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Paul Rosenzweig

George Washington University School of Law

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The Quality of Mercy

Paul Rosenzweig*

*The quality of mercy is not strain'd,
It droppeth as the gentle rain from heaven
Upon the place beneath: it is twice blest;
It blesseth him that gives and him that takes.*¹

In recent years, the incidence of executive clemency for capital offenses has dropped dramatically.² Why? Paul Larkin, in his article, *The Demise of Capital Clemency*,³ offers one very sensible explanation. Clemency, he argues, is less frequent precisely because the other mechanisms by which capital punishment is imposed have improved so much over the years in their capacity for differentiating between those truly deserving of capital punishment and those who are not.⁴ If one sees clemency, as Larkin does, as the ultimate error-correction mechanism,⁵ then

* Professorial Lecturer in Law, George Washington University School of Law; Principal, Red Branch Consulting, PLLC. I thank my good friend Paul Larkin for the invitation to respond to his work. The fact that I have some questions and thoughts about his essay should not, in any way, detract from its significance. As should be clear, I find Larkin's main point indisputable—it is only at the edges that I find myself suggesting the analysis needs greater amplification.

1. WILLIAM SHAKESPEARE, *THE MERCHANT OF VENICE* act 4, sc. 1.

2. See, e.g., William Alex Pridemore, *An Empirical Examination of Commutations and Executions in Post-Furman Capital Cases*, 17 JUST. Q. 159, 161 fig.1 (2000) (comparing the number of executions to commutations and showing a sharp decline in the latter).

3. 73 WASH. & LEE L. REV. 1295 (2016).

4. See *id.* at 1312–13

The sentencing stage of capital prosecutions now eliminates almost all of the people who would have received clemency in days gone by. The small number of commutations seen today is a testament to that success and is an entirely logical result of the new capital sentencing rules adopted by the Supreme Court over the last forty years.

5. See *id.* at 1337 (arguing that until the middle of the twentieth century, “the clemency process was the principal mechanism for correcting errors at the guilt or sentencing stages of a capital case”).

surely part of the explanation for why clemency is less frequent is that errors—of both law and justice—occur less often.

Thus, according to Larkin, the assessment is that legislators have done a better job of more narrowly constraining the imposition of capital punishment to those who truly “deserve” it—in some broader sense of justice—or at least to those who deserve it more than had been the case in earlier times.⁶ In this effort, the legislators have been assisted by the courts (most prominently the US Supreme Court) who have systematically excluded from the ambit of capital punishment classes of cases—those, for example, involving juveniles, or those where death does not result—that, by any measure, are less clear and less justified applications of the death penalty than the classes of cases that remain.⁷

Likewise, under guidance from the courts, juries have been systematically provided with less discretion and greater guidance in the imposition of capital punishment.⁸ And this, in turn, has again narrowed the class of cases in which capital punishment is imposed to defendants who most people—at least among those who think that capital punishment is ever justified—would agree are more “worthy” of the ultimate sanction.⁹

Perhaps more to the point, as Larkin points out, what is left of capital punishment continues to have the approval of citizens and legislators across the country—by a fair margin it seems.¹⁰ In that context, executive clemency seems less an exercise of error correction and is more frequently perceived as executive nullification of the people’s democratic choice. No elected official

6. See *id.* at 1300–06 (discussing the evolution of capital punishment from the common law of the American colonies to the present).

7. See *id.* at 1348–49 (noting that “the Supreme Court has placed out of bounds the execution of certain categories of offenders—the young, the mentally disabled, the less culpable”).

8. See *id.* at 1348 (“Today, the capital sentencing process no longer leaves the decision whether a murderer should live or die to the unguided discretion of a jury or judge, who may not have heard relevant mitigating evidence.”).

9. See *id.* at 1349 (arguing that modern sentencing procedures permit executions of “only those offenders most deserving of death”).

