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Austin Sarat: Mercy on Trial

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Mercy, Clemency, and Capital Punishment

THE ILLINOIS STORY

If we simply use the term “mercy” to refer to certain of the demands of justice (e.g., the demand for individuation), then mercy ceases to be an autonomous virtue and instead becomes part of . . . justice. It thus becomes obligatory, and all the talk about gifts, acts of grace, supererogation, and compassion becomes quite beside the point. If, on the other hand, mercy is totally different from justice and actually requires (or permits) that justice sometimes be set aside, it then counsels injustice. In short, mercy is either a vice (injustice) or redundant part of justice.

—*Jeffrie Murphy*

No one who has never watched the hands of a clock marking the last minutes of a condemned man’s existence, knowing that he alone has the temporary Godlike power to stop the clock, can realize the agony of deciding an appeal for executive clemency.

—*Michael DiSalle*

Death is power’s limit, the moment that escapes it.

—*Michel Foucault*

ON JANUARY 10 AND 11, 2003, Governor George Ryan emptied Illinois’s death row. Exercising his clemency powers under the state constitution, he first pardoned 4 and then commuted 167 condemned inmates’ sentences in the broadest attack on the death penalty in decades. Ryan’s act was a compelling moment in our society’s continuing turmoil about crime and punishment, appearing, at first glance, to be a rare display of mercy in distinctly unmerciful times. As a seemingly humane, compassionate gesture

in a culture whose attitudes toward punishment emphasize strictness not mercy, severity not forgiveness, it ran against the grain of today's tough-on-crime, law-and-order politics. In the controversy that it occasioned, Ryan's clemency put mercy on trial, forcing us to consider anew when and to whom it should be accorded.

It was, in addition, the single sharpest blow to capital punishment since the U.S. Supreme Court declared it unconstitutional in 1972.¹ Because Ryan pardoned or commuted the sentences of sadistic rapists and murderers as well as those who seemed more sympathetic candidates for mercy and those whose convictions were questionable, his decision produced an explosive reaction among people who believe that death is both a morally appropriate and necessary punishment. They demonized Ryan and denounced his clemency in the strongest possible terms, claiming that he had dishonored the memory of murder victims, inflicted great pain on their surviving families, made the citizens of Illinois less safe, and abused his power. For opponents of capital punishment, Ryan became an instant hero. His decision, they claimed, would be a signal moment in the evolution of a "new abolitionist" politics.² They hoped it would mark a turning point on the way toward the demise of state killing.

That Ryan acted with two days left in his term and in the face of vocal opposition from citizens, the surviving families of murder victims, prosecutors, and almost all of Illinois's political establishment only compounded the drama. In addition, and even to many opponents of capital punishment, Ryan's action was a worrying reminder of the virtually unchecked powers of chief executives at the state and federal level to grant clemency. In a society committed to the rule of law, to the idea that all of the government's actions should be governed and disciplined by rules, that all government powers should be checked and balanced, that those who govern always should be accountable for their acts, what Ryan did exposed a gaping hole in the fabric of legality. It seemed to push to, and beyond, the limits of law's

ability to regulate executive power, and, like the actions of the president in times of national emergency, hinted at the specter of power out of control, a dangerous, undemocratic, unaccountable power lying dormant and waiting for an occasion to be exercised.³

George Ryan hardly seemed typecast for such a dramatic part in our contemporary history. Prior to becoming governor, Ryan had had a long career in Illinois politics, serving in the state legislature from 1973 to 1983, as lieutenant governor from 1983 to 1991, and as secretary of state in 1991. Because Ryan embodied a rather unremarkable combination of familiar midwestern Republican positions—fiscally conservative, moderate in his social views—his 1998 election as governor was barely noticed nationally and greeted with little fanfare locally. This white-haired, sixty-nine-year-old former pharmacist from Kankakee, Illinois, did not fit anyone's stereotype of either demon or hero, much less of the kind of national and international celebrity his clemency decision would make him. Nothing in his personality, or prior political record, suggested he would make much of a splash during his gubernatorial term or become a key national anti-death penalty activist. Ryan himself noted, "I mean, I am a Republican pharmacist from Kankakee. All of a sudden I've got gays and lesbians by my side. African-Americans. Senators from Italy, groups from around the world. It's a little surprising."⁴

Throughout his career in government he had been an outspoken supporter of capital punishment, and in his gubernatorial campaign he had restated his belief in the appropriateness of the death penalty. "I believed some crimes were so heinous," Ryan said of his long-held position on capital punishment, "that the only proper way of protecting society was execution. I saw a nation in the grip of increasing crime rates; and tough sentences, more jails, the death penalty—that was good government." In 1977, after the Supreme Court lifted its ban on execution, a bill to reinstate the death penalty came before the state legislature in Springfield. When an anti-death penalty legislator asked his colleagues to consider whether they personally would be willing to

CHAPTER 1

throw the switch, “Ryan rose to his feet with ‘unequivocal words of support’ for execution—words he now regrets. The truth, though, was that Ryan never thought about capital punishment much before that vote or for more than twenty years afterward, except as an abstract idea of justice. ‘I supported the death penalty, I believed in the death penalty, I voted for the death penalty.’”⁵

During his tenure as governor his views about capital punishment were radically transformed, with the result that he took two particularly dramatic actions: the first a statewide moratorium on executions, which he announced in February 2000; the second his mass clemency. These two acts helped to galvanize and change the national discussion about capital punishment.

THE SHIFTING TERRAIN

By the time Ryan became governor, voices at both the national and state level had begun to raise new and disturbing questions about state killing. To take but one particularly important example, in February 1997 the American Bar Association issued a call for a nationwide moratorium on executions. The ABA proclaimed that the death penalty as “currently administered” was not compatible with central values of our Constitution. Thus it called

upon each jurisdiction that imposes capital punishment not to carry out the death penalty until the jurisdiction implements policies and procedures . . . intended to (1) ensure that death penalty cases are administered fairly and impartially, in accordance with due process, and (2) minimize the risk that innocent people may be executed.⁶

In the report accompanying its call for a moratorium, the ABA pointed to three glaring flaws in the death penalty process.⁷ First was the failure of most states to guarantee competent counsel in capital cases. Because those states have no regular

public defender systems, indigent capital defendants are frequently assigned lawyers with no interest, or experience, in capital litigation.⁸ The result is often an incompetent defense that is all the more damaging in light of rules preventing defenses not raised, or waived, at trial from being raised on appeal or in habeas proceedings.⁹ The ABA thus called for the appointment of “two experienced attorneys at each stage of a capital case.”¹⁰

The second basis for the ABA’s recommended moratorium was a significant erosion in postconviction protections for capital defendants caused by the passage of the Anti-Terrorism and Effective Death Penalty Act of 1996. Contradicting the provisions of that act, the ABA said that “federal courts should consider claims that were not properly raised in state court if the reason for the default was counsel’s ignorance or neglect and that a prisoner should be permitted to file a second or successive federal petition if it raises a new claim that undermines confidence in his or her guilt or the appropriateness of the death sentence.” Third, the ABA called for a moratorium because of the persistence of “longstanding patterns of racial discrimination . . . in courts around the country.”¹¹ The ABA cited research showing that defendants are more likely to receive a death sentence if the victim is white rather than black,¹² and that in some jurisdictions African Americans tend to receive the death penalty more than do white defendants.¹³ The report urged the development of “effective mechanisms” to eliminate racial prejudice in capital cases.

