

Mercy, Clemency, and Capital Punishment: Two Accounts

Austin Sarat*

Schwartz Lecture, Moritz College of Law**
The Ohio State University
April 22, 2005

On January 10 and 11, 2003, Governor George Ryan emptied Illinois's death row by exercising his clemency powers under the state constitution, first pardoning six and then commuting 164 condemned inmates' sentences in the broadest attack on the death penalty in decades. Ryan's act was a particularly compelling moment in our society's continuing turmoil about issues of crime and punishment, appearing, at first glance, to be a rare display of mercy in distinctly unmerciful times. As a humane, compassionate gesture in a culture whose attitudes toward crime and punishment emphasize strictness not mercy, severity not compassion, it seemed to run 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 United States Supreme Court declared it unconstitutional in 1972. 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 where there was a question about whether they were, in fact, guilty of the crimes for which they were convicted, his decision produced an explosive reaction among death penalty supporters. They demonized Ryan and denounced his clemency in the strongest possible terms, claiming along the way 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, and his decision became a signal moment in the evolution of a new abolitionist politics. They hoped it would mark a turning point on the way toward the demise of state killing.

* William Nelson Cromwell Professor of Jurisprudence and Political Science, Amherst College.

** The Schwartz Lecture on Dispute Resolution was established in 1992 as a result of the generosity of the late Stanley Schwartz Jr. '47 and the Schwartz family. Each lecture is published in either the *Ohio State Journal on Dispute Resolution* or another OSU journal in keeping with Mr. Schwartz's interest in the promotion of scholarly publication in the area of dispute resolution. Recent presenters have included such preeminent scholars as Austin Sarat (Amherst College), Russell Korobkin (UCLA), Francis McGovern (Duke University), Christine Chinkin (London School of Economics), and Amy Gutmann (Princeton University), and such distinguished jurists as Judges Harry T. Edwards and Jack Weinstein.

That Ryan acted with two days left in his term of office 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 surrounding his decision. In addition, it was an anxiety-arousing reminder of the virtually unchecked powers of chief executives at the state and federal level to grant clemency and, in so doing, to spare life. 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, and that those who govern always should be legally 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. Like the actions of the President in times of national emergency, it hinted at a specter of power out of control, a dangerous, undemocratic, unaccountable power laying dormant waiting for an occasion to be exercised.

I. ON THE NATURE OF CLEMENCY

When Ryan announced his clemency, he exercised one of the great prerogatives of sovereignty and one of the most vivid expressions of mercy. Thus, the opening sentence of Michel Foucault's final section of *The History of Sexuality: An Introduction. Volume One* says that "for a long time, one of the characteristic privileges of sovereign power was the right to decide life and death." Nor does the Anglo-common law tradition remain impervious to such a definition. The great English seventeenth-century common law authorities, such as Lord Coke, even as they tried to curb and contain such a power, acknowledged its existence, particularly for the new colonies attained by conquest. In a modern, constitutional democracy, of course, such a power 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, the sovereign power over life is far from being extinguished.

Much has been said and written about the power to kill within the confines of modern law; the punishment of death has been regarded as of a different order, as the most robust and terrifying of law's power, of its essential dealings in pain and violence. Such a sustained focus on the right to impose death sometimes eclipses its essential corollary, namely the sovereign right to spare life. In a modern political system, this power to spare life remains in the form of executive clemency. 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. As the law professor Robert Weisberg puts it, "the commutation of a death sentence [is] the most dramatic example of mercy."

The association of clemency and mercy has roots that extend as far back as the Roman Empire. There, Seneca defined mercy as "moderation that remits something of a deserved and due punishment." William Blackstone described the relation of 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 rigor of the general law, in such criminal cases as merit an exception from punishment.”

In each of these descriptions, certain aspects of mercy, the kind of mercy 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.” Charity, compassion, giving criminals less than they deserve . . . these are the essence of mercy.

The idea that clemency and mercy can be given (or withheld) “freely” as well as Blackstone’s description of it as a “court of equity,” highlights their complex and unstable relationship to law. Like all sovereign prerogative, clemency’s efficacy is bound up in its very disregard of declared law. Thus, more than half a century before Blackstone, John Locke famously defined prerogative as the “power to act according to discretion for the public good, without the prescription of the law and sometimes even against it, is that which is called prerogative. . . . [T]here is a latitude left to the Executive power to do many things of choice which the laws do not prescribe.”

