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Anthony V. Alfieri

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MERCY LAWYERS

ANTHONY V. ALFIERI

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INTRODUCTION

This Essay addresses the dilemmas of mercy lawyers, defenders of prisoners and death row inmates in post-conviction clemency proceedings. Framed by the moral tension between retribution and redemption, the dilemmas arise at trials in the clash of opening claims of innocence and penalty phase pleas of mitigating forgiveness, and at commutation hearings in dissonant confessions of guilt and declarations of atonement. To better understand these moral and strategic dilemmas, the Essay examines the recent literature of clemency and the accumulated writings of four academics distinguished in the field of criminal law and capital punishment: Stephen Garvey, Austin Sarat, Jonathan Simon, and Robert Weisberg.¹

¹ Professor of Law and Director, Center for Ethics and Public Service, University of Miami School of Law. A.B., 1981, Brown University; J.D., 1984, Columbia University School of Law. I am grateful to Adrian Barker, Troy Elder, Michael Fischl, Clark Freshman, Steve Garvey, Ellen Grant, Patrick Gudridge, Amelia Hope, Dennis Lynch, Cynthia McKenzie, Janet Reno, Harriet Roberts, Austin Sarat, Jonathan Simon, Karen Throckmorton, Frank Valdes, Laura Walker, and Robert Weisberg for their comments and support. I also wish to thank Wendy Blasius, Claudine Rigaud, and the University of Miami School of Law library staff for their research assistance, as well as the editors of the North Carolina Law Review for their commitment to the scholarship of mercy. This Essay is dedicated to Rose Marie Rocha Alfieri, an aunt of remembered kindness.

Cast against the backdrop of my own writings on the race-conscious ethics of prosecutors and defenders within the criminal justice system, this examination situates clemency advocacy in the context of sociolegal violence and criminal defense practice. My

Penalty Reform Act in Illinois).

2. See generally Anthony V. Alfieri, Community Prosecutors, 90 CAL. L. REV. 1465 (2002) (evaluating the role of community prosecution in illuminating and positively transforming the tension between the criminal justice system and race); Anthony V. Alfieri, Defending Racial Violence, 95 COLUM. L. REV. 1301 (1995) (parsing the defense of those charged with beating Reginald Denny during the 1992 riots in South Central Los Angeles to address the larger dynamics revealed in cases of black-on-white racially motivated violence); Anthony V. Alfieri, Lynching Ethics: Toward a Theory of Racialized Defenses, 95 MICH. L. REV. 1063 (1997) (utilizing the trials of the Alabama Ku Klux Klan for the 1981 lynching of Michael McDonald to assess the representation of defendants in cases of white-on-black racially motivated violence); Anthony V. Alfieri, Prosecuting Race, 48 DUKE L.J. 1157 (1999) (studying the role of race in the prosecution of the New York police officers charged with the assault of Abner Louima, a Haitian immigrant); Anthony V. Alfieri, Prosecuting Violence/Reconstructing Community, 52 STAN. L. REV. 809 (2000) (contemplating the role of community in prosecutions for the sexual assault of the Central Park jogger and for the murder of James Byrd in Jasper, Texas); Anthony V. Alfieri, Race Prosecutors, Race Defenders, 89 GEO. L.J. 2227 (2001) (exploring the role of community based race-conscious modes of prosecution and defense in healing racial tensions within the criminal justice system); Anthony V. Alfieri, Race Trials, 76 TEX. L. REV. 1293 (1998) (considering race in the context of the trials of Lemrick Nelson and Charles Price for their roles in four days of race-motivated violence in New York City in 1991); Anthony V. Alfieri, Retrying Race, 101 MICH. L. REV. 1141 (2003) (reviewing prosecutorial discretion in the revival of cases involving white-on-black racially motivated violence during the 1950s and 60s).

