Volume 82 | Number 4 Article 3

5-1-2004

Mercy Lawyers

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MERCY LAWYERS

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INTRODUCTION

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

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1. *See generally* Stephen P. Garvey, *Is It Wrong To Commute Death Row? Retribution, Atonement, and Mercy*, 82 N.C. L. REV. 1319 (2004) (exploring the concept of mercy within the theories of retributive punishment and punishment as atonement); Austin Sarat, *Putting a Square Peg in a Round Hole: Victims, Retribution, and George Ryan's Clemency*, 82 N.C. L. REV. 1345 (2004) (addressing victims' rights claims and the retributive theory of punishment); Jonathan Simon, *Fearless Speech in the Killing State: The Power of Capital Crime Victim Speech*, 82 N.C. L. REV. 1377(2004) (analyzing the role of capital crime victims' speech); Robert Weisberg, *Apology, Legislation, and Mercy*, 82 N.C. L. REV. 1415 (2004) (examining the idea of mercy in the context of the Death

Cast against the backdrop of my own writings on the race-conscious ethics of prosecutors and defenders within the criminal justice system,[2] this examination situates clemency advocacy in the context of sociolegal violence[3] and criminal defense practice.[4] My

Penalty Reform Act in Illinois).

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

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

4. The American tradition of criminal defense practice is embodied in the adversary

purpose is to describe and prescribe the defender role of the clemency advocate in cases of private violence, especially violence motivated by race and racism in their various forms.[5] Part I of the Essay briefly surveys the history and structure of clemency, highlighting the actions of former Illinois Governor George Ryan in pardoning and commuting the sentences of 167 prisoners and death row inmates in January 2003. Part II explores traditional and alternative models of criminal defense advocacy germane to attaining clemency. Part III integrates the analytic methods and enlarges the normative prescriptions of Garvey, Sarat, Simon, and Weisberg into a faith-inspired abolitionist model of clemency advocacy for mercy lawyers.

I. CLEMENCY

Properly located, this abridged study of mercy lawyers forms part of a larger body of interdisciplinary research and scholarship on criminal justice norms.[6] The study treats the seeking of clemency as a

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

5. Recent work on the prosecution and defense of racial violence incites academic quarrel. *See, e.g.*, Robin D. Barnes, *Interracial Violence and Racialized Narratives: Discovering the Road Less Traveled*, 96 COLUM. L. REV. 788, 788–91 (1996) (rejecting arguments in Alfieri's *Defending Racialized Violence* critiquing criminal defense strategies in cases involving racially motivated violence); Richard Delgado, *Making Pets: Social Workers, "Problem Groups," and the Role of the SPCA—Getting a Little More Precise About Racialized Narratives*, 77 TEX. L. REV. 1571, 1571–72 (1999) (endorsing studies of the "rhetorical meaning of race" in civil and criminal contexts); Christopher Slobogin, *Race-Based Defenses: The Insights of Traditional Analysis*, 54 ARK. L. REV. 739, 739–49 (2002) (critiquing restriction on criminal defense lawyers' use of racialized narratives in defense of their clients); Abbe Smith, *Burdening the Least of Us: "Race-Conscious" Ethics in Criminal Defense*, 77 TEX. L. REV. 1585, 1585–91 (1999) (critiquing race conscious conceptions of progressive criminal defense lawyering). *See also* Alex J. Hurder, *The Pursuit of Justice: New Directions in Scholarship About the Practice of Law*, 52 J. LEGAL EDUC. 167, 185–86 (2002) (acknowledging the importance of critical clinical scholarship for prosecutors and defense lawyers).

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

basic element of the post-conviction review process essential to the jurisprudential legitimacy of capital punishment.[7] It defines clemency broadly to include commutations and pardons.[8]

Prior work in this area documents the injustice of state systems regulating trials and post-conviction appeals in capital cases.[9] The work cites evidence of procedural irregularity and substantive

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(1998) (stating that economic analysis of crime should consider social norms); Dan M. Kahan & Tracey L. Meares, *Law and (Norms of) Order in the Inner City*, 32 LAW & SOC'Y REV. 805 (1998) (discussing the potential role of social norms in the discouragement of crime); Dan M. Kahan & Martha C. Nussbaum, *Two Conceptions of Emotion in Criminal Law*, 96 COLUM. L. REV. 269 (1996) (discussing the role of emotion in criminal law).

7. *See generally* CATHLEEN BURNETT, JUSTICE DENIED: CLEMENCY APPEALS IN DEATH PENALTY CASES (2002) (exposing pervasive flaws in death penalty convictions); RANDALL COYNE & LYN ENTZEROTH, CAPITAL PUNISHMENT AND THE JUDICIAL PROCESS 838–44 (2d ed. 2001) (reviewing the rationales and procedures behind executive clemency); SAMUEL P. STAFFORD II, CLEMENCY: LEGAL AUTHORITY, PROCEDURE AND STRUCTURE (1977) (reviewing the clemency rules and procedures of the fifty states); Daniel T. Kobil, *The Evolving Role of Clemency in Capital Cases*, *in* AMERICA'S EXPERIMENT WITH CAPITAL PUNISHMENT: REFLECTIONS ON THE PAST, PRESENT, AND FUTURE OF THE ULTIMATE PENAL SANCTION 531–546 (James R. Acker et al. eds., 2002) (assessing the development of the clemency power and judicial interpretations of its function); Michael L. Radelet & Barbara A. Zsembik, *Executive Clemency in Post-*Furman *Capital Cases*, 27 U. RICH. L. REV. 289 (1993) (compiling cases where clemency was granted); Alyson Dinsmore, Comment, *Clemency in Capital Cases: The Need to Ensure Meaningful Review*, 49 UCLA L. REV. 1825 (2002) (arguing that clemency requires procedural safeguards in order to be effective).

8. *See generally* Symposium, *Clemency and Pardons*, 27 U. RICH. L. REV. 177 (1993) (discussing clemency and pardons); Symposium, *Forgiveness & The Law: Executive Clemency and the American System of Justice*, 31 CAP. U. L. REV. 139 (2003) (discussing the role of executive clemency in the criminal justice system); Symposium, *The Law and Politics of the Death Penalty: Abolition, Moratorium, or Reform?*, 81 OR. L. REV. 1 (2002) (discussing differing ways of mitigating the death penalty). *See also* Norman L. Greene, Panel Presentation, *Clemency and the Capital Offender: An Introduction to the Power and the Punishment*, 28 CAP. U. L. REV. 557, 564 (2000) (giving a brief review of the history of pardons and the shift in attitude of organized religion); Michael Heise, *Mercy by the Numbers: An Empirical Analysis of Clemency and Its Structure*, 89 VA. L. REV. 239, 264–68 (2003) (using statistical analysis to consider the factors which affect the decision to grant clemency).

9. *See* James S. Liebman, *The Overproduction of Death*, 100 COLUM. L. REV. 2030, 2047–51 (2000) (considering the relationship between substantive capital review and clemency); Judge Stephen Reinhardt, *The Supreme Court, The Death Penalty, and the* Harris *Case*, 102 YALE L.J. 205, 221 (1992) (arguing that last-minute claims that raise substantial issues of innocence or constitutional violation should be handled fairly and expeditiously by the federal courts); Austin Sarat, *Violence, Representation, and Responsibility in Capital Trials: The View from the Jury*, 70 IND. L.J. 1103, 1113–117 (1995) (discussing the jury's central role in exercising the people's power to decide between life and death in capital cases); Ronald J. Tabak, *The Death of Fairness: The Arbitrary and Capricious Imposition of the Death Penalty in the 1980s*, 14 N.Y.U. REV. L. & SOC. CHANGE 797, 799–848 (1986) (discussing each stage of a death penalty case and the inequities that occur).

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

10. *See generally* DAVID COLE, NO EQUAL JUSTICE SYSTEM: RACE AND CLASS IN AMERICAN CRIMINAL JUSTICE (1999) (discussing the role that both race and class play in the administration of the criminal justice system); Mari A. DeWees et al., *Race, the Death Penalty, and Wrongful Convictions*, 18 CRIM. JUST. 49 (2003) (addressing the issue of racial discrimination in the criminal justice system); Charles J. Ogletree, Jr., *Black Man's Burden: Race and the Death Penalty in America*, 81 OR. L. REV. 15 (2002) (presenting the problems confronting African Americans in the criminal justice system with specific emphasis on the death penalty); U.S. GEN. ACCT. OFF., REP. NO. GGD 90-57, DEATH PENALTY SENTENCING: RESEARCH INDICATES PATTERN OF RACIAL DISPARITIES 5 (1990), *reprinted in* THE DEATH PENALTY IN AMERICA: CURRENT CONTROVERSIES 268–74 (Hugo A. Bedau ed., 1997) [hereinafter CURRENT CONTROVERSIES] (summarizing studies examining the influence of race on capital sentencing procedures).

