

5-1-2004

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FEARLESS SPEECH IN THE KILLING STATE: THE POWER OF CAPITAL CRIME VICTIM SPEECH

JONATHAN SIMON*

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INTRODUCTION

In January 2003, Governor George Ryan of Illinois pardoned four condemned prisoners and commuted the sentences of the 163 remaining death row prisoners to sentences of life in prison.¹ In so doing, he brought national attention to a new abolitionism that has been developing in the shadow of America's apparent pro-death

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1. Don Babwin, *Board Feels Deceived by Ryan, Some Say*, ST. LOUIS POST-DISPATCH, Jan. 16, 2003, at A1.

penalty consensus.² It is too early to know whether Ryan's actions constitute a significant precedent for other political leaders. In general, American chief executives in recent decades have become extremely reluctant to use their clemency powers in capital cases.³ Ryan's willingness to buck this trend reflects in part the unique circumstances present in Illinois at the time of Ryan's dramatic move. The exoneration of seventeen death row inmates since the resumption of capital punishment in Illinois in 1977, including three in 1999, revealed a broad pattern of mistakes and misconduct by law enforcement and prosecutors in death penalty cases.⁴ Facing a storm of media attention surrounding the problem of wrongful convictions, Governor Ryan appointed a Governor's Commission on Capital Punishment, which issued a report in April 2002, deeply critical of the death penalty's operation and criminal investigations generally in Illinois. The Commission proposed sweeping changes in the areas of law enforcement and prosecution of capital cases.⁵ While other states have had problems with some death penalty cases, few have a known record as palpably bad as Illinois. No other state possessed the unique conditions provided by the findings of the commission that Ryan himself had appointed. The commission's broad condemnation specifically called for major structural reforms both to the death penalty and to the general practices of prosecutors and law

2. While the old abolitionism was primarily based on the view that the death penalty was incompatible with the evolving sensibilities of society, the new abolitionism focuses on the practical problems posed by state killing, including: the danger of executing the innocent, the intractable residues of racism in the operation of the death penalty system, and the consequences of executions on correctional workers as well as families of both victims and condemned prisoners. *See generally* BEYOND REPAIR?: AMERICA'S DEATH PENALTY (Stephen H. Garvey ed., 2003) (containing essays critiquing the modern death penalty in the United States and addressing capital punishment as it relates to public opinion, the issue of innocence, race, capital juries, and international law); AUSTIN SARAT, WHEN THE STATE KILLS: CAPITAL PUNISHMENT AND THE AMERICAN CONDITION (2001) (exploring the political, legal, and cultural aspects of capital punishment in the United States and the new abolitionist movement); FRANKLIN E. ZIMRING, THE CONTRADICTIONS OF AMERICAN CAPITAL PUNISHMENT (2003) (exposing the conflicts within the cultural and legal conceptions of the death penalty and arguing for its abolition). Several scholars have suggested that the pro-death penalty consensus in America hides deep divisions on the details of its operation. *See generally* BEYOND REPAIR, *supra*; SARAT, *supra*; ZIMRING, *supra*.

3. *See* STUART BANNER, THE DEATH PENALTY: AN AMERICAN HISTORY 291 (2002).

4. SCOTT TUROW, ULTIMATE PUNISHMENT: A LAWYER'S REFLECTIONS ON DEALING WITH THE DEATH PENALTY 9-11 (2003).

5. *See* REPORT OF THE GOVERNOR'S COMM'N ON CAPITAL PUNISHMENT, (April 2002), http://www.idoc.state.il.us/ccp/ccp/reports/commission_report/complete_report.pdf, at 187 (on file with the North Carolina Law Review).

enforcement agencies. The report therefore provided compelling reasons that few other governors have thus far faced. Moreover, Governor Ryan's own political future had already been severely undermined by a scandal involving his tenure as Illinois' Secretary of State.⁶ Since that time, no other governors or gubernatorial candidates have followed Ryan's lead, either in commuting death sentences or pursuing claims of wrongful conviction that inmates have raised in virtually every death penalty state.

Governor Ryan's decision also unleashed a storm of criticism from victims' families, prosecutors, the media, and politicians across the political spectrum.⁷ The negative reaction towards Ryan opens a revealing window into the relationships of power and knowledge that bind American politicians (especially elected executive officials) to crime victims, and especially to close relatives of people who have been murdered. This relationship is even more powerful in the majority of American states where capital punishment is an available punishment for murder.⁸ In these states, in varying ways, the relatives of capital crime victims are allowed, even expected to speak about their injuries, and this speech operates both within and outside the legal forum of the capital trial. Indeed, it is revealing to consider capital punishment, independent of its larger purposes or functions, as investing a new body of discourse, the speech of capital victims, with extraordinary political significance.

Ryan's speech announcing the commutations at Northwestern University Law School on January 11, 2003, will doubtless be remembered as one of the landmarks in the emergence of a new

6. Beginning early in his term as Governor, Ryan was plagued by rumors that he would be implicated in a growing scandal involving corruption in the office of the Illinois Secretary of State during Ryan's tenure. *George Ryan Indicted; Events Leading to Ryan's Indictment*, CHI. TRIB., Dec. 18, 2003, at C19. On December 17, 2003, Ryan was charged with eighteen counts of racketeering, conspiracy, mail fraud, making false statements, and income tax violations. *Id.*

7. Lee Hockstader, *Dead Men Walking*, WASH. POST, Feb. 23, 2003, § W (Magazine), at 24.

8. States that have the death penalty are: Alabama, Arizona, Arkansas, California, Colorado, Connecticut, Delaware, Florida, Georgia, Idaho, Illinois, Indiana, Kansas, Kentucky, Louisiana, Maryland, Mississippi, Missouri, Montana, Nebraska, Nevada, New Hampshire, New Jersey, New Mexico, New York, North Carolina, Ohio, Oklahoma, Oregon, Pennsylvania, South Carolina, South Dakota, Tennessee, Texas, Utah, Virginia, Washington, and Wyoming. U.S. DEP'T OF JUSTICE, BUREAU OF JUSTICE STATISTICS, CAPITAL PUNISHMENT 2002 (Nov. 2003), <http://www.ojp.usdoj.gov/bjs/pub/pdf/cp02.pdf>, at 1-2 (on file with the North Carolina Law Review). States that do not have the death penalty are: Alaska, Hawaii, Iowa, Maine, Massachusetts, Michigan, Minnesota, North Dakota, Rhode Island, Vermont, West Virginia, and Wisconsin. *Id.* Other United States jurisdictions that do not have the death penalty are: Puerto Rico and Washington, D.C. *Id.*

abolitionism. The political impact of Ryan's speech, however, had already been profoundly shaped by the speech acts of capital crime victims at clemency hearings held in October and November 2002 in response to the Governor's public pronouncement that he was considering the possibility of broad commutations. Although he chose not to attend any of the hearings directly, Governor Ryan could not easily ignore the outpouring of anguished testimony that was closely covered by the Illinois and national media. Retelling the horrifying details of the murders, and relating their own agony in revisiting the details of the crimes, the Illinois capital crime victims by all accounts turned public attention away from the harsh criticism earlier made of the Illinois law enforcement agencies and toward the savagery of the crimes that brought most of the death row prisoners to their condemnations. Weeks of dramatic testimony led newspaper editorial pages to turn against the clemency process. Governor Ryan himself backed away from earlier hints that he was considering a blanket clemency of death row prisoners, although this is what he ultimately did.⁹

This Essay turns to the Illinois clemency hearings, and the capital crime victim speech they produced, to further explore the normative implications of this kind of discourse and its legal valorization. It argues that capital sentencing and its satellite procedures (like clemency hearings) have the unintended consequence of 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. Capital victim speech can be squeezed into existing categories of evidence, but a broader account of its features requires us to reflect on alternative models.¹⁰

The Illinois clemency hearings provided a remarkable instance of the emergence of the victim as an important focus for criminal justice¹¹ and for the larger political order—what sociologists of

9. See John Keilman, *Clemency Hearings a Study in Anguish*, CHI. TRIB., Oct. 28, 2002, at 1 (describing clemency hearings for Illinois death row inmates).

10. See, e.g., *Booth v. Maryland*, 482 U.S. 496, 503 (1987) (stating that the prosecution claimed that victim speech was evidence of a "circumstance" of the crime).

11. See DAVID GARLAND, *THE CULTURE OF CONTROL: CRIME AND SOCIAL ORDER IN CONTEMPORARY SOCIETY* 121 (2001) ("In stark contrast to previous policy, victims have become a favoured constituency and the aim of serving victims has become part of the redefined mission of all criminal justice agencies."); see also HANS BOUTELLIER, *CRIME AND MORALITY: THE SIGNIFICANCE OF CRIMINAL JUSTICE IN POST-MODERN CULTURE* 47 (2000) ("Without exaggeration, the reinforced position of the victim is the most important post-war development in the practice of criminal law.").

punishment point to as the most distinctive feature of contemporary penalty. David Garland describes this as a dramatic change from the generally marginal place of crime victims held in the modern criminal law and administration as it developed in the nineteenth and twentieth centuries. "The crime victim is no longer represented as an unfortunate citizen who has been on the receiving end of a criminal harm Instead, the crime victim is now, in a certain sense, a representative character whose experience is assumed to be common and collective, rather than individual and atypical."¹²

Legal theorists have also noted the increasing importance of the crime victim in the legal process. For the most part, these theorists have raised concerns about what their legal recognition does both to the victims and to the broader legal and political process. Critics argue that victim rhetoric undermines the stability and certainty of the legal process, introducing elements of incommensurable truth and leading to contests over who is a more genuine victim.¹³ Victim speech also pushes the capital sentencing process away from classical and modern goals of criminal law like deterrence and retribution, and toward an embrace of vengeance.¹⁴ Critics also suggest that victims are themselves harmed by a logic that ties them to a debilitating account of their own state of injury, thus producing passive supplicants to a strong state who find themselves vulnerable to a reversal in which they are blamed for their own victimization.¹⁵ To highlight some of the most important features of capital victim speech as a "game of truth," i.e., a relationship between knowledge and power, the essay turns to a cultural practice of speech that existed in ancient Greece and was understood as central to its political and legal system. "*Parrhesia*" is often translated as "freedom of speech," and much of the discussion of it in ancient Greek texts sounds quite similar to the modern constitutional right to freedom of speech that has been so contested and celebrated in liberal societies since World War II.¹⁶

12. GARLAND, *supra* note 11, at 144.

13. See Susan Bandes, *Empathy, Narrative, and Victim Impact Statements*, 63 U. CHI. L. REV. 361, 405 (1996); Angela P. Harris, *The Jurisprudence of Victimhood*, 1991 SUP. CT. REV. 44, 94; Elizabeth E. Joh, *Narrating Pain: The Problem with Victim Impact Statements*, 10 S. CAL. INTERDISC. L.J. 17, 30 (2000); Martha Minow, *Surviving Victim Talk*, 40 UCLA L. REV. 1411, 1413 (1993).

