STAFF ANALYSIS OF EXECUTIVE CLEMENCY IN LOUISIANA

Governor's Pardon, Parole and Rehabilitation Commission

February 2, 1978

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ACKNOWLEDGEMENTS

The staff wishes to thank Mr. John Hunter, Chairman of the Board of Pardons, Board of Pardon members and their staff for their assistance in the preparation of this document. Appreciation is also extended to Mr. Larry Cormier of the Governor's Office for his cooperation. Special recognition is directed to Mr. Randall Snowden for his assistance in the statistical analysis of pardon procedures and to Mr. Thomas Pinhey of the Louisiana State University for his contribution to this analysis. The collection of data provided by Ms. Paula Guidry, Mr. Brad Smith, and Mr. Richard Lawrence of the School of Social Welfare of the Louisiana State University was vital to the preparation of this report.

INTRODUCTION

This is the second in a series of reports prepared by the staff of the Governor's Pardon, Parole and Rehabilitation Commission. The findings result from previous staff research in probation and parole and a more recent specific examination of executive clemency policies and procedures. The primary purpose of this phase of research was to examine executive clemency in context of the Louisiana criminal justice system as a whole.

CHAPTER I - PARDON: AN OVERVIEW

Pardon: General Definition

The U.S. Attorney General's Survey of Release Procedures (1939) summarizes the institution of pardon this way:

> Being an offspring of power in all its diverse manifestations, /pardon/ resists the application of mere justice and cannot completely be safeguarded from miscarriage and distortion. Being a prerogative in that old sense of freest personal discretion, pardon defies all efforts to be forced into rules.
>
> This freedom from formal ties allowed the prerogative to be misused and made an object of bargain. On the other hand this mobile institution has been able to play a far-reaching role in the development of the criminal law. We have seen that the law of insanity, of self-defense, of compulsion and the improved treatment of the juvenile offender started from the practice of pardoning in cases where the strict application of the law seemed undesirable. This eminently creative function of the concept of pardon has not yet come to an end. The principles of parole and probation are children of the aging concept, which shrinks to make way for its new and growing offshoots./1/

In less broad phrases, pardon is a release procedure. It is, in one perspective, the last such procedure in the series of discretionary administrative determinations that are part of the criminal justice system.[2] It is a corrective measure, quasi-judicial in nature, normally exercised by the executive branch.[3] Bound neither by legal precedent nor by rules of evidence,[4] it appears a means of ameliorating both the mistakes and the harshness of the criminal law.[5] To do so, it grants release from some or all of the penalties a state would exact for a criminal offense. It is very closely linked to other processes that constitute the criminal justice system, and the necessity and frequency of pardon's use depends upon the functioning

of these other components: "When /for example/ innocent persons are not found guilty, when sentences imposed are not unduly long in relation to the crime committed, and when other release laws work properly, the responsibilities of the pardoning authority are greatly reduced."[6] When legislative bodies assume the responsibility of restoring the ex-offender's civil rights and of removing employment disabilities--as numerous sources state or imply they should--[7] the duties of the pardoning authority are reduced still further.

Pardon--Really Three Forms of Clemency

To consider the pardoning process is actually to consider three different forms of clemency--pardon, commutation, and reprieve--one distinguishable from another according to the type of relief granted.[8] Historically, pardon has meant many things. In modern times, pardon per se is a form of clemency normally granted after an offender has completed his sentence;[9] it provides a means of restoring to the offender certain rights lost upon conviction; it sometimes is construed as establishing innocence.[10] Additionally, a pardon may be absolute, limited, conditional or unconditional. The absolute pardon restores everything that a pardon can restore in a particular jurisdiction; the limited pardon restores only what is specified. The conditional pardon has conditions attached; the unconditional pardon does not.

Conditional pardon is most frequently used as an adjunct to parole where parole is disallowed. Conditional pardon is, in fact, much like parole in that it indicates certain things that an individual must or must not do. If a condition of such a pardon is violated, it may be revoked. Unlike parole, however, conditional pardon is

often without the corollary characteristic of supervision.[11]

Twenty-one states[12] make specific constitutional or legislative reference to the pardoning authority's power to grant conditional pardon. However, the courts considering the question have unanimously held that the power to grant conditional or limited pardons is inherent in the greater power to pardon absolutely and unconditionally.[13]

Commutation is a form of clemency that substitutes a lighter punishment for a heavier one without, however, implying forgiveness or effecting a restoration of civil rights.[14] Though the word "commutation" did not appear in a state constitution until 1850,[15] the pardon process has been interpreted throughout its history to include commutation, the assumption being that the greater power (to pardon) must certainly include the lesser (to commute).[16]

Finally, reprieve involves a postponement, a delay in the execution of sentence. The Attorney General's Survey gives "respite" as a synonym and adds the following observation: "'Either /term/ signifies the suspension, for a time, of the execution of a sentence which has been pronounced.'"[17] Most readily one associates reprieve with a stay of execution in capital sentences, but the power to reprieve is generally construed to be more broadly applicable, and like the power to commute, it is assumed to fall within the broader power to pardon.[18]

Source of the Pardoning Power

The power to pardon is usually considered an executive prerogative, and tradition explains that fact by drawing a parallel between ancient rulers, who possessed the power to pardon offenses against the sovereign, and the contemporary governors, highest individual authority

in the state. Out of that context the Attorney General's Survey offers this summary:

> The true rule is that "the pardoning power is neither inherently nor necessarily an executive power, but is a power of government inherent in the people, who may by constitutional provision place its exercise in any official, board, or department of government they choose." If the constitution is silent it vests no more power in one branch of the government than in another.
>
> Probably the reason why we identify the pardoning power with the chief executive is that, as Lieber pointed out, he stands in the place of the monarch of other nations and the monarch was considered the sovereign. But this ignores the fact that "the monarch had the pardoning power not because he is the chief executive, but because he was considered the sovereign--the self-sufficient power from which all other powers flow;" while with us sovereignty, as already said, rests in the people who may delegate this power to whichever agency of the government they choose. Our Governors, as well as our other departments and agencies of government, have only such powers as are delegated to them in the constitution./19/

In keeping with this attitude, an article in the Columbia Journal of Law and Social Problems speaks of the granting of clemency as "an expression of the mercy of the American public,"[20] rather than of a jurisdiction's chief executive.

In all fifty states, in fact, the pardoning power resides in the executive branch and normally involves the governor,[21] although that executive's specific role in the process varies. In a majority of states (32)[22] the pardon power rests exclusively with the governor,[23] though the governor may receive legal advice from a pardon attorney[24] or advice and recommendations from an advisory pardon board or from the state's parole board.[25]

In contrast, other states assign the pardoning power to a pardon board. In Alabama, Connecticut, Georgia, Idaho, North Dakota and Nebraska, the power to grant pardons is vested exclusively in the board of pardons. In two of these states--Nebraska and North Dakota--the governor is a member of the board but he has no greater authority than the other board members in granting clemency.

A third common administrative model is a hybrid of the first two: before clemency is granted, both the pardon board and the governor must approve. Six states employ this arrangement in various forms. In Delaware, Pennsylvania and Texas, the governor is not a member of the board, but must have the recommendation of the board to grant clemency. Minnesota, Nevada and Utah place the governor on the pardon board, but require his affirmative vote in addition to that of a majority of the board to pardon offenders. Three jurisdictions require the recommendation of bodies other than a pardon board in addition to the governor's action: in Florida, three members of the cabinet; in Massachusetts, a majority of the Governor's Council; and in Rhode Island, a majority of the senate must concur. Two states allocate the pardoning power between the governor and the pardon board according to the type of relief granted: South Carolina delegates to the governor the power to reprieve and to commute a death sentence to life imprisonment while vesting all other clemency powers in the Board of Probation, Parole and Pardon; Tennessee allows the governor to pardon and reprieve without the concurrence of the board of pardons, but requires the board's approval to commute sentences, except from death to life imprisonment.

Only in Connecticut, Montana and Pennsylvania are qualifications

...

established for pardon board membership.

The Attorney General's Survey supports a system in which all applications are brought before a board, but in which all decisions are made, unrestricted, by the governor, after he has considered the board's views.[26] The rationale for this preference is stated as follows: "This subjects the Governor's action to control which is sufficient to exert powerful pressure against abuse, and yet is respectful and leaves full responsibility resting very directly upon his own shoulders."[27] The same source goes on to object to investing the ultimate power to pardon in a board because that procedure "scatters responsibility so that it may be difficult for the public to place the blame for abuse of the pardon power"[28]--though a board, it concedes, would be helpful--in an advisory capacity.[29] Another more recent source represents the alternative view, seeming to recommend a shared power to pardon. "This plan is favored," these authors explain, "because it eliminates absolute power, which is conducive to abuse, by shifting the responsibility to the board. While involving the chief executive in the decisions, it shares his responsibility with the community."[30]

Pardon's Discretionary Nature: Potential Danger, Essence of Vitality

The Danger: Pardon, by virtue of its highly discretionary nature, is necessarily more open to control by the pardoning authority than other more specifically defined systems are by those who administer them. "Control by the pardoning authority" is, of course, not a synonym for abuse by the pardoning authority, but certainly control by the pardoning authority used to abuse it is the gravest danger associated with that power, for such abuse has broadly negative ramifications:

> Abuse of the power unsettles the general faith in the law and confidence in its supremacy. It destroys the certainty of punishment and increases the hope of immunity in the criminally disposed. It permits well-meaning individuals, male and female, from a feeling of pity not always well founded, to meddle with cases of which they have only superficial knowledge, with a disrupting effect upon general penal policy which they rarely consider. It permits a politician bent on building up a political following to make a mockery of the law./31/

Indeed, to many, the concept of pardon connotes unlimited discretion, and that situation, in turn, promises abuse. Commonly quoted folk wisdom embodies this attitude and illustrates the point: power corrupts and absolute power corrupts absolutely.

Constraints on the Pardoning Power: When the executive is constitutionally granted the absolute power to pardon, this power is, in fact, in many ways extra-legal--i.e., legislative authority cannot exclude any class of offenders from the executive's pardoning power;[32] a pardon, once granted, is beyond direct judicial or legislative intervention.[33] On the other hand, the framework within which pardon exists may be limited by constitutional provisions and is often further shaped by legislative instruction regarding procedural matters.[34] In most state constitutions, along with the grant of the power to pardon, some particular limitations are imposed: (1) in 39 states either treason or offenses tried by impeachment or both cannot be pardoned by the pardoning authority and (2) in 23 states, the pardoning authority must report to the legislature all cases of clemency granted.[35] The latter requirement is designed to inform the electorate as well as legislators about the practices of the pardoning authority;[36] this practice, in turn,

is generally viewed as a check on possible abuse by the pardoning authority.[37]

In addition, several jurisdictions place restrictions upon when pardon may be granted generally or for certain crimes or restrict the extent of the relief that may be granted. Alabama requires that candidates complete three years of parole or three years of their sentences before they may be pardoned, except upon unanimous vote of the pardon board after proof of innocence and approval of the sentencing judge or the district attorney. In Arizona, there can be no pardon until an inmate serves his minimum sentence. Armed robbers cannot be pardoned in Georgia until they have served five years and capital crimes require the unanimous approval of the pardon board. California forbids pardons for two-time felons, except upon recommendation of the California Supreme Court, and Delaware demands that a psychiatrist examine inmates convicted of certain crimes before they may be pardoned. Finally, commutation of death sentences may not be to less than a prescribed number of years in Colorado (16 years), Georgia (25 years) and Kansas (10 years).

The very term "pardoning authority" identifies another restraint.[38] As described above, the power to pardon is a shared power within some U.S. jurisdictions. Rather than entrust the decision to grant clemency to a single individual, some state constitutions require that the governor consult or have the favorable recommendation of a pardon board before he may grant clemency.

In some states the power to pardon is given to a board, a process which necessarily disperses that authority.

The ultimate and probably the most effective control on the possible abuse of the pardoning power--at least when that power is exercised by an elected official--is political accountability and the possibility, in extreme cases, of impeachment.[39]

Discretion and Vitality: Abuse is certainly not the only potential result of pardon's discretionary nature. Nor is it--at least in the long run--the most common result, though it sometimes seems to be the only one the public is invited to recognize. Authorities state repeatedly that pardon's discretionary nature is not only the source of pardon's greatest potential weakness, but also the originating point of its continued vitality. That the power to pardon is without rigid, formal restrictions makes it possible for the pardoning authority to consider individual merits--to make exception where the law has exacted more than circumstances merit or where circumstances have changed so that what once seemed just no longer seems so.

Originally, pardon was a procedure used to remedy unduly harsh sentences. When the only penalty available for commission of a felony was death--and most crimes were defined as felonies--pardon represented one of the very few humane alternatives. Today the death penalty exists in 32 of the 50 states[40] and for a relatively few felonies. Yet it is still generally acknowledged that there are cases--perhaps involving death, but more likely not--"where the strict legal rules of guilt and innocence have produced harsh or unjust results"[41] and thus where some form of clemency can be appropriately granted. For example, a change in Connecticut's code of criminal justice made some penalties

much less severe than those imposed before the change. One result was inmates sentenced under the old statutes, who, by the time the new code was enacted, had already served longer sentences than those imposed under the new code. It fell the lot of the board of pardons to remedy this inequity.[42]

In other instances, a sentence, not in itself disproportionate, may come to seem unnecessary or undesirable in view of the sentenced individual's changed circumstances--e.g., ill health and inability to withstand the full punishment meted.[43] One source suggests that life sentences or even very long sentences become, with time's passage, "unnecessary and therefore cruel": as advancing age renders the offender innocuous, it is common among all nations that these individuals be discharged.[44] Again, some form of clemency is usually the tool to make the adjustment. Also traditionally, pardon has been used to remedy wrongful conviction: "Pardons are the last and only resort for an innocent person who has been wrongly convicted and who can no longer appeal or get a new trial."[45] As an article in the Yale Law Journal notes, because American jurisprudence is based on a prevailing conviction that judgments should not be forever subject to review, there comes a point--ordinarily after the prison term has been completed*--after which courts cannot re-open a case even though erroneous conviction becomes apparent; consequently, "that task has been left to the executive /or other pardoning authority/ in the exercise of his pardoning power."[46]

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*In Louisiana the point usually comes much sooner--one year after the verdict or judgment. (La. Code of Criminal Procedure, Art. 853).

Over time, various forms of pardon have been used in other instances which may or may not seem to be a continuation of those original functions of remedying wrongful conviction or punishments that, with time's passage, seem unduly harsh. For example, in 1863 President Lincoln used his pardoning power as a means of rejoining a broken nation, offering Confederate soldiers and supporters a full pardon and restoration of property rights so long as they would take an oath of loyalty to the U.S. Constitution and to the United States itself.[47] To judge from the words of his statement granting pardon to Richard Nixon, President Gerald Ford also viewed that action as part of and necessary to the healing process, for a wound continuously re-examined cannot heal. The divisive debate that preceded Nixon's resignation from office would, President Ford indicated, make a fair trial immediately impossible. While awaiting such time as a fair trial could be obtained and, certainly at such time as a trial were held, "ugly passions would again be aroused. And our people would again be polarized in their opinions."[48] From this conviction and his belief that it is his duty "not merely to proclaim domestic tranquility, but to use every means that I have to insure it"[49] apparently comes his decision to pardon Nixon.

Also in current times other authorities have used their power of clemency to extend the benefits of new legislation to all individuals sentenced prior to its passage. "In 1965 Governor /Nelson/ Rockefeller extended the benefit of a restricted capital punishment law to inmates sentenced under prior law,"[50] and in Connecticut in 1968 pardon was used as the vehicle for extending to inmates already in prison the

benefit of a new state law, which reduced "the minimum term of their present imprisonment by time spent in jail."[51]

Much more common among recently evolved applications of the pardoning power are its use to circumvent restrictions on parole eligibility or to create parole eligibility for inmates either entirely excluded from parole or excluded for lengthy periods of time,[52] and its use to remove disabilities that are collateral consequences of criminal conviction.[53] It is the propriety of these two modern applications of pardon that merits further attention.

Pardon as a Form of Parole

Though the concept of parole has evolved from the concept of pardon,[54] in many instances the two processes have not yet been cleanly separated. Consequently, in spite of reiterated observations that pardon and parole are different functions, based on different factors and different kinds of judgment,[55] the pardon procedure continues to be used, in many jurisdictions, as a simple release mechanism "to circumvent overly rigid restrictions on the granting of parole."[56] One modern author states succinctly the attitude held by most who have studied the matter: "Pardon as a legal device for tempering justice with mercy and for righting the wrongs of justice should be forever preserved. It is not, however, a substitute for parole. . . ."[57] Yet, for whatever reason--distrust of paroling authorities or of the parole system or of the "criminal nature"--legislators have chosen to limit parole eligibility. One result has been the use of the pardon process to release numerous offenders before expiration of

their full terms. This phenomenon is an example of what numerous commentators have identified as the "hydraulic" nature of discretion in the criminal justice system.[58] Under this view, when discretion is removed or limited at one point in the system, rather than being eliminated, it merely emerges elsewhere. Thus, executive commutation plays an enhanced role as a release mechanism when burdensome restrictions are placed on parole eligibility.

Another result of using pardon where parole is the appropriate mechanism is a very large workload for the pardon authority. An article in the Louisiana Law Review suggests as much:

> Many of the difficulties of the Board of Pardons have been due to the inadequate performance of the parole laws. It is only natural that more applications will be filed with the Board of Pardons when the parole laws contain arbitrary restrictions or when the administration of parole is not based on fair and equitable principles. If the original sentences imposed by the courts are in accordance with the law and the facts and if the established release procedures operate as they should, the work of the pardoning authority should then be reduced to a minimum./59/ (Emphasis added.)

In fact, one measure suggested for determining the effective functioning of the parole authority and of the courts is the relative lightness of the pardoning authority's workload.[60]

Using pardon to parole has been long and consistently criticized. In 1939 the Attorney General's Survey included the following summary, identifying the fallacies associated with employing pardon to do what parole should do:

> To the same end, the parole laws should be liberalized so as to give the parole board full discretion to parole any prisoner it deems worthy. This means repealing all restrictions in the

> parole statutes making certain classes of prisoners ineligible for parole. The primary reason why conditional pardon, commutation, reprieve, and other forms of executive clemency have been so extensively used to effect conditional release has been to cover cases not eligible for parole. The big mistake made by those who think we should be "hard boiled" about parole is in forgetting that while they may bar the door against release on parole, the back door of executive clemency always remains open. The result is that restrictions written into the parole laws by those who do not think that certain kinds of criminals should be turned loose on parole--murderers, rapists, second offenders, or those who have not served a certain portion of their sentences--too often defeat their own object. The convicts we refuse to release on parole are released on indefinite furloughs, on conditional pardons, or other types of release under which there is much less actual supervision and control than under parole./61/

Releasing without supervision individuals whose crimes have identified them as more dangerous than other inmates, who <u>are</u> released under supervision (i.e., on parole), is not the only undesirable result associated with using pardon as a simple release mechanism;". . .it has been argued that legislatures should restrain from restricting the applicability of parole statutes lest they thereby abdicate the releasing function to the executive clemency power which is beyond legislative control."[62]

A major step toward establishing the appropriate separation of pardon and parole systems and consequently of ensuring the proper handling of individuals released is to allow parole eligibility to all who are incarcerated. Of course, to remove such restrictions invests the parole authority with great power. Nonetheless, to again quote the Attorney General's <u>Survey</u>, there is a more appropriate

way of monitoring a parole board's power than by creating arbitrary restrictions on parole:

> The answer, however, must be to safeguard the capability and honesty of the board rather than to cut down its power by arbitrary restrictions. Granting parole is necessarily a matter of individualized consideration of each case. The board should be so constituted as to guarantee that its decisions will be based upon careful, scientific investigation and capable and honest judgment. In short, the answer to defects in the parole system is a better parole system, not less parole./63/

Pardon to Remove Disabilitities

The other subject that commands attention in contemporary debates about the pardoning power is the proper role of pardon in restoring civil disabilities that result from a felony conviction. Discussion is based on several questions. Should pardon be the vehicle through which one's civil rights are restored? Is pardon an appropriate or even an effective means for removing employment disabilities that accompany conviction? What positive functions are served by the continuation of civil disabilities following release from prison?

In the Constitution of 1974 Louisiana takes the stance that basic rights of citizenship are restored automatically upon completion of sentence. A full discussion of that matter, of the various disabilities that are a result of a criminal conviction and of the consequences of an executive pardon in Louisiana appears in Ch.II, Sec.2 of this report. The practical results of the collateral disabilities resulting from criminal conviction--and recommendations regarding these disabilities--are the subjects of another staff report.

Recommended Standards for the Pardon Procedure

The Attorney General's Survey of Release Proceedings, published

in 1939, cited five standards for the ideal operation of the pardon procedure in performing its classic functions: it should be simple, thorough, public, free of charge, and adversary rather than ex parte in nature.[64] Following this observation is a brief elaboration:

> By a simple procedure is meant one which the average prisoner is able to handle without the aid of a lawyer. Of course, important or difficult cases probably will require a lawyer and certainly the right to counsel in all cases should be allowed.
>
> By a thorough procedure is meant one in which the final decision is reached not merely upon allegations stated in the prisoner's petition, or in court records, or upon recommendations of the trial judge, prosecutor, or interested citizens, but upon a careful investigation of the case. The pardoning authorities should have available at least one officer to make such investigations.
>
> Not every phase of the procedure can be public, but it is proper that a right to a public hearing be granted, in which the whole case may be subjected to the full light of publicity.
>
> The granting of clemency in proper cases is a matter of public interest, and not of interest to the prisoner alone. There is, therefore, no reason for charging the cost to him. The right to apply should be free of charge. The practice of one State of charging $10 for the privilege of applying for clemency is not to be commended.
>
> By adversary proceedings is meant a procedure in which the State is regularly represented at any public hearings./65/

More recent sources reaffirm and further elaborate these standards and suggest a sixth: whatever the other particular features of the process, procedures governing application and consideration should be equitable[66]--e.g., the pardoning authority should be "equally available to all";[67] all applicants should be accorded equal time for a hearing whether or not the applicants are still inmates.[68]

Having acknowledged the features that should typify the pardon process, most sources make concentrated commentary on matters related to its thoroughness, its adversary nature, and thus, by extension, its fairness.

In 1939 the Attorney General's Survey concluded that procedures followed by most states were not thorough. According to that source, very few states at that time made provision for any sort of personal investigation into requests for clemency; rather the pardoning authority tended to rely only on those documents already in their files.[69] A 1973 source indicates that the situation is not much changed: "In only a few states does the investigation proceed beyond the collection of reports to interviewing the applicant, members of his family, his defense counsel or others who know him."[70] Such interviews as are conducted would seem to be those based on statutory requirements that the prosecuting attorney and the sentencing judge be notified of a pending clemency hearing. Nineteen states[71] legislatively mandate notification of the sentencing judge or prosecuting attorney or both, while nine states[72] require that those officials provide information to the pardoning authority if requested to do so. Even this requirement is usually met by an optional written exchange rather than a personal interview.

Not only whether the applicant shall be interviewed as part of the clemency investigation but also what role he shall have in the clemency hearing seems part of the debate about thoroughness of the pardon procedure. The Attorney General's report urged that the applicant be present at the hearing and labeled as "without foundation" objections that such a procedure

would disrupt prison discipline and unduly influence the board members in the inmate's favor.[73] And as before, a modern source echoes the opinion, stating that each petitioner should be required to come forward to discuss his or her case with the pardoning authority "unless attendance is physically impossible."[74]

A discussion between the applicant for clemency and the granting authority presupposes a clemency hearing. While the Attorney General's Survey insists that "a public hearing be granted,"[75] this is not the policy adhered to by all states. The states holding no formal clemency hearings are generally those in which the governor alone makes such decisions.[76] Nor have the courts felt that a hearing is necessary. (The one exception involved the case of an individual in Arizona sentenced to death.)[77]

That the pardon procedure is also to be adversary and equitable raises the question of who other than the applicant should attend a clemency hearing if one is held. "It is most important that the State be made a party to all pardon cases, and that it be represented at the hearings by the attorney general or a member of his staff, who should oppose the granting of the petition where that course seems proper," states the Attorney General's Survey. Then it elaborates that observation.

