of an innocent person who accepted a pardon is eliminated. Victims of judicial errors no longer have to accept liberty under false colors. A pardon no longer necessarily implies guilt for it may flow from clearly established innocence. Sir Henry Maine, so long ago as 1862, while a law member of the Indian Governor's Council, referring to pardons in a minute on *Suspension and Remissions of Sentences*, said: "Originally, as might be inferred from the old theory, the exercise of the power was a matter of grace and favor; more recently it came to be controlled by considerations of state policy or popular sentiment; and now, at length, it is rapidly becoming identified with a rehearing of the whole case."

In this country there is not only a rehearing or review of the entire case as judicially presented, but all the surroundings are considered, even to the punishment imposed, and notwithstanding the fact that the legal conviction itself may not be within clemency the penalty may be mitigated.

The depository of clemency need not consider the legal effect of his charter. That is for the court. He must be guided by the broader principles that govern his exceptional jurisdiction which he has sworn to exercise. Most all the constitutions in substance or words contain the clause: "The supreme executive power shall be vested in the governor, who shall take care that the laws are faithfully executed." (Const. Pa., art. IV, sec. 2.) Among his enumerated "supreme executive" powers is that of clemency, which requires him to withdraw from the regular operation of the laws such particular cases as in his wise and merciful discretion he may deem the people intended to except from the results of the application of a particular law or the consequences of the rigid procedure of courts. He can no

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more rightfully refuse a pardon in a proper case than he can rightfully refuse to call out the militia when the preservation of public peace demands it. His oath to "take care that the laws are faithfully executed" must be construed with the qualification "subject to the pardoning power," and his duty in respect of the latter is as high as in respect of the former. The obligation to enforce the laws and the burden of exercising clemency, which is above the law, are properly attached to the "supreme executive power" in whom the people have reposed all of the unexpressed and otherwise undelegated powers necessary to accomplish the ends of government.

The exercise of this discretionary, exceptional and unreviewable jurisdiction undoubtedly presents grave difficulties. No function in a democratic government requires greater care, broader mental capacity or loftier morality. Under modern political conditions no official act is more likely to call forth criticism and charges of favoritism, caprice or corruption. The unhampered and uncontrollable nature of the power, its emanation direct from the people whose best general sentiment it should always reflect, the lack of formality in its procedure and its effects upon legislative intendments and judicial results make the lot of its depositary no enviable one. This is especially so in states having the "one-man power," which is now generally believed to be unwise. In the federal constitutional convention the question was debated and the clause as finally adopted was strongly upheld by Hamilton in the *Federalist*. (No. 74, Lodge ed., p. 464.) There has been little cause for complaint, probably because of the lack of general, direct and continuous contact between the executive and the citizens and the consequent feebleness of local influences. In the state, however, different results have followed and the "one-man" pardoning power has been the subject of much just criticism. Community sentiment, intimacy with local affairs, neighborhood knowledge of crimes committed, familiarity with criminal trials and constant approachability have made governors susceptible to deception, false sympathetic evidence and the obligations or feelings of friendliness founded upon political or personal considerations. Complaints were loud and many during the first half of the nineteenth century. Many remedies were suggested in the various constitutional conventions, resulting in some instances by certain restrictions being placed upon the executive, most commonly by requiring him to act only upon advice of other officials. The first state to constitutionally provide for a board of pardons by name was Minnesota, in 1857, although other states have designated similar functions to be exer-

cised by certain officers without denomination as a body. It is now generally conceded that there should be some advisory body to hear and make a recommendation to the governor before he acts on any application for clemency. This is not only advisable in relieving him of laborious and grave responsibilities, but exceedingly wise in providing regularity, publicity and careful consideration of the merits of every application.

