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John Charles Boger

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FOREWORD: ACTS OF CAPITAL CLEMENCY: 
THE WORDS AND DEEDS OF GOVERNOR 
GEORGE RYAN

JOHN CHARLES BOGER*

During the final days of his term in early 2003, Illinois Governor George Ryan exercised gubernatorial clemency on a scale without precedent in the history of American capital punishment. First, on January 10, 2003, speaking before an audience at DePaul University College of Law, Governor Ryan announced a decision to pardon four African-American inmates, concluding that none of the four committed the crimes for which they had been capitally sentenced:1 “Today, I am pardoning them of crimes for which they were wrongfully prosecuted and sentenced to die... The system has failed for all four men,” Governor Ryan said, “[a]nd it has failed the people of this state.”2

The next day, Governor Ryan traveled to Northwestern University Law School. Its Center on Wrongful Convictions was among those institutions whose findings documented egregious errors and mistakes in Illinois capital cases. These findings impelled the Governor, three years earlier, to declare a statewide moratorium on executions while a blue ribbon commission undertook a comprehensive study of Illinois' capital charging and sentencing system.3 Although the commission eventually recommended dozens

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* Professor of Law, University of North Carolina School of Law, and Deputy Director, University of North Carolina Center for Civil Rights. A.B., 1968, Duke University; M.Div., 1971, Yale University; J.D., 1974, University of North Carolina School of Law. I am grateful to Catalina Azuero, University of North Carolina School of Law, Class of 2004, for her excellent research assistance and to Anthony V. Alfieri for conceiving of this Colloquium and recruiting its distinguished participants.


2. Id.

3. See Steve Mills & Maurice Possley, Clemency for All; Ryan Commutes 164 Death Sentences to Life in Prison Without Parole; “There is No Honorable Way to Kill,” He Says, CHI. TRIB., Jan. 12, 2003, § 1, at 1; see also CTR. ON WRONGFUL CONVICTIONS, A CONSTITUENCY FOR THE INNOCENT, at http://www.law.northwestern.edu/depts/clinic/wrongful/History.htm (last visited Apr. 1, 2003) (recounting the launching of the Center during the fall of the 1999-2000 academic year at Northwestern University Law School) (on file with the North Carolina Law Review). The establishment of the Center on
of changes in a report issued in April of 2002, Governor Ryan was unable to persuade the Illinois General Assembly to adopt any of the suggested reforms. Ryan therefore decided to take unilateral action. Delivering a major address on January 11, 2003, to a Northwestern University audience that included exonerated death-row inmates, as well as law school students, Governor Ryan shared his own experience with Illinois’ system of capital charging and sentencing. After assuring listeners that he was no stranger to the violent loss that accompanies homicide—a brutal murder had taken the life of a close family friend and neighbor of the Ryans—and after recounting his meetings with the families of victims, Governor Ryan poured out his mounting distress with the error and capriciousness that he had found in Illinois’ “deeply flawed” criminal justice system. Declaring that he “must act” in the face of this overwhelming evidence, Ryan announced his decision to grant executive clemency to each one of the 167 Illinois inmates awaiting execution on the state’s death row.

Never before has an American governor exercised his clemency powers so broadly. The largest previous mass clemency spared eight capital inmates in Ohio in 1991. Indeed, not since 1972, when the United States Supreme Court issued its 5-4 decision in Furman v. Georgia, lifting the death sentences of 633 inmates, has any single American legal body freed more inmates facing death by execution.

Wrongful Convictions was prompted by a Northwestern University professor’s work to exonerate three Illinois inmates and a national conference at Northwestern in 1998 that brought together twenty-eight innocent and freed death row inmates. Id. These developments, along with a series of investigative journalism articles in the Chicago Tribune, led to Governor Ryan’s moratorium announcement in January of 2000. Id.