> Merely notifying the prosecutor who tried the criminal case and permitting him to be present if he wishes (as in Louisiana and Massachusetts) is not sufficient to protect the public's interest. What is needed is a statutory provision of the sort found thus far only in Michigan, providing for the presence of the attorney general or a member of his staff./78/

And again the present echoes the past. Authors surveying the situation

in 1973 note that "in surprisingly few states is there any provision for a representative of the state to appear at the hearing."[79] At present: At present only Michigan, Louisiana[80] and Massachusetts[81] make specific legislative provision for prosecutorial appearance at pardon hearings. Rather the usual procedure seems to be to allow the prosecutor to appear if he wishes, or, more often, to accept written responses from the district attorney and the sentencing judge.[82]

Some states would seem to satisfy the requirement for definite involvement by the state by assigning the state's attorney general to the pardoning authority, as Louisiana did prior to the Constitution of 1974. On the other hand, that is apparently not the arrangement envisioned by the 1939 Survey, because at the time of the criticism above, Louisiana's attorney general was a member of this state's pardon board, yet the Survey characterized the provision as "not sufficient."

To require the presence of the state's agent at a pardon hearing is to raise the question of the applicant's being represented by an attorney. Not only have the courts held that a clemency hearing is not required; they have so far also ruled that, if a hearing is granted, it need not "comply with the procedural requirements of due process of law."[83] One consequence of this is that most states do allow the applicant to hire an attorney who will attend the hearing and present his case, but the states are not required to provide attorneys for indigents.[84] It may be that the U.S. Supreme Court's decisions in Morrissey v. Brewer[85] and Gagnon v. Scarpelli[86] will eventually lead to a holding that due process must be afforded pardon applicants,[87] but there is presently no prohibition against having the district

attorney present even though the applicant is not represented. Fairness as a matter of policy is perhaps an issue, however, when one considers that a district attorney is trained in the law and experienced at making persuasive public commentary and that the average prison inmate is unlikely to have similar skills.

Relevant, too, while considering an applicant's having legal assistance, is the relative complexity of the pardon procedure. The Attorney General's Survey mandated that the pardon procedure be simple--i.e., "one which the average prisoner is able to handle without the aid of a lawyer."[88] Yet, in the opinion of one modern source, in many states just the process of filing for clemency "is so complex that applicants would do well to have lawyers to assure their rights."[89]

Various suggestions and efforts have been made to deal with the problem. One source recommends that there should be written guidelines to assist the individual applying for clemency and that the individual who is denied should be advised in writing of ways to make his petition more substantial.[90] Another attempt to clarify if not simplify the process of pardon application is one made in this state. Inmates are assigned to the legal aid offices at Angola, Dixon, St. Gabriel and DeQuincy as legal counselors to assist other inmates with legal problems. In this capacity one task is to advise other inmates who are making pardon application.

In keeping with the idea that pardon is a public procedure, about half of the states have some requirement of notice or publication of application for clemency,[91] but in only 15 states is this

requirement legislatively mandated for all applicants.[92] In Arkansas, publication or notice is required by statute only for applicants convicted of capital murder[93] and Iowa's legislature specifies publication only when pardon is sought by one sentenced to death or life imprisonment.[94] The Attorney General's Survey labels this a "wholesome requirement"[95] but notes that there is no very effective way to inform the public of pardon applications because most people do not peruse a newspaper closely enough to notice an applicant's statement of intentions. "The victim of the crime may feel an interest," the Survey continues, "but he will probably not make it a point to read newspaper advertisements of pardon applicants for years after the crime."[96] The solution advanced by the report is to look to a day in which "the laggard law will eventually adopt modern publicity devices like radio to replace outmoded methods like posting in the courthouse or publishing a small notice in an obscure journal."[97]

Another form of publicity is associated with the legislative requirement in 12 states that the applicant also notify some combination of the prosecuting attorney, the presiding judge, the appropriate chief of policy, and the warden of the penitentiary.[98]

[1]The U.S. Attorney General's Survey of Release Procedures: Pardon, Vol. 3 (Washington: U.S. Government Printing Office, 1939), p. 52 (Hereinafter cited as Attorney General's Survey).

[2]Comment, "The Pardoning Power: Historical Perspective and Case Study of New York and Connecticut," 12 Columbia Journal of Law and Social Problems 149, 155 (1976) (Hereinafter cited as Columbia Journal). Footnote 25 on p. 155 elaborates this point, citing decisions made by the police, the state's attorney, the trial judge, the appellate court and finally "at the terminal release stage, the parole board /which/ decides whether to parole the prisoner and the governor /who/ decides whether to grant a pardon."

[3]Attorney General's Survey, p. 308.

[4]Ronald L. Goldfarb and Linda R. Singer, After Conviction (New York, 1973), p. 330.

[5]Comment, "The Louisiana Criminal Code: Making the Punishment Fit the Criminal," 5 Louisiana Law Review 78,78 (1942) (Hereinafter cited as 5 Louisiana Law Review).

[6]Ibid, 79.

[7]See, for example, Robert M. Carter, et al. Corrections in America (Philadelphia, 1975), p. 231; National Advisory Commission on Criminal Justice Standards and Goals, Corrections (Washington, D.C., 1973), p. 591. Implicit support appears in state statutes which automatically return civil rights at some point after conviction--see, for example, Wisconsin (W.S.A. 57.078) and Washington (R.C.W.A. 9.96.050). The latter says, in part, that discharge from parole shall have the effect of restoring "civil rights lost by operation of law upon conviction." Another illustration of the attitude that restoration of civil rights should not be left for the pardoning authority is, of course, Louisiana's constitutional provision that returns rights of citizenship upon termination of state and federal supervision (Art I, Sec. 20).

[8]Columbia Journal, 156.

[9]Goldfarb and Singer, p. 331.

[10]The minority view, maintained in a small minority of states--of which Louisiana is one--is that pardon restores innocence--i.e., that it blots out the fact of the conviction.

[11]Columbia Journal, 156-158. Exceptions to this generalization are, for example, New Mexico, where one given conditional release on the governor's authority (i.e., one commuted but not granted a full pardon) is defined as being on parole and is supervised /N.M. Statutes

41-17-25/ and Washington and Virginia, where there is also statutory provision for supervision of one granted a conditional pardon by the governor /R.S. W.A. 9.95.260; Code of Va. Ann. Sec.53-229(b)/.

[12]Me., Md., Mich., Minn., Miss., Mo., Nev., N.H., N.J., N.M., N.Y., N.C., N.D., Ohio, Okla., Oregon, R.I., Tenn., Tex., Va., Wisc.

[13]Ex parte Wells, 18 How. 307 (1855); Fuller v. State, 122 Ala. 32, 37, 26 So. 146, 147 (1898); Ex parte Hunt, 10 Ark. 284 (1850); Arthur v. Craig, 48 Iowa 264, 267 (1878); In re Kennedy, 135 Mass. 48 (1883); In re Court of Pardons, 97 N.J.Ed. 555, 129 Atl. 624 (1925); People v. Potter, 1 Edm.Sel., Cas. 235, 1 Parker Cr. R.47 (N.Y. 1846); Flavell's Case, 8 Walls and S. 197 (Pa. 1844); Comm. v. Haggerty, 4 Brewst. 376 (Pa. 1869); State ex rel. Bedford v. McCorkle, 163 Tenn. 101, 40 S.W.(2d) 1015 (1931); State ex rel. Rowe v. Connors, 166 Tenn. 393, 61 S.W. (2d) 471 (1933); Lee v. Murphy, 22 Grat. 789 (Va. 1872); and cases cited in 60 P.L.R. 1411.

[14]Charles L. Newman, Sourcebook on Probation, Parole and Pardons, 3rd ed. (Springfield, Ill., 1970), p. 59. See also Attorney General's Survey, p. 219 and Columbia Journal, 158-159.

[15]Columbia Journal, 159.

[16]Id., Newman, p. 59.

[17]Attorney General's Survey, p. 222.

[18]State ex rel Stafford v. Hawk, 47 W.Va. 434, 34 S.E. 918 (1900), cited in Ibid., 222-223.

[19]Ibid, 87-88 /Footnote numbers omitted/.

[20]Columbia Journal, 152. An observation in the closing pages of the Attorney General's Survey carries the point yet a step further, suggesting that "there is no reason for denying the legislature a fully concurrent power." The rationale for that judgment follows: "In no State does the constitution expressly say that the executive power shall be exclusive; it merely provides that the Governor shall have the power to grant pardons, commutations, etc., subject to certain exceptions and restraints."/p. 312/

[21]Carter, et al., p. 230.

[22]Alaska, Ark., Cal., Colo., Del., Hawaii, Ill., Ind., Iowa, Kan., Ken., Me., Md., Mass., Mo., Mont., N.H., N.J., N.M., N.Y., N.C., Ohio, Okla., Oregon, S.D., Tenn., Vt., Va., Wash., W.Va., Wisc., Wyo.

[23]Columbia Journal, 151, n. 9.

[24]Carter, et al., p. 230.

[25]Nine states (Ark., Ill., Ind., Okla., Mass., Mont., and S.D.) have an advisory pardon board. In 23 states, legislation assigns to the parole board the duty of investigating clemency applications and making advisory recommendations (Alaska, Calif., Del., Fla., Hawaii, Iowa, Kan., Ken., Me., Mass., Mich., Miss., Mo., Neb., N.J., N.M., N.Y., Ohio, Okla., Vt., Wash., W. Va., Wyo.). Fifteen states have combined pardon and parole boards, some of which are advisory and some of which have some authority in the decision-making process. (Ala., Ariz., Ark., Ga., Hawaii, Idaho, Ill., Mich., Mont., Okla., S.C., S.D., Tenn., Tex., Utah). In N.H., the Governor's Council rather than a pardon or parole board advises the governor on pardon applications.

[26]Attorney General's Survey, p. 303.

[27]Id.

[28]Id.

[29]Ibid, p. 302.

[30]Goldfarb and Singer, p. 325.

[31]Attorney General's Survey, p. 148.

[32]Ex parte Garland, 71 U.S. (4 Wall.) 333, 380 (1866).

[33]Goldfarb and Singer, p. 324.

[34]Columbia Journal, 160; Attorney General's Survey, p. 133.

[35]Goldfarb and Singer, p. 327; Columbia Journal, 161.

[36]Newman, p. 59; Attorney General's Survey, p. 145.

[37]National Advisory Commission, p. 591; Attorney General's Survey, p. 309.

[38]Goldfarb and Singer, p. 328.

[39]Attorney General's Survey, p. 133.

[40]Louisiana Coalition on Jails and Prisons, "Killing is Killing," Inside, I, no. 5 (August 1977), p. 3.

[41]Newman, p. 63.

[42]Columbia Journal, 165.

[43]Ibid, 153.

[44]Attorney General's Survey, p. 76.

[45]Columbia Journal, 154.

[46]Ibid, 155.

[47]Ibid, 153-154.

[48]"Text Given on Nixon Pardon." (Baton Rouge) Morning Advocate, Sec. A (September 9, 1974), p. 9.

[49]Id.

[50]Columbia Journal, 196.

[51]Id.

[52]Attorney General's Survey, p. 212.

[53]"Special Project--The Collateral Consequences of a Criminal Conviction," 23 Vanderbilt Law Review 919, 1143 (1970).

[54]Attorney General's Survey, p. 52.

[55]5 Louisiana Law Review, 80. See also, Attorney General's Survey, pp. 300, 301, which include the following judgment:

> The examples we have listed as properly coming within the scope of the pardoning power all depend upon political or judicial considerations. Whether political prisoners should be granted clemency is not a matter to be determined from the social worker's point of view, but from a statesman's. Whether a conviction is of a kind that popular opinion denounces is properly addressed to political officials. Whether a person is innocent though legally convicted is a judicial question which if too late to be reopened in the regular courts must nevertheless be decided by an investigation approaching as nearly as possible the judicial fact-finding type of inquiry.

[56]Goldfarb and Singer, p. 331.

[57]Newman, p. 38.

[58]See e.g. F.E. Zimring, "Making the Punishment Fit the Crime," Hastings Center Report 13-17 (Dec. 1976); Albert Alschuler, "Impact of Determinate Sentencing Upon Judges, Defense Attorneys, Prosecutors," Paper for Special Conference on Determinate Sentencing, Earl Warren Legal Institute, Univ. of California, Berkeley, June 3, 1977; Peter B. Hoffman, before Governor's Pardon, Parole and Rehabilitation Commission.

[59]5 Louisiana Law Review, 80.

[60]The Attorney General's Survey, p. 302.

[61]Ibid, pp. 297-298.

[62]Goldfarb and Singer, p. 328.

[63]The Attorney General's Survey, p. 298.

[64]Ibid, p. 304.

[65]Id.

[66]Goldfarb and Singer, p. 330.

[67]National Advisory Commission, p. 591.

[68]Columbia Journal, 197.

[69]Attorney General's Survey, p. 307.

[70]Goldfarb and Singer, p. 329.

[71]Ala., Ariz., Calif., Del., Fla., Idaho, Ill., Kan., Me., Mass., Mich., Mont., Nev., N.H., N.D., Ohio, Oregon, Wisc., Wyo.

[72]Ariz., Cal., Conn., Iowa, Me., Mich., Nev., N.H., N.D.

[73]Attorney General's Survey, p. 307.

[74]Columbia Journal, 198.

[75]Attorney General's Survey, p. 304.

[76]Goldfarb and Singer, pp. 329-330.

[77]Ibid, p. 330.

[78]Attorney General's Survey, p. 307.

[79]Goldfarb and Singer, p. 330.

[80]La.R.S. 15:572.4.

[81]Ann. Laws of Mass., Sec. 127:154.

[82]Goldfarb and Singer, p. 330.

[83]Id.

[84]Ibid, pp. 329, 330.

[85]Morrissey v. Brewer, 408 U.S. 471 (1972).

[86]Gagnon v. Scarpelli, 411 U.S. 779 (1973).

[87]Governor's Pardon, Parole and Rehabilitation Commission, Staff Analysis of Probation and Parole Services and Parole Decision-Making Procedures in Louisiana, Ch. III, pp. 1-8.

[88]Attorney General's Survey, p. 304.

[89]Goldfarb and Singer, p. 329.

[90]Columbia Journal, 197.

[91]Goldfarb and Singer, p. 329; Attorney General's Survey, p. 157.

[92]Ariz., Fla., Idaho, Kan., Me., Md., Miss., Mont., Penn., Utah, Wisc., Wyo.

[93]Arkansas Statutes Ann. Sec. 41-1306.

[94]I.C.A. Sec. 248.7.

[95]Attorney General's Survey, p. 305.

[96]Id.

[97]Ibid, p. 306.

[98]Ibid, pp. 157-159; Goldfarb and Singer, p. 329.

CHAPTER II - EXECUTIVE CLEMENCY IN LOUISIANA

THE PROCEDURE

Art. IV, Sec. 5, Para. (E) of the Louisiana Constitution of 1974 states that the governor may grant reprieves to persons convicted of offenses against the state and may, upon recommendation of the Board of Pardons, "commute sentences, pardon those convicted of offenses against the state, and remit fines and forfeiture imposed for such offenses." Removed are the restrictions of the 1921 Constitution, which exclude cases of impeachment and treason as pardonable offenses and which indicate that a reprieve granted as a result of treason shall last only until the next session of the legislature. Gone, in fact, is any reference that would limit the period for which a reprieve may be granted, reprieve being the only form of clemency that the Louisiana Constitution allows the governor to grant without prior recommendation of the Board of Pardons. /Art. 5, Sec. 10, Constitution of 1921/

Art. IV, Sec. 5, Par. (E) also establishes the automatic pardon, granted first offenders never previously convicted of a felony--this requiring neither recommendation of the Board of Pardons nor action of the governor. Par. (E) also creates a five-member pardon board, its members appointed by the governor for a term concurrent with his own term. These appointments are subject to approval by the senate.

The constitutionally established guidelines regarding first offender pardon and board membership and functions are elaborated by statute. Parts of La. R.S. 15:572 define "first offender";

assign to the Division of Probation and Parole of the Department of Corrections the verification and issuance of first offender pardons as well as the task of informing certain sources that such a pardon has been granted; and indicate that one granted an automatic pardon can be charged and punished as a second or multiple offender should he be convicted of another crime. La. R.S. 15:572.1 addresses further the membership of the Board of Pardons. Individuals appointed to the board shall devote full time to the duties of that office and shall therefore engage in no other business or profession nor hold any other public office. La. R.S. 15:572.3 provides that the board may adopt rules and regulations necessary to carry out its duties and functions /La. R.S. 572.3(1)/ and that it may also employ a staff and other professional personnel with training or professional experience in fields such as criminology or psychology as the board finds necessary. /La. R.S. 15:572.3(2)/ Nowhere are professional or educational standards for board members established.

Elsewhere the statutes indicate that the board must meet on regularly scheduled dates, to be determined by the board itself /La. R.S. 572.1(C)/; that all of the board's meetings are open to the public /La. R.S. 572.1(D) and 15:573/; and that a majority of the board's total membership shall constitute a quorum, with all actions of the board requiring the favorable vote of a majority of its membership. /La. R.S. 572.1(E)/ Other statutes regarding the board's functioning provide that the board shall select a vice chairman from among its membership and shall select and fix a salary for an executive secretary, who need not be a board member. /La. R.S. 15:572.1(D)/

Salaries of board members are fixed by the governor; travel and other expenses incurred in the discharge of duty are reimbursed. /La. R.S. 15:572.2 and La. R.S. 15:574.1/

Other portions of the statutes address pardon application and the hearing process. La. R.S. 15:572.4 requires, in part, that each applicant to the board be heard at least once and that each application received be registered chronologically and subsequently heard at a formal hearing. If the applicant is denied, reasons for the denial are affixed to his application, which must be reviewed at least once. New evidence may be introduced for the review hearing. /La. R.S. 15:572.4/

Before the Board of Pardons actually hears an application, the board must give written notice to the district attorney, the applicant, and other interested parties of the date and time of the scheduled hearing and must afford the district attorney and others opportunity to attend and to be heard. /La. R.S. 15:572.4/ La. R.S. 15:574 reiterates the stipulation that the district attorney be provided ample opportunity to attend the hearing.

Another step preliminary to a pardon hearing is the collection of information regarding the offender. The Board of Pardons requests from the Department of Corrections and the Department of Public Safety any records they hold or have compiled regarding the offender and his circumstances, personal history, etc. /La. R.S. 15:572.5/

Once an application for clemency is received, heard and approved, one other legislatively established step follows: the Department of Corrections (thus, the Division of Probation and Parole) is mandated

to provide a clemency report on the offender for whom the board has approved clemency. /La. R.S. 15:574.3(C)/

Regulations and procedures other than those described above are defined administratively.

There are two essentially discrete pardoning procedures followed in Louisiana: one process is required of first felony offenders who wish to have restored certain rights lost upon conviction; another is for second or multiple felony offenders as well as for first offenders wanting commutation of sentence or restoration of the right to carry a firearm. These processes are further divisible, however, because of changes in the Constitution of 1974 that define exemptions and procedures applicable only to individuals sentenced after January 1, 1975.

Consider first the pardon available only to first offenders. The concept of first offender pardon was introduced into the 1921 Constitution in 1968 (Art. V. Sec. 10). That enactment allowed the governor to pardon without pardon board recommendation a first offender who had completed his sentence.[1] The 1974 Constitution replaced that process with the procedure of automatic pardon for first offenders upon completion of their sentences. (This is the process, the legal implications of which are discussed on pages 102-103 of Chapter II.) Automatic pardon is available, however, only for individuals sentenced after January 1, 1975; first offenders sentenced before that must act according to the terms of the old constitution and apply to the governor for pardon.[2] These applications are handled ultimately via the Division of Probation and Parole.

The applicant may go to a district probation-parole office or to the headquarters office[3] or contact the governor's office[4] to request consideration for first offender pardon. If the first contact is with the governor's office, that office notifies Headquarters, Division of Probation and Parole, of the request. Headquarters, in turn, forwards all requests to the appropriate district office (i.e., the office in the district in which the offender was sentenced). That office conducts the clemency investigation.[5] When the report is complete, the original and one copy are sent to the division headquarters. Headquarters, in turn, forwards the original to the governor's office.[6] First offender felons, sentenced after January 1, 1975, who complete their terms in the parish prisons, must also work through a district probation and parole office in order to be verified eligible for and to receive their automatic pardon.[7]

When the individual desiring pardon is not eligible for first-offender pardon or when the relief he wishes is something other than that provided by a first-offender pardon or when he was sentenced as a second or multiple offender before January 1, 1975, he must apply for the desired clemency through the pardon board.*

Rules created by the Board of Pardons for its own governance

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*Civil rights are automatically restored to offenders upon "termination of state and federal supervision" (Art. I, Sec. 20, Constitution of 1974). Arguably, offenders sentenced before January 1, 1975, must apply through the board for restoration of their civil rights if these rights are not otherwise restored.

establish only two basic requirements to be met by one making application. One, the board requires submission of a petition, written legibly but according to no fixed format, which sets forth the name and age of the applicant, his offense, the parish and the judicial district in which he was tried, the sentence given and the date of its imposition, the length of time served, the form of clemency requested, and the particular relief desired.[8] This petition must be signed and dated and must contain a home address. Additionally, if the petition is for pardon or restoration of citizenship, the petitioner must indicate all previous convictions for which he was not pardoned.[9]

The second stipulation of the pardon board is that the offender publish one advertisement of his intention to apply for clemency and that he do so in a newspaper distributed in the parish where he allegedly committed the offense. This advertisement may appear up to one year in advance of the offender's application to the board; its appearance must be documented by a certificate from the newspaper.[10]

Once an application for clemency has been received, the pardon board begins to develop a file, which contains the following information:

a. inmate's prison record
b. state police or FBI rap sheet
c. prison conduct record
d. bill of information or indictment
e. court minutes
f. district attorney's or police statement of fact

Also included in the applicant's file, if available, are investigative reports (i.e., pre-sentence, post-sentence and pre-parole), institutional progress reports, and physical and/or psychiatric reports. The board encourages the applicant to furnish letters, affidavits or signed petitions supporting his request and to provide the board with both an employment and a residence agreement to indicate his present or future plans as well as his good intentions.[11] Primary responsibility for the file and for the further handling of the case is assigned to the pardon board member responsible for the judicial district in which the applicant's case was tried.

As soon as the file is complete, the case is scheduled for a hearing, and the applicant is notified at least 30 days in advance of his hearing date. To ensure that communication has been established, the board requires acknowledgement from the applicant that he has received notification of same. The district attorney of the parish in which the applicant was convicted and any others judged to be "interested persons" are also informed in such time as to allow them a "reasonable opportunity" to attend.[12] The board advises the applicant to attend if he is not confined, and requests that the applicant provide in advance the names of those whom he expects will appear in person.[13]

At the clemency hearing, which is open to the public, the board will listen to all who desire to speak. Following the hearing, board members decide in private whether to grant the applicant's request. If the board determines to deny the applicant, its own administrative regulations require that it so inform the applicant within 21 working

days;[14] it is currently able to do so within ten days, the board's chairman reports.

At the same time, the board informs the applicant of its reasons for denial. The format used to do so is simply a check list, which includes six reasons: premature, original crime, post criminal record, insufficient self-improvement shown while incarcerated, law enforcement personnel opposed, and "other."[15] Should the applicant desire more information, however, the chairman has indicated that the board will elaborate upon its reasons at the applicant's request. At the same time, the denied applicant is informed that statute requires that his application be reviewed automatically at least once. Administrative regulations establish that the review shall occur within a period not exceeding one year from the date of receipt of the original petition.[16] As in the formal hearing, the applicant, the district attorney and other interested parties are notified of the date set for the review and are allowed to introduce new information, but the board considers only written evidence at the review hearing: no witnesses are allowed. If the applicant is again denied, he is of course so informed. In order to be considered yet another time, the applicant must file a new application, but he may not do so until another year has elapsed.