11. *See generally* Arthur L. Burnett, Sr., *Permeation of Race, National Origin and Gender Issues From Initial Law Enforcement Contact Through Sentencing: The Need for Sensitivity, Equalitarianism and Vigilance in the Criminal Justice System*, 31 AM. CRIM. L. REV. 1153 (1994) (examining the role of race, gender, and national origin in the criminal justice system from contact with law enforcement officials to sentencing); Yoav Sapir, *Neither Intent Nor Impact: A Critique of the Racially Based Selective Prosecution Jurisprudence and a Reform Proposal*, 19 HARV. BLACKLETTER L.J. 127 (2003) (examining racially based selective prosecutions and equal protection challenges); Lori Montgomery, *Steele Seeks New Study of Death Penalty Cases: Ehrlich's Point Man Fears Racial Bias*, WASH. POST, Jan. 26, 2003, at C1 (discussing the finding of bias against blacks in prosecutions and the role of the governor and lieutenant governor).

12. *See* STEPHEN P. GARVEY, BEYOND REPAIR?: AMERICA'S DEATH PENALTY 2 (2003). *See generally* William J. Bowers et. al., *A New Look at Public Opinion on Capital Punishment: What Citizens and Legislators Prefer*, 22 AM. J. CRIM. L. 77 (1994) (presenting a review of public opinion on capital punishment from the viewpoints of both citizens and legislators); Nora V. Demleitner, *The Death Penalty in the United States: Following the European Lead?*, 81 OR. L. REV. 131 (2002) (discussing the discrepancy in stances on the death penalty between Western Europe and the United States); Austin Sarat & Neil Vidmar, *Public Opinion, the Death Penalty, and the Eighth Amendment: Testing the Marshall Hypothesis*, 1976 WIS. L. REV. 171 (1976) (discussing the Eighth Amendment's prohibition of cruel and unusual punishment with reference to the death penalty); Michelle M. Sharoni, *A Journey of Two Countries: A Comparative Study of the Death Penalty in Israel and South Africa*, 24 HASTINGS INT'L & COMP. L. REV. 257 (2001) (comparing the diversity of opinion over the use of the death penalty in South Africa and Israel); Carol S. Steiker, *Capital Punishment and American Exceptionalism*, 81 OR. L. REV. 97 (2002) (reviewing the use of the death penalty in the United States and its implications).

13. *See* JAMES A. STRAZZELLA, THE FEDERALIZATION OF CRIMINAL LAW: TASK FORCE ON THE FEDERALIZATION OF CRIMINAL LAW, AMERICAN BAR ASS'N, CRIMINAL JUSTICE SECTION 5–17 (1998); Steven D. Clymer, *Unequal Justice: The Federalization of Criminal Law*, 70 S. CAL. L. REV. 643, 652–75 (1997); Symposium, *Federalization of Crime: The Roles of the Federal and State Governments in the Criminal Justice System*, 46 HASTINGS L.J. 965, 965–1251 (1995); Symposium, *Rethinking Federal Criminal Law*, 1 BUFF. CRIM. L. REV. 1, 1–271 (1997).

14. *See generally* Rory K. Little, *The Future of the Federal Death Penalty*, 26 OHIO

discord.

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

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N.U. L. REV. 529 (2000) (discussing the uncertain future of the death penalty).

15. *See* Norman L. Greene, *The Context of Executive Clemency: Reflections on the Literature of Capital Punishment*, 28 CAP. U. L. REV. 513, 523–54 (2000) (reflecting on the literature concerning the death penalty and the role of executive clemency); George H. Ryan, *The Role of the Executive in Administering the Death Penalty*, 2003 U. ILL. L. REV. 1077, 1084–85.

16. ILL. CONST. art. V, § 12; 730; ILL. COMP. STAT. ANN. § 5/3-3-13 (West 1997 & Supp. 2002).

17. *See* Lee Hockstader, *Dead Men Walking; When a Scandal-Plagued Governor Cleared Out Illinois' Death Row, He Wasn't Worried About His Political Future. He Already Knew He Didn't Have One*, WASH. POST, Feb. 23, 2003, at W24; Steve Mills et al., *Life-or-Death Debate Rages at Hearings: Attorneys Argue Over Clemency as Victims' Families Relive Grief, Pain*, CHI. TRIB., Oct. 16, 2002, § 1, at 1; *Victims Protest Chance Clemency*, NEWSDAY, Oct. 17, 2002, at A19.

18. *See* Ctr. on Wrongful Convictions, Northwestern Univ. Sch. of Law, Illinois Death Penalty Exonerations, *at* http://www.law.northwestern.edu/depts/clinic/wrongful/deathpenalty.htm (last visited Feb. 17, 2004) (on file with the North Carolina Law Review).

19. *See* Ken Armstrong & Steve Mills, *Inept Defenses Cloud Verdicts*, CHI. TRIB., Nov. 15, 1999, § 1, at 1.

20. *See* Glenn L. Pierce & Michael L. Radelet, *Race, Region, and Death Sentencing in Illinois, 1988–1997*, 81 OR. L. REV. 39, 67–68 (2002).

21. *See* Bryn Nelson, *Setting Innocent Free*, NEWSDAY, Jan. 26, 2003, at A07; Ctr. on Wrongful Convictions, Northwestern Univ. Sch. of Law, Executions of Possibly Innocent Prisoners (June 2, 2003), *at* http://www.law.northwestern.edu/depts/clinic/wrongful/executingtheinnocent.htm (on file with the North Carolina Law Review); *see also* Stanley Z. Fisher, *Convictions of Innocent Persons in Massachusetts: An Overview*, 12 B.U. PUB. INT. L.J. 1, 12–56 (2002) (providing detailed case studies of convictions of innocent persons in Massachusetts); Stephen P. Garvey, *Death-Innocence and the Law of Habeas Corpus*, 56 ALB. L. REV. 225, 249–53 (1992) (pursuing a conception of death-innocence in capital cases); Eli Paul Mazur, *"I'm Innocent": Addressing Freestanding Claims of Actual Innocence in State and Federal Courts*, 25 N.C. CENT. L.J. 197, 219–26 (2003) (describing difficulties in obtaining habeas relief for claims of actual innocence); Henry Pietrkowski, *The Diffusion of Due Process in Capital Cases of Actual Innocence After* Herrera, 70 CHI.-KENT L. REV. 1391, 1393–401 (1995) (discussing restrictions on habeas relief for innocence claims); Michael L. Radelet et al., *Prisoners Released from Death Rows Since*

spurred Governor Ryan to create a Commission on Capital Punishment to review the historical prosecution and sentencing of capital cases in Illinois.[22] The gravity of the Commission's April 2002 report eventually compelled Ryan to issue an executive order granting a mix of 167 commutations[23] and pardons[24] for both capital and non-capital offenses.[25] Decreed on January 12, 2003, the clemency order provoked far-reaching public outcry[26] as well as prosecutorial and legislative challenges to the exercise of state executive clemency power.[27] The furor engulfed Illinois,[28] a battery of sister states,[29] Europe,[30] and ultimately even Latin America.[31] At the

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

22. *See* COMM'N ON CAPITAL PUNISHMENT, REPORT OF THE COMMISSION ON CAPITAL PUNISHMENT 1 (2002), *at* http://www.idoc.state.il.us/ccp/ccp/reports/commission_report/index.html (on file with the North Carolina Law Review); Executive Order as Issued by Former Governor George Ryan, Creating the Commission on Capital Punishment, *at* http://www.idoc.state.il.us/ccp/ ccp/executive_order.html (last visited Feb. 18, 2004) (on file with the North Carolina Law Review); *see also* David Horan, *The Innocence Commission: An Independent Review Board for Wrongful Convictions*, 20 N. ILL. U. L. REV. 91, 98 (2000) (discussing the preliminary stages of the Illinois Commission).

23. *See* Steve Mills & Maurice Possley, *Clemency for All; Ryan Commutes 164 Death Sentences to Life in Prison Without Parole; "There Is No Honorable Way to Kill," He Says*, CHI. TRIB., Jan. 12, 2003, § 1, at 1; Jodi Wilgoren, *Citing Issues of Fairness, Governor Clears Out Death Row in Illinois*, N.Y. TIMES, Jan. 12, 2003, at A1.

