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Legislative Pardons: Another View

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The doctrine that an American legislature has the power to pardon is not a new one. It has recently been re-examined because of the effort made to secure such a pardon for Tom Mooney from the California legislature of 1937. Those who have argued in favor of a legislative power to pardon have based their conclusions partly on history and partly on specific provisions of state constitutions. The weight of opinion both in decided cases and doctrinal discussion is clearly against them.

Professor Weihofen returns to the attack in the foregoing article. It must be admitted that he makes out as good a case as can well be made for his thesis. His conclusion—stated at the beginning of his article—is that the doctrine that the legislature has no power to pardon is "unsupported by any direct authority, is historically untrue, politically unsound and socially a nuisance."1

Evidently the question is in part historical. In most historical discussions of the matter, a great deal of confusion is apparent. Professor Weihofen, like so many others, shifts from pardons to amnesties as though they were of the same nature. But this, I think, is an initial error and is the basis of what seems to me his wrong conclusion.

It is usual to begin the history of pardons with Roman law and practice on the subject. Some indeed go further and deal with prehistoric and primitive pardons and it is usually asserted that the power of pardon is somehow inherent in the supreme authority of the state.2

This notion is quite without foundation.3 Headship, even in the form of an hereditary principate, existed before the idea of crime, and therefore of pardon, had developed. Except as breaches of military discipline, crimes in ancient societies were private injuries which entailed a feud, or private war; or else they were acts that incurred divine displeasure. The feud could be at any time ended by composition or reconciliation, but an offense that might elicit divine venge-

1 Legislative Pardons, supra p. 371.
3 There is not even a tradition that the ancient Roman king could pardon. All the legends indicate that the only method of pardon was by appeal to the people. Livy, i, 26. The medieval king as such had no right of grace. Cf. the Kleines Kaiserecht, pt. 2, 119: "Wer die tat richten sol, der hat gewalt gnade zu tun." The rule was general in Germany that the judge pardons as well as punishes. Cf. 1 His, Das Strafrecht Des Deutschen Mittelalters (1920) 387-389.
ance, could be wiped out only by expiation, some assurance that atone-
ment had been accepted by the god, and this in theory could not be
accomplished by any purely human agency.

In such highly organized states as the Greek republics, whether on
an oligarchic or democratic basis, although both older notions of
crime persisted, the modern concept of crime as a disobedience of a
sovereign command or a threat to the constitution or to the security
of the state, *i.e.* the crime that threatens public order or the state's
independence, developed rapidly.

Such crimes might readily enough be forgiven by the public au-
thority which alone could punish them, since punishment in these
communities was the task of public officers who could be peremptorily
forbidden to proceed. We find consequently in Athens that the *eccl-esia*,
the sovereign assembly of all citizens, could pardon as well as con-
demn, not only when the accused had been convicted in the popular
courts, but even when he had already been delivered for execution to
the Board of Eleven.4

It is commonly said that this was not possible in the Roman re-
public.5 This is not an accurate statement. The popular *comitia* of
centuries, which corresponded to the Athenian *eccllesia*, had the
same power as the *eccllesia*. The condemned Roman could seek pardon
by *provocatio*. This term is rendered in English by "appeal," but it
is not an appeal in our sense at all. The *comitia* was not asked to cor-
rect errors but to show mercy, and it often did. Further the enforce-
ment of any penalty could be vetoed by the intervention of a tribune,
the *intercessio*.6

What is generally meant by the statement that pardons were un-
known in Republican Rome is that beginning with the second cen-
tury B.C., special courts with jurisdiction over specific crimes were
established by statute, *i.e.*, by act of the *comitia*, and from a convic-
tion in these courts there was no *provocatio* nor was the enforcement
capable of being prevented by *intercessio*.

When the principate was established, the *imperium* of the em-
peror was likewise free from *intercessio* or *provocatio*. The emperor
might, therefore, prevent any execution or punishment from being
inflicted and the accuser of the condemned man could not compla

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4 Bonner and Smith, *The Administration of Justice from Homer to Aris-
totle* (1930) 301-303; 2 *ibid.* (1938) 253-254.
5 Weihofen, *Legislative Pardons*, supra p. 373.
6 Greenidge, *Roman Public Life* (1911) 63, 274. 1 Mommsen, *Römisches Staats-
recht* (1876) 186-222.
to any higher authority. This practice soon resulted in a special com-
mission that would hear not only appeals in the proper sense but also
petitions for pardon.