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, since 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.”

As a monarchical prerogative, or executive action in a democracy, clemency appears to be something essentially lawless, what one commentator described as “the raw exercise of power against the law itself.” This fact may have prompted Blackstone’s observation that “in democracies . . . this power of pardon can never subsist.” It may also give rise, in a society dedicated to the rule of law, to tension, doubt, and anxiety about clemency.

Perhaps clemency’s anxiety-arousing status explains why, writing in 1788, Alexander Hamilton set out to explain and defend what seemed to his contemporaries something of an anomaly in America’s new constitutional scheme, namely lodging the power to grant “reprieves and pardons for offenses against the United States” solely in the President of the United States. Unlike the President’s power as commander-in-chief of the army and navy, a constitutional provision the propriety of which, in Hamilton’s view, was “so evident in itself . . . that little need be said to explain or enforce it,” the President’s power to pardon was neither self-evident nor self-explanatory. The need for explanation and defense arose because granting such a power to the Chief Executive breached the boundary between the rule of law and monarchical privilege. Traditional ideas of sovereignty would be imported into a document dedicated to constructing a government of limited powers.

Hamilton constructed his defense of the pardon power around several propositions. First, he noted that without such a power “justice would wear a

countenance too sanguinary and cruel.” To the framers, the power to pardon was necessary because in the England of their day it was common for minor offenses to carry a sentence of death, with pardon by the King being the only way to avoid that punishment. Judges often applied a death sentence, having no choice, but applied for a Royal Pardon in the same breath. This is what Hamilton had in mind when, in Federalist 74, he mentioned “necessary severity” and “unfortunate guilt.”

Second, he argued that having such awesome power lodged in one person would inspire in the chief executive “scrupulousness and caution.” Third, Hamilton focused particularly, and revealingly, on the political uses of executive clemency, paying special heed to the power to pardon in cases of treason which he rightly describes as “a crime leveled at the immediate being of the society.” Hamilton worried that “treason will often be connected with seditions which embrace a large proportion of the community.” And it is a “well-timed” offer of clemency, Hamilton contended. Deriving neither from the “dilatatory process of convening the legislature” nor its fractious deliberations, which in the “critical moments” of “seasons of insurrection or rebellion . . . may restore the tranquility of the commonwealth; and which, if suffered to pass unimproved, it may never be possible afterwards to recall.”

While, to a twenty-first century audience, some of Hamilton’s arguments may seem quaint or outdated, the need to explain and defend executive clemency appears to be as pressing today as it was in Hamilton’s time. One result of this need is that clemency had, and continues to have, a rich discursive and literary life. In one form or another, those who exercise that power regularly respond to a compulsion to speak, to narrate, to give what the sociologists Marvin Scott and Stanford Lyman call “accounts.”

Accounts are linguistic devices “employed whenever an action is subject to valuative inquiry . . . to explain unanticipated or untoward behavior [They] recognize a general sense in which the act in question is impermissible, but claim that the particular occasion permits or requires the very act.” In clemency what is untoward or impermissible, in need of explanation and defense, is its lawless quality, its status as “the power of doing good without a rule.”

II. ACCOUNTING FOR CLEMENCY

In the remainder of this lecture, I want to focus on two examples of the speech and writing that surround clemency, and the accounts governors construct to justify its uses in capital cases. These are cases in which by a stroke of the pen they can spare life, or by standing silent, acquiesce in its extinction. I take up these accounts, focusing in particular on how chief executives enlist narrative in their confrontation with law’s violence, on how they use rhetoric and narrative to cope with the emotionally charged decision to spare a life or to let someone die, and on how they explain, or justify their use of this extraordinary power.

One of the central preoccupations of the accounts of clemency is the effort to domesticate sovereign power and, in so doing, render it compatible with democratic politics. Contemporary pardoners try to do so by speaking to background

expectations against which sovereign prerogative in a constitutional democracy might seem to be acceptable. As Terri Orbuch observes, “producing their accounts, actors are displaying knowledge of the ideal ways of acting and ideal reasons for doing what they have done.”

