Memorializing Miscarriages of Justice: Clemency Petitions in the Killing State

Austin Sarat

Clemency in capital cases today has become quite rare. Capital clemency has been a victim of the rejection of rehabilitation as the guiding philosophy of criminal sentencing and of the increasing politicization of issues of crime and punishment since the 1960s. Yet despite the reluctance of governors to grant clemency, despite the difficulty of rectifying miscarriages of justice through the clemency process, petitions seeking commutation or pardon in death cases still are regularly presented to chief executives. With so little chance of success, filing them may seem to be nothing more than an empty ritual. In this article, I examine clemency petitions from Texas and Virginia, and I argue that those petitions may serve another function, and take on meaning in another way. This function I label "memorialization." These pleas provide an archive of stories of law's failures, of alleged breakdowns in the legal process, of a legal process in disrepair, as well as of racial prejudice, of lives shattered by violence and neglect, of remorse, rehabilitation, and redemption. They are cultural artifacts, documents that address both governors and an indeterminate audience beyond them and that memorialize miscarriages of justice. While they reveal the importance of religion, family, and good works in American thinking about remorse, redemption, and mercy, they also should be seen as histories of the present, documenting the breakdowns and inequities in the death penalty system as well as the tragic circumstances of lives shaped and shattered by poverty, abuse, and neglect.

> Legal interpretation demands that we remember the future.
>
> (Drucilla Cornell, "From the Lighthouse: The Promise of Redemption and the Possibility of Legal Interpretation")

> I had no evil intent when I taught the tricks of pleading, for I never meant them to be used to get the innocent condemned but, if the occasion arose, to save the lives of the guilty.
>
> (St. Augustine, *Confessions*)

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> Turning a terrible action into a story is a way to distance oneself from it, at worst a form of self-deception, at best a way to pardon the self.
>
> (Natalie Zemon Davis, *Fiction in the Archives: Pardon Tales and Their Tellers in Sixteenth-Century France*)

The last decade has brought increased attention to the problem and prevalence of miscarriages of justice in capital cases in the United States (Rosen 2003). Dramatic exonerations from death row (discussed in Radelet et al. 1996; Bedau & Radelet 1987; Gross et al. 2005), rigorous empirical studies (Liebman 2000; Liebman et al. 2004), and judicial decisions acknowledging failures in the death penalty system (see *United States v. Quinones* 2002)[1] have made a compelling case that where the stakes are highest, the law fails with alarming frequency. Yet at the same time, the Supreme Court and Congress have grown impatient with the complex legal process used in the administration of law's ultimate penalty. Thus the Court has gradually cut back on the availability of federal habeas corpus relief in death penalty cases (see *Wainwright v. Sykes* 1977; also Greenberg 1982; Zimring 1992), and Congress has passed legislation to curb what it labeled as "abuses" in the habeas process in capital cases (Antiterrorism and Effective Death Penalty Act [AEDPA] 1996; see Doyle 1996).

Because of what the Court and Congress have done, a defendant who receives a death sentence now often cannot obtain federal habeas review of the merits of whatever decisions or rulings might have been made by the judge during his or her capital trial (Liebman 1990–91; Goldstein 1990, 1990–91).[2] Even new evidence of

[1] In this case a federal district court judge threw out a death penalty sentence because of the risk of executing the innocent, but this decision was quickly and summarily reversed on appeal. See *United States v. Quinones*, 205 F. Supp. 2d 256 (S.D.N.Y. 2002), rev'd., *United States v. Quinones*, 313 F. 3d 49 (2d Cir. 2002).

[2] For assessments of the consequences of AEDPA, see Hammel (2002); Stevenson (2006); Freedman (2006). As Freedman says about the provisions of the ADEPA, "In today's legal environment the effect of this system is that some prisoners may literally be left to die of neglect" (2006:1090). For a different perspective, see Broughton (2006). Broughton notes that

> In the five years since the Court first articulated its approach under the AEDPA, in both capital and non-capital cases, the Court has given substantial deference to state courts, consistent with the AEDPA's scheme and with the expressions of those who crafted the statute. Notably, however, the Court has proven less deferential (though certainly not undeferential) in capital habeas cases. Over the past five years, only death-sentenced inmates have prevailed in challenging a state court's decision as objectively unreasonable under 2254(d). Interestingly, three of those cases involved ineffective assistance of counsel claims, which are ordinarily among the most difficult to prove on collateral review, given the combination of the AEDPA's deference scheme and the high threshold for relief established in Strickland v. Washington's requirement that such challenges demonstrate both deficient performance and actual prejudice . . .. The Court also has ruled against the government, and in favor in the death row inmate, in

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actual innocence has been found by the Supreme Court to be inadequate as the basis for challenging a death sentence (*Herrera v. Collins* 1993).[3] Due to the imposition of procedural bars and default rules, and the resulting limits on federal habeas review of convictions and sentences in death cases, gubernatorial clemency has become, in essence, the court of last resort, providing what Chief Justice William Rehnquist in *Herrera v. Collins* (1993:414) called a "fail safe" mechanism in the death penalty system.[4]

While much has been said and written about the power to kill within the confines of modern law (for example, Sarat 2001b), that sustained focus on the right to impose death sometimes eclipses its essential corollary—the sovereign right to spare life (for exceptions, see Hay 1975; Davis 1987; Moore 1989; Radelet & Zsembik 1992–93; Love 2001; Rapaport 2001; Breslin & Howley 2002; Dinsmore 2002; Kobil 2002; Heise 2003; Garvey 2004; Turrell 2004; Sarat 2005). In a modern political system, this power to spare life remains in the form of executive clemency.[5] Executive

several recent capital habeas cases from Texas that did not all involve AEDPA deference, but that signaled a budding doctrinal feud with the Fifth Circuit in the capital habeas arena (2006:654).

Sweeping new limitations on habeas in capital cases have been incorporated into the proposed Streamlined Procedures Act of 2005 (see Baich 2005 and Coyle 2005). As Berger (2005) explained,

> Overruling a long line of Supreme Court precedent, it removes jurisdiction from habeas courts to consider claims that a state court refused to hear on the ground of some procedural error committed by the prisoner or his lawyer-even if the lawyer's inadequate assistance caused the default or the state court's action was unreasonable. To overcome this global barrier to review, a petitioner would generally have to show that the factual predicate for the claim could not have been discovered previously through the exercise of due diligence; and . . . the facts underlying the claim . . . would be sufficient to establish . . . that, but for constitutional error, no reasonable fact-finder would have found the applicant guilty of the underlying offense (Berger 2005:954).

[3] In response to *Herrera*, Justice Harry Blackmun charged the Court with coming "perilously close to murder." See Blackmun, cited in Hoffmann (1993:817).

[4] As Chief Justice Rehnquist observed,

> Clemency is deeply rooted in our Anglo-American tradition of law, and is the historic remedy for preventing miscarriages of justice where judicial process has been exhausted. Executive clemency has provided the "fail safe" in our criminal justice system. It is an unalterable fact that our judicial system, like the human beings who administer it, is fallible. But history is replete with examples of wrongfully convicted persons who have been pardoned in the wake of after-discovered evidence establishing their innocence . . .. Recent authority confirms that over the past century clemency has been exercised frequently in capital cases in which demonstrations of "actual innocence" have been made (*Herrera v. Collins* 1993:411–12).

[5] Executive clemency is, of course, not coterminous with "sparing life." Pardons are used for the most mundane of crimes. Moreover, it could be argued that the potential to "spare life" is not exclusively reserved to executive clemency: a jury that declines to impose

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clemency in capital cases is distinctive in that it is the only power that can *undo death*—the only power that can prevent death once it has been prescribed and, through appellate review, approved, even if erroneously, as a legally appropriate punishment.

Clemency is a general term referring to the authority of an executive to "intervene in the sentencing of a criminal defendant . . .. It is a relief imparted after the justice system has run its course" (Weisberg 2004:1415).[6] Clemency is the reduction of a punishment authorized by law. That clemency provides "relief" from legal justice reminds us that not only has clemency traditionally been an important element of sovereign power, but it often has also been a vivid expression of mercy.[7]

At the same time that it has assumed increased importance in the jurisprudence of the death penalty, clemency in capital cases, despite Chief Justice Rehnquist's claim about its "frequency," has become quite rare.[8] With the exception of an unusual dramatic gesture, such as Governor George Ryan's mass commutation in

capital punishment when it has the choice to do so could equally be considered as sparing life, as indeed, could an appeals court that overturns a death sentence. "As a matter of fact," Barnett contends, "many others exercise virtually the same function—judges, juries, prosecuting attorneys, informers, police officers, victims of the offense" (1927:490).

[6] See *Clemency for Battered Women in Michigan: A Manual for Attorneys, Law Students and Social Workers*, http://www.umich.edu/~clemency/clemency_manual/manual_chapter02.html.

[7] As Weisberg put it, "[t]he commutation of a death sentence [is] the most dramatic example of mercy" (2004:1421). Long ago Blackstone described the relation of clemency and mercy by noting that the power to spare lives was "one of the great advantages of monarchy in general; that there is a magistrate, who has it in his power to extend mercy, whenever he thinks it is deserved: holding a court of equity in his own breast, to soften the rigour of the general law, in such criminal cases as merit an exception from punishment . . ." (Blackstone 1979: 4: 389). And, as Montesquieu noted, "So many are the advantages which monarchs gain by clemency, so greatly does it raise their fame, and endear them of their subjects, that it is generally happy for them to have an opportunity of displaying it . . ." (1989: Book 6: 21).

[8] During the 1990s, from one to eight death row inmates had their sentences commuted every year—out of approximately 20 to 90 executions. In 1998, for example, 68 people were executed. Only one death row inmate was granted clemency, a Texas man who "confessed" to 600 murders but was found to be in Florida during the one killing for which he received a death sentence. This represents a radical shift from several decades ago, when governors granted clemency in 20 to 25 percent of the death penalty cases they reviewed (Sarat 2005: Appendix B). As Banner notes, "For centuries governors commuted death sentences in significant numbers. That pattern continued for the first two-thirds of the twentieth century. Florida commuted nearly a quarter of its death sentences between 1924 and 1966; North Carolina commuted more than a third between 1909 and 1954. Those figures dropped close to zero under new sentencing schemes" (2002:291–2).