That this power of exercising mercy, *clementia*, became partic-
ularly associated with imperial authority was inevitable, and the as-
sociation became more intimate, as the imperial authority became
an undisguised absolutism. But after the breakdown of the imperial
system in the West, the feudal states that began to develop upon the
failure of the Carolingian system, were far indeed from being an out-
growth of the Roman imperial system.

The feudal king was in no sense an unlimited monarch and even
his consecration by the church did not invest him with imperial au-
thority. Whatever public power he had, he held as a property right,
by tenure from God, to be sure, but still within the feudal scheme of
tenures. This was as eminently true of the Norman-Angevin king of
England as of any other feudal monarch.

The term "pardon," _perdonare_, as its obvious etymology implies,
meant a grant, a giving up. Neither the king nor anyone else could
give up what he did not have. If any subject forfeited his property, his
life or his limbs to the king, it was quite possible for the king to grant
them back, give them up, to the condemned man. His pardon is,
therefore, a grant, evidenced by charter; and it is supported by a
writ, _i.e._ a peremptory notice to the king's officers, especially his
sheriff, that the condemned man has been taken back into the king's
protection _firmam pacem concessimus_ and has a rightful status once
more _quod stet recto_.

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7 I have examined the growth of _clementia_ in *A Juster Justice, A More Lawful Law_ in _LEGAL ESSAYS IN TRIBUTE TO ORPIN KIP MCMURRAY_ (1935) 537-565.

8 Remission is used interchangeably with pardon. Cf. 2 *Sayles, Select Cases in the Court of King's Bench_, Ed. I (Selden Soc. Vol. 57, 1938) 140: "We out of re-
gard for charity and by reason of our reverence for St. Alban, the first martyr of Eng-
land and also for the salvation of our soul and that of our consort, Queen Eleanor of
illustrious memory, formerly Queen of England, and for the salvation of the souls of
our ancestors and successors, have remitted the entire cause of action we had against
the Abbot."

9 Examples of charters of pardons are given in the _Register. REGISTRUM BREVIUM_ (4th ed. 1687) 287, 288. In the case of a charter of pardon of justifiable homicide, the
phrase runs, "We moved by compassion, have forgiven him the suit of our peace which
belongs to us." In a pardon of outlawry, the phrase runs, "We have forgiven him his
outlawry." The royal rights in the case of a condemned felon or an outlaw were con-
siderable. It may be noted that while _pietate moti_ is properly enough "moved by com-
passion," the word _pietas_ originally meant "piety," as it does in classical Latin. The
king made a free-will offering for the good of his soul. Cf. *Sayles, loc. cit. supra_ note 8.
_Cf._ the previous note.
But there were many matters in which such royal interference was impossible because other rights existed which the king could not dispose of. The "appeal of felony" is a case in point. The appeal is the ancient private feud and the king could no more withdraw the appellee from the need of fighting for his life, than he could have taken any unforfeited right away that any of his tenants had, high or low. An incident of the thirteenth century makes the situation clear. If the appellee cried "craven," the appellor could not kill him, but he was then delivered to the king's officers to be hanged. In other words, having lost the appeal, he forfeited life and member to the king. And this forfeit the king might remit.

As the king's actual and direct control over all tenures extended, and as his pretensions—especially in the writings of royally minded officials—became more and more imperial, a great many of the incidents of imperial authority were asserted on his behalf. This was particularly true when the Yorkist kings claimed a qualified absolutism on the Renaissance model which was itself clothed in the terms of the Byzantine interpreters of Roman law. In a Year Book of Edward IV, it is said of pardons: "a chescun roy appent per reason de son office a faire justice et grace...." But the actual practice kept within the feudal doctrine and a belated and thorough feudalist like Coke is quite right in asserting limitations on the royal power to par-

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10 Blackstone's history in this, as in so many other matters, is quite sound. 4 Br. Comm. *397. Both Blackstone [loc. cit.] and Coke [3 Inst. (Ed. 1797) c. 105, 236] quote Bracton [Bk. III, f. 132]: "Non potuerit rex gratiam facere cum injuria et damno aliorum: quod autem alienum est, dare non potest per suam gratiam."

