

Spring 1952

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Recommended Citation

J. L. Gillin, Executive Celemency in Wisconsin, 42 *J. Crim. L. Criminology & Police Sci.* 755 (1951-1952)

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EXECUTIVE CLEMENCY IN WISCONSIN

J. L. Gillin

The author is Professor Emeritus of Sociology in the University of Wisconsin. He is former chairman of the Department of Sociology and Anthropology and a past president of the American Sociological Society. His chief interest has been the field of criminology and penology. In 1931 he published a study of the prison systems of a number of countries, which he visited in 1928. In 1946 appeared his *The Wisconsin Criminal*, the results of his study of 486 inmates of the Wisconsin State Prison. This paper is an abstract of a study on parole, probation and executive clemency in Wisconsin, the complete Ms. of which is ready for publication. This article points up the chaotic procedure characteristic of clemency procedures in one state, which probably is not peculiar to Wisconsin.—EDITOR.

My interest in the subject of pardons goes back to 1926. In looking through the literature for material on the subject to my surprise I found at that time there was only one serious study of the matter, that by Dr. Christen Jensen. He had made a study of the pardon laws of the various States of the United States for his Ph.D. thesis at the University of Chicago. My interest was more deeply intrigued after I had served for four years on the Pardon Board appointed by Governor La Follette in 1935. At that time there was very little written anywhere on the subject. Most of the references to the subject I cited in Chapter XXXIII of my *Criminology and Penology*. Since then a number of articles and monographs have appeared.¹ None of these writers made any attempt to analyze the pardons actually granted in any state or in the United States.

On beginning service on the first Pardon Board in Wisconsin I found that there were no established principles according to which pardons were granted. When Governor La Follette talked with me about the matter he indicated that he thought a very important function of the pardoning power was to equalize the sentences imposed by the various courts of the State for the same crime. This he considered important because after the men reached prison comparison of the crimes and the sentences they had received led those who had received longer sentences than others for the same crime to feel that they had been dealt with unjustly. Such a feeling did not result in good behavior in the prison and did not make for an attitude of respect for the courts. When the Board got under way and had had some experience, it became apparent that such was only one, and perhaps not the most important, function of executive clemency. Therefore, early in our experience on the Board a statement was formulated by the writer and informally approved by

1. See *Attorney General's Survey of Release Procedures*; Vol. III, "Pardon," and the Bibliography cited therein; Humbert, W. H., *THE PARDONING POWER OF THE PRESIDENT*, American Council on Public Affairs.

the Board and the Governor on "Fundamental Pardon Policies." Under the types of cases to be considered were the following:

1. Those in which later evidence had been discovered showing the innocence of the convicted, but in which it was too late under existing law for the court to take action for correction of the sentence.

2. Those in which there was a plea of guilty based on a misunderstanding of the nature of the charge.

3. Those in which there was a plea of guilty on the promise by an officer of the law that he would intervene with the court to secure a short sentence or probation, but which he had not done, or in which he had been unsuccessful.

4. Those in which the sentence given was unusually severe judged by sentences given others of equal culpability. This was that in the mind of Governor La Follette, as mentioned above.

5. Those in which the previous history of the prisoner and his attitude in the institution indicated that he would probably be well behaved if released under supervision, but who could not be paroled under the existing statutes, and who could not have his sentence reduced by the court.

6. Those who probably could be safely paroled if the sentence were reduced.

The principles to be followed by the Board were:

1. Disregard of political, organizational or religious affiliations.

2. Due (but not undue) regard for the attitudes of the people, including the prosecuting attorney and the judge, of the community from which he was sentenced.

3. Careful consideration of the judicial history of the case (such as is referred to in 1-4 above).

4. Careful investigation of the background of the prisoner before he was committed to the institution including social, economic, psychological and emotional backgrounds.

It is easily seen from these statements that the Board felt that in most cases the important matter was to work closely with the Board of Parole. Upon it we had to depend for much of the information as to the institutional behavior and the pre-sentence backgrounds of the case under consideration.

