THE PARDONING POWER IN THE AMERICAN STATES

A DISSERTATION

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PREFACE

The exercise of the clemency power offers an excellent illustration of the use of administrative discretion. Because of limited constitutional and statutory regulation the practices which have developed in the administration of clemency in the American states are numerous and varied in character. The purpose of this study is to examine and criticize the organization and methods of operation of clemency authorities.

The scope of clemency is so broad that it has been necessary to confine this investigation to a limited field. An examination of the administration of clemency in the national government has therefore been left untouched. For the same reason this study does not deal with the pardoning power of mayors and other local officials in those cases where the exercise of this power for minor offenses has been vested in them.

No attempt has been made to deal with the subject of clemency from the standpoint of the sociologist and criminologist. This field of investigation, although of vital importance, lies outside the scope of this study which is limited to an examination of the administration of this power.

Valuable assistance and encouragement in this undertaking have been received from Professors Ernst Freund, C. E. Merriam, and Mr. W. F. Dodd. I am also much indebted to pardoning officials of several states for their kindness in furnishing information.

C. J.
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CHAPTER I

INTRODUCTORY: THE PARDONING POWER IN THE AMERICAN COLONIES

The principle of clemency as developed in the English governmental system and transmitted to America had its probable origin in the early tribal life of the Teutonic peoples. Its application at this early date was extremely vague and uncertain because of many counteracting influences. The existence of the right of private vengeance and retaliation, the wergeld, and the blood feud offset its use. Added to this was the weakness of the royal power which was often nullified by powerful nobles.

This condition was typical of the different areas of England during the early Saxon rule. Coupled with this was the absence of a system of national jurisprudence, and no clear demarcation between public and private wrongs. As a result the kings attempted to apply clemency to those offenses only which were committed by members of their own household, or to offenses which threatened their royal power and authority.

The idea of clemency seems to have been loosely recognized in the laws of Aethelbert of Kent, of Alfred, and in the collections of Edward the Confessor. The royal prerogative was greatly strengthened through the conquest of England by the Normans. William the Conqueror brought from Normandy the view that clemency was an exclusive privilege of the king. But in practice he was compelled to acknowledge the limitations of this theory. The church was able through its strong power to develop its system of canon law and to claim the exemption of the clergy, in criminal matters, from the king’s jurisdiction. This “benefit of clergy” operated to lessen the monarch’s complete power in matters of clemency. The granting of power to the county palatines had a like effect.

During this early period Glanville and Bracton had occasion to refer to the clemency power and the latter indicated some royal limitations by declaring:

But in all the aforesaid cases, whatever may have been the cause, when the outlawry has been made duly and according to the law of the land, a person is not restored except to the king’s peace alone, that he may go and return and
contract anew, for that which has been dissolved by the outlawry cannot be joined anew by the inlawry without a new intention on the part of those who have contracted. For the king cannot grant a pardon with injury or damage to others. He may give what is his own, that is his protection, which the outlawed person has lost through his flight and contumacy, but that which is another's he cannot give by his own grace. ¹

During the period marked by the ascendency of Parliament from the later Plantagenets to the Tudors, Parliament, on different occasions, made efforts to regulate or curtail the administration of royal clemency. ² With the centralization of power under the Tudors it was not surprising that Henry VIII should aim at the possession of the exclusive exercise of this power. This was accomplished by the passage of the act of 27 Henry VIII, c. 24, which provided that complete authority to grant clemency should be vested in the crown. This process of maintaining unimpaired the royal power to grant clemency continued under the Tudors and the Stuarts. But with it went an attempt more clearly to define and describe its exercise and use.

Lord Bacon was of the opinion that the rigidity of the law could be partially corrected through the judiciary instead of appealing to the monarch to extend mercy. In his essay “Of Judicature” he advises the judges as follows:

Judges must beware of hard constructions, and strained inferences; for there is no worse torture than the torture of laws; especially in the case of laws penal, they ought to have care that that which was meant for terror be not turned into rigor . . . . therefore let penal laws if they have been sleepers of long, or if they be grown unfit for the present time, be by wise judges confined in the execution. . . . In cases of life and death, judges ought (as far as the law permitth) in justice to remember mercy, and to cast a severe eye upon the example, but a merciful eye upon the person. ³

Coke defined more accurately the nature of clemency and its true relationship to the royal prerogative. ⁴ A number of other writers, both legal and philosophical, such as Thomas Hobbes, ⁵ Sir Mathew Hale, ⁶ Chief Justice Holt, Sir William Hawkins, ⁷ Sir Michael Foster, ⁸ and

¹ Bracton (Twiss’s translation, II, 371).
² 2 Edward III, c. 2; 5 Edward III, c. 12; 13 Richard II, c. 1.
³ Bacon’s Essays, edited by Joseph Devey, pp. 283–84.
⁴ Coke, Institutes, chap. 105, “Of Pardons.”
⁵ De Civ, chap. iii; Leviathan, p. 182.
⁶ Historia Placitorum Coronae. ⁷ A Treatise of the Pleas of the Crown.
⁸ A Discourse on High Treason, 9 (Crown Cases).