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# Putting a Square Peg in a Round Hole: Victims, Retribution, and George Ryan's Clemency

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# PUTTING A SQUARE PEG IN A ROUND HOLE: VICTIMS, RETRIBUTION, AND GEORGE RYAN'S CLEMENCY

AUSTIN SARAT\*

*On January 11, 2003, Governor George Ryan of Illinois launched the broadest attack on the death penalty in decades, using his clemency power to empty his state's death row of 167 condemned inmates. This Article examines what Ryan's rhetoric and the justifications behind it reveal about victims' rights, retributive justice, and legality. It places Ryan's decision in the context of gubernatorial exercises of clemency in the twentieth century and shows how, until Ryan, the use of clemency in capital cases had atrophied. In opposition to many of Ryan's critics, it argues that Ryan's rhetoric was impelled by democracy's fragile sovereignty and by a limited view of clemency, one not at all hostile to legality. Indeed, what Ryan did lends itself easily to positions taken by conservative politicians and judges who see retributive principles providing the only legitimate basis for executive clemency in America's capital punishment system. Yet, in the end, Ryan's decision is caught in the crossfire of two of our society's most powerful but opposing forces, the claims of victims and the demands of retribution, forces that he could neither ignore nor reconcile.*

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[T]hough the victim occupies the unhappy special position of victim and is owed compensation, he is not owed punishment.

Robert Nozick<sup>1</sup>

### INTRODUCTION

On January 11, 2003, Governor George Ryan of Illinois emptied that state's death row by exercising his clemency powers under the state constitution, first pardoning four and then commuting 167 condemned inmates' sentences in the broadest attack on the death penalty in decades.<sup>2</sup> Ryan's act was the single sharpest blow to capital punishment since the United States Supreme Court declared it unconstitutional in 1972.<sup>3</sup> It was also a dramatic reminder of the powers of chief executives at the state and federal level to grant clemency,<sup>4</sup> and of the role of two important forces—the claims of victims and the demands of retributive justice—in contemporary American law and politics.

While Ryan did not do what the victims' community wanted him

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1. ROBERT NOZICK, ANARCHY, STATE, AND UTOPIA 138 (1974).

2. On January 11, 2003, Ryan commuted 167 death sentences to life without parole. Jeff Flock, "Blanket Commutation" Empties Death Row: Incoming Governor Criticizes Decision, CNN.com (Jan. 13, 2003), at <http://www.cnn.com/2003/LAW/01/11/illinois.death.row> (on file with the North Carolina Law Review). The previous day he pardoned four death row inmates. Another three inmates had their sentences shortened to forty year terms. Robert Anthony Phillips, *Ryan Commutes All Death Sentences in Illinois*, The Death House.com (Jan. 11, 2003), at [http://www.thedeathhouse.com/deathhousenewfi\\_352.htm](http://www.thedeathhouse.com/deathhousenewfi_352.htm) (on file with the North Carolina Law Review).

3. *Furman v. Georgia*, 408 U.S. 238, 239–40 (1972); see James W. Marquart & Jonathan R. Sorensen, *Institutional and Post-Release Behavior of Furman-Commuted Inmates in Texas*, 26 CRIMINOLOGY 677, 677–93 (1988) (noting that *Furman* caused the reduction of approximately 600 death sentences across the nation to life in prison).

4. The Battered Women's Clemency Project at the University of Michigan describes executive power to grant clemency this way:

Clemency is a general term for the power of an executive to intervene in the sentencing of a criminal defendant to prevent injustice from occurring. It is a relief imparted after the justice system has run its course. . . . The U.S. Constitution gives the President the power to grant clemency. In 35 states, the governor can make clemency decisions directly, or exercise this power in conjunction with an advisory board. In five states, boards make clemency decisions, and in 16 states, the power to grant clemency is shared between the governor and an advisory board.

SARAH GERAGHTY, CLEMENCY FOR BATTERED WOMEN IN MICHIGAN: A MANUAL FOR ATTORNEYS, LAW STUDENTS AND SOCIAL WORKERS 12 (1998) (citations omitted), [http://www.umich.edu/~clemency/clemency\\_manual/manual\\_chapter02.html](http://www.umich.edu/~clemency/clemency_manual/manual_chapter02.html) (on file with the North Carolina Law Review).

to do, his justificatory rhetoric paid homage—perhaps undue homage—to victims. While he broadened and complicated traditional conceptions of victimhood, he nonetheless used his clemency decision to identify with and express respect for victims. Yet he also sought refuge in the principles of retributive justice. This Article argues that Ryan tried to reconcile the irreconcilable by combining fidelity to victims and their suffering with adherence to retribution, and by trying to be responsive to both private pain and the strict dictates of public justice. His failure to make a square peg fit in a round hole was symptomatic of the complex and contradictory pulls of victims' rights and retribution in our legal and political systems.

Perhaps unsurprisingly, when Governor Ryan claimed to feel the pain of the victims and then seemed to ignore it, he enraged them and left them feeling like they had suffered another undeserved injury. Reacting to Ryan's clemency decision, Cathy Drobney, whose daughter Bridget was murdered in 1985 by one of the people granted clemency, accused Governor Ryan of gross insensitivity to murder victims and their families. Referring to the victims whose killers had their sentences commuted, she said, "[Governor Ryan] has killed them all over again."<sup>5</sup> 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.<sup>6</sup> Woodhouse said:

The problem is the system, not the sentences . . . . 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.<sup>7</sup>

Randy Odle, whose cousin murdered five other members of his family in 1985, also criticized Ryan for acting unjustly.<sup>8</sup> He stated, " 'This decision mocks our judicial system, and tells the jurors they did not do their jobs.' "<sup>9</sup>

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5. See Associated Press, *Illinois Governor's Blanket Pardon Spares Lives of 167 Condemned Inmates*, FoxNews.com (Jan. 11, 2003), at <http://www.foxnews.com/story/0,2933,75170,00.html> (on file with the North Carolina Law Review).

6. Claire O'Brien, *Ryan: Life over Death: Over Protests of Victims' Families, Governor Commutes All Sentences*, S. ILLINOISIAN (Carbondale, Ill.), Jan. 11, 2003, at 1A, available at <http://www.stopcapitalpunishment.org/coverage/45.html>.

7. *Id.*

8. *Id.*

9. *Id.*

Such criticism was not confined to the victim community. Rod Blagojevich, Ryan's successor, said:

I support [Governor Ryan's] decision on the moratorium. . . . But I disagree with his decision to provide blanket clemency. . . . There is no one-size fits all approach to this.<sup>10</sup>

Cook County State's Attorney Richard Devine joined the attack on Ryan, combining the argument about victims with Blagojevich's complaint about the injustice of the mass clemency. He said:

All of these cases would have been best left for consideration by the courts which have the experience, the training and the wisdom to decide innocence or guilt. . . . By his actions today the governor has breached faith with the memory of the dead victims, their families and the people he was elected to serve.<sup>11</sup>

State Senator William Haine, who, during his tenure as a state's attorney had helped convict two of those whom Ryan freed from death row, provided one of the most extensive critiques.<sup>12</sup> He called Ryan's clemency decision "a great wrong . . . [and] an extraordinary and . . . breathtaking act of arrogance."<sup>13</sup> Pointing in two somewhat different directions, Haine argued that clemency was meant to be used "sparingly to prevent clear miscarriages of justice" and "for an occasional act of mercy."<sup>14</sup> "George Ryan," he continued, "has severed the bond of trust between those who hold great power on behalf of the people and the people themselves."<sup>15</sup>

Senator Haine observed:

[Ryan] may have irreparably injured the law itself. . . . He has 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.<sup>16</sup>

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

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10. *Reactions to Death Row Commutations*, CNN.com (Jan. 12, 2003), at <http://www.cnn.com/2003/LAW/01/12/deathrow.quotes/> (on file with the North Carolina Law Review).

11. Phillips, *supra* note 2.

12. Steve Whitworth, *Haine Enraged by Governor's Move*, TELEGRAPH (Alton, Ill.), Jan. 12, 2003, at A1, available at <http://www.stopcapitalpunishment.org/coverage/44.html>.

13. *Id.*

14. *Id.*

15. *Id.*

16. *Id.*

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.<sup>17</sup>

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.<sup>18</sup>

Like Haine, other commentators also called Ryan's act anti-democratic. “Illinois Gov. George Ryan's commutation of the death sentences of all 167 inmates in Illinois prisons,” the columnist George F. Will wrote, “is another golden moment for liberals that underscores how many of their successes are tarnished by being explicitly, even exuberantly, anti-democratic.”<sup>19</sup> Will compared Ryan's act to the Supreme Court's abortion decision,<sup>20</sup> stating that it was “a judicial fiat that overturned the evolving consensus on abortion policy set by 50 state legislatures.”<sup>21</sup> 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.”<sup>22</sup>

This Article examines Ryan's clemency announcement,

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17. *Id.*

18. *Id.* For an assessment and critique of the argument that clemency is a lawless act, see Austin Sarat & Nasser Hussain, *On Lawful Lawlessness: George Ryan, Executive Clemency, and the Rhetoric of Sparing Life* 9–22 (2004) (unpublished manuscript, on file with the North Carolina Law Review).

19. George F. Will, Editorial, *Unhealable Wounds*, WASH. POST, Jan. 19, 2003, at B7.

20. *Roe v. Wade*, 410 U.S. 113, 164–67 (1978).

