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Mitigation, Mercy, and Delay: The Moral Politics of Death Penalty Abolitionists

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MITIGATION, MERCY, AND DELAY: THE MORAL POLITICS OF DEATH PENALTY ABOLITIONISTS

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Introduction

Thirteen years ago, I worked on the Capital Punishment Project of the NAACP Legal Defense & Educational Fund (LDF) representing capital defendants and death row inmates. In the early 1960s, LDF launched a campaign to abolish capital punishment.[1] Led by self-proclaimed "abolitionist" lawyers,[2] the campaign pressed for both procedural reform and substantive repeal of the death penalty.[3] Today, thwarted by a retributive politics clamoring for death in courts and legislatures, the litigation campaign carries on more narrowly, attacking the procedure and application, rather than the substantive immorality, of state-imposed death.

I recall many moments from the year at LDF: the summer heat of a North Carolina prison, the cadences of a Louisiana cooperating attorney, the scratched white walls of death row. But the moment I recall most vividly came at the end of a cold December day upon learning of the imminent death of a client, Robert Wayne Williams, in Angola, Louisi-

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This Article is dedicated to Gary Bellow.

[1] For a history of the LDF abolitionist campaign, see JACK GREENBERG, CRUSADERS IN THE COURTS 440–60 (1994); MICHAEL MELTSNER, CRUEL AND UNUSUAL: THE SUPREME COURT AND CAPITAL PUNISHMENT 60–72 (1973). *See also* HUGO A. BEDAU, THE COURTS, THE CONSTITUTION, AND CAPITAL PUNISHMENT 81–90 (1977); Jack Greenberg, *Capital Punishment as a System*, 91 YALE L.J. 908 (1982); Eric L. Muller, Note, *The Legal Defense Fund's Capital Punishment Campaign: The Distorting Influence of Death*, 4 YALE L. & POL'Y REV. 158 (1985).

[2] By "abolitionists," I mean civil rights and criminal defense lawyers committed to the invalidation of the death penalty. Austin Sarat distinguishes between "old" and "new" abolitionist lawyers. *See* Austin Sarat, *Narrative Strategy and Death Penalty Advocacy*, 31 HARV. C.R.-C.L. L. REV. 353 (1996). Old abolitionists, Sarat observes, oppose the death penalty on substantive, moral grounds. New abolitionists, by contrast, oppose the death penalty on procedural, legal grounds. *Id.*

Because of the instrumentalist orientation shared by "old" and "new" abolitionists, I reject Sarat's sociohistorical distinction. Instead, I use the term "abolitionists" to refer generally to the anti–capital punishment bar. *See* Franklin E. Zimring, *On the Liberating Virtues of Irrelevance*, 27 LAW & SOC'Y REV. 9, 15 (1993) (discussing the significance of empirical evidence documenting the emergence of a capital punishment bar).

[3] *See* GREENBERG, *supra* note 1, at 440–60; MELTSNER, *supra* note 1, at 60–72.

ana.[4] Throughout that long day at LDF, no one held vigil. The work required its own vigilance. When word came of the scheduled execution, no one prayed. The work entailed its own secular prayer. Later, past nightfall, having exhausted hope of clemency or a stay, no one invoked moral community. The work assembled its own community. The next day, no one mourned. The work did not allow it.

Thirteen years ago, I wondered aloud how abolitionists could suffer the pain of witnessing death without consecration. I wondered how they could struggle to forge litigation strategy without hearing or disclosing client moral voice. I wondered how they could sustain their cause without constitutional sanction. I wondered, finally, how they could prevail in their campaign without a wider moral community.

Capital punishment litigation occurs within a pluralist moral community consisting of lawyers and lay advocates, capital clients and their families, legislators, prosecutors, judges, jurors, and executioners. In theory, all of these communities stand accessible to abolitionist moral discourse. In practice, however, many decline to hear or to participate in that discourse. Recoiling from the Williams execution, I wondered how to speak to those silent communities, how to find words to turn away death.

Thirteen years ago I resolved to take up such questions. This Article presents a long-distilled, albeit hesitant and no doubt incomplete, first effort. I confess hesitation at the outset for fear that many in or allied with the anti-capital punishment bar may consider this effort misguided. For twenty years, courts, legislatures, and public opinion have besieged the abolitionist position, accelerating the pace and number of executions. Abolitionists decry this race to death and the incompetence of counsel that mars its spectacle. To raise controversial issues of abolitionist politics under these circumstances may strike some as absurd, akin to Justice Scalia's recent exhortation to the anti–capital punishment bar to "Try harder"[5] in its already tireless struggle to advocate and to secure compe-

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[4] *See* Fay S. Joyce, *One Slayer Executed, with Another to Die Today*, N.Y. TIMES, Dec. 15, 1983, at A22. The Williams litigation is well accounted in the legal record. *See* Williams v. Maggio, 383 So. 2d 369 (La.), 387 So. 2d 598 (La. 1980), *cert. denied sub nom.* Williams v. Louisiana, 449 U.S. 1103, and *reh'g denied*, 450 U.S. 971 (1981); State *ex rel.* Williams v. Blackburn, 396 So. 2d 1249 (La.), Williams v. Blackburn, No. 81-237-B, slip op. (M.D. La.), 649 F.2d 1019 (5th Cir.), *reh'g granted*, 661 F.2d 1020 (5th Cir. 1981), *aff'd on reh'g*, 679 F.2d 381 (5th Cir. 1982), *cert. denied sub nom.* Williams v. Maggio, 463 U.S. 1214, and *reh'g denied*, 463 U.S. 1249 (1983); Williams v. King, 439 So. 2d 1092 (La. 1983); Williams v. King, 573 F. Supp. 525 (M.D. La.), *aff'd* 719 F.2d 729 (5th Cir.) (granting stay of execution), 719 F.2d 730 (5th Cir.) (same), Maggio v. Williams, 464 U.S. 46 (1983) (vacating stay), *cert. denied sub nom.* Williams v. King, 464 U.S. 1027 (1983) (denying stay), State *ex rel.* Williams v. King, 442 So. 2d 473 (La. 1983),722 F.2d 104 (5th Cir. 1983) (same).

[5] United States Supreme Court Official Tr. at 7, McFarland v. Collins, 114 S. Ct. 2568 (1994) (No. 93-6497) (Scalia, J.).

tent counsel for capital defendants and death row inmates. Yet, the call to reflection is compelling, especially in times of crisis.

This Article summons an answer to that call, offering a preliminary reflection on the politics of abolitionist lawyering. By politics, I mean a vision of law practice that both describes the activities and prescribes the norms of representation.[6] For abolitionist lawyers in the post-*Furman*[7] era, the modern era of constitutionalized death,[8] the daily activities of representation are no longer bound up in the pursuit of a nationwide moratorium strategy to halt executions. Instead, lawyers engage in a case-by-case triage strategy to save one life at a time.[9] Put simply, the normative goal is to keep the client alive.[10]

To make the case for life, abolitionists employ the twin strategies of mitigation and delay. During the penalty or sentencing phase of capital trials, lawyers present mitigating evidence of client psycho-social deprivation to the jury in an attempt to explain specific violent acts of criminal lawbreaking and, thus, invite mercy. Likewise, to delay death at post-conviction proceedings, lawyers present and sometimes re-present mitigation-linked evidence of client deprivation in direct state appeals, certiorari petitions, successive state and federal habeas corpus filings, stay requests, and executive clemency pleas. These mitigation-linked pleadings also work to invite mercy. Although intended as supplications of mercy, the strategies of mitigation and delay profoundly shape the moral vision of abolitionist lawyers. Indeed, to post-*Furman* abolitionists, the deprivation histories of penalty phase mitigation and the mitigation-linked calculations of post-conviction delay furnish alternative measures of political and personal accomplishment.[11]

Both the trial and post-conviction contexts of state-imposed death demand that abolitionist lawyers exercise normative judgment. Abolitionists regularly confront judgments, for example, about the content of mitigating evidence at trial and the legitimacy of mitigation-linked claims raised during post-conviction relief proceedings.[12] The norms of mitiga-

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[6] For elaboration on the notion of a practice vision, see William H. Simon, *The Dark Secret of Progressive Lawyering: A Comment on Poverty Law Scholarship in the Post-Modern, Post-Reagan Era*, 48 U. MIAMI L. REV. 1099 (1994) (assailing new poverty law scholars); William H. Simon, *Visions of Practice in Legal Thought*, 36 STAN. L. REV. 469 (1984) (comparing professional and critical views of practice).

[7] Furman v. Georgia, 408 U.S. 238 (1972).

[8] For surveys of death penalty litigation developments in the post-*Furman* era, see Ronald J. Tabak, *The Death of Fairness: The Arbitrary and Capricious Imposition of the Death Penalty in the 1980s*, 14 N.Y.U. REV. L. & SOC. CHANGE 797 (1986); Franklin E. Zimring, *Inheriting the Wind: The Supreme Court and Capital Punishment in the 1990s*, 20 FLA. ST. U. L. REV. 7 (1992).

[9] *See generally* Sarat, *supra* note 2.

[10] *See generally id.*

[11] *See generally id.*

[12] A third, less frequently encountered judgment involves the abolitionist response to

tion, mercy, and delay inform those judgments and dictate the result-oriented politics of instrumentalism that pervades current abolitionist practice.

Instrumentalism expresses a vision of practice animated by claims of purposive and practical advocacy.[13] The claim of purposivism assumes the normative autonomy of lawyers from clients and society.[14] This premise gives lawyers the room and the authority to maneuver outside of client will and societal constraint. The room to maneuver is limited. If the lawyer ventures too far beyond client intent or societal convention, he risks illegitimacy. Still, lawyer-client decisional boundaries generally lie unclear and client-delegated authority normally issues broadly. Vagueness and overbreadth thus combine to enable abolitionist lawyers to exercise discretion in making judgments of litigation strategy independent of clients, the state, and society.

