

# TERROR AND TENDERNESS IN CRIMINAL LAW

*M. Eve Hanan*<sup>†</sup>

## TABLE OF CONTENTS

INTRODUCTION .....	582
I. THE EMOTIONAL REGISTER OF LENIENCY.....	590
A. <i>Historical Examples of Mercy as a Managerial Technique</i> .....	592
1. The Spectacle of Mercy .....	592
2. Mercy for Lesser Crimes and Punishments .....	598
B. <i>Managerial Mercy in the Twenty-First Century</i> .....	600
1. Extreme Prison Sentences and Discretionary Release.....	603
2. Clemency .....	606
3. Compassionate release.....	609
4. Second-Look Sentencing .....	612
C. Conclusion: The Role of Hope in Maintaining Mass Incarceration ....	614
II. MERITOCRACY, MYTHS, AND LENIENCY .....	616
A. <i>The Parole Release Process</i> .....	620
B. <i>The Theater of the Release Decision</i> .....	620
III. LEADERSHIP: EMPATHY ENTREPRENEURS .....	630
A. <i>“Wisdom, Grit, and Compassion”</i> .....	631

---

<sup>†</sup> Associate Dean of Faculty Development and Research and Professor of Law, University of Nevada, Las Vegas; J.D., University of Michigan Law School. I am deeply grateful to the many legal scholars who provided me with comments and corrections, including Jonathan Abel, Prithika Balakrishnan, David Ball, Susan Bandes, Bennett Capers, Gabriel Jack Chin, Frank Rudy Cooper, Russel Covey, Craig Cowie, Donald Dripps, Dan Epps, Eric Fish, Thomas Frampton, Fanna Gamal, Carissa Byrne Hessick, Justin Iverson, Sam Kamin, Ben Levin, Paul Lombardo, John Travis Marshall, Sandra Mayson, Eric Miller, Michael Pinard, Anna Roberts, Addie Rolnick, Nirej Sekhon, Jacob Schuman, Julia Simon Kerr, Jocelyn Simonson, Charisa Smith, Yasmin Tager, David Tanenhaus, Dane Thorley, India Thusi, Matthew Tokson, Lisa Washington, Robert Weber, and Meghan Woolley. I also thank the organizers of the forums where I presented drafts of this Article, including Georgia State University College of Law, the NYU Clinical Writers Conference, and the ABA Criminal Justice Roundtable, among others.

1. A Reliance on Character.....	631
2. Individuals Acting on Empathy.....	633
B. <i>The Prosecutor’s Leadership &amp; Leniency</i> .....	637
1. Restraint.....	638
2. Individualized Consideration .....	640
3. The Prosecutor as Empathy Entrepreneur.....	641
4. Personality over Structural Change .....	643
5. The Limits of Entrepreneurial Leadership.....	646
CONCLUSION.....	648

## INTRODUCTION

Sentencing reductions, executive pardons, prison release programs, and progressive prosecutors have something in common. In word choice and design, they suggest tempering the violence of criminal law in a limited number of cases. The prisoner may be released early based on a record of good behavior.<sup>1</sup> The President may grant clemency to those sentenced in an earlier era to decades in prison for a drug crime.<sup>2</sup> The prosecutor may recommend drug court rather than a jail sentence to a defendant addicted to illegal substances.<sup>3</sup> In the era of “smart on crime,” reform often comes through expanding these mechanisms of relief that rely on individualized discretionary decisions to reduce the number of people prosecuted, convicted, and punished for crimes. Although the tagline “smart on crime” generally refers to interventions that meet measurable objectives at acceptable costs, these reforms often are accompanied by an endorsement of the power of discretionary actors to act in a caring manner toward the targets of prosecution and punishment. Empowered to unleash the violence of criminal systems upon the targets of criminal prosecution and punishment, prosecutors and judges can often exercise their discretion along the lines of conceptually fuzzy gestures of leniency, mercy, or compassion.<sup>4</sup>

---

<sup>1</sup> See, e.g., Shon Hopwood, *Second Looks & Second Chances*, 41 CARDOZO L. REV. 83, 84–87 (2019) (describing the primetime broadcasting of the release of Matthew Charles after his resentencing hearing pursuant to the federal First Step Act).

<sup>2</sup> See, e.g., Rachel E. Barkow & Mark Osler, *Restructuring Clemency: The Cost of Ignoring Clemency and a Plan for Renewal*, 82 U. CHI. L. REV. 1 (2015).

<sup>3</sup> See, e.g., Richard C. Boldt, *Rehabilitative Punishment and the Drug Treatment Court Movement*, 76 WASH. U. L.Q. 1205, 1208–12 (1998) (describing the rehabilitative treatment plan of drug court).

<sup>4</sup> Anna Roberts cautions that the word “leniency” is not neutral in that its use “bolsters the criminal apparatus by suggesting the state’s benevolence.” Anna Roberts, *Criminal Terms*, 107

Many of these reforms have been critiqued for their limited and imperfect application.<sup>5</sup> Few prisoners are released.<sup>6</sup> Prosecutors generally divert from prosecution only the most trivial of cases.<sup>7</sup> The few defendants diverted to programs like drug court may fail in treatment and face imprisonment.<sup>8</sup> Mass conviction and incarceration of targeted populations remains intact despite these reforms.<sup>9</sup> Many of the reforms expand rather than shrink the criminal legal net.<sup>10</sup>

Moreover, reforms designed to systematize discretionary relief are criticized for entrenching algorithms of racialized punitiveness<sup>11</sup> and using terms like “evidence-based practice” to gloss over first-order

---

MINN. L. REV. 1495, 1528 (2023). I am neither endorsing the term leniency nor equating it perfectly with terms like “mercy,” which has been analyzed and critiqued by others from different angles. See, e.g., Dan Markel, *Against Mercy*, 88 MINN. L. REV. 1421 (2004). The meaning and use of terms like leniency, mercy, and care have been addressed in academic literature in ways more precise than for my purpose, which is to analyze the emotional valence of tenderness in certain criminal system reforms.

<sup>5</sup> MARIE GOTTSCHALK, *CAUGHT: THE PRISON STATE AND THE LOCKDOWN OF AMERICAN POLITICS* 165, 259 (2015) (describing how many criminal legal reforms impact only the “non, non, nons,” meaning “nonviolent, nonserious, and nonsexual” offenses, causing further retrenchment of mass incarceration for the many people whose crimes do not fit into that narrow category).

<sup>6</sup> See Hopwood, *supra* note 1, at 105 (noting the rarity of early release and recommending enhanced methods of discretionary release, including judicial review, prosecutorial dismissal of convictions under enhancement statutes, compassionate relief, and other forms of executive clemency).

<sup>7</sup> GOTTSCHALK, *supra* note 5, at 116, 195, 259 (discussing a small category of defendants who actually benefit from reforms, the “non, non, nons”—meaning “nonserious, nonviolent, nonsexual” cases).

<sup>8</sup> See, e.g., Boldt, *supra* note 3, at 1211–12 (describing the common phenomenon of a defendant in drug court receiving a longer than expected sentence of incarceration if the defendant fails to rehabilitate in the court’s treatment plan).

<sup>9</sup> Eddie Conway, *Eddie Conway: ‘It’s Not Mass Incarceration, It’s Targeted,’* REAL NEWS NETWORK (Mar. 1, 2018), <https://therealnews.com/eddie-conway-its-not-mass-incarceration-its-targeted> [<https://perma.cc/ZAJ7-SGP8>] (arguing for adopting the term “targeted incarceration” over “mass incarceration” because of the high percentage of incarcerated people who are “people of color, black, brown, Native American, et cetera”); see also Ann C. McGinley & Frank Rudy Cooper, *Introduction: Masculinities, Multidimensionality, and Law: Why They Need One Another*, in *MASCULINITIES AND THE LAW: A MULTIDIMENSIONAL APPROACH* 1, 11 (Frank Rudy Cooper & Ann C. McGinley eds., 2012) (suggesting the term “hyper-incarceration” rather than “mass incarceration” to clarify that the criminal legal system targets Black, Brown, and Indigenous groups rather than the population at large).

<sup>10</sup> See, e.g., Kay L. Levine, Joshua V. Hinkle & Elizabeth Griffiths, *Making Deflection the New Diversion for Drug Offenders*, 19 OHIO. ST. J. CRIM. L. 75 (2021) (describing how drug courts place people under the court’s surveillance and control who otherwise would have had their cases dismissed).

<sup>11</sup> See, e.g., Jessica M. Eaglin, *Against Neorehabilitation*, 66 SMU L. REV. 189, 195 n.33 (2013) (coining the term “neorehabilitation” and critiquing it as detrimentally focusing on “cost-efficiency, predictive tools, risk management, and individual responsibility”).

questions of morality and public policy.<sup>12</sup> Even aside from algorithmic decisions, the problem of racialized application of discretionary leniency has received well-deserved criticism. Discretionary decisions usually involve subjective assessments of culpability and dangerousness, and thus are prone to exacerbate racial disparities in policing,<sup>13</sup> prosecution,<sup>14</sup> and punishment,<sup>15</sup> infected with centuries of propaganda about white victimhood and Black criminality.<sup>16</sup>

The critique of leniency-based reforms is incomplete, however, without an analysis of their emotional register. Their language reveals an attachment to—and thus a reliance on—individual prosecutors, judges, and prison authorities to mitigate the harshness of criminal legal systems through empathetic and individualized decisions.<sup>17</sup> As I have written elsewhere, the use of empathy and moral imagination is critically important in the exercise of discretion at sentencing.<sup>18</sup> But the danger of the sentimentalism embodied in the rhetoric and structure of reforms that champion discretionary decision-making merits caution. Focusing

---

<sup>12</sup> See, e.g., Erin Collins, *Abolishing the Evidence-Based Paradigm*, 48 *BYU L. REV.* 403, 425–426 (2022) (questioning the values underlying the championing of “evidence-based” practices).

<sup>13</sup> See, e.g., Frank Rudy Cooper, *The “Seesaw Effect” from Racial Profiling to Depolicing: Toward a Critical Cultural Theory*, in *THE NEW CIVIL RIGHTS RESEARCH: A CONSTITUTIVE APPROACH* 139, 143 (Benjamin Fleury-Steiner & Laura Beth Nielsen eds., 2006) (“If we do not believe people should be stopped based principally upon their race, we should be concerned about the amount of discretion the *Terry* doctrine affords.”).

<sup>14</sup> See, e.g., Angela J. Davis, *Prosecution and Race: The Power and Privilege of Discretion*, 67 *FORDHAM L. REV.* 13, 16–17 (1998) (arguing that “[a]t every step of the criminal process, there is evidence that African Americans are not treated as well as whites” and that, “because prosecutors play such a dominant and commanding role in the criminal justice system through the exercise of broad, unchecked discretion, their role in the complexities of racial inequality in the criminal process is inextricable and profound”).

<sup>15</sup> See, e.g., Alexis Hoag, *Valuing Black Lives: A Case for Ending the Death Penalty*, 51 *COLUM. HUM. RTS. L. REV.* 983, 994 (2020) (observing racial disparity in death sentences where, “even with guided discretion,” it remains the case that “most decision-makers are white—investigative law enforcement, the prosecution, judges, and juries”). Elsewhere, I have written about racial bias in subjective assessments of remorse at sentencing. M. Eve Hanan, *Remorse Bias*, 83 *MO. L. REV.* 301 (2018).

<sup>16</sup> See generally KHALIL GIBRAN MUHAMMAD, *THE CONDEMNATION OF BLACKNESS: RACE, CRIME, AND THE MAKING OF MODERN URBAN AMERICA* (2010) (laying out the twin strands of pseudoscience and racist animus supporting the criminalization of Blackness in the United States from the antebellum period to the present day).

<sup>17</sup> See generally JOAN C. TRONTO, *MORAL BOUNDARIES: A POLITICAL ARGUMENT FOR AN ETHIC OF CARE* (1993) (discussing the theory of moral sentiments espoused by various philosophers of the Scottish Enlightenment and applying the theory to state institutions).

<sup>18</sup> M. Eve Hanan, *Invisible Prisons*, 54 *U.C. DAVIS L. REV.* 1185, 1240 (2020) (arguing that sentencing policy should be informed by moral imagination regarding the experience of incarceration); M. Eve Hanan, *Incapacitating Errors: Sentencing and the Science of Change*, 97 *DENV. L. REV.* 151, 191–94 (2019) [hereinafter Hanan, *Incapacitating Errors*] (arguing for the exercise of discretion informed by developmental psychology and neuroscience in sentencing and early release decisions).

on these sentimental mechanisms of control clarifies the theoretical gap in efforts to dismantle carceral practices. In this Article, I argue that, although reforms relying on discretionary leniency provide needed relief for some, their rhetoric and structure entrenches the excessiveness of criminal legal systems in at least three ways.

First, these reforms function in a premodern manner to soothe alarm about the sovereign's monopoly on violence—the state's power to arrest, convict, and punish.<sup>19</sup> Examples of discretionary leniency reassure that the sovereign can also bestow tenderness and mercy. In this sense, these reforms are not innovative. Rather, they rely on the centuries-old polarity between the terrifying possibility of ruinous punishment and the hope that the sovereign will bestow mercy.<sup>20</sup> In this polarity, acts of mercy legitimate the authority of the sovereign in the eyes of the public and, often, in the eyes of the defendant.<sup>21</sup> To quote Kathryn Temple's discussion of a criminal process described by Lord Blackstone, "both terror and tenderness [are] juridical technologies meant to manage resistance."<sup>22</sup> Like Temple, I use the term "tenderness" critically to mean not genuine affection but the strategic deployment of mercy.

Second, these reforms reassert the liberal keystone of meritocracy in punishment.<sup>23</sup> Anecdotes of discretionary leniency tell the story of defendants and prisoners who have made choices that demonstrate their

---

<sup>19</sup> Robert M. Cover, *Violence and the Word*, 95 YALE L.J. 1601, 1607 n.16, 1610 (1986) (describing judicial sentencing as an act of violence that illustrates the coercive power of law and legal interpretation, which is "designed to generate credible threats and actual deeds of violence"); *id.* at 1609 (stating that "judges deal pain and death"); see also CHRIS HANEY, REFORMING PUNISHMENT: PSYCHOLOGICAL LIMITS TO THE PAINS OF IMPRISONMENTS 213–18 (2006) (observing that prisons "maintain control through force and intimidation").

<sup>20</sup> See, e.g., Douglas Hay, *Property, Authority, and the Criminal Law*, in ALBION'S FATAL TREE: CRIME AND SOCIETY IN EIGHTEENTH-CENTURY ENGLAND 17, 40–49 (Douglas Hay, Peter Linebaugh, John G. Rule, E.P. Thompson & Cal Winslow eds., 1975) (arguing that the terror of a death sentence and the hope for a pardon were the central methods of state control and protection of private property).

<sup>21</sup> See, e.g., Helen Carrel, *The Ideology of Punishment in Late Medieval English Towns*, 34 SOC. HIST. 301, 301–02 (2009) (arguing that England's fourteenth- and fifteenth-century borough courts used "ritualized submission and public displays of mercy as political weapons within civic government").

<sup>22</sup> KATHRYN D. TEMPLE, *LOVING JUSTICE: LEGAL EMOTIONS IN WILLIAM BLACKSTONE'S ENGLAND* 114 (2019) (discussing *peine forte et dur* in her study of emotions in Blackstone's *Commentaries on the Laws of England*).

<sup>23</sup> Criminal law embraces a capacious view of individual responsibility and excuses few actions for contextual reasons. See, e.g., Richard Delgado, "Rotten Social Background": *Should the Criminal Law Recognize a Defense of Severe Environmental Deprivation?*, 3 LAW & INEQ. 9, 12–17 (1985) (observing that, due to an expansive view of the individual's ability to make choices free of external controls, environmental factors such as social deprivation generally do not exculpate defendants but may mitigate the seriousness of the offense or the punishment).

merit for special relief.<sup>24</sup> In so doing, the anecdotes entrench a foundational principle of criminal law—that both punishment and its remittance are doled out according to what the defendant deserves. Rooted in centuries of the folk psychology of individual autonomy, criminal law punishes actions deemed the product of voluntary choice, with a hierarchy of severity tied to claims about individual culpability. On the flip side, leniency based on rehabilitative success, such as, for example, the defendant’s completion of a drug court treatment protocol, reassures the public that the judge is carefully distinguishing among defendants based on their individual merit. But this means that not only were the acts of leniency deserved, but also punitive acts against defendants who refused or failed the treatment protocol. Our folk belief in individual autonomous control over our lives is, I argue, a foundational emotional attachment of criminal law, and it is an attachment that is strengthened by doling out mercy to the few who are deemed deserving.

Third, these discretionary-based reforms shore up rather than call into question the vast power of criminal-legal actors, whether they are prosecutors, judges, parole commissioners, governors, or U.S. Presidents. The reforms squarely place in their hands the authority to reduce the harshness of criminal systems, trusting them as the arbiters of relief. This further entrenches the neoliberal tenet that reforming unjust or inequitable institutions can be accomplished by infusing the existing structures with professionals who exercise empathy and moral imagination.<sup>25</sup> This reliance on good people making good decisions truncates discussion of more sweeping changes. In other words, “confidence in the critical intelligence of affect, emotion, and good intention” of leaders substitutes for critical examination of laws and institutions.<sup>26</sup>

The emotional register of these three aspects of discretionary-based reforms—premodern mercy, liberal meritocracy, and neoliberal sensibility of leadership—work together as a love potion for the carceral state, a cocktail of sentimentalism about the possibility of careful sorting

---

24 For example, in many states, a prisoner can “earn” early release through credits for good behavior or discretionary parole decisions. The early release systems presume that the person’s past conduct merited imprisonment and current conduct could merit conditional freedom. See, e.g., Cecelia Klingele, *Changing the Sentence Without Hiding the Truth: Judicial Sentence Modification as a Promising Method of Early Release*, 52 WM. & MARY L. REV. 465 (2010) (discussing methods of early release, many of which are “earned” through good-time credits and parole preparation).

25 See, e.g., Richard C. Boldt, *Rehabilitative Punishment and the Drug Treatment Court Movement*, 76 WASH. U. L.Q. 1205, 1211 & n.30 (1998) (describing some support for judicial empathy and support—including hugging defendants who successfully complete the drug court program).

26 LAUREN BERLANT, *THE FEMALE COMPLAINT: THE UNFINISHED BUSINESS OF SENTIMENTALITY IN AMERICAN CULTURE* 2 (2008).

and calibrated punishment. In other words, these reforms seduce. Beneath the seduction, these reforms conceal and legitimate the power of criminal legal reach.<sup>27</sup> The promise of individual acts of discretionary leniency engenders a sentimental mood that permeates the rhetoric around these reforms. The reforms relax the public into a sense of optimism toward the gradual ending of mass incarceration while the mechanisms of terror whirl on in the background.<sup>28</sup>

My use of the word terror derives from Achille Mbembe, who conceptualizes state terror as the state's capacity to destroy or ruin a person's life, whether literally or figuratively.<sup>29</sup> The idea of ruination in criminal law was recently described by Judith Resnik, who argues that the Eighth Amendment contains an antiruination principle that has been recognized by the Supreme Court in the context of the Excessive Fines Clause, which should be developed in the Eighth Amendment's prohibitions against excessive bail and cruel and unusual punishment.<sup>30</sup>

Yet, when one thinks about ruination, it quickly becomes a concept that characterizes the risk at each step of the process of being policed, prosecuted, and punished. Ruination includes the danger of the police

---

<sup>27</sup> See, e.g., Carolyn Pedwell, *Economies of Empathy: Obama, Neoliberalism, and Social Justice*, 30 ENV'T & PLAN. D: SOC'Y & SPACE 280, 282 (2012) (using President Obama's speeches to highlight the neoliberal tendency to frame empathy as a competency, which should be developed by individuals); *id.* at 294 (noting that, in neoliberalism, empathy and care may be valued only "to the extent that they can be incorporated within, or leveraged to advance, goals of economic competitiveness" or, in this case, the goals of the carceral state).

<sup>28</sup> Kathryn Abrams & Hila Keren, *Law in the Cultivation of Hope*, 95 CALIF. L. REV. 319, 321 (2007) (hypothesizing that the law facilitates "the emergence of emotion-states" not just to facilitate behavior but because the target emotion is "thought to be a social good"). Although this distinction is made by Abrams and Keren, I think the goals of provoking emotion and behavior are intertwined.

<sup>29</sup> ACHILLE MBEMBE, *NECROPOLITICS* 34–35 (Steven Corcoran, trans., Duke Univ. Press 2019) (2016) (discussing various methods of state-sponsored or state-permitted terror and its significance as an indicator that the state is demonstrating its capacity to kill). Notably, this type of terror is not limited to criminal systems. Likewise, Dorothy Roberts has used the phrase "benevolent terror" to describe the experience of Black families targeted by the child welfare system. DOROTHY ROBERTS, *TORN APART: HOW THE CHILD WELFARE SYSTEM DESTROYS BLACK FAMILIES—AND HOW ABOLITION CAN BUILD A SAFER WORLD* (2022) (discussing the gloss of benevolence over the terror inspired by removal of children from the family home); see also S. Lisa Washington, *Survived & Coerced: Epistemic Injustice in the Family Regulation System*, 122 COLUM. L. REV. 1097, 1128 (2022) (examining the interrelated and cumulative consequences of the family regulation system and the criminal systems).

<sup>30</sup> Judith Resnik, *(Un)Constitutional Punishments: Eighth Amendment Silos, Penological Purposes, and People's "Ruin,"* 129 YALE L.J.F. 365, 408 (2020).

interaction,<sup>31</sup> the devastating effects of arrest and pretrial detention,<sup>32</sup> insuperable fines,<sup>33</sup> incarceration,<sup>34</sup> the collateral consequences of conviction,<sup>35</sup> and sometimes the sentence of death.<sup>36</sup> Whatever the constitutional limits on ruination, criminal legal systems have the power to devastate—to ruin—their targets.

While the coercive power of criminal law has been explored at length, less attention has been given to its complementary emotional register: the power of displays of mercy or—to use Temple’s word—tenderness. This Article fills that gap, revealing the way in which the emotional register of these reforms lulls us into a fuzzy sentimental state that truncates the possibility of more lasting, structural changes to criminal legal practices. By masking the violence of criminal law, the emotional register of these leniency-based reforms cuts short the opportunity to have a full, public debate about whether we want criminal law to have such awesome power to provoke terror and to ruin.

There is benefit in shaking off the haze of hope produced by stories of reformed prisoners returning home and drug court graduation ceremonies. When the love potion wears off, one can focus on imagining reforms that actually limit the power of the state to prosecute and punish by decriminalizing certain offenses, lowering maximum punishments, and providing mental health and addiction treatment outside of criminal

---

<sup>31</sup> See, e.g., Amna A. Akbar, *An Abolitionist Horizon for (Police) Reform*, 108 CALIF. L. REV. 1781, 1786 (2020) (summarizing the perspective that “police violence is routine, is legal, takes many shapes, and targets people based on their race and class” and that “police violence reflects and reproduces our political, economic, and social order”); *id.* (noting recent skepticism about the law’s ability to meaningfully demarcate “proper and improper police violence”).

<sup>32</sup> Shima Baradaran Baughman, *Costs of Pretrial Detention*, 97 B.U. L. REV. 1, 5–6 (2017) (describing the detrimental impact of pretrial detention on the detained); Aya Gruber, Commentary, *Policing and “Bluelining”*, 58 HOUS. L. REV. 867, 902–09 (2021) (arguing that police brutality is an inherent feature of police-civilian interactions that function to police race and de facto segregation).