3. Broadly defined, sociolegal violence spans private, public, and state forums. Examples include domestic abuse, hate crimes, and capital punishment. See generally The Killing State: Capital Punishment in Law, Politics, and Culture (Austin Sarat ed., 1999) [hereinafter The Killing State] (exploring, through an anthology, the impact of the death penalty on American politics, legal values, and culture); Austin Sarat, When the State Kills: Capital Punishment and the American Condition (2001) (surveying the political and cultural consequences of living in a society which allows state killing as criminal punishment); Jonathan Simon, Review Essay, Why Do You Think They Call It Capital Punishment? Reading the Killing State, 36 LAW & SOC’Y REV. 783 (2002) (reviewing When the State Kills and exploring its place within sociolegal scholarship on the death penalty). Additional examples, such as lynching, cross categorical boundaries. Sociolegal violence encompasses material as well as narrative forms of violence. See generally Law’s Violence (Austin Sarat & Thomas R. Kearns eds., 1992) (collection of essays pondering the relationship between violence and the law); Law, Violence and the Possibility of Justice (Austin Sarat ed., 2001) (exploring, through an anthology, the interaction of violence and the law); Pain, Death, and the Law (Austin Sarat ed., 2001) (collecting essays); Anthony V. Alfieri, Reconstructive Poverty Law Practice: Learning Lessons of Client Narrative, 100 YALE L.J. 2107 (1991) (articulating the importance for poverty lawyers of the empowerment of their clients’ narratives); Donald L. Beschle, What’s Guilt (or Deterrence) Got to Do With It?: The Death Penalty, Ritual, and Mimetic Violence, 38 WM. & MARY L. REV. 487 (1997) (analyzing the death penalty as a phenomenon not meant to fulfill goals of retribution or deterrence, but to serve as a source of unity within the communities in which it is practiced, and exploring theories of capital punishment as mimetic violence).

4. The American tradition of criminal defense practice is embodied in the adversary
purpose is to describe and prescribe the defender role of the
clemency advocate in cases of private violence, especially violence
motivated by race and racism in their various forms. Part I of the
Essay briefly surveys the history and structure of clemency,
highlighting the actions of former Illinois Governor George Ryan in
pardonning and commuting the sentences of 167 prisoners and death
row inmates in January 2003. Part II explores traditional and
alternative models of criminal defense advocacy germane to attaining
clemency. Part III integrates the analytic methods and enlarges the
normative prescriptions of Garvey, Sarat, Simon, and Weisberg into a
faith-inspired abolitionist model of clemency advocacy for mercy
lawyers.

I. CLEMENCY

Properly located, this abridged study of mercy lawyers forms part
of a larger body of interdisciplinary research and scholarship on
criminal justice norms. The study treats the seeking of clemency as a

model of zealous advocacy. See generally, e.g., MONROE H. FREEDMAN & ABBE SMITH,
UNDERSTANDING LAWYERS' ETHICS § 2, § 4 (2d ed. 2002) (providing an overview of the
adversarial system and the duty of zealous representation); Charles Curtis, The Ethics of
Advocacy, 4 STAN. L. REV. 3, 3 (1951) (emphasizing the lawyer's duty of client loyalty);
David Luban, Are Criminal Defenders Different?, 91 MICH. L. REV. 1729, 1755–60 (1993)
(upholding the criminal defense norm of zealous advocacy).

5. Recent work on the prosecution and defense of racial violence incites academic
quarrel. See, e.g., Robin D. Barnes, Interracial Violence and Racialized Narratives:
arguments in Alfieri’s Defending Racialized Violence critiquing criminal defense strategies
in cases involving racially motivated violence); Richard Delgado, Making Pets: Social
Workers, “Problem Groups,” and the Role of the SPCA—Getting a Little More Precise
About Racialized Narratives, 77 TEX. L. REV. 1571, 1571–72 (1999) (endorsing studies of
the “rhetorical meaning of race” in civil and criminal contexts); Christopher Slobogin,
Race-Based Defenses: The Insights of Traditional Analysis, 54 ARK. L. REV. 739, 739–49
(2002) (critiquing restriction on criminal defense lawyers’ use of racialized narratives in
defense of their clients); Abbe Smith, Burdening the Least of Us: “Race-Conscious” Ethics
conceptions of progressive criminal defense lawyering). See also Alex J. Hurder, The
Pursuit of Justice: New Directions in Scholarship About the Practice of Law, 52 J. LEGAL
EDUC. 167, 185–86 (2002) (acknowledging the importance of critical clinical scholarship
for prosecutors and defense lawyers).