The claim of practicality assumes that strategic litigation judgments may be reached through a lawyer's contextual application of neutral, problem-solving skills that purport to operate objectively, generalizing differences of client race and class in producing mitigation evidence at trial and mitigation-linked evidence on post-conviction review. Robin West points to evidentiary production of this sort in the defense narrative of a capital defendant's "life story."[15] This narrative implies neutral and objective findings of psychosocial deprivation, assigning criminal blame and responsibility to societal causes external to the capital defendant. For West, that assignment minimizes, even excludes, moral responsibility for criminality.[16] Interweaving the norms of community, connection, and responsibility, West emphasizes "the very real need to assign and then

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the decision of a capital defendant or a death row inmate to elect voluntary execution. The literature discussing the nature of this judgment is sparse. *See* Kathleen L. Johnson, Note, *The Death Row Right to Die: Suicide or Intimate Decision?*, 54 S. CAL. L. REV. 575 (1981); G. Richard Strafer, *Volunteering for Execution: Competency, Voluntariness and the Propriety of Third Party Intervention*, 74 J. CRIM. L. & CRIMINOLOGY 860 (1983); Welsh S. White, *Defendants Who Elect Execution*, 48 U. PITT. L. REV. 853 (1987); Richard C. Dieter, Note, *Ethical Choices for Attorneys Whose Clients Elect Execution*, 3 GEO. J. LEGAL ETHICS 799 (1990).

[13] In a prior work, I engrafted the notion of instrumentalism onto a vision of law practice carried out in the context of poverty. *See* Anthony V. Alfieri, *Impoverished Practices*, 81 GEO. L.J. 2567, 2619–39 (1993) (discussing the formal/instrumental tension in the politics of poverty law practice).

[14] The claim of purposivism also assumes the relative autonomy of law and lawyers from the political state. The premise of relative autonomy sees law and lawyers pushed internally by the imperatives of professional ideology and legal reasoning, and pulled externally by the forces of politics, society, and economics. Out of this tension emerges a middle ground or space open to doctrinal evolution and to lawyer maneuver. Typically, the evolution is incremental and the maneuver is small in scale.

[15] Robin West, *Narrative, Responsibility and Death: A Comment on the Death Penalty Cases from the 1989 Term*, 1 MD. J. CONTEMP. LEGAL ISSUES 161, 167 (1990).

[16] *Id.* at 174.

acknowledge both individual and societal responsibility for the consequences of actions."[17] Imbued by the narrative of societal deprivation, the claim of practicality offers an impoverished interpretation of moral responsibility for criminality.

Instrumentalist advocacy fails to strengthen the moral force of the abolitionist cause. Although abolitionists oppose state-sanctioned violence, they yield to a politics of instrumentalism in legal advocacy. In this Article, I argue that lawyers waging post-*Furman* abolitionist campaigns sacrifice the moral voice of capital clients to the politics of instrumentalism, and therefore silence the empathic narrative of moral community.

The shift from moral descant to legal instrumentalism occupies two ongoing historical waves or movements in the post-*Furman* abolitionist campaign. Across individual cases, the movements appear coextensive, at other times sequential. In the first wave, abolitionists express their moral opposition through the instrumental strategies of mitigation and mitigation-linked delay situated within the evolving jurisprudence of the Eighth Amendment. In the second wave, they move to legitimize mitigation and delay by means of alternative constitutional and ethical inscription, entrenching the strategies in a Sixth Amendment professional commandment, and failing that, a professional ethic of effective assistance of capital counsel.

Both mitigation and delay strategies silence the moral voice and community of the capital client. Silencing permits a retributive politics of morality to infect judicial, legislative, and media treatment of civil rights and criminal laws, thereby weakening the constitutional and statutory protections that shield capital defendants and death row inmates from cruel and unusual punishment. In civil rights law, this retributive politics generates arbitrariness and inequality. In criminal law, it engenders brutality and death. To reverse these trends, I urge abolitionist lawyers to reconceive a client/community–centered politics of morality tailored to the context of death penalty litigation.

The Article is divided into three parts. Part I describes the first wave of the abolitionist campaign to transform moral politics into the instrumental strategies of mitigation and delay. Section A discusses the trial strategy of mitigation. Section B considers the post-conviction strategy of delay.

Part II examines the second wave of the abolitionist crusade to configure moral politics into instrumental strategies of effective assistance of counsel in capital cases. Section A explores the effort to constitutionalize the jurisprudence of effective assistance. Section B analyzes the attempt to professionalize that jurisprudence in the form of an ethical canon. Section

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[17] *Id.* at 167.

C evaluates the tendency of abolitionist ethical judgments to silence the moral voice of capital defendants and death row inmates at trial and on post-conviction review.

Part III proposes reconstructing the moral politics of abolitionist litigation under the norms of moral agency and community. Section A contemplates the limits and possibilities of moral discourse in capital cases. Section B exposes the elements of moral agency within the victimization-agency dichotomy embedded in the strategies of mitigation and delay. Section C encourages a vision of moral community in abolitionist practice.

I. First Wave Moral Politics: Instrumental Strategies of Mitigation and Delay

Understanding the moral politics of current abolitionist litigation, both descriptively and normatively, requires an understanding of specific practice contexts.[18] In the post-*Furman* era, abolitionists embrace a moral politics of form rooted in the instrumental strategies of mitigation and delay. This politics of form and tactical maneuver omits the substantive import of moral agency and community. In this Section, I trace the first wave of abolitionist instrumental practices in trial and post-conviction proceedings.

A. The Trial Strategy of Mitigation

The abolitionist trial strategy of mitigation arises out of the constitutional jurisprudence of the Eighth Amendment. This jurisprudence breaks down into two doctrinal strands: channeling and individualization.[19] Post-*Furman* courts and legislatures have translated these doctrines into two dominant state capital sentencing schemes: weighing and non-weighing.[20]

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[18] For illustrations of context-specific analysis, see GERALD P. LÓPEZ, REBELLIOUS LAWYERING: ONE CHICANO'S VISION OF PROGRESSIVE LAW PRACTICE (1992) (ethnicity); Peggy C. Davis, *Contextual Legal Criticism: A Demonstration Exploring Hierarchy and "Feminine" Style*, 66 N.Y.U. L. REV. 1635 (1991) (gender); Lucie E. White, *Subordination, Rhetorical Survival Skills, and Sunday Shoes: Notes on the Hearing of Mrs. G.*, 38 BUFF. L. REV. 1 (1990) (race/class).

[19] Carol and Jordon Steiker describe the tension between channeling and individualization as "the central dilemma in post-Furman capital punishment law." Carol S. Steiker & Jordon M. Steiker, *Sober Second Thoughts: Reflections on Two Decades of Constitutional Regulation of Capital Punishment*, 109 HARV. L. REV. 355, 382 (1995).

[20] On the character of weighing and non-weighing schemes, see Scott E. Sundby, *The* Lockett *Paradox: Reconciling Guided Discretion and Unguided Mitigation in Capital Sentencing*, 38 UCLA L. REV. 1147 (1991); Srikanth Srinivasan, Note, *Capital Sentencing Doctrine and the Weighing-Nonweighing Distinction*, 47 STAN. L. REV. 1347 (1995).

Weighing schemes,[21] originally upheld in *Gregg v. Georgia*[22] and its companion cases,[23] embody the doctrine of guided discretion. State statutes guide, or channel, discretion by suitably directing the sentencer to balance aggravating and mitigating circumstances in determining the eligibility of a defendant for death.[24] Non-weighing schemes, initially approved in *Woodson v. North Carolina*[25] and *Lockett v. Ohio*,[26] incorporate the doctrine of individualized sentencing.[27] *Woodson* linked the requirement of individualization to the consideration of mitigating factors.[28] *Lockett* amplified this requirement, recognizing a defendant's right to present and a sentencer's duty to consider mitigating evidence relating to any aspect of a defendant's character or record.[29] Extending *Lockett*'s mandate, *Penry v. Lynaugh*[30] added that mitigating evidence may include reference to a defendant's mental disorder, physical abuse, and social deprivation.[31]

The moral and strategic purpose of mitigation evidence is to evoke mercy in the jury. Abolitionists relate mitigation and mercy to the presentation of a human narrative.[32] Humanizing the voice of the capital

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[21] Weighing statutory schemes predominate in 21 of 36 state death penalty jurisdictions. *See* Stephen Hornbuckle, Note, *Capital Sentencing Procedure: A Lethal Oddity in the Supreme Court's Case Law*, 73 TEX. L. REV. 441, 448 n.38 (1994).

[22] 428 U.S. 153 (1976).

[23] Roberts v. Louisiana, 428 U.S. 325 (1976); Woodson v. North Carolina, 428 U.S. 280 (1976); Jurek v. Texas, 428 U.S. 262 (1976); Proffitt v. Florida, 428 U.S. 242 (1976).

[24] For an analysis of channeling schemes and jury discretion, see James Luginbuhl & Julie Howe, *Discretion in Capital Sentencing Instructions: Guided or Misguided?*, 70 IND. L.J. 1161 (1995).

[25] 428 U.S. 280 (1976).

[26] 438 U.S. 586 (1978). For an explanation of *Lockett*'s importance, see Randy Hertz & Robert Weisberg, *In Mitigation of the Penalty of Death:* Lockett v. Ohio *and the Capital Defendant's Right to Consideration of Mitigating Circumstances*, 69 CAL. L. REV. 317 (1981).

[27] *See* Ronald J. Mann, *The Individualized-Consideration Principle and the Death Penalty as Cruel and Unusual Punishment*, 29 HOUS. L. REV. 493 (1992); Carol S. Steiker & Jordan M. Steiker, *Let God Sort Them Out? Refining the Individualization Requirement in Capital Sentencing*, 102 YALE L.J. 835 (1992).

[28] *Woodson*, 428 U.S. at 304 (describing "the character and record of the individual offender and the circumstances of the particular offense as a constitutionally indispensable part of the process of inflicting the penalty of death").

[29] *Lockett*, 438 U.S. at 604; *accord* Eddings v. Oklahoma, 455 U.S. 104 (1982); *see also* JAMES W. MARQUART ET AL., THE ROPE, THE CHAIR, AND THE NEEDLE: CAPITAL PUNISHMENT IN TEXAS, 1923–1990 172 (1994) (asserting that the "major source" of juror discretion stems from the assessment of the defendant's character and violent propensities).

[30] 492 U.S. 302 (1989).

[31] *Id.* at 307–10, 328; *see also* Peggy M. Tobolowsky, *What Hath* Penry *Wrought?: Mitigating Circumstances and the Texas Death Penalty*, 19 AM. J. CRIM. L. 345, 355–64 (1992) (evaluating constitutional adequacy of Texas death penalty statutory provisions regulating consideration of mitigating circumstances).