In Florida, one of the states most firmly in the "death belt," between 1924 and 1966, there were 59 commutations and 196 executions in capital cases, but between 1983 and 2000, the clemency requests of all 161 Florida prisoners on death row were denied (Sarat 2005: Appendix B). Yet the rarity of capital clemency is not just a Southern, death belt phenomenon. Thus "since at least 1965, no Washington Governor has intervened to overturn a death sentence, and in only one instance was an execution postponed by a Governor's action" (Washington State Office of the Attorney General n.d.). From 1964 to 2003, the year of Governor George Ryan's clemency, it was granted in only one Illinois

Illinois in January 2003, the long-held constitutional right of chief executives to spare life seems to have "died its own death, the victim of a political lethal injection and a public that overwhelmingly supports the death penalty" (Salladay 1998).[9] Even as crime rates declined during the 1990s, fear of crime persisted and, in this climate, mercy fell into disfavor, compassion went out of style.[10]

Capital clemency has been a victim of the rejection of rehabilitation as the guiding philosophy of criminal sentencing and of the increasing politicization of issues of crime and punishment since the 1960s. In this climate, governors seek, in Simon's evocative phrase, to "govern through crime," to turn crime fighting, tough-on-crime policy into a strategy for building coalitions and strengthening the state (Simon 2007; also Kennedy 2000). Many have used the death penalty in their campaigns, promising more and quicker executions (Simon 2007: chapter 5).

capital case. And in Pennsylvania, another state with a large death row population, the last death penalty commutation took place in the early 1960s (Sarat 2005: Appendix B).

[9] As Fiskesjo puts it, "In light of 'domestic' opinion, it is very often not the decision to pardon but the decision not to pardon that best furthers the political standing of the power-holder . . ." (2003:46).

[10] Cobb argues, "Political considerations have figured prominently in the unwillingness of many governors to be merciful. The popularity of the death penalty suggests to these officials that the safest course of action is to avoid the exercise of their clemency powers" (1989:394).

This is not to say that capital clemency has completely disappeared. It has not. For example, in 2002,

> Hours before Charlie Alston was scheduled to be executed in North Carolina, Governor Mike Easley commuted Alston's sentence to life without parole. Although Easley did not give a specific reason for the reprieve, he stated, "After long and careful consideration of all the facts and circumstances of this case in its entirety, I conclude that the appropriate sentence for the defendant is life in prison without parole." Alston's commutation marks the 2nd time Easley has granted clemency, and the 5th time a North Carolina governor has done so since 1976. During that same time, 47 death row inmates nationally have had their sentences commuted for humanitarian reasons (Death Penalty Information Center n.d.a, "Clemency News and Developments," http://www.deathpenaltyinfo.org/article.php?scid=13&did=850).

In Oklahoma, Governor Brad Henry recently granted a request for clemency in the case of Osvaldo Torres, a Mexican foreign national on Oklahoma's death row, in part because of a recent International Court of Justice decision ordering the United States to review the cases of 51 Mexican foreign nationals because they were denied their right to seek consular assistance following their arrest. Henry's decision to commute Torres's sentence to life in prison without parole marks the first time that the governor has granted clemency to an individual on death row. In his statement, Governor Henry said the International Court of Justice ruling is binding on U.S. courts and that the U.S. State Department had contacted his office to urge that he give careful consideration to the fact that the U.S. signed the 1963 Vienna Convention on Consular Relations, which ensures access to consular assistance for foreign nationals who are arrested. "The treaty is also important to protecting the rights of American citizens abroad," Henry noted (Death Penalty Information Center n.d.a, "Clemency News and Developments," http://www.deathpenaltyinfo.org/article.php?scid=13&did=850).

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Rejecting appeals from the Pope, Mother Teresa, televangelist Pat Robertson, former prosecutors, and even judges and jurors in death cases, today governors reserve their clemency power largely for cases where there is *indisputable* proof that someone has been erroneously convicted and no other remedy is available (Acker & Lanier 2000). Thus at the outset of his administration, Texas Governor George W. Bush embraced a standard for clemency that all but ensured that few if any death sentences would be seriously examined. Writing about then-Governor Bush's views, Berlow (2003) noted,

> "In every case," [Bush] wrote in *A Charge to Keep*, "I would ask: Is there any doubt about this individual's guilt or innocence? And, have the courts had ample opportunity to review all the legal issues in this case?" This is an extraordinarily narrow notion of clemency review: it seems to leave little, if any, room to consider mental illness or incompetence, childhood physical or sexual abuse, remorse, rehabilitation, racial discrimination in jury selection, the competence of the legal defense, or disparities in sentences between co-defendants or among defendants convicted of similar crimes. Neither compassion nor "mercy," which the Supreme Court as far back as 1855 saw as central to the very idea of clemency, is acknowledged as being of any account .... During Bush's six years as governor 150 men and two women were executed in Texas—a record unmatched by any other governor in modern American history .... Bush allowed the execution to proceed in all cases but one (Berlow 2003: n.p.).

Similarly, then-Governor Bill Clinton explained his reluctance to grant clemency by saying, "The appeals process, although lengthy, provides many opportunities for the courts to review sentences and that's where these decisions should be made" (cited in "Clemency Becoming Rare as Executions Increase," *Corrections Digest*, 8 July 1987, 2).

The Bush and Clinton views are today the norm.[11] Governors are reluctant to substitute their judgment for those of state

[11] These views have a long history, reaching back at least to the early nineteenth century. However, "the actual record of gubernatorial pardons ... [in that period] shows that in practice the pardon process was not so cut and dried" (Brown 2003:191). Yet today the decline in capital clemency may be a consequence of structural changes in the post–*Furman v. Georgia* (1972) death penalty process. Over the last several decades, juries in capital cases have been required to consider *any* mitigating evidence that the defendant wishes to present, thus insuring that consideration of mercy is part of every death penalty sentencing decision (*Lockett v. Ohio* 1978; also see Lithwick 2004). As a result, governors can say that the question of mercy already has been addressed by the time a clemency petition reaches their desk. In addition, while prior to 1976 there was relatively little appellate review of death sentences, since then there has been a substantial expansion of appellate review and, until recently, of federal habeas proceedings in those cases, again allowing governors to say that the person seeking clemency has already had a full adjudication and review of their case. This point was suggested by an anonymous reviewer of an earlier version of this article.

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legislators and courts, and, in death cases, to use clemency much at all (Breslin & Howley 2002; see also Dinsmore 2002; Kobil 2002).[12] As a result, Chief Justice Rehnquist's description of clemency as a "fail safe" in the killing state may do more to help legitimate judicial dismantling of various procedural protections than to point toward an efficacious device for correcting law's failures in the killing state.[13]

Yet despite the reluctance of governors to grant clemency, despite the difficulty of rectifying miscarriages of justice through the clemency process, petitions seeking commutation or pardon in death cases still are regularly presented to chief executives. With so little chance of success, filing them may seem to be nothing more than an empty ritual, meaningful, if at all, as a way for lawyers to satisfy the desires of desperate death row inmates to leave no stone unturned. Or they may appear to be occasions to rehash arguments previously made to, and rejected by, the sentencing jury or appellate courts. Or they may look like efforts to move beyond the law, deploying arguments imagined to have more resonance in a political rather than a legal forum.

In this article, I argue that clemency petitions in capital cases may serve another function, and take on meaning in another way, even as the lawyers who file them may seek to appease desperate clients, rehash old arguments, or reframe legal into political appeals, and even if they are unable to persuade governors to stop executions. This function I label "memorialization." These pleas provide an archive of stories of law's failures, of alleged break-

The importance and significance of appellate review is discussed in Casey 2002. As Casey noted,

> The restriction most commonly imposed upon waivers of capital proceedings is the mandatory appellate review. According to the Department of Justice, 37 of the 38 states where the death penalty is on the books provide non-waivable mandatory appellate review. The federal government does not provide for non-waivable appellate review. In some of these states the mandatory review is of sentencing only; however, most states have included review of the entire case in their mandatory appeal .... Thus the conviction, as well as the sentence, is normally subject to the mandatory non-waivable appellate review (2002:87–8).

For a more complete discussion of the reasons for the decline of clemency in capital cases, see Sarat (2005).

[12] Love noted a similar reluctance at the federal level. Beginning with the Reagan administration, she says, "the number of pardons each year began to drop off" (2001:126). Rita Radostitz, co-director of the Capital Punishment Clinic at the University of Texas and an attorney for Henry Lee Lucas, who was granted clemency in Texas, said about clemency, "I think that clearly a miscarriage of justice should be raised, but in other cases, mercy could also come into play," she said. "That's what clemency has historically been about - mercy" (quoted in Salladay 1998: n.p.).

[13] Imagined as a fail-safe mechanism, clemency may provide the judicial system with an alibi for its fallibility. See Berger (1994).

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downs in the legal process, of a legal process in disrepair, as well as of racial prejudice, of lives shattered by violence and neglect, of remorse, rehabilitation, and redemption.

This article analyzes the memorialization function of stories told by the condemned and their advocates in their petitions for clemency as well as the narrative conventions and cultural assumptions that frame their pardon tales.[14] I treat those petitions as cultural artefacts, documents that address both governors and an indeterminate audience beyond them, as documents that memorialize miscarriages of justice. While they reveal the importance of religion, family, and good works in American thinking about remorse, redemption, and mercy, they also should be seen as histories of the present, documenting the breakdowns and inequities in the death penalty system as well as the tragic circumstances of lives shaped and shattered by poverty, abuse, and neglect.[15]

Through this analysis I highlight a way of thinking about the clemency process that previously has not been addressed in the scholarly literature. My work is theoretically driven and interpretive, aimed at unearthing neglected meanings of the clemency process. As a result, in my discussion of that process, I focus neither on the motivations of the lawyers who file clemency petitions, or the persons on whose behalf they are filed, nor on explaining why those petitions are filed or why they tell the stories they tell. In this sense I do not seek to test and refute rival plausible hypotheses. Whether the motivations of lawyers, or their death row clients, are base or noble, whether they understand and consciously seek to speak to the future or intend their petitions to have no such audience, I seek to provide a frame within which scholars might interpret those petitions, understand at least one of their meanings, and assess part of their significance.[16]

[14] Here I am following in the footsteps of Burnett's 2002 study of clemency in Missouri. However, my work differs from hers in a few ways. First, while Burnett's work concentrates on the way errors at various stages in the legal process are described in clemency petitions, my work provides an account of the narrative conventions and cultural assumptions that they contain and reveal. Second, while Burnett analyzes these documents for their value in pointing out problems in the clemency process ("This study demonstrates that the clemency process is non-functional" [Burnett 2001: n.p.]) and highlighting needed reforms in the death penalty system, I treat them as addressing both the present and the future. For another examination of clemency petitions focusing on their value in present-day struggles over capital punishment, see Bertenthal et al. (2002).

[15] While I have not undertaken a systematic comparison of the pre-clemency litigation of capital cases with the clemency process, other stages in the litigation of those cases may also serve a similar function. For a discussion of that pre-clemency litigation, see Sarat (1996).

[16] Thus my work is not designed to say anything about the way lawyers or their clients *do or should* think about the clemency process.

