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CONSOLIDATION OF PARDON AND PAROLE: A WRONG APPROACH

HENRY WEIHOFFEN*

There is a growing tendency throughout the United States to consolidate pardon with parole administration, and even with probation. This movement seems to have met with almost unanimous approval; at least it has no opposition. It is the purpose of this paper to remedy that lack and furnish the spice of opposition.

The argument for such consolidation is that pardon and parole perform very largely the same function. A conditional pardon, particularly, is practically indistinguishable from a parole. But the governor, granting a conditional pardon, usually has no officers available to see that the conditions are complied with. Why not—it is argued—assign this duty to parole officers? Moreover, it is felt to be illogical to have two forms of release so similar as parole and conditional pardon issuing from two different sources, one from the parole board and the other from the governor's office. Why not place the power to grant both in one authority—for example, a board of pardon and parole of which the governor is a member?

This reasoning has led about half of the states to combine the pardoning with the paroling authority to greater or less extent. Thus in seventeen states the parole board is also the governor's advisory pardon board,¹ and in at least two others the parole commissioner is also the governor's advisory pardon commissioner.²

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¹ ALA. CONST., art. V, §124; ARIZ. REV. CODE ANN. (Struckmeyer, 1928) §5220; ILL. REV. STAT. ANN. (Smith-Hurd, 1935) c. 33, §802; IND. STAT. ANN. (Burns, Supp. 1936) §§13-1301 to 13-1304; IOWA CODE (1935) §3812; MASS. LAWS ANN. (Michie, 1933) c. 127, §154; Mich. Pub. Acts 1937, no. 255, c. III, §§1, 13; Mo. LAWS, 1937, p. 400; MONT. CONST., art. VII, §20; MONT. REV. CODES ANN. (Anderson and McFarland, 1935) §§12434, 12455, 12456, 12264; N. Y. CONSOL. LAWS (Cahill, 1930) c. 18, §116; OHIO CODE ANN. (Throckmorton, 1936) §2211-7; PA. STAT. ANN. (Purdon, 1930) tit. 61, §299; TEX. CONST., art. IV, §11, as amended 1936; Tex. LAWS 1935, p. 1237; Wash. LAWS 1935, c. 114; WYO. REV. STAT. (Courtright, 1931) §80-102. In North Carolina and Oklahoma, the governor in exercising the pardoning power has the help of a pardon and parole officer and a pardon and parole board.

² Md. LAWS 1922, c. 29; N. C. LAWS 1933, c. 111; N. C. LAWS 1935, c. 414. In Oregon also, although no legal authority exists for the practice, the governor always requests the parole officer to investigate pardon applications, and this request is complied with.

In a few states the power to grant paroles is treated in the constitution as part of the clemency power, the governor being given power to "grant reprieves, paroles, commutations and pardons."³ Several of the states which have vested the pardoning power in a board rather than in the governor alone have given this board jurisdiction over both pardons and paroles.⁴ The courts have sometimes fostered this tendency by holding that parole is a form of executive clemency,⁵ and even holding that any attempt to vest the paroling power elsewhere is unconstitutional.⁶ Seven states have more or less consolidated the administration of pardon with probation—most of these within the last few years.⁷

No one will deny that it is undesirable to have practically the same type of release issued from two possible sources under two different names. Nor will anyone dispute that it is desirable, if conditional pardons are going to be issued as a substitute for paroles, that there should be officers provided to supervise persons so released to see that the conditions are complied with. It seems to me, however, that to try to accomplish this by consolidating the two is not the best solution. I propose instead that we start a step further back, and define the proper sphere of action for pardon and parole respectively; and I believe that a proper definition would show them to be entirely different in nature and purpose. If each

³ ALA. CONST., art. V, §124; OKLA. CONST., art. VI, §10.

