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Pardon and Parole in Prohibition-Era New York: Discretionary Justice in the Administrative State

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Abstract

Historians of early-modern England and British colonies have productively applied Douglas Hay's germinal study of mercy. In contrast, historians of the United States have overlooked the utility of the conceptual tools Hay provided to prize open the mitigation of punishment across time and place. In the decade that followed the First World War, disputes over the proper role of mercy and administrative discretion were as heated as they were in Hanoverian England. In Jazz Age New York, fears of gangsterism and concern over the apparent laxity of parole regulations put the proponents of Progressive penology on the defensive. This article asks what drove opinion against discretionary justice in the form of the pardon and parole, and traces the conditions that gave rise to judgments that discretionary justice was too frequent and injudicious. A new vision of order, fixated on penal certainty, came into sharp focus over the 1920s, when mandatory sentencing statutes were introduced. Yet gubernatorial clemency survived that crisis, and in 1930 parole was professionalized and placed under stricter management. This article confirms that modernity proved no match for discretionary justice. In its personal and administrative forms, discretion penetrates penal justice, despite the earnest drive to certainty and the persistent demands to terrorize criminals.

Keywords

Pardon--History; Parole--History; Administrative discretion--History; New York (State)

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Special Issue

Law, Authority & History: A Tribute to Douglas Hay

Pardon and Parole in Prohibition-Era New York: Discretionary Justice in the Administrative State*

CAROLYN STRANGE[†]

Historians of early-modern England and British colonies have productively applied Douglas Hay's germinal study of mercy. In contrast, historians of the United States have overlooked the utility of the conceptual tools Hay provided to prize open the mitigation of punishment across time and place. In the decade that followed the First World War, disputes over the proper role of mercy and administrative discretion were as heated as they were in Hanoverian England. In Jazz Age New York, fears of gangsterism and concern over the apparent laxity of parole regulations put the proponents of Progressive penology on the defensive. This article asks what drove opinion against discretionary justice in the form of the pardon and parole, and traces the conditions that gave rise to judgments that discretionary justice was too frequent and injudicious. A new vision of order, fixated on penal certainty, came into sharp focus over the 1920s, when mandatory sentencing statutes were introduced. Yet gubernatorial clemency survived that crisis, and in 1930 parole was professionalized and placed under stricter management. This article confirms that modernity proved no match for discretionary justice. In its personal and administrative forms, discretion penetrates penal justice, despite the earnest drive to certainty and the persistent demands to terrorize criminals.

Les historiens de l'Angleterre et des colonies britanniques de l'époque moderne ont utilisé à l'envi l'étude préliminaire de Douglas Hay sur la clémence. En revanche, les historiens spécialistes des États-Unis ont négligé l'utilité des outils conceptuels proposés par M. Hay

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pour envisager l’allègement des sanctions en termes de durée et de lieu. Au cours de la décennie qui a suivi la Première Guerre mondiale, les débats sur le rôle de la clémence et de la discrétion administrative ont ainsi engendré des querelles aussi vives que dans l’Angleterre des Hanovre. À New York à l’ère du jazz, les craintes à l’égard du gangstérisme et l’inquiétude envers le laxisme apparent des règles en matière de libération conditionnelle ont mis les partisans de la pénologie progressiste sur la défensive. Cet article examine les facteurs qui ont mobilisé l’opinion contre la justice discrétionnaire, matérialisée sous la forme de la grâce et de la libération conditionnelle. Il retrace également les conditions dans lesquelles les tribunaux ont rendu des décisions jugeant la justice discrétionnaire trop fréquente et injuste. En effet, une nouvelle vision de l’ordre, axée sur la certitude pénale, est clairement apparue dans les années 1920, lorsque des lois sur les peines obligatoires ont été adoptées. Néanmoins, la clémence du gouvernement a survécu à cette crise et, en 1930, la libération conditionnelle a été confiée à des professionnels et assortie d’une gestion plus stricte. Cet article confirme que la modernité n’a eu aucune influence sur la justice discrétionnaire. Dans ses formes personnelles et administratives, la discrétion imprègne la justice pénale, en dépit d’un fort désir de certitude et des demandes persistantes pour terroriser les criminels.

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THE POWER TO PARDON, an enduring aspect of criminal justice with ancient and divine roots, resurfaced as a political issue in the late twentieth century, as mandatory sentencing laws consigned hundreds of thousands of petty criminals along with serious violent offenders to long-term incarceration in many advanced democracies.¹ In the United States, some social justice advocates have questioned the prospect of pardoning as a potential remedy, citing its tendency to favour the white and wealthy, but assertive voices have begun to urge the

1. A key work on this phenomenon remains David Garland’s book. See David Garland, *The Culture of Control: Crime and Social Order in Contemporary Society* (Chicago: University of Chicago Press, 2001).

more vigorous use of discretionary clemency to alleviate the pains of mandatory imprisonment.² This debate rests on narrow ground, however. Until recently, scholars have concentrated on presidential pardoning, despite the fact that most offenders are convicted under state criminal laws.³ When Illinois Governor George Ryan decided in 2003 to pardon four men on death row and to commute the life sentences of 167 prisoners he exposed state executives' power to mitigate the punishment for most criminal offences. Ryan's dramatic demonstration of discretionary justice has inspired socio-legal scholarship that productively questions mercy's relationship with the terror of capital punishment and the slow death of life without parole.⁴ The significance of discretionary justice in contemporary US penal politics could not be clearer, and the need to rectify the dearth of historical research on the subject in US state history could not be more pressing.

This article takes up that challenge by applying Douglas Hay's germinal study of mercy—the neglected “other face” of criminal justice—to debates over discretionary justice in Prohibition-era New York.⁵ Despite claims that colonial contexts provide the most fruitful sites to test Hay's analysis, the broader insights in his essay are well-suited to prize open the mitigation of punishment in any jurisdiction or period.⁶ Mercy, Hay argued, operates not according to law or rules but in response to politics, “mental and social structures,” and the ever

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2. On the prejudicial patterns of presidential pardoning, see Robin Respaut, Al Shaw & Krista Kjellman Schmidt, “Timeline: A History of Pardons” (December 2011), online: <www.propublica.org/special/timeline-a-history-of-pardons>. On pardon advocacy to rectify injustice, see Margaret Colgate Love, “Reinventing the President's Pardon Power” (2007) 20:5 Fed Sent R 5; Margaret Colgate Love, “Fear of Forgiving: Rule and Discretion in the Practice of Pardoning” (2000–2001) 13:3–4 Fed Sent R 125.
 3. Jeremy Crouch, “The Law: The Presidential Misuse of the Pardon Power” (2008) 38:4 Pres Stud Q 722; PS Ruckman Jr, “Executive Clemency in the United States: Origins, Development, and Analysis (1900–1993)” (1997) 27:2 Pres Stud Q 251; Kathleen Dean Moore, *Pardons: Justice, Mercy, and the Public Interest* (New York: Oxford University Press, 1989).
 4. Austin Sarat, *Mercy on Trial: What it Means to Stop an Execution* (Princeton: Princeton University Press, 2005); Austin Sarat & Nasser Hussain, eds, *Forgiveness, Mercy and Clemency* (Stanford: Stanford University Press, 2007).
 5. Douglas Hay, “Foreward” in Carolyn Strange, ed, *Qualities of Mercy: Justice, Punishment and Discretion* (Vancouver: University of British Columbia Press, 1996) vii at viii–ix.
 6. Jim Phillips, “Albion's Empire: Property, Authority and the Criminal Law in Eighteenth-Century Canada” (2006) 10 LH 21 at 26.

