Voice for the defense

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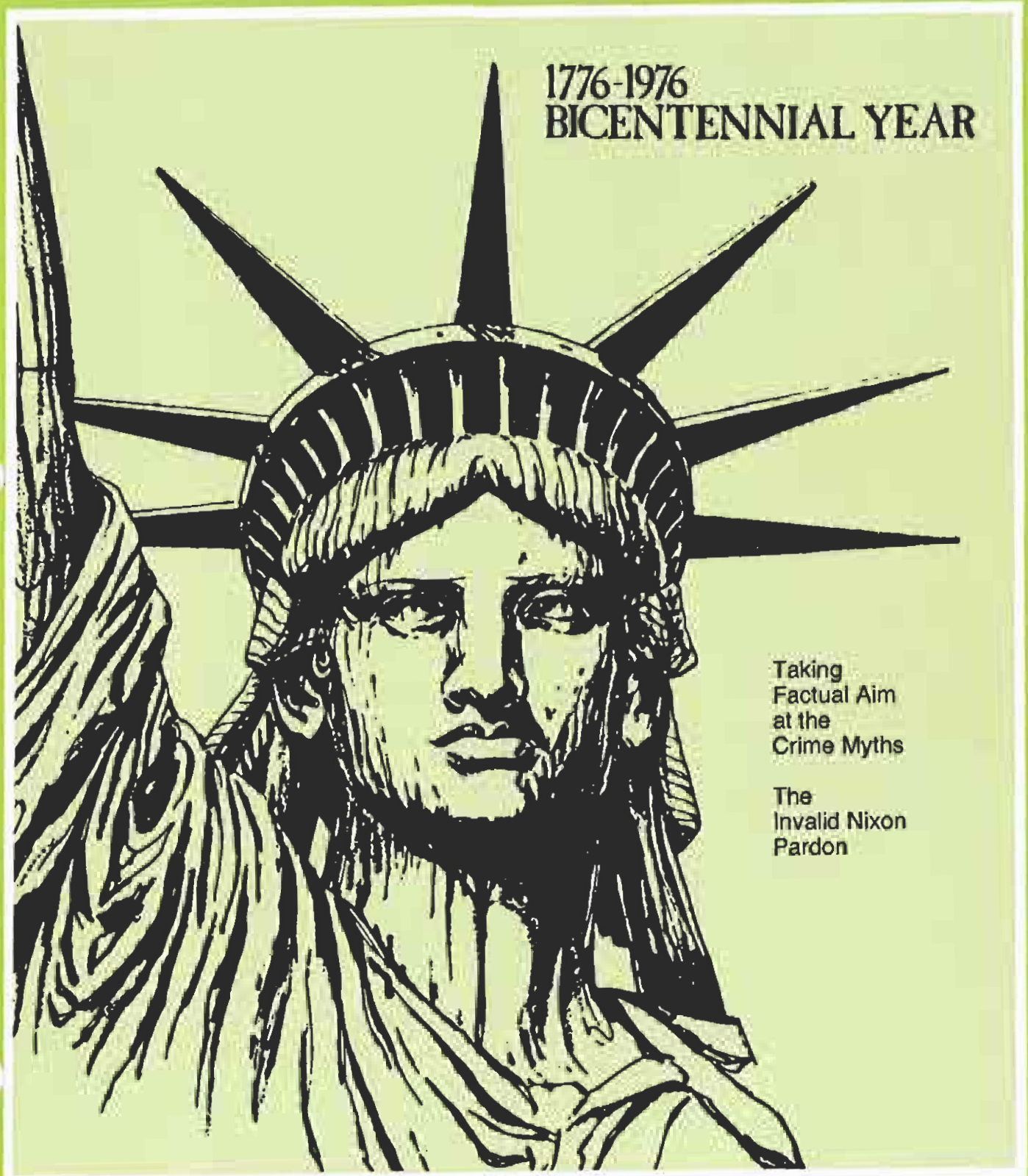

1776-1976 BICENTENNIAL YEAR

Taking Factual Aim at the Crime Myths

The Invalid Nixon Pardon

Defense Lawyers Politics

Last year a group of Texas lawyers started a loosely knit organization called the Lawyers Political Action Committee for the purpose of supporting candidates for office. Since that time LAWPAC has been active in elections where candidates involved in the Criminal Justice System were running for office. LAWPAC has no official affiliation to TCDLA, but is primarily composed of criminal defense lawyers. LAWPAC is the only identifiable group of criminal defense lawyers involved in politics in Texas. If you are interested in having some say in the election of your public officials, information may be obtained by writing LAWPAC at P.O. Box 13151 Capitol Station, Austin, Texas 78711.

Congratulations to Court of Criminal Appeals Judges

Hearty congratulations and best wishes go to Judge Truman Roberts and W. T. Phillips who were recently victorious in contested races for the Court. These races were both hotly contested as is well known by our many members who were actively supporting various candidates. In the case of Judge Roberts' race the defense bar was able to put forth a united front and were instrumental in the Judges' win. In the Dally-Vollers-Phillips race the defense bar was split among the three. Mr. Phillips with 40 years of legal experience behind him including a number of felony cases will make us a fine judge. I think the important thing here is the involvement of the defense bar in the elective process. Each lawyer who worked for his candidate by donating his time, money and energies is also due a pat on the back.

Legislative Input Needed

In April of 1976, the Special Task Force on Crime of the House of Representatives met in San Antonio to hold hearings on anti-crime legislation as they have in other cities in the State before and since. The result of these hearings will be legislation that will eventually affect the citizens of Texas. The Texas Criminal Defense Lawyers, because of the importance of the hearings, made special efforts to notify every attorney and law firm of the date, time and place of the hearings and urged them to attend and present statements and testimony where appropriate. Under consideration were subjects relating to the commission of a felony while carrying a firearm. One bill would automatically prohibit parole and probation for a felony conviction involving a firearm, while another one would tack on an automatic 5 years to the sentence. Other matters considered included the states right to appeal, denial of bail for repeat offenders, use of wire taps and electronic surveillance equipment and admission of oral confessions.

These hearings were well attended by the Peace Officers and prosecutors and other law enforcement officials who made successful presentations of the prosecution's point of view. Several members of TDCLA, from San Antonio appeared and gave generously of their time to participate in discussions and offer points of view more directly related to TDCLA positions concerning justice, individual rights and protection of fundamental freedoms. These members should be complimented. However, despite intense publicity efforts by TDCLA and others, to call members to attend and provide necessary inputs for this important future legislation there were times when none or very few persons were present to give our points of view.

This is an old problem in connection with private practitioners and the President realizes that everyone has pressures upon their time which often provide enough excuses to miss a meeting or such a hearing. If we fail to meet our duty in this area, it may be necessary for us to blame ourselves for not having been present and giving of our time at the critical point where the legislation was being conceived. I urge the membership not to miss any opportunity to provide input into the legislative process. It is not enough to be a member of this organization by merely paying dues. Your obligation does not end at this point if the organization is to be effective, we need complete participation in these endeavors and without such participation the organization will fail.