14. Bandes, *supra* note 13, at 397–98; Harris, *supra* note 13, at 92–93; Joh, *supra* note 13, at 18.

15. Minow, *supra* note 13, at 1431.

16. MICHAEL FOUCAULT, *FEARLESS SPEECH* 50 (Joseph Pearson ed., 2001). Thus, in Euripides' drama *Ion*, the title character worries that as a person of uncertain

Rather 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).¹⁷ This sense is better captured by Michel Foucault's translation of *parrhesia* into English as "fearless speech."¹⁸

This Essay argues that *parrhesia* provides an illuminating model for what is emerging as an increasingly powerful cultural practice of speech acts of capital crime victims in contemporary American law and politics.¹⁹ Modern democracies rely on games of truth quite distinct from those of ancient Athens, but the Illinois clemency hearings suggest that a game of truth very much like *parrhesia* is operating in the political space created by capital punishment.

In arguing that something very much like the ancient Greek democratic practice of *parrhesia* is reemerging in the form of capital crime victim talk, this Essay proceeds in three Parts. Part I describes the emerging centrality of the victim and criticism of victim speech as a new form of discourse raised by legal scholars. Part II summarizes Foucault's account of *parrhesia* and its role in ancient Greek political and philosophical life. Part III compares the ancient Greek practice of *parrhesia* to our current practices of capital crime victim speech to help explain the disturbing political effects produced when capital crime victims speak. The Conclusion draws some implications from the Greek experience with *parrhesia* for the emerging power of crime victims in our current political order.

I. THE RISE OF THE VICTIM

According to sociologists, the status of the victim has undergone a remarkable transformation in the last quarter century.²⁰ In the previous "penal-welfare framework" of criminal justice, the victim

parentage, he may be denied freedom of speech in Athens: "If I may do so, I pray my mother is Athenian, so that through her I may have the rights of speech [*parrhesia*]. For when a stranger comes into the city of pure blood, though in name a citizen, his mouth remains a slave: he has no right of speech." *Id.* at 50 (quoting Euripides, *Ion*, in EURIPIDES III, lines 668–70 (David Grene & Richmond Lattimore eds., Ronald Frederick Willetts trans., 1958)).

17. FOUCAULT, *supra* note 16, at 14–18.

18. *Id.*

19. This Essay leaves to another time the question of whether interesting genealogical pathways actually connect ancient Greek *parrhesia* with the place of the capital crime victim in modern American democracy.

20. See, e.g., GARLAND, *supra* note 11, at 11 ("Over the last three decades there has been a remarkable return of the victim to center stage in criminal justice policy.").

did not have much legal significance in the prosecution or punishment of criminals.²¹ The purposes of punishment focused on the public interest in reducing crime and even in rehabilitating the offender.²² “The tendency of criminal justice systems in Western democracies has been to displace the victim, to shut the door on those with the greatest interest in responding to a crime.”²³ In the early twenty-first century, with the rehabilitative ideology largely disavowed by governments in the United States, the victim is emerging both as a subject of sympathy and a source of legitimacy for the criminal justice system.²⁴ As David Garland notes: “The new political imperative is that victims must be protected, their voices must be heard, their memory honoured, their anger expressed, their fears addressed.”²⁵

This valorization of the victim goes beyond the criminal process. The political order itself now reflects upon the crime victim as definitive of the governable interests of the larger public.²⁶ Garland further articulates:

The victim is now, in a certain sense, a much more representative character, whose experience is taken to be common and collective, rather than individual and atypical. Whoever speaks on behalf of victims speaks on behalf of us all—or so declares the new political wisdom of high crime societies. Publicized images of actual victims serve as the personalized, real-life, it-could-be-you metonym for a problem of security that has become a defining feature of contemporary culture.²⁷

This means that when lawmakers, executives, and administrators seek to discover the governable interests of the population, it is to crime victims that they look for that truth.²⁸ This is not only true of the objectives of the criminal process or its justifications, but it is also true of the forms of truth producing. Under correctionalism, expert knowledge of individual offenders was the central expression of how truth was produced. The victim now stands at the center of how criminal justice produces truth about crime. “Contemporary penal

21. *Id.*

22. *Id.*

23. SARAT, *supra* note 2, at 34.

24. GARLAND, *supra* note 11, at 11.

25. *Id.*

26. *Id.*

27. *Id.*

28. See JONATHAN SIMON, *GOVERNING THROUGH CRIME: THE WAR ON CRIME AND THE TRANSFORMATION OF AMERICA, 1960–2000*, at 13 (forthcoming 2004).

discourse is (a political projection of) the individual victim and his or her feelings."²⁹

If sociologists have been impressed with the dramatic change that the rise of the victim represents, normative legal scholars have been far from sanguine about the consequences.³⁰ When law invests meaning in the injuries of the victimized subject, it sets off a chain of unintended effects. These normative arguments emphasize three different concerns about victim speech: the effects on the criminal process; the effects on the subject; and the effects on the broader political order.

The discussion among legal scholars has been framed largely by the victim impact evidence controversy set off by the Supreme Court's 1991 reversal of its four-year-old precedent holding such evidence inadmissible in capital sentencing proceedings.³¹ *Payne v. Tennessee*³² raised questions about the majority's fealty to the tenuous structure of guided discretion built up by the Court's capital jurisprudence since *Furman v. Georgia*.³³ This approach included various ways of guiding decisionmakers through legislatively determined aggravating factors and then weighing them against an almost unlimited range of mitigating considerations arising from the defendant's life. This method was assumed to result in a narrowing of the field of criminal defendants exposed to sentences of death, thus reducing the capriciousness of death sentences. While the Supreme Court retreated from this model,³⁴ the Court's approval of victim

29. GARLAND, *supra* note 11, at 144.

30. See generally Bandes, *supra* note 13 (exploring and arguing against the use of victim impact statements); Harris, *supra* note 13 (criticizing the United States Supreme Court's opinion in *Payne v. Tennessee*, 501 U.S. 808 (1991), as promoting what the author terms a "jurisprudence of victimhood"); Joh, *supra* note 13 (exposing problems with the use of victim impact statements); Minow, *supra* note 13 (critically analyzing the role of victim statements in criminal jurisprudence).

31. In *Booth v. Maryland*, a 5-4 majority held that victim impact testimony was unconstitutional. 482 U.S. 496, 509 (1987). In *Payne v. Tennessee*, a different 5-4 majority upheld the use of such testimony. 501 U.S. 808, 827 (1991).

32. 501 U.S. 808 (1991).

33. 408 U.S. 238 (1972) (per curiam); see also Bandes, *supra* note 13, at 395 (arguing that victim impact statements create emotional reactions that "deflect the jury from its duty to consider the individual defendant and his moral culpability").

34. The Court's retreat from a strong version of guided discretion became visible by the end of the 1970s. See Robert Weisberg, *Deregulating Death*, 1983 SUP. CT. REV. 305, 305. The problem has been exacerbated by the proliferation of aggravating factors by legislators who recognize the potency of such factors as ways for law to recognize and reward whole categories of constituents. See Jonathan Simon & Christina Spaulding, *Tokens of Our Esteem: Aggravating Factors in the Era of Deregulated Death Penalties, in THE KILLING STATE: CAPITAL PUNISHMENT IN LAW, POLITICS AND CULTURE* 89-95 (Austin D. Sarat ed., 1999). The result of judicial loosening of standards and legislative

impact evidence in *Payne* seemed to risk a complete break with the premise that discretion guided by rationality was even desirable and a return to the view that death penalties belonged to a field of justice and power beyond rational review. More concretely, critics have feared that allowing capital victims to speak about their families' pain directly in front of juries will lead jurors to reject careful weighing in favor of an undifferentiated quest for vengeance which will find its meaning in such constitutionally offensive concerns as "the social position, articulateness, and race of their victims and their victims' families."³⁵ From this perspective, the dramatic intervention of capital crime victim testimony changes the penalty phase from a consideration of the murderer's culpability to a " 'status competition' between the offender . . . and those who were directly or derivatively injured by the crime."³⁶

Critics have also worried about the consequences for victims themselves of being legally inscribed in the identity and narratives of victimization. In taking up law's invitation to speak as a victim, subjects may find themselves caught up in a "rhetoric of victimization [that] charts out a limited repertoire of responses" from others.³⁷ The victim impact statement "legitimizes a particular identity and narrative."³⁸ They may "disempower, dehumanize, and silence victims."³⁹ More generally, drawing on recent political and cultural theory,⁴⁰ victim speech critics believe that the victim identity is a "cramped identity"⁴¹ which emphasizes the passivity of the victim and links him to "images associated with (white) middle-class values (e.g., nuclear families, celebrations of holidays), Christianity, and patriotism, as well as emotional reactions associated with victimhood such as rage, helplessness, and fear."⁴²

The law grants the victim power in the capital sentencing

proliferation of aggravators is that the present system is unlikely to effectuate much narrowing.

35. Bandes, *supra* note 13, at 397–98; *see also* Harris, *supra* note 13, at 92–95; Joh, *supra* note 13, at 18.

36. ZIMRING, *supra* note 2, at 55.

37. Minow, *supra* note 13, at 1413.

38. Joh, *supra* note 13, at 30.

39. Bandes, *supra* note 13, at 405.

40. For a discussion on political and cultural theory, *see generally* WENDY BROWN, *STATES OF INJURY: POWER AND FREEDOM IN LATE MODERNITY* (1995); KRISTIN BUMILLER, *THE CIVIL RIGHTS SOCIETY: THE SOCIAL CONSTRUCTION OF VICTIMS* (1988); WENDY KAMINER, *I'M DYSFUNCTIONAL, YOU'RE DYSFUNCTIONAL: THE RECOVERY MOVEMENT AND OTHER SELF-HELP FASHIONS* (1992).