Whether the power be vested in one or many, however, the governing principles, as well as the source and nature of data that should control, are matters of highest importance, quite frequently misconceived by the executive and generally not appreciated by the public. Caprice, rancor, or mere compassion obviously should be avoided in clemency. Francis Lieber has well said that it should "be wielded in the spirit of justice, and not according to individual bias, personal weakness, arbitrary view or interested consideration." (*Civil Liberty*, App. II, 435, ed. 1901.) It would be wise for the depositary ever to remember that a supreme and plenary executive power of clemency is intended to supplement the inadequacies in and correct imperfections of ordinary governmental procedure so far as they affect individual liberty. On the other hand, he should firmly determine to exercise it only when in obedience to a rational interpretation of common public sentiment the case by reason of natural equity raises a presumption that it was intended by the people to be excepted out of the general terms of the punishing statute.

Under the former thought one who has been declared legally guilty should be pardoned if the broader inquest in clemency reveals his non-participation in the alleged crime. Under the latter rule, though the legal guilt be undeniable, where the circumstances would make it repugnant to natural equity and contrary to the common sentiment of the community for the law to take its course, relief should be granted. In either case the wisdom of the action taken must depend upon the character of the inquest, the nature and source of the data and the proper conception of the sacred duty imposed upon the depositary of the power. There is no doubt, however, that decision is capable of being rendered upon precise and unassailable grounds, for clemency if duly considered is a definite jurisdiction with guiding rules tending to rational and just results.

One of the commonest errors is that executives are limited or bound by what has transpired while the judiciary had the case in charge. This would simply mean an additional court of review. There is no such intendment by the constitution. Every department

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of government is separate, and it is well settled that the executive is no more bound by a judicial finding in considering a pardon than the courts would be bound by an act of the legislature saying how a pending suit should be decided. James Wilson, one of the great thinkers of the early days of our country, in one of his law lectures, referring to the three great powers of government being independent as well as distinct, said: "The independency of each power consists of this, that its proceedings, and the motives, views and principles which produce those proceedings, should be free from the remotest influence, direct or indirect, of either of the other two powers." (Works: Vol. I, 367, Andrews ed., 1896.) When the Massachusetts judges were asked by the governor what effect he should give to the recommendation of mercy added to the verdict convicting the notorious Jesse Pomeroy of murder, they specifically decided that the recommendation was not binding on the court or the executive for the reason that the pardoning power is an independent function to be exercised upon a special consideration of the whole case *irrespective of any prior proceeding*. (*Opin. of the Judges*, 120 Mass., 600.) The term "legal discretion," with its well-defined legal limitation, has no counterpart in "executive discretion" which is in nowise circumscribed save by reason and conscience. A governor represents the average honesty, intelligence and good judgment of the people and those are the guiding qualities of his discretion. If he commits blunders there is no appeal nor can he be held to any settled lines of reasoning in the exercise of his discretion. Only his corruption can bring impeachment. If he sees fit to call out the militia to quell disorder which indeed did not warrant such an expense, no man or court can overrule his action, review his conduct or compel him to give his reasons. (*Hartranft*, App., 85 Pa., 433.) He exercised his "executive discretion." So it is in matters of pardon, where he acts alone; there are no rules binding upon him as to how he will consider the case, what information he will seek or consider, what weight he will give to a judicial decision, an affidavit, an oral, unsworn statement, or facts within his own knowledge; what circumstances he will consider important, what decision he will arrive at, what reasons he will give or whether he shall give any at all. A recent careful writer on constitutional law says that "if the constitution has vested a particular discretion in an executive officer, his interpretation of that discretion is conclusive." (Thomas Raeburn White: *Const. of Pa.*, p. 3.)

The case thus being open to examination *ab initio* it will be found subject to certain controlling principles which eliminate

caprice and lead to a conclusion fortified by reason and data. At the outstart every executive should be mindful of two presumptions, viz.: that the statute invoked was intended to apply and that the judiciary acted properly and with correct results. All reasonable doubts must be resolved in favor of the law, its due course and the justice of its regular consequences. (*Com. v. Moir*, 199 Pa. St., 534; *Likins' Pet.*, 37 Super. Ct., 625.)