⁴ IDAHO CONST., art. IV, §7; NEB. CONST., art. IV, §13; NEB. COMP. STAT. (1929) §§29-2602, 29-2604; NEV. CONST., art. V, §14; N. J. COMP. STAT. (1911) tit. 53, §173; UTAH CONST., art. VII, §12; UTAH REV. STAT. ANN. (1933) §67-0-1; *State ex rel. Bishop v. Board of Corrections*, 16 Utah 478, 52 Pac. 1090 (1898).

⁵ *In re Prout*, 12 Idaho 494, 86 Pac. 275 (1906); *State v. Yates*, 183 N. C. 753, 111 S. E. 337 (1922).

⁶ *People v. Cummings*, 88 Mich. 249, 50 N. W. 310, 14 L. R. A. 285 (1891); *Fehl v. Martin*, 155 Ore. 455, 64 P. (2d) 631 (1937); *State ex rel. Bishop v. Board of Corrections*, 16 Utah 478, 52 Pac. 1090 (1898). As a result of the latter decision, parole in Utah is now administered by the board of pardons. UTAH REV. STAT. ANN. (1935) §67-0-7. See also *In re Conditional Discharge of Convicts*, 73 Vt. 414, 51 Atl. 10 (1901).

⁷ Missouri, Tennessee and Washington have recently created consolidated boards which not only administer both parole and probation, but also act as the governor's advisory pardon board. Mo. Laws 1937, p. 400; Tenn. Laws 1937, c. 132, 276; Wash. Laws 1935, c. 114. Michigan in 1937 consolidated all three functions in a department of corrections, but probation is handled by one bureau within this department, and pardons and paroles in another. Mich. Pub. Acts 1937, No. 255. In Arkansas the director of probation and parole is appointed by the State board of pardons and paroles, and presumably the administration of the two release procedures is fairly closely linked in the same officials. In Montana the board of prison commissioners is charged with the administration of probation. This board consists of the governor, the attorney general and the secretary of state; the first two of these, together with the state auditor, also make up the board of pardons. In North Dakota the State board of administration has charge of probation, subject to the probation regulations of the board of pardons.

were kept within its proper limits, there should be no overlapping and so no necessity for consolidation.

It is submitted that the policy and practice of releasing convicts from the penitentiary upon conditions calling for good behavior, and under supervision, should be denominated parole, with administration concentrated in one agency, the parole board. Pardon should not be used as a regular release procedure but should be an extraordinary measure, granted for peculiar reasons calling for mercy or leniency.

The cause for our present confusion is that pardon is not so restricted to extraordinary cases, but is in many states employed as a regular releasing device, as a substitute for or supplement to parole. The reason for this situation is largely historical. Before regular parole systems were created by statutes, the same general purpose could to some extent be served by a conditional pardon.⁸ It wasn't necessary to wait for the legislature to enact a parole law; a makeshift sort of parole could be had by a pardon granted upon condition of maintaining good behavior. This was mere "make-shift," however, because the governor had no staff to see that the conditions were in fact complied with, and a conditional release without supervision is in effect a mere turning loose of criminals without any strings attached. It fools only the public and lulls the consciences of officials; it never fools the convicts, who know quite well that no one is checking up on the requirement that they remain employed, stay away from evil companions, refrain from drinking, etc.

Nevertheless, this makeshift substitute for parole was sufficiently like the real thing in appearance to satisfy some states, especially since it was commonly referred to as "parole." The public, hearing it spoken of as "parole" thought they had a parole system and were satisfied; there was no sufficiently strong demand for a real parole law to overcome legislative inertia.

⁸ The usefulness of conditional pardon for this purpose was early recognized. In 1336, a statute was enacted in England providing that no pardon of felony would be allowed unless the party found sureties for his good behavior, before the sheriff and the coroners of the county (10 Edw. III, c. 2). This was repealed in 1694, by a statute which provided that the judges before whom any pardon of felony was pleaded might at their discretion require that the person enter into a recognizance with two sureties for good behavior for a period of time not to exceed seven years (5 & 6 W. & M., c. 13).

Transportation to the colonies was originally established in English legal practice by the device of granting a pardon conditional upon the convict's remaining in a colony for seven years, five of them to be spent in service. At the end of that service he was given a grant of land. Kenny, *Outlines of Criminal Law* (14th ed.) p. 502.

