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# HUMILITY IN CRIMINAL JUSTICE: WHAT IT MIGHT INVITE US TO RECONSIDER\*

DEAN A. STRANG\*\*

## I. INTRODUCTION

Imagine how our system of criminal justice might look different if one value ascended in the system's hierarchy of values: humility. Day to day, in my work, I do not see much humility among police officers, defense lawyers, prosecutors, probation agents, and judges. This is noteworthy, given how unavoidably uncertain—or at least contestable or close—many of the outcomes in our trial and appellate courts are to an objective eye. Even when the basic facts on guilt are fairly certain, the right sentence often is not. I propose that humility is an essential value that, properly understood, is tied to liberty; and because humility is tied to liberty, it should be intrinsic to our conception of justice.

What do I mean by humility in the administration of justice and its linkage to liberty? Let me start with a humble man who thought seriously about liberty. In 1940, as war again was engulfing Europe, the United States Congress declared the third Sunday in May “I Am an American Day.”<sup>1</sup> The day celebrated those native-born citizens who reached the age of majority that year and now could vote, and also those immigrants naturalized that year who now could exercise the privileges and duties of citizenship.<sup>2</sup> Celebrations in following years grew, especially in cities like New York, which were large and also home to many recent immigrants.

On Sunday, May 21, 1944, a lovely spring day that reached seventy-two degrees under fair skies in New York City, a short man with a square jaw, bushy eyebrows, and rugged good looks, but a quiet and reflective personality, had the honor of addressing a crowd of nearly one million in Central Park for I Am An American Day. He perhaps was a surprising choice as a speaker. This man was not given to patriotic tub-thumping, or to stemwinders on the stump. He was thoughtful and measured instead

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\* This article was delivered originally as a speech entitled “Humility in Criminal Justice” before the Wisconsin Law Foundation on October 18, 2016.

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1. H.R.J. Res. 437, 76th Cong., 54 Stat. 178 (1940).

2. *Id.* In 1952, it was moved to September 17th and renamed Citizenship Day or, now, Constitution Day. H.R.J. Res. 314, 82d Cong., 66 Stat. 9, (1952); 36 U.S.C. § 106 (2017).

by nature, even a self-doubter. He was a federal Court of Appeals judge who sat in New York City, probably something of a social liberal in the privacy of a voting booth but a judicial conservative on the bench. He was Learned Hand.

Judge Hand gave a serious talk, and a very short one, that he called, "The Spirit of Liberty."<sup>3</sup> Just more than twice as long as the Gettysburg Address, Learned Hand's remarks offered this to the hushed crowd of immigrants, soldiers, and young people gathered on the lawn in Central Park:

"What then is the spirit of liberty? I cannot define it; I can only tell you my own faith. The spirit of liberty is the spirit which is not too sure that it is right; the spirit of liberty is the spirit which seeks to understand the minds of other men and women; the spirit of liberty is the spirit which weighs their interests alongside its own without bias."

This captures for me the essential link between liberty and humility.

I do not confuse humility, as Learned Hand understood it, with lazy ambivalence, mere indecision, fear to act, or lack of vigor in our arguments. Rather, it is the recognition that while we must act, and should hold firm principles and opinions, we also must remember simply that we are human, with bounded experience, bounded foresight, and bounded rationality—so we could be wrong in the end. Yet I see daily more hubris than humility. Only infrequently do I see police officers, prosecutors, defense lawyers, probation agents, and judges living and expressing a spirit that is not too sure that we are right.

As an exercise of legal imagination then, I offer four important questions of justice that humility might lead us to consider anew. I do not offer answers; rather, I try here to offer only ideas and brief sketches of the inquiry. The inquiries are not ordered in rank, as I think all of them important. But the first two questions thematically concern finality; the second two thematically concern impoverishment.

First, I consider the appropriate role of death in administering criminal justice, not overlooking the slow death sentence that is life without parole (LWOP).<sup>4</sup> Second, I turn to the value we assign to the finality of judgments; is it right, or do we assign too much value to finality

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3. LEARNED HAND, THE SPIRIT OF LIBERTY 190 (Knopf 1952). The speech was exactly 600 words; the Gettysburg Address, 272 words. When it was published eight years later with several other of Judge Hand's essays, after some elaboration and refinements, the slim volume was nominated for the National Book Award for Nonfiction in 1953.