As of January 1, 1978, administrative procedure allows a second option for the applicant whose first appeal for clemency is denied. Slightly less than a year after the applicant's denial by the pardon board, he is contacted by the board and given the option of having the previously automatic "paper" review--which seldom results in a

changed recommendation--or of reapplying for a formal clemency hearing. The automatic review would come within a month; reapplication for a full hearing would delay further consideration of the applicant for four to six months, the period currently required in order to apply, be scheduled for and have a formal hearing. Though the initial delay that precedes a second consideration of some kind is longer if one chooses the newer option, this alternative procedure will ensure an applicant a full formal hearing at intervals of about 18 months rather than 28-30 months as occurs when he chooses the older option.[17]

On the other hand, if the board approves the application for clemency, the board notifies the applicant of same and requests a clemency report from the Division of Probation and Parole. Except when the clemency request is made by one no longer incarcerated, the contents of the clemency report seem largely duplicative of other information collected by board members prior to the clemency hearing (see pp. 33-34 above): the clemency report contains pertinent details of the offense for which the offender is asking clemency, including information and responses about and from the victim; it notes any reduction in charge and the date, length and place of sentence; it documents prior criminal activities--including copies of state police and FBI records--as well as all previous interactions with the other components of the corrections system--e.g., probation, parole, previous clemency grants; it reports current employment and address and the applicant's reputation in the community and at his place of employment since completion of sentence.[18]

Completion of this report requires from one to six months, depending largely on the workload of probation-parole agents in the judicial district from which the report must come. It is possible that the board change its recommendation based on new information contained in the clemency report, but this does not normally happen. The board's decision thus reaffirmed, the board member in charge of the case prepares a cover letter, attaches it to the clemency report and the rest of the applicant's file, and forwards the material to the office of the governor. The period between the board's favorable action and reception of the file by the governor normally ranges from several weeks to several months. When the materials are sent to the governor's office, the applicant is again informed of the stage that his case has reached and is urged not to contact the governor's office about his case. At this point in the procedure the Board of Pardons involvement ends; all further definitive actions must come from the office of the governor.

Certainly the particular procedures followed within the governor's office will vary with the administration. The currently employed procedure moves pardon applicants progressively through two or three channels. All files entering this office go first to one of the governor's assistants, who records each in a card file, examines each file for completeness, adds to it any letters or other information sent directly to the governor's office, and makes a preliminary assessment of priorities (i.e., first offender, non-violent, unopposed cases are given top priority).

From that office the files proceed to the office of the governor's executive counsel for secondary screening and, in some instances, disposition. Other files are simply reviewed there and then forwarded to the governor himself with the executive counsel's recommendation.

The governor can make one of three responses to the applications he receives and reviews. One, he can deny clemency. In that case, the file is sent to the office of the secretary of state, where it becomes a dead file. A second alternative is to grant clemency. The clemency granted may be that recommended by the board, or it may be less than that recommended. It cannot be more. In any case, when clemency is granted, both the pardon board and the applicant are notified: the pardon is mailed directly to the applicant; the pardon board receives a copy. The file is returned to the pardon board, unless the grant was pardon and restoration. In that instance, the file becomes a dead one and is sent to the archives of the secretary of state.

The third alternative open to the governor is to take no action, which means that the file is returned to the office of the governor's assistant. In that location the file accumulates new information or correspondence, should that be forthcoming; from that location the file returns at three- or four-month intervals to the governor for further consideration. Until such time as the governor acts on the application, the applicant's file remains in the governor's offices.

[1]Probation and Parole Officers Operating Manual, rev. ed. (Baton Rouge, 1972), p. 89.

[2]Id.

[3]Ibid, p. 90.

[4]Letter from Richard Crane to Mrs. Jane T. Lemann, July 8, 1975.

[5]Probation and Parole Officers Operating Manual, p. 90.

[6]Ibid, p. 93, p. 89.

[7]Ibid, p. 90.

[8]Administrative guidelines of the Board of Pardons, contained in Background Materials for the Governor's Pardon, Parole and Rehabilitation Commission, compiled January 1977 by the Louisiana Legislative Council, p. 29.

[9]Id.

[10]Id.

[11]Ibid, p. 30.

[12]Id.

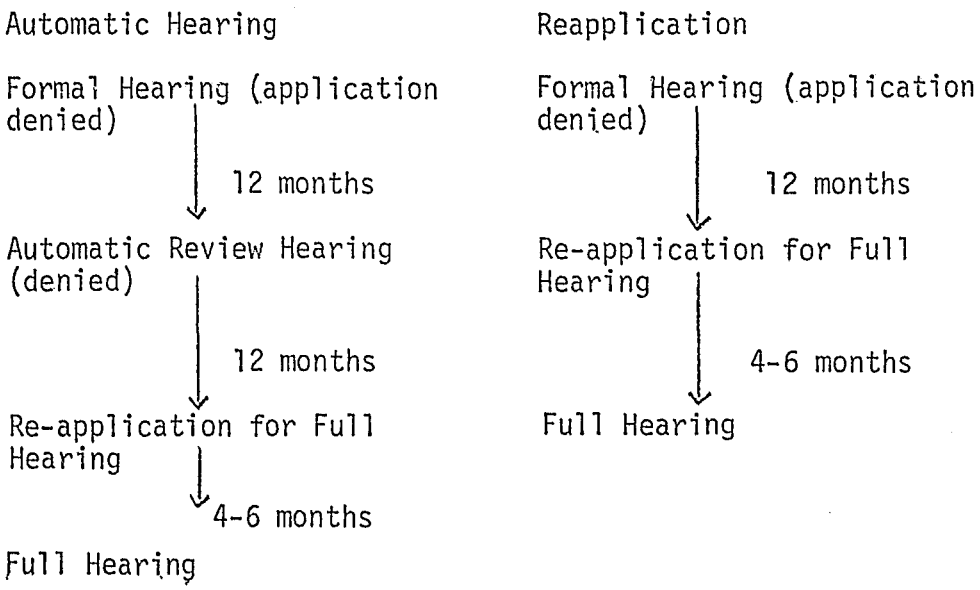
[13]Ibid, p. 31.

[14]Id.

[15]Probation and Parole Officers Operating Manual, p. 39.

[16]Administrative guidelines of the Board of Pardons, p. 31.

[17]Review Options:



[18] Probation and Parole Officers Operating Manual, pp. 92-93.

COLLATERAL CONSEQUENCES OF CONVICTION IN LOUISIANA; IMPACT OF THE 1974 LOUISIANA CONSTITUTION

Introduction

When a person is convicted of a crime, he is perhaps only aware of its immediate impact--a loss of freedom or a monetary fine. Society, through its legislatively enacted criminal codes, appears to give the exact full penalty for each transgression which the judge then imposes as his sentence. What the offender (and perhaps even the judge and jury) does not fully realize is the numerous civil disabilities that attach to criminal conviction, disabilities that may have a greater impact on the offender than the actual sentence imposed. His family may disintegrate, the conviction serving as both grounds for divorce and loss of future child custody. Employment opportunities after release are restricted by licensing laws that preclude ex-felons. His eligibility for inheritance and workman's compensation may be affected. His right to vote is suspended and the conviction may be used to impugn his integrity in any judicial proceeding.

These disabilities have their historic antecedents in ancient Greece and Rome and have reappeared in the laws of every state. Diminishing the impact of these disabilities is the phenomenon of executive clemency adopted in this country from the practice of the English king to pardon criminal offenders. In order to understand how civil disabilities affect offenders in present day Louisiana, it's helpful to look briefly at their evolution as well as the background of the contemporary pardon procedures.

In ancient Greece, a criminal conviction could cost an offender numerous civil rights. He could lose his right to vote, to

appear in court, to join the army and to be involved in politics.[1] Considering the high value placed upon citizenship, these deprivations were probably intended as punishment and deterrence as well as protection for the rest of society.

Ancient Rome, which also held city-state loyalty in high esteem, included loss of citizenship rights in its penalties for crimes. Particularly serious offenses triggered complete deprivations automatically upon conviction. The offender's marriage instantly terminated, his will was defunct, he lost all contractual privileges, tutorship and usufructuary interests.[2]

Of lesser severity was the status of "infamy" which resulted from disreputable, although not necessarily criminal, behavior. While certain rights were abrogated, it did not negate the entire civil personality. Causes of infamy ranged from being an actor, which was considered a questionable profession, to reneging on contractual obligations as well as conviction of crime. The disabilities usually included loss of the right to vote and to hold public office and the eligibility to serve as an agent.[3] While no doubt punitive in effect, the disabilities seemed equally intended to protect society from potentially deceitful persons.

Early French law incorporates the notion of "civil death," similar to the Roman total loss of citizenship and status.[4] Under Article 25 of the Code Civil, a person who is civilly dead is incapable of owning property, of contracting a marriage, of appearing in court in any capacity and cannot even designate to whom his forfeited property devolves.[5] Civil death resulted only from

particularly serious offenses,[6] and eventually was abrogated in 1854.[7]

Less onerous were the penalties of civil degradation and legal interdiction. Civil degradation, once imposed, was irrevocable regardless of the actual length of confinement or punishment. Legal interdiction ran concurrently with the principal punishment, terminating at the same time. Among the rights and privileges lost were the right to vote, to be a juror, to serve as a tutor, to carry arms, and to hold public office.[8]

The trend over the years and even centuries has been to lessen the disabling effects of criminal conviction. Most civil code countries have abolished the notion of civil death.[9] In the United States as well, only a few states[10] have retained the institution of civil death and even there efforts are made to at least partially bypass its effects.[11]

Regardless of the trend, however, every state still attaches some civil disabilities to criminal conviction.[12] One procedure for quashing some of these effects has been through a pardon. Every state has a pardon procedure, with most states delegating the authority to the governor or a board of pardons.[13] A pardon's effects vary from state to state, with much reliance on court interpretations which, unfortunately, often conflict.[14] In Ex parte Garland,[15] the U.S. Supreme Court stated that

> A pardon reaches both the punishment prescribed for the offense and the guilt of the offender... it releases the punishment and blots out of existence the guilt, so that in the eye of the law the offender is as innocent as if he had

> never committed the offense. . . it removes the penalties and disabilities and restores to him all his civil rights./16/

However, in a later decision, the Court remarked that a "confession of guilt" is "implied in the acceptance of a pardon."[17] The majority of lower courts have held that the pardon does not nullify the conviction, hence many disabilities presumably remain.[18]

Louisiana, reflecting its franco-anglo-roman heritage, has attached various civil disabilities to criminal conviction and also furnishes a pardon procedure whereby some of those disabilities can be removed. The 1921 Louisiana Constitution, for example, decreed that anyone convicted of an offense punishable by penitentiary imprisonment could not vote, hold office or an "appointment of honor, trust, or profit" unless pardoned with restoration of franchise.[19] Numerous civil disabilities are disseminated throughout the Civil Code of 1870, erecting a variety of barriers to ex-offenders, including ineligibility to be a tutor[20] or a witness to a testament.[21] Inheritance rights can be affected[22] and the imprisonment can serve as grounds for divorce[23] and loss of child custody.[24] Louisiana, however, like other states in the union, does not require forfeiture of property upon conviction[25] although some contractual rights may be affected.[26]

Louisiana has had a pardon process since its first constitution in 1812.[27] The specific procedure has varied over the years[28] but it has always been considered the exclusive domain of the executive department, untouchable by legislative or judicial restrictions.[29]

Louisiana adheres to the expansive minority view of the effect

of a pardon. In State v. Lee,[30] a pardoned offender was convicted of a new crime and charged as a second offender. The court considered the varying lines of authority, then adopted the reasoning of Ex parte Garland that a pardon "blots out of existence the guilt" of the offender.[31] The court also remarked that other courts including Louisiana have held that

> the pardon restores the original status of the pardoned individual, i.e. a status of innocence of crime, and therefore a person occupying such a status, who is convicted of a crime subsequent to the granting of a full pardon for the first offense. . . must be dealt with and punished as a first offender./32/

With respect to legislative limits on the effect of a pardon, the court held that the pardoning power is solely an executive function and that the legislature cannot restrict its impact to "merely. . . a restoration of citizenship and civil rights."[33]

Ten years later, in 1941, the court again dealt with a pardoned offender who was being multiple billed on a subsequent conviction.[34] While the case hinged on whether or not a pardon had actually been issued, the court remarked that

> It is conceded by the State that, if the accused had been pardoned of the first offense, he could not be convicted and sentenced as a second offender. . . ./35/

In State v. Selmon,[36] a 1977 case, the court dealt with the effect of the 1974 Constitution's provision restoring "/f/ull rights of citizenship"[37] to offenders completing their terms of punishment. In passing, the court noted that in Louisiana "a full complete pardon by the Governor precludes the use of the pardoned offense to enhance

punishment";[38] that this "is a minority rule"[39] as compared to other states; and that the Louisiana cases "involved full pardons restoring the status of innocence, 'not a mere restoration to citizenship'. . . ."[40]

Therefore, it would appear that Louisiana jurisprudence has consistently held that a pardon "blots out the existence of guilt," at least insofar as a pardoned offense may not be used as the basis for a subsequent habitual offender prosecution.

The 1974 Louisiana Constitution has several provisions within its Declaration of Rights that affect the civil disabilities attached to criminal convictions.[41] These provisions will be discussed later in an analysis of how they affect each disability, but the overall Declaration of Rights has been both praised and criticized for its emphasis on individual rights. Delegate and co-author of the Declaration of Rights, Louis "Woody" Jenkins, feels the section makes "fundamental changes in political theory which will significantly alter the relationship between Louisiana citizens and their government."[42] The prior constitution stressed "collective or group rights"[43] while the 1974 document elevates "individual rights."[44]

Ben R. Miller, Chairman of the American Bar Association Section of Criminal Justice, warned that the Declaration may create an "imbalance favoring the rights of those accused of crime over the rights of the victims and of society to be protected from crime. . . ."[45]

Professor of law, Lee Hargrave, coordinator of legal research for the Constitutional Convention, felt the Declaration could be

viewed as "a radical document making extreme innovations"[46] when compared to the earlier state constitution, but that in comparison with United States Supreme Court decisions interpreting the federal Bill of Rights, "the innovations in the new state document are minimal."[47]

Of primary importance to the ex-offender are Art. I, Sec. 20 of the Declaration of Rights and the re-enacted pardon power of the governor.

Distinction Between Section 20 and the Governor's Pardon Power

Art. I, Sec. 20 of the new constitution provides, in part, that "Full rights of citizenship shall be restored upon termination of state and federal supervision following conviction for any offense." Art. IV, Sec. 5 of the constitution, under the executive powers, sets out the traditional power of the governor to pardon offenders, as well as grant reprieves and commute sentences. Since an automatic restoration of rights was not included in prior constitutions, a logical question is how this provision interacts with the pardon power. Arguably the provisions restore identical rights, the difference being that a pardon can actually release an offender before his sentence is completed, whereas Sec. 20 only comes into effect after ordinary termination of supervision.

On the other hand, the inclusion of the two provisions almost mandates a distinction between their effects. Art. IV, Sec. 5(E), for example, grants an automatic pardon to first offenders upon completion of their sentences. If a pardon has the same effect as Sec. 20, this first offender pardon would be superfluous as all

offenders receive the Sec. 20 benefits upon termination of their sentence, regardless of how many prior convictions. One delegate proposed an amendment to Sec. 20 which would limit its impact to first offenders, thus presumably matching it up with the first offender pardon. The amendment was adopted but then swept away by a subsequent amendment. Since Sec. 20 rights are restored automatically to all offenders, then a pardon must somehow have a greater impact than Sec. 20 or else there would be no need for a pardon at all, other than to terminate supervision earlier. According to the Board of Pardons, however, most requests for pardons come from individuals who have already completed their sentences.

In their debate on Sec. 5(E)(1), the delegates didn't say what a pardon actually did.[48] They argued over who should have the authority to pardon and whether first offenders should have an automatic pardon, but beyond some oblique references to its putting people back on the street, no one discussed its effect.[49] During the debate on Sec. 20, the delegates did discuss the impact of a pardon, but they did so by analogizing it to 20. While this helped clarify what they meant by a pardon, it muddied the distinction between the two.

Several of the delegates, for instance, tied their support of Sec. 20 with criticism of the pardoning procedure. Chris Roy felt that most offenders "don't know they have to go to the governor for a pardon. Secondly, they don't have the money to get a pardon, and thirdly, they don't know a lawyer to go give them the money to get the pardon."[50] Delegate Derbes believed that going through the

process of petitioning the governor for a pardon was just a "further discouragement and a further. . .hurdle to the ultimate rehabilitation of the individual" and that a pardon is often just a "political favor from a governor."[51] At one point, Delegate Willis asked Delegate Jackson if Sec. 20 was "solely a device whereby a person who has paid his debt to society can go get his receipt from the constitution instead of going to the governor" and Jackson answered, "That's exactly right, sir. That's all it is, sir."[52]

To confuse matters more, those delegates that analogized Sec. 20 to a pardon didn't agree on what a pardon does. Delegate Jack was opposed to Sec. 20 because he felt it gave ex-offenders "the same rights if they go through the pardon board now. Everybody, once they are through with their sentence, it's going to wipe the slate clean no matter how bad they were. . . ."[53] Later on, Jack implied that a pardon prevented application of the multiple offender laws and permitted an ex-offender to answer "no" to the conviction question on job applications.[54]

Delegate Ray, supporting Sec. 20, felt that Jack was "absolutely wrong with his conclusions that if you receive a pardon that the slate is wiped clean with respect to your prior multiple offenses," that a pardon "simply restores your rights to vote and to citizenship" but it "doesn't change the fact that you committed a crime."[55] Roy went on to say that a pardon does restore "the right to hold certain types of jobs" and that Sec. 20 was another "vehicle" to that goal.[56] Delegate Jackson went further than Roy by implying that Sec. 20 lifted

licensing restrictions in employment, but he also compared it to a pardon, saying pardons were "awfully expensive" hence the necessity for a Sec. 20.[57] Delegate Derbes also felt that Sec. 20 was a streamlined pardoning procedure but believed at the same time that it would have no impact on employment licensing, weapons restriction or multiple offender laws.[58] Delegate Gravel was apparently the only one who saw the need to distinguish between a pardon and Sec. 20--"/Sec. 20/ doesn't say that you are pardoned for the crime that you have committed and that your slate has been wiped clean. It simply says that we're going to give you back the minimum things that have been taken from you because you have earned them."[59]

Some of the confusion, both over pardoning and Sec. 20, was no doubt due to the problems in general of changing from the old constitution to the new. Under the old constitution, an ex-felon couldn't register, vote, or hold an office or appointment of "honor, trust or profit" in the state unless he had been "pardoned with express restoration of franchise."[60] These were some of the disabilities that the delegates, in supporting Sec. 20, wanted to wipe out, but they were implicitly wiped out by their omission from the new constitution altogether. Similarly, a pardon seems to have lost much of its impact, unless it goes beyond the traditional civil and political rights.

The present attorney general has twice grappled with the mysteries of Sec. 20 and the pardon. In an April, 1975, opinion, he said that a "felony conviction, besides depriving a person of his rights of

citizenship, i.e. right to vote, also deprives the convicted person of many privileges, for example, the privilege of holding a liquor license. Therefore it is our opinion that Article I, Section 20 restores only the basic rights of citizenship; on the other hand a pardon, automatic under Article IV Section 5(E), or otherwise, restores the privileges as well as the rights of citizenship."[61] A year earlier, he said that Sec. 20 precluded Sec. 5(E)(1) from being interpreted as limiting automatic restoration of civil rights just to first offenders.[62]

While an argument can be made that Sec. 20 and a pardon were intended to have identical effects, this report assumes that Sec. 20 has a lesser impact than a pardon. What the actual effects are will be suggested in the following appraisal of the individual disabilities associated with conviction.

Voting Rights

Art. I, Sec. 10 of the Declaration of Rights states in part that:

> Every citizen of the state, upon reaching eighteen years of age, shall have the right to register and vote, except that this right may be suspended while a person is . . .under an order of imprisonment for conviction of a felony./63/

Under the 1921 Constitution and accompanying statutes, the right to vote was denied persons who had been convicted of felonies and was only restored by a pardon expressly returning the franchise.[64] The clerk of each district court delivered the names of the disqualified persons to the registrar of voters, who then erased the voter's name from the roll.[65] Voting by a disqualified person was a misdemeanor, punishable by both a fine and a jail term.[66]

Under Art. I, Sec. 10 of the 1974 Constitution, the right to vote may be suspended only as long as a person is under an order of imprisonment. This is further confirmed by Art. I, Sec. 20 which provides that

> Full rights of citizenship shall be restored upon termination of state and federal supervision following conviction for any offense./67/

While the convention delegates argued over the scope of the "rights of citizenship,"[68] the right to vote is unquestionably one of the most basic prerogatives of citizenship. Because these two provisions are self-executing, an offender need not apply for a pardon upon release in order to vote. The franchise is automatically restored.

Several questions arise nonetheless under the new provisions. Since a felony conviction is required, persons in pretrial detention and those incarcerated for misdemeanors are entitled to vote.[69] Delegate and co-author of the Declaration of Rights, Woody Jenkins, concluded that the legislature needed to provide a mechanism, such as absentee balloting, for such persons.[70]

The status of persons on parole or on probation is unclear, hinging upon whether such a status is akin to an "order of imprisonment." An Attorney General's Opinion concluded that persons on probation are not under an order of imprisonment as "the granting of probation. . .amounts to a suspension of sentence."[71] Parolees, on the other hand, are still in the legal custody of the prison facility and therefore are under an order of imprisonment.[72] The result then is that persons on probation can vote and parolees may

not. While the conclusion may be technically sound, it creates a seemingly irrational distinction. Professor Hargrave, who conducted research for the Committee on the Bill of Rights and Elections feels that neither a person on probation nor a person on parole is under an order of imprisonment; hence both should be permitted to vote.[73]

The most fundamental issue of all with respect to Art. I, Sec. 10 is whether the right to vote has actually been suspended at all. The section states merely that the right "may" be suspended. As the 2nd Circuit Court of Appeal noted in Fox v. Municipal Democratic Executive Committee of the City of Monroe,[74] the phrasing

> . . .is permissive and not self-operative, meaning that it must be implemented before it can operate to deprive one of his right to vote. . . ./75/

The court found in that case that the right had not been specifically suspended, hence the particular individual was a qualified elector, even though convicted.

Sec. 17 of Art. XIV of the 1974 Constitution repealed the 1921 Constitution. Sec. 18 repealed all prior laws in conflict with the new state charter. The court in Fox acknowledged that distinction but still found that "no action"[76] had been taken to suspend the defendant's franchise, and it was therefore unnecessary to decide whether or not he was under an order of imprisonment.

Under the old laws, constitutional and statutory, the period of disenfranchisement included the time spent incarcerated. The state attorney general concluded that the statute therefore was still effective insofar as it applied to persons under an order of imprisonment,

since that did not conflict with the permissive language of Sec. 10.[77] According to him, therefore, persons presently incarcerated as well as those on parole are eligible to vote. The final decision must await full consideration by the state supreme court.[78]

With respect to federal convictions, Art. I, Sec. 10 would also allow disenfranchisement of a person serving a federal sentence since the article refers only to "an order of imprisonment for conviction of a felony." The 1921 Constitution originally disenfranchised those convicted of crimes punishable by imprisonment "in the penitentiary"[79] which was interpreted to refer only to the Louisiana State Penitentiary. Hence, a federal offender was not disenfranchised.[80]

While Art. I, Sec. 10 does disenfranchise federal offenders under orders of imprisonment, Art. I, Sec. 20 does expressly include those persons as entitled to full restoration of citizenship rights after release.

By adopting fewer restrictions on voting rights, Louisiana has paralleled the federal tendency to view impediments to voting with strict scrutiny.[81] It also elevated the individual's right to vote above the more amorphous right of society to be protected from the possibly contaminating influence of an ex-felon's judgment. It's unlikely that the loss of voting rights has had deterrent effect on crime and its restoration may have a salutary effect on an ex-offender and his attitude towards re-entering society.

The Right to Hold Public Office

The right to hold public office carries with it a greater responsibility than casting an individual vote, but the grounds for

disqualification are less clearly expressed. Under the 1921 Constitution, persons convicted of felonies could not "register, vote or hold office or appointment of honor, trust or profit"[82] in the state unless pardoned with an express restoration of franchise. The 1974 Constitution did not re-enact that impediment beyond the already discussed narrower limitations on voting. Arguably then even a person incarcerated could be a candidate for public office. This coincides philosophically with the democratic concept that the people should decide whom they wish to elect and those elected, in turn, should decide whom they wish to appoint, even if an offender.