24. *See* Jodi Wilgoren, *4 Death Row Inmates Are Pardoned*, N.Y. TIMES, Jan. 11, 2003, at A13.

25. *See* Christi Parsons & Steve Mills, *Ryan Pardons Don't Stop at Death Row: 150 Got Clemency for Other Offenses*, CHI. TRIB., Jan. 26, 2003, § 1, at 1.

26. *See* David Firestone, *Absolutely, Positively for Capital Punishment*, N.Y. TIMES, Jan. 19, 2003, § 4, at 5; Gregory Kane, *Commutation of Ill. Killers Not Justice for Victims' Kin*, BALT. SUN, Jan. 19, 2003, at 1B; Eric Slater, *Sentenced to a Life of Mourning: The Family of a Woman Murdered for Her Fetus Can't Understand How the Governor of Illinois Could Have Emptied Death Row*, L.A. TIMES, Jan. 25, 2003, §1, at 1; George F. Will, Editorial, *Ryan's Fiat: The Outgoing Governor of Illinois Defied the Will of the People*, PITT. POST-GAZETTE, Jan. 20, 2003, at A11.

27. *See* Alexa Aguilar, *Bill Would Set Process for Granting Clemency: Lawmaker Wants Each Case Reviewed, Followed by a Public Recommendation: Governor Would Retain Power*, ST. LOUIS POST-DISPATCH, Jan. 17, 2003, at B1; *Effort to Void Death-Row Clemencies Continues*, MILWAUKEE J. SENTINEL, Jan. 18, 2003, at 4A; Christi Parsons & Karen Mellen, *House Bill Seeks Limit on Blanket Clemency*, CHI. TRIB., Jan. 17, 2003, § 1, at 1.

28. *See* Molly McDonough, *The National Pulse: Outgoing Illinois Gov. George Ryan's Commutation of 171 Death Sentences Reverberates Throughout the State Legal System: Balance of Power: Prosecutors Challenge Historic Commutation of 171 Death Sentences*, 2 ABA J. E-REPORT 1 (2003).

29. *See* Maura Dolan, *Echoes of Illinois on Death Row: California System Shares Traits with One So Flawed That the State's Governor Commuted All Sentences*, L.A. TIMES, Jan. 23, 2003, § 2, at 1 (reporting suspected weaknesses in California's capital punishment system); Bill Murphy, *Death Row: Status Quo: Texas Undeterred by Illinois'*

same time, it sparked a broad ecumenical movement, supported by many in the clergy, to abolish the death penalty in Illinois.[32]

Despite earlier uproar over the executive clemency power wielded during the Clinton Administration,[33] at present surprisingly muted debate surrounds the constitutional and statutory underpinnings of executive clemency on federal or state levels. Current commentary tends to dwell on the justifications[34] and

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

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

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

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

33. *See* Michael A. Genovese & Kristine Almquist, *The Pardon Power Under Clinton: Tested but Intact*, *in* THE PRESIDENCY AND THE LAW: THE CLINTON LEGACY 75–88 (David Gray Adler & Michael A. Genovese eds., 2002) (defining the extent of the presidential pardon power and critiquing President Clinton's use of that power); *see also* Deborah A. Devaney, *A Voice for Victims: What Prosecutors Can Add to the Clemency Process*, 13 FED. SENT. R. 163, 163 (2001) (urging prosecutor participation in the clemency process); David M. Zlotnick, *Reflections on the Clinton Pardons: Federal Prosecutors and the Clemency Power*, 13 FED. SENT. R. 168, 168 (2001) (noting the debate following the Clinton pardons). *See generally* Margaret Colgate Love, *The Pardon Paradox: Lessons of Clinton's Last Pardons*, 31 CAP. U. L. REV. 185 (2003) (discussing the pardons President Clinton granted on the last day of his term in office to draw lessons about how the executive pardon process should function in the American constitutional framework).

34. *See generally* Bruce Ledewitz & Scott Staples, *The Role of Executive Clemency in Modern Death Penalty Cases*, 27 U. RICH. L. REV. 227 (1993) (proposing justifications for commutation, including to correct error at trial or to respond to circumstances that have developed since trial); Kathleen Dean Moore, *Pardon for Good and Sufficient Reasons*, 27 U. RICH. L. REV. 281 (1993) (examining reasons used to justify pardons historically and arguing that clemency must be justified by "good and sufficient reason" to be a valid exercise of the pardoning power); Neal Walker, Commission Report, *Executive Clemency and the Death Penalty*, *in* Amnesty International, USA, *Commission Report: Death Penalty on Trial*, 22 AM. J. CRIM. L. 266 (1994) (addressing various reasons given for commutations such as mental illness, disability, or doubts about guilt).

limitations[35] of executive clemency. The moral claims of retribution[36] and mercy[37] stand central to this inquiry. Retribution has long served as the moral bulwark for capital punishment schemes. Yet, in recent decades, mercy has gained progressively more vocal adherents in ameliorating and rationalizing those schemes and has thereby advanced the criminal justice process toward a more redemptive posture.[38]

Multiple factors impinge on the resolution of the competing moral claims specific to capital punishment. Of these, contextual and interpretive considerations weigh heavily. Both erect impediments to a redemptive clemency process. Contextual impediments stem from the constraints posed by the populist politics of the electoral process[39]

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35. *See* Brian M. Hoffstadt, *Normalizing the Federal Clemency Power*, 79 TEX. L. REV. 561, 609–40 (2001); James N. Jorgensen, Note, *Federal Executive Clemency Power: The President's Prerogative to Escape Accountability*, 27 U. RICH. L. REV. 345, 367–70 (1993). *See generally* Mark Strasser, *Some Reflections on the President's Pardon Power*, 31 CAP. U. L. REV. 143, 153–58 (2003) (discussing limitations on presidential pardon power and concluding that the costs of imposing more limitations would be far greater than benefits gained).

36. *See* Hugo Adam Bedau, *A Retributive Theory of the Pardoning Power?*, 27 U. RICH. L. REV. 185, 189–90 (1993); Elizabeth Rapaport, *Retribution and Redemption in the Operation of Executive Clemency*, 74 CHI.-KENT L. REV. 1501, 1509–19 (2000); Mark Strasser, *The Limits of the Clemency Power on Pardons, Retributivists, and the United States Constitution*, 41 BRANDEIS L.J. 85, 89–100 (2002). *See generally* Richard O. Lempert, *Desert and Deterrence: An Assessment of the Moral Bases of the Case for Capital Punishment*, 79 MICH. L. REV. 1177 (1981) (analyzing retribution and deterrence as moral bases for the death penalty); Julian Davis Mortenson, *Earning the Right to Be Retributive: Execution Methods, Culpability Theory, and the Cruel and Unusual Punishment Clause*, 88 IOWA L. REV. 1099 (2003) (discussing gratuitous infliction of pain as a challenge to the moral integrity of capital punishment).

37. *See* KATHLEEN DEAN MOORE, PARDONS: JUSTICE, MERCY, AND THE PUBLIC INTEREST 181 (1989); JEFFRIE G. MURPHY & JEAN HAMPTON, FORGIVENESS AND MERCY 162–74 (1988); Kathleen M. Ridolfi, *Not Just an Act of Mercy: The Demise of Post-Conviction Relief and a Rightful Claim to Clemency*, 24 N.Y.U. REV. L. & SOC. CHANGE 43, 77–81 (1998).

38. *See* P.E. Digeser, *Justice, Forgiveness, Mercy, and Forgetting: The Complex Meaning of Executive Pardoning*, 31 CAP. U. L. REV. 161, 169–73 (2003); Daniel T. Kobil, *The Quality of Mercy Strained: Wresting the Pardoning Power from the King*, 69 TEX. L. REV. 569, 611–14 (1991); Margaret Colgate Love, *Of Pardons, Politics and Collar Buttons: Reflections on the President's Duty to Be Merciful*, 27 FORDHAM URB. L.J. 1483, 1500–06 (2000). *See generally* Paul Whitlock Cobb, Jr., Note, *Reviving Mercy in the Structure of Capital Punishment*, 99 YALE L.J. 389 (1989) (arguing that mercy must play a central role in the capital punishment system).