4. See *infra* Part I.

for finality's sake?<sup>5</sup> Third, I invite you to think about the relationship between presence in the criminal justice system—whether as accused, victim, or citizen witness—and poverty, more fully understood.<sup>6</sup> Fourth and finally, I consider the effect of executive clemency, or more accurately of its dramatic decline, on the administration of justice.<sup>7</sup>

## II. WHAT IS THE RIGHT ROLE OF DEATH IN ADMINISTERING CRIMINAL JUSTICE?

A death sentence in our criminal justice system is administered through two methods. The first is the comparatively fast death sentence that we call capital punishment. The second is the slower death sentence that is a life sentence without hope of parole. Today, thirty-one states retain capital punishment and federal law does, too.<sup>8</sup> Life without parole, though, is used in all United States jurisdictions and has risen dramatically in popularity since the 1980's.<sup>9</sup> It is a recent innovation compared to the death penalty, and became popular as the United States saw both ebbing support for the death penalty and waning faith in indeterminate sentencing. LWOP consigns a prisoner to a hopeless existence, forever cut off from the community. It is a sort of social death sentence, in which the prisoner awaits only biological death.

Today roughly 2,900 prisoners sit on America's death rows.<sup>10</sup> A much less noticed 49,000 or more are serving a sentence of social death, LWOP, in those same prisons.<sup>11</sup> Of those 49,000, over 3,200 are serving LWOP for nonviolent drug and property crimes.<sup>12</sup> And of the greater total, at least 2,500 were children aged seventeen or younger when they

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5. See *infra* Part II.

6. See *infra* Part III.

7. See *infra* Part IV.

8. Kevin Barry, *The Death Penalty & the Dignity Clauses*, 102 IOWA L. REV. 383, 436 (2017) (citing *States With and Without the Death Penalty*, DEATH PENALTY INFO. CTR., <http://www.deathpenaltyinfo.org/states-and-without-death-penalty> [<https://perma.cc/L9XC-Y3BZ>] (last visited Oct. 22, 2016)). See, e.g., VA. CODE ANN. § 18.2-31 (2017) (defining "capital murder" and its punishment); TEX. PENAL CODE ANN. § 19.03 (West 2017); OHIO REV. CODE ANN. § 2929.02 (West 2017).

9. Ashley Nellis, *Life Goes On: The Historic Rise in Life Sentences in America*, THE SENTENCING PROJECT, Sept. 2013, at 4, <http://sentencingproject.org/wp-content/uploads/2015/12/Life-Goes-On.pdf> [<https://perma.cc/KZ37-A2GJ>].

10. *Death-Row Prisoners by State*, DEATH PENALTY INFO. CTR., <https://deathpenaltyinfo.org/death-row-inmates-state-and-size-death-row-year> [<https://perma.cc/UYB4-PPFL>] (last visited May 30, 2017).

11. Nellis, *supra* note 10, at 16.

12. Jennifer Turner, *A Living Death: Life Without Parole for Nonviolent Offenses*, ACLU FOUND., Nov. 2013, at 2, <https://www.aclu.org/files/assets/111813-lwop-complete-report.pdf> [<https://perma.cc/FFB2-JKA3>].

committed the offense that led to a sentence of LWOP. In other words, we have nearly as many people under an original sentence of social death for crimes committed as children as we do people under sentence of actual death for crimes committed as adults. While the January 2016 United States Supreme Court decision in *Montgomery v. Louisiana* now requires that inmates sentenced for crimes committed when they were seventeen or younger have some meaningful chance to argue for parole, some or even many of those sentenced as children probably will die in prison.<sup>13</sup>

I do not dispute that there is a meaningful distinction between a death sentence as we usually describe one and LWOP. The latter preserves the possibility of a remainder interest in life and liberty, for it can be commuted or vacated at any time if a mistake is discovered or the public mores of punishment change over time. At least as to the death penalty proper, though, the most basic question is whether rightful humility in the administration of justice—Hand’s spirit of not being too certain that we are right—ever can be squared with permitting our courts to fill the God-like role of deciding who shall live and who shall die.