In the debate on Art. I, Sec. 20, which restores full rights of citizenship to persons after termination of penal supervision, the right to hold public office was cited as a right thus restored.[83] This naturally implies that the right is still suspended by imprisonment. Alternatively, it could be interpreted to apply only to those incarcerated prior to the effective date of the new constitution since their right to hold public office had been expressly withdrawn. In Fox v. Municipal Democratic Executive Committee of the City of Monroe,[84] the 2nd Circuit dealt with a complaint that a newly elected mayor was disqualified because a previous conviction disenfranchised him and he had not been pardoned. Interestingly, the court concluded that the 1974 Constitution applied and his right to vote had not been suspended, but by ruling on the issue in the first place, the court was adopting the 1921 Constitution's requirement that only bona fide electors could run for public office.

Whether or not a person may hold a public office while incarcerated,

he would be eligible to do so immediately upon completion of his supervision as a result of Art. I, Sec. 20. Unlike under the 1921 Constitution, a pardon is no longer necessary.

Judicial Rights

Loss of capacity to litigate as a result of conviction perhaps stemmed from the notion that citizenship was a privilege, not a right, and that one who abused society's laws was not entitled to assistance from society's courts. On a more practical level, the loss paralleled the practice of offenders having to forfeit their property as a consequence of conviction. Consequently, realistically speaking, they had no rights or demands to make in court since they had no property.[85]

Louisiana apparently does not suspend the right to litigate after conviction. The 1974 Louisiana Constitution states emphatically that:

> All courts shall be open, and every person shall have an adequate remedy by due process of law and justice, administered without denial, partiality, or unreasonable delay, for injury to him in his person, property, reputation or other rights./86/

The fact that the section guarantees access to every person rather than just every citizen reinforces the notion that conviction and incarceration don't affect this basic right.

Convicted persons may also, apparently, sue in their own names, unlike in some states where a prisoner can sue only through an authorized representative.[87] Art. 682 of the Code of Civil Procedure provides that a "competent major" has the capacity to sue.[88] Conviction of a felony is not given as grounds for incompetency. Similarly,

under Art. 731, a "competent major" has the capacity to be sued as well.[89]

As far as exercising these rights is concerned, Louisiana prisoners frequently go to court with their complaints, despite the difficulties in obtaining legal counsel.

Since convicted persons do retain the capacity to sue and be sued, no interruption or suspension of prescription apparently occurs as a result of conviction. Liberative prescription is a legal concept whereby the mere passage of time can render a legal right unenforceable. For example, under Civil Code Art. 3542 a suit to nullify a contract has to be brought within five years of the making of the contract. Louisiana law expressly states that "/p/rescription runs against all persons, unless they are included in some exception established by law."[90] No such exception exists for convicted persons. In Whitsell v. Rodrigues,[91] a 5th Circuit District Court case, the plaintiff argued that prescription should be interrupted by incarceration. The federal court found

> . . .no general rule of law in Louisiana--either legislative or judicial--providing for the interruption or suspension of the prescriptive period because of imprisonment;. . .and . . .it is not for this court to establish one by implication./92/

With respect to contractual power, Louisiana law declares that "/a/ll persons have the capacity to contract, except those whose incapacity is specially declared by law."[93] Convicted persons are not specifically excluded. Art. 1796 of the Civil Code states that:

> Those who may be interdicted from the enjoyment of their civil rights, in consequence of a

> conviction for crime, can not oppose their incapacity against the performance of any contract they may have made, unless it be against some person having power over them during their confinement, nor can any person with whom they contact plead such incapacity./94/

Art. 1796 reflects a hands-off attitude toward contractual obligations, leaving it to the individuals to assess each other's trustworthiness rather than imposing an automatic disqualification. Arguably, a person who contracts with a convicted felon without knowing his status, while unable to void it for incapacity, could perhaps plead mistake of fact[95] or error as to the person.[96] In order to invalidate on those grounds, however, the status of the person must be the main or only cause of the contract.[97]

A peculiarity appears under the Civil Code provisions on the extinguishment of obligations by payment. Art. 2147 states that a payment to a creditor isn't valid if the creditor is under some legal incapacity to receive it, unless the debtor can show that the creditor actually utilized the payment.[98] Art. 2148 then reads:

> But if the incapacity to receive the payment arose from the privation of civil rights by the effect of a sentence, then the payment is not good, although the payment were applied to the utility of the creditor./99/

The anomaly is that it is the creditor-offender who benefits by this provision by being able to presumably keep one payment while the debtor still legally owes the debt. Usually civil disabilities work to the detriment of criminal offenders.

Since the statute speaks in terms of "privation of civil rights," then the capacity to receive would automatically return to an offender

under Art. I, Sec. 20's restoration of citizenship after termination of supervision. The article did not appear in the French Code[100] nor in our codes of 1804 or 1808[101] and no cases apparently have interpreted its impact.[102]

With respect to contracting to serve as an agent, Art. 3027 says that "seclusion" of either the principal or agent can dissolve the relationship.[103] In a 1886 case,[104] the Supreme Court traced the word to its French origins and concluded the correct translation was "reclusion" which, unlike "seclusion", implies an involuntary confinement.[105] The court went on to say that reclusion in France meant a "temporary afflictive and infamous punishment, consisting in being confined in a hard labor institution and carrying civil degradation."[106] The court went on to hold that a voluntary self-commitment for psychological therapy was not a "reclusion."[107] The French version existed within the overall policy that civil death occurred upon conviction, a concept not adopted in Louisiana.[108] In France, the civil degradation status could devolve on persons not imprisoned at all[109] and the ineligibility to serve as an agent seemed more to protect others who might be deceived by these persons than to punish, per se, the offender. Since Louisiana prefers to allow persons freedom to contract with minimal government interference, the seemingly automatic disqualification for seclusion-reclusion may be a vestige of an inappropriate legal philosophy.[110] More in keeping with the ideal of contractual freedom are Arts. 3028 and 3031 which allow either the principal or the agent within certain conditions to terminate their relationship voluntarily.[111] This would allow the parties

involved to decide if conviction of one should dissolve their arrangement.

If a conviction does serve as an automatic disqualification, the capacity would be reinstated after termination of supervision under Art. I, Sec. 20's restoration of rights, since historically the disability arose within the context of forfeiture of civil rights in general. A pardon would not be necessary.

Under the concept of civil death, an offender forfeited his property and his capacity to make a will designating how that property should devolve.[112] In Louisiana, "/a/ll persons may dispose of their property by will unless expressly declared incapable by law. The incapacities relate to possible faulty judgment (i.e. minority,[113] insanity[114]) and convicted persons are not precluded. Another statute stipulates that persons incapable of officially witnessing testaments include "persons whom the criminal laws declare incapable of exercising civil functions."[115] Since Art. I, Sec. 20 restores "full rights of citizenship" after supervision is terminated, arguably this law is applicable only to persons actually serving sentences.

Capacity to Testify

In Louisiana, as in most states,[116] convicted persons are competent to testify. The primary prerequisite to testifying in either criminal or civil matters is to be a "person of proper understanding."[117] This could exclude underage persons[118] and mentally unsound people[119] but the case law has found convicted persons to be competent witnesses.[120]

The general rule in Louisiana is that evidence of prior crimes is inadmissible against a person on trial for a criminal offense or

testifying in a trial as a witness, unless specifically permitted through a statutory exception.[121] The two exceptions are that prior convictions can be admitted to impeach the credibility of a witness[122] and prior "acts" are admissible to prove a defendant had the requisite intent, knowledge or plan to commit the present offense.[123]

Impeachment of witnesses through the use of prior convictions is permissible in order to allow the trier of fact, be it judge or jury, to weigh the likelihood that a particular witness is telling the truth. In Louisiana, only convictions of crimes are admissible, not arrests, indictments or prosecution.[124] "Crime" covers both misdemeanors and felonies,[125] and any conviction is admissible, not simply those which relate to credibility such as a prior perjury.[126] Prior convictions, no matter how remote in time from the present, can be used[127] although juvenile records are apparently excluded.[128] Only the fact of the conviction can be presented, not details of the offense.[129]

When convictions are admitted to impeach, it has been held proper to also admit counterbalancing information, such as evidence that a new trial was given resulting in a non-prosecution,[130] or that the prior conviction was constitutionally infirm (i.e. the defendant did not have an attorney).[131]

While any witness may be impeached by prior convictions, a criminal defendant who takes the stand is particularly vulnerable to its consequences. Under Louisiana law, a defendant who takes the stand may be cross-examined like any other witness.[132] Unlike a nondefendant

witness who risks only an unpleasant smirching of his reputation, a defendant-witness is in danger of being convicted partly because the jury considers him an unsavory character due to prior convictions.[133] Derogatory character evidence to imply present guilt is admissible by the state only if the defendant first offers evidence of good character.[134] Additionally, character evidence is supposed to be limited to a person's "general reputation" and not delve into specific acts of the person.[135] Even though a defendant choses not to present good character evidence, convictions admitted to impeach his credibility may nonetheless be consciously or unconsciously considered by the jury in deciding present guilt.[136] In one Louisiana case, for example, a conviction was upheld when the court concluded that prior convictions admitted to impeach the defendant-witness were intended as attacks on the character of the witness and not on the character of the accused.[137] Since the two are actually the same person, such finite distinctions may be beyond a jury to distinguish.

One state supreme court justice has contended that the broad impeachment provisions violate the defendant's constitutional right to defend himself.[138] A defendant may choose not to testify for fear that resulting introduction of prior convictions will prejudice the jury against him in general, not just in terms of credibility as a witness. This particular justice felt that convictions used to impeach should be limited to crimes which "have some rational bearing upon the accused's propensity for veracity, such as a perjury conviction. . . ."[139]

Art.I, Sec. 20 of the 1974 Constitution probably does not affect

the use of prior convictions to impeach. While some delegate discussion claimed Sec. 20 wiped "the slate clean,"[140] voiding prior convictions even for impeachment purposes,[141] the discussion prior to the vote clarified that Sec. 20 did not erase the fact of conviction but simply restored basic prerogatives of citizenship.[142] The right to testify, for example, is arguably a right of citizenship, however convicted persons are competent to testify, hence that right needs no restoration.

The effect of a pardon on use of prior convictions to impeach is somewhat vague. Prior convictions are used to impugn present credibility and imply present guilt through present untrustworthiness and dubious character. If a pardon does indeed wipe the slate clean, blot out the existence of guilt and create a new man, as contended in State v. Lee, then arguably pardoned convictions should not be used. While a pardon cannot negate the fact a conviction occurred, it does purportedly strip it of its impact by erasing the taint it carries, and the taint is what is used to smirch the credibility or character of the witness.

The effect of a pardon on impeachment of witnesses has been dealt with jurisprudentially in Louisiana. In State v. Taylor,[143] a 1931 case, evidence of a prior conviction was admitted to impeach the defendant witness. He had been pardoned for the offense, but evidence of the pardon had been excluded by the lower court. The supreme court cited State v. Lee, saying a pardon "granted a new character. . .a new man, and it removes his disabilities."[144] The pardon had the effect of "re-establishing his credibility as a

witness"[145] and therefore it was prejudicial error to prevent him from rebutting the implication of the prior conviction by his pardon. The court did not hold that it was error to admit evidence of the prior conviction in the first place. In State v. Boudreaux,[146] a defendant-witness again objected to being impeached by a conviction for which he had been pardoned. The supreme court dispensed with the complaint by simply stating that "/t/he defendant was not prevented from showing that he had received a full pardon from the prior conviction."[147] Thus, even though Louisiana adopts the minority rule in giving a general broad effect to a pardon, it adopts the majority rule of allowing pardoned convictions to nonetheless be used to impeach.[148]

In addition to being used to impeach, prior convictions are admissible to infer "intent,"[149] or "knowledge"[150] on the part of an offender or to prove that the offense is one of a continuous series or system.[151] Unlike with impeachment, these prior convictions have to be acts that are similar or tend to point to the commission of the present offense. A prior conviction for fraud, for example, might imply that the accused had the same requisite evil intent when accused of a present swindle. Ironically, even though the use of prior convictions is already limited under this section, unlike with impeachment use, the courts have scrutinized its use closely and even imposed additional restrictions. If intent is not a prerequisite to being guilty of an offense, for example, evidence of an identical crime committed a few days earlier is inadmissible.[152] Under court guidelines established in State v. Prieur,[153] if the state wishes to

introduce other crimes' evidence, they have to notify the defendant in advance what offenses are included, and within what exception they fall. The state also must show the evidence is not repetitive or a subterfuge to imply bad character. The judge is to give instructions on the limited use of the evidence.[154]

While the use of prior offenses, for knowledge, system and intent purposes is restricted both statutorily and jurisprudentially, it is not restricted merely to prior convictions. Similar "acts"[155] are admissible, as is "conduct or declarations of the accused."[156] Since the validating force of an official conviction may be lacking the state must show "by clear and convincing evidence"[157] that the present defendant did indeed commit the previous act.

Presumably neither Art. I, Sec. 20 nor the pardon power would have an effect on admissibility of a prior "act" rather than a conviction, unless an offender was pardoned even before trial. As for use of prior convictions to infer probability of guilt, the same rationale is applicable as when convictions are used to impeach. Since the conviction is used to infer a state of mind at the time of the present offense, an intervening pardon that creates "a new man" arguably voids any inferences from the prior conviction. Most likely, the court would treat such a conviction the same as when used to impeach--admit the evidence of both the conviction and pardon, letting the jury assess if the pardon blots out the implications of the earlier crime.

Service as Juror

Moving to another part of the courtroom, the capacity to serve

as a juror has long been associated with rights of citizenship.[158] Both the 1921 and 1974 Constitution give the legislature power to provide particular qualifications for jury service.[159] The Code of Criminal Procedure excludes any person "under indictment for a felony" and any person "convicted of a felony for which he has not been pardoned."[160] The philosophy behind excluding such persons presumably is to prevent input of questionable integrity into a judgment of guilt or innocence. The revised statutes track the identical qualifications for civil trials.[161] Since these statutes were enacted prior to 1975, they do not take into account the new constitution. The exclusion of persons convicted but unpardoned is probably unconstitutional under Art. I, Sec. 20 insofar as it excludes a person who has completed his sentence. Persons still incarcerated, and persons under indictment are unaffected by Art. I, Sec. 20 and would still be ineligible to serve.

Since the incapacity is legal, it has served as a grounds for challenge for cause in both criminal and civil trials.[162] A challenge for cause, however, must be made timely.[163] In a 1970 case, a defendant moved for a new trial on the grounds that one of the jurors had a prior felony conviction.[164] The court cited the rule that a new trial will be granted upon discovery of a prejudicial error after verdict only if "reasonable diligence" could not have discovered it earlier.[165] Since the defense counsel did not question the prospective juror during voir dire as to prior convictions, diligence was not shown and the verdict was affirmed.[166]

Appointments of Trust

Another judicial area where conviction affects status is in eligibility to serve as a court sanctioned fiduciary. Under the 1921 Constitution, unpardoned offenders could not hold appointments of public trust.[167] No such specific disability appears in the 1974 Constitution.

However, according to the Code of Civil Procedure "/a/ convicted felon, under the laws of the United States or of any state or territory thereof" cannot be confirmed as a testamentary executor or appointed dative testamentary executor, provisional administrator or administrator.[168] A separate disqualification is bad moral character, determined through a contradictory hearing.[169] The rationale does not appear to be punishment of the offender but rather protection of the property. A very early case indicated that a convicted person is assumed to be of such poor moral character that he can't be trusted as a curator of a vacant estate.[170] In Succession of Townsend,[171] the named executor was in jail for murdering the testatrix. There the court refused his appointment, not so much for poor moral character but because the court considered him incapable of discharging the duties of executor on account of all the anxiety and duress he was presumably experiencing awaiting trial.

A much more recent case[172] dealt with a similar situation but came to a different conclusion. The decedent's husband, who was under indictment for her murder, petitioned to be appointed administrator of her estate. The court made the perhaps startling conclusion that:

> . . .the record contains no evidence whatsoever, save the indictment, that Jones is an untrustworthy person or unfit for appointment because of bad moral character./173/

Presuming him innocent until proven guilty, noting also that he had been released on bail, which indicated some mitigating circumstances, the court confirmed the appointment. Since he had not been actually convicted, he was not precluded statutorily.

Convicted felons are also specifically disqualified from acting as tutors, as are persons of "bad moral character."[174] Interestingly, an earlier statute disqualified from tutorship "/t/hose whom the penal law declares incapable of holding a civil office,"[175] indicating that the rationale was a general civil disability rather than presumed untrustworthiness.

If the basis for these disqualifications is civil disability in general, Art. I, Sec. 20 should remove the incapacity. Under this rationale, only persons actually under sentence would be disqualified. If the basis is, on the other hand, a presumed lack of good moral character, Art. I, Sec. 20 probably has no impact. Sec. 20 purports only to restore legal rights; it does not cleanse the offender internally, washing away bad character.

A pardon, on the other hand, does arguably cleanse the offender of his earlier guilt and related poor moral character. As with the credibility of a witness, the purpose of considering a prior conviction is to disparage the person's present trustworthiness. While persons under sentence would still be excluded, regardless of whether the rationale is general disability or poor moral character, a pardon should at least be allowed to rebut the implications of a

conviction for which the debt has been paid. While no cases are on point, the court could hold a contradictory hearing to consider the conviction and the pardon, rather than automatically disqualify a pardoned offender. This is the procedure when a non-offender applicant is challenged as having unfit moral character.[176]

Trustees have an apparently smoother acceptance judicially. The only apparent qualification to serve as trustee is to be able to contract and be a citizen.[177] This would exclude persons actually under sentence since their citizenship status is in limbo, but Art. I, Sec. 20 would restore the capacity upon release. Contractual rights are arguably not impaired by conviction and incarceration at all.

Employment

Perhaps the most important task facing an offender, upon release from prison, is finding a job. He may be willing to work but may be frustrated by legal restrictions on his eligibility as well as the understandable wariness of private employers.[178] Yet without a job his liklihood of returning to crime is increased, thereby continuing the cycle of distrust and disappointment.

The 1921 Constitution itself contained several restrictions on the employment possibilities of ex-felons. Art. 8, Sec. 6 banned them from holding an "office or appointment of honor, trust or profit in this state. . . ." Art. 14, Sec. 15(I)(9) dealing with civil service, allowed preferences in job eligibility to "citizens and registered voters" which indirectly hampered ex-felons who didn't have the right to vote unless expressly pardoned. Neither

of these enactments were carried forth into the 1974 Constitution.

Ex-felons face other obstacles in their attempts to find work. Louisiana has numerous professions for which a license is required.[179] The vast majority include qualifications that could automatically eliminate an ex-offender. Refusal can be grounded on conviction of a crime,[180] conviction of a crime involving "moral turpitude,"[181] a felony,[182] and restrictions limiting licensing to those possessing "good moral character."[183] The list includes such wide-ranging professions as accountants, barbers, hearing aid dealers, shorthand reporters, doctors and sanitation workers.[184] One profession, at least, was found to discontinue the impact of the conviction once sentence was served.[185] To be an architect, one has to have "paid his debt to society if he has ever been convicted of a felony."[186] The qualifications also include the more general "good moral character."[187]

During the debate on Art. I, Sec. 20, the delegates discussed and disagreed as to its impact on the ex-offender's access to employment. Delegate and committee member Chris Roy felt that the provision gave the ex-offender the right to "hold certain types of job," that "/t/here are certain jobs now that you can't hold if you've ever been convicted of a crime without being pardoned."[188] While this sounds like a reference to licensing restrictions, Roy stated in a later interview that he was actually alluding to the old laws preventing ex-felons from holding public office and positions of public trust.[189] He was specifically thinking of an instance in his district where a person had been turned down for the job of city policeman because he had been convicted of negligent homicide sometime in the past.[190] However,

SURVEY OF LICENSED OCCUPATIONS IN LOUISIANA

Occupation	Statute	Requirement or Restriction Affecting Entry by Ex-Offender
certified public accountant	37:79(3)	good moral character
architects	37:146(1)(2)	good moral character conviction of a felony for which the debt to society hasn't been paid
attorney	37:Chap. 4 App. Art. 14, Sec. 7	good moral character
barber	37:356 37:374	good moral character *conviction of a felony
cosmetology (manicurist)	37:502 (37:507) 37:513	good moral character (good moral character) *conviction of a felony
podiatry	37:613 37:624	good moral character *conviction of a felony
engineer(civil)	37:692(B) (37:700)	good moral character (grounds for suspension/revocation of a license--conviction of a felony)
dental hygienist	37:764	good moral character
dentist	37:776	*conviction of felony or crime involving moral turpitude
embalmers/funeral directors	37:842 37:846(9)	good moral character *conviction of felony or offense involving moral turpitude
registered nurse	37:921(B)	*guilty of a felony
practical nurse	37:970 37:969(b)	good moral character *guilty of a crime

*indicates the same grounds may be used to suspend or revoke a license already issued

Occupation	Statute	Requirement or Restriction Affecting Entry by Ex-Offender
medication attendants	37:1025(5)	conviction of a felony
optometry	37:1049(1) 37:1061(1)	good moral character *conviction of crime involving moral turpitude
osteopaths	37:1111-1123	no apparent exclusion for ex-offenders
pharmacist	37:1179	good moral character
midwifery/ physician	37:1272 37:1285	good moral character *conviction of a crime
acupuncture	37:1356-1360	no apparent exclusion for ex-offenders
real estate brokers/ salesman	37:1438 (37:1454)	good reputation for honesty and fair dealing (grounds for suspension/revocation of license - conviction of a felony or other violation involving moral turpitude)
veterinarian	37:1520 (37:1526)	good moral character (grounds for suspension/revocation - conviction of felony or other public offense involving moral turpitude)
watchmakers	37:1592	good reputation and good moral character
pawnbroker	37:1751-1762	no apparent exclusion for ex-offenders (unless convicted three times for violations of pawnbrokers' statutes)
second hand dealer	37:1862	good moral character
transient merchant	37:1901-1909	no apparent exclusion for ex-offenders

*indicates the same grounds may be used to suspend or revoke a license already issued

Occupation	Statute	Requirement or Restriction Affecting Entry by Ex-Offender
sanitarians	37:2114	*conviction of a crime
contractors	37:2156.1	no apparent exclusion for ex-offenders
radio & TV technicians	37:2308	no apparent exclusion for ex-offenders
psychologist	37:2357 37:2360	good moral character *conviction of a felony or crime involving moral turpitude
physical therapist	37:2403(3) 37:2413	good moral character *conviction of a crime
hearing aid dealers	37:2445 (37:2453)	good moral character (grounds for suspension/revocation of a license - conviction of an offense involving moral turpitude)
nursing home administrators	37:2506 (37:2510)	good character (grounds for suspension/revocation of license - conviction of a felony)
shorthand reporters	37:2554 (37:2557)	no apparent exclusion for ex-offenders (grounds for suspension/revocation of license - conviction of a felony or a misdemeanor involving moral turpitude)
financial planning and management service	37:2585	conviction of any crime involving moral turpitude
speech pathologist	37:2659 (37:2662)	good moral character (grounds for suspension/revocation of license - conviction of a felony)
social workers	37:2706 37:2713	good moral character *conviction of a felony
chiropractor	37:2805(B)(3) (37:2816)	good moral character (grounds for suspension/revocation of a license - conviction of a crime)

*indicates the same grounds may be used to suspend or revoke a license already issued

the laws barring access to jobs of public trust were not re-enacted in the new constitution anyway, hence Sec. 20 presumably would only affect persons convicted prior to the effective date, as persons convicted later would not have those employment opportunities taken away.

When asked specifically, Roy felt Sec. 20 would make unconstitutional "general" licensing restrictions in the non-government area but not restrictions tailoring the offense to the profession.[191] For example, a drug offender could be denied a pharmacist license; an embezzler an accounting license. Louisiana's licensing restrictions are not so specifically structured. . .<u>any</u> offense could trigger an exclusion.

Within the general debate on Sec. 20 was a sub-debate on an amendment that changed the wording from "full rights shall be restored" to "full rights <u>of citizenship</u> shall be restored."[192] /<u>Emphasis added.</u>/ Delegate James Derbes, who offered the amendment, felt it restored the right to vote and "the right of employment and the right to hold office."[193] When asked if the provision voided licensing restrictions, Derbes replied "Absolutely not."[194] Like Roy, Derbes felt the section affected only public office and positions of public trust.