[32] *See* Robert Weisberg, *Deregulating Death*, 1983 SUP. CT. REV. 305, 361; *see also* Albert L. Vreeland, Note, *The Breath of the Unfee'd Lawyer: Statutory Fee Limitations and Ineffective Assistance of Counsel in Capital Litigation*, 90 MICH. L. REV. 626 (1991). Vreeland explains:

defendant, they contend, acts to counter the prosecutorial image of an "irredeemably evil person"[33] preternaturally "hostile to civilized values" and "devoid of human sensibilities."[34] To convey this image, the prosecutor must call up images of defendant-inflicted violence,[35] depicting a "sociologically simple world of good and evil" where "responsibility and desert" count.[36] Cultural demonization affords defense counsel an opportunity[37] to humanize the capital defendant.[38]

The presentation of mitigating evidence to humanize the capital client acquires a common form and substance under the channeling and individualization strands of Eighth Amendment death penalty jurisprudence. At trial, during the penalty phase, mitigating evidence usually inhabits the form of story recited on behalf of the defendant by family, friends, neighbors, teachers, and mental health professionals (psychiatrists, psychologists, and social workers). Borrowing from the social science literature of victimization, the story characterizes a defendant's life history as one of physical abuse[39] and mental disorder.[40]

> Humanizing the client requires research into personal history from birth to trial, interviewing family, neighbors, teachers, ministers, employers and anyone with significant contact with the defendant. These witnesses must be presented to the jury to tell the defendant's story, to make sense of the client's life and to explain how he came to commit the crime.

Id. at 649.

[33] Weisberg, *supra* note 32, at 361.

[34] *See* Stephen J. Schulhofer, *The Trouble with Trials; the Trouble with Us*, 105 YALE L.J. 825, 852 (1995) (reviewing GEORGE P. FLETCHER, WITH JUSTICE FOR SOME: VICTIMS' RIGHTS IN CRIMINAL TRIALS (1995)).

[35] *See* Austin Sarat, *Violence, Representation, and Responsibility in Capital Trials: The View from the Jury*, 70 IND. L.J. 1103, 1122 (1995).

[36] Austin Sarat, *Speaking of Death: Narratives of Violence in Capital Trials*, 27 LAW & SOC'Y REV. 19, 51 (1993).

[37] A similar opportunity arises in clemency proceedings, albeit with growing infrequency. *See* MARQUART ET AL., *supra* note 29, at 102; Hugo A. Bedau, *The Decline of Executive Clemency in Capital Cases*, 18 N.Y.U. REV. L. & SOC. CHANGE 255 (1990/1991).

[38] Stephen Schulhofer comments:

> Cultural demonization of the criminal offender provides the emotional energy to condemn without remorse and eventually to pull the lethal switch, but it also leaves a large opening for defense counsel, because that picture of the generic Mobster or Mugger seldom corresponds to the facts of the particular case. If a guilty criminal is defined as a moral monster who deserves execution or isolation from human society forever, then the individual on trial—a three-dimensional person with human frailties and human needs—probably will not fit the picture . . . .

Schulhofer, *supra* note 34, at 852.

[39] *See* Sarat, *supra* note 36, at 39–47; *see also* WELSH S. WHITE, THE DEATH PENALTY IN THE EIGHTIES: AN EXAMINATION OF THE MODERN SYSTEM OF CAPITAL PUNISHMENT 51–74 (1987).

[40] On the use of mental disorders as mitigating evidence, see William Green, *Capital Punishment, Psychiatric Experts and Predictions of Dangerousness*, 13 CAPITAL U. L.

Victimization theory provides defense counsel with "a causal, determinist explanation" of the defendant's crime.[41] Making an evidentiary record of abuse, neglect, and disorder expands the field of material fact, effectively indicting the defendant's family and social history.[42] When effective, determinist theory builds a "narrative chain" of events chronicling a defendant's abusive childhood, delinquent youth, and adult criminal behavior.[43] To the extent that this narrative helps explain the impact of life events on a defendant's conduct, social scientists suggest that it may serve "to justify compassion, sympathy, and mercy by jurors."[44] In this way, mitigation evidence seeks to introduce the quality of mercy into capital sentencing.

Doubtless, the mitigation strategy of humanizing the capital defendant through a narrative of victimization oftentimes persuades juries to forego the sentence of death. Nonetheless, in a significant number of cases, the strategy proves fruitless. Full explication of this result requires a theory of jury decision making[45] well beyond the scope of this inquiry. At a minimum, the theory must ascertain whether juries understand victimization-based mitigation evidence,[46] and, if so, whether they possess the ability and willingness to find that such evidence provides the moral justification for mercy or devolves into a moral excuse deserving of death.[47] Linking, by empirical or anecdotal evidence, a sentence of death to a finding of moral excuse warrants reconsideration of the efficacy of

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REV. 533 (1984); James Liebman & Michael Shephard, *Guiding Sentencer Discretion Beyond the "Boilerplate": Mental Disorder as a Mitigating Factor*, 66 GEO. L.J. 757 (1978); Joshua N. Sondheimer, Note, *A Continuing Source of Aggravation: The Improper Consideration of Mitigating Factors in Death Penalty Sentencing*, 41 HASTINGS L.J. 409, 418–29 (1990); *cf.* EMILY F. REED, *PENRY* PENALTY: CAPITAL PUNISHMENT AND OFFENDERS WITH MENTAL RETARDATION 17, 42–43 (1993) (discussing mental retardation as a mitigating factor).

[41] Weisberg, *supra* note 32, at 361.

[42] *Id.*

[43] *Id.* at 381; *see also* Dorothy O. Lewis et al., *Psychiatric, Neurological, and Psychoeducational Characteristics of 15 Death Row Inmates in the United States*, 143 AM. J. PSYCHIATRY 838 (1986).

[44] Mark Costanzo & Julie Peterson, *Attorney Persuasion in the Capital Penalty Phase: A Content Analysis of Closing Arguments*, 50 J. SOC. ISSUES 125, 134 (1994).

[45] For studies of capital jury decision making, see William J. Bowers, *The Capital Jury Project: Rationale, Design, and Preview of Early Findings*, 70 IND. L.J. 1043 (1995); Joseph L. Hoffmann, *Where's the Buck?—Juror Misperception of Sentencing Responsibility in Death Penalty Cases*, 70 IND. L.J. 1137 (1995).

[46] *See* Craig Haney, *Taking Capital Jurors Seriously*, 70 IND. L.J. 1223, 1227 (1995) (expressing skepticism that jurors understand either the significance of mitigating evidence or its proper use in reaching a verdict); *see also* Peter Meijes Tiersma, *Dictionaries and Death: Do Capital Jurors Understand Mitigation?*, 1995 UTAH L. REV. 1.

[47] Marla Sandys reports that the majority of capital jurors make guilt and penalty decisions concurrently, prior to the penalty phase of the trial. Concurrent decision making not only vitiates the purpose of bifurcated proceedings, but "also precludes capital jurors from basing their sentencing decisions on an evaluation of aggravating and mitigating circumstances." *See* Marla Sandys, *Cross-Overs—Capital Jurors Who Change Their Minds*

the first strategic prong of abolitionist politics. The second prong fares no better.

B. The Post-Conviction Strategy of Delay

At state and federal post-conviction proceedings, deprived of a constitutional guarantee of counsel[48] and governed by the doctrine of effective assistance,[49] abolitionists adopt a strategy of delay. Deploying collateral procedural devices, primarily successive habeas corpus and stay petitions, they struggle to slow the execution process[50] in order to discover evidence sufficient to obtain a new trial or a lesser sentence.[51] Delay in this respect is attributable to an effort to retry, supplement, or improve mitigation evidence.

Overall, capital proceedings reflect two preponderant forms of delay: institutional and strategic. Institutional delay stems from an abolitionist lawyer's effort to discharge his defensive duty to compel the prosecution

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About the Punishment: A Litmus Test for Sentencing Guidelines, 70 IND. L.J. 1183, 1220–21 (1995).

[48] *See* Murray v. Giarratano, 492 U.S. 1 (1989); Pennsylvania v. Finley, 481 U.S. 551 (1987). *But see* Michael Mello, *Facing Death Alone: The Post-Conviction Attorney Crisis on Death Row*, 37 AM. U. L. REV. 513 (1988); Michael Millemann, *Capital Post-Conviction Petitioners' Right to Counsel: Integrating Access to Court Doctrine and Due Process Principles*, 48 MD. L. REV. 455 (1989); Alice McGill, Comment, Murray v. Giarratano*: Right to Counsel in Post-Conviction Proceedings in Death Penalty Cases*, 18 HASTINGS CONST. L.Q. 211 (1990).

[49] Strickland v. Washington, 466 U.S. 668, 697 (1984). *But see* Lissa Griffin, *The Right to Effective Assistance of Appellate Counsel*, 97 W. VA. L. REV. 1, 32–35, 36–37 (1994); Ira P. Robbins, *Toward a More Just and Effective System of Review in State Death Penalty Cases: A Report Containing the American Bar Association's Recommendations Concerning Death Penalty Habeas Corpus and Related Materials from the American Bar Association Criminal Justice Section's Project on Death Penalty Habeas Corpus*, 40 AM. U. L. REV. 1, 62–92 (1990). *See generally* Symposium, *Toward a More Effective Right to Assistance of Counsel*, 58 LAW & CONTEMP. PROBS. 1–138 (1995).

[50] *See* Alex Kozinski & Sean Gallagher, *Death: The Ultimate Run-On Sentence*, 46 CASE W. RES. L. REV. 1, 7 (1995) ("In a death case involving a first habeas petition, it is fairly typical to consume a year on the appeal, although two years or more certainly is not unheard of."); *see also* Joseph B. Ingle, *Final Hours: The Execution of Velma Barfield*, 23 LOY. L.A. L. REV. 221 (1989); Daniel E. Lungren & Mark L. Krotoski, *Public Policy Lessons from the Robert Alton Harris Case*, 40 UCLA L. REV. 295 (1992).

[51] *See* Laurin A. Wollan, Jr., *Representing the Death Row Inmate: The Ethics of Advocacy, Collateral Style*, *in* FACING THE DEATH PENALTY: ESSAYS ON A CRUEL AND UNUSUAL PUNISHMENT 92, 107 (Michael L. Radelet ed., 1989). Wollan remarks:

> In death cases, at their very end, *any* amount of time, even an hour, might yield a gain: information or witnesses may come forth, a decision may be rendered by another court, a political change may occur in the system (such as appointment of a new judge). Any one of these changes may happen within hours or days or weeks of the inception of such a period of extension, thereby fundamentally altering substantive or procedural advantages.