Using familiar tropes and comforting rhetorical appeals, the accounts of their exercise of clemency in capital cases that governors provide begin to emerge as a genre. The first of their generic properties has to do with the structural position of clemency as a discretionary power lodged finally in the office and person of the chief executive. Thus, in each of these accounts we encounter the governor as a solitary figure wrestling alone with an enormous responsibility. But executive clemency is not only a personal discretion, it is a virtually unreviewable power by either the people or the courts.

This leads to two other generic qualities in these narratives: an effort to demonstrate the gravity of the decision making process, and some rhetorical trope that would ground what is in the end a personal choice in larger cultural and political values. These generic conventions are addressed to an audience imagined to be anxious and doubtful about the way the power to spare life is used. How, then one might ask, do these accounts respond to the pervasive cultural anxiety that necessarily attaches to a power that cannot be subject to rule? What rhetorical and literary strategies do they employ? Can, and do, these narratives provide consolation and calm that anxiety?

My inquiry into capital clemency owes much to the work of Natalie Zemon Davis who, in *Fiction in the Archives*, turned to letters of remission authored in the hope of securing the king’s grace for what they revealed about the narrative conventions of sixteenth century France. Here I alter Davis’ perspective, moving from analysis of the literary productions of those seeking clemency to the rhetorical and literary work of those with the power to grant it. However, just as Davis argued that appeals for mercy were, several centuries ago, particularly good sources for understanding “contemporary habits of explanation, description, and evaluation,” I believe that the same is true of modern pardon tales. They provide one fruitful resource for examining the capacity of narrative to soothe anxiety and quiet doubt, to suture the breach between law and sovereign prerogative, between our culture’s desire for governed conduct and the ungovernability of mercy.

A. George Ryan, “I Must Act”

The most recent, and one of the most interesting, of those pardon tales was delivered by Governor Ryan. While his account, delivered the day he announced his mass clemency, gave voice to some of the most important of today’s arsenal of anti-death penalty arguments, as a rhetorical performance Ryan’s twenty-two page, hour long, “I Must Act” was both deeply personal and yet flatly bureaucratic, presenting, as its title suggests, his decision as if it were “compelled,” an act of duty not a personal choice. In addition, his speech was, as law professor Robert Ferguson says of judicial

rhetoric, “self-dramatizing. It has, in effect, no other choice. Judges often solve this difficulty by stressing the importance of a decision only they can make.”

In terms of its substance, Ryan’s account had two different registers, and was driven along the important and pervasive distinction between an individual grant of clemency and a mass commutation. If the first is more amenable to a language of compassion and largesse, then the second is inexorably systemic and speaks more in the discourse of institutions and the distribution of powers amongst them. In both, he sought to speak to a variety of background assumptions in the presence of which his exercise of clemency might be forgiven, if not applauded.

In this regard, Ryan’s rhetoric was designed to convince his listeners that, in spite of his mass clemency, he shared their values and commitments, their compassion for victims, their belief in fairness, and their desire to be tough on crime. In terms of the last of these values and commitments, he recounted the story of one inmate who did not want his sentence commuted. “Some inmates on death row,” he told his listeners,

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-foot, usually double-bunked. Our prisons have no air conditioning, except at our supermax facility where inmates are kept in their cell twenty-three 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.

Though his clemency was a merciful reduction of punishment, his account was, in fact, less a story of mercy than initially meets the eye. Indeed, how could Ryan’s act be merciful when it was directed not to particular individuals, but toward everyone on death row? Mercy, after all, is not a wholesale virtue. As the philosopher and critic Martha Nussbaum notes, mercy requires singularity and attention to particulars. It demands, she says, “flexible particularized judgment.” To be merciful one must regard “each particular case as a complex narrative of human effort in a world full of obstacles.”

As if to alleviate any shred of doubt, the language of mercy played a small role in his account. In fact, in the course of the speech announcing the clemency decision, Ryan mentioned mercy only twice; both times the language of mercy was used in quotations, through the deployment of someone else’s words. This rhetorical gesture meant that he could grant clemency while, at the same time, keeping mercy at a safe distance. Thus he told his listeners, without further elaboration or comment, that, “[t]he Most Reverend Desmond Tutu wrote to me this week stating that ‘to take a life when a life has been lost is revenge, it is not justice. He says justice allows for mercy, clemency and compassion. These virtues are not weakness.’” Second, reaching back into American history, he quoted Abraham Lincoln’s admonition that “‘mercy bears richer fruits than strict justice.’”

