

The Pardoning Power in Antebellum Pennsylvania

THE proper exercise of the pardoning power was one of the most troublesome aspects of criminal administration in antebellum Pennsylvania. There was no unanimity of opinion as to the legitimate grounds for granting a pardon, nor were the legal consequences clear. There was general agreement, however, that this executive prerogative was exercised too frequently, producing socially adverse results. Further, not only was executive clemency a penological matter, it was also a source of political controversy, particularly during the gubernatorial administration of David Porter.

One pardon in particular caused Porter's difficulties—an 1841 pardon to Hutter and Cantine, editors of *The Magician*, a Dauphin County newspaper. The pair had been indicted for libelling Thaddeus Stevens, no stranger to such litigation.¹ The striking feature of the pardon was its issuance before the trial commenced. Explaining the action in his pardon message, Porter indicated that he wished to maintain a free press, even at the risk of licentiousness. He further stated that he regarded the prosecution as malicious and politically motivated. He noted that although *The Magician* was published in Harrisburg, the trial was to be held in Adams County, Stevens' home. The unusually high recognizance for a libel of \$5,000 was required. Even after the trial was postponed, this same ball was maintained. When the editors returned the following term, the indictment was quashed for improper jury selection. The wheel from which the jurors' names were drawn had not been sealed, and it appeared to be no coincidence that all the jurors selected were

¹ In a renowned 1831 libel case, Stevens successfully prosecuted Jacob LeFevre, the editor of the *Gettysburg Chronicle*. Stevens' triumph was short-lived, however, for Governor Wolf pardoned LeFevre. Norman Wilkinson, "Thaddeus Stevens: A Case of Libel," *Pennsylvania History*, XVIII (1951), 317-325.

antimasons, members of Stevens' party.² Under these circumstances and to block further prosecutions, the pardon covered not only the existing indictment, but "all other matters, published or alleged to have been published, by the said Edwin W. Hutter and John J. C. Cantine, or either of them, through the columns of the said Magician, in the County of Adams or elsewhere, alleged to have been libellous."³

Porter's action produced numerous outcries against "the high-handed abuse of the pardoning power,"⁴ and the pardon became an issue in the 1841 gubernatorial campaign. Address Number 7 of the Democratic State Central Committee to the People of Pennsylvania, which dealt solely with pardons, accused the Whigs of "most flagrantly and DESIGNEDLY misrepresenting"⁵ the Governor's pardon record. The *Bradford Porter*, criticizing the recklessness of the Whig press, observed that "one of the most fruitful themes for the exercise of vituperation and slander against the present executive has been his alleged abuse of the pardoning power."⁶ Consequently, it is not surprising that the executive prerogative was a campaign issue in 1841.

Opposition to a strong executive was an important element in Whig ideology, and Porter's opponents linked the pardoning power with the veto power as manifestations of executive autocracy.⁷ Quite recently, proposals to limit the governor's pardoning power had received considerable attention, particularly at the Constitutional Convention of 1838.⁸ In short, the association of pardons and

² *Keystone*, Feb. 24, 1841.

³ *Pennsylvania Telegraph*, Feb. 3, 1841.

⁴ *Jeffersonian Republican*, Mar. 3, 1841.

⁵ *Keystone*, July 14, 1841.

⁶ *Bradford Porter*, Mar. 15, 1843.

⁷ Lee Benson, *The Concept of Jacksonian Democracy: New York as a Test Case* (New York, 1964), 239-240; William C. Armour, *Lives of the Governors of Pennsylvania, with the Incidental History of the State from 1689 to 1873* (Norwich, 1874), 386-387; *Pennsylvania Telegraph*, Mar. 30, 1841; *Hollidaysburgh Register*, June 23, 1841.

