

Introduction

Pardon and Parole in the Empire State

The Great Seal of the State of New York features two goddesses who stand astride a shield that depicts the sun rising over the Hudson River. Justice appears on the right, carrying her scales and clutching a sword; her sister, Liberty, holds a staff topped with her cap as she kicks aside a crown. Designed in 1778 by the governor and chancellor of the state, it replaced the previous seal of the Crown with a new image that encompassed the Revolutionary generation's dual aspiration—to retain the rule of law and the principles of British justice while simultaneously unshackling the Republic from monarchical governance.¹ In the state of New York the power of the people to elect their leaders would replace the sovereign's inherited rule over his subjects. Nevertheless, the state's first constitution, and each one that followed, vested the ancient prerogative to pardon in the office of the governor. Liberty put her foot to the Crown, but she did not dislodge executive discretion. Her incomplete move raises two questions: How did the royal prerogative of mercy transform into gubernatorial clemency? Why did the governor's discretion over criminal sentences persist despite the emergence of parole in the late nineteenth century? The answers to these questions lie in the state's unique blend of colonial legacies and modernizing ambitions.

Historians of modern punishment have rightly named New York the nation's chief engine room of penal innovation. Enlightenment thought and humanitarian ideals found fertile ground in the state, producing a revolt against painful and spectacular forms of punishment and their replacement by imprisonment in the half century following the Revolution.² By the 1820s, New York's Auburn State Prison, a massive penitentiary that combined solitary confinement with congregate labor, became a model institution that inspired copies around the world. New York's Prison Association, incorporated in 1846, was founded decades after Philadelphia's equivalent, but it quickly became one of the country's leading voices in penal reform.³ Within a generation of its founding, the association conducted a comprehensive study of the penitentiary system in North America, spearheaded the National Prison

Association in 1870, and played a leading role in the establishment of the International Prison Association.⁴

In the post-Civil War period New York legislators turned the state into an incubator of cutting-edge penal practice. By authorizing indeterminate sentencing provisions and nurturing the reform principle of punishment, New York experimented early with the notion of progressive penology. A small town in upstate New York made history in 1876, as the New York State Reformatory became the nation's first reformatory for adult males.⁵ Built in the town of Elmira, its institutional managers acquired the discretionary authority to determine when an inmate had reformed and when he might be granted release on parole. The Prison Association hailed the Elmira Reformatory as a symbol of penal progress while pointing proudly to the groundwork it laid for parole in the 1840s through its committee to assist and monitor released prisoners. By the turn of the twentieth century New York surged further forward with a state parole system, buttressed by statutes that enabled and later dictated indeterminate sentences for all but the most serious offenders. In the latter decades of the Progressive Era it continued to lead other jurisdictions by adding a state board of probation, prison-based psychological clinics staffed by leading behavioral and social scientists, and institutions for the confinement of "defective" delinquents. By the 1930s New Yorkers could justly boast that the state had one of the most comprehensive and advanced criminal justice systems in the world.⁶

Excelsior (meaning "still higher") was the Great Seal's motto, and it was an apt term to characterize New York's leadership in penal practice. When it came to the field of discretionary justice, however, tradition clung. The constitution granted the chief executive unchecked authority to grant pardons, to commute sentences for non-capital offenses, and to reprieve individuals sentenced to death. No state governor wore a crown or held a scepter, but the chief executive's authority came to be called "the one-man power," and it struck many critics as discordant in a republic. From the third constitutional convention in 1821 straight through to the 1915 convention, delegates vigorously debated executive discretion. Outside these arenas, legal publicists turned the sovereign prerogative into a contentious issue, charging that it violated the principle of proportionality and defeated deterrence. The foremost opponent of the prerogative power to pardon was Francis Lieber, a German immigrant who fled Prussian autocracy for American liberty, eventually calling New York home. A political scientist and law professor at Columbia University, Lieber inspired later analysts of the pardon power who advocated the alternative of an advisory board of experts capable, they asserted, of appraising clemency petitions dispassionately. New York was out of tune with most

states, which turned toward administrative means of dispensing discretionary justice in the late nineteenth century.⁷ Humming along in harmony with its colonial past, rather than joining the national chorus, the Empire State retained a relic of royalist clemency.