<sup>33</sup> An order certifying the plaintiff class in a pending lawsuit against the City of Ferguson, Missouri, lays out allegations of repeated arrests and heightened financial penalties associated with late payments, warrants, and payment plans for people unable to pay fines related to minor and traffic offenses. *Fant v. City of Ferguson*, No. 15-CV-00253, 2022 WL 2072647 (E.D. Mo. June 9, 2022).

<sup>34</sup> See, e.g., Hanan, *Incapacitating Errors*, *supra* note 18, at 188–89 (reviewing studies on harm caused by incarceration to mental and physical health).

<sup>35</sup> See, e.g., Gabriel J. Chin, *The New Civil Death: Rethinking Punishment in the Era of Mass Conviction*, 160 U. PA. L. REV. 1789, 1799–803 (2012) (describing the ways in which collateral consequences of convictions impose restrictions on the formerly convicted that amount to civil death).

<sup>36</sup> According to the Death Penalty Information Center, twenty-seven states currently permit death as a form of punishment. *Facts About the Death Penalty*, DEATH PENALTY INFO. CTR. 1, <https://documents.deathpenaltyinfo.org/pdf/FactSheet.pdf> [<https://perma.cc/9RRJ-HGME>] (Sept. 7, 2023).



courts.<sup>37</sup> Abolitionists, for example, analytically distinguish between reforms that increase and decrease the size of criminal systems.<sup>38</sup> But this type of analysis is difficult when one is satiated by anecdotes of discretionary leniency.<sup>39</sup>

The Article contains three parts. Part I draws a parallel between the emotional register of current reforms that rely on discretionary leniency and examples of the premodern use of mercy to legitimate the harshness of English criminal law as reported by legal historians. These historians suggest that various state actors—from royalty to municipal officials—remitted punishment in calculated efforts to maintain legitimacy.<sup>40</sup> With these historical examples in mind, this Part analyzes the public face of former President Obama’s clemency initiative,<sup>41</sup> as well as the language of “compassionate release” and “second-look” sentencing. The thesis of this Part is that leniency continues to function as a technique to enhance positive feelings toward the state and thus shore up its legitimacy. Leniency serves this legitimating function even when the real-world impact of the initiative is negligible.

Part II demonstrates how the meritocracy-of-punishment trope fits within reforms that rely on discretionary leniency. Using a media account of the parole process, where early release is granted only to those who can demonstrate a record of perfect conduct in prison,<sup>42</sup> this Part shows how discretionary leniency is tied to an assessment of the defendant’s merit.

---

<sup>37</sup> See, e.g., Levine, Hinkle & Griffiths, *supra* note 10, at 77 (“Funneling a person out of the system post-arrest and post-booking, even with a promise of non-prosecution, is simply too late because the arrest and booking process itself imposes a form of punishment and stigma that can be hard to undo.”).

<sup>38</sup> See, e.g., Akbar, *supra* note 31, at 1783 (describing the abolitionist goal of “shrinking the police”); Allegra M. McLeod, *Envisioning Abolition Democracy*, 132 HARV. L. REV. 1613, 1622–23 (2019) (describing abolition activists advocating a two-step process of dismantling criminal legal systems like policing and building institutions that meet public needs without violence).

<sup>39</sup> See, e.g., Máximo Langer, *Penal Abolitionism and Criminal Law Minimalism: Here and There, Now and Then*, 134 HARV. L. REV. F. 42, 73 & n.179 (2020) (advocating for a kind of “minimalism” in which “criminal law should only be used as a last resort when no other social responses or public measures would suffice to adequately advance a legitimate goal”).

<sup>40</sup> Carrel, *supra* note 21, at 310 (stating that the practice of easing or remitting punishment was “firmly rooted both in contemporary religious context and shrewd political pragmatism”); Hay, *supra* note 20, at 40 (explaining that the royal pardon functioned as “a crucial argument in the arsenal of conservatives opposing reform” of the Bloody Code).

<sup>41</sup> *A Nation of Second Chances: President Obama’s Record on Clemency*, WHITE HOUSE: PRESIDENT BARACK OBAMA, <https://obamawhitehouse.archives.gov/issues/clemency> [<https://perma.cc/957X-C6QT>].

<sup>42</sup> The parole release example derives from a *New Yorker* documentary featuring state parole applicants. Jon Miller & Jack Russo, *The Interview: The Dehumanizing Theatre of the Parole Process*, NEW YORKER (Nov. 17, 2021), <https://www.newyorker.com/video/watch/the-dehumanizing-theater-of-the-parole-process> [<https://perma.cc/5AJW-9EG7>].

Leniency, in other words, must be earned.<sup>43</sup> Reforms that rely on discretionary leniency thus entrench an inflated sense of individual autonomy, which justifies the most destructive structural features of criminal systems. The idea that the defendant's choices are the source of the state action has been used to justify all manner of policing, courtroom procedure, and punishment. By emphasizing merit, discretionary leniency maintains—and perhaps intensifies—moral and emotional attachment to the status quo of criminal systems.

Part III addresses how neoliberal leadership philosophy has elevated the discretionary criminal legal professional to new heights. An important aspect of neoliberalism is its commitment to the idea that most problems can be solved not through institutional change, but through visionary leaders/entrepreneurs who disrupt rather than restructure institutions.<sup>44</sup> Using the example of the “progressive prosecutor,” I demonstrate how reforms that rely on discretionary leniency tend to elevate personality over systemic change.<sup>45</sup> The right person in the role of top prosecutor will, so the argument goes, exercise their discretion to charge with restraint, divert cases to treatment courts, bargain fairly, and recommend fair sentences.<sup>46</sup> This Part analyzes the public discourse supporting “progressive prosecution” to tease out where it tends to elevate personality over structural change.

## I. THE EMOTIONAL REGISTER OF LENIENCY

Discretionary acts of leniency serve as an assertion of state authority and as a release valve for public criticism of unduly harsh criminal laws, prosecutions, and punishment. Lawmakers can criminalize wide swaths of conduct and set high maximum penalties knowing that prosecutors will not prosecute every violation and the judge will not max out every defendant at sentencing.<sup>47</sup>

This Part argues that the power of criminal legal systems stems not simply from the power to punish, but from the astonishingly wide range of potential (and often uncertain) outcomes, from ruinous punishment

---

<sup>43</sup> Eric Miller noted something similar in drug courts, a process he calls “responsibilization.” Eric J. Miller, *Drugs, Courts, and the New Penology*, 20 STAN. L. & POL'Y REV. 417, 440–42 (2009) (discussing the emphasis on responsibility for recovery as a responsibilization strategy).

<sup>44</sup> Pedwell, *supra* note 27, at 291.

<sup>45</sup> See, e.g., EMILY BAZELON, CHARGED: THE NEW MOVEMENT TO TRANSFORM AMERICAN PROSECUTION AND END MASS INCARCERATION (2019).

<sup>46</sup> *Id.* at xxvi (“[Prosecutors] answer to no one else and make most of the key decisions in a case, from choosing the charge to making the bail demand to determining the plea bargain.”).

<sup>47</sup> See William J. Stuntz, *The Pathological Politics of Criminal Law*, 100 MICH. L. REV. 505 (2001).

to complete mercy. An illustrative historical example of this power was the practice of *peine forte et dur*, described in Blackstone's *Commentaries on the Laws of England*, and used by Temple as her example of "terror and tenderness."<sup>48</sup> *Peine forte et dur* was a technique for getting criminal defendants to submit to the court's jurisdiction. Defendants sometimes refused to accept jurisdiction and instead remained silent when asked to enter a plea of not guilty or guilty. Blackstone describes the court's response as twofold. First, the judge would attempt to coax the defendant to enter a plea. If that failed, the judge would order the defendant's torture, which consisted of pressing heavy weights down on the defendant's body, increased incrementally until the weight was sufficient to crush the defendant.<sup>49</sup>

If the defendant agreed to enter a plea, the judge would order the torture stopped and the defendant returned to court. Blackstone took pains to describe the judge's solicitous demeanor toward the defendant upon the defendant's coerced agreement to submit to the court's jurisdiction. Reflecting on Blackstone's emphasis on the solicitousness of the judge after the defendant's compliance had been secured through torture, Temple characterizes this judicial "tenderness" as similar to judicial "terror," in that both are methods of "manag[ing] resistance."<sup>50</sup> Not only does the fear of torture press defendants into submitting to the court's jurisdiction, but the court's return to a dignified and courteous tone also constitutes a display of "tenderness" that shores up the legitimacy of the sovereign.

While Temple referred to tenderness as a juridical technique to control the rebellious defendant, my interest in emotional techniques of control is more expansive. Displays of leniency or mercy may strengthen public attachment to existing ways of doing things in criminal law. Criminal legal systems can inspire fear based on their displays of the power of the state to capture, confine, pass judgment, and punish. At the same time, in the potential for mercy, criminal legal systems can inspire hope and thereby shore up the legitimacy of decision-makers who, although they have the power to ruin, are selective in the exercise of this power.

In this Part, I first offer historic examples of the emotional power of leniency and mercy to quell critiques and inspire loyalty. I then discuss

---

<sup>48</sup> TEMPLE, *supra* note 22, at 113–14 (discussing the techniques employed to secure consent to the court's jurisdiction, including the torture method of *peine forte et dur*).

<sup>49</sup> *Id.* at 125–26, 137 (describing that the court must explain three times what will happen if the defendant does not enter a plea and must give them a few hours to think it over before commencing torture).

<sup>50</sup> *Id.* at 114. Perhaps this shortens the conceptual gap between tenderness and tenderizing.

the degree to which a similar emotional dynamic plays out in present-day displays of leniency, noting important differences as well.

A. *Historical Examples of Mercy as a Managerial Technique*

A wide and unpredictable gulf between the harshest punishment and the chance that some authority will bestow leniency is not new. While there is a risk of oversimplifying crime and punishment by collapsing centuries of English history into one story,<sup>51</sup> it is possible to point to the work of legal historians who have considered whether leniency legitimated sovereign power at varied moments of English legal history between the late Middle Ages and the end of the era of the Bloody Code, when a vast array of property crimes carried the death penalty.<sup>52</sup>

1. The Spectacle of Mercy

Spectacular, “theatricalized” executions occurred in England as early as the thirteenth century, before the era of the Bloody Code, and as late as the nineteenth century.<sup>53</sup> The theater of sentencing and execution seemed designed to evoke strong emotions. A source from 1785 describes, for example, the defendant “trembling” during the judge’s public pronouncement of the death sentence. The judge, too, appeared “deeply affected by the melancholy part of his office” while ordering the death sentence. Those witnessing the event were described as leaving in a “mournful” state.<sup>54</sup> Some argue that public executions functioned as theater designed to terrify the audience into obeying the law.<sup>55</sup> Michel Foucault argues that the “spectacle of the scaffold” demonstrates the raw power of the sovereign, enacted on the body of its subject.<sup>56</sup> In this sense,

---

<sup>51</sup> Katherine Royer, *The Body in Parts: Reading the Execution Ritual in Late Medieval England*, 29 HIST. REFLECTIONS 319, 321 (2003) (“[M]uch of the current historiography conflates the twelfth through the eighteenth centuries as a cruel prologue to the modern exercise of punishment.”).

<sup>52</sup> See Hay, *supra* note 20.

<sup>53</sup> Royer, *supra* note 51, at 323 (describing the executions of thirteenth-century England as involving a “new punitive aesthetic” with performative dismemberment).

<sup>54</sup> Hay, *supra* note 20, at 17–18 (quoting MARTIN MADAN, THOUGHTS ON EXECUTIVE JUSTICE WITH RESPECT TO OUR CRIMINAL LAWS, PARTICULARLY ON THE CIRCUITS 26–30 (London, J. Dodsley 2d ed. 1785)).

<sup>55</sup> *Id.* at 18 (citing sources establishing that the imposition of a death sentence in eighteenth-century England “was the climactic moment in a system of criminal law based on *terror*”).

<sup>56</sup> MICHEL FOUCAULT, DISCIPLINE AND PUNISH: THE BIRTH OF THE PRISON 49–50 (Alan Sheridan trans., Vintage Books 2d ed. 1995) (1975).

the scaffold was designed, as Douglas Hay suggests, to simply terrify the public into submission.<sup>57</sup>

Others contend that public executions were not raw displays of sovereign power but rather targeted messages meant to deter specific crimes.<sup>58</sup> Katherine Royer hypothesizes that, although more than five hundred years before Jeremy Bentham's utilitarian theory of punishment, public executions in medieval England were designed to inform people of specific criminal laws and impress upon them the causal relationship between crime and punishment.<sup>59</sup> By publicly announcing the law that had been violated before imposing punishment, the state "responded to commonly held perceptions about the arbitrary nature of royal justice."<sup>60</sup> In other words, the medieval theater of public execution was designed for general deterrence rather than to consolidate state power. Whatever the specific purpose, the public displays of capital punishment surely evoked a range of emotions, including fear of the state's power to punish.

Yet executions were often forgone. During the era of the Bloody Code, for example, many people convicted of capital offenses were spared death through various kinds of leniency.<sup>61</sup> In addition to a royal pardon, the judge who initially ordered the sentence of death could issue a pardon.<sup>62</sup> In fact, one who had committed a death-eligible crime like robbery could exit the criminal process at multiple points. As Simon Devereaux explains:

Victims might choose not to prosecute an offender in the first place; magistrates might choose not to lay an indictment against an accused offender; grand juries might choose not to pass an indicted offender along for trial; the victim-prosecutor might choose not to appear at the scheduled trial; if the trial proceeded, judges and/or juries might choose either to acquit the accused or, where the legal definition of the crime permitted, opt for a 'partial' (non-capital) conviction; and finally, a person fully-convicted on a capital charge might be pardoned . . . . The number of accused who reached the final stages of this much-mediated journey—capital conviction, followed by

---

<sup>57</sup> Hay, *supra* note 20, at 26.

<sup>58</sup> Royer, *supra* note 51, at 332 (arguing that the performative execution "did not simply advertise the ability of the state to wield its power, but more importantly justified its need to do so").

<sup>59</sup> *Id.*

<sup>60</sup> *Id.*

<sup>61</sup> Hay, *supra* note 20, at 22–23. In addition to the King's pardon, the civilian prosecuting the case could drop the prosecution or request a lesser punishment. *Id.* at 40–42, 48 (describing how the requests of private prosecutors for mercy toward the convicted person were influential).

<sup>62</sup> *Id.* at 43.

execution or pardon—comprised only a small (perhaps very small) portion of those who entered . . . .<sup>63</sup>

Given these discretionary mechanisms,<sup>64</sup> it is unsurprising that capital punishment varied widely over time and geography. From 1730 to 1837, for example, executions were twenty to thirty times higher per capita in London than in counties remote from the capital.<sup>65</sup> Lower rates of execution in the counties may have been due to fewer prosecutions, jury verdicts, or more frequent reprieve and pardon after sentences of death were ordered.<sup>66</sup> In some jurisdictions remote from London—including Wales and Scotland—the death penalty simply was not imposed.<sup>67</sup>

According to Peter King and Richard Ward, the complete refusal to prosecute, convict, or sentence anyone to death in certain jurisdictions challenges Hay's thesis that the terror of a death sentence was the central method of state control and protection of private property.<sup>68</sup> How, after all, could a local court express its power to ruin if the death penalty was never imposed? One explanation could be that the most salient demonstration of state power was the ability of local leadership to *refrain from exercising its power* to put people to death. Given the existence of the death penalty for many crimes (including what we now consider relatively low-level property crimes), local officials demonstrated their power through their authorized acts of leniency as well as through their ability to persuade the central government to issue pardons when a local judge imposed a death sentence.<sup>69</sup> Leniency—rather than the spectacle of public executions—may have functioned as the cornerstone of official displays of power.

As early as the thirteenth century, the spectacle of public execution was often forgone in favor of tactical decisions to pardon or simply decline prosecution.<sup>70</sup> Particularly in instances of civil unrest, royal courts took care to measure public sentiment lest they foment more rebellion through excessive punishment. So, for example, after the Peasant Revolt

---

<sup>63</sup> Simon Devereaux, *Execution and Pardon at the Old Bailey 1730–1837*, 57 AM. J. LEGAL HIST. 447, 455 (2017) [hereinafter Devereaux, *Execution and Pardon*].

<sup>64</sup> Peter King & Richard Ward, *Rethinking the Bloody Code in Eighteenth-Century Britain: Capital Punishment at the Centre and on the Periphery*, 228 PAST & PRESENT 159, 176 (2015) (noting that criminal law in eighteenth-century England was a “deeply discretionary process”).

<sup>65</sup> *Id.* at 168.

<sup>66</sup> *Id.* at 177–82 (discussing variables in death sentences in England in the late 1700s).

<sup>67</sup> *Id.* at 200.

<sup>68</sup> *Id.* at 201; Hay, *supra* note 20, at 49.

<sup>69</sup> King & Ward, *supra* note 64, at 201 (querying whether “private access to ‘the levers of fear and mercy’ may have aided local leaders (quoting Hay, *supra* note 20, at 51)).

<sup>70</sup> Royer, *supra* note 51, at 335–36.

of 1381, Royer reports, “the state performed a calculus before it built the scaffold; as a result, not every rebel found himself before the executioner nor did every traitor feel the full fury of the crown.”<sup>71</sup> Mercy was the product of a political calculus designed to maintain power, including the power to punish.<sup>72</sup>

Centuries later, the requests for pardons to the central government from borough officials demonstrate similar political concerns. Many requests for pardons appear to have been responsive to public sentiment.<sup>73</sup> Requests from local leadership for a King’s pardon sometimes explained that the populace of the county was so vehemently against the imposition of a death sentence that the local Parliamentarian feared the political consequences of imposition of the death sentence ordered by the local judge.<sup>74</sup> Borough officials expressed concern that certain executions would “blot ‘the county’s reputation,’” particularly if the public was sympathetic to the convicted person.<sup>75</sup> Devereaux concludes that, where “mercy was the rule, it is clear that hangings often created a sense among the local community both that their county’s reputation was on the line, and that the convict concerned was in a real sense the victim, thus putting the judges increasingly on the defensive.”<sup>76</sup>

There is some evidence that excessive punishment became a hotly debated political issue during the Bloody Code. Capital punishment for property crimes reached a zenith around 1600, with an execution rate of 25 to 30 per 100,000 residents.<sup>77</sup> By 1750, the execution rate fell to 1.3 per 100,000 residents.<sup>78</sup> By the late eighteenth century, pamphlets supporting and decrying various punishments and pardons were circulating in the public sphere.<sup>79</sup> As public debate about punishment increased, pardoning became more systematized. Indeed, in the mid-eighteenth century, the pardon process became a routinized part of bureaucracy designed

---

<sup>71</sup> *Id.* at 336.

<sup>72</sup> *Id.* (“Practical political considerations tempered the use of spectacular justice, particularly since other methods existed for ridding oneself of an enemy.”).

<sup>73</sup> Devereaux, *Execution and Pardon*, *supra* note 63, at 464–65.

<sup>74</sup> King & Ward, *supra* note 64, 187–88 (describing a letter sent by a Cornish Parliamentarian requesting a royal pardon for a sheep stealer sentenced to death by a local judge). Looking purely at the “geography of pardoning,” it appears that between 1760 and 1775, fifty-two percent of those sentenced to death in London were pardoned, and between seventy and eighty-five percent of those sentenced to death in counties remote from London were pardoned. *Id.* at 182–83.

<sup>75</sup> *Id.* at 190 (quoting V.A.C. GATRELL, *THE HANGING TREE: EXECUTION AND THE ENGLISH PEOPLE 1770–1868*, at 58 (1994)).

<sup>76</sup> *Id.*

<sup>77</sup> *Id.* at 164.

<sup>78</sup> *Id.*

<sup>79</sup> Devereaux, *Execution and Pardon*, *supra* note 63, at 466 (discussing pamphlets supporting and condemning various sentencing and pardon practices during the late eighteenth century).

specifically to mitigate the harshness of the Bloody Code.<sup>80</sup> The Recorder of London sent a list and description of the cases resulting in a death sentence to “the king and a select body of government ministers,” who, in turn, during sessions referred to as “the Recorder’s Report,” decided whether the convicted person would be pardoned or executed.<sup>81</sup>

Even as executions became less frequent and pardons more routinized, the central government and monarchy became increasingly concerned about their reputation for leniency. For example, the Recorder’s Report started issuing letters explaining every denial of a request for a pardon.<sup>82</sup> This perceived need to explain to the public why mercy was denied was a new phenomenon. In addition, the members of the Recorder’s Report debated how often they should meet, in part because infrequent meetings meant that pardons were denied to a group of people at the same time. If the Recorder’s Report decided the fate of many petitions at once, the result could be a mass pardon *or* a mass execution.<sup>83</sup> If the Recorder’s Report met too infrequently, the ensuing mass execution would present a picture of the monarchy as unduly harsh.<sup>84</sup> More frequent meetings of the Recorder’s Report would result in executions spread out over time, drawing less attention.<sup>85</sup>

It is possible that the increased exercise of discretionary leniency in issuing pardons led to the eventual abolition of the death penalty in England. Death penalty abolitionist Samuel Romilly argued in 1808, for example, that the death penalty for certain property crimes should be repealed as an unenforced law *because* the Recorder’s Report was pardoning everyone.<sup>86</sup> Other factors also contributed to the disuse and eventual abolition of the death penalty. David Garland argues that the decline in executions marked the shift to an era when capital punishment became simply one of many modes of crime management.<sup>87</sup> The

---

<sup>80</sup> *Id.* at 451 (describing consideration for pardon as a routine part of post-sentence criminal procedure in the eighteenth century).

<sup>81</sup> *Id.*

<sup>82</sup> *Id.* at 471–72.

<sup>83</sup> The Recorder’s Report met at varying intervals during the final century of the Bloody Code. In the early 1800s, the Crown was criticized for convening the Recorder’s Report too infrequently. *Id.* at 486–87. Infrequent meetings would result in mass executions. *Id.* at 487.

<sup>84</sup> *Id.* at 487.

<sup>85</sup> *Id.* at 487–89; *see also id.* at 456–60 (discussing large-scale executions and infrequent intervals).

<sup>86</sup> *Id.* at 473.

<sup>87</sup> See King & Ward, *supra* note 64, at 164 (citing David Garland, *Modes of Capital Punishment: The Death Penalty in Historical Perspective*, in *AMERICA’S DEATH PENALTY: BETWEEN PAST AND PRESENT* 30 (David Garland, Randall McGowen & Michael Meranze eds., 2011)).



punishment of transport to the colonies, for example, increasingly seemed to be more palatable to the public than execution.<sup>88</sup>

Regardless of the long-term impact of frequent acts of pardon, their immediate political benefit seems to have been that they served as a release valve for political dissatisfaction with the harshness of criminal laws. Historians note the “ambivalen[ce]” of the crowds at executions and the doling out of pardons to appease them.<sup>89</sup> In the late eighteenth century, London’s increased number of executions, which were “intended to instill a renewed awe both for the law and the authority that it upheld,” instead “provoked a chorus of critical voices in the contemporary press.”<sup>90</sup> According to Devereaux, the state struggled to “communicate its [tough-on-crime] message without overwhelming its audience’s moral senses and thereby defeating the ritual’s deterrent purpose.”<sup>91</sup> To balance these competing concerns, the state increased the use of both pardons and the punishment of transportation to the colonies. Rather than doing so out of a wish to be more “humane,” those with authority over the executions “believed that, ‘in the Public Impression,’ a show of mercy and lenience ‘will certainly be an Act very acceptable and becoming.’”<sup>92</sup>

Thus, what might have otherwise been societal criticism for the prevalence of capital crimes was muted by the prevalence of pardons.<sup>93</sup> If public executions functioned, as Foucault thought, as a demonstration of raw power, then the act of clemency could enhance that power by heightening the sense of “contingency.”<sup>94</sup> The sovereign—with the power to kill—does what the sovereign does not have to do: dispense mercy. Naturally, these official displays of mercy increased good feelings toward the state. Indeed, Blackstone described how pardons engendered affection and loyalty toward the ruler.<sup>95</sup> In this view, the spectacle of the scaffold is one side of a coin, and the spectacle of mercy is the other side.