5. Laurent Belsie, Big Setback, and New Ire, on Death Penalty, CHRISTIAN SCI. MONITOR, Jan. 13, 2003, at 1, 4.


7. Id. at 2.
8. Id. at 4.
9. Id. at 10.
10. Id. at 11; see also Abdon M. Pallasch et al., Gov. Ryan Empties Death Row of All 167, CHI. SUN-TIMES, Jan. 12, 2003, at 2.
12. 408 U.S. 238 (1972) (per curiam).
13. See generally HUGO ADAM BEDAU, THE DEATH PENALTY IN AMERICA:
The public response to Governor Ryan's mass clemency was sharply divided. International leaders, many of whom oppose on principle America's continued use of capital punishment, voiced a chorus of approval. South African President Nelson Mandela called to congratulate the Governor. In addition, Archbishop Desmond Tutu, the Vatican, and leaders of the European Community, Poland, and Mexico, among others, offered warm support. However, many within the State of Illinois, especially members of the political and law enforcement communities, responded with anger and condemnation. State Senator George Haine, a former prosecutor, described Governor Ryan's mass clemency as "an extraordinary and a breathtaking act of arrogance." Senator Haine declared that:

George Ryan has severed the bond of trust between those who hold great power on behalf of the people and the people themselves .... He may have irreparably injured the law itself .... He has certainly committed a great wrong against the victims, and 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.

Determined to challenge Governor Ryan's action as not only unwarranted but illegal, the Attorney General of Illinois filed a petition for a writ of mandamus with the Supreme Court of Illinois, seeking a judicial decree to prevent the state's Director of Corrections or its prison wardens from recording the clemencies. The Attorney General asserted a variety of state constitutional and statutory arguments, some founded in separation of powers concerns, to support the petition. Although the Supreme Court of Illinois

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14. See Pallasch et al., supra note 10; see also Barry James, Clearing of Illinois Death Row is Greeted by Cheers Overseas, N.Y. TIMES, Jan. 14, 2003, at A10 (reporting support from sixty lawyers and judges, the International Commission of Jurists, and Walter Schwimmer, Secretary-General of the Council of Europe).


17. See People ex rel. Madigan, v. Snyder, 804 N.E.2d 546, 550-52 (Ill. 2004). The petition contended that since article V, section 12 of the Illinois Constitution provides that "the manner of applying" for reprieves, commutations, or pardons "may be regulated by
declined to grant the writ, reasoning that the Illinois Constitution reposed unreviewable authority in its governor to issue clemencies and pardons, the court ended its opinion with a paragraph implicitly disapproving the Governor's exercise of his authority:

As a final matter, we note that clemency is the historic remedy employed to prevent a miscarriage of justice where the judicial process has been exhausted. We believe that this is the purpose for which the framers gave the Governor this power in the Illinois Constitution. The grant of this essentially unreviewable power carries with it the responsibility to exercise it in the manner intended. Our hope is that Governors will use the clemency power in its intended manner—to prevent miscarriages of justice in individual cases.

Governor Ryan's exercise of clemency, especially on such a mass scale, raises fundamental questions about the proper objectives of criminal law, including the underlying purposes of punishment, the demands of retributive justice, and most pointedly, the role of mercy. This Colloquium brings together five of the nation's most thoughtful observers of law, jurisprudence, and public policy—Austin Sarat, Stephen Garvey, Jonathan Simon, Robert Weisberg, and Anthony Alfieri—to address these issues. Taking Governor Ryan's actions as their starting point, each offers wider and complementary reflections.

Austin Sarat's article focuses on Governor Ryan's rhetorical justifications for his clemency announcements, asking whether Ryan was successfully able to reconcile his expressed concern for murder
victims with the principles of retributive justice he implicitly accepted.20 Stephen Garvey turns from the rhetorical struggle to search for philosophical justifications that place mercy within some broader theory of justice and punishment.21 Unable to situate mass clemency within modern retributive theories, Garvey proposes an alternative theory, "punishment as atonement," which could provide, he suggests, a more coherent rationale for Governor Ryan's actions.22