It seems to me beyond dispute that death is in a sense a perfect penalty: one that marks the conclusion of a life, and thus removes all risk of further wrongdoing as well as all hope for rehabilitation or redemption. I think it equally beyond dispute that this perfect penalty then must be justified by an unavoidably imperfect system of justice, if justified at all. I wonder whether, when an imperfect system of justice reaches for a perfect penalty, it reaches too far. That effort to claim perfection from the perch of imperfection may be an act of hubris, not of humility.

### III. WHAT VALUE DO WE RIGHTLY ASSIGN TO FINALITY OF JUDGMENTS, FOR FINALITY’S SAKE?

From the concrete finality of death and LWOP, I now turn to finality as a matter of legal doctrine. In the last thirty-five years or so, and perhaps especially in the twenty-plus years since the Antiterrorism and Effective Death Penalty Act of 1996, I think that finality has ascended as a value in criminal justice.<sup>14</sup> Finality, as a legal principle, holds that all litigation must come to an end at some point; that life—and our courts—must move on. Eventually, there are diminishing returns, and perhaps

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13. 136 S. Ct. 718 (2016).

14. Pub. L. No. 104-132, 110 Stat. 1214 (codified as amended in scattered sections of the U.S. Code).

diminished reliability, in attempts to revisit a past outcome and improve upon it, or come closer to getting it right.

There are, of course, elements of truth in this principle. Finality may be very defensible when the outcome of a lawsuit is reallocation of money or property rights: money is renewable after all; at least in theory, it can be made again and losses can be recouped. Additionally, property rights remain endlessly negotiable, even after a judicial resolution of a dispute. If microeconomic theory is correct on this point, and I think here it generally is, property rights in the end tend to belong to the party who values them most. In criminal cases, finality also has real value to victims and their families, if we make the assumption that the right person was convicted.

But what do we make of finality when liberty or even life is at stake, and the prisoner may be the wrong person? Liberty is not renewable or recoupable in the way money is: a day imprisoned is a day that never can be restored, and the next day will be a new deprivation, as will the day after. A life mistakenly taken certainly cannot be restored. So the precise questions we might ask are these: Exactly what value should we assign to the finality of a wrongful conviction? And what value should we assign to the continuation of an injustice tomorrow because it was not discovered yesterday?

In order to answer those questions, we might consider whether humble officers of our criminal justice system would seek to correct their, or our, serious mistakes at any time while the loss of liberty persists. If a wrongly convicted man remains in prison, is it ever too late to restore his liberty for the future, even if we can do nothing to return his yesterdays? At the very least, is it ever too late to restore that man to the courtroom for a new trial?

Looking at these questions with humility in mind, I might say that it never is too late. Demoting finality and promoting humility in our hierarchy of values would open fully the opportunity to acknowledge and correct our mistakes, and in so doing both to atone for and to confront the causes of those mistakes, so that we might learn how not to repeat them. Speaking for myself, I do not learn from a mistake that I refuse to admit and confront on grounds that it is stale or a relic of the forgotten past. I learn only from the mistakes I acknowledge and seek humbly to correct, because in that acknowledgment there comes the resolve not to repeat the mistake. This linkage between admitting and correcting a mistake today, and not repeating it tomorrow, is the great public good we would serve by not allowing finality to foreclose even tardy error correction. Importantly, then, we do more than rectify a past injustice to

the prisoner directly affected by it when we correct even long past errors. We increase public confidence in the justice system's legitimacy and serve the public good by reducing the risk of future injustice as we act subsequently to prevent the mistake from recurring.

But the rank ordering of finality and humility that I propose is opposite to current norms. We might ask, then, whether the ascendancy of finality as a value in criminal justice, and the relative demotion of the value of acknowledging humbly and correcting mistakes, has from the perspective of the wrongly convicted prisoner degraded a system of justice to a system of chance: of chance that scarce outsiders—*pro bono* lawyers from large civil firms, law students in Innocence Projects and clinics—will continue to seek justice long after duty-bound crowds of insiders have declared the result final and turned their attention elsewhere. In my view, and perhaps I stand alone here, the fact that long overdue exonerations of wrongly-convicted innocents so frequently are the result of work by law students, underpaid clinical law professors, civil lawyers working *pro bono*, and even undergraduates is a shameful indictment of our criminal justice system, of the professionals like me working in it, and of a legal culture that elevates finality over humility and even accuracy or reliability of outcomes.