41. Minow, *supra* note 13, at 1432.

42. Joh, *supra* note 13, at 27.

process, but at a potentially great cost. First, the subject may become invested in her own emotional injuries, injuries actually reinforced by the legal practices of testimony.⁴³ Second, the growing body of governmental expertise focused on helping victims can “rebound” on victims by placing responsibility on the victim to change his life in order to reduce opportunities for future victimization.⁴⁴ Having helped legitimize a role for government as an authoritarian crime fighter, victim speech may oblige victims to accept a truncated set of freedoms in exchange for the promise of security.

Perhaps the gravest concerns held by normative critics of victim speech have to do with the effects such speech has on the broader political order and the role of law in it. From this perspective, victim speech provides far more than mere “information” to the legal process,⁴⁵ but instead constitutes a powerful discourse that resituates the relationship among citizens and between citizens and the state. One feature of this new and disturbing discourse is its emphasis on subjective experience and emotions as forms of truth that can be directly introduced into legal and political consideration.⁴⁶ With this subjectivity, however, comes the risk of incommensurability. How are we to choose among multiple claims of victimization and injury? Moreover, this subjective voice of injury tends to level all forms of injury, finding in the experience of pain a common source of authority that does not readily permit a moral hierarchy. Instead it divides the world into victims and victimizers, setting off complex strategic maneuvers by various parties to secure the identity of victim.⁴⁷

The emphasis on vengeance also raises broader problems for the political order. As Susan Bandes explains it, the victim impact statement “disinter[s] a primitive version of privatized justice, one that not only pits the defendant against the victim’s family, but revives the notion that different victims call for different levels of compensation.”⁴⁸ Society’s need for punishment, including the death penalty, as a way to achieve justice as an end in itself, and apart from any crime suppressive effects of punishment, has long been

43. *Id.* at 30.

44. Minow, *supra* note 13, at 1416–17.

45. Joh points out that victim impact statements are not “ ‘simply another form or method of informing the sentencing authority’ but rather the inscription and legitimization of a cultural practice which has significantly altered the capital sentencing scheme, as well as criminal sanctions generally.” Joh, *supra* note 13, at 18 (quoting *Payne v. Tennessee*, 501 U.S. 808, 825 (1991)).

46. Minow, *supra* note 13, at 1416.

47. *Id.* at 1430.

48. Bandes, *supra* note 13, at 407.

recognized in modern jurisprudence under the name of retribution.⁴⁹ Justice Potter Stewart recognized the legitimacy of this view, even in modern society, in his concurring opinion in *Furman*:

The instinct for retribution is part of the nature of man, and channeling that instinct in the administration of criminal justice serves an important purpose in promoting the stability of a society governed by law. When people begin to believe that organized society is unwilling or unable to impose upon criminal offenders the punishment they "deserve," then there are sown the seeds of anarchy of self-help, vigilante justice, and lynch law.⁵⁰

The rise of capital crime victim speech is less about exacting retribution in a moral theory sense than it is about providing a vehicle for expressing collective outrage and desire for vengeance.⁵¹ This represents a profound disruption of the legal and political equality of the individual, one with implications for interpersonal as well as governmental relations.

There are, to be sure, positive normative arguments that the rise of victims in the criminal process and the proliferation of victim speech are necessary developments that help address the historic indifference of the legal system toward victims. Victim participation also secures a greater measure of political support for victims by making politicians more accountable.⁵² Critics of victim impact

49. See IMMANUEL KANT, *THE PHILOSOPHY OF LAW: AN EXPOSITION OF THE FUNDAMENTAL PRINCIPLES OF JURISPRUDENCE AS THE SCIENCE OF RIGHT* 195 (W. Hastie trans., 1887) (1796). Kant is perhaps best known for his expression of this view of retribution:

The Penal Law is a Categorical Imperative; and woe to him who creeps through the serpent-windings of Utilitarianism to discover some advantage that may discharge him from the Justice of Punishment, or even from the due measure of it What, then, is to be said of such a proposal as to keep a Criminal alive who has been condemned to death, on his being given to understand that if he agreed to certain dangerous experiments being performed upon him, he would be allowed to survive. . . . It is argued that Physicians might thus obtain new information that would be of value to the Commonwealth. But . . . Justice would cease to be Justice, if it were bartered away for any consideration whatever.

Id. at 195–96.

50. *Furman v. Georgia*, 408 U.S. 238, 308 (1971) (per curiam) (Stewart, J., concurring). In his dissenting opinion, Justice Powell observed that "[r]etribution is no longer the dominant objective of the criminal law." *Id.* at 452 (Powell, J., dissenting) (quoting *Williams v. New York*, 337 U.S. 241, 248 (1949)). However, Chief Justice Burger noted in his dissent that "the Court has consistently assumed that retribution is a legitimate dimension of the punishment of crimes." *Id.* at 394–95 (Burger, C.J., dissenting).

51. Banes, *supra* note 13, at 396–98.

52. PAUL GEWIRTZ, *VICTIMS AND VOYEURS: TWO NARRATIVE PROBLEMS AT THE*

statements may exaggerate the vulnerability of juries and the legal system more generally to the seductions of emotion and subjectivity.⁵³ Rather than evaluating these competing arguments, the rest of this Essay seeks to explore an important insight of the critics that victim speech is not just more information but rather, as Elizabeth Joh puts it, “a cultural practice,”⁵⁴ or discourse, with the potential to significantly alter the legal and political order. In the next two Parts, this Essay seeks to expand upon this discussion by analogizing contemporary victim speech to the ancient Greek speech practice of *parrhesia*.

II. THE ANCIENT GREEK PRACTICE OF *PARRHESIA*

A. *Frankness*

Much of the work of Michel Foucault, the late philosopher, can be read as a series of studies into the very different practices of truth that fed into the contemporary western tradition of truth. In a series of lectures presented at Berkeley in the fall of 1983, Foucault turned to the topic of *parrhesia*, a word used in Ancient Greek texts to describe a special kind of speech in which a speaker presents to the audience a complete account of a truth known to the speaker through his own experience and insight and independent of any other kind of corroborating evidence.⁵⁵ According to Foucault, the concept of *parrhesia* and its emergence as a problem for philosophy in the fifth century B.C. marked a permanent fissure between two different kinds of truth projects.⁵⁶ One, which he calls an “analytics of truth” is “concerned with determining how to ensure that a statement is true.”⁵⁷ The other, which grew from *parrhesia*, is concerned with the question of “[w]hat is the importance for the individual and for the society of telling the truth, of knowing the truth, of having people who tell the truth, as well as knowing how to recognize the truth.”⁵⁸ This second pathway that grows from *parrhesia* provides the roots of the “critical” tradition in the West.

CRIMINAL TRIAL, LAW'S STORIES 135 (Peter Brooks & Paul Gewirtz eds., 1996).

53. *Id.*

54. Joh, *supra* note 13, at 18.

55. Thomas Schwarz, *Ancient Frankness: Foucault's Aesthetics of Existence and the Question of Free Speech*, 9 PRETEXTS: LITERARY AND CULTURAL STUDIES 125, 129 (2000).

56. FOUCAULT, *supra* note 16, at 170.

57. *Id.*

58. *Id.*

The key to *parrhesia* is frankness. *Parrhesia* creates a direct circuit between the inner experience of the speaker and the judgment of the listener.⁵⁹ The speaker, or *parrhesiastes*, undertakes to allow the completeness of an inner experience to come forward through speech and enter directly into the feelings and thoughts of the other.⁶⁰ Frankness is often translated as honesty, but it goes beyond that in at least two directions. Frankness implies completeness. Frank speech is speech that reflects the complete knowledge of the speaker on the topic. The *parrhesiastes* is someone who says everything he has in mind: he does not hide anything, but opens his heart and mind completely to other people through his discourse.⁶¹

Frankness also references the internal origins of the knowledge communicated in speech. What makes speech frank is precisely that it reveals as transparently as possible exactly to what the speaker has special access—her own beliefs.⁶² In this sense *parrhesia* was distinguished from “rhetoric,” the process by which a speaker tries to persuade someone through the deployment of skillful argumentation.⁶³ In contrast the *parrhesiastes* operates through frankness.

According to Foucault, the political effectiveness of this kind of speech is the inverse of the great risk it created for the frank speaker. If the sovereign was affronted by the impertinence of the *parrhesiastes*, he might retaliate, but this danger is precisely what validated the truth of the speech, which would seem contrary to self-interest.⁶⁴ In another set of texts, *parrhesia* appears as a method of education or pedagogy. It is Socrates as a teacher and model who is the *parrhesiastes*, now confronting not the King, but the self of the student or disciple with questions exposing their lack of self-knowledge. It is through the practice of *parrhesia* in this sense that the mature citizen enters into the full power of freedom through a knowledge-based mastery of the self.⁶⁵

59. *Id.* at 12.

60. *Id.*

61. *Id.*

62. *Id.* (“[T]he *parrhesiastes* acts on other people’s minds by showing them as directly as possible what he actually believes.”).

63. *Id.*

64. See *id.* at 15–17 (noting that a philosopher who “speaks the truth” to a tyrant takes a risk that the tyrant may kill him).

65. *Id.* at 23–24.

B. Truth

In this sense *parrhesia* is a distinct mode of producing truth. This method is not tied to or even engaged with empirical observation or logical deduction but rather arises directly from the internal access of the speaker to her own beliefs.⁶⁶ This raises profound problems of commensurability. What do we do when two or more speakers produce *parrhesiastic* truths that are irreconcilable with each other? The problem of validation was addressed for the ancient Greeks by the social and moral stature reflected in the very act of *parrhesia*.⁶⁷ Unlike the game of truth that has dominated the official epistemologies of Western societies since Descartes' exploration of our mental experiment, *parrhesiastic* truth emerges not in thinking, but in cultural practices of speaking. Unlike the Cartesian interrogator of mental states whose stance is one of self-doubt, the *parrhesiastic* speaker manifests pure confidence in the knowledge of the truth which lies wholly within him.⁶⁸

C. Danger

Confidence is integral to another feature of *parrhesia*. There is a degree of risk involved in the completeness and frankness of *parrhesia*. The speech act itself, which does the work of *parrhesia*, must be precisely that which exposes the speaker to risk. "The *parrhesiastes* says something which is dangerous to himself and thus involves a risk."⁶⁹ This can work in two ways. First, the reprocessing of the traumatic experiences that underlie *parrhesiastic* truth may do damage to the speaker through his own circuits of memory and emotion.⁷⁰ Second, the truth spoken may offend powerful members of the audience who may seek to retaliate. "[I]n *parrhesia* the danger always comes from the fact that the said truth is capable of hurting or angering the *interlocutor*."⁷¹ In both senses, *parrhesiastic* speech is

66. *Id.* at 14.