Delegate Gravel also favored the addition of the citizenship proviso, saying it restored "a couple of limited rights" including "the right to vote and the right to hold a job, let's say with the state, or to run for office."[195] Gravel felt that by adding "of citizenship," the section's impact was greatly reduced from the "broad sweep" of the earlier phrasing.[196]

Declaration of Rights Committee Chairman, Alphonse Jackson, on the other hand, intended Sec. 20 to have a substantial impact. It came out of his committee without the limiting language. When another delegate proposed to eliminate the provision altogether,[197] Jackson strongly defended the proposal, including a reference to job restrictions:

> I think that when we talk about prison reform in this country, when we talk about some degree of rehabilitation, we certainly have to recognize the serious problems that confront individuals who have been incarcerated. . . All we are saying here is that an individual ought not to have to pay the rest of his life, time and time again, that he ought not to have to face the fact that everytime he asked to be employed that he is faced with the fact that he once went afoul of the law./198/

A short time later, Delegate Jackson was asked if he felt that an attorney who had been disbarred for conviction of embezzlement would be reinstated automatically to the bar after completion of his sentence.[199] Jackson replied, "/T/hat's not a right. That's a privilege to practice law, to practice medicine, to engage in the profession of teaching is a privilege and when you abuse that privilege you lose it."[200] Jackson's remarks are not necessarily contradictory because revoking a license for abuse is different from denying a license in the first place for a conviction that occurred prior to the request and unrelated to the employment.

Delegate Alexander, who supported the addition of "of citizenship" seemed nonetheless to see a broad impact on employment opportunities. Alexander wasn't so concerned about the restoration of the right to vote as he was the fact that an ex-offender "has to

work. What happens is, once the judge sentences him for a felony, to Angola, he is convicted for life, in Louisiana, and barred from employment.[201] He gave an example of an ex-felon returning to a former employer and being rejected because of the conviction. Most job applications ask if the applicant has ever been convicted--"He tells the truth. He doesn't get the job."[202] As a result, he's "thrown back on the street" to commit another crime.[203] Alexander felt that adoption of Sec. 20 would allow the ex-convict to "get a job."[204] When asked if he felt Sec. 20 would permit an ex-felon to deny he had ever been convicted, Alexander answered no, but added "/M/ost employers, especially the various civil service systems investigate, and when they investigate, they would not find this in his record."[205] Alexander implied that some sort of expungement could occur but the comment wasn't clarified. Delegate Jack, who opposed the provision for several reasons, felt it would permit an ex-felon to answer "no," if asked if he had ever been convicted.[206]

The debate over Sec. 20's impact on state licensing laws wasn't quieted by the passage of the provision. Rep. Woody Jenkins, a co-author of the Declaration of Rights, noted that the "proceedings of the Convention are unclear as to the extent" of the restoration of rights, but "/a/t a minimum, it includes the return of all political rights and the right to engage in licensed occupations or accept state employment if otherwise qualified." [207] (Emphasis added.)

Jenkins also felt that Sec. 20 would restore all the rights included in the Declaration of Rights.[208] Art. I, Sec. 3 reads, in part:

> No person shall be denied the equal protection of the laws. No law shall discriminate against a person because of race or religious ideas, beliefs, or affiliations. No law shall arbitrarily, capriciously, or unreasonably discriminate against a person because of birth, age, sex, culture, physical condition, or political ideas or affiliations. . . .

Ben Miller, Chairman of the American Bar Association Section of Criminal Justice, suggests that a combination of the above Sec. 3, Sec. 20 and Sec. 10's right to vote, effectively precludes "the Legislature from imposing any restrictions whatever on criminals after they have served time, regardless of the type of offense committed."[209] However, Sec. 3 does not mention the status of ex-offender as being among the categories of persons protected from even arbitrary discrimination.

Sec. 2 of the Declaration of Rights states that "No person shall be deprived of life, liberty or property except by due process of law." Arguably, the procedure by which a person is convicted of a crime is adequate "due process" to also terminate his access to certain types of jobs. The legislature, in 1967, did enact the Administrative Procedure Act,[210] whereby agency rulings and decisions could be reviewed by an independent district court. The act does apply to licensing decisions by state boards. if the board is under a legal mandate to provide notice and hearing prior to making its decision.[211]

The district court can overrule an agency decision if they find it to be "arbitrary," "capricious," an "abuse of discretion,"[212] or "/m/anifestly erroneous in view of the reliable, probative, and substantial evidence on the whole record."[213] This procedure permits a case by case perusal of licensing restrictions.

Returning to the impact of Sec. 20 alone, the attorney general in 1975 sought to distinguish Sec. 20's effect by comparing it to a pardon. Unlike Jenkins and Miller, the attorney general found Sec. 20 not to affect licensing:

> A felony conviction, besides depriving a person of his rights of citizenship, i.e. right to vote, also deprives the convicted person of many privileges, for example, the privilege of holding a liquor license. Therefore it is our opinion that Article 1, Section 20, restores only the basic rights of citizenship; /while a pardon/ restores the privileges as well as the rights of citizenship./214/

One case has commented on Sec. 20's possible impact on licensing. In Williams v. Louisiana Board of Alcholic Beverages[215] the plaintiff was denied a liquor license on the basis of a prior felony conviction. The plaintiff based her case in part on Sec. 20. The Third Circuit Court of Appeals decided against the plaintiff, but on the basis that the new constitution was not retroactive and therefore inapplicable to a conviction before its passage.[216] In dicta, the court favorably quoted from Lee Hargrave's law review commentary on the purpose of the Derbes amendment which changed the wording from "full rights" to "full rights of citizenship:"

> . . .in Derbes' view, his wording would not prevent adoption of legislation prohibiting the carrying of weapons by convicted felons or restricting the issuance of liquor licenses to persons who had been convicted of an offense. He explained that he had in mind restoration of basic rights of citizenship, such as the rights to vote, to work, to hold office, and to be employed by the state./217/

The Supreme Court, in 1889, upheld the right of local governing units to license certain professions in the interest of the "general

welfare of its people,"[218] but at the same time an objection could be made if the qualifications "have no relation to the occupation."[219] The qualifications should be "appropriate to the calling or profession."[220]

Like Louisiana, many other states have ex-offender restrictions that seem somewhat afield from the original Supreme Court intent. An ex-felon cannot be a horsemeat salesman in Illinois.[221] Dry cleaners in California,[222] and foresters in Oklahoma[223] are required to have "good moral character." In Maryland, the court upheld a denial of a cab driver license in part because of the applicant's prior convictions as a student protester.[224]

On the other hand, in a Tennessee case, the court found that licensing requirements in general for watch repairmen interfered with private property rights.[225] The court felt watchmaking was not so associated with public health, safety and welfare that the state police power was warranted in regulating it. Louisiana stipulates that watchmakers must have "good moral character."[226] In spite of these occasional decisions, "/a/s a general rule. . .courts are reluctant to substitute their judgement for that of the legislature."[227]

The 1974 Constitution apparently opens up opportunities in the public sphere of employment which had been closed before. Under the old constitution, a school bus driver, for example, was ruled a holder of an "appointment for profit," hence dismissed after 10 years of employment upon discovery of a conviction that occurred 25 years earlier.[228] The court noted that no allegation was made that the driver was not competent and faithful at his job but rather that the remote conviction automatically excluded him from that job. It was this sort of deprivation

that was apparently intended to be erased by Sec. 20. Nor did the 1974 Constitution re-enact any of the disabling provisions of the old constitution. Consequently, an ex-felon is eligible for civil service placement and other public employment.

While the legislature still has the right to license particular occupations, it has given the courts judicial review, through the Administrative Procedure Act, of individual board decisions on licensing. The court may void such a decision if it is "arbitrary, capricious" or an "abuse of discretion."[229] The 1974 Constitution places the courts in a peculiar position with regard to the standard. On the one hand, the delegates did not seem to intend to wipe out licensing laws altogether, but they did apparently open up opportunities in state and local public employment. An ex-felon can now become a mayor, or head of an agency or a superintendent of a school but cannot be a barber, a hearing aid dispenser or a watchmaker.[230] In light of the re-opening of government employment opportunities for ex-offenders, the courts could well decide that some of the licensing restrictions and decisions are "arbitrary" or "capricious." In this respect, Sec. 20 wouldn't affect licensing laws directly but would do so in a backhanded way by setting a new standard for the courts to follow.

Arguably a pardon <u>does</u> cause licensing restrictions to be inapplicable. Under Louisiana jurisprudence, "the /<u>p</u>ardoned/ offender is as innocent as if he had never committed the offense."[231] Professor Hargrave concludes that a pardoned individual wouldn't be disqualified on the basis of his prior conviction.[232] An Attorney General's Opinion, distinguishing the pardon from Sec. 20, stated that a pardon "restores

the privileges" as well as the rights of citizenship, including the privilege of holding a liquor license.[233] In an early case,[234] a lawyer who had been disbarred for a conviction was subsequently pardoned and petitioned to have his disbarment rescinded. The supreme court ruled that the pardon "removed the disqualification" resulting from his conviction, but it declined to rescind the prior disbarment.[235] The attorney was advised to simply re-apply for admission, as would a new attorney.

The delegates at the constitutional convention did not give guidance as the effect of a pardon. In the discussion on the pardon power itself, no mention was made of its impact. During the debate on Sec. 20. various delegates gave their opinions on the pardon's effects but only in conjunction with their concepts of Sec. 20. As has already been discussed, the opinions were conflicting and confusing. Consequently, courts will no doubt continue to rely on the jurisprudence rather than constitutional intent in determining the impact of a pardon upon licensing restrictions.

The U.S. Supreme Court recently upheld the voiding of a Chicago city ordinance that permanently barred certain classes of offenders from obtaining a taxi driver's license.[236] The ordinance was ruled an unconstitutional denial of equal protection in light of another ordinance which provided that a person already holding a license may have it revoked if convicted of the same offenses, but is not automatically so revoked. Because of the unique factor of two ordinances being compared and the fact that the decision was affirmed by only a tie vote by the Supreme Court makes the decision less predictive of how the court makes the decision less predictive of how the court might respond to other licensing laws.

Domestic Relations

In order to contract a marriage, the persons must be willing and able to contract and must do so pursuant to the proper "forms and solemnities. . . ."[237] Criminal conviction is legally no obstacle to either the willingness or the capacity to marry. However, according to penitentiary policy, an inmate desiring to marry must obtain permission from the prison chaplain. The chaplain, in turn, after interviewing the couple, makes a recommendation to the warden. Length of sentence, disciplinary record and apparent sincerity of the request are taken into consideration. While the statutes don't provide for this special screening, to be denied would make it difficult, if not impossible, to wed, since the marriage must be performed by an official magistrate or recognized minister.[238] Obviously once a person is released from confinement, he would be free to contact his own minister or local magistrate and arrange to be married.

Unlike several other states, Louisiana hasn't adopted any procedures for compulsory sterilization of certain types of offenders.[239] Presumably these laws are meant to prevent genetic transmission of criminal tendencies, a questionable justification scientifically. Castration is periodically recommended for sex offenders, but the basis there is not to prevent procreation but simply to prevent a repeat of the crime.

Although a criminal conviction in Louisiana does not affect the right to have children, it may impede an offender in adopting a child. In its investigation of a proposed adoption, the welfare

department studies a number of factors, including "the moral. . . fitness of the petitioner."[240] The standard is vague and a pardon would no doubt help negate the impact of a conviction. The overriding consideration is 'the best interest of the child."[241]

With respect to divorce in Louisiana, conviction of a felony with a sentence to death or imprisonment at hard labor is one of nine grounds for separation from bed and board[242] and one of two grounds for immediate divorce.[243] The suit can be filed only by the nonconvicted spouse. Both conviction and sentence are required, making it unclear whether the underlying justification is that the offender lacks good moral character or simply that the conjugal status of the couple has been seriously interrupted. Either way since adultery is the only other ground for immediate divorce, the legislature presumably considers a marriage to an incarcerated felon unsalvageable if the spouse wants to divorce, hence no waiting period is required. A spouse, of course, can always choose to stay married or pursue only separation rather than divorce.

In the grounds for separation, the statute adds the proviso that the hard labor sentence be "in the state or federal penitentiary."[244] (Emphasis added.) The divorce law adds no such stipulation as to location of the offense. Originally the wording for both the separation and divorce referred to condemnation "to an infamous punishment,"[245] which apparently meant the death penalty or imprisonment at hard labor in a state institution.[246] Arguably the legislature did not intend to re-enact the law in such a way that conviction and sentence in another state would be grounds for immediate divorce but not legal

separation. While the argument may seem technical, the attorney general and the Louisiana Supreme Court made that exact distinction with respect to the disenfranchisement provisions of the 1921 Constitution. Referring to Art. VIII, Sec. 6, which disqualified voters on the basis of conviction, the attorney general noted that the provision:

> . . .speaks of crimes which may be punishable in the penitentiary. This means one certain penitentiary, and can only refer to the Louisiana State Penitentiary. If it had been intended to include Federal penitentiaries and those of other States, the Article would not have used the term the penitentiary, but would have used the term a penitentiary or any penitentiary./247/

In addition to the ambiguity as to other states prisons, Louisiana no longer has just one institution for persons sentenced to hard labor, but several.

A divorce will not be granted on the grounds of conviction and sentence to hard labor if it occurred prior to the marriage.[248] Even if the spouse is unaware of the prior criminal record until after marriage, the action is presumably of no avail.[249] Voiding a marriage for mistake as to the person[250] refers only to the actual identity of the person and not to an error as to "the character of the person, or in his or her attributes, condition in life or previous habits."[251]

If the spouse fails to file suit upon conviction and sentence and the offender is subsequently released, the validity of suing at that point is unclear. If the underlying basis is the interruption of conjugal relations, the offender is now ready to return and the suit would fail. If the basis is the moral turpitude of the offender,

arguably the suit is still timely, although the offender has presumably paid his debt to society. Art. I, Sec. 20 would have no effect since it doesn't purport to deal with personal relations, only rights of citizenship.

The impact of a pardon is less clear cut, as a pardon does purport to wash away the taint left by the conviction; thus a pardoned offender is a "new man" and is ready to resume conjugal relations.

Only one Louisiana case has touched on the interrelationship of a pardon and termination of a sentence with a divorce proceeding.[252] In this instance, the pardoned offender initiated the suit on the basis of adultery and the wife reconvened on the basis of his prior conviction. The court noted that the wife could have sued for divorce at the time of conviction "or at any time thereafter."[253] Nonetheless, the court granted his petition, feeling her adultery had precluded her countersuit. The court specifically declined to rule on whether the pardon would otherwise have voided her suit for divorce. The implication of the case, at least, is that without a pardon, the grounds would remain valid even after release from prison. What effect a pardon would have remains undecided.

With respect to institutions, since imprisonment at hard labor or sentence to death is required, incarceration in a parish facility, even for conviction of a relative felony, would not constitute grounds for either separation or divorce.[254] Again, the underlying basis may be that such a conviction is less morally reprehensible or simply that such sentences tend to be shorter and don't irrevocably interrupt conjugal relations.

Lastly, an additional basis for separation occurs when one of the spouses has been charged with a felony and has fled.[255] In order to succeed, the spouse must produce proofs that the fleeing partner is actually guilty of the offense. This burden of proof would imply that it's the moral turpitude, rather than interruption of conjugal relations, that underlies the policy of dissolving marriages because of criminal conviction.

Custody of Children

In addition to losing a spouse, a convicted felon may also lose parental rights over his children. During the pendency of a suit for separation or divorce, custody of the children is to be granted the wife unless "strong reasons"[256] indicate otherwise. Since usually the husband is the one incarcerated, a court would be highly unlikely to award him custody, even without the presumption in favor of the wife. If the wife is imprisoned, presumably that is a "strong reason" to award custody to someone else. If either spouse is convicted but not imprisoned, or has served his sentence, a court still might find the spouse morally unfit to have custody. The underlying consideration is the welfare of the child[257] and much discretion is given to the judge.[258]

Once a divorce is finalized, the presumption is to award permanent custody of the children to the parent who obtained the divorce, unless it would be better for the child to be placed with someone else.[259] Once this placement is made, it's as if the other spouse "had died."[260] In addition to losing custody, an imprisoned spouse may possibly be denied visitation by his children. While the particular issue doesn't

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appear to have been litigated in Louisiana, visitation rights are presumed unless the parent "has forfeited the privilege by his conduct or the exercise of it would be detrimental to the welfare of the child."[261]

Even if the convicted felon filed and obtained the divorce, the court could easily ignore the presumption in the interest of the child, and place the child elsewhere. This would be especially true while the spouse is incarcerated as even if awarded custody, he couldn't act upon it personally until released. Once released, the court may be more willing to consider his desires as "/t/he purpose of a custody determination is not to punish a parent for any past misconduct, it is rather to serve the best interests of the children of the marriage."[262] In another case,[263] the court found that two convictions for drunkenness on the part of a grandparent did not render the home improper. The brother of the wife had also been charged with a criminal offense, but the court noted that the brother didn't live at the house, nor had a conviction occurred. How the court would feel about a parent as opposed to a relative of the parent being convicted of a crime, particularly a felony, is apparently unlitigated, although such a parent would presumably have a heavy burden of proof of fitness.

A child of a convicted felon might also be lost through "neglect" proceedings in Louisiana. The statutory definition of a "neglected" or "dependent" child includes one who has been "abandoned" by his parents and one "whose parents, tutor or other custodian are unable to discharge their responsibilities to and for the child because of

their incarceration."[264] Additionally, a court can assert custody of a child whose "environment or associations are injurious to his welfare."[265] Such a child can be placed in a foster home or confined in a private or public institution.[266] Even given these options, the court is to allow the child to remain with his parents unless "his welfare or the safety and protection of the public cannot . . . be adequately safeguarded. . . ."[267] Several other states, with similar statutes, have been hesitant to declare a child neglected because of a parent's imprisonment.[268] The rationale has been that it's a further punishment, and arguably, also, the parent has not willfully abandoned the child.[269]

A child will also be "abandoned" and subject to adoption if a parent has refused to care for him for four months and it's apparent that it is an intentional disregard of parental responsibilities.[270] Since this is considered a voluntary surrender, the courts require a clear manifestation of the parent's intention to be permanently rid of a child. Since such a proceeding dissolves the bond between parent and child, "all reasonable doubt should be resolved against entering such a decree."[271] Even an incarcerated felon could probably block such a decree by asserting that, even though presently unable to care for the child, he has no intention of abandoning the child. If a child is declared abandoned, his parent's consent is no longer necessary for adoption.[272]

Parental consent is also not required for adoption in one other specific instance. If a step-parent, married to the natural parent, or if the grandparent of the child, desires to adopt, consent of the

other parent isn't needed as long as the petitioner already has legal custody of the child and the other parent has refused to pay a court order of support for a year or is a non-resident and has failed to support for a year after the petitioner obtained custody.[273] The jurisprudence has implicitly added that the non-support has to be unjustified.[274] Since the parent's presumed indifference is the basis for dispensing with his consent, a showing that his failure to support was beyond his control voids the presumption. An incarcerated person has little opportunity to earn money and a failure to provide support under those circumstances would probably not obviate his consent to his child's adoption.

In all instances where the judge needs to assess the moral character of the offender, such as in consideration of his fitness to have custody of his child, a pardon would no doubt help alleviate the negative impact of a prior conviction.

Property Rights

A criminal conviction does not result in property forfeiture in Louisiana. Historically, a conviction through the concepts of attainder and corruption of blood, could cost the offender his property and inheritance rights as well.[275] The doctrines were not widely adopted in the United States.[276] Both the United States and Louisiana Constitutions forbid the enactment of of bills of attainder.[277] Additionally, the Declaration of Rights of the Louisiana Constitution includes a strong statement that "every person" has the right to own property and that it cannot be taken except for certain reasons.[278] While the delegates were primarily thinking in terms of expropriation

for public purposes, the article protects property rights in general.[279]

A conviction can affect a person's eligibility to inherit. All persons, including convicted criminals, have the capacity to inherit[280] as the only qualification is that the heir exist when the succession is opened.[281] A person may be declared unworthy of inheriting, however, due to some injury he causes the person from whom he is to inherit.[282] The unworthiness doesn't occur automatically but must be sued for and a judgment obtained.[283] One ground for unworthiness is being "convicted of having killed, or attempted to kill, the deceased."[284] The petition to declare an heir unworthy on this basis must include the allegation that the heir has been convicted. Consequently, if the slayer heir should die himself before being convicted[285] or if no charges are actually brought,[286] the heir cannot be declared unworthy.

With respect to children of a parent declared unworthy, they can still inherit in their own name, but an unworthy father is not entitled to the traditional usufruct over the children's inheritance.[287] Once the unworthy parent dies, however, the children can replace him, via representation, and inherit in his name without being barred by his unworthiness.[288] Since the doctrine of unworthiness appears under the general provisions on legal successions as opposed to testamentary dispositions, it presumably only can be brought against heirs who would would inherit by law in the absence of, or in the case of forced heirs, in spite of, an actual will.

Disinherison is asserted by the testator himself against a forced heir.[289] Parents can disinherit their children;[290] children their

parents[291] and ascendants their descendants.[292] A child may be disinherited for being "guilty, towards a parent, . . .of a crime" or for attempting to kill either parent or accusing either parent of a capital crime, other than high treason.[293] Ascendants can disinherit descendants for the same reasons when the injury is directed towards them.[294] A child can disinherit a parent for attempting to kill him, for attempting to kill the other parent or for accusing him of a capital crime, other than high treason.[295] Unlike with an allegation of unworthiness, an actual criminal conviction is apparently not required, but the testator must state in his will why he is disinheriting the heir and the other heirs must have facts available to prove the grounds of the disinherison.[296] Similarly with unworthiness, the children of a disinherited person cannot represent him in a succession while he is alive but can step into his degree, unhindered by his disinherison, after he dies.[297]

Since a conviction can trigger an allegation of unworthiness and a criminal act that of disinherison, the infirmity would presumably last at least as long as the person was under sentence. Since the causes for either action are injury to the person from whom the offender was to inherit, the rationale is less that of general incapacity or untrustworthiness but rather that he simply doesn't deserve to inherit from someone he has grievously injured. Since neither action purports to affect capacity to inherit, Art. I, Sec. 20 would have no impact on his status once released--he never lost the capacity to inherit, hence it doesn't need restoration.

A government granted pardon arguably has no impact either. A

pardon is a state grant of clemency and may not be intended to affect the peculiar intimacy involved when children, parents or other close heirs cause serious injury to each other. With respect to unworthiness, a statute specifically states that the killer or would-be killer "will not be the less unworthy, though they may have been pardoned after their conviction."[298] At the same time, a personal reconciliation and an individual pardon from the person injured does void the unworthiness.[299] In the case of a forced heir, for example, if the heir attempts to kill the testator and fails and the testator doesn't disinherit him, this is presumed forgiveness.[300] In the case of a nonforced heir, the fact that the testator included him in his will presumably would connote a personal pardon. If the would-be heir actually kills the testator, then obviously no opportunity exists for the reconciliation and the suit for unworthiness could be brought.

While the disinherison articles don't mention either a state pardon or personal pardon, the leading case, Succession of Lissa,[301] concluded that disinherison and unworthiness were so similar that they should be construed together. Hence they found that even though the testator left a will disinheriting his child, the child was able to claim the forced portion by showing they had reconciled after the will was written. Analogizing further, a state pardon would not, according to the unworthiness statute, erase the cause of disinherison. While the mandate of the statute is clear, the doctrine of forced heirships are a legislative creation exemplifying a strong public interest in preserving family unity and security. Both the statutes and jurisprudence require heavy burdens of proof

and procedural compliance. This researcher found no case where an heir was successfully disinherited or decreed unworthy as a result of criminal behavior. How the court would balance the "new man" concept of a pardon and the policy of upholding forced heirships as against the specific proviso of the analogized statute is unknown. The courts have frowned upon legislative restrictions on the effects of pardon. Any decision would probably hinge on whether the disinherison or unworthiness action is considered more a private matter between the family members as opposed to a question of public policy, threatening the doctrine of forced heirships in general.

As far as donations inter vivos are concerned, again, criminal conviction does not affect the capacity to give or receive.[302] A donation may be revoked if the donee is ungrateful.[303] Ingratitude exists, for example, if the donee tries to kill the donor or is guilty of a criminal act towards him.[304] The donor himself has to bring the action, and only against the donee. The heirs of the donor cannot sue the ungrateful donee (unless the donor initiated the suit or the donor died before the one year prescriptive period passed) nor can the donor sue the heirs of the donee.[305] In Grandchampt v. Administrator of Succession of Billis,[306] the court felt it obvious that the donee had murdered the donor before committing suicide himself, but concluded that "the law does not visit the sins of the donee on his heirs,"[307] hence the donation was not revoked.