6. See generally Dan M. Kahan, Between Economics and Sociology: The New Path
of Deterrence, 95 MICH. L. REV. 2477 (1997) (arguing that deterrence theory can best be
understood by imagining law as a representation of shared values); Dan M. Kahan,
Privatizing Criminal Law: Strategies for Private Norm Enforcement in the Inner City, 46
UCLA L. REV. 1859 (1999) (arguing for private sector participation in the regulation of
social norms in criminal law); Dan M. Kahan, Social Influence, Social Meaning, and
Deterrence, 83 VA. L. REV. 349 (1997) (showing how economic analysis of crime fails to
consider the role of social influence in the individual’s decision to commit crimes); Dan M.
Kahan, Social Meaning and the Economic Analysis of Crime, 27 J. LEGAL STUD. 609
basic element of the post-conviction review process essential to the jurisprudential legitimacy of capital punishment. It defines clemency broadly to include commutations and pardons.

Prior work in this area documents the injustice of state systems regulating trials and post-conviction appeals in capital cases. The work cites evidence of procedural irregularity and substantive


inequality attributed to racial bias\textsuperscript{10} and exacerbated by unchecked prosecutorial discretion.\textsuperscript{11} The evidence continues to incite public debate both here and abroad.\textsuperscript{12} The increasing federalization of the criminal law\textsuperscript{13} and the expanding congressional ratification of the death penalty\textsuperscript{14} amplify this chorus of national and international

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14. See generally Rory K. Little, \textit{The Future of the Federal Death Penalty}, 26 Ohio
discord.

Similar procedural and substantive controversy infects executive clemency in capital cases.\textsuperscript{15} The source of state executive clemency power is grounded in statutory authority encoded in Illinois and elsewhere.\textsuperscript{16} Public controversy over the scope of that authority exploded in the aftermath of the recent, highly charged Illinois clemency hearings.\textsuperscript{17} Commencing in October 2002, the two-week hearings involved scores of inmates and horrific stories of private violence. They convened in the wake of a series of widely publicized state inmate exonerations.\textsuperscript{18} The exonerations prompted close scrutiny of the tainted history of the Illinois death penalty. That history revealed recurrent cases of ineffective counsel,\textsuperscript{19} sentencing disparity,\textsuperscript{20} and, most disturbing, outright innocence.\textsuperscript{21} Those findings

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\textsuperscript{16} ILL. CONST. art. V, § 12; 730 ILL. COMP. STAT. ANN. § 5/3-3-13 (West 1997 & Supp. 2002).
\textsuperscript{19} See Ken Armstrong & Steve Mills, Inept Defenses Cloud Verdicts, CHI. TRIB., Nov. 15, 1999, § 1, at 1.
spurred Governor Ryan to create a Commission on Capital Punishment to review the historical prosecution and sentencing of capital cases in Illinois. The gravity of the Commission's April 2002 report eventually compelled Ryan to issue an executive order granting a mix of 167 commutations and pardons for both capital and non-capital offenses. Decreed on January 12, 2003, the clemency order provoked far-reaching public outcry as well as prosecutorial and legislative challenges to the exercise of state executive clemency power. The furor engulfed Illinois, a battery of sister states, Europe, and ultimately even Latin America. At the

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1970 Because of Doubts About Their Guilt, 13 T.M. COOLEY L. REV. 907, 916-22 (1996) (examining cases in which innocent defendants were put to death).


29. See Maura Dolan, Echoes of Illinois on Death Row: California System Shares Traits with One So Flawed That the State's Governor Commuted All Sentences, L.A. TIMES, Jan. 23, 2003, § 2, at 1 (reporting suspected weaknesses in California's capital punishment system); Bill Murphy, Death Row: Status Quo: Texas Undeterred by Illinois'
same time, it sparked a broad ecumenical movement, supported by many in the clergy, to abolish the death penalty in Illinois.32

Despite earlier uproar over the executive clemency power wielded during the Clinton Administration,33 at present surprisingly muted debate surrounds the constitutional and statutory underpinnings of executive clemency on federal or state levels. Current commentary tends to dwell on the justifications34 and

_Ripple Effects_, HOUS. CHRON., Jan. 19, 2003, at 1A (noting that Texas law precludes commutation of death sentences or pardon by the governor); Howard Pankratz, _Salazar Defends State Death Penalty: AG Says Use is 'Prudent,'_ DENV. POST, Jan. 23, 2003, at 3B (reporting that the Colorado Attorney General's defense of the death penalty is based on a four-step process required in all capital cases); Daniel Ruth, _Florida Strives to Regain the Title in Death Row Follies_, TAMPA TRIB., Jan. 29, 2003, at 2 (discussing Florida's proliferation of death row inmates whose sentences were later commuted due to extrinsic evidence of innocence).