39. *See* Jeffrey D. Kubik & John R. Moran, *Lethal Elections: Gubernatorial Politics and the Timing of Executions*, 46 J.L. & ECON. 1, 3–7 (2003); Jonathan Simon & Malcolm M. Feeley, *True Crime: The New Penology and Public Discourse on Crime*, *in* PUNISHMENT AND SOCIAL CONTROL: ESSAYS IN HONOR OF SHELDON L. MESSINGER 147–80 (Thomas G. Blomberg & Stanley Cohen eds., 1995). *See generally* Beau Breslin & John J.P. Howley, *Defending the Politics of Clemency*, 81 OR. L. REV. 231 (2002)

and the inflammatory customs of the media.[40] They also involve the institutional constraints of police[41] and prosecutorial misconduct,[42] and the systemic juridical deficiencies caused by ineffective assistance of counsel,[43] inadequate funding of state indigent defense systems,[44]

(adhering to the position that politics is, and should remain, a necessary component of the clemency decision); Stephen P. Garvey, Note, *Politicizing Who Dies*, 101 YALE L.J. 187 (1991) (discussing the risks of vesting death selection in institutions that are politically-electorally accountable).

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

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

42. *See* Welsh White, *Curbing Prosecutorial Misconduct in Capital Cases: Imposing Prohibitions on Improper Penalty Trial Arguments*, 39 AM. CRIM. L. REV. 1147, 1147–50, 1184 (2002); Brian C. Duffy, Note, *Barring Foul Blows: An Argument for a Per Se Reversible-Error Rule for Prosecutors' Use of Religious Arguments in the Sentencing Phase of Capital Cases*, 50 VAND. L. REV. 1335, 1339–59 (1997); Ashley Rupp, Note, *Death Penalty Prosecutorial Charging Decisions and County Budgetary Restrictions: Is the Death Penalty Arbitrarily Applied Based on County Funding?*, 71 FORDHAM L. REV. 2735, 2738 (2003).

43. *See* Stephen B. Bright, *Counsel for the Poor: The Death Sentence Not for the Worst Crime but for the Worst Lawyer*, 103 YALE L.J. 1835, 1837 (1994); Stephen B. Bright, *In Defense of Life: Enforcing the Bill of Rights on Behalf of Poor, Minority and Disadvantaged Persons Facing the Death Penalty*, 57 MO. L. REV. 849, 859 (1992); William S. Geimer, *A Decade of* Strickland*'s Tin Horn: Doctrinal and Practical Undermining of the Right to Counsel*, 4 WM. & MARY BILL OF RTS. J. 91, 93 (1995); Bruce A. Green, *Lethal Fiction: The Meaning of "Counsel" in the Sixth Amendment*, 78 IOWA L. REV. 433, 433 (1993); Richard Klein, *The Eleventh Commandment: Thou Shalt Not Be Compelled to Render the Ineffective Assistance of Counsel*, 68 IND. L.J. 363, 364 (1993); Joe Margulies, *Resource Deprivation and the Right to Counsel*, 80 J. CRIM. L. & CRIMINOLOGY 673, 676 (1989); Celestine Richards McConville, *The Right to Effective Assistance of Capital Postconviction Counsel: Constitutional Implications of Statutory Grants of Capital Counsel*, 2003 WIS. L. REV. 31, 32 (2003); Ivan K. Fong, Note, *Ineffective Assistance of Counsel in Capital Sentencing*, 39 STAN. L. REV. 461, 485 (1987); *see also* Panel Discussion, *The Death of Fairness? Counsel Competency and Due Process in Death Penalty Cases*, 31 HOUS. L. REV. 1105 (1994) (comparing the O.J. Simpson defense team to the common public defender system).

44. *See* Stephen B. Bright, *Neither Equal Nor Just: The Rationing and Denial of Legal Services to the Poor When Life and Liberty Are at Stake*, 1997 N.Y.U. ANN. SURV. OF AM. LAW 783, 783 (1997); Ruth E. Friedman & Bryan A. Stevenson, *Solving Alabama's Capital Defense Problems: It's a Dollars and Sense Thing*, 44 ALA. L. REV. 1, 4–5 (1992); Norman Lefstein, *Reform of Defense Representation in Capital Cases: The Indiana Experience and Its Implications for the Nation*, 29 IND. L. REV. 495, 496 (1996); Michael G. Millman, *Financing the Right to Counsel in Capital Cases*, 19 LOY. L.A. L. REV. 383, 384

judge-made error,[45] jury failure,[46] and cultural bias in the criminal justice system common to race and gender.[47]

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

(1985); Anthony Paduano & Clive A. Stafford Smith, *The Unconscionability of Sub-Minimum Wages Paid Appointed Counsel in Capital Cases*, 43 RUTGERS L. REV. 281, 342 (1991).

45. *See* John H. Blume & Stephen P. Garvey, *Harmless Error in Federal Habeas Corpus After* Brecht v. Abrahamson, 35 WM. & MARY L. REV. 163, 176–82 (1993).

46. *See* Theodore Eisenberg et al., *The Deadly Paradox of Capital Jurors*, 74 S. CAL. L. REV. 371, 395 (2001); Theodore Eisenberg et. al, *Forecasting Life and Death: Juror Race, Religion, and Attitude Toward the Death Penalty*, 30 J. LEGAL STUD. 277, 308–10 (2001); Theodore Eisenberg et al., *Jury Responsibility in Capital Sentencing: An Empirical Study*, 44 BUFF. L. REV. 339, 352–68 (1996); Stephen P. Garvey et al., *Correcting Deadly Confusion: Responding to Jury Inquiries in Capital Cases*, 85 CORNELL L. REV. 627, 635–36 (2000); Stephen P. Garvey & Paul Marcus, *Virginia's Capital Jurors*, 44 WM. & MARY L. REV. 2063, 2083–85 (2003).

47. *See* VIVIEN M.L. MILLER, CRIME, SEXUAL VIOLENCE, AND CLEMENCY: FLORIDA'S PARDON BOARD AND PENAL SYSTEM IN THE PROGRESSIVE ERA 215–16 (2000); David C. Baldus et al., *Racial Discrimination and the Death Penalty in the Post-*Furman *Era: An Empirical and Legal Overview, with Recent Findings from Philadelphia*, 83 CORNELL L. REV. 1638, 1710–15 (1998); Stephen B. Bright, *Race, Poverty, the Death Penalty, and the Responsibility of the Legal Profession*, 1 SEATTLE J. FOR SOC. JUST. 73, 78 (2002); Victor L. Streib, *Gendering the Death Penalty: Countering Sex Bias in a Masculine Sanctuary*, 63 OHIO ST. L.J. 433, 434 (2002).

48. *See* Paula K. Birderman & John R. Steer, *Impact of the Federal Sentencing Guidelines on the President's Power to Commute Sentences*, 13 FED. SENT. R. 154, 154 (2001); Daniel T. Kobil, *Should Clemency Decisions be Subject to a Reasons Requirement?*, 13 FED. SENT. R. 150, 150 (2001).

49. *See* Clifford Dorne & Kenneth Gewerth, *Mercy in a Climate of Retributive Justice: Interpretations from a National Survey of Executive Clemency Procedures*, 25 NEW ENG. J. CRIM. & CIV. CONFINEMENT 413, 427–38 (1999); Daniel T. Kobil, *Due Process in Death Penalty Commutations: Life, Liberty, and the Pursuit of Clemency*, 27 U. RICH. L. REV. 201, 202 (1993).

50. *See* 28 C.F.R. § 1.1-1.11 (2003); United States Attorney's Manual §§ 1-2.110-.113 (1997) (Sup. Docs. No. J1.8:At84/2/997/v.1, http://www.usdoj.gov/pardon/petitions.htm (last visited Feb. 18, 2004) (on file with the North Carolina Law Review).

51. *See* John H. Blume, *Twenty-Five Years of Death: A Report of the Cornell Death Penalty Project on the "Modern" Era of Capital Punishment in South Carolina*, 54 S.C. L. REV. 285, 309–15 (2002); Marshall J. Hartman & Stephen L. Richards, *The Illinois Death Penalty: What Went Wrong?*, 34 J. MARSHALL L. REV. 409, 437–39 (2001); Illinois Prisoner Review Board: Guidelines for Executive Clemency, http://www.law.northwestern.edu/depts/clinic/wrongful/clemency.html (last visited Feb. 18, 2004) (on file with the North Carolina Law Review); *see also* Daniel T. Kobil, *Do the Paperwork or Die: Clemency, Ohio Style?*, 52 OHIO ST. L.J. 655, 677, 682–95 (1991) (examining checks on clemency power); Walter A. McFarlane, *The Clemency Process in Virginia*, 27 U. RICH. L. REV. 241, 255–56 (1993) (offering practical guidance in clemency petitions).

case-by-case basis is compounded by doctrinal instability,[52] for example in engrafting criminal law categories of insanity and mental retardation upon capital cases.[53] As a result of these intertwining impediments, mercy lawyers struggle to marshal the redemptive norms embedded in the institutions and texts of clemency.