By granting the leading edge of penal change the limelight, historians of modern criminal justice have left lingering practices in the shadows. If we search for the enduring role of executive discretion, a problem pondered from the first rumblings of Revolution, we find few scholarly signposts. Theoretical accounts of long-term penal change are attracted, like penal histories, to the distinct identifiers of modern punishment: the prison, parole, the expert. David Garland observes that Foucauldian, Marxist, Durkheimian and Weberian approaches all fix on “a particular cultural trait or characteristic of modern society . . . and explicate it in terms of a particular theory of social structure or social change.”⁸ The apparatuses of penal discipline that deprived criminals of liberty became the modern substitutes for torture and public executions. The clinical probings of the “psy” professionals differed from the exhortations of the chaplain. And the parole officer’s questionnaire was the cold contrast to the sting of the warden’s whip. Yet sovereign justice remained in place. The royal pardon’s extensive use declined sharply after the eighteenth century, but not to the extent claimed in standard accounts of penal modernity. We need only consider the Queen of England’s posthumous pardon of 306 World War I deserters in 2006, or Illinois governor George Ryan’s pardon of four men sentenced to death, and his commutation of a further 167 death sentences in 2003 to be reminded that jurisdictions that introduced parole over the late nineteenth and early twentieth centuries did not dispense with executive discretion.⁹

Skyrocketing imprisonment rates and rising concern over wrongful convictions, particularly in death penalty states, have recently turned scholars toward the study of clemency—the modification of criminal sanctions through constitutional authority, not statute law. Like the monarch’s royal prerogative of mercy, modern forms of clemency include the suspension of fines, the commutation of prison sentences, the pardon of convicted criminals, and the reprieve of death sentences. For federal offenders, the president holds this power, and governors have the authority to grant clemency for inmates in state institutions, where the vast majority of prisoners serve time. While studies of the presidential pardon power in historical perspective continue to multiply, histories of gubernatorial clemency remain scarce. Furthermore, studies of parole and related administrative means of modifying criminal sentences rarely integrate an analysis of executive discretion, which transformed, rather than disappeared, as indeterminate sentencing and parole emerged.¹⁰ Par-

doning was not simply parole's pre-modern forerunner, and parole's origins lie deeper in the past than penal historians have suggested.

New York provides the ideal setting to explore discretionary justice's complex history. From the Revolution onward, various forms of conditional liberty, military parole, and discharged prisoner programs developed alongside pardoning, sometimes at odds, at others in concert with it, and ultimately intertwined. How did advocates of a historically regal prerogative argue in favor of its retention? Why did state-administered parole merely overshadow executive clemency without overtaking it? What conflicts and accommodations occurred in this mixed marriage of pardoning and parole? And how did prisoners and petitioners negotiate the distinct but related routes to release and relief from punishment? These questions prompt the chapters that follow.

Histories of mercy in the ancient world and the pre-modern past help to inform the analysis of clemency's enduring presence. The Romans chose *Clementia*, a goddess associated with mercy, to stand for a personal ethic and a pre-Christian social ideal, as well as a force that "constructs peace from war and restores harmony where discord has reigned." When the emperor granted clemency to subjects who appeared in "abject submission," he demonstrated his authority virtuously, with no suggestion of weakness.¹¹ In sixteenth-century France, the tale of a humble pardon petitioner could touch the clement heart of the sovereign. In a strongly hierarchical structure, royal pardons could bring peace and assist the poor at the same time that they augmented the monarch's status.¹² Douglas Hay's germinal analysis of "property, authority and the criminal law" in early modern England has influenced a generation of scholars who have applied his analysis of mercy to numerous jurisdictions and periods.¹³ Whether examining modern North America or colonial Africa, historians have shown how the "calculated blend of terror and mercy under the strict rule of law" has upheld hierarchies of class, race, and gender through the clement treatment of individuals.¹⁴ Among American historians, in contrast, the power dynamics of mercy have attracted comparatively little attention. Historian Vivien M. L. Miller rightly observes that "historical treatments of clemency in its wider social and cultural context are conspicuous by their absence."¹⁵