30. See Peter Finn, _Foreign Leaders Laud Move on Death Penalty in Illinois_, WASH. POST., Jan. 18, 2003, at A19 (noting the hope of foreign leaders that Governor Ryan's actions would prompt debate on the death penalty in America); Barry James, _Clearing of Illinois Death Row is Greeted by Cheers Overseas_, N.Y. TIMES, Jan. 14, 2003, at A10 (reporting near unanimous support for Governor Ryan's decision in legal communities overseas).

31. See Duncan Campbell, _Mexico to Challenge US Use of Death Penalty_, GUARDIAN (London), Jan. 22, 2003, at 13 (reporting Mexico's quest to free fifty-one Mexican citizens on death row in America who were refused assistance of consulates by the U.S.); Hugh Dellios, _Mexico Asks UN to Spare 51 in U.S.: World Court Told Nationals Illegally on Death Row_, CHI. TRIB., Jan. 22, 2003, §I at 1 (same).

32. See Julia Lieblich, _Clergy Leaders Stand with Ryan on Death Penalty_, CHI. TRIB., Jan. 31, 2003, §2, at 6 (citing the approval of Governor Ryan's exercise of clemency by world religious leaders such as Pope John Paul II and Archbishop Desmond Tutu).


34. See generally Bruce Ledewitz & Scott Staples, _The Role of Executive Clemency in Modern Death Penalty Cases_, 27 U. RICH. L. REV. 227 (1993) (proposing justifications for commutation, including to correct error at trial or to respond to circumstances that have developed since trial); Kathleen Dean Moore, _Pardon for Good and Sufficient Reasons_, 27 U. RICH. L. REV. 281 (1993) (examining reasons used to justify pardons historically and arguing that clemency must be justified by "good and sufficient reason" to be a valid exercise of the pardoning power); Neal Walker, _Commission Report, Executive Clemency and the Death Penalty, in Amnesty International, USA, Commission Report: Death Penalty on Trial_, 22 AM. J. CRIM. L. 266 (1994) (addressing various reasons given for commutations such as mental illness, disability, or doubts about guilt).
limitations of executive clemency. The moral claims of retribution and mercy stand central to this inquiry. Retribution has long served as the moral bulwark for capital punishment schemes. Yet, in recent decades, mercy has gained progressively more vocal adherents in ameliorating and rationalizing those schemes and has thereby advanced the criminal justice process toward a more redemptive posture.

Multiple factors impinge on the resolution of the competing moral claims specific to capital punishment. Of these, contextual and interpretive considerations weigh heavily. Both erect impediments to a redemptive clemency process. Contextual impediments stem from the constraints posed by the populist politics of the electoral process.


and the inflammatory customs of the media.40 They also involve the institutional constraints of police41 and prosecutorial misconduct,42 and the systemic juridical deficiencies caused by ineffective assistance of counsel,43 inadequate funding of state indigent defense systems,44 (adhering to the position that politics is, and should remain, a necessary component of the clemency decision); Stephen P. Garvey, Note, Politicizing Who Dies, 101 YALE L.J. 187 (1991) (discussing the risks of vesting death selection in institutions that are politically-electorally accountable).

40. See generally George Lardner, The Role of the Press in the Clemency Process, 31 CAP. U. L. REV. 179 (2003) (explaining the importance of “watchdog journalism” in monitoring the exercise of pardon power); Austin Sarat, The Cultural Life of Capital Punishment: Responsibility and Representation in Dead Man Walking and Last Dance, 11 YALE J.L. & HUMAN. 153 (1999) (determining that death penalty films support the conceptual foundations of capital punishment and legitimate its place in the American penal system); Austin Sarat & Aaron Schuster, To See or Not to See: Television, Capital Punishment, and Law’s Violence, 7 YALE J.L. & HUMAN. 397 (1995) (suggesting that televising executions would unsettle the law’s attempt to dignify the death penalty and expose the sadism that is at the heart of the state’s attachment to capital punishment).

41. See Thomas P. Sullivan, Three Police Station Reforms to Prevent Convicting the Innocent, 17-APR CBA REC. 30 (2003).


judge-made error,\textsuperscript{45} jury failure,\textsuperscript{46} and cultural bias in the criminal justice system common to race and gender.\textsuperscript{47}

Interpretive impediments also thwart a redemptive clemency process. They relate to the contested construction and uneven implementation of sentencing guidelines\textsuperscript{48} and procedures\textsuperscript{49} under federal regulations\textsuperscript{50} and state statutes.\textsuperscript{51} The difficulty of textual construction in parsing capital statutes and clemency regulations on a


case-by-case basis is compounded by doctrinal instability, for example in engrafing criminal law categories of insanity and mental retardation upon capital cases. As a result of these intertwining impediments, mercy lawyers struggle to marshal the redemptive norms embedded in the institutions and texts of clemency.