II. CLEMENCY ADVOCACY

Clemency advocacy derives from the adversarial tradition of zealous criminal defense practice.[54] That tradition rests on the foundational norms of partisanship and moral non-accountability.[55] Applied to capital punishment, these twin norms produce trial strategies based primarily on claims of innocence, justification, and mitigation. By design, neither the innocence phase nor the penalty phase of bifurcated capital trials emphasizes the redemptive norms of either contrition and remorse or penitence and atonement. Post-conviction review practices adopt the same conception and stratagem.[56] Prescribed standards of care, even when appropriately heightened, operate similarly.[57] Indeed, American Bar Association defense guidelines scarcely mention redemptive norms and

52. *See* Carol S. Steiker, *Things Fall Apart, but the Center Holds: The Supreme Court and the Death Penalty*, 77 N.Y.U. L. REV. 1475, 1489–91 (2002).

53. *See* Bryan Lester Dupler, *The Uncommon Law: Insanity, Executions, and Oklahoma Criminal Procedure*, 55 OKLA. L. REV. 1, 63–65 (2002); James W. Ellis, *Mental Retardation and the Death Penalty: A Guide to State Legislative Issues*, 27 MENTAL & PHYSICAL DISABILITY L. REP. 11, 11–12 (2003); Lyndsey M. Sloan, Comment, *Evolving Standards of Decency: The Evolution of a National Consensus Granting the Mentally Retarded Sanctuary*, 31 CAP. U. L. REV. 351, 372–73, 379–81 (2003).

54. *See* Cristina C. Arguedas, *Duties of a Criminal Defense Lawyer*, 30 LOY. L.A. L. REV. 7, 7–8, 11–12 (1996); Abbe Smith, *Defending Defending: The Case for Unmitigated Zeal on Behalf of People Who Do Terrible Things*, 28 HOFSTRA L. REV. 925, 958–59 (2000); Michael E. Tigar, *Defending*, 74 TEX. L. REV. 101, 102–03 (1995).

55. *See* DAVID LUBAN, LAWYERS AND JUSTICE: AN ETHICAL STUDY 7, 50–66 (1988).

56. *See* CATHLEEN BURNETT, JUSTICE DENIED: CLEMENCY APPEALS IN DEATH PENALTY CASES 117–23 (2002); DAVID T. WASSERMAN, A SWORD FOR THE CONVICTED: REPRESENTING INDIGENT DEFENDANTS ON APPEAL 229–33 (1990); John Blume & Theodore Eisenberg, *Judicial Politics, Death Penalty Appeals, and Case Selection: An Empirical Study*, 72 S. CAL. L. REV. 465, 466–70 (1999); Michael Mello, *"In the Years When Murder Wore the Mask of Law": Diary of a Capital Appeals Lawyer (1983–1986)*, 24 VT. L. REV. 583, 677–84 (2000).

57. *See* Vivian Berger, *The Chiropractor as Brain Surgeon: Defense Lawyering in Capital Cases*, 18 N.Y.U. REV. L. & SOC. CHANGE 245, 249–51 (1990–1991); Gary Goodpaster, *The Trial for Life: Effective Assistance of Counsel in Death Penalty Cases*, 58 N.Y.U. L. REV. 299, 360–62 (1983); Welsh S. White, *Effective Assistance of Counsel in Capital Cases: The Evolving Standard of Care*, 1993 U. ILL. L. REV. 323, 360–65, 368–74 (1993).

narratives.[58]

The call for redemptive forgiveness and mercy is inhibited by the standard conception of the criminal defense function. Notwithstanding important commitments to lawyer competence and diligence coupled with pledges of client loyalty and confidentiality, standard conventions naturally favor acquittal and plea bargaining tactics over risk-taking gambits involving capital defendants' guilt-disclosing, individualized redemptive pleas.[59] Devised by statute, capital sentencing allows for limited moral individualization through the admission of aggravating and mitigating evidence.[60] However, the moral individualization of clemency advocacy goes beyond standard defense practices of sentencing mitigation.[61] Rather than summoning evidence from social psychology[62] or science,[63] clemency-tailored

58. *See American Bar Association: Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases*, 31 HOFSTRA L. REV. 913, 924–31 (2003). *See generally* AMERICAN BAR ASSOCIATION GUIDELINES FOR THE APPOINTMENT AND PERFORMANCE OF COUNSEL IN DEATH PENALTY CASES, Guidelines 11.4, 11.6.1, 11.8.6 (1989) (providing instructions on the investigation relating to the guilt/innocence phase of the trial followed by possible plea bargaining and use of mitigating factors in the case of conviction).

59. *See* Douglas M. Cohen & Esther F. Lardent, *The Last Best Hope: Representing Death Row Inmates*, 23 LOY. L.A. L. REV. 213 (1989; Steven Zeidman, *To Plead or Not to Plead: Effective Assistance and Client-Centered Counseling*, 39 B.C. L. REV. 841, 907–08 (1998).

60. *See* Stephen P. Garvey, *Aggravation and Mitigation in Capital Cases: What Do Jurors Think?*, 98 COLUM. L. REV. 1538, 1544–50 (1998); Scott W. Howe, *Reassessing the Individualization Mandate in Capital Sentencing: Darrow's Defense of Leopold and Leob*, 79 IOWA L. REV. 989, 1068–71 (1994); Jonathan Simon & Christina Spaulding, *Tokens of Our Esteem: Aggravating Factors in the Era of Deregulated Death Penalties*, *in* THE KILLING STATE, *supra* note 3.

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

62. *See generally* Craig Haney, *The Social Context of Capital Murder: Social Histories and the Logic of Mitigation*, 35 SANTA CLARA L. REV. 547 (1995) (discussing the legal, moral, and psychological significance that attaches to a capital defendant's life and their impact upon the punishment decision); David B. Wexler, *Therapeutic Jurisprudence and the Criminal Courts*, 35 WM. & MARY L. REV. 279 (1993) (discussing the effect of therapeutic jurisprudence on sex offenders and the plea process, and the conditional release process); Bruce J. Winick, *The Jurisprudence of Therapeutic Jurisprudence*, 3 PSYCHOL. PUB. POL'Y & L. 184 (1997) (discussing the rise of therapeutic jurisprudence and its impact as an interdisciplinary approach to the study of law).

63. *See generally* Anna M. Franceschelli, Comment, *Motions for Postconviction DNA Testing: Determining the Standards of Proof Necessary in Granting Requests*, 31 CAP. U. L. REV. 243 (2003) (detailing the legal issues involved in post-conviction DNA testing and

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

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

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the need for standards in such testing to protect inmates); Holly Schaffter, Note, *Postconviction DNA Evidence: A 500 Pound Gorilla in State Courts*, 50 DRAKE L. REV. 695 (2002) (tracing the history and modern-day use of forensic DNA evidence in the post-conviction process).

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

65. *See generally* Austin Sarat, *Narrative Strategy and Death Penalty Advocacy*, 31 HARV. C.R.-C.L. L. REV. 353 (1996) (describing "the role that narrative plays in the work of lawyers who devote their professional lives . . . to opposing capital punishment"); Austin Sarat, *Speaking of Death: Narratives of Violence in Capital Trials*, 27 LAW & SOC'Y REV. 19 (1993) (addressing how legal violence is differentiated from extralegal violence in capital trials).

66. *See generally* Theodore Eisenberg et al., *Victim Characteristics and Victim Impact Evidence in South Carolina Capital Cases*, 88 CORNELL L. REV. 306 (2003) (discussing the influence of victim impact evidence on the course and outcome of capital trials using interviews conducted with South Carolina jurors); Stephen P. Garvey, *"As the Gentle Rain from Heaven": Mercy in Capital Sentencing*, 81 CORNELL L. REV. 989 (1996) (advocating a restructuring of the penalty phase to "incorporate and accommodate mercy"); Stephen P. Garvey, *The Emotional Economy of Capital Sentencing*, 75 N.Y.U. L. REV. 26 (2000) (exploring the emotional distance between a defendant and a juror in a capital case and its impact upon the likelihood of a death sentence); Daryl M. Schumacher, Comment, *Intruders at the Death House: Limiting Third-Party Intervention in Executive Clemency*, 30 J. MARSHALL L. REV. 567 (1997) (discussing the need for standing in executive clemency petitions due to the changes which flow from "allowing improper third parties access to the executive clemency forum"); Brian L. Vander Pol, Note, *Relevance and Reconciliation: A Proposal Regarding the Admissibility of Mercy Opinions in Capital Sentencing*, 88 IOWA L. REV. 707 (2003) (arguing that the use of victim impact evidence inflames the jury in a capital case).