---

<sup>88</sup> *Id.* at 164–65.

<sup>89</sup> *Id.* at 159.

<sup>90</sup> Simon Devereaux, *Imposing the Royal Pardon: Execution, Transportation, and Convict Resistance in London, 1789*, 25 *LAW & HIST. REV.* 101, 121 (2007) [hereinafter Devereaux, *Imposing*].

<sup>91</sup> *Id.* at 126.

<sup>92</sup> *Id.* (quoting March 10, 1789 letter from William Pitt to Lord Sydney).

<sup>93</sup> Hay, *supra* note 20, at 40.

<sup>94</sup> *Id.* at 62.

<sup>95</sup> *Id.* at 48 (citing 4 WILLIAM BLACKSTONE, *COMMENTARIES* \*391). Hay attributes an intent to terrorize and manipulate gratitude to the state and to the ruling class. *Id.* at 52 (describing the terror of the death penalty and the manipulative uses of mercy as a “ruling-class conspiracy”). The second part of Hay’s argument is that this regime of terror and manipulative mercy in criminal law “made it possible to govern eighteenth-century England without a police force and without a large army.” *Id.* at 56.

The power of the spectacle of mercy is augmented by its resonance with religious ideals of forgiveness. Acts of mercy soothed complaints about the violence of the state because mercy resonated with the religious sentiments of the time. Elizabeth Papp Kamali notes that “English felony law took root during the age of penitential literature.”<sup>96</sup> In the thirteenth century, the members of the public—including jurors—were “steeped in the religious traditions of the Catholic faith.”<sup>97</sup> Acts of mercy may have been calculated to shore up legitimacy by displaying the virtues instilled in the citizenry through the churches. Because forgiveness was esteemed in sermons and religious texts, it is likely that the public valued mercy shown by the monarchy and local officials. Mortal rulers who act with mercy assert their goodness in the moral universe and thus shore up legitimacy—and the right to punish, as well.

## 2. Mercy for Lesser Crimes and Punishments

While the death sentence provides a dramatic example of the power of mercy to shore up allegiance to the state, the same dynamic has been observed in the prosecution and punishment of lesser crimes in England during the late medieval period. In the words of historian Helen Carrel, England’s fourteenth- and fifteenth-century borough courts used “ritualized submission and public displays of mercy as political weapons within civic government.”<sup>98</sup>

The borough courts of the late medieval period had jurisdiction over minor crimes and some felonies.<sup>99</sup> Local authorities, perhaps experiencing “anxiety to reiterate their autonomy,” publicized their capacity to impose corporal punishment on felons through, for example, castration and blinding, even though they rarely or never imposed such punishment.<sup>100</sup> In practice, borough officials relied on more common punishments like the pillory and other shaming methods that took place in the public square. The convicted person would be “ostentatiously paraded to the pillory, often with accompanying music, and the punishment was carried out in a main thoroughfare or in the market place where the offender was known.”<sup>101</sup> The severity of the pillory as a punishment should not be underestimated simply because the convicted

---

<sup>96</sup> ELIZABETH PAPP KAMALI, *FELONY AND THE GUILTY MIND IN MEDIEVAL ENGLAND* 2 (2019).

<sup>97</sup> *Id.* at 7.

<sup>98</sup> Carrel, *supra* note 21, at 301–02.

<sup>99</sup> *Id.* at 303 (noting that civic leaders of borough courts presided over felony trials only “when acting by royal appointment as Justices of the Peace”).

<sup>100</sup> *Id.*

<sup>101</sup> *Id.* at 304.

person kept life and limb. Some defendants committed suicide before the punishment of pillory, from which one can assume that the social impact of the shaming punishment resulted in permanent, debilitating stigma.<sup>102</sup>

Even in shaming punishments like the pillory, local authorities often forewent punishment if they perceived that public sympathy would trend toward the convicted person.<sup>103</sup> In this, the local authorities walked a fine line. On the one hand, they sought to display their authority to punish. On the other hand, they sought to demonstrate their moral legitimacy through selective forgiveness in instances where punishment would have been viewed as excessive or otherwise unpopular. Indeed, from time to time, ordinary people rebelled against the borough authorities and used force to release people from jails and public stocks.<sup>104</sup> Local authorities had to take this possibility into account when deciding when to arrest, jail, and punish.

To sum up, the “threat of a harsh punishment, which was then ultimately remitted, was a set piece of medieval legal practice.”<sup>105</sup> The switch from the threat of ruinous punishment to mercy was designed to engender gratitude in the convicted person.<sup>106</sup> As Carrel argues:

The idea of those who sentenced offenders to the stocks then publicly easing their suffering is an interesting paradox, but one which was firmly rooted both in contemporary religious context and shrewd political pragmatism on the part of town leaders. If the authorities were seen to be compassionate and merciful, it was much more difficult for detractors to claim that their edicts were unfair or that the town was ill governed.<sup>107</sup>

Periodic displays of mercy enhanced the moral legitimacy of the authorities by aligning them with the moral structure taught to the citizenry through the churches. Official mercy toward a person convicted of a crime was “in keeping with Christian doctrine concerning the forgiveness and judgment of God . . . [and with] royal pardons.”<sup>108</sup>

---

<sup>102</sup> Martin Ingram, *Shame and Pain: Themes and Variations in Tudor Punishments*, in *PENAL PRACTICE AND CULTURE, 1500–1900: PUNISHING THE ENGLISH* 36, 49 (Simon Devereaux & Paul Griffiths eds., 2004).

<sup>103</sup> Carrel, *supra* note 98, at 308.

<sup>104</sup> *Id.* (describing an incident in 1402 in the county of Hull in which the public freed convicted persons from the jail and the stocks, shouting their opposition to the mayor). A later example is the pillory of Daniel Defoe for “seditious libel” in London in 1703, in which the crowd “pelted [him] with flowers” and sang a hymn praising him and castigating the authorities. *Id.*

<sup>105</sup> *Id.* at 307.

<sup>106</sup> *Id.* (“[A] bond of personal gratitude was created towards the person who had shown them mercy.”).

<sup>107</sup> *Id.* at 310.

<sup>108</sup> *Id.* at 307.

Selective leniency enhances the legitimacy—and thus the power—of the criminal legal system.

### B. *Managerial Mercy in the Twenty-First Century*

The emotional interplay between the possibility of either ruinous punishment or leniency remains a central dynamic of discretionary power in modern criminal legal systems. The practice of pardons continued in the United States, and, although it has received “spotty” attention from legal historians, remained a way to ensure that criminal punishment tracked some form of dominant, public sentiment.<sup>109</sup> Additional discretionary release valves were championed in the late nineteenth and early twentieth centuries during the Progressive Era, when “new penologists advocated for a more nuanced, discretionary, and individualized approach to imprisonment.”<sup>110</sup> At the same time, criminal systems used discretionary leniency in ways that exacerbated and entrenched mass criminalization of Black Americans.<sup>111</sup> Khalil Gibran Muhammad observes that the Progressive Era’s pseudoscience about criminogenic environments and eugenics cemented an “enduring . . . discourse of [B]lack dysfunctionality.”<sup>112</sup> Likewise, as detailed in the investigative journalism of Ida B. Wells, the Progressive Era saw relentless but false claims of Black criminality used to justify white supremacist violence against and lynching of Black people.<sup>113</sup> As Alexis Hoag-Fordjour points out, this lethal dynamic should be viewed as the contemporaneous counterpoint to Progressive Era initiatives to institute social services and legal assistance that were primarily for the benefit of white people accused or convicted of crimes.<sup>114</sup>

---

<sup>109</sup> Carolyn Strange, *The Unwritten Law of Executive Justice: Pardoning Patricide in Reconstruction-Era New York*, 28 *LAW & HIST. REV.* 891, 900 (2010).

<sup>110</sup> PHILIP GOODMAN, JOSHUA PAGE & MICHELLE PHELPS, *BREAKING THE PENDULUM: THE LONG STRUGGLE OVER CRIMINAL JUSTICE* 44 (2017).

<sup>111</sup> While criminal systems continued to mete out harsh and brutal punishments for Black people, especially in Southern states that instituted convict leasing during the Reconstruction, Goodman, Page, and Phelps observe that the harshness of punishment in Northern states remained a subject of protest and critique throughout the Progressive Era. *Id.* at 50.

<sup>112</sup> MUHAMMAD, *supra* note 16, at 7.

<sup>113</sup> IDA B. WELLS, *A RED RECORD: TABULATED STATISTICS AND ALLEGED CAUSES OF LYNCHINGS IN THE UNITED STATES, 1892-1893-1894* (Chicago, Donohue & Henneberry 1895) (investigating the pretextual claims of criminality used to justify the lynching of Black men by white mobs in the post-Reconstruction era in the Southern United States).

<sup>114</sup> Alexis Hoag, *The Color of Justice*, 120 *MICH. L. REV.* 977, 984 (2022) (reviewing SARA MAYEUX, *FREE JUSTICE: A HISTORY OF THE PUBLIC DEFENDER IN TWENTIETH CENTURY AMERICA* (2020)) (citing IDA B. WELLS, *CRUSADE FOR JUSTICE: THE AUTOBIOGRAPHY OF IDA B. WELLS* 270–73 (Alfreda M. Duster ed., 2d ed. 2020)). To the extent that reports of lynching and other acts of

The application of discretion to secure leniency in modern legal systems can be analyzed as an extension of premodern mercy when it is used selectively to calibrate public response to the state's exercise of power through its criminal legal system. Discretion can be defined as the power, conferred by law, to choose,<sup>115</sup> or as the freedom to “make a choice among possible courses of action or inaction.”<sup>116</sup> The power of the discretionary actor is central to the act of discretion. Put another way, discretion is “the legitimate right to make choices based on one's authoritative assessment of a situation.”<sup>117</sup> The power to exercise discretion may be absolute or subject to limited review.<sup>118</sup> The discretionary power may be explicitly granted by law, or it may be an effective freedom based on structure and power.<sup>119</sup>

This Article is not, however, a wholesale critique of discretion, which has been widely discussed in legal scholarship. Others have criticized discretion in criminal legal processes, observing that its exercise injects uncertainty, unevenness, and bias into legal outcomes, evading meaningful review.<sup>120</sup> Some have argued that constraining discretion is central to enforcing legal rights against the government.<sup>121</sup> Others have emphasized a contrary position, that discretion is essential to responding to the uniqueness of every situation.<sup>122</sup> This Article does not address those

---

white supremacist violence generated public outcry, the primary tack for restoring the legitimacy of the state was to strengthen formal mechanisms of prosecution, adjudication, and punishment. See *generally* FROM LYNCH MOBS TO THE KILLING STATE: RACE AND THE DEATH PENALTY IN AMERICA (Charles J. Ogletree, Jr. & Austin Sarat eds., 2006) (exploring the relationship between the extrajudicial killing of Black people from the Reconstruction to the mid-twentieth century and the emergence of twentieth-century death penalty procedures, particularly as implemented in the South).

<sup>115</sup> John Bell, *Discretionary Decision-Making: A Jurisprudential View*, in THE USES OF DISCRETION 89, 92 (Keith Hawkins ed., 1992) (defining discretion as “(1) a power to choose standards for action on the part of an actor, (2) which choice is made unilaterally by one legal subject in relation to another, and (3) which choice is conferred or legitimated by the law”); see also RONALD DWORKIN, TAKING RIGHTS SERIOUSLY 31–32 (1977) (describing weak and strong forms of discretion and rule-based constraints on its exercise).

<sup>116</sup> KENNETH CULP DAVIS, DISCRETIONARY JUSTICE: A PRELIMINARY INQUIRY 4 (1969) (defining discretion in legal systems).

<sup>117</sup> Martha S. Feldman, *Social Limits to Discretion: An Organizational Perspective*, in THE USES OF DISCRETION, *supra* note 115, at 163–64.

<sup>118</sup> DAVIS, *supra* note 116, at 151–52 (defining absolute discretion as “unchecked and unreviewable”).

<sup>119</sup> *Id.* at 4 (defining discretion broadly to include all choices to act or refrain from acting that may be chosen by an official).

<sup>120</sup> See Keith Hawkins, *The Use of Legal Discretion: Perspectives from Law and Social Science*, in THE USES OF DISCRETION, *supra* note 115, at 11, 14 (discussing critiques of discretion).

<sup>121</sup> See DAVIS, *supra* note 116.

<sup>122</sup> Hawkins, *supra* note 120, at 17–18 (discussing critiques of procedural due process rules and support for flexibility in individualized decisions).

critiques, but instead accepts the premise that legal actors—including lawyers, judges, and an array of administrative professionals—must make choices about how to implement and interpret the law.<sup>123</sup> By design, these discretionary decisions permit legal actors to be responsive to the needs and expectations of the public.<sup>124</sup>

Of interest to this Article is the emotional appeal of criminal legal reforms that rely on discretionary acts of leniency, such as an executive clemency initiative or a progressive prosecutor who promises to charge with restraint and bargain fairly. Central to the emotional appeal of the promise of wisely exercised discretion is its implicit assurance that, if we have the right people in positions of power, they will accurately assess who merits leniency and, ultimately, use their discretion to reduce the excesses of criminal systems.

To be sure, contemporary proponents of discretionary-based reforms do not rely exclusively on emotional appeals. Some go to great lengths to describe their reforms as “smart on crime,” fiscally responsible, and parsimonious—rather than vengeful—in punishment. These rational reforms, however, have alluring emotional underpinnings. That is not to say that those who exercise their discretion toward leniency are making decisions based on emotion, rather than reason. Rather, whatever the motivation or process of the decision-maker, acts of discretionary leniency pack an emotional punch that enhances the sense of legitimacy of existing criminal legal practices.

What is also of interest to this Article is the political power wielded by criminal legal actors when they exercise their discretion. When actors in the criminal legal system make discretionary decisions about charging or punishment, they wield a “politically important power, even if there is not unlimited choice.”<sup>125</sup> The person with discretion has the power “to affect unilaterally the position of other persons in society.”<sup>126</sup> In bestowing leniency, the discretionary actor demonstrates that they possess the political power to decide the individual’s fate.<sup>127</sup> In other words, leniency is a power move. The discretionary actor demonstrates power by refraining from doing the worst of what the law authorizes. This display of power is the flip side of the spectacle-of-the-scaffold coin first

---

<sup>123</sup> *Id.* at 11 (defining discretion as “the space . . . between legal rules in which legal actors may exercise choice” (footnote omitted)).

<sup>124</sup> Carl E. Schneider, *Discretion and Rules: A Lawyer’s View*, in *THE USES OF DISCRETION*, *supra* note 115, at 47, 64 (noting that discretion allows judges to “take their community’s standards into account”).

<sup>125</sup> Bell, *supra* note 115, at 94.

<sup>126</sup> *Id.* at 95.

<sup>127</sup> *Id.* (arguing that private law arrangements may benefit from a similar analysis of discretionary power as the analysis of more “archetypal power relationships . . . between officials of the state and citizens”).

described by Foucault.<sup>128</sup> It serves a political end of maintaining things as they are, including the power of the state to destroy lives through the quotidian decisions of prosecutors, judges, parole commissioners, and other discretionary actors.<sup>129</sup>

### 1. Extreme Prison Sentences and Discretionary Release

The present wave of criminal legal reforms includes increasing the use of various methods of release from prison, including clemency, compassionate release, resentencing, and the like.<sup>130</sup> Indeed, this is a welcome shift given the decades of increase in the number and length of prison sentences. Following a familiar, historic pattern, the dramatic expansion of incarceration in the United States reasserted state power through displays of punishment. The prison population expanded from around 329,000 in 1980 to its peak of more than 1.6 million in 2009.<sup>131</sup> The well-documented punishment trends show that public support for vigorous prosecution and harsh punishment in the 1980s and 1990s were accompanied by implicitly racist “dog whistles” meant to rally support for “tough on crime” politicians by demonizing Black and Brown communities and recent immigrants.<sup>132</sup> Then, in the 2000s, critiques of mass incarceration and racial disparities in sentencing gained traction, reaching a zenith in the past ten years. A wave of critique of mass incarceration reached a peak between 2010 and 2020 when “large

---

<sup>128</sup> FOUCAULT, *supra* note 56, at 49–50.

<sup>129</sup> The motives of discretionary actors are not particularly relevant to this analysis. Legal and social science literature addresses whether discretionary acts are the product of rational choice or social and organizational constraints. See, e.g., Hawkins, *supra* note 120, at 20–24 (discussing individualistic, reason-based descriptions of discretionary decision-making); M.P. Baumgartner, *The Myth of Discretion*, in THE USES OF DISCRETION, *supra* note 115, at 129–30 (discussing critiques of discretion and arguing that discretion is exercised according to certain sociopolitical factors like status and intimacy). My interest here is in the message and impact of discretionary acts of leniency rather than the intent of the actors.

<sup>130</sup> See, e.g., Hopwood, *supra* note 1.

<sup>131</sup> James Cullen, *The History of Mass Incarceration*, BRENNAN CTR. FOR JUST. (July 20, 2018) <https://www.brennancenter.org/our-work/analysis-opinion/history-mass-incarceration> [<https://perma.cc/F47F-L3DZ>]; HEATHER C. WEST, WILLIAM J. SABOL & SARAH J. GREENMAN, BUREAU OF JUST. STAT., BULLETIN: PRISONERS IN 2009 (2010), <https://bjs.ojp.gov/content/pub/pdf/p09.pdf> [<https://perma.cc/E8P4-QSYM>].

<sup>132</sup> See generally IAN HANEY LÓPEZ, *DOG WHISTLE POLITICS: HOW CODED RACIAL APPEALS HAVE REINVENTED RACISM AND WRECKED THE MIDDLE CLASS* (2014) (arguing that racist tropes of the risk of violent crime were deployed to mobilize U.S. voters throughout the last half of the twentieth century).

portions of society . . . awakened to America's record-breaking levels of mass incarceration and criminalization."<sup>133</sup>

Mass incarceration increased not only the number of people imprisoned but also the length of their sentences. A 2014 study concluded that fifty-one percent of the increase in prison population from 1980 to 2010 was due to the imposition of longer prison sentences.<sup>134</sup> Punitive attitudes are coupled with fear of crime, leading to what Jonathan Simon and Jessica Eaglin have both called a regime that seems to seek "total incapacitation" of those who might commit a crime in the future.<sup>135</sup> Sentences that are too short were viewed as both inadequately punitive and as endangering safety by returning dangerous people to society too soon. The focus on incapacitation fueled another trend: decreased use of mechanisms for early release, like parole.<sup>136</sup> A 2017 report states that approximately 162,000 people in the United States are serving sentences of life in prison, and another approximate 44,000 are serving sentences of fifty years or more.<sup>137</sup> This means that almost fourteen percent of the prison population faces the possibility of never leaving prison in their lifetimes.<sup>138</sup> In keeping with the extreme racial disparity in criminal sanctions, over forty-eight percent of incarcerated people serving sentences of fifty years to life are Black.<sup>139</sup> Black people are five times more likely than white people to be sentenced to incarceration in state courts.<sup>140</sup> If Black, Latino, and other people who identify as people of color are

---

<sup>133</sup> PEW CTR. ON THE STATES, PUBLIC OPINION ON SENTENCING AND CORRECTIONS POLICY IN AMERICA (2012), [https://www.pewtrusts.org/-/media/assets/2012/03/30/pew\\_nationalsurveyresearchpaper\\_final.pdf](https://www.pewtrusts.org/-/media/assets/2012/03/30/pew_nationalsurveyresearchpaper_final.pdf) [<https://perma.cc/8LYZ-TR2K>] (reporting that voters "overwhelmingly" support alternatives to incarceration for nonviolent offenders, as well as the reduction in the length of prison sentences); see also Rachel E. Barkow & Mark Osler, *Designed to Fail: The President's Deference to the Department of Justice in Advancing Criminal Justice Reform*, 59 WM. & MARY L. REV. 387, 390 (2017) [hereinafter Barkow & Osler, *Designed to Fail*] (broadly discussing conditions that led then-President Obama to advance criminal justice reforms).

<sup>134</sup> NAT'L RSCH. COUNCIL, THE GROWTH OF INCARCERATION IN THE UNITED STATES: EXPLORING CAUSES AND CONSEQUENCES (2014).

<sup>135</sup> Eaglin, *supra* note 11, at 196–99 (citing Jonathan Simon, *Dignity and Risk: The Long Road from Graham v. Florida to Abolition of Life Without Parole*, in LIFE WITHOUT PAROLE: AMERICA'S NEW DEATH PENALTY? 282, 293 (Charles J. Ogletree, Jr. & Austin Sarat eds., 2012)) (discussing the theory of "total incapacitation" to describe current sentencing practices for those deemed incorrigible).

<sup>136</sup> See discussion *infra* Part II.

<sup>137</sup> ASHLEY NELLIS, THE SENT'G PROJECT, STILL LIFE: AMERICA'S INCREASING USE OF LIFE AND LONG-TERM SENTENCES 5 (2017), <https://www.sentencingproject.org/app/uploads/2022/10/Still-Life.pdf> [<https://perma.cc/4FND-YFUJ>].

<sup>138</sup> *Id.*

<sup>139</sup> *Id.*

<sup>140</sup> *Id.* at 14.



considered together, the group constitutes more than sixty-five percent of those serving sentences of fifty years or more.<sup>141</sup>

The doling out of long and life sentences was accompanied by an emotional appeal that seemed no less designed to terrify than Foucault's "spectacle of the scaffold." Of course, in Foucault's influential book, *Discipline and Punish*, he argued that the spectacle of the scaffold had been replaced with Bentham's panopticon, in which people under state supervision are constantly monitored in order to train or discipline them into "docile subjects."<sup>142</sup> Loïc Wacquant observes, however, that Foucault's "news of the death of the 'spectacle of the scaffold' has been greatly exaggerated."<sup>143</sup> Wacquant argues that "a whole galaxy of novel cultural and social forms" of "theatricalization of penalty" have emerged, including, for example, true crime shows.<sup>144</sup> Indeed, he argues, displaying the punishment of people convicted of crimes is "core civic theater" to demonstrate the state's ability to enforce behavioral norms through the exercise of punitive power.<sup>145</sup> Even aside from media accounts, as a new public defender, I recall a billboard over a local jail that said, "If you break the law, you'd be home now"—an intended deterrent in the traditional sense because it is designed to provoke fear of ruination through incarceration.<sup>146</sup> Such displays of the state's power to punish, perhaps Foucault would agree, are more scaffold than panopticon.