shifting “problem of public order.”⁷ With this checklist of criteria to interrogate, and mindful, as he was, of discretionary justice’s contingency, the historian of mercy can range beyond the well-charted histories of England and its former colonies.⁸ Bridging from that rich historiography, mercy’s politics can be charted to capture its contours and its sometimes seismic shifts. The questions Hay first formulated to analyze Hanoverian England are timeless: What drives opinion in favour of mercy or against its use? When is clemency judged to be too frequent or indiscreet? How and why do the “mental worlds” that give mercy its meanings change hue? If, as Hay stressed, the history of discretionary justice is made by individuals, not dictated by systems or ideologies, why do certain individuals’ voices accrue authority?

In post-World War I New York the fear of gun-related violence created a volatile setting for debate over administrative and executive discretionary justice. Whereas industrialization and urbanization stoked similar concerns in mid eighteenth-century England, Prohibition-related gangsterism, and the apparent ease with which bandits preyed on the public with little risk of punishment, produced a political environment hostile to any hint of mercy, whether in the form of the governor’s pardon or the parole board’s grants of release. Property and authority seemed under attack, and a modern version of the gentry—captains of industry—banded with Republican politicians to wage war against crime. The proponents of Progressive penology, whose authority rose over the late nineteenth and early twentieth century, lost credibility after Prohibition came into force in 1919. Over the next decade a new vision of justice, fixated with penal certainty, came into sharp focus. By the late 1920s, when mandatory sentencing statutes were introduced, executive clemency was constrained by governors’ worries over appearing soft on crime, not by legislative or constitutional change. Yet gubernatorial clemency survived that crisis, and in 1930 parole was professionalized and placed under stricter management. Modern administrative discretion and the pardon came to coexist in one of the most forward-looking penal jurisdictions in the world.

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7. Douglas Hay, “Property, Authority and the Criminal Law” in Douglas Hay et al, eds, *Albion’s Fatal Tree: Crime and Society in Eighteenth-Century England* (London: Allen Lane, 1975) 17 at 24, 26, 53 [Hay, “Property”].
 8. For key works, see Jim Phillips, “The Operation of the Royal Pardon in Nova Scotia, 1749-1815” (1992) 42:4 UTLJ 401; Peter King, *Crime, Justice and Discretion in England, 1740-1820* (Oxford: Oxford University Press, 2000); Simon Devereaux, “Peel, Pardon, and Punishment” in Devereaux & Paul Griffiths, eds, *Penal Practice and Culture, 1500-1900: Punishing the English* (London: Palgrave Macmillan, 2004) 258.

I. RATIONALIZING REPUBLICAN EXECUTIVE DISCRETION

The framers and subsequent defenders of the US Constitution needed no convincing that the pardon was a matter for careful consideration. Alexander Hamilton deployed his political persuasiveness and rhetorical flare in the 1780s to ensure that the Chief Executive was assigned constitutional authority to grant pardons unfettered by any check or balance from the judicial or legislative branch of government. Although a revolutionary leader, Hamilton took his cue from Locke and Blackstone, not radicals such as Thomas Paine who warned that any hint of monarchical fiat would lead to tyranny.⁹ Hot-headed republicans might wish to strike out executive discretion (indeed, Pennsylvania's first Constitution substituted an elected council),¹⁰ but Hamilton argued successfully that the nation's leader must have the option to win over enemies in volatile times. In the rebel states no less than the old empire, justice must bear a benevolent countenance to curry loyalty.

Today's advocates of a more robust exercise of clemency typically refer to the framers and founders of the federal justice system to justify their pleas.¹¹ The historiographical preoccupation with the presidency and the passage of the Constitution has ensured that the origins of executive pardoning at the federal level have been studied intensively.¹² Supreme Court Justice Joseph Story saw nothing unfitting in the Republic's incorporation of a power long associated with the royal prerogative and the divine right of kings. In 1833 he wrote that the "power of pardon" was not "incompatible with the fundamental principles of a republic." On the contrary: "it may be boldly asserted to be peculiarly appropriate, and safe in all free states; because the power can there be guarded by

9. Ron Chernow, *Alexander Hamilton* (New York: Penguin, 2004) at 253-59.

10. John Dinan, "The Pardon Power and the American State Constitution Tradition" (2003) 35:3 *Polity* 389 at 396.

11. Paul Rosenzweig, "A Federalist Conception of the Pardon Power" (4 December 2012) 89 *Legal Memorandum* 1 (Washington, DC: The Heritage Foundation).

12. For the first substantial study, see Willard H Humbert, *The Pardoning Power of the President* (Washington, DC: American Council on Public Affairs, 1941). For a review of this work and subsequent scholarship, see PS Ruckman Jr, "The Study of Mercy: What Political Scientists Know (and Don't Know) about the Pardon Power" (2012) 9:3 *U St Thomas LJ* 783.

a just responsibility for its exercise.”¹³ References to such high-minded statements and to pardoning’s constitutional validity may have buoyed recent efforts to reinvigorate executive clemency, but they tell us nothing about the ways that discretionary justice operated once it was put into practice. With few exceptions, historians have also failed to examine the impact of parole in its various guises, treating it separately from pardoning. Finally, the need for grounded studies of mercy’s past, as it transformed in conjunction and tension with parole, is most pressing at the level of states.

II. A CASE FOR STATE-BASED STUDIES OF DISCRETIONARY JUSTICE

Leading socio-legal scholars, notably Austin Sarat, David Garland, and Jonathan Simon, have drawn on Hay’s work since the 1980s to explore the historical roots of contemporary penal politics, but just two historians of the United States have followed suit.¹⁴ Vivien M.L. Miller’s and Ethan Blue’s histories of discretionary justice in Florida, California, and Texas in the late nineteenth and early twentieth centuries have confirmed the enduring importance of patronage.¹⁵ In these states white elites exerted influence that determined which prisoners were reprieved from execution or spared from serving their full prison sentences, either by pardon boards or by governors in consultation with administrative appointees. Stark inequalities of class, race, and gender were reinforced through the exercise of mercy, since petitioners could urge and sponsor clemency, in many cases on condition that released prisoners work for employers under exploitative

13. Joseph Story, *Commentaries on the Constitution of the United States; with a Preliminary Review of the Constitutional History of the Colonies and States before the Adoption of the Constitution* (Boston: Hilliard, Gray, and Company, 1833) vol 3 at para 1491.

14. See e.g. Sarat, *supra* note 4; David Garland, “Sociological Perspectives on Punishment” (1991) 14 *Crime Just* 115; Jonathan Simon, *Poor Discipline: Parole and the Social Control of the Underclass, 1890-1990* (Chicago: University of Chicago Press, 1993). Garland later included an essay by Douglas Hay (“Hanging and the English Judges: The Judicial Politics of Retention and Abolition”) in his collection, co-edited with Randal McGowan and Michael Meranze, *America’s Death Penalty: Between Past and Present* (New York: New York University Press, 2011) 129.