67. *See* Abbe Smith, *Rosie O'Neill Goes to Law School: The Clinical Education of the Sensitive New Age Public Defender*, 28 HARV. C.R.-C.L. L. REV. 1, 15–45 (1993).

68. *See generally* PATRICIA GAGNE, BATTERED WOMEN'S JUSTICE: THE MOVEMENT FOR CLEMENCY AND THE POLITICS OF SELF-DEFENSE (1998) (tracing the history of the battered women's clemency movement); Linda L. Ammons, *Why Do You Do the Things You Do? Clemency for Battered Incarcerated Women, a Decade's Review*, 11 AM. U. J. GENDER SOC. POL'Y & L. 533 (2003); Sarah M. Buel, *Effective Assistance of*

gender discourse,[70] and moral agency[71] in defending crimes of violence effectively transformed advocacy narratives and outcomes for women's advocates. A comparable transformation of professional hierarchy, racial discourse, and agency narratives animates the representation of subordinated communities of color,[72] thus demanding new lawyer competencies and client-lawyer relationships.[73]

III. TOWARD FAITH-BASED CLEMENCY ADVOCACY

The faith-imbued model of clemency advocacy contemplated

Counsel for Battered Women Defendants: A Normative Construct, 26 HARV. WOMEN'S L.J. 217 (2003) (citing battered women's history in discounting clemency as a cure for domestic violence); Mary E. Greenwald & Mary-Ellen Manning, *When Mercy Seasons Justice: Commutation for Battered Women Who Kill*, 38 B.B.J. 3 (1994) (describing the commutation process of the criminal justice system and its effect in focusing public attention on the victims of domestic violence); Joan H. Krause, *Of Merciful Justice and Justified Mercy: Commuting the Sentences of Battered Women Who Kill*, 46 FLA. L. REV. 699 (1994) (documenting the history of granting clemency to battered women who kill their batterers); Jacqueline St. Joan & Nancy Ehrenreich, *Putting Theory into Practice: A Battered Women's Clemency Clinic*, 8 CLINICAL L. REV. 171 (2001) (describing the clemency movement for battered women in light of a clinical course where law students petitioned the governor of Colorado "for clemency on behalf of three women who had been convicted of homicide in the deaths of their batterers").

69. *See* Peggy C. Davis, *Contextual Legal Criticism: A Demonstration Exploring Hierarchy and 'Feminine' Style*, 66 N.Y.U. L. REV. 1635, 1645–82 (1991); Kimberly E. O'Leary, *Creating Partnerships: Using Feminist Techniques to Enhance the Attorney-Client Relationship*, 16 LEGAL STUD. F. 207, 212–22 (1992); Ann Shalleck, *Theory and Experience in Constructing the Relationship Between Lawyer and Client: Representing Women Who Have Been Abused*, 64 TENN. L. REV. 1019, 1027–39 (1997); *see also* Bryna Bogoch, *Gendered Lawyering: Difference and Dominance in Lawyer-Client Interaction*, 31 LAW & SOC'Y REV. 677, 681 (1997) (tracking gender and language differences in lawyer-client interaction).

70. *See* Joan W. Howarth, *Executing White Masculinities: Learning from Karla Faye Tucker*, 81 OR. L. REV. 183, 184–85 (2002); Elizabeth Rapaport, *Staying Alive: Executive Clemency, Equal Protection, and the Politics of Gender in Women's Capital Cases*, 4 BUFF. CRIM. L. REV. 967, 967–68 (2001).

71. *See* Martha R. Mahoney, *Victimization or Oppression? Women's Lives, Violence, and Agency*, *in* THE PUBLIC NATURE OF PRIVATE VIOLENCE 59, 61–62 (Martha Albertson Fineman & Roxanne Mykitiuk eds., 1994).

72. *See* Lisa A. Crooms, *"To Establish My Legitimate Name Inside the Consciousness of Strangers": Critical Race Praxis, Progressive Women-of-Color Theorizing, and Human Rights*, 46 HOW. L.J. 229, 234, 236 (2003); Eric K. Yamamoto, *Critical Race Praxis: Race Theory and Political Lawyering Practice in Post-Civil Rights America*, 95 MICH. L. REV. 821, 828 (1997).

73. *See* GERALD P. LOPEZ, REBELLIOUS LAWYERING: ONE CHICANO'S VIEW OF PROGRESSIVE LAW PRACTICE 38 (1992); Susan Bryant, *The Five Habits: Building Cross-Cultural Competence in Lawyers*, 8 CLINICAL L. REV. 33, 35 (2001); Michelle S. Jacobs, *People From the Footnotes: The Missing Element in Client-Centered Counseling*, 27 GOLDEN GATE U. L. REV. 345, 348–49 (1997).

here reconceives lawyer identity and professional ethics in a religious and, moreover, race-conscious sense.[74] Historically, abolitionist norms informed both lawyer identity and ethics in clemency advocacy.[75] An extension of these norms, faith-based advocacy envisions the clemency process as a religious forum for lawyer engagement and client revival.[76] Communicating that vision demands narrative and story. Admittedly, narrative alone will not correct institutional bias or cure ineffective assistance. But narratives may bear witness to, and protest the injustice of, state killing.[77] Lamentably, their echo may be muted by a criminal justice culture marked by mistrust and punitiveness.[78] Yet, this very culture harbors community.[79] Significantly, the bonds of redemptive community may be strengthened by the killing state itself in heightening the standards of death-making legislation, confessing error, and proffering apology.[80]

Faith narratives encourage religious community from the culture

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74. *See* David B. Wilkins, *Identities and Roles: Race, Recognition, and Professional Responsibility*, 57 MD. L. REV. 1502, 1506–07 (1998).

75. *See* Austin Sarat, *The "New Abolitionism" and the Possibilities of Legislative Action: The New Hampshire Experience*, 63 OHIO ST. L.J. 343, 343 (2002); Austin Sarat, *Recapturing the Spirit of* Furman*: The American Bar Association and the New Abolitionist Politics*, 61 LAW & CONTEMP. PROBS. 5, 5–6 (1998).

76. *See* Steven D. Smith, *Believing Like a Lawyer*, 40 B.C. L. REV. 1041, 1098–136 (1999).

77. *See* HELEN PREJEAN, DEAD MAN WALKING: AN EYEWITNESS ACCOUNT OF THE DEATH PENALTY IN THE UNITED STATES *passim* (1993); Richard W. Garnett, *Christian Witness, Moral Anthropology, and the Death Penalty*, 17 NOTRE DAME J.L. ETHICS & PUB. POL'Y 541, 543 (2003); Austin Sarat, *Bearing Witness and Writing History in the Struggle Against Capital Punishment*, 8 YALE J.L. & HUMAN. 451, 455 (1996); Austin Sarat, *Between (The Presence of) Violence and (The Possibility of) Justice: Lawyering Against Capital Punishment*, *in* CAUSE LAWYERING: POLITICAL COMMITMENTS AND PROFESSIONAL RESPONSIBILITIES 317–46 (Austin Sarat & Stuart Scheingold eds., 1998).

78. *See* Jonathan Simon, *Sanctioning Government: Explaining America's Severity Revolution*, 56 U. MIAMI L. REV. 217, 237–38 (2001); Benjamin D. Steiner et. al, *Folk Knowledge as Legal Action: Death Penalty Judgments and the Tenet of Early Release in a Culture of Mistrust and Punitiveness*, 33 LAW & SOC'Y REV. 461, 464–66 (1999).

79. *See* Jonathan Simon, *From a Tight Place: Crime, Punishment, and American Liberalism*, 17 YALE L. & POL'Y REV. 853, 871–72 (1999) (reviewing SUSAN ESTRICH, GETTING AWAY WITH MURDER: HOW POLITICS IS DESTROYING THE CRIMINAL JUSTICE SYSTEM (1998)); Jonathan Simon, *Introduction: Crime, Community, and Criminal Justice*, 90 CAL. L. REV. 1415, 1417 (2002).