This is the situation still in a few states, e.g., Florida and Virginia. Neither of these has a real parole system; "paroles," so called, are in fact conditional pardons, and are granted not by virtue of any statutory parole system, but under the governor's pardoning power.

It is true that the pardoning power is broad and flexible. It has throughout the centuries frequently been used to circumvent the rigidity of formal law and to introduce new reforms. The defenses of insanity and infancy, for example, found their way into the law through the practice of pardoning such persons. And in making it possible conditionally to release convicts before statutory authority for the practice had been born, the institution of pardon has contributed another valuable reform. But just as we have long since recognized insanity and infancy as legal defenses, and divorced them from pardon, hasn't the time come also to divorce the parole system? Is it not time to recognize that a parole is not a mere matter of mercy or grace granted as an exercise of executive clemency, but is a regular and systematic process designed to bridge the gap between the regimented and irresponsible life of the penitentiary and the responsibilities and temptations of freedom?

The answer would be easier if the historical were the only reason for the prevalent use of pardon as a regular release procedure. But there is another reason: the restrictions and exclusions written into the parole laws. The story of these restrictions furnishes an ironic example of how cautious conservatism and "hard-boiled" opposition to the liberal extension of the parole system defeat their own ends.

This opposition to the "soft hearted sentimentality of cream-puff reformers" has in almost every state succeeded in writing certain restrictions into the parole laws. Persons convicted of certain crimes (murder, rape, etc.) are sometimes excluded from the hope of parole; or are declared not parolable until they have served a certain portion of their sentences. Second offenders are sometimes declared ineligible. But do these laws succeed in their purpose of keeping such persons in prisons? They do not. Penal authorities, having worthy cases deserving release, or simply being so overcrowded that they must find means of releasing more convicts, get the governor to release them by conditional or outright pardons or other form of executive clemency, or to commute their sentences to a term rendering them eligible to parole. In Nevada, for example, conditional pardons are used to release convicts who have not served

the ten months in prison required for eligibility for parole, or who are ineligible for parole because three times convicted. Because there is no suspension of sentence or adult probation in Nevada, defendants are sometimes found guilty whom the courts do not wish to send to prison. In such cases, judges are quite willing to recommend release on conditional pardon a short time after commitment. This is not the most desirable procedure, but until the State enacts a probation law it will remain necessary.

One of the most frequent uses of commutation has been to make the prisoner eligible for parole. This may be necessary or desirable in two types of cases: (1) to parole persons excluded from the parole law; (2) to parole persons who under the law are not eligible yet, but would be later.

The first type of case is occasionally met with in Iowa, among other States. The Iowa parole law excludes those serving life sentences. It has not been uncommon for the board of parole to find in one of the penal institutions a "lifer" who seemed to be one of the best parole risks of all the prisoners there. The board has not been hasty to act in such a case, but after such an inmate has served long enough so that his provisional release would not disturb the community's sense of justice, it has recommended to the governor that the sentence be commuted to a term of years in order that a parole might be granted. The practice has been to change the sentence to a rather long term. Since, under the Iowa law, eligibility for parole is not dependent on having served any stated portion of the sentence, this device permits reincarceration for the probable duration of the prisoner's life, should it be necessary to revoke his parole, without delaying the time of his original release. Such recommendations have usually been followed by the governor. The board and the governor seem to feel that they are in a better position to pass upon the problem of provisional release of an inmate when they are considering the case of a particular person, with the facts of the crime and his case history before them, than the legislature was when it was dealing merely with abstractions. And when they feel that this device should be employed for this purpose they resort to it. Furthermore, they seem to have been rather fortunate in the selections they have made, and have had little trouble from parolees who have been released by this procedure.