11 A special illustration of the result of the king's pardon in 1221, is given by 1 Maitland, Select Pleas of the Crown (Selden Soc. Vol. 1, 1888) 112. Roger killed John "and proffered letters patent of King John wherein is contained that he has pardoned to him the death of John." This makes him quit, quantum ad dominem Regem pertinet, "so far as concerns the king." But that does not free him from the appeal of John's wife and brother.

12 2 Pollock and Maitland, History of English Law (2d ed. 1898) 483. Cf. also Stroughborough v. Biggin (1599) Moo. K. B. 571, (1735) 3 P. Wms. 452-453, where it was decided that the queen (Elizabeth) could not pardon in the case of an appeal. It was the same with forgery, which at that time was a private suit. This case is misreported in 5 Co. 50a-50b, and in Cro. Eliz. 632, 682; cf. the statement of Eyre, J., in Sir George Ludlam v. Lopez (1723) 1 Strange 530, n.

13 The pardoning power was almost as much abused by medieval kings as it has been in the United States by state executives. The Parliament attempted vainly to prevent it. Cf. 2 Ed. III (1338) c. 2; 10 Ed. III (1336) st. 1, c. 2; 14 Ed. III (1340) c. 15; 13 Ric. II (1390) st. 2, c. 1. In striking cases, it could disregard a pardon by impeachment or bill of attainder.

14 Y. B. 9 Ed. IV, 2a (cited in 3 Co. Inst. (Ed. 1817) c. 105, 233).
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...don, limitations which, if carefully examined, come to no more than saying that the king may make no gift of what is not his own.\(^{15}\)

What then is the force of the Case of Non Obstante\(^{16}\) in which Coke declares that the prerogative of pardon may not be taken from the king even by Act of Parliament? We may recall that in Coke's time an Act of Parliament was in fact as well as theory an enactment of the king. The king in Parliament could not deprive his successors of their prerogative powers, any more than he could deprive them of their property interests—which amounts to the same thing. The king's prerogative is the property of the king as a "body politic," as a corporation sole, not as an individual.

This pardon, this grant or waiver of royal rights conceived as rights of property, is wholly different from the amnesties with which it is so constantly confused. The confusion is based on the fact that the effect of an amnesty is the same as a pardon as far as the persons within the terms of either are concerned. That is a valid logical argument, but it merely illustrates the convergence of institutions that had a different background.

Amnesty, or general pardon, and pardon proper, result in the same thing. Certain person or persons who without this act would be subject to punishment are no longer so subject. But this similarity of result does not make the two the same act. Quite clearly the terminology is confused. The pardons issued by the president after the Civil War were described in the body of the grant as "a full pardon and amnesty."\(^{17}\) It was nevertheless a pardon because it dealt not with anyone who might have committed a specified offense, but with a specific person and with specific offenses. The difference between amnesty and pardon—"general" or "special pardon," if one likes—lies not in the word used, but in the character of the act. The one remits punishment to a named person. The other remits punishment for an offense, without particular reference to those who committed it.

The word "amnesty" is a Greek word and its original purpose has always been maintained. It is strictly and properly an "act of ob-

\(^{15}\) The king does not properly pardon a person. He "gives up" to a person his rights. The Latin texts uniformly have *perdonare alicui aliquid*. For a very early pardon (before 1202) cf. 1 MAITLAND, *op. cit.* supra note 11, at 22.

\(^{16}\) *Cir.* 1608 12 Co. 18: "No act [i.e., Act of Parliament] can bind the King from any prerogative which is sole and inseparable to his person. . . ." It may be well to note this statement of Coke's in any discussion of whether he really believed that acts of Parliament could be declared void. *Cf.* also Case of Pardons (1587) 6 Co. 13a-13b, n. a, for discussion of the pardoning power.

\(^{17}\) *Ex parte* Garland (1866) 71 U. S. (4 Wall.) 333, 337.
livion." Its purpose was similar to that of a treaty which ends hostilities between different nations when both nations retain their independence. The acts of amnesty ended hostilities between warring factions, when neither faction was exterminated or expelled.