PRELIMINARY STUDIES

As the studies on parole and probation proceeded I began to wonder

if a study of executive clemency in the State might not be of value. Such a study might indicate whether there was any uniformity in the exercise of this function by different governors, and whether such a study might indicate how this function should be performed in the interests of even-handed justice and of security to the State. Consequently a number of studies of executive clemency in Wisconsin was started. The first of these was one by Dr. William Oldigs, finished in 1941, designed to do two things: (1) to describe the history of pardons especially in the legislation and court decisions in Wisconsin, and (2) to compare the number and types of clemency granted from 1901-1935 in order to ascertain whether the governors had different clemency policies. The second, assigned to Mr. Gustave H. Amerell was intended to compare the clemency activities of Wisconsin governors over an eight year period. Comparison was made between Governors Kohler and Schmedeman taken together and Governor Philip La Follette's first two terms. Also in this study comparison was made between Governor La Follette's practice in his first term when he had no advisory pardon board and his practice during his second term when he had such a board. The purpose of the third study, the data on which were assembled by Mr. David Steinicke and Mr. Robert Strain, was to learn whether there was any association between the policies of governors in extending executive clemency and the success or failure after release of those to whom some form of clemency had been extended. This study covered only the period between 1930 and 1938. The fourth and last was by Miss Margaret G. Smith under my direction. This inquiry had two objects: (1) to test statistically the efficacy of the clemency policies of the different governors as measured by success or failure and (2) to see if there were any common factors associated with their later conduct between parolees, probationers and pardonees. In actual practice the comparison was found to be possible between only two of three periods into which the years between 1900 and 1938 naturally fell. The first period, 1900-1920 was found to be so sadly lacking in adequate records that it had to be omitted from the Smith study.

THE OLDIGS STUDY

What were the results of these studies? The chief findings are as follows:

1. The Oldigs study besides showing the historical development of the pardoning power in this State indicated that

- (a) Apparently each governor held different ideas about the function

of executive clemency. While all of them believed that clemency should be extended to those who had suffered a miscarriage of justice, they varied as to whether a man should be granted an absolute pardon, a conditional pardon, or should have a commutation of sentence.

(b) There was no consistency between the different administrations in extending executive clemency if the ratio of pardons to the populations of the penal and correctional institutions of the State is considered.

(c) The different governors appeared to pay very little attention to the type of crime committed. The only exception to this was the tendency of Blaine and Zimmerman to pardon prohibition law violators.

(d) Attention to length of sentence imposed and length of sentence served was not given equal attention by the different governors.

(e) For the whole period there is some evidence that certain governors made an unusual proportion of grants of clemency to men sentenced from the two most populous counties of the State. Milwaukee county with 24.7 percent of the State's population in 1930 was granted 38.9 percent of the pardons: Dane with 3.8 percent of the population, 5.4 percent of the pardons. These counties contributed to the prison population 24.7 percent and 4.0 percent, respectively. The following table shows how the governors varied in the proportion of grants of clemency to prisoners from these two counties composed with the total to prisoners from the other counties of the State.

<u>Governor</u>	<u>Milwaukee Co.</u>	<u>Other Cos.</u>	<u>Dane Co.</u>
LaFollette, R.	41.9%	48.8%	9.3%
Davidson	37.2	55.0	7.8
McGovern	38.9	54.8	6.3
Philipp	39.7	53.0	7.3
Blaine	41.0	54.6	4.4
Zimmerman	48.7	45.6	5.7
Kohler	20.9	76.8	2.3
LaFollette, P.	31.5	65.9	2.6
Schmedeman	28.9	65.7	5.4

No clear evidence appeared that political considerations account for the preponderance of grants of clemency to these two populous counties. But the facts suggest that governors were moved by the number and influence of persons who appear for a prisoner. In the absence of detailed information about the applicant it is but natural for governors to give weight to the testimony of people whom they know.