Making a Record/Calling on the Future to Remember

The petitions I examine were filed during slightly different, though overlapping, 10-year periods in two of America's leading killing states, Texas and Virginia.[17] (See the Appendix for a description of data and methods used in this article.) From 1990 to 2000, there were 206 executions in Texas and one successful clemency petition. From 1990 to 2002, 74 people were put to death in Virginia and five people had their death sentences commuted. Expanding the time frame from *Gregg v. Georgia*'s (1976) reintroduction of capital punishment in the United States to 2005 reveals that there were 369 executions in Texas and 95 in Virginia.[18] During that same almost 30-year period, 229 clemencies were granted nationwide in capital cases. Of these, Texas governors granted only one; Virginia governors granted seven. Thus in these two states, as elsewhere,[19] filing clemency petitions was a bit like buying a lottery ticket in a contest for a multimillion-dollar payoff. In filing them, death row inmates participated in this lottery for life, hoping against long odds that they would draw the winning number.[20]

Yet as Cornell puts it in one of the epigraphs to this article: "Legal interpretation demands that we remember the future" (1990:1687).[21] In that phrase, Cornell suggests that legal processes fix their gaze temporally, not just on the possibilities (or impossibilities) of the present, but on a future promise of Justice and that legal scholars should attend to the way law speaks to that future. She reminds us that there are, in fact, two audiences for every legal act: the audience of the present (to which one might appeal to spare the life of the condemned), and the audience of the future

[17] These periods were the time frame of the data available on clemency petitions in Texas and Virginia in The National Death Penalty Archives at SUNY-Albany (see Appendix).

[18] Oklahoma with 81, and Missouri and Florida with 66 and 60, respectively, were the closest competitors in this race to execute.

[19] Illinois with 172 and Ohio with nine were the only states to grant more clemencies than Virginia. See the Death Penalty Information Center n.d.b, http://www.deathpenaltyinfo.org/article.php?did=126&scid=13.

[20] Clemency procedures in Texas and Virginia are quite different. While in Virginia the governor has the sole and exclusive authority to grant clemency, Texas is one of eight states in which the governor must have a recommendation of clemency from a board or advisory group before he or she can act. Nonetheless, in both states, during the period in which the clemency petitions I analyze were filed, the chances of receiving a favorable outcome were slim. The data on executions are from the Death Penalty Information Center n.d.c at http://www.deathpenaltyinfo.org/article.php?did=414&scid=8. For the clemency data, see the Death Penalty Information Center n.d.b at http://www.deathpenaltyinfo.org/article.php?did=126&scid=13.

[21] Lobel argues, "Even when prophetic litigation loses in court, it often functions . . . as an appeal to future generations" (1995:1347).

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(which stands as a figure of law's redeeming promise of Justice). In this sense, processes such as clemency also may be seen as offering the chance to record a history of the present and, in that history, preserve the present's pained voice. In Cover's words, they provide "a bridge to alternity" (1983:9).

Taking Cornell's and Cover's perspective, one might say that clemency petitions, which have so little chance of immediate success, nonetheless participate in the logic of "redemptive constitutionalism" (Cover 1983:34). While they may serve many purposes, those documents nonetheless refuse to recognize the violence of the present moment as the defining totality of law, and they carry a vision of a future in which Justice prevails over that violence. Whatever the intentions of those who draft them, they conjure a world, borrowing Cover's formulation, in which "Redemption takes place within an eschatalogical schema that postulates: (1) the unredeemed character of reality as we know it, (2) the fundamentally different reality that should take its place, and (3) the replacement of one with the other" (1983:34). In this view, clemency petitions speak in a prophetic voice even as they supply the argumentative and interpretive resources to bridge the gap between the violence of the present and the beckoning possibility of Justice.[22]

But there is perhaps a second way of understanding the meaning of those petitions in the contemporary killing state. In this second understanding Cover's (1983) image is reversed, and redemption gives way to Judgment. As redemption gives way to Judgment, the future is called on to remember the injustices of the present (Le Goff 1992). Given this imperative to remember, those who ask for clemency serve as witnesses testifying against those injustices. Their petitions supply

> the testimonial *bridge* which, mediating between narrative and history, guarantees their correspondence and adherence to each other. This bridging between narrative and history is possible since the narrator is both an *informed* and an *honest* witness . . .. All the witness has to do is to *efface himself*, and let the *literality of events* voice its own *self-evidence*. "His business is only to say: *this is what happened*, when he knows that it actually did happen" (Felman & Laub 1992:101; emphasis in original).[23]

[22] Lobel (1995:1337) explores the utility of the idea of prophecy to the work of lawyers who serve losing causes.

[23] Treating the lawyer for a losing cause as a witness giving testimony suggests that he or she has addressed his or her work to the community of the future as much as the law of the present. "To testify—before a court of law or before the court of history and of the future . . .," as Felman argues, "is more than simply to report a fact or an event or to relate what has been lived, recorded and remembered. Memory is conjured here essentially in

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Like the mitigation stage of a capital trial or the habeas process,[24] clemency provides a chance to take advantage of one of the legitimating promises of law, namely its commitment to giving everyone a hearing.[25] The clemency process creates a record that serves as the materialization of memory and creates an archive of unnecessary, unjust, undeserved pain and death (Nora 1989).[26] Clemency petitions record history by creating narratives of present injustices and call on an imagined future to choose Justice over the jurispathic tendencies of the moment (Cover 1983). By doing so, they insure that, even when no one (including the governors to whom they are addressed) seems willing to listen, the voices of the "oppressed" will not be silenced.

The movement from giving testimony to writing history is a movement from the immediacy of the eyewitness report to the mediation produced through narrativization (Felman & Laub 1992). In this movement clemency petitions may, as Gordon indicates, frame the stories they seek to record in what he calls "legalist" style (1996:36). This style treats the injustices of the present as wrongs "done by specific perpetrators to specific victims" (Gordon 1996:36). It stays within the frame of liberal-legalism and describes present injustice in terms of the remedies that governors, should they be willing, could easily supply.

Alternatively, the petitions may speak about "bad structures rather than bad agents . . .. This historical enterprise takes the form of a search for explanations rather than a search for villainous agents and attribution of blame" (Gordon 1996:36–7). In this narrative style, pardon tales broaden the scope of inquiry by linking the condemned inmate's particular story with broader patterns of injustice and institutional practice.

The ability to use the clemency process to speak to the future and memorialize the present, to both give testimony and write history, has been ignored in the scholarly literature. By focusing on the possibilities and problems of the present moment, those who write about clemency portray its value exclusively in terms of its most immediate effects. But as Cornell (1988:1628) points out, legal processes, like clemency, are as much about the future as the

order to address another, to impress upon a listener, to *appeal* to a community" (Felman & Laub 1992:204; emphasis in original).

[24] For a discussion of the significance and meaning of these stages of the capital litigation process, see Sarat (2001a).

[25] Minow (1987:1860) suggests that legal rights matter not just because they provide dignity to law's victims, or because they help mobilize them to undertake political action, but because they provide an opportunity to tell a story that might not otherwise get to be told.

[26] As Nora argues, "Modern memory is, above all, archival. It relies entirely on the materiality of the trace, the immediacy of the recording, the visibility of the image" (1989:15).

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present, and as much about the possibilities of memory as the current prospects of success.

Clemency petitions in capital cases represent one method of "remembering the future," of memorializing miscarriages of justice, and of insuring that the future remembers. They are both a kind of testimony and a way of recording a history of injustice. The stories they tell put state killing in a narrative context that juxtaposes it to the Good, and they preserve "the versions of legal meaning created by groups outside the mainstream of American law" (Lobel 1995:1337). They turn clemency boards and governor's offices into memorials to present injustice. Perhaps by paying attention to this function of the clemency process, we can gain a new perspective on its value in the contemporary killing state.

Narrative Conventions and Cultural Assumptions in Contemporary Pardon Tales

Writing about so-called letters of remission in sixteenth-century France, the historian Natalie Zemon Davis called attention to their "fictional" qualities, namely "their forming, shaping, and molding elements: their crafting of narrative" (1987:3). She described the letter of remission as a "mixed genre: a judicial supplication to persuade the king and the courts, a historical account of one's past actions, and a story" (1987:4).

Given the prevailing Bush–Clinton understanding of clemency, clemency petitions today are predominantly tales of legal woe, stories of errors made in the legal process. As such they position governors, exactly as Chief Justice Rehnquist imagined, as courts of last resort unburdened by law's rules of relevance, procedural bars, and default rules, able finally to rectify injustices left uncorrected in earlier stages of the legal process. Thus while the condemned and their advocates can appeal to a broader set of narrative conventions than those available to lawyers in the guilt phase of a death penalty trial, or those pursuing redress through the appellate or the habeas process,[27] in the clemency process they nonetheless tend to frame their stories narrowly, in what Gordon described as the "legalist mode."

Moreover, only a few contain outright acknowledgments of guilt or extended narratives of the crime for which the condemned was sentenced. As a result, they have relatively little to say about

[27] As Burnett puts it, "Clemency petitions are different from other legal appeals in that the statements are neither limited by evidentiary rules of admissibility nor defined by the procedural requirements of jurisdictional precedent" (Burnett 2001: n.p.).

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mercy, about the place of grace in the killing state, and when they do make appeals for mercy, they do so in the most conventional terms, appealing to the twin pillars of American cultural conservatism—namely, religion and family life.

In what follows, I describe five stories that play key roles, either in whole or in part, in the memorialization of miscarriages of justice in clemency petitions. I examine the way these stories appear in five "exemplary" cases in Texas and Virginia.[28]

1. "You Got the Wrong Man: Please Don't Execute the Innocent."

The specter of executing the innocent haunts the system of capital punishment in the United States and has helped transform the national debate about the death penalty. As Marshall notes, the so-called

> innocence revolution . . . addresses a value that everyone shares: accurate determinations of guilt and innocence. Put another way, the innocence revolution is born of science and fact, as opposed to choices among a competing set of controversial values . . .. [I]t is safe to conclude that our newfound appreciation of the system's fallibility is destined to make a lasting mark on criminal law" (2004:573–4).

At the heart of this innocence revolution is DNA, which is now admissible as evidence in criminal trials in almost every state (see Connors et al. 1996).

Preventing gross miscarriages of justice of the kind revealed by DNA testing,[29] as I suggested earlier, has become the almost exclusive grounds on which governors today will grant clemency. As a result, many clemency petitions aim to raise doubts about the guilt of the condemned on whose behalf they are filed. Mistaken eyewitness identification, the corrupt jailhouse snitch, newly discovered evidence—all are marshaled to the serve that end. A few request DNA testing, or present DNA evidence, to prove that someone scheduled to die is, in fact, innocent. One such petition was filed in Virginia by two large-firm lawyers working pro bono on the case of Michael Satcher, who had been convicted of stabbing a

[28] Each of the cases I discuss represents a kind of "ideal type." For a discussion of the procedures used in classifying the petitions, see the Appendix. Limiting the analysis to these five cases permits a more in-depth examination of the rhetorical strategies and narrative techniques used in different types of clemency petitions as well as the way those strategies and techniques are combined in an effort to make a persuasive case for clemency.

[29] DNA has, in fact, played a relatively small role in preventing executions of the innocent. Of the 199 people freed from death row between 1973 and 2005, only 14 are attributable to the use of DNA technology. See Death Penalty Information Center n.d.d, "Innocence and the Death Penalty," http://www.deathpenaltyinfo.org/article.php?did=412&scid=6. See also Liebman (2002).

