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BOOK REVIEW

A TALISMAN AGAINST THE DARK FORCES

PUBLIC JUSTICE, PRIVATE MERCY: A GOVERNOR'S EDUCATION ON DEATH ROW. By *Edmund G. (Pat) Brown* with *Dick Adler*. New York: Weidenfeld & Nicolson, 1989. Pp. 171. $18.95.

The paths are similar. An individual commits a particularly brutal crime or crimes, usually resulting in the killing of another person. The local public is outraged and cries out for justice. The state legislature has responded to similar cries by enacting a statute providing for capital punishment for certain crimes. The politically sensitive prosecutor prosecutes the individual's case as a capital crime, demanding the death penalty. No plea bargain is made. The jury finds the individual guilty and, instilled with the fear that the sentence of life imprisonment without possibility of parole is illusory, recommends the death penalty. The trial judge imposes the sentence so recommended. The individual appeals the conviction, and the appeals wind their way first through the state court system to the state supreme court and then through the federal courts to the United States Supreme Court. The conviction and sentence are upheld, and the execution of the individual is scheduled.

The individuals are similar. The condemned individual probably has a family history involving a broken family, child abuse, or neglect. He is probably of low intelligence, has a history of mental problems, or abuses alcohol or drugs. The individual is probably poor and uneducated, male, and either black or Hispanic; his victim was probably white. The individual probably has a felony record. Prior to his death sentence, he is probably represented by an overworked public defender or a court-appointed lawyer. He is probably guilty of the crime.

The last resort is the same. Years after the crime and the imposition of the death sentence, in the face of execution, the individual petitions the governor of the state for clemency. What has transpired prior to this point is presumably justice, society's punishment of an individual that has violated its laws imposed within the consti-

tutional requirements of due process. The clemency petition is not a request for further justice, at least of this type, but rather is a plea for mercy. The governor must decide whether some factor exists that compels him or her to prevent the execution of the individual and commute his sentence to life imprisonment without possibility of parole. The factors to be considered will most likely not be new; they will have been considered by the prosecutor, the jury, the trial judge, and the appellate courts. The governor is asked to be merciful as well as just where these others have declined to be so. *Public Justice, Private Mercy: A Governor's Education on Death Row*[1] is the story of how a governor personally opposed to capital punishment on moral grounds made such decisions.

Edmund G. (Pat) Brown served two terms as Governor of the State of California from 1959 to 1967. During his term of office, Governor Brown received fifty-nine such petitions for clemency from individuals convicted of capital crimes and sentenced to death by the courts of the State of California. In thirty-six cases, Brown denied the petition and the prisoner went to the gas chamber. In twenty-three cases, Brown granted the petition and commuted the prisoner's sentence to life imprisonment without possibility of parole. *Public Justice, Private Mercy* is Brown's attempt to answer his question, "What had I, as a governor and a man, really learned from these decisions—about the death penalty itself and the way we punish the worst members of our society?"[2]

Governor Brown entered office with a pragmatic view of the death penalty. While he had some personal reservations, he had been elected by the people of the State of California to uphold and to execute faithfully the laws of the state, which laws provided for capital punishment.[3] Brown approached his job with respect to the clemency petitions with the mindset of a law enforcement officer, having served seven years as the District Attorney for the City and County of San Francisco and eight years as the Attorney General of the State of California. Brown took an appropriately narrow view of

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[1] E. BROWN, PUBLIC JUSTICE, PRIVATE MERCY: A GOVERNOR'S EDUCATION ON DEATH ROW (1989).

[2] *Id.* at xvi-xvii.

[3] *Id.* at 36. Governor Brown states in the prologue to the book:

> Taking office in 1959, I was almost certain that I knew how I felt about the death penalty. To me it was a necessary evil, a deterrent against certain kinds of violent crime, especially those committed with a loaded gun, and a needed emotional purge for society. Most of all, the death penalty was the law of the state, one of the laws I had sworn to uphold. If I disagreed with a law, it was my job to try to change it through the legislative process, not by evading my responsibility and refusing to enforce it.