10. See, e.g., *Death Penalty*, GALLUP, <http://www.gallup.com/poll/1606/death-penalty.aspx> (last visited Feb. 13, 2017) (showing that, in 2016, 60% of Americans polled favored the death penalty while only 37% opposed it) (on file with the Washington and Lee Law Review).

who wants ever to be re-elected is comfortable defying the will of the populace. And so, again, the structural changes in capital sentencing seem to be driving a reduction in the use of clemency by executive agents.¹¹

Larkin makes a powerful argument, one with a great deal of persuasive force, and one, I think, that goes a long way to describing much of what lies behind the reduction in executive clemency. But it is, in my view, incomplete. In focusing so exclusively on the behavioral explanations for clemency reduction, I wonder if Larkin is, perhaps, missing a part of the puzzle—namely that there is a non-systemic moral component to the criminal law (and to capital punishment in particular) that his exposition does not fully take into account. Put another way, we seem to be in the process of sorting the American populace based upon attitudes toward capital punishment, and that might also explain partially the decline in executive clemency.

To explain what I mean, let me start with a personal reflection from my time as a law clerk at the US Court of Appeals for the Eleventh Circuit. Based in Atlanta, the Eleventh Circuit covers the geographic area of Georgia, Florida, and Alabama—all states that impose capital penalties on various offenders.¹² As a consequence, the judges of the Circuit spent an inordinate amount of time processing federal habeas corpus appeals from capital cases in those States. Though by volume the number of such cases could not have exceeded 5% of the docket (at least so my memory says) they seemed, anecdotally at least, to require 25% of the judges' time (and, as a result, a similar fraction of the time of the judges' law clerks). There were, of course, initial habeas appeals—often massive filings alleging dozens, if not hundreds, of errors in a lengthy State trial record and appellate proceeding. And then, even more daunting, there were the emergency appeals—equally voluminous, and all filed on the cusp of execution, where decisions by the court were made in a matter

11. See Larkin, *supra* note 3, at 1338 (explaining that clemency has declined because “[l]ocal juries and judges have already filtered out those offenders to whom governors would have historically granted a commutation”).

12. *States With and Without the Death Penalty*, DEATH PENALTY INFO. CTR., www.deathpenaltyinfo.org/states-and-without-death-penalty (last updated Nov. 9, 2016) (last visited Feb. 13, 2017) (on file with the Washington and Lee Law Review).

of hours, rather than at the leisurely pace that attended most of the court's actions.

The cases were all extremely painful and heart-rending. There was always a victim—some innocent whose life had been snuffed out by criminal violence, leaving behind grieving family and friends who had suffered a tragic, almost arbitrary loss. Likewise, there was the perpetrator—now a convicted felon, often with no visibly redeeming qualities but who, with the help of his lawyers, was now presenting evidence of his own humanity, often by illuminating past circumstances of his life. This evidence was not offered to justify his crime, mind you, but rather was a kind of indirect appeal for the exercise of judicial clemency. His troubled childhood, mental illness, sexual abuse, and/or limited intelligence had already been presented to a jury and found wanting; yet, the appeal asked the court to revisit that weighing and reset the scales of justice.

Judicial clemency, however, was rare. The jurists of the court were rather inured to the appeal process and focused instead on the legal requirements—exercising the gate keeping function that Larkin has so ably described¹³ while putting aside (for the most part) their own personal feelings. But that did not mean that their sense of just deserts was always satisfied—I suspect it was not. Or, more accurately, I can say that for at least one law clerk (me) it was not.

One case in particular, the case of Marvin Edward Johnson,¹⁴ sticks with me as an example of a situation in which the sorting functions that Larkin touts seem to have failed. Johnson was no angel—he had a lengthy criminal record and on the day in question was engaged in the armed robbery of a convenience store, hardly conduct that would engage our sympathies. But there were sympathies nonetheless. Johnson had completed the robbery and was leaving the store, with everyone in it unharmed, when the pharmacist pulled a gun from under the counter and shot Johnson. Johnson, wounded and no doubt angry, exchanged gunfire and shot the pharmacist, killing him instantly.