The second type of case is found in most of the States where the parole law requires that the prisoner serve his minimum sentence (as in Missouri) and where it is felt that the particular pris-

oner is safe and worthy to be paroled before that time. In States where parole and pardon are administered by the same body, this use of commutation practically avoids the restrictions of the parole law. If a parole is deemed advisable, but the law renders him ineligible, he is given a commutation and then immediately paroled.⁹

Judicial sabotaging of the purpose of indeterminate sentence laws, coupled with judicial ignorance of the operation of good time laws, creates another situation calling for remedy by exercise of the executive clemency power. It is shockingly common under laws requiring the trial judge to fix a maximum and a minimum sentence, within limits fixed by statute, for the judge to fix the minimum so close to the maximum as to amount practically to a definite rather than an indefinite sentence ("thirteen years and eleven months to fourteen years"). This is not only a callous disregard by the judge of the spirit and purpose of the law which he is sworn to uphold, but is a subversion—usually merely ignorant and unintentional—of the parole law. The parole law commonly provides that convicts convicted for indeterminate terms are eligible for parole after serving their minimum sentences, but not before. But in all except two or three states there are so-called "good time" laws, providing for reduction of sentence for good behavior. As applied to indeterminate sentences, it is usually provided that good conduct reductions are made from the maximum sentence. On long sentences, these reductions often amount to as much as one-third of the maximum. Where the minimum sentence is fixed too close to the maximum, the effect is that the maximum sentence, minus good time deduction, is less than the minimum sentence, and the convict is therefore entitled to absolute release before he is ever eligible for parole. The result is that such convicts must be released into society without the restraint and help which parole affords.

How this works can perhaps be better seen from a concrete illustration. Recently a Denver judge sentenced a man pleading guilty of rape to "thirteen years and eleven months to fourteen years." The Colorado parole law makes this man ineligible for

⁹ This cannot be done in Illinois and Kentucky, however. The courts of those states have construed the statutes making a prisoner eligible for parole upon serving the minimum sentence "imposed by law" to mean the minimum imposed by the sentencing judge, and not that fixed by the governor's commutation. *People v. Jenkins*, 325 Ill. 372, 156 N. E. 290 (1927); *Alford v. Hines*, 189 Ky. 203, 224 S. W. 752 (1920). It would seem sounder to say that the governor's power to commute a minimum sentence makes the new sentence the complete substitution for the old for every purpose, including parole; and most courts do so hold. See, for example, *People ex rel. Atkins v. Jennings*, 248 N. Y. 46, 161 N. E. 326 (1928).

parole until he has served the minimum sentence, thirteen years and eleven months. But the Colorado good time law will enable him to earn a reduction of five years and two months from his maximum sentence (and even more if he is made a trusty), and so entitle him to unconditional release in eight years and ten months, or even less. What has the judge accomplished by placing the minimum so close to the maximum? He has in no way interfered with the criminal's release at the end of eight years and ten months. With a maximum of fourteen years, there is no purpose of setting the minimum at more than eight years and ten months—no purpose, that is, except one: to prevent the convict from ever being paroled. Perhaps this is the effect that the judge wished. If so, most readers of this journal will agree that it is an undesirable result; the parole system is a valuable institution and should not be precluded in this way. But it is not necessary here to argue in defense of the parole system. It is enough to say that whether or not the system should be abolished is not to be determined by a single judge. Until changed by the legislature, parole represents the deliberate policy of the state. Whether and when convicts are to be paroled was meant to be left to the paroling authorities under the terms of the statute; it was not meant to be determined by the sentencing judge.

At present, the only way to overcome such partly deliberate, partly ignorant, judicial obstruction to the clearly expressed penal policy of the state is by exercise of the executive clemency power, commuting high minimum sentences in such cases to a lower term, so as to permit a period of parole before the convict is entitled to final discharge. The Arizona judges have been especially guilty in this respect, requiring the governor to use his clemency power frequently for this purpose. And while the matter can always be solved in this way (if the governor can be induced to act) it is not the most satisfactory situation for two reasons. First, because it requires calling in the executive pardoning power to carry out a policy which should be and was intended to be administered by the parole board; and second, it always subjects the governor to political criticism for "turning loose criminals" by what on its face seems an excessively liberal use of the pardoning power. In recent years there has been considerable public criticism in Arizona of parole and pardon of convicts. In several cases where the board has recommended commutations, the governor because of this criticism has refused his approval.