Following the ABA’s recommendation, activists mounted a statewide moratorium campaign in Illinois,¹⁴ and legislators introduced bills in the state legislature calling on then-governor Jim Edgar to stop executions and appoint a commission to conduct a comprehensive review of the state’s death penalty system.¹⁵ The Chicago Council of Lawyers joined in the call for a moratorium, citing especially the fact that between 1993 and 1997 seven death row inmates had been freed after it was discovered that they were convicted and sentenced to death for crimes they did not commit. In July 1997 Governor Edgar signed into law a bill providing

funds for postconviction DNA testing of inmates on death row. And late in that year, the Illinois State Bar Association formed a special committee to study the state's capital case process and to recommend needed reforms.

During the 1990s the increasingly availability of DNA testing throughout the country and in Illinois resulted in dramatic exonerations of inmates condemned to death, like those cited by the Chicago Council of Lawyers. Among the most striking and important of these cases was the exoneration in February 1999 of Anthony Porter. Porter, an African-American man with an IQ of 51, had been convicted and sentenced to die for the double homicide of Marilyn Green and Jerry Hillard in 1982. His conviction and sentence were later upheld on appeal by both the Illinois and the U.S. Supreme Court. However, forty-eight hours before his scheduled execution in 1998, a judge entered a stay to allow for a hearing on the question of whether Porter's IQ was so low that he should not be executed.

After the stay was entered, the case against Porter began to unravel when a key prosecution witness signed an affidavit saying that he lied under oath during the trial. In early 1999 an inmate in state prison admitted that his uncle and he "took care" of Green and Hillard because of a drug debt. Finally, a private investigator working on the Porter case with a Northwestern University journalism professor and his students obtained a videotaped confession from the uncle acknowledging that he had committed the murders.¹⁶

The Porter case quickly came to symbolize what death penalty opponents had long claimed about rampant problems in the administration of capital punishment, and it spurred calls for change. Newspaper editorials, the Illinois State Bar Association's Section on Criminal Justice, and many public officials called on Ryan to immediately stop all executions and launch a thoroughgoing review of the capital punishment system in Illinois. Yet Ryan at first refused. Instead, a spokesperson for the governor noted at the time of Porter's release that Ryan would "review death penalty case[s] on a case-by-case basis, just as the Supreme

Court does, and will make an appropriate decision on each at an appropriate time.”¹⁷

Ryan’s initial reaction to the Porter case echoed his predecessors’ reactions to earlier exonerations. As his spokesperson put it, “I know people use these reversals as an argument for a moratorium . . . but an argument can also be made that the system is working as designed.”¹⁸ In Ryan’s view, Porter’s exoneration proved that the system worked.¹⁹ As he said at the time, “I still support the death penalty, and there’s no question it ought to be applied fairly and accurately and I’m willing to work with anyone to ensure that process goes on. We’re still looking for the best way to do that.”²⁰

Later, reflecting on the transformation of his views about the death penalty, Ryan put a different spin on the Porter case. “I was caught completely off-guard. Maybe I shouldn’t have been, but I was. That mentally retarded man came within two days of execution, and but for those students Anthony Porter would have been dead and buried. I felt jolted into reexamining everything I believed in.”²¹ Nonetheless, a conflicted Ryan still resisted a full-fledged review of Illinois’s capital apparatus, though he endorsed one reform: an \$18 million capital-crimes litigation fund to ensure that defendants like Porter, as well as prosecutors, have access to investigative resources.

In the meantime, a month after Porter’s exoneration, Ryan received a clemency request in the capital case of Andrew Kokoraleis, who had been convicted and sentenced for his role in the kidnapping, rape, and mutilation murder of a twenty-one-year-old woman. Referring to himself as the “guy who pushes the plunger,” Ryan publicly agonized about his decision, but, in the end, decided to let the execution proceed.²² He explained his denial of clemency by saying that “some crimes are so horrendous and so heinous that society has a right to demand the ultimate penalty.”²³

Within three months of the Kokoraleis execution, two more Illinois death row inmates were exonerated: one by DNA evidence, the other when a jailhouse informant’s testimony was

discredited. The state judiciary began its own investigation,²⁴ and calls for a moratorium grew more frequent and intense. Still, Ryan recalled, “I was resisting.” But one day, “the attorney general called seeking a new execution date for an inmate. In my heart at that moment, I couldn’t go forward with it.”²⁵ Ryan’s critics suggested that his emerging doubts about capital punishment were less the product of a genuine change of heart than a political expedient designed to deflect attention from a brewing scandal and charges of corruption in the secretary of state’s office during his tenure there.

Whatever its true motivation Ryan’s transformation was facilitated by the publication in November 1999 of a four-part series in the *Chicago Tribune* entitled “The Failure of the Death Penalty in Illinois.” Written by Ken Armstrong and Steve Mills, these articles painted a devastating picture of “a system so riddled with faulty evidence, unscrupulous trial tactics and legal incompetence” as to be unable to do justice reliably in capital cases. Armstrong and Mills documented numerous cases in which capital defendants were represented by incompetent lawyers. In addition, they reported that nearly half the state’s death penalty cases were reversed on appeal, and many were marked by racial discrimination in jury selection. Their articles recounted case after case in which capital convictions were obtained on the basis of jailhouse snitches and confessions that police and prosecutors knew, or should have known, were of questionable value. The cumulative picture painted by the *Tribune* series was devastating. It exposed a system “so plagued by unprofessionalism, imprecision, and bias that . . . the state’s ultimate form of punishment is its least credible.”²⁶

The Armstrong and Mills pieces marked a turning point for Ryan and Illinois.²⁷ Barely two months after they were published, Ryan reversed course and announced both a statewide moratorium on executions and the creation of a blue-ribbon panel to study the state’s death penalty system. As he said at the time,