(f) The Wisconsin Statutes require that each application for executive clemency shall be accompanied by a written communication from the judge and district attorney who participated in the trial, if such can be obtained, indicating their views regarding the application. In a murder

case the recommendation of the judge alone is required. This study shows that the district attorneys in a slightly larger percentage of the cases than the judges favored the application, the former favoring in 49.9 percent of the cases in which clemency was granted, and the judges in 43.0 percent. The governors differed decidedly in acting in accordance with the recommendation of these officials. The elder LaFollette and Davidson, save for one case by LaFollette, granted no clemency in opposition to the recommendations of these two local officials. Kohler granted only four opposed by the prosecuting attorney and three opposed by the judge. But McGovern and all the later governors granted many applications opposed by these officials.

(g) The Wisconsin Constitution requires the governor to report to the Legislature all grants of clemency and to give his reason for granting them. Public opinion is the only check on the pardoning power of the governor. This report to the Legislature gives him his chance to report to the public his reasons for his acts. Oldigs' survey found 65 reasons stated by the governors during this third of a century. He reduced them to 43. Six of these accounted for more than 10 percent each of the total reasons. These six were "doubt of guilt" 10.2 percent, "excessive sentence" 12.2 percent, "good institutional record" 20.3 percent, "dependents" 14.3 percent, "first offense" 25.8 percent, and "to make eligible for parole" 14.4 percent. These percentages fluctuated, however, between the different governors and between the earlier and the later part of the period covered by the study. On the whole "doubt of guilt" and "dependents" diminished, while the others increased in importance. Probably these variations reflect in part changing conceptions of the way to handle offenders with increasing emphasis upon probation for first offenders, and upon parole, and in part on provisions for the care of dependents. The list is most instructive in showing that the governors had no fundamental philosophy and no clear-cut policies concerning the clemency function.

THE AMERELL STUDY

The report by Amerell is a special study on Executive clemency to answer two questions: (1) Was there any uniformity of policy shown in the grants of clemency by three recent governors, Schmedeman and Kohler, one term each, and P. LaFollette, two terms? and (2) Was there any difference in Governor LaFollette's practices before and after he had a pardon board? The first question was intended to apply statistical tests to the different practices of various governors. The Oldigs study did not test the differences for significance. Amerell's study showed

that the three governors close together in time without doubt conceived the function of pardon in entirely different terms. They were acting under the same legal provisions concerning the handling of prisoners, hence their differences must have been due to their own personal notions of the purposes of clemency. Of Schmedeman's and Kohler's grants of clemency 28 percent were for full pardons, 23 percent conditional, and 49 percent commutation of sentence. LaFollette's were 12 percent full pardons, 11 percent conditional, and 77 percent commutation of sentence. These are differences which could have occurred by chance less than once in 100 times. It is clear that LaFollette used commutation much more than the others in order to make the clemency function aid in releasing men on parole.

The answer to the second question is that LaFollette with the advice of the Pardon Board used commutation slightly less, but that he denied applications somewhat more frequently when advised by the Pardon Board than during the term before the appointment of the Board (77 percent compared with 72 percent). Of the 209 recommendations for commutation of sentence made by the Board, 1935-37, 75 percent were made in order that the men might become eligible for parole, 21 percent that their sentences might be equalized with those of others committed for like crimes. The increase of denials between the first and second terms of LaFollette was probably due to the greater care in investigating the cases by the Pardon Board.

THE STERNICKE-STRAIN STUDY

The third study attacked another problem. Is it possible by a study of events in the history of those granted clemency to identify those events which contribute to success or failure after release from incarceration? This is the first attempt known to the writer ever to have been made to ascertain whether by taking into account facts in the history of those granted executive clemency one could say what facts have a relationship to the behavior of men when released. It covered the grants of clemency 1930-38, a total of 501 cases.

About 24 items in the men's histories as found in the records of the cases granted clemency were considered. Only six of these showed any significant relationship to the man's post-release behavior. The six were:

(1) Nature of the crime. Those convicted of sex offenses showed a lower proportion of failures than the offenders against person or property.