Robert Weisberg's essay aims not to weigh the normative justification of Governor Ryan's words or deeds, but rather to explore how other institutional actors during the modern capital punishment era have accommodated the conflicting impulses toward justice and mercy.23 Weisberg's intriguing account finds other cognate "acts of mercy" exercised by judicial and legislative authorities as forms of *apologia*—confessions of systemic failure in the administration of criminal justice and capital sentencing systems.24 Jonathan Simon, by contrast, invites readers to hear the anguished voices of victims' families who spoke in emotionally charged clemency hearings held during October and November of 2002.25 Simon draws parallels between this contemporary victim speech and *parrhesia*, a distinctive form of rhetorical address in ancient Athens, and he uses that comparison to explore the significance of victims' speech for contemporary decisionmaking in capital cases. Finally, Anthony Alfieri reflects upon the difficult mission faced by capital defense lawyers in clemency proceedings, during which arguments that are forbidden at guilt or sentencing proceedings—appeals to "the racial character of crime and criminal justice," overtly religious appeals, and "faith-based claims of redemption"—become not merely appropriate but perhaps decisive.26 In sum, a rich feast awaits the readers of this Colloquium. To sharpen appetites, this Foreword offers a few introductory observations on each piece.

Austin Sarat's incisive meditation begins with Governor Ryan's "I Must Act" speech, which Sarat ultimately judges as a failed
attempt "to reconcile the irreconcilable." In an effort to simultaneously embrace victims’ suffering and act upon some version of retribution, Governor Ryan undertook, in Sarat’s view, “to make a square peg fit in a round hole,” a doomed effort “symptomatic of the complex and contradictory pulls of victims’ rights and retribution in our legal and political systems.”

Sarat suggests that “modern legality” has been built upon an essentially retributive foundation, aiming “to make reason triumph over emotion and to make punishments proportional in their severity to the crimes that occasion them.” This Kantian approach finds contemporary articulation in the work of Robert Nozick, among others, who stress the ways in which retributive punishment must achieve an impartiality and proportionality that necessarily “distances itself from the claims of private victims.”

The contemporary victims’ rights movement has strongly challenged this impersonal approach, Sarat reports, demanding a more central role for victims in the resolution of criminal judgments. Citing political pressure from an increasingly pro-death penalty public and from victims’ groups in recent decades, Sarat chronicles a consequent decline in gubernatorial exercise of clemency. Specifically, Sarat contrasts the broader view of clemency embraced by Governors Terry Sanford of North Carolina, Lee Cruce of Oklahoma, Pat Brown of California, Winthrop Rockefeller of Arkansas, and Tony Anaya of New Mexico, who often employed “the rhetoric of high moralism” from the 1960s through the early 1980s, with the far narrower retributive justifications and the more sparing use of clemency by modern governors, including such governors-become-presidents as William J. Clinton of Arkansas and George W. Bush of Texas.

Governor Ryan took great care in his “I Must Act” speech, Sarat notes, to situate himself within the contemporary rhetorical world of victims’ rights and to acknowledge their pain and loss. Ryan shared with his listeners an extended story of a horrible murder that had occurred in his hometown, where Ryan knew both murderer and

27. Sarat, supra note 20, at 1347.
28. Id.
29. Id. at 1350.
30. Id. at 1351.
31. Id. at 1363; see also id. at 1364 (contending that “Ryan’s mass commutation was situated in the saga of an increasingly victim-centered political and legal environment”).
32. Id. at 1357.
33. See id. at 1358.
Ryan assured listeners that he had tested his clemency decision against this personal experience, characterizing himself as someone “caught, almost literally torn, between the victim and the offender.”

Yet ultimately, Sarat suggests, Governor Ryan did not make his clemency decision in response to the emotional world of victims and their suffering. Instead, “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.” What Sarat emphasizes in that movement, however, is that Governor Ryan’s clemency, while striking in its breadth, is “yet quite continuous with the emerging [retributive] logic governing executive clemency.”

Ryan “neither linked clemency to mercy nor ... elevate[d] it to... moral stature,” as had Governors Sanford, Rockefeller, Anaya, and others before him. Instead, he justified his actions on systemic grounds, finding that Illinois’ system was so flawed in its execution of the criminal justice tasks assigned to it that he could no longer repose confidence in its life-or-death sentencing judgments. Sarat emphasizes that Governor Ryan’s theme is characteristic of “the new abolitionist [who] does not oppose state killing as an affront to morality or as per se unconstitutional” but decries demonstrated failures to observe substantive or procedural norms.