THE ILLINOIS STORY

I now favor a moratorium, because I have grave concerns about our state's shameful record of convicting innocent people and putting them on death row. I believe many Illinois residents now feel that same deep reservation. I cannot support a system, which, in its administration, has proven to be so fraught with error and has come so close to the ultimate nightmare, the state's taking of innocent life. Thirteen people have been found to have been wrongfully convicted. . . . How do you prevent another Anthony Porter—another innocent man or woman from paying the ultimate penalty for a crime he or she did not commit? Today, I cannot answer that question. Until I can be sure that everyone sentenced to death in Illinois is truly guilty, until I can be sure with moral certainty that no innocent man or woman is facing a lethal injection, no one will meet that fate. I am a strong proponent of tough criminal penalties, of supporting laws and programs to help police and prosecutors keep dangerous criminals off the streets. We must ensure the public safety of our citizens but, in doing so, we must ensure that the ends of justice are served. As Governor, I am ultimately responsible, and although I respect all that these leaders have done and I will consider all that they say, I believe that a public dialogue must begin on the question of the fairness of the application of the death penalty in Illinois.²⁸

Several themes that would reemerge three years later when he announced his clemency decision stand out in this statement. First is the criticism of the *process* through which the death penalty is administered, not of capital punishment itself. Here Ryan presented himself as a new abolitionist interested in defending traditional legal values rather than in being merciful toward the condemned. New abolitionists do not oppose state killing because it is an affront to morality, nor do they claim that it is *per se* unconstitutional. Instead, new abolitionists, like Ryan, argue against the death penalty by claiming that it has not been, and cannot be, administered in a manner that is compatible

with our legal system's fundamental commitments to fair and equal treatment.

Second is the characterization of his beliefs as following, not leading, public opinion. Here Ryan tried to side with what he saw as cultural common sense rather than presenting an elitist critique of the immorality of capital punishment. Third is a self-dramatizing emphasis on his own responsibility, an emphasis somewhat at variance with his effort to describe his decision as following the views of "many Illinois residents": "As Governor, I am ultimately responsible." Fourth is the articulation of an almost impossibly high burden of proof for the resumption of executions—what Ryan called "moral certainty." This standard would ultimately set the stage for his clemency decision. Finally, there is the emphasis, even as he stopped all executions, on his "tough on crime" credentials. It is indicative of the political and cultural context in which acts of mercy now exist that Ryan did not present the moratorium as motivated by, or as a form of, compassion for the condemned. In this way Ryan's initial step on the road to clemency was framed as fully compatible with a commitment "to help police and prosecutors keep dangerous criminals off the streets."

Unlike the controversy that would surround the clemency decision, there was surprisingly little in the way of outright public opposition in the immediate aftermath of the moratorium.²⁹ As the *Chicago Sun-Times* editorialized, "The moratorium is welcome—and long overdue,"³⁰ and many proponents of capital punishment quickly embraced it. Thus, Republican Senate President Philip Wood, longtime death penalty supporter and a key stumbling block in previous legislative efforts to impose a moratorium, said, "This is an opportunity for the legal community to review the death penalty process, not the death penalty."³¹ Democratic House Speaker Michael Madigan, another longtime death penalty supporter, praised Ryan's action. Finally, Attorney General Jim Ryan, one of the governor's most persistent critics, joined in support, saying that everyone involved in

administering the state's criminal justice system wants "to make sure capital punishment operates fairly."³²

Five weeks after announcing the moratorium, Ryan unveiled the membership of his Governor's Commission. Comprised of leading politicians, prosecutors, public defenders, and well-known citizens, the commission was charged to review the entire death penalty system and make recommendations with the goal of ensuring that no innocent person would ever again be sentenced to death in Illinois. Referring to that system, one of the commission's cochairs said at the time, "We've got to find out why it's flawed, in what way it is flawed . . . and how it can be corrected."³³

Two years later, as the Governor's Commission continued its work, and under the pressure of a growing federal investigation into allegations of corruption against Ryan, he announced that he would not seek reelection. During this same period, he occasionally voiced his own doubts about capital punishment, openly admitting that he was struggling with this issue. As he put it in a speech to the Association of the Bar of the City of New York, "I once believed that there were crimes that were so heinous that the death penalty sentence was the only proper societal response. . . . I believed in the death penalty and I thought it was the right thing. So I gave some words of unqualified support that I regret."³⁴ Later, talking about the impending execution of Oklahoma City bomber Timothy McVeigh, Ryan said, "I couldn't throw the switch on this guy, McVeigh, and he was a terrible guy. . . . I think there may be cause for the death penalty for a guy like him, but I don't know."³⁵

At the same time, the terrain on which the death penalty debate proceeded in Illinois continued to shift. Thus in early 2001 the Illinois Supreme Court announced a revision of the Rules of Professional Conduct that guided capital litigation. It adopted new rules and amended existing ones to require, among other things, that prosecutors provide notice of intent to seek the death penalty within 120 days of arraignment and identify all evidence

favorable to the defense prior to trial, that judges who preside in capital cases receive special training, and that lead attorneys in capital cases have at least five years of criminal litigation experience and training in the preparation and trial of capital cases in a course approved by the supreme court.³⁶

THE ROAD TO CLEMENCY

The start of 2002 brought with it anticipation of the forthcoming report of the Governor's Commission. The *Chicago Tribune* noted that the commission was "preparing a report containing scores of reforms as well as a controversial vote to abolish capital punishment."³⁷ However, the newspaper predicted that the final report would not contain a recommendation to end the death penalty since such a move would be seen by commissioners as going beyond their charge.

Looking forward to the completion of the Governor's Commission's work, Ryan began to talk openly about clemency. At the University of Oregon in March, Ryan told his audience that he was reviewing the cases of all inmates on death row to determine if any should have their sentences commuted. "I believe," he said, "there are probably some people we can commute [*sic*]. Believe me, it's been a topic of discussion."³⁸ This was his first public acknowledgment of the possibility of clemency, and opponents of capital punishment seized on it to urge him to consider commuting all death sentences in Illinois.³⁹

In April the Governor's Commission issued its final report and recommendations. While stopping short, as the *Tribune* had correctly predicted, of urging abolition of the state's death penalty, the commission recommended eighty-five changes in the criminal justice system designed to improve the fairness and integrity of the death penalty system. Among other things, the commission suggested reduction of the list of twenty circumstances under which the death penalty could be imposed

to five; that executing the mentally retarded be prohibited; that all police interrogations be videotaped; that juries consider a defendant's history of physical and emotional abuse when sentencing; that death sentences be banned when a defendant is convicted with only a single witness, a prison informant, or an accomplice whose testimony is not corroborated with other evidence; that judges be allowed to overrule a jury decision to impose a death sentence; and that a statewide panel of three prosecutors, an attorney general's representative, and a retired judge review each state's attorney's decision to seek the death penalty.