21. Will, *supra* note 19.

22. *Id.*

interestingly entitled “I Must Act,”<sup>23</sup> for what it says about victims’ rights, retributive justice, and legality. Part I looks in greater depth at the tension between the principles of retributive justice and the claims of victims. Part II places Ryan’s decision in the context of gubernatorial exercises of clemency in the twentieth century and shows how the use of clemency in capital cases has atrophied. Part III looks in detail at “I Must Act” for what it reveals about the justifications for Ryan’s clemency decision, and argues that Ryan’s rhetoric is impelled by democracy’s fragile sovereignty and a limited view of clemency. This view is not at all hostile to legality; quite to the contrary, it lends itself easily to positions taken by conservative politicians and judges who see retributive principles providing the only legitimate basis for executive clemency in America’s capital punishment system. The Article concludes with the suggestion that Ryan’s decision was caught in the crossfire of two of our society’s most powerful opposing forces—the claims of victims and the demands of retribution—forces that he could neither ignore nor reconcile.

### I. RETRIBUTION AND THE CLAIMS OF VICTIMS

Modern legality is founded on an effort to make reason triumph over emotion<sup>24</sup> and to make punishments proportional in their severity to the crimes that occasion them.<sup>25</sup> Just deserts, not deterrence or rehabilitation, becomes the primary, if not the sole, norm governing punishment.<sup>26</sup> Immanuel Kant noted:

Only the Law of retribution (*ius talionis*) can determine exactly the kind and degree of punishment; it must be well understood, however, that this determination [must be made] in the chambers of a court of justice (and not in your private judgment). All other standards fluctuate back and forth and,

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23. Governor George Ryan, “I Must Act,” Speech at Northwestern University School of Law (Jan. 11, 2003), <http://www.deathpenaltyinfo.org/article.php?scid=13&did=551> (on file with the North Carolina Law Review).

24. See Susan A. Bandes, *Introduction*, in *THE PASSIONS OF LAW* 1, 7 (Susan A. Bandes ed., 1999).

25. See SUSAN JACOBY, *WILD JUSTICE: THE EVOLUTION OF REVENGE* 295 (1983).

26. See *id.* at 115 (“Insofar as humanly possible . . . law attempts to remove personal animus from the process of apportioning blame and exacting retribution. It is the removal of private animus . . . that distinguishes the rule of law from the rule of passion.”). See generally RICHARD G. SINGER, *JUST DESERTS: SENTENCING BASED ON EQUALITY AND DESERT* 11–25 (1979) (discussing and evaluating deserts approaches); ANDREW VON HIRSCH, *PAST OR FUTURE CRIMES: DESERVEDNESS AND DANGEROUSNESS IN THE SENTENCING OF CRIMINALS* 31–101 (1985) (describing the concept of desert and discussing its measurement).

because extraneous considerations are mixed with them, they cannot be compatible with the principle of pure and strict legal justice.<sup>27</sup>

Kant's suggestion that the determination of punishment must not be made in private judgments relegates the claims of victims to the margins of a just legal order. Yet, as Terry Aladjem observes, there is a tension built into the logic of retribution in the liberal state:

[T]he state is supposed to arise from the inclinations of individuals as they might be found in nature, but it must rescue them from the very same inclinations. . . . [A] vengeful "natural man" turns to the state as a place of appeal from the injustices of nature *and* from the excesses of his own revenge.<sup>28</sup>

This tension is illustrated in Robert Nozick's discussion of the demands of retributive justice.<sup>29</sup> Nozick identifies five attributes of retribution and five ways that it distances itself from the claims of private victims. First, retribution is only provided where there is a "wrong," while, on the other hand, the punishment that victims may seek is "for an injury or harm or slight and need not be for a wrong."<sup>30</sup> What counts in the realm of injury, harm, or slight is the private pain of the victim and not the intent of the person whose action caused that pain.

While "retribution sets an internal limit to the amount of punishment, according to the seriousness of the wrong," victims often recognize no such limits.<sup>31</sup> Nozick means that retributive punishment must be proportional to the wrong committed.<sup>32</sup> In addition, "the

27. IMMANUEL KANT, *METAPHYSICAL ELEMENTS OF JUSTICE* 138–39 (John Ladd trans., Hackett 2d ed. 1999) (1797).

28. Terry Aladjem, *Revenge and Consent: The Death Penalty and Lockean Principles of Democracy* 9, 16 (1990) (unpublished manuscript, on file with the North Carolina Law Review).

29. ROBERT NOZICK, *PHILOSOPHICAL EXPLANATIONS* 363–97 (1981); *see also* JOEL FEINBERG, *DOING AND DESERVING: ESSAYS IN THE THEORY OF RESPONSIBILITY* 95–118 (1970) (discussing the expressive, symbolic function of punishment); Hugo Adam Bedau, *Retribution and the Theory of Punishment*, 75 *J. PHIL.* 601, 601 (1978) (noting confusion in the scope, limitations, explanations, and justifications of retributive theory); John Cottingham, *Varieties of Retribution*, 29 *PHIL. Q.* 238, 240–41 (1979) (recognizing tension between traditional retributive theory and the more contemporary retributive notion that no one should be punished unless guilty and culpable).

30. NOZICK, *supra* note 29, at 366.

31. *Id.* at 367.

32. *See* Michael Davis, *Harm and Retribution*, 15 *PHIL. & PUB. AFF.* 236, 238–39 (Summer 1986), *reprinted in* *PUNISHMENT* 188, 190–91 (John Simmons et al. eds., 1995) (describing *lex talionis* as a principle that requires punishment to be proportional to the harm done). Kant describes the law of retribution thus: "[A]ny undeserved evil that you



agent of retribution,” Nozick tells us, “need have no special or personal tie to the victim.”<sup>33</sup> It is, of course, just this element of impersonality in retributive justice that causes discomfort and concern in the victims’ rights movement. The goal of victims and those who take up their cause is to re-personalize criminal justice so that the sentencer has to declare an alliance—with either the victim or the offender. Criminal sentencing thus becomes a test of loyalty.

As Nozick sees it, retributive justice involves no “emotional tone.”<sup>34</sup> The desire to experience a direct, immediate, passionate connection to the suffering of the criminal fuels the victims’ rights movement. Only when victims become agents in the suffering of the people responsible for their own suffering is a kind of social equilibrium reached. “The notion of paying back,” Miller argues, “makes no sense unless the victim or his representative is there to hit back. Under this paradigm . . . [t]he focus is . . . [o]n the obligation to repay the wrong done to him by retaliating against either the wrongdoer or someone closely connected to him.”<sup>35</sup> When punishment is guided by retributive principles, the victim’s right/need to pay back remains unsatisfied.

Finally, retribution is based on “general principles . . . mandating punishment in other similar circumstances.”<sup>36</sup> Victims, in contrast, care most about their injuries and the punishment inflicted for them.<sup>37</sup> Victims and their pain must be kept at bay, so the argument goes, because they threaten to overwhelm us with anger and passion that knows no limits.<sup>38</sup> As Saint Augustine put it:

[W]e do not wish to have the sufferings of the servants of God avenged by the infliction of precisely similar injuries in the way of retaliation. . . . [O]ur desire is that justice be satisfied. . . . [W]ho does not see that when a restraint is put upon the boldness of savage violence, and the remedies fitted to produce repentance are not withdrawn, this discipline should be called a

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inflict on someone else among the people is one that you do to yourself.” KANT, *supra* note 27, at 138.

33. NOZICK, *supra* note 29, at 367.

34. *Id.*

35. William Ian Miller, *Clint Eastwood and Equity: Popular Culture’s Theory of Revenge*, in *LAW IN THE DOMAINS OF CULTURE* 161, 167 (Austin Sarat & Thomas R. Kearns eds., 1998).

36. *Id.*

37. NOZICK, *supra* note 29, at 368.

38. For a discussion of the role of emotion in justice, see generally Samuel Pillsbury, *Emotional Justice: Moralizing the Passions of Criminal Justice*, 74 *CORNELL L. REV.* 655 (1989).

benefit rather than vindictive punishment?<sup>39</sup>

Justice becomes public and the voice of the victim is merged with the distanced state bureaucracy which speaks for “The People” against whom all criminal offenses are said to be directed.<sup>40</sup> Beccaria states:

It is sometimes the custom to release a man from the punishment of a slight crime when the injured pardons him: an act, indeed, which is in accordance with mercy and humanity but contrary to public policy; as if a private citizen could by his remission do away with the necessity of the example in the same way that he can excuse the reparation due for an offense. The right of punishing does not rest with an individual, but with the community as a whole, or the sovereign. Sometimes a man is freed from punishment for a lesser crime when the offended party chooses to forgive—an act in accord with beneficence and humanity, but contrary to the public good—as if a private citizen, by an act of remission, could eliminate the need for an example, in the same way that he can waive compensation for the injury. The right to inflict punishment is a right not of an individual, but of all citizens, or of their sovereign.<sup>41</sup>

Some theorists believe that clemency itself can and should be governed by retributive principles. The most extended example of this argument has been offered by Kathleen Moore.<sup>42</sup> Moore begins from the proposition that clemency as it is currently understood is an archaic idea that needs to be refurbished to fit with constitutional democracy in the modern state.<sup>43</sup> She insists on the necessity of stripping away “all the concepts left over from the seventeenth century—all the ‘acts of grace’ and divine forgiveness—and look[ing] at pardons operatively . . . .”<sup>44</sup> When we do so, she contends, what she calls the “close relation[ship]” of pardons and punishment will be apparent.<sup>45</sup>

39. Saint Augustine, *Letter CXXXIII* (412 A.D.) (J.G. Cunningham trans., 1872), in 1 A SELECT LIBRARY OF THE NICENE AND POST-NICENE FATHERS OF THE CHRISTIAN CHURCH 470, 470 (Philip Schaff ed., 1907).