Id. at xii.

the clemency power under the California Constitution. It was not the governor's duty to answer the question of guilt or innocence or to review "the finer points of the law"; this had been done by the trial judge and jury and by the appellate courts, respectively. Brown's role as governor was "to look for some extraordinary reason why the defendant should not be executed,"[4] to find a "legal or moral reason to go against the judgment of the court."[5] This role, the clemency process, transformed Brown's personal reservations concerning capital punishment to outright opposition to the death penalty.

Governor Brown handled each clemency petition thoroughly and personally. He was ably assisted by a series of three clemency secretaries, Cecil F. Poole, Arthur L. Alarcon, and John S. McInerny, each of whom was a "hardnosed, pro-capital-punishment former prosecutor"[6] and each of whom went on to a career as a judge.[7] They reviewed the transcripts of the trial proceedings, the personal histories of the condemned, any medical or psychiatric reports, the coverage of and commentary on the crimes, trials and sentences in the media, and correspondence from interested or concerned parties. In each case, a clemency hearing was held.

In the end, however, the decision was up to Governor Brown alone. He often "became in a very real sense a scale of justice,"[8] called upon to weigh all of the good people of whom he had been elected to take care against one bad person.[9] While Brown was appalled and angered by the crimes that had been committed, he attempted to give each "subject human dimensions outside the parameters of his crime"[10] and find some unfairness or injustice that would justify clemency.[11] In twenty-three cases, he succeeded. In thirty-six cases, however, he "couldn't find a compelling reason to go against the judgment of the court and the law of the state."[12]

To the extent that *Public Justice, Private Mercy* is in any way an apologia, it is more a defense by Governor Brown of the twenty-three commutations to life imprisonment without possibility of pa-

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4 *Id.* at 10.

5 *Id.* at 31.

6 *Id.* at xii.

7 Judge Poole and Judge Alarcon are currently Circuit Judges sitting on the United States Court of Appeals for the Ninth Circuit; Judge McInerny is currently a Superior Court Judge sitting in Santa Clara County, California.

8 E. BROWN, *supra* note 1, at 83.

9 *Id.* at 112.

10 *Id.* at 110.

11 *Id.* at 121-22.

12 *Id.* at 106-07.

role than of the thirty-six denials of clemency. Brown discusses at varying lengths twenty of the commutations, but only twelve of the denials. As a minor quibble, one cannot help being curious about the three commutations that were excluded, as well as the nature of the other twenty-four denials. Brown's authorial technique is to recall the facts of the crime and the events leading to the imposition of the death penalty; to relate the pertinent characteristics of the condemned individual; to describe the external factors, such as political pressures, impacting his decision; and to discuss the factors that he ultimately weighed. The stories, though simply told, are engaging, and they effectively clothe the moral question of the rightness or wrongness of capital punishment with a very human quality. Governor Brown is faithful to his premise of not inquiring into the guilt or innocence of the clemency petitioners. In all fifty-nine cases, he was certain that the individual was factually guilty of the crime. In only two cases are procedural flaws in the individual's conviction dwelled upon, and in both instances the matter was ultimately addressed by the United States Supreme Court.[13] In all fifty-nine cases, the crimes were brutal and horrible, and Brown is unflinching both in recounting the facts of each case and in reexamining his decision.

Governor Brown begins with the story of John Russell Crooker, Jr., his first and easiest clemency decision.[14] Crooker's crime was a crime of passion, as he murdered his former lover with a kitchen knife after she shunned him. The issue of the coercion of Crooker's confession was decided negatively by the United States Supreme Court.[15] Brown commuted Crooker's sentence to life imprisonment without possibility of parole, basing his decision on Crooker's troubled family history, psychiatric reports of his history of mental problems and his mental deterioration on death row,[16] the absence

[13] The Supreme Court held that John Crooker's confession was valid in Crooker v. California, 357 U.S. 433 (1958), and held that Caryl Chessman had been denied due process in the settling of the trial transcript in Chessman v. Teets, 354 U.S. 156 (1957).

[14] E. BROWN, *supra* note 1, at 3-19.

[15] *Crooker*, 357 U.S. at 433.

[16] Crooker, a former UCLA law student, wrote a description of life on death row which was included in an influential book on capital punishment:

> You awaken from the shock of the death verdict, unless you are one of those too sick in the mind. You begin to resist death, study your legal case, listen, talk, read this thing—the law