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Reviewed by JaneAnne Murray

Mercy on Trial: What It Means to Stop an Execution

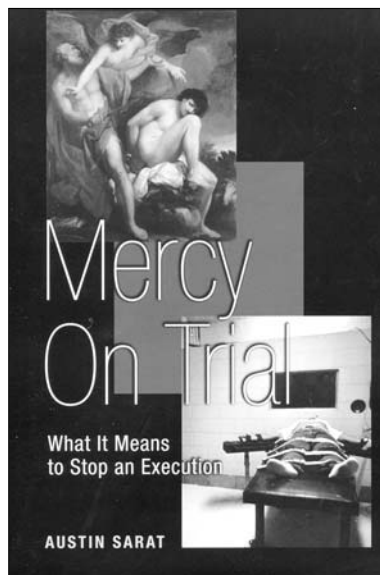
By Austin Sarat, Princeton University Press, Princeton, N.J. 352 pages, \$29.95

The execution of Crips co-founder Stanley Tookie Williams came at a time when support for the death penalty in America is gradually on the decline from its highs of 80 percent in the early 1990s. But clemency in capital cases is a rarity. Rarer still are grants of capital clemency—like the one sought by Williams' advocates—grounded in mercy and compassion for the offender.

Sparing a person's life may be the ultimate act of mercy, but those who have done so have usually explained their action in terms of redressing procedural inadequacies and institutional failures. Virginia Governor Mark Warner's commutation of a death sentence recently is a case in point. Citing the improper destruction of DNA evidence, he said this was an "extraordinary" case where "the normal and honored

processes of our judicial system [did] not provide adequate relief." In other words, the problem lies with the mechanics of our killing process, not with its consequences.

Why is merciful rhetoric so conspicuously absent from these fundamentally merciful acts? Should mercy play a role in capital clemency decisions? If so, how is an exercise of an essentially lawless power to be reconciled with the rule of law? These questions are the subject of a multi-layered and thought-provoking book by Amherst College Professor Austin Sarat, "Mercy on Trial: What It Means to Stop an Execution." Taking as his focus Governor George Ryan's commutation of 167 death sentences in Illinois in 2003, Sarat presents a scholarly but accessible examination of the declining role of "mercy in the killing state." In so doing, he takes a frank look at how victim-centered politics and retributive goals have displaced redemptive models of justice in our society, and makes a passionate defense of mercy-based clemency in capital cases.



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The story of Governor Ryan's mass commutation provides a compelling dramatic core to this academic work. A self-described "Republican

pharmacist from Kankakee” and a staunch supporter of the death penalty throughout his long career in Illinois politics, Governor Ryan was an unlikely candidate to become a world-famous hero of the anti-death penalty movement. As governor, however, his views on the death penalty underwent a radical transformation. Spurred by several exonerations of inmates on death row during his tenure, as well as mounting evidence of a capital prosecution system riddled with unfairness, Governor Ryan first declared a moratorium on executions in 2000, and then, three years later, made the grand gesture of emptying Illinois’ death row in one fell stroke. Sparing the lives of murderers without regard to the presence or absence of individual mitigation, his decision—made (like Governor Warner’s recent commutation) on the eve of his departure from office—inevitably provoked a firestorm of praise and protest.

No doubt anticipating the explosive reaction, Governor Ryan announced his decision in a lengthy and painstaking speech, entitled “I Must Act.” As only a politician can, he framed his revolutionary act in the distinctly unrevolutionary rhetoric of his age—“tough on crime,” respectful of victim’s rights, and committed to retribution. Expressions of mercy in the speech were reserved for the victims’ and offenders’ families—not the offenders themselves. Sarat puts this speech under the microscope. He demonstrates how Ryan’s justificatory rhetoric placed his act squarely in contemporary retributive understandings of punishment and clemency, rather than traditional clemency jurisprudence, which viewed clemency as an act of mercy. Ryan based his decision on the brokenness of the system—a system that failed to give victims closure or the public the confidence of knowing that the ultimate penalty was meted out fairly. In so doing, Sarat points out, Ryan fashioned his clemency in “such a way as to insulate [himself] against charges that it showed sympathy for those whose lives he spared.” Sarat concludes that Ryan “did the right thing ...for the wrong reasons.”

Sarat’s critique of Ryan’s rhetoric is cogent but perhaps a little unrealistic. After all, this is one time when the act spoke so much louder than the words. And politicians, more than anyone else, are under pressure to pay lip service to the mores of their time. Indeed, it is acts of humanity like Ryan’s mass reprieve that pave

the way for more humane rhetoric in the public debate about the death penalty.

More persuasive is Sarat’s eloquent defense of—and call for—capital clemencies that are overtly based on mercy. Critics of mercy have highlighted its arbitrariness, potential for discrimination and favoritism, and the difficulty of reconciling it with the rule of law. The concept of mercy inspires fear and anxiety because it inhabits an area beyond law—like the president’s emergency powers—that is both lawful and lawless. As Sarat points out, this is especially true of mercy in the death penalty context, which in the globalized world has become for many an important symbol of sovereignty. Far from rejecting mercy’s lawlessness, however, Sarat argues we should embrace it. For mercy’s lawlessness brings not only risks, but also possibilities—of justice unattainable under traditional legal processes, of ennoblement through sympathy and understanding, and of a more engaged democracy. The bulwark against the insecurity inspired by unfettered executive discretion is careful selection of and dialogue with our leaders.

But there is another risk of a mercy-infused clemency process that Sarat does not address. That is the risk that the exercise of mercy may legitimize the death penalty and prolong its usage. For the right to show mercy presupposes the right to take life. In exercising mercy, a lawful punishment is commuted in favor of compassion and forgiveness. Moreover, a system founded on mercy must accept that some are beyond it. Mercy is, by definition, an individual exercise—mercy extended to all is no mercy at all. Mercy-based clemency is therefore no solace to those who believe that the state should not be in the business of killing anyone—even the most heinous of murderers who are apparently beyond redemption.

“Mercy on Trial” is an important contribution to death penalty jurisprudence. In an era when the death penalty debate focuses so heavily on “tinkering with the machinery,” it is inspiring to come across such a well-written call to respond to the higher instincts within us: the instincts to empathize and forgive.

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