40. Lawrence Becker, *Criminal Attempt and the Theory of the Law of Crimes*, 3 PHIL. & PUB. AFF. 262, 267–70 (1974).

41. CESARE BECCARIA, ON CRIMES AND PUNISHMENTS 58 (Henry Paolucci trans., Bobbs-Merrill ed., 1963) (1764).

42. KATHLEEN DEAN MOORE, PARDONS: JUSTICE, MERCY, AND THE PUBLIC INTEREST 89–98 (1989).

43. *Id.* at 91.

44. *Id.*

45. *Id.* Linda Meyer provides a very different perspective on this issue as well as an

When looked at operationally, Moore argues, executives may not have the direct right to assign punishments, but their uses or refusals to use clemency are punitive.<sup>46</sup> They determine “who will be punished and who will not, and how much and how little.”<sup>47</sup> If we grant the equivalence between pardon and punishment, Moore notes, we will accept that pardons, like punishment, need to be “justified by reasons having to do with what is just.”<sup>48</sup> While Moore concedes that pardons sometimes “make exceptions to rules . . . when . . . general presumptions are defeated by exceptional circumstances,”<sup>49</sup> she insists they can and should be disciplined. “[I]n the American democracy,” Moore argues, “the pardon is not a gift from the sovereign and cannot be exempt, on that ground, from the need for justification.”<sup>50</sup> In her view, the simplest and best justification for punishment is that it is deserved.<sup>51</sup> While there are other justifications, none is as powerful as retribution.

A retributive theory of pardons not only has conceptual advantages, but, in her view, it would have the added benefit of bringing clemency into line with this era’s prevailing theory of punishment. Even more importantly, it holds out the hope of bringing clemency to heel, of guiding and governing it in a way that allows courts and citizens to hold those who have the power to spare life accountable against a set of coherent standards.

Moore is a strict retributivist in the sense that she believes that helping to satisfy the demands of just desert is the *only* basis on which modern clemency can be justified.<sup>52</sup> As she says, “the only good and sufficient reason for pardoning a felon is that justice is better served by pardoning than by punishing in that particular case.”<sup>53</sup> Pardons are corrective for legal mistakes that put the commands of justice at risk. They help the law adhere, more closely than it otherwise could, to those commands.

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important critique of retributivism when she contends that every act of punishment is also “a form of forgiveness.” See Linda Meyer, *Forgiveness and Public Trust*, 27 FORDHAM URB. L.J. 1515, 1530 (2000).

46. MOORE, *supra* note 42, at 91.

47. *Id.*

48. *Id.*

49. *Id.* at 129.

50. *Id.* at 91.

51. *Id.* at 92.

52. This is an example of what Dan Markel calls “the confrontational conception of retribution.” See Dan Markel, *Against Mercy* 26 (2003) (unpublished manuscript, on file with the North Carolina Law Review).

53. Kathleen Dean Moore, *Pardon for Good and Sufficient Reasons*, 27 U. RICH. L. REV. 281, 281 (1993).

Whether as a theory of punishment or pardon, the victims' rights movement contests the hegemony of the very normative constraints that retributive justice insists must govern criminal justice<sup>54</sup> as well as what Allen calls "the near-total erasure of the victim from the process of punishment."<sup>55</sup> It demands that the legal system respond to crime victims' grief and rage.<sup>56</sup> By turning punishment into a site for the rituals of grieving,<sup>57</sup> that movement would make private experiences part of public discourse. Yet in so doing, not only is a private colonization of public processes encouraged; public scrutiny invades some of most personal aspects of our lives—the ways we suffer and grieve. The victims' rights movement points to the difficulty of "reconciling grief and rage and vengefulness with practicable moral enforcements of civil association. . . [and] of reconciling a cultural preoccupation with vengeance and . . . forms of legal punishment which deny it."<sup>58</sup> Retributive norms, so this argument goes, no longer adequately express common moral commitments, if they ever did at all.

## II. THE RECENT HISTORY OF CLEMENCY IN CAPITAL CASES

Governor Ryan acted against this complex backdrop in trying to heed the voices of victims and, at the same time, satisfy the requirements of retributive justice. He acted at a time when clemency in capital cases had come to be both one of the most dramatic, and least often used, sovereign prerogatives. During the

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54. On the requirements of retributive justice, see KANT, *supra* note 27, at 137–44; see also MARVIN HENBERG, RETRIBUTION: EVIL FOR EVIL IN ETHICS, LAW, AND LITERATURE 32–38 (1990) (evaluating the extent to which retributivistic tendencies in humans are a product of evolutionary biology); JEFFRIE G. MURPHY, RETRIBUTION, JUSTICE, AND THERAPY: ESSAYS IN THE PHILOSOPHY OF LAW 77–82 (1979) (discussing various theories of retributivism and their flaws).

55. Danielle Allen, *Democratic Dis-ease: Of Anger and the Troubling Nature of Punishment*, in THE PASSIONS OF LAW, *supra* note 24, at 191, 204.

56. See WENDY KAMINER, IT'S ALL THE RAGE: CRIME AND CULTURE 75 (1995) (noting that we should consider a victim's experiences when "designing a trial process and resolving individual cases"). "To a victim," Kaminer writes, "the notion that crimes are committed against society, making the community the injured party, can seem both bizarre and insulting: it can make them feel invisible, unavenged, and unprotected." *Id.* See generally *Payne v. Tennessee*, 501 U.S. 808 (1991) (addressing introduction of victim impact evidence); Angela Harris, *The Jurisprudence of Victimhood*, 1991 S. CT. REV. 77 (analyzing the Supreme Court's holding in *Payne* that evidence about a victim and the grief suffered by the victim's family is relevant in the sentencing of a convicted murderer).

57. For a discussion of the rituals of grieving, see generally LOU TAYLOR, MOURNING DRESS: A COSTUME AND SOCIAL HISTORY (1983).

58. Terry Aladjem, *Vengeance & Democratic Justice: American Culture and the Limits of Punishment* 3 (1992) (unpublished manuscript, on file with the North Carolina Law Review).

twentieth century, a few governors took a broad view of this power, and some used it to overturn large numbers of death sentences. Unlike Ryan, they neither catered to victims nor, in the exercise of their clemency power, saw themselves as limited to retributive considerations.

Terry Sanford, former Governor of North Carolina, is an example of a governor who took this broad view. He said:

The courts of our state and nation exercise in the name of the people the powers of administration of justice. The Executive is charged with the exercise in the name of the people of an . . . important attitude of a healthy society—that of mercy beyond the strict framework of the law.

The use of executive clemency is not a criticism of the courts, either express or implied. I have no criticism of any court or any judge. Executive clemency does not involve the changing of any judicial determination. It does not eliminate punishment; it does consider rehabilitation. . . . It falls to the Governor to blend mercy with justice, as best he can, involving human as well as legal considerations, in the light of all circumstances after the passage of time, but before justice is allowed to overrun mercy in the name of the power of the state.

I fully realize that reasonable men hold strong feelings on both sides of every case where executive clemency is indicated. I accepted the responsibility of being Governor, however, and I will not shy away from the responsibility of exercising the power of executive clemency.<sup>59</sup>

Lee Cruce, Oklahoma governor from 1911 to 1915, commuted twenty-two death sentences to life in prison, boldly telling the state legislature that “the infliction of the death penalty by the state is wrong in morals and is destructive of the highest and noblest ideals in government.”<sup>60</sup> Speaking in the lofty terms of a confident sovereignty, Cruce asserted his right to spare lives because he disagreed with the state’s policy.<sup>61</sup>

During Pat Brown’s tenure as governor of California, from 1959 to 1966, he anguished over the death penalty and clemency,

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59. Governor Terry Sanford, On Executive Clemency (July 4, 1961), in *MESSAGES, ADDRESSES, AND PUBLIC PAPERS OF TERRY SANFORD, GOVERNOR OF NORTH CAROLINA, 1961–1965*, at 552, 552 (Memory F. Mitchell ed., 1966).

60. Craig Hines, *A Heartening Rain As We Await the Flood*, *HOUSTON CHRON.*, Jan. 14, 2003, at A26.

61. *Id.*

commuting the sentences of twenty-three death row inmates and allowing thirty-six others to be executed in the gas chamber at San Quentin.<sup>62</sup> Brown later said that his power of life and death

was an awesome, ultimate power over the lives of others that no person or government should have, or crave. And looking back over their names and files now, despite the horrible crimes and the catalog of human weaknesses they comprise, I realize that each decision took something out of me that nothing—not family or work or hope for the future—has ever been able to replace.<sup>63</sup>

As he cleared Arkansas's death row with commutations at the end of his term in 1970, Governor Winthrop Rockefeller, like Governors Sanford, Cruce, and Brown, used the rhetoric of high moralism to explain his grant of clemency: "I yearn to see other chief executives throughout the nation follow suit, so that as a people we may hasten the elimination of barbarism as a tool of American justice."<sup>64</sup> In 1986, Governor Toney Anaya of New Mexico, with just weeks left in office, commuted the death sentences of all five condemned men in his state.<sup>65</sup> He called capital punishment "a false god that all too many worship."<sup>66</sup> Anaya said that he exercised his clemency power because he "opposed capital punishment as being inhumane, immoral, anti-God and incompatible with an enlightened society."<sup>67</sup> At the time of his commutation decision he had a hopeful vision: "I am dropping a pebble into a pond that will cause a ripple which I pray will be joined in other ponds across this great country, ripples that, coming together, will cause a rising tide."<sup>68</sup>

Despite Anaya's prayer, the tide moved in precisely the opposite direction, with governors increasingly reluctant to grant clemency in capital cases. Across the nation, the long-held constitutional right of

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62. Susan Sward, *Pat Brown's Book Helped Ryan Decide: Former Governor Wrote About Struggles over Death Penalty*, S.F. CHRON., Jan. 13, 2003, at A11.