(2) Size of community where crime was committed. Those from

places of 100,000 or over had a much higher failure rate than the average.

(3) Age at conviction and at date of clemency. These were two separate items analyzed, but since it is clear that they are closely correlated, I have cited them as one. Those aged 21-23 at time of conviction and those 36 and over had lower failure rates than could be theoretically expected. Those under 30 at date of clemency and those 36 and over also had lower than the theoretical expectation.

(4) Previous criminal history. Those with no previous conviction got into trouble after clemency was granted less often than those who had a previous record.

(5) Number of accomplices. Those with no accomplices kept out of trouble to a significantly greater degree than the others.

(6) Occupation at date of crime. The only subcategory of significance was "Unemployed." These had the highest rate of failure.

As the third study covered only the period 1930-38, I wished to see whether its findings remained stable in a study of clemency grants over a longer period of time. Therefore I had a search made of the records in the governor's office from 1900 to the end of 1938. Because of the changes in the records it was found that there were roughly three periods in these 38 years—1900-19, 1920-29 and 1930-38. When tested statistically it was clear that these three periods were not one universe but three.

With that problem settled, that there were three universes in the entire period, the next question was, Within each of the three do any categories distinguish between success and failure after release? So much information was lacking in the records of the first period, 1900-1919, that the categories were not dependable. In the second period, 1920-29, there were but two categories which distinguished significantly between success and failures—Previous criminal history and Number of accomplices. In the third period, 1930-38, there were the six categories cited above. Previous criminal history and number of accomplices persisted through both the second and third periods. Two of the six certainly and the other four probably could safely be used in forecasting the probability of success of those who apply for executive clemency.

THE ODEGARD STUDY

One other analysis was made of those who had received executive clemency in Wisconsin. The data were taken from a study by Mr. Burnett Odegard, Chief Statistician of the Board of Control, with the

help of WPA workers for the United States Attorney General's Survey of Release Procedures. From these cards we had extracted those which had been granted executive clemency 1927-1938. There were 591 of these. In part they cover the same period as the third study in our series. This study took into consideration many other categories than those included in ours. Only three of the categories showed any significant difference between the successes and failures. These were Months remaining of the sentence, Nativity, and Economic status. The last of these was more or less subjective, and was not tested for reliability. The sub-categories were "Good," "Fair," "Poor." Under the category "Nativity," this study showed that those with one or both parents foreign-born in contrast with those with both parents native-born had the lowest rate of failure. Those with five years or more remaining of their sentence less "good time" had the lowest percentage of failure. Those of "good" economic status had the lowest rate of failure. None of these coincided with those found of importance in our study of 1930-38. The upshot of these various pieces of investigation of the behavior of those granted clemency is that, except for our study of those granted clemency from 1920 to 1938, there is no consistency of results, and that for that period there were only two categories which remained stable throughout. On this showing what is the value of these studies?

LESSONS FROM THE STUDIES

Several lessons can be learned from these rather unfruitful studies—unfruitful if one is concerned with a prediction table with the aid of which a pardon board can select those whom they will recommend for clemency. Some of these are:

(1) The data now found in the records of the governor's office have little value unless the board is willing to use only the two factors which remained stable over the two periods studied—Criminal history and Number of accomplices. Since most of the men had no accomplices, judgment as to whether to recommend for clemency would rest largely upon the other factor. Mr. Wood found in his study of parolees that he could predict outcome on parole just as well from Criminal history as from either 10 or 20 factors. A Pardon Board might try that and follow up with a study to see what happened.

(2) A Board might try to use the six factors found significantly associated with success or failure in the study 1930-38. By following that practice with a study of the results it could ascertain whether it is of any value.

(3) A better plan would be to conclude that with the data now found in the records it is impossible to predict with any degree of certainty what a man will do on release. But it should not stop there. The Board, or some other body, should attempt by interview to ascertain the personal characteristics of a large sample of the prisoners, and the experiences associated with the development of those characteristics, and then follow up with a study of the behavior of the men granted clemency to see what characteristics are associated with success and failure. From our work it may be assumed that the data now available do not reveal the subtle but probably important factors in conduct. The problem should not be abandoned, but should be attacked in a more profound way.