Illinois lawmakers and public officials reacted to the commission's recommendations with caution, some worrying about the cost of implementing its proposed changes.⁴⁰ Death penalty opponents saw them as a back door to abolition. "It is an effort, brick by brick, rock by rock, stone by stone, to create more burdens and restrictions upon the prosecution to have them say, 'Oh, the heck with it, What's the use? I'll just pursue it as a regular murder.'" And from the start, the commission's report and recommendations fueled talk about clemency. As Bill Ryan, president of the Illinois Death Penalty Moratorium Project, put it, the Governor's Commission's report is "the strongest case ever for the Governor to do the right thing and commute the sentences of the 160 or so people on death row. They were all convicted under a system rife with corruption."⁴¹

Through the following months of summer, increasing numbers of clemency petitions were filed with the state's Prisoner Review Board, which is charged with receiving and reviewing them and presenting nonbinding, confidential recommendations to the governor. As more petitions were filed, families of murder victims began publicly to voice their opposition to the prospect that the governor might pardon or commute death sentences. As one put it, "Why do we have the jury system? Why do we have the system we have if you're going to have a man who happens to be governor, and he can, with a twist of his pen, change the whole thing?"⁴² Another said,

CHAPTER 1

We are the ones who have no rights as survivors. Our loved ones were not able to say which persons killed them. No. The death penalty is not going to bring our loved ones back, but it is a closure. People forget about the families that have to survive. None of us should have to go through this, but Governor Ryan is pushing this so he can go out with a big bang. How can he do it?

Newspaper commentators described the prospect of mass commutations as “appalling.”⁴³ Others urged the governor not to “reverse years of honest work of jurors and judges and prosecutors . . . [and] to think of the heartbreak, the renewed grief, such an act would bring to those who have already suffered more than anyone deserves to suffer.”⁴⁴

That autumn brought with it the start of hearings convened by the Prisoner Review Board on the clemency petitions. Around the same time, Ryan began a period of public equivocation on the question of whether he would entertain the idea of a blanket clemency. Either everyone should have their sentences commuted or no one should, Ryan suggested. He wondered out loud whether it would be fair or right for him to “pick and choose” those whose lives should be spared: “That’s why I have to determine whether it’s going to be for everybody or nobody. I think that’s probably what my decision is going to be. . . . How do you decide who’s guilty and who isn’t. The system right now is, you can flip a coin and determine who’s going to live and die.”⁴⁵

Despite Ryan’s ruminations about a possible all or nothing decision, the Prisoner Review Board went ahead with its hearings, held over a two-week period in Chicago and Springfield. As they began, critics again urged the governor not to put families of victims through the ordeal of the hearings if he was inclined to issue a blanket clemency. As one reporter noted, “Not since Pope John Paul II convinced Missouri Governor Mel Carnahan to spare the life of a triple murderer . . . has the issue of commuting sentences garnered such attention.”⁴⁶

The hearings themselves galvanized the state's attention, providing lead stories on local television news and in major newspapers. Against the abstract arguments of defense lawyers arguing about systemic flaws in the cases of their clients, families of victims presented gripping and emotionally compelling accounts of gruesome murders and of their shattered lives. Referring to those accounts and their impact, an advocate of blanket clemency said, "I would have to admit that we probably underestimated it. It's pretty much overpowering."⁴⁷ One newspaper described the twenty-three hearings held the first day as a "sad parade of victims' families, some of them wearing yellow ribbons in memory of their loved ones, saying they could hardly bear to again hear gruesome details of the cases."⁴⁸ Another reported that, "The issues that had defined the death penalty debate for more than two years—bad defense lawyering, police misconduct, the use of unreliable witnesses—have faded, at least for now."⁴⁹

Columnists drew unflattering comparisons between Ryan and governors whose clemency considerations were plagued by corruption,⁵⁰ or held him personally responsible for what they called an "absurd Theatre of Pain." They said that the hearings were "a fraudulent process aimed at legitimizing a foregone conclusion."⁵¹ The *Chicago Tribune* called them "disastrous" and worried that they had dealt "a political blow to the momentum of Illinois's reform movement."⁵² As the *Tribune* predicted, the package of reforms arising from the recommendations of the Governor's Commission that Ryan had so enthusiastically sent to the legislature went nowhere. They were bogged down in the controversy surrounding the clemency hearings, Ryan's lame-duck status, and the usual end-of-term legislative logjam.⁵³

As time went by, the chorus of criticism of the hearings included members of the Prisoner Review Board and witnesses testifying before it.⁵⁴ Many questioned Ryan's motives. "I really wish Governor Ryan was sitting here today and look[ing] in the eyes of the victims' families and see[ing] the hurt he's causing," one witness said. "He's using these victims' families as pawns in the debate on the death penalty."⁵⁵

CHAPTER 1

During and after the hearings Ryan was the subject of escalating pressure from all sides. In November and December 2002, first one group then another weighed in on the question of whether Ryan should commute any or all death sentences.⁵⁶ In response, he said that he had “‘pretty much ruled out’ switching every death sentence to life in prison.”⁵⁷

CLEMENCY AS MERCY BEYOND LAW

When Ryan eventually announced his clemency, pardoning a few, commuting many sentences, and sparing the lives of the condemned, he exercised one of the great prerogatives of sovereignty. Indeed the original definition of “sovereignty” in the West comes from the Roman law maxim—*vitae et necis potestatem*—the power over life and death. Thus in the opening sentence of the final section of volume 1 of the *History of Sexuality*, Michel Foucault says that “for a long time, one of the characteristic privileges of sovereign power was the right to decide life and death.”⁵⁸ The Anglo common-law tradition also contains elements of such a definition. The great English seventeenth-century common-law authorities, like Lord Coke, even as they tried to curb and contain such a power, acknowledged its existence, particularly for the new colonies attained by conquest. Hence in *Calvin’s Case* Lord Coke suggested, “for if a King come to a Christian Kingdom by conquest, seeing that he hath *vitae et necis potestatem*, he may at his pleasure alter and change the laws of that kingdom.”⁵⁹ In a modern constitutional democracy, the power over life and death is no longer associated with a king or a single authority. But as the continuing existence of capital punishment in the United States reminds us, that power is far from extinguished.