#### IV. WHAT DOES THE IMPOVERISHMENT THAT SURROUNDS US IN THE CRIMINAL JUSTICE SYSTEM CALL UPON US TO ASK AND LEARN?

Turning now to impoverishment generally, I start by asking what the impoverishment that surrounds us in the criminal justice system calls upon us to ask and learn? Everyone who works in a court, no matter the location, knows by experience that the poor find themselves ensnared in those courts, as victims, as the accused, and as witnesses, in great disproportion.

Moreover, the rampant impoverishment of so many in the criminal courts is not limited to a financial measure. Poverty often has a much more complex meaning. Many people who find themselves the grist for our courts are impoverished in education, intellect, fund of general knowledge, emotional support and emotional attachment, language, cultural competence, mental health, and love.<sup>15</sup> Perhaps most commonly,

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15. The point is not entirely new and also not entirely mine. See, e.g., Oscar Lewis, *LA VIDA* (Random House 1966), which remains controversial and some critics have rejected as racist. To my mind, whatever his methodological shortcomings, and acknowledging the obvious vice of attributing forms of poverty to ethnicity or race even implicitly (Puerto Ricans, in Lewis's book), Lewis had a valid insight in thinking more broadly of poverty than just its purely financial aspect.

people enmeshed in the criminal justice system are mired in a poverty of hope. We need to think more broadly about impoverishment, then, if we are to consider realistically all of the people on whom our criminal justice system has the most immediate impact. But even if for simplicity we focus on the relatively concrete and objective issue of financial poverty, humility may counsel change.

Among criminal defendants across the United States, more than 80% are unable to afford a lawyer, let alone the additional expenses of mounting a defense.<sup>16</sup> This percentage has been about constant for decades,<sup>17</sup> and there is no reason to think it has changed much since *Gideon v. Wainwright* first established a right to counsel, at public expense if necessary, for all felony cases.<sup>18</sup> Certainly it does not appear to have changed since the United States Supreme Court extended that right to most misdemeanors in 1972.<sup>19</sup> To return then to some echoes of our national debate on healthcare, the imperative of assuring that the poor have counsel—compliance with the unfunded mandate that is the Sixth Amendment right to counsel, as *Gideon* and its progeny construed it—means that we have adopted without much discussion something close to a single-payor system of universal legal coverage in criminal cases.

In other words, federal, state, and local governments carry nearly the entire cost of defense in criminal cases, just as they carry the cost of prosecution. But governments spend much more on the prosecution function than on the defense function: about two to three times more.<sup>20</sup> A 2007 study commissioned by the Tennessee Justice Project and the American Bar Association, conducted by the Spangenberg Group, found that in 2005 Tennessee spent \$130–\$139 million on prosecution and \$56.4 million on indigent defense.<sup>21</sup> This asymmetry does not appear to

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16. This is a conservative estimate. Robert L. Spangenberg et al., *Resources of the Prosecution and Indigent Defense Functions in Tennessee*, TENN. JUST. PROJECT (The Spangenberg Group, West Newton, Mass.), May 2007, at 2, [https://www.americanbar.org/content/dam/aba/administrative/legal\\_aid\\_indigent\\_defendants/l\\_s\\_sclaid\\_def\\_tn\\_comp\\_study\\_final\\_7\\_30\\_07.authcheckdam.pdf](https://www.americanbar.org/content/dam/aba/administrative/legal_aid_indigent_defendants/l_s_sclaid_def_tn_comp_study_final_7_30_07.authcheckdam.pdf) [<https://perma.cc/B5XA-4ZNG>].

17. *Id.*

18. 372 U.S. 335 (1963).

19. *Argersinger v. Hamlin*, 407 U.S. 25 (1972).

20. Spangenberg et al., *supra* note 16, at 11.

21. *Id.* For a more immediate and local example in Wisconsin, consider the May 2017 budget action of the joint budget committee of the state legislature, recommending 6.2% raises for assistant district attorneys, but only 1.3% raises for the parallel role on the indigent defense side, assistant state public defenders. Matthew DeFour, *Budget committee approves raises for prosecutors, public defenders, judges*, WIS. STATE J. (June 1, 2017), <http://host.madison.com/wsj/news/local/govt-and-politics/budget-committee-approves->



be much different anywhere else.