The only solution (excluding the difficult job of educating

judges to a better understanding of the wider effects of such sentences) is to substitute for the quasi-indeterminate sentence laws found in such states as Colorado and Arizona laws which themselves fix the minima and maxima, leaving no discretion in the judges.

Restrictions upon parole eligibility have also fostered another type of release usually known as the indefinite furlough. The indefinite furlough is a release procedure of uncertain parentage. It is not specifically mentioned in any state constitution as one of the types of clemency which the governor may grant, nor is it easy to uphold as coming within one of the types which are mentioned,—pardon, reprieve, commutation. Nevertheless, it is found in several states, and its legality has rarely been questioned. In one case, the Arkansas court upheld it as being a form of commutation.¹⁰ Although called a “furlough” in Arkansas, Louisiana, and Texas, it is known as a “reprieve” in Louisiana and an “indefinite suspension” in Mississippi. By whatever name known, it operates virtually as a conditional pardon or parole. If a convict released on an indefinite furlough is not discovered to have violated the conditions regarding good behavior which are usually attached, he is never returned to serve out his sentence. In some states such furloughs are granted even before the convict ever enters the prison.

In Arkansas and Louisiana this type of release has been very commonly used to release convicts not eligible for parole. The Louisiana indeterminate sentence law requires service of two-thirds of the maximum sentence before a convict is eligible for parole, but under the good time law, a prisoner's maximum sentence, less deductions for good time, may expire before two-thirds of the sentence has been served. Therefore, indefinite reprieves were granted in meritorious cases to allow conditional release prior to the time for absolute release under the good time law. In Arkansas, the present parole practice is not to allow the prisoner to apply for parole until one-third of the sentence has been served. But this rule is self-imposed by the board, and may be changed. It would be much better to liberalize the parole law and release such prisoners on parole instead of on indefinite furlough.

We have here another example of what we have pointed out before: the fact that restrictions on parole eligibility often result merely in the release of prisoners under some type of clemency with less supervision than they would have under parole.

The reason for saying that it would be better to release con-

¹⁰ *Williams v. Brents*, 171 Ark. 367, 284 S. W. 56 (1926).

victs on parole rather than on furlough is that there is more likely to be some sort of supervision of parolees than of persons at liberty on furlough. Most States now have some sort of supervision for parolees, but nowhere are there any officers specially charged with the duty of checking the actions of convicts on furlough. It follows that the likelihood of the furlough's being revoked for violation of conditions is slight. In Mississippi, out of 318 indefinite suspensions granted in the fiscal years 1933-1935, only three violators were returned to the penitentiary.¹¹ Unpublished statistics for the year 1935-1936 indicate that of 264 suspensions granted, only seven violators had been returned. Yet on November 13, 1936, there were 178 definite suspension violators who had not been returned to prison. This indicates that violations rarely result in re-imprisonment. From the viewpoint of public protection, even an inadequate and under-manned parole system is definitely preferable to release on furlough.

There is another reason why the conditional release of convicts should be handled under a parole law instead of having to resort to the executive pardoning power; and that is that only by legislative enactment can a comprehensive and intelligently planned system of conditional releases be worked out. Parole is in the great majority of states recognized as under legislative control;¹² whereas the pardoning power is a constitutional power, usually beyond the power of the legislature to control. It is therefore always open to capricious exercise, unrestricted by any defined policy. For example, the parole statute defines how a parole may be revoked and how much of a hearing the parolee is entitled to on the question of whether he did in fact violate the parole. On the other hand, for

¹¹ Biennial Report of Superintendent of Miss. State Penitentiary, 1933-35, pp. 46, 51.