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23-year-old girl to death after raping her during a March 31, 1990 assault.

In their clemency petition, his lawyers waste no time before stating the heart of Satcher's case for clemency: "Michael Satcher," they note,

> is a loving father of two small boys, respected within his church, and, prior to 1990, had no history of violent behavior. He was also convicted of the cold-blooded killing of a young Arlington, Virginia woman in March 1990 and sits on death row with a fast approaching execution date of December 9, 1997. This contradiction of character could have a simple explanation—innocence—which has not yet been fully explored by the Commonwealth despite the strong reasons presented post-trial for doing so. We implore the Governor to rectify this situation before allowing Michael to be put to death.

Using the conditional, "could have," the petition seeks to raise, rather than resolve, doubt. It asks the governor to stop the execution to allow time to investigate and resolve that doubt. In this sense, its narrative strategy follows a familiar model, namely the trial strategy of many criminal defense lawyers. "Michael has consistently maintained his innocence," the petition notes. Moreover,

> All of the evidence presented at trial supports his innocence except one piece—a deoxyribonucleic acid (DNA) test. As discussed below, however, that evidence is now in grave doubt. We did not become involved as Michael's counsel until after his state court remedies were exhausted and the time had come to pursue federal habeas corpus relief. As of that point, no attorney for Michael had done anything to check the accuracy of the critical DNA test introduced at trial in 1990 (the "1990 test"). Because the physical evidence found at the crime scene was in the custody of the Commonwealth, we did the only thing we could to double-check the 1990 test before filing a federal habeas petition. We ran a new DNA test on Michael's blood, the only relevant DNA to which we had access.
>
> We arranged with the Lifecodes Corporation in Stamford, Connecticut to conduct this test (the 1995 test) and then compared the results to those of the 1990 test on the crime scene evidence. (We replicated the 1990 test as closely as possible; in fact Lifecodes was selected as the laboratory to do the test because it was capable of using the same procedures as the laboratory that conducted the 1990 test.) The results were stunning: the DNA from Michael's blood did not match the DNA extracted from the 1990 crime scene evidence.

This narrative moves from circumstantial evidence (the anomaly of the good, church-going father with no history of violence being charged with murder), to testimonial evidence (the fact that the

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condemned has consistently maintained his innocence), to scientific evidence (the new DNA test). The authority of science is deployed to verify conventional cultural assumptions associated with family and religion and the legal assumption that consistency is an indicator of credibility. DNA is presented as the trump, the showstopper.[30]

But the new test does little more than create a mystery—"Why did Michael's blood match the crime scene evidence in 1990 but not in 1995?"—to which the petition suggests there is a straightforward answer. "The most obvious explanation is that the 1995 test supports Michael's persistent claim of innocence and the 1990 test was flawed." Yet that answer, the petition acknowledges, has not persuaded the courts that have heard it. "Neither the federal district court nor the United States Court of Appeals for the Fourth Circuit," Satcher's lawyers concede, "determined the reason for the conflict between the two tests; instead, both federal courts held that a 'battle of experts' was an insufficient reason to grant a writ of habeas corpus." In the Bush–Clinton paradigm, the fact that courts had already considered the new evidence would be dispositive, as it eventually was in this case.

Knowing this, Satcher's lawyers concede that, at this point, the situation is indeed a "battle of the experts," a battle they argue that can be resolved by yet *another* DNA test, one that will put the battle to rest and definitively establish their client's innocence.

> We respectfully submit that it would be irresponsible to execute Michael before this 'battle of experts' is resolved, especially when a clear and simple means to resolving it exists—a new test. In fact, Michael has . . . authorized us to request the crime scene evidence from the Commonwealth . . .. We urge the Governor to order a new DNA test of the crime scene evidence and Michael's blood before Michael is executed.

To bolster their "reasonable doubt" strategy, Satcher's lawyers present an account of the crime and the evidence tying their client to it. They note that many of the traditional, and most important, pieces of evidence were lacking. "No eyewitness placed Michael at the crime scene. No murder weapon was ever found . . .. Neither motive evidence nor evidence that Michael had any violent history was introduced at trial." Suggesting that he had nothing to hide, they note that "At the time of his arrest, Michael voluntarily gave the police blood, saliva and hair samples," and that the prosecution failed to "match these samples with hair and semen samples found

[30] As Culbert explains, in the era of DNA, "Judgment becomes the legal acknowledgment or recognition of what is simply always already the case . . .. With DNA testing human fallibility is authenticated. Human susceptibility to err is *apparent*" (n.d.:148, 158; emphasis in original).

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on Ms. Borghesani's clothing and taken from her body." All that tied their client to the crime was DNA. As the petition notes, "The prosecution's only direct evidence linking Michael to the murder was DNA evidence . . .."

They try to undermine the credibility of that evidence by raising questions about the laboratory in which the DNA testing was done, noting along the way that the "laboratory . . . was not subject to accreditation or licensing requirements, was not operated under uniform standards, and often did not conduct confirmatory testing of initial test results."

A large portion of their narrative consists of a rather technical description of the 1995 DNA test and a point-by-point refutation of the state's attack on it. Speaking in scientific language, they assure the governor of this new test's reliability and validity.

> Because the Tidewater Lab's 1990 testing procedures were based on Lifecodes' procedures, and because Lifecodes was equipped to conduct a new test using those procedures, a retest by Lifecodes was the best and only way to replicate the Tidewater Lab's test (The Tidewater Lab is available only to the police and, in any event, no longer uses the same procedures and protocols it used in 1990.) The sample was sent to Lifecodes anonymously – nothing was done (or could have been done) by Michael or the defense team to affect the results of the 1995 test.

The results of this new test, they remind the governor, "fully support Michael's claim of innocence."

Satcher's lawyers concede, however that

> whether or not such a comparison is scientifically sound boils down to scientific judgments. In the judgment of Michael's experts, such a comparison is scientifically sound. In the judgment of the Commonwealth's experts, such a comparison is not. However, at the end of the day, relying on expert judgments is unnecessary because a better way to resolve this dispute exists– conducting a new DNA test on the crime scene DNA and Michael's blood at the same time and in the same laboratory.

This argument, as Culbert suggests in another context, places "faith in a new authority—DNA . . . (and) undermines the distinction between how things appear to us and how they really are" (n.d.: 147). They argue that a new test will provide the kind of certainty that no set of human judgments can provide while, at the same time, expressing "a sense of futility at the possibility of ever determining for ourselves what is true" (Culbert n.d.:180).

Indeed, Satcher's petition concedes as much in that it does not rest its entire case on the request for a new test. Arguing in the alternative, it again appeals to Satcher's family, religion, and com-

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munity as it presents a mitigation case and urges the governor to choose a sentencing option that was not available to Satcher's jury.

> Furthermore, even if there were no new DNA evidence demonstrating his innocence, Michael should not be executed. Rather, as one of the jurors from Michael's trial has stated in an affidavit accompanying this Petition, life without the possibility of parole would be the more appropriate punishment for Michael. Since word that the Commonwealth has set an execution date has spread, there has been an outpouring of community support for Michael, not only from friends and family, but from others who have known Michael throughout his life. A District of Columbia corrections officer, a high school principal, the owner of a beauty shop, church choir members, people from all walks of life have written and called to tell us that they do not believe that Michael should be executed. All state their belief that Michael could not have committed these crimes. And all unanimously describe Michael as a good father, a family man, a quiet man, a religious man, and a peaceful man. Michael's conduct during incarceration also demonstrates that he is not the type of person the Commonwealth should execute. His record is devoid of a single instance of violent behavior. Indeed, there is nothing to suggest that he poses a future danger to others within [the] prison community. The jury that determined Michael's sentence did not have the option of choosing life without the possibility of parole because Virginia did not offer that option at the time of Michael's trial. The Governor does. Thus, we respectfully urge the Governor to consider that option.

This petition, like many others, gives pride of place to religion.[31] "One additional fact about Michael," his lawyers state,

> is mentioned over and over again by almost everyone who knows him: his dedication to God and the church. Michael was brought up in the New Macedonia Baptist Church in Southeast Washington, a large church with numerous active members. Michael did not just passively attend church, he actively participated in it: he sang in the church choir from the age of 6 and belonged to the Junior Usher Board. Michael remains committed to God.

Satcher's lawyers suggest that these facts should make a difference to the governor by noting that they would have made a difference to some of those who served on his jury. Jurors who sentenced Michael to death would seriously have considered the alternative of life in prison without parole had they had the opportunity to do so. Three jurors have submitted affidavits stating as much. Moreover, one juror, Rubye Baumgardner, has sworn in an

[31] In doing so, it joins two domains that, as Agamben (1998) suggests, are conjoined in the present moment, the sacred and the biological.

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affidavit that she would have voted for life imprisonment without parole had she been given the option. This is all the more significant because, to impose the death penalty, the jury had to be unanimous:

> Ms. Baumgardner's affidavit creates a substantial question as to whether such unanimity would have been possible among the jurors. Indeed, on the basis of this affidavit, it is likely that the jury would have decided that life without the possibility of parole was more appropriate for Michael.

In the end, DNA testing, Satcher's lawyers contend, points the way to a solution and provides the governor the chance "to correct two grievous errors." The first could be addressed

> simply by providing Michael access to whatever crime scene evidence still exists so that the 1990 test can be redone. If the retest proves a non-match, the Commonwealth will know it has the wrong man in prison and a great injustice will be avoided. If the new test turns out to be a match . . . the Governor can consider the second question presented by Michael's application. The Governor has the power to heed these jurors and sentence Michael to a life behind bars, a life where he can continue, in a limited way, to be a father to his children, a son to his parents, and a brother and friend to those who love him. His life before 1990 and his behavior in prison since his conviction warrant this sentence.

While Satcher's petition did not succeed in saving his life (he was executed by lethal injection on December 9, 1997), it memorializes the tragic possibility of executing the innocent. It calls on the future to recall, and judge, the unreliability of today's killing state.

2. "It Ain't Fair: Legal Error"

Clemency petitions in capital cases read like catalogs of legal mistakes and misconduct. As Burnett (2001) demonstrated in her study of Missouri, they highlight police and prosecutorial misconduct, mistaken eyewitness identifications, problems in jury selection, and failures of appellate courts to remedy cognizable legal errors. Moreover, 74 percent of the cases she studied contained allegations of ineffective assistance of counsel. Rather than duplicating her treatment of the full range of legal errors documented in pardon tales, in what follows I focus on one case, centering on an ineffective assistance claim, to exemplify this genre.

The 53-page petition of Joe Louis Wise Sr. was submitted to Governor Douglas Wilder of Virginia in 1993. His petition, concentrating on what his lawyers called—Death by Default: The Unrepresented Defendant—was written in a highly legalistic style,

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marshaling facts, affidavits, exhibits, and case law to prove that his lawyer's performance at trial and on appeal was so poor that it was as if he had no lawyer at all.

