

Criminal Law: Conditional Pardoning of Undesirables

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collusion.²⁴ For example, the mere fact that the insured openly expressed a desire that the injured plaintiff, his wife, secure a judgment against him has been held insufficient to establish collusion.²⁵

This brings up a consideration of great importance which has been overlooked in cases involving parental immunity—namely, the relationship between the parties which is totally unlike that existing between husband and wife. It is not enough to say that, if family discord is no longer a problem, immunity may be discarded in an area where the insurance company will bear the ultimate liability. The duty of a parent does not cease when he has provided a harmonious home. He also has an obligation to instill in his child a right moral sense.

No minor child, on his own initiative, would prosecute an action against his parent, except in the most unusual circumstances. The necessity of the parent exercising some influence over the child, in order to successfully recover from the insurance company, distinguishes this from all other types of immunity cases. Whether the degree of conspiracy reaches the point where the insurer may avoid the policy is immaterial. In this writer's opinion, when the negligent parent takes a child of tender age to an attorney for the purpose of preparing a law suit against the parent and his insurance company, the child is provided with impressions of equity and justice which strike at the very heart of our judicial system.

A. WILLIAM FINKE

Criminal Law: Conditional Pardoning of Undesirables—Petitioner, a person imprisoned for burglary, signed a pardon agreement conditioned upon his leaving Utah. The pardon provided that he be re-imprisoned if he ever returned. Upon release, he ignored the agreement and remained in Utah. State authorities promptly returned him to prison, whereupon he applied for a writ of habeas corpus which was denied in the trial court.¹

The Utah Supreme Court, basing its decision upon the contract theory of pardoning, upheld the lower court's ruling. It reasoned that since the promise required of petitioner raised no constitutional objection, it could support a binding contract.² Petitioner's assertion that the state's action amounted to banishment in violation of the state³ and federal⁴ constitutions was deemed erroneous, for he was given a free

²⁴ Collusion may not be inferred merely from the close relationship between the plaintiff and the defendant. *Conroy v. Commercial Cas. Co.*, 292 Pa. 219, 140 Atl. 905 (1928).

²⁵ *Maryland Cas. Co. v. Lamarre*, 83 N.H. 206, 140 Atl. 174 (1928).

¹ *Mansell v. Turner*, —Utah—, 384 P. 2d 394 (1963).

² *Id.* at 395. There are two general types of pardons. A pardon may be given when there is a recognition that a previous conviction was based on guilt or when a convicted person is found to be innocent, as where another confesses to the crime for which the convict was imprisoned. This article deals with the former type of pardon only.

³ UTAH CONST. art. I, §§3, 6, and 9.

⁴ U.S. CONST. amend V, VI, and XIV.

choice to leave or to remain in prison. Even, however, if petitioner's contention were correct, he could not prevail, for in the court's eye: "If the conditional termination were void . . . the compact was nudum pactum."⁵ The court stated also that to release petitioner would be to enforce a compact in his favor that could not be enforced in the state's behalf.⁶

The contract theory of conditional pardoning present in the *Mansell* case is a minority view in the United States. Courts taking this position hold that a conditional pardon is a contract, in form and substance, between the pardoning power of the state or nation and the person to whom it is granted.⁷ While this theory has at times been criticized,⁸ there is no judicial opinion providing a clearly reasoned analysis of its defects.

There is, it appears, a definite distinction between a conditional pardon and a contract. If the conditional pardon in *Mansell* is considered a contract, it is either a reverse unilateral or an executed (on one side) bilateral contract. In either case, the state has performed a jural act, and petitioner has made a promise. Moreover, each has been offered as consideration for the other. Petitioner's promise, from the very nature of the transaction, could only be that he would leave the state and never return. His failure to leave the state or his subsequent return thereto must, under contract law, be either a simple breach of promise or the operative fact of a condition subsequent rendering the contract a nullity. The latter alternative is impossible, for a condition subsequent must be a condition to some promise, and in this case, there is no promise on the part of the state to which it can relate. While the promise of the offeree must be considered a condition precedent to the promise of the offeror, in this case the offeror's part of the contract is executed, and the promise of the offeree can, therefore, be neither condition precedent nor condition subsequent to the offeror's part of the contract. If, therefore, a conditional pardon is to be held a contract, its violation by the pardonee must be termed a breach of promise for which the state must seek a remedy. At this point the contract theory breaks down and a dilemma appears. Either this is a contract for which there are no remedies because of the peculiar nature of the intangible rights involved, or this is a contract for which there is indeed a remedy. It is thus necessary to determine whether any of the five contract remedies is applicable.

The damage remedy is clearly inapplicable. It would be impossible for a court to evaluate the cost of relocating, apprehending and re-

⁵ *Mansell v. Turner*, *supra* note 2.