Scholarly interest in the history of discretionary justice in the United States gravitates to the White House, not to the prerogative powers of governors.¹⁶ The presidential power to pardon became a sticking point in constitutional negotiations in the 1780s, when radicals were averse to any hint of royal prerogative until a New Yorker, Alexander Hamilton, invoked the need

for political stability and won over opponents of expansive executive power. Enlightenment exponents could reject the custom of divine kingship and still consider it necessary to preserve “core elements of monarchy.”¹⁷ Consequently, the president, like his imperial Roman counterpart and the erstwhile King of England, should hold unchecked power to grant clemency through the Constitution. Scholarship on the different presidents’ use of their power and the shifting political contexts in which they granted or denied pardons boomed after Gerald Ford’s preemptive pardon of disgraced President Richard Nixon in 1974.¹⁸ President Bill Clinton’s spate of last-minute pardons in 2001 and George W. Bush’s questionable commutation of a Republican staffer’s sentence for obstructing justice placed a chill on presidential pardoning, at the very point when the number of federal prisoners seeking executive clemency began to rise sharply.¹⁹ State governors, led by Ryan, began to take a different course by commuting death sentences and by pardoning prisoners, especially wrongfully convicted inmates. In a climate of penal populism, the ancient prerogative of mercy is as political today as it was when the nation was founded.²⁰

Most studies of state governors’ prerogative to pardon approach the subject through the history of capital crime and punishment, which emphasizes sovereign authority’s endurance in modernity, yet this concentration fosters a distorted image of the power to commute sentences as a matter, always, of life and death.²¹ Hollywood hasn’t helped. In crime melodramas, such as *I Want to Live* (1958), the camera shifts from the deathwatch cell to the governor’s mansion, and it cuts to close-ups of the clock and the telephone. Will it ring? Will she live or die?²² Real life did conform to silver screen portrayals of gubernatorial mercy in New York, though not until 1930: this was the year when the state’s chief executive assumed exclusive authority over death penalty cases, and the Board of Parole became responsible for assessing petitions in all other cases. Prior to that point, New York’s governors appraised pleas for mercy by and on behalf of all offenders, from minor miscreants to murderers.²³ This chronology leads to two further questions: How did New York’s chief executives regard and exercise the most individual of their powers, and how did prisoners experience changes in clemency procedures after indeterminate sentencing and parole were introduced?

The history of the pardon has developed largely in parallel to the history of the parole, written primarily by criminologists and socio-legal scholars.²⁴ Although they are not framed as histories, the leading works in this field indicate the need for an integrated approach to the analysis of discretionary justice. Jonathan Simon’s *Poor Discipline* applies a Foucauldian lens to interpret the ways in which modern parole “normalized” offenders, and he

connects this mode of discipline to deeper historical practices of clemency in which religious and secular authorities demanded sureties for good behavior and relied on families and communities to monitor and regulate deviance.²⁵ Published in 1993, when a “flight from discretion” was well underway in penal justice, Simon’s book reveals how “psy” professionals accrued discretionary authority over the release of prisoners in the early twentieth century. Another foundational study, published by Sheldon Messinger and his colleagues, examines California’s legislative debates and parole board records to explain why a rehabilitative justification for parole emerged belatedly: in the first twenty years of its existence (the mid-1890s to the mid-1910s) the California Board of Parole operated chiefly to relieve the governor of his responsibility to review pardon petitions against excessive sentence, and to reduce prison populations.²⁶ Parole operated for decades in that state in direct association with pardoning, and both forms of discretionary release relied upon informal decision making and personal judgments of great consequence to the prisoners under their authority.

Unlike the power to pardon at the federal level, hybrid models of discretionary decision making developed in most states, which established boards to process pardoning and parole requests and to provide advice to the governor. Consequently, studying parole in combination with executive discretionary justice is more faithful to historical practice than are narratives of penal modernity that emphasize the taming of discretion.²⁷ New York, one of the first states to introduce parole, was a laggard when it came to assigning clemency petitions to administrative review in 1930. In contrast, Florida established a board of pardons in the 1890s but it did not introduce a parole board until 1941. Nevertheless, pardons in that state resembled parole in Florida because they typically imposed conditions upon released prisoners (to lead a “sober, peaceable, law-abiding life”), and because they carried the threat of a return to prison.²⁸ In Texas, the formal conjunction of parole and pardon review took place in 1905, although the governor could overrule any board decision. In both of these former slave states, white plantation owners and families employing servants often promised to employ pardoned offenders as a means to maintain their control over African American workers, historian Ethan Blue argues. This discretionary practice was less a modern form of parole than an updated system of peonage.²⁹

