Book Review—Mercy on Trial: What It Means to Stop an Execution

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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 Tokle Williams came at a time when support for the death penalty in America is gradually on the decline but remains supported by 60 percent of the population.

Spatting a person's life may be the ultimate act of mercy, but those who have done so usually explained their actions in terms of redressing perceived wrongs. A year ago, Governor Mark Warner's commutation of a death sentence recently was a case in point. In 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 the cause.

Why is mercy rhetoric so conspicuously absent from these fundamentally merciful acts? Should mercy play a role in capital clemency decisions? If so, how far is an execution amid troubles and lawlessness power to be reconciled with the rule of law?

These are questions that are subject of a multi-layered and thought-provoking book, "Mercy on Trial: What It Means to Stop an Execution," by Amherst College Professor Austin Sarat. "Merger on Trial: What It Means to Stop an Execution," which was introduced in 2003, presents an absolutely necessary 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.

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 injuring Illinois' death row in one fell stroke. Sparing the lives of murderers without regard to the merits of individual mitigation, his decision — made with a hammer at the time of the recent commutation — was done on the eve of his departure from office — inevitably provoked a storm of public and political reaction.

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 made an extraordinary act to the distinctly unrevolutionary rhetoric of his age — "thin on crime," respectful of victim's rights, and committed to retribution. Expressions of mercy in the face of the system are not the nor offenders' families — not the offenders themselves. Sarat puts this speech under the microscope. He demonstrates how Ryan's justification rhetoric placed his act squarely in context. The clemency of this clemency decision was an act of mercy. Ryan based his decision on the brokenness of the state 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's decision was 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 moral of their time. Indeed, it acts of humanity like Ryan's mass clemency in a time of hyper-rhetoric in the public debate about the death penalty.

More persuasive is Sarat's eloquent defense of — and call for — capital clemency that is overburdened 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 executive authority 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 more an important symbol of sovereignty. Far from rejecting mercy's lawfulness, however, Sarat argues we should embrace it. For mercy's lawlessness brings not only risks, but possibilities. The possibility of an idea unattainable under traditional legal processes, emancipation through sympathy and compassion, and a more engaged democracy.

The book is the account of the insecurity inspired by unfiltered executive discretion, a careful selection and dialogue with our leaders. But there is another risk of a mercy-infused clemency process that Sarat does not address. That the risk that the exercise of mercy may legitimatize the death penalty and prolong its use. For the right to show mercy presupposes the right to take life. In exercising mercy, a law can be used 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 redemp- tion.

"Mercy on Trial" is an important contribution to death penalty jurisprudence. In an era when the death penalty is being reargued,God, mercy cannot be ignored. The debate about mercy is not about whether mercy is the right thing to do. It is about whether mercy is the right thing to do, given the history and form of capital punishment in our society. The book offers a valuable contribution to this debate.