> On November 9, 1984, Joe Louis Wise, Sr., alone and unrepresented in all but appearance, faced the jury that would decide whether he lived or died. Joe, a young black man, was facing death for a crime he committed when he was 21 years old. He was borderline mentally retarded and had dropped out of school in the ninth grade, after being held back at least once. Joe had been raised in wretched poverty, never consistently living in a house with indoor plumbing until he made the upward move into a public housing project at age twelve. Moreover, Joe had been raised by corrupt and cruel parents who beat him horribly, threatened to put him in foster homes, introduced him to sex, drugs, gambling, and crime, and in short provided him with the worst possible upbringing. None of these facts were known to the jury.

The petition continued,

> Though practically alone, Joe did not face the jury without the semblance of representation. Standing next to him was William Bryant Claiborne, whom the Mecklenburg County court had appointed to be Joe's lawyer. Claiborne was unprepared and unqualified to represent Joe in the fight for his life. The 28 year-old Claiborne was just over two years out of law school, had never tried a murder case, had never tried a jury trial, had never received any capital defense training, had not consulted with any experienced capital defender, and had undertaken little or no investigation of Joe's life. When his, and Joe's, turn came to present evidence that would convince the jury that Joe should receive a sentence of life imprisonment rather than death, Claiborne offered absolutely nothing, because he had looked for nothing .... 22 sentences are all Claiborne said to the jury that had just convicted Joe and was about to determine his fate. The jury returned in 42 minutes with a verdict of death.

This argument is straightforward and assertive, highlighting the idea that having an unqualified capital defense lawyer is equivalent to having no lawyer at all. The word *nothing*—offering nothing, looked for nothing—does much of the rhetorical work here. And the story presented is less one of malevolence on the part of Claiborne than of his being asked to do a task that was way beyond him. In this manner, the petition offers a parallel between the uneducated defendant and the unprepared lawyer. Both, it seems, are victims: Wise was a victim of his lawyer, and his lawyer was a victim of a system of capital representation that put him in such a position.

Claiborne's mistakes were only compounded by the ineffectiveness of Wise's next set of lawyers. Like Claiborne, his state ha-

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beas lawyers were inexperienced in the world of capital litigation. "They failed," the petition claims,

> to offer evidence of the prejudice Joe suffered from Claiborne's ineffectiveness. Second, his lawyer neglected to file Joe's notice of appeal from the Circuit Court's denial of relief. Not only did this default eliminate appellate review of Joe's habeas, it precluded federal review of virtually all of Joe's claims, including his claim that Claiborne gave him ineffective assistance .... In order to present his ineffectiveness claims to the federal habeas court, Joe had to preserve them against a procedural bar—a technicality that prevents a court from considering many claims, no matter how meritorious—while passing through state habeas. One necessity for preserving Joe's claims was an appeal to the Virginia Supreme Court from the Circuit Court's denial of his state habeas. The first, mandatory step to appealing was the simple filing of a notice of appeal in the Circuit Court within 30 days after that court issued a decision .... That turned out to be too much for Hawthorne [one of the new lawyers], who missed the date, not by a day or a week, but by 2 1/2 months .... The consequence of these attorneys' mistakes was that no jury and no court, state or federal, ever considered Joe's compelling case in mitigation.

The argument for clemency contained in this petition came down to this:

> Because Joe has been abandoned at every step by his appointed lawyers, Joe's case constitutes a complete failure of our system of justice .... Because of the inexperience, lack of zeal, and other derelictions of his trial and state habeas attorneys—deficiencies matched in no other capital case tried in Virginia in the post-Furman era—barely a moment passed in Joe Wise's trial when his trial had true adversarial character .... Accordingly, we petition the Governor to commute Joe's death sentence to life imprisonment.

Indeed, the petition goes to the heart of this failure by conceding Wise's guilt at the outset. "Joe," it says matter-of-factly, "shot [the victim] with a .25 caliber pistol, beat him over the head with a rifle, breaking the stock, put him in a wastewater-filled hole, and shot him in the chest with a shotgun." Claiborne's incompetence is also narrated in a matter-of-fact tone: "The defense case during Joe's guilt trial consisted of seven witnesses. Six of the defense witnesses had testified for the prosecution, and they repeated and expanded on their prosecution testimony when called by the defense."

But the real focus of the story was Claiborne's performance during the sentencing phase of the trial. "Claiborne compressed the case for Joe's life," the petition notes, "into the 'one or two minutes' required to speak the 22 sentences of his closing argument. Two of the 22 sentences alluded to mitigating evidence and

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suggested, curiously, that the jury knew what the mitigating evidence was, though Claiborne had not called a single witness during the sentencing trial."

Claiborne's failure, according to the petition, was the result of a failure by the appointing court, for which the petition offers no explanation. Just as Wise was, in effect, made to stand alone before the bar of justice, so too did the court abandon Claiborne to his own devices. "There was no shortage of experienced trial lawyers in Mecklenburg County," the petition notes,

> But for whatever reasons, the court did not choose a Mecklenburg attorney. Instead, the court looked toward Halifax County and chose Claiborne. At that time, courts usually appointed two attorneys to represent capital defendants . . .. Indeed, of the 30 trials resulting in death sentences that took place between 1975 and 1985, in fewer than eight did the trial court appoint only one lawyer . . .. The Mecklenburg court opted not to follow this practice, despite Claiborne's inexperience. The court appointed 28-year-old Claiborne and left him on his own. In terms of Claiborne's utter lack of experience and seasoning, the court's choice was unprecedented at the time, and fortunately has not been equaled since.

Wise's petition continues its legalist narrative by presenting expert testimony and carefully parsing the American Bar Association Code of Ethics to bolster its contention that "Not only should the Mecklenburg courts have respected more Joe's entitlement to minimally competent counsel, Claiborne himself owed a duty both to Joe and to the court to decline the appointment." It portrays Claiborne as negligent in, once having accepted the appointment, failing to seek help that the petition contends was readily available. It departs from its earlier tone as it catalogs the errors Claiborne made and notes the severe consequences of those mistakes. Thus it insists that

> The opportunity to offer mitigating evidence during the penalty phase of a capital trial is not a nicety of law provided to capital defendants by the good graces of the Commonwealth. Rather, it is a constitutional imperative: [T]he Eight and Fourteenth Amendments require that the sentencer, in all but the rarest kind of capital case, not be precluded from considering, *as a mitigating factor*, any aspect of a defendant's character or record and any of the circumstances of the offense that the defendant proffers as a basis for a sentence less than death . . .. Given that the imposition of death by public authority is so profoundly different from all other penalties, we cannot avoid the conclusion that an individualized decision is essential in capital cases. The need for treating each defendant in a capital case with that degree of respect due the uniqueness of the individual is far more important than in non-capital cases . . .. The non-availability of corrective or mod-

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> ifying mechanisms with respect to an executed capital sentence underscores the need for individualized consideration as a constitutional requirement in imposing the death sentence. *Lockett v. Ohio*, 438 U.S. 586, 605, 606 (1978). Thus, Joe Wise had a constitutional right and Claiborne had a constitutional duty to present to the jury any and all relevant mitigating evidence tending to show that Joe deserved a sentence less than death. That Claiborne failed to grasp this fundamental precept of capital jurisprudence is truly *astounding* (emphasis added).

The metaphor of solitude, of being alone, reappears throughout the petition, sometimes spoken in the voice of Joe's advocates and sometimes attributed to outside experts. "Joe effectively faced the sentencing jury alone. Professor Bonnie believes that Claiborne's abandonment of Joe at the sentencing trial represents a failure of the justice system."

As if addressed to an appellate court, the petition carefully follows the form required in ineffective assistance cases, first documenting the unreasonable performance of Joe's lawyers and then the substantial prejudice that resulted from it. As to his habeas claim, "Had Joe gotten to litigate, with competent counsel, his claims of ineffective assistance of counsel in federal court, there is a great probability—more nearly a certainty—that he would have received a new sentencing trial." Here the petition's legalistic style comes to the fore, offering as it does a "summary of 26 state and federal cases in which courts have reversed death sentences because counsel failed to properly investigate and present the mitigation available on behalf of a capital defendant."

In addition, it describes in some detail the mitigation case that the jury in Joe's original trial never heard, highlighting a long family history of violence, abuse, and neglect; poverty; unaddressed problems at school; and borderline mental retardation. "The jury that sentenced Joe to death knew none of these facts. Claiborne's decisions preventing the jury from achieving a better understanding of who and what shaped Joe into the person he was . . .. The facts were horrible and horrifying." Citing another expert, it states, "Their mitigating force would have been powerful."

The petition concludes again in the mode of a legal argument, drawing an analogy between Wise's case and the famous Supreme Court case of Clarence Gideon. And, like any good legal argument, it presents Joe as making modest but important claims, claims that it is very much within the governor's power to recognize and address. Unlike pardon tales, which advance structural claims, this petition goes out of its way to present the condemned as seeking redress within a capital sentencing system about which he has no complaint. Yet in its detailed rendering of the ineffectiveness of

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Wise's lawyers it offers to the future another story of a death penalty system in default.

> In *Gideon v. Wainwright*, the United States Supreme Court held that under the Sixth Amendment to the Constitution, an indigent defendant facing criminal prosecution in state court has the right to have counsel appointed for him. The Court stated for all of us that: The right of one charged with crime to counsel may not be deemed fundamental and essential to fair trials in some countries, but it is in ours. From the very beginning, our state and national constitutions and laws have laid great emphasis on procedural and substantive safeguards designed to assure fair trials before impartial tribunals in which every defendant stands equal before the law. This noble ideal cannot be realized if the poor man charged with crime has to face his accusers without a lawyer to assist him.
>
> In a very real sense, this is a fundamental clemency case in the same way that *Gideon v. Wainwright* was a fundamental constitutional case. Joe Wise does not seek relief from this office because he claims innocence. Rather, he seeks commutation of his death sentence because, like Clarence Earl Gideon, he was denied his constitutional right to the assistance of counsel. Unlike Gideon, however, Joe was on trial for his life. And unlike Gideon, Joe was unable to present his constitutional claim to the federal courts of the United States. As a consequence, Joe faces a September 14, 1993 execution date. Joe does not complain about Virginia's capital sentencing system or its system of appointing counsel to represent those charged with capital murder. Rather, Joe requests commutation because, in his case, these systems have failed completely, in a way that could not now be repeated. Joe's death sentence is a true miscarriage of justice. It is wholly unreliable, because for all these years it has gone untested by the crucible of our adversarial system. Under these unique circumstances, it would be appropriate for the Governor to commute Joe's sentence of death to one of life imprisonment.

Governor Wilder refused to do so, and Wise was executed as scheduled, one of the last inmates in Virginia to be put to death by electrocution.

3. "If You'd Led My Life You'd Understand"

Some clemency petitions do not focus primarily on legal errors of the kind raised in the Satcher and Wise cases; instead they revisit and sometimes expand the mitigation case that was, or should have been, presented during the original trial. They put the crime in context and highlight aspects of the life circumstances of the condemned that explain why the person did what he or she did or suggest reduced culpability for his or her offense.