The confusion of an "Act of Grace" with a pardon, is really a matter of misunderstanding of the word "act." A pardon is often called an act of grace, in which the words are used in their ordinary sense. But the "Act of Grace" which is so often referred to is a technical term. It is a statute, of a special sort, but it is none the less a statute. And its use in English history was precisely the same as in Greek and Roman history. It put an end to rebellion, civil war or disturbance, in which it was not desired to exterminate or expel all guilty persons. It had in fact the same purpose as the famous Dictum de Kenilworth which is really pre-statutory.

For that reason it is clear that Professor Weihofen has misunderstood the effect of Coke's statement in the Third Institute, of which he quotes only a part.\textsuperscript{18} It runs as follows:

\begin{quote}
"All pardons of treason or felony are to be made by the king, and in his name only, and are either generall or speciall. All pardons either generall or speciall, are either by act of parliament (whereof the court in some cases shall take notice) or by the charter of the king, (which must always be pleaded.) And these againe are either absolute, or under condition, exception, or qualification: for some of those pardons last mentioned the party may have a writ of allowance, or take an averment in certain cases, in others the party may be aided by averment only, where no writ of allowance doth lie.

"And first of generall pardons. Generall pardons are by act of parliament, if any of these pardons be generall and absolute, the court must take notice of them, though the party plead it not, but would wave the same."
\end{quote}

That is to say, the king by himself may issue pardons in those matters which are within his prerogative, and if he chooses he may for the same purposes, and must for purposes outside of his prerogative, issue pardons general or special—\textit{i.e.} by Act of Grace or by private bill—with the consent and approval of his Parliament. It appears clearly enough from the foregoing paragraph that general pardons are only by act of Parliament. Indeed except for the time before Parliament took its present shape, an example of a general pardon by the king alone would be hard to find.

When Parliament in the eighteenth century gradually made the king's assent a pure formality the result was that the king retained his right to grant special pardons—no longer limited by Coke's argu-

\textsuperscript{18} Legislative Pardons, supra p. 376. 3 Co. Inst. 233.
ments in *Non Obstante*. But Parliament, now *de facto* a body separate from the king, retained its right of granting either special or general pardons, both of which it had granted when its pronouncements merely occasioned the king's act.

But the fact that the English Parliament in 1776 had, as it still has, concurrent power with the king to issue a special pardon, because it can pass a private bill as well as a public one, is not conclusive of the question. The matter after all must be determined by a study of the constitutional provisions of every state, supplemented by certain rather general notions which demonstrably were in the minds of the framers of American constitutions.

One thing we may be fairly sure was in their minds was the famous theory of the separation of powers. The legislature had one group of functions, the executive, another, and the application of this to the pardoning power is not a matter of conjecture. In the Debates on the section in the federal Constitutional Convention, the following discussion took place:

"Art: II. sect. 2. 'he shall have power to grant reprieves and pardons for offences against the U. S. &c'"

"M' Randolph [moved] to 'except cases of treason'. The prerogative of pardon in these cases was too great a trust. The President may himself be guilty. The Traytors may be his own instruments."

"Col: Mason supported the motion."

"M' Govr Morris had rather there should be no pardon for treason, than let the power devolve on the Legislature."

"M' Wilson. Pardon is necessary for cases of treason, and is best placed in the hands of the Executive. If he be himself a party to the guilt he can be impeached and prosecuted."

"M' King thought it would be inconsistent with the Constitutional separation of the Executive & Legislative powers to let the prerogative ['be be abused to' stricken out] [be exercised by] the latter—A Legislative body is utterly unfit for the purpose. They are governed too much by the passions of the moment. In Massachusetts, one assembly would have hung all the insurgents in that State: the next [was] equally disposed to pardon them all. He suggested the expedient of requiring the concurrence of the Senate in Acts of Pardon."

"M' Madison admitted the force of objections to the Legislature, but the pardon of treasons [was] so peculiarly improper for the President that he should acquiesce in the transfer of it to the former, rather than leave it altogether in the hands of the latter. He would prefer to either an association of the Senate as a Council of advice, with the President."