⁸ *Democratic State Journal*, June 13, 1835; *Pennsylvania House Journal*, 1834-1835, Vol. 2, Report of the Inspectors of the Eastern Penitentiary; *Proceedings and Debates of the Convention of the Commonwealth of Pennsylvania to Propose Amendments to the Constitution* (hereinafter *Proceedings and Debates*), II, 400, ff. For a fuller discussion of the proposals, and generally for fuller documentation of the arguments presented here, see my dissertation, "Crime in Pennsylvania, 1786-1859: A Legal and Sociological Study" (Harvard University, 1974), 328-371.

partisan politics was a long-standing one in Pennsylvania, dating back to the Mifflin administration.⁹

The criticism directed at Porter, however, was unparalleled both in its intensity and its volume.¹⁰ Yet, the case against him was in fact not a strong one. A pardon before trial may have been a measure of doubtful propriety, but it was neither unprecedented nor illegal in Pennsylvania.¹¹ In terms of the number of pardons granted, the argument could probably be made that Porter had exercised the pardoning power too frequently.¹² On the other hand, relative to the policy of his predecessors in office, the number of pardons issued by Porter was not excessive.¹³

According to the 1843 *Pennsylvania Senate Journal*, II, 453, and *The Keystone* for February 25, 1843, the average number of pardons granted annually by the governors was: Mifflin, 68; McKean, 118; Snyder, 110; Findlay, 144; Heister, 101; Shulze, 121; Wolf, 71; Ritner, 26; and Porter (through 1842), 60. These figures in themselves do not disclose the attitude of the governors toward the pardoning power. Factors to be considered were the ratio of pardons granted to petitions for pardon, and the ratio of prisoners released by pardon to all prisoners released. Contemporaries, however, did view the subject in terms of the total number of pardons each governor granted.

Thus, the gross number of pardons does not adequately reflect the

⁹ Harry Tinkcom, *The Republicans and Federalists in Pennsylvania, 1790-1801: A Study in National Stimulus and Local Response* (Harrisburg, 1950), 136; *Genius of Liberty*, June 27, 1820; *Bedford Gazette*, Feb. 24, 1807; *Huntingdon Gazette*, July 19, 1810; *Harrisburg Chronicle*, Nov. 16, 1818; *Pennsylvania Telegraph*, June 22, 1836; *Pennsylvania Intelligencer*, Mar. 27, 1834.

¹⁰ See, for example, *Jeffersonian Republican*, June 2, 1841; *Miners Journal*, Apr. 3, May 15, July 24 and 31, 1841; *Pennsylvania Reporter*, Apr. 27, 1841; *Hollidaysburgh Register*, Apr. 7, Sept. 8, 1841; *Pennsylvania Telegraph*, Mar. 27 and 30, 1841.

¹¹ Christopher Jensen, *The Pardoning Power in the United States* (Chicago, 1922), 30-31; Robert Green McCloskey, ed., *The Works of James Wilson* (Cambridge, 1967), II, 445.

¹² In theory, a pardon could be granted only in exceptional circumstances. James C. Biddle argued that "the only proper cases for the exercise of this extraordinary power, are either in the case of after discovered innocence, or of circumstances of an unusual character rendering the further continuance of punishment unjust or improper. Such cases are of rare occurrence." *Proceedings and Debates*, II, 424; see also *Pennsylvania Telegraph*, May 25, 1842.

¹³ The use of the pardon as a release procedure has been declining in Pennsylvania since the decade 1826-1835. Walter A. Lunden, *Statistics on Crime and Criminals* (Pittsburgh, 1942), 257. Today, a full pardon is almost never employed as a release procedure.

manner in which the system was regarded. In the first place, there was a clear legal rationale for granting many pardons: they were the only means of restoring a felon's competency. Many pardons were granted to people so circumstanced.¹⁴ Moreover, pardons were issued to indicate to a prisoner that when he returned to society he would begin, in effect, with a clean slate. Consequently, many prisoners were pardoned a few months before their sentences were scheduled to terminate.¹⁵ In addition, a certain number of pardons were granted conditionally—usually upon the condition that the recipient leave the state. Not only were these pardons of questionable legal propriety,¹⁶ but their political meaning was distinct. They constituted, in effect, sentences of exile or banishment,¹⁷ and as such did not arouse widespread concern. Opposed, however, to the pardoning rationale was the sentiment expressed by Francis Lieber in 1851:

Although there be but few pardoned in a given community, yet incalculable mischief may be done by arbitrarily or wickedly pardoning a few prominent and deep-stained criminals; as the average temperature of a place may turn out fair at the end of the year, while nevertheless, a few blasting frosts might have ruined the whole crop. . . . A wholesale pardon may be warranted by the truest principles, and a single arbitrary pardon may shock the whole community.¹⁸

Thus, in Porter's case, the granting of one pardon was sufficient to produce a public outcry, even though his overall record was consistent with the state's past practice. Pardons, to conclude, were not viewed in isolation, but rather as one component of the criminal

¹⁴ John Reed, *Pennsylvania Blackstone* (Carlisle, 1831), III, 365; Frederic Brightly, *A Digest of the laws of Pennsylvania from the year one thousand seven hundred to the tenth day of July, one thousand eighteen hundred and seventy two* (Philadelphia, 1873), 469; P.L. 426 (1860).

¹⁵ *Proceedings and Debates*, II, 434.

¹⁶ The legality of the conditional pardon was upheld in *Flavell's Case*, 8 Watts and Sergeant 197 (1844). Although *Commonwealth v. Hatsfield*, *Pennsylvania Law Journal* (Berks County, 1843), II, 39, had held to the contrary, the Court did not refer to it in its opinion. In *Commonwealth v. Haggerty*, 4 Brewster 326 (Philadelphia Oyer and Terminer 1869), the court was confronted with *Hatsfield*, but upheld a conditional pardon on the authority of *Flavell*.

¹⁷ *Pennsylvania Law Journal* (1843), II, 39; Gerald R. Miller, "Banishment—A Medieval Tactic in Modern Criminal Law," *Utah Law Review*, V (1957), 370.

¹⁸ Francis Lieber, "The Pardoning Power and Its Abuses," *Stryker's American Register*, VI (1851), 561; *Lebanon Courier*, Aug. 11, 1841.

justice system. Any suspected abuses of the pardon power reflected the dangers of a system which appeared to afford criminals a substantial likelihood of escaping their just deserts.¹⁹

The editors of *The Keystone*, political allies of Porter, labelled the public uproar after the Hutter-Cantine pardon as "much ado about nothing," and suggested that the Whigs were simply seeking to create "a little political capital."²⁰ Yet politically motivated or not, Porter's action was severely criticized. Cries of executive despotism became commonplace.²¹ The *Lancaster Examiner* was typical in its vehement denunciation of the pardon:

This is an alarming precedent. It spreads forth a broad principle and seems to proclaim the doctrine, that David R. Porter will prostitute the pardoning power, so far as to screen from condign punishment every malicious libeller who may strive to blast and blacken the fair fame of any man who shall oppose the re-election of David R. Porter.²²

After the Hutter-Cantine pardon, every manifestation of executive clemency was *prima facie* suspect in some quarters. *The Keystone* observed in 1842, after Porter pardoned William Milner to allow him to testify against the principals in a forgery case, "the pardon having been granted by Governor Porter, it constitutes as a matter of course, in the eyes of the *immaculate* Telegraph, an 'outrage.'²³ It was further alleged that Porter issued pardons in the hopes of obtaining votes.²⁴ Charges of pardon-buying, both veiled and explicit, were also common during Porter's administration.²⁵

¹⁹ Salkin, "Crime in Pennsylvania, 1786-1859," 372-382, 413-470.

²⁰ *Keystone*, Feb. 4, 1841.

²¹ See, for example, *Pennsylvania Telegraph*, Feb. 10 and 17, 1841; Mar. 3, 13 and 20, 1841; *Jeffersonian Republican*, May 5, 1841; *Miners Journal*, Feb. 6, 1841; *Lebanon Courier*, Feb. 3, 1841; *Hollidaysburgh Register*, Feb. 17, Mar. 31, Sept. 29, 1841.