13. See Larkin, *supra* note 3, at 1338 (observing that “state appellate courts review the conviction and sentence” of defendants sentenced to death).

14. For those interested, the case is *Johnson v. Wainwright*, 806 F.2d 1479 (11th Cir. 1986).

For my money, Johnson had a colorable (perhaps even compelling) case for avoiding the imposition of capital punishment. He had been leaving the store; he had not acted with malice aforethought; and the death of the pharmacist was the result of Johnson's own reaction to being shot. Indeed, the pharmacist had (according to eye witnesses) emptied his gun firing at Johnson, who then killed the now-defenseless pharmacist. These mitigating factors were precisely the sort that, had I been on the jury, would have motivated me to opt for a sentence of life imprisonment rather than death.

And yet, on review, it seemed as though all of the proper substantive and procedural requirements for the imposition of capital punishment had been met. The Florida jury that convicted Johnson had heard the mitigating circumstances but nevertheless chose to impose the death penalty. Despite my misgivings (I cannot, and would never, speak for the judge I clerked for), Johnson's capital sentence was duly affirmed and he died while awaiting execution in death row.¹⁵

Therein, I think, lies the gap in Larkin's analysis: he sees the capital punishment system as a *system*. It operates, for Larkin, at the level of collective incentives and systematic preferences. And, to be sure, that is true—but it is only a partial truth. The other portion of the truth is that capital punishment is an intensely individual question, one that engages a person's moral faculties in ways that are surely unique. It asks each of us, individually and collectively, about our sense of the quality of justice (Larkin's focus) and also the quality of mercy.

So, where I take issue with Larkin's analysis (to the limited extent I take issue) is with his supposition that the "system" is itself sufficient to address the clemency-worthy cases.¹⁶ As he puts it, "[b]y the time that a condemned prisoner has run out of legal challenges to his sentence and applies for clemency, the

15. Press Release, Fla. Dep't of Corrections, Death Row Inmate Dies of Natural Causes (Nov. 22, 1999) (on file with author), <http://www.dc.state.fl.us/secretary/press/1999/drdeath.html>.

16. See generally Larkin, *supra* note 3 (arguing that the modern American death penalty system excludes those death sentences that, in the past, would have been eliminated through clemency).

chances are *virtually nil* that the death penalty is an unduly severe or inappropriate penalty for him.”¹⁷

That characterization is only true if we think that nothing but the systemic questions to which the legal process is addressed are the only ones that bear on the question of clemency. As the example of Mr. Johnson makes clear,¹⁸ I think that theory overstates the case. There remains (and always will remain) a zone or ambit of moral faculty—what I call the question of mercy—that is outside the bounds of the system.

The best contemporary example that I know of this dichotomy, one which tends to support Larkin’s main point, is the story of former Virginia governor Tim Kaine, who is now a Senator and, recently, was a candidate for Vice President of the United States.¹⁹ Kaine is, quite famously, a Catholic with strong moral principles against the imposition of the death penalty.²⁰ But Virginia was, at the time of his gubernatorial term at least, a State where the populace strongly backed the imposition of capital punishment.²¹ As Kaine was running for election, he was challenged about how he would square his personal views with the laws of Virginia.

His response was unequivocal—he would follow the law as written and decline to exercise executive clemency in a way that frustrated the will of the populace.²² And, by all accounts, Kaine

17. *Id.* at 1338 (emphasis added).

18. *See supra* note 14 and accompanying text (recounting my experience with Mr. Johnson and his death penalty case).

19. *See generally Tim Kaine Biography*, BIO, <http://www.biography.com/people/tim-kaine-338982> (last updated Nov. 9, 2016) (last visited Feb. 14, 2017) (providing information about Tim Kaine) (on file with the Washington and Lee Law Review).