State-by-state studies of pardoning and parole—alert to the demographics, economies, and politics of each jurisdiction, and attentive to the individuals and groups involved in decision making—must form the necessary foundation for a nationwide analysis of discretionary justice. New York was not just another state: it was the Empire State, almost a nation unto itself by the mid-

nineteenth century, when 10 percent of Americans were New Yorkers. By the turn of the century it towered over other states in the size and diversity of its economy and population.³⁰ There were three and one-half million inhabitants in the boroughs of New York City alone in 1900, and by 1930 this number almost doubled, with more than half of its population foreign born.³¹ Not surprisingly, New York developed a parole system run by state agents long before southern and sparsely populated states followed suit. But in the mid-1920s, when a law-and-order agenda eroded earlier support for progressive penology, New York was also the first state to turn its back on parole. Riots at two of New York's state prisons in 1929 created a crisis of confidence in New York's capacity to fight crime and to punish fairly and effectively. Out of this crucible the merger of parole and pardoning under one board was forged almost a century after Francis Lieber had advocated this modern alternative to an imperial model of clemency.

Recent advocacy of large-scale narrative political history sets a new agenda for an understanding of criminal justice, charted through pardoning and parole.³² In New York, concerns over the constitutionality and exercise of discretionary justice were hot political issues from the first days of the republic to the mid-twentieth century. The intensity and tenor of those debates shifted over that long period, but one matter remained constant: the significance of discretionary justice as a means for convicted offenders to seek relief from punishment. Although criminal justice historians have connected long-term transformations in state punishment to economic and social change, to emergent strategies of law and order, and to new regimes of knowledge, similar attention to discretionary release is lacking. Authoritative surveys, such as Lawrence M. Friedman's 1993 classic, *Crime and Punishment in American History*, and more recently Elizabeth Dale's *Criminal Justice in the United States* (2011), analyze the infliction of punishment in great depth but refer only briefly to pardoning and parole.³³ Compared to our deep knowledge of the factors that consigned offenders to prisons and the gallows we know surprisingly little about discretionary justice, the power to shorten sentences and spare life.

The 1970s was a period when academics and criminal justice practitioners began to question the project to transform preexisting models of criminal justice into an expert-orchestrated science, and David J. Rothman led the way with two major historical studies, *The Discovery of the Asylum* (1971) and *Conscience and Convenience* (1980).³⁴ Rothman was on a mission to expose the arrogance of penal professionals, including those involved in the screening of prospective parolees. His scathing account of modernizers' self-serving ambitions casts correctional officials and experts in starring roles,

but he sets no scenes for executive clemency, and governors make cameo appearances only when their actions are tied to parole's administration. If we highlight professional hubris and institutional stasis we leave out the plot twists of penal modernization. Accordingly, a larger cast of actors appears in this book: the governors who exercised personal discretion; the prisoners, their families, and advocates, who used customary appeals in pardon and commutation petitions; and the public, which weighed the costs and benefits of discretionary justice in legislative and constitutional deliberations, surveys, and the popular press.

The epistemic transition from sovereign justice to discipline is nowhere more powerfully drawn than in Michel Foucault's *Discipline and Punish* (1975). Initially, historians were dubious of the book's concern with discourse, its selective references to institutional practice, and its inattention to individual actors' motivations. Even criminologist Stanley Cohen, who reviewed the book in 1978, found that Foucault concentrated on origins and ruptures, rather than processes and people, because "he is not really an historian."³⁵ Such criticism is warranted only to the extent that Foucault confines his analysis of sovereign power to its heyday, the period prior to the ascendance of penitential punishment. Judged as a history, *Discipline and Punish* fails to grapple with the persistence of executive discretion in modernity. Nevertheless, Foucault provides historians with analytical tools that can pick out the contrasting characteristics of sovereign and disciplinary power. Perhaps in ways he did not anticipate, these tools can also unpack how and why parole emerged and pardoning persisted. The technology of parole developed in step with regimes of surveillance, inspection, and normalization, all of which colored penal administration in disciplinary society. In New York the state shifted the responsibility for processing clemency petitions to the revamped parole board in 1930, but the state's chief executive—the inheritor of sovereign authority—retained the sovereign power to permit death and to preserve life.