II. CLEMENCY ADVOCACY

Clemency advocacy derives from the adversarial tradition of zealous criminal defense practice. That tradition rests on the foundational norms of partisanship and moral non-accountability. Applied to capital punishment, these twin norms produce trial strategies based primarily on claims of innocence, justification, and mitigation. By design, neither the innocence phase nor the penalty phase of bifurcated capital trials emphasizes the redemptive norms of either contrition and remorse or penitence and atonement. Post-conviction review practices adopt the same conception and stratagem. Prescribed standards of care, even when appropriately heightened, operate similarly. Indeed, American Bar Association defense guidelines scarcely mention redemptive norms and


The call for redemptive forgiveness and mercy is inhibited by the standard conception of the criminal defense function. Notwithstanding important commitments to lawyer competence and diligence coupled with pledges of client loyalty and confidentiality, standard conventions naturally favor acquittal and plea bargaining tactics over risk-taking gambits involving capital defendants' guilt-disclosing, individualized redemptive pleas. Devised by statute, capital sentencing allows for limited moral individualization through the admission of aggravating and mitigating evidence. However, the moral individualization of clemency advocacy goes beyond standard defense practices of sentencing mitigation. Rather than summoning evidence from social psychology or science, clemency-tailored narratives.


61. See A.L. STUBBS, CLEMENCY, THE FUTURE OF THE DEATH PENALTY: THE ACTION HANDBOOK FOR ABOLITIONISTS & ACTIVISTS (1999) (advocating strategic planning initiatives for death penalty abolitionists, which can be used to “plan ideological campaigns for abolition and clemency”); Larry Myers, An Appeal for Clemency: The Case of Harold Lamont Otey, in CURRENT CONTROVERSIES, supra note 10, at 361–83 (detailing the appeals process endured by one capital defendant and his ultimate execution by the State of Nebraska).


moral individualization demands a faith-based proffer of defendant religious awakening, enlightenment, and devotion. That proffer springs from client-lawyer theological collaboration in fashioning an authentic religious predicate for a faith-infused claim of clemency.\textsuperscript{64} Clothed in frequently derided narratives,\textsuperscript{65} the claim invites a state-mediated redemptive dialogue of contrition and atonement between the inmate and the victim, the latter typically in the guise of a surviving family.\textsuperscript{66}

Strands of deepened client-lawyer collaboration and reconfigured moral dialogue may be gleaned from feminist revisions of criminal defense practice,\textsuperscript{67} most notably in the representation of battered women.\textsuperscript{68} The reevaluation of client-lawyer hierarchy,\textsuperscript{69}

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\textsuperscript{64} See generally Gary J. Simson & Stephen P. Garvey, \textit{Knockin' on Heaven's Door: Rethinking the Role of Religion in Death Penalty Cases}, 86 CORNELL L. REV. 1090 (2001) (arguing that if the First Amendment Religion Clauses were strictly construed, religion would play a much more limited role in capital cases).


gender discourse, and moral agency in defending crimes of violence effectively transformed advocacy narratives and outcomes for women's advocates. A comparable transformation of professional hierarchy, racial discourse, and agency narratives animates the representation of subordinated communities of color, thus demanding new lawyer competencies and client-lawyer relationships.

III. TOWARD FAITH-BASED CLEMENCY ADVOCACY

The faith-imbed model of clemency advocacy contemplated


here reconceives lawyer identity and professional ethics in a religious and, moreover, race-conscious sense. Historically, abolitionist norms informed both lawyer identity and ethics in clemency advocacy. An extension of these norms, faith-based advocacy envisions the clemency process as a religious forum for lawyer engagement and client revival. Communicating that vision demands narrative and story. Admittedly, narrative alone will not correct institutional bias or cure ineffective assistance. But narratives may bear witness to, and protest the injustice of, state killing. Lamentably, their echo may be muted by a criminal justice culture marked by mistrust and punitiveness. Yet, this very culture harbors community. Significantly, the bonds of redemptive community may be strengthened by the killing state itself in heightening the standards of death-making legislation, confessing error, and proffering apology.