15. Vivien ML Miller, *Crime, Sexual Violence, and Clemency: Florida’s Pardon Board and Penal System in the Progressive Era* (Gainesville, FL: University Press of Florida, 2000); Ethan Blue, *Doing Time in the Depression: Everyday Life in Texas and California Prisons* (New York: New York University Press, 2012). My own work continues in their footsteps. See Carolyn Strange, *Discretionary Justice: Pardon and Parole in New York from the Revolution to the Depression* (New York: New York University Press, 2016).

conditions that underlined recipients' subservience. Hanoverian England was distant in time and space from Progressive Era Florida or Texas and California during the Depression, yet the economic and social dynamics Hay identified played out in line with similar asymmetries through discretionary justice.¹⁶

The US Constitution delegated to the states the responsibility to determine criminal law as well as the conditions under which penalties might be mitigated. Since many states maintained gubernatorial authority over mercy's dispensation well after parole became the dominant mode of discretionary release for prisoners, Hay's analysis of terror, mercy, and majesty need not be considered a foreign historiographical import. Of all the states, New York was arguably the most majestic in its retention of the governor's power to pardon, and according to one constitutional scholar, its founding set a precedent for a strong federal executive.¹⁷ After the state's First Constitution of 1777, which granted the legislature the power to pardon in cases of treason and murder, the Constitution of 1821 boosted executive authority, giving governors sole authority to pardon or commute death sentences for murder. Despite the ratification of three subsequent Constitutions, the governor of the State of New York retains to this day full latitude to grant pardons and commute sentences.¹⁸ Thus, when New York's parole board assumed responsibility in 1930 for screening and appraising clemency requests in all but capital cases, this transformation of discretionary justice was administrative, not constitutional in nature.

Why did the governor's pardoning prerogative persist despite mounting hostility toward discretionary justice in the 1920s? The answer lies, surprisingly, in the assault on discretionary justice, which advanced over the decade and culminated in the passage in 1926 of the first suite of mandatory imprisonment

16. For an equally significant article which also draws on Hay's essay, see Stephen Garton, "Managing Mercy: African Americans, Parole and Paternalism in the Georgia Prison System, 1919-1945" (2003) 36:3 *J Soc Hist* 675.

17. Daniel J Hulsebosch, *Constituting Empire: New York and the Transformation of Constitutionalism in the Atlantic World, 1664-1830* (Chapel Hill: University of North Carolina Press, 2005) at 175-76.

18. The State of New York adopted a third Constitution in 1846, a fourth in 1894 and a fifth in 1938, which has been amended several times. For the current Constitution (effective 1 July 2014), see New York Department of State, "New York State Constitution" (1 January 2014), online: <www.dos.ny.gov/info/constitution.htm>. For the authoritative history of the New York Constitution, see Charles Z Lincoln, *The Constitutional History of New York From the Beginning of the Colonial Period to 1905, Showing the Origin, Development, and Judicial Construction of the Constitution*, 5 vols (Rochester: The Lawyers Co-Operative, 1906).

statutes in the United States, commonly known as the Baumes laws.¹⁹ Named after Caleb H. Baumes, the powerful Republican senator who proudly bore the face of law and order, these laws included a statute that imposed life sentences on all felony offenders after a third felony conviction. Baumes battled alongside business leaders and newspaper editors who attacked discretionary justice in all its forms, including gubernatorial clemency. Yet parole was their enemy number one, since it appeared to permit bureaucrats to work behind closed doors for the criminal's benefit, not the security of the law-abiding public. Defenders of mandatory life sentences contended that criminals less deserving of severe punishment could still petition the governor for mercy. Ironically, the most conservative opponents of administrative discretion defended executive prerogative power.

III. THE CRIME WAVE AND THE POLITICS OF DISCRETION

The short duration of US participation in the First World War did not shield it from a post-war crime wave, or at least the general impression that lawlessness was rife. Crime, especially gun-related violence, followed with the return of servicemen, a pattern historians have tracked in other post-war contexts.²⁰ But several factors maintained its momentum in the 1920s, especially in New York City.²¹ One was the growing availability of automobiles—tempting objects to steal and a means to evade authorities. Another was the profits to be made through the illicit liquor trade.²² Newspaper editors complained that “automobile bandits” went on crime sprees, while states such as New York still allowed prisoners the means to reduce their sentences through “good time” and to apply for parole.²³ Many legal experts questioned the veracity of claims that crime was out of control

19. Victoria Nourse, “Rethinking Crime Legislation: History and Harshness” (2004) 39:4 *Tulsa L Rev* 925.

20. See *e.g.* Lawrence M Friedman, *Crime and Punishment in American History* (New York: Basic Books, 1993) at 449-52.

21. In New York City the jump in homicides was greater after the First World War than after any other previous war. Eric Monkkonen, *Murder in New York City* (Berkeley: University of California Press, 2001) at 18-19.

22. See *e.g.* Lisa McGirr, *The War on Alcohol: Prohibition and the Rise of the American State* (New York: WW Norton & Co, 2016).

23. “America’s Crime Wave,” *New York Tribune* (16 February 1919) 3.

but headlines spoke louder, and a pervasive sense of fear clouded the mental world of 1920s New York.²⁴

Crime was the Jazz Age's seedy underbelly in post-war America, which novelist F. Scott Fitzgerald portrayed in *The Great Gatsby* (1925). The novel's setting—Sands Point, Long Island—was the real-life location for a series of robberies that took place in the summer of 1921, when a gang of thieves made off with gold, coins, jewellery, and \$40,000 in stock certificates, the property of Commodore Frank S. Hastings—yachtsman, ranchman, and financier.²⁵ Although police captured the bandits, who were subsequently convicted, this show of law enforcement failed to inspire Hastings' confidence that justice would be served. One of the gunmen bragged after his conviction that he expected a "speedy release," since he had sufficient "political influence" to secure parole. More brazenly, the "thug" vowed to return to Sands Point, to rob the rich residents and kill Hastings.²⁶ Under the circumstances the law's deterrent majesty was sorely wanting.

By the 1920s, leaders of government and industry felt pressured to take action against unwarranted discretionary justice. "Governor Sees Crime Wave Due to 'Living Fast,'" was the *New York Times*' headline for Republican Governor Nathan Miller's January 1922 address to the state legislature on the problem. New York's governors, elected directly by the people, delivered periodic messages to the legislature on matters of the moment, and their annual addresses commented on the general state of affairs, alerted politicians to policies under review, and highlighted matters they might act upon. Miller attempted to allay public anxiety over the audacity of criminals by stressing that he kept a tight rein on his use of clemency, unlike his immediate predecessor, Democrat Alfred E. Smith, who had "let a good many people out of prison" through his liberal use of the pardon power. Miller announced that he had granted just two pardons and commuted the sentences of twelve prisoners over the previous year. "I understand I have a reputation for being hard-hearted," he conceded, but the governor's prerogative must be "exercised very sparingly, with 'very' underscored ... It is a power in which sentiment and sympathy should be very carefully controlled."²⁷ Only a

24. When the Medico-Legal Society of New York met early in 1922, one member stated, "there is no crime wave," but simply an increase in young men's use of guns, "owing to the use of firearms in the army." Alexander Karlin "For Suspended Sentences," *New York Times* (12 January 1922) 4.