Discretionary decision making expanded rather than contracted in the modern administrative state. Enlightenment thinkers such as Montesquieu and utilitarian philosopher Jeremy Bentham laid out programs for the rationalization of justice in order to combat the arbitrary and capricious nature of pre-modern punishment.³⁶ The replacement of severe and bloody punishment with fixed terms of imprisonment was a measure of their success. Despite the embrace of certainty, discretion seeped into old and new cracks in the criminal process: victims' decision to report or to disregard an offense; grand jurors' inclination to indict or to find that evidence of criminal culpability was doubtful; prosecutors' willingness to offer a plea or their determi-

nation to apply the law strictly; jurors' readiness to render verdicts in strict alignment with the law or to nullify; and judges' use of their power to suspend or set minimal sentences, or to impose the strictest sentences under the law. The introduction of probation and the increasing use of plea bargaining further extended the optional expansion or contraction of penal sanctions.³⁷ Unlike these other forms of discretionary justice, the pardon and parole differ; they come into play only after courts set penalties—fines, imprisonment, death. In New York, the state constitution and subsequent statutes imposed nothing more than parameters within which chief executives and boards wielded their authority to pardon or grant parole. State governors' exercise of discretionary power could not have been more profound: it spelled the difference between those offenders who did, and those who did not suffer the full impact of criminal penalties.

Thanks to New York's rich repository of archival and published primary records, it is possible to plot the arc of persistence and change in discretionary justice.³⁸ Forty-nine men served as governor from the Revolution to the Depression, and many of the records concerning their pardon practice have survived.³⁹ Chapter 1 uses the public papers and messages of New York's first and longest-serving governor, George Clinton, to document the military and political context in which the chief executive exercised his authority to modify punishment. Because the first constitution, inspired by the surge of confidence in democratic rule, determined that the legislature must pardon in capital cases, pardons granted through statutes document the bifurcated nature of mercy in the Revolutionary era. George Clinton, who governed New York for the first eighteen years of its statehood, could pardon only in non-capital cases, yet he inherited powers greater than those of his British predecessor, who had rendered his pardoning decisions in consultation with his provincial Council under the authority of the crown.⁴⁰

Historians agree that post-Revolutionary New York, more than any other original state, invested considerable authority in the chief executive, embodied by Clinton.⁴¹ A towering military figure and popular leader, he was elected while serving in the Continental Army. Wearing these two hats in the midst of war, Clinton made tactical use of the pardon as well as the dispensation of military paroles, and his public papers detail how he weighed mercy against severity in his responses to judgments handed down in civil courts and courts-martial. In the decade after hostilities ceased, legislators began to reduce the number of capital statutes and to approve plans for the state's first penitentiary. By the time John Jay, New York's second governor, took office

in 1796, the state aligned with the move made in Pennsylvania and Massachusetts toward imprisonment as the new form of punishment for serious offenders.

As the nineteenth century approached, the era of public whippings and hangings, the punishment prescribed for a wide range of felonies, drew to a close. New York's age of the penitentiary opened with the construction of Newgate Prison in lower Manhattan in 1797, and long penal sentences replaced physical punishment and death for felons thereafter. Enlightenment-inspired alternatives to sanguinary justice and Quaker-led faith in penitence triumphed, but only for a short while, as the prison became dangerously crowded and escape attempts and inmate riots were put down with brutal violence. In response to these problems the governor's power to pardon assumed a new role by releasing a steady stream of prisoners. Traditionalists, who hankered for the old days of public floggings and hangings, decried the release of criminals through executive mercy, and they complained that governors of the early nineteenth century pardoned indiscriminately. Fortunately, the journals of executive pardons, commutations, and respites (a ten-volume set that begins in 1799) allow a more complex story to be told. Discretionary justice in the early national period was more selective than hardliners claimed, and historians have assumed.