If the donor does live to sue for revocation, evidence of an actual conviction is not apparently required.[308] Since the action has to be brought within a year of the injury or knowledge of the

injury,[309] waiting for an actual conviction is unrealistic. Nor would an executive pardon appear to wash away the taint. Unlike disinherison, revocation of donations inter vivos does not necessarily involve forced heirships and the state has consequently less interest in interfering. If the donee has been guilty of an act of ingratitude as defined, the donor should be entitled to a return of his gifts regardless of a pardon.

The same causes of ingratitude will also void a donation made in the form of a testamentary bequest.[310] With respect to the killing of the testator, the law specifically provides that the legacy to the killer is automatically revoked.[311] In this case the property would remain in the succession rather than pass on to the legatee's heirs.

The Right to Carry Firearms

Section 11 of the Declaration of Rights states that:

> The right of each citizen to keep and bear arms shall not be abridged, but this provision shall not prevent the passage of laws to prohibit the carrying of weapons concealed on the person.

The question arises as to whether Sec. 11, through Sec. 20, precludes any restriction on ex-felons owning weapons. Semantically, it would seem it does: Sec. 11 refers to the "right of each citizen" and Sec. 20 says that "full rights of citizenship shall be restored."

During the debate on Sec. 11, Delegate Avant, a supporter of the provision, was asked outright if Sec. 20 and 11 would "permit a former felon to carry firearms." Avant replied, "I don't think so because the right to citizenship that is referred to in that section

are the rights to vote and the restoration of civil liberties."[312]

During the debate on Sec. 20, which occurred a few days before that on Sec. 11, Delegate Derbes was asked if 20 would prevent the legislature from passing a law that "a convicted felon could not carry a weapon or cannot own a weapon. . ." and Derbes' answer was "Absolutely not."[313] This brought a rise out of both Delegates Lanier and Drew who questioned whether "full rights of citizenship" could be granted on one hand, and at the same time limitations imposed on the other hand, thus creating a "first class of citizenship and perhaps a second class of citizenship."[314]

Both provisions passed without any further enlightenment on their relation, passing the problem to the law reviewers to explain. Lee Hargrave's commentary cited Delegate Avant's remark and implied that Sec. 11 was not a right of citizenship within the scope of Sec. 20.[315] Ben Miller was more disturbed by it, feeling that it could be "seriously argued" that a convicted criminal "regardless of the number and viciousness of his previous crimes" would have the same right to keep and bear arms as any other citizen.[316] In Woody Jenkins' discussion of Sec. 20, he says that "rights of citizenship" would include all the Declaration of Rights provisions. In an interview, Jenkins said that included Sec. 11.[317]

In 1975, the legislature passed R.S. 14:95.1 which provides that certain categories of ex-felons (i.e. those convicted of serious or aggravated crimes) are precluded from <u>possessing a firearm</u> or carrying a concealed weapon. While the prohibition against carrying a concealed weapon is allowed by Sec. 11, the banning of possession of a

firearm seems unconstitutional. Woody Jenkins, for one, thinks it is.[318]

The state Supreme Court, however, did not agree. In a 1977 case, State v. Amos,[319] the defendants were prosecuted under R.S. 14:95.1 for possession of a firearm. Noting the comments made by the delegates during the convention's debate, the Supreme Court concluded that neither Sec. 20 nor Sec. 11 were intended to preclude legislation restricting an ex-felon's right to possess a firearm.[320] Consequently, R.S. 14:95.1 was held constitutional. Justice Calogero's dissent argued that Sec. 20 had restored the ex-felons to citizenship status after termination of their previous sentence, that Sec. 11 grants "each citizen" the unabridged right to bear arms, hence R.S. 14:95.1 was void insofar as it infringed on that right.[321]

Since the Supreme Court has determined that Sec. 20 does not restore the right to possess a firearm, arguably a pardon would. In fact, due to the impact of several federal laws, to be discussed below, a pardon at times specifically states that it restores the right to possess a firearm. While this is done in order to comply with federal regulations, it would presumeably also lift the disability under state law. In addition, an ex-felon may apply for dispensation from the restriction through the sheriff's department where he resides.[322]

A pardon's effect on the prohibition against carrying a concealed weapon is less clear. R.S. 14:95 makes it a crime for anyone to carry a concealed weapon under certain circumstances. Obviously a pardon would not give an ex-felon greater privileges than

an ordinary citizen. However, it would probably absolve him from the enhanced penalty provisions of R.S. 14:95.1 which stipulates three to ten years at hard labor without benefit of probation, parole or suspension of sentence for an ex-felon's carrying a concealed weapon. An ordinary citizen is subject to six months in prison, without hard labor, for the first conviction; up to five years, with or without hard labor for the second conviction; and up to ten years with or without hard labor, for any subsequent convictions.

The whole issue of ex-felon's owning weapons, concealed or otherwise, is overshadowed heavily by federal law. Under 18 U.S.C. App. Sec. 1201-1203, ex-felons along with several other categories of people are precluded from possessing weapons unless pardoned by the President or a state's governor with the express restoration of the privilege. Thus, an ex-offender who desires to own a gun must request specific authorization from the Board of Pardonsand the governor's proclamation must include the express stipulation. As was stated before, this would presumeably remove the disability under state law as well.

Another federal law exists, 18 U.S.C. Sec. 921-928 which also bans the possession of firearms by ex-felons. Since the other categories precluded are not identical with Sec. 1201-1203, the United StatesSupreme Court has held that the statutes are independent in impact, even though redundant in part.[323] Therefore, an ex-felon needs to follow the procedure outlined in Sec. 925 to be relieved of the disability in that statute. This involves petitioning the

Secretary of the Alcohol, Tobacco and Firearms Bureau of the U.S. Treasury Department for relief. If the secretary finds that the applicant is not "likely to act in a manner dangerous to public safety" and feels that lifting the restriction "would not be contrary to the public interest,"[324] he may do so. As a practical matter, the bureau will not consider a request for relief unless the state pardon has been obtained first.[325] The state pardon is both an indication that the applicant is no longer considered dangerous and also removes the disability otherwise imposed by Sec. 1202-1203 and state law.

Habitual and Multiple Offender Statutes

The Louisiana Habitual Offender Act [326] provides for an enhancement of the penalty if a person is convicted of a felony and has a prior record of felony convictions. The multiple offender laws refer to particular offenses, such as driving while intoxicated,[327] where subsequent convictions for the same type of offense would trigger increasingly long and onerous penalties.[328] While the delegates at the constitutional convention disagreed as to the full impact of Art. I, Sec. 20's restoration of citizenship, even its supporters intended that it not affect the multiple offender laws.

Delegate Chris Roy, during the Sec. 20 debate, claimed it had "absolutely nothing to do with the multiple offender law."[329] Delegate Jackson, who had inferred that the section could do away with licensing laws, at the same time felt it would not "violate" the multiple offender statutes.[330] Delegate Derbes, who introduced the "of citizenship" amendment said the section "has nothing, in

my opinion, to do with the conduct of trials for multiple offenders, the sentencing of multiple offenders, the probation and parole of multiple offenders."[331]

In fact, only one delegate, Welbourn Jack, apparently felt that the provision did eradicate the multiple offender laws and for that reason he was in outspoken opposition to the section:

> A three-time loser, let's say at Angola, that never voted and never is going to vote, not going to run for office; why does he want his citizenship back? Because it'll wipe out the first, second and third offense and because he cannot later be prosecuted if he commits a crime under a special prosecution of being a second offender or a third offender or a fourth offender. /332/

The various committee members who drafted the section staunchly denied that the proposal had that effect. As interpreted by Lee Hargrave in the Louisiana Law Review, "The committee's intent was that restoration of full rights would not automatically erase the fact of a conviction, and thus multiple offender legislation would be permitted under its proposal."[333] Woody Jenkins, in his law review discussion, says simply that the "restoration of 'full rights of citizenship' does not exempt persons from the application of 'multiple offender' laws." Ben Miller's commentary agrees.[334] The Louisiana Supreme Court in a 1977 case, State v. Selmon,[335] recognized this intent and held that Sec. 20 did not erase the prior conviction, hence it could be used as a basis for enhanced habitual offender penalty after a subsequent conviction.

The impact of a pardon on multiple offender legislation is another matter. Most of the confusion over the effects of a pardon,

in Louisiana and elsewhere, is due to the lack of distinction made between pardons granted on the basis of innocence as opposed to pardons issued for other reasons, but with no intention of erasing the original guilt or conviction of the offender.[336]

The Louisiana Constitution refers only to the general power of the governor to pardon without distinguishing whether pardons may be conditional or full.[337] As a matter of course, when the governor does pardon an offender, the language used is "full pardon and restoration of citizenship."[338] No conditional pardons are issued although a pardon will specify whether or not it grants the right to carry firearms.[339] As has been pointed out, this is necessitated partly by the peculiar interaction of federal with state law.

The landmark Louisiana case on the effects of a pardon, State v. Lee,[340] specifically dealt with the habitual offender law. The defendant had a prior conviction in Texas and was given a "full pardon"[341] by the Texas governor. The Louisiana Supreme Court quoted Ex parte Garland[342] at some length, citing its sweeping language to the effect that

> /A/ pardon reaches both the punishment prescribed for the offense and the guilt of the offender; and when the pardon is full, it releases the punishment and blots out of existence the guilt, so that in the eye of the law the offender is as innocent as if he had never committed the offense. . . ./343/

The court also cited an earlier Louisiana case that proclaimed a pardon to grant "a new character and makes of him /the offender/ a new man."[344] Concluding that the "weight of authority" is to give pardons "full force and effect" the court held that the defendant

could not be sentenced as a habitual offender.

Later Louisiana cases have upheld the Lee decision. State v. Childers[345] also dealt with the habitual offender law, the case hinging on whether or not in fact the defendant had actually been pardoned by a prior Louisiana governor. The court presumed that if the pardon was verified, the defendant could not be treated as a habitual offender.[346]

Recently, in State v. Selmon,[347] the Louisiana Supreme Court reiterated that "a full complete pardon by the Governor precludes the use of the pardoned offense to enhance punishment."[348]

Interestingly, the 5th Circuit Court of Appeals[349] upheld the habitual offender penalty enhancement of an offender who had a prior Missouri conviction for which he had also a Missouri pardon. The court noted that while Louisiana followed the rule of precluding a pardoned offense from serving as a basis for the habitual offender enhancement, Missouri does not give a pardon that effect. Since different states have different standards for issuing pardons, the Louisiana court was justified in construing the Missouri pardon as Missouri would construe it, rather than as a Louisiana pardon would be treated.

R.S. 15:572(E) states that pardoned offenders "may be charged and punished as a second or multiple offender." This would appear to be unconstitutional in light of the jurisprudential history that precludes the legislature from impinging upon the executive authority. It also runs counter to the specific jurispurdence which has held consistently that a pardoned offense cannot be used as a basis for habitual offender penalty enhancement.

First Offender Pardons

The 1974 Constitution provides an automatic pardon for a "first offender never previously convicted of a felony."[350] The effect of such an automatic pardon is apparently the same as one issued through the Board of Pardons and the governor's office, as the debate during the convention set forth no distinction.[351] Additionally, the first offender automatic pardon appears directly after the designation to the governor of the traditional pardon power. The purpose of the "never previously convicted of a felony" clause is to guarantee that a person will only receive one automatic pardon. Otherwise, an offender would become endlessly a first offender: after serving his sentence for his first offense, he would be pardoned automatically, hence on a subsequent conviction he would be classified as a first offender, hence eligible for another first offender pardon at completion of that sentence and so on through subsequent convictions. The "never previously convicted" proviso insures that only a bona fide first offender will receive the automatic pardon.

R.S. 15:572(E) while by its language purports to allow the multiple billing on the basis of any pardoned offense, regardless of how the pardon was received, perhaps was intended to specifically apply to the first offender automatic pardon. However, the effect of a first offender pardon was apparently intended to be the same as a regular pardon, judging by the lack of any distinction drawn by the delegates themselves. Consequently, the jurisprudence holding that the legislature cannot interfere with the executive clemency

authority nor can a pardoned offense be used as a basis for multiple billing arguably would apply to first offender pardons as well.

The first offender pardon does create an anomaly in the philosophy behind Louisiana's treatment of pardons in general. On the one hand, Louisiana subscribes to the minority view that a pardon sweeps away virtually all disabilities, creating a new and essentially guiltless person. This would argue for a tight screening process to assure that only persons having a genuinely changed attitude would be pardoned. This is the purpose of the full-time Board of Pardons. At the same time, Louisiana grants an automatic pardon to all first offenders without any screening whatsoever. While an automatic first offender pardon presumably has the same impact as a regular pardon, the fact that it is issued by the Department of Corrections[352] rather than the governor's office would alert the observer that the pardon accrued automatically without any perusal for actual merit. On the other hand, it also indicates that the state considers a first offender in general to be relatively untainted by his one conviction, hence trustworthy enough to be given the quick pardon and another chance. However it's viewed philosophically, it apparently should be treated legally as a regular pardon.

Miscellaneous

Various other disabilities attach to criminal conviction in Louisiana. Under Article 893 of the Code of Criminal Procedure,

for example, a multiple felony offender is ineligible for probation unless he is a drug offender (presumably) and is referred to an authorized drug treatment program. While Art. 20 would apparently have no impact on this law, a pardon would arguably wash away the prior conviction.

Inmates injured while in prison are not entitled to workman's compensation even when hurt while working on jobs assigned to them by the state prison authorities.[353] The ruling rests on the notion that such inmates are not employees of the state. One commentator, while agreeing with the legal distinction, felt the state should provide some sort of relief since most prisoners will eventually be released and the need for assistance is the same as for a free person employee.[354]

Conclusion

This survey has discussed the great majority of disabilities associated with criminal conviction. Some, like employment restrictions and habitual offender provisions, may have an enormous impact on the future of an ex-offender. Others, such as inability to witness a testament, are vestiges of our civil law heritage and have little significance to the reintegration of offenders into society.

The 1974 Constitution, Art. I, Sec. 20, was intended to remove at least some of the obstacles facing ex-offenders. The delegates limited this relief to restoration of rights associated with citizenship, although they disagreed among themselves as to the extent of those rights. The courts now carry the responsibility

of interpreting the constitutional intent of the provision.

Jurisprudentially, a pardon in Louisiana erases nearly all the disabilities associated with a conviction. This philosophy is made extremely significant in light of the newly created automatic pardon for first offenders. Whether the courts will interpret first offender pardons differently in impact than regular pardons remains to be seen.

[1]"Special Project--The Collateral Consequences of a Criminal Conviction," 23 Vanderbilt Law Review 929, 941 (1970) (Herinafter cited as Vanderbilt).

[2]"The Deprivation of Civil Rights," 16 Tulane Law Review 126, 126-127 (1941).

[3]Ibid, 129.

[4]Ibid, 130.

[5]Art. 25, French Civil Code quoted in ibid, 130-131, footnote 57.

[6]Ibid, 131.

[7]Ibid, 133.

[8]Ibid, 133-134.

[9]Ibid, 135.

[10]Vanderbilt, 950.

[11]Vanderbilt, 1019 (statute of limitations suspended during imprisonment); 1020-23 (capacity to sue); 1033-35 (capacity to contract).

[12]Vanderbilt, 950-952.

[13]Ibid, 1143-44.

[14]Ibid, 1144-47; see also Slovenko, Ralph. "The Treatment of the Criminal in Louisiana and Elsewhere," 34 Tulane Law Review 523, 543-45; also "The Effect of a Pardon," U.S. Attorney General Survey of Release Procedures, Volume 3, 267+ (1939).

[15]Ex parte Garland, 71 U.S. (4 Wall) 333 (1866).

[16]Ibid, 380.

[17]Burdick v. United States, 236 U.S. 79,91 (1914).

[18]Vanderbilt, 1145.

[19]1921 Louisiana Constitution, Art. VIII, Sec. 6.

[20]Louisiana Civil Code, Art. 302(5), new Louisiana Code of Civil Procedure, Art. 4231(3).

[21]La. Civil Code, Art. 1591.

[22]For example, La. Civil Code, Art. 966, Art. 1621, Art. 1622, Art. 1623.

[23]La. Civil Code, Art. 139, see also Art. 138.

[24]La. Civil Code, Art. 146, Art. 157.

[25]Slovenko, Ralph. "The Treatment of the Criminal in Louisiana and Elsewhere," 34 Tulane Law Review, 523, 537 (1960) (Hereinafter referred to as Slovenko).

[26]La. Civil Code, Art. 2148.

[27]1812 Louisiana Constitution, Art. 3, Sec. 11.

[28]1845 Louisiana Constitution, Art. 47;
1852 Louisiana Constitution, Art. 44;
1864 Louisiana Constitution, Art. 52;
1868 Louisiana Constitution, Art. 58;
1879 Louisiana Constitution, Art. 66;
1898 Louisiana Constitution, Art. 69;
1913 Louisiana Constitution, Art. 70;
1921 Louisiana Constitution, Art. V, Sec. 10;
1974 Louisiana Constitution, Art. IV, Sec. 5;
see also Slovenko, 541-542.

[29]See, for example, State v. Collins, 328 So.2d 674 (1976); State v. Ramsey, 292 So.2d 708 (1974); State v. Spotville, 308 So.2d 763 (1975); State v. Varice, 292 So.2d 703 (1974).

[30]State v. Lee, 132 So. 219 (1931).

[31]Ibid, 220.

[32]Ibid, 219.

[33]Ibid, 220.

[34]State v. Childers, 2 So.2d 189 (1941).

[35]Ibid, 190.

[36]State v. Selmon, 343 So.2d 720 (1977).

[37]1974 Louisiana Constitution, Art. I, Sec. 20.

[38]State v. Selmon, 343 So.2d 720, 721 (1977).

[39]Id.

[40] Id.

[41] 1974 Louisiana Constitution, Art. I, Sec. 10; Art. I, Sec 11; Art. I, Sec. 20.

[42] Jenkins, Louis. "The Declaration of Rights," 21 Loyola Law Review 9, 9 (1975) (Hereinafter cited as Jenkins).

[43] Id.

[44] Id.

[45] Miller, Ben. "The Declaration of Rights: Criminal Provisions." 21 Loyola Law Review 43, 43 (1975) (Hereinafter cited as Miller).

[46] Hargrave, Lee. "The Declaration of Rights of the Louisiana Constitution of 1974," 35 Louisiana Law Review 1, 1 (1974).

[47] A commutation of sentence, also within the governor's authority to grant clemency, is not the same as a pardon even if the offender is immediately released as a result. A commutation only shortens the length of sentence; it does not negate the conviction or guilt of the accused. Consequently, commuted offenders in this analysis are treated in the same category as other offenders who have received no clemency whatsoever. Pardoned offenders are distinctively of a different status, having had not only their sentences terminated but arguably their guilt and conviction erased as well.

[48] State of Louisiana Constitutional Convention of 1973 Verbatim Transcripts VII (25th Day) 106-123; VII (26th Day) 2-25; XXXVIII (114th Day) 63-72 (Hereinafter cited as Proceedings).

[49] Id.

[50] XIV Proceedings (44th Day) 44.

[51] Ibid, 57.

[52] Ibid, 46.

[53] Ibid, 43.

[54] Ibid, 49.

[55] Ibid, 44.

[56] Id.

[57] Ibid, 45.

[58] Ibid, 57-58.

[59]Ibid, 61.

[60]1921 Louisiana Constitution, Art. VIII, Sec. 6.

[61]No. 75-339, 1974-75 Louisiana Opinions of the Attorney General.

[62]No. 74-295, Opinion of the Attorney General, 7 March 1974.

[63]1974 Louisiana Constitution, Art. I, Sec. 10.

[64]1921 Louisiana Constitution, Art. VIII, Sec. 6.; La. R.S. 18:42, 18:270.210, 15:572.1.

[65]La.R.S. 18:111.

[66]Louisiana Act 129 of 1940.

[67]1974 Louisiana Constitution, Art. I, Sec. 20.

[68]XIV Proceedings (44th Day) 41-62.

[69]Hargrave, Lee. 35 Louisiana Law Review 1, 34 (1974).

[70]Jenkins, 33.

[71]No. 75-131, 1974-75 Louisiana Opinions of the Attorney General, 147, 148 (May 2, 1975).

[72]Id.

[73]Hargrave, Lee. "Louisiana Constitutional Law," The Work of the Louisiana Appellate Courts for the 1975-1976 Term, 37 Louisiana Law Review 480, 491 footnote 76 (1977); see also Hargrave, 35 Louisiana Law Review 1, 34 (1974).

[74]328 So.2d 171 (La. App. 2d Cir. 1976).

[75]Ibid, 174.

[76]Ibid, 175.

[77]No. 75-131, 149.

[78]The supreme court refused to review the lower court decision in Fox, 328 So.2d 893 (1976). The court noted that the "result is correct." Two justices dissented from the denial of writs, including Justice Dennis who felt that "significant constitutional issues" were involved.

[79]1921 Louisiana Constitution, Art. VIII, Sec. 6.

[80]1938-1940 Louisiana Opinions of the Attorney General 779, 780; see also Crother v. Jones, 120 So.2d 248 (1960).

[81]See, for example, Reynolds v. Sims, 84 S.Ct. 1362 (1964); Walters v. Edwards, 396 F.Supp. 809 (1975).

[82]1921 Louisiana Constitution, Art. VIII, Sec. 6.

[83]XIV Proceedings (44th Day) 57.

[84]328 So.2d 171 (2nd Circuit 1976); writ denied, 328 So.2d 893 (1976).

[85]Vanderbilt, 1018-1019.

[86]1974 Louisiana Constitution, Art. I, Sec. 22.

[87]Vanderbilt, 1023-1025.

[88]La. Code of Civil Procedure, Art. 682.

[89]La. Code of Civil Procedure, Art. 731.

[90]La. Civil Code, Art. 3521; see also Art. 3551.

[91]351 Federal Supplement 1042 (1972).

[92]Ibid, 1044.

[93]La. Civil Code, Art. 1782.

[94]La. Civil Code, Art. 1796.

[95]La. Civil Code, Art. 1821.

[96]La. Civil Code, Art. 1834, Art. 1838.

[97]La. Civil Code, Art. 1823.

[98]La. Civil Code, Art. 2147.

[99]La. Civil Code, Art. 2148.

[100]16 Tulane Law Review 126, 137.

[101]La. Civil Code, Art. 2148, History and Text of Former Codes.

[102]See annotations under La. Civil Code, Art. 2148.

[103]La. Civil Code, Art. 3027.

[104]Phelps v. Reinach, 38 La.Ann. 547 (1886).

[105]Ibid, 551.

[106]Id.

[107]Ibid, 552.

[108]See "Termination of Powers of Attorney in Louisiana by Operation of Law," 25 Tulane Law Review 249, 258 (1951); see also 16 Tulane Law Review 126, 136-138 (1941) and also Slovenko, 534-535.

[109]16 Tulane Law Review 126, 133-134.

[110]See 25 Tulane Law Review 249, 258.

[111]La. Civil Code, Art. 3028, Art. 3031.

[112]16 Tulane Law Review 126, 130-131.

[113]La. Civil Code, Art. 1470, Art. 1476-1479.

[114]La. Civil Code, Art. 1475.

[115]La. Civil Code, Art. 1591.

[116]Vanderbilt, 1038.

[117]La.R.S. 15:461, 13:3665.

[118]See Chavigny v. Hava, 51 So. 696 (1910).

[119]See State v. Sullivan, 105 So. 631 (1925).

[120]State v. Robertson, 200 So. 320 (1941); State v. Reed, 24 So. 131 (1898).

[121]With respect to prior convictions of the defendant, see La. Code of Criminal Procedure, Art. 770, Art. 771; see also, for example, State v. Gerald, 199 So.2d 536 (1967).

[122]La.R.S. 15:495.

[123]La.R.S. 15:445; 15:446.

[124]La.R.S. 15:495.

[125]La.R.S. 14:7; see also, State v. Bradford, 298 So.2d 781, 792 (1974) appl. dismissed 95 S.Ct. 1109; State v. Odom, 273 So.2d 261, 264 (1973).