67. *Id.* at 14–15.

68. *Id.* at 14. Interestingly, Foucault sees this contrast as so dramatic that "[i]t appears that, *parrhesia*, in this Greek sense, can no longer occur in our modern epistemological framework." *Id.* This may suggest Foucault would have been skeptical about the central argument of this Essay, that the speech of crime victims is a new birth of *parrhesia*. It may also suggest, however, that the return of something like the *parrhesiastic* game of truth reflects a broad challenge to that modern epistemological framework.

69. *Id.* at 15–17.

70. *Parrhesia*, then, is linked to courage in the face of danger: it demands the courage to speak the truth in spite of some danger. And "in its extreme form, telling the truth takes place in the 'game' of life or death." *Id.* at 16.

71. *Id.* at 17.

fearless speech because it knowingly embraces risk. Danger can also come from those who listen to the *parrhesia*. A striking example of this reckless and provocative aspect of *parrhesia* is recounted in writings of Dio Chrysostom of Prusa, a provincial Roman noble of the late first century, who became a liberal political activist and to some extent a philosophical follower of the cynic tradition. Dio describes the relationship of Diogenes, the philosopher who originated the cynic tradition, and Alexander, the King of Greece, who accepted the philosopher as a counselor and teacher. This *parrhesiastic* contract was put to a severe test by Diogenes's famously insulting style:

[Diogenese] went on to tell the king that he did not even possess the badge of royalty. . . . "And what badge is that?" said Alexander. "It is the badge of the bees," he replied, "that the king wears. Have you not heard that there is a king among the bees, made so by nature, who does not hold office by virtue of what you people who trace your descent from Heracles call inheritance?" "What is this badge?" inquired Alexander. "Have you not heard farmers say," asked the other, "that this is the only bee that has no sting, since he requires no weapon against anyone? For no other bee will challenge his right to be king or fight him when he has this badge. I have an idea, however that you not only go about fully armed but even sleep that way. Do you know," he continued, "that it is a sign of fear in a man for him to carry arms? And no man who is afraid would ever have a chance to become king any more than a slave would."⁷²

According to Dio, these remarks so tested Alexander that he prepared to hurl a spear at Diogenes.⁷³ Diogenes's fearlessness in speaking so frankly epitomized the *parrhesiastic* role a philosopher could play in guiding a Greek sovereign. Likewise, Alexander's forbearance in accepting Diogenes's criticism without retribution marked him as a virtuous ruler rather than a tyrant.⁷⁴

D. Criticism

What makes *parrhesia* dangerous, of course, is that it is likely to be critical. It is not *parrhesia* to praise the sovereign or flatter one's friends, even if one believes what one says. Nor is it *parrhesia* to

72. *Id.* at 127–28 (quoting DIO CHRYSOSTOM, THE FOURTH DISCOURSE ON KINGSHIP, 61–64 (J.W. Cohoon trans., Loeb Classical Library (1971)).

73. *Id.*

74. *Id.* at 23.

testify against oneself in a criminal trial.⁷⁵ The danger in *parrhesia* must come from another, the interlocutor, who is in a position to hurt the speaker.⁷⁶

In democratic societies, *parrhesia* involves speaking truth to an assembly (or an elected executive), rather than to the sovereign. Yet even in democratic *parrhesia*, the speaker must have sufficient status, i.e., be at least a citizen. "[I]n fact, one must be one of the *best* among the citizens, possessing those specific personal, moral, and social qualities which grant one the privilege to speak."⁷⁷ Danger was present in democratic *parrhesia* as well as monarchical. The sovereign, if sufficiently affronted by *parrhesia*, could order its author punished. It was a well-known feature of Greek democracy that the majority, if offended by the truths spoken by a speaker, could be exiled.⁷⁸

E. Duty

"[I]n *parrhesia*, telling the truth is regarded as a *duty*."⁷⁹ But if *parrhesia* is in some sense not a matter of personal choice, neither is it a general obligation imposed on the general citizenry and enforced by something like criminal law.⁸⁰ Instead it emerges from the self-recognized obligation to speak when to do so is required by one's relationship to the other. A typical example from the ancient Greek texts surveyed by Foucault would be the duty of one friend to another to speak the *parrhesiastic* truth if he believed the latter was embarked on an error of judgment likely to produce a substantial moral wrong or great misfortune.⁸¹ Likewise, a citizen who observed her polity entering a course of wrongdoing might decide that she was obliged to undertake an act of *parrhesia*. In both examples there is real danger that the *parrhesiastic* act will result in offending a friend or a sovereign.

Not only is the motivation of *parrhesia* grounded in duty, but also ideally the *parrhesiastic* truth should itself arise from the dutifulness of the speaker.⁸² A strong example of *parrhesia* grounded in duty

75. *Id.* at 17.

76. *Id.* at 17.

77. *Id.*

78. *Id.*

79. *Id.* at 19.

80. Indeed, to the extent that speech was forced by the coercion of the state (or any other actor), it was not *parrhesia*. Confession to a criminal act could constitute a *parrhesia*, but only if their confession was voluntary. *Id.*

81. *Id.*

82. *Id.*

comes in Euripides' play *Orestes*,⁸³ in which a positively portrayed speaker argues that Orestes should not only be spared execution for murdering his mother and her husband, but honored for avenging his father. This speaker is described by Euripides as an *autourgos*, essentially a small landowner who worked his own lands with the help of family members or a few slaves.⁸⁴ The *autuorgos* were much celebrated by Greek thinkers for their excellence in protecting the state as soldiers and citizen-counselors.⁸⁵ Their reputation as soldiers arose from their natural interest in protecting the countryside from aggressive raiders.⁸⁶ Their reputation as speakers was traced to their role as self-governing landowners who must rule over servants and family members in a context of subsistence.⁸⁷ "[S]uch landowners are used to giving orders to their servants, and making decisions about what must be done in various circumstances. . . . Hence when they do speak [publicly], they do not use [clamor or uproar, i.e., negative *parrhesia*]; but what they say is important, reasonable, and constitutes good advice."⁸⁸ Thus, those who spoke not only out of a sense of duty, but out of an experience or knowledge which is itself produced by the pursuit of duty (like that of a soldier or one responsible for the well being of the household), had special credibility in the ancient Greek order.⁸⁹

F. *Parrhesia and Athenian Politics*

Parrhesia was an integral part of the constitution of Athenian democracy. Like freedom of speech in modern constitutions, *parrhesia* was, as a practice, accorded a privileged role in producing the effects of truth essential to the operation of a self-governing people to govern themselves.⁹⁰ Athenian democracy was defined very explicitly as a constitution in which people enjoyed *demokratia isegoria* (the equal right of speech), *isonomia* (the equal participation of all citizens in the exercise of power), and *parrhesia*.⁹¹

Unlike the situations in which issues of freedom of speech often arise today, *parrhesia* was overwhelmingly a matter of direct personal

83. Euripides, *Orestes*, in *ORESTES AND OTHER PLAYS* 332–33 (Philip Vellacott trans., Betty Radice et al. eds., Penguin Books 1972).

84. *Id.* at 333.

85. FOUCAULT, *supra* note 16, at 68.

86. *Id.*

87. *Id.* at 69.

88. *Id.*

89. *Id.* at 68.

90. *Id.* at 22.

91. *Id.*

interaction rather than publication or broadcast.⁹² *Parrhesia* took place in the public space of political life, with both interlocutors present and ready to respond.⁹³

After the rise of the Hellenistic monarchies, the place and function of *parrhesia* shifted; but, it remained central to making power accountable:

In the monarchic constitution of the state, it is the advisor's duty to use *parrhesia* to help the king with his decisions, and to prevent him from abusing his power. *Parrhesia* is necessary and useful both for the king and for the people under his rule. . . . A good king accepts everything that a genuine *parrhesiastes* tells him, even if it turns out to be unpleasant for him to hear criticisms of his decisions. A sovereign shows himself to be a tyrant if he disregards his honest advisors, or punishes them for what they have said.⁹⁴

In both ancient democracy and monarchy, specific acts of *parrhesia* could fail and cause damage to the polity. Greek texts surveyed by Foucault also contain examples and references to *parrhesia* as a bad or dangerous practice.⁹⁵ Monarchs could break the *parrhesiastic* promise and seek to punish those who have offended them.⁹⁶ Likewise, those with specific criticisms could refuse to risk frank speech. In democracy, "negative *parrhesia*" might have taken the form of "ignorant outspokenness"⁹⁷ by those poorly informed to guide the polity. Because of such failures, *parrhesia* existed both as functional practice and problem for the ancients. "One of the problems which the *parrhesiastic* character must resolve, then, is how to distinguish that which must be said from that which should be kept silent. For not everyone can draw such a distinction."⁹⁸ The political function of *parrhesia* and its operation as a technique of personal enlightenment were intertwined in ancient Greece. The suitability of a *parrhesiastes* had to do ultimately with her spiritual and philosophical depth.

92. *Id.*

93. *Id.*

94. *Id.* at 22–23.

95. *Id.* at 23.

96. *Id.*

97. *Id.* at 73. This negative use of *parrhesia* appears in Euripides' account of the public trial of Orestes. In the play, Euripides describes a speaker who advocates Orestes's death as having "a mouth like a running spring, a giant in impudence . . . putting his confidence in bluster and ignorant outspokenness." *Id.* at 58 (quoting Euripides, *supra* note 83, at 332).

98. *Id.* at 64.

G. *The Care of the Self*

By the middle of the fourth century B.C., in the writings of Plato and Aristotle, *parrhesia* had become primarily a problem of the speaker's personal characteristics rather than her status.⁹⁹ The question was no longer who had a right to *parrhesia*, but rather a question of the capacities of the speaker, i.e., his moral integrity and insight.¹⁰⁰ Here the *parrhesiastes* is one who speaks truth to other individuals with the purpose of guiding them toward a more virtuous or healthy life. In this sense it is a part of a larger Greek tradition of techniques for the "care of the self."¹⁰¹ Socrates is perhaps the most famous example in this Athenian tradition.¹⁰² His career included moments of classic Athenian political *parrhesia*, but also revealed him as a leading proponent of *parrhesia* in the service of spiritual guidance.¹⁰³ He offered his frank opinion of the reasoning of his students, including many who stood far above him in social position.¹⁰⁴

H. *Problematicization of Parrhesia*

Parrhesia then is much more than a legal right, it is a complex arrangement of truth and power on which people act on each other and on their own relationships to other people and whole political communities. Foucault's brief study of *parrhesia* was expressly motivated less by an interest in the political and sociological function of *parrhesia* than by an interest in the controversies stirred in ancient Greek thought around this special practice of truth-telling. According to Foucault, questions like these were raised:

Who is able to tell the truth? What are the moral, the ethical, and the spiritual conditions which entitle someone to present himself as, and to be considered as, a truth-teller? About what topics is it important to tell the truth? . . . What are the consequences of telling the truth? What are the anticipated positive effects for the city, for the city's rulers, for the individual?, etc. And finally: What is the relation between the

99. *Id.* at 85–87.