⁶ *Ibid.*

⁷ Annot., 60 A.L.R. 1414 (1929); *Ex parte Cochran*, 158 Tex. Crim. 48, 253 S.W. 2d 443 (1952).

⁸ State *ex rel. Davis v. Hunter*, 124 Iowa 569, 100 N.W. 510, (1904); *Woodward v. Murdock*, 124 Ind. 439, 24 N.E. 1047 (1890).

imprisoning petitioner, the loss of his penal labor (abated to an extent, perhaps, by the fact that the state did not have to support him), and the "peace of mind" value of his removal from society through imprisonment or absence from the state. No court has as yet attempted to apply this remedy.

Specific performance is also impossible. Even if petitioner were escorted beyond the state's borders, what, short of execution or imprisonment in another state, which would raise serious constitutional questions, would prevent him from returning in a few weeks, months or years?

While specific restitution of tangible things is well known to the law, specific restitution of human beings, or more precisely, human liberty, is unheard of. It is true that as to intangibles, restitution, if applicable, provides for compensatory money payment. It would, however, be about as easy to "clean the Augean Stables" as to place a monetary value upon human liberty.

Legal rescission, which allows a party unilaterally to rescind the contract, is also not an available remedy for breach of a conditional pardon. When applicable, it enables a party to cease performance of his promise, if he has not already done so, and to secure restitution of such consideration as he has given, if he seeks it. In this case, however, the state has already completely performed, and restitution is inapplicable.

Cancellation or judicial rescission is a rather specialized remedy which is applicable only in certain circumstances.⁹ Even, however, assuming that a conditional pardon situation satisfies such conditions, cancellation would be difficult of application, for it is an equitable remedy and equity requires that one who seeks equity must do equity. Therefore, one seeking judicial rescission, would have to restore any partial consideration he received from the adverse party in accord with the contract.¹⁰ If a person pardoned on his promise of permanent absence from the state returns after being absent two years, he has provided partial consideration. How is the state to restore this partial consideration, if it seeks to reimprison him? Restoration in monetary terms would force upon the courts the burden of determining immeasurables. It might be argued that deducting such time from a person's remaining prison term and allowing him the "goodtime" he previously earned solves this problem. Yet, most courts refuse to permit this except where there is a specific provision in the pardon allowing or implying it, and statutes in some states prohibit it.¹¹ Moreover, even if such time balancing is permitted, at most it solves one problem by creating another (i.e. the creation of a contract by the court, never agreed to by the

⁹ AM. JUR. *Cancellation of Instruments* §§24-28 (1937).

¹⁰ *Id.*, §39.

¹¹ WIS. STAT. §57.11 (3) (1961).

parties). Suppose, for example, a convict serving a five year term is given a pardon on condition that he leave the state and never return. If he remains out of the state for five years and the court applies the time balancing theory, he can return to the state at will. But this is diametrically opposed to an essential term of the written agreement (i.e. that he never return).

Thus, from the absence of any workable basis to apply the contract remedies, it is apparent that a conditional pardon is not a contract. Certainly, there is no judicial opinion supporting the contract theory of conditional pardoning which contains a clearly reasoned analysis of the remedy problems inherent therein. Normally, there is a distinction between the fields of contract and criminal law, which was not seen, perhaps, by the court in *Mansell*.

It appears sounder to view a conditional pardon as a noncontractual grant of privilege from the state, after the manner of a conveyance, based upon a condition precedent or subsequent. This is the position taken by the majority of courts in the United States.¹² Under this theory, if the condition imposed is valid, no problem arises as regards immediate reimprisonment. The only question that does arise is whether the condition imposed is, itself, valid. Thus, conditions like that in the *Mansell* case, requiring a person to leave the state and never return, would be tested in the area of constitutional policy, not contract law.

The general rule is that a condition attached to a pardon may be anything within the stretches of executive imagination, as long as it is not illegal, immoral, or impossible of performance.¹³ Pardons conditioned upon leaving a county, state,¹⁴ or even the United States¹⁵ have been held valid by state and federal¹⁶ courts. In *In re Cammarata*,¹⁷ petitioner was pardoned conditionally to Italy. Several years later he returned to the United States, spent a short time in Pennsylvania, and then took up residence in Ohio, living there freely and openly for twelve years. Then Michigan began successful extradition proceedings against him, culminating in his arrest, return to Michigan and reimprisonment. On appeal the Michigan Supreme Court upheld denial of a writ of habeas corpus by the trial court. While not explicitly affirming this procedure, the United States Supreme Court denied certiorari.¹⁸

¹² *Ex parte Wells*, 59 U.S. (18 How.) 307 (1855); *In re Saucier*, 122 Vt. 208, 167 A. 2d 368 (1961); Annot, 60 A.L.R. 1414 (1929).