But if there is theater of punishment to satisfy public desire, there is also theater of mercy, of remittance, to satisfy public concerns for undue and sometimes illegitimate punitiveness. The problem of long sentences has been met with a panoply of suggestions both to reinvigorate traditional means of release like parole and clemency and to create opportunities for judicial review of sentences after a period of years.<sup>147</sup> Notably, these reforms are designed to increase opportunities for discretionary acts of mercy and to increase the use of existing means of exercising mercy.<sup>148</sup> Although rarely resulting in the release of prisoners,

---

<sup>141</sup> *Id.*

<sup>142</sup> FOUCAULT, *supra* note 56, 200–01.

<sup>143</sup> Loïc Wacquant, *Crafting the Neoliberal State: Workfare, Prisonfare, and Social Insecurity*, 25 SOCIO. F. 197, 206 (2010).

<sup>144</sup> *Id.*

<sup>145</sup> *Id.*

<sup>146</sup> Observed by author.

<sup>147</sup> Cecelia Klingele, *Changing the Sentence Without Hiding the Truth: Judicial Sentence Modification as a Promising Method of Early Release*, 52 WM. & MARY L. REV. 465, 485–98 (2010) (describing legislative reforms that expand parole, compassionate release, and eligibility for credit for time served).

<sup>148</sup> See, e.g., JORGE RENAUD, PRISON POL'Y INITIATIVE, EIGHT KEYS TO MERCY: HOW TO SHORTEN EXCESSIVE PRISON SENTENCES (2018) <https://www.prisonpolicy.org/scans/>

clemency and compassionate release provide textual examples of the emotional register and rhetoric of this theater.

## 2. Clemency

Clemency can serve a variety of functions, including undoing past excesses in punishment and signaling to line prosecutors the priorities of the chief executive.<sup>149</sup> Although both governors and the U.S. President can grant clemency, it is a power used infrequently compared with prior centuries of British common law.<sup>150</sup> But, regardless of frequency, clemency can be seen as part of the techniques of terror and tenderness—a system that calibrates the fear that criminal law inspires with other performative moments of mercy that quell criticism and shore up legitimacy.

Former President Obama's clemency initiative is a notable example of an explicit claim of mercy designed to correct for punitive excess. Consider, for example, the landing page on the Obama Administration's White House website for his clemency initiative.<sup>151</sup> Centered at the top is a photograph of former President Obama hugging a person he granted commutation. The caption reads, "A Nation of Second Chances." Next, the webpage features a quote from President Obama: "The power to grant pardons and commutations . . . embodies the basic belief in our democracy that people deserve a second chance after having made a mistake in their lives that led to a conviction under our laws."<sup>152</sup> In an embedded video celebrating his commutation of forty-six prison sentences for people he describes as "not hardened criminals," President Obama makes both a rational and emotional appeal. Obama describes his actions as motivated by correcting "inequities," increasing fairness, reducing costs, and being "smarter" on crime. He argues: "I believe that

---

long\_sentences\_printable.pdf [https://perma.cc/B8B9-DL3N] (suggesting policy reforms to reduce mass incarceration).

<sup>149</sup> Barkow & Osler, *supra* note 2, at 12 (arguing that presidential pardons signal the President's priorities to prosecutors in the Department of Justice).

<sup>150</sup> *Id.* at 7 (reviewing bipartisan criticism of the infrequent use of presidential pardon); *id.* at 13–15 (discussing the "atrophy" of pardons); Rachel E. Barkow, *The Ascent of the Administrative State and the Demise of Mercy*, 121 HARV. L. REV. 1332, 1345–46 (2008) (describing the President's power to pardon). Barkow argues that clemency, once common, fell out of use when, in the early twentieth century, parole became the dominant mode of early release from prison. RACHEL ELISE BARKOW, PRISONERS OF POLITICS: BREAKING THE CYCLE OF MASS INCARCERATION 81 (2019) [hereinafter BARKOW, PRISONERS OF POLITICS] ("Many states vest parole and clemency power in one institution, such as a state board of pardons and parole, thus demonstrating how the two are viewed interchangeably by many state legislatures.").

<sup>151</sup> *A Nation of Second Chances: President Obama's Record on Clemency*, *supra* note 41.

<sup>152</sup> *Id.*

at its heart America is a nation of second chances.”<sup>153</sup> The hug between the President and the woman he released from prison, the reference to the “heart” of America, and the fellow feeling embodied in giving someone a “second chance” all play directly to the emotions of the viewer.

Notably, the emotional appeal is masked by language emphasizing the rational, “smart on crime” approach. Advocates of criminal justice reform often frame increased use of discretionary mechanisms of leniency as rational and punitive excesses as irrational. In her book advocating for rational administrative approaches to criminal legal reform, Rachel Barkow characterizes the era of mass incarceration as one of irrational excesses of punitive reactions. She argues for “an institutional structure that creates a space for experts [to] look at facts and data to set policies that will improve public safety outcomes, even if they are not easily reduced to sound bites or fail to provide emotional appeal.”<sup>154</sup> With regard to uniformly long prison sentences, she argues that “[g]iving individuals of lesser culpability sentences that were set based on the most serious offenders is the very definition of disproportionality—and irrationality.”<sup>155</sup>

There is some of Barkow’s appeal to rationality—parsimony and cost savings—in President Obama’s pitch for clemency power. It is fair to critique mass incarceration in terms of its excess costs, lack of attention to proportionality, and lack of smartness.<sup>156</sup> But this emphasis on utilizing discretionary means of leniency to further rational reform runs the risk of clouding critique of reform’s emotional side. The image of President Obama hugging a woman released through his act of clemency, coupled with language about America’s “heart” and “belief” in “second chances,” conveys a strongly emotional appeal—a caring authority is paying attention, reviewing prison sentences, and correcting excesses.

Indeed, the emotional appeal of singular displays of mercy may be the furthest-ranging public impact of the clemency initiative. President Obama’s rhetoric of clemency did not match the release rates. During his first term, media reports called attention to the gap between the President’s rhetoric of mercy and low rates of release during his first term.<sup>157</sup> In his second term, the President relied on the Department of

---

<sup>153</sup> The Obama White House, *Commuting the Sentences of 46 Prisoners*, YOUTUBE (July 15, 2015), [https://youtu.be/xSYMseMnmfk?si=LiBDJpMR6\\_ZddwwA](https://youtu.be/xSYMseMnmfk?si=LiBDJpMR6_ZddwwA) (last visited Nov. 12, 2023).

<sup>154</sup> BARKOW, PRISONERS OF POLITICS, *supra* note 150, at 2.

<sup>155</sup> *Id.* at 36 (discussing the prosecutor’s decision to seek the harshest sentence in every case as irrational and disproportional).

<sup>156</sup> See Benjamin Levin, *Criminal Justice Expertise*, 90 FORDHAM L. REV. 2777, 2790–801 (2022) (describing models for expertise in criminal systems and criminal legal reform initiatives).

<sup>157</sup> Barkow & Osler, *Designed to Fail*, *supra* note 133, 426–27 (“[P]eople began to notice that President Obama’s clemency record did not match his rhetoric on criminal law.”).

Justice to coordinate his clemency initiative, a move that Barkow and Osler argue resulted in low rates of release from a large group of applicants who met the very narrow criteria set by the clemency initiative.<sup>158</sup> Due in part to bureaucratic inefficiency in the process,<sup>159</sup> fewer than four percent of those who met the strict criteria for release were granted clemency.<sup>160</sup> All told, the former President granted clemency to about 1,700 people.<sup>161</sup> The clemency initiative displayed—even performed—tenderness in a way that risks assuaging concerns over mass incarceration while providing relief only to a few.

As discussed earlier, the clemency power, even when exercised as frequently as during the Bloody Code, was designed to support a system of harsh criminal laws rather than reform it. While clemency can be seen as a release valve built into the Constitution,<sup>162</sup> it is a release valve designed to temper the *appearance* of harshness. In support of the pardon power, Alexander Hamilton wrote: “The criminal code of every country partakes so much of *necessary* severity, that without an easy access to exceptions in favor of unfortunate guilt, justice would wear a countenance too sanguinary and cruel.”<sup>163</sup>

Note that Hamilton saw the severity of punishment set in criminal law to be necessary rather than excessive. Secondly, note that pardons and clemency are not to protect the innocent but for cases of “unfortunate guilt,” meaning someone who is guilty of the crime but to whom sympathy flows. Third, note that the concern is for the “countenance” of justice, meaning the appearance or expression of justice. In Hamilton’s sights, harsh punishments are necessary, but some mercy is required to reduce the impression of cruelty. It is easy to fit the paltry number of President Obama’s clemency grants—coupled with the publicity and emotional claim to “heart” and “second chances”—as a clear example of

---

<sup>158</sup> *Id.* at 429–32 (describing the Department of Justice’s involvement in setting the criteria and procedure for clemency during President Obama’s second term).

<sup>159</sup> *Id.* at 435–36 (characterizing the process as a “rusty bicycle” that you have to “pedal hard” to “get . . . to move”).

<sup>160</sup> *Id.* at 437 (“A report by the United States Sentencing Commission identified 2687 individuals convicted of drug trafficking offenses who met the 6 criteria, yet only 92 of them received clemency—just a little more than 3 percent.”).

<sup>161</sup> *Clemency Statistics*, U.S. DEP’T OF JUST., <https://www.justice.gov/pardon/clemency-statistics> [<https://perma.cc/8AHG-DTAL>] (May 30, 2017) (statistics through January 19, 2017).

<sup>162</sup> U.S. CONST. art. II, § 2, cl. 1 (stating that the President has the power to “grant Reprieves and Pardons for Offences against the United States, except in Cases of Impeachment”); Margaret Colgate Love, *Fear of Forgiving: Rule and Discretion in the Theory and Practice of Pardoning*, 13 FED. SENT’G. REP. 125, 125 (2000) (arguing that, in early U.S. history, “the meat and potatoes of pardoning was the ordinary criminal case in which the legal system had produced too harsh a result”).

<sup>163</sup> Barkow & Osler, *supra* note 2, at 17–18 (emphasis added) (quoting THE FEDERALIST NO. 74, at 501 (Alexander Hamilton) (Jacob E. Cooke ed., 1961)).

putting a merciful countenance on a punitive punishment system. To be sure, President Obama and others working on his clemency initiative likely were motivated by compassion and a sense of justice. But the emotional impact of high-profile acts of clemency is the unwarranted assuagement of concerns about the cruelty of long prison sentences.

One might argue that contemporary public discourse in the United States emphasizes punishment far more than mercy. But public appetite for punishment is not so clear-cut. As Barkow observes, “[a]lthough the public is punitive at the wholesale level and in the abstract . . . , studies show that laypeople would impose less severe sentences than the ones actually imposed by judges” when given a hypothetical set of facts.<sup>164</sup> Hearing “stories of excessive sentences and unjustified pretrial detentions as part of the media’s relatively recent attention to the problems of mass incarceration” likely increases public demand for displays of mercy.<sup>165</sup> A hug, or a story of forty-six lives restored upon release, slakes public thirst for mercy and increases confidence in a criminal legal apparatus that loses legitimacy in its excesses. But it does little beyond setting a mood.

### 3. Compassionate Release

A discussion of the emotional appeal of the “countenance” of mercy—to use Hamilton’s phrasing—would be incomplete without some reference to the emergence of the phrase, “compassionate release.” What is called compassionate release refers to a section of the U.S. Code that permits judicial release of prisoners for “extraordinary and compelling reasons.”<sup>166</sup>

Compassionate release can be understood within the framework of vanishing opportunities for release on parole. Although parole release is used to varying degrees by the states, the federal system of parole was abolished in 1984.<sup>167</sup> Prisoners who once were given the opportunity to earn their early release now serve most of their imposed sentences, greatly increasing the harshness of their punishment compared to early decades of the twentieth century.

The law that forms the basis for what is now called compassionate release is a product of the same Sentencing Reform Act of 1984.<sup>168</sup> Just as a meaningful opportunity for release on parole was abolished, Congress

---

<sup>164</sup> BARKOW, PRISONERS OF POLITICS, *supra* note 150, at 203–04.

<sup>165</sup> *Id.*

<sup>166</sup> 18 U.S.C. § 3582(c)(1)(A)(i).

<sup>167</sup> Sentencing Reform Act of 1984, Pub. L. No. 98-473, 98 Stat. 1987 (codified as amended in scattered sections of 18 U.S.C. and 28 U.S.C.).

<sup>168</sup> 18 U.S.C. § 3582(c)(1)(A)(i).

held out the thin reed of mercy that would come to be known as compassionate release. The Senate Judiciary Committee's Report on the Act states that the provision is meant to address "unusual cases," including "severe illness, cases in which other extraordinary and compelling circumstances justify a reduction of an unusually long sentence."<sup>169</sup> In 2006, the Federal Sentencing Commission defined "extraordinary and compelling reasons" narrowly, to include terminal illness, conditions that prevent prisoners from caring for themselves, and the care for a minor child after the only other potential family member who could care for the child is dead or incapacitated.<sup>170</sup> The Bureau of Prisons defined § 3582(c)(1)(A)(i) to include circumstances that "could not reasonably have been foreseen by the court at the time of sentencing."<sup>171</sup> Although the First Step Act of 2018 amended § 3582(c)(1)(A)(i) to expand early release, such release is still infrequently granted, even in compelling and urgent cases, as made abundantly clear during the initial waves of the COVID-19 pandemic.<sup>172</sup> In other words, compassionate release continues to function as a performance of mercy that fails to deliver reliable relief for incarcerated people facing severe illness and death.

The state analogues of compassionate release fare no better. As in the federal system, compassionate release legislation at the state level is generally limited to terminal, seriously ill, or incapacitated prisoners.<sup>173</sup> According to Renagh O'Leary, "[o]n average, each state grants compassionate release to between four and seven people per year."<sup>174</sup> Although it may be exceedingly expensive to house and care for

---

<sup>169</sup> S. REP. NO. 98-225, at 55–56 (1983).

<sup>170</sup> U.S. SENT'G GUIDELINES MANUAL § 1B1.13 (U.S. SENT'G COMM'N 2006).

<sup>171</sup> 28 C.F.R. § 571.60 (2023) ("The Bureau uses [§] 4205(g) and [§] 3582(c)(1)(A) in particularly extraordinary or compelling circumstances which could not reasonably have been foreseen by the court at the time of sentencing.").

<sup>172</sup> Federal compassionate release was somewhat expanded in the federal First Step Act. Motions for compassionate release can now be filed directly with the court after exhaustion of administrative remedies or thirty days after the Bureau of Prisons has failed to act. First Step Act of 2018, Pub. L. No. 115-391, § 603(b), 132 Stat. 5194, 5239–41 (2018) (codified as amended at 18 U.S.C. § 3582); Jalila Jefferson-Bullock, *Consensus, Compassion, and Compromise? The First Step Act and Aging Out of Crime*, 32 FED. SENT'G REP. 70 (2019).

<sup>173</sup> E. Lea Johnston, *Smoke and Mirrors: Model Penal Code § 305.7 and Compassionate Release*, 4 WAKE FOREST J.L. & POL'Y 49, 60–64 (2014) (contrasting state-level compassionate release statutes with a proposed Model Penal Code provision). By 2012, thirty-nine states had adopted compassionate release provisions. Nicole M. Murphy, *Dying to Be Free: An Analysis of Wisconsin's Restructured Compassionate Release Statute*, 95 MARQ. L. REV. 1679, 1695 (2012) (stating that thirty-nine states have early release for medical reasons).

<sup>174</sup> Renagh O'Leary, *Compassionate Release and Decarceration in the States*, 107 IOWA L. REV. 621, 624, 646–47 (2022) (discussing reasons for denying compassionate release and the frequent exclusion of people deemed "violent offenders" from consideration).

terminally ill and incapacitated people in prison, O’Leary suggests that the infrequency of release is due to “extreme risk aversion”<sup>175</sup>—the fear that even an elderly, incapacitated person near death will commit another crime if released.

The word “compassionate” does not appear in the federal law or guidelines. So how did a system that denies mercy, in both its design and implementation, come to describe itself as compassionate? The U.S. Office of the Inspector General credits the Bureau of Prisons with coining the phrase “compassionate release.”<sup>176</sup> At some point, the Bureau of Prisons started using the word “compassionate” in its program statements.<sup>177</sup> States followed suit. Although some states refer to it as “medical parole,”<sup>178</sup> the term “compassionate release” is now widely used at the state level to describe release for medical reasons.<sup>179</sup> In general usage, compassion is defined as a sympathetic awareness of another’s distress together with a desire to alleviate it. By choosing this word for its process of determining whether there are extraordinary and compelling reasons to release someone, the Federal Bureau of Prisons and the states adopting the term defined themselves as capable of some sort of compassion, fellow feeling, or kindness.

It is neither possible nor necessarily desirable to attribute actual motivations and emotions to institutions and to the people who work in them. It is possible that, as E. Lea Johnston argues, “the primary motivation behind [compassionate release] appears to [be to] avoid (or, rather, to deflect) the cost of caring for elderly and seriously ill prisoners when their release will not pose a threat to public safety.”<sup>180</sup> But, even if the institutional actors see themselves as moved by compassion, or as embracing practices with “dignitarian” or even “spiritual overtones,”<sup>181</sup> the relevant point for the purposes of this Article is the emotional impact of the claim of compassionate release. The public sees that the federal government and most states have adopted a compassionate stance toward

---

<sup>175</sup> *Id.* at 627–28 (discussing infrequency of grants of compassionate release in state systems).

<sup>176</sup> EVALUATION & INSPECTIONS DIV., OFF. OF THE INSPECTOR GEN., U.S. DEPT OF JUST., I-2013-006, THE FEDERAL BUREAU OF PRISONS’ COMPASSIONATE RELEASE PROGRAM, at i (2013), <https://oig.justice.gov/reports/2013/e1306.pdf> [<https://perma.cc/6MTS-AQQY>].

<sup>177</sup> Professor William Berry notes a 1998 policy statement from the Bureau of Prisons with “compassionate release” in its title. William W. Berry III, *Extraordinary and Compelling: A Re-Examination of the Justifications for Compassionate Release*, 68 MD. L. REV. 850, 852–53, 853 n.9 (2009).

<sup>178</sup> O’Leary, *supra* note 174, at 637 n.90.

<sup>179</sup> Jesse J. Norris, *The Earned Release Revolution: Early Assessments and State-Level Strategies*, 95 MARQ. L. REV. 1551, 1568–69 (2012) (“The term ‘compassionate release’ . . . has become a nationally recognized generic term for statutes allowing earned release for age or health reasons.”).

<sup>180</sup> Johnston, *supra* note 173, at 68.

<sup>181</sup> *Id.* at 70.

prisoners who are very sick or dying, assured that someone is carefully applying mercy to individual cases where it is warranted.

#### 4. Second-Look Sentencing

Other means of early release are being dusted off or newly implemented, such as discretionary release on parole (discussed in the next Part) and second-look sentencing. Second-look sentencing is not described by its proponents as primarily compassionate, but it is part of a suite of reforms proposed by the American Law Institute (ALI) to correct for what is commonly viewed as unduly harsh sentencing practices of the late twentieth century.<sup>182</sup> The ALI's argument for judicial second looks at long sentences contains similar rhetoric to former President Obama's claim about the United States being a "nation of second chances." The ALI report states that we are "a nation that makes frequent use of exceptionally severe prison sentences. Whenever a legal system imposes the heaviest of incarcerative penalties, it ought to be the most wary of its own powers and alert to opportunities for the correction of errors and injustices."<sup>183</sup> Sentences ought to be largely determinate, the ALI contends, but contain an array of mechanisms to shave off the top end, including clemency, credit earned and awarded for good behavior, compassionate release, and emergency release.<sup>184</sup> Recognizing that parole and clemency grants fail to provide a reliable opportunity for release,<sup>185</sup> the ALI proposed returning to the court for a judicial review of the original sentence.

The ALI's Model Penal Code's model statute for judicial second-look sentencing provides a mechanism through which judges can take second looks at prison sentences after fifteen years, and thereafter every ten years.<sup>186</sup> The statute guides judicial discretion in modifying sentences

---

<sup>182</sup> The model provision authorizes second-look review after fifteen years of imprisonment for adults. MODEL PENAL CODE: SENT'G app. A, § 305.6 (AM. L. INST., Proposed Final Draft 2017).

<sup>183</sup> *Id.* app. A, § 305.6 cmt. b.

<sup>184</sup> The ALI recommends a rough equivalent to judicial compassionate release in a second model statute, "which permits judicial modification of prison sentences under circumstances of advanced age, physical or mental infirmity, exigent family circumstances, or other compelling reasons." *Id.* app. A, § 305.6 cmt. a (citing *id.* § 305.7).

<sup>185</sup> See, e.g., E. Lea Johnston, *Modifying Unjust Sentences*, 49 GA. L. REV. 433 (2015) (arguing for greater judicial power to reduce previously imposed sentences for mentally ill prisoners and others).

<sup>186</sup> MODEL PENAL CODE: SENT'G app. A, § 305.6 (AM. L. INST., Proposed Final Draft 2017).



in line with the licit purposes of punishment.<sup>187</sup> In part, second-look sentencing is designed to realign punishment with changing societal views of the culpability that attaches to certain crimes, like drug crimes.<sup>188</sup> This reassessment of past sentencing decisions has the feel of buyer's remorse. In its commentary for § 305.6, the ALI states:

The provision reflects a profound sense of humility that ought to operate when punishments are imposed that will reach nearly a generation into the future, or longer still. A second-look mechanism is meant to ensure that these sanctions remain intelligible and justifiable at a point in time far distant from their original imposition.<sup>189</sup>

In other words, the political climate may shift. What was once cheered as “tough on crime” may be viewed as punitive excess.

The idea of bringing someone back into court from the invisible confines of a prison cell to give them a “second look” has emotional undertones. The phrase “giving something a second look” implies a generosity of attention, suggesting that the object of the gaze is worthy of more attention, more deliberation. The gaze, the concerned second look, suggests caring, especially when viewed against the backdrop of the invisibility of the prisoner and the finality of determinative sentences. A long sentence is often the equivalent of a life sentence, and the cell, the tomb. To bring someone out of that annihilation to gaze upon them again suggests a kind of tenderness.

Second-look sentencing provisions are relatively new and their effectiveness in securing sentencing reductions is yet to be seen. But they are set up to pose the same risks as compassionate release and clemency. There is a sentimentalism in the gaze at past injustices toward people who were sentenced to draconian punishments not justified by current thinking. And in this sentimentalism, we risk soothing our concerns over the continued harshness of penalties in criminal statutes and sentencing practices. Instead of lowering the maximum number possible for years in prison, we are told that there will be “compassionate” release and

---

<sup>187</sup> *Id.* app. A, § 305.6(4) (“The inquiry shall be whether the purposes of sentencing in § 1.02(2) would better be served by a modified sentence than the prisoner’s completion of the original sentence.”).

<sup>188</sup> Meghan J. Ryan, *Taking Another Look at Second-Look Sentencing*, 81 *BROOK. L. REV.* 149, 150–52 (2015) (arguing that changing societal norms are a problematic rationale for second-look sentencing).

<sup>189</sup> MODEL PENAL CODE: SENT’G app. A, § 305.6 cmt. a (AM. L. INST., Proposed Final Draft 2017).

“second-look” sentencing, perhaps fifteen years into a life sentence.<sup>190</sup> Richard S. Frase makes this argument, noting that judges may feel less concerned and accountable for meting out extremely long sentences if they reassure themselves that those sentences will be reassessed by another judicial body down the road.<sup>191</sup> The promise of early release permits the state to have it both ways: long prison sentences with the hope of early release.