The context for the exercise of that power is, of course, quite different today than it was in the seventeenth century or even in the early twentieth century. Under the twin pressures of glob-

alization and what Foucault calls “governmentality,”⁶⁰ state sovereignty and its prerogatives seem less secure, or at least more complicated, than they have been in the past. Just as the formation of nation-states was one of the defining characteristics of an earlier era, their rapid and often radical transformation is one of the defining characteristics of ours. Today state forms throughout the world alter and adapt, adding new functions, shedding old ones, refining institutional processes, developing new alliances within and beyond national borders, sometimes increasing democratic tendencies, sometimes weakening them. “There is a growing view, approaching conventional wisdom in some quarters, that the power of the nation state is being eroded by globalization. . . . [T]here is little doubt that the accelerating pace of structural transformations of the global economy places increasing strain on the adaptive capacity and hence the legitimacy of governments.”⁶¹

The political theorist William Connolly lists “nonstate terrorism, the internationalization of capital, the greenhouse effect, acid rain, drug traffic, illegal aliens, the global character of strategic planning, extensive resource dependencies across state boundaries, and the accelerated pace of disease transmission across continents” as factors that “signify a widening gap between the power of the most powerful states and the power they would require to be self-governing and self-determining.”⁶² This gap, in turn, creates a dilemma for state sovereignty by undermining “the state’s self-representation as an agency that is capable of efficaciously translating the will of the democratic electorate into coherent public policy.”⁶³

In addition, as Foucault famously warned, “in political thought and analysis, we still have not cut off the head of the king.”⁶⁴ He advocated a theoretical beheading so that attention could shift to developments of the late modern era in which the state loses whatever monopoly it has on effective power in, and over, society. Governmentality designates a broad array of technologies—some public, some private, some official, some unofficial, some located in and around the state, some operating more or less

autonomously from it. These technologies of power are characterized by a convergence of “the constitutional, fiscal, organizational and judicial powers of the state . . . (and by) endeavors to manage economic life, the health and habits of the population, the civility of the masses, and so forth.”⁶⁵ The concept of governmentality directs attention to “the proliferation of alliances between state and nonstate bearers of expertise and authority aimed at regulating the conduct of diverse populations.”⁶⁶

Sociologist Nikolas Rose characterizes this proliferation of alliances as involving a shift from the social state to advanced liberal values—leading, in effect, to “a reconstruction of subjectivity”: “National and international competitiveness,” he notes, “was recoded, at least in part, in terms of the psychological, dispositional, and aspirational capacities of those who make up the labour force. Thus each individual is solicited as a potential ally of economic success.”⁶⁷ In addition, neoliberal values seek to transform states by introducing market values into public processes. *Laissez-faire* once meant keeping the state out of the market; today neoliberalism means bringing the market into the state and transforming citizenship into another means for expressing and obtaining preferences. Just as competition is good within the market so too competition within and among state agencies is, in the neoliberal pantheon, something to be encouraged.

While globalization puts increased pressure on state sovereignty from outside its boundaries, governmentality and neoliberalism create pressure from within. Under these pressures, as political theorist Timothy Kaufman-Osborn says, “the authority of the late liberal state is now unsettled.” And where sovereignty is most fragile, as it is today, dramatic symbols of its presence, like capital punishment, may be most important. The maintenance of the death penalty is, one might argue, essential to the demonstration that sovereignty still resides in nation-states. At a time when citizens are skeptical about the governing capacities of states, the death penalty provides one arena in which the state can redeem itself by taking action with clear and popular results.

Under pressure, state actors try to mobilize premodern symbols of sovereignty, one of the most important of which is the death penalty. They seek to “substantiate (the state’s) mystical claim to sovereign authority via the carefully orchestrated drama of political power that is an execution.”⁶⁸ Because a state unable (or unwilling) to execute those it condemns to die would seem too impotent to carry out almost any policy whatsoever, clemency, Ryan’s act notwithstanding, has little place. In the drama of state sovereignty under conditions of globalization and governmentality, one form of prerogative—clemency—gives way before another: execution.

Much has been said and written about the power to kill within the confines of modern law;⁶⁹ death has been regarded as of a different order from other punishments, as the most robust and terrifying of law’s dealings in pain and violence.⁷⁰ Such a sustained focus on the right to impose death sometimes eclipses the essential corollary of *vitae et necis potestatem*: the sovereign right to spare life.⁷¹ In a modern political system this power to spare life remains in the form of executive clemency.⁷² Executive clemency in capital cases is distinctive in that it is the only power that can *undo death*—the only power that can prevent death once it has been prescribed and, through appellate review, approved as a legally appropriate punishment.

Clemency is a general term referring to the legal authority of an executive to “intervene in the sentencing of a criminal defendant. . . . It is a relief imparted after the justice system has run its course.”⁷³ Clemency is the reduction of punishment that is authorized by law. That it provides “relief” from legal justice strictly construed reminds us that not only has clemency traditionally been an important element of sovereign power, but it often has also been a vivid expression of mercy. As the law professor Robert Weisberg says, “the commutation of a death sentence (is) the most dramatic example of mercy.”⁷⁴ Long ago William Blackstone described the relation between clemency and mercy by noting that the power to spare lives was “one of the great advantages of monarchy in general;

that there is a magistrate, who has it in his power to extend mercy, whenever he thinks it is deserved: holding a court of equity in his own breast, to soften the rigour of the general law, in such criminal cases as merit an exception from punishment.”⁷⁵

Recently scholars have tried to chart mercy’s complex relations to forgiveness on the one hand and justice on the other,⁷⁶ some seeing irreconcilable tensions,⁷⁷ with others seeking to accommodate mercy with the virtues of forgiveness or the demands of justice.⁷⁸ In all of those efforts, certain aspects of mercy, the kind of mercy that may be shown in clemency, stand out. “Mercy is part of a larger notion of ‘charity.’ . . . Mercy entails a decision . . . either to forgo a right to punish or to reduce punishment because of compassion. . . . Mercy mitigates the punishment that an offender deserves. . . . Mercy is not earned or deserved but is given freely.”⁷⁹ Charity, compassion—these moral sentiments are the essence of mercy and provide the impetus for the work it does in giving criminals less than they deserve.