100. *See id.* at 85–86.

101. *See generally* MICHAEL FOUCAULT, *THE CARE OF SELF* (Robert Hurley trans., Pantheon Books 1986) (1984) (discussing the larger tradition of techniques for "care of self").

102. Socrates lived between 470 B.C. and 399 B.C. *See* 20 *ENCYCLOPAEDIA BRITANNICA* 819 (15th ed. 2002).

103. FOUCAULT, *supra* note 16, at 101.

104. *Id.*

activity of truth-telling and the exercise of power?¹⁰⁵

These questions, raised around the practice of *parrhesia* by ancient Greek drama and philosophy, become, in Foucault's view, the source in Western societies of a critical tradition or critical attitude that has developed in Western philosophy, independent of the dominant concern with the validity of the process of reasoning.

Foucault turned to the plays of Euripides for a number of examples of *parrhesiastic* practice. Here he finds confirmation of its significance as a marker of social status, since only those with certain standing gain access to *parrhesia*. Foucault finds evidence in drama, as well as philosophical writing, for a crisis of *parrhesia* as its defects under both democratic and monarchical politics became more visible, and as it became more associated with the spiritual work of educating the subject in the care of the self.

Euripides' play *Ion*¹⁰⁶ celebrates *parrhesia* as a form of truth telling and thematizes its relationship to other forms of truth operating in the ancient world. The truth telling in *Ion* involves a crime that quite literally dwells at the center of religious truth in ancient Greek society, the Delphic oracle, and was committed by the god responsible for powering the oracle, Apollo.¹⁰⁷ Years before the time depicted in the play, Apollo raped a young noble woman, Creusa, who then gave birth to the title character Ion.¹⁰⁸ Rather than admit his crime, Apollo hides it by taking Ion away and installing him as a servant at Delphi, where he serves to guide visitors seeking to place questions before the Oracle.¹⁰⁹ In the course of the play, Creusa and her husband, Xuthus, the reigning sovereigns of Athens, come to Delphi to inquire of the god Apollo whether they will succeed in their efforts to have a child, who will be an heir to the throne.¹¹⁰ At Delphi they meet Ion, but do not apprehend that he is the offspring of Creusa.¹¹¹ As Apollo's servant, he directs them in for their meeting with the Oracle.¹¹²

105. *Id.* at 169–70.

106. Euripides, *Ion*, in EURIPIDES III (David Grene & Richmond Lattimore eds., Ronald Frederick Willetts trans., 1958).

107. 2 ENCYCLOPAEDIA BRITANNICA, *supra* note 102, at 120.

108. FOUCAULT, *supra* note 16, at 39.

109. *Id.* at 40.

110. Euripides, *supra* note 106, at 187–88. This plotline is complicated by the fact that Xuthus, as a foreigner, is in some tension with the Athenian tradition of native Kings. FOUCAULT, *supra* note 16, at 40. A clear and legitimate successor would shore up concern about this anomaly. *Id.*

111. Euripides, *supra* note 106, at 187–88.

112. *Id.*

Euripides, according to Foucault, uses the dramatic wrongness of the rape to contrast the truth making process of the Delphic oracle's interpretable utterances with that of *parrhesia*, which operates directly upon the listener.¹¹³ Throughout the play Apollo, who never appears, refuses to admit the truth of what he has done to Creusa. Instead, the Oracle is used to spread misinformation and lies aimed at concealing Apollo's crime.¹¹⁴ In contrast, Ion and Creusa use *parrhesia* to advance political reform, to expose Apollo's guilt for a terrible crime, and with the aid of further twists in the plot, to bring forth the truth of the central characters' relationship to each other.¹¹⁵

The central *parrhesiastic* act in the play is Ion's speech, delivered to his sudden benefactor, Xuthus, Creusa's husband, who has been misled by Apollo into believing that Ion is his son from a brief liaison years earlier.¹¹⁶ Xuthus is the King of Athens as a result of his marriage to Creusa. Deceived by the Oracle into believing that Ion is his son, Xuthus offers to bring him back to Athens and provide for him.¹¹⁷ Ion responds rather strangely to this generous offer, launching into an extended polemic about Athenian politics, which is expressly motivated by worries that he will not be able to acquire the right of *parrhesia* unless he can prove that he was born of an Athenian.¹¹⁸ He goes on to lament to Xuthus the pathologies of both democracy, in which envy and resentment define the relations between people, and a monarchy, in which the potential for lethal animus against the sovereign is always possible.¹¹⁹ These speeches, delivered to the King himself, constitute exemplary acts of political *parrhesia*.¹²⁰

A second act of *parrhesia* involves Creusa's angry speech to Apollo himself in which she criticizes and mocks Apollo for his cruel act of rape and his continuing concealment of the truth of her offspring.¹²¹ Speaking outside the locked doors of the Oracle and angered further by the fact that Apollo has favored her husband with the discovery of his long lost son (just what she wants), Creusa delivers a tirade against the god, berating him for the cruelty of his

113. See FOUCAULT, *supra* note 16, at 40–44.

114. See, e.g., *id.* at 45 (describing one instance of Apollo's "obscure and ambiguous" pronouncements through the Oracle).

115. *Id.* at 46–54.

116. *Id.* at 44–52 (describing various aspects of Ion's speech).

117. *Id.* at 48.

118. *Id.* at 50.

119. *Id.* at 48–49.

120. *Id.* at 47–52. Foucault suggests that this seems to be the dramatic function of the speeches which have little relationship to the plot. *Id.*

121. *Id.* at 53–54.

treatment.¹²²

Both speeches seem deliberately to juxtapose *parrhesia* with the system of oracular truth in which Apollo functions as the central god, communicating truth through the interpreted shrieking of the Oracle.¹²³ As a way of linking governing with truth, Ion depicts *parrhesia* for all its faults as a far more reliable instrument than the Delphic oracle.

While Euripides seems to celebrate the *parrhesia* as a successful practice of truth telling in *Ion*, it is portrayed much more problematically in a series of plays Euripides produced in the last years of his life. Once again, *parrhesia* is deployed in a context of the criminal behavior of the powerful. In *Ion*, the powerful criminal is the god Apollo; in *Electra*,¹²⁴ it is Clytemnestra, a Queen who has murdered her husband, Agamemnon, upon his return from the Trojan wars.¹²⁵ She then rules Athens with her adulterous lover, who has become her husband and King.¹²⁶ In *Electra*, the title character, along with her brother Orestes, kills her mother Clytemnestra and her husband in vengeance for their conspiracy against and murder of their father.¹²⁷ In a key scene of the drama just before the final execution of vengeance, Clytemnestra confesses to Electra that she has in fact killed her husband, Agamemnon, and explains that her act was in fact a vengeance against her husband for his sacrifice of Iphigenia.¹²⁸ Clytemnestra then explicitly invites Electra to perform *parrhesia* in order to test Clytemnestra's assertion that she was justified in killing Agamemnon.¹²⁹ Electra takes up what Foucault describes as a *parrhesiastic* contract, only to betray it by killing the object of that *parrhesia*, her mother and Queen.¹³⁰ In *Electra*, *parrhesia* seems troubling and without redemption, perhaps because it operates in a landscape defined by horrendous crimes and the deep felt need for vengeance. Whereas the normal operation of *parrhesia* in a monarchy is to create a space where speakers may speak truth to

122. *Id.* at 52–54.

123. In the Delphic ritual, a prophetess called Pythia delivered Apollo's message through ecstatic expressions that were then interpreted by the priests of the temple. See 8 ENCYCLOPAEDIA BRITANNICA, *supra* note 102, at 975.

124. Euripides, *Electra*, in MEDEA AND OTHER PLAYS 105 (Philip Vellacott trans., Penguin Books 1963).

125. FOUCAULT, *supra* note 16, at 32.

126. *Id.* at 33.

127. *Id.*

128. *Id.* at 34.

129. *Id.*

130. Recall that the sovereign is perceived as the interlocutor for *parrhesia* to work.

the sovereign without fear of punishment, it is deployed in *Electra* as a prelude to the pursuit of vengeance against a sovereign.

The theme of *parrhesia* is raised even more problematically in Euripides' final play, *Orestes*, which continues the familial and political story described in *Electra*.¹³¹ In *Orestes*, the title character and his sister, Electra, are on trial for their murder of Clytemnestra and her husband.¹³² Here *parrhesia* is once again being used in the context of criminal justice, but this time in the imagined speeches of an Athenian jury deciding the fates of the siblings.¹³³ Taking advantage of the traditional Athenian procedure for criminal trials that allows any citizen to address the court, Euripides presents a variety of mythological and historical figures exercising *parrhesia* to take a stand on the fate of the pair. But Euripides portrays both foolish and wise counsel being expressed in this classic form of *parrhesia*. For Euripides, neither the frankness of speech, nor its fearlessness, can assure its value to the assembly. Those who are privileged to speak include those who do have special qualities of insight and those who do not, and how to distinguish among them is a problem.

In Foucault's view, the shift in Euripides' attitude toward *parrhesia* between *Ion* and *Orestes* captured a shift in the political context and meaning of *parrhesia* brought on by the Peloponnesian wars.¹³⁴ If the play *Ion* celebrated *parrhesia* and its advantages over the divine system of truth associated with the Delphic oracle, *Orestes* problematizes *parrhesia*, revealing a host of problems about the uses made of *parrhesia* in a democracy.¹³⁵ This was a problem haunting Athenian society in the midst of its long and controversial war with Sparta. This war split the major political parties; the democratic party of merchants and traders supported the war, and the conservative party of aristocratic landowners opposed the war.¹³⁶ The contrast between foolish and wise uses of *parrhesia* in *Orestes* corresponds, according to Foucault, to the split between the leading political parties in Athens.¹³⁷ The leader of the democratic party, Cleophon, a foreigner naturalized as an Athenian citizen and famous for his rhetorical abilities, exemplified for Euripides the danger of *parrhesia*

131. Euripides, *supra* note 83, at 301–02.

132. *Id.* at 330–34.