[126]State v. Johnson, 294 So.2d 229, 230 (1974); State v. Bray, 292 So.2d 697, 703 (1974).

[127]State v. Rossi, 273 So.2d 265, 268 (1973); State v. Prather, 290 So.2d 840 (1974).

[128]State v. Roberts, 331 So.2d 11, 13 (1976); State v. Williams, 309 So.2d 303, 304 (1975).

[129]State v. Kelly, 271 So.2d 870 (1973); State v. Brent, 184 So.2d 14, 19 (1966).

[130]State v. Duplechain, 26 So. 1000 (1899).

[131]State v. Bernard, 326 So.2d 332 (1976).

[132]La.R.S. 15:462.

[133]Vanderbilt, 1046-7; see also State v. Ghoram, 290 So.2d 850 (1974).

[134]La.R.S. 15:481; see, for example, State v. Prieur, 277 So.2d 126, 129 (1973).

[135]La.R.S. 15:479; see State v. Ricks, 128 So. 293, 295 (1930); State v. Rives, 190 So. 374, 379 (1939); State v. Grant, 295 So.2d 168, 171 (1973).

[136]Vanderbilt, 1046-8.

[137]State v. McCoy, 33 So. 730, 731 (1903).

[138]See Justice Barham's dissent in State v. Prather, 290 So.2d 840, 842 (1974).

[139]Id.

[140]XIV Proceedings (44th Day) 43.

[141]Ibid, 41.

[142]Ibid. 60-61.

[143]State v. Taylor, 133 So. 349 (1931).

[144]Ibid, 351.

[145]Id.

[146]State v. Boudreaux, 61 So.2d 878 (1952).

[147]Ibid, 878.

[148]See 25 Tulane Law Review 281 (1951).

[149]La.R.S. 15:445.

[150]La.R.S. 15:446.

[151]La.R.S. 15:446.

[152]State v. Moore, 278 So.2d 781 (1972).

[153]State v. Prieur, 277 So.2d 126 (1973).

[154]Ibid, 130.

[155]La.R.S. 15:445, 15:446.

[156]La.R.S. 15:446.

[157]State v. Prieur, 277 So.2d 126, 129 (1973); see also Hills v. Henderson, 529 F.2d 397 (5th Circuit Court of Appeals, 1976).

[158]Vanderbilt, 951-952; Slovenko, 535-536; 16 Tulane Law Review 126, 133.

[159]1921 Louisiana Constitution, Art. VII, Sec. 41.
1974 Louisiana Constitution, Art. V, Sec. 33.

[160]La. Code of Criminal Procedure, Art. 401.

[161]La.R.S. 13:3041.

[162]La. Code of Criminal Procedure, Art. 797 (1); La. Code of Civil Procedure, Art. 1765 (1).

[163]La. Code of Criminal Procedure, Art. 795; La. Code of Criminal Procedure, Art. 1767 (A).

[164]State v. Hall, 233 So.2d 541 (1970).

[165]La. Code of Criminal Procedure, Art. 851(4), cited in Hall, 542.

[166]State v. Hall, 542.

[167]1921 Louisiana Constitution, Art. VIII, Sec. 6.

[168]La. Code of Civil Procedure, Art. 3097(3).

[169]La. Code of Civil Proecdure, Art. 3097(6).

[170]Rust v. Randolph, 5 Mart.(O.S.) 89 (1817).

[171]36 La.Ann. 535 (1884).

[172]Succession of Jones, 310 So.2d 700 (1st Circuit 1975).

[173]Ibid, 702.

[174]La. Code of Civil Procedure, Art. 4231(3)(6).

[175]La. Civil Code, Art. 302(4), repealed by Acts 1960, No. 30, Sec. 2, eff. Jan. 1, 1961.

[176]La. Code of Civil Procedure, Art. 4231(6); La. Code of Civil Procedure, Art. 3097(6).

[177]La. R.S. 9:1783.

[178]Vanderbilt, 1001-1018.

[179]See Table, pp. 71-73.

[180]La.R.S. 37:624, podiatrist; La.R.S. 37:1285, midwife.

[181]La.R.S. 37:1061, optometrist; La.R.S. 37:846, funeral director.

[182]La.R.S. 37:374, barber; La.R.S. 37:513, cosmetologist.

[183]La.R.S. 37:79(3), Certified public accountant; La.R.S. 37:764, dental hygienist.

[184]See Table.

[185]La.R.S. 37:146(2).

[186]Id.

[187]La.R.S. 37:146(1).

[188]XIV Proceedings (44th Day) 44.

[189]Interview, March 17, 1976.

[190]Id.

[191]Id.

[192]XIV Proceedings (44th Day) 57-62.

[193]Ibid, 57.

[194]Ibid, 58.

[195]Ibid, 60.

[196]Ibid, 61.

[197]Ibid, 40-42.

[198]Ibid, 45.

[199]Ibid, 46.

[200]Ibid, 47.

[201]Ibid, 60.

[202]Id.

[203]Id.

[204]Id.

[205]Id.

[206]XIV Proceedings (44th Day) 49.

[207]Jenkins, 39.

[208]Id.

[209]Miller, 48-49.

[210]La.R.S. 49:951-968.

[211]La.R.S. 49:961.

[212]La.R.S. 49:964(5).

[213]La.R.S. 49:964(6).

[214]No. 75-339, 1974-75 Louisiana Opinions of the Attorney General, 166, 167.

[215]317 So.2d 247 (1975).

[216]Ibid, 248.

[217]Ibid, 249.

[218]Dent v. West Virginia, 129 U.S. 114, 122 (1889).

[219]Id.

[220]Id.

[221]Illinois Ann. Statutes, Ch. 56½, Sec. 242.2(d).

[222]California Business and Professional Code, Sec. 9551.5(a).

[223]Oklahoma Statutes Annotated, Title 59, Sec. 1212.

[224]Kaufman v. Taxicab Bureau, Baltimore City Police Department, 204 A.2d 521 (1964).

[225]Livesay v. Tennessee Board of Examiners in Watchmaking, 322 S.W.2d 209 (1959).

[226]La.R.S. 37:1592(2).

[227]Vanderbilt, 1004.

[228]Thomas v. Evangeline Parish School Board, 138 So.2d 658 (3rd Circuit, 1962).

[229]La.R.S. 49:964-965.

[230]La.R.S. 37:374(1); R.S. 37:2453(1); R.S. 37:1592(2).

[231]State v. Lee, 132 So. 219, 220 (1931).

[232]37 Louisiana Law Review 480, 492 (1977).

[233]No. 75-339, 1974-75 Louisiana Opinions of the Attorney General, 166, 167.

[234]State v. Gowland, 140 So. 500 (1932).

[235]Ibid, 501.

[236]Carter v. Miller, 96 S.Ct. 1171 (1978) upholding 547 F.2d 1314(1977)

[237]La. Civil Code, Art. 90.

[238]La. Civil Code, Arts. 88, 99, 102-105.

[239]Deleware Code Ann. Title 16, Sec. 5703; Oklahoma Statutes Ann. Title 43A, Sec. 341.

[240]La.R.S. 9:427.

[241]La.R.S. 9:432(B).

[242]La. Civil Code, Art. 138(2).

[243]La. Civil Code, Art. 139(2).

[244]La. Civil Code, Art. 138.

[245]La. Civil Code, Arts. 138, 139, prior to 1954 amendments.

[246]Hull v. Donze, 113 So. 816 (1927); see also Louisiana Opinions of the Attorney General, 1942-44, 755, 768.

[247]Louisiana Opinions of the Attorney General, 1938-40, 779, quoted favorably in Crothers v. Jones, 120 So.2d 248, 255 (1960).

[248]McKee v. McKee, 262 So.2d 111, 112 (2nd Circuit, 1972).

[249]Ibid, 112-113.

[250]La. Civil Code, Arts. 91, 110.

[251]McKee, 114.

[252]Abshire v. Hanks, 44 So. 186 (1907).

[253]Ibid, 187.

[254]Hull v. Donze, 113 So. 816 (1927).

[255]La. Civil Code, Art. 138(7).

[256]La. Civil Code, Art. 146.

[257]For example, State v. Pulling, 25 So.2d 620, 622 (1946).

[258]For example, Robertson v. Robertson, 215 So.2d 521, 522-3 (2nd Circuit, 1968).

[259]La. Civil Code, Art. 157.

[260]Id.

[261]Roshto v. Roshto, 39 So.2d 344 (1949).

[262]Fulco v. Fulco, 254 So.2d 603, 606 (1971).

[263]Willis v. Willis, 24 So.2d 378, 381-3 (1945).

[264]La. R.S. 13:1569(16)(a)(b).

[265]La. R.S. 13:1570A(3).

[266]La.R.S. 13:1580(1)(2).

[267]La.R.S. 13:1580(3).

[268]23 Vanderbilt Law Review 929, 1975 (1970); Diernfeld v. People, 323 P.2d 628 (1958) (Colorado); State v. Grady, 371 P.2d 68 (1962) (Oregon); Frank v. State, 322 P.2d 397 (1958) (Utah).

[269]Id.

[270]La.R.S. 9:403.

[271]In re State ex rel. Sharp, 219 So.2d 317, 320 (1st Circuit, 1969).

[272]La.R.S. 9:404; 9:407.

[273]La.R.S. 9:422.1.

[274]For example, In re Ackenhausen, 154 So.2d 380, 383 (1963); Rodden v. Davis, 293 So.2d 578, 580-581 (1974).

[275]Vanderbilt, 1080.

[276]34 Tulane Law Review 523, 534-538 (1960).

[277]United States Constitution, Art. I, Sec. 10; 1974 Louisiana Constitution, Art. I, Sec. 23.

[278]1974 Louisiana Constitution, Art. I, Sec. 4.

[279]Jenkins, 19-27.

[280]La. Civil Code, Art. 951.

[281]La. Civil Code, Art. 953.

[282]La. Civil Code, Art. 964.

[283]La. Civil Code, Art. 967.

[284]La. Civil Code, Art. 966(1).

[285]Kilpatrick v. Pickett, 307 So.2d 673 (2nd Circuit, 1975); Succession of Medica, 163 So.2d 425 (2nd Circuit, 1964).

[286]Sharp v. Sharp, 81 So.2d 820 (1955).

[287]La. Civil Code, Art. 973.

[288]La. Civil Code, Art. 901.

[289]La. Civil Code, Art. 1617.

[290]La. Civil Code, Art. 1621.

[291]La. Civil Code, Art. 1623.

[292]La. Civil Code, Art. 1622.

[293]La. Civil Code, Art. 1621(2)(3)(4).

[294]La. Civil Code, Art. 1622.

[295]La. Civil Code, Art. 1623(1)(2).

[296]La. Civil Code, Art. 1624.

[297]La. Civil Code, Art. 901.

[298]La. Civil Code, Art. 966(1).

[299]La. Civil Code, Art. 975.

[300]Id.

[301]Succession of Lissa, 3 So.2d 534 (1941).

[302]La. Civil Code, Arts. 1470-1492.

[303]La. Civil Code, Art. 1559(1).

[304]La. Civil Code, Art. 1560(1)(2).

[305]La. Civil Code, Art. 1561.

[306]Grandchampt v. Administrator of Succession of Billis, 49 So. 998 (1909).

[307]Ibid, 1001-1002.

[308]La. Civil Code, Art. 1560.

[309]La. Civil Code, Art. 1561.

[310]La. Civil Code, Art, 1710.

[311]La. Civil Code, Art. 1691.

[312]XIV Proceedings (45th Day) 7.

[313]XIV Proceedings (44th Day) 58.

[314]Ibid, 59.

[315]35 Louisiana Law Review 1, 37 (1974).

[316]Miller, 49.

[317]Jenkins, 39; Interview with Woody Jenkins, March 1976.

[318]Interview with Woody Jenkins, March 1976.

[319]343 So.2d 166 (1977).

[320]Ibid, 168.

[321]Ibid, 169-170.

[322]La. R.S. 14:95.1(2).

[323]U.S. v. Bass, 92 S.Ct. 515 (1971).

[324]18 U.S.C. 925(C).

[325]Interview with Baton Rouge division of the Alcohol, Tobacco and Firearms Bureau.

[326]La.R.S. 15:529.1.

[327]La.R.S. 14:98.

[328]See also La.R.S. 14:67; R.S. 14:69; 14:71; 14:95.

[329]XIV Proceedings (44th Day) 44.

[330]Ibid, 45.

[331]Ibid, 58.

[332]Ibid, 49.

[333]35 Louisiana Law Review, 1, 64.

[334]Jenkins, 39; Miller, 49.

[335]343 So.2d 720 (1977).

[336]U.S. Attorney General's Survey of Release Procedures, Vol. 3, Ch. IX, pp. 267-270.

[337]1974 Louisiana Constitution, Art. IV, Sec. 5(E).

[338]Interview with Mr. Larry Cormier, Governor's Office, January 1978.

[339]Id.

[340]132 So. 219 (1931).

[341]Ibid, 220.

[342]71 U.S. (4 Wall) 333 (1866).

[343]132 So. 219, 219-220.

[344]Ibid, 220.

[345]2 So.2d 189 (1941).

[346]Ibid, 190.

[347]343 So.2d 720 (1977).

[348]Ibid, 721.

[349]Murray v. State of Louisiana, 347 F.2d 825 (1965).

[350]1974 Louisiana Constitution, Art. IV, Sec. 5(E)(1).

[351]37 Louisiana Law Review 480, 491-492.

[352]La. R.S. 15:572(D).

[353]Jones v. Houston Fire and Casualty Insurance Co., 134 So.2d 377 (1961).

[354]23 Louisiana Law Review 357 (1963).

PURPOSES OF COMMUTATION IN LOUISIANA

In order to gain an understanding of the role played by executive clemency in Louisiana, it is necessary to analyze the kinds of cases handled by the Board of Pardons and the governor. Two sources furnish the statistics used in this analysis. The first is board statistics compiled between November, 1975 and October, 1976 and the other is data compiled by the staff by taking a random sampling of the cases disposed of by the Board of Pardons between those same dates. This period rather than a later one was chosen to assure that sufficient time was allowed for the governor's action on cases recommended by the board so that his decision making could also be examined. In addition to the frequency data discussed below, the information gathered by the staff (hereinafter referred to as the staff statistics) were subjected to statistical analysis, which will be discussed in the section on the characteristics of executive clemency decision making on pages 131-137 of this report.

Both sets of statistics reveal that by far the largest portion of the cases heard as well as of those recommended by the board involve commutation of sentence by those in prison rather than pardons, which are principally sought by persons requesting restoration of rights and privileges after they are released from incarceration. In the period covered by the data (1 year), the staff statistics indicate that 84% of the sample applied to the board for some form of commutation while only 16% sought some form of pardon. Precisely the same proportions of the cases recommended by the board to the

governor (84% and 16%) were commutations and pardons respectively.

The vast majority of commutations of sentence requested by inmates and recommended by the board (90-95%) are from a longer sentence to a particular number of years. However, some inmates are commuted to time served, in which case they are released immediately, or from sentences for more than one offense running consecutively to concurrent sentences.

Commutation may be used for a number of purposes. Commutation may be used to shorten the sentence or to release an inmate in cases when unusual circumstances develop or service of the entire sentence would cause extreme hardship, but a full pardon is not warranted, such as in the case of an inmate with a terminal illness. However, it is much more common in Louisiana to use commutation to remedy two deficiencies in other parts of the sentencing system rather than to perform this more traditional purpose of clemency.[1] The first is disparity in sentences imposed upon similarly situated defendants, a phenomenon which has been documented elsewhere in the Commission's studies.[2] Commutation is used to equalize this disparity in extreme cases, often to advance parole eligibility after service of one-third of the sentence. The second important purpose of commutation is to fill the gaps left in the parole system by legal exclusions of parole eligibility for inmates convicted of certain crimes.

Parole Exclusions in Louisiana and Other States

Louisiana and many other jurisdictions place numerous restrictions on parole eligibility. The most significant restriction on

parole eligibility in Louisiana applies to persons sentenced to life imprisonment. Such persons are specifically routed through the pardon process by La.R.S. 15:574.4(B), which provides that parole may be granted only after the governor commutes a life sentence to a set number of years. The following crimes are punishable by life imprisonment in Louisiana: first degree murder,[3] second degree murder,[4] aggravated kidnapping,[5] aggravated rape,[6] killing a child during delivery,[7] a person over twenty-five years of age distributing a Schedule I or II narcotic drug to a person under eighteen years of age,[8] and manufacturing or distributing a Schedule I narcotic drug.[9]

Only four other states--Arkansas,[10] Iowa,[11] Pennsylvania,[12] and Wyoming[13]-- which utilize parole release have a general ban on parole eligibility like Louisiana's for persons under life sentences. Forty-four states do not prohibit paroling inmates serving life sentences.[14] Of these, twenty-four require that such persons serve ten, fifteen, twenty-five or thirty years before they are considered for parole.[15] This latter group includes such southern states as Mississippi (10 years), North Carolina (20 years), South Carolina (10 years), Tennessee (30 years) and Virginia (15 years). Some jurisdictions also allow parole eligibility for all offenses, including those punishable by life imprisonment, after inmates have served the minimum terms imposed by the court,[16] and others apparently allow the parole board to release at any time even those under life sentences for other than capital crimes.[17]

Eight states do authorize imposition of life sentences without

parole for certain crimes, but not for all crimes for which life imprisonment is available.[18] These provisions are designed to provide an alternative to the death penalty for the most serious crimes, usually only first degree murder. Louisiana's first degree murder statute includes a special provision not found in other life sentence penalties in Louisiana, stating that if the punishment is life imprisonment rather than death, it is "without benefit of parole."[19] Apparently, the intent is to prohibit parole of such an offender even if the governor commutes his sentence to a set number of years. Likewise, those convicted of second-degree murder and sentenced to life imprisonment may not be paroled, despite executive commutation for at least forty years--for all practical purposes, life. Four other states,[20] while not prohibiting parole entirely for first degree murder, require that those convicted thereof wait longer than others under life sentence before being eligible for parole. The periods of ineligibility range from twenty to fifty years.

Thirteen states other than Louisiana preclude parole eligibility for a limited number of offenders because they have been convicted of certain crimes other than first degree murder. These states are: Delaware (escape, third conviction of certain serious felonies);[21] Idaho (commission or attempted commission of a sex offense);[22] Michigan (aggravated arson);[23] Mississippi (third felony offense and armed robbery);[24] Missouri (third drug distribution conviction);[25] Rhode Island (subsequent conviction of an offender on parole for a life sentence);[26] Vermont (subsequent offense carrying sentence of

two years or more by paroled offender);[27] Washington (offender under life sentence who is diagnosed as a "sexual psychopath");[28] and Wyoming (an escape or violent crime committed by an inmate in prison).[29]

The comparable eligibility exclusions in Louisiana are for commission of the following crimes: armed robbery;[30] burglary of a pharmacy;[31] third or subsequent offense of illegal carrying of a weapon;[32] carrying a concealed weapon when the offender was previously convicted of first- or second-degree murder, manslaughter, aggravated battery, aggravated or simple rape, aggravated kidnapping, aggravated arson, aggravated or simple burglary, armed or simple robbery, any felony violation of the uniform controlled dangerous substances law or an attempt to commit any of the above crimes;[33] taking contraband to or from state correctional institutions or to state-owned hospitals;[34] attempt to distribute or possess with intent to distribute a narcotic drug in Schedule I.[35]

More typical than absolute exclusion of parole eligibility are statutes that delay parole eligibility for those convicted of certain crimes. For instance, certain offenders may be required to serve the minimum sentence imposed rather than some portion of the minimum or of the maximum sentence.[36] Some states otherwise allowing parole eligibility at any time require service of a specified portion of the sentence imposed before certain inmates may be released on parole.[37]

Another mode of postponing parole release followed in ten states[38] is to require service of a particular number of years of

a sentence before allowing parole eligibility for certain crimes. These restrictions amount to mandatory sentences if a prison sentence is imposed. For instance, those who commit a forcible felony with a firearm must serve a certain minimum sentence without parole in Iowa, Minnesota, Missouri, New Mexico and Washington. Habitual offenders are similarly restricted in Iowa, Tennessee and Washington as are distributors of certain narcotics in Mississippi and armed robbers in South Carolina. The crimes other than life sentences for which Louisiana imposes such minimum sentences are manslaughter, simple or forcible rape, simple or aggravated battery, aggravated assault, simple or aggravated kidnapping and false imprisonment or attempt to commit any of the above, against persons sixty-five years of age or older (5 years);[39] second-degree murder, manslaughter, aggravated battery, simple kidnapping, or attempt of any of these, while using a firearm or explosive device (2 years for first offense, 5 years for each second or subsequent offense);[40] and theft of cattle, horses, mules, sheep, hogs or goats (1 year).[41]

This comparative examination of the limitations on parole eligibility reveals that Louisiana's are among the most restrictive in the nation. In addition to being one of the five states with a general ban on parole for lifers, Louisiana seems to absolutely exclude parole for more offenses than any other state and imposes minimum terms of comparable length for as many offenses as any other state.

Louisiana Commutations to Circumvent Parole Restrictions

The statistics compiled by the Board of Pardons and those gathered by the staff indicate that over 20% of those applying for commutation are lifers, who must receive a gubernatorial commutation in order to be eligible for parole. Moreover, at least 40% of the non-lifers applying for commutation are inmates who have committed offenses that make them ineligible for parole; hence, their only hope of early release--other than by good time--is by commutation. Thus, at least 52% of those seeking commutation do so because they are ineligible for parole.

The virtually unanimous opinion by scholarly authorities considering the subject is that parole restrictions should be removed to allow the proper functioning of executive clemency has already been discussed at pages 12 through 15 of this report. As it does not appear that parole restrictions will be modified by the Louisiana legislature, the fact that one aspect of executive clemency--namely, commutation--serves as an important adjunct to the parole and sentencing systems should be borne in mind in analyzing that part of the pardon system and in formulating legislation on the pardon process.

[1]Another form of relief executive clemency could possibly offer those ineligible for parole is commutation of sentence to allow them to be eligible for parole. Since commutation is the substitution of a lesser penalty for a heavier one, it is conceivable that executive clemency could bestow parole eligibility upon those not otherwise entitled thereto. (Letter from Richard Crane, attorney for Department of Corrections to Edwin Scott, member of Louisiana Board of Pardons, March 11, 1976) However, the board has taken the position that it does not have authority to override legislative judgment by extending parole eligibility to those otherwise excluded therefrom.

[2]Minutes, Governor's Pardon, Parole and Rehabilitation Commission (November 14, 1977) pp. 2-4.

[3]La.R.S. 14:30.

[4]La.R.S. 14:30.1.

[5]La.R.S. 14:44.

[6]La.R.S. 14:42.

[7]La.R.S. 14:87.1.

[8]La.R.S. 40:981.

[9]La.R.S. 40:966.

[10]Ark. Statutes Ann. Sec. 43-2807.

[11]L.C.A. Sec. 201.

[12]61 P.S. Sec. 331.21.

[13]Wyo. Statutes Sec. 7-325(a).

[14]Ala., Alaska, Ariz., Cal., Colo., Conn., Del., Fla., Ga., Hawaii, Idaho, Ill., Ind., Kan., Ken., Md., Mass., Mich., Minn., Mo., Mont., Neb., Nev., N.H., N.J., N.M., N.Y., N.C., N.D., Ohio, Okla., Oregon, R.I., S.C. S.D., Tenn., Tex., Utah, Vt., Va., Wash., W.Va., Wis.

[15]Alaska (15 yrs.), Cal., Colo. (10 yrs.), Del. (as if 45-year fixed sentence), Idaho (10 yrs.), Ill. (20 yrs. less good time), Kan. (15 yrs less good time), Md. (15 yrs. less good time), Mass. (15 yrs.), Mich. (10 yrs.), Minn. (20 yrs. less good time), Miss. (10 yrs.), Mont. (30 yrs less good time), N.J. (25 yrs. less good time), N.M. (10 yrs.) N.C. (20 yrs.), Ohio (10 yrs.), R.I. (10 yrs.), S.C. (10 yrs.), Tenn. (30 yrs.), Utah (15 yrs.), Va. (15 yrs.), Wash. (20 yrs.), W.Va. (10 yrs.), Wis. (20 yrs. less good time).