20. *See id.* (noting Kaine’s Catholic beliefs and that he “was deeply opposed to the death penalty”).

21. *See, e.g., Jennifer Agiesta, On Eve of Execution, Virginians Broadly Support Penalty*, WASH. POST (Nov. 9, 2009), http://voices.washingtonpost.com/behind-the-numbers/2009/11/on_eve_of_execution_virginians.html (last visited Feb. 14, 2017) (“Virginia voters favor the death penalty by a better than 2 to 1 margin, with 66 percent supportive of it, 31 percent opposed. And intensity on this issue is with the supporters: 45 percent ‘strongly’ back capital punishment, 18 percent are that solidly opposed.”) (on file with the Washington and Lee Law Review).

22. Sheryl Gay Stolberg & Thomas Kaplan, *On Death Penalty Cases, Tim Kaine Revealed Inner Conflict*, N.Y. TIMES (July 23, 2016), <https://www.nytimes.com/2016/07/24/us/politics/tim-kaine-death->

was true to his word; during his term, he rejected several clemency petitions that his religious principles would have called for him to accept.²³ But the mere fact that he was obliged to do so—and that we can also imagine Kaine having taken the opposite tack—suggests that the non-systemic values have a continuing and important role in the clemency determination.

To explore this further, imagine the counter-factual: that Kaine did not exclude faith from his decision-making and, indeed, made clear that he could not do so and remain true to himself. Imagine if he had instead said, “Here I am, take all of me or none.” And imagine further that he had won election anyway, notwithstanding his opposition to the death penalty in all forms. What, then, could we say about clemency in Virginia?

Well, in the first instance, it would have given us an executive who favored clemency even when the processes of capital punishment had operated appropriately. That, in turn, would suggest that Larkin’s assessment is incomplete.

But the thought experiment also exposes another way in which I think that Larkin’s analysis is not as nuanced as the real world might be, for he imagines a system in which societal preferences are well-expressed and easily discerned. That, after all, is why Larkin thinks that the executives act as they do—they fear, for example, political retribution, and they are comfortable with delegating in effect their clemency authority to the jury and the judges reviewing the case.²⁴

Put another way, Larkin supposes a world in which the citizenry’s exogenous preferences regarding capital punishment are well-enough known that they can be readily discerned and, having been discerned, acted upon by elected representatives. My Kaine hypothetical challenges that supposition by positing a case in which the electoral body sends mixed messages—both electing

penalty.html?_r=0 (last visited Feb. 14, 2017) (“He cast his decisions in simple terms: As Virginia’s governor, he was sworn to uphold the law — a message that helped him get elected governor.”) (on file with the Washington and Lee Law Review).

23. See *id.* (noting that despite his opposition to the death penalty, “Mr. Kaine presided over 11 executions as governor, delaying some but granting clemency only once”).

24. See Larkin, *supra* note 3, at 1308 (“Fearing the electorate’s political wrath, governors have refused to commute death sentences, particularly in election years.”).

a legislature that adopts capital punishment and an executive who is opposed to it. How to resolve this conflict? And, more importantly, what does the fact of uncertainty say about Larkin's premise? There is, it seems to me, ample room for a vision of capital punishment that is not as monolithic as Larkin suggests it might be.

Let me make one final point in this short essay before closing, one that relates to the allocation of authority and responsibility for the imposition of capital sentences. As Larkin accurately notes, the evidence regarding the deterrent effect of capital punishment is hotly disputed and the subject of much analysis.²⁵ I think that the evidence mostly supports the idea that capital punishment has a deterrent effect. That, after all, is consistent with our broader sense of criminal law and deterrence.

Where I part ways from Larkin, however, is in his conclusion that the disputed efficacy of capital punishment suggests that the proper place for resolving the question is "in the legislatures and at the ballot box."²⁶ Why should this be the case?