63. Mary Meehan, Book Review, HARMONY, Nov.-Dec. 1989, at 9, 10 (reviewing EDMUND G. (PAT) BROWN WITH DICK ADLER, *PUBLIC JUSTICE, PRIVATE MERCY: A GOVERNOR'S EDUCATION ON DEATH ROW* (1989)), available at <http://members.verizon.net/~meehan4/mercy.html>.

64. Hines, *supra* note 60.

65. *Five, Lives Spared, Hail Anaya's Move*, N.Y. TIMES, Nov. 28, 1986, at A18.

66. *Id.*

67. Toney Anaya, *Statement by Toney Anaya on Capital Punishment*, 27 U. RICH. L. REV. 177, 177 (1993).

68. Hines, *supra* note 60. Ohio Governor Richard Celeste commuted the death sentences of eight inmates days before he left office in January 1991. Ray Long & Steve Mills, *Ryan to Review Death Row Cases: Governor May Commute Terms*, CHI. TRIB., Mar. 3, 2002, at 1, 15.

chief executives to bestow mercy has “died its own death, the victim of a political lethal injection and a public that overwhelmingly supports the death penalty.”<sup>69</sup> Thus, at the outset of his administration, then-Texas Governor 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.<sup>70</sup>

Similarly, then-Governor William Clinton explained his reluctance to grant clemency by stating that “[t]he appeals process, although lengthy, provides many opportunities for the courts to review sentences and that’s where these decisions should be made.”<sup>71</sup>

The Bush and Clinton views were, and are, still very much the norm. Thus, as death sentences and executions have increased, grants of clemency have declined. Illustratively, before 1984 the national ratio of clemency grants to executions was 105 to 32, but in the years following 1984 the number of executions has increased to seven times the number of grants of clemency.

During the 1990s, from one to three death row inmates were granted clemency every year in the entire nation, out of

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69. Robert Salladay, *Clemency: Slim Chance These Days; Granting Mercy to Condemned Felons a Vanishing Practice Due to Pressure of Public Sentiment*, S.F. EXAMINER, Nov. 29, 1998, at A1.

70. Alan Berlow, *The Texas Clemency Memos*, ATLANTIC MONTHLY, July–Aug. 2003, at 91, 93–94 (quoting GEORGE W. BUSH, *A CHARGE TO KEEP* 141 (1999)). One hundred fifty men and two women were executed during then-Governor Bush’s six years as governor. *Id.* at 91. Clemency was denied in every case but one. *Id.* No governor in modern American history has matched this record. *Id.*

71. *Clemency Becoming Rare as Executions Increase*, CORRECTIONS DIG., July 8, 1987, at 2.

approximately sixty to eighty executions each year.<sup>72</sup> This is a dramatic shift from several decades ago, when governors granted clemency in twenty to twenty-five percent of the death penalty cases they reviewed.<sup>73</sup> In Florida, one of the pillars of the “death belt,” governors commuted twenty-three percent of death sentences between 1924 and 1966, yet no Florida death penalty sentences were commuted in the 1990s.<sup>74</sup>

Unlike Governors Sanford, Cruce, Brown, Rockefeller and Anaya, governors today are reluctant to substitute their judgment for those of state legislators and courts, and to use clemency as a tool of sovereign prerogative.<sup>75</sup> Rejecting appeals from the Pope, Mother Teresa, televangelist Pat Robertson, former prosecutors, and even judges and jurors in death cases, they reserve their clemency power for “unusual” cases in which someone has clearly been unfairly

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72. Of the sixty-nine people sentenced to death in 1998, only one was granted clemency—a Texas man who “confessed” to 600 murders, but was found to be in Florida during the one killing for which he received a death sentence. See Jim Yardley, *On the Record: Bush and the Death Penalty*, N.Y. TIMES, Jan. 7, 2000, at A1 (discussing Henry Lee Lucas and his false confessions); Death Penalty Information Center, Executions in the U.S. in 1998, at <http://www.deathpenaltyinfo.org/article.php?scid=8&did=474> (last visited Apr. 9, 2004) (listing the sixty-eight people who were executed in 1998) (on file with the North Carolina Law Review).

73. Robert Salladay, *supra* note 69. In general, it seems that governors now commute death sentences less frequently than their predecessors. Bruce Ledewitz & Scott Staples, *The Role of Executive Clemency in Modern Death Penalty Cases*, 27 U. RICH. L. REV. 227, 227 (1993) (arguing that the recent decline in commutation may be due to “public officials’ inability to place commutation in a context that is intelligible to the public”).

74. See Margaret Vandiver, *The Quality of Mercy: Race and Clemency in Florida Death Penalty Cases, 1924–1966*, 27 U. RICH. L. REV. 315, 322 (1993) (cataloguing Florida’s clemency record). See generally Michael Radelet & Barbara A. Zsembik, *Executive Clemency in Post-Furman Capital Cases*, 27 U. RICH. L. REV. 289 (1993) (cataloguing clemency in the United States from 1972 to 1993).

75. See Beau Breslin & John J.P. Howley, *Defending the Politics of Clemency*, 81 OR. L. REV. 231, 239 (2002) (“The use of clemency has declined precipitously in the last twenty-five years to the point where only a small fraction of those facing execution are now released from death row.”); Alyson Dinsmore, *Clemency in Capital Cases: The Need to Ensure Meaningful Review*, 49 UCLA L. REV. 1825, 1842 (2002) (indicating that modern governors view clemency as essentially another appeal and noting the deference of governors to the courts); Daniel Kobil, *Chance and the Constitution in Capital Clemency Cases*, 28 CAP. U. L. REV. 567, 572 (2002) (documenting a dramatic drop in the frequency of commutation after the death penalty was reinstated). There has been a similar decline at the federal level. See Margaret Colgate Love, *Fear of Forgiving: Rule and Discretion in the Theory and Practice of Pardoning*, 13 FED. SENTENCING REP. 125, 126 (2000–2001). Between 1960 and 1980, pardon applicants had a thirty percent chance of success. *Id.* By 2000, however, the likelihood of successful applications had dropped to three percent. *Id.* Rita Radostitz, co-director of the Capital Punishment Clinic at the University of Texas and an attorney for Henry Lee Lucas, who was granted clemency in Texas, says about clemency, “I think that clearly a miscarriage of justice should be raised, but in other cases, mercy could also come into play.” Salladay, *supra* note 69.



convicted.<sup>76</sup> To some extent this is because of the political climate surrounding the death penalty. While during the 1950s and 1960s about fifty percent of the public supported the death penalty, current polls show the public overwhelmingly approves of it.<sup>77</sup> As a result, many politicians have used the death penalty in their campaigns, promising more and quicker executions.<sup>78</sup> This is “the answer to the public’s fear of crime,” Richard Dieter, executive director of the Death Penalty Information Center, observes, “so (clemency) just goes against the grain.”<sup>79</sup>

### III. “I MUST ACT”

Ryan’s clemency decision was at once unusual in its scope and yet quite continuous with the emerging logic governing executive clemency. He neither linked clemency to mercy nor did he elevate it to the moral stature of Stanford, Cruce, Brown, or Anaya. His

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76. See Howard Mintz, *Schwarzenegger Denies Clemency Appeal from Death Row Inmate: Kevin Cooper Faces Feb. 10 Execution for Murdering Four in 1983*, MERCURY NEWS (San Jose, Cal.), Jan. 30, 2004, at 1A; *Clemency Decision Due Monday for Woman on Texas Death Row: Lethal Injection Set for Tuesday*, CNN.com (Feb. 1, 1998), at <http://www.cnn.com/US/9802/01/female.execution/> (on file with the North Carolina Law Review); *International Appeals to Spare Tucker Fail*, CNN.com (Feb. 3, 1998), at <http://www.cnn.com/US/9802/03/tucker.world/> (on file with the North Carolina Law Review); *Virginia Inmate Executed Despite International Campaign: Appeals from Pope, Mother Teresa Fail to Save Him*, CNN.com (July 23, 1997), at <http://www.cnn.com/US/9707/23/o.dell/> (on file with the North Carolina Law Review); Michael Kroll, *The System Screwed Up: Just Because California’s Next “Dead Man Walking” Might Be Innocent Doesn’t Mean That His Life Will Be Saved* (July 23, 1997), at <http://archive.salon.com/july97/news/news970723.html> (on file with the North Carolina Law Review).

77. Samuel Gross & Phoebe Ellsworth, *Second Thoughts: Americans’ Views of the Death Penalty at the Turn of the Century*, in BEYOND REPAIR? AMERICA’S DEATH PENALTY 7, 13 (Stephen P. Garvey ed., 2003).

78. See Jonathan Simon, *CAPITAL Punishment: The Death Penalty and Modern Governance*, in *Governing Through Crime: The War on Crime and the Transformation of American Governance 1960–2000*, at 5-1, 5-13 (2003) (unpublished manuscript, on file with the North Carolina Law Review).

79. Salladay, *supra* note 69. Concern regarding the impact of public opinion and political approval on an executive’s choice to exercise the pardon power is not limited to modern history. See 2 JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES: WITH A PRELIMINARY REVIEW OF THE CONSTITUTIONAL HISTORY OF THE COLONIES AND STATES, BEFORE THE ADOPTION OF THE CONSTITUTION § 1497 (3d ed. 1858). Justice Story wrote:

If the power should ever be abused, it would be far less likely to occur in opposition than in obedience to the will of the people. The danger is not, that in republics the victims of the law will too often escape punishment by a pardon; but that the power will not be sufficiently exerted in cases where public feeling accompanies the prosecution and assigns the ultimate doom to persons who have been convicted upon slender testimony or popular suspicions.

critique of capital punishment was systemic, not moral; yet he treated executive clemency as little more than an adjunct and corrective to the judicial process. Moreover, because clemency declarations have no standard genre, George Ryan had to stitch together a rhetorical performance.<sup>80</sup> He did so by borrowing from the rhetoric of judicial opinions.<sup>81</sup> As though he were a judge who was unelected and accountable only through the adequacy of his justifications, Ryan granted clemency as he was about to leave office, no longer subject to electoral accountability, with the imagined judgment of history as his target audience.