Id. at 107.

to establish every element of its case.[52] Ethical rules hold that this duty regulates both pretrial and trial proceedings.[53] To abolitionists, the same duty applies to appellate and post-conviction proceedings. Embellishing this duty, they strive to re-try the capital case to uncover evidence of error, omission, or misconduct. Post-trial delay in this sense exists as an outgrowth of effective, quality criminal defense representation.[54]

Strategic delay derives from an abolitionist lawyer's alternative attempt to meet a heightened duty of advocacy[55] through the filing of multiple, and sometimes repetitive, habeas petitions and appeals. The filing of successive state and federal petitions generates a recurrent cycle of execution dates, applications, and stays.[56] The bid to raise "some issue"[57] to delay the execution, however, may conflict with a lawyer's competing obligation to demonstrate a legitimate basis[58] for procedural maneuvers that intentionally cause delay.[59]

The charge of illegitimacy, couched mainly in terms of frivolousness and manipulation, resounds with increasing frequency and vehemence in

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[52] MODEL RULES OF PROFESSIONAL CONDUCT Rule 3.1 (1983); *see also* CANONS OF PROFESSIONAL ETHICS Canon 5 (1908) ("Having undertaken [the defense of a person accused of a crime], the lawyer is bound, by all fair and honorable means, to present every defense that the law of the land permits, to the end that no person may be deprived of life or liberty, but by due process of law.").

[53] *See, e.g.*, ABA GUIDELINES FOR THE APPOINTMENT AND PERFORMANCE OF COUNSEL IN DEATH PENALTY CASES Guideline 1.1 cmt., 2.1 cmt. (Feb. 1989); DISTRICT OF COLUMBIA COURT RULES ANNOTATED Rule 3.1 (1995) (applying duty to contested fact-finding hearing and trial).

[54] STANDARDS FOR CRIMINAL JUSTICE § 4-1.2(b) (1994).

[55] Section 4-1.2(c) of the *Standards for Criminal Justice* provides: "Since the death penalty differs from other criminal penalties in its finality, defense counsel in a capital case should respond to this difference by making extraordinary efforts on behalf of the accused." STANDARDS FOR CRIMINAL JUSTICE § 4-1.2(c) (1994); *see also* ABA GUIDELINES FOR THE APPOINTMENT AND PERFORMANCE OF COUNSEL IN DEATH PENALTY CASES (1989); Andrea D. Lyon, *Defending the Death Penalty Case: What Makes Death Different?*, 42 MERCER L. REV. 695 (1991).

[56] *See* Joseph Hoffmann, *Starting from Scratch: Rethinking Federal Habeas Review of Death Penalty Cases*, 20 FLA. ST. U. L. REV. 133, 146 (1992). Hoffmann describes the ongoing cycle of successive habeas petitions as the "hallmark" of post-conviction litigation. He reports:

> [T]he State sets an execution date, even if it knows that the execution will not actually take place, because this is the only way to make the prisoner use up his federal claims by filing a habeas petition and requesting a stay. After the petition is filed, the habeas court grants a stay so it will have sufficient time to resolve the claims. If the court rejects the claims, the State sets another execution date, and the cycle resumes.

Id. at 146.

[57] *See* Kozinski & Gallagher, *supra* note 50, at 8 (discussing "high gear" litigation efforts to "forestall" execution dates).

[58] STANDARDS FOR CRIMINAL JUSTICE § 4-1.3(d) (1994).

[59] *See* Wollan, *supra* note 51, at 106 (maintaining that "the interest of the client in a capital case is often not in acceleration but in *delay*").

Congress and the federal judiciary. Distinguishing illegitimate claims and parsing frivolous issues compel lawyers to engage in vexing categorical definition and delicate line-drawing, yet congressional and judicial critics demand absolutist solutions to post-conviction delay. Congressional criticism centers on the liberality of rules controlling state and federal habeas practice, particularly the timing and repetition of filings.[60] Judicial reproach emphasizes "abusive delay" and "last-minute attempts to manipulate the judicial process."[61] Judges cite a "pattern of calculated efforts to frustrate valid judgments"[62] and to block executions at great time and expense.[63] Denouncing the dilatory filing of successive habeas petitions as a "regrettable fact"[64] typical of post-conviction capital proceedings, they upbraid defense counsel for making a "mockery" of the criminal justice system.[65]

Abolitionists concede that post-conviction litigation "is uniquely rough and tumble, with many of the trappings of judicial decorum suspended."[66] Moreover, judges acknowledge that "some last minute claims are 'sham.'"[67] Neither admission aids in resolving the disputed legitimacy or merit of a post-conviction appeal of constitutional claims taken "at the last moment"[68] to stay a scheduled execution date. Even when short-lived, the stay serves to "buy the inmate time, sometimes as little as five hours and sometimes as much as years."[69] The stay also may serve to introduce potentially favorable doctrinal and legislative developments in various state and federal fora.[70]

For abolitionists, the problem of last-ditch appeals is exacerbated by the fact-specific nature of capital cases. This particularistic character gives

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[60] Since 1986, congressional sponsors have introduced more than 80 bills proposing a statute of limitations for federal habeas corpus petitions. *See* Lonchar v. Thomas, 64 U.S.L.W. 4245, 4250 app. (Apr. 1, 1996); *see also* Ad Hoc Committee on Federal Habeas Corpus in Capital Cases, *Report on Habeas Corpus in Capital Cases*, 45 CRIM. L. REP. 3239 (1989).

[61] Gomez v. United States District Court, 112 S. Ct. 1652, 1653 (1992) (per curiam).

[62] Gray v. Lucas, 463 U.S. 1237, 1240 (1983) (Burger, C.J., concurring).

[63] *See* McCleskey v. Zant, 111 S. Ct. 1454, 1469 (1991).

[64] Sawyer v. Whitley, 112 S. Ct. 2514, 2520 n.7 (1992); *see also* Franklin v. Lynaugh, 860 F.2d 165, 166 (5th Cir. 1988) (describing counsel's "[d]eliberate withholding of claims until the eleventh hour" to be a "standard tactic" in post-conviction capital proceedings).

[65] Coleman v. Balkcom, 451 U.S. 949, 958 (1981) (Rehnquist, J., dissenting).

[66] Michael Mello, *Another Attorney for Life*, *in* FACING THE DEATH PENALTY: ESSAYS ON A CRUEL AND UNUSUAL PUNISHMENT, *supra* note 51, at 81.

[67] Stephen Reinhardt, *The Supreme Court, The Death Penalty, and the* Harris *Case*, 102 YALE L.J. 205, 220 (1992).

[68] *Id.* at 217–18.

[69] Mello, *supra* note 66, at 85. The strategic logic behind the filing of the appeal hinges on the likely issuance of a stay to allow reasoned consideration of the merits of the claims. Cast routinely in the form of a successive habeas corpus petition, the appeal may assert the defendant's innocence, allude to newly discovered evidence, or introduce innovative scientific procedures for evaluating past or proffered evidence.

[70] Wollan, *supra* note 51, at 104. Wollan comments: "In a field as fast-moving as death

rise to protracted disputes over evidence gathering involving matters of admissibility, preclusion, and the quality of evidentiary argument.[71] By pressing these disputes on appeal, abolitionists "end up re-trying facts, arguing that little mistakes in particular factual contexts might have shifted the perception of the overall factual context."[72] Mistakes generate inferences of prejudice, thereby undermining the reliability of the verdict and the sentence of the trial court below.

Although historically useful in forestalling and sometimes averting execution, the strategy of delay seems to be deteriorating in effectiveness. In fact, this second strategic prong of abolitionist politics appears increasingly counterproductive, provoking both congressional antipathy and judicial animosity. This collective enmity is nowhere more pronounced than in the areas of federal habeas corpus[73] and federal legal assistance.[74] Lost amid this procedural rancor is the moral substance of abolitionist claims. The transformation of moral politics into the instrumental politics of strategic mitigation and delay contributes to this loss. The next Section assesses a second wave of instrumental strategies to salvage that loss by encoding mitigation and delay in an alternative constitutional and ethical discourse.

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penalty law, it is sometimes difficult to distinguish today's 'good faith argument' from tomorrow's 'frivolous' argument, and vice versa. What today seems absurd may persuade a judge tomorrow or another judge down the corridor today." *Id.*

[71] *See* Robert Weisberg, *Who Defends Capital Defendants?*, 35 SANTA CLARA L. REV. 535, 539 (1995).

[72] *Id.* at 540.

[73] On April 24, 1996, Congress enacted legislation reforming federal habeas corpus procedures under the Anti-Terrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, 110 Stat. 1214 (codified at 28 U.S.C. §§ 2244, 2253, 2261–2266 (1996)). Title I of the Act limits the filing, appeal, and review of habeas petitions in captial cases.

On May 3, 1996, in Felker v. Turpin, 64 U.S.L.W. 3740 (U.S. May 3, 1996) (May 3, 1996) (mem.), the Supreme Court granted a stay of execution and a writ of certiorari to review the constitutionality of Title I of the Act.

For a prior history of the judicial dismantlement of habeas corpus protections, see Barry Friedman, *Failed Enterprise: The Supreme Court's Habeas Reform*, 83 CAL. L. REV. 485 (1995); James S. Liebman, *Apocalypse Next Time?: The Anachronistic Attack on Habeas Corpus/Direct Review Parity*, 92 COLUM. L. REV. 1997 (1992); James S. Liebman, *More than "Slightly Retro": The Rehnquist Court's Rout of Habeas Corpus Jurisdiction in* Teague v. Lane, 18 N.Y.U. REV. L. & SOC. CHANGE 537 (1990/1991).

[74] Congress recently voted to defund federal Community Defender Organizations created by statute in 1988. *See* H.R. 3019, 104th Cong., 2d Sess. (1996) (declaring funds unavailable after Apr. 1, 1996); 142 CONG. REC. H1958 (daily ed. Mar. 7, 1996) (same); 142 CONG. REC. S2441, 2450 (daily ed. Mar. 20, 1996) (same). Congress created these organizations to provide representation, assistance, information, and other related services to eligible persons and appointed attorneys in connection with federal habeas corpus proceedings commenced to challenge state capital convictions. *See* 18 U.S.C. § 3006A (1995).