Faith narratives encourage religious community from the culture

of criminal justice killing. Both civil and criminal justice traditions in
American law\(^{81}\) and lawyering\(^{82}\) draw upon religious faith. Unsurprisingly, faith-based movements stand deeply entwined
with the death penalty, alternately joining and departing the ranks of
abolitionists.\(^{83}\) The movements and their underlying norms signal a
great diversity of theological stances on the morality of that penalty.\(^{84}\)
Discrete and sometimes irreconcilable narratives emanate from each
of these stances. All of these narratives possess authority\(^{85}\) and
command logic.\(^{86}\) And all distill norms into stories\(^{87}\) that guide the
moral imagination of the tripartite parties to capital cases. Enthralled
by the ordinary and extraordinary elements of morally compelling
story,\(^{88}\) the main parties to law-sanctioned ritualized death (offenders,
victims, and juries), their legal agents (prosecutors, defenders, and judges), and their state representatives (governmental executives, legislators, and executioners) combine disparate norms, metaphors, and stories in driving the machinery of capital punishment and clemency.

Like all stories, criminal justice stories embrace the use of metaphor. Indeed, their authority and logic depend on metaphorical reasoning. Predictably, the pain of private violence and the death of state killing resist the easy application of metaphor. To be sure, it is easy to talk of innocence and guilt. To the same extent, it is easy to talk of punishment and of the harsh simplicity of retribution. However, it is difficult to talk of redemption. Narratives of redemption are agonizing. They recall the agony of pain inflicted on the other-as-victim and the anguish of the accused in accounting for that pain. In this way, death penalty narratives mix cries of pathology and violence not only with wails of forgiveness and mercy, but also with punitive howls of retribution.

The first among the core dilemmas of clemency advocacy stems from this moral cacophony. Confronted by the sounds of lawbreaking and penal violence, it is difficult to hear of guilt pronounced by offender voices of contrition and remorse. Similarly, it is difficult to speak of forgiveness warranted by offender acts of penitence and atonement. In sum, it is both necessary and paradoxical, and perhaps futile, to beg for redemptive mercy from retributive agents and institutions of violence, notwithstanding the variable facts and trials of individual killings.

A second dilemma of clemency advocacy emerges from the procedural and ethical regulation of religious imagery and narratives inside and outside the courtroom. Abolitionists have long urged


courts and bar associations to proscribe or at least narrow the use of religious narrative and symbolism in pretrial and trial proceedings.\textsuperscript{92}

The record of prosecutorial misconduct in capital cases is replete with prejudice-inducing invocations of religion and religious iconography in pretrial comments, opening statements, closing arguments, and post-trial remarks. Insofar as such invocations tilt the adversary process toward death, they warrant prohibition. Although the logical corollary of this ban also operates to forbid faith-inspired redemptive advocacy, symmetry may go too far. Because offenders possess unequal resources and standing relative to the state and its prosecutorial agents, equality norms in fact may require the differential treatment of offender and prosecutorial appeals to moral theologies of redemption and retribution. Absent this distinctive treatment, the dominance of retributive discourse directs clemency advocates to espouse faith-based claims of redemption as widely and forcefully as courts may permit.

A third dilemma of clemency advocacy arises from the constitutional injunction to enunciate colorblind narratives and to uphold race-neutral tactics at pretrial, trial, and post-conviction proceedings. The breadth and vigor of this injunction are crucial given the profound racial coloring of capital defendants and death row offenders. Rather than rehearse the familiar objections to this constitutional bar, cognition, practicality, and intuition collectively recommend rejection of the colorblind charge in capital cases. Put simply, death is not colorblind. Like the race of victims, the race of offenders, jurors, and judges bears relevance to death penalty procedures and outcomes. That relevance explains the prosecutorial impulse and practice of employing color-coded and color-conscious narratives in jury selection, opening statements, and closing arguments. Clemency advocates ignore the racial character of crime and criminal justice at their own peril and at the risk of squandering

\textsuperscript{92}. See \textsc{Model Rules of Prof. Conduct R. 3.1} (meritorious claims and contentions), 3.4 (fairness to opposing party and counsel), 3.6 (trial publicity), 3.8 (special responsibilities of a prosecutor) (2002); \textsc{Standards Relating to the Admin. of Criminal Justice Standards} 3-1.4 (public statements), 3-5.2 (courtroom professionalism), 3-5.3 (selection of jurors), 3-5.4 (relations with jury), 3-5.5 (opening statement), 3-5.6 (presentation of evidence), 3-5.7 (examination of witnesses), 3-5.8 (argument to the jury), 3-5.9 (facts outside the record), 3-5.10 (comments by prosecutor after verdict), 3-6.1 (role in sentencing) (1991).
an important opportunity to engage the civic community in a moral dialogue over the place of race in redemption.