So even if we look only at financial impoverishment, we still might consider why our courts subsist so greatly on the poor; why between eight and nine out of every ten criminal defendants are below or just barely above the poverty line. With that in mind I ask the questions that follow.

First, does the criminal justice system perpetuate the poverty of criminal defendants? Does it increase the likelihood that a defendant will remain permanently in that financial underclass? Here, I venture to answer yes.

Second, how will we ever acknowledge racial and ethnic disparities if we are not even comfortable acknowledging the impact of poverty on criminal justice, and of our criminal justice system on impoverishment? Race inevitably gets linked to class in a heterogeneous nation like the United States. For example, in 2010, 27.4% of African-Americans, 26.6% of Latinos, but only 9.9% of whites lived below the poverty line.<sup>22</sup> Perversely, this disparity only gets larger as we talk about younger people: 45.8% of the youngest black children (those under six) live in poverty, compared to 14.5% of the youngest white children.<sup>23</sup>

From that dismal starting point, consider the disparate numbers of minority youth who come into contact with the juvenile justice system, a problem known as Disproportionate Minority Contact or Confinement (DMC). Again, this number refers specifically to juveniles. The fraction of African American children enmeshed in all phases of juvenile justice is well more than double their representation in the background population.<sup>24</sup>

Further, the linkage between schools and juvenile courts is an area of necessary focus, as the data demonstrate that children of color are removed from school more often and for longer, as well as referred to juvenile courts more often, than their white schoolmates for the same behavior. For example, African American children are expelled at a rate

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raises-for-prosecutors-public-defenders-judges/article\_dad3a5a5-4bbf-5df6-af41-38edd83d58bb.html [https://perma.cc/EYV2-G8CW].

22. *Poverty Fact Sheet*, ST. OF WORKING AM., <http://stateofworkingamerica.org/fact-sheets/poverty/> [https://perma.cc/QVF6-8QRR] (last visited May 30, 2017).

23. *Id.*

24. OFFICE OF JUVENILE JUSTICE AND DELINQUENCY PREVENTION, U.S. DEP'T JUSTICE, MODEL PROGRAMS GUIDE LITERATURE REVIEW: DISPROPORTIONATE MINORITY CONTACT, NCJ 249700, at 6-7 (Nov. 2014), [https://www.ojjdp.gov/mpg/litreviews/Disproportionate\\_Minority\\_Contact.pdf](https://www.ojjdp.gov/mpg/litreviews/Disproportionate_Minority_Contact.pdf) [https://perma.cc/AR4P-MKB8] (this includes formal hearings, detention, out-of-home placement, etc.).

more than three times that of their white counterparts, while American Indian children are expelled at a rate twice that of those same white children.<sup>25</sup> Children with disabilities are expelled at just under three times the rate of white children without disabilities.<sup>26</sup> Many of these expulsions are coupled with direct police contact.

Finally, we must learn or acknowledge eventually that adequate funding of indigent defense is not about handouts to bad guys, or giving tax dollars to trial lawyers. Adequate indigent defense instead would be a public good that would help to assure us that our courts produce reliable and accurate outcomes when people go to jail or prison.

From these specific forms of impoverishment that afflict many people individually, I turn finally to a systemic and moral impoverishment that has afflicted governments and their executive branches—governors and occasionally presidents—peculiarly in recent decades.

#### V. WHAT ROLE SHOULD EXECUTIVE CLEMENCY HAVE AS A SUPPLEMENT TO THE ROLE OF THE JUDICIARY?

For almost 200 years, this country had a rich and ennobling tradition of executive pardons and commutations, usually by governors as almost all convictions were and are state convictions, not federal.<sup>27</sup> Governors and occasionally presidents commuted death sentences to life sentences when there were questions about the fairness of a trial, shortened other sentences that later appeared to have been the product of overheated public opinion at the time, released prisoners who had shown exemplary rehabilitation or were sick, and pardoned former convicts who went on to lead praiseworthy lives after leaving prison. The Republic was stronger for this. Lives were saved and restored, mistakes that courts ignored or missed were corrected, rehabilitation was rewarded, and justice was tempered with mercy in a way that lent grace to the public's perception of state power.