There is a natural bias that will result out of this type of legislation where one point is being presented by salaried persons whose attendance at the hearings is a direct duty associated with their office and which as a result will not cut into their income the way attendance might affect members of TCDLA. This is understandable but we must recognize our public duty as attorneys requires us to make a financial sacrifice and provide our expertise in shaping the legislative process. The same conception should be applied not only to law and order legislation. Most of us have law practices and clients that are going to be indirectly and vitally affected by legislation in other areas. We have an obligation to be aware of any legislative hearings or proposed legislation that would affect the citizens of the State of Texas. We need to ask our clients to attend such hearings and urge our associates to attend the hearings and provide input into the legislative process. As times change, it is more and more important for lawyers to be involved in the legislative process at the level of being personally acquainted with every legislator as well as for lawyers to become more active as a group.

C. David Evans

IN THIS ISSUE

ARTICLES

FEATURES

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Texas Criminal Defense Lawyers Association

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Taking Factual Aim at the Crime Myths

By Richard A. McGee

It has been popular in recent years to refer to our thousands of law enforcement, judicial, and correctional agencies in the aggregate as the "non-system of criminal justice." Certainly it is not a "system" in the military or engineering sense. In such a "system," burdened as it is by a chronic and ever-growing overload, each player in the scene is so preoccupied with his own problems, if not his survival, that nobody really takes the time or effort to look at the administrative realities of the total structure. No other aspect of public service is so plagued by "the pot calling the kettle black" syndrome. Even Dick Tracy devoted his 1975 Christmas prayer to asking the Almighty to intervene with the courts.

We will try in this short article to look at the "system load" and some of the relevant numbers as well as some of the mythology which tends to militate against rational solutions. We will not speculate on the reasons why crime seems to be escalating or succumb to the temptation to advance sociological or economic remedies.

First of all, if we accept the premise that the criminal justice system exists primarily for the purpose of preventing, controlling, and reducing crime, we ought first to know how much crime actually occurs. *Unfortunately, we do not and never have known the complete answer to this question.* The so-called "Uniform Crime Reports" published by the FBI are the source of most of the popular information about the volume of crime in the United States. They are useful, but the uninitiated should know their limitations. First, they are police statistics based principally on two kinds of information—"crimes known to the police" and arrests. There is no reporting from prosecutors and courts as to dispositions after arrest, and neither are there any facts reported from correctional agencies such as prisons, county jails, probation departments, parole authorities, or juvenile delinquency control agencies. The UCR crime index widely quoted in the press is based on "crimes known to the police," but includes only the seven crimes most likely to be reported by victims or others. The index crimes are (1) criminal homicide, including murder, non-negligent and negligent manslaughter; (2) forcible rape; (3) robbery; (4) aggravated assault; (5) burglary —breaking and entering; (6) larceny—theft; (7) motor vehicle theft. They do not include such common offenses as drug crimes, sex crimes, and forgery.

Recent "victimization" studies using scientific sampling and polling techniques reveal that except for homicide and car theft, only about 65% of such crimes as robbery and 25% of the rape cases are reported to the police, while burglary, the most common of all the index crimes, is probably reported at a level of about 30%. Furthermore, of these, less than one in five is "solved." Or putting it another way, a burglar has about five or six chances out of 100 of being arrested for each reported offense.

Of the crimes not included in the FBI index, we are far worse off. For example, the laws against possession and trafficking in narcotic drugs are probably violated many hundreds of times for each arrest. If Joe sells Juan a paper of heroin, no one will report it unless one of them is a police informer.

In short, the actual amount of crime in any category except homicide and car theft will almost surely be anything from 50% greater to many fold that revealed by official statistics for the simple reason that the victims do not report them. In the case of the so-called victimless crimes like prostitution and illegal gambling, the ratio between known and actual offenses probably runs into the thousands.

President Lyndon Johnson once said, at a meeting of the National Crime Commission in Washington, D.C. in 1965, that he understood there were two ways to deal with the crime problem—one, to control crime itself, or two, to control the crime statistics. When the mayor pounds the tables, fires the chief of police, and demands that "those crime statistics must come down," it is fairly safe to wager that in the next six months serious felony crimes reported will come down but, curiously enough, most categories of minor crime will appear to have gone up.

Where does this leave us? For our purpose here the numbers in terms of measuring load on the system become more realistic if we begin with actual arrests of persons charged with a criminal offense and monitor them through the steps that follow. To the best of this writer's knowledge, complete information based on follow-up actions or transactions with each offender arrested have not been routinely collected, classified, and published in any state or major subdivision of a state anywhere in this country.

Failure to record and use this kind of information puts the policy and decision makers in a position analogous to that of the General Motors Corporation if it tried to survive in business without bookkeepers and accountants. Fortunately for our purpose here, the Bureau of Criminal Statistics of the California Department of Justice has made some beginnings during the last five years in developing what it has named the *Offender-Based Transaction Statistics System*. It is a kind of gigantic sorting machine. It picks up the record of every person arrested and charged with an offense which the penal law describes as a felony and follows each case until the processes are concluded by the police, prosecution, and judicial agencies of the jurisdiction.

In California there were 1,485,000 arrests in 1974, of which over 400,000 were of both adults and juveniles charged with a felony at the time of arrest. Now, so as to give us a kind of "bottom line" picture of what the criminal justice system does with these 400,000 persons arrested, we have extrapolated some fairly solid

gures from a sample of about 15,000 adult cases from four populous Southern California counties.[1]

To make the figures a little easier to grasp we have used a base of 1,000.[2]

Dispositions per 1,000 Felony Arrests In Southern California in 1974

575 were not convicted.

Where in the system were these decisions made?

106 were released by the police.

164 were released because the prosecutor refused to file a complaint.

302 were dismissed, acquitted, remanded to juvenile court, charge reduced to a misdemeanor and not convicted in lower court, dismissed on a felony complaint in lower court, etc. Only 32 of these 302 defendants not convicted fell out in the Superior Court.

425 were found guilty by plea or trial.

236 of these were sentenced in the lower court on misdemeanor complaints.

42 were disposed of in the lower court on felony complaints.

147 were convicted of felonies and sentenced in the Superior Court. In other words, only about one in seven persons arrested for felonies ever reached the point of conviction and sentence in the Superior Court.

Now, what dispositions did the courts make of this final residue of 147 cases out of 1,000 felony arrests which range in severity from forgery to homicide?[3]

74 were placed on probation with a condition that part of the sentence be served in the county jail. More than half of these served six months to one year in jail.

36 received straight probation without jail time except what may have been served while awaiting adjudication.

19 were sentenced to state prison with indeterminate terms.

6 got civil commitments to the state narcotic rehabilitation center.

6 cases under 21 years of age went to the California Youth Authority.

5 were sentenced to county jail without probation.

1 was committed to a state mental hospital.

The above are only the bare bones of the information derived from this kind of criminal justice accounting. The system is capable of producing masses of related information such as the reasons behind the actions, the breakdowns by offense, plea, trial, age, sex, race, geographical area, elapsed time from charge to disposition. Much relevant information such as cost analyses of functions and transactions are still not available, but intelligent policy and management decisions on a systemwide basis will never be made until we begin running all parts of the system on a basis of solid factual information rather than by trying to create knowledge by dogmatic statements which if repeated often enough by prominent personalities are soon accepted as gospel if not scientific fact.