133. *Id.*

134. FOUCAULT, *supra* note 16, at 71–72.

135. *Id.*

136. *Id.* at 70.

137. *Id.*

as speech that claimed the status of inner truth but was actually rhetorical and manipulative.¹³⁸ The leader of the aristocratically-leaning conservative party, Theramenes, exemplified the good *parrhesiastic* speaker who expresses inner truths derived from his own experience fulfilling his duties and obligations.¹³⁹

Euripides captured the transformation of *parrhesia* from a clear institutional right to a moral quality present in some, but not all, citizens and the cultivation of which became the task of philosophical training. This problematization emerged in disputes around two fundamental questions. First, who is entitled to speak the truth, now not according to formal status, but according to ability?¹⁴⁰ Second, how is one to prepare to speak the truth?¹⁴¹ The risk taking of truth speaking no longer suffices to assure its validity. The problem of how to cultivate a capacity to speak the truth becomes a subject of philosophical and spiritual expertise.

III. ANCIENT *PARRHESIA* AND VICTIM SPEECH IN CONTEMPORARY LAW & SOCIETY

Freedom of speech plays a critical role in contemporary democracy, but fearless speech does not.¹⁴² The legal doctrine of freedom of speech protects *parrhesiastic* speech of the sort celebrated in the ancient Greek texts discussed above, but places no special significance on *parrhesia* as such.¹⁴³ The unique features of *parrhesia* as a type of speech act have no special role in legal or political accounts of freedom of speech in contemporary American democracy.¹⁴⁴ The person who steps forward in public to condemn the corruption of leaders or practices (or whole communities) has

138. *Id.*

139. *Id.*

140. *Id.* at 72.

141. *Id.* at 72–73.

142. See generally THOMAS EMERSON, THE SYSTEM OF FREEDOM OF EXPRESSION (1970) (discussing the status of free speech and its corresponding restraints in America today); ALEXANDER MEIKELJOHN, POLITICAL FREEDOM: THE CONSTITUTIONAL POWERS OF THE PEOPLE (1965) (emphasizing the importance of free speech in America to the vital goal of self-government).

143. LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW 849–56 (2d ed. 1988). Actually, the existence of doctrines like “fighting words” and “clear and present danger,” which permit repression of speech that is very likely to lead to violence, means that provocative *parrhesiastic* speech acts are somewhat less protected by First Amendment freedom of speech than speech with similar content but delivered with less “frankness.” *Id.*; see also Judy Sarasohn, *Resurrecting ‘Harry’ and ‘Louise’ Stirs Flap*, WASH. POST, Apr. 25, 2002, at A27.

144. This is one reason to prefer Foucault’s translation of *parrhesia* into English as “fearless speech” to the more conventional translation of “free speech.”

often been celebrated in the popular culture of American democracy,¹⁴⁵ but seems to play little role in the political functions of speech today. Instead, a dominant role is accorded to mass media, through print and broadcast channels, and in the form of skillfully produced political advertising. Whatever one makes of such political advertisements, they are not *parrhesiastic* in any sense that would have been recognizable to the ancient Greeks. For one thing, they typically do not involve real individuals. The speakers who might appear to be making a *parrhesiastic* act by condemning a particular policy supported by powerful leaders or interests, or criticizing political candidates, are simply actors playing fictional characters (like Harry and Louise, the celebrated “characters” whose fictional dialogs on behalf of health insurance reform organization sponsored by the health insurance industry, were widely credited with helping to scuttle President Clinton’s plans for health insurance reform in the early 1990s). But even if actual individuals appear in such advertisements, the nature of the modern liberal political order has eliminated the crucial elements of duty and risk in ancient *parrhesia*.

Parrhesia is not, however, wholly absent from contemporary political life. The western tradition of critical *parrhesiastic* speech by intellectuals, a recognizable genealogy that stretches from Socrates through Emile Zola¹⁴⁶ to Daniel Ellsberg,¹⁴⁷ remains alive today but only episodically. It plays little role in the active practice of governmental power. A kind of “simulacra”¹⁴⁸ of *parrhesia* exists in modern television journalism where celebrity reporters compete to confront politicians with questions about scandals in hopes of eliciting fresh denials or explanations. It should be clear from the preceding discussions why this is not *parrhesia*. First, it lacks a basis in the internal “truth” of the speaker, amounting to little more than a recirculation of existing charges. Second, although it may appear brave to confront a politician, or even an elected leader, with

145. See MEET JOHN DOE (Warner Bros. 1941); MR. SMITH GOES TO WASHINGTON (Columbia Classics 1939); STATE OF THE UNION (MGM Pictures 1948).

146. Zola was a Parisian journalist who was condemned by the French government for misconduct in the prosecution of Corporal Alfred Dreyfus. See ALAN SCHOM, EMILE ZOLA: A BOURGEOIS REBEL 161–90 (1987).

147. Ellsberg was a Defense Department system’s analyst who was persecuted by President Richard Nixon after leaking a copy of the Pentagon’s secret study of the Vietnam War to the media. See TOM WELLS, WILDMAN: THE LIFE AND TIMES OF DAN ELLSBERG 459–503 (2001).

148. See generally JEAN BAUDRILLARD, SIMULACRA AND SIMULATION (Sheila Faria Glaser trans., 1994) (1981) (coining the term to describe the emergence in post-modern society of subjects and objects that appear to be real because of their intense media presentation, but which are anchored in myth rather than reality).

scandalous charges, modern reporters face little real danger from their interlocutors and are likely to be rewarded by their colleagues and employers.

One of the few places we find an active and politically important cultural practice that resembles *parrhesia* is in the speech of crime victims, especially capital crime victims. Whether in victim impact statements, political advertising, or in the special agora-like forum of the Illinois clemency hearings, capital crime victims engage in fearless speech, in which an inner truth of victimization, is produced in public, at some risk to the speaker, and with life or death consequences. All three modes of ancient *parrhesia* operate in the speech of contemporary crime victims.

This Essay identifies three distinct practices that have emerged in which capital crime victims produce truth in a *parrhesiastic* manner: the victim impact statement; the political advertisement; and the clemency hearing. These practices differ in their legal status as well as in their fit with the model of ancient Greek *parrhesia*. Victim impact statements involve formal testimony by capital crime victims in penalty phase trials held to determine whether defendants convicted of capital crimes (essentially murder) should suffer the death penalty or another alternative (usually life in prison with various restrictions on parole). Like Creusa in Euripides' *Ion*, the victim impact testimony of a capital crime victim can make visible and publicize injuries left hidden by the modes of knowledge at work in the official finding of criminal guilt. For example, the father of murder victim Megan Kanka told the jury considering whether to sentence her killer to death: "The only peace we have as parents are the moments during sleep when we don't have to deal with the harsh reality of our everyday lives."¹⁴⁹ In doing so, the capital crime victim undertakes real risks. There is the risk that he will experience trauma in having to revisit the crime and its effects. There is the risk that a capital sentencing jury will reject their truth. There is a duty to the loved one to seek for her the maximum form of whatever "justice" the legal system defines as available.

Capital crime victims, especially parents of murdered children, have emerged as highly effective champions of harsher criminal laws.¹⁵⁰ Crime victims have also emerged as potent critics of political

149. Joh, *supra* note 13, at 34.

150. Nicholas Riccardi, *Prosecutors Seek Fewer 3rd Strikes*, L.A. TIMES, May 27, 2003, at B1 (discussing views of Mike Reynolds). In California, the adoption of the nation's most severe version of "three-strikes" legislation, was championed first by Mike Reynolds, a Fresno salesman whose daughter was murdered. *Id.*

leaders seen as failing to protect citizens from violent crime or to seek adequate punishment after the fact. One of the most widely discussed images of contemporary presidential politics occurred in the 1988 presidential campaign when supporters of Vice President George H. W. Bush ran a commercial against his Democratic opponent, Governor Michael Dukakis of Massachusetts. The advertisement featured victims of violent rapes and kidnappings that were committed by a convicted murderer on furlough from a Massachusetts prison where he had been serving time for murder.¹⁵¹ The program had not been originated by the Dukakis administration, but the prisoner, Willie Horton, was released during the Dukakis administration's tenure.¹⁵² The victims bitterly criticized Governor Dukakis for exposing them to such violence. The crimes, while not involving the issue of the death penalty itself, which was not available in Massachusetts either before or after, clearly involved capital offenses.¹⁵³ The depiction of the Governor being criticized by victims helped illuminate one of the central policy differences the Bush campaign was seeking to draw, i.e., its willingness to be much harsher with convicted criminals.¹⁵⁴

In ancient Greece, *parrhesia* also functioned as a source of pedagogic instruction and spiritual enlightenment. Victim speech is justified in part as promoting the psychological and spiritual well-being of the speaker.¹⁵⁵ Indeed, the purpose of the penal system has increasingly been seen in relation to the spiritual and psychological needs of victims. This is especially true of that assemblage of judicial and penal practices that composed the United States system of capital punishment at the turn of the twenty-first century. The massively extended United States prison system is publicly justified primarily as a way to protect American communities against criminal assaults on their persons and property (and there is no reason to doubt it is understood in just those terms by the general public). In contrast, the death penalty is coming to be seen in large part as a practice defined by the needs of the victims.¹⁵⁶

151. E.J. DIONNE, WHY AMERICANS HATE POLITICS 77, 301 (1991).

152. *Id.*

153. *Id.* at 20 (emphasizing that Horton's release played into the public's fears that convicted rapists and murderers were being set free).

154. *Id.* at 20, 77, 301.

155. Supporters of victim impact evidence in capital trials have argued that denying victims the opportunity to speak at capital trials hinders their effort to overcome the traumatic effects of victimization. See Bandes, *supra* note 13, at 405.

156. As Franklin Zimring has pointed out, the exoneration of non-capital prisoners poses little threat to the survival of imprisonment because the prison remains essential to

The clemency hearings held in Illinois after Governor Ryan announced that he would consider the mass clemency of prisoners on death row offered an exceptional moment of frank speech, as if mass clemency was matched by a mass moment of *parrhesia*. The sheer scale of the “horror” expressed by the long list of families became a factor in the thinking of reporters assigned to cover the hearings. The families spoke formally and directly to the Governor, and many of them made this confrontational quality explicit. The nature of the mass clemency made the truth expressed by the capital crime victims relevant—not only to the question of any particular sentence of death, but also to the very existence of a death penalty. All three of these aspects intensified the *parrhesiastic* quality of capital crime victim speech. The hearings demonstrated the extraordinary power released by this kind of truth telling in contemporary politics, especially its ability to overwhelm expert based systems of political information as exemplified by the Illinois Capital Commission, whose highly critical report on the Illinois capital punishment system led Governor Ryan to pursue clemency in the first place.