²² Quoted in *Pennsylvania Telegraph*, Feb. 13, 1841. See also *Lebanon Courier*, July 21, 1841; *Jeffersonian Republican*, June 2, 1841.

²³ *Keystone*, June 22, 1842.

²⁴ *Miners Journal*, Apr. 3, 1841; May 15, July 24 and 31, 1841; *Hollidaysburgh Register*, Apr. 7, 1841; *Pennsylvania Telegraph*, Mar. 27, 1841.

²⁵ *Pennsylvania Telegraph*, Feb. 24, 1841; *Hollidaysburgh Register*, June 9, 1841; *Bradford Porter*, May 26, 1841; *Democratic Union*, Jan. 27, 1844; *Miners Journal*, Jan. 28, 1843.

Underlying the partisanship, however, may well have been a serious problem in the administration of criminal law. Certainly contemporaries saw a real problem. Porter himself complained of a weakening and relaxation of the criminal laws, produced by jurors convicting a criminal one day and requesting a pardon for him the next.²⁶ Predictably, *The Telegraph* labelled Porter's defense "executive hypocrisy," but there was probably a good deal of substance to Porter's complaint. In general, a sympathetic outlook toward criminals was manifested during these years, a sentiment castigated by the *Public Ledger* in 1836 as "a false spirit of philanthropy."²⁷

In another sense, however, the problem was more basic than an undue sympathy for felons. In theory, the grounds for issuing a pardon were quite limited. In practice, a wide variety of grounds apparently sufficed. Warden Samuel Woods reported that "very seldom is the petition for pardon got up on grounds of innocence, improper evidence, or new evidence," which were the legally accepted standards for issuing pardons. Rather, typical justifications were "he the prisoner has a large family dependent on him," "he previously had a good character or this is his first conviction," and "his imprisonment has been effective and he is now a reformed and penitent man."²⁸ Particularly if the sentence was a lengthy one, the petition might state, if the prisoner had already served a substantial portion of that sentence, that future imprisonment would be counter-productive.²⁹ If a pardon was granted in such a case, it might be construed as an implicit rejection of the legislative judgment about the proper punishment for the offense.

²⁶ *Journal of the Senate*, I (1843), 22; *Pennsylvania Telegraph*, Jan. 21, 1843.

²⁷ *Public Ledger*, Mar. 26, 1836; E. Douglas Branch, *The Sentimental Years: 1836-1860* (New York, 1965); David Rothman, *The Discovery of the Asylum* (Boston, 1971), 82-85; W. David Lewis, *From Newgate to Dannemora: The Rise of the Penitentiary in New York; 1796-1848* (Ithaca, 1965), 231.

²⁸ Negley K. Teeters and John D. Shearer, *The Prison at Philadelphia; Cherry Hill, The Separate System of Penal Discipline, 1829-1913* (New York, 1957), 194. The clemency files appear to support Woods' observations. Clemency Files, RG 26, Pennsylvania Historical and Museum Commission, Harrisburg.

²⁹ See, for example, *Commonwealth v. John Wheatley*, Clemency File, RG 26, Box 8, October, 1824; Box 9, August, 1825, Thomas Bradford to Gov. Shulze re pardon of Gilbert T. Walker, July 15, 1825; *ibid.*, Box 9, May, 1826, King to Shulze, May 27, 1826. See also *New York University Law Review* XXXIX (1964), 188.