II. Second Wave Moral Politics: Instrumental Strategies of Effective Assistance

The second wave of the abolitionist campaign to transform moral politics into an instrumental politics of strategic mitigation and delay occurs through the medium of an alternative constitutional and ethical discourse. At issue is the meaning of the Sixth Amendment and the nature of effective legal assistance in capital cases. Surveying the ventured transformation of constitutional and ethical realms uncovers the tendency of abolitionist judgments to silence the moral voice of capital defendants and death row inmates.

A. Constitutionalizing Effective Assistance

The abolitionist strategy of establishing an affirmative duty of counsel under the Eighth Amendment to present mitigation evidence at trial[75] and to delay post-conviction proceedings in order to recapitulate or supplement mitigation-linked evidence collapses under the Sixth Amendment jurisprudence of effective legal assistance in capital cases. Abolitionists contend that the "quality" of counsel, rather than the crime itself, largely determines the imposition of the death penalty.[76] Unfortunately, they find incompetent representation by capital counsel to be pervasive.[77]

The literature of the abolitionist bar indicates widespread constitutional condemnation of the quality of legal assistance in capital cases.[78]

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[75] Abolitionists mention that the strategy of mitigation applies to both the guilt and penalty phases of capital proceedings. *See* Gary Goodpaster, *The Adversary System, Advocacy, and Effective Assistance of Counsel in Criminal Cases*, 14 N.Y.U. REV. L. & SOC. CHANGE 59 (1986). Goodpaster cautions:

> A capital case defense attorney, who tries the capital case guilt phase without regard to its potential effects on the penalty phase trial, may effectively condemn his client to a death sentence. Such an attorney is not aware that some guilt phase defenses are seriously inconsistent with an affirmative penalty phase case for life.

Id. at 84–85.

[76] Stephen B. Bright, *Counsel for the Poor: The Death Sentence Not for the Worst Crime but for the Worst Lawyer*, 103 YALE L.J. 1835, 1836 (1994).

[77] *Id.* at 1837. Bright states: "[A]a large part of the death row population is made up of people who are distinguished by neither their records nor the circumstances of their crimes, but by their abject poverty, debilitating mental impairments, minimal intelligence, and the poor legal representation they received." *Id.* at 1840.

[78] *See* Vivian Berger, *The Chiropractor as Brain Surgeon: Defense Lawyering in Capital Cases*, 18 N.Y.U. REV. L. & SOC. CHANGE 245 (1991); David R. Dow, Teague *and Death: The Impact of Current Retroactivity Doctrine on Capital Defendants*, 19 HASTINGS CONST. L.Q. 23, 50–72 (1991); Jordan Steiker, *The Long Road Up from Barbarism: Thurgood Marshall and the Death Penalty*, 71 TEX. L. REV. 1131, 1155–57 (1993); Symposium, *Politics and the Death Penalty: Can Rational Discourse and Due Process Survive the Perceived Political Pressure?*, 21 FORDHAM URB. L.J. 239, 283–84

Abolitionists buttress their denunciations with evidence of inadequate state and federal funding,[79] bureaucratic disincentive,[80] meager fee compensation,[81] and deficient lawyering.[82] Yet, the highly deferential standard of effective representation announced in *Strickland v. Washington*[83] accords defense counsel a strong presumption that his conduct at trial or sentencing lies within the wide range of reasonable professional assistance.[84] Overcoming that presumption requires a showing that counsel's representation fell below an objective standard of reasonableness prejudicial to a just and reliable sentencing result.[85]

Under *Strickland*, the proper measure of performance in representation refers to a standard of reasonableness appraised under prevailing professional norms.[86] These norms purportedly preserve "the ability of counsel to make independent decisions about how to conduct the defense."[87] Because that independence is constitutionally protected, counsel consequently enjoys wide latitude in making "tactical" decisions.[88] Such leeway renders the strategic choices and judgments of counsel "virtually unchallengeable."[89]

(1994); Ivan K. Fong, Note, *Ineffective Assistance of Counsel at Capital Sentencing*, 39 STAN. L. REV. 461 (1987).

[79] *See* WILLIAM J. BOWERS, LEGAL HOMICIDE: DEATH AS PUNISHMENT IN AMERICA, 1864–1982 337, 348–53 (1984); Ruth E. Friedman & Bryan A. Stevenson, *Solving Alabama's Capital Defense Problems: It's a Dollars and Sense Thing*, 44 ALA. L. REV. 1 (1992).

[80] *See* Stephen B. Bright, *Discrimination, Death, and Denial: The Tolerance of Racial Discrimination in Infliction of the Death Penalty*, 35 SANTA CLARA L. REV. 433, 468 (1995) (citing public defender's fear of incurring race-based community hostility); Panel Discussion, *The Death of Fairness? Counsel Competency and Due Process in Death Penalty Cases*, 31 HOUS. L. REV. 1105, 1117 (1994) (David R. Dow, noting "systematic pressure not to litigate aggressively" in order to secure future appointments); *see also* Steiker & Steiker, *supra* note 19, at 399 (commenting that state attorneys appointed under voluntary assignment schemes "are frequently underfunded, inexperienced, unsympathetic to their clients, and thoroughly incapable of mounting an effective defense during either the guilt or punishment phases of the capital trial").

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

[82] *See* Stephen B. Bright, *Death by Lottery—Procedural Bar of Constitutional Claims in Capital Cases Due to Inadequate Representation of Indigent Defendants*, 92 W. VA. L. REV. 679, 680 (1990); Stephen B. Bright, *In Defense of Life: Enforcing the Bill of Rights on Behalf of Poor, Minority and Disadvantaged Persons Facing the Death Penalty*, 57 MO. L. REV. 849, 858 (1992); Bruce A. Green, *Lethal Fiction, The Meaning of "Counsel" in the Sixth Amendment*, 78 IOWA L. REV. 433, 491 (1993).

[83] 466 U.S. 668 (1984).

[84] *Id.* at 689.

[85] *See id.* at 687–88, 692–96.

[86] *Id.* at 688.

[87] *Id.* at 686.

[88] *Id.* at 689; *see* Green, *supra* note 82, at 502 n.284 (explaining that "decisions about the content of opening statements and summations, about what evidence to introduce, about what objections to make, and about how to conduct cross-examination, are presumed to be strategic").

[89] *Strickland*, 466 U.S. at 690; *see* Bright, *supra* note 76, at 858; Richard Klein, *The*

Nevertheless, abolitionists challenge *Strickland*'s presumption of effective assistance.[90] Rejecting the teaching that "the purpose of the effective assistance guarantee of the Sixth Amendment is not to improve the quality of legal representation,"[91] they ratchet up the *Strickland* standard of reasonableness to require the development and presentation of mitigating evidence at trial,[92] even urging a policy of open admissibility to gain lesser sentences.[93] Federal and state courts, however, ordinarily rebuff claims of ineffective assistance judged by heightened standards,[94] notwithstanding defense counsel's failure to investigate or to present mitigating evidence.[95]

Abolitionists similarly ratchet up the *Strickland* standard of reasonableness to require the development and retrial of mitigating as well as exculpating evidence on post-conviction appeal. To support this expansive reading, they cite the federal habeas corpus statutory grant of "adequate representation" in post-conviction proceedings.[96] In *McFarland v. Scott*,[97] the Supreme Court approved this grant, announcing the "mandatory right"

Emperor Gideon *Has No Clothes: The Empty Promise of the Constitutional Right to Effective Assistance of Counsel*, 13 HASTINGS CONST. L.Q. 625, 634 (1986); Ellen Kreitzberg, *Death Without Justice*, 35 SANTA CLARA L. REV. 485, 500 (1995). Echoing Bright, Kreitzberg notes that "[r]eviewing courts uphold the performance of counsel when the court is able to attribute any conceivable strategy to the performance, even if there is no evidence that the attorney pursued that particular strategy." *Id.* (citation omitted).

[90] Bright charges that the presumption of competence is misplaced "where the accused is represented by counsel who lacks the training, experience, skill, knowledge, inclination, time, and resources to provide adequate representation in a capital case." *See* Bright, *supra* note 76, at 863.

[91] *Strickland*, 466 U.S. at 689.

[92] *See* Bright, *supra* note 80, at 459 (asserting counsel's "obligation to investigate the life and background of the client in order to introduce mitigating evidence"); Kreitzberg, *supra* note 89, at 493 (underscoring counsel's duty "to investigate and assemble all possible evidence about a defendant's life"); *see also* ABA GUIDELINES FOR THE APPOINTMENT AND PERFORMANCE OF COUNSEL IN DEATH PENALTY CASES §§ 11.4.2, 11.7.1, 11.8.2–.3, 11.8.6, 11.9.3 (1989); Linda E. Carter, *Maintaining Systemic Integrity in Capital Cases: The Use of Court-Appointed Counsel to Present Mitigating Evidence When the Defendant Advocates Death*, 55 TENN. L. REV. 95 (1987).

[93] *See* Robert A. Kelly, *Applicability of the Rules of Evidence to the Capital Sentencing Proceeding: Theoretical and Practical Support for Open Admissibility of Mitigating Information*, 60 UMKC L. REV. 411 (1992); *see also* Green v. Georgia, 442 U.S. 95 (1979) (per curiam).

[94] Douglas W. Vick, *Poorhouse Justice: Underfunded Indigent Defense Services and Arbitrary Death Sentences*, 43 BUFF. L. REV. 329, 422 (1995) (reporting evidence of "a substantial drop in findings of ineffective assistance of counsel in capital cases over the past decade").

[95] *See* Green, *supra* note 82, at 502 (citation omitted) (finding that "courts frequently reject ineffective assistance claims premised on defense counsel's failure to present a case at the sentencing proceeding or even to investigate the possibility of a defense"); Steiker & Steiker, *supra* note 19, at 421 (noting that "it is commonplace in many states for trial counsel to fail to present any evidence or argument at all during the punishment phase of a capital trial").

[96] 21 U.S.C. § 848(q)(4)(B) (1995).