Ryan's wholesale clemency was less an act of grace, or of forgiveness, than a concession to inadequacies of a death penalty system gone awry and to a political system unwilling or unable to address those inadequacies. "Ultimately," law professor Dan Kobil claims, "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." Ryan tried to appeal to his audience's sense of fairness, their imagined revulsion at the prospect of executing the innocent. When his speech did display compassion, its compassion was directed to the surviving families of murder victims rather than to the murderers whose lives he spared. The attributes of clemency without forgiveness, and mercy without being merciful, are crucial in the contemporary pardon tale.

Unlike governors before him, who in their own accounts attacked the death penalty *per se*, criticized it as immoral, and called for its abolition, Ryan provided no such critique. Instead, Ryan's "I Must Act" explains his decision through two somewhat contradictory stories. Both serve to ground his clemency in a set of shared cultural and political concerns. Far from a majestic act, Ryan put clemency into discourse to demonstrate his engagement with and fidelity to those concerns.

The key element in this effort is a story of victims and their suffering. So important was this element that it seems safe to say that Ryan's account gave further evidence of an important trend in our political culture, namely that "[w]e have become a nation of victims, where everyone is leapfrogging over each other, competing for the status of victim, where most people define themselves as some sort of survivor." In his second story, he examined institutions and their failures. While the first expressed a commitment to the interests of the victimized, the other embraced a retributive theory of clemency.

In both of these stories, Ryan put himself at the center. In one, he sought to account for, and 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 the criminal, and that the criminal in turn would suffer at his hands. In the other, he is described as a reluctant actor seeking to insure that justice is done in a failing justice system and a political system in paralysis.

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.

Ryan portrays himself as according victims a deep and respectful attentiveness. He takes in their grief and anger, rhetorically refiguring himself into a victim. Ryan's

account is grounded not in sovereign grace, but in the need to pay homage to suffering. In his embrace of victims and their suffering as a rhetorical touchstone for his clemency, he displays the frail sovereignty of a democracy, desperately seeking grounding in a shared conception of citizenship, in which what binds us together is our common suffering and victimization.

In the story of institutional failure, Ryan appears as a committed retributivist, using clemency to do the work that justice, not mercy, requires. "The facts I have seen in reviewing each and every one of these cases," Ryan observed,

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?

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."

Finally, in Ryan's account, like others of its genre, clemency is an agonizing burden thrust on him by the duties of his office rather than an awe-inspiring power wielded with pleasure. "My responsibilities and obligations," Ryan noted, "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. I know," he said, "that my decision will be just that—my decision."

Ryan continued, as if his listeners would derive satisfaction from seeing him suffer for his lawless act. "Even if the exercise of my power becomes my burden I will bear it," he said. In addition, he described the extreme personal cost, the anguish, that accompanies the exercise of the sovereign power to spare life. Thus, Ryan shared with his listeners his concern that "whatever decision I made, I would be criticized" and his worry that he would "never be comfortable with [his] final decision."

When Governor Ryan issued the mass commutation of death sentences in Illinois he spoke to, as well as stirred up, our national doubts and anxieties about executive clemency. Attending to his rhetoric, to his explanation of this decision, shows Ryan desperately trying to allay those doubts and calm those anxieties. Ryan was compelled to speak, to explain, to justify by his confrontation with the structural aporia of clemency. He spoke to fill in the space, to heal the spilt in which clemency in a democratic society exists. Yet despite Ryan's efforts to ground and authorize his acts in the suffering of victims and the systemic flaws of the capital punishment system, he could not resolve the contradictory elements which, as far back as Alexander Hamilton, register democracy's need for, and yet discomfort with, prerogative power.