Not only were pardons sought on dubious grounds,³⁰ but it was also a simple matter to obtain the required number of respectable names for a clemency petition. No actual responsibility attached to the signature, and doubtless many individuals signed petitions for reasons wholly unrelated to the proper administration of the criminal justice system.³¹ As Governor Johnston told a mass meeting of Whigs in 1851, the "pardoning power may be abused by the one who exercises the power, and it may be abused by those from whom he derives his information."³²

Prison inspectors, as well as private individuals, made recommendations for pardons, and their recommendations fell under closer scrutiny. While a case could have been made that behavior exhibited in prison did not constitute legal grounds for pardon, the typical objection to pardons based upon prison behavior was a practical one. Such behavior was easily feigned, especially when criminals were aware that penitent behavior could reduce their sentences.³³

Ultimately, however, the pardoning power resided in the governor. Yet, while the state's chief executive made the final decision:

It is a power no executive will be anxious to possess. . . . Witness the morbid sympathy for undoubted criminals, for deliberate and atrocious murderers. It is not infrequently that the whole community thus assails the executive: judges, juries, lawyers, citizens, friends and relatives, join in the appeal to excite his sympathies, and the Governor, who can nerve himself impregnable to all these attacks, is endowed with more than human firmness and determination.³⁴

If, therefore, the criticism of Porter was justified in that he bore final responsibility for pardons, it was nevertheless misleading in criticizing only the governor. The system allowed outside forces to

³⁰ These grounds are dubious only in terms of the existing legal framework. There is no reason that executive clemency could not have enjoyed a more expansive meaning, nor would it necessarily produce the kinds of evils that were feared in the nineteenth century. James P. Goodrich, "The Use and Abuse of the Power to Pardon," *Journal of Criminal Law and Criminology*, XI (1920), 342.

³¹ *Harrisburg Telegraph*, Feb. 5 and 12, 1859; *Public Ledger*, Mar. 29, 1836.

³² *Pennsylvania Telegraph*, June 8, 1842; Sept. 24, 1851.

³³ *Public Ledger*, Mar. 29, 1836; *Proceedings and Debates*, II, 442-443.

³⁴ *Pennsylvania Telegraph*, Mar. 27, 1852.

play a significant role in the pardoning process. No one doubted it was an awesome task to be the conscience of the people, and any aid which the governors received in this task must have been comforting.

Partisanship may have prevented Porter's critics from accurately comprehending the source of the problem, which may also have been affected by inadequate prison facilities—thus pardons could alleviate the problem of overcrowding.³⁵ However, the critics' assessment of the social consequences of an undue reliance upon the pardoning power may well have been accurate. Yet some qualification is necessary here, for one cannot determine with any certainty what the popular attitude toward the administration of criminal justice was generally, let alone how people felt about the pardoning power. One can say, however, that the criticisms were plausible ones. A thoughtful observer of mid-nineteenth-century penology could have agreed with almost any of the various charges that were made.

Among such charges, a pardon could be construed as an implicit sanctioning of illegal behavior. Thus, after the pardon of a wife murderer in 1842, the *Evening Journal* contended that Porter had, in essence, approved the murder by withdrawing the punishment of the laws.³⁶ This was a possible construction of a pardon, though not necessarily the correct one. While a pardon certainly implied forgiving, it did not imply forgetting. The United States Supreme Court had suggested it was only the former in *United States v. Wilson*: "A pardon is an act of grace, proceeding from the power entrusted with the execution thereof, which exempts the individual to whom it is bestowed from the punishment which the law inflicts for a crime he has committed."³⁷

There has always been confusion about the significance of a pardon: "The reason for this confusion lies in the broad ground which pardon covers. Pardons may be granted for innocence, or for a number of reasons all of which imply guilt."³⁸ If a convicted felon was later proved innocent, the governor's pardon did blot out his guilt. If, however, a felon was pardoned after six years of a twelve-

³⁵ *Proceedings and Debates*, II, 424.

³⁶ Quoted in *Pennsylvania Telegraph*, May 25, 1842; *ibid.*, Mar. 4, 1843.

³⁷ 7 Peters 150, 162 (1833).

