



Carolyn Strange, *Discretionary Justice: Pardon and Parole in New York from the Revolution to the Depression*

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Wilbur R. Miller



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- 1 At least since Cesare Beccaria's time, critics have attacked the power of a sovereign or head of state to pardon or reduce the punishment of people convicted of crimes. They charge that clemency diminishes the certainty of punishment and places the ruler outside of the rule of law. Carolyn Strange's general theme is this quest for certainty in criminal justice and retention of discretionary punishment. Certainty of punishment within the rule of law was a major principle of Enlightenment thought about criminal justice, of which Beccaria was a leader. Enlightenment critics focused on the arbitrary powers of monarchs; it was not until the American Revolution that the issue of executive clemency became relevant to criminal justice in a representative democracy.
- 2 Strange researches the history of executive pardoning power in the state of New York from the Revolutionary period through the 1930s, examining the debates over the legitimacy of pardons in a democracy, the criteria governors used to pardon or mitigate sentences, and the twentieth century interaction of the pardoning power with development of parole. While the power of the American president to pardon offenders has been thoroughly studied, criminal justice is primarily a concern of individual states and governors' pardons are a neglected area of research. Despite many criticisms, New

York retained executive clemency for many crimes, non-capital as well as capital, long after most states, adopting a joint Governor – pardon commission scheme only in 1930. Strange asks, how did New Yorkers argue for and against retaining gubernatorial pardons during the democratization of the early XIXth century and development of “scientific” progressive penology in the late XIXth and early XXth centuries? How did the development of reformatories and indeterminate sentencing with parole remain parallel to rather than replacing pardons? How did individual Governors view their power and exercise it? How did prisoners seeking clemency develop strategies for success? What types of prisoners were most likely to succeed?

- 3 To answer her questions Strange fortunately found a collection of Governors’ pardon books, where they recorded their reasons for pardons and the documents of each successful case (unsuccessful ones rarely appear), records of parole boards and many other primary documents as well as published material. These data reveal that individual governors were lenient or strict, but all took their responsibility seriously. Not many wealthy people applied, because so few were in prison, but a poor person was successful if he or she had respectable connections to testify to their character, or even better endorsements from the district attorney or judge of their case. By far most of the people requesting clemency were men but without records of unsuccessful applications Strange could not tell whether women received mercy more often than men. There was always a debate when rarely women applied for pardon for a capital crime and governors were not eager to execute them. In both the early XIXth and early XXth centuries, governors pardoned prison inmates who were the victims of cruel treatment, excessive solitary confinement or harsh punishments.
- 4 New York’s gradual abolition of slavery, culminating in 1827, allowed time for this to sell them south. The governors co-operated with masters when they pardoned convicted slaves and required they be sent out of state. Another group for whom pardons were ambiguous were Native Americans, who claimed sovereignty over their own lands in the early XIXth century as nations defined by treaties. Governors, though, insisted on treating the few Indian offenders as subject to state sovereignty. They asserted New York’s power by granting pardons in the few cases when Indians applied.
- 5 Until 1821, the State Legislature was responsible for pardons in capital cases, the governor for all others. Between the time of the first state Constitution in 1777 and the second in 1821, the number of crimes considered capital declined dramatically as part of the era’s general penal reform. In the 1821 Constitution, the legislature lost its pardoning power while the governor’s increased to include all crimes. There was considerable debate over the place of pardons in a democracy, which would continue through the XIXth century with the thorough research and lobbying of the Prison Association of New York and the scholarship of Francis Lieber mobilizing powerful objections to what they considered arbitrary power.
- 6 New York was a pioneer in progressive penology, beginning with the construction of Newgate Prison in 1797 and Auburn in 1820, both meant to reform as well as punish. Even more significant was Elmira Reformatory of 1876, based on the principle of release as a reward for good conduct in the prison more than convicts’ professions of religious or moral reform. Later development of the indeterminate sentence (minimum and maximum terms in prison) and parole, which created an alternative method of clemency to the governor’s decision, did not replace executive clemency but paralleled it. Parole was originally created in 1901, modified in 1907 to make all first-time

offenders eligible for early release, except murderers in the first degree. Governors began to take the advice of parole boards as recommendations for pardons. Parole advocates hoped that the personal element of gubernatorial clemency would be replaced by objective review by experts, social workers or psychiatrists. Instead they were ordinary citizens who made judgements based on their impressions of the prisoner during interviews. During the 1920s, responding to a partly-manufactured fear of crime during the prohibition era, hard-liners resorted to fixed sentencing and almost abolished parole. However, riots in overcrowded prisons generated a reaction that led in 1930 to a return of indeterminate sentencing and a pardon commission to work with the governor. This scheme had been developed in other states earlier, so in the area of clemency reform New York was a late arrival. Strange has looked to conditions within a specific state to understand that delay, and reminds us that future studies will have to adopt the same pattern, as only a few have so far.

- 7 Thoroughly and thoughtfully researched, *Discretionary Justice* should be interesting to anybody who seeks to understand the complex and sometimes unpredictable process we call justice.

AUTHORS

WILBUR R. MILLER

Professor of History Emeritus, Stony Brook University
wilbur.miller[at]stonybrook.edu