B. Michael DiSalle, *The Power of Life and Death*

From Ryan's recent speech, I now look back several decades to another governor, Michael DiSalle and his pardon tale. DiSalle, who served as Governor of Ohio from 1959 to 1963, was a long time and consistent opponent of capital punishment. "I have long felt," he once said, "that only the Giver of Life has the right to take away life. I do not believe we achieve justice by practicing retribution, but I had sworn to uphold the laws of Ohio." He believed that "'punishing and even killing criminals may yield a grim kind of satisfaction. . . . [b]ut playing God in this way has no conceivable moral or scientific justification.'" Thus, during his term as Governor, DiSalle commuted six death sentences. Yet, somewhat surprisingly, he also allowed six others to be carried out. As a commentator noted sometime later, while conservatives attacked DiSalle for his opposition to the death penalty, "there were more executions carried out in Mr. DiSalle's one term than in the administrations of the next four governors combined!" Two years after he left office, in 1965, DiSalle turned clemency into literature, publishing an account of the decisions he made in each of the twelve capital cases that came to his desk.

The Power of Life and Death is, in many ways, a remarkable book, straightforward in its exposition, lucid in its prose, revealing in its rhetoric. It is fictive in the way Davis describes the pardon tales of the sixteenth century citizens of France as fictive, namely in its "forming, shaping and moulding elements: the crafting of a narrative." As Davis explains, the "shaping choices of language, detail, and order are needed to present an account that seems to both writer and reader true, real, meaningful, and/or explanatory."

DiSalle deploys language, detail, and order to tell a story of conflict between his conscience and his duty, his moral principles and the oath of office that binds chief executives to faithfully execute the law of the land even when they find it morally abhorrent. Like Ryan's account, it relies on the trope of anguish, the agony of the person forced by circumstance to wield God-like power on the basis of fallible human judgment. And, one of the most revealing aspects of this book is its primary narrative device, a series of detailed accounts of each of the twelve instances in which DiSalle considered clemency in a capital case.

Page after page he recounts the details of the crime, of the life and circumstances of the criminal, of the legal processing of the case, and of his own efforts to get at the truth and reach a judgment that would heal the rift between his moral objection to capital punishment and Ohio's embrace of it. Each of the cases is introduced by a hackneyed headline or transparent play on words—"The Lovesick Den Mother," "The Equality of Justice Is Not Strained," "The Four-Angled Triangle," and "The Bookie and the Wise Guy," etc. As he moves from the headline through each case, DiSalle is didactic and, at the same time, defensive, trying both to encourage more informed and rational responses to crime and criminals and also provide a convincing explanation of each decision he made.

Presenting the detailed story of each of the twelve cases in which he considered, or granted, clemency, DiSalle offers evidence that can be used to judge his decisions.

DiSalle's book is written as if he were putting himself on trial in the here and now, calling himself before the bar of public opinion to defend against an accusation frequently made during his term as Governor: that, in his use of the clemency power, he set himself above and outside the law, arrogantly and irresponsibly deploying a power that should be used more sparingly than he used it or that it should not be used at all.

Indeed, repeatedly DiSalle reminds his readers of the charges against him, charges contained in newspaper stories and letters addressed to him. He enfold the voices of his critics in his story, often characterizing them in sweeping terms, e.g., "[m]ost Ohio newspapers cried out in editorial horror and indignation each time I exercised clemency; they spoke in whispers each time I allowed a man to die," or, as he puts it, in response to his first commutation, editorial writers "excoriated me," DiSalle says, "for having set myself above the conclusions of the courts and jurors."

In other places he quotes particular criticisms communicated directly to him. For example, "[w]e no longer need police, courts, juries or judges. The great DiSalle will see that justice is served." Or as another outraged citizen wrote, "[i]t is difficult for an ordinary Ohio voter to understand how an elected Chief Executive can allow his beliefs to cause him to overrule the judiciary."

As to its avowed purpose, DiSalle says that his book was "written in the hope that judges prosecutors, criminologists, law enforcement officers, and the ordinary citizen . . . will make a sober, disinterested judgment, when passions are not raised to a fever heat by inflammatory headlines blazing the news of some monstrous crime." A sober, disinterested judgment of what? Or, of who?

At first glance one might think that the object of this admonition is crime and punishment policy, but as the book unfolds it is clear that it is written as a reply brief to the charges he has so scrupulously documented. And, explaining his use of "case histories," he exclaims, "[l]et the reader judge." Reader sovereignty substitutes for popular sovereignty, placing the once powerful governor within the frame of a kind of democratic community. The reader's imagined judgment is a stand in for the verdict of history itself.