In the penultimate portion of his address at Northwestern University, Governor Ryan turned to the Illinois legislators. He lamented their refusal to enact any of the procedural reforms recommended by his Commission on Capital Punishment, despite their promise to mitigate or eliminate the flaws uncovered in the Illinois system. This refusal, Ryan concluded, left Illinois “a rudderless ship.” Sarat chronicles this final rhetorical step: “The legislature couldn’t reform it. Lawmakers won’t repeal it. But I will not stand for it. I must act.” Ryan plunged into that lawful lawlessness that today, as it always has, marks the exercise of

34. Id. at 1364–65.
35. Id. at 1366.
36. Id. at 1369.
37. Id. at 1360.
38. Id.
39. See id. at 1360–61.
40. See id. at 1371–72.
41. Id.
42. Id. at 1374 (quoting Ryan, supra note 6, at 5).
sovereign prerogative."  
Sarat concludes that Ryan's decision, however appropriate, was "contradictory and somewhat incoherent" in its justifications, since his rhetorical justification rested upon two foundations that neither he, nor any modern philosopher, has yet been able to reconcile—victims' claims and retributivist principles that together represent "the contradictory forces that mark our contemporary political condition."

Stephen Garvey's essay, *Is It Wrong To Commute Death Row? Retribution, Atonement, and Mercy*, concerns itself not with rhetorical forms but rather with the normative judgment reflected in Governor Ryan's decision. Garvey frames his ultimate question as whether it "[i]s ... morally legitimate for a governor to use the clemency power to commute the death sentences of everyone on a state's death row in the name of mercy."

To answer that question, Garvey explores two variant theories of retributive mercy, neither of which he finds adequate to justify mass commutations. If retributive principles require the state to punish an offender to the extent that he or she deserves, then mercy appears to interfere with, and compromise, retributive duty. If mercy is considered instead "a gift or act of grace" by the sovereign, its use compromises principles of evenhandedness and seems, once again, problematic.

One solution to this problem, Garvey suggests, is to imagine "mercy as equity." On this view, the role of mercy is to redress sentences that prove to be inequitable, either because the trial and appellate processes somehow failed to detect and remove error or because the rules are too overbroad or under-inclusive to permit substantive justice under the unique facts of a especially compelling case. This theory, however, ultimately turns mercy into "justice in disguise," a "remedial mechanism" necessary to achieve "the result the rules should have produced in the first place." Yet this theory cannot explain or justify the wholesale clemencies Governor Ryan

43. *Id.* (quoting Ryan, *supra* note 6, at 10).
44. *Id.* at 1375.
45. *Id.* at 1376.
46. Garvey, *supra* note 11, at 1319.
47. *Id.* at 1321.
48. *Id.* at 1321-23.
49. *Id.* at 1324.
50. *Id.* at 1325-30.
51. *Id.* at 1325-28.
52. *Id.* at 1328-29.
 announced in Illinois, Garvey observes, for surely some fraction of Illinois' death-row inmates received the sentences they deserved under a retributive theory of punishment.53

Under Garvey's alternative theory of "mercy as imperfect obligation"—which acknowledges that occasional acts of mercy do exist in tension with equal treatment and strict justice, but nonetheless might serve the important societal purpose that "tempers justice"—the rub also comes with the breadth and indiscriminate nature of Governor Ryan's decisions:

[T]he imperfect obligation to show mercy always competes with the perfect obligation to achieve retributive justice. As such, with every act of mercy comes a corresponding denial of justice. At some point, so it would seem, the demands of justice must prevail against those of mercy. . . . Consequently, any decision to commute all of death row would be too much of a good thing—too much mercy, too little justice.56

Garvey then turns to his own theory of mercy as atonement, one he has previously explored in another article.57 Under this theory beyond retribution, punishment is neither an end in itself (as retributivists believe) nor a means to another socially desirable end such as deterrence or rehabilitation (as utilitarians believe). Instead, punishment is "a necessary part of a larger process through which an offender atones for his offense, a process leading ideally to the reconciliation of the offender and those he wronged."58 Garvey's theory depends upon a morally sophisticated idea of crime as more than an injury to person or property, but as contempt for the victim that breaches the preexisting relationship of trust and mutual respect, "damaging the social bond between them, though not to the breaking point."59

Atonement, which necessarily involves the wrongdoer's willing submission to punishment, is the work that repairs the moral injury and restores the social relationship between them. The wrongdoer "pays for the moral injury of his crime through his willing submission to the punishment he deserves. His punishment therefore sheds its

53. Id. at 1329.
54. Id. at 1330–34.
55. Id. at 1330–31.
56. Id. at 1334.
58. Garvey, supra note 11, at 1336.
59. Id.
character as punishment. It becomes a form of secular penance."