¹² In a few states, the courts have held that parole is "in the nature of a conditional pardon," and that therefore the legislature has no power to enact a parole law, because that would be an attempt to grant pardons by legislation whereas the pardoning power is exclusively in the executive. Ante, notes 5 and 6. This reasoning is doubly erroneous. Parole is not merely a form of conditional pardon, but a systematic provision for the discharge and rehabilitation of prison inmates. Nor is the pardoning power of the executive exclusive. The legislature has a concurrent pardoning power. Weihofen, "Legislative Pardons," 27 Cal. Law Rev. 371.

The better reasoned cases uphold the power of the legislature to enact parole laws. *Laird v. Sims*, 16 Ariz. 521, 147 Pac. 738 (1915); *People v. Roth*, 249 Ill. 532, 94 N. E. 953 (1916); *Miller v. State*, 149 Ind. 607, 49 N. E. 894 (1897); *Board of Prison Commissioners v. De Moss*, 157 Ky. 289, 163 S. W. 183 (1914); *George, etc., Commissioners v. Lillard*, 106 Ky. 820, 51 S. W. 793, 1011 (1899); *People v. Warden of Sing Sing Prison*, 39 Misc. Rep. 113 (1889); *State v. Peters*, 43 Ohio St. 629, 4 N. W. 81 (1885); *Woods v. State*, 130 Tenn. 100, 169 S. W. 558 (1914).

the legislature to require a hearing or otherwise stipulate the procedure to be followed in the case of conditional pardons or other forms of executive clemency might be held invalid as an unconstitutional attempt to interfere with the governor's pardoning power.¹³ Again: parole statutes specifically provide how long the person may be kept on parole and provide for his discharge into full freedom after a certain period. There is no established rule regarding how long conditions in a conditional pardon may run. It is generally said that the governor may attach any conditions to a pardon which are not immoral, illegal, or impossible. It would seem that he could therefore pardon a person on condition that he remain a law-abiding citizen, abstain from alcoholics, etc., for the remainder of his life; and a person so pardoned could be recommitted for the remainder of his sentence if he at any time violated these conditions, no matter how many years later.¹⁴ And presumably the legislature would have no power to prohibit such conditions. It is much better to have conditional releases granted under a statute, wherein such questions can be carefully and intelligently disposed of, rather than to leave them to an executive power beyond all legislative control.

It is clear, however, that so long as the parole laws are so restricted as to prevent the paroling of all convicts whom the penal authorities deem worthy of release, just so long will the pardoning power be used for this purpose. Before we can hope to see the pardoning power restricted to its proper sphere, and the parole system take complete jurisdiction over the policy of releasing prisoners on condition of good behavior, it is necessary to liberalize the parole laws. The lesson to be drawn from the states where

¹³ If it is expressly stipulated as one of the terms of the pardon that the governor shall have exclusive power to determine summarily whether a violation of the conditions has occurred, this is a binding condition and no hearing need be granted before the pardon can be revoked. *Henderson v. State*, 55 Fla. 36, 46 So. 151 (1908); *Woodward v. Murdock*, 124 Ind. 439, 24 N. E. 1047 (1890); *Arthur v. Craig*, 48 Iowa 264, 30 Am. Rep. 395 (1878); *State ex rel. Davis v. Hunter*, 124 Iowa 569, 100 N. W. 510, 104 Am. St. Rep. 361 (1904); *State v. Yates*, 183 N. C. 753, 111 S. E. 337 (1922); *Ex Parte Houghton*, 49 Ore. 232, 89 Pac. 801, 9 L. R. A. (n. s.) 737, 13 Ann. Cas. 1101 (1907); *Ex Parte Davenport*, 110 Tex. Cr. Rep. 326, 7 S. W. (2d) 589 (1927); *In re Conditional Discharge of Convicts*, 73 Vt. 414, 51 Atl. 10, 56 L. R. A. 658 (1901); *Spencer v. Kees*, 47 Wash. 276, 91 Pac. 963 (1907); *State ex rel. Rowe v. Connors*, 166 Tenn. 393, 61 S. W. (2d) 471 (1933). But suppose a statute requires a judicial hearing? Would it be valid, notwithstanding the express provision in the pardon for summary revocation?