### C. *Conclusion: The Role of Hope in Maintaining Mass Incarceration*

There is no doubt about the value of expanding the mechanisms for early release from prison in order to provide some relief for the legions of people whose incarceration no longer seems justified or fair. Within this context, discretionary actions of prison officials, parole boards, governors, and sentencing judges serve an important function: considering individual petitions for release. While these mechanisms of release remain important avenues of advocacy, the focus on idiosyncratic, discretionary mechanisms of release leaves unchallenged the terrorizing structure of extremely long sentences. The touting of second chances, second looks, clemency, and compassionate release—often accompanied by a heartfelt anecdote of the singular released prisoner—use a sentimental register that renders distant and fuzzy what we know about the harshness of the state’s punitive apparatus. The possibility of relief through release lulls the observer while failing to accomplish a meaningful retreat from the imposition of ruinous punishment. Instead, anecdotes of early release relieve anxiety and criticism of mass incarceration, targeted incarceration, and sentence lengths popularly perceived as excessive.

Punishment has long been calibrated for public reaction so that it demonstrates power and inspires fear, and alternately demonstrates mercy when public views do not support the punishment. As in centuries past, displays of harsh punishment that the public viewed as unwarranted have the effect of creating the impression that the state actors were “tyrannical, unreasoning and unchristian,” and, thus, not legitimate.<sup>192</sup> In the exercise of mercy, the state shores up its legitimacy as an authority

---

<sup>190</sup> Even the injustices of the trial penalty seem like something that could be ameliorated during a second-look sentencing hearing. Janeanne Murray, *Ameliorating the Federal Trial Penalty Through a Systematic Judicial “Second Look” Procedure*, 31 FED. SENT’G REP. 279, 280 (2019).

<sup>191</sup> Richard S. Frase, *Second Look Provisions in the Proposed Model Penal Code Revisions*, 21 FED. SENT. R. 194, 200 (2009).

<sup>192</sup> Carrel, *supra* note 98, at 311 (discussing the prosecution and arrest of “sanctuary men” in Bristol in 1479).

discerning enough to know when to punish and when to refrain from punishment.

An excellent example of the provocation of hope through discretionary release is the Supreme Court's decision in *Graham v. Florida*, which held that no one may be sentenced to life without the possibility of parole for nonhomicide crimes committed as a juvenile.<sup>193</sup> Although parole is nothing new, the case was part of a wave of renewed interest in parole as a mitigator to the harsh sentencing practices of the 1980s and 1990s. *Graham* was not exclusively a parole case. It set a constitutional limit on extreme sentences for juveniles by barring life without parole for nonhomicide crimes committed by children. In so doing, the Court seemed to invite a broader conversation about the "meaning and morality" of shorter sentences that nonetheless ruin lives in ways that seem disproportional to the crime.<sup>194</sup> But the actual holding in *Graham* was quite limited. The possibility of parole release is enough to satisfy the Eighth Amendment. This holding leaves open the possibility that a child could be sentenced to life *with* parole and then never released. Thus, the case that was heralded as holding that life without parole sentences for juveniles in nonhomicide cases violates the Eighth Amendment in fact offered only the slimmest change of relief: the possibility that a paroling authority or court would permit release from custody before death.

Alice Ristroph, discussing the majority opinion in *Graham*, written by Justice Kennedy, argues that the case uses hope in two ways. Ristroph notes that *Graham* first endorses hope for the juvenile nonhomicide offender's chance at reform. Second, in requiring an opportunity for early release, the Court holds that depriving the juvenile nonhomicide offender of hope for a life outside of the prison walls violates the Eighth Amendment's prohibition against cruel and unusual punishment.<sup>195</sup> Yet, of course, release is not guaranteed and, even if it happens, release occurs decades after incarceration. Juveniles may still be terrorized with life sentences, and juveniles who commit homicides may be terrorized with life sentences with no chance of parole. The opinion thus provokes hopeful feelings and a sense of the Court's legitimacy through a claim of tenderness and legal limits, but—remarkably—does not prohibit a child from spending their entire life in a prison cell.

---

<sup>193</sup> 560 U.S. 48, 82 (2010).

<sup>194</sup> Charles J. Ogletree, Jr. & Austin Sarat, *Introduction: Lives on the Lone: From Capital Punishment to Life Without Parole*, in *LIFE WITHOUT PAROLE: AMERICA'S NEW DEATH PENALTY?*, *supra* note 135, at 10.

<sup>195</sup> Alice Ristroph, *Hope, Imprisonment, and the Constitution*, 23 *FED. SENT'G REP.* 74, 76 (2010).

Like fear, hope is “an affective orientation toward . . . the future.”<sup>196</sup> While hope can protect from “panic and demoralization,”<sup>197</sup> it can also mislead.<sup>198</sup> As two scholars of law and emotions note, “[e]xternal efforts to cultivate hope may become manipulative undertakings that serve the goals of the cultivator rather than those of the prospective hoppers.”<sup>199</sup> They go on to say that there is “a more diffuse danger that legal actors may stress narratives of hope and progress in order to produce quiescence among underserved populations.”<sup>200</sup> Likewise, in her exploration of optimism’s cruelties, Lauren Berlant discusses the costs of hoping for hazy and sentimental types of changes.<sup>201</sup> She argues:

[I]t matters how much an instance of sentimental abstraction or emotional saturation costs, what labor fuels the shift from the concrete real to the soundtrack reel, and who’s in control of the meaning of the shift, the pacing of the shift, and the consequences of detaching, even for a moment, from the consensual mirage.<sup>202</sup>

Returning to the example in *Graham*, the possibility of tenderness, defined as the state’s discretionary grant of early release, provokes hope. In optimism, the ordinary—and disappointing—is given a “suffusion of the ordinary with fantasy.”<sup>203</sup> But this type of hope is an emotional balm that covers cruelty. The destructiveness of a life sentence is possible in the opinion because hope has been sparked.

## II. MERITOCRACY, MYTHS, AND LENIENCY

Modern discretionary acts of leniency often track the liberal ideal of a meritocracy. They rely on an ideological commitment to individual

---

<sup>196</sup> Abrams & Keren, *supra* note 28, at 326.

<sup>197</sup> *Id.* at 337 (citing Philip Pettit, *Hope and Its Place in Mind*, 592 ANNALS AM. ACAD. POL. & SOC. SCI., Mar. 2004, at 152, 160).

<sup>198</sup> *Id.* at 339–40. The authors focus on a separate “hazard[] of hope”—the passive hoper who does not take actions toward their goals. *Id.* at 341–42.

<sup>199</sup> *Id.* at 355–56 (citing Peter Drahos, *Trading in Public Hope*, 592 ANNALS AM. ACAD. POL. & SOC. SCI., Mar. 2004, at 18).

<sup>200</sup> *Id.* at 372.

<sup>201</sup> LAUREN BERLANT, CRUEL OPTIMISM 44 (2011) (describing how optimistic attachments may cause one to “surf from episode to episode while leaning toward a cluster of vaguely phrased prospects”).

<sup>202</sup> *Id.* at 35 (discussing optimism as an affective attachment with political dimensions within the context of literary analysis of a poem).

<sup>203</sup> *Id.* at 14.

agency, which holds those convicted of crimes responsible for the harshness of the state's punishment apparatus. In other words, harsh treatment is deemed to be deserved, and acts of lenience must be earned, through, for example, having no prior convictions, agreeing to participate in diversionary courts or therapeutic programs, and demonstrating good behavior while incarcerated.<sup>204</sup> Leniency thus functions as a reward for the defendant's performance, and the withholding of leniency reflects on the inadequacy of the defendant rather than the sovereign. Instead of reducing the overall harms of the criminal legal system, these discretionary reforms reinforce the system's ability to harm by insisting that the locus of control for tenderness is in the hands of the defendant, a "what happens depends on you" approach. In this way, the harshest aspects of criminal legal practices are obscured under a gloss of personal choice.

The neoliberal conceptualization of meritocracy and "responsibilization" enjoy wide acceptance in criminal legal systems. This is in keeping with criminal law's liberal underpinnings.<sup>205</sup> At its root, we have a system of individualized, personal responsibility for crimes. But the idea of personal responsibility goes further than that. There is a deep and abiding liberal notion of the individual as a free agent creating their own destiny regardless of limitations on their circumstances. Kathryn Miller contends that "[t]he biggest myth of the criminal legal system is that most of those who become entangled within it do so because of their 'bad choices' to commit criminal acts."<sup>206</sup> Miller notes that the trope of individual responsibility undergirds the courtroom arguments of prosecutors, who frequently open at trial with the statement: "[T]his is a case about choices."<sup>207</sup> Similarly, public defenders report hearing "over and over again" that even addicts are making a choice to use the drug to which they are addicted.<sup>208</sup> Likewise, while the culpable defendant is seen as making their own fate, the reformed prisoner is seen as earning their early release. True to the idea of meritocracy, the person is all but

---

<sup>204</sup> An excellent example of the primacy of notions of merit and individual responsibility in the new reforms can be found in Erin Collins's work on problem-solving courts. Collins argues that problem-solving courts may replace immediate incarceration with treatment and surveillance regimens, but that they also "entrench the primacy of individual responsibility" while obscuring social factors that contributed to the defendant's predicament. Erin R. Collins, *Status Courts*, 105 GEO. L.J. 1481, 1512, 1518 (2017).

<sup>205</sup> Miller, *supra* note 43, at 425, 440–42 (discussing the drug court's emphasis on responsibility for recovery as a "responsibilization strategy" (quoting DAVID GARLAND, *THE CULTURE OF CONTROL: CRIME AND SOCIAL ORDER IN CONTEMPORARY SOCIETY* 124 (2001))).

<sup>206</sup> Kathryn E. Miller, *The Myth of Autonomy Rights*, 43 CARDOZO L. REV. 375, 397 (2021).

<sup>207</sup> *Id.* at 379.

<sup>208</sup> Ann Roan, "Those People" *Are Us*, in *HOW CAN YOU REPRESENT THOSE PEOPLE?* 121, 133 (Abbe Smith & Monroe H. Freedman eds., 2013).

promised that the investment of personal effort will be reciprocated by improved conditions.<sup>209</sup> In economic advancement, the American Dream evokes the sense that one's labors result in added value, personal dignity, and prevent one from being "reduced to a type."<sup>210</sup> So too with merit-based relief from prosecution and incarceration.

Yet, the criminal legal system is not a meritocracy. People frequently become the targets of policing and prosecution, "not because of the decisions they make, but because of their identity."<sup>211</sup> Black, Brown, Indigenous, gender-variant, and other marginalized groups "are selected for participation in the criminal legal system by state agents due to the defendants' passive membership in disfavored groups."<sup>212</sup> Indeed, the meritocracy myth functions as a cover for systematic economic disenfranchisement and political scapegoating of disfavored groups. Wacquant makes a similar point, arguing that the "cultural trope of individual responsibility" is one of the four defining hallmarks of the neoliberal effort to dismantle social safety nets and market regulations.<sup>213</sup> Economic deregulation has been accompanied by the restructuring of social welfare programs and the recommitment to "expansive, intrusive, and proactive" policing and punishment practices.<sup>214</sup> To see the relationship among these features and individualism, he notes that being poor and being convicted of crime are both matters of exclusive individual responsibility.<sup>215</sup> According to Wacquant, assistance through welfare programs becomes increasingly linked to surveillance and coercion through "work opportunity," while the criminal legal system becomes increasingly invested in providing assistance to those incarcerated or otherwise supervised by the state through parole and probation.<sup>216</sup> The poor are thus subject to double regulation.<sup>217</sup> In this system of double regulation, the individual is deemed to be responsible for their actions, and any contextual drivers of their behavior must be

---

<sup>209</sup> LAUREN BERLANT, *THE QUEEN OF AMERICA GOES TO WASHINGTON: ESSAYS ON SEX AND CITIZENSHIP* 4 (1997) (discussing the "American Dream" as a type of "political optimism" that "fuses private fortune with that of the nation").

<sup>210</sup> *Id.*

<sup>211</sup> Miller, *supra* note 206, at 398.

<sup>212</sup> *Id.* at 401.

<sup>213</sup> Wacquant, *supra* note 143, at 213–14.

<sup>214</sup> LOÏC WACQUANT, *PUNISHING THE POOR: THE NEOLIBERAL GOVERNMENT OF SOCIAL INSECURITY* 307 (2009) [hereinafter WACQUANT, *PUNISHING THE POOR*]; see also Wacquant, *supra* note 143, at 213.

<sup>215</sup> WACQUANT, *PUNISHING THE POOR*, *supra* note 214, at 98.

<sup>216</sup> *Id.* at 11–15.

<sup>217</sup> *Id.* at 15.

ignored as mere “excuses” for bad choices.<sup>218</sup> Bad choices that result in poverty and criminal conviction are perceived as “moral failing.”<sup>219</sup> The twin regulatory systems of welfare and criminal legal practices thus share a punitive and paternalistic model of individual responsibility for one’s circumstances and future.<sup>220</sup>

Central to my argument is that many of the current reform efforts are lauded precisely for the emotions that they inspire—hope and gratitude—rather than for their ability to address the central harms of carceral practices. As an emotional provocation, the meritocracy model draws one’s attention to exceptional defendants and prisoners who are rewarded with leniency. The success stories elevate anecdotes of exceptional rehabilitation while obscuring the role of the state, and thus derailing focused consideration of more far-reaching structural changes that could be made to criminal legal systems. Displays of merit-based leniency provoke positive emotions in the public and give the impression that mechanisms are in place to identify those undeserving of further punishment, those meriting a break. This Part uses the example of the discretionary decision whether to grant or deny parole to illustrate how the myth of meritocracy infuses discretionary leniency and props up criminal law’s central conceit of individual responsibility.

The decision to release an incarcerated person on parole is a classic example of discretionary leniency purportedly tied to merit. As noted earlier, in the discussion of *Graham v. Florida* and juvenile life sentences, the opportunity to earn early release on parole engenders feelings of hope—a counterpoint to the terror of long prison sentences by providing “early release.”<sup>221</sup> By providing the possibility of parole, the state stakes a claim to tenderness, to paying close attention to “what a man is and what he may become rather than simply what he has done.”<sup>222</sup> Rephrasing without the gendered language, the parole process claims to award the person conditional freedom based on a holistic assessment of who the person is *now*. This power of leniency is substantial. In some states, parole

---

<sup>218</sup> *Id.* at 9 (providing the example of President George H.W. Bush, who said that “society itself doesn’t cause the crime—criminals cause the crime”).

<sup>219</sup> *Id.* at 15.

<sup>220</sup> *Id.* at 16.

<sup>221</sup> Kevin R. Reitz, *Prison-Release Reform and American Decarceration*, 104 MINN. L. REV. 2741, 2746 (2020) (arguing that parole boards “are reflexively classified as agents of lenity by many academics and criminal-justice professionals” because “early release” is framed as an “act of grace”); see also Scarpa v. U.S. Bd. of Parole, 468 F.2d 31, 41 (5th Cir. 1972) (Gewin, J., dissenting) (parole as an act of “legislative grace”), *rev’d on reh’g*, 477 F.2d 278 (5th Cir. 1973), *vacated*, 414 U.S. 809 (1973).

<sup>222</sup> *Greenholtz v. Inmates of the Neb. Penal & Corr. Complex*, 442 U.S. 1, 10 (1979) (quoting Sanford H. Kadish, *The Advocate and the Expert—Counsel in the Peno-Correctional Process* 45 MINN. L. REV. 803, 813 (1961)); see also Swarthout v. Cooke, 562 U.S. 216 (2011) (*per curiam*).

release can be granted after the defendant has served one-third of their sentence.<sup>223</sup> Of course, the reverse is true. The denial of parole results in a sentence up to two-thirds longer than the sentence of the person granted parole. In this way, the power to release is thus also the power to deny release.<sup>224</sup>

In the liminal space of early release, the defendant attempts to exercise limited autonomy to secure leniency.<sup>225</sup> A perfect prison record with evidence of rehabilitation is necessary but often not sufficient to secure release. In this way, the parole regime adds a gloss of liberalism to moments of leniency within a harsh sentencing regime: a regime in which release can be earned and denials of release often are attributed to failures of the prisoner.

Below, I briefly discuss the parole release process, considering its emotional provocations, and then provide an example of a public-facing, media account of the parole process in action.

### A. *The Parole Release Process*

Parole release occurs in indeterminate sentencing, where the person is sentenced to a range of time rather than a set amount of time.<sup>226</sup> So, for example, if a person is sentenced to five to twenty years, they are eligible for parole at year five. If the paroling authority declines the application,

---

<sup>223</sup> Reitz, *supra* note 221, at 2754–57 (describing the parole release system in Georgia and comparing to other states).

<sup>224</sup> *Id.* at 2748 (“[P]arole boards’ law-given authority to reduce prison-sentence lengths always entails a corresponding power to increase prison stays.”).

<sup>225</sup> Parole release traditionally focuses on a demonstration of rehabilitation, in contrast to clemency, compassionate release, and second-look sentencing. For example, Model Penal Code § 305.6, the model second-look sentencing statute, does not focus on rehabilitation or good behavior, but on correcting sentences whose length reflects the calculus of a different political era and now appears excessive. See MODEL PENAL CODE: SENT’G app. A, § 305.6 (AM. L. INST., Proposed Final Draft 2017). At the same time, the Commentary to the model second-look sentencing statute acknowledges that, in second-look sentencing, “rehabilitation remains an eligible concern on an equal footing with other utilitarian objectives.” See *id.* app. A, § 305.6 cmt. f. While not a review of the original judge’s sentence, the fifteen-year mark is a time at which “much new information about the prisoner will have accumulated, new criminological knowledge may exist about offender rehabilitation and other relevant utilitarian objectives and, in some cases, broader societal values relevant to punishment decisions may have shifted.” *Id.* Second-look sentencing is thus personal. Each defendant gets to come back into court for a second look at which the defendant might be able to demonstrate changed circumstances and rehabilitation. See, e.g., Sarah French Russell, *A “Second Look” at Lifetime Incarceration: Narratives of Rehabilitation and Juvenile Offenders*, 31 QUINNIPIAC L. REV. 489, 519 (2013).

<sup>226</sup> Most states and the federal government had indeterminate sentencing schemes until the era of sentencing reform in the 1980s and 1990s. W. David Ball, *Heinous, Atrocious, and Cruel: Apprendi, Indeterminate Sentencing, and the Meaning of Punishment*, 109 COLUM. L. REV. 893, 906 (2009).



the person may reapply for parole after a time. As a result, a person serving a five-to-twenty-year sentence could be incarcerated from anywhere from five to twenty years minus reductions that occur through other mechanisms like “good time,” meaning a set percentage reduction in the total sentence based on the absence of disciplinary infractions.<sup>227</sup>

Parole was introduced into criminal sentencing in the United States in 1876, when New York adopted an indeterminate sentencing scheme. Within fifty years, early release on parole was the norm in state and federal criminal sentencing schemes.<sup>228</sup> Roughly one hundred years later, as the 1980s began, the “truth in sentencing” and “tough on crime” political rallying cries resulted in Congress and some state legislatures abolishing or rolling back their parole regimes.<sup>229</sup> Despite these rollbacks, many states continue to use indeterminate sentencing with the possibility of parole release.<sup>230</sup> Indeterminate sentencing (meaning a sentence with the possibility of early release) “remains ‘the most common approach to sentencing in the United States.’”<sup>231</sup> Currently, two-thirds of states permit early release on parole, meaning that the state’s “parole boards hold the lion’s share of legal authority over the ultimate durations of most prison sentences.”<sup>232</sup> At the same time, the likelihood of release on parole has been severely curtailed in some states where parole is theoretically an option, resulting in reformist calls for more robust and meaningful opportunities for release. Understandably, then, critics of mass incarceration have turned their attention to parole as a potential source of relief from unjustly long prison sentences and have also offered critiques of parole’s weaknesses as a vehicle for reducing incarceration.<sup>233</sup>

---

<sup>227</sup> Good-time credits are a fixed reduction in the length of the prison sentence that apply to incarcerated people as a matter of statutory right or for “good behavior.” Good-time credits continued during the “truth-in-sentencing” decades. Paul J. Larkin, Jr., *Clemency, Parole, Good-Time Credits, and Crowded Prisons: Reconsidering Early Release*, 11 GEO. J.L. PUB. POL’Y 1, 10–11 (2013).

<sup>228</sup> Laura Cohen, *Freedom’s Road: Youth, Parole, and the Promise of Miller v. Alabama and Graham v. Florida*, 35 CARDOZO L. REV. 1031, 1067 (2014) (discussing the history of parole and noting that, by the 1970s, more than seventy percent of prisoners were released through parole).

<sup>229</sup> *Id.* at 1067–68 (noting the abolition of indeterminate sentencing and parole in the federal system, and the rollback of parole in some state systems).

<sup>230</sup> See Jorge Renaud, *Grading the Parole Release Systems of All 50 States*, PRISON POL’Y INITIATIVE (Feb. 26, 2019), [https://www.prisonpolicy.org/reports/grading\\_parole.html](https://www.prisonpolicy.org/reports/grading_parole.html) [<https://perma.cc/M295-LN47>] (providing an overview of state procedures).

<sup>231</sup> Cohen, *supra* note 228, at 1068 (quoting Steven L. Chanenson, *Guidance from Above and Beyond*, 58 STAN. L. REV. 175, 187 (2005)).

<sup>232</sup> Reitz, *supra* note 221, at 2742. Other states and the federal government permit early release through various systems of credit based on length of stay and also on good behavior. This type of early release is said to be based on “good time” credits. *Id.* at 2743–44 (discussing “good-time” mechanisms).

<sup>233</sup> See Alexis Karteron, *Parole, Victim Impact Evidence, and Race*, 87 BROOK. L. REV. 1283 (2022) (analyzing the impact of victim participation and race on parole release decisions);

The parole process usually has three components: the incarcerated person's prison record (including any accomplishments or disciplinary infractions), a "psychological evaluation or risk assessment," and a hearing that might include an interview with the prisoner.<sup>234</sup> Usually, the parole applicant can submit to the parole board letters of support, plans for reentry, evidence of accomplishments such as certificates of completion of prison programs and classes, their prison work history, and a personal statement.<sup>235</sup> One can see how some notion of merit would play into this discretionary process of deciding whether to exercise leniency through early release from prison.