Ideally, Garvey continues, the victim can then act to bestow the non-obligatory, and admittedly difficult, but crucial gift of forgiveness. With that corresponding act, the circle is complete and full reconciliation occurs.

When the state’s punishment is death, Garvey reasons, a decree like that of Governor Ryan preserves the life of all capital offenders and thereby preserves the possibility of this circle of atonement. Thus, Garvey concludes, “extending mercy to death-sentenced offenders can be justified, not simply as a way to achieve equity or to satisfy the demands of an imperfect obligation, but also as a way to preserve the possibility of atonement.” While a decree offering mass clemency to all of Illinois’ death-row inmates is not obligatory under such a theory, it becomes morally defensible.

As a former divinity student, issues of atonement touch a chord within me. Yet I despair over the prospect that any legislature within the United States—in this era characterized by fierce punitive severity and an all-but-wholesale abandonment of rehabilitative ideals—would seriously embrace the goal of reconciliation between criminal inmates and their victims or between inmates and society at large. While a theory of mercy as atonement might amply justify mercy in a religiously millennial system of justice, it seems utopian in the decidedly earthly systems that presently hold sway.

Yet Anthony Alfieri presses related concerns when he urges

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60. Id. at 1336–37.
61. Id. at 1337.
62. Id. at 1341.
63. Id.
64. See, e.g., KARL BARTH, IV CHURCH DOGMATICS, THE DOCTRINE OF RECONCILIATION passim (1956) (examining the Christian doctrines of atonement and reconciliation comprehensively).
lawyers to view “the clemency process as a religious forum for lawyer engagement and client revival.” Alfieri urges that after issues of guilt or innocence have been resolved, and after statutory aggravating and mitigating factors have been weighed during the capital sentencing phase, “clemency-tailored moral individualization demands a faith-based proffer of defendant religious awakening, enlightenment, and devotion.” While Alfieri acknowledges that it is “both necessary and paradoxical, and perhaps futile, to beg for redemptive mercy from retributive agents,” he nonetheless encourages clemency lawyers “to reintegrate mercy into the moral paradigm of retribution,” pointing to “the rising historical moment of theological integration increasingly pervading legal theory and education.”

Robert Weisberg shifts our attention from Garvey’s normative justification of mercy as atonement to the question of what kind of act clemency actually is. Does it bestow forgiveness? Is it an institutional form of forgetting? Is it, as Garvey suggests, a form of atonement? Weisberg suggests two related alternatives: mercy constitutes either “an act of apology . . . . [in which] the state, or the society for which it acts, itself apologizes to the criminal . . . [a]nd in doing so . . . also in some way confesses error,” or an apologia under which, while not remitting punishment, “the legal authority nevertheless confesses the errors in its system of justice, or at least admits the appearance of error.”

After offering a thoughtful review of recent writing on the role of mercy in a system of justice, and of the newly emerging theme of restorative justice, Weisberg proposes to review the recent history of the American legal system to study how it has “agonize[d] over the relationship of justice to mercy, or . . . consciously or unconsciously rationalize[d] the relationship between the two.” Weisberg suggests that this story is “a narrative of neurotic, conflicted, erratic and incomplete acts of mercy aimed at reconciling American law with confessed errors in our history that no law can readily cure.”

66. Alfieri, supra note 26, at 1312.
67. Id. at 1309–10.
68. Id. at 1314.
69. Id. at 1316.
70. Id. at 1318.
72. Id. at 1417.
73. Id. at 1416–21.
74. Id. at 1421.
75. Id. at 1420–21.
Weisberg sets out to demonstrate that “[t]he American legal/political system has a very guilty conscience about the death penalty,” emphasizing several earlier moments in which actors in the system other than governors and/or other chief executives “granted a kind of systemic pardon,” in the form either of an express apology or Weisberg’s special *apologia.* Weisberg sees this guilty conscience at work in the compromises adopted by the drafters of the Model Penal Code in the mid-1950s. Professor Herbert Wechsler and other drafters “were repelled by what they saw as the vulgarity of the death penalty and its potential to cause social disruption,” but unable to dictate immediate abolition. Thus, while they wrote “a reformist code that had some reasonable chance of widespread adoption across the states,” they built into their sentencing regime a system of “guided discretion,” with enumerated aggravating and mitigating criteria that would limit the discretion of sentencing juries.