"M' Randolph could not admit the Senate into a share of the Power. the great danger to liberty lay in a combination between the President & that body—"
"Col: Mason. The Senate has already too much power—There can be no danger of too much lenity in legislative pardons, ['as' written upon 'and'] the Senate must con concur, & the President moreover [can] require 2/3 of both Houses".

It is difficult to raise any doubt that the members of the Constitutional Convention understood the power of the president to issue pardons and reprieves—individual pardons—to be exclusive.

That any state legislature had that power must, of course, depend on the constitution of the state. Professor Weihofen admits that no constitution expressly grants this power to the legislature. It may on the other hand be admitted that the fact that no legislature has exercised it—if it is a fact—is not conclusive that it had no such power.

Has any legislature ever exercised it? Professor Weihofen says it has, but his citations do not bear him out. Most of his citations—indeed most of his discussion—deal with amnesties, and are, therefore irrelevant. But on page 381, note 42, he cites three cases which purport to prove the existence of such an act.

As a matter of fact all these cases refer to the same statute, a Pennsylvania statute of 1860, dealing with the civil rights of men who had been convicted and served their full term. It is quite true that in his opinion Judge Buffington deals with this statute as though it was a legislative pardon in the ordinary sense—i.e., an individual pardon—and that he even uses astoundingly strong language on the legislature's right to issue such pardons. But if we understand him, as we doubtless should, as referring to the kind of pardon implied—i.e., a general pardon, his words are not as much out of line with the authorities he himself cites, as they would be if we took him literally.

And above all if we look at the statute quoted, we shall see that the statute makes no pretense of claiming a power of legislative individual pardons. The words are: "The punishment so endured shall have the like effects and consequences as a pardon by the governor." So far from being the assertion that the legislature has the power to pardon, it implies that this power rests with the governor.

Since it is a matter of separate state constitutions, the most important part of Professor Weihofen's argument is that which deals

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20 The citation of two of these cases illustrates the need of care in such matters. United States v. Hall (W. D. Pa. 1892) 53 Fed. 352, and United States v. Hughes (W. D. Pa. 1892) 175 Fed. 238, are not two cases. The second is a verbatim repetition of the first. How a case decided in 1892 got into a volume dealing with 1909 is hard to explain except by inadvertence. The second case, therefore, hardly "confirms" the first, as Professor Weihofen supposes. Legislative Pardons, supra p. 381, n. 42.
with California. Does the California Constitution by direct provision or by implication permit a legislative pardon?

The California Constitution, differing in this from the Federal Constitution, expressly makes the separation of powers a part of its fundamental doctrine.

"Article III, Section 1. The powers of the government of the state of California shall be divided into three separate departments—the legislative, executive and judicial; and no person charged with the exercise of powers properly belonging to one of these departments shall exercise any functions appertaining to either of the others, except as in this Constitution expressly directed or permitted."

When Professor Weihofen declares that this particular matter was not discussed in the Convention, he is in error. The precise point was raised, and even the strongest supporter of limiting the pardoning power of the governor, vehemently repudiated the suggestion of leaving that power with the legislature.

Mr. Hager, who moved an amendment to the article establishing the pardoning power says emphatically:

"I regret exceedingly that the gentlemen have so misinterpreted the language and purport of this amendment. Certainly I had no intention of giving this power to the Legislature. On the contrary I would vote against any such proposition. I understand the Committee on Legislative Department have prepared and will report a proposition taking it entirely away from the Legislature. I hope they will do so and I shall support the proposition."

He is followed by Mr. Johnson:

"There are two propositions which it seems to me ought not to be considered at all. One is giving the Legislature power to grant pardons. That we certainly cannot do, because it would take up a great deal of the time of the Legislature for which they would have to be paid by the State. They would have to adjourn their committees, and no matter how important the business, their time would have to be taken up in the consideration of these applications for pardon. Therefore, it appears to be foolish, and against the principles of economy, to give this pardoning power to the Legislature."

We may safely assert that whatever is meant by article VII, which confers the pardoning power, the members of the Convention quite strongly believed that the legislature should not share it.

21 Legislative Pardons, supra pp. 384-385.

Professor Weihofen on page 372 declares that the grant of the pardoning power in state constitutions is merely permissive, and not exclusive, because the words used are not "the pardoning power." But, as a matter of fact, those words are used in the California Constitution, and if they imply what Professor Weihofen says they imply, the grant must be considered as exclusive.