States vary widely in the standards for release and the degree of specificity in those standards.<sup>236</sup> Release decisions may be routinized and primarily based on the person's classification within the prison, the number of disciplinary infractions that they have received, and the quantified results of some sort of risk assessment instrument designed to predict future dangerousness.<sup>237</sup> If the conviction was for a crime with an identifiable victim, the parole board may be swayed by the victim's

---

Alexandra Harrington, *The Constitutionalization of Parole: Fulfilling the Promise of Meaningful Review*, 106 CORNELL L. REV. 1173 (2021) (arguing for more robust judicial review of parole denials); Kristen Bell, *A Stone of Hope: Legal and Empirical Analysis of California Juvenile Lifer Parole Decisions*, 54 HARV. C.R.-C.L. L. REV. 455 (2019) (analyzing parole release decisions for people sentenced to life in prison in California for crimes committed when they were juveniles); Lila Meadows, *Realizing "Meaningful" in Maryland: A Call for Reforming Maryland's Parole System in Light of Graham, Miller, & Montgomery*, 48 U. BALT. L.F. 59 (2018) (critiquing the parole process in Maryland and recommending reforms to ensure meaningful opportunities for release); Kimberly Thomas & Paul Reingold, *From Grace to Grids: Rethinking Due Process Protection for Parole*, 107 J. CRIM. L. & CRIMINOLOGY 213 (2017) (arguing that courts should recognize a greater liberty interest in parole applicants' appeals of parole denial); Michelle Lewin & Nora Carroll, *Collaborating Across the Walls: A Community Approach to Parole Justice*, 20 CUNY L. REV. 249 (2017) (discussing strategies to provide legal and volunteer assistance to parole applicants); Michael M. O'Hear, *Beyond Rehabilitation: A New Theory of Indeterminate Sentencing*, 48 AM. CRIM. L. REV. 1247 (2011); Ball, *supra* note 226; W. David Ball, *Normative Elements of Parole Risk*, 22 STAN. L. & POL'Y REV. 395 (2011); Laura I. Appleman, *Retributive Justice and Hidden Sentencing*, 68 OHIO ST. L.J. 1307 (2007); Steven L. Chanenson, *supra* note 231; Steven L. Chanenson, *The Next Era of Sentencing Reform*, 54 EMORY L.J. 377 (2005).

<sup>234</sup> Cohen, *supra* note 228, at 1069.

<sup>235</sup> *Id.* at 1069–70 (briefly outlining the parole process in New York and similar states). Of course, another aspect of the parole process is an actuarial risk assessment, which purportedly introduces an element of regularity into the process. *Id.* at 1070–72.

<sup>236</sup> See Victoria J. Palacios, *Go and Sin No More: Rationality and Release Decisions by Parole Boards*, 45 S.C. L. REV. 567, 576–77 (1994) (describing the factors various state parole boards use to determine release).

<sup>237</sup> As one might imagine, requiring the prisoner to express remorse presents insurmountable challenges for the wrongfully convicted defendant seeking release on parole. See generally Daniel S. Medwed, *The Innocent Prisoner's Dilemma: Consequences of Failing to Admit Guilt at Parole Hearings*, 93 IOWA L. REV. 491 (2008).

perspective on release.<sup>238</sup> Or, the decision to deny release may be based on a subjective assessment of the applicant's remorse and rehabilitation combined with a risk assessment made through statistical means. The decision to deny release may also rest on the parole commissioner's fear of public approbation should the released person reoffend, or on variables idiosyncratic to the worldview of the commissioner assigned to the case.

From the brief sketch of the parole process above, it should be clear that parole release decisions are "discretionary" in an almost unencumbered sense of the term. Unencumbered discretion is the result of at least two variables: the parole official's ability to assign any or no weight to different factors (such as prison record and the seriousness of the crime) and the lack of meaningful review of denials of release. While regulations govern permissible factors for the paroling authority to take into consideration in deciding whether to release, "standards remain highly subjective and [the paroling authority] generally [is] not compelled to accord equal weight to each of the[] factors."<sup>239</sup> In fact, as we will see in the example discussed below, some parole authorities accord more weight to the nature of the crime than to the prisoner's record of rehabilitation.<sup>240</sup> Parole authorities might deny release if the prisoner does not express remorse in a convincing way, and are, as I have written elsewhere, susceptible to racial and other biases in their assessments of remorse.<sup>241</sup> All other factors may point toward release, yet the parole authority may deny release to the prisoner who does not weep during the interview.<sup>242</sup>

Moreover, the hearings may lack enforceable procedural rules or standards.<sup>243</sup> If the state's statutory scheme does not create a liberty interest in release on parole, the decision whether to grant release does not even require a hearing. If the state's statutory scheme creates a liberty interest in parole release, all due process requires is an informal hearing between the applicant and the paroling authority.<sup>244</sup> Before the abolition of the U.S. Parole Board, Kenneth Culp Davis, a critic of discretion,

---

<sup>238</sup> See Mary West-Smith, Mark R. Pogrebin & Eric D. Poole, *Denial of Parole: An Inmate Perspective*, 64 FED. PROB. J., no. 2, Dec. 2000, at 3 (describing the parole release process, its variables, and how it is perceived by both parole release authorities and applicants).

<sup>239</sup> Cohen, *supra* note 228, at 1074.

<sup>240</sup> *Id.* at 1075 (noting that parole authorities may accord more weight to "static" factors, like the severity of the original offense).

<sup>241</sup> See generally Hanan, *supra* note 15.

<sup>242</sup> Cohen, *supra* note 228, at 1076 (discussing remorse assessments during parole hearings).

<sup>243</sup> Reitz, *supra* note 221, at 2756.

<sup>244</sup> *Greenholtz v. Inmates of the Neb. Penal & Corr. Complex*, 442 U.S. 1, 7 (1979); see *Bd. of Pardons v. Allen*, 482 U.S. 369, 378 n.10 (1987); see also *Jago v. Van Curen*, 454 U.S. 14, 17 (1981) (holding that parole for state prisoners lies wholly within the discretion of the state parole authority and statutes providing for parole do not create protected liberty interests).

pointed out that the Board “never announced rules, standards, or guides,” nor did it “state the characteristics of cases in which parole will obviously be granted or will obviously be denied.”<sup>245</sup> In state parole systems, discretion is exercised with regard to factors, and some states issue a written explanation of the parole board’s decision. Nevertheless, similar criticisms of arbitrary and opaque exercise of discretion have been leveled against state parole systems.

The parole authority’s decisions regarding early release are “unfettered” by meaningful appellate review.<sup>246</sup> Given the individualized assessment in every case, the Supreme Court characterized parole release as a “discretionary assessment of a multiplicity of imponderables, entailing primarily what a man is and what he may become rather than simply what he has done.”<sup>247</sup> Because early release from prison generally is not considered a right, a denial of parole rarely constitutes an unappealable decision.<sup>248</sup> Of course, a parole statute could create a legislative right to early release, mandating more procedural protections and review.<sup>249</sup> But, in the absence of a statutory right, the lack of a constitutional right to parole results in essentially unreviewable decisions by the parole authority.<sup>250</sup>

With this process in mind, one can see how parole situates responsibility for the harshness of a life sentence and the hope of release squarely on the shoulders of the prisoner who applies for parole from a life sentence. Indeed, parole release requires much of the individual prisoner, who must follow all prison rules, avoid disciplinary infractions, and behave in an exemplary way, working, volunteering, and taking classes. The job of the paroling authority, then, is to approach the parole applicant holistically, making “individualized, granular determinations” and “weighing evidence bearing on the offender’s specific

---

<sup>245</sup> DAVIS, *supra* note 116, at 126–27 (critiquing the U.S. Parole Board for its lack of standards for exercising its discretion to grant or refuse release on parole).

<sup>246</sup> Robert A. Bierschbach, *Proportionality and Parole*, 160 U. PA. L. REV. 1745, 1752 (2012) (describing the constitutional doctrine regarding parole release decisions).

<sup>247</sup> *Greenholtz*, 442 U.S. at 10 (quoting Kadish, *supra* note 222, at 813).

<sup>248</sup> See Ball, *supra* note 233, at 944; see also *Swarthout v. Cooke*, 562 U.S. 216, 220 (2011) (stating that there is no federal constitutional right “to be conditionally released before the expiration of a valid sentence”); *Allen*, 482 U.S. 369; *Hewitt v. Helms*, 459 U.S. 460, 467–68 (1983) (stating that there is no inherent right to release on parole or to the accumulation of “good-time credit” toward early release).

<sup>249</sup> *Greenholtz*, 442 U.S. at 7–8.

<sup>250</sup> See, e.g., Laura I. Appelman, *Retributive Justice and Hidden Sentencing*, 68 OHIO ST. L.J. 1307, 1307 (2007) (identifying parole as an understudied aspect of “hidden sentencing”). *Greenholtz*, 442 U.S. at 12 (emphasizing that while defendants do not have a constitutional right to release on parole, and, thus, procedural due process rights, the Court will analyze on a case-by-case basis whether the parole statute in question has a “unique structure and language” that indicates a “protectible entitlement”).

circumstances.”<sup>251</sup> It is worth noting how difficult it is for applicants to demonstrate that they merit release. On the one hand, early release often requires a demonstration of exemplary conduct while incarcerated. The emphasis on individual behavior belies the fact that incarcerated people are constantly responding to an impossible and often dangerous environment in which they have few choices to make. On the other hand, a common reason for denial is the parole board’s decision that release will result in too little punishment given the severity of the crime. This “not enough time served” rationale is retributive in nature and used when the applicant has otherwise satisfied all the required and recommended steps to make themselves a good candidate for release.<sup>252</sup> The severity of the crime can override evidence of rehabilitation. The uncertainty of release simultaneously provokes in applicants the feelings of fear of denial and hope of release.

Narratives of parolees returning home have the potential to garner hopefulness for the criminal legal system—that, despite great difficulty, the meritorious person eventually will secure release from prison and return home. Of course, for those denied parole and their supporters, the sentencing scheme is an affective regime of terrorizing punishment and ephemeral hope. The following Section analyzes a journalistic video report of several incarcerated people applying for release on parole in New York, noting the ways in which the report emphasizes merit and the emotional appeal of granting mercy where merited.

### B. *The Theater of the Release Decision*

A *New Yorker* video on New York State’s parole process demonstrates the sentimental impact of reforms that call upon discretionary actors to respond to merit-based requests for leniency.<sup>253</sup> The video features a handful of parole applicants, a parole commissioner, and a former parole commissioner. Against a black background, the faces of singular parole applicants and, later, commissioners, appear while they comment on their experiences. The faces fade in and out against the black

---

<sup>251</sup> Bierschbach, *supra* note 246, at 1786. The sentencing court’s individualized assessment of rehabilitative potential would thus be applied to the parole release hearing. Indeed, this kind of careful, holistic look at the person convicted of a crime was traditionally part of all sentencing. In the words of the Supreme Court, “careful study of the lives and personalities of convicted offenders” is necessary because “[r]eformation and rehabilitation of criminal offenders have become important goals of criminal jurisprudence.” *Williams v. New York*, 337 U.S. 241, 248–49 (1949).

<sup>252</sup> West-Smith, Pogrebin & Poole, *supra* note 238 (discussing reasons for denial and how the reasons are perceived by applicants).

<sup>253</sup> Miller & Russo, *supra* note 42.

background, creating a chiaroscuro effect and the sense that prison life occurs out of time and space in a kind of purgatory. Somber music plays.

In describing the parole hearing, one applicant describes the monumental nature of sitting down across from the person capable of granting release. The applicant says: “You sit down and, you know, think about, you know, what could you say? What would you say?” Another applicant says, “My worst period of my life would not forever define me.”<sup>254</sup> The documentary seems to endorse the view that the applicants may have merited some loss of liberty through their actions. Applicants describe snippets of the crimes for which they were convicted. One applicant acknowledges that she and her boyfriend killed her grandmother.<sup>255</sup> The applicant explicitly expresses her remorse in the documentary, stating: “I made a commitment then that that would be it. I would never hurt another human being.”<sup>256</sup>

The documentary then pivots to the person’s actions while incarcerated, highlighting the applicant’s emotions as well as their efforts:

I’m super nervous, but I’m hopeful, because reading the guidelines for what can possibly get you out, or grant you parole. I was asked to one, do anger management, two, substance abuse treatment, three, do a vocation, learn a skill, and four, my time, the first three of which I completed before my first five years.<sup>257</sup>

Similarly, another parole applicant notes that, at the time of the parole interview: “I had a master’s degree. I’m a published poet. I was a published poet by that time.”<sup>258</sup> And another states: “I had multiple job offers. I was ready to go.”<sup>259</sup> Through these statements, the viewer understands that the applicants accept the meritocracy approach to parole and have tried to do everything required of them to merit release.

Meritocracy is implicitly endorsed by the video in two ways. First, the video implicitly suggests that the applicants merited long periods of incarceration for the serious crimes they acknowledge committing. Indeed, part of the merit of their release is the heavy debt paid through serving decades in prison. As noted earlier in this Part, this idea of criminal law as a meritocracy has been roundly criticized. Some people are serving life sentences for murder, but others are serving decades to life for nonviolent offenses under three-strike laws and for the possession

---

<sup>254</sup> *Id.* at 1:25–1:35.

<sup>255</sup> *Id.* at 3:17–3:35 (showing the applicant stating, “[w]e ended the life of my grandmother to fuel our addiction”).

<sup>256</sup> *Id.* at 3:39–3:46.

<sup>257</sup> *Id.* at 4:00–4:36.

<sup>258</sup> *Id.* at 4:36–4:40.

<sup>259</sup> *Id.* at 4:41–4:44.

of controlled substances. Legal scholars such as Michelle Alexander have done a great deal to explain how incarceration is predicated on structural racism.<sup>260</sup> Incarcerated people are overwhelmingly people without wealth or power; the majority qualify for public defenders. Meanwhile, people with more wealth and power engage in conduct that constitutes white collar crime but enjoy low rates of incarceration. Second, the parole process and the *New Yorker* video endorse the idea that early release must be earned. If the applicants have served a significant amount of time during which their behavior has been exemplary, they merit release.<sup>261</sup> If parole is designed to be a meritocracy, then careful and attentive assessment of the actions and character of the applicants is the key. This too seems to suggest that better, more humane parole commissioners are the solution to unfair denials of parole.

But what the applicants find at their first parole hearing is that the encounter is less personal than expected. One applicant is disappointed that the meeting is not in person: “There’s a big television in front of you. Three commissioners sitting there, and you’re talking to a television.”<sup>262</sup> Even though parole release decisions involve an assessment of rehabilitation, which would give great weight to the applicant’s personal efforts while incarcerated, applicants report that commissioners sometimes focus exclusively on the crime that led to incarceration:

And each time right out the gate, we had a discussion about the instant offense. Tell me, how do you take the life of somebody who was always there for you? Make me understand how it was just so easy for you to end her life. My jaw dropped. The tears started flowing. I couldn’t get control of myself. I couldn’t answer his question, because I was so overwrought with guilt.<sup>263</sup>

From this quote, the reader can see that the emotional draw of merit-based leniency is recognized in its breach. The viewer must agree that the parole applicant has done everything they were required to do to make up for their crimes and demonstrate rehabilitation. The viewer learns that, despite the applicants’ efforts to rehabilitate, they are seen as no more than their crime. One applicant describes feeling as if the efforts that he made to improve himself and to help others had “no value whatsoever” to the parole commissioner.<sup>264</sup> To realize that the steps taken

---

<sup>260</sup> See generally MICHELLE ALEXANDER, *THE NEW JIM CROW: MASS INCARCERATION IN THE AGE OF COLORBLINDNESS* (2010).

<sup>261</sup> An applicant states, “I remember a time that parole was a fair system back in the 80s, but somewhere along the line, it got into the punishment era.” Miller & Russo, *supra* note 42, at 10:41–10:51.

<sup>262</sup> *Id.* at 6:02–6:09.

<sup>263</sup> *Id.* at 6:11–6:47.

<sup>264</sup> *Id.* at 9:53–9:59.

to merit release are not valued by the parole commission, “almost enrages you, that they could be so callous.”<sup>265</sup> To say that someone is callous is to comment on their inability to feel compassion, empathy, or fellow feeling. The callous person is insensible to the applicant’s efforts and personhood. The callous person lacks tenderness.

The video leads the viewer to the conclusion that the solution to the unfairness of this failure to reward merit is *better discretionary decision-makers*. The video goes on include portions of interviews with two, contrasting parole commissioners: Commissioner Ferguson, who sees weakness and danger in going along with an incarcerated person’s claim of rehabilitation, and Commissioner Shapiro, who endorses the possibility of redemption. Commissioner Ferguson expressly works to avoid fellow feeling with the applicants.<sup>266</sup> He is intentionally skeptical of the applicants, worried that the applicants who have “perhaps dedicated their life to criminal activity” are putting on a show of remorse and rehabilitation. The commissioner does not want to be responsible for releasing a person if it will result in “someone else [getting] raped or murdered.”<sup>267</sup> Fellow feeling, which the Commissioner describes offensively as a “hug-a-thug mentality,” is expressly disavowed.<sup>268</sup>

But Commissioner Shapiro takes a different tack. She adopts the view that people change, and that a person’s actions early in life do not define the person decades later. She states, “Nowhere else [other than in the criminal legal system] believes that you shouldn’t be forgiven, and that you don’t have the right to move on just because you did something heinous at one fixed point in your life.”<sup>269</sup> Shapiro is the commissioner who perceives not only the merited punishment but also the merited leniency. Despite repeated denials of release, these applicants eventually are granted parole in the end and describe returning to families and leading free lives.<sup>270</sup> What changed? One applicant says he believes that what changed was that his application was considered by a different parole commissioner.<sup>271</sup>

The video highlights the unfairness of denying parole to a rehabilitated person who has served a substantial part of their sentence. But important to this Article is what the video omits. It does not offer criticism or commentary on the length of the sentence originally imposed. Indeed, the video suggests their crimes merited long sentences

---

<sup>265</sup> *Id.* at 10:01–10:06.

<sup>266</sup> *Id.* at 8:08–8:18, 8:41–8:49.

<sup>267</sup> *Id.* at 9:05–9:14.

<sup>268</sup> *Id.* at 11:45–11:53 (“[T]he justice system cannot survive the hug-a-thug mentality.”).

<sup>269</sup> *Id.* at 15:54–16:06.

<sup>270</sup> *Id.* at 16:32–17:45.

<sup>271</sup> *Id.* at 15:25–15:34.



in the first instance. The video focuses on the merit of the applicants and the difference in the approach to release taken by parole commissioners. The video leads the viewer to the recommendations that parole should be reinvigorated through attentiveness to the accomplishments and predicaments of the long incarcerated.<sup>272</sup> The ultimate takeaway is that better parole commissioners are needed to spot merit and reward it with release, not that criminal sentencing should be less punitive or ruinous in the first instance.

Parole is thus a bureaucratic process that functions like a sentimental salve, promising that long and life prison sentences are not as harsh as they seem. One might easily feel assured that leniency will be the result of complying with rehabilitation regimens. Yet, what often results is something that might be said to be quintessential of the state's promises to mitigate harshness with leniency. Incarcerated people who have perfect institutional records and demonstrated participation in all the recommended prison programming are routinely denied in a promise that is both opaque and disheartening. If released, it is often after decades and in the latter part of their lives.<sup>273</sup>

To call for more compassionate, thoughtful parole commissioners, sensible to the life trajectories of their subjects, is not objectionable. Elsewhere, I have argued that discretionary assessments of rehabilitation are essential to fairness and to reducing mass incarceration.<sup>274</sup> But it is not a simple matter to put discretionary acts of care in their right place. Sentimental notions of powerful people doing the right thing tend to lead to reforms based on individual acts of discretion rather than structural change. This has broad implications as second-look sentencing becomes more prominent. Indeed, some judges may be willing to sentence for longer, seduced into believing that there is a meritocracy of release overseen by smart, empathetic judges or parole commissioners.

---

<sup>272</sup> One of the interviewees in the documentary was paroled and established an organization dedicated to the release of older prisoners, including offering support for legislative changes to make parole release processes earlier and fairer. *Our People*, RELEASE AGING PEOPLE IN PRISON, <https://rappcampaign.com/our-people> [<https://perma.cc/RQQ7-WZKE>] (highlighting the role of founder Jose Hamza Saldaña).

<sup>273</sup> NAZGOL GHANDNOOSH, THE SENT'G PROJECT, DELAYING A SECOND CHANCE: THE DECLINING PROSPECTS FOR PAROLE ON LIFE SENTENCES 7, 10 (2017) <https://www.sentencingproject.org/app/uploads/2022/08/Delaying-a-Second-Chance.pdf> [<https://perma.cc/LX46-A8KP>] (providing examples of the increasing lengths of prison time served by parole-eligible people serving life sentences in various states).

<sup>274</sup> Hanan, *Incapacitating Errors*, *supra* note 18, at 154–57.

Moreover, early release mechanisms—while essential—may cut short public critique of life and long sentences.<sup>275</sup> The existence of back-end release possibilities entrench long sentences. In setting long sentences as punishment, the lawmaking body assures itself that, should the sentenced person merit early release, someone will notice and let them out. Likewise, a judge may assuage any second thoughts about imposing a life sentence on a twenty-year-old by imagining the incarcerated person's release on parole in fifteen years. In this way, the hopeful discretionary process of parole—that advertises itself as considering the whole person and their trajectory of improvement—reinforces a whipsaw arrangement of the terror and despair of being sentenced to die in a prison cell and the chance that someone at some point will decide to award freedom. Moreover, while it is difficult to argue with the call for better parole commissioners, such reforms continue to rely on “confidence in the critical intelligence of affect, emotion, and good intention” of individuals rather than restructuring of criminal legal systems.<sup>276</sup> The next Part addresses this problem.

### III. LEADERSHIP: EMPATHY ENTREPRENEURS

The idea of innovative, empathetic leadership inspires optimism about the possibility of reducing the harms of criminal legal practices without significantly changing them. One example, described above, is the call for parole commissioners who will be sensible—or sensitive—to the individual parole applicant and recognize merit.<sup>277</sup> But perhaps the most salient example of the leadership-oriented calls for reform is the phenomenon of the “progressive prosecutor,” celebrated for their promise to exercise discretion in ways that reduce mass incarceration and otherwise alleviate excess and unfairness in criminal legal practices.

The reader will note the shift from post-sentencing relief discussed in Parts I and II to front-end decisions made by prosecutors. This shift is justified for three reasons. First, the touting of leadership qualities is most apparent in public discussions of prosecutors because they enjoy a greater spotlight than prison officials, parole authorities, or judges. Often, the role of county district attorneys is explicitly political because they are elected to office. Second, prosecutors enjoy broad discretion in their charging decisions, making them quintessential policymakers within

---

<sup>275</sup> *Id.* at 194–95 (arguing that parole “(1) lacks meaningful judicial review; (2) still requires the releasing authority to predict future behavior, a task this Article argues is exceptionally difficult; and (3) can have the effect of coercing prisoners into intrusive therapeutic regimes”).

<sup>276</sup> BERLANT, *supra* note 26, at 2.

<sup>277</sup> See *supra* Section II.B.

criminal legal systems. Third, prosecutors punish, too. Although a judge must impose the sentence, prosecutors exercise their discretion to charge crimes with mandatory minimum sentences, and they often threaten additional charges should the defendant refuse to plead guilty. Through their charging decisions and aggressive plea-bargaining tactics, prosecutors are an integral part of the punishment apparatus and thus bear a significant share of the responsibility for mass incarceration.<sup>278</sup>

This Part argues that reforms that rely on visionary, empathetic leaders tend to legitimate existing criminal legal practices with the neoliberal hope that prosecutorial and punitive excess can be remedied simply by putting the right people in power. It first lays out a framework for understanding and critiquing the promises of neoliberal leadership and then applies those insights to the promise of progressive prosecution through the example of Emily Bazelon’s book, *Charged*, and the frequently cited *Twenty-One Principles for the Twenty-First Century Prosecutor*.<sup>279</sup>

## A. “Wisdom, Grit, and Compassion”

### 1. A Reliance on Character

It may seem strange to think of discretionary actors within government systems as neoliberal when the term “neoliberalism” generally is used to describe the push to shrink government and rely on market forces.<sup>280</sup> Others have observed, however, that institutions for policing, prosecution, and punishment have grown during the same decades when governmental social welfare systems have shrunk.<sup>281</sup> Indeed, as the neoliberal agenda shrinks spheres of government that

---

<sup>278</sup> See generally CARISSA BYRNE HESSICK, PUNISHMENT WITHOUT TRIAL: WHY PLEA BARGAINING IS A BAD DEAL (2021).