As a rhetorical performance, Ryan's "I Must Act" was marked by a certain conceptual incoherence, drawing its logic from the contradictory claims of victims' rights and retributive justice.<sup>82</sup> In both of these elements Ryan put himself at the center. On the one hand, 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. On the other hand, he painted himself as a

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80. The following discussion is derived from Sarat & Hussain, *supra* note 18, at 39–57.

81. His statement most closely resembles the justificatory act of a judge speaking through his opinion to the counter-majoritarian difficulty that in a democracy places judicial review, like executive clemency, in a structurally anomalous position. See Robert Ferguson, *The Judicial Opinion as a Literary Genre*, 2 YALE J.L. & HUMAN., 201, 202 (1990) (citing the unique nature of the judicial opinion in American political life and arguing that an important function of judicial language is to "match experience and form in ways that a citizenry can recognize and accept"). Ferguson describes the rhetoric of judicial opinions as a response to "the judiciary's non-majoritarian status in a democratic republic." *Id.* at 207. Like a judge, Ryan presented his decision as "compelled," an act of duty, not a personal choice. See *id.* at 207–08 (noting that the "vital strategy" of judges is to explain their decisions as neutral in an effort to garner public acceptance and support). It was, as Ferguson says of judicial rhetoric, "self-dramatizing." *Id.* at 205. It subsumed "difference in an act of explanation and moment of decision" and appeared, like a judicial opinion, "as if forced to its inevitable conclusion by the logic of the situation and the duties of office, which together eliminate all thought of an unfettered hand." *Id.* at 205, 207.

82. For a description of the retributive theory of clemency, see MOORE, *supra* note 42, at 89–98, and Moore, *supra* note 53, at 286–87. Pardons, like punishment, Moore argues, need to be "justified by reasons having to do with what is just." MOORE, *supra* note 42, at 91. Specifically, Moore argues, pardons are justified when used to correct the punishment of the innocent (those who stand convicted of a crime they did not commit) and of those who are guilty under the law but are not morally blameworthy. Moore, *supra* note 53, at 286–87. Moreover, they are justified when the punishment of a guilty and deserving offender is unduly severe or to prevent cruelty or relieve those whose suffering exceeds what they merit. *Id.* at 284. In our legal system, the pardon is "a backup system that works outside the rules to correct mistakes, making sure that only those who deserve punishment are punished." *Id.* at 284. For additional discussion regarding the justifications for clemency, see generally Daniel Kobil, *The Quality of Mercy Strained: Restoring the Pardoning Power from the King*, 69 TEX. L. REV. 569 (1991).

reluctant actor seeking to ensure justice in a failing justice system and a paralyzed political system.

In his story of victims and their suffering, he displayed the frail sovereignty of a democracy, desperately seeking grounding in a shared conception of citizenship. In this worldview, what binds us together is our common suffering and victimization.<sup>83</sup> In his story of institutional failure, he portrayed himself as a committed retributivist<sup>84</sup> and embraced a “fail safe” attitude toward clemency advocated by Clinton, Bush and Justice Rehnquist.<sup>85</sup> If responsiveness to victims provided the point of departure for his clemency, retributive principles provided its disciplining core.

#### A. *Listening to Victims*

Legal systems in the United States and Europe have recently been confronted by stern challenges in the name of victims' rights.<sup>86</sup> A tide of resentment is rising against a system of justice which traditionally has tried to substitute public processes for private action, and thus to justify the criminal sanction as a response to injuries to public order rather than harms to particular individuals.<sup>87</sup> The tendency of criminal justice systems in western democracies has been to displace the victim, to shut the door on those with the greatest interest in seeing justice done. In response, victims have successfully

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83. See generally Jennifer L. Culbert, *The Sacred Name of Pain: The Role of Victim Impact Evidence in Death Penalty Sentencing Decisions*, in PAIN, DEATH, AND THE LAW 103, 104 (Austin Sarat ed., 2001) (discussing society's collective identification with an individual victim's suffering).

84. See Daniel Kobil, *How to Grant Clemency in Unforgiving Times*, 31 CAP. U. L. REV. 219, 227 (2003) (claiming that Governor Ryan relied entirely on retributive arguments). This statement is somewhat inaccurate. See *infra* notes 128–32 and accompanying text.

85. Chief Justice Rehnquist, writing for the majority in *Herrera*, observed: “Clemency is deeply rooted in our Anglo-American tradition of law, and is the historic remedy for preventing miscarriages of justice where judicial process has been exhausted.” *Herrera v. Collins*, 506 U.S. 390, 412–13 (1993).

86. See generally GEORGE P. FLETCHER, WITH JUSTICE FOR SOME: VICTIMS' RIGHTS IN CRIMINAL TRIALS 177–206 (1995) (discussing the victim's role at trial and reforms supported by the victims' rights movement); David Roland, *Progress in the Victim Reform Movement: No Longer the 'Forgotten Victim'*, 17 PEPP. L. REV. 35, 35–36 (1989) (documenting the increased public awareness of crime victims' problems in the early 1980s); Stuart Scheingold et al., *Sexual Violence, Victim Advocacy, and Republican Criminology: Washington State's Community Protection Act*, 28 LAW & SOC'Y REV. 729, 741–48 (1994) (discussing the role of victim advocacy and victim advocates in the political process). For a general discussion of the role of the victim in the criminal process, see LOIS FORER, CRIMINALS AND VICTIMS 28–45 (1980).

87. Stephen Schulhofer, *The Trouble with Trials; The Trouble with Us*, 105 YALE L.J. 825, 825 (1995) (reviewing FLETCHER, *supra* note 86).

demanded that their voices be heard throughout the criminal process.<sup>88</sup>

The victims' rights movement wants more. It seeks participation and power by making the victim the symbolic heart of modern legality.<sup>89</sup> It contests the attempted appropriation of the role of the victim by offenders and what it sees as the promiscuous use of the language of victimization throughout our culture.<sup>90</sup> The movement draws on standard stories and mobilizes around incidents that are "horrifying and aberrational,"<sup>91</sup> generating sentimental narratives of lives lost, families ruined, and evil done.

Former Attorney General Janet Reno once said:

I draw most of my strength from victims, for they represent America to me: people who will not be put down, people who will not be defeated, people who will rise again and stand again for what is right. . . . [Y]ou are my heroes and heroines. You are but little lower than the angels.<sup>92</sup>

So important is the image of the victim in our political life that one scholar argues that crime victims have come to be

the most idealized form of political subjectivity. . . . It is as crime victims that Americans are most readily imagined as

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88. In 1981, President Reagan proclaimed the week of April 19th the first "National Victims' Rights Week." Proclamation No. 4831, 3 C.F.R. 18 (1981). The President has since proclaimed a Crime Victims Week annually. Legislation now exists that grants victims a role in the plea bargaining process and sentencing decisions as well as a right to be notified about the release of the offenders who victimized them. See Leroy Lamborn, *Victim Participation in the Criminal Justice Process: The Proposal for a Constitutional Amendment*, 34 WAYNE L. REV. 125, 147-52 (1987). Moreover, "the constitutions of at least 20 states now contain 'victim's rights amendments,' and similar legislation has been introduced at the federal level." Wayne A. Logan, *Through the Past Darkly: A Survey of the Uses and Abuses of Victim Impact in Capital Trials*, 41 ARIZ. L. REV. 143, 144 n.4 (1999). See generally Frank Carrington & George Nicholson, *The Victims' Movement: An Idea Whose Time Has Come*, 11 PEPP. L. REV. 1 (1984) (tracing the beginnings of the victims' rights movement and advocating for further progress); Lynne N. Henderson, *The Wrongs of Victims' Rights*, 37 STAN. L. REV. 937 (1985) (outlining current victims' rights legislation and examining the confusion and ideology surrounding the movement); Maureen McLoed, *Victim Participation at Sentencing*, 22 CRIM. L. BULL. 501 (1986) (describing various models of victim participation in sentencing proceedings).

89. See Schulhofer, *supra* note 87, at 825-26, 840-41.

90. See, e.g., Lynn Henderson, *The Wrongs of Victims' Rights*, 37 STAN. L. REV. 937, 943-53 (1985) (describing the growing visibility of the victim in criminal sentencing decisions); *Victim Justice*, NEW REPUBLIC, Apr. 17, 1995, at 9, 9 (deploring the public display of victims' anguish at post-conviction hearings in a Long Island murder trial).