A. Frankness

When capital crime victims testify as part of the sentencing phase of trials, their testimony is tightly controlled through examination by the prosecution and the rules of courtroom decorum. The capital crime victim is not allowed to comment directly on the suitability of the death sentence. The form of his testimony is strictly limited to that which is not considered overly prejudicial. While prosecutors played a key role in mobilizing capital crime victims to testify at the clemency hearings, they seem to have done little to shape the content or form of those hearings. The statements actually made by families during the clemency hearings were particularly unrestrained. In that sense they epitomize “frankness” in the sense of rawness:

“He [Fedell Caffey] was conceived in hell. God would not have created such a waste of life. So please, send him back.”¹⁵⁷

“If you or the governor need someone to pull the switch or make the injection, I volunteer. Not that I’m a vindictive man,

our contemporary means of security from crime. ZIMRING, *supra* note 2, at 61. In contrast, even supporters of the death penalty understand that it is no longer an essential tool of security. *Id.*

157. Christy Gutowski, *Killers’ Pleas Fail to Sway Panel Officer, Life Sentence ‘Insufficient’ for Couple Formerly of Schaumburg, He Says*, CHI. DAILY HERALD (Arlington Heights, Ill.), Oct. 17, 2002, at 1.

but I'll kill him (Fedell Caffey) myself if it's a problem for the state or the Governor."¹⁵⁸

"So what (the governor is) trying to make everybody believe, that we have a broken system and the death penalty is flawed and all these cases are flawed, is bull —," he said. "It's bull—. And we get tired of it."¹⁵⁹

"This isn't justice . . . justice is that man dead."¹⁶⁰

In the view of journalist observers, this gave the hearings a newsworthiness that belied their length. "Though the audience has grown smaller and the legal arguments more repetitive, the sobs of victims' family members have never lost their anguish, and the details of the crimes are rarely less than shocking."¹⁶¹

B. Truth

Like the victim impact statement, the clemency hearings produced testimony that constituted its own validity. The victims' statements concerned beliefs and experiences to which they are the only possible observers and which are self-affirming.

"Fedell Caffey never gave my little girl an opportunity to grow old. I have missed her being a teenager, her sweet 16th birthday, teaching her to drive, warning her about boys, wiping her tears away when she was sad and seeing her smile."

"Our pain will only go away when Robert Turner draws his last breath."¹⁶²

But while victim impact evidence is focused on the question of the appropriate sentence in a particular case, the testimony of the capital crime victims at the clemency hearings produced a truth relevant to the question of whether the death penalty was itself a legitimate penalty. Even prosecutors were apparently amazed at how effective the capital crime victims' testimony was in altering the spin the media put on the issue. A journalist who had become communications director for the Cook County state's attorney's office

158. *Id.*

159. Adriana Colindres & Chris Dettro, *Families Angry at Governor*, STATE JOURNAL-REGISTER (Springfield, Ill.), Oct. 18, 2002, at 1.

160. *Id.* (statement of Cynthia Sheperd, sister of Robert Webb, who was murdered in a Bloomington, Illinois liquor store robbery along with two others).

161. Keilman, *supra* note 9, at 1.

162. Colindres & Dettro, *supra* note 159, at 1.

said:

And so it was hard to explain to some veteran prosecutors who marveled at how the news coverage of the recently concluded death row clemency hearings was so poignant, so riveting. I tried to explain that reporters have children, have mothers and fathers, and siblings, and so when they heard this parade of horrors for nine unprecedented days their psyches were seared.¹⁶³

In an editorial calling on Governor Ryan to call off the clemency process altogether, the *Chicago Tribune* emphasized that the victim testimony had produced the truth of the death penalty: "Their agony does not by itself certify a convict's guilt, but it does reiterate why Illinois citizens, through their elected representatives, have enacted and sustained capital punishment."¹⁶⁴

C. *Danger*

As with victim impact statements, capital crime victims testifying at the clemency hearings exposed themselves to danger of experiencing new trauma in recalling the old:

"When I found out that George Ryan was doing this (considering the death penalty cases), the thing that hit home for me was it was just like my brother being murdered again."¹⁶⁵

"Governor Ryan is making us suffer all over again."¹⁶⁶

"It just makes my whole body tremble, inside and out, when I think of the horrible way my daughter and grandchildren had to die."¹⁶⁷

To the extent that we see the crime victim primarily as pitted against the defendant, the scenario of victim impact statements and the hierarchical aspects of *parrhesia* are lacking since the defendant is under the control of an armed state. But the Greeks also considered speech about criminal punishment to be a paradigmatic instance of *parrhesia*, as in *Orestes*, when the topic was debated in the agora.¹⁶⁸ A

163. John Gorman, *The Public Winced in the Face of Their Pain: Clemency Hearings Surprised Death Penalty Foes*, CHI. TRIB., Nov. 29, 2002, at 19.

164. Editorial, *Halt the Anguish, Gov. Ryan*, CHI. TRIB., Oct. 20, 2002, at 8.

165. Colindres & Dettro, *supra* note 159, at 1 (quoting Cynthia Sheperd, sister of murder victim).

166. *Id.*

167. Gutowski, *supra* note 157.

168. Euripides, *supra* note 83, at 884-931.

subject of *parrhesiastic* oratory was precisely whether Orestes and his sister should be put to death for murder. The speech of the crime victim is to the jury, which may or may not accept his truth and in refusing it may injure the victim. Consider the capital crime victim who provides victim impact testimony in the penalty phase of a capital murder trial, only to have the jury return a life sentence in a context where the only choices are death and life. In the clemency hearing context this hierarchy is even more striking. The capital crime victim is speaking directly to the chief executive of the state.

Prosecutors also spoke at the clemency hearings, and their speech often rivaled the victims' speech for its frankness. Peoria County State's Attorney Kevin Lyon's addressed the clemency board concerning death row inmate Joseph Miller: "If there is a hell that is nothing but fire and the eternal damnation of the soul, then hell should be the home of Joseph Miller."¹⁶⁹ Their speech acts were not perceived as having the kind of power that victim speech had. Their frankness is not redeemed in the classic logic of *parrhesia* by the risk they take; the pain of re-experiencing the murders is not theirs. They respond to no duty to seek death since the public interest may lie in either life imprisonment or death. The prosecutors belong to government and cannot speak from below in a hierarchy of power.

D. Criticism

While the clemency hearings had as their formal purpose to inform the Governor's lawful exercise of his clemency powers, the circumstances of the Illinois clemency hearings in the fall of 2002 presented a different context. Usually clemency comes before the Governor in a passive mode, through the motion of an inmate facing execution and having exhausted his appeals.¹⁷⁰ Here the Governor initiated the process by announcing his intent to review the cases of all then on death row.¹⁷¹ The capital victims were explicit in addressing themselves to Governor Ryan and in their criticism of his consideration of impeding the death penalty. Donna Jacobs, mother of JoAna Bollinger, who was raped and murdered in her home at seventeen, testified to the Prisoner Review Board in terms that implied the Governor as the ultimate interlocutor: "We as her family

169. Keilman, *supra* note 9.

170. See Michael Heise, *Mercy by the Numbers: An Empirical Analysis of Clemency and its Structure*, 89 VA. L. REV. 239, 241 (2003) (stating that a clemency petition is usually a defendant's final plea for relief from state execution).

171. See Lee Hockstader, *Dead Men Walking*, WASH. POST Feb. 23, 2003, § W (Magazine), at 24.

want *him* to know that Paris Sims deserves the death penalty.”¹⁷²

The statements also reflect the way that the elements of *parrhesiastic* speech accumulate and reinforce each other. The truth telling and the danger help constitute the criticism. Sam Evans, the father and grandfather of murder victims, testified about his own truth relationship with his surviving grandchildren. Evans’s daughter Debra was murdered in order to harvest her ready to be born fetus.¹⁷³ The killers, Fidell Caffrey, her ex-lover, and Jacqueline Williams, his girlfriend, also murdered two of Evans other children, sparing only a twenty-two-month old baby that was the offspring of an earlier relationship between Caffrey and Evans.¹⁷⁴ Evans told the Prisoner Review Board “I have comforted the boys for almost seven years with the fact that they (Caffrey and Williams) would be put to death,” he said. “Now what do I say to them? This is wrong. We have no closure—no end to this horrible nightmare.”¹⁷⁵

This is classic *parrhesia*. The truth produced here is totally internal. The grandfather, one capital victim, has comforted two grandchildren, themselves capital victims, with the promise that a death sentence would be carried out against the killers. This is a truth that belongs only to them. The pain of having that promise made false is knowable to them and only to them. But it is a pain in which the sovereign is hugely implicated. The promise of that execution had been forged in the verdict of the Illinois court that sentenced Caffrey and Williams to death. Now Governor Ryan’s announced review of Illinois death sentences had called that promise into question. Evans’s *parrhesiastic* act is also one of danger, not because an affronted sovereign would seek his life (Ryan chose not to even attend the sessions and responded to the victims in apologetic tones throughout),¹⁷⁶ but because the speaker will be further damaged by the testimony and Ryan’s pursuit of the potential commutations.

E. Duty

As with victim impact statements, testimony at the clemency hearings reflects just the kind of duty-based speech required for *parrhesia*. It is not a general duty of all citizens, as would be the

172. Bill Bell, Jr., *Victims’ Families Urge Panel to Keep Killers on Death Row: Illinois Governor Ordered the Unprecedented Review of All Death Penalty Cases*, ST. LOUIS POST-DISPATCH, Oct. 17, 2002, at B1 (emphasis added).

173. Gutowski, *supra* note 157.

174. *Id.*

175. *Id.*

176. Editorial, *supra* note 164.

testimony of a witness to a crime (whether a victim or not). If a capital crime victim chooses not to participate in victim impact evidence, or in a clemency hearing, she cannot be compelled to do so. Neither is it an act motivated mainly by desire for self-improvement or therapy. Indeed, capital crime victims often testify about the suffering they experience as a result of the process. Instead, it can be assumed that virtually all capital crime victims that participate in either process act out of a sense of duty to their murdered family members. In the clemency process this sense of duty is enhanced by the sense that a death sentence, whether sought or not by the family, has now been judged appropriate by the action of a capital sentencing process and is now subject to being taken away by the Governor's clemency power.