³⁸ Lunden, *Statistics on Crime and Criminals*, 254.

year sentence on the premise that any reformation that was going to occur had already transpired, then it was misleading to argue that the prisoner's guilt had been obliterated, or his conduct condoned.³⁹ Most of the pardons granted in Pennsylvania fell into this second category: they did not forget or condone the original wrongdoing. However, since the reasons for issuing pardons were not widely disseminated, the inferences that Porter's opposition drew were plausible. Yet it seems there should have been a general awareness of the typical pardon petition. Since these petitions dealt almost entirely with the felon's character, and rarely with the character of his act, it would have been difficult to conclude that a pardon granted in response to these petitions implicitly sanctioned the criminal conduct. Ultimately, however, there seems to have been a lack of awareness of the ambiguities of a pardon, possibly because the formal criteria for issuing pardons obscured this ambiguity. Thus, the criticism may have been made in good faith. That is, since pardons should, in theory, only have been granted if there was reason to believe that the prisoner was innocent or because of judicial corruption, and since the number of pardons issued almost surely suggested that pardons were being granted upon other grounds, the critics concluded that, whatever the governor's intentions, the consequence of these pardons was to give the appearance of the condoning of unlawful activity. If a pardon did not signify that a man was innocent, it must have signified that his "crime" was not worthy of punishment.⁴⁰

Thus it was feared that pardons would decrease the moral revulsion which society was supposed to experience toward criminal activity. Pardons desensitized society, as the *Evening Journal* discussed at length in 1842: "What contributes more directly, more fatally to debauch the tone of popular moral sentiment, than the *pardon* of a cold-blooded murderer, or a heartless cheat who has betrayed confiding women, or a profligate swindler, who under

³⁹ Samuel Williston, "Does A Pardon Blot Out Guilt," *Harvard Law Review*, XXVIII (1915), 647-663.

⁴⁰ Legally, there were no distinctions among pardons. Any pardon removed all the infamy attached to the offense. That is, a governor could not simply remit the remainder of a sentence; he had to restore competency as well. *Hoffman v. Coster*, 2 Wharton 468 (Pa. 1837). Thus, whatever the general public's sense of a pardon, it removed legal guilt in Pennsylvania.

specious pretexts has defrauded his fellow citizens, and brought old age to want?"⁴¹ The public's attitude toward both the crime and the criminal was affected by a pardon:

The general delusion prevails that if a felon is *pardoned*, he must be guiltless of the crime of which he was convicted. The act of clemency is thought to redeem him from all pollution. And not only is this pernicious fallacy present, but a delusion still more mischievous arises as a consequence of this ill-judged remission of the penalty of the law; and that is, that the felon thus pardoned, becomes a meritorious man by his professions of piety and reformation. The pardon being each time predicated on his *reformation* and profession of a deep religious feeling. People naturally lose their abhorrence of the crime by seeing the criminal go unpunished. . . . The forger, the cheat, the swindler, the murderer all let loose on society by the exercise of executive clemency, amounts to this declaration from the highest seat of power and the most potent creator of public opinion: 'I do not think that these crimes ought to be punished. The Laws are too severe and these gentlemen are very worthy citizens, and are really as good or better than most of you who have never been accused.' This at least is the *popular* construction of a pardon, and the consequence is a most pernicious corruption of the moral sentiment of the public, in relation to the turpitude of the crime.⁴²

If one function of deviant behavior is to serve as a contrast and thus accentuate normal "good" behavior, then, according to the *Journal's* analysis, the promiscuous employment of the pardoning power jeopardized this function.⁴³

It was further alleged that pardons increased crime in several ways. They returned convicted felons prematurely to society to renew their depredations.⁴⁴ Further, it was an axiom of antebellum penology that the certainty, not the severity, of punishment was the chief deterrent against crime. A pardon diminished the certainty of punishment. It suggested to a would-be felon that even if he were captured and convicted, he would not have to endure the full penalty

⁴¹ Quoted in *Pennsylvania Telegraph*, June 8, 1842.

⁴² *Ibid.*

⁴³ Albert Cohen, *Deviance and Control* (Englewood Cliffs, 1968), 10; see also *Hollidaysburgh Register*, Sept. 1, 1841.