Let us look at some of the favorite contemporary myths which persist without modification by uncomfortable facts.

Myth Number One: "Most crimes are committed by a body of professional repetitive criminals."

Like most such sweeping generalities, it is false on its face because what may be true for one kind of crime like homicide is obviously untrue of forgery. Since we don't even know who commits most of the crimes, how could one make such a statement anyway? But the statement refers to "most crimes," so let's look at the most numerous of all the crimes against property, i.e., burglary. According to a special study of burglars,[4] 51% of the persons arrested for burglary in 1972 and 54.2% of the 1974 group were juveniles 17 years of age or under, and 62.3% were under 25 years old. Almost ¾ of the offenses were committed less than three miles from the residence of the burglar. Admittedly, there are habitual professional burglars, but most of their competitors in the business are young amateurs who are more likely than not to be the victim's neighbors. In California about ⅓ of all felony arrests are of juveniles under 18.

Myth Number Two: If the legislature would make prison sentences mandatory for most serious crimes committed, we would soon stop the increase in the incidence of such behavior.

In the face of more than 75 years of demonstrated failure of the "habitual offender statutes" in New York State and elsewhere, that state in 1973 enacted a new "second felony offender" act. It is already raising havoc in the whole system by increasing the number of days from arrest to adjudication, reducing guilty pleas, clogging the detention jails, and increasing the prison population. There appears to be no evidence of the predicted reduction in the relevant crime rates.[5]

In the same vein, the California Legislature in 1975 passed an act providing mandatory prison sentences for offenders convicted of crimes in which a dangerous weapon is used. Former Governor Reagan advocated it, Attorney General Younger promoted it, and Governor Brown signed it. It all sounds so convincing that empirical evidence, historical experience, and even a little simple arithmetic are all cast aside. The law has just gone into effect, but there is no reason to believe that California's experience will be different from New York's.

Furthermore, let us look for a moment at the 1974 disposition figures cited above for California. Recall that only 19 out of 425 defendants found guilty of felonies were sent to state prisons. Seventy-four got jail terms as a condition of probation. If only 25% of these went to prison instead, it would double the prison intake and over a period of less than three years double the prison population which is already at full capacity.

If we look at the convictions for armed robbery alone, ignoring felonious assault, forcible rape, and manslaughter, we find that mandatory prison sentences for this crime alone would more than double the annual state prison intake. California's prison population in recent years has fluctuated around a mean of about 20,000 in-

Richard A. McGee, president and founder of the American Justice Institute, was the director of the California Department of Corrections from 1944 to 1961 and chairman of the California Board of Corrections from 1944 to 1967. Early in his lengthy career in the field of corrections he was organizer and first warden of the New York City Penitentiary, Riker's Island (1935 to 1939). The Institute devotes itself to planning, research, evaluation, training and consultation activities in the areas of criminal and juvenile justice and related social systems.

mates. At current costs for prison construction of $30,000 to $40,000 per inmate unit, this innocent bit of legislation may obligate the taxpayers for a building cost of ¾ of a billion dollars and an increase in operating budgets of $1 million per year.

It might be worth it if the violent crime rate were to be reduced significantly. That this will not be the result can be predicted with reasonable assurance.

Myth Number Three: That harsh penalties dictated by the statutes have a unique deterrent effect.

Whenever a wave of publicity focuses on some particular crime, the politicians feel obliged to make noises like they were doing something about it. The standard formula is to increase the penalties and try to make them mandatory. We have dealt with the mandatory sentence idea above. But the notion that making the authorized penalty harsher is a different idea based on the same kind of thinking wherein facts and experience are excluded. Raising the maximum penalty from 10 years to 25 years and the minimum from two years to five years, or prohibiting the granting of probation in certain circumstances, are the usual ploys.

It is assumed that potential offenders know what the law provides and, stricken with fear, will not commit the offense. There have been polls of both free citizens and of prisoners which demonstrate what any thoughtful person should know without them. It isn't so. It is assumed also that persons arrested for the offense in question will be (1) charged with that particular violation, (2) convicted of the offense originally charged, and (3) sentenced under that particular section of the statutes. None of these will necessarily occur as every prosecutor, criminal defense lawyer, and judge knows perfectly well. Many of the lawyer members of the legislature know better, too, but the whole idea is so seductive from the political viewpoint that it acts like the drowning man's straw on the choppy waves of public outrage. If any of these nostrums would actually accomplish one half what is usually claimed for them, the whole system from detection to disposition would cave in under the load.

Myth Number Four: That convicted felons are sent to prison for the purpose of being rehabilitated.

Guilty defendants are, and always have been, sentenced to suffer a penalty because they violated a criminal law, not because a professional diagnosis revealed that the person needed "rehabilitation," whatever that may mean. Again, look at the numbers in California where rehabilitation programs have received more support and emphasis than in most other jurisdictions. Of the 425 out of 1,000 guilty defendants, only 19 went to prison and six to the California Youth Authority. They were not selected for such dispositions because they were the best candidates for reform but because, generally speaking, they had either committed the most serious crimes or had records of repetitive criminal behavior of lesser severity.

What about the concept of rehabilitation then? This writer has done more than most prison administrators to promote and establish programs of prisoner education, vocational training, counseling, medical and psychiatric treatment, and related programs. Why? Not because men and women are selected by the criminal justice system for these services, but because since they are selected to serve prison terms for other reasons, it is only common human decency to help them to help themselves and to keep them from being damaged beyond repair by the experience. Further, one must assume that they are entitled to "protection from harm" under the Eighth Amendment.

Only about 2% of those who enter the receiving gates of American prisons die there. Prisons are not only places to which we send people, they are places that disgorge about 100,000 men and a few women each year to come out and live amongst us. Enlightened self-interest and basic humanitarian principles dictate that we do the best we can to help these people if they will let us. It is important here to keep our thinking straight. The sentence is society's response to unacceptable and abhorrent criminal behavior. The reason for discharge from the sentence is simply that the conditions of the sentence have been satisfied. To hold prisoners beyond normal limits because they haven't graduated from the seventh grade, or because someone doesn't believe they will quit drinking, or because they have been lazy, or because they have had three violations of prison regulations, or for any reason other than a new conviction, is not only impractical, it is irrational.

The concept that people are sent to prison to be "treated" has some legal pitfalls too.[6] It is rare indeed that even the best of our overcrowded American prisons have enough resources for education and treatment to accommodate all those who request it. Hence, if the purpose of the commitment is "treatment," is not the failure of the state to provide the treatment grounds for relief as in *Wyatt v. Stickney*?[7]

Myth Number Five: That we can predict future dangerous criminal conduct.