Thus clemency has a contingent, not necessary, relation to mercy. The former may arise from, or express, a variety of sentiments of which mercy is only one. It may arise, as we will see, from a desire to correct injustices, spare the innocent from undeserved punishment, reward political allies, ameliorate political conflict, and so forth. Mercy, unlike clemency, always entails a particular motive and feeling toward the recipient: compassion (literally feeling “with” the other). The outcome of clemency and mercy is the same—the forgoing of some level of punishment—but mercy implies a particular orientation and relationship between grantor and grantee.⁸⁰

The idea that clemency and mercy can be given (or withheld) “freely,” together with Blackstone’s “court of equity” language, highlight their complex and unstable relationship to law. Blackstone was undoubtedly thinking of the actual courts of equity in his time. They developed in distinction to the common-law courts with their elaborate, even Byzantine, system of rules, pleadings, and writs. And although by the time Blackstone wrote

the *Commentaries*, equity had hardened into law, he knew well the common understanding that “Chancery was not a court of law but a court of conscience . . . (and) the essence of equity as a corrective to the rigour of laws was that it should not be tied to rules.”⁸¹ While the language of desert properly could be attached to it, the calculus of desert in clemency cannot be governed by rules; it remains purely discretionary.⁸²

Like all sovereign prerogative, clemency’s efficacy is bound to its very disregard of declared law. Thus more than half a century before Blackstone, John Locke called prerogative the “power to act according to discretion, for the public good, without the prescription of the Law, and sometimes even against it. . . . [T]here is a latitude left to the Executive power, to do many things of choice, which the Laws do not prescribe.”⁸³ And mercy too extends beyond the reach of law. “The Rulers,” Locke observed, “should have a Power . . . to mitigate the severity of the Law, and Pardon some Offenders: For the end of Government being the preservation of all, as much as may be, even the guilty are to be spared, where it can prove no prejudice to the innocent.” Following Locke, John Harrison has recently defined clemency as “the power of doing good without a rule.”⁸⁴

Though the equity of which Blackstone speaks, or Locke’s power to mitigate, springs from the body of sovereignty, as if originating well beyond any place the law could know or inhabit, the sovereign’s right to intervene, like equity itself, “depends on the law getting a chance to get the right result; his actions are . . . derivative of the law, secondary, complementary, and equitable.”⁸⁵ “Derivative,” “secondary,” “complementary,” this language situates clemency at a fault line in the fabric of legality, waiting to do the work that law requires. While it entails the willing suspension of the right to punish, clemency serves, even as it mitigates punishment in an individual case or a group of cases, to affirm the general right to punish that law asserts. In this way clemency contributes to law’s power and legitimacy even as it poses a challenge to it. It is, in this sense, law’s necessary other.

What is this necessary other that the law seems incapable of holding within itself, the possibility of which nonetheless must always be present offstage? Pardon is like other prerogatives, which Locke had defined tout court as the embodiment of a necessary discretion, but it is also for Blackstone the “most amiable” of all the prerogative powers, as it is the only one that exercises mercy and compassion. And yet, crucially, Blackstone is aware of the possible dangers of designating the source of mercy and compassion outside the law: “Pardons (according to some theorists) should be excluded in a perfect legislation, where punishments are mild but certain: for that clemency of the prince seems a tacit disapprobation of the laws.” Blackstone was willing to run such a risk rather than introduce an even more “dangerous power” by permitting judges and juries to apply the “criminal law by the spirit instead of the letter.”⁸⁶

Blackstone’s reading of the prerogative clarifies, in a manner strikingly like the language of contemporary debates, essential quandaries in the act of clemency and the trial of mercy. For as he shows, it is certainly possible to judge a penal system by the standards of mercy and compassion—that is, one can speak of a penal system as more or less “*merciful*.” But there remains something in the act of *mercy* that invokes the ineradicable and perhaps necessary gap between law and justice, letter and spirit, rules and discretion.

ON THE TRIAL OF MERCY: GEORGE RYAN ACCUSED

Until George Ryan’s clemency, the long-held constitutional right of chief executives to spare life seemed to have “died its own death, the victim of a political lethal injection and a public that overwhelmingly supports the death penalty.”⁸⁷ Capital clemency also has been a victim of the rejection of rehabilitation as the guiding philosophy of criminal sentencing and the increasing politicization of issues of crime and punishment since the 1960s. Thus, at the outset of his administration,

Texas governor George W. Bush embraced a standard for clemency that all but ensured that few if any death sentences would be seriously examined. Writing about Bush's views, Alan Berlow noted,

"In every case," [Bush] wrote in *A Charge to Keep*, "I would ask: Is there any doubt about this individual's guilt or innocence? And, have the courts had ample opportunity to review all the legal issues in this case?" This is an extraordinarily narrow notion of clemency review: it seems to leave little, if any, room to consider mental illness or incompetence, childhood physical or sexual abuse, remorse, rehabilitation, racial discrimination in jury selection, the competence of the legal defense, or disparities in sentences between co-defendants or among defendants convicted of similar crimes. Neither compassion nor "mercy," which the Supreme Court as far back as 1855 saw as central to the very idea of clemency, is acknowledged as being of any account. . . . During Bush's six years as governor 150 men and two women were executed in Texas—a record unmatched by any other governor in modern American history. . . . Bush allowed the execution to proceed in all cases but one.⁸⁸

Similarly, then-governor Bill Clinton explained his reluctance to grant clemency by saying, "The appeals process, although lengthy, provides many opportunities for the courts to review sentences and that's where these decisions should be made."⁸⁹

Today the Bush and Clinton views are the norm.⁹⁰ Mercy has been put on trial, and it has been found wanting. Governors are reluctant to substitute their judgment for those of state legislators and courts and, in death cases, to use clemency as an expression of mercy.⁹¹ They seek, in Jonathan Simon's evocative phrase, to "govern through crime," to turn tough-on-crime policy into a strategy for building coalitions and strengthening the state.⁹² Many have used the death penalty in their campaigns, promising more and quicker executions.⁹³ Simon's work suggests that the political power of governors depends

in large part on their power to mobilize the state around crime fears. In numerous states and on many occasions the death penalty has been the venue for the assertion of a governor's power by campaigning for, or signing into law, a new death penalty statute . . . or signing a death warrant authorizing the execution of a particular prisoner. Clemency provides another occasion when, in effect, the Governor can assert his or her support for the death penalty (and empathy with ordinary citizens) by rejecting clemency.⁹⁴

Perhaps because of the current political climate or his personal convictions, or both, Ryan's clemency did not focus on the morality of the death penalty as a punishment. Instead his decision was largely rooted in a critique of its application and administration.⁹⁵ By reducing punishment, he fulfilled one of the requirements of mercy, yet he showed no compassion toward those whose lives he spared. Instead of marking a revival of mercy, Ryan acted within the Bush-Clinton model of executive clemency, embracing what Justice Rehnquist has called a "fail safe" conception of the prerogative of power.⁹⁶ As a result, Ryan's commutations were fully compatible with our era's cramped conception of clemency.