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One such petition was submitted in 1992, to Texas Governor Ann Richards and the Texas Board of Pardons and Paroles in the case of Billy White. Authored by an all-star lineup of death penalty lawyers—Richard Burr, Steve Hawkins, Eden Harrington, and Mandy Welch—their expertise and commitment is displayed on every page of this 38-page petition. Throughout, they meticulously present facts, marshal expert testimony, and carefully craft arguments. Yet they were unable to stop White's execution.[32]

His plea for clemency works in two genres, combining a legalist frame with an appeal to psychological understandings. White's petition centers on his mental retardation, which, it claimed, meant that he was "less culpable than non-retarded persons for the crime that led to his death sentence." As the petition notes, "He [White] has mild mental retardation, not severe mental retardation, but even mild mental retardation is a severe disability." Much of its argument is framed in the language of psychology and relies on the authority of that discipline. Thus early on it cites "one of the leading mental retardation specialists in the country," who submitted an expert opinion that "[h]is mental retardation affects every dimension of his life."

White's petition goes to great lengths to educate its readers about the meaning and significance of retardation. It describes mental retardation as combining: "(1) significantly sub-average general intellectual functioning (IQ of 70–75 or lower), (2) existing concurrently with impairments in adaptive behavior, and (3) manifested during the developmental period (before one's eighteenth birthday)." As to the first of these elements, it reports that

> On April 15, 1992, psychologist Windel Dickerson . . . conducted a battery of psychological tests with Mr. White. He determined that Mr. White's full scale IQ is 66 . . .. Finding that IQ score consistent with a public school measure of Mr. White's IQ as 69 in 1966, and with Mr. White's school history, Dr. Dickerson found that Mr. White has had "significantly sub-average general intellectual functioning during the developmental period."

As to the second part of the definition, the petition invokes another psychologist. "Professor Luckasson obtained and reviewed data with respect to the nine areas of adaptive behavior that are deemed most important by mental retardation professionals: communication, self-care, home living, social skills, community use, self-direction, health and safety, functional academics and leisure and work. She found that Mr. White's behavior was impaired in nearly all these areas."

[32] White was executed on April 23, 1992.

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Using "everyday terms," White's lawyers translate this psychological evidence to provide a picture of how White's retardation affected his life. White, they claim, was extremely dependent on other people. Again seeking to provide a context for his crime and to bolster their argument about reduced culpability, they note that

> [T]ragically, the direction into which these people led Billy was negative. Roy Charles introduced Billy to heroin and before long he was heavily involved in shooting up heroin and in taking a variety of other street and prescription drugs . . .. The other direction into which Billy was led was criminal activity. Gradually Billy was transformed from a meek, frightened teenager into a person who was not afraid to break into houses, steal property, and commit robberies.

Seemingly concerned that this portrait of White might make him seem to be a dangerous, out-of-control individual, they contextualize his disability and, in so doing, try to humanize him. "While Billy White's life has been severely circumscribed by his mental retardation," they continue,

> the remains a complex human being like any other human being. As Professor Luckasson has cautioned, there is "[a] risk in attempting to describe the disabilities and their impact on [Mr. White's] life that [one] might inadvertently stereotype him as a mentally retarded person, rather than fully describe his uniqueness as a complex person who has mental retardation. Mental retardation is a serious disability, and it affects every dimension of Billy's life. He has, however, other attributes and characteristics that make him Billy White." To all who know Billy White, his most striking characteristics beyond mental retardation are his sweetness of spirit, his kindness, and his generosity.

Only after this complex narrative—which joins psychology and the vernacular, White's disability and his redeeming human characteristics—is in place do the authors of his petition discuss his crime. "On August 23, 1976, at approximately 6:00 p.m., Martha Laura Spinks was killed by a single shot from a −38 caliber gun in the office of the furniture store owned and operated by her and her husband, Alge Spinks. Ms. Spinks was shot during the course of an incident involving Billy White." Framing this description in the passive voice works to diminish White's agency in the crime.

Moreover, the petition returns to a theme noted earlier, namely White's extreme dependence on others. "What took place on the day of the crime," it suggests,

> was significantly the product of other people's shaping of Billy White's behavior. He was only nineteen years old when Ms. Spinks was killed. He was fundamentally dependent upon people

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> like Henry Wyatt at that time in his life. Because of Billy's mental retardation, people like Henry Wyatt and Roy Charles Baines had been able to shape Billy in their image. He did not have the internal capabilities necessary to question them or resist their influences. Even if he could appreciate that the criminal activities they led him into were wrong, his whole life history revealed that he would have tremendous difficulty changing his behavior. Further, the chance that Billy would accidentally kill someone in the course of an armed robbery was high. Unless Billy was closely guided, he often failed to do what he set out and intended to do.

At this point, the petition provides an extended description of White's trial, highlighting inadequacies in the representation provided by his lawyer and noting the availability of evidence that could have been presented to raise "substantial questions about whether the shooting of Ms. Spinks was intentional, and even if these questions were resolved against Mr. White, whether he was culpable enough to deserve a sentence of death." White's clemency lawyers argue that "The most important evidence omitted from the trial was the evidence that Mr. White had mental retardation. Had the jury known this and come to appreciate the effects of mental retardation in Mr. White's life, it would have viewed Mr. White as less culpable even if Mr. Spinks' version of the crime was accepted without reservation."

It is noteworthy that this clemency petition contains no statements by jurors testifying to this fact. This absence is notable because other petitions, such as Satcher's, often present such statements. They provide affidavits from prosecutors, judges, prison officials, and occasionally even the relatives of those killed to bolster their argument for relief.

After a lengthy description of evidence that could have been, but was not, presented, White's petition states,

> It is manifest that Billy White's trial was a sham. Lasting little more than a day, dealing with none of the evidence about Mr. White's life and disabilities that had obvious bearing on the crime and his culpability for it, failing to explore in any meaningful way the evidence that bore directly on whether Ms. Spinks was killed accidentally during a struggle, Mr. White's trial cannot engender confidence that reliable judgments were made about his culpability. Clemency must be available for a case like this, where the criminal justice process has failed so miserably to provide a reliable vehicle for arriving at true and just results.

This petition moves toward its conclusion by departing from the genre of the mitigation tale or the tale of legal woe to raise, albeit briefly, the issue of White's post-sentencing conduct in prison. Here it deploys the kind of authority—in the affidavits of prison

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guards—that was not used elsewhere in this petition. "Perhaps the best proof that death was not the appropriate sentence for Billy, and that his trial resulted in an incorrect and unjust sentence, is the picture of who Billy is today. That picture," it continues,

> shows us a human being who possesses attributes which we are taught to value and which enhance the quality of life for others. These attributes were apparent to Professor Luckasson during the several hours she spent with Billy . . .. "In my opinion, his most striking characteristics beyond the mental retardation are his gentleness, kindness, and generosity of spirit. Although his ability to fully actualize that basic goodness is limited by his deficient abilities to understand, express, communicate and have logical understanding of cause and effect or strategic problem solving I believe the goodness is there" . . .. The prison officers and guards who are in the best position to know Billy describe him in the same way. They see Billy as a "gentle, friendly person who gets along well with everyone." They consistently remark that "Billy treats people with respect, and is outgoing and friendly with the officers and inmates." Billy has been on death row for almost fourteen years, and he is known as a person who has never caused any problems for the officers or inmates. One officer described Billy as "a model inmate in the prison."

White's clemency petition ends in an almost lyrical and uplifting manner, conjuring him in a new role not only as "a human being whose life is worth saving," but as a person who

> gives you special insight into that remarkable human spirit which enables a human being to overcome limitations and hardships beyond his understanding without developing bitterness or cynicism. Billy is remarkable in his warmth, his gentleness, his respectfulness, and his kindness. Billy's trial was remarkable in its failure to provide his jury with the information necessary for a fair and just response to his crime. Billy's appeals have been remarkable in their failure to reveal the injustices of Billy's trial. At this point, the Governor of the State of Texas is the only hope Billy has that fairness and justice will prevail in his case.

Yet despite its lyricism and uplift, another absence is noteworthy: namely, that there is no reference to God, spirituality, or religion of the kind that is ubiquitous in petitions that seek to show that the condemned has been transformed and now has those human qualities that make his or hers a life worth sparing.

4. "Accept My Contrition, Grant Me Mercy, Spare My Life"

God, spirituality, and religion are central elements in the 1998 clemency petition of Ronald Watkins. While this petition, like most others, was written by a lawyer, it breaks from the standard nar-

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rative of legal injustice and the memorialization of law's failure by beginning with an admission of Watkins's guilt and making a straightforward appeal for mercy. It announces its difference in the way it is titled—"A Plea for the Life of Ronald Watkins"—as well as in its epistolary form. Written as a letter to the governor, it starts, "Insofar as possible, this will not be a legal document. It is a plea for an act of executive grace."

Throughout, Watkins's petition grounds itself in appeals to shared religious beliefs and commitments to family values. This is "an appeal from fellow Christians," it says, "to exercise that grace in recognition of the power of God's grace in the life of Ronald Watkins and the worth of that life to others . . .. We pray that God will guide our hands as we undertake that task." Moreover, the petition's author disclaims his own narrative authority, saying, "I intend to let much of Ron's story be told in this petition through his own words to us. From literally hundreds of letters, I have included excerpts that reveal who Ron is now. I assure you these words were not written with any thought of clemency in mind, but that will certainly be apparent from the writings themselves." This personal assurance seems to come out of a different era, in which a man's word was his bond, and it frames the petition's creation of a vicarious audience between Watkins and the governor. It does so by presenting, in allegedly unmediated form, the voice of the condemned, a voice that is clear, articulate, and revealing enough to need no interpretation.

Like other petitions for mercy, this one is structured as a story of transformation in which religion and family play key roles.

> By any test you could formulate, Ron is a different person from the man sentenced to death years ago; he is now a redeemed child of God. He has made every effort to be a good father to his sixteen-year old son, David. He has reached out to repair the relationship with his own father, who abused him . . .. During his first three years on death row, the abused angry man had time to reflect and accept responsibility for his actions. He also found Christ. For six years, in hundreds of small ways, he has reached out to his family and to others, and has been a helper . . ..

Watkins's willingness to express remorse for his crime and the authenticity of words spoken and actions taken with no thought of their consequences are presented as evidence of the sincerity of his transformation.

> During one of our visits with Ron, he expressed his great remorse over the death of his victim, William McCauley. It was difficult for him to say these things to us face-to-face. Although he had written many times over the years how much he regretted his actions,

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> and told us the same over the phone, his sincerity was evidenced by his actions that day. At his request, we tried to find the McCauley family to convey his remorse . . .. In Ron's case, the redeeming power of God rebuts the death penalty's assumption that, once condemned, he could have no human qualities, particularly remorse. Typical of the person he had become, Ron expressed his humanity and remorse years ago in a poem he never expected anyone but us to read.