91. Scheingold et. al., *supra* note 86, at 734.

92. Bruce Shapiro, *Victims and Vengeance: Why the Victims' Rights Amendment is a Bad Idea*, NATION, Feb. 10, 1997, at 11 (quoting Attorney General Janet Reno's unpublished address to a victims' rights conference on August 12, 1996).

united by threat that simultaneously downplays their differences and authorizes them to take dramatic political steps. . . . The innocent victim of violent crime becomes the paradigm example of the citizen who needs government.<sup>93</sup>

That Ryan's mass commutation was situated in the saga of an increasingly victim-centered political and legal environment was suggested by the great prominence that he gave to the language of victimization in his speech.<sup>94</sup> "I have read, listened to and discussed the issue with the families of the victims as well as the families of the condemned," Ryan said, before sharing a story in which he identified himself as a crime victim twice removed.<sup>95</sup> "I grew up in Kankakee which even today is still a small Midwestern town, a place where people tend to know each other." Ryan continued:

Steve Small was a neighbor. I watched him grow up. He would babysit my young children which was not for the faint of heart since Lura Lynn and I had six children, 5 of them under the age of 3. He was a bright young man who helped run the family business. He got married and he and his wife had three children of their own. Lura Lynn was especially close to him and his family. We took comfort in knowing he was there for us and we for him. One September midnight he received a call at his home. There had been a break-in at the nearby house he was renovating. But as he left his house, he was seized at gunpoint by kidnapers. His captors buried him alive in a shallow hole. He suffocated to death before police could find him. His killer led investigators to where Steve's body was buried. The killer, Danny Edwards was also from my

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93. Jonathan Simon, *We the Victims: Fearing Crime and Making Law*, in *Governing Through Crime*, *supra* note 78, at 3-5 to 3-7. We become what cultural critic Lauren Berlant calls "infantile citizens." LAUREN BERLANT, *THE QUEEN OF AMERICA GOES TO WASHINGTON CITY: ESSAYS ON SEX AND CITIZENSHIP* 25 (1997). In this version of citizenship, "a citizen is defined as a person traumatized by some aspect of life in the United States. Portraits and stories of citizen-victims . . . now permeate the political public sphere." *Id.* at 1.

94. His decision followed closely on the heels of an extraordinary series of hearings by the Illinois Prison Review Board, hearings that were dominated by victims and their family members. During these hearings, "hour after hour, victims and family members of dead victims [were] forced to come before a panel and revisit the most horrific event in their lives. These people had to retell their stories and beg, sobbing, for the panel to let the current sentence of death stand." Katie Walsh, *Clemency Hearings Unjust to Victims' Families*, COLUM. CHRON., Oct. 21, 2002, at 11, available at <http://www.ccchronicle.com/back/2002-10-21/opinions4.html>. As Jennifer Culbert has said, in our era, "[t]he pain and suffering expressed by the murder victim's survivors can serve as an absolute in a society in which every other kind of claim is subject to contestation, doubt, and criticism." Culbert, *supra* note 83, at 104.

95. Ryan, *supra* note 23.

hometown. He now sits on death row. I also know his family. I share this story with you so that you know I do not come to this as a neophyte without having experienced a small bit of the bitter pill the survivors of murder must swallow . . . .<sup>96</sup>

This is a ghastly account, bringing before its listeners the specter of a dead man, mercilessly slaughtered. That Ryan tied himself to this ghost reminds us of Fitzpatrick's account of the finitude that death imposes on law and the unfolding indeterminism of law's beyond.<sup>97</sup> Clemency exercised to stave off death, confronting it, as it were, face-to-face and refusing its demand, helps to mark death as the horizon of law both as "supreme stasis" and "the opening to all possibility that is beyond affirmed order."<sup>98</sup> Moreover, metaphors of place, the small town, and the knowledge that Small was "there for us," contribute to the ghostliness of Ryan's account precisely by marking the placelessness of death and its irresistible ability to enter any.<sup>99</sup>

But there was another specter in this story, this one of a life marked for its own untimely extinction.<sup>100</sup> By connecting himself to Danny Edwards, Ryan rhetorically invoked the kind of dual accountability that governs clemency in capital cases, one side facing the already dead, the other those whose lives are in the balance. If Ryan's rhetoric is rightly thought of as juridical,<sup>101</sup> then, like others who pass judgment in death penalty cases, he turned to "expressions of pain as others may once have turned to God, in trust that this

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96. *Id.*

97. Peter Fitzpatrick, *Life, Death, and the Law—and Why Capital Punishment Is Legally Insupportable*, 47 CLEV. ST. L. REV. 483, 486–87 (1999).

98. *Id.* at 484.

99. The small town imagery is reminiscent of what Minow says about victim impact statements:

[They] persuade, when they do, because they invoke widely shared images of goodness, Christian piety, . . . the "little guy," and American patriotism, all of which are talismans of the deserving person. Some degree of simplification is inevitable and no one should be surprised to find that victim impact statements do not reveal the uniqueness of the human being victimized by crime.

Martha Minow, *Surviving Victim Talk*, 40 UCLA L. REV. 1411, 1432 (1993).

100. One Italian scholar puts it this way:

With the death penalty—an act of sovereignty—the State, the Prince or the Dictator claims an extraordinary power of calculation: the right to determine when life expires. The President, the Governor, or the Judge, who hold the right to grant pardon, the right to forgive and thus to make exceptions, are meant to know and be able to calculate the time of death, the moment which abruptly puts an end to the other's finitude.

Stefano Crosara, *I'm Against the Death Penalty*, TRIESTE CONTEMPORANEA, Nov. 2000, <http://www.tscont.ts.it/pag20-e.htm> (on file with the North Carolina Law Review).

101. See *supra* note 81 and accompanying text.

'sacred name' will make it possible for individuals to answer the question, 'In the name of what or whom do we judge?'<sup>102</sup>

Moreover, Ryan made his persona, his private not sovereign body, vividly present. In this story he was caught, almost literally torn, between the victim and the offender, reassuring his listeners that he has tasted murder's "bitter pill." This was hardly the language of a majestic, distant, undemocratic sovereignty, unresponsive to, or uninterested in, the pain of the victims. It was, instead, the voice of a real human being: a sovereign domesticated by that pain. For it was only by assuming the status of a victim of Danny Edwards's crime that he could be entitled to forgive it or to mitigate its punishment.<sup>103</sup> As the philosopher Jacques Derrida writes, pointing to the condition that creates Ryan's dilemma:

Who would have the right of forgiving in the name of the vanished victims? They are always absent, in a certain manner. Missing in essence, they are never themselves absolutely present, at the moment pardon is asked for. . . .<sup>104</sup>

As victim and as someone in contact with the experience of victimization, Ryan constituted his listeners as particular kinds of political subjects, earning their attention, as it were, through his own earnest attention to the claims of victims, even as he both broadened and blurred the referent of the term.<sup>105</sup>

As I came closer to my decision, I knew that I was going to have to face the question of whether I believed so completely in the choice I wanted to make that I could face the prospect of even commuting the death sentence of Danny Edwards, the man who had killed a close family friend of mine. I discussed it

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102. Culbert, *supra* note 83, at 104–05 (quoting PHILLIPE LACQUE-LABARTHE, HEIDEGGER, ART, AND POLITICS: THE FICTION OF THE POLITICAL, trans. Chris Turner (Oxford: Basil Blackwell, 1990), at 31) (source misquoted).

103. Only a victim, not a third party, should be allowed to grant forgiveness. See Jacques Derrida, *To Forgive: The Unforgivable and the Imprescriptible* 34 (undated) (unpublished manuscript, on file with the North Carolina Law Review). Of course what Ryan did was not really forgiveness in the strictest sense since most of his clemency involved commutation, a kind of mercy, rather than pardon, which seems more closely associated with forgiveness.

104. Jacques Derrida, *The Century and the Pardon*, LE MONDE DES DEBATS, Dec. 1999 (Greg Macon trans., 2001), <http://www.excitingland.com/fixion/pardonEng.htm>.

105. As Berlant notes, the result is to produce a "special form of tyranny that makes citizens like children, infantilized, passive, and over dependent on the 'immense and tutelary power' of the state." BERLANT, *supra* note 93, at 27 (quoting 2 ALEXIS DE TOCQUEVILLE, *DEMOCRACY IN AMERICA* 641 (Harvey C. Mansfield & Delba Winthrop eds & trans., Univ. of Chicago Press 2000) (1835)).

with my wife, Lura Lynn, who has stood by me all these years. She was angry and disappointed at my decision like many of the families of other victims will be.<sup>106</sup>

There is a very interesting use of verb tenses here with Ryan again describing himself as caught, this time between the past with its own imagined future—"was going"—and the present, with its anticipation of the coming anger and disappointment of the community with which he is rhetorically allied. Danny Edwards returned to the story, this time as the touchstone of Ryan's accountability to his dead "close family friend." The test of his commitment to clemency would be found in the answer to the question of whether his beliefs and convictions could pass the Danny Edwards test. Could he find the reasons to commute every death sentence sufficiently persuasive to move him to spare even Edwards's life? This was a stern test indeed, converting clemency into a measure of personal conviction and strength for Ryan himself.

As if not able to say it enough times, Ryan repeatedly tried to assure his listeners that he had indeed heard the voice of victims:

I have conducted private group meetings, one in Springfield and one in Chicago, with the surviving family members of homicide victims. Everyone in the room who wanted to speak had the opportunity to do so. Some wanted to express their grief, others wanted to express their anger. I took it all in. . . . I redoubled my effort to review each case personally in order to respond to the concerns of prosecutors and victims' families.<sup>107</sup>

Unlike the minimal due process that some Justices of the United States Supreme Court believe must be provided for those seeking clemency,<sup>108</sup> Ryan accorded a deep and respectful attentiveness to victims. He took into himself their grief and anger, again rhetorically refiguring himself as a victim. In Ryan's account there was a

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106. Ryan, *supra* note 23.