That he is right in suggesting this implication is confirmed by the fact that the article "the" is used in article IV, section 1, when "the legislative power" is vested in the legislature; in article V, section 1, when "the supreme executive power" is vested in the governor and in article VI, section 1, when "the judicial power" is vested in the senate and the courts.

All these facts taken together would seem to indicate that under the Constitution of California, the power of private statutes of pardon, which the English Parliament had exercised, however rarely, was not given to the legislature. The assumption that the framers of the constitution were familiar with the doctrine of legislative pardons and meant to exclude it, is not conjecture but based on the evidence of the debates and is confirmed by the terms of article III, section 1, and article VII.

Professor Weihofen's strongest point, however, is in this very article VII. The limitation on the pardoning power is expressed as follows:

"Neither the governor nor the legislature shall have power to grant pardons... in any case where the convict has been twice convicted of felony, unless upon the written recommendation of a majority of the judges of the supreme court."

This, says Professor Weihofen, implies that the legislature has such a power.

If this section stood quite alone, it might well carry such an implication, but, in connection with what has been said, this construction is scarcely tenable.

It would not be difficult to hold that the legislative power of pardon was thought of in connection with crimes withdrawn from the governor's power, like treason and cases of impeachment. The debates both of the Federal Constitutional Convention of 1777 and of the State Convention of 1879 indicate that a legislative pardon for these offenses, a pardon which could be effected in indirect as well as direct ways, was not out of their contemplation.

23 Italics added.
Again, the words might allude in general to any attempt by the legislature to secure by indirection a pardon for a twice convicted man. The legislature has the undoubted power of granting amnesty for all guilty of named offenses. If a statute named an offense so particularly that it would apply to only one man or to a few specific men, this would in form be an exercise of legislative power, but in fact be an individual pardon. Non constat but the constitutional phrase was aimed precisely at that.24

But the most probable explanation is that the words "or the legislature" were added ex abundanti cautela. The framers of the article yielded to the constant temptation of men drafting statutes and added superfluous terms. The rule superflua non nocent is applicable here. Surely it is easier to disregard a superfluous phrase than to use a casual statement that the legislature may not do something, as a grant of powers which are contradicted by the known intentions of the constitution makers and by the accepted doctrine and practice of legislatures. It may be recalled that article III, section 1, declares that a power normally belonging to one department may not be assumed by another unless it is expressly, not impliedly, granted by the constitution.

Professor Weihofen holds the view not only that the legislature has the power of pardon, but should have it. On that, opinions may vary. I am inclined to agree with the members of the constitutional conventions that the legislature is not an appropriate means to exercise the power of individual pardons. But in those states in which there is provision for initiative and referendum, there is no good reason why in an extreme case pardons should not be granted by the people. The difficulties of such action are abundant guaranties that the power will not be abused.

Max Radin.

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A NOTE IN REPLY*

A word in rebuttal: I do not seriously disagree with anything in the scholarly historical review which makes up the first part of Professor Radin's criticism, as is shown by what I have written on the

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24 The fact that a legislature by indirect means may attempt to deal with pardons was quite well known. Cf. Ex parte Garland, supra note 17, at 380.

* Professor Radin's article was sent to Professor Weihofen and the above note was received from him by the editorial staff.
subject elsewhere. Professor Radin tacitly concedes that I am half right, i.e., that the legislature does have power to grant general pardons. He denies only that this power extends to individual pardons, and he feels that my basic error lies in confusing the two. The answer is that the confusion is not mine, but is the law's. There is much to be said for separating the pardoning authority from the authority to proclaim amnesties, as in the French law, but the fact remains that our law makes no such separation. They are lumped together, as part of one power, vested in the same authority. If this statement is correct, then it is Professor Radin who is guilty of basic error, for his whole argument rests upon distinguishing the pardoning from the amnesty granting authority. Of all the cases cited in my article, there is none which supports such a distinction, and only one which even suggests it. Until some authority can be shown to support the distinction, I shall continue to believe that if the legislature can grant general pardons—as Professor Radin apparently admits is proper—it can grant individual pardons, unless prohibited by the constitution.

Henry Weihofen.

Boulder, Colorado.

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