In the course of his book, DiSalle, like Ryan, attempts to reassure his readers that though his exercise of clemency, like all such exercises, was a kind of lawful a legality, authorized, but not governed, by law; it was, in every case, grounded in values and beliefs he shared with the citizens of Ohio. He writes as if trying to persuade his readers that his use of clemency was less a majestic moment of sovereign prerogative, than just the kind of thing that they too would have done had they been in his shoes. In this way his account domesticates and diminishes prerogative even as it details its exercise. To do so, it tells two different stories, one substantive and the other procedural.

First, DiSalle seeks to convey to his readers that, while they might disagree about particular judgments, his exercise of power was grounded and disciplined by principles deeply rooted in the legal and political culture. The first of these is that clemency is appropriate when "the inflexibility of legal procedure prevented the entire truth from reaching the jury." Second, DiSalle explained that clemency should be

used to insure equal treatment under the law as in instances when “there was an obvious inequity of justice in administering punishment.” Third, clemency is appropriate when particular factors (e.g. youth or mental incapacity) “mitigate guilt.”

These principles are, in the first instance, legalistic. They position clemency as merely a corrective for some deficiency in the legal process. However, the third does leave space for mercy, albeit on limited grounds. As if authoring his own constraining jurisprudence, these principles are said by DiSalle to supply the only “legitimate reasons” for granting clemency. Where one or more were present, clemency would be granted; where none were present, clemency would be denied. As DiSalle informs his readers, “[f]or the six who died I could find no extenuating circumstances, no unequal justice, no questionable legal procedure, no reasonable doubt, to justify my reversing the sentences of the courts.”

It is worth noting that in these principles there is little of the kind of concern for victims and their suffering that played such a large role in Ryan’s pardon tale. This difference registers a profound change in the background assumptions to which pardon tales must speak if they are to do their justificatory work. It registers change from a time when criminal justice was thought to be public justice to today when victims have succeeded in contesting what Professor Danielle Allen calls “the near-total erasure of the victim from the process of punishment.”

In any case, when they are present in DiSalle’s pardoner’s tale, victims appear mostly as an abstract category. Thus, early in the book DiSalle says, “[t]he time to show concern for the victims of crime is long before the shot is fired or the blow struck—by seeking a sensible way of eliminating the causes of crime rather than by trying as we now do, futilely, after the fact, to eradicate crime by punishing the perpetrator.” DiSalle, like Ryan, offers an account that displays mercy without being merciful, a story in which clemency does not forgive.

In addition to the substantive grounds on which DiSalle’s account seeks to reassure its reader-judges, it repeatedly details the process he employed in reaching his clemency decisions. DiSalle seeks to persuade both that his decisions were made with great care and that there were great personal costs associated with each and every instance of clemency. While Ryan’s narrative task was to account for a use of clemency that refused to draw distinctions and make individual judgments, DiSalle’s book is filled with stories of uniquely, almost obsessively, individualized judgment.

In each of these stories, DiSalle presents himself as an engaged and active participant, reviewing extensive case files, reading pleadings, asking questions, and, in several instances, going to death row himself to interview the person whose fate he would ultimately decide. As he notes in regard to one of the cases in which he granted clemency,

[i]n due course I received an application for executive clemency, and gave it long and serious consideration . . . I was left with no alternative but to conduct my own investigation. I spent weeks researching the legal and philosophical basis for executive clemency. I spent more weeks digging into the archives for the result of clemency appeals in cases, particularly in

the state of Ohio, in which people found guilty in the same crime received different sentences. I went to the gray stone fortress that is the state penitentiary to talk to the principals in the case.

In another case, he tells his readers that he went “to see the physical layout of the scene of the crime so that I could understand what really took place.” In still another case, he says, “I pursued my own investigation into the question of responsibility. The day before Nelson was to die, I drove to the penitentiary to talk to the condemned youth.”

Not only does his narrative seek to bridge the gap between himself and his reader-judges through an appeal to shared principles and a demonstration of the care with which he used his clemency power, in the end, it recounts the substantial personal pain that acting beyond rules imposes on those who wield life or death power. DiSalle writes of the “harrowing days” on which he had to “go into a long executive session with his conscience” when he decided on clemency petitions in capital cases. In so doing, he turns clemency into melodrama, reminding his readers at the outset that his story comes from “someone who . . . had the final word on whether or not a fellow man was to die.”