107. *Id.*

108. See *Ohio Adult Parole Auth. v. Woodard*, 523 U.S. 272, 289 (1998) (O'Connor, J., concurring). Justice O'Connor stated that "some *minimal* procedural safeguards apply to clemency hearings." *Id.* (O'Connor, J., concurring). However, she did not specify what those procedures might be. She could imagine judicial intervention only in cases of the most transparent and unreasoning arbitrariness, as in "a scheme where a state official flipped a coin to determine whether to grant clemency, or in a case where the State arbitrarily denied a prisoner any access to its clemency process." *Id.* (O'Connor, J., concurring). Justice Stevens added to this list of barely imaginable horrors when he stated that "no one would contend that a governor could ignore the commands of the Equal Protection Clause and use race, religion, or political affiliation as a standard for granting or denying clemency." *Id.* at 292 (Stevens, J., dissenting).



responsiveness to pain and a grounding not in sovereign grace, but in the need to pay homage to suffering.<sup>109</sup>

Just as Ryan's rhetoric positioned him between victim and offender and through him established connections between them, in his expansive use of the category of "victim," he attempted to establish connections between the relatives of those who had already died and of those who were sentenced to death. Everyone, it turns out, is in pain; the political community is imagined as constituted by shared suffering.<sup>110</sup>

I also had a meeting with a group of people who are less often heard from, and who are not as popular with the media. The family members of death row inmates have a special challenge to face. I spent an afternoon with those family members at a Catholic Church here in Chicago. At that meeting, I heard a different kind of pain expressed. Many of these families live with the twin pain of knowing not only that, in some cases, their family member may have been responsible for inflicting a terrible trauma on another family, but also the pain of knowing that society has called for another killing. These parents, siblings and children are not to blame for the crime committed, yet these innocent stand to have their loved ones killed by the state. . . . They are also branded and scarred for life because of the awful crime committed by their family member. Others were even more tormented by the fact that their loved one was another victim, that they were truly innocent of the crime for which they were sentenced to die.<sup>111</sup>

Again Ryan deployed his own kind of due process. He was the sovereign holding court to receive the petition of his subjects, but in a church instead of a castle. He was listening, hearing, heeding the voice of another group figuratively silenced by their connection to death, the death of those whose time of death had been made calculable by society's choice. And again it was pain that provides the connective tissue between speakers and listeners.

Yet what can victims provide for those with the power of clemency? They are present in every clemency decision, whether it is granted or refused, but despite Ryan's rhetorical identification with

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109. "In the absence of an overarching principle or absolute to which to refer for sense and guidance in a multicultural, morally pluralist society, the survivor is embraced as a unique figure with the power to liberate people from the chains of a well-meaning but paralyzing relativism." Culbert, *supra* note 83, at 134.

110. Culbert contends that it is "counter-intuitive to think of a subjective experience like pain as establishing a publicly valid authority." *Id.*

111. Ryan, *supra* note 23.

them, the judgment, and responsibility for it, could only be his. Despite his identification with victims, he could not, as the reactions of Cathy Drobney and John Woodhouse suggest,<sup>112</sup> dispense forgiveness in their name. Despite the connections he tried to forge in a community with many different kinds of victims, stable grounds for his act could not be established in its shared pain. So, he turned from responsiveness to suffering in a community of victims to a critique of the institutions of the legal and political system for being insufficiently attentive to the claims of retributive justice.

### *B. Clemency and the Requirements of Justice*

As Ryan changed the subject, he used victims and their needs to introduce his broad indictment of Illinois's death penalty system. Victims of heinous crimes, it turns out, are also victimized by the capital punishment system. Speaking of the relative rarity of capital punishment, he cited the statistic that less than two percent of the more than one thousand murder defendants in Illinois would receive the death penalty. Ryan further sympathized with the victims' families, who would not have the opportunity to derive satisfaction from a sentence of death.<sup>113</sup>

Ryan's guarded language registers his uncertainty about what executions do for victims' families, and his doubt that they provide their much advertised virtue of closure.<sup>114</sup> Imagining the crime victim's family as the paradigmatic needy citizen, Ryan asked, "What kind of victims' services are we providing? Are all of our resources geared toward providing this notion of closure by execution instead of tending to the physical and social service needs of victim families?"

But Ryan's rhetorical identification with victims was overridden in his "I Must Act" statement by a commitment to ensuring that offenders get what they deserve. Retribution provided a disciplining

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112. See *supra* notes 5–7 and accompanying text.

113. Ryan, *supra* note 23.

114. "To a family they talked about closure," Ryan says. "They pleaded with me to allow the state to kill an inmate in its name to provide the families with closure. But is that the purpose of capital punishment? Is it to soothe the families? And is that truly what the families experience?" *Id.* In Kaminer's view, talk about closure partakes of the popular confusion of law and therapy and the substitution of feelings for facts. But if feelings are facts in a therapist's office . . . feelings are prejudices in a court of law. . . . Justice is not a form of therapy, meaning that what is helpful to a particular victim . . . is not necessarily just and what is just may not be therapeutic.

KAMINER, *supra* note 56, at 84.

presence in his exercise of clemency,<sup>115</sup> an anchor of lawfulness in the presence of his potentially uncheckable power.<sup>116</sup> Kobil describes Ryan's statement thus:

Governor Ryan relied entirely on retributive arguments. . . . Although there has been substantial public outcry against Ryan's actions and even legal challenges to some of his commutations, it appears that for now retributive justifications have carried the day. . . . Ultimately . . . Governor George Ryan was persuaded to grant clemency to every person on Death Row not as a grand gesture of forgiveness, but because his faith in the ability of the Illinois system to give only deserving defendants a sentence of death had been destroyed by a series of blatant errors and mistakes.<sup>117</sup>

Ryan's commitment to a just deserts theory of punishment moved him from individual cases, on which clemency typically focuses, to the systemic level. Ryan observed,

The facts I have seen in reviewing each and every one of these cases, raised questions not only about the innocence of people on death row, but about the fairness of the death penalty system as a whole. If the system was making so many errors in determining whether someone was guilty in the first place, how fairly and accurately was it determining which guilty defendants deserved to live and which deserved to die? What effect was race having? What effect was poverty having?<sup>118</sup>

Ryan inverted the logic of the Supreme Court's decision in *McCleskey v. Kemp*<sup>119</sup> in this rhetorical movement from the individual to the system and in his reference to the effect of race in the system of state killing. Presented with a wholesale challenge to Georgia's death penalty system, the Court refused to inquire into systemic problems that might undermine confidence in decisions at the "heart of the criminal justice system."<sup>120</sup> Unlike the Court, which refused to move

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115. Kobil, *supra* note 84, at 227–28.

116. See *Ex parte* Garland, 71 U.S. 333, 380 (1866). Speaking of the President's power to pardon, the Court gave legal sanction to its lawlessness. Writing for the majority, Justice Field observed that the power to pardon is virtually unlimited, as it includes any offense and can be exercised at any time. The power is also not subject to Congressional limits. *Id.*; see also *Ex parte* Grossman, 267 U.S. 87, 120–21 (1925) (stating that the President's power to grant pardons is absolute, rather than strictly limited to federal offenses).

117. Kobil, *supra* note 84, at 227–28, 240.

118. Ryan, *supra* note 23.

119. 481 U.S. 279 (1987).

120. *Id.* at 314 n.37 (stating that by basing their dissent on a statistical study that

from the particular to the general,<sup>121</sup> it is exactly this inquiry upon which Ryan insisted:

The death penalty has been abolished in 12 states. In none of these states has the homicide rate increased. In Illinois last year we had about 1000 murders, only 2 percent of that 1000 were sentenced to death.[sic] Where is the fairness and equality in that? The death penalty in Illinois is not imposed fairly or uniformly because of the absence of standards for the 102 Illinois State Attorneys, who must decide whether to request the death sentence. Should geography be a factor in determining who gets the death sentence? I don't think so but in Illinois it makes a difference. You are 5 times more likely to get a death sentence for first degree murder in the rural area of Illinois than you are in Cook County. Where is the justice and fairness in that? Where is the proportionality?<sup>122</sup>

Instead of a system finely geared to assigning punishment on the basis of a careful assessment of the nature of the crime and the blameworthiness of the offender, Ryan, quoting Justice Blackmun, concluded that “the death penalty remains fraught with arbitrariness, discrimination, caprice and mistake.”<sup>123</sup> Here he assumed the posture of a “new abolitionist.”<sup>124</sup> The new abolitionist does not oppose state killing as an affront to morality or as per se unconstitutional. Instead, he argues against the death penalty in the name of constitutional rights other than the Eighth Amendment—in particular due process and equal protection. New abolitionists, like Ryan, argue against the death penalty, 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. Thus, Ryan noted that:

[P]rosecutors in Illinois have the ultimate commutation power, a power that is exercised every day. They decide who will be subject to the death penalty, who will get a plea deal or even

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purports to show a disparity in imposition of the Georgia death penalty sentences due to the victim's race, the dissenting Justices would eliminate the traditional discretion that prosecutors and juries necessarily must have).

121. For a useful analysis of the implications of this refusal for our understanding of narrative and rhetoric, see Patricia Ewick & Susan Silbey, *Subversive Stories, Hegemonic Tales: Toward a Sociology of Narrative*, 29 LAW & SOC'Y REV. 197, 215–16 (1995).

122. Ryan, *supra* note 23.

123. *Id.* (quoting *Collins v. Collins*, 510 U.S. 1141, 1129 (1994) (Blackmun, J., dissenting from denial of certiorari)).

124. AUSTIN SARAT, *WHEN THE STATE KILLS: CAPITAL PUNISHMENT AND THE AMERICAN CONDITION* 246–60 (2001).

who may get a complete pass on prosecution. By what objective standards do they make these decisions? We do not know, they are not public. . . . [I]f you look at the cases, as I have done both individually and collectively—a killing with the same circumstances might get 40 years in one county and death in another county. I have also seen where co-defendants who are equally or even more culpable get sentenced to a term of years, while another less culpable defendant ends up on death row. . . . Our capital system is haunted by the demon of error, error in determining guilt, and error in determining who among the guilty deserves to die.<sup>125</sup>

Ryan issued a stunning, though by now familiar, indictment of a system in which decisions about who gets the death penalty and who does not are made without reference to “objective standards.” He drew attention to the contrast between his own publicly delivered justification and the daily “commutation” decisions of prosecutors, made without explanation, outside of the public eye. Ryan found arbitrariness deeply enfolded within the operations of the death penalty system, pointing to the influence of irrelevant factors like geography and to the fact that offenders committing the same acts end up with radically different sentences. In a system marked by such arbitrariness, perhaps only the arbitrary power of clemency could provide a route to justice.