When the Supreme Court confronted the Model Penal Code’s handiwork in 1971 in *McGautha v. California,* it offered an initial *apologia* that acknowledged the death penalty’s imperfections but refused to remit punishment. A year later, however, in *Furman,* the Court’s famous 5-4 judgment set forth in nine separate opinions proceeded to a full-scale apology, “in an implicit holding that confessed nothing so simple as legal error at trial, but rather, the moral failure of the whole history of capital punishment in the United States.” *Furman* had the practical effect of a mass clemency or “a national act of amnesty,” Weisberg notes, for it removed the death sentences of every prisoner then under sentence of death throughout the nation.

When the Supreme Court upheld revised capital punishment statutes four years later, in *Gregg v. Georgia* and companion cases,
Weisberg suggests that the ambiguous language of the prevailing plurality opinion made it impossible to be sure whether the Court categorically withdrew its Furman apology, or instead constructed “a kind of conditional apologia,” under which it would allow death sentences to go forward pursuant to the reformulated statutes on the assumption that their revisions would assure their constitutional operation in practice.87

For Weisberg, “the great reckoning” came in 1987 in McCleskey v. Kemp,88 in which the Court confronted extensive empirical evidence that Georgia’s capital sentencing system had been compromised since 1973 by systematic racial bias—proof that death sentences had been imposed at substantially higher rates against those whose victims were white.89 Faced with this indictment of the essential fairness of the Georgia system, “Justice Powell’s majority opinion famously conceded the salience of the statistics, startlingly accepted their logical implications, but refused to accept their arguably legal consequences.”90 Weisberg reports that Powell “apologize[s] for the entire criminal justice system, but ask[s] for acceptance that society cannot afford to choose perfect justice over law enforcement.”91 In effect, “it was precisely because Justice Powell fully recognized that McCleskey had effectively condemned the moral legitimacy of our entire criminal justice system that he declared the Court unable to grant McCleskey the remedy he sought.”92

An anticlimax to McCleskey came three years later, when Justice Powell confessed in retirement that McCleskey was one of two decisions he most regretted; “[i]n effect,” Weisberg quips, “Justice Powell uttered an apologia for his previous apologia.”93 Justice Blackmun likewise eventually renounced capital punishment as inherently arbitrary, discriminatory, capricious, and mistaken.94


87. Weisberg, supra note 23, at 1430.
89. See id. at 279; BALDUS ET AL., supra note 84, at 311–40 (detailing the statistical evidence presented by plaintiff in the McCleskey case); see also SAMUEL R. GROSS & ROBERT MAURO, DEATH AND DISCRIMINATION: RACIAL DISPARITIES IN CAPITAL SENTENCING 134–58 (1989).
90. Weisberg, supra note 23, at 1431.
91. Id. at 1432–33.
92. Id. at 1432.
93. Id. at 1433 (citing JOHN C. JEFFRIES, JR., JUSTICE LEWIS F. POWELL, JR. 450–53 (1994)).
94. Id. at 1433–34 (citing Callins v. Collins, 510 U.S. 1141, 1143–59 (1994) (Blackmun,
Beyond these judicial acts that, Weisberg shrewdly suggests, parallel executive clemency in effect, he turns finally to a close examination of two legislative clemencies, the first the New York capital statute crafted after a long period of gubernatorial vetoes of earlier capital statutes by New York governor Mario Cuomo.  

Weisberg designates the resulting exceedingly strict and limited statute as "the first of what one might call our politically correct death penalty laws," having built so many procedural safeguards into New York's capital sentencing that only a handful of defendants have received death sentences under the statute and none has been executed under the statute.  

Weisberg sees the statute as "a kind of apology for the political decision to reinstate the formal death penalty law, offering a kind of implicit pre-remission of death sentences. . . ."  