Nonetheless Ryan's action generated intense controversy.⁹⁷ Interestingly, the distinction between rejecting capital punishment per se and criticizing its application was lost upon some who supported Ryan's decision.⁹⁸ "Governor Ryan has moved this nation in the direction of the other world democracies. The U.S. has been alone in the world in its use of the death penalty," said former Illinois senator Paul Simon. "What the families of the victims want is revenge, and that's understandable. But the role of government can't be about revenge. The role of government is to protect society—and there is no evidence at all that the death penalty protects society."⁹⁹ A spokesperson for Amnesty International said Ryan's decision marked a "significant step in the struggle against the death penalty" and urged governors in U.S. states still implementing the death penalty to follow suit.¹⁰⁰

Neither Ryan's distinctions between opposition to the punishment and a more limited critique of the manner of its administration, nor his lack of compassion for the beneficiaries of his clemency, was of much solace to the victims' families. Cathy Drobney, whose daughter Bridget was murdered in 1985 by one of the people granted clemency, said of Governor Ryan, "He has killed them [the victims of those who had their sentences commuted] all over again."¹⁰¹ John Woodhouse's wife, Kathy Ann, was raped and murdered in 1992; when he learned of Ryan's decision, Woodhouse complained that the death penalty debate in Illinois had become very one-sided because it focused on offenders rather than the victims and the harm done to their families. "The problem is the system, not the sentences," said Woodhouse. "If it's true—and it seems to be true—that the system is jailing and executing innocent people, well, fix the system. They had years and years to fix the flaws in the system. But don't destroy the sentences. Don't let murderers off the hook. This makes a mockery of my wife's life."¹⁰²

Others were bitter. Seeing in Ryan's clemency an injury to themselves, they questioned his motivations. Sam Evans, whose sister and her children were murdered, complained, "He's seen to it that us and all the other families waiting will never have that final closure. . . . We've been robbed of our justice. He cannot state that there is any error whatsoever in our specific case. It was just wrong. There's no other way of putting it." Helen Rajca, whose two brothers were stabbed and shot to death in 1978, said, "I just think it's a political tactic. It's not right what he did. He's got too many things following him. This is just to blindside everyone from what he's done."¹⁰³ Or, as a newspaper article reviewing Ryan's term as governor put it, referring to the federal corruption probe that swirled around him and later resulted in his indictment for bribery and corruption, "Ryan is leaving office under such a cloud that his motives for commuting the sentences of all Death Row inmates will be debated

for years to come. Was it rooted in personal conviction or merely an attempt to add at least a little varnish to a badly marred legacy?"¹⁰⁴

Randy Odle, who lost five family members to a murder in 1985 committed by his cousin, said he might have been able to accept Ryan's decision if the governor had proceeded on a case-by-case basis. "There was never any question about Thomas Odle's guilt. He bragged about killing our family. He admitted it when the police arrived and he bragged about it in jail. This decision mocks our judicial system, and tells the jurors they did not do their jobs."¹⁰⁵

Such criticism was not confined to the victim community.¹⁰⁶ In an editorial, the *Chicago Sun-Times* said that the governor reacted to the disturbing reality of wrongful conviction in Illinois with what it called "wrongful leniency." The newspaper criticized him for not issuing clemencies on a case-by-case basis. "We must bear in mind that there are also guilty people on Death Row—the majority. And it is not justice if their punishments are set aside because of the innocence of others or flaws in the system unrelated to their cases."¹⁰⁷ The Cook County state's attorney urged the legislature to limit the governor's clemency power,¹⁰⁸ and the attorney general and many state's attorneys filed suit alleging that Ryan did not have the authority to "grant clemency to 34 death row inmates who never sought to have their sentences reduced to life or for prisoners whose death sentences had been thrown out and who were awaiting resentencing."¹⁰⁹

State Senator William Haine, who had helped convict two of those Ryan freed from death row during his tenure as a state's attorney, provided one of the most extensive critiques. He called Ryan's decision "a great wrong (and) . . . an extraordinary and . . . breathtaking act of arrogance." Advancing his own theory of clemency, Haine argued that it was meant to be used "sparingly to prevent clear miscarriages of justice" and "for an occasional act of mercy."¹¹⁰ His analysis pointed in two somewhat different directions, one having to do with the place of

clemency in a democratic political system, the other with its impact on the rule of law.

With regard to the first, “George Ryan,” he said, “has severed the bond of trust between those who hold great power on behalf of the people and the people themselves.”¹¹¹ Like Haine, other commentators also called Ryan’s act antidemocratic. “Illinois Gov. George Ryan’s commutation of the death sentences of all 167 inmates in Illinois prisons,” columnist George Will wrote, “is another golden moment for liberals that underscores how many of their successes are tarnished by being explicitly, even exuberantly, anti-democratic.” Will compared Ryan’s act to the Supreme Court’s abortion decision, “a judicial fiat that overturned the evolving consensus on abortion policy set by 50 state legislatures.” Ryan’s clemency decision will be remembered, Will continued, for its “disregard of democratic values” and “cavalier laceration of the unhealable wounds of those who mourn the victims of the killers the state of Illinois condemned.”¹¹²

As to the rule of law, Senator Haine observed that Ryan “profoundly insulted his subordinates in the system—the state’s attorneys, the police officers, the jurors and judges—with his pen and his reckless language. . . . [H]e may have irreparably injured the law itself. . . . It’s not in the tradition of Abraham Lincoln, who believed in a government of law, not of men.” Haine was angered that Ryan used his gubernatorial power to circumvent the state’s legal system. “Even those who are opposed to the death penalty as an option must stand shocked at the use of raw power to cut down the law itself, the Constitution, to get at the end they desire—a state without a death penalty. . . . If they cheer him at Northwestern Law School (where Ryan announced his clemency decision), they are cheering the raw exercise of power against the law itself.”

While the governor has “unfettered discretion,” Haine continued,

The bond between the governor and the citizens is that these great powers are to be used with constraint consistent with the

law. George Ryan has, by his conduct, breached that ethic, which is as old as the Republic itself. . . . Every citizen should see this as an abuse of power. This was not intended by the framers of our Constitution. . . . I can't think of any analogy to compare it to other than the Civil War, when senators and military officers abandoned their oaths and took up arms against the United States. In the history of the Republic, I can't compare it to anything else, an act of this nature, where you simply take the position that the law doesn't mean anything.¹¹³

In this flood of criticism, two recurrent themes stand out: Ryan's personal arrogance, and the antidemocratic quality of his actions—an almost illegal usurpation of power. Perhaps such assertions are to be expected from those who so strongly disagree with Ryan's action, but what is striking about these criticisms is how at odds they are with the tone and content of Ryan's explanation for his decision. As we will see in chapter 5, that explanation is one marked by a language of humility and an effort to justify his action in terms of democratic responsibility.