Ryan invoked yet another calculus of desert to justify his commutation, returning Danny Edwards to the center of the story:

Some inmates on death row don't want a sentence of life without parole. Danny Edwards wrote me and told me not to do him any favors because he didn't want to face a prospect of a life in prison without parole. They will be confined in a cell that is about 5-foot-by-12 feet, usually double-bunked. Our prisons have no air conditioning, except at our supermax facility where inmates are kept in their cell 23 hours a day. In summer months, temperatures in these prisons exceed one hundred degrees. It is a stark and dreary existence. They can think about their crimes. Life without parole has even, at times, been described by prosecutors as a fate worse than death.<sup>126</sup>

Ryan told his listeners of Edwards's preference not to be spared. He did so in order to assure them that his commutation decision actually satisfied the requirements of justice better than would capital

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125. Ryan, *supra* note 23.

126. *Id.*

punishment. He described a future spent in thinking about one's worst deed, a kind of living self-torture, as a "fate worse than death," and in doing so again called attention to his own future suffering:

I realize it will draw ridicule, scorn and anger from many who oppose this decision. They will say I am usurping the decisions of judges and juries and state legislators. . . . I may never be comfortable with my final decision, but I will know in my heart, that I did my very best to do the right thing.<sup>127</sup>

From responsiveness to the claims of suffering and of death itself, Ryan sought grounding in a retributive calculus.<sup>128</sup> Yet, as Ryan's discussion of Danny Edwards's views on life-without-parole highlighted, retributivism could not ensure stable grounds for judgment any more than could his complicated imaginings of the victims and their needs.<sup>129</sup> It could not alleviate the need to take responsibility for his decision. It is that decision, along with the power to actualize it, that defines the essence of clemency whether in monarchical or democratic governments:

My responsibilities and obligations are more than my neighbors and my family. I represent all the people of Illinois, like it or not. The people of our state have vested in me the power to act in the interest of justice. Even if the exercise of my power becomes my burden I will bear it. . . . "I know," he said, "that my decision will be just that—my decision."<sup>130</sup>

Saying that he "never intended to be an activist" on the death penalty,<sup>131</sup> Ryan portrayed himself as someone who was propelled against his own inclination to do a painful and costly duty that others, in particular the courts and the legislature, refused to do.<sup>132</sup> The

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127. *Id.*

128. Kobil, *supra* note 84, at 227.

129. See R.A. DUFF & DAVID GARLAND, *Introduction: Thinking About Punishment, in A READER ON PUNISHMENT* at 1, 7 (1995) ("[T]he notion of 'desert' is supposed to indicate the justificatory link between past crime and present punishment. But just what is that link? What is 'desert' which supposedly makes punishment the appropriate response to crime?").

130. Ryan, *supra* note 23.

131. *Id.*

132. Here, Ryan's critique was not directed at the system through which the death penalty was administered. Instead, his critique turned from a retributivist's indictment of the flaws in that system to a criticism of the failures of the political system—failures in the absence of which clemency would have been unnecessary.

Turning first to the Illinois State Supreme Court, Ryan portrayed it as "divided" on issues which he saw as clear cut and as failing in courage on the ultimate question of the constitutionality of capital punishment itself. Ryan reported:

We have come very close to having our state Supreme Court rule our death

legislature's failure to take responsibility was not its failure alone. It was, on Ryan's account, "a symptom of the larger problem" in the domain of state killing:

It is easier and more comfortable for politicians to be tough on crime and support the death penalty. It wins votes. But when it comes to admitting that we have a problem, most run for cover. We are a rudderless ship because [these politicians] failed to act.<sup>133</sup>

Seizing that rudder is today, as it long has been, one of the imperatives of executive leadership in times of crisis. Saying that "[t]he legislature couldn't reform it. Lawmakers won't repeal it. But I will not stand for it. I must act,"<sup>134</sup> Ryan plunged into that lawful lawlessness that today marks the exercise of sovereign prerogative, as it always has.<sup>135</sup>

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penalty statute—the one that I helped enact in 1977—unconstitutional. Former State Supreme Court Justice Seymour Simon wrote to me that it was only happenstance that our statute was not struck down by the state's high court. When he joined the bench in 1980, three other justices had already said Illinois' death penalty was unconstitutional. But they got cold feet when a case came along to revisit the question. One judge wrote that he wanted to wait and see if the Supreme Court of the United States would rule on the constitutionality of the new Illinois law. Another said precedent required him to follow the old state Supreme Court ruling with which he disagreed. Even a pharmacist knows that doesn't make sense. We wouldn't have a death penalty today, and we all wouldn't be struggling with this issue, if those votes had been different. How arbitrary.

*Id.*

But his strongest criticism was directed toward the state legislature of which he was once a member:

I have also had to watch in frustration as members of the Illinois General Assembly failed to pass even one substantive death penalty reform. Not one. They couldn't even agree on ONE. How much more evidence is needed before the General Assembly will take its responsibility in this area seriously? . . . I don't know why legislators could not heed the rising voices of reform. I don't know how many more systemic flaws we needed to uncover before they would be spurred to action. Three times I proposed reforming the system with a package that would restrict the use of jailhouse snitches, create a statewide panel to determine death eligible cases, and reduce the number of crimes eligible for death. These reforms would not have created a perfect system, but they would have dramatically reduced the chance for error in the administration of the ultimate penalty.

*Id.*

133. *Id.*

134. *Id.*

135. Derrida refers to the clemency power as what he calls "the right of grace." To speak of such a right, he says, is to locate clemency on the terrain of law, that is to place it within the "order of rights." Yet *this* right works precisely by inscribing in law "a power above the law." Clemency, he says, is "[l]aw above the law." Derrida, *supra* note 104.

## CONCLUSION

George Ryan's clemency was an enormously significant moment in our national debate about capital punishment, if for no other reason than that it energized those seeking to end state killing. For example, a spokesperson for Amnesty International said Ryan's decision marked a "significant step in the struggle against the death penalty" and urged governors of states still implementing the death penalty to follow suit.<sup>136</sup> Or, as former Senator Paul Simon put it, "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."<sup>137</sup>

Yet, the justifications that Ryan offered for his decision were contradictory and somewhat incoherent, symptomatic of the power and appeal of the victims' rights movement and of the continuing attraction of retribution as a basis for punishment. Ryan did not and could not make the pieces fit. His identification with victims pushed him toward an emotional embrace of their pain and suffering as the standard for determining just punishment. Yet his critique of the arbitrariness and politicization of the death penalty system pushed him toward the kind of reasoned, impersonal judgment that distances itself from the pain and suffering of victims.

If philosophers cannot reconcile retributive justice and the desires of victims, it should not be surprising that George Ryan failed in this same endeavor. Despite his inability to put a square peg in a round hole, however, Ryan's act was well within the bounds of traditional understandings of clemency. Its forebears are Clinton, Bush, and Rehnquist. Far from disrupting the essential rhythms of American politics, in its emphasis on suffering and victimization, and in its embrace of retributive principles, in its demonstration of "energy in the executive"<sup>138</sup> yet modest view that clemency is only appropriate to correct errors in the judicial process, Ryan gave new voice to ongoing trends in our political and cultural lives.

State Senator Haine may have been right to characterize it as "a great wrong [and] . . . an extraordinary and . . . breathtaking act of arrogance" and to say that it broke the bond of trust between the

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136. Dominic Evans, *Amnesty Urges Bush "Moral Stand" on Death Penalty*, at <http://www.stopcapitalpunishment.org/coverage/48.html> (Jan. 12, 2003) (on file with the North Carolina Law Review).

137. O'Brien, *supra* note 6.

138. THE FEDERALIST NO. 70, AT 471 (Alexander Hamilton) (Jacob E. Cooke ed., 1961) ("Energy in the Executive is a leading character in the definition of good government.").



people and the Governor, but he was surely wrong when he alleged that Ryan's clemency rendered the law meaningless.<sup>139</sup> And, if Ryan's pardon was an "injury to law itself," it is an injury that the law authorizes and requires, a form of lawful lawlessness without which the law would indeed be rendered meaningless.<sup>140</sup> While his critics may have misread and misunderstood Ryan's use of clemency, failing to see that its essential incoherence arose from his effort to be sensitive to victims and also responsive to the dictates of justice, they may have been onto something important in highlighting the lawful lawlessness that is endemic to clemency itself. Despite Ryan's gallant efforts to ground and authorize his acts in the suffering of victims and the systemic flaws of the capital punishment system, he could neither resolve the contradictory forces that mark our contemporary political condition nor satisfy our need for, and yet discomfort with, the sovereign power to spare life.

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139. Whitworth, *supra* note 12; *see supra* notes 12–22 and accompanying text.

140. GIORGIO AGAMBEN, *HOMO SACER: SOVEREIGN POWER AND BARE LIFE* 18 (Daniel Heller-Roazen trans., 1998). Acts of clemency create exceptions, exclusions, but as Agamben notes, the exception does not "subtract itself from the rule; rather the rule, suspending itself, gives rise to the exception and, maintaining itself in relation to the exception, first constitutes itself as a rule." *Id.*