25. Donald L. Miller, *Supreme City: How Jazz Age Manhattan Gave Birth to Modern America* (New York: Simon & Schuster, 2014).

26. "Miller Defends the Parole Board," *New York Times* (15 January 1922) 16.

27. "Governor Sees Crime Wave Due to 'Living Fast,'" *New York Times* (20 January 1922) 1.

strong office holder could resist the urge to pardon out of sympathy, and the *Times* applauded Miller's stingy record: "He has been very sparing, indeed some have called him niggardly."²⁸

Miller's favourable headlines notwithstanding, he was keenly aware that public confidence in criminal justice was on the wane, especially in the minds of wealthy New Yorkers. Two weeks before the governor's statement to the legislature Commodore Hastings had written Miller to express his "intense indignation" over the anticipated parole of the men who had robbed him. He had also hired a lawyer to present a formal protest against the paroling of dangerous criminals "on fake pretext and crocodile tears." Although New York's governors played no direct role in the state's parole system or its related indeterminate sentencing laws, introduced in 1889, Hastings and his well-heeled neighbours demanded that the governor take action against the paroling of "arch fiends."²⁹ One such man was an African American former parolee named Luther Boddy, who had shot and killed two white detectives in New York City just days before Hastings wrote the governor.³⁰ Yet the Commodore was less exercised over this "cop fighter" than he was over the white men who served on the Board of Parole:

We are in greater danger from that board than we are from the thugs themselves. We can kill the thugs, and are prepared to do so; but we seem to have no redress against the action of the Parole Board, which all agree is a menace to public safety.³¹

Threatened with elite vigilantism, Governor Miller publicly backed the board, but privately he put its chairman on notice.³² Thereafter repeat offenders and "life men" were to be paroled rarely, and he admonished the board to refer any such exceptional cases to the governor's office.³³ In the niggardly pardoner's mind, executive clemency was more judicious than the opaque decisions of state bureaucrats.

In the 1922 State elections Alfred Smith made a comeback, riding on support for his calls to modify the federal restrictions on alcohol.³⁴ His tenure

28. *Ibid.*

29. Hastings to Miller, *Papers of Governor Nathan L. Miller* (11 January 1922; 15 January 1922), Albany NY, New York State Archives (box 14, file 150-586, 13682-78B) [*Miller Papers*].

30. "Negro Bandit Kills 2 Police Detectives," *New York Times* (6 January 1922) 1. The officers had attempted to question Boddy on suspicion of robbery and murder.

31. Hastings to Miller, *Miller Papers*, *supra* note 29 (11 January 1922).

32. "Miller Defends Parole Board," *New York Times* (15 January 1922) 1.

33. Miller to George W Benham, *Miller Papers*, *supra* 29 (January 17, 1922). Benham was the board's Chairman and a fellow Republican.

34. Christopher M Finan, *Alfred E. Smith: The Happy Warrior* (New York: Hill and Wang, 2002) at 171-72.

this time would, however, be longer and far bumpier than Miller's, since the state's legislature remained Republican controlled over the 1920s. Most of the metropolitan dailies, led by the *Brooklyn Eagle*, amplified that party's call for tougher laws with fewer loopholes for criminals to evade punishment. The Democratic governor's use of his discretionary powers was closely watched and frequently condemned, but when it came to the Board of Parole's actions Smith shared his opponents' concerns that administrative discretion required an overhaul. Indeed, he went so far as to endorse the many academic criminologists and psychologists, who claimed that criminal sentencing ought to be a matter for experts, not judges or parole authorities. As Smith no doubt anticipated, the Republican majority rejected his proposal; instead, they rammed through a sheaf of regressive statutes in 1926, which left the governor's power to pardon the felon's only hope to leave prison alive.

IV. THE FAILINGS OF ADMINISTRATIVE DISCRETION

By the 1920s the Empire State operated the largest and most differentiated penal-correctional system in the United States. Historians such as David J. Rothman, Nicole Hahn Rafter and Rebecca McLennan have emphasised New York's leadership in experimenting with new forms of prison management, such as Sing Sing warden Thomas Mott Osborne's "Mutual Welfare League."³⁵ Scholars have also emphasized the rising influence of experts, and their methods of classifying, treating, and releasing prisoners under the rubric of indeterminate sentencing.³⁶ The Elmira Reformatory in upstate New York led the world in devising means to screen inmates for medical and moral 'deviations' and to monitor parolees after release. The search for 'defectives' and attempts to sift them out broadened and became more sophisticated over the 1910s, as New York introduced psychological clinics in the Bedford Hills Reformatory for Females and Sing Sing State Prison. Psychiatrists, psychologists, social workers, and criminologists entered prisons, turning inmates into 'cases' requiring expert

35. David J Rothman, *Conscience and Convenience: the Asylum and its Alternatives in Progressive America* (Boston: Little Brown and Company, 1980); Nicole Hahn Rafter, *Partial Justice: Women in State Prisons, 1800-1935* (Boston: Northeastern University Press, 1985); Rebecca M McLennan, *The Crisis of Imprisonment: Protest, Politics, and the Making of the American Penal State, 1776-1941* (New York: Cambridge University Press, 2008).

36. For an historic analysis of the rise, fall, and resurfacing of indeterminate sentencing, see Fiona Doherty, "Indeterminate Sentencing Returns: The Invention of Supervised Release" (2013) 8:3 NYUL Rev 958.

judgement.³⁷ Critical histories of Progressive penology have emphasized that punitive convenience consistently trumped the corrective consciences of the men and women whose authority rested on their training in social and behavioural science.³⁸ Histories of parole in the United States share this dim view of Progressive penology: The supervision of parolees expanded the carceral state, leading to more intensive governance of poor and African American communities.³⁹

These damning depictions of penal modernity's class, race, and gender biases would have been unrecognizable to New Yorkers in the post-war era, whether friends or foes of Progressivism. This does not mean the state's penal system lacked critics; rather, criticism was filtered through a different lens in the 1920s. Metropolitan newspapers sold by the tens of thousands by blaring that crime was skyrocketing. Far from net widening, it looked to most New Yorkers that the prison system needed to punish more criminals and incarcerate them longer.⁴⁰ City and state police authorities felt the heat of public demands for order, but parole authorities were scorched over their handling of administrative discretion. Even parole's supporters, such as Brooklyn Mayor John F. Hylan, condemned New York's system: "The beneficent purposes of the parole system ... have been too frequently disfigured by a mushy sentimentality... [there have been] too many instances of criminals to whom mercy was injudiciously extended." With friends like Hylan the discretionary release of prisoners needed no enemies, but they lined up in force by the mid 1920s. Every time a previously paroled inmate committed a violent crime bold headlines convinced New Yorkers that the "loose administration of the parole law" must come to an end.⁴¹

Criminal justice authorities, particularly academics and contributors to highbrow magazines, were sceptical of newspaper editors' claims, but few believed that the ideals of screened and monitored release had been implemented.⁴² From its origins in the 1840s the Prison Association of New York (PANY) advocated

37. These diagnostic terms, favoured by Progressives, were stigmatic. Rothman, *supra* note 35 at 328.

38. *Supra* note 35.