In the chapters that follow, I move from Ryan's clemency to examine larger questions of sovereignty and state killing, clemency and constitutional democracy. I try to situate his decision in history, jurisprudence, and the philosophical debate surrounding clemency, showing the roots of today's trial of mercy. I argue that clemency in capital cases is in decline as political leaders respond to forces—for instance, victims rights and retributivism—that are increasingly powerful in American political culture. These forces reject mercy and compassion as legitimate responses to criminals. Thus even governors who grant clemency (such as George Ryan) do so in as unmerciful way as possible. I regret this trend and argue for recoupling clemency and mercy. Yet I recognize that there is something deeply mysterious and risky about mercy and its exercise. Learning to live comfortably with mystery and risk is perhaps the most important opportunity that today's trial of mercy offers.

In chapter 2 I look first at the history of gubernatorial clemency in capital cases in the twentieth century. Here I revisit the theme of clemency's recent decline and of the rejection of mercy that this decline reflects. This chapter provides background for Ryan's act, presenting three case studies of the use of clemency in capital cases. It examines the motivations of the governors granting clemency, the controversies surrounding their actions, and the way those controversies speak to contemporary concerns about clemency's lawlessness and compatibility with constitutional democracy.

Chapter 3 takes up Haine's critique of Ryan, "the raw exercise of power against the law itself." It explores the legal status of clemency in the United States for what it illustrates about the nature and limits of law. I see in the history of law's treatment of clemency an anxiety generated by its recognition of this power as necessarily beyond the reach of legal rules. As territorial boundaries erode in their distinctiveness, or become more permeable under the pressure of globalization, the temptation to seek other kinds of demarcation, what might be called "conceptual borders," intensifies.¹¹⁴ Conceptual borders like those marked by adherence to the rule of law, mark a cultural and political geography, and are used in ongoing efforts to separate "self" from "other," "our nation" from "theirs."¹¹⁵ Such borders, as law professor Margaret Montoya argues, are today particularly important as "an epistemic space for the exploration of cultural production."¹¹⁶ More than ever they require critical examination.

Turning to mercy and executive clemency and their treatment in and by law provides one arena for such an effort, because, as I argue in chapter 3, here we see law authorizing a kind of lawlessness, or acknowledging the limits of the ability of rules to tell officials how, when, and why they may exercise the power accorded to them. In the jurisprudence of clemency we see law constructing and policing its own boundaries, boundaries within which, on its own account, prerogative power cannot be contained. In this jurisprudence we find law's borderland and, as in

all borderlands, uncertainty and anxiety as well as possibility and opportunity.¹¹⁷

I develop this argument through an examination of cases from 1833, the year the first clemency case reached the U.S. Supreme Court, to the present, legal challenges brought after Ryan's decision. In addition, I discuss the theories of philosophers Giorgio Agamben and Jacques Derrida as they illuminate clemency jurisprudence. The cases and theory suggest that clemency may contain in itself something—namely mercy—that is beyond the complete discipline or domestication of law, something essentially lawless. It is this lawlessness that law both authorizes and finds troubling.

Chapter 4 moves from history and jurisprudence to consider the recent rejection of rehabilitation as a governing theory of punishment and its consequences for a “redemptive” view of clemency. In so doing, it discusses some of the most important philosophical critiques of a mercy-based conception of clemency. In these critiques, scholars have responded to the mysteries and risks of mercy, and to the anxiety generated by clemency's ambivalent legal status, by offering what they see as a set of stabilizing prescriptions, philosophies, and guidelines to govern mercy and clemency. Taking off from Justice Rehnquist's idea that clemency should be used to remedy “miscarriages of justice,” they have elaborated a retributive theory of clemency or, perhaps more accurately, tried to harmonize clemency with a retributive theory of punishment. Chapter 4 considers both the appeal and dangers of a retributive theory of clemency as well as efforts to respond to retributivism by seeking to rehabilitate mercy. I argue that law requires mercy of the kind that clemency can provide, that the dangers of a mercy gone bad are dangers that cannot be eliminated without driving mercy itself from the system of state killing.

Chapter 5 returns to Governor Ryan, taking a close look at what he said to justify his clemency and treating his rhetoric as an important event in the trial of mercy that his act precipitated. In this chapter I show how Ryan's decision was situated in an

increasingly victim-centered political and legal environment as well as how it invokes and depends on retributivism. He tried to express a commitment to the interests of the victimized, and yet he embraced a retributive theory of clemency. In the first he sought to authenticate his act by identifying himself as a suffering subject, able in his suffering to know the pain that families of murder victims suffer at the hands of criminals and that they would suffer at his hands. In the second he painted himself as a reluctant actor, seeking to ensure that justice is done in a failing justice system and a political system in paralysis. This chapter argues that the embrace of victims and the logic of retributivism cannot coexist, and that Ryan's deployment of these contradictory justifications left little room for genuine compassion.

I end chapter 5 by arguing that, despite his inability to reconcile irreconcilable forces, Ryan's act was well within the bounds of contemporary understandings of clemency. In his preemptive strike against capital punishment, Ryan did the right thing. Yet far from disrupting the essential rhythms of American politics, in its emphasis on suffering and victimization, in its embrace of retributive principles, and in its demonstration of "energy in the executive," it gave new voice to ongoing trends in our political and cultural lives. If Ryan's was a form of clemency without compassion, it responded to the temper of our times even as it reverberated through our national debate about capital punishment. It was controversial because it seemed to be a lawless and arrogant act. I argue that if Ryan's use of clemency was an "injury to law itself," it was an injury that the law authorizes and requires, a form of lawful lawlessness without which the law would indeed be rendered meaningless.

In the concluding chapter I suggest that George Ryan's action reveals the precarious state in which clemency currently exists. It put mercy on trial and highlighted the trials of mercy in the killing state. Here I note that clemency has always needed a vigorous defense in the United States, and I discuss the kind of arguments that governors typically have used to defend it. I explore the fears that clemency and mercy evoke in a society dedicated to

CHAPTER 1

the rule of law and equal treatment under the law, and the way contemporary pardon tales speak to those fears. I argue that mercy and clemency always involve risks. Taking these risks means acknowledging the limits of law and justice, and of their ability to guarantee genuine moral deliberation rather than arbitrariness, fairness rather than discrimination.