<sup>279</sup> BAZELON, *supra* note 45; BRENNAN CTR. FOR JUST., FAIR & JUST PROSECUTION & THE JUST. COLLABORATIVE, TWENTY-ONE PRINCIPLES FOR THE TWENTY-FIRST CENTURY PROSECUTOR (2018) [hereinafter TWENTY-FIRST CENTURY REPORT], [https://www.brennancenter.org/sites/default/files/publications/FJP\\_21Principles\\_FINAL.pdf](https://www.brennancenter.org/sites/default/files/publications/FJP_21Principles_FINAL.pdf) [<https://perma.cc/9WDA-CSRU>].

<sup>280</sup> By some accounts, the term “neoliberalism” was first used by supporters of former U.K. Prime Minister Margaret Thatcher to describe the desire to return to the *laissez-faire* economics of the nineteenth century. Carolyn Pedwell, *supra* note 27, at 281 n.1; see also Pepi Leistyna, *Neoliberal Non-Sense*, in CRITICAL PEDAGOGY: WHERE ARE WE NOW? 97, 97 (Peter McLaren & Joe L. Kincheloe eds., 2007) (stating that neoliberalism’s “political and economic ideology . . . works to largely eliminate government’s power to influence the affairs of private business”).

<sup>281</sup> BERNARD E. HARCOURT, THE ILLUSION OF FREE MARKETS: PUNISHMENT AND THE MYTH OF NATURAL ORDER 40–44 (2011) (arguing that neoliberalism permits “passing new criminal statutes and wielding the penal sanction more liberally because that is where government is necessary, that is where the state can legitimately act, that is the proper and competent sphere of politics”).

provide social services and regulatory protections, it leaves policing, prosecution, and punishment as a last bastion of government control.<sup>282</sup> This is a central insight of Wacquant, discussed in Part II.<sup>283</sup>

But my focus is slightly different: it is the idea of leadership within neoliberal ideology.<sup>284</sup> In its conceptualization of leadership, neoliberalism's "market-oriented logics [have] come to order and refigure modes of political governance and citizenship."<sup>285</sup> In particular, neoliberalism has elevated a particular vision of leadership based on a renewed faith in the individual and a suspicion that institutions thwart innovation. Neoliberalism pins its hopes on the "capacity and potential of individuals and populations" to be entrepreneurial.<sup>286</sup> Because its ideology celebrates the individual, its rhetoric of leadership reifies the potential of exceptional individuals while "staying silent about the problematic nature of wider structural forces."<sup>287</sup> When an institution is not functioning well, the neoliberal solution is to look for someone with the right attributes to take charge.

Leadership attributes often are described in fuzzy, notional ways. In their theoretical study of neoliberal leadership, Mark Learmonth and Kevin Morrell describe a flyer for a leadership summit that lists the desirable traits of a leader as "wisdom, grit, and compassion."<sup>288</sup> According to their literature review, the neoliberal leader takes inspiration from historic figures whose leadership derived not from a system of predefined duties, but from their own "virtue and goodness and for their ability to motivate their followers to do good deeds."<sup>289</sup> To

---

<sup>282</sup> *Id.* Others have argued that neoliberals who view themselves as progressive on criminal justice matters support rehabilitation over retribution, but without any relief from the power of criminal practices to incarcerate and control. JUDAH SCHEPT, PROGRESSIVE PUNISHMENT: JOB LOSS, JAIL GROWTH, AND THE NEOLIBERAL LOGIC OF CARCERAL EXPANSION 2–5 (2015) (noting that self-identified progressives support carceral practices so long as they promise rehabilitation even though they oppose "mass incarceration").

<sup>283</sup> See *supra* notes 212–19 and accompanying text.

<sup>284</sup> Mark Learmonth & Kevin Morrell, 'Leadership' As a Project: Neoliberalism and the Proliferation of 'Leaders,' 2 *ORG. THEORY*, Oct.–Dec. 2021, at 1, 2 (arguing that the term "leader" in corporate culture aligns with neoliberalism, stating that "as an individual-centered ideology and rhetoric, the neoliberalism milieu neatly aligns with the language of leadership, such that the two have become mutually reinforcing").

<sup>285</sup> Pedwell, *supra* note 280, at 286.

<sup>286</sup> AIHWA ONG, NEOLIBERALISM AS EXCEPTION: MUTATIONS IN CITIZENSHIP AND SOVEREIGNTY 6 (2006).

<sup>287</sup> Learmonth & Morrell, *supra* note 284, at 5.

<sup>288</sup> *Id.* at 6.

<sup>289</sup> *Id.* at 4–5 (quoting Ryan Fehr, Kai Chi (Sam) Yam & Carolyn Dang, *Moralized Leadership: The Construction and Consequences of Ethical Leader Perceptions*, 40 *ACAD. MGMT. REV.* 182, 182 (2015)) (loosely referring to such diverse historical figures as Martin Luther King, Jr., and Winston Churchill).

describe a leader as a person with “wisdom, grit, and compassion,” is such a compliment to anyone in a position of power that it is “closer to being seductive than merely attractive.”<sup>290</sup> It suggests an almost romantic appreciation for the person with the characterological traits to lead the way.

## 2. Individuals Acting on Empathy

What is meant by “compassionate” or “empathetic” leadership is ill-defined. Susan Bandes draws a careful distinction between empathy as “a capacity for understanding the desires, goals and intentions of others,” and compassion as the act of perceiving the suffering of another, resulting in the desire to alleviate that suffering.<sup>291</sup> But used in the neoliberal leadership context, both compassion and empathy take on fuzzier meanings. For the sake of the discussion, we can read the call to compassion and empathy in the best possible light: to be sensible to or sensitive about the predicament of other people and to use that sense of the other person’s predicament to make contextualized decisions. The modern concept of empathy blends the emotional experience of compassion with a commitment to taking the perspective of the other person or people.<sup>292</sup> This modern sense of empathy derives from Adam Smith’s theory of moral sentiments, or, as Joan Tronto calls it, an “ethic of care.” To care is to take “the concerns and needs of others as the basis for action.”<sup>293</sup> As a normative matter, Tronto’s work on care makes a compelling argument that the state should care. Tronto argues that the ethic of care is compatible with general principles of justice and, further, that justice is incomplete without care.<sup>294</sup> She claims, “For a society to be judged as a morally admirable society, it must, among other things, adequately provide for care of its members and its territory.”<sup>295</sup> If one starts from the premise that we are fundamentally engaged with each other at least as much as we can be said to be autonomous, then the practice of care coexists with rules.<sup>296</sup> With this move, Tronto shifts the ethics of care into the politics of care—the business of the state.

---

<sup>290</sup> *Id.* at 6.

<sup>291</sup> Susan A. Bandes, *Compassion and the Rule of Law*, 13 INT’L J.L. CONTEXT 184, 185 (2017).

<sup>292</sup> Pedwell, *supra* note 280, at 282.

<sup>293</sup> TRONTO, *supra* note 17, at 105. The idea of an ethic of care has been widely explored in feminist moral philosophy from the publication of Carol Gilligan’s book, *In a Different Voice*, in 1982.

<sup>294</sup> *Id.* at 151–52 (pointing out “that humans are not only autonomous and equal, but that they are also beings who require care”).

<sup>295</sup> *Id.* at 126.

<sup>296</sup> *Id.* at 166–67.

Empathy can be understood not as the emotion of sympathy, but as a “*capacity, tool, or skill*” that individuals may possess,<sup>297</sup> to use as a “guidepost” in political decision-making.<sup>298</sup> Empathy-as-capacity is neither inherently good nor bad in legal situations but must be evaluated in terms of how it functions in different situations.<sup>299</sup> In some situations, empathy tempers unduly harsh results. In other situations, empathy can be used for manipulative purposes, such as when police engage in perspective-taking with a suspect in order to extract a confession.<sup>300</sup> Or, empathy may pull the decision-maker to exclusively identify with the victim of the crime. Bandes argues, for example, that the emotions underlying harsh treatment—such as outrage about the crime—have been elevated over the empathetic emotions underlying tender treatment.<sup>301</sup>

Although there is a legitimate concern that empathy, and thus leniency, will be dispensed inequitably,<sup>302</sup> a lack of empathy among criminal legal actors is devastating. Take, for example, judges who are insensible to the inner world and the lives of those they punish. The importance of empathy to decision-making among criminal legal actors has been expressed eloquently by Michael Tonry. As he puts it, “The best way to think about [what a better criminal justice system would look like] is to ask yourself how you would want the system to work if someone you love was ensnared in it.”<sup>303</sup> He uses the prompt of imagining loving the defendant to arrive at four kinds of justice in sentencing: proportionality (to culpability), fairness (transparent procedures applied in good faith), equal treatment (among similarly situated), and parsimony (in meeting utilitarian goals). Tonry thus argues for building the capacity to be

---

<sup>297</sup> Pedwell, *supra* note 280, at 283.

<sup>298</sup> See, e.g., Susan Bandes, *Empathy, Narrative, and Victim Impact Statements*, 63 U. CHI. L. REV. 361, 372 (1996) (describing empathy as a capacity); Pedwell, *supra* note 280, at 284 (quoting BARACK OBAMA, *THE AUDACITY OF HOPE: THOUGHTS ON RECLAIMING THE AMERICAN DREAM* 67 (2006) (describing empathy as his “guidepost” in politics)).

<sup>299</sup> See Bandes, *supra* note 298, at 385.

<sup>300</sup> *Id.* at 381 (citing *Miranda v. Arizona*, 384 U.S. 436, 450–52 (1966)).

<sup>301</sup> See, e.g., *id.* at 388–89 (describing case law which “marginalizes” “compassion, empathy, and mercy” while entrenching “hatred,” “mean-spirited formalism,” and “the zeal to prosecute” as “inexorably compelled by logic and precedent”). To be clear, exercising empathy is not synonymous with an ethic of care. Because empathy produces widely different outcomes depending on its target, it is not synonymous with an ethic of care. In contrast, Tronto’s ethic of care is a set of principles. Those principles of care can be codified as procedures for identifying and responding to needs. It is not necessary that care simply permit space for people with a lot of power to refrain from hurting others. TRONTO, *supra* note 17, at 161–64.

<sup>302</sup> Jeffrey Bellin, *Defending Progressive Prosecution: A Review of Charged by Emily Bazelon*, 39 YALE L. & POL’Y REV. 218, 245 (2020) [hereinafter Bellin, *Review of Charged*] (stating that “[p]rosecutors may offer leniency inequitably, unfairly, or even corruptly”).

<sup>303</sup> Michael Tonry, *Doing Justice in Sentencing*, 50 CRIME & JUST. 1, 5 (2021).

empathetic toward defendants by imagining a loved one in their predicament. Other examples of the power of empathy in criminal legal decisions can be found in Bandes' reflections on Judge Weinstein and the power of moral imagination.<sup>304</sup> Indeed, individualized sentencing is premised on holistic consideration of all factors related to the defendant, the case, and the circumstances, including mass incarceration.<sup>305</sup> This requires an inquiry into the defendant as an individual—into both biographical information and inferences about character. In this context, there is great room for empathy and moral imagination.

Yet even at its best, reliance on empathetic actors emphasizes individual virtue over structural change. Deciding who should be the recipient of empathy and care is a quintessentially political decision. Empathy as a political solution enjoys frequent mention in political campaigns. In neoliberalist (small government) ideology, improvements are driven by empathetic reflection rather than institution building.<sup>306</sup> In former President Obama's book, *The Audacity of Hope*, he diagnosed an "empathy deficit," and argued that "a stronger sense of empathy" was needed to "tilt the balance of our current politics in favor of those people who are struggling in this society."<sup>307</sup>

President Obama's call for empathy is not exactly like the "compassionate conservatism" touted in the campaign of former President George W. Bush, which involved a vision of a completely dismantled social welfare state replaced by individual (and often faith-based) acts of charity.<sup>308</sup> But perhaps President Obama's call for empathy echoes the pivot from structural reform to charity heralded by former President George H.W. Bush's image of "a thousand points of light," representing private companies and individuals who would voluntarily choose to help others in need.<sup>309</sup> As Berlant puts it, "This brightly lit

---

<sup>304</sup> Susan A. Bandes, *Empathy and Article III: Judge Weinstein, Cases and Controversies*, 64 DEPAUL L. REV. 317, 336–38 (2015) (applying the concept of moral imagination to written decisions of U.S. District Court Judge Weinstein); Susan A. Bandes, *Moral Imagination in Judging*, 51 WASHBURN L.J. 1, 24 (2011) (defining moral imagination as "the ability to understand one's own limitations, the limitations of perspective, the range of values at stake, and the possibilities for change inherent in the situation").

<sup>305</sup> See 18 U.S.C. § 3553; Anne R. Traum, *Mass Incarceration at Sentencing*, 64 HASTINGS L.J. 423 (2013).

<sup>306</sup> Pedwell, *supra* note 280, at 280 (arguing that President Obama's empathy discourse exemplified neoliberalism by uncritically embracing empathy as the cornerstone of social justice).

<sup>307</sup> OBAMA, *supra* note 298, at 67–68.

<sup>308</sup> Robert P. Weiss, *Charitable Choice as Neoliberal Social Welfare Strategy*, 28 SOC. JUST. 35, 35–36 (2001) (describing how "compassionate conservatism" entailed defunding and dismantling social welfare programs in favor of nonstate, charitable volunteerism).

<sup>309</sup> The phrase was coined by President Bush's speechwriter, Peggy Noonan, and given as part of his speech accepting the Republican nomination for President. *Transcript of Bush Speech Accepting Nomination for President*, N.Y. TIMES, Aug. 19, 1988, at A14.

portrait of a civic army of sanctified philanthropists was meant to replace an image of the United States as a Great Society with a state-funded social safety net.”<sup>310</sup>

A parallel can be drawn between “a thousand points of light” and criminal legal reform that relies on the empathy of discretionary actors. If we mind that, for example, prison sentences are astronomically long compared with other European countries, there are two remedies. One is to change the laws that permit such sentences and the other is to ask legal actors—in this case government actors, not private citizens—to temper their power to prosecute and punish by charging with restraint and bargaining fairly (prosecutors), sentencing with consideration for the whole person standing before the court (judges), and considering releasing the person early if they are suffering in an exceptional way (compassionate release) or have demonstrated extraordinarily good conduct (parole). While these legal actors are part of the government, there is an apt comparison between their discretionary acts of leniency and the compassionate conservative that relies on the goodness of people and eschews the codification and institutionalization of assistance for those in need. Reform efforts skew away from the structural and political questions to “sentimental spaces” where change is measured through personal stories of second chances given by prosecutors, parole boards, and drug court judges.<sup>311</sup>

These sentimental, individualistic reforms mirror two aspects of larger culture: the individual, merit-based success that serves as the cornerstone of the American Dream, and the idea that hardships and social deprivation can be alleviated through private acts of mercy better than by government policies and programs. In this equation, equitable decision-making and discretion are a sort of charity—not owed but optional—in contrast to legal limits. It is tempting to believe that a visionary and compassionate prosecutor could solve the problems of mass conviction, mass incarceration, and persistent racial disparities in prosecution and punishment. As the next Section discusses, progressive prosecutors are portrayed in such a light.

---

<sup>310</sup> BERLANT, *supra* note 209, at 7.

<sup>311</sup> *Id.* at 3 (arguing in a different political context that “critical energies of the emerging political sphere” were being “rerout[ed] . . . into the sentimental spaces of amorphous opinion culture”).



## B. *The Prosecutor's Leadership and Leniency*

To be a “progressive” prosecutor could mean many things,<sup>312</sup> some of which mesh with the notion of progress, like openness to new ideas and innovations in “public safety.”<sup>313</sup> Some of the commitments of public prosecutors seem, on the other hand, to simply mean doing the job better: carefully screening cases to ensure parsimony, proportionality, and fiscal prudence, as well as following ethical rules and guidelines.<sup>314</sup> Some of the reforms are commitments to follow the law and to honor longstanding prosecutorial obligations to fair play. For example, to comply with discovery, disclose exculpatory evidence, and refrain from prosecuting cases in which there is insufficient evidence of guilt are all merely a restatement of traditional prosecutorial ethics.<sup>315</sup> Other reforms call for transparency that align with the democratic value of government transparency.<sup>316</sup> Others taking on the mantle of “progressive prosecutor” may focus on removing racial and wealth disparities in prosecution and holding police accountable for their crimes.<sup>317</sup> Still other progressive

---

<sup>312</sup> See Benjamin Levin, *Imagining the Progressive Prosecutor*, 105 MINN. L. REV. 1415, 1417 (2021) (arguing that “progressive prosecutor” means many different things to many different people”). Levin suggested a typology: “(1) the progressive who prosecutes; (2) the proceduralist prosecutor; (3) the prosecutorial progressive; and (4) the anti-carceral prosecutor.” *Id.* at 1418.

<sup>313</sup> The meaning of “public safety” is currently the subject of some debate, as evidenced in, for example, a speaker series titled the “Myths of Public Safety: Pretrial,” hosted by the Kennedy School at Harvard University. *Myths of Public Safety: Pretrial*, HARV. KENNEDY SCH., <https://www.hks.harvard.edu/centers/wiener/programs/criminaljustice/news-events/myths-public-safety-pretrial> [<https://perma.cc/8MJP-UM7C>].

<sup>314</sup> Levin, *supra* note 312, at 1432–34 (discussing the focus of the “proceduralist prosecutor”) (citing David Alan Sklansky, *The Progressive Prosecutor's Handbook*, 50 U.C. DAVIS L. REV. ONLINE 25 (2017)); TWENTY-FIRST CENTURY REPORT, *supra* note 279, at 14–19 (discussing progressive prosecutorial commitments related to procedural fairness).

<sup>315</sup> Bellin, *Review of Charged*, *supra* note 302, at 243 (“Declining to prosecute the innocent is not a progressive position. It is a consensus position.”); see also *Berger v. United States*, 295 U.S. 78, 88 (1935) (describing prosecutors as “servant[s] of the law” who must ensure that the innocent do not “suffer”).

<sup>316</sup> Brandon L. Garrett et al., *Open Prosecution*, 75 STAN. L. REV. 1365, 1370 (2022) (arguing that transparent documentation of the plea bargaining process would provide “a crucial safeguard of the fundamental values of public reason and democratic legitimacy”); see also TWENTY-FIRST CENTURY REPORT, *supra* note 279, at 17–18 (discussing open file discovery). An excellent example of prosecutorial transparency can be found Yolo County, California, where the District Attorney’s Office partners with the Yolo County Multi-Cultural Commission to publish data on referrals for prosecution, prosecuted and diverted cases, and sentencing outcomes. *Case Flow Data: Yolo County, CA*, MEASURES FOR JUST., <https://www.measuresforjustice.org/commons/yoloda/case-flow> (June 12, 2023) (last visited Nov. 13, 2023).

<sup>317</sup> Levin, *supra* note 312, at 1438–42 (discussing the varied commitments of prosecutors committed to progressive agendas like prosecuting hate crimes, wage theft, and policing abuses); Angela J. Davis, *Reimagining Prosecution: A Growing Progressive Movement*, 3 UCLA CRIM. JUST. L. REV. 1, 2–3 (2019) (arguing that progressive prosecutors can use their power and discretion with

prosecutors may hold abolitionist or anticarceral commitments.<sup>318</sup> But the details of their commitments do not matter to this discussion so much as the emotional appeal of the hope that a good prosecutor will save us from the excesses of policing, prosecution, and punishment through the exercise of their discretion.<sup>319</sup>

Two approaches to casework championed by the progressive prosecution movement are relevant to this discussion: restraint and individualized consideration of defendants. I discuss restraint and individualized consideration to highlight the role of empathy—perspective taking—and the elevating of personality over structural change.

### 1. Restraint

In many ways, the progressive prosecutor's movement has reframed the power of the prosecutor as a leniency power. In her book on progressive prosecution, Bazelon endorses the exercise of prosecutorial discretion as the primary vehicle of the progressive prosecutor.<sup>320</sup> Prison remains a possibility, but as a “last resort” while the progressive prosecutor works to find alternatives.<sup>321</sup> Indeed, leniency may be the greatest source of power for the prosecutor. In his comments on Bazelon's book, Jeffrey Bellin identifies the prosecutor's power as unilateral leniency.<sup>322</sup> Whereas prosecutorial zeal is somewhat limited by laws criminalizing acts and setting punishments, as well as by other criminal system actors such as judges, prosecutorial leniency is almost unlimited. Prosecutors “control the outcome” of criminal cases not only through their charging decisions and subsequent leverage in securing guilty pleas,<sup>323</sup> but also through their discretionary power to forgo charges,

---

the goals of not only enforcing the law but also reducing mass incarceration, eliminating racial disparities, and seeking justice for all, including the accused).

<sup>318</sup> Levin, *supra* note 312, at 1444–46 (discussing the “anti-carceral” platform of some progressive prosecutors).

<sup>319</sup> Cynthia Godsoe, *The Place of the Prosecutor in Abolitionist Praxis*, 69 UCLA L. REV. 164, 166–67 (2022) (providing a sketch of recent prosecutors advancing a self-identified progressive agenda).

<sup>320</sup> BAZELON, *supra* note 45, at xxvii (arguing that the prosecutor “can start to fix what's broken without changing a single law”).

<sup>321</sup> *Id.* at 274.

<sup>322</sup> Bellin, *Review of Charged*, *supra* note 302, at 226–27; see also Jeffrey Bellin, *The Power of Prosecutors*, 94 N.Y.U. L. REV. 171, 209 (2019) (describing the prosecutor's power in declining to charge the defendant as a habitual offender as the power of “leniency”).

<sup>323</sup> BAZELON, *supra* note 45, at xxvi. William Stuntz famously called prosecutors “the criminal justice system's real lawmakers.” William J. Stuntz, *The Pathological Politics of Criminal Law*, 100 MICH. L. REV. 505, 506 (2001). He argued that prosecutors and legislators have a symbiotic

dismiss charges, and recommend leniency. As such, it is no surprise that most of the examples of progressive prosecution are discretionary acts of leniency.<sup>324</sup>

In screening cases, prosecutors are urged to “charge with restraint.”<sup>325</sup> The prosecutor’s office screens all cases brought to it by the police or through civilian complaint and decides whether to file charges and what charges to file. This may be accomplished through office policy set by the lead prosecutor to, for example, refrain from filing charges for certain offenses, like possession of marijuana or other low-level misdemeanors. Indeed, a central theme of *Twenty-One Principles for Twenty-First Century Prosecutors*, a report for prosecutors by Fair and Just Prosecution, the Brennan Center, and the Justice Collaborative, is of “restraint.” Prosecutors are encouraged to screen out or dismiss cases that should not be prosecuted and caution against filing additional charges or threatening maximum penalties to coerce a guilty plea.<sup>326</sup>

Likewise, refraining from requesting high bails or calling for—as Cook County District Attorney Kim Foxx did—the release of anyone unable to pay a one thousand dollar bail, the prosecutors are not just demonstrating fiscal responsibility in the face of the costs of pretrial detention but also sensibility to and empathy for the human cost of pretrial detention.<sup>327</sup> Rather than prosecute every case charged, progressive prosecutors are encouraged to divert cases to mental health treatment for mental illness and drug addiction.<sup>328</sup> Should the case move forward to a traditional plea offer, Bazelon suggests electing chief prosecutors who promise to refrain from exercising their power to pile on charges and threaten trial penalties.<sup>329</sup> As the above examples demonstrate, the reforms championed by the progressive prosecution

---

relationship in which “discretionary enforcement frees legislators from having to worry about criminalizing too much, since not everything that is criminalized will be prosecuted,” and the multitude of overlapping crimes (many with steep punishments) improves the prosecutor’s “charging opportunities.” *Id.* at 528. In this sense, prosecutors have always had the freedom to decline charges for “sympathetic defendants.” *Id.* at 548; see also Roger A. Fairfax, Jr., *Prosecutorial Nullification*, 52 B.C. L. REV. 1243, 1252–54 (2011) (describing the declination of charges as “nullification,” implemented when the prosecutor disagrees with the law or the merits of prosecuting a particular defendant).