There is a current rash of discussion about identifying and confining for long terms the so-called "dangerous offender." The difficulty of defining dangerousness aside, the whole notion has to be based on the assumption that future dangerousness or lack thereof can be predicted. This is a subject which has had the attention of competent scholars. The early studies of Burgess and others at the University of Chicago in the 1920s were among the first. The development and use of the "Base Expectancy Scale" by the California Department of Corrections is another. These systems are basically actuarial and are useful in terms of establishing limits of

probability. They cannot predict future conduct in an individual case any more than a life expectancy table can tell any one of us how long we will live. This kind of echnology is useful in making judgments for large groups of individuals, but its use as the basis for long-term confinement in individual cases certainly would not stand either the tests of law or simple logic.

Conclusions:

Every state needs a crime accounting system which records every single transaction within the total criminal justice system. It should be operated by an independent agency which also should be subject to periodic outside audit. To continue to operate as we have in the past leaves society at the mercy of demagogues and well-intentioned, but uninformed, tinkerers.

If the "system" is to be redesigned, it must be done in terms of the known load. A wagon which is already sagging under its load cannot be repaired by putting on higher sideboards, nor will the job get done by leaving half the oad by the roadside.

References

[1]*The counties are Los Angeles, Orange, San Diego, and San Bernadino, from* A Description of the Offender-Based Transaction Statistics System, A Preliminary Report, 1974, *California Department of Justice, Bureau of Criminal Statistics, Sacramento, California, P.O. Box 13427, Dec. 1975.*

[2]*To obtain rough estimates for the whole state, any of the numbers in the disposition tree may be multiplied by 400. Such figures should be used with the utmost caution, however, because there is great variability from county to county and of the 400,000 persons arrested for felonies, 134,000 were juveniles.*

[3]*Drug law violations, larceny including auto theft, burglary, assault and robbery account for more than ¾ of these cases.*

[4]The Burglar in California—A Profile, *Research Report No. 15, California Bureau of Criminal Statistics, 1973.*

[5]Community Alternatives to Maximum Security Institutionalization of Selected Offenders, *by Donald Newman, Vincent O'Leary and Scott Christianson, Institute for Public Policy Alternatives, State University of New York, June, 1975, pages 77–108.*

[6]*"Behind the Institutional Wall" by Paul Friedman, TRIAL, Nov./Dec. 1975.*

[7]Ibid.

1975-76 Annual Report

The Association celebrates its fifth anniversary this July at the Bar Convention in Austin. During these years the Texas Criminal Defense Lawyers Association has grown into the largest such Association in the Nation and continues to be the voice for the criminal defense attorney in the State of Texas.

The Dues structure has never been altered and remains as follows: Attorneys who have practiced less than two years are admitted for $50.00 annually; the regular membership is $100.00 annually. TCDLA also offers affiliate memberships for $15.00 and student memberships for $5.00. Those who wish to give additional support to the Association as sustaining members pay dues of $200.00 annually. TCDLA lists a number of out of state members who are admitted on an affiliate basis.

Publications remain high on the list of priorities with the following items currently being published:

VOICE FOR THE DEFENSE, TCDLA's law quarterly, signifies the high quality and aims of the Association. All members of TCDLA plus others interested in the Association and criminal law receive this publication which emphasizes the practical aspect of criminal law.

SIGNIFICANT DECISIONS REPORT is a monthly report providing up to date reports on decisions handed down by the Court of Criminal Appeals. It has met with tremendous acceptance by the Bar.

NEWS NOTES is a bi-monthly news letter including news from the membership, information regarding discounts, programs, legislative items and seminars.

MEMBERSHIP DIRECTORY is published each January containing the name, address and phone number of each member and the TCDLA bylaws.

For the last 4 years TCDLA and the State Bar have co-sponsored the Criminal Defense Lawyers Project funded by a Federal Grant through the Governor's Criminal Justice Division. Last year the Project held 18 Institutes on State and Federal law in various parts of the State. The Project is governed by a six man Executive Committee and administered by a Project Administrator under the supervision of the State Bar. The Project publishes 3 important manuals concerning State, Federal and Juvenile law that are distributed widely throughout Texas.

Last year TCDLA solely sponsored seminars in Las Vegas, Crested Butte, Colo., Dallas, Houston, McAllen, Austin and Fort Worth with approximately 500 attorneys attending. TCDLA members have also been active and very instrumental in establishing the Advanced Criminal Law Refresher Course being held prior to the new Criminal Law Specialization Exam. CLE remains one of the most important concerns of the Association.

During the past year TCDLA members met locally in Dallas, Fort Worth, San Antonio, Austin and Waco to discuss problems peculiar to their area. A number of constructive changes have been initiated in local procedures by these groups.

Last year 35 committees were appointed to insure member participation and involvement in all aspects of the practice of criminal law. A number of these committees have been very active in supporting the interests of the Association especially the Amicus Curiae Committee. 700 TCDLA members serve in various committees.

BRIEF BANK Activity has increased along with membership. The Brief Bank service does original research for members at the rate of $5.00 hourly. Research is performed by second and third year law students under the supervision of the Austin attorneys.

In addition the Brief Bank Service can do filing for members in the Supreme Court or Court of Criminal Appeals, can obtain copies of briefs or opinions filed with either court for 10¢ per page and can obtain copies of virtually any document available for a state agency in Austin.

MANY DISCOUNTS are offered to members including Tessmer's DWI Transcript, Erisman's Manual of Reversible Errors, and Moses' Criminal Defense Sourcebook. During the year, TCDLA members receive a number of booklets and materials, obtained by the Member Services Committee at no cost.

With some 2,000 new attorneys being added to the Bar annually, many of which are attracted to criminal law, the potential growth of the Association appears significant. TCDLA will continue to cosponsor the Criminal Defense Lawyers Project which is scheduled to hold approximately 20 State and Federal Institutes next year. Additionally, TCDLA will sponsor a number of one day special emphasis seminars concentrating only on major selected areas of the criminal law.

TCDLA begins its sixth year of operation with renewed efforts to involve its membership in the affairs of the Association and to provide increased services to the members. The Association will continue to maintain an open door policy towards members, striving to provide existing services with promptness and efficiency, always vigilent for new benefits and the opportunity to be of assistance to the criminal defense lawyers of the State.

The Invalid Nixon Pardon: I. "Watergate Regulation" and II. Rex Non Concessit

By
Joel W. Westbrook
Jay Lawrence Westbrook

"I find no basis for attacking the pardon legally . . . [A] Challenge would . . . become a farce. The pardoning power has no limitations whatsoever."
—Leon Jaworski, *Time*, October 28, 1974.

[T]he President will not exercise his Constitutional powers . . . to limit . . . the jurisdiction of the Special Prosecutor . . . [including] (d) deciding whether or not to prosecute any individual, firm, corporation or group of individuals . . ." 28 CFR §0.38-1 (G), Appendix.

"In England the ancient rule was that where the King pardoned a convicted felon the pardon was not good unless it recited specifically the offense for which it was granted . . . because the failure to specify the felony indicated that the King had not been duly informed of the true state of the case . . ." 34 ALR 212, 214.

Agreeing with the concept expressed by the Kansas Supreme Court in *Jamison v. Flanner*, 228 Pac. 82 (1924), we do not here inquire into President Ford's motives, but we do believe his authority to grant this particular pardon can be judicially questioned, and we do believe that a full and complete judicial inquiry would result in invalidation of the pardon of former President Nixon.