Weisberg points, finally, to the post-Ryan clemency actions of the Illinois' legislature as another example of legislative *apologia*.  

Weisberg details a remarkable series of substantive and procedural reforms that work to narrow capital discretion in Illinois and assure greater reliability in police investigation, interrogation of suspects, line-up identification, use of informant and eyewitness testimony, and other matters.  

"[T]hese are essentially apologies for the whole history of abuses by the Illinois police," Weisberg concludes.  

In sum, Weisberg concludes that Governor Ryan's decision merely echoes decisions made by the scholars who drafted the Model Penal Code, the Supreme Court justices who compromised the majority in *Furman*, Justices Powell and Blackmun in the years after *McCleskey*, the New York State Legislature, and the very Illinois General Assembly that heaped such scorn on Governor Ryan for deciding that he "must act."

Jonathan Simon's essay focuses not on the rhetorical task that faced Governor Ryan, but rather upon the anguished voices of the victims' families who testified in clemency hearings during October and November of 2002, months prior to the Governor's mass
clemency decision. Confirming Austin Sarat’s observations about the increasing political significance of the victims’ rights movement for modern criminal sentencing, Simon suggests that modern capital punishment is “investing a new body of discourse, the speech of capital victims, with extraordinary political significance.” Simon recounts how “[w]eeks of dramatic testimony” from these victims “turned public attention away from the harsh criticism” of the Illinois criminal process and “toward the savagery of the crimes,” thereby leading Illinois newspapers “to turn against the clemency process.”

Simon suggests that the capital sentencing paradigms that have emerged since 1972 may be “unleashing a new (or rather very old) model of how truth is produced in the service of governance, a ‘game of truth’ quite foreign to the way power and knowledge have operated within modern forms of law and administration.” Simon’s specific reference is to parrhesia, a form of “fearless speech” known to ancient Greece and reflected in the tragedies of Euripides, which has been given recent prominence by Michel Foucault: “[R]ather than describing speech in general, or even political speech, parrhesia in ancient Greece described a more specific cultural practice of speech in which the speaker frankly reveals his personally known truth at great risk out of a duty of loyalty to another (or to the public good).”

The three key elements of parrhesia were: a complete and open-hearted frankness by the speaker, the reliance upon a truth emerging from the speaker’s own deepest beliefs, and the risk of danger that accompanied the speech. Indeed, the truth embraced in an act of parrhesia was validated by the risks the speaker took in speaking candidly with the sovereign, who possessed obvious power to retaliate if not persuaded. Finally, as Simon notes, the speaker of parrhesia was often seen as acting under a special kind of duty, “the self-recognized obligation to speak when to do so is required by one’s relationship to the other.”

While Simon acknowledges that “[m]odern democracies rely on games of truth quite distinct from those of ancient Athens,” he nonetheless finds a strong parallel emerging as victims’ voices grow

102. Simon, supra note 25, at 1379.
103. Id. at 1380.
104. Id.
105. Id. at 1382.
106. Id. at 1388–91.
107. Id. at 1390–91.
108. Id. at 1392.
more central to modern sentencing regimes. Normative legal scholars have expressed uneasiness about these developments for at least three reasons: the tendency of victim speech to emphasize vengeance over proportionality in choosing criminal sanctions; the indirect injury to victims themselves, who can become locked in their emotionally passive "victim" roles; and the broader elevation of subjective feelings over reason as a measure of legal and political policy. After a thoughtful and nuanced examination of parrhesia in the Athenian context, drawing especially upon Euripides' Ion, Electra, and Orestes, Simon moves to present-day America, suggesting that the victims' families who testified during the Illinois clemency hearings were engaging in "fearless speech" characteristic of parrhesia. Freed from the strict evidentiary constraints of the courtroom, Simon observes, the clemency hearings permitted openhearted and agonized frankness from victims' families. The deeply felt personal truth that emerged had remarkable power over listeners, including experienced members of the press and other observers. Perhaps drawing a more strained analogy, Simon argues that the victims' family members faced the "danger" that their openness would revive their former pain and that their speech might be ignored. Simon's essay closes with a prediction that such anecdotal truth telling will likely remain a fixture in post-modern America, and he shares his own concerns about the problematic features of such speech.