In the first instance, as I've already noted, the resolution from the ballot box may be ambiguous or indeterminate. It may conflict, in some instances, with the views of the legislature (if only because some rent-seeking group has captured the legislature).

In the second instance, there is no reason that I know of to suppose that the legislature is *a priori* better at resolving these efficacy questions than the executive. To be sure, there is some sense in which the legislature is more representative of popular opinion—but one premise of the modern state is actually that we should defer to executive determinations of disputed factual questions, rather than legislative ones.²⁷ You don't need to pick

25. See *id.* at 1326–27 ("Some economists and sociologists have conducted regression analyses of the available data and have concluded that capital punishment has a measurable deterrent advantage over life imprisonment. . . . Other scholars, however, doubt that conclusion.").

26. *Id.* at 1328.

27. One example of this is the *Chevron* doctrine of deference to agency rulemaking. See, e.g., Edward J. Imwinkelried, *Defeating Deference: A Practitioner's Guide to Overcoming the Chevron Doctrine*, 31 AM. J. TRIAL ADVOC. 69, 69 (2007) ("The Chevron Doctrine gives administrative agencies almost unbridled discretion to form statutory interpretations of legislative intent. More often than not, the interpreting agency receives heightened, if not, mandatory

sides in the contest, however, to recognize that it is, in fact, a contest and there is (or ought to be) nothing wrong with an executive substituting his or her considered judgement as to efficacy for that of the legislature's discretion.

A governor might, for example, think that the potential for clemency would induce to a criminal to put down his or her arms and surrender in a situation where, in the absence of clemency, the criminal might choose to "shoot it out" rather than surrender and face death anyway.

This assessment is not nonsensical—before the International Criminal Court was created, there were many who argued that a far better way to improve the real-world, on the ground situation in countries ruled by despots was to offer them a way out—retirement, say, in some foreign land with impunity from prosecution.²⁸ The idea, of course, was that when faced with criminal prosecution, an autocrat would hunker down in place and refuse to leave. It was said then (and I agree) that the availability of forgiveness, or mercy, was sometimes an incentive to the end of strife. That isn't necessarily an accurate judgment, but I can readily imagine an executive who publicly says that he will exercise clemency in those sorts of capital punishment cases as an incentive to early surrender. That might be a sentiment contrary to the lessons of the legislature or the ballot box.

And so, in the end, one of the lessons we learn from Shakespeare (or so it seems to me) is that mercy is a quality that we should value highly and value most highly of all in the powerful. The greater the authority wielded, the greater the necessity of humility and the capacity for forgiveness. That, in the end, is where I part ways with Larkn. Not in any disagreement with his analysis, but rather in his implicit acceptance of the system as designed. Yes, indeed, our

deference for its interpretation.”).

28. See, e.g., KENNETH A. RODMAN, THE ICC AND TRANSITIONAL JUSTICE: SHOULD THE PROSECUTOR EXERCISE DISCRETION IN THE INTERESTS OF PEACE? 4 (Nov. 2006), https://www.researchgate.net/profile/Kenneth_Rodman/publication/305315482_The_ICC_and_Transitional_Justice_Should_the_Prosecutor_Exercise_Discretion_in_the_Interests_of_Peace/links/57878e0a08ae21394a0c6624/The-ICC-and-Transitional-Justice-Should-the-Prosecutor-Exercise-Discretion-in-the-Interests-of-Peace.pdf (noting that “the leaders of abusive regimes and rebel movements are often granted formal amnesties or asylum abroad in order to facilitate bargaining and advance reconciliation”).

restructuring of the capital punishment process narrows the ambit within which executive clemency can be exercised. But in the end, a structure that Larkin sees as a supporting edifice holding up the architecture of clemency is one that, to me, is also sometimes a crutch used by those who are unwilling to engage in hard moral choices as a way of avoiding responsibility. On its own terms, the structure is a wild success; as an exercise in moral accountability, I rate it less highly.