We believe that President Ford lacked authority to grant this particular pardon because of the inhibitions of the special "Watergate Regulation".

Aside from this want of authority, we believe the pardon is void because it does not specify the offenses pardoned, and it is, therefore, a general pardon, intolerable to American and English law, and, furthermore, it was never legally "accepted" by ex-President Nixon.

Dictum of Ex Parte Garland

Those who contend that the President enjoys virtually unlimited discretion with respect to pardons under the constitutional provision of *Article II, Section 2, Clause 1** are believed to rely principally upon *Ex Parte Garland*, 71 U.S. 333, 18 L.Ed. 366 (1867).

Garland does contain some sweeping declarations which would encourage believers in the President's unlimited power to pardon; e.g. "[T]he power thus conferred is unlimited . . . It extends to every offense known to the law, and may be exercised any time after its commission, either before legal proceedings are taken, or during their pendency, or after conviction and judgment." *Page 370 of 18 L.Ed.*

This statement is purest dictum, because the validity of the pardon in *Garland* was not in issue; only its effect was in issue. Furthermore, although the Court had no occasion to rule on this issue, what is described as a "pardon" in *Garland* was perhaps more nearly "amnesty". (The proclamation granted "pardon and amnesty")*

Precisely what was in issue in *Garland* was the right of *Garland*, a former Confederate senator, and a former member of the Bar of the Supreme Court of the United States, to resume his practice in the Supreme Court without first taking an oath (required by the Congressional Act of July 2, 1862, as supplemented by the Act of January 24, 1865) that, inter alia, he had not exercised the functions of any office under any authority hostile to the United States—an oath that obviously he could not honestly subscribe.

In July of 1865 the Petitioner had been pardoned by President Andrew Johnson "for all offenses by him committed, arising from participation, direct or implied, in the said Rebellion", subject to certain conditions attached to the pardon, which was accepted by the Petitioner *Garland* in writing.

The Supreme Court, speaking through Mr. Juctice Field, held that *Garland* could practice before it without taking the oath prescribed by the Act of July 2, 1862, as supplemented by the Act of January 24, 1865.

The Court rested its decision upon three propositions; viz, that the exaction of such an oath offends the Constitutional provisions against bills of attainder and ex post facto laws*, that attorneys and counselors are not officers of the United States but officers of the Supreme Court, which alone has the authority to exclude them from further practice before it, and finally that the Presidential pardon relieved the Petitioner "from all penalties and disabilities attached to the offense of treason, committed by his participation in the Rebellion", and thusly, "So far as that offense is concerned, he is . . . placed beyond the reach of punishment of any kind", and to exclude him from practicing his profession in any federal court would be to "enforce a punishment for that offense notwithstanding the pardon." *Page 371 of 18 L.Ed.*

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*". . . and he shall have power to grant Reprieves and Pardons for Offenses against the United States, except in Cases of Impeachment."

**"The distinction between 'amnesty' and 'pardon' is one rather of philological interest than of legal importance . . . The one overlooks offense; the other remits punishment . . ." Burdick v. U.S., 236 U.S. 79, 35 S.Ct. 267, 59 L.Ed. 476 (1915).

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Joel Whitsitt Westbrook, III received his B.A. from the University of Texas in 1937 and his JD in 1940. Mr. Westbrook was admitted to the Texas Bar in 1940. He is a former Assistant District Attorney of Bexar County and a member of the Texas Criminal Defense Lawyers Association. He is currently a partner in the firm of Trueheart, McMillan, Westbrook, Hoffman and Russell in San Antonio.

Thus we can examine the validity of the Nixon pardon without the encumbrance of *Garland*.

Inhibitions of "Watergate Regulation"

The limitation upon the Presidential pardoning power which we contend has rendered the pardon of former President Nixon void (or perhaps "voidable") is not a legislative one, but is an executive limitation imposed, ironically enough, by the beneficiary himself of the void pardon, former President Nixon.

As a result of well-known events, a unique Department of Justice regulation was promulgated by the Attorney General, *28 CFR §0.38-1(G)* (the "Watergate Regulation"). This regulation established and defined the jurisdiction of the office of the Watergate Special Prosecutor. This jurisdiction included "full authority" with respect to all crimes connected with the Watergate break-in and the subsequent coverup, as well as with certain other enumerated areas of criminal activity.

This very regulation was central to the resolution of the issues presented in *U.S. v. Nixon*, 418 U.S. 683, 94 S.Ct. 3090 (July 24, 1974), the "tapes" case. There the President had argued:

> *"Since the Executive Branch has exclusive authority and absolute discretion to decide whether to prosecute a case,* Confiscation Cases, *7 Wall. 454 (1869),* United States v. Cox, *342 F. 2d 167, 171 (CA5), cert. denied, 381 U.S. 935 (1965) . . . a President's decision is final in determining what evidence is to be used in a given criminal case."* Id., *94 S.Ct. at 3100.*

On that basis, the President argued that the Special Prosecutor's demand for the President's tape recordings raised a political question, since the President's authority arose from a " 'textually demonstrable' grant of power under Article II". *Id.* The Court rejected the President's argument on the ground that the President's authority was limited by the Watergate Regulation, which gave the Special Prosecutor authority to sue for the tapes. The Court cited a line of cases standing for the proposition that an official is required to act in accordance with regulations he has promulgated unless and until he amends those regulations. *Vitarelli v. Seaton*, 359 U.S. 535 (1959); *Service v. Dulles*, 354 U.S. 363 (1957); *Accardi v. Shaughnessy*, 347 W.S. 260 (1953). The Court summarized the *Accardi* decision as follows:

> *"In [Accardi], regulations of the Attorney General delegated certain of his discretionary powers to the Board of Immigration Appeals and required that Board to exercise its own discretion on appeals in deportation cases. The Court held that so long as the Attorney General's regulations remained operative, he denied himself the authority to exercise the discretion delegated to the Board even though the original authority was his and he could reassert it by amending the regulations."* Id., *94 S.Ct. at 3101.*

The Court went on to hold that

> *"So long as [the Watergate] regulation remains in force the Executive Branch is bound by it,* and indeed the United States as the sovereign *composed of the three branches is bound to respect and to enforce it."* Id., *94 S.Ct. at 3101-02. (Emphasis supplied)*

The Watergate Regulation provides that the President of the United States may not, without the concurrence of a "consensus" of eight specified officers of Congress, fire the Special Prosecutor or limit the jurisdiction given him. The Special Prosecutor's jurisdiction expressly includes

> *"Deciding whether or not to prosecute any individual, firm, corporation or group of individuals;"* 28 CFR §0.38-1(G), Appendix.

*In Cummings v. Missouri, *18 L.Ed. 356, decided the same day as* Garland, *January 14, 1867, the Supreme Court held invalid on bill of attainder and ex post facto grounds, an oath imposed by the then new Constitution of Missouri upon priests and ministers in religions–an oath quite similar in tone and character to that required by Congress and considered by the Court in* Garland.