Such a study should be a continuing one with a sample of the prisoners as they are admitted to the penal and correctional institutions, and as they are released by any means whatsoever. Once a body of knowledge of this kind became available it should be continued because characteristics and the experiences associated therewith might change with time. That would enable the authorities to keep up with whatever changes might occur.

(4) Either the Board itself, or better, a separate governmental authority, should have such a study as its responsibility. It could do the study itself, or arrange with the University of Wisconsin to do the research. It might make available to the University a number of scholarships to which would be appointed outstanding graduate students, or the University authorities might make available a number of scholarships, or graduate research assistantships, for this purpose.

(5) Since it would be impossible without the expenditure of a larger sum of money for this research than probably could be obtained, only a part of those given executive clemency would be studied. That would make possible a comparison of results between those who had been granted clemency on the basis of facts obtained in the interview and those who had not been interviewed. That would provide a test of the criteria developed by the research. The results of the research would be available also for a study of parole.

(6) It seems probably that before successful prediction for pardonees is possible a study will have to be made also of their experiences in the prison or reformatory, and of the experiences they have after release from the prison. Otherwise we are assuming that experience in prison and after release has nothing to do with their behavior on release.

(7) I had comparisons made between the parolees, the probationers and those granted executive clemency covered by our series of studies. The results showed clearly that on the basis of the data in the records as now kept the factors associated with success or failure are different for the three groups. On almost every category the differences between the three classes were so great that they could not have occurred by chance.

If one were to reach any conclusion from these studies it would be that on the basis of the data to be found now in the records it is impossible to predict future behavior of the pardonee in Wisconsin, except for one or two categories, and except for a very short period of time. It should be said, however, that our findings are based only on data in the Wisconsin records, and do not apply to data found in the records of other states. It may be that the latter reveal more of the subtle factors in the behavior of prisoners. For Wisconsin we shall have to dig deeper into what motivates conduct, before we can hope to provide a prediction table for the guidance of those who grant probation, parole and executive clemency.

Altogether aside from the question of using data to guide an administrative board or a governor in granting clemency this study revealed that under present laws from about half to over three-fourth of the acts of clemency exercised in this State for over a quarter of a century were commutations of sentence, 14.4 percent of these commutations were to make prisoners eligible for parole. This situation indicates how inadequate were the parole laws during the time covered by the study. So inflexible were they that the parole board in many cases could not release a man on parole until the pardoning authority has cut the sentence. On any theory this is indefensible. Thus some prisoners had to spend time in prison who could have been out earning their living under supervision. At that time it cost about \$500 a year to keep a man in prison. In contrast it cost about \$30 to supervise him on parole. But the cost in dollars is not the most important aspect of the matter. If a man is kept too long in prison, the hope of his rehabilitation fades.

Also, under the laws on the books at the time of the study when the pardon authority commuted a prisoner's sentence in order to make him eligible for parole, it necessarily limited the time he could be kept on parole to the maximum of the commuted sentence.² whereas, if the parole board were free to grant parole at such time as in their judgment

2. The 1943 legislature modified the Statutes governing parole of recidivists by making no distinction between them and first offenders, and removed some of the limitations on parole eligibility.

is best for society and for the rehabilitation of the prisoner, they could keep him under supervision until the expiration of his original, maximum sentence. Thus, the functions of the parole board and of the pardon authority would be more clearly differentiated.

An alternative is for the State to adopt laws similar to those of the United States, which provide that judges in granting suspended sentence and probation may make the period of probation longer than the sentence imposed, and that those paroled may be kept under supervision until the expiration of their maximum sentences without deduction for "good time." However, it is better to give to an administrative board the determination of when a man is to be paroled and how long he should be kept on parole. Then action can be taken in the light of all of the facts in the case. California has enacted an Adult Authority law which gives it greater autonomy than is to be found in most states to handle some of these problems by an administrative board.