39. For the most influential work on this topic, see Simon, *supra* note 14. See also, A Keith Bottomley, "Parole in Transition: A Comparative Study of Origins, Developments and Prospects for the 1990s" (1990) 12 *Crime & Just* 319.

40. The term "net widening" refers to the expansion of social control that attends various forms of penal diversion. Thomas G Blomberg, "Foreword," in Rothman, *supra* note 35 at xii.

41. "Criminals and the Courts," *Brooklyn Daily Eagle* (8 January 1922) 4B.

42. Raymond Moley, *An Outline of the Cleveland Crime Survey* (Cleveland: The Cleveland Foundation, 1922) at 57. Over one month in 1919, Moley (who held a PhD in political science from Columbia University) found that the amount of crime coverage in Cleveland had increased seven-fold, while the rate of crime had stayed steady.

penal modernization, and it claimed credit for introducing parole to the state in the 1870s at Elmira. Initially, the organization considered the State's selection criteria for Board of Parole appointments perfectly acceptable. A record of public service did nicely, as did the assumption that middle-aged white men of probity could be trusted to exercise "great discrimination and sound judgment."⁴³ PANY applauded New York's decision to hire physicians and psychiatrists to report on parole applicants' suitability for release, detailing their physical and mental 'defects,' but the organization found it worrying that the board's decisions took little account of this expertise. In his 1921 Annual Report the Secretary of PANY praised New York's embrace of "modern efforts in the solution of the treatment of crime and delinquency," but he decried the amateurish administration of parole. If the board failed to modernize, public demand for harsher justice would continue to escalate. Nothing but an authoritative and judicious system of discretionary release would stifle the "loud clamor for a reversion to more punitive forms of treatment for law breakers."⁴⁴ These were prescient words. Over Governor Smith's second and third term that clamour became deafening in the press and, more significantly, the legislature responded.

V. THE PRESSER AFFAIR AND THE PURSUIT OF PENAL CERTAINTY

If wealthy Long Islanders managed to turn their victimization into an attack on parole in the early 1920s, the Izzy Presser affair of 1926 nearly destroyed the concept of indeterminate punishment and the discretionary mechanisms that controlled it. Isadore "Izzy" Presser was the sort of criminal who gave believers in the crime wave reason to accuse the parole system of abetting criminality. Presser began his lawless life in his teens, and his use of firearms earned him the profile of a gun-toting gangster. In 1915 Presser and an associate gunned down another underworld figure before witnesses. Indicted for pre-meditated murder, he chose to plead guilty to manslaughter in the first degree, which earned him a sixteen-year sentence, reducible through "good time" credits.⁴⁵ By 1926 the District Attorney's earlier decision to accept a plea was not the discretionary act

43. State of New York, Prison Department, *Annual Report of the Superintendent of State Prisons for the Year Ending September 30, 1902* (February 1903) at 13.

44. Prison Association of New York, *Annual Report of the Prison Association of New York, 1921* (Albany, NY: JB Lyon, 1921) 23 at 24-25 [PANY, *Report*].

45. "Two Gangsters Plead Guilty to Murder and Get 12 Years Each," *New York Evening World* (10 August 1915) 3.

that incensed the public; rather, it was the Board of Parole's decision to release Presser on parole. In April the public learned that the gunman, who had racked up numerous misconduct charges and escaped prison in 1921, was to be paroled into the custody of the Jewish Board of Guardians. New York's Superintendent of Prisons, an *ex officio* member of the state board, had evidently dismissed the prisoner's "black marks" and recommended that he be released on parole.⁴⁶

The *Brooklyn Eagle's* editor could not have wished for a better case. By law, Presser should have been tried for jail-breaking and required, at the very least, to serve out his full original sentence. Over the previous few years the paper had depicted parole as a system run by "sob sisters" posing as judicious men. Stronger words seemed appropriate in this case, which gave off the stench of corruption on top of incompetence. "VICIOUS CRIMINAL TO BE FREED," the *Eagle* screeched, calling the Board's decision "another flagrant illustration of the way in which notorious and vicious criminals are slipped out of State prisons through an abuse of the parole system."⁴⁷ Presser's controversial parole provided compelling evidence that administrative discretion endangered public safety.

Parole's embattled supporters had their own reasons to find the case troubling. There was no question that parole, whatever its failings, had become an essential cost-saving measure and the chief means to manage the burgeoning number of prisoners in the country's largest penal system. Its repeal would spell more than a defeat for Progressive penological principles: it was a recipe for calamity in the already overburdened prison system. The fiasco prompted Governor Smith to take bold action against the board, by ordering it to rescind Presser's parole pending an investigation into the case and the parole system's operations at large.⁴⁸ This showdown asserted executive discretion's superiority over administrative justice, with Smith exhibiting the "just responsibility" the founding fathers had granted the president's office. Taking a tough stand against the board also allowed the Democratic governor to claim a leadership position in the mounting war against crime. In the summer of 1925 industry leaders, including Elbert H. Gary, the chairman of the board of US Steel, had beaten Smith to the field of battle when

46. "Long Unfit for his Office," *The Long Islander* (30 April 1922) 1. The Board of Parole comprised the State Superintendent, acting with two governor-appointed members. US, *An Act Constituting the State Prison Commission, a State Board of Parole, and Authorizing it to Parole the Prisoners in State Prisons*; NY, *Laws of the State of New York*, NY, 1901, c 260.

47. "Vicious Criminal to be Freed Next Week on Parole," *Brooklyn Daily Eagle* (23 April 1926) 1.

48. Governor Smith to James L Long (30 April 1926), in Alfred E Smith, *Public Papers of Alfred E. Smith, Governor of New York, 1923-1928*, vol 3 (Albany, NY: JB Lyon, 1938) at 514 [Smith, *Public Papers*].

they took command of what they termed a “citizen’s anti-crime crusade.”⁴⁹ At that point, “big business” had invited the governor along to their initial meeting out of courtesy. Less than a year later the bungled parole of Izzy Presser put the chief executive back in charge, determined to revamp parole.

VI. QUESTIONING ADMINISTRATIVE AUTHORITY

Since the early 1920s the parole problem had vexed men of property and lent support to Smith’s political rivals. In 1925 one Republican observer of New York’s criminal justice system summed up his party’s view: “the laws are too lax, the parole board is—well—rotten, and the judges are too lax in imposing sentences under the laws we now have.”⁵⁰ Republican Senator Baumes added personal clout to this cause. In the guise of delivering a report on the state of civil and criminal law in March of 1926, he laid out his formula for root and branch reform. Based on his claim that violent crime in New York had doubled in the previous five years, Baumes demanded that scope for discretion be narrowed: “The present conditions demand firmness in all officials having to do with the administration of criminal law and that of executive pardons.”⁵¹ Although he saved his harshest remarks for the Board of Parole, Baumes also judged the current governor too soft: “leniency in any official heartens the criminal.”⁵² Thus, Smith’s reprimand of the board a month later and his appointment of a Commissioner were two counterpunches that followed the senator’s swipe. Penal politics were intensely personal in this policy ring, and both men were prepared to go the distance.