The eight officers specified are the House and Senate leaders and the Chairman and ranking minority members of the House and Senate Judiciary Committees.

The President's purported pardon of Mr. Nixon limits the above-stated jurisdiction of the Special Prosecutor, in contravention of the Watergate Regulation, in that it would deprive the Special Prosecutor of the opportunity to determine whether or not Mr. Nixon should be prosecuted. That decision is certainly the most important single question within the jurisdiction of the Special Prosecutor's office, but the pardon would remove that question from its consideration. The effect of the pardon would be the same as if the President had attempted to forbid the prosecution of Mr. Nixon. Yet the President could not order the Special Prosecutor not to prosecute Mr. Nixon, since the Watergate Regulation expressly gives the Special Prosecutor the jurisdiction to make that decision.

It was that specific Presidential power, the discretion not to prosecute, that was urged by the President in *U.S. v. Nixon*, quoted *supra*, and it was that specific Presidential power which the Court held was checked by the provisions of the Watergate Regulation. *Id.*, 94 S.Ct. at 3100-02. Like the Attorney General in *Accardi*, the Executive Branch has in the area of Watergate prosecutions chosen to limit its broad Constitutional powers by the terms of a lawful regulation. The President had no more legal right to violate the regulation by use of the pardon power than by use of his broad power to prevent prosecutions. Accordingly, the President's attempt to defeat the Special Prosecutor's jurisdiction with respect to Mr. Nixon, without the approval of the "consensus" required by the Watergate regulation, was unlawful and the pardon has not been validly issued.

Nothing stated above is meant to suggest that the President has lost his power to pardon. The President retains that power and will be able to exercise it when it will not interfere with the jurisdiction of the Special Prosecutor, i.e., after the Special Prosecutor has either announced that he will not prosecute Mr. Nixon or after a prosecution has resulted, if such be the case, in a plea of guilty or a conviction. At that time the exercise of the Presidential power to pardon would in no way intrude on the Special Prosecutor's jurisdiction and the President would be free to determine that Mr. Nixon should be relieved of criminal penalties. (The regulation could, of course, be amended, as discussed *infra*)

It would appear there are two ways in which the proposition stated above could be tested. Undoubtedly, the best approach would be for the Special Prosecutor to secure an indictment against Mr. Nixon.* Mr. Nixon's attorneys would presumably respond with a Motion to Dismiss based on the pardon and the issue would then be squarely presented for judicial resolution.

However, there may be another method available as well. In *Kennedy v. Sampson*, 511 F. 2d 430 (D.C. Cir. Aug. 14, 1974, no certiorari history) Senator Edward Kennedy brought suit against the Administrator of the General Services Administration seeking a declaration that a particular bill had become law and should be published as a statute. The suit attacked the validity of a purported pocket veto claimed to have been exercised during a Congressional recess. Kennedy argued that a pocket veto could only be accomplished during an adjournment. The defendants strongly but unsuccessfully challenged the Senator's standing to raise the issue.

Even before *Kennedy*, it would have been highly probable that a group of the Congressional officers named in the Watergate Regulation would have standing to challenge the lawfulness of a purported Presidential pardon issued without their approval in contravention of the Watergate Regulation. Whether or not one of the named officers, suing alone, would have standing might be affected by a judicial construction of the regulation's language concerning a "consensus" of specified officers, i.e. whether the approval of each officer was required. However, even if "consensus" was interpreted to mean something less than unanimity, a single officer would probably have standing on the same basis that Kennedy, as a single Senator, was found to have standing in *Kennedy*. *Id* at 435-436.

A Court ruling consistent with the above analysis would still leave open the possibility of a pre-judgment pardon for Mr. Nixon, because President Ford would have the power to repeal or amend the Watergate Regulation. However, such an action would focus public attention on the real issue, which is not whether Mr. Nixon goes to jail, but rather that the President has tampered with the jurisdiction of the Special Prosecutor.

Or perhaps a misdemeanor complaint filed by the U.S. Attorney. There have been two fruitless challenges in Federal Courts of the Nixon pardon. McCord v. Ford, Civil No. 74-1368 (D.D.C. filed September 23, 1974, and dismissal not appealed, according to McCord's counsel) This District Court challenge of the Nixon pardon was noted in U.S. v. McCord, 509 F. 2d 334, (D.C.Cir. December 12, 1974, sitting en banc, certiorari denied April 21, 1975, 95 S.Ct. 1656, denying McCord's appeal from his conviction of illegal interception of communications etc. . . The Court remarked in footnote 59, page 350 of 509 F. 2d, that ". . . no claim had been made to us that McCord's conviction is legally vulnerable because of the pardon, and any legal questions that may arise from the pardon are not sufficiently focused by the adversary process to justify appellate consideration of their validity or substantiality at this time." (Emphasis supplied) Murphy vs. Ford, 390 F.Sup. 1372 (W.D. Michigan, March 28, 1975, dismissed, and no appeal according to Murphy's counsel) unsuccessfully sought a declaratory judgment that the pardon was void.

Indeed, if it is true that the President has had second thoughts about his action, a declaration that the pardon was unlawful might actually be a blessing for President Ford.

When the King Is Not Fully Apprised

The Government wished to use testimony of a convicted felon, one Lewis George, in *Stetler's Case* (Federal Cases No. 13,380, E.D. Pennsylvania, 1852). A Presidential pardon was tendered to remove George's disability as a witness.*

George had been convicted of two felonies at the May session, 1850, of the Circuit Court for the Eastern District of Pennsylvania; viz, counterfeiting, and additionally for passing counterfeit coin. The sentence was a general one for the payment of a fine and for imprisonment for the period of one year.

President Fillmore's pardon recited a conviction at the June, 1850, term of the Court for counterfeiting, and recited a sentence of imprisonment for the term of one year, and the pardon concluded with the grant of a "full and unconditional pardon".

On motion for new trial, which was granted, the Court held that George was disqualified because, even if the pardon was a valid one as to the counterfeiting charge, it had no application to the conviction for passing counterfeit coin.

In the course of this holding the Court made this trenchant observation: "[T]he concurrent opinion of the commentators . . . all go to this: That whenever it may be reasonably intended that the King, when he granted the pardon, was not fully apprised of both the heinousness of the crime and also how far the party stands convicted thereof upon record, the pardon is 'void'."

The Court also considered, but did not expressly pass upon, the contention by the Defendant (convicted in part upon the testimony of George) that the pardon was invalid because it was a general one. The Court did not consider the pardon to be a general one, but did observe that the power to grant a general pardon "is one which can hardly be regarded as established in England, notwithstanding the numerous dicta in the ancient books [and which possibly might be more conceivable] under the terms of the federal constitution. It is certain that such pardons have not been granted by the Crown for some centuries past, and I am not aware that they have ever been known in the United States."

We have found a number of American cases which have tested the validity of pardons by their specificity, or want thereof, in identifying the offenses forgiven.

Some of these cases have found —at least in effect—the pardoning power knew what he was doing, and some that he did not or could not, and some that he was not clearly apprised.*

We have found no American case upholding a pardon of unspecified offenses.**

Logically, a pardon to be valid should identify the offenses forgiven with reasonable specificity.