The Power of Life or Death describes DiSalle as an agonizing and agonized decision-maker, as if by recounting the pain associated with his clemency decision he could enlist some measure of sympathy and convince his readers that his use of sovereign prerogative was reluctant and responsible. Describing each of the days on which an execution was carried out as “a waking nightmare,” he said that “I could never get used to the idea that a man would die—even a man guilty of the most incredibly inhuman behavior—because I had not exercised the power that was mine as long as I was governor, the power to keep him alive.” In another place, DiSalle writes, “[e]ven when I was convinced of the man’s guilt, doubt haunted my unconscious long after the warden had notified me that the prisoner was dead.” Conjuring a metaphysical imagining, he says that when he refused clemency he “owed the whole human race an apology” and that he “could not bear to see the imagined reproach in anyone’s eyes.”

In the end, despite his effort to bridge the gap between himself and his readers through an appeal to common principles, a demonstration of the care he took in making his decisions, and the agony associated with them, he worries about narrative’s inability to supply the materials for truly empathetic judgment. He warns his reader-judges and reminds himself that, inevitably, they must judge him from a distance that no set of stories or narrative conventions can close. Finally giving into the impossibility of the task he set for his account, DiSalle concedes that “[n]o 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.”

III. CONCLUSION

The impulse to narrate, to provide accounts of our actions, Hayden White writes is “so natural . . . [and] so inevitable . . . that narrativity could appear problematical only in a culture in which it was absent.” Or, as Peter Brooks puts it, “[o]ur lives are ceaselessly intertwined with narrative. . . . We live immersed in narrative, recounting and reassessing the meaning of our past actions, anticipating the outcome of our future projects, and situating ourselves at the intersection of several stories not yet completed.” Surely, White and Brooks are right; putting events into narrative, creating stories to record and speak about those events, and turning deeds into justificatory rhetoric is ubiquitous.

Our immersion in narrative is, however, not free of history or context. Narrative lives in history and has a history of its own. At some times, and under some conditions, narrative flourishes; at other times, it atrophies. In some places and in response to some situations, narrative finds a home; in others, it seems strangely absent. In this talk, I turned to executive clemency as one site to examine the generation of narrative.

In the face of clemency’s lawful lawlessness and its seemingly anomalous place in a constitutional democracy, the accounts of chief executives provide some semblance of order by connecting sovereign prerogative and the lived experience of readers in a democratic culture. Yet, as DiSalle reminds us, they may be unable, in the end, to bridge the gap between sovereign and citizen and do the justificatory work that accounts always seek to do. This may be because, as Jacques Derrida suggests, the pardon always undoes any account offered for it.

In *The Century and the Pardon*, Derrida turns to the universalization of apology and forgiveness, both personal and historical, that mark our post-traumatic times. Exploring diverse manifestations of the pardon from the Japanese apology, the language of forgiveness in the South African Truth Commission, and the role of pardon in the mitigation of punishment, Derrida locates an illuminating paradox about pardon and the accounts offered to explain it; “it is necessary it seems to me, based on the fact that, yes, there is the unpardonable. Is this not in truth the only thing to pardon? The only thing which calls for the pardon.” Derrida’s analysis dramatizes the limitations that inhere in any accounting of a pardon. What account, what narrative, what set of rhetorical devices can satisfactorily account for this paradox? For pardoning of the unpardonable?

Perhaps the real work that pardon tales do is to console those who exercise sovereign power in a world in which that power takes and spares life. It may be, however, that all pardon tales can do is provide some assurance for those with the power to spare life that meaning can be made and that it can survive in a world of violence and pain. As Natalie Zemon Davis writes about pardon tales several centuries ago, “[t]urning a terrible action into a story is a way to distance oneself from it, at worst a form of self-deception, at best a way to pardon the self.” When governors provide accounts of clemency in capital cases, they seek to domesticate the

exercise of their sovereign power and render it less threatening to the rule of law. In so doing, one might ask: are they seeking to pardon their own unpardonable acts?