Chapter 2 analyzes how pardoning became a factor in the management of new and old hierarchies in New York's canal era. Although African Americans made up a small number of penitentiary inmates, they represented a significant quotient of New York's diverse population, greatly outstripping their proportion in the population of other northern colonies and states. After the Revolution slavery remained legal in New York, and the road toward gradual abolition took twenty years to roll out. In 1799 the legislature finally prohibited the traffic in bonded labor, but the pardon of slaves on condition of their "transportation" became a means for masters to weasel their way around this prohibition, allowing them to sell slaves outside the state. Property also superseded democratic rights in the state's relationship with indigenous peoples, as land-hungry speculators set their sites on Indian land. Prior to the Revolution the state acknowledged treaty Indians' right to self-govern, but it quickly encroached on the rights of Native Americans after the war, including the Iroquois nation in New York. Then, in 1821, this pluralist approach came to a symbolic end. In the state's last legislated pardon, clemency's coercive face showed itself in the stark wording of a statute that pardoned Tommy Jemmy, a Seneca man prosecuted for the murder of a Seneca woman in treaty territory. That act simultaneously pardoned one Indian and declared the state's sovereignty over all matters of criminal law, treaty or no treaty.

The completion of the Erie Canal in 1825 carved a path for the state's economic ascendance in the antebellum era and earned New York a nickname that stuck: the Empire State. Many New Yorkers, not just native peoples and slaves but also the tenant farmers of the Hudson Valley, were unimpressed, and they protested that the state government had failed to deliver on the egalitarian promise of the republic. The use of the pardon power became bound up in the search for stronger anchors to democratic principles. On the federal scene disputes over executive pardoning authority drifted into "philosophical obscurity" in the nineteenth century, but in New York this was not the case, as constitutional conventions drew delegates who lined up for and against gubernatorial discretion.⁴² Chapter 3 examines the records of the two conventions (1821 and 1846) in which delegates vigorously tackled the question of the one-man power. Beyond this formal scrum, a pioneering generation of social scientists and penal theorists devised a two-pronged attack on gubernatorial discretion, arguing that mercy, granted by the chief executive, was incompatible with democratic justice, and that pardons distracted prisoners from correcting their characters. But the traditional reliance upon one elected authority, open to scrutiny, attracted greater support in New York. When French social surveyors Gustave de Beaumont and Alexis de Tocqueville visited the U.S. in 1831 to study the prison system they found it curious to find royalist pardoning in the republican homeland of penal innovation.

The alternative to executive discretion—granting the power to the legislature or an appointed board—proved politically unpalatable at a point when divisive local and national issues polarized state party politics. New York's constitution consequently expanded the governor's authority to pardon in 1821 and only moderately trimmed it in 1846. New York governors also proved that pardons could resolve crises that politicians had produced. In 1823, Governor Joseph C. Yates stepped in to pardon inmates whom enthusiasts of isolation had experimented on in Auburn State Prison. As philosopher John Locke and common law theorist William Blackstone had urged, pardons were most beneficent and just when they rectified injustice; clemency affirmed the fallibility of men, not the failure of the rule of law. Governor John Young claimed he acted on this basis in 1847 when he pardoned eighteen prisoners who had been sentenced harshly for their role in a tenant revolt against the great landlords of New York. Young later disclosed to a friend: "If I err at all I feel it should be on the side of mercy."⁴³ No less than in 1777, the governor deployed mercy to quell a political crisis and to subdue disorder.

Chapter 4, which covers the mid-nineteenth century to Reconstruction, utilizes the first batch of an extraordinary run of clemency case files, and these records complement governors' published papers and messages to the

legislature. Chief executives recorded surprisingly lengthy and moving accounts of their motivations behind granting or denying clemency; even so, the internal records of clemency review allow the historian to peer more deeply into the inner workings of the pardon power. In the collection's first decades, most files pertain to petitioners who were ultimately successful in their bids for clemency. Because few unsuccessful files have been preserved it is impossible to determine patterns of refusal versus success. Nevertheless, correspondence in the files that remain, including remarks by the governor and his clerk, plus letters from prisoners, their families, and their supporters, provides an intimate sense of the clemency process prior to the large-scale introduction of parole.

The most obvious feature of the clemency files is the preponderance of male cases: only 4.2 percent of the files preserved from the late nineteenth century concern female prisoners. Nevertheless, their political significance outweighed their frequency, thanks to the American woman's rights movement, with its leadership drawn from New York starting in the 1840s. Agitation against women's inequality under the law, civil and criminal, cast women's cases in a light that exposed the larger question at the heart of every plea for mercy: Should the law apply equally to all, or should clemency recognize the frailties and vulnerabilities of certain individuals or types? Chapter 5 examines elite debate over this question, which intensified in the mid- to late nineteenth century, and highlights cases that provoked national attention. The capital cases of Maria Hartung and Roxalana Druse proved so contentious that the New York legislature attempted to pass laws that would resolve this vexing question without requiring the governor to render an unpalatable decision. Although "fancy" prisoners—white, wealthy, and well connected—could usually drum up support for clemency, the rarity of such persons among the criminally sentenced meant governors could anticipate that the press and their political enemies would keep a hawk eye on their moves in such cases.⁴⁴ The Walworth murder case of 1873, involving the killing of a father from a nationally prominent family by his own son, demonstrated that privilege could be a liability as well as an asset, and that the prospect of a pardon was never axiomatic.