80. *See* Weisberg, *supra* note 1, at 1415; *see also* Kent Greenawalt, *Religious Convictions and Lawmaking*, 84 MICH. L. REV. 352, 363 (1985) (examining the implications for community morality when an immoral act is treated as legal); Jennifer L. Weiers & Marc R. Shapiro, *The Innocence Protection Act: A Revised Proposal for Capital Punishment Reform*, 6 N.Y.U. J. LEGIS. & PUB. POL'Y 615, 618 (2002–2003) (discussing the effects of DNA testing of suspects on community safety).

of criminal justice killing. Both civil and criminal justice traditions in American law[81] and lawyering[82] draw upon religious faith. Unsurprisingly, faith-based movements stand deeply entwined with the death penalty, alternately joining and departing the ranks of abolitionists.[83] The movements and their underlying norms signal a great diversity of theological stances on the morality of that penalty.[84] Discrete and sometimes irreconcilable narratives emanate from each of these stances. All of these narratives possess authority[85] and command logic.[86] And all distill norms into stories[87] that guide the moral imagination of the tripartite parties to capital cases. Enthralled by the ordinary and extraordinary elements of morally compelling story,[88] the main parties to law-sanctioned ritualized death (offenders,

81. *See* MICHAEL W. MCCONNELL ET AL., RELIGION AND THE CONSTITUTION 814–39 (Erwin Chemerinsky et al. eds., 2002); MICHAEL J. PERRY, RELIGION IN POLITICS: CONSTITUTIONAL AND MORAL PERSPECTIVES 9–24 (1997); H. JEFFERSON POWELL, THE MORAL TRADITION OF AMERICAN CONSTITUTIONALISM: A THEOLOGICAL INTERPRETATION 48–81 (1993).

82. *See* THOMAS L. SHAFFER, FAITH AND THE PROFESSIONS 39–40 (1987); THOMAS L. SHAFFER, ON BEING A CHRISTIAN AND A LAWYER: LAW FOR THE INNOCENT 107–09 (1981); Thomas L. Shaffer, *Lawyers and the Biblical Prophets*, 17 NOTRE DAME J.L. ETHICS & PUB. POL'Y 521, 521 (2003); Thomas L. Shaffer, *Lawyers as Prophets*, 15 ST. THOMAS L. REV. 469, 469 (2003). *Compare* John H. Garvey & Amy V. Coney, *Catholic Judges in Capital Cases*, 81 MARQ. L. REV. 303, 350 (1998) (reasoning that judges should not and cannot work to match the morality of the legal system), *with* Sanford Levinson, *The Confrontation of Religious Faith and Civil Religion: Catholics Becoming Justices*, 39 DEPAUL L. REV. 1047, 1048–49 (1990) (discussing confirmation hearings of Catholic nominees for the United States Supreme Court).

83. *See* GARDNER C. HANKS, AGAINST THE DEATH PENALTY: CHRISTIAN AND SECULAR ARGUMENTS AGAINST CAPITAL PUNISHMENT 52–58 (1997); JAMES J. MEGIVERN, THE DEATH PENALTY: AN HISTORICAL AND THEOLOGICAL SURVEY 457–61 (1997); Michael L. Radelet, *The Role of Organized Religions in Changing Death Penalty Debates*, 9 WM. & MARY BILL RTS. J. 201, 207, 211–13 (2000).

84. *See generally* Bruce S. Ledewitz & Scott Staples, *Reflections on the Talmudic and American Death Penalty*, 6 U. FLA. J.L. & PUB. POL'Y 33 (1993) (discussing the procedures and restrictions for capital punishment in ancient Israel as set forth in the Talmud); Samuel J. Levine, *Capital Punishment in Jewish Law and Its Application to the American Legal System: A Conceptual Overview*, 29 ST. MARY'S L.J. 1037 (1998) (analyzing capital punishment in Jewish law as it relates to the death penalty under American law); William A. Schabas, *Islam and the Death Penalty*, 9 WM. & MARY BILL RTS. J. 223 (2000) (suggesting that Islamic states, in recognizing the death penalty, do not appreciate the more limited role of capital punishment under Islamic religion).

85. *See* ROBIN WEST, NARRATIVE, AUTHORITY, AND LAW 419–39 (1993); Kathryn Abrams, *Hearing the Call of Stories*, 79 CAL. L. REV. 971, 981–82 (1991).

86. Narrative logic both provokes and silences resistance. *See* Jane B. Baron, *Resistance to Stories*, 67 S. CAL. L. REV. 255, 255–57 (1994).

87. *See* ANTHONY G. AMSTERDAM & JEROME BRUNER, MINDING THE LAW 113–15, 121–22, 135 (2000); JEROME BRUNER, MAKING STORIES: LAW, LITERATURE, LIFE 5–6, 15–16 (2002).

88. *See* AMSTERDAM & BRUNER, *supra* note 87, at 51–53.

victims, and juries), their legal agents (prosecutors, defenders, and judges), and their state representatives (governmental executives, legislators, and executioners) combine disparate norms, metaphors, and stories in driving the machinery of capital punishment and clemency.

Like all stories, criminal justice stories embrace the use of metaphor.[89] Indeed, their authority and logic depend on metaphorical reasoning.[90] Predictably, the pain of private violence and the death of state killing resist the easy application of metaphor. To be sure, it is easy to talk of innocence and guilt. To the same extent, it is easy to talk of punishment and of the harsh simplicity of retribution. However, it is difficult to talk of redemption. Narratives of redemption are agonizing. They recall the agony of pain inflicted on the other-as-victim and the anguish of the accused in accounting for that pain. In this way, death penalty narratives mix cries of pathology and violence not only with wails of forgiveness and mercy, but also with punitive howls of retribution.

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

A second dilemma of clemency advocacy emerges from the procedural and ethical regulation of religious imagery and narratives inside and outside the courtroom.[91] Abolitionists have long urged

89. *See* Jonathan Simon, *Governing Through Crime Metaphors*, 67 BROOK. L. REV. 1035, 1037–42 (2002). *See generally* LAW'S STORIES: NARRATIVE AND RHETORIC IN THE LAW (Peter Brooks & Paul Gewirtz eds., 1996) (collecting perspectives on the role of narrative in litigation and judicial opinions); NARRATIVE AND THE LEGAL DISCOURSE: A READER IN STORYTELLING AND THE LAW (David Ray Papke ed., 1991) (anthology discussing alternative legal narratives in advocacy and adjudication).

90. *See* STEVEN L. WINTER, A CLEARING IN THE FOREST: LAW, LIFE, AND MIND 12–14 (2001).

91. *See, e.g.*, Commonwealth v. Chambers, 630 A.2d 630, 644 (Pa. 1991), *cert denied*, 522 U.S. 827 (1997) (adopting a per se exclusionary rule for references to religious texts during the capital punishment sentencing phase); Elizabeth A. Brooks, Note, *Thou Shalt Not Quote the Bible: Determining the Propriety of Attorney Use of Religious Philosophy and Themes in Oral Arguments*, 33 GA. L. REV. 1113, 119–36 (1999) (discussing judicial responses to religiously themed oral arguments); Marcus S. Henson, Casenote, Carruthers v. State*: Thou Shalt Not Make Direct Religious References in Closing Argument*, 52

courts and bar associations to proscribe or at least narrow the use of religious narrative and symbolism in pretrial and trial proceedings.[92] The record of prosecutorial misconduct in capital cases is replete with prejudice-inducing invocations of religion and religious iconography in pretrial comments, opening statements, closing arguments, and post-trial remarks. Insofar as such invocations tilt the adversary process toward death, they warrant prohibition. Although the logical corollary of this ban also operates to forbid faith-inspired redemptive advocacy, symmetry may go too far. Because offenders possess unequal resources and standing relative to the state and its prosecutorial agents, equality norms in fact may require the differential treatment of offender and prosecutorial appeals to moral theologies of redemption and retribution. Absent this distinctive treatment, the dominance of retributive discourse directs clemency advocates to espouse faith-based claims of redemption as widely and forcefully as courts may permit.

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

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MERCER L. REV. 731, 731–44 (2001) (describing standards used by the Georgia Supreme Court to determine when prosecutorial religious references constituted reversible error); *see also* DAVID E. GUINN, FAITH ON TRIAL: COMMUNITIES OF FAITH, THE FIRST AMENDMENT, AND THE THEORY OF DEEP DIVERSITY 9–10, 126 (2002) (asserting that religious argument prevents public discussion).

92. *See* MODEL RULES OF PROF. CONDUCT R. 3.1 (meritorious claims and contentions), 3.4 (fairness to opposing party and counsel), 3.6 (trial publicity), 3.8 (special responsibilities of a prosecutor) (2002); STANDARDS RELATING TO THE ADMIN. OF CRIMINAL JUSTICE Standards 3-1.4 (public statements), 3-5.2 (courtroom professionalism), 3-5.3 (selection of jurors), 3-5.4 (relations with jury), 3-5.5 (opening statement), 3-5.6 (presentation of evidence), 3-5.7 (examination of witnesses), 3-5.8 (argument to the jury), 3-5.9 (facts outside the record), 3-5.10 (comments by prosecutor after verdict), 3-6.1 (role in sentencing) (1991).

an important opportunity to engage the civic community in a moral dialogue over the place of race in redemption.