[97] 114 S. Ct. 2568 (1994).

of indigent capital defendants to "qualified" legal counsel under the provisions of the federal habeas corpus statute.[98] The right to "quality legal representation," according to *McFarland*, extends to preapplication legal assistance in capital habeas corpus proceedings.[99] This right, however, fails to entitle capital defendants to an automatic stay of execution. To the contrary, *McFarland* teaches that a "dilatory" capital defendant who "inexcusably ignores" the opportunity to request the appointment of habeas counsel in a timely manner and "flouts" the process available to seek such remedial assistance implicitly waives his rights and may properly suffer the denial of a stay of execution.[100]

To abolitionists, the different character of last-minute capital appeals warrants formulation of a test for undue delay tied to the *potential* merit or substantiality of a capital defendant's legal claims, not to his constructive or implied waiver of such claims. No doubt, claims exhibiting a substantial question of innocence, new evidence, or constitutional violation merit reasonable delay. But to abolitionists, claims manifesting *any* question germane to these findings deserve delay. That such claims wholly or partly emerge out of mixed motive or manipulation strikes abolitionists as inconsequential.[101] For the abolitionist cause, the immorality of death dictates an end-game strategy of delay: "To win time is to win."[102] Yet, at the same time, delay may invite claim preclusion and death. Defeated in the two-fold effort to constitutionalize and to codify in habeas corpus statutes capital counsel's strategic duty of mitigation and mitigation-linked delay, abolitionists look to ethical commands.

B. Professionalizing Effective Assistance

Post-*Strickland* abolitionist litigation strategies espouse a moral politics intertwined with an instrumental account of ethics and professionalism. Standard renditions of this account suggest a higher obligation to pursue strategies of mitigation and delay both at trial and on post-conviction review. Justifications of this stringent, ethical obligation in death penalty cases rely on familiar, and indeed, recurrent due process and equal protection principles. The death-is-different rationale[103] implicates due process interests.[104] Evidence of racial discrimination in prosecution and

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[98] *Id.* at 2571.

[99] *Id.* at 2572.

[100] *Id.* at 2573; *accord* Duffey v. Lehman, No. 94-9003, 1996 U.S. App. WL 13154 (3d Cir. Jan. 16, 1996) (opinion vacated on grant of rehearing en banc, Feb. 12, 1996).

[101] *Cf.* Evan Caminker & Erwin Chemerinsky, *The Lawless Execution of Robert Alton Harris*, 102 YALE L.J. 225, 240 (1992) (opposing manipulation of court procedures to delay death penalty).

[102] Mello, *supra* note 66, at 85.

[103] *See* Woodson v. North Carolina, 428 U.S. 280, 305 (1976).

[104] *See* McGautha v. California, 402 U.S. 183, 214–15 (1971); Gregg v. Georgia, 428

sentencing[105] triggers equal protection concerns.[106] Spurred by the criminal defense mandate of zealous advocacy,[107] abolitionists apply these principles to deduce a fundamental ethical obligation of mitigation and delay in capital cases outside the jurisprudence of the Sixth Amendment.

Founding the abolitionist duty of mitigation and delay on ethical rather than constitutional grounds provides little guidance to death penalty defense lawyers. Even when equipped to investigate and to proffer mitigating evidence, counsel may be unable to obtain his client's consent to pursue a victim-based strategy of mitigation at trial or on appeal. Given the client's troubled psychosocial history, counsel may doubt not only his ability to procure, but also the client's capacity to grant such consent.[108] Absent a clear-cut mechanism of or procedure for consent, counsel may shun the matter entirely, treating the strategies of mitigation and delay as tactical decisions delegated to his own independent discretion.[109]

Construing the litigation strategies of mitigation and delay as properly delegated judgments of lawyer discretion misleads abolitionists in fashioning a political ethos. The notion of delegated discretion licenses counsel simply to override the objections of capital defendants and death row inmates. Discretionary override makes no inquiry into the manner or content of client objections. It provides no means to engage death penalty volunteers in dialogue over the merits of delay, ignoring issues of decision-making competence and voluntary dismissal or waiver. It supplies no mode to address the dignity-based objections of defendants and inmates directed toward the preparation and presentation of mitigation evidence, denying the risk and gravity of harm to client moral identity. And it furnishes no method to integrate or to reconcile legal narratives of indi-

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U.S. 153, 195–96 n.47 (1976); *see also* CHARLES L. BLACK, CAPITAL PUNISHMENT: THE INEVITABILITY OF CAPRICE AND MISTAKE 17–107 (1981).

[105] *See* McCleskey v. Kemp, 481 U.S. 279 (1987).

[106] *See* DAVID BALDUS ET AL., EQUAL JUSTICE AND THE DEATH PENALTY (1990); SAMUEL GROSS & ROBERT MAURO, DEATH & DISCRIMINATION: RACIAL DISPARITIES IN CAPITAL SENTENCING (1989); Bowers, *supra* note 79, at 193–269; *see also* U.S. GEN. ACCOUNTING OFFICE, REPORT TO THE SENATE AND HOUSE COMMITTEES ON THE JUDICIARY, DEATH PENALTY SENTENCING—RESEARCH INDICATES PATTERN OF RACIAL DISPARITIES (1990), reprinted in 136 CONG. REC. S6889–90 (daily ed. May 24, 1990).

[107] *See* MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 7-101, EC 7-1 (1981); MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.3 cmt. (1983). For strong and weak defenses of this mandate, see Bruce A. Green, *Zealous Representation Bound: The Intersection of the Ethical Codes and the Criminal Law*, 69 N.C. L. REV. 687 (1991); David Luban, *Are Criminal Defenders Different?*, 91 MICH. L. REV. 1729 (1993); Charles J. Ogletree, Jr., *Beyond Justifications: Seeking Motivations to Sustain Public Defenders*, 106 HARV. L. REV. 1239 (1993); William H. Simon, *The Ethics of Criminal Defense*, 91 MICH. L. REV. 1703 (1993).

[108] Lacking expertise, time, and resources, defense counsel may be unable to prepare and to present mitigation evidence regarding psychosocial theories of victimization.

[109] For a justice-based defense of lawyer discretion, see William H. Simon, *Ethical Discretion in Lawyering*, 101 HARV. L. REV. 1083 (1988).

vidual responsibility and scientific narratives of societal responsibility at trial and on appeal. Wedded to a theory of instrumental politics, the ethic of discretionary override finds justification in the tragic necessity of the abolitionist craft and its silencing judgment. The tragedy of the abolitionist practice vision lies in this accommodation to silence, in the accommodation to violence.[110]

C. Judgments of Effective Assistance

The theory of instrumental politics underlying the proposed abolitionist ethic of mitigation and delay arouses troubling questions that go beyond the debate about the scope of the mitigation requirement at the penalty phase of capital trials or the legitimacy of intentional delay at post-conviction proceedings. While this debate continues, the constitutional jurisprudence of the Sixth and Eighth Amendments concerning defense counsel's de minimis representational duties seems well settled. Left open are issues traditionally considered outside the reach of constitutional regulation: ethical obligation and moral vision. Resolution of these issues will determine the future politics of abolitionist lawyering.

Abolitionists defend the ethical judgment to employ determinist scientific discourse and attendant victimization narratives on the ground of rhetorical function: the narratives establish "a reason for showing mercy."[111] Fulfilling the duty of presenting mitigating narratives demands "extensive and generally unparalleled investigation into personal and family history."[112] To conduct that investigation, abolitionists contend, "a lawyer must be comfortable working with the client, the client's family, and the client's friends."[113] Rapport allegedly facilitates the attorney-client relationship by encouraging "cooperation and the disclosure of compelling mitigating evidence that might not be found by a less skillful attorney."[114] But, the circumstances at trial and on appeal militate against building lawyer-client rapport. Consider Michael Mello's recollection of the constraints of post-conviction litigation. Mello recalls "often meet[ing] the inmate for the first time when the execution date has been set for the forthcoming month."[115] Stirred by the "urgency of an impending execution date," he concedes the impulse to "get to know the inmate fast and gain

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[110] *See* Anthony V. Alfieri, *Stances*, 77 CORNELL L. REV. 1233, 1241 (1992).

[111] Sarat, *supra* note 36, at 41.

[112] Robbins, *supra* note 49, at 63.

[113] Bright, *supra* note 80, at 459.

[114] Bright, *supra* note 76, at 1864.

[115] Mello, *supra* note 66, at 84. Mello notes that "[t]he first step in most postconviction efforts is to compile a complete life history of the inmate. Often the information needed is of the most intimate sort and may require the inmate to confront and share painful feelings and long-buried memories." *Id.*

his trust," and thus "sometimes [to] force[] trust and closeness at an accelerated pace."[116]

Like other abolitionists, Mello declines to explain how to build rapport or trust with a client under the exigent circumstances of trial and appellate death penalty proceedings. His silence illustrates a structural failing in the abolitionist politics of law: the absence of client voice. Without the voice of the capital client, the instrumental or necessitarian justification of the litigation strategies of mitigation and delay contains no logical stopping point, no line of excess or boundary-crossing into illegitimacy.[117] Hence, when abolitionist litigation gives rise to the culturally produced identity of the death row victim/sociopath, no objection is heard. In fact, no one is able, much less permitted, to object. This silence conforms to the hierarchical nature of lawyer-client discourse in abolitionist litigation.

Abolitionists acknowledge the impact of legal discourse on litigation outcomes, especially the influence of story and narrative on juries and the media. But, they evade the full import of a constructionist analysis,[118] diminishing the extent to which legal processes construct social meaning and produce clients' cultural identity in capital cases.[119] Elsewhere I have suggested that criminal defense stories of black-on-white racial violence construct the racial identity of young black males in terms of bestiality and pathology.[120] Allied with criminal defense lawyers, abolitionists implement constructionist strategies unbridled by the moral ramifications of constituting the criminal subject in the cultural image of a victim/sociopath.

Abolitionists view this construction as a narrative necessity, even though the notion of human dignity anchors the individualization requirement in *Furman*. Denying capital clients the cognitive, volitional, or moral capacity to act complies with the scientific discourse of victimization.[121] To the extent that legal discourse can "neither fully contain nor explain the lawless violence" experienced by capital defendants,[122] the

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[116] *Id.*

[117] On the ambiguity of legitimacy in legal advocacy, see George E. Bisharat, *Courting Justice? Legitimation in Lawyering under Israeli Occupation*, 20 LAW & SOC. INQUIRY 349 (1995); Stephen Ellmann, *Law and Legitimacy in South Africa*, 20 LAW & SOC. INQUIRY 407 (1995).

[118] *See* Carol J. Greenhouse, *Constructive Approaches to Law, Culture, and Identity*, 28 LAW & SOC'Y REV. 1231 (1994); Elizabeth Mertz, *A New Social Constructionism for Sociolegal Studies*, 28 LAW & SOC'Y REV. 1243 (1994).

[119] *See* Craig Haney, *The Social Context of Capital Murder: Social Histories and the Logic of Mitigation*, 35 SANTA CLARA L. REV. 547, 548–49 (1995).