¹³ *Ex parte Wells*, *supra* note 12; *Kavalin v. White*, 44 F. 2d 49 (10th Cir. 1930).

¹⁴ *State ex rel. O'Conner v. Wolfer*, 53 Minn. 135, 54 N.W. 1065 (1893).

¹⁵ *People v. Potter*, 1 Park Crim. Rep. 47 (N.Y. 1846); *Comm'r v. Haggerty*, 4 Brewst. 326 (Pa. 1869).

¹⁶ *Kavalin v. White*, *supra* note 13.

¹⁷ 341 Mich. 528, 67 N.W. 2d 677, *cert. denied*, 349 U.S. 953 (1955).

¹⁸ The Wisconsin Supreme Court has not to date considered this issue. However, if it were to adopt the traditional view, the governor has sufficient authority to grant a pardon conditioned upon leaving the state under art. 5, §6 of the Wisconsin Constitution and §57.11 of the Wisconsin Statutes (1961).

Justice Crockett wrote a concurring opinion in the *Mansell* case. He pointed out that a condition imposed by the pardon board should bear some reasonable relationship to convict "treatment or rehabilitation and/or public safety"¹⁹ which were, in his view, the purposes of conditional pardoning. The crucial issue to his eye was not whether the board had the power to impose conditions but whether *the condition imposed* was "capricious or arbitrary."²⁰ Chief Justice Henriod, writer of the majority opinion, responded to this statement of the issue thus: "Ridiculousness of the condition is not a matter of concern to us. . . ."²¹

There is support for Justice Crockett's view within the field of administrative law. A federal administrative board, when deliberating on a matter involving the creation of criminal penalties by the board, must adhere to standards (e.g. public convenience and necessity) reasonably relevant to the purpose of Congress in passing the statute creating that board, albeit such standards are vague and allow wide discretion and imaginative interpretation.²² Inquiries and investigations by such a board, though otherwise virtually unlimited, must be reasonably relevant to the purpose for which the board is acting.²³ A progressive court might adopt Justice Crockett's standard and hold the condition imposed in the principal case invalid unless shown to bear some reasonable relationship to the purposes of conditional pardoning, convict treatment or rehabilitation, and/or societal protection.²⁴ Public policy, it appears, would support such a holding.

The court in *Mansell*, in order to satisfy policy requirements, found it necessary to cite cases making a distinction between pardons conditioned upon leaving the state and sentences so conditioned.²⁵ Such a sentence, customarily termed a "floater" by criminal attorneys, is frequently used in Wisconsin, as well as in other states, to dispose of undesirables.²⁶ Milwaukee judges, for example, typically suspend sentence for a period of years. If a person has remained absent from the state when the case comes up before the court again (after such period), the

¹⁹ *Mansell v. Turner*, *supra* note 1, at 396.

²⁰ *Ibid.*

²¹ *Id.* at 396 n.4.

²² *Fahey v. Mallonee*, 332 U.S. 245, 249 (1947). The distinction in this case as to "creation of new crimes" is significant and indicates that the rule in *A.L.A. Schechter Poultry Corp. v. United States*, 295 U.S. 495 (1935) still applies in this limited area.

²³ *United States v. Morton Salt Co.*, 338 U.S. 632 (1950).

²⁴ California courts require a showing of "reasonableness" to support a conditionally commuted sentence. *Green v. Gordon*, 246 P. 2d 38 (Cal. App. 1952). The purposes of pardoning, stated above, are limited to the type of pardon dealt with in this article as indicated in note 2 *supra*. This is the only kind of pardon which may be conditional.

²⁵ *Mansell v. Turner*, *supra* note 2.

²⁶ *Milwaukee Journal*, Sept. 16, 1963, pt. 1, p. 1, col. 1. In Wisconsin, this type of sentence is often given to those convicted of prostitution, vagrancy, relief fraud, fortune telling and disorderly conduct, although occasionally "floaters" have been given for serious offenses such as robbery.

judge dismisses it. Since early in the history of this country, "floaters" have been condemned by every state court considering them. It is agreed that they are against public policy as amounting to banishment.²⁷ Pardons conditioned upon leaving the state are generally distinguished from "floaters" on the ground that they are freely accepted.²⁸ Anyone, it is said, may freely choose to leave a geographic area. The state is not rejecting its citizen. He may remain in prison if he likes. Yet, it might be argued, that a person given a "floater" also has a choice. He too may remain in the geographical area and go to prison in accord with his sentence if he does not desire to leave.

Judicial reimprisonment of convicts violating a pardon like that in the *Mansell* case has, at times, been supported on humanitarian grounds. It has been stated that a failure to enforce such a pardon would "militate against clemency for all prisoners."²⁹ Yet, it seems doubtful that such a pardon is given for humanitarian reasons. A parole within the state would be sufficient for those purposes. Justice Crockett's concurring opinion in the principal case questioned the motivation behind the granting and enforcement of such pardons.³⁰ If a man is not trustworthy enough to live in one state with a parole, how can he be trustworthy enough to live in another state without a parole?