In pleas for clemency the word of respectable citizens and religious, business, and political leaders counted in prisoners' favor; the approval of district attorneys and judges mattered even more. The files of successful petitioners, as well as governors' public papers, confirm that chief executives rarely commuted sentences or pardoned offenders without the endorsement of at least one of these officials. Petitioners had little control over these assessments, although family members and other advocates sometimes called up local

lawmen in an attempt to garner their support. More commonly, seekers of mercy tugged on community ties and plugged into organizational networks to solicit support. For the average prisoner—the poor man, the recent immigrant, and members of racial minorities—a personal link to a higher-status individual or membership in an association willing to stand up for one of its members was a precious resource. Above all, prisoners with strong family and neighborhood connections who appealed for mercy with requisite humility and avowals of reformation stood a fair chance of a pardon. Nevertheless, no plea was a sure bet: some governors were generous, others stingy, and many were accused of favoring the wealthy and influential, although no New York governor came close to being impeached for the misuse of his discretionary authority.

In the Gilded Age the first generation of penal reformers made great strides in New York, where the Elmira Reformatory symbolized the state's endorsement of the principle that punishment ought to reform and release ought to be earned. Pioneering penologists decried the aleatory nature of pardoning. Why should a prisoner's early release depend on the sympathetic heart or the tough mind of an elected politician? And why should the hardship a criminal's absence imposed on his dependent family members—the most frequently cited ground for clemency—matter more than the sound appraisal of his reformation? Indeterminate sentencing and the institutional management of parole were reforms conjured to replace pardoning, but they produced problems only the governor could rectify, which recast sovereign authority as a corrective to penal modernization. Superintendent Zebulon Brockway was initially a star on the international stage of progressive penology. Then, in the 1890s, allegations of cruelty and favoritism added to evidence of Elmira managers' abuse of their statutory authority to revoke parole flared into a scandal. The *New York World* led a spirited campaign on behalf of Brockway's "boys," and it inspired Governor Roswell P. Flower to intervene. As Governor Young had done seventy years earlier, he used his superior constitutional power. Flower pardoned Elmira inmates on the basis that reformatory staff had "overpunished" young men. The mixed marriage of pardoning and parole was off to a rocky start by the turn of the century.

The principle of parole as a discretionary means to prepare inmates for freedom and to reduce the risk of recidivism turned out to be more resilient than Zebulon Brockway's reputation, and New York provided further endorsement by establishing a State Board of Parole in 1901. Chapter 6 considers the first two decades of the board's operations and examines how the extension of parole and indeterminate sentencing to cover inmates in the major state prisons recast the role of executive clemency. In addition to a sample of

the clemency case files from this period, this chapter draws on the records of the Parole Board's hearings held at the Auburn State Prison from 1905 to 1919. Most studies of parole in Progressive Era New York have capitalized on inmate case files from Elmira or the Bedford Hills Reformatory for Women, where the most advanced psychological appraisals of deviance were implemented in institutionally managed parole operations.⁴⁵ However, the records from the largest state prisons, which incarcerated male and female felons, reflect the ways in which the majority of New York's inmates experienced discretionary release—as a largely personal and decidedly unprofessional mode of character assessment and job placement.

The average prisoner released on parole in the early twentieth century was a male inmate from one of the state prisons. New York remained the nation's leading jailhouse in the Progressive Era, and the state's Board of Parole was assigned responsibility to review applications from prisons that held thousands of inmates, with a substantial proportion reflecting the rise of immigrants in New York from Italy and southern and eastern Europe, plus an increasing number of African Americans. Few of the uniformed applicants for parole resembled the suited men who served on the three-person board: white Anglo-American men of standing, appointed for their political loyalty and community stature, not their expertise in behavioral science. Parole board hearing records (frequently verbatim) indicate how little trust its members placed in expertise and how firmly they relied on what they believed to be common sense. In these interview transcripts we hear bold prisoners complaining that their rights to a fair hearing were denied. We also hear how disrespectful backchat provoked jibes from the board in response. Parole was far less professional as its advocates had hoped it might be, and less expert-driven than historians have claimed.