[120] *See* Anthony V. Alfieri, *Defending Racial Violence*, 95 COLUM. L. REV. 1301 (1995).

[121] *See* J. Michael Echevarria, *Reflections on O.J. and the Gas Chamber*, 32 SAN DIEGO L. REV. 491, 526 (1995) (challenging the notion of free will as applied to certain types of criminally deviant behavior).

[122] Sarat, *supra* note 36, at 44.

resort to scientific, determinist discourse seems sensible, particularly given the complexity of victimization histories.[123] Scientific discourse, however, may dissipate a proffered explanation of violence or "locate it outside the acting subject."[124] In this way, scientific narratives chronicling the psychobiography[125] "of an abused person enacting his abuse"[126] may prove damaging or otherwise futile. The next Section considers the availability of alternative forms of discourse.

III. Reconstructing Moral Politics

Reconstructing the instrumental politics of abolitionist litigation requires a revised moral discourse guided by the norms of client agency and community. The purpose of this discourse is to make the violence and pain of a capital defendant's life story "knowable"[127] through a narrative that "explains but does not excuse" the lawbreaking act at issue.[128] The call for revision stems from the recognition that the contexts of capital trial and post-conviction proceedings, and the corollary strategies of mitigation and mitigation-linked delay, limit the language of pain and the evidence of moral agency available to abolitionists. Pain in these contexts is consigned to a rhetoric of defendant deviance.[129] Proof of moral agency is often altogether absent.[130] This twin deficiency requires abolitionists to search out an alternative discourse of moral anguish and experience accessible to the community of judges, jurors, and prosecutors that surround capital proceedings.

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[123] Costanzo and Peterson elucidate this complexity in their summary of victimization stories. *See* Costanzo & Peterson, *supra* note 44, at 143. They report:

> Defenders tell a complex and textured story. The defendant is a tragically flawed character, emotionally and socially deformed by years of neglect and abuse. The origins of his violent behavior can be traced back to early life experiences as well as to the forces acting on him at the time of the crime (e.g., drug addiction, domination by others, emotional stress). According to this version of the story, the causes of his crimes are complex—the product of multiple determinants.

Id.

[124] Sarat, *supra* note 36, at 45.

[125] The term belongs to Costanzo and Peterson. *See* Costanzo & Peterson, *supra* note 44, at 143.

[126] Sarat, *supra* note 36, at 46.

[127] Sarat, *supra* note 35, at 1123.

[128] Sarat, *supra* note 36, at 41.

[129] Haney, *supra* note 119, at 549.

[130] Even when present, such proof is distorted by the cognitive and interpretive frameworks of judges and jurors that narrow their perception and comprehension of moral action.

A. Moral Discourse

The formulation of an alternative discourse that connects capital defendants to the death penalty community in moral opposition to state-sanctioned killing hinges on transforming the meaning of violence. Austin Sarat describes a conception of violence dominant in capital proceedings that obscures defendants' common experience of abuse and poverty.[131] To contest this dominant conception, Sarat advocates "the construction of a more complex narrative of causation and accident" that elucidates the "mixed lives and mixed motives" of capital defendants guilty of committing lawbreaking acts.[132] The task of advocacy is to capture in language accessible to judges and juries the "diffuse" psychological, physical, and social violence[133] pervading defendant life histories, and accordingly, contributing to the performance of acts of lawbreaking.

Recounting individual histories of abuse and poverty requires a thick description of narrative. Yet narratives of deprivation slip easily into narratives of excuse, relocating criminal responsibility and moral accountability beyond the reach of capital defendants. Abolitionists often point to exculpating "factors beyond the [defendant]'s control, such as mental illness or a childhood of extreme abuse or neglect,"[134] exhorting jurors to consider "the person behind the crime" and to evaluate "the crime in context."[135] These exhortations, however, falsely assume the narrative compatibility of explanation, excuse, and responsibility. Although mitigation histories are not excuses,[136] they run afoul of the "strong desire" found among jurors "to fix personal responsibility on the defendant, to make him a moral agent capable of being held to account for what otherwise seemed unaccountable actions."[137]

The tensions embedded in the abolitionist narratives of explanation, excuse, and responsibility spring from the oppositions internal to liberal legalism. Critical Legal Studies scholars map the doctrinal oppositions suffusing substantive criminal law, citing the instability of the present intentionalism/determinism dichotomy.[138] Like any practice of criminal defense advocacy, abolitionist litigation is organized around this dichotomy, and accordingly, is framed as "the choice between intentionalistic

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[131] Sarat, *supra* note 36, at 42, 52.
[132] *Id.* at 52.
[133] *Id.* at 23.
[134] Mello, *supra* note 66, at 83.
[135] Sarat, *supra* note 36, at 40.
[136] Haney, *supra* note 119, at 560–61.
[137] Sarat, *supra* note 35, at 1128.
[138] *See* Mark Kelman, *Interpretive Construction in the Substantive Criminal Law*, 33 STAN. L. REV. 591 (1981); *see also* Albert P. Cardarelli & Stephen C. Hicks, *Radicalism in Law and Criminology: A Retrospective View of Critical Legal Studies and Radical Criminology*, 84 J. CRIM. L. & CRIMINOLOGY 502 (1993).

and deterministic accounts of human conduct."[139] Abolitionists ratify this choice, elevating the determinist excuse of victimization-based diminished capacity over the blameworthy intentionalism of free will.

Privileging a determinist interpretation of lawbreaking behavior devalues intentionalistic norms. As a result, abolitionist efforts to portray the capital defendant as a human being endowed with positive qualities and to show that his capital crimes "are humanly understandable in light of his past history and the unique circumstances affecting his formative development"[140] consistently falter. They falter in part because the language employed to demonstrate that a defendant "is not solely responsible for what he is"[141] suppresses the norm of moral agency, rendering the task of conceptualizing and legitimizing mercy even more difficult.[142]

B. Moral Agency

Imagining an alternative moral discourse appropriate to abolitionist litigation depends on the reaffirmation of moral agency. Too often abolitionists speak not of moral action but of "individual differences in resilience and coping ability."[143] Experience suggests that this narrative gives judges and jurors too little reason for showing mercy to capital defendants.

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[139] *See* Kelman, *supra* note 138, at 596 (explaining intentionalism and determinism as constructs that pervade the substantive criminal law). Kelman explains:

> Intentionalism is the principle that human conduct results from free choice. An intentionalist interpretation of an incident gives moral weight to autonomous choice and expresses the indeterminacy of future actions. Determinism, on the other hand, implies that subsequent behavior is causally connected to prior events. A determinist interpretation considers behavior by looking backward, and it expresses no moral respect or condemnation of these predetermined acts.

Id. at 597–98 (citations omitted).

[140] Gary Goodpaster, *The Trial for Life: Effective Assistance of Counsel in Death Penalty Cases*, 58 N.Y.U. L. REV. 299, 335 (1983).

[141] *Id.* at 335.

[142] Haney, *supra* note 46, at 1227. Haney observes:

> [W]e seem to have become a society that has, at this time in our history, a very difficult time conceptualizing and legitimizing compassion, mercy, charity, and understanding—all concepts that are intertwined with mitigation but which now have become terribly hard for our citizens to define, harder to assert, and virtually impossible to connect to something resembling a principled point of view.

Id.

[143] Costanzo & Peterson, *supra* note 44, at 136. Haney adds:

> particularly in the case of powerful risk factors and traumatic life experiences like chronic poverty and childhood maltreatment, different kinds of behavior—behavior that "not everybody" engages in the same way—must be understood as

Talk of moral agency is found in David Luban's conception of morally activist lawyering,[144] here derived from the principle of shared lawyer-client moral accountability. Luban posits the notion of the lawyer's obligation "to engage the client in moral dialogue, to attempt not merely to save the client from the consequences of her deeds but to transform and redeem her."[145] For the abolitionist, the charge of moral redemption encompasses the client, the judge, and the jury. Consistent with the constitutional jurisprudence of the death penalty, abolitionists must invigorate not only jurors' obligation to impose a sentence based on "a reasoned *moral* response to the defendant's background, character, and crime,"[146] but also judges' empathic duty to evaluate that response on post-conviction review. Invigoration entails exploding the victimization/agency dichotomy embedded in the trial strategy of mitigation and reintegrating moral agency into the post-conviction strategy of delay, emphasizing throughout the capital proceedings the defendant's human vulnerability to both good and bad motive[147] and the possibility of redemption.[148]

Moral redemption occurs through story. Milner Ball suggests that "law depends fundamentally on story for its meaning and legitimacy."[149] Ball explains that an attorney "forms the story of his client, first for himself and then for judges and juries, by discerning and emphasizing or deemphasizing given elements under the influence of earlier courtroom stories."[150] Story, in this way, is a medium through which "a lawyer understands, makes sense of, and presents a case."[151]

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variation in adapting, coping, and struggling to survive a set of circumstances that few if any have "chosen" to endure.

Haney, *supra* note 119, at 592.

[144] *See* DAVID LUBAN, LAWYERS AND JUSTICE: AN ETHICAL STUDY 162 (1988).

[145] *Id.* at 163. Luban evaluates this principle against the practice tradition illustrated by the "lawyer for the damned." *Id.* at 166. For Luban, the lawyer for the damned "takes on those cases that no one else will come near, cases in which the client has for one reason or another rightly become odious or untouchable in the eyes of mankind." *Id.* at 162. Here, I extend his analysis to the abolitionist lawyer.

[146] Penry v. Lynaugh, 492 U.S. 302, 319 (1989) (citations omitted).

[147] On the contextual meaning of good and bad client moral character, see Jane M. Spinak, *Reflections on a Case (Of Motherhood)*, 95 COLUM. L. REV. 1990, 2078 (1995) (urging advocates "to break down stereotypical notions of 'good' or 'bad' mothers in order to represent them" in context). *See also* Marie Ashe, *The "Bad Mother" in Law and Literature: A Problem of Representation*, 43 HASTINGS L.J. 1017 (1992).

[148] *See* Helen Prejean, *Capital Punishment: The Humanistic and Moral Issues*, 27 ST. MARY'S L.J. 1 (1995).

[149] MILNER S. BALL, THE WORD AND THE LAW 143 (1993).

[150] MILNER S. BALL, THE PROMISE OF AMERICAN LAW: A THEOLOGICAL, HUMANISTIC VIEW OF LEGAL PROCESS 23 (1981).