When commissioner George W. Alger delivered his report on parole late in 1926 he concluded that the system had failed to keep pace with up-to-date methods of case management.⁵³ Over the course of his investigation, Alger uncovered evidence that three board members, travelling once per month on a circuit of the state’s prisons, had to process fifty to seventy-five applicants per day. The chairman, George Benham, admitted that board members did not use

49. “Gary in Body to Fight Crime,” *Pittsburgh Gazette Times* (30 July 1925) 1.

50. “Clayton Indorses Gov. Smith’s Plan for a Crime Board,” *Brooklyn Daily Eagle* (2 August 2 1925) 6A. Walter F Clayton sided with fellow Republicans, who urged the Board of Parole’s abolition, so that it could work “in favor of the average citizen instead of the criminal and law-breaker.”

51. Caleb Howard Baumes, New York (State) Legislature, *Report of the Joint Legislative Committee on the Civil and Criminal Practice Acts* (Albany, NY: JB Lyon Company, 1926).

52. *Ibid.*

53. Report of Commissioner on Board of Parole and Parole System (1926), in Smith, *Public Papers*, *supra* note 48 at 519-34 [Report of Commissioner].

a points system to appraise prisoners' eligibility; instead, they considered "the look" of them, and offered offenders what he termed "fatherly advice."⁵⁴ When it came to reports from prison physicians and psychiatrists, Benham stated (correctly) that they were not obliged to consider evidence of mental or physical defects. Alger found it extraordinary to hear that the board relied on the word of prisoners and their keepers, rather than examining each applicant's 'social history.' When he questioned the official who had recommended Presser's parole, Superintendent James L. Long, he received a similar response about the vague criteria for parole. Alger persisted: "So that when you really get down to the question of what the parole board has to judge a man by it is how he appears, plus what the shop [overseer] says about his conduct?"⁵⁵ Long saw nothing wrong with this approach, since prisoners had the "right" to expect parole once they served their minimum sentences without violating prison rules. In his final report Alger condemned Long's orientation toward prisoners' rights: "It is not enough that the Parole Board should, as it says, 'retain the respect and confidence of the prisoner.'"⁵⁶ Because prisoners were typically paroled after serving their minimum sentences, Alger concluded that the board had lost "the respect and confidence of society itself."⁵⁷ A suspect system of discretionary justice, not just New York's "arch criminals," had eroded confidence in the law.⁵⁸

Commissioner Alger did not advocate the abolition of parole or the cessation of pardoning, as some law and order advocates wished. His prognosis was that the Progressive programme of indeterminate sentencing, parole, and probation, introduced in the late nineteenth century, would ultimately prove its worth if parole were to become based on "facts," which added up to a "reasonable probability" of an inmate's likelihood of "remaining at liberty without violating the law."⁵⁹ Because New York had underfunded and undermanned the operation of the board these ideals had yet to be properly evaluated. To become more than a "moral gesture," Alger advised, parole required the state's investment in a full-time body of properly trained members, prepared to base their decisions on

54. "Investigation of the Board of Parole and the Prison Department of the State of New York, stenographers minutes," in *Papers of Governor Alfred E. Smith*, Albany NY, New York State Archives (Box 65, 13682-53A) at 327.

55. *Ibid* at 401.

56. *Ibid*.

57. "New Parole Body and Pardon Plan Urged by Alger," *Brooklyn Daily Eagle* (10 December 1926) 1. The *Eagle* published the Report of Alger's Commission almost verbatim.

58. *Ibid*.

59. *Ibid* at 2.

expert assessments.⁶⁰ Such a body of men could operate according to the latest social scientific case management protocol. This arrangement would also allow trained professionals to assist the governor in executing his authority to commute sentences. Although the question of executive discretion was beyond Alger's brief, he used his report to highlight that the gubernatorial prerogative also sat awkwardly in the modern administrative state.⁶¹ Mercy must remain but it must also, somehow, be modernized alongside parole. Surprisingly, hardliners agreed.

VII. EXECUTIVE DISCRETION AS PENAL ANTIDOTE

Demands for tougher law enforcement registered at all levels of government by the mid-1920s. President Calvin Coolidge launched a federal Crime Commission in November 1925, as interstate crime increased under Prohibition, but New York's Crime Commission, launched in May 1926, gained a higher national profile. Under Baumes' leadership it oversaw the dramatic rollback of indeterminate sentencing, earned release schedules, and liberal parole provisions, which Progressive penologists had introduced over the previous four decades.⁶² The Commission became a sharp-toothed watchdog snapping at lapses in policing, punishment, and prosecution, but there was one branch of government it handled with care: executive discretion. Despite the Commission's and Republicans' regular harping over Smith's liberal pardoning, the governor's prerogative survived while judicial discretion was mauled.

Taking a tough stance on prisoners' opportunities to shorten their sentences and clipping judges' options to vary sentences according to individual circumstances did not translate into disapproval of clemency. Indeed, mandatory penalties heightened clemency's symbolic significance. Liberal-minded critics and benevolent associations hoped that gubernatorial clemency would reduce unwarranted suffering. When PANY reported in 1927 that cases of "manifest injustice" had come to light it projected that "cases of that kind can be taken care of through executive clemency."⁶³ For different reasons Baumes resisted demands from within his own party to axe executive discretion. If handled

60. *Ibid* at 1.

61. See Rachel E Barkow, "The Ascent of the Administrative State and the Demise of Mercy" (2008) 121:5 Harv L Rev 1333.

62. The Commission's official brief was to examine the "crime situation" in the state, as well as the "punishment treatment and pardon of convicted persons." Mary M Stolberg, *Fighting Organized Crime: Politics, Justice and the Legacy of Thomas E. Dewey* (Boston: Northeastern University Press, 1995) at 101-102.

63. PANY Report, *supra* note 44 at 25.

with far greater restraint and discrimination the pardon power could operate without interfering with crime control. “In times like we are now experiencing,” he advised, a soft-hearted approach to discretionary justice must stop:

It is extremely easy through the relaxing of rigid scrutiny of the merits of individual applications for executive clemency and the giving of freer rein to sentimentalism, to so hearten the criminal classes as to create in them a feeling of security that an avenue of escape from the service of prison terms exists, no matter what the sentence of the court nor the enormity of the offense.⁶⁴

According to Baumes, building a road to a greater sense of security among the law-abiding public required narrowing avenues for clemency and straightening out protocol concerning applications for mercy. As it was currently practiced executive clemency eroded the “majesty of the law,” but governors could shore it up by dispensing mercy in the manner of a formal and solemn “judicial proceeding.”⁶⁵ Like Alexander Hamilton, Baumes regarded executive justice as a tool of statecraft in dangerous times. But times had changed since the Revolution. In the late 1920s the pardon power became the hard-liners’ antidote for possible side effects of mandatory sentencing.