⁴⁴ *Hollidaysburgh Register*, Sept. 29, 1841; *Jeffersonian Republican*, June 2, 1841; *Miners Journal*, May 22, 1841; *Pennsylvania Telegraph*, July 6, 1842; *Public Ledger*, Mar. 16, 1842.

of the law. The likelihood of such a favorable outcome might persuade him to enter upon a criminal career.⁴⁵ The possibility of a pardon also made it unlikely that a criminal would be reformed. The possibility of obtaining a pardon distracted a prisoner from thoughts of reformation, and thus made it likely that he would return to society unrepentant.⁴⁶ It was also argued that the excessive use of the pardoning power would give rise to a belief that adequate redress for injury could not be obtained through the legal system, and that this state of things would encourage people to take the law into their own hands.⁴⁷

Pardons called into question the supremacy of the law.⁴⁸ It has already been noted that pardons could, in effect, negate legislative judgments. A more common criticism was the nullification of judicial proceedings by pardons. The *Westmoreland Intelligencer* asked of what avail were mild and humane laws, a prompt and vigilant police and magistracy, and courts of great ability that imposed the penalties of the violated laws with firmness and impartiality, "while the reckless abuse of Executive power renders nugatory the salutary actions of our courts of justice."⁴⁹ Other newspapers suggested that Porter save the counties' time and money by dispensing with criminal courts entirely.⁵⁰ Less facetiously, the vitality of the enforcement procedure was threatened. The incentive to prosecute abated, as men came to believe "that if all rogues cannot be punished, it is useless as well as oppressive to punish any."⁵¹

It was recognized that unless pardons were issued with the utmost care, the state would appear arbitrary in imposing any punishment at all. Reform was the central component of the state's penology, but it was acknowledged that there was no hope of reformation

⁴⁵ *Pennsylvania Telegraph*, May 25, 1842; Dec. 7, 1842; Dec. 4, 1844; *Jeffersonian Republican*, Nov. 2, 1843.

⁴⁶ Lieber, "The Pardoning Power and Its Abuses," 555.

⁴⁷ *Pennsylvania Telegraph*, Feb. 3, 1841; Mar. 13, 1841; June 23, 1841; *Miners Journal*, Feb. 6, 1841.

⁴⁸ *Pennsylvania Telegraph*, Feb. 20, 1841; Mar. 13, 1841; *Hollidaysburgh Register*, Feb. 10, 1841.

⁴⁹ Quoted in *Pennsylvania Telegraph*, Dec. 7, 1842. See also *Miners Journal*, Jan. 28, 1843; *Jeffersonian Republican*, Nov. 2, 1843.

⁵⁰ *Pennsylvania Telegraph*, Mar. 16, Dec. 21, 1842; Jan. 18, Sept. 20, 1843.

⁵¹ *Ibid.*, June 8, 1842.

unless the felon recognized the justness of his punishment.⁵² If many criminals were pardoned, however, the unpardoned felon would regard himself as unlucky, rather than as deserving of punishment. His sentence would appear less as an emanation of justice than as an exhibition of force. The prisoner might conclude that he was not necessarily a bad man, but that he simply lacked the necessary influence with the governor.

Finally, the pardoning power took away from the community the enforcement of the criminal law. In an era in which criminal justice was experienced tangibly by throngs of people visiting the county seat four times a year to attend courts of quarter sessions and oyer and terminer, the community participated directly in upholding the law.

Even in frontier days it would have been wrong and rather superficial to regard the audience in the courtroom as nothing but a crowd of entertainment seekers. It was felt to be the business of everyone in the county to be present when in their name justice was dispensed. The accusation and conviction or acquittal, as much perhaps as the execution of punishment, operated to restore the imbalance which was created by the offense or public charge, to reaffirm the temporarily lost feeling of security and, perhaps, to satisfy that latent 'urge to punish'. . . . The public wanted to be directly and personally convinced that justice was done.⁵³

Thus a pardon negated this informal dispensation of justice, as well as the more formal judicial proceedings, and raised serious questions about the state's administration of criminal justice.