[151] *Id.* Ball cautions that "stories require good listeners as well as good tellers if they are to have effect." BALL, *supra* note 149, at 144. Stories, he admonishes, "cannot gather willing hearers among us if we do not have ears to hear." *Id.* Thus, for Ball, there is a "limit to the power of stories in law." *Id.*

Abolitionist mitigation strategies illustrate the deployment of story to identify the rights of capital defendants. But story, as Robin West points out, may also mark responsibility.[152] To the extent possible, abolitionists must employ stories to render the capital defendant's world of human rights *and* responsibilities accessible to the judge and jury. Opening access to that shared world reconstitutes moral community by encouraging judges and juries to forgive, and thereby negate the capital defendant's act of immorality. The interpretive key is to tell stories of moral agency highlighting defendants' acceptance of blame and confession of responsibility for lawbreaking.

C. Moral Community

To regain moral community, abolitionists must confront the prevalence of moral silence and exile in capital proceedings. Even when the capital defendant's silence at trial is rooted in a history of oppression and fear,[153] jurors may infer moral guilt,[154] and in opting for death, expel the defendant as a moral outcast. Similarly, even though a defendant's history of class or racial victimization supplies an explanation for criminal lawbreaking violence, jurors may adversely conflate such an explanation with moral excuse, and in voting for death, banish the defendant as a moral pariah. It is essential, therefore, to sustain the defendant's moral voice and to maintain his moral credibility with the jury.[155]

To that end, abolitionists must look for opportunities in capital trials and appeals to develop unimagined relations[156] and to devise empathic procedures[157] that reveal a double vision of the defendant as a subject and

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[152] West, *supra* note 15, at 161.

[153] Stephanie Wildman and Adrienne Davis trace silence to experiences of oppression and fear. *See* Stephanie M. Wildman & Adrienne D. Davis, *Language and Silence: Making Systems of Privilege Visible*, 35 SANTA CLARA L. REV. 881, 885 (1995).

[154] *See* Peter Tiersma, *The Language of Silence*, 48 RUTGERS L. REV. 1, 99 (1995).

[155] *Cf.* Kreitzberg, *supra* note 89, at 489. Kreitzberg comments:

> From the outset of the case, defense counsel needs to devise a common theme or strategy that effectively links the guilt and penalty phases. Counsel's challenge is to maintain credibility with jurors during the penalty trial, even after a guilty verdict is returned in the guilt trial.

Id.

[156] *See* Maureen Cain, *Horatio's Mistake: Notes on Some Spaces in an Old Text*, 22 J. L. & SOC'Y 68, 75 (1995). Cain remarks:

> [L]ike discourse, social relations exist powerfully in a state of radical and uncaused autonomy. What is needed, therefore, methodologically, is a mapping of the articulations between relationships and knowledge/discourse or, if you will, between discourse and the extra-discursive.

Id. at 75.

[157] *See* Stephen Ellmann, *Client-Centeredness Multiplied: Individual Autonomy and*

a subjected other in command of partial moral agency,[158] and furthermore, communicate a vision of common moral obligation held equally among the defendant, judge, and jury.[159] A vision of moral agency, Cynthia Bowman and Elizabeth Mertz maintain, affords a client "an opportunity to name her own experiences" and stimulates "the development of a self-authored life story."[160] Authorship, Bowman and Mertz stress, encourages a client's "sense of agency."[161]

A vision of common moral obligation espouses love. Liberation theologists find the "heart of the human community" in the spiritual "duality of love for the self and the other."[162] Love builds community by promoting the development of empathic understanding. The focus of love is the spirit of human reconciliation, in this case the reconciliation of the judge, jury, and capital defendant.[163]

In that spirit, abolitionists must reimagine the role of the death penalty defense lawyer as a transmitter of community norms,[164] rather than solely as a prophet engaging the law of capital punishment in an ethical and jurisprudential process of struggle.[165] They must adopt a discourse of community,[166] despite the spiritual difficulty of realizing a loving or mer-

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Collective Mobilization in Public Interest Lawyers' Representation of Groups, 78 VA. L. REV. 1103 (1992); Lynn Henderson, *Legality and Empathy*, 85 MICH. L. REV. 1574 (1987).

[158] *See* Kathryn Abrams, *Sex Wars Redux: Agency and Coercion in Feminist Legal Theory*, 95 COLUM. L. REV. 304, 346 (1995).

[159] On the ethical duty to advise clients of their moral connection to third parties and communities, see Bill Ong Hing, *In the Interest of Racial Harmony: Revisiting the Lawyer's Duty to Work for the Common Good*, 47 STAN. L. REV. 901, 933 (1995); Stephen L. Pepper, *Counseling at the Limits of the Law: An Exercise in the Jurisprudence and Ethics of Lawyering*, 104 YALE L.J. 1545, 1598 (1995).

[160] *See* Cynthia G. Bowman & Elizabeth Mertz, *A Dangerous Direction: Legal Intervention in Sexual Abuse Survivor Therapy*, 109 HARV. L. REV. 549, 628 (1996).

[161] *Id.* at 627. Bowman and Mertz note that "therapists treating incest survivors repeatedly stress the importance of returning agency, authority, and decision-making power to the client." *Id.*

[162] Robert J. Araujo, S.J., *Political Theory and Liberation Theology: The Intersection of Unger and Gutiérrez*, 11 J. L. & RELIGION 63, 66 (1994-95).

[163] *Id.* at 68. Araujo draws on liberation theology "to reconcile human beings so that injustice and oppression caused by people and institutions are replaced with a more just society in which the dignity and the right to a flourishing human experience for all are respected." *Id.*

[164] *Cf.* Sanford Levinson, *National Loyalty, Communalism, and the Professional Identity of Lawyers*, 7 YALE J.L. & HUMAN. 49, 69 (1995) (positing a conception that "emphasizes the role played by the lawyer (or teacher) as a transmitter of cultural norms and, indeed, as a model of what it might mean to conceive of oneself as a member of an overarching political community").

[165] Jules Lobel, *Losers, Fools & Prophets: Justice as Struggle*, 80 CORNELL L. REV. 1331, 1333 (1995). Lobel claims that law viewed "as a process of struggle . . . arises from the clash between the state seeking to enforce its rules and the activist communities seeking to create, extend, or preserve an alternative vision of justice." *Id.* (citation omitted).

[166] For an examination of "discourses of community" in the field of criminal justice, see Nicola Lacey & Lucia Zedner, *Discourses of Community in Criminal Justice*, 22 J. L.

ciful community of jurors. Overcoming juror anonymity[167] to connect in a disquisition about the "larger values" of moral and social citizenship[168] addresses the "human need"[169] to construct a contextualized story of explanation. The construction of story occurs through narratives of defendant self-destruction and alteration. For the jury, this explanatory process is therapeutic. For the abolitionist, it is pragmatic as well. Affirming the values of agency and community empowers the jury to recognize the capital defendant in context, restoring a sense of personhood and sympathy.

Community in this respect flows from the "participatory character of . . . story."[170] According to Ball, story "allows for a kind of participation in the events reproduced in the telling."[171] Participation in story enacts community through inclusive narratives that humanize the violator of community norms as both a moral agent *and* a victim.[172] The narratives, West asserts, help "weav[e] the violator back into the fabric of the larger society."[173]

Abolitionists must interweave narratives of community in story to renew the human bonds relating the judge and jury to the capital defendant. By proclaiming client/community, they entreat juries to renounce state-sanctioned killing "as much wrong for the community as for the individual."[174] They inspire juries to declare: "We are not that kind of people."[175] For Ball, the work of abolitionists "has everything to do with community, or it makes no sense at all."[176]

Contrary to Ball, striving to enact or to redeem moral community will not remake the dehumanizing institution of the death penalty. But it may persuade some judges and juries that the penalty of death "is a statement, too, of the death of the society, an expression of our despair and fear. A yielding to hopelessness. Our giving up."[177] As Ball suggests, the law of

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& SOC'Y 301, 301, 317 (1995). Lacey and Zedner note that "[c]ommunity has furnished a discursive framework within which social policies have been conceived, designed, implemented, and legitimated." *Id.* at 301 (citation omitted).

[167] *But see* Nancy J. King, *Nameless Justice: The Case for the Routine Use of Anonymous Juries in Criminal Trials*, 49 VANDERBILT L. REV. 123, 159 (1996) (describing anonymous juries as "an ideal compromise between the interests of jurors, defendants, and the public in a jury free from apprehension about exposure, on the one hand, and the interests of insuring adequate disclosure of the workings of the jury on the other").

[168] Clyde Spillenger, *Elusive Advocate: Reconsidering Brandeis as People's Lawyer*, 105 YALE L.J. 1445, 1523 (1996).

[169] Margaret Jane Radin, *Reconsidering Personhood*, 74 OR. L. REV. 423, 447 (1995).

[170] BALL, *supra* note 150, at 19.

[171] *Id.*

[172] *See* West, *supra* note 15, at 162.

[173] *Id.*

[174] BALL, *supra* note 149, at 155.

[175] *Id.*

[176] *Id.*

[177] *Id.* at 137.

capital punishment signifies a metaphor of both individual and societal death.[178] Abolitionists must find words, find "what it is possible to say,"[179] to signal this larger death and to transfigure a judge's and a jury's willingness to take responsibility to avert that death.[180] In this way, abolitionist lawyering enacts redemptive community.

Conclusion

Progress in law and politics, however slow and inconsistent, turns on moral vision. The task of post-*Furman* abolitionist litigation is to map that vision through the facilitation of moral discourse. Learning to speak of moral pain in law requires a collaborative,[181] client/community-centered theory of abolitionist politics. Professing moral theory in practice is our professional responsibility.[182] To bear witness to the inhumanity of capital punishment without invoking the moral authority of client and community voices honors only the dead.

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[178] *See* BALL, *supra* note 150, at 136.

[179] *Id.* at 137 ("The more such words the lawyer finds, the more he will have made law mean life, for his clients and therefore also for himself.").

[180] *See* BALL, *supra* note 149, at 12.

[181] *See* Lucie E. White, *Collaborative Lawyering in the Field? On Mapping the Paths from Rhetoric to Practice*, 1 CLINICAL L. REV. 157 (1994).

[182] *See* BALL, *supra* note 149, at 153 ("Where law is a medium of community, lawyers' professional responsibility lies in developing, curing, and sustaining the communities of which they are members.").