Spurred by Austin Sarat's earlier article, however, my thoughts moved in a different direction. As I apply the parrhesiatic paradigm to the Illinois clemencies, it seems to fit Governor Ryan himself, not the victims' families. His "I Must Act" speech bore, in my view, all of the features of classical parrhesia. The two elements of the speech that Sarat found unsuccessfully reconciled—Ryan's personal history of strong identification with victims' families, and yet his unfolding horror in finding how poorly the Illinois criminal justice system sorted truth from error—both seem to have emerged from personal

109. Id. at 1382.
110. Id. at 1381.
111. Id. at 1388–400.
112. Id. at 1404.
113. Id. at 1402.
114. Id. at 1406–07.
115. Id. at 1409–10.
116. Sarat, supra note 20, at 1347.
encounters that led to Ryan's "fearless speech." His act was prompted by a sense of felt duty, despite the contempt and anger he accurately foresaw from the Illinois legislature, the courts, and the public at large.

Since elected officials, even those at the very end of their terms, serve "the people," who are the ultimate sovereigns in our representative democracy, Governor Ryan indeed risked censure from those with the greatest power to condemn him, albeit only to banishment from electoral politics. Indeed Ryan delivered his "I Must Act" speech fully aware of these risks:

This is a blanket commutation. 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. But as I have said, the people of our state have vested in me to act in the interest of justice. Even if the exercise of my power becomes my burden I will bear it. Our constitution compels it. I sought this office, and even in my final days of holding it I cannot shrink from the obligations to justice and fairness that it demands.  

Until I read Jonathan Simon's fascinating essay, I did not know how best to characterize Governor Ryan's rhetoric. I am now persuaded that it was a pure act of parrhesia. As such, despite the logical tensions that Austin Sarat found rhetorically unsatisfying, Ryan's declaration expressed a personal truth beyond jurisprudential logic, a speech "that reflects the complete knowledge of the speaker on the topic," as Simon has put it. In so doing, Governor Ryan joined those other eminent jurists and legislative actors described in Robert Weisberg's essay, all of whom spoke out after long personal and professional encounters with the machinery of death: Professor Herbert Wechsler and the drafters of the Model Penal Code; the Supreme Court majority in Furman v. Georgia; Justices Lewis Powell and Harry Blackmun in the post-McCleskey era; and the New York and Illinois legislatures in the early 2000s.

They joined as witnesses to three interrelated truths. The first two appear in canonical form in the Supreme Court's 1976 decision in Woodson v. North Carolina: "[T]he penalty of death is qualitatively different from a sentence of imprisonment, however long... Because of that qualitative difference, there is a corresponding
difference in the need for reliability in the determination that death is the appropriate punishment in a specific case.”

If death is a special penalty, they appear to say, and if the state must exercise special care before imposing it, then we who administer this special penalty must assure ourselves that such care is invariably taken in capital charging and sentencing decisions.

Yet as Professor Charles Black argued thirty years ago with eloquence, passion, and prescience—and as Justice Blackmun and Governor Ryan have since found to their dismay:

the possibility of mistake in the infliction of this penalty and the presence of standardless arbitrariness in its infliction” are not “fringe-problems, susceptible to being mopped up by minor refinements in concept and technique, but... [exist] at the very heart of the matter and... [are] insoluble by any methods now known or now foreseeable.”

In light of this evidence Professor Black reframed retributivist theory:

If this thesis is right, then in the full context the retribution question takes on what seems to me a new form. One must now ask oneself whether the moral value of sheer retribution is sufficient to justify not only the infliction of death in accordance with clear standards and without error, but also the infliction of death without clear standards and by mistake.

Professor Black’s answer to that central question, like that offered by Governor Ryan, is “no.” As Black put it, “Though the justice of God may indeed ordain that some should die, the justice of man is altogether and always insufficient for saying who these may be.” Or as Governor Ryan declared more simply, “The legislature couldn’t reform it. Lawmakers won’t repeal it. But I will not stand for it. I must act.”

May the readers of this wonderful Colloquium find themselves as deeply engaged by these authors and their thoughts as I have been.

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120. Id. at 305.
122. Id. at 24.
123. Id. at 96.
124. Ryan, supra note 6, at 11.