CONCLUSION

The Illinois clemency controversy was a battle not just between death row inmates and capital crime victims, but also between two distinct mechanisms for the production of truth. One mechanism is the expert commission¹⁷⁷ that studies a crime or social problem and designs a remedy based on empirical investigation and the best current social science theories. While the Illinois Governor's Commission on Capital Punishment was not a formal party in the clemency process, its report and recommendations for reforming the death penalty, coupled with the legislature's refusal to act on the reform proposals, were undoubtedly the prime movers behind Governor Ryan's willingness at the outset to consider mass clemency. The other mechanism is the speech of individuals psychically wounded by the murder of a close relative in an especially atrocious crime. While power in modern societies has often been tied to the production of truth by and about the individual, through mechanisms

177. This form is ubiquitous at all levels of government in the American political structure. Well known modern examples in the criminal justice field include: the National Commission on Law Observance of 1928, known popularly as the "Wickersham Commission," see U.S. WICKERSHAM COMM'N, ENFORCEMENT OF THE PROHIBITION LAWS (1931); the President's Commission on Crime and Law Enforcement of 1966, popularly known as the "Katzenbach Commission," see PRESIDENT'S COMM'N ON LAW ENFORCEMENT AND ADMIN. OF JUSTICE, THE CHALLENGE OF CRIME IN A FREE SOCIETY (1967); and the President's Commission on the Assassination of President Kennedy of 1964, popularly known as the "Warren Commission," see PRESIDENT'S COMM'N ON THE ASSASSINATION OF PRESIDENT JOHN F. KENNEDY, REPORT OF THE PRESIDENT'S COMMISSION ON THE ASSASSINATION OF PRESIDENT JOHN F. KENNEDY (1964). Riots have been particularly productive events for producing Commissions. See generally ANTHONY M. PLATT, THE POLITICS OF RIOT COMMISSIONS 1917-1970 (1971) (assessing the political implications and internal dynamics of riot commissions).

like religious or legal confession, life-history, and psycho-therapy, the kind of truth produced by the capital crime victims in the clemency hearings was quite different in ways that this Essay has attempted to draw out through a comparison with the ancient Greek practice of *parrhesia*. Unlike religious or legal confession, the *parrhesiastic* speech of capital crime victims is not closely inscribed by the questioning techniques of professional investigators or clergy. Unlike therapy, this speech must involve danger and duty. It is not about self-improvement. It must be addressed to those who can exercise power on a matter of consequence, perhaps of life and death. Only then is it “fearless speech” in the way ancient Greeks would have recognized.¹⁷⁸

Both mechanisms operate as part of the exercise of power by governments, especially chief executives like governors. In Illinois, Governor Ryan appointed the Governor’s Commission, which reported to him. The clemency hearings were in front of members of the Prison Review Board, but they heard testimony as representatives of the Governor. The clemency power belonged solely and without qualification to the Governor. Governor Ryan’s ultimate decision to grant mass clemency to everyone then on death row (except those that were pardoned) represents at best a mixed triumph for the modern “tradition” of the expert commission. “A majority of the convicts would never have been sentenced to death had they been prosecuted under the rules proposed by the Governor’s own blue ribbon commission.”¹⁷⁹ But the perception of the journalists covering the clemency hearings was that impact of the Governor’s Commission report was overwhelmed by the fearless speech of the capital crime victims.¹⁸⁰ “While Ryan ultimately sided with the Commission, there is little evidence that a politician with more of a political future would have.”¹⁸¹ “The debate over reforming the capital punishment system was quickly overpowered by the emotion of it all, leading Ryan to retreat and say he was having ‘second thoughts’ about granting a

178. Of course, any actual example of capital crime victim speech may violate these features, and whole categories of speech, like victim impact statements, may undercut the likelihood of its *parrhesiastic* potential being achieved, but that only means *parrhesiastic* victim speech is a limited category.

179. Hockstader, *supra* note 171.

180. See Steve Mills & Christi Parsons, *Tears Send a Message: Hearings’ Emotional Impact Surprises Death Penalty Foes*, CHI. TRIB., Oct. 27, 2002, at C1 (describing the impact of emotional testimony at the clemency hearing); Editorial, *supra* note 164.

181. See, eg., Hockstader, *supra* note 171 (observing that “in making himself a lame duck, [Governor Ryan] had also freed himself from the political considerations and consequences attached to the death penalty”).

blanket commutation for the state's condemned prisoners."¹⁸²

Journalists saw the victim testimony as directly displacing the words of the Governor's Commission. "The issues that had defined the death penalty debate for more than two years—bad lawyering, police misconduct, the use of unreliable witnesses—have faded, at least for now."¹⁸³ The recommendations made by the commissioners, then before the Illinois legislature, were less likely to be adopted because of the "truth" that the hearings had revealed.¹⁸⁴ More importantly, the sense that concern about operation of the death penalty now extended beyond those generally opposed to it, the essence of the claim that a new abolitionism is forming was dealt a blow. An editorial in the *Chicago Tribune*, the newspaper most responsible for problematizing the Illinois death penalty, stated:

The hearings of recent days have exposed the mere notion of mass clemency as something that can be embraced only by those who flat-out oppose the death penalty. For the majority of citizens that favor a death penalty, the hearings have been a powerful reminder of why many proven killers on Death Row have fully earned the penalty that should await them.¹⁸⁵

To some observers, this result is a reliable manifestation of the general preference of at least the American public (if not publics generally) for anecdote over analysis. Whether this stems from the structure of cognition or the ideological structures of the reigning hegemony, it has often been thought to drive American policy generally¹⁸⁶ and especially in the crime field.¹⁸⁷ "Perhaps more than anything the hearings have made clear what seasoned observers have always known: When playing to a jury, true-life emotional stories will always trump a dispassionate case analysis."¹⁸⁸ Seen as a cultural practice, however, the power of victim speech goes beyond whatever cognitive or ideological advantage anecdote has over analysis. Presidents like Ronald Reagan and Bill Clinton have won praise for

182. Mills & Parsons, *supra* note 180.

183. *Id.*

184. Editorial, *Why Clemency Imperils Reform*, CHI. TRIB., Oct. 29, 2002, at 20. The clemency hearings have only made voting for reform in the upcoming veto session a bigger challenge for Illinois legislators. *Id.*

185. *Id.*

186. See generally E.J. DIONNE, *WHY AMERICANS HATE POLITICS* (1991) (arguing that Americans have lost faith in democratic institutions and that politics has become increasingly abstract, causing Americans to view it with boredom and detachment).

187. See generally STUART SCHEINGOLD, *THE POLITICS OF STREET CRIME* (1990) (describing street crime, the politics behind street crime, and future policy).

188. Mills & Parsons, *supra* note 180, at 1.

adept use of anecdote in their speeches.¹⁸⁹ But these speech acts, whatever their effectiveness, were not *parrhesiastic*. They took no risk. They obeyed no duty. They spoke not from below, but from above. For all these reasons, they could be and were attacked by their political opponents in ways that *parrhesiastic* speech cannot.

One of the unintended effects of the resurrection of the death penalty in the United States since 1972 has been to reopen a space within contemporary democracy for ancient *parrhesia* (or something newly invented but with many of the same features). As we consider the normative significance of these developments let us follow Foucault's lead in asking not what capital victim speech is, but how it becomes a problem for law and for society. From this perspective we can see the Governor's Commission and the capital crime victims as forms of *parrhesiastic* speech. With its focus on the fearless production of truths for which validation lies internally in the very character and experiences, *parrhesia* lends itself to populist expression but also, oddly, to the expert.

Commissions work (when they do) through the individual character and expertise of the commission members whose personal integrity and deep knowledge are expected to validate conclusions produced largely through empirical study by social science trained staff members or contract experts. Serving on such commissions is almost always a reflection of a strong sense of duty to the political community. It involves the production of public pronouncements to the sovereign and the "agora" and comes with a degree of risk to those commissioners whose conclusions may anger powerful leaders or outrage a volatile public.¹⁹⁰

As long as we have a death penalty, we are likely to see a growing role for the truth produced by capital crime victims. Even if the Supreme Court were to reverse itself again on victim impact statements, this would remove only one, and arguably the least *parrhesiastic* form of capital crime victim speech. Clemency and parole hearings will remain a very potent path (and any mass clemency will magnify this effect qualitatively).¹⁹¹ Commissions and

189. Howard Kurtz, *Some Managed-Care Sagas Need Second Exam*, WASH. POST, Aug. 10, 1998, at A1 (noting that both Reagan and Clinton effectively used anecdotal evidence for policy purposes).

190. A good example of this in the Illinois context is Scott Turow, best-selling author and attorney, who both served on the commission and became the most vocal advocate of a new abolitionist reading of its conclusions. TUROW, *supra* note 4, at 9–11. Whatever the merits of his position, he clearly took a major risk in alienating his popular reading audience given the breadth of support for the death penalty in the United States.

191. Indeed, the Illinois legislature adopted changes in the clemency proceedings which

other experts engaged in *parrhesia* share with the speakers that Euripides valorized in the *Orestes* the fact that their truth, while personal, was also grounded in hard won experience. In contrast, capital crime victim speech shares much with the dangerous *parrhesia* that the playwright associated with the appeal of emotions that are uneducated by experience and enduring social roles. The danger of our current death penalty is that it provides a virtual *agora* for enticing and amplifying the kind of speech that in ancient Greece destabilized and discredited democratic judgment.

One place to start is with the problematization of *parrhesia* in ancient Greece. Philosophers and dramatists who reflected this important cultural practice of truth making neither embraced nor dismissed it, but raised questions about it. They recognized that in democracies, neither the status requirements of *parrhesia* nor the risk-taking of speaking to a king could reliably assure its validity. First, who is entitled to produce *parrhesiastic* truth, not simply in terms of status, but according to ability? In the capital crime victim context, we need to ask all kinds of uncomfortable questions about who is a capital crime victim, what role prosecutors play in defining who is such a victim, and whether they can speak. Second, how do we prepare one to speak the truth? In the capital crime victim context, we must ask how the capital process itself alters and affects the injuries which the victim is testifying about. The problem of how to cultivate a capacity for *parrhesia* became a subject of philosophical and spiritual expertise in ancient Greece, and it may also be necessary to engage in such a discussion in postmodern America.

will have the effect of making governors ultimately more accountable to victim speech by requiring them to provide reasons for overriding the recommendation of the appointees who have actually conducted the clemency hearings.