One would expect a lessening of public confidence in the concept of pardon, as well as in any given pardon attempting an indiscriminately general forgiveness, and we believe it not unrealistic to speculate that a large measure of the public dissatisfaction with the Nixon pardon was occasioned by its very general and sweeping terms.

These were in pertinent part as follows: "now, therefore, I, Gerald R. Ford, President of the United States, pursuant to the pardon power conferred upon me by Article II, Section 2, of the Constitution, have granted and by these presents do grant a full, free, and absolute pardon unto Richard Nixon for all offenses against the United States which he, Richard Nixon, has committed or may have committed or taken part in during the period from January 20, 1969 through August 9, 1974." *Federal Register*, Vol. 39, No. 176-Tuesday, September 10, 1974, pp. 32601-32602.

When The Grantee Does not Accept The Grant

An even more important reason for identifying the offenses forgiven rests upon the propositions that a pardon cannot be valid unless accepted, and that acceptance imports admission of guilt. *Burdick v. U.S.*, 236 U.S. 79, 35 S.Ct. 267, 59 L.Ed. 476 (1915); *Curtin v. U.S.*, 236 U.S. 96, 35 S.Ct. 271, 59 L.Ed. 482 (1915).

In *Burdick* (to which *Curtin* was a companion case) the Government—even then—was trying to get at a newsman's sources. Mr. Burdick, an editor of the New York Tribune, appeared before the grand jury and declined to give his sources concerning certain articles regarding custom frauds then under investigation. His refusal was based upon his privilege against self incrimination.

**Many, if not most, of the cases interpreting executive pardon (presidential or gubernatorial) have involved the use of the pardon power to qualify convicted felons as witnesses, recalling that under the common law convicted felons were incompetent to testify, although the modern tendency of the courts, and statutes, has been to broaden the field of competency and to hold the previous conviction of a crime does not of itself disqualify a witness,* 97 C.J.S. Witnesses, Sec. 65.

**Identification sufficient:* Redd v. State, *47 S.W. 121 (Ark. Supreme Court, 1898);* Martin v. State, *17 S.W. 430 (Tex. Crim. App., 1886)*

Identification insufficient: Miller v. State, *79 S.W. 567 (Tex. Crim. App., 1904);* State v. Foley, *37 Am. Rep. (Nev. Sup. Ct., 1880);* Ex Parte Crane, *29 S.W. 2d 357 (Tex. Crim. App., 1930)*

See also cases noted in 34 ALR 212, 214-215 and in Later Case Service.

***Ex Parte Garland, *supra, and other cases dealing with President Andrew Johnson's "Pardon[s] and Amnes[ties]", recognized that they were dealing with the offense of treason, albeit the specific acts thereof were understandably not enumerated.*

He was remanded to appear at a later day, at which time he was handed a Presidential pardon. This pardon, after giving background with respect to the article in question, granted Burdick a full and unconditional pardon "for all offenses against the United States which he, the said George Burdick, has committed or may have committed, or taken party in, in connection with the securing, writing about, or assisting in the publication of the information so incorporated in the aforementioned article . . ." *Pages 85-86 of 236 U.S.*

Burdick refused to accept the pardon, and continued to refuse to answer questions as to the sources of his information and similar questions.

He was found guilty of contempt, the trial court deciding that the "President has power to pardon for a crime of which the individual has not been convicted and which he does not admit, and that acceptance is not necessary to toll the privilege against incrimination." *Page 87 of 236 U.S.*

The Supreme Court reviewed Burdick's commitment under the contempt order by writ of error.

Of course the Government was contending that the pardon need not be accepted in order to be effective, and accordingly that Burdick could not claim his privilege against self incrimination.

Burdick, on the other hand, contended the pardon was illegal as "not reciting the offenses upon which it is intended to operate; worthless, therefore, as immunity." He also contended that the pardon was invalid "because it was issued before accusation, or conviction or admission of an offense." *Page 93 of 236 U.S.*

The Supreme Court did not deal with these contentions of Burdick, preferring to place the case on the grounds that acceptance was necessary before the pardon could become effective.

This led the Court then to consider whether or not Burdick could still claim his privilege when he had "the means of immunity at hand, that is, the pardon of the President . . ." *Page 93 of 236 U.S.*

The Supreme Court squarely met this question and said that Burdick had the right to refuse it and therefore his right to decline to testify by invocation of his privilege remained effective. *Page 94 of 236 U.S.*

Earlier in the opinion Justice McKenna discussed the reasons why a person might not accept a pardon. "Circumstances may be made to bring innocence under the penalties of the law. If so brought, escape by confession of guilt implied in the acceptance of a pardon may be rejected—preferring to be the victim of the law rather than its acknowledged transgressor—preferring death even to such certain infamy." *Pages 90–91 of 236 U.S.*

How could Richard Nixon "accept" a "deed" of pardon (which the Supreme Court declared a pardon to be, requiring delivery, and accordingly acceptance) of such vagueness as the one tendered to him by President Ford?*

This "deed" conveyed nothing, and nothing could be accepted.**

Let us imagine the tribulations of President Ford's counsel as he drafted the pardon.

If he specified obstruction of justice, would Richard Nixon accept this and admit guilt of obstructing justice? Suppose the pardon specified offenses growing out of the ITT antitrust settlement, or the Milk Fund donations, or whatsoever other specified offenses against the United States . . . ?

The poor man simply could not draft a pardon which would be acceptable to Richard Nixon and at the same time be specific enough to be valid within the requirements of sound American and English case law.

We advert to English case law and the English pardoning practice, because it is clear that the Presidential pardoning power is to be measured in terms of that possessed by the English king. *U.S. v. Wilson*, 7 Peters 150, 8 L.Ed. 640 (1833), opinion by Chief Justice Marshall.**

The *Wilson case*, which was cited in *Burdick* and relied heavily upon in that case, also involved the refusal to accept a pardon, this one for a death penalty conviction.

The Supreme Court in *Wilson* declared that a pardon was a deed, requiring delivery for its validity, and delivery requiring acceptance in order to be complete. Chief Justice Marshall went on to say that the pardon could be "rejected by the person to whom it is tendered; and if it be rejected, we have discovered no power in a Court to force it on him." *Page 644 of 8 L.Ed.*

The Supreme Court actually determined the cause on the basis that the pardon had not been brought to the attention of the court below, which could not judicially notice it as it could a pardon by Parliament—a public law.