In addition, Watkins's petition presents a chronicle of good works, of a once seemingly wasted life now made useful.

> He has been a peacemaker and a keeper of order in the prison. He has helped to keep another Danville teenager from going down the wrong road. He has not done these things out of some hope that you would one day see fit to spare his life, Governor. That he has done them is witness to the magnificent power of Christ to take the unclean vessel and use it to advance the work of the Kingdom on earth. Please let that work continue within the prison walls, where it is so badly needed.

Here the appeal is made in the form of a supplication, an entreaty. "Please . . ." takes the place of the language of grievance or injustice that characterizes many of the petitions in Texas and Virginia.

Yet as is the case in almost every clemency petition, genres get mixed as new arguments get marshaled. Thus the narrative of this petition, the purest appeal to mercy among the Texas and Virginia petitions I read, proceeds, like other genres in its contextualization of Watkins's crime, to broaden the interpretive frame within which it should be understood. "For many of his early years," the petition states,

> Ron lived in a situation where he could not escape the constant threat and reality of violence. Outside the door in New York City lay violence and death. Inside the home, he was singled out and subjected to violent and humiliating forms of physical abuse. A summary of this frightening history is attached as Exhibit 1. The reason I detail these events, which are documented in the court records but were never heard by the jury, is that they are not at all offered as an excuse for what he did in 1988. Rather, they are relevant to an explanation and understanding of the young man that emerged from that environment. What would have been the extent of the damage to you, or to me, if, in our youth, there had been week after week with no escape or rest from violence, inside and outside our home? It was after his family moved to Virginia that Ron committed his only other serious offense. It was a serious offense, abduction, and I do not wish to minimize it. But it was also not a random crime.

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Several things stand out in this narrative. One is that traces of the very legal language that its author initially disclaimed begin to appear (e.g., "Exhibit 1"), as do narrative elements found in other kinds of petitions ("documented in the court records but were never heard by the jury"). In addition, we see some of the rhetoric of the skilled advocate in the penalty phase of a capital trial—"Not at all offered as an excuse"; "It was a serious offense"—and an appeal to empathy through identification.

Furthermore, the petition makes a direct equity appeal, comparing Watkins's case with one of the few recent cases in which clemency was granted in Virginia, the 1997 commutation of the sentence of William Saunders. "In the case of William Saunders," the petition suggests,

> Virginia recognized the relevance of reformation and a changed life to the clemency decision. To be sure, there are many ways to distinguish the cases if one is of a mind to do so .... But the record shows that Saunders' post-sentence conduct was an important factor, if not the only factor. It is to be assumed that if doubts about guilt were the primary factor, Saunders' sentence would have been commuted to something less than life without possibility of parole, the commutation sought by Ronald Watkins. The post-sentence record of Ronald Watkins is superior to that of William Saunders. That is not to say that Mr. Saunders did not deserve this act of executive grace. It is to say that Ronald Watkins has shown himself equally worthy and has demonstrated that he is no danger to anyone.

In the end, Watkins's petition returns to its central narrative elements, again personalizing its appeal, grounding it in shared religious commitments, and concluding not with an appeal to the governor's majestic, sovereign powers, but with a request that he seek Divine guidance. "We are," it concludes,

> unashamed to make this plea for mercy to you in the name of Christ. That is because we search in vain in His gospel for examples of the good being taken and made better. But we see story after story of the wretched and sinners being transformed into instruments of God's will. At the end of the day, redemption is what the gospel story is about. Please ignore your lawyers, your political advisors, get on your knees and seek God's will in this case. That is all we can ask, but we do ask it. Please spare the life of our friend.

In the end the governor refused to heed this plea, and Watkins was executed on March 25, 1998.

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5. "The Death Penalty Is a Tool of Racism"

Even rarer than straightforward appeals for mercy are petitions that embed their appeals in a broad structural critique of the legal system or of the death penalty system—petitions that are, I would contend, the most direct in memorializing injustice and appealing to an imagined future. If the narrative style in appeals for mercy is submissive, the style of the structural genre is declarative and accusatory. Take, for example, the Virginia petition of Johnny Watkins Jr.[33] The alliterative title—"Danville, Death, and Discrimination"—both proclaims its conclusion and initiates an argument that Watkins is a victim of racism.

The petition's bold opening paragraph states: "For over one hundred years, the death penalty has been a tool of racism in Virginia." It backs up this claim by reminding its readers that "Black people have been sentenced to death far more often than white people, and they have been sentenced to death for crimes for which white people have not faced death." Only after making those assertions does it connect them to the particulars of Watkins's case.

> Now Danville seeks to have carried out the death sentences of Johnny Watkins, Jr., a black man. The process by which those sentences were procured was shot through with the impermissible factor of race. Two separate juries, from which the prosecutor had struck every qualified black person, sentenced Mr. Watkins to death. Significantly, both victims were white. Indeed, virtually everyone involved in the case other than Mr. Watkins - the judge, the jury, the prosecutor, the police investigators, even the court clerk - was white. This was no isolated occurrence: since 1977, Danville capital prosecutions reflect an unmistakable under-representation of black people as anything but defendants. Indeed, Danville's post-*Furman* pattern of capital punishment is indistinguishable from Danville's antebellum, Reconstruction, and Jim Crow pattern. That pattern is one of racism.

This is a narrative of structural inequity and unfairness, one that emphasizes historical continuity, one that names its target "racism."

This train of logic is, of course, hardly one that an elected official would likely embrace. Yet the petition calls on the governor to commute Watkins's sentence and in that gesture to "repudiate" that history. And, if the tone of Ronald Watkins's petition tended toward a kind of intimacy in which petitioner and governor were connected as speaker and listener, here the narration is impersonal. Johnny Watkins is given no agency, no role, in constructing the story ostensibly designed to save his life.

[33] He was not related to Ronald Watkins.

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So eager is the author of this petition, a Richmond attorney, to get to the large matters of race and race prejudice that he spends but two lines describing the crime for which his client was sentenced to death.[34] He weaves a description of a single town's history of racial prejudice together with an indictment of the entire state and nation.

> The evidence that race is a factor in Danville capital prosecutions is historic, extensive, and irrefutable. For the past 100 years, race surely has been the best predictor of who gets the death penalty in both Virginia and Danville. Danville has a long history of racial strife, extreme among Virginia cities, which lasted well into the Nineteen Seventies. The widespread perception among black Americans that systems of justice treat them more harshly than whites is held by black citizens in Danville just as elsewhere. More to the point, capital prosecutions in Danville unmistakably display a pattern of racism.
>
> In the post-*Furman* era, Danville has sentenced more men to death than any other jurisdiction in Virginia; every one of those men is black. In all but one case, their victims were white. But in Danville, black capital defendants are not judged or sentenced by juries with anything resembling a representative number of black persons on them. Black citizens are under-represented in the venires from which Danville chooses its juries, black citizens are stricken from those juries by the prosecution in excessive numbers, and black citizens often are completely absent from the petit juries that result. In a city whose population is over 30% black, black citizens have been shut out of any role in the administration of capital justice. In short, Jim Crow's tool remains in the hands of white people in Danville.
>
> Virginia's record in capital punishment from 1908–1962 is one of unadulterated racism. Virginia executed 236 prisoners in that time. Of these, 201 were black, an astounding 85%. The first person Virginia electrocuted was black, the last person Virginia electrocuted before *Furman* was black, and virtually all the ones in-between were black. During this period, Virginia executed 57 black men for crimes less than murder, including attempted rape and robbery. No white man was executed for a crime less than murder during this time. Virginia executed one woman - predictably, she was black. Danville's record is similarly egregious.

Finally, broadening its indictment to the entire nation, Watkins's lawyer suggests that

[34] "Johnny Watkins, Jr., was convicted in 1984 of the capital murders and robberies of two convenience store workers, Betty Barker and Carl Buchanan, in separate incidents in the City of Danville. One of the victims was shot three times, the other four. At the time, Mr. Watkins was 22 years of age and had no significant criminal record."

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> There can be little doubt that the death penalty process in the United States is heavily influenced by the issue of race. In a famous Georgia study, researchers determined that a black defendant who killed a white victim was 22 times more likely to receive the death penalty than a black defendant who killed a black victim, and 7 times more likely to receive the death penalty than whites who kill blacks. *McCleskey v. Kemp*, 481 U.S. 279, 326–27 (1987). While there is no comparable Virginia study, the Commonwealth's history, and Danville's history in particular, certainly do not suggest that a contrary result would be found here.

Sprinkled throughout the petition are tables documenting these assertions as well as a long narrative of Danville's tainted history. These tables and this history provide background for an argument about the exclusion of blacks from jury service and its impact in the Watkins case.

> It should come as no surprise that Danville is excluding blacks from jury service, because Danville has been doing so for virtually all its history. Of course, it goes without saying that Danville excluded black citizens from jury duty through most of the Jim Crow era. But Danville's recent history is little better. On at least three occasions, federal courts have found as a fact that Danville was systematically excluding blacks from jury service .... What Danville is doing is procuring death sentences against black defendants by means of a racially discriminatory system. What Danville is doing is intolerable .... It ... falls to the Governor to consider whether, in light of all those circumstances, Johnny Watkins, Jr., a young black man, has been sentenced to death by a process tainted by racism, and if so, whether, in 1994, the Commonwealth is still so indifferent to the reality of racism that it is prepared to carry out those sentences regardless of that fact.

Indeed, only on page 16 does this 27-page petition return to the petitioner. When it does so it proceeds in a rather perfunctory fashion, highlighting the impact of the exclusion of blacks from the jury, of what Watkins's clemency lawyers call prosecutorial misconduct, and of the poor quality of his trial lawyer. It briefly recounts the nature of Watkins's crime before devoting a single paragraph to the mitigation evidence presented in the penalty phase of his first trial.

> In the first trial, the evidence created the portrait of a severely dysfunctional family. The evidence established that Mr. Watkins, along with his brother, was abandoned by his mother due to unemployment and ill health. Mr. Watkins was only three years old when he was brought to Virginia by her, where his elderly aunt raised him. The aunt's husband was himself ill, however, and remained in the hospital for years before dying. Mr. Watkins's aunt, therefore, raised him and his brother by herself. There was

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> never a father figure in Mr. Watkins's life. The jury in the first trial had the opportunity to observe for itself the extraordinary indifference of Mr. Watkins's mother to the very question of whether he lived or died. After she and Mr. Watkins's stepfather had testified, they asked to be excused, because they had to leave early to return to New York! The jury thus had a dramatic first hand demonstration of the fact that Mr. Watkins's mother, who had devoted precious little of her time to him over the years, thought it more important to return home than to see if her son was sentenced to die in the electric chair.
>
> The crimes, while providing a basis for imposition of the death penalty if the jury so chose, were not so horrifying that they mandated it. The mitigating evidence, on the other hand, demonstrated that Mr. Watkins had grown up under difficult circumstances, having been emotionally and physically abandoned by his parents. While this evidence did not compel a life sentence, it did provide a substantial basis for such a result. In fact, a fair jury, one that reflected the entire community and could, therefore, more likely reach a decision unfettered by racial bias, had ample reason not to sentence Mr. Watkins to death despite the nature of the crimes.