¹⁴ In at least one case, a pardon stipulating that the grantee continue on good behavior for the rest of his life was held valid. *Crooks v. Sanders*, 123 S. C. 28, 115 S. E. 760, 28 A. L. R. 940 (1922). See also *Spencer v. Kees*, 47 Wash. 276, 91 Pac. 963 (1907), where the pardon was granted on condition that the convict remain with his relatives, who were to care for him so long as he lived.

conditional pardon, commutation and furloughs are used to effect the release of prisoners as a regular and habitual practice is that rigid eligibility restrictions in the parole laws often result *not* in keeping convicts in prison, as is assumed, but in causing them to be released by some other procedure usually less desirable and more dangerous than parole—with less supervision and with less—often no—possibility of rearresting and recommitting them upon further wrongdoing.

The first essential, then, is to remove the restrictions in the parole laws—permit murderers and third offenders to be paroled, and permit it at any time the parole board thinks proper. If this seems to be dangerously liberal to some people, the answer is that it is silly to keep the front locked when the back door is open, and under the constitution must remain open. It is silly to say that a murderer is not eligible to be released on parole, under the supervision of parole officers, and that therefore if the penal authorities wish to release him it must be on conditional pardon or furlough, without any supervision.

There will, of course, be fear of vesting a broad discretion in the parole board to release any criminal no matter what his offense or his record. It is this fear which prompted the restrictions now found in the parole statutes. But a full realization of the fact that these restrictions have merely allowed such criminals to be released by other means should help reconcile us to the desirability of placing the responsibility for such releases squarely upon the parole board. If caution is to be exercised, it should be rather in seeing that the parole board is so constituted and equipped that it will exercise this discretion wisely and prudently, rather than in denying it this discretion entirely, only to have it exercised by others.

Merely to consolidate pardon and parole administration in one board and have persons released by conditional pardon and furlough supervised by parole officers, is a superficial solution. The fundamental requirement is not to combine the two, but to eliminate the one, pardon, from a field which belongs exclusively to the other, parole.

In Minnesota in recent years the pardon board has tended to make more and more use of "conditional commutation."¹⁵ This, it

¹⁵ Of the 721 cases in which the Minnesota pardon board granted clemency during the years 1921-1936, 88.2% were commutations. Moreover, many of these were conditional commutations,—(31.2% of the 459 commutations granted from 1926 to 1936). And the use of commutation and the attaching of conditions to such

was felt, invaded a field belonging to the state parole board. The members of the board of pardons themselves have been critical of the liberal use they have made of their power to commute sentences. So strong was this opinion that, in 1934, upon the recommendation of the Minnesota Crime Commission the legislature passed the following bill:

"That the function of the board of pardons shall be confined to such cases as do not come within the statutory jurisdiction of the board of parole, except that the board of pardons shall retain its present jurisdiction in relation to life sentences and to claims of innocence and to sentences imposed through clerical error." The late Governor Floyd B. Olsen vetoed this measure. It is said that after he became more familiar with the work of the pardon board, the governor was sorry for his adverse action on this legislation.

In most states, however, there would be no point in passing such a bill without at the same time amending the parole law so as to give the parole board full jurisdiction over the cases from which the pardon authorities were being ousted. And even then such a bill could probably have no other effect than as a statement of legislative desire, which under the constitution could not bind the pardoning power of the executive. But it is reasonably safe to prophecy that if the legislature will eliminate the necessity for employing the pardoning power as a regular releasing method, by permitting the cases to be handled by parole, the practice will cease. Governors will be glad to be relieved of penal problems, and the pardoning power will be restricted to its proper function of affording a last extraordinary remedy in special cases where the law has apparently worked a hardship or where special considerations of mercy are invoked, leaving the conditional discharge of convicts as a regular release procedure to be handled by the parole board.

commutations have both been increasing. Of 336 commutations granted from July 1, 1925, to Dec. 31, 1934, conditions were attached to only 56, or 16.7%. Of 137 commutations granted during the two years 1935 and 1936, conditions were attached in 97, or 71.3%.