These presumptions remain until overcome by data weighed by the principles of clemency. Manifestly the first duty is to obtain full information from reliable sources. The natural course will be to first glean the facts developed during the trial and then to consider them in their relation to data pertaining to the witnesses, the public interest, the history of the offender and the offense. The method is immaterial so long as leading to trustworthy results. Examination of facts should in no wise be limited by standards or maxims of legal procedure for therein frequently only half the truth appears. It is impossible to indicate these matters more in detail in an article of this nature, but it may be said that there should be special attention paid to the prosecution, statute, the trial and its incidents, the condition of the public mind when the offense was committed and at the time of the trial, the conduct of public officers, the penalty imposed, the history of the culprit and the best interests of the community. All of this data should be considered relevant, subject only to the tests of reliability, comprehensiveness and correct interpretation.

The sources of information are not limited in character, but reasonable circumspection should be exercised to test their capacity and candor. The avenues will be found to embrace public functionaries, agencies reflecting public sentiment and particular individuals. Among the first it is frequently considered advisable to consult the prosecuting attorney, the trial judge and the jurors. This arises from a common belief that they are disinterested, but this is generally an error. The degree of partisanship entering into the selection and the duties of a modern prosecuting officer, the probability of his having set views and his purely legal conception of a case render his opinion of little value in the higher field of clemency. He is not apt to possess or have been impressed with the broader field of facts, and while he may be requested to give some undisputed data, his opinion should not be asked. All the facts, judicial and extra-judicial, plus the doctrines of clemency, ought to guide the executive to an opinion entirely his own. He has no right to shirk the responsibility.

The trial judge, until recent years, was the one official most fre-

quently consulted in pardon matters. Executives made no study of clemency jurisdiction, did not appreciate its scope, and in their weakness sought to find support in the old tradition of judicial recommendation formerly usual when criminal appeals were not allowed. Under the "one-man power" it was not unnatural for such advice to be sought, but it was a rule of expediency rather than of reason. It, moreover, is an acknowledgment of incompetency. The record shows all the judge can or should know about the case and his mere opinion voices only the conclusion of the judicial department whose very imperfections and errors make a pardoning power necessary. The impropriety of even an appellate tribunal including the trial judge is well recognized, although the lines of authority and procedure are practically well defined. It is the more incongruous when applied to a jurisdiction governed by clement equity, state policy and public sentiment. The great Marshall said: "It is a constituent part of the judicial system that the judge sees only with judicial eyes and knows nothing respecting any particular case of which he is not informed judicially." (*U. S. v. Wilson*, 7 Peters, 150.) His mental attitude and his training makes a limited view almost inevitable. Lieber said: "The business of the judge, his duty and his habit of thinking, are strictly to apply the law, but in the case of pardon, the object is neither to make nor apply a law." (*Civil Liberty*, 446, ed. 1901.)

Many efforts have been made in constitutional conventions to couple the judiciary with the pardoning power and in some states it has been done. It is not generally considered expedient and many times the proposition has been rejected. In the Pennsylvania constitutional convention of 1873 in combatting a proposition to include judges of the trial court or the court of appeal in the board of pardons, the late Andrew G. Curtin, who had formerly been governor, said: "I would not vest the pardoning power in the courts; it is not a judicial proceeding. It is a subject which appeals solely to the conscience of the executive and its exercise does not require a judicial inquiry and decision. When a judge has discharged his duty in sentencing a criminal, after conviction, his connection with the destiny of the criminal should terminate forever and he should not be recalled to sit in judgment upon his pardon." (*II Pa. Const. Deb.*, 1873, p. 335.) In the same debate George W. Biddle, Esq., one of the great legal minds of that period, also said: "When the judge has pronounced the ultimate judgment of the law, his function with the case is, or ought to be, ended forever. If there are good reasons for