As the paroling of felons from the state prisons became an established form of discretionary release, governors of the early twentieth century began to grant fewer pardons and to commute sentences more frequently. Occasionally governors pardoned inmates who could not meet the new requirements of parole, based on their low intelligence or limited capacity for work on release. The board had jurisdiction over inmates serving indeterminate sentences but the governor could still grant clemency to any offender, including those serving long mandatory sentences. Whenever this occurred, these prisoners became "special clemency cases," and governors referred their files to the Board of Parole for discretionary release. Thus, the historic gubernatorial practice of attaching conditions to pardons without any means to enforce them transformed into a cooperative venture in which the executive relied on parole procedures that included the prospect of reimprisonment if discharged

prisoners violated their parole conditions. The rise of parole in the Progressive Era produced a new interwoven pattern of discretionary justice.

The final chapter traces the political machinations and public outrage that led to the formal merger of pardoning and parole, a deal brokered by Governor Franklin D. Roosevelt. In some respects, which his contemporaries failed to note and criminal justice historians have overlooked, the seeds of that merger were planted during the Revolution under George Clinton, since he handled the parole of military captives and the pardon of wartime offenders, while the legislature had jurisdiction over capital offenders.⁴⁶ But the 1930 merger of pardoning and parole blended tradition with novelty: the fate of capitally convicted offenders now lay in the governor's hands alone; an administrative body of appointees and civil servants processed all other clemency petitions; and a Division of Parole employed scores of agents to evaluate released prisoners during a different kind of war, this one against Prohibition-era gangsterism.⁴⁷

Brash newspaper headlines seared fear of a crime wave into public consciousness in the postwar years, and governors, particularly Democrat Alfred E. Smith, faced unprecedented pressure to justify every decision. By the mid-1920s, however, scandals over the Parole Board's bungling of discretion generated greater discontent than concerns over gubernatorial clemency. In the press and in the Republican-dominated legislature, troops lined up to fight crime by tougher measures. Under the leadership of State Senator Caleb H. Baumes, New York clawed back earlier indeterminate sentencing provisions, replacing them with a string of statutes that put a stranglehold on parole eligibility. As of 1926 the so-called Baumes Laws imposed mandatory life sentences on four-time felony offenders. Ironically, the governor's pardon power survived this campaign, partly because supporters of the statute recognized the value in preserving gubernatorial discretion: if minor and nonviolent offenders faced unduly harsh sentences, the chief executive could intervene. Ultimately New York's inmates, overcrowded in the antiquated state prisons and deprived of hope of release, spoke louder than politicians. Violent rebellions at Clinton and Auburn State Prisons in 1929 achieved what constitutional convention delegates and high-minded critics of the one-man power had failed to accomplish: the establishment of a new system of discretionary justice in which a board would process clemency requests along with parole applications. Without constitutional amendment and without dislodging the chief executive's prerogative powers, the modern face of discretionary justice took shape.

When ex-governor Roosevelt left Albany for Washington he packed his concerns over the administration of discretionary justice. As president, he au-

thorized a study of release procedures in every state and the federal penal system.⁴⁸ Like this book, this massive survey studied pardoning in tandem with parole, but it portrayed the latter mode of administrative release as the modern substitute for an earlier, personal mode of relief from punishment. This succession analogy, which most historical studies of parole reinforce, does a disservice to the long and tangled roots of parole and pardoning, which reach back to the Revolution, with wartime paroles. By the mid-nineteenth century they grew through discharged prisoners' services, intertwined with charitable aid. The federal survey's separate volumes also overlooked the interrelatedness of executive and administrative discretion, which emerged in New York in the late nineteenth century and persists in the twenty-first century, with calls to revive and reinvigorate pardoning to undo the unjust outcomes of draconian sentencing and risk-averse parole.⁴⁹ This advocacy will become more robust once it is grounded in histories of discretionary justice, conducted state by state. There is no better place to start than the Empire State.