However, in about 1977, that tradition began to collapse, resulting in

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Daniel Losen et al., *Are We Closing the School Discipline Gap?*, 2015 CTR. FOR C.R. REMEDIES 1, 5, 38 n.8, [https://www.civilrightsproject.ucla.edu/resources/projects/center-for-civil-rights-remedies/school-to-prison-folder/federal-reports/are-we-closing-the-school-discipline-gap/AreWeClosingTheSchoolDisciplineGap\\_FINAL221.pdf](https://www.civilrightsproject.ucla.edu/resources/projects/center-for-civil-rights-remedies/school-to-prison-folder/federal-reports/are-we-closing-the-school-discipline-gap/AreWeClosingTheSchoolDisciplineGap_FINAL221.pdf) [<https://perma.cc/VZ6P-4DMM>].

26. *Id.*

27. See e.g., *Clemency Statistics*, U.S. DEP'T JUST., <https://www.justice.gov/pardon/clemency-statistics> [<https://perma.cc/K8XH-UANH>] (last visited May 30, 2017).

a plummeting rate of pardons and commutations.<sup>28</sup> The precise reasons for this collapse are unclear. Two events, however, may have contributed to discouraging executive clemency. The first was the United States Supreme Court's decision ending a four-year moratorium on executions in this country that had begun with *Furman v. Georgia* in 1972.<sup>29</sup> The 1976 decision in *Gregg v. Georgia* and its four companion cases approved some of the revised capital punishment statutes that state legislatures had enacted after *Furman*, and the court allowed many states to execute prisoners convicted under the new statutes.<sup>30</sup> In the aftermath of these cases, it was clear that the public generally supported the death penalty and the resumption of executions. Governors noticed. Clemency seemed unpopular; its opposite did not.

Second, governors certainly noticed the 1976 presidential election that brought Jimmy Carter to the White House. The link between Carter's election and the flight from clemency is subtler. From 1789 through Franklin Delano Roosevelt, only nine governors had gone on to be elected President of the United States.<sup>31</sup> Another four, but only four, former governors had risen to the presidency from the vice presidency because of the president's death in office.<sup>32</sup> Of the nine former governors elected to the presidency, all had come from the largest, most influential states of their day: states like Virginia in the early 19th century, Ohio in the mid- and late 19th century, and New York throughout the nation's history.<sup>33</sup> And in the thirty-one years following the death of President Roosevelt, no governor had become president.

Then, in 1976, Jimmy Carter won. More, he was from Georgia, not an especially large or influential state at the three-quarter mark of the 20th century. All over the country, in governors' mansions, perhaps it dawned on the men living there that they might not be in a terminal elected office

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28. *Id.* President Obama did not fit this pattern, especially in the last half of his second term. But it is too early to say whether he was an aberration, or instead represented the beginning of a reversal of the trend.

29. 408 U.S. 238 (1972).

30. *Gregg v. Georgia*, 428 U.S. 153 (1976); *Proffitt v. Florida*, 428 U.S. 242 (1976); *Jurek v. Texas*, 428 U.S. 262 (1976); *Woodson v. North Carolina*, 428 U.S. 280 (1976); *Roberts v. Louisiana*, 428 U.S. 325 (1976).

31. David J. Andersen & John Weingart, *Governors Who Became President*, RUTGERS CTR. ON THE AM. GOVERNOR, <http://governors.rutgers.edu/on-governors/us-governors/governors-and-the-white-house/governors-who-became-president/> [<https://perma.cc/NA8J-EKE7>] (last visited May 30, 2017). See generally SALADIN M. AMBAR, *HOW GOVERNORS BUILT THE MODERN AMERICAN PRESIDENCY* (2012).