a modification of the judgment, they ought not to be addressed to him who is, or ought to be, as we say proverbially, blind." (*II Pa. Const. Deb.*, 1873, p. 356.) Former Governor David B. Hill of New York said he considered the opinions of judges "by no means conclusive," and that "it is evident that a judge unconsciously is often influenced by the prejudiced atmosphere of a courtroom and the unreasonable clamor of a community." (*The Pardoning Power*, 154 North Am. Rev., 50.) To seek the opinion of the sentencing judge in his official capacity is unfair to him, a snare to his sincerity and too imperfect a source of data in determining a question of clemency. Judges might with as much reason ask the executive or legislators how to decide a certain case before them.

The jurors who have convicted the applicant are also sometimes petitioners for his pardon, but obviously their views should have little weight. Even their official recommendation of mercy is often unjustifiable and misguided. Its utmost force may be some slight light on whether the case was exceptional, but expressions of jurors, after separation, can ordinarily be of little aid because they reflect only the court presentation of the facts and are weakened by incomplete knowledge, irresponsibility, indifference, forgetfulness and the general human susceptibility to pitiful appeals.

Police and prison officials are also a source of data, and often supply many relevant facts, but they should be carefully weighed and opinions should have little influence. They know but parts of the case, while the depository of clemency must draw his conclusion from a complete and compassing view in which bare facts are only parts and sometimes are really of little importance.

Newspapers, mass meetings and general petitions at times supply important facts and constitute valuable means of ascertaining public sentiment. They cannot wisely be ignored, although the necessity remains to test their reliability from the standpoint of motive, opportunity and interpretation.

Individuals, such as witnesses of specific facts, whether called at the trial or not, relatives, employers, neighbors and acquaintances will frequently be factors in arriving at a decision. They should not be ignored, for by the wide-reaching and informal methods belonging to clemency data may thus be obtained on both sides of the question.

Every facility should be afforded the applicant and the protestants to produce enlightening information and there is no necessity for establishing rigid rules of form or method. Judge Story said that "this benign prerogative should be as little as possible fettered

or embarrassed." (*Com. on Const. of United States*, sec. 1498.) Ordinary legal rules of evidence and methods of proof lack uniformity and perfection and adherence to them would be inappropriate in clemency for they frequently conceal that broader truth which it is well known courts of law do not always require or even permit. The executive is always bound to use his discriminative and analytical judgment, but should freely admit depositions, *ex parte* affidavits, petitions, with or without oath, collective or single, letters, and even oral appeals and protests. Not all of these will be determining factors, but it is a popular, as well as a scholastic tradition, that the pardoning power, like the Greek shrine, never closes its doors. Hamilton said: "Humanity and good policy conspire 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 an easy access to exceptions in favor of unfortunate guilt, justice would wear a countenance too sanguinary and cruel." (*The Federalist*, No. 74.)

When the depositary of clemency has gathered all the data pertaining to the offender, the violated statute, the offense, the trial and the punishment, the important question arises whether the case as a whole calls for relief. If it is one that, by reason of natural equity or general public sentiment, a dispassionate mind of honest intent is constrained to believe was not included or would have been excepted out of the terms of the violated statute when it was enacted had the legislature known the facts, then it is exceptional and clemency should be extended so far as the exceptionality warrants.

The equity which belongs to the jurisdiction of clemency is not that of the courts or of statutory creation. It is limited only by the boundaries of universal morality or natural law. Aristotle said: "The equitable is just, but not the justice which is according to law, but the correction of the legally just. \* \* \* And this is the nature of the equitable, that it is a correction of law, wherever it is defective owing to its universality." (*The Nicomachean Ethics*, b. V. c. x. S. 4.) In another place he says: "And equity is that idea of justice which contravenes the law. \* \* \* Equity also is the having an eye, not to the law, but to the lawgiver, and not to the conduct, but to the principles of the agent; not to his conduct in one particular, but to its whole tenor, not what kind of a person he has been in this instance, but what he has always shown himself or generally at least." (*Rhetoric*, b. I. c. III, ss. 2-18.) Seneca said: "Mercy is free in coming to a conclusion; she gives her decision, not under