Conceivably, judicial enforcement of this procedure could militate against the parole system. What better, and more constitutional, way is there to economize, for those who share theoretical persuasions with Mr. Mitchell and the "city fathers of Newburg, New York," than to grant all convicts, in lieu of parole (with its costly supervisory and administrative systems), pardons conditioned upon permanent absence from the state?³¹ This possibility was clearly recognized in *People v. Baum*.³² Although there the court was dealing with a "floater" sentence, its words seem equally applicable to this situation:

To permit one state to dump its convict criminals into another would entitle the state believing itself injured thereby to exercise its police and military power, in the interest of its own peace, safety, and welfare, to repel such an invasion. It would tend to incite dissension, provoke retaliation and disturb that fundamental equality of political rights among the several states which

²⁷ *Bird v. State*, 231 Md. 432, 190 A. 2d 804 (1963); *Ex parte Scarborough*, 76 Cal. App. 2d 648, 173 P. 2d 825 (1946); Annot., 70 A.L.R. 100 (1931). The Wisconsin Supreme Court has not ruled on this matter and may never do so. When a sentence of this type is appealed, the sentence is declared void and the case is remanded to the trial court for imposition of the proper sentence. Hence, it is only in extraordinary situations where a "floater" is appealed, even if the person is imprisoned for failure to leave the state.

²⁸ *Ex parte Hawkins*, 61 Ark. 321, 33 S.W. 106 (1895).

²⁹ *Mansell v. Turner*, *supra* note 2.

³⁰ *Id.* at 396.

³¹ For the distinction between a parole and a conditional pardon see *Marsh v. Garwood*, 65 So. 2d 15 (Fla. 1953).

³² 251 Mich. 187, 231 N.W. 95 (1930).

is the basis of the union itself. Such a method of punishment is . . . impliedly prohibited by public policy.³³

In conclusion, it should be noted that conditional pardons, in the proper situation, are not only practical but necessary to effective penal practice. When, however, the condition imposed is so broad as to be arbitrary, whimsical or ridiculous, the very purpose of pardoning may be thwarted. To remedy this situation, a conditional pardon should be viewed as a noncontractual grant of privilege from the state based upon a condition precedent or subsequent which is valid if the condition imposed is valid. A standard should then be adopted by judicial opinion or legislative enactment requiring that conditions imposed in a pardon be held invalid unless shown to bear some reasonable relation to the purposes of conditional pardoning, convict treatment or rehabilitation, and/or societal protection.

ROBERT A. MELIN

Constitutional Law: Indigent's Right to Counsel When Charged With a Series of Misdemeanors, Carrying a Possible Substantial Prison Sentence—The case of *Melvin v. Burke, Warden, Wisconsin State Prison*¹ raised the question of the right of a defendant, who is charged with a misdemeanor, to have counsel appointed. In the original action, the County Court of Portage County, Wisconsin found petitioner guilty on nine charges of issuing worthless checks in violation of section 943.24 of the 1961, Wisconsin Statutes. These offenses are defined as misdemeanors under Wisconsin law, and each offense is punishable by a fine of not more than \$1000 or imprisonment for no more than one year or both.² Petitioner was sentenced to eight concurrent and one consecutive one year terms for a total of two years in the Wisconsin State Prison.³

At the time of his arraignment in Portage County, petitioner was informed by the court that he would not be furnished with counsel, the court having no such appointive power under Wisconsin law. After

³³ *Id.* at 96.

¹ *Melvin v. J. C. Burke, Warden, Wisconsin State Prison*, File No. 63-c-52 (E.D. Wis. 1963).

² Other offenses calling for a fine or one year prison sentence or both include: homicide by negligent use of vehicle or weapon, WIS. STAT. §940.08 (1961); carrying concealed weapon, WIS. STAT. §941.23 (1961); fraud on hotel or restaurant keeper, WIS. STAT. §943.21 (1961); lewd or lascivious behavior, WIS. STAT. §944.20 (1961); harboring or aiding felons, WIS. STAT. §946.47 (1961); bribery of witnesses, WIS. STAT. §943.61 (1961); interference with custody of child, WIS. STAT. §946.71 (1961); cruelty to animals, WIS. STAT. §947.10 (1961); contributing to the delinquency of children, WIS. STAT. §947.15 (1961).

³ Compounding this problem is the effect of the so-called repeater statute, WIS. STAT. §939.62 (1961), which provides that if the actor is a repeater (convicted of misdemeanors on three separate occasions within a five year period) the maximum term of imprisonment prescribed by law for that crime may be increased to not more than three years for a maximum term of one year or less.