[16]Colo. (Sec. 17-1-204, C.R.S. 1973); Hawaii (H.R.S. Sec. 353-68); Ill. (38 S.H.A. Sec. 1003-3-3); Indiana (B.I.S.A. Sec. 11-1-9.1); Iowa (I.C.A. Sec. 203).

[17]Fla., Mo., N.D., Oregon.

[18]Ala., Ark., Cal., Del., Haw., Idaho, Mass., Mich., Wash.

[19]La.R.S. 14:30.1.

[20]Ariz., Fla., Mo., S.C.

[21]11 Del. Code Ann. Sec. 4214, 4347.

[22]Idaho Code 520-223.

[23]M.S.A. 28:404.

[24]Miss. Code 1972, Sec. 47-7-3.

[25]V.A.M.S., Sec. 195.200.

[26]General Laws of R.I., Sec. 13-8-13.

[27]Vt. Stat. Ann. T.28, Sec. 553.

[28]R.C.W.A. 9.95.115.

[29]Wyo. Stat., Sec. 7-325(a).

[30]La.R.S. 14:61.

[31]La.R.S. 14:95.

[32]La.R.S. 14.95.

[33]La.R.S. 14:95.1.

[34]La.R.S. 14:402, 402.1(B).

[35]Act 632, Reg. Sess., 1977.

[36]Ariz., Iowa, Mass., W.Va.

[37]Idaho, Kan.

[38]Iowa, Mass., Minn., Miss., Mo., N.M., S.C., Tenn., Wash., La.

[39]H.B. No. 175, Reg. Sess. 1977.

[40]H.B. No. 310, Reg. Sess. 1977.

[41]La.R.S. 14:67.1.

CHARACTERISTICS OF EXECUTIVE CLEMENCY DECISION MAKING IN LOUISIANA

The release policies of the Board of Pardons and the governor will vary considerably depending on the composition of the board and upon who holds the governor's office. Therefore, the decisions made during any particular administration do not necessarily reflect any inherent characteristics of the institution of executive clemency. However, a greater understanding of the institution and some of the current discussions regarding its function and administration may result from analyzing the decision making of the present board and of the governor.

THE DATA AND THE SAMPLE

The data utilized in this analysis consisted of various characteristics drawn from the Board of Pardons files of 268 offenders, who were systematically sampled from all pardon board cases disposed of during the one-year period of November 1, 1975, through October, 1976.

The purpose of this analysis was to attempt to identify the personal, criminal history, and clemency request characteristics which influence the action taken by the Board of Pardons and the governor on clemency applications.

RESULTS

Pardon Board

Of the 268 offenders making requests for clemency to the Board of Pardons, data was available for 258 as to the action of the board on these requests. Of these 258 applications, 156 (60.5%) requests were approved by the board, while 102 (39.5%) were denied.

Chi square analysis identified two offender characteristics:

(1) the presence of a representing attorney at pardon hearings and (2) whether or not previous requests for clemency had been made, which appear to be significantly related to the Board of Pardons' decision making.

TABLE 1

FREQUENCIES OF PARDON BOARD APPROVALS OR DENIALS OF CASES AT WHICH A REPRESENTING ATTORNEY WAS PRESENT OR ABSENT (N=178) (CHI SQ=27.6*)

Attorney Present	Pardon Board Decision			
	Frequency	Percent	Frequency	Percent
Yes	52	29.2	20	11.2
No	34	19.1	74	40.4

*significant at .0001 level
Cramers V=.394

Of the 178 applications for which data was available as to the presence of a representing attorney, 52 (29.2%) of those requests approved by the board were represented by an attorney, while only 34 (19.1%) of those requests not represented by an attorney were approved. Accordingly, 74 (40.4%) of those requests not represented by an attorney were denied, while only 20 (11.2%) of those requests represented by an attorney were denied. That the presence of a representing attorney improved an applicant's chance for approval by the pardon board is in part indicated by a relatively strong

Cramer's V statistic (.394) which indicates the strength of association between the two variables.

Of the 256 applications for which data was available as to whether or not previous applications for clemency had been submitted to the Board of Pardons, 58 (22.6%) of those offenders who had submitted previous applications had their current request for clemency approved, while 65 (25.3%) had their requests denied. Accordingly 97 (37.7%) of those offenders who had not made a previous application to the Board of Pardons had their current requests approved, while only 36 (14.0%) had their current requests denied.

Other variables with weaker but still rather strong relationships to the outcome of cases before the board are the number of offenses for which the applicant is presently incarcerated and the length of sentence he is serving. In other words, the greater the number of offenses for which the inmate is under sentence and the longer the sentence the inmate is serving, the less likely the board will be to grant the clemency requested.

Analysis: The above statistics leave little doubt that, at least for the sample tested, the presence of an attorney to represent an applicant before the Board of Pardons is extremely important. The staff had hypothesized that the presence of an attorney in itself may not be as important as it first appears, but that rather those persons able to hire an attorney may be those possessing other characteristics that made them attractive candidates for a pardon board recommendation. However, when the data was rigorously analyzed, it was found that the presence of an attorney was not closely tied

to any other factor that predicted board approval. Thus, it can be said with a fair amount of certainty that having an attorney before the board significantly increases the likelihood that an inmate will be given a favorable recommendation.

The fact that the board is more likely to recommend relief for an applicant who is before it for the first time as opposed to one who has applied before is probably a function of there being a certain class of offenders to which the board repeatedly denies relief, regardless of their making repeated applications and serving increasingly greater proportions of their sentences. It seems likely that the offenders falling into this class are those possessing the two other characteristics already identified as relating to unfavorable board action--those presently serving time for numerous offenses and those with long sentences. These offenders probably also possess a third characteristic found to be strongly related in our sample to having made many previous applications--a large number of previous convictions.

Equally important as what is significant in predicting board decisions is what was found not to be significant. Neither race nor sex had any relationship to the likelihood of favorable disposition.

Thus, the board would appear to be generally concerned with relevant matters in making decisions: the seriousness of the crime and the inmate's prior record. However, the board is also strongly influenced by organized and persuasive presentations of attorneys at pardon hearings.

Governor

Of the 156 offenders recommended to the governor by the Board

of Pardons for executive clemency, data was available as to action by the governor in 145 cases. Of these cases, the governor approved the board's recommendation and granted clemency in 90 (61.6%) of the cases and failed to do so in 55 (37.7%) of the cases.

Chi square analysis identified three offender characteristics which appear to be significantly related to the governor's decision making: (1) the type of relief requested, (2) whether the crime was violent or non-violent, and (3) the length of the sentence imposed upon the applicant.

Of the 116 individuals considered for clemency by the governor and on whom statistics are available as to the specific type of relief sought, 54 (46%) of them applied for commutation and were granted relief and 44 (39%) applied for commutation and were denied relief, while 17 (14%) applied for pardon and were granted relief and 1 (1%) sought pardon and was denied. A relatively strong Cramer's V statistic (.324) indicates the strength of association between the governor's favorable action and an application for pardon rather than for commutation.

Nearly as strong a relationship is apparent between favorable gubernatorial action and applications by persons convicted of non-violent crimes. Of the 117 applicants considered by the governor whose crimes were identified, 32 (27.4%) were non-violent offenders and were approved and 8 (6.8%) were non-violent offenders and not approved, while 40 (34.2%) were violent offenders who were approved and 37 (31.6%) were violent who were not approved. Statistical analysis points up the much greater likelihood that a non-violent

offender will be awarded clemency by the present governor than will a violent offender.

Finally, of the 146 cases recommended by the board in our sample on whom data is available regarding the length of sentence, 48 (32.9%) whose clemency applications were approved by the governor are serving sentences of 10 years or less and 43 (29.5%) who were approved were serving sentences of over 10 years while 16 (11%) of those denied relief were serving sentences of 10 years or less and 39 (26.7%) were serving terms in excess of 10 years. Thus, the governor appears to be significantly disposed toward granting clemency to persons having shorter sentences.

Once again, statistical analysis indicates that the race and sex of the applicant do not influence the governor's decision making. Of even greater significance is the finding that whether the inmate is represented by an attorney has no measurable effect on the outcome after the case leaves the Board of Pardons.

Table 2

FREQUENCIES OF REQUESTS FOR CLEMENCY WHICH WERE SIGNED BY THE GOVERNOR FOR WHICH A REPRESENTING ATTORNEY WAS PRESENT OR ABSENT AT THE PARDON BOARD HEARING (N=79) (CHI SQ=.82)**

Attorney Present	Signed by Governor			
	Yes		No	
	Frequency	Percent	Frequency	Percent
Yes	45	55.7	5	6.3
No	25	31.6	4	5.0

**Not Significant

Analysis: The statistics relating to current gubernatorial decision making in clemency matters seem to reveal a very cautious approach to granting relief. The governor's actions are most strongly characterized by a tendency to grant pardons (almost exclusively to individuals who have completed their sentences and have had time to prove themselves in the community) rather than commutations (which release or accelerate the release of inmates). Another powerful tendency is to refuse relief to individuals convicted of violent crimes and to be more generous to those who have not. Likewise, the present chief executive rather consistently prefers granting relief to persons serving shorter sentences; i.e., those convicted of less serious crimes. Finally, although the Board of Pardons serves as a screening committee for the governor and all its members are appointed by him, only a little better than 6 out of 10 of the board's recommendations are followed by the governor.

All of these indications point toward an aspect of executive clemency cited in the first chapter of this report: the ultimate check on the executive clemency power is the governor's political accountability. The present governor's hesitancy to grant clemency in the cases discussed earlier indicates that he is very sensitive to public opinion and does not appear to be greatly influenced by factors other than the seriousness of the crime. Because every grant of executive clemency must be signed by the governor, these decision-making practices characterize not only the governor's actions, but all clemency decisions in Louisiana.

RECOMMENDATIONS

The following are problem areas or matters that the staff or others have raised as possible subjects for legislative action relating to executive clemency. The conclusions reached by the staff in some instances is that no action is appropriate. In other areas, no position is taken by the staff, but proposals are presented for the Commission's consideration.

1. Statistical Aids

If the Board of Pardons and the governor were principally concerned with the more traditional functions of executive clemency--pardoning deserving ex-offenders who have been living in the community for a number of years and pardoning or commuting sentences of wrongfully convicted persons--there would be little need to provide them with decision-making aids outside the facts of each particular case. However, as has been discussed previously, the great majority of applications for executive clemency call for decisions similar to those made by the Board of Parole (i.e., determinations of the likelihood of recidivism) and for decisions on the propriety of shortening sentences to equalize unwarranted disparity. Thus, it would seem that statistical aids in the form of (1) an experience table indicating the characteristics of persons commuted in the past who have succeeded or have not succeeded when released [1] and (2) tables indicating the average sentences imposed upon each type of offender convicted of each crime in Louisiana would aid the board and the governor in reaching decisions in many cases.

This recommendation could be taken one step further by requiring the Board of Pardons to develop guidelines similar to those recommended for the Board of Parole, incorporating statistics on recidivism and disparity of sentences to insure that similarly situated persons are treated similarly by the board. However, because the board and governor are constitutionally delegated the power to grant clemency and it is well settled that this power cannot be qualified or otherwise infringed upon by the legislature, legally mandated guidelines

may not be imposed upon the Board of Pardons. Hence, statistical tools to aid decision making would seem to offer the best solution.

2. Conditional Commutation

As discussed earlier, executive clemency conditioned upon subsequent good conduct by the recipient is common in many jurisdictions. It is not the practice in Louisiana to grant such conditional relief and no provision is made for it constitutionally. However, the unanimous opinion of the courts is that the power to grant unconditional clemency includes the power to grant conditional clemency.[2]

In a large number of cases persons ineligible for parole seek commutation of sentence. The Board of Pardons and the governor are then faced with the choice of denying clemency or of releasing the inmate without any form of supervision. Likewise, the board often confronts a case of an unjustifiably disparate sentence and commutes the sentence to a term three times the length of the time thusfar served by the inmate so that he is immediately eligible for parole. The present board members have indicated that when they do this, they feel the inmate should be released immediately. The board could commute the sentence to time served to accomplish this purpose, but they prefer to have the individual released by the Board of Parole so that he will be supervised rather than released outright. This requires the additional administrative burden of a parole board determination, which is either unnecessary or which may differ from that made by the Board of Pardons and the governor.

In the early days of the "new" Board of Pardons established by the 1975 Constitution, the board and the governor sought to solve the latter difficulty by commuting those the board felt had unusually

long sentences to "parole eligibility." In this case, the individual's sentence was reduced to three times the length of time he had already served, and he was released immediately, without parole board action, with or without supervision. This practice was abandoned, apparently after it resulted in some institutional conflict between the Board of Pardons and the Board of Parole.[3]

If the Commission does not recommend the elimination of parole restrictions so that the Board of Parole may release and place on supervision inmates without regard to unjustifiably long sentences or to the crimes they have been convicted of, it may be appropriate to specifically provide legislatively that the Board of Pardons and the governor may conditionally release inmates to supervision by the Division of Probation and Parole. At least four states--New Mexico, Oregon, Virginia and Washington--provide for supervision for those conditionally released by executive clemency.

If the purpose of forbidding parole release for those convicted of crimes excluded from parole eligibility is that they are the more serious offenders, it does not appear to be good policy to make no provision for supervising such offenders when they are released by executive clemency; assuming that supervision is an effective tool to discourage former inmates from returning to crime, those excluded from parole eligibility would seem to be more likely candidates for deterrence than those who are not excluded.

The addition of conditionally committed inmates to the caseload already carried by parole and probation officers will necessitate supplying the Division with additional manpower.

3. Appointed Attorneys at Pardon Board Hearings

Of all the factors tested for their relationship to favorable action by the Board of Pardons, none was as strongly or as clearly predictive as was the presence of an attorney at the pardon hearing. Because those who can afford to retain attorneys are allowed to have them present at pardon hearings, it seems only fair--and perhaps constitutionally required under the equal protection clause--that those who are indigent have attorneys appointed to represent them at hearings.

Also, because the law specifically provides for the presence and participation of the district attorney at pardon hearings, provision should be made that all applicants be afforded the opportunity to have the assistance of counsel, whether they can afford to retain an attorney or not.

4. The Governor's In-House Procedures

Concerns have been expressed to the staff during the course of the staff's research regarding some procedures followed in the governor's office in processing clemency applications after they have been approved by the Board of Pardons. One issue is the delay that often occurs between disposition by the board and the governor's action. A related concern is that often, unless the governor quickly acts favorably on the application for clemency, he often does not act at all, neither granting nor denying the relief recommended by the board. This failure to act, it is argued, creates uncertainty and anxiety in inmates who are awaiting some action by the governor. Another issue that has been raised is that an appearance of impropriety is created by having attorneys with "special relationships" with the governor or with officials in his office representing inmates who seek the governor's approval of a clemency application. This appearance of possible favoritism, it is argued, induces inmates to retain these particular attorneys in hope that they will receive special gubernatorial consideration.[4]

The most basic response to those who seek to have the Commission act on these issues is that the Commission's mandate is to propose legislative recommendations. The governor's pardon power is constitutionally delegated, and therefore his administration of that power is solely his executive prerogative. The legislature has no authority to instruct the governor as to what procedures he should follow and whom he should listen to in granting pardons and commutations.

However, more can be said on both issues. As to the delays

in the governor's office and the governor's failure to act favorably or unfavorably on most cases, those who are argued to be most inconvenienced by the uncertainty resulting therefrom are the inmates who are seeking clemency. However, the governor rarely expressly denies application for pardon or commutation. In virtually every case that he holds in his office indefinitely, if he eventually takes an action at all, it is to approve the request. It is likely that if the governor felt compelled to act on all cases recommended by the Board of Pardons within a short time after he received them, he would deny those that he was uncertain about since he could not delay consideration until a later date. Thus, it would appear that, despite the uncertainty engendered by delays, they work to the advantage of the inmate seeking clemency by permitting a later favorable reappraisal rather than immediate denial.

Regarding the second matter of the appearance of improper influence with the governor by certain attorneys, the statistical analysis presented in the preceding section objectively points up the present governor's conservatism and sensitivity to public sentiment in granting clemency, the fact that he is influenced most by the seriousness of the crime, particularly by whether it was violent. Most importantly, unlike the board, there appears to be no correlation between the governor's favorable action on a clemency matter and whether or not the applicant is represented by an attorney.

None of the above, however, is intended to demean the importance of the proposition that every part of the criminal justice system treat inmates with certainty and fairness both in fact and in appearance.

As discussed in the staff's report on parole,[5] every effort should be made to convince those convicted and serving periods of incarceration that fair and even-handed decisions by rational, responsible decision makers will determine how long they serve and what disabilities will attach once they return to society. To do less is to risk seriously impeding those inmates' rehabilitation and reintegration into society.

From this viewpoint, it would seem incumbent upon all those who administer executive clemency to do everything possible to communicate with inmates, to explain delays and inaction, and to dispel rumors attributing extraordinary influence to anyone in aiding them to obtain a pardon.

In discussions with the staff, members of the Board of Pardons mentioned a number of matters they felt would be beneficial to consider as legislative recommendations:

1. Finality of Board Determinations

One suggestion raised by the Board was the need for a provision similar to the following provision, La.R.S. 15:574.11, applicable to the Board of Parole:

> Sec. 574.11 Finality of board determinations
>
> Parole is an administrative device for the rehabilitation of prisoners under supervised freedom from actual restraint, and the granting, conditions or revocation of parole rest in the discretion of the Board of Parole. No prisoner or parolee shall have a right of appeal from a decision of the board regarding release or deferment of release on parole, the imposition or modification of authorized conditions of parole, the termination or restoration of parole supervision or discharge from parole before the end of the parole period, or the revocation or reconsideration or revocation of parole, except for the denial of a revocation hearing under R.S. 15:574.9.

The rationale for this proposal is that it pretermits any possibility that a person denied a favorable recommendation by the board could seek judicial review of that decision. Since there is presently no legal authority for such an appeal, this provision would not seem necessary, but its enactment would clearly state the legislative policy against any appeal.

2. Automatic Review

The board also expressed some dissatisfaction with the requirement that each denial of a pardon or commutation be automatically reviewed again at a later time. (See underlined portion.)

> Sec. 572.4 Notice to district attorney; consideration and review of applications
>
> Every application for a pardon received by the board shall be registered chronologically, considered by it at least once and, if a recommendation for pardon is denied, reasons for the denial shall be affixed to the application. Thereafter the application, together with any additional supporting evidence thereafter presented, shall be reviewed at least once again. Each application for pardon which is approved by the board shall be forwarded to the governor.

Under present pardon board rules, this review of the file takes place within a year of the initial denial. No hearing is held, no witnesses heard. Rarely does a different recommendation result. However, the inmate is nonetheless precluded from reapplying for a full hearing until a year after the denial on review. In effect, then, an inmate is eligible for a full hearing only at two-year intervals. The Pardon Board felt that by eliminating the requirement of the automatic review, the board is relieved of an administrative task that rarely results in any change of the initial decision. The inmate is benefitted in that he may apply for a full hearing a year from his initial denial rather than waiting two years. The board also felt they could gather information in greater depth from a full hearing, hence their decision making would be facilitated.

If such a change is made, it should be carefully explained to

the inmate population who might interpret it simply as a loss of review rather than the gain of a full hearing at an earlier date.

3. Summary Dismissal for Prematurity

The board also indicated that it wants the option to make summary dismissal of a request for clemency when it judges the request to be premature. Such a provision could appropriately be added to La.R.S. 15:572.4. /Revisions in brackets below./

> Sec. 572.4 Notice to district attorney; consideration and review of applications
>
> Every application for a pardon received by the board shall be registered chronologically /and/ considered by it at least once. /The board may dismiss an application summarily for prematurity if the inmate has not served five years or one-fifth of his sentence, whichever is shorter. When an application is heard/ and ~~if~~ a recommendation for pardon is denied, reasons for the denial shall be affixed to the application. Thereafter the application, together with any additional supporting evidence thereafter presented, shall be reviewed at least once again. Each application for pardon which is approved by the board shall be forwarded to the governor.

Each year the Board of Pardons receives a number of applications for clemency from inmates who, in the board's view, obviously have spent too brief a time in prison in view of the length of sentence given and/or the nature of the crime committed or too brief a time to allow realistic appraisal of a change in attitude. This opinion of the board virtually assures the applicant's denial four-six months later (the average time between application and hearing) when the applicant is given a hearing.

This situation has disadvantages for both the inmate and the board. (1) According to procedures established by the Board of Pardons an inmate, once denied, cannot gain another full hearing--and thus serious consideration--for another one or two years,

depending upon the option he chooses following denial of his original application. (See discussion of Recommendation 2, above.) Summary dismissal would not have the impact of a formal denial and thus would not require that an inmate wait a specified time before making application for clemency. (2) The board, even though its decision is essentially made, must nevertheless invest the time required to gather and review the documents it examines during the hearing process.

4. Board of Pardons: Other Activities

The Board of Pardons also notes that according to R.S. 15:572.1, "Each member (of the Board of Pardons) shall devote full time to the duties of his office and shall not engage in any other business or profession or hold any other public office."

The provision requiring "full time" attention to Board of Pardons duties adequately states the commitment needed. The added proviso precluding any other business or professional work would hamper a pardon board member's outside investments, family businesses, etc., without necessarily any enhancement of his ability to serve on the board. It could also result in an inability to hire persons otherwise qualified who would be unwilling to divest themselves of unrelated income.

Parole board members are also under the identical limitations. (See La.R.S. 15:574.2).

5. Commutation of Life Sentence by Governor

> Whenever a prisoner who has been convicted of a crime and sentenced to imprisonment for life, so conducts himself as to merit the approval of the superintendent of the state penitentiary he may apply for a commutation of his sentence and the application, upon approval of the superintendent, shall be forwarded to the governor. The governor may commute the sentence upon the recommendation in writing of the lieutenant governor, attorney general, and presiding judge of the court before which the conviction was had or any two of them. No commutation under the provisions of this Section shall reduce the period of incarceration to less than ten years and six months.

The statute is probably unconstitutional and should be repealed in that the last sentence attempts to limit the governor's absolute power to pardon/commute to not less than a ten-year six-month incarceration. /See State v. Lee, 132 So. 219 (1931) and subsequent jurisprudence).

The statute is also incompatible with the present pardon procedure as the statute refers to the 1921 Constitution's pardon board members: the lieutenant governor, attorney general, sentencing judge.

The statute serves no purpose that isn't already served under the present pardon procedure.

6. Forfeiture of Good Behavior Allowance or Commutation

> If any prisoner who has received commutation of sentence or earned diminution of sentence under the provisions of R.S. 15:571.3 through 15:571.7 escapes, the prisoner shall thereby automatically forfeit all claims to commutation of sentence previously granted or diminution of sentence previously earned. The prisoner may thereafter be granted another commutation of sentence and may earn a diminution of sentence only on that portion of his original sentence remaining at the time of his escape. In determining the amount of good time which may be earned in each year following his return to the prison from which he escaped, the date of his return to the prison shall be taken as the first day of the first twelve months period during which diminution of sentence may be thereafter earned. Other than time thereafter served and good time thereafter earned, the time actually served prior to his escape shall be the only time allowed in determining the expiration date of his original sentence or that time to which the original sentence may have been commuted subsequent to his return to prison.

The provision revoking a prior commutation is arguably unconstitutional in light of State v. Lee /132 So. 219 (1931)/ and subsequent jurisprudence and should therefore be repealed.

[1]For a basic explanation of statistical techniques used in formulating experience tables and their usefulness in estimating the likelihood of recidivism, see Governor's Pardon, Parole and Rehabilitation Commission, Staff Analysis of Probation and Parole Services and Parole Decision Making Procedures in Louisiana, pp. IV-14 thru IV-20. (Hereinafter cited as Staff Analysis.)

[2]Refer to pp. 2-3 of this report.

[3]Telephone interview with Edwin Scott, member of Louisiana Board of Pardons, January 30, 1978.

[4]J. Douglas Murphy, "Edwards Firm Asks $2,000 for Pardon Signing," (New Orleans) Times Picayune Sec. 1 (Monday, October 3, 1977), pp. 1, 12; "Two Law Firms Asked to Stop Handling Prison Inmate Cases," (Baton Rouge) Morning Advocate, Sec. A (Sat., Nov. 5), p. 5.

[5]Staff Analysis, p. III-8.

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