any statute, but according to equity and goodness." (*De Clementia*, l. II. c. 7.) Pufendorf declared that "it is necessary that reason and the law of nature should supply the defects of the civil law." (*De Jure Nat. et Gent.*, l. III. s. XVI.) Domat, after dividing laws into those derived from equity and those founded on positive enactments, said of the former: "These are the laws which have in them a justice that cannot be changed, which is the same at all times and in all places; and whether they are set down in writing or not, no human authority can abolish them, or make any alterations in them." (*Les Lois civiles dans leur ordre naturel.*) A modern American jurist has perpetuated these principles: "There is a kind of equity which is founded in natural justice, in honesty and right, and which arises *ex aequo et bono*; this is called *natural equity*. \* \* \* This kind of equity embraces so wide a range that human tribunals have never attempted to enforce it." (Bouvier: *Institutes*, sec. 3724.) It is this higher, more refined and less formal equity that belongs to the jurisdiction of clemency, where alone it can be administered because of its elasticity and consequent susceptibility of particular application. Under it, state policy, mercy, propriety of a particular law or 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 given case. It rises above the law. "The exact sequence of acts prescribed by the law will be set aside in favor of one more consistent with the demands of justice or morality, upon a view of all the circumstances of the individual case." (Hammond: Note H, "*Equitable Interpretation*," ed. of Lieber's Works, 1880.)

The public sentiment which should be reflected in the pardoning power often presents difficulties in interpretation. Caution should be used lest the will of the people be misrepresented or expressions be temporary, inflamed or territorially limited. Sectionalism, partisanship or interested outbreaks should never be mistaken for *vox populi*. The true "cry of the country" will be temperate, logical and in accord with the average motives and conduct of mankind. Where no expression of general public opinion has occurred it must rest upon inference. Thus where innocence has clearly been shown there can be no doubt that natural equity requires, and it should be inferred that public sentiment demands, a pardon. This is true, although personal enmity, partisan prejudice or ignorance of the facts might prompt public denials of innocence. The executive is the best and the sole judge within his jurisdiction. In matters of state policy,

such as dealing with youthful offenders, habitual criminals, etc., the common knowledge and generally accepted views of criminology will justify action. So as to the effects of sex, age and health and questions of pure humanity and mercy, although no case ought to rest entirely upon mere compassion.

It would be impossible to here discuss the various features which in particular cases ought to have weight, but the governing principles are capable of definite application and where clemency is rationally justified it should be awarded fearlessly. Criticism may sometimes result because of purely local conditions, partisan rancor or ignorance of the nature and jurisdiction of the pardoning power. That is not a reflection, however, of general public sentiment and the real sense of the community will, notwithstanding, approve the dispassionate and reasoned act of the executive who is vested with the constitutional power. Former Chief Justice Lowrie of Pennsylvania said: "In the very nature of humanity, people must trust very largely to the good faith and discretion of their public agents if they would have a government that is worth anything. They cannot have an efficient government if they do not allow it a large freedom in its movements. And they cannot have honest and honorable men in office if they are to be always suspected by the people because of their office." (*R. R. v. Cooper*, 33 Pa. St., 278, 285.) In conclusion it may be said that the pardoning power is at once the most sacred and the most difficult of all executive functions, particularly when vested in one individual. Its exercise is likely to arouse the most unreasonable complaints because of the broad nature of the jurisdiction, the opportunity for caprice, interest or favoritism, the impossibility of review, and particularly because of the commonly superficial knowledge of the subject among laymen and the meager special study given it by the bench and bar. It is, nevertheless, a definite jurisdiction with rational governing principles which, if honestly applied, will lead to precise and justifiable conclusions in every case.