This clemency petition vividly describes Watkins's trial lawyer, suggesting that he was so intimidated by the racism of the trial that, in effect, he provided no argument at all that Watkins should not be executed. "In closing arguments," the petition contends,

> defense counsel vouched for what a wonderful person the victim was, based upon what they had heard about him "outside this trial and in this trial." He told the jury that "the killing of Miss Barker was senseless, brutal, uncalled for, and running entirely against the grain of everything that you and I and perhaps all of us were brought up and raised to believe in;" that his own client had breached a "sacred trust to honor the life and property of others;" that the question "why should we give him mercy when this man probably has shown none" is a "difficult one" that he "could argue to [the jury] all night" and not know if he could convince them or even give them a satisfactory answer. He posed the question "If we take another life will that improve matters any?" He incredibly answered the question "Arguably." Thus, not only did counsel do nothing to object to the prosecutor's excesses, but he gave the jury precious little reason not to follow the Biblical mandate that Mr. Fuller had foisted upon them. Indeed, counsel virtually admitted to the jury that even he did not believe that there was a good reason not to follow Mr. Fuller's agenda.

This pardon tale concludes by returning to its overall theme—Danville, Death, and Discrimination—and by framing its plea less as an appeal to the governor than as a challenge to him. "This

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petition raises no question whether Mr. Watkins deserves punishment for his crimes,'' it suggests.

> Instead this petition questions whether the discriminatory manner in which Danville set the level of his punishment should be validated or repudiated. Hundreds of years of harsh and inequitable treatment of black defendants in America's courts provide the answer. Whether overt or subconscious, Danville's latter day banishment of upright black citizens from the criminal justice process in capital murder trials should be rejected, and Johnny Watkins's death sentences should be commuted to life imprisonment.

Here Watkins's fate is linked to a large moral and political question: namely, whether the governor will ally himself with Danville and its history of racism, or take the political risk of repudiating it. Clemency in this case would be one small but significant step on the road toward undoing that history. In the end, the governor chose to side with Danville and refused to take that step. Johnny Watkins was executed on March 3, 1994.

Conclusion

Speaking in different genres, telling different stories, clemency petitions in capital cases should be read, I contend, not just as pleas to spare the life of someone condemned to death, but also as calls to the future to attend to injustices of the present moment, cumulating, despite their often narrow legalist frames, in a broad indictment of the inequities and injustices of America in the late twentieth century. In the present moment, these memorializations of miscarriages of justice appeal to the shared values of a community of imagined readers, values such as fairness and equality, Christian compassion, and family connection.[35] How they will be heard/read in the future is, of course, impossible to know.

Yet through their narratives, the condemned and their advocates speak to that future, giving content to both the possibility of Justice as well as its deferred presence in law.[36] While Justice, what Cornell called the Good, is, on her account, always present *to* law, it

[35] While I have no data on clemency petitions in earlier eras, two things may result from the recent decline in the chances of success and narrowing of the grounds on which governors are willing to commute or pardon those sentenced to death. First is an increased legalization and juridification of the discourse of clemency. If governors are going to act as *courts* of last resort, it is not surprising that typically petitions speak in and through the language of law rather than displaying a more personal or emotive rhetoric. Second, given the political climate that, at least until recently, surrounded the death penalty, it is not surprising that the discourse of mercy for the condemned has fallen into disfavor.

[36] As Lobel notes, ''Law . . . arises from the clash between the state seeking to enforce its rules and . . . activist communities seeking to create, extend, or preserve an alternative vision of justice'' (1995:1333). See also Alfieri (1996).

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is never completely realized *in* law (Cornell 1988:1587).[37] "[T]he law posits an ideality . . . that it can never realize, and . . . this failure is constitutive of existing law" (Butler 1990:1716). [38] Law combines both the "as yet" failure to realize the Good, and the commitment to its realization. In this failure and this commitment law is two things at once: the social organization of violence through which state power is exercised in a partisan, biased, and sometimes cruel way,[39] and the arena to which citizens address themselves in the hope that law can, and will, redress the wrongs committed in its name.

In this same vein, Cover compellingly called our attention to law's "jurisgenerative" and its "jurispathic" qualities (1983:4).[40] "Law," Cover argued,

> may be viewed as a system of tension or a bridge linking a concept of reality to an imagined alternative . . .. Thus, one constitutive element of a *nomos* is the phenomenon George Steiner has labeled "alternity": the "other than the case", the counterfactual propositions, images, shapes of will and evasions with which we charge our mental being and by means of which we build the changing, largely fictive milieu for our somatic and our social existence. But the concept of a *nomos* is not exhausted by its "alternity"; it is neither utopia nor pure vision. A *nomos,* as a world of law, entails the application of human will to an extant state of affairs as well as toward our visions of alternative futures (1983:9; emphasis in original).

Cover used the word *nomos*, "normative universe," to argue that law is crucially involved in helping persons to "create and maintain, a world of right and wrong, of lawful and unlawful, of valid and void" (1983:4). The nomos that law helps to create, Cover (1983) believed, always contains within it visions of possibility not yet realized, images of a better world not yet built. But, he reminds us, law is not simply, or even primarily, a gentle, hermeneutic apparatus; it always exists in a state of tension between a world of meaning in which Justice is pursued, and a world of violence in which "legal interpretation takes place on a field of pain and death" (Cover 1986:1601).

[37] Justice, Cornell argues, "is precisely what eludes our full knowledge." We cannot "grasp the Good but only follow it. The Good . . . is a star which beckons us to follow" (1990:1697).

[38] Butler observes that "this horizon of temporality is always to be projected and never fully achieved; this constitutes the double gesture as a persistent promise and withdrawal . . .. Cornell argues that it is necessary to repeat this gesture endlessly and thereby to constitute the posture of vigilance that establishes the openness of a future in which the thought of radical alternity is never completed" (1990:1716).

[39] According to Young and Sarat "[L]aw is simultaneously a denial of the ethical in the name of the political and a denial of the political in the name of the ethical" (1994:328).

[40] For a collection of Cover's work, see Minow et al. (1993).

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In this article I have shown how clemency petitions in capital cases confront this tension. As they do so, these memorializations of miscarriages of justice are haunted by the specter of an all-but-impossible to stop death, the death of those in whose name they are authorized to speak about the legal failures and injustices of the present. The condemned are suspended in a place between life and death, living, breathing, but with a rapidly closing horizon of possibility. Because everyone knows that their pleas for clemency most likely will be denied, they become rhetorical and political stand-ins for various of law's failures and symbols of martyred innocence, victims of legal incompetence, or racial discrimination.

Appendix: Data and Methods

There is no comprehensive, nationwide archive of clemency petitions. Like the death penalty itself, clemency varies state by state in its procedures and in the ways records are kept. After initial inquiries in several places, including Texas and Virginia, I concluded that getting petitions directly from the states would be extremely costly (since most are not kept in electronic form) and difficult, if not impossible. As a result, I turned to the clemency petitions collected by the National Death Penalty Archive (NDPA) at the State University of New York at Albany. Theirs is the largest and most comprehensive single collection in the United States.

At the time of my research, the archive contained 150 machine-readable clemency petitions filed, between 1990 and 2002, in 13 states (Alabama, Florida, Georgia, Indiana, Illinois, Mississippi, Missouri, North Carolina, Ohio, South Carolina, Tennessee, Texas, and Virginia) as well as in the federal system. Of these, 28 were filed in Texas from 1990 to 2000, and 53 were filed in Virginia covering the period 1992 to 2002. Because the petitions were collected from attorneys who represented death row inmates in clemency proceedings, I have no way of knowing whether they are representative of the universe of petitions filed between 1990 and 2002 or, if not, the ways they might be systematically biased.

I chose to focus on Texas and Virginia because, as noted above, they are two of America's leading killing states and because they have very different clemency procedures.

A research assistant and I began the analysis by separately reading all of the 150 petitions in the NDPA and identifying each of the issues/allegations/claims raised in the petitions. That exercise resulted in the identification of the following issues/allegations/claims: factual error/innocence; police misconduct; prosecutorial misconduct; false/unreliable witness testimony; incompetent/unethical expert witness; ineffective assistance of counsel; jury bias;

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errors or omissions in the mitigation phase of the original trial; unavailability of life without parole as an option at the time of sentencing; equity; error/procedural bar in the appellate or post-conviction process; remorse/religious conversion/post-sentencing rehabilitation/mercy. These issues/allegations/claims provided the building blocks for the subsequent analysis.

We then sorted petitions into groups based on the issues/allegations/claims they made. In 18 instances, we disagreed about the classification of these issues/allegations/claims. In those cases, we reread the petition in question and discussed our disagreement, working to refine our understandings of the issues raised. Informed by our discussion, we again read the petitions that were the source of the disagreements. This second pass resulted in agreement in all but three cases. In those three cases, we followed my classifications.

Our next step was to determine whether the Texas and Virginia petitions raised distinctive, different, or unusual issues/allegations/claims. On the basis of three rounds of reading of the entire data set, we determined that they did not.

Focusing then solely on the petitions from Texas and Virginia, we again read the petitions three times with the purpose of identifying the main story, or the predominant genre, of each petition. This procedure resulted in the identification of five types of stories or genres in the petitions. In seven cases, we disagreed in our assignment of cases to these genres. Here again we discussed our initial disagreements, worked together to clarify misunderstandings about terms or arguments used in the petitions, and eventually reached a shared decision about each of those seven cases.

Once all the Texas and Virginia petitions had been classified by story or genre, we each did yet another pass in order to select "ideal types" or "primary exemplars" of the five stories/genres. As a result of that exercise, three of the cases that I discuss in this article were initially tagged by both myself and my research assistant. One or the other of us nominated six other cases for possible inclusion. Subsequently we reread and discussed those six cases, agreeing ultimately on two other cases to be included in the article. Throughout, we sought to pick cases that were illustrative of the kinds of arguments made in a particular story or genre. At the same time, each of the cases chosen as "ideal types" or "primary exemplars" has its own particular emphasis or tone. Each highlights the elements of its genre in a distinctive fashion.

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Austin Sarat *is William Nelson Cromwell Professor of Jurisprudence Political Science at Amherst College, Five College Fortieth Anniversary Professor, and Justice Hugo L. Black Visiting Senior Faculty Scholar at the School of Law, University of Alabama. Former President of the Law and Society Association, the Association for the Study of Law, Culture and the Humanities, and the Consortium of Undergraduate Law and Justice Programs, his writings include* When the State Kills: Capital Punishment and the American Condition and Mercy on Trial: What It Means to Stop an Execution. *With Charles Ogletree he is currently working on a book entitled* When Law Fails: Making Sense of Miscarriages of Justice.

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