The dilemmas of moral discourse, religious narrative, and race-consciousness encumber clemency advocates with recurrent burdens. Discharging those burdens dictates the development of strategies to reintegrate mercy into the moral paradigm of retribution. Like morality, law holds the jurisgenerative promise of constructive opposition.[93] That promise must be seized to affirm alternative visions of moral community embodied in redemption. Seizure occurs through the reconstruction of trial narratives[94] material to both race[95] and death.[96] Part of the process of reconstruction involves contesting the narrative necessity of public retribution[97] and fostering empathy[98]

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93. *See* NARRATIVE, VIOLENCE AND THE LAW: THE ESSAYS OF ROBERT COVER 95–172, 203–38 (Martha Minow, Michael Ryan & Austin Sarat eds., 1995); Anthony V. Alfieri, *The Ethics of Violence: Necessity, Excess, and Opposition*, 94 COLUM. L. REV. 1721, 1748 (1994) (reviewing AUSTIN SARAT & THOMAS R. KEARNS, LAW'S VIOLENCE (1992).

94. *See* Phillip H. Miller, *Storytelling: A Technique for Juror Persuasion*, 26 AM. J. TRIAL ADVOC. 489, 489–90 (2003); Martha Merrill Umphrey, *The Dialogics of Legal Meaning: Spectacular Trials, the Unwritten Law, and Narratives of Criminal Responsibility*, 33 LAW & SOC'Y REV. 393, 393 (1999); Martha Merrill Umphrey, *Fragile Performances: The Dialogics of Judgment in* A Theory of the Trial, 28 LAW & SOC. INQUIRY 527, 530 (2003).

95. *See* JON-CHRISTIAN SUGGS, WHISPERED CONSOLATIONS: LAW AND NARRATIVE IN AFRICAN AMERICAN LIFE 19–42 (2000). *See generally* Chester L. Britt, *Race, Religion, and Support for the Death Penalty: A Research Note*, 15 JUST. Q. 175 (1998) (studying the effect of race and religion on an individual's view of capital punishment); Robert L. Young, *Religious Orientation, Race and Support for the Death Penalty*, 31 J. SCI. STUDY RELIGION 76 (1992) (studying the role of religious orientation in shaping attitudes toward capital punishment).

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

97. *See* Richard K. Sherwin, *Law Frames: Historical Truth and Narrative Necessity in a Criminal Case*, 47 STAN. L. REV. 39, 81–82 (1994).

98. *See generally* Susan Bandes, *Empathy, Narrative, and Victim Impact Statements*, 63 U. CHI. L. REV. 361 (1996) (discussing the capabilities and limitations of storytelling to trigger empathy); Toni M. Massaro, *Empathy, Legal Storytelling, and the Rule of Law: New Words, Old Wounds?*, 87 MICH. L. REV. 2099 (1989) (analyzing the role of emotion and narratives in law and concluding that narratives and emotions, such as victim impact statements, are not always helpful or appropriate); Martha Minow, *Surviving Victim Talk*, 40 UCLA L. REV. 1411 (1993) (discussing the dilemmas, drawbacks, and persuasive power of victim rhetoric).

in reaching out to heal the private pain of victims and their families.[99] Evidence of this strained form of dialogue may be found in extant jury deliberations and public debates, both endless and irreconcilable.[100] Of necessity, the dialogue must draw guidance and substance from the norms of remorse and atonement.[101] Regrettably, that dialogue must unfold in an environment of fear where truth is put at risk.[102]

CONCLUSION

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

By turns celebrated and condemned, the actions of former Illinois Governor George Ryan in pardoning and commuting the sentences of 167 prisoners and death row inmates in January 2003 offer no formula for resolving the confounding dilemmas of clemency lawyers. Traditional and alternative models of criminal defense advocacy provide nothing more than failed effort and vague direction to lawyers[103] and inmates[104] in the post-Illinois era of clemency

99. *See* Kristen F. Grunewald & Priya Nath, *Defense-Based Victim Outreach: Restorative Justice in Capital Cases*, 15 CAP. DEF. J. 315, 332–33 (2003).

100. *See* Harold G. Grasmick et al., *Religion, Punitive Justice, and Support for the Death Penalty*, 10 JUST. Q. 289, 289 (1993). *See generally* Brian Galle, *Free Exercise Rights of Capital Jurors*, 101 COLUM. L. REV. 569 (2001) (arguing that excluding jurors based on their death penalty views may conflict with the Free Exercise Clause).

101. *See* Stephen P. Garvey, *Restorative Justice, Punishment and Atonement*, 2003 UTAH L. REV. 303, 311–17 (2003). *See generally* Theodore Eisenberg et al., *But Was He Sorry? The Role of Remorse in Capital Sentencing*, 83 CORNELL L. REV. 1599 (1998) (discussing jurors' reactions to defendants and their crimes in terms of remorse and how those reactions affect sentencing).

102. *See generally* John H. Blume et al., *Future Dangerousness in Capital Cases: Always "At Issue,"* 86 CORNELL L. REV. 397 (2001) (arguing that future dangerousness of a defendant is on the minds of most capital jurors).

103. *See* Molly McDonough, *Spared From Death: Blanket Commutations Leave Lawyers Scrambling*, 2 NO. 2 ABA J. E-REPORT 2 (2003), *at* http://www.abanet.org/journal/ereport/j17clemency.html (on file with the North Carolina Law Review).

104. *See* Robert Goodrich, *Two Former Death Row Inmates Reflect on Ryan's Decision*

appeals. I have argued elsewhere that defenders and prosecutors may play a transformative role in larger abolitionist and redemptive movements.[105] The normative prescriptions of Garvey, Sarat, Simon, and Weisberg confirm that tempered role. Observing the growing authority and violence of the penal state,[106] they decline fully to endorse a faith-inspired abolitionist model of clemency advocacy for mercy lawyers. Their reluctance, however, overlooks the rising historical moment of theological integration increasingly pervading legal theory and education.[107] Unless abolitionists grasp this moment of transformation, the dilemmas of the secular lawyer in pleading redemptive norms to the retributive state, in citing the sacred to the profane, will remain insoluble.[108]

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to Commute Sentences: Appeals Had Run Out for One, ST. LOUIS POST-DISPATCH, Jan. 24, 2003, at A1; Lee Hockstader, *Off Ill. Death Row, to a Rougher Place: Inmates' Isolation Also Meant Safety*, WASH. POST, Jan. 17, 2003, at A3; Jodi Wilgoren, *Leaving Death Row is Blessing and Curse for Prisoner in Illinois*, N.Y. TIMES, Jan. 17, 2003, at A14; Eric Zorn, *Tragic Case Cried Out for Ryan's Mercy*, CHI. TRIB., Jan. 23, 2003, at 1N.

105. *See generally* Anthony V. Alfieri, *(Er)Race-ing an Ethic of Justice*, 51 STAN. L. REV. 935 (1999) (putting William Simon's *The Practice of Justice: A Theory of Lawyers' Ethics* to work "in the service of fashioning an ethic of representation in race cases"); Anthony V. Alfieri, *Mitigation, Mercy, and Delay: The Moral Politics of Death Penalty Abolitionists*, 31 HARV. C.R.-C.L. L. REV. 325 (1996) ("offering a preliminary reflection on the politics of abolitionist lawyering"); Anthony V. Alfieri, *Race-ing Legal Ethics*, 96 COLUM. L. REV. 800 (1996) (arguing that the convergence of race, law, and language in criminal defense advocacy warrants a fuller ethical defense of racialized strategies within the ambit of zealous advocacy).

106. *See* Stephen B. Bright, Lecture, *The Electric Chair and the Chain Gang: Choices and Challenges for America's Future*, 71 NOTRE DAME L. REV. 845, 847 (1996).

107. *See* William J. Stuntz, *Christian Legal Theory*, 116 HARV. L. REV. 1707, 1711 (2003) (reviewing CHRISTIAN PERSPECTIVE ON LEGAL THOUGHT (Robert F. Cochran et al. eds., 2001); *see also* Panel Discussion, *Does Professionalism Leave Room for Religious Commitment?*, 26 FORDHAM URB. L.J. 875 (1999) (examining the place of religion in present-day lawyering). *See generally* Panel Discussion, *Models of Successful "Religion and Lawyering" Programs*, 26 FORDHAM URB. L.J. 917 (1999) (identifying several programs that provide for the combination of religion and lawyering).

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