In part, the state's problems were structural. No responsibility attached to the signers of petitions for pardon, and governors, to relieve themselves of the immense burden of the task, may have been too willing to accept the recommendations of the board of inspectors.⁵⁴ In part, the problem was philosophical, for there was

⁵² Francis Lieber, *A Popular Essay on Subjects of Penal Law, and on Uninterrupted Solitary Confinement at Labor, as Contradistinguished to Solitary Confinement at Night and Joint Labor by Day, in a Letter to John Bacon, Esq., by Francis Lieber* (Philadelphia, 1838), 42-43.

⁵³ Gerhard O. W. Mueller, "Problems Posed by Publicity to Crime and Criminal Proceedings," *University of Pennsylvania Law Review*, CX (1967), 6-7; see also *Hollidaysburgh Register*, June 9, 1841; Salkin, "Crime in Pennsylvania," 365-366.

⁵⁴ Michael B. Lavinsky, "Executive Clemency: Study of a Decisional Problem Arising in the Terminal Stages of the Criminal Process," *Chicago-Kent Law Review*, XLII (1965), 38.

no agreement whether a pardon removed guilt, or even upon the legitimate grounds for issuing a pardon.

In another sense the problem was inherent in the executive prerogative. If the state was concerned with maintaining the rule of law, it also wanted to insure that justice was done. Although criminal law was to be certain in its administration, the pardoning power could not be eliminated. A pardon "represents the sense of human weakness, the recognition of human fallibility, the cry of human compassion. It is a confession of imperfect wisdom."⁵⁵ Pardons were an anomaly within the system of criminal procedure, and it is not surprising that they produced heated outcries.

Porter's critics perceived a conflict between the rules of law and executive despotism. In fact, however, what might have been involved were differing standards of justice. The problem was a general one, transcending the Porter administration:

Even the most impartial and fair-minded people, and especially those in a position to impose political or judicial decisions upon us, will seem unjust sooner or later. Even when the rules to be applied, the nature of merit, are not unchallenged, no two cases are really so alike that equal treatment under a rule can be realized to everyone's satisfaction. That is why just behavior does not necessarily lead to results recognized as just by those affected.⁵⁶

If a man received a pardon because he was a Mason, and another man was denied a pardon because he was not a Mason, and the two cases were identical in every other respect, then an injustice had probably occurred because such membership was almost certainly an irrelevant consideration. But only upon rare instances was an issue so clear. In most cases, reason might differ as to the justness of the matter. To the extent there was agreement that the only legitimate grounds for issuing a pardon was that an innocent man had been convicted, it might be contended that a conflict existed between law and justice. In fact, there was no such accord in mid-nineteenth-century Pennsylvania, as the petitions for pardons attest. Moreover, even among the petitions, there is no agreement upon

⁵⁵ Smithers and Thorn, *Executive Clemency in Pennsylvania*, 61, quoted in *New York University Law Review*, XXXIX (1964), 178, note 146.

⁵⁶ Judith Shklar, *Legalism* (Cambridge, 1964), 117.

those equitable elements that should be decisive in the governor's determination.

While some of the criticism could be dismissed as mere political rhetoric, there appear to have been real weaknesses in the administration of the state's criminal law, weaknesses that were not to be remedied until the state constitution was revised in 1873 and a board of pardons established.⁵⁷ Before the Civil War, no area of criminal administration was so vexing to the state's penal reformers as the excessive use of executive clemency. In addition to its significance as an element of criminal procedure, it was frequently a partisan political issue, as was manifested most clearly during Governor Porter's administration. Political pressure affecting criminal law is not solely a contemporary phenomenon; it was well known before the Civil War.

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⁵⁷ Jensen, *The Pardoning Power in the United States*, 14.