The dilemmas of moral discourse, religious narrative, and race-consciousness encumber clemency advocates with recurrent burdens. Discharging those burdens dictates the development of strategies to reintegrate mercy into the moral paradigm of retribution. Like morality, law holds the jurisgenerative promise of constructive opposition. That promise must be seized to affirm alternative visions of moral community embodied in redemption. Seizure occurs through the reconstruction of trial narratives material to both race and death. Part of the process of reconstruction involves contesting the narrative necessity of public retribution and fostering empathy.

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96. See generally Jeffrey J. Pokorak, Dead Man Talking: Competing Narratives and Effective Representation in Capital Cases, 30 ST. MARY'S L.J. 421 (1999) (explaining that the need to humanize the defendant in a capital case requires that the defense lawyer offer, and that the judge facilitate, the “Human Story” behind the defendant); Christopher J. Meade, Note, Reading Death Sentences: The Narrative Construction of Capital Punishment, 71 N.Y.U. L. REV. 732 (1996) (arguing that death penalty opposition must create narratives that go beyond innocence stories and instead persuade people that even the guilty should not be executed).


98. See generally Susan Bandes, Empathy, Narrative, and Victim Impact Statements, 63 U. CHI. L. REV. 361 (1996) (discussing the capabilities and limitations of storytelling to trigger empathy); Toni M. Massaro, Empathy, Legal Storytelling, and the Rule of Law: New Words, Old Wounds?, 87 MICH. L. REV. 2099 (1989) (analyzing the role of emotion and narratives in law and concluding that narratives and emotions, such as victim impact statements, are not always helpful or appropriate); Martha Minow, Surviving Victim Talk, 40 UCLA L. REV. 1411 (1993) (discussing the dilemmas, drawbacks, and persuasive power of victim rhetoric).
Evidence of this strained form of dialogue may be found in extant jury deliberations and public debates, both endless and irreconcilable. Of necessity, the dialogue must draw guidance and substance from the norms of remorse and atonement. Regrettably, that dialogue must unfold in an environment of fear where truth is put at risk.

CONCLUSION

This Essay took as its focal point the dilemmas of mercy lawyers in representing prisoners and death row inmates in post-conviction clemency proceedings. Often seen as deplorable, that representation works to mediate the moral tension between retribution and redemption. The tension erupts at the outset of capital trials in the competition between innocence phase acquittal and penalty phase mitigation strategies. It reoccurs at post-conviction clemency hearings in the discordance of admitted guilt and asserted atonement. The moral and strategic dilemmas spawned by this inherent tension constitute byproducts of a system of state violence and an adversary criminal justice process equally saturated by race and error.

By turns celebrated and condemned, the actions of former Illinois Governor George Ryan in pardoning and commuting the sentences of 167 prisoners and death row inmates in January 2003 offer no formula for resolving the confounding dilemmas of clemency lawyers. Traditional and alternative models of criminal defense advocacy provide nothing more than failed effort and vague direction to lawyers and inmates in the post-Illinois era of clemency.

104. See Robert Goodrich, Two Former Death Row Inmates Reflect on Ryan’s Decision
appeals. I have argued elsewhere that defenders and prosecutors may play a transformative role in larger abolitionist and redemptive movements. The normative prescriptions of Garvey, Sarat, Simon, and Weisberg confirm that tempered role. Observing the growing authority and violence of the penal state, they decline fully to endorse a faith-inspired abolitionist model of clemency advocacy for mercy lawyers. Their reluctance, however, overlooks the rising historical moment of theological integration increasingly pervading legal theory and education. Unless abolitionists grasp this moment of transformation, the dilemmas of the secular lawyer in pleading redemptive norms to the retributive state, in citing the sacred to the profane, will remain insoluble.


108. See generally Thomas L. Shaffer, Nuclear Weapons, Lethal Injection, and American Catholics: Faith Confronting American Civil Religion, 14 NOTRE DAME J.L. ETHICS & PUB. POL'Y 7 (2000) (examining the "collision that should occur between faith and American civil religion").