32. Andersen & Weingart, *supra* note 31.

33. *Id.*

after all; that there might be one higher office to seek. Indeed, after Jimmy Carter, only three presidents—George H.W. Bush, Barack Obama, and Donald J. Trump—have *not* been former governors.<sup>34</sup> Since 1980, we have had presidents who were the former governor of California—which is consistent with the earlier pattern—but also from Arkansas and Texas.<sup>35</sup> We have had serious contenders for the presidency who were former governors from at least Massachusetts, Arkansas, Minnesota, Florida, Ohio, and New Jersey.<sup>36</sup>

These men and other governors all likely have shared one common understanding: acts of executive clemency or mercy do not advance a bid for the White House. Recall that Bill Clinton, then governor of Arkansas, interrupted his 1992 presidential campaign briefly to go home to be there when Arkansas executed a black man, Rickey Ray Rector, convicted by an all-white jury, who had serious brain damage from shooting himself in the head after killing his second victim.<sup>37</sup> In effect, Rector gave himself a crude partial lobotomy. His disability was obvious to the end: he is the condemned man who famously told his guards on the way to the death chamber, after eating only part of his last meal, that he was saving his dessert for later.<sup>38</sup> That execution was shortly before the New Hampshire primary. Recall George W. Bush mocking Karla Faye Tucker, who had rehabilitated herself considerably on death row before her execution, in a 1999 interview with Tucker Carlson while his presidential bid was taking off.<sup>39</sup> Recall the devastating effect of the Willie Horton advertisement that the first President Bush ran against his opponent, Massachusetts governor Michael Dukakis, about a prisoner who committed a home invasion, rape, and stabbing while on a weekend furlough.<sup>40</sup>

Whatever the reasons for the sharp drop in executive clemency, it may be time to rethink with humility the role of clemency. Most would agree that there is a role for mercy in justice. Still, courts generally and

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34. *See id.*

35. *Id.*

36. *See id.*

37.

Peter Applebome, *The 1992 Campaign: Death Penalty; Arkansas Execution Raises Questions on Governor's Politics*, N.Y. TIMES (Jan. 25, 1992), <http://www.nytimes.com/1992/01/25/us/1992-campaign-death-penalty-arkansas-execution-raises-questions-governor-s.html> [<https://perma.cc/88J8-25BB>].

38. Marshall Frady, *Death in Arkansas*, NEW YORKER, Feb. 22, 1993, at 105, 105.

39. Tucker Carlson, *Devil May Care*, TALK MAG., Sept. 1999, at 106, 106.

40. Opinion, *George Bush and Willie Horton*, N.Y. TIMES (Nov. 4, 1988), <http://www.nytimes.com/1988/11/04/opinion/george-bush-and-willie-horton.html> [<https://perma.cc/P53W-6BFS>].

institutionally do not dispense that mercy; the courts are places of legal formalism in the main. And anyway, mercy often is more appropriate years after a conviction when the prisoner or ex-convict has established a long record of rehabilitation and productive behavior. In other words, mercy often is appropriate only long after the courts are done with a person.

That power of considered mercy resides in the executive branch, usually in just one officer, although that power sometimes is vested in or shared with pardons boards. We might ask whether a governor or a president who refuses to consider or exercise clemency appreciates the role of mercy in tempering justice, especially for those who have proven themselves over time. For that matter, we might ask more fundamentally whether a governor who will not exercise clemency really understands the nobility and power of the executive office: its potential to allow the citizenry to see sovereign grace and humility through the words and acts of a single human being. We might ask, in other words, whether he or she understands clemency's potential to offer a public lesson that sovereign strength lies not just in wielding power, but much more in desisting from the use of brute power in favor of grace, mercy, and forgiveness. That lesson has been available for a long time. Seneca spoke of this when he argued that clemency fosters virtue more generally.<sup>41</sup>

It may just be that a governor or president who lacks the humility to act occasionally with clemency forfeits something of the very dignity of his office; in effect, commits *lese majeste* against himself. Indeed, perhaps such a governor forfeits something of his own personal dignity in pursuit of his political ambitions. He neither fills the corners of his office entirely nor fills and illuminates the corners of his own humanity.

Again, in the end I do not know how exactly a reimagined system of justice more fully infused with Learned Hand's sense of humility would look. I only invite you to take up these four questions in a spirit of liberty and to seek answers, so that we might be worthy public servants in the offices we are fortunate to hold within our institutions of justice. More broadly, I hope that we might strive to become the citizens Learned Hand had in mind as he looked out at the sea of faces in Central Park—all gathered together to proclaim, as we still should, that We Are Americans.

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41. See LUCIUS ANNAEUS SENECA, *DE CLEMENTIA* (Susanna Braund ed. and trans., 2009).