VIII. HARD CASES, MERCILESS TIMES

When gunman “Bum” Rogers was sent away for life in November 1926 as a repeat felony offender his sentence proved that mandatory sentencing was the bitter pill needed to cure the ills produced by New York’s parole system. “Turning the Criminals Loose,” an article that appeared in a social affairs magazine, connected Rogers’ case to Presser’s to dramatize the “debauch of leniency” that had infested New York’s penal system.⁶⁶ It revealed that Smith, during his first term as governor, had commuted Rogers’ fourteen-year sentence for assault after he had served only two years. While on parole Rogers had committed numerous armed robberies, one of which netted him a thirty-year sentence. Like Presser, Rogers had managed to escape, but his recapture in 1927 allowed prosecutors to try him under the new fourth offender laws, which the Appellate Division of the New York Supreme Court had ruled constitutional in February 1927. The judge who presided over Rogers’ trial sang from Baumes’ song sheet as he delivered the

64. “Executive Clemency,” in Baumes, *Report of the Joint Legislative Committee*, *supra* note 51 at 27.

65. *Ibid.*

66. Lawrence Veiller, “Turning the Criminals Loose,” *The World’s Work* (5 March 1927) 546 at 549.

sentence: “You have scorned society and as a spokesman for an aggrieved public it is my duty to give you the punishment which your conduct deserves.”⁶⁷

The turn toward unflinching severity attracted plenty of adherents, including legislators in other states, but within New York opposition soon emerged. At the November 1927 meeting of the New York State Conference on Social Work, the head of the new Board of Parole, Dr. Kieb, denounced the mandatory sentencing statutes’ impact on the prison population, inflating numbers to dangerous levels. Democratic Assemblymen began to draft bills to restrict the laws to violent offenders. Philanthropists and businessmen concerned about de-investment in penal reform lobbied for the repeal of the laws.⁶⁸ And quietly, District Attorneys encouraged repeat offenders to plead guilty to misdemeanors, while judges urged juries to consider convicting sympathetic offenders on lesser charges. The cultured *Century Magazine*, one of many elite organs opposed to the Baumes laws, observed that “not a few of our judges and prosecutors, as well as penologists, have found occasion to bitterly denounce them.”⁶⁹

It took an ideal case, a change of governor, and growing anxiety over the ballooning state prison population and its attendant financial burden for the exercise of clemency to correct an injustice imposed through mandatory life sentencing. In 1928 Governor Smith gambled on a bid for the presidency and lost, leaving his younger protégé, Democrat Franklin D. Roosevelt, to search for the means to increase the legitimacy of parole in a climate hostile to ‘breaks’ for criminals. Like his predecessor the new governor faced a Republican majority, and Roosevelt knew that any move to loosen the binds of mandatory sentencing would undermine his credibility as a crime fighter. Since Roosevelt was powerless to change the law he cautiously administered the one corrective remedy Baumes had left on the shelf—executive clemency. As protest and unrest reached a fevered pitch in the state’s prisons the mitigation of Bart Garstin’s punishment pitted the legitimacy of the Baumes’ laws against the prerogative of mercy.

67. “Sing Sing Doors Lock in Rogers for the Rest of Life,” *Brooklyn Daily Eagle* (7 December 1926) 1 at 2.

68. Doctor Kieb spoke at the New York State Conference on Social Work, held in Troy, New York, 15-17 November 1927. On 1 February 1927 Assemblyman Jerome G Ambro introduced a bill to impose life sentences only when fourth-time offenders used a gun in two of four offences. Adolph Lewisohn, the wealthy industrialist who had headed the 1919 Prison Survey Commission, wrote the *Eagle*’s editor to argue the need to consider individual cases and to allow for case reviews. See, Adolph Lewisohn, “Too Many Prisoners,” *Brooklyn Daily Eagle* (1 December 1927) A5.

69. Julius Hallheimer, “Justice by Formula: Who is an Habitual Criminal and What is a Felony,” *Century Magazine* 17:2 (December 1928) 232 at 233.

IX. A DOSE OF EXECUTIVE CLEMENCY

Garstin, a knock-about journalist, was no Bum Rogers, and his history of offending included no acts of violence. In the argot of the day he was a serial paper hanger, who had passed fraudulent cheques over a period of twenty-one years. In his 1927 trial the number that mattered was four: his fourth conviction for attempting to cash a worthless cheque in the amount of three hundred dollars, which led to his imprisonment for life. Nine months into office as governor, Roosevelt commuted that sentence and ordered Garstin's release after he had served only two years and four months in prison. "BAUMES LAW UNJUST IN SEVERITY, ROOSEVELT HOLDS," announced the first challenge the statutes faced.⁷⁰ The governor took care to explain his decision, emphasizing that New York's mandatory penalties had served a "salutary deterrent against crime."⁷¹ Unfortunately, these laws also carried the risk of "grave injustice," as Garstin's case illustrated.⁷² The District Attorney of New York County and the sentencing judge had both agreed that the man's crimes did not warrant a life sentence, and their support allowed Roosevelt to leverage Garstin's commutation into a plea for the Republican-dominated legislature to modify the law. In the meantime, gubernatorial mercy would rectify the injustice done to this one prisoner: "the only way in which this man can be spared from spending his whole life in prison ... is by executive action."⁷³

Rather than denounce the governor's commutation the Crime Commission reframed it as proof that strict laws, with the prospect of clemency, were just. The Commission's Republican Vice-Chairman reminded New Yorkers that no law could apply in every case. Assemblyman Burton D. Esmond declared this was precisely why his party had criticized the liberality of parole while they ensured that executive discretion remained available in exceptional cases. The Republicans were not, however, prepared to modify the Baumes laws, and they tried to turn Roosevelt's commutation against him: "the Governor, in exercising executive clemency, had made use of the very means provided for the purpose of preventing the working of an injustice."⁷⁴ The hardline critic had evidence to

70. "Baumes Law Unjust in Severity, Roosevelt Holds," *Albany Times Union* (23 September 1929) 3.

71. State of New York, *Public Papers of Franklin D. Roosevelt Governor, Volume 1, 1929* (Albany, NY: J.B. Lyon, 1930) at 470.

72. *Ibid.*

73. *Ibid.* at 468-70.

74. "Governor Wrong on Baumes Law, Is Esmond Claim," *Brooklyn Daily Eagle* (23 September 1929) 1.

back his claim. By 1929, one hundred and sixty repeat felons had been sentenced to life before Roosevelt acted in the case of Garstin. "Does the Governor know of another case in which an injustice has been worked?"⁷⁵ Esmond's taunt was justified. Smith and Roosevelt were more concerned about their political fortunes than the suffering of minor criminals whose cases failed to fit the profile of a solid test case.

Despite executive inaction in scores of other cases involving sentences disproportionate to the gravity of prisoners' offences, the penal landscape did shift in the direction Roosevelt favoured, tilting support away from sentencing rigidity. The punitive treatment of non-violent property offenders was just one problem that critics raised. Another was the fact that most offenders found guilty of violent first, second, or third offences paid a lower price than minor felony offenders who were found guilty of a fourth offence. The first woman sentenced under the Baumes laws was Ruth St. Clair, a young woman whose past crimes of shoplifting led to her life sentence in 1930 for stealing two coats. Immediately on sentencing her, General Sessions Judge Max Levine declared he would strongly support a bid for clemency.⁷⁶ One newspaper highlighted the travesty of St. Clair's sentence by contrasting it to the lighter punishment murderer Earl Pecox received for strangling his wife and burning her body. Convicted of murder in the second degree late in 1929, Pecox received a twenty-year sentence with the prospect of parole if he followed prison regulations.⁷⁷ Justice was wildly out of kilter when anomalies of this nature surfaced, but how to restore a balance of sound penal policy?