The entire discussion of the principles involved in the *Wilson case* rested upon citation of English authority, Chief Justice Marshall stating that as the pardon power "had been exercised from time immemorial by the executive of

Ironically, the significance of "acceptance" was emphasized in James Hoffa's unsuccessful challenge f his conditional commutation of sentence by then—barely then—President Nixon in Hoffa v. Saxbe, *378 F. Supp. 1221 (D.D.C., July 19, 1974)*

**One is reminded of Porgy's lyric statement "I've got plenty of nuthin, and nuthin is plenty for me".

**Ex Parte Wells, 59 U.S. 307, 15 L.Ed. 421 (1855) puts the time of construction as of the adoption of our Constitution. Page 424 of* 15 L.Ed.

that nation whose language is our language, and to whose judicial institutions ours bear a close resemblance; we adopt their principles respecting the operation and effect of a pardon, and looking through their books for the rules prescribing the manner in which it is to be used by the person who would avail himself of it." *Pages 643-644 of 8 L.Ed.* As recently as December 23, 1974, the Supreme Court in *Shick v. Reed*, Chairman of the United States Board of Parole, et al, 419 U.S. 186, 95 S.Ct. 379, rehearing denied at 95 S.Ct. 1150, cited *U.S. v. Wilson* for the same proposition, and discussed the history of the pardoning clause in our Constitution at pages 382-385 of 95 S.Ct. See also *Ex Parte Grossman*, 267 U.S. 87, 112-113, 69 L.Ed. 527, 45 S.Ct. 332 (1925).

Since the editor of the annotation "Formal requisites of pardon", 34 ALR 212, 214 discussed the ancient English rule that "where the King pardoned a convicted felon the pardon was not good unless it recited specifically the offense for which it was granted", there has been to our knowledge no challenge of the statement and listed English authorities.

How could there have been such a challenge when there has not been, so far as our research discloses, any Presidential attempt before now to pardon so broadly?

The Supreme Court of Nevada wisely commented in *State v. Foley*, 37 Am. Rep. 458 (1880): "But although it was never asserted in terms that [the English king] had no power to pardon a man of all felonies in general without describing any one particular felony, the rule of constructing pardon had the practical effect of denying the evidence of any such power. For whenever it could be reasonably intended that the king, when he granted a pardon, was not fully apprised both of the heinousness of the crime, and also how far the party stood convicted thereof upon record, the pardon was held void, as being *gained by imposition upon the king*." (Emphasis supplied) *Page 463 of 37 Am. Rep.*

The Nevada Supreme Court concluded that "there is as strong a presumption today as there ever was, that although the executive might think a man worthy of being restored to civil rights who had committed one offense against the law, *he would not think so if he knew that he was a [sic] habitual offender.*"* (Emphasis supplied)

Conclusion

Logically, by reason of the "Watergate regulation" and by case authority, both English and American, the Nixon pardon is void.

The question does remain, of course, has the invalidity been rendered moot?**

**In future years the courts may well find that President Ford's pardon of Richard Nixon was invalid. What a mockery of justice it will have been if Special Prosecutor Jaworski's failure to investigate and prosecute Richard M. Nixon followed from a failure to test the legality of the pardon now. *Richard Sprague, first assistant district attorney, Philadelphia County (successful prosecutor of former UMW President, Tony Boyle, and others for murder), in letter published in* Time, *October 7, 1975.*

*Foley *cited several English authorities other than those cited in the 34 ALR annotation published some 65 years later.*

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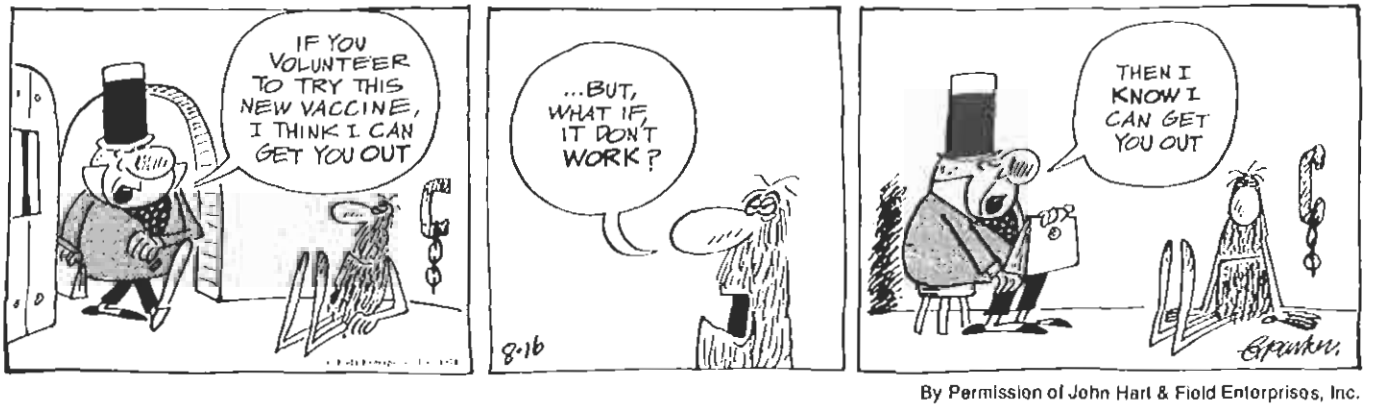

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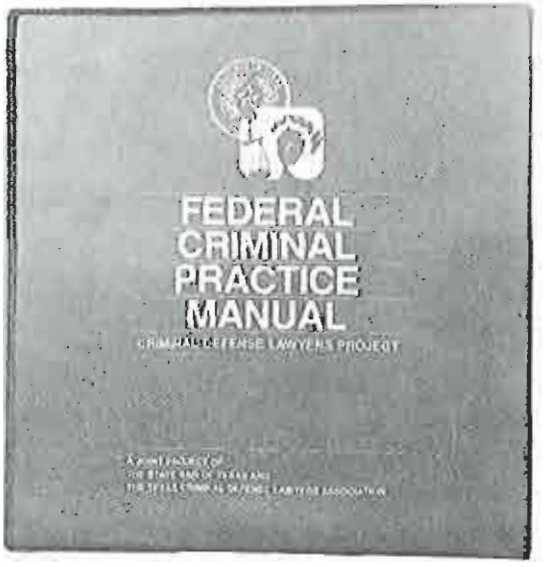

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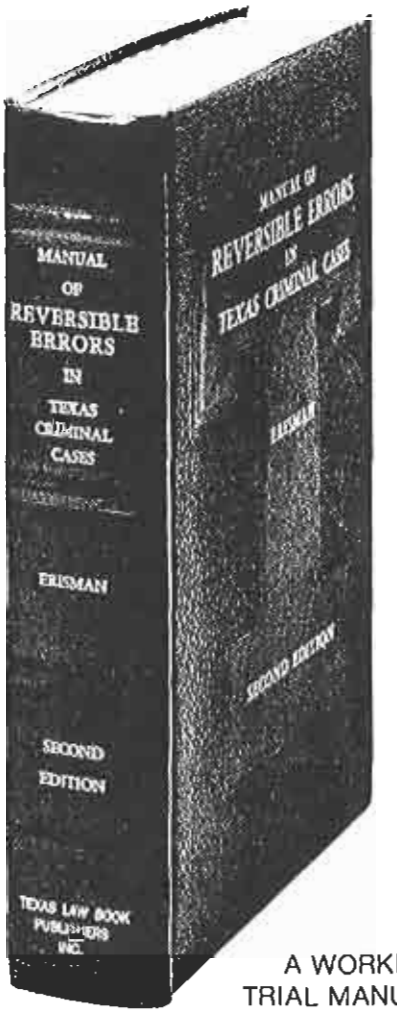

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