<sup>324</sup> Angela J. Davis, *The Prosecutor’s Ethical Duty to End Mass Incarceration*, 44 HOFSTRA L. REV. 1063, 1079 (2016) (urging prosecutors to use their discretion to decline criminal charges in some cases and otherwise advance reforms in line with the “broader goals of the criminal justice system”).

<sup>325</sup> BAZELON, *supra* note 45, at 316–22.

<sup>326</sup> TWENTY-FIRST CENTURY REPORT, *supra* note 279, at 5.

<sup>327</sup> BAZELON, *supra* note 45, at 92.

<sup>328</sup> *Id.* at 316–22.

<sup>329</sup> *Id.* at xxxi (“[W]e can stop caging people needlessly *right now* if we choose prosecutors who will open the locks.”).

movement frequently rely on the prosecutor's power to exercise discretion toward leniency.

## 2. Individualized Consideration

The language of individualized consideration can be seen in the *Twenty-One Principles* report in its discussion of diverting cases from prosecution to rehabilitative programs. Prosecutors are encouraged to “[m]ake sure people aren’t denied the opportunity for diversion because they can’t pay” and to “[e]nsure that the program matches the risk and needs of the individual. For example, people who are lower risk should be placed in a lighter touch program (or no program at all).”<sup>330</sup> This attention to the defendant’s individual circumstances and needs is one cornerstone of diversionary decisions: “Carefully consider which program conditions (like abstaining from marijuana use) are necessary to address the underlying causes of misconduct and keep the community safe.”<sup>331</sup> And, in general, Bazelon emphasizes the prosecutor’s obligation to “‘get it right’ by looking at each case individually.”<sup>332</sup>

Individual consideration includes taking care to identify and respond to mental illness. The *Twenty-One Principles* report advises: “Screen cases before charging to identify individuals in need of mental health services and support.”<sup>333</sup> Regarding children and young adults, the report urges prosecutors to “[r]ecognize that young people accused of crimes often have experienced trauma, and may lack the ability to express remorse, especially in the days and weeks immediately after an offense. Take that into account in charging, plea bargaining, and sentencing.”<sup>334</sup> A diversionary program in Washington, D.C., for example, “serves teenagers” by evaluating their “stress, trauma, and health needs,” and developing “plans that can include therapy, tutoring, mentoring, and school support.”<sup>335</sup> The report encourages prosecutors to exercise the same care when a person is not successful on diversion: “Pay attention to whether punitive responses to non-compliance (like ankle bracelets and jail time) serve the purpose of rehabilitation or public safety.”<sup>336</sup> In sum, the progressive prosecutor’s attention is encouraged to be attuned to each

---

<sup>330</sup> TWENTY-FIRST CENTURY REPORT, *supra* note 279, at 4.

<sup>331</sup> *Id.*

<sup>332</sup> BAZELON, *supra* note 45, at xxiii.

<sup>333</sup> TWENTY-FIRST CENTURY REPORT, *supra* note 279, at 7.

<sup>334</sup> *Id.* at 9.

<sup>335</sup> *Id.* at 4.

<sup>336</sup> *Id.*

defendant in order to ensure the proper fit of any rehabilitative or punitive measure.

### 3. The Prosecutor as Empathy Entrepreneur

How should lead prosecutors make the “right” calls when guiding their line attorneys’ handling of individual cases? In this, the rhetoric of the progressive prosecutor echoes the characterological approach of neoliberal leadership. The prosecutor should exercise wisdom by being “smart on crime,” as well as compassionate and empathetic. While there are certainly “public safety” elements to this approach,<sup>337</sup> as well as fiscal concerns,<sup>338</sup> those elements are blended in with what might be called an effort at empathy for the targets of policing, prosecution, and punishment. The progressive prosecutor is portrayed as empathetic in that they are attentive to unwarranted suffering and calamity. As the *Twenty-One Principles* report puts it, “Putting so many people behind bars imposes great costs and burdens on them, their families, and our country.”<sup>339</sup> The website for Fair and Just Prosecution, a networking organization for prosecutors, states that a progressive prosecutor should promote “a justice system grounded in fairness, equity, compassion, and fiscal responsibility.”<sup>340</sup>

Prosecutors are urged to meet with formerly incarcerated people and their families, to meet with the exonerated, and to visit prisons and jails.<sup>341</sup> From this, it is assumed prosecutors will calibrate their charging, bargaining, and sentencing recommendations with an eye toward the damage caused by incarceration. Given this emphasis on empathy,

---

<sup>337</sup> BAZELON, *supra* note 45, at 56 (diverting youth portrayed as “in the best interest of public safety in the long run”).

<sup>338</sup> For “smart on crime” approaches to prosecutorial reform, see, for example, Douglas A. Berman & Steven L. Chanenson, Editor’s Observations, *Taking Stock of Changing Prosecutorial Policies*, 30 FED. SENT’G REP. 1 (2017), which describes U.S. Attorney General Eric Holder’s “smart on crime” initiative, involving, inter alia, encouraging line prosecutors to use their discretion toward greater leniency in sentencing; David Alan Sklansky, *The Changing Political Landscape for Elected Prosecutors*, 14 OHIO ST. J. CRIM. L. 647, 651–67 (2017) (describing “smart on crime” campaigns in elections for local prosecutors); and Roger A. Fairfax, Jr., *The “Smart on Crime” Prosecutor*, 25 GEO. J. LEGAL ETHICS 905, 911 (2012).

<sup>339</sup> TWENTY-FIRST CENTURY REPORT, *supra* note 279, at 3.

<sup>340</sup> FAIR & JUST PROSECUTION, <https://fairandjustprosecution.org> [<https://perma.cc/N98X-RMS3>].

<sup>341</sup> TWENTY-FIRST CENTURY REPORT, *supra* note 279, at 15 (encouraging district attorneys to “[s]et up programs and opportunities for prosecutors to meet with formerly incarcerated individuals and their families and with people who have been exonerated (and do so early in prosecutors’ careers),” and stating that “[p]rosecutors should also be expected to visit prisons and jails where the people they prosecute are held”).

prosecutors with personal or familial experience with criminal systems are welcomed for the insight and emotional engagement they bring to their work. Brooklyn District Attorney Eric Gonzalez, for example, talks about how many of the people he grew up with had been arrested and incarcerated, giving him a sense of “skin in the game” that may not be shared by prosecutors from middle class and affluent families. His brother died from a gunshot wound after Gonzalez began working as a prosecutor.<sup>342</sup> In other words, District Attorney Gonzalez is held up as someone who may have balanced empathy—the ability to appreciate what is at stake for everyone involved in a criminal case.<sup>343</sup> As Cynthia Godsoe observes, “This level of transparency and attempt to connect with a broader community can . . . simultaneously entrench[] the idea of the prosecutor as a change agent.”<sup>344</sup>

The new progressive prosecutor also invents new approaches to cases, assuming a role less like the manager of an established institution and more like a “change agent.”<sup>345</sup> In this sense, “the prosecutorial function [is treated] as essentially indeterminate, capable of being redirected to serve a variety of different ends.”<sup>346</sup> Although prosecutors have always had the ability to be “entrepreneurial” in setting their prosecutorial priorities,<sup>347</sup> the progressive prosecutor is urged to have a broader agenda. A prosecutor’s office might, for example, create an in-house restorative justice program,<sup>348</sup> or employ therapeutic professionals.<sup>349</sup>

---

<sup>342</sup> BAZELON, *supra* note 45, at 74–75.

<sup>343</sup> Bandes, *supra* note 291, at 185 (describing a balanced approach to empathy in which the judge can appreciate what is “at stake” for everyone involved in the case).

<sup>344</sup> Godsoe, *supra* note 319, at 208.

<sup>345</sup> *Id.* This focus on individualized innovation may be related to Bellin’s observation of a “curious absence of a normative theory of prosecutorial behavior” in the new literature advancing the idea of progressive prosecution. Jeffrey Bellin, *Theories of Prosecution*, 108 CALIF. L. REV. 1203, 1207 (2020).

<sup>346</sup> Levin, *supra* note 312, at 1423.

<sup>347</sup> Daniel Epps, *Adversarial Asymmetry in the Criminal Process*, 91 N.Y.U. L. REV. 762, 806 (2016) (casting doubt on the reformative value of “entrepreneurial” aspects of the prosecutor’s discretionary power).

<sup>348</sup> For example, the Office of the Attorney General for the District of Columbia created an in-house restorative justice program to which it refers some juvenile cases for out-of-court resolution. Seema Gajwani & Max G. Lesser, *The Hard Truths of Progressive Prosecution and a Path to Realizing the Movement’s Promise*, 64 N.Y.L. SCH. L. REV. 69, 78–79 (2019/2020) (describing the restorative justice program in the District of Columbia Office of the Attorney General).

<sup>349</sup> Godsoe, *supra* note 319, at 204 (discussing the partnership with therapeutic professionals initiated by District Attorney Gonzalez, and critiquing “mission creep”).

#### 4. Personality over Structural Change

I do not mean to diminish the importance of empathy and lived experience in prosecutors or the benefits that flow from such perspectives. Rather, I mean to point out that, in this model of reform, the prosecutor continues to have at every moment the power to provoke fear, to coerce pleas, to ask for the maximum sentence, and to oppose pretrial and post-conviction release. The *Twenty-One Principles* report's principles urge prosecutors to display restraint, compassion, and discretion but within the same framework of power. Nothing in the structure of criminal legal systems changes. The only change is the person in charge of charging.<sup>350</sup>

In the empathetic leadership model of reform, the prosecutor's power is celebrated rather than worried over. Reformers champion the prosecutor's discretionary power "to improve the overall fairness and efficacy of the criminal justice system and champion priorities that improve the safety and well-being of our communities."<sup>351</sup> As District of Columbia Attorney General Karl Racine put it:

Prosecutors are gatekeepers to the justice system. They have significant discretion to decide whether to press charges and what those charges will be, to pursue charges in adult court and seek the maximum penalties or offer a negotiated plea deal. They can advocate for or oppose treatment-based alternatives to incarceration, and they recommend sentence length. Prosecutors can wield influence over how justice is served.<sup>352</sup>

This neoliberal leadership model "foregrounds the person" while "tak[ing] attention away from hierarchy and formal power as such."<sup>353</sup> Put another way: "In keeping with the neoliberalism milieu, this construction of the leader celebrates the self and glosses over structural antagonisms."<sup>354</sup> Indeed, those embracing the idea of neoliberal leadership may be antagonistic to institutional rules that constrain the leader. With this notional vision of individual goodness frothing up to the top, institutions and their rules may be perceived as impediments rather than important guardrails. The logic of neoliberal leadership seems

---

<sup>350</sup> *Id.* at 171 (arguing that, while progressive prosecutors could ameliorate the excesses of criminal systems, they do not advance the abolitionist agenda if they leave intact or even expand the "footprint" of the prosecutor's office).

<sup>351</sup> TWENTY-FIRST CENTURY REPORT, *supra* note 279, at 3.

<sup>352</sup> *Id.*

<sup>353</sup> Learmonth & Morrell, *supra* note 284, at 5 (comparing language describing the virtues of modern chief executive officers with descriptions of inspirational historical figures).

<sup>354</sup> *Id.* at 6.

to lead to the conclusion that the solution to excesses in prosecution and punishment can be remedied by each system actor (prosecutor, judge, or parole officer) exercising rational and empathetic decision-making. In other words, lionizing the virtuous—empathetic and rational—leader may lead to reforms based on individual acts of discretion rather than structural change.

Another danger of the downplaying of the structural features that permit prosecutors to coerce pleas and recommend harsh sentences is that it leads the advocates for progressive prosecution to characterize prosecutorial excesses as mere aberrations on the road to greater fairness and empathy.<sup>355</sup> Bazelon, for example, presents the destructive aspects of prosecution as anomalous:

On days when I went to criminal court in Brooklyn, I still regularly saw *flashes of indifference and cruelty*. A teenager was rejected from diversion because he didn't have stable housing. One prosecutor demanded a fine for a homeless person who couldn't pay it. Another sought unaffordable bail for a girl coming out of foster care who'd gotten into a fight.<sup>356</sup>

Here, failures of empathy are portrayed as residual “flashes of indifference or cruelty.”<sup>357</sup> But in the next sentence, she seems to acknowledge that the terror and cruelty—and the insensitivity to suffering—is not anomalous: “The everyday machinery of prosecution ground on, impervious to change at the top.”<sup>358</sup> Faith in the new empathic entrepreneurs appears to have seduced Bazelon into thinking that criminal legal systems are in the midst of a sea change. This is the seductive hope of displays of leniency and tenderness.

Moreover, empathy without structural change collapses into patterns of discrimination and abuse.<sup>359</sup> In a paragraph that could aptly be applied to analyze the dynamics of therapeutic jurisprudence in problem-solving courts today, Bandes writes: “Ideas about therapeutic empathy and commonality of interpretation look foolishly sentimental when the empathizer is in a dominant position. The real challenge is to

---

<sup>355</sup> For example, Bazelon portrays the election in New York of prosecutors like Gonzalez as part of a wave of progress that includes problem-solving courts, such as Red Hook Community Court. BAZELON, *supra* note 45, at 271–73. She notes reduced rates of incarceration for misdemeanors and, to a lesser extent, felonies. *Id.* at 273 (discussing reform in both prosecution and court innovation in New York).

<sup>356</sup> *Id.* at 273 (emphasis added).

<sup>357</sup> *Id.*

<sup>358</sup> *Id.*

<sup>359</sup> Bandes, *supra* note 298, at 381.



create actual political equality. Empathy may be harnessed in the service of this ideal, but by itself it won't get us there."<sup>360</sup>

To take the point a step further, Robert Cover stresses the role and actions of each person in the courtroom. If the judge commits the act of violence in sentencing the defendant, and the defendant is the person upon whom state violence is enacted, any prior commonality of perspectives that the judge and the defendant achieved is irrelevant.<sup>361</sup> Their experiences are so divergent and so completely shaped by their roles in a hierarchy of power that any empathy drops out.

The visionary leader, the empathetic entrepreneur, retrains our focus from changing laws and institutions to encouraging and cheering for individualized acts of mercy, compassion, and lenience. In this I borrow again from Berlant's study of sentimentalism in U.S. politics, applying her thesis about the pivot from political change to sentimental ideas about culture in political discourse.<sup>362</sup> Sentimental optimism is engendered by reform efforts that emphasize a good person coming in to shake things up with their moral imagination and empathy. In Berlant's words, it is a kind of sentimentality that ignores the danger in having "confidence in the critical intelligence of affect, emotion, and good intention."<sup>363</sup> We risk being seduced by anecdotes of compassionate care, confidence, hope, and allegiance to systems if they are led by good people in high places doing the right thing.

To put a finer point on it, observing the suffering of others can produce at least two responses. One is to determine whether the suffering is the product of some form of an injustice and, if so, work to change laws and institutions so that they produce less injustice.<sup>364</sup> The other approach is to leave the laws and structure as it is, but encourage individualized, charitable responses to the suffering. This kind of compassion "turns out merely to describe a particular kind of social relation."<sup>365</sup> When under the influence of the latter tack, we are reassured that no structural changes are needed so long as we have empathetic and visionary leaders.

---

<sup>360</sup> *Id.* at 382 (footnotes omitted).

<sup>361</sup> Cover, *supra* note 19, at 1609. "[A]ny commonality of interpretation . . . [is] destroyed by divergent experiences" of "having dominated and having been dominated with violence, respectively." *Id.*

<sup>362</sup> BERLANT, *supra* note 209, at 5–6 (arguing that the Democratic party has followed the Republican party, "relinquishing the fight against structural inequality for a more labile and optimistic culturalist perspective").

<sup>363</sup> BERLANT, *supra* note 26, at 2.

<sup>364</sup> JUDITH N. SHKLAR, *THE FACES OF INJUSTICE* 19 (1990) ("Most injustices occur continuously within the framework of an established polity with an operative system of law, in normal times.").

<sup>365</sup> Lauren Berlant, *Introduction: Compassion (and Withholding)*, in *COMPASSION: THE CULTURE AND POLITICS OF AN EMOTION* 1, 9 (Lauren Berlant ed., 2004).

## 5. The Limits of Entrepreneurial Leadership in Institutions

One rejoinder to my argument contrasting a change in leadership with structural change in law is that good leaders can and do change the institutions that they lead. But the idea that a visionary leader can exercise discretion to change an established institution is called into question by social science literature. Despite new leadership, legal actors make the same choices in a routinized fashion due to their training, socialization, and the organizational structure in which they work. Decisions are made within organizational structures in which multiple perspectives must be taken into account, not just the perspective of the new leader.<sup>366</sup> As a result, decisions involve compromises, or may reflect slippage between the initial decision by one person and its implementation by another.<sup>367</sup> In exercising discretion, legal actors may be sensitive to the expectations of the institution of which they are a part—like a courthouse or prosecutor’s office. They may also be sensitive to public expectations, as they perceive them.<sup>368</sup>

In one study of charging decisions in a prosecutorial screening unit, researchers noted that the choice whether to charge was made in an environment saturated with context and institutional perspectives on past cases and possible outcomes.<sup>369</sup> Attorneys in the screening unit considered the “judgment and practices” of others within the organization as well as the likely “institutional outcomes and consequences” of their charging decisions.<sup>370</sup> This sounds like normal decision-making. But remember that the progressive prosecutor promises to do something very different. The progressive prosecutor presents as what is now referred to as a change agent, someone who will dramatically alter the discretionary decisions of the organization.

Sociological theory of decision-making casts doubts on the idea that one person—even the boss—can change the way discretionary decisions are made in the existing prosecutor’s offices. Indeed, many legal actors exercise their discretion in such “routine and repetitive ways” that it may

---

<sup>366</sup> Feldman, *supra* note 117, at 170.

<sup>367</sup> *Id.* (noting that, due to organizational structure, change is often “[i]ncremental and marginal” because it is the result of compromise and bargaining).

<sup>368</sup> Hawkins, *supra* note 120, at 11–13 (arguing that discretion is “guided and constrained” by “social and organizational” factors, which are more powerful than formal rules in shaping what might be considered irrational or arbitrary).

<sup>369</sup> Robert M. Emerson & Blair Paley, *Organizational Horizons and Complaint-Filing*, in *THE USES OF DISCRETION*, *supra* note 115, at 231, 235–45 (discussing a six-month observational study of the Los Angeles County District Attorney’s screening office).

<sup>370</sup> *Id.* at 236.

seem that they are not deciding anything on an individualized basis.<sup>371</sup> M.P. Baumgartner surveys studies of the exercise of discretion in criminal systems to conclude that it is “remarkably patterned and consistent.”<sup>372</sup> The exercise of discretion in criminal systems follows “sociological laws” that “apply throughout history, in all locations, at all stages of a legal system, and in the handling of all kinds of crime.”<sup>373</sup>

Leniency, for example, is doled out in predictable patterns that perpetuate disparity. Leniency tracks intimacy—or the feeling of kinship. The closer the relationship between the decision-maker and subject, the more lenient the decision.<sup>374</sup> Leniency also tracks perceptions of “moral respectability”<sup>375</sup> and social status.<sup>376</sup> Thus, despite the conscious intentions of individuals, institutional trends in leniency demonstrate a strong preference for those with social, political, and financial power. We certainly see this in the racial disparity in policing and punishment, and Baumgartner argues that the same factors structure discretionary decisions in a variety of societies.<sup>377</sup> Yet the neoliberal change agent or entrepreneur rides into office on a soft cloud of hope, an emotional register that reassures that the right people in the right places can reverse patterns of excess and injustice.

In sum, with promises of better leadership—through progressive prosecution or other legal actors—we absorb a story about the voluntary relinquishment of power not much different than the act of pardon during the years of the Bloody Code. Leadership-based reform offers a kind of empathy that consolidates and strengthens the power of the state to say: I could imprison you, I could separate you from your family, I could bankrupt you, I could enter a ruling that would ensure your removal from the country, but I *choose*—at my discretion—not to.<sup>378</sup> This follows a familiar pattern in which tender gestures obscure and support the terrorizing aspects of criminal systems: violent policing, prosecution, and ruinous punishments.

---

<sup>371</sup> Hawkins, *supra* note 368, at 39.

<sup>372</sup> Baumgartner, *supra* note 129, at 129.

<sup>373</sup> *Id.* at 130.

<sup>374</sup> *Id.* at 131–36 (providing examples of leniency based on relational proximity in a variety of legal systems and time periods).

<sup>375</sup> *Id.* at 136–41 (providing examples of leniency based on the moral respectability of the subject).

<sup>376</sup> *Id.* at 142–48 (providing examples of leniency based on social status of the subject).

<sup>377</sup> *Id.* at 157 (“Discretion, in practice, amounts to what is commonly known as discrimination.”).

<sup>378</sup> Cover, *supra* note 19, at 1601 (“A judge articulates her understanding of a text, and as a result, somebody loses his freedom, his property, his children, even his life.”).

## CONCLUSION

In her book, *Cruel Optimism*, Berlant describes what she calls “optimistic attachment” as a “sustaining inclination to return to the scene of fantasy what enables you to expect that *this* time, nearness to *this* thing will help you or a world to become different in just the right way.”<sup>379</sup> The possibility and promise of leniency produces this sort of optimistic attachment to the criminal legal system. It produces a sentimental optimism that latches on to the feeling of compassion, treatment, or restraint, thereby “ignit[ing] a sense of possibility [that] actually makes it impossible to attain the expansive transformation.”<sup>380</sup> The sense of possibility, to use Berlant’s words, distracts from the deep limitations of the reforms and thereby truncates our thinking about what a larger transformation of criminal legal practices might look like.

I am not advocating curtailing leniency, but rather careful scrutiny of its celebration so that structural changes have room to be considered. All told, the leniency-based reforms solidify our attachment to institutions that have not delivered on dignity and fairness—let alone compassion and tenderness—in the past. Some reforms, like diversionary programs and refurbished parole, serve to justify the continued harshness of criminal systems through an idea of personal choice. Escape from the harshness of prosecution and incarceration is available to the defendant who behaves in a way that qualifies for leniency. Even compassionate release and charging decisions suggest that the qualities of the individual defendant are determinative of whether they will benefit from the reform. In this way, individualization is turned on its head to justify the continuation of some of the harshest, and most ruinous, practices of the criminal legal system. At the same time, we are told that a new generation of empathetic and visionary criminal system leaders will end mass incarceration and other excesses through the exercise of their discretion. Yet the promise of powerful leaders dispensing mercy to deserving individuals is no reform at all, but merely an extension of criminal law’s reliance on the twin poles of terror and tenderness to maintain the status quo.

---

<sup>379</sup> BERLANT, *supra* note 202, at 2.

<sup>380</sup> *Id.*