Over 1929 the need to address this question became critical as the state's prisons erupted in violence. Filled far beyond their capacity with a growing number of lifers, Clinton and Auburn State Prison were rocked by three violent outbreaks of prisoner protest. Just as liberal critics of mandatory sentencing had projected, Baumes had set a time bomb when he left men deprived of earning release no reason to obey rules and every inducement to use whatever means

75. *Ibid* at 3.

76. "Seek Clemency for Woman Lifer," *Shamokin News-Dispatch* (13 February 1930) 7. St Clair was convicted of grand larceny on 7 February 1930. In subsequent weeks the prosecutor in the case and the Chief Magistrate added their support.

77. "The Wonders of the Law," *Brookfield Courier* (18 December 1923) 6. Pecox was convicted on 21 September 1929 of murder in the second degree in White Plains, New York. The offence carried a sentence of twenty years to life.

possible to protest.⁷⁸ Some repeat offenders were fortunate to be spared from joining lifers in the state prisons thanks to judges and prosecutors who induced accused offenders to plead to misdemeanors, and to jurors who refused to convict on felony charges, but such actions corroded confidence in the law. And gubernatorial clemency, even liberally applied, could not defuse the likelihood of future unrest. Added to this mix was the rising cost of imprisonment, which strained the state budget to the breaking point after the economic crash late in 1929. An ever-growing population of felons with no prospect of parole and little chance of a pardon became unsustainable.

Amidst this crisis Roosevelt's hard-nosed commitment to reassert executive power and to restore public confidence in parole led to a remarkable showdown between the governor and his Republican foes. In 1927, when the Court of Appeals upheld the mandatory sentencing laws, it had left a door ajar for their future modification. Any "feeling that the punishment was too severe for the nature and circumstances of the crime," the Court had ruled, could be dealt with by the executive or legislature.⁷⁹ This is precisely what happened. Four years after he crafted the landmark legislation that bore his name, Baumes eyed this altered penal and fiscal field and buckled. In 1930 the senator agreed to a plan Roosevelt devised to install a more professionally managed parole agency and to reintroduce sentencing options for repeat offenders.⁸⁰ The executive, working with the legislature's chief power broker, enhanced modern administrative discretion, recuperated judicial discretion, and preserved the governor's prerogative to pardon.

X. CONCLUSION

The battle over discretionary justice in New York's post-war decade could be read as a tussle between political titans with opposing crime fighting approaches. Because Roosevelt ultimately gained the upper hand presidential historians have identified his outmaneuvering of Baumes and his Republican majority as an early index of his penchant for a strong executive, supported by

78. "Baumes Law Modification Advocated," *Albany Times Union* (14 February 1930) 2. This story reported a speech by George M Alger before the Bar Association of New York, 13 February 1930.

79. *People v Gowasky*, [1927] 244 NY 451 at 466, 155 NE 737.

80. "Baumes Planning to take Sting out of Life Term Law," *Brooklyn Daily Eagle* (13 April 1930) 1.

hand-picked experts, as the best means to steer public policy.⁸¹ Although this interpretation is persuasive it focuses narrowly on US politics in the period leading up to the Depression. The retreat from mandatory sentencing, viewed through a wider lens, exposes enduring struggles between three branches of state government. However, the settlement of 1930, which saw the establishment of a professionally staffed Parole Division working within the Executive Department, lends broader relevance to this episode in the history of discretionary justice. The professionalization of parole did not displace the pardon, as most penal histories claim or infer. Notwithstanding the growth of administrative discretion in modern penal politics executive power persisted, most dramatically in respect of death sentences. No one knew this better than the capitally convicted, and the men who continued to exercise the power of life and death. One of the last men to hold executive office while capital punishment remained in force, Governor W. Averell Harriman, revealed in 1958 what it felt like to exercise a prerogative tied to the divine right of kings: “Mercy is a lonely business.”⁸²

The chief executive’s resilient pardoning power, despite a pervasive fear of crime and the full-bore attack on discretionary justice in the 1920s, is a reminder that evolving political and social currents lend historic penal practices new meanings. Hay demonstrated how scholars could interrogate those historic values when he asked why a system of pardoning endured for so long, in the face of Enlightenment thinkers’ reasoned arguments that terror, counterbalanced with frequent but uncertain mercy, provided an ineffective deterrent against crime.⁸³ The attempt to tame mercy and disputes over its proper place in criminal justice occurred not just in the Hanoverian period or under monarchical governance: it also took place in republics, and as late as the 1920s. The recursive character of swings between certainty and discretion in the delivery of criminal justice is less surprising, perhaps, than the continuing relevance of individual protagonists in these struggles. Whenever we take note of the king and his advisors, or an elected governor and his legislative rivals, we acknowledge that some history-making men (and only more recently women) have championed discretion while others have held out against it. Taking positions in penal politics can bring fame or infamy to political actors; in contrast, the Garstins and St. Clairs of the past

81. See e.g. William E Leuchtenburg, *Franklin D. Roosevelt and the New Deal, 1932-1940* (New York: Harper & Row, 1963); Roger Daniels, *Franklin D. Roosevelt: Road to the New Deal, 1882-1939* (Urbana, IL: University of Illinois Press, 2015).

82. Averell Harriman & Murray Teigh Bloom, “Mercy is a Lonely Business,” *Saturday Evening Post* 230:38 (22 March 1958) 24. Harriman was governor between 1951 to 1955.

83. Hay, “Property,” *supra* note 7.

are known to us only because their cases for clemency suited the purposes of power-wielders.

In an early appraisal of *Albion's Fatal Tree*, the collection in which Hay's essay originally appeared, a reviewer alerted students of contemporary "American law and criminology" to the work's "theoretical and methodological implications."⁸⁴ For forty years, socio-legal scholars have followed that recommendation by applying Hay's understanding of mercy to contemporary penal problems. In contrast, historians of criminal justice in the United States have all but ignored it. There is ample evidence that discretionary justice troubled New Yorkers during the Prohibition period as deeply as it did Blackstone, Beccaria, or, indeed, Alexander Hamilton in the late eighteenth century. The terms of discussion were different in the 1920s but the historic question remained the same: how to uphold the ideology of the rule of law against the myriad grounds, just and unjust, on which exceptions might be made? Modernity has proved no match for discretionary justice; whether personal or administrative, it never fails to penetrate penal justice, despite the earnest drive to certainty and the persistent demands to terrorize criminals. Yet the directions in which it flows, and the depth of its penetration, can never correct the systemic inequities of criminal justice.

84. Gerda Ray, Book Review of *Albion's Fatal Tree, Crime and Society in Eighteenth Century England*, by Douglas Hay et al, eds, and *Whigs and Hunters: The Origin of the Black Act*, by EP Thompson (1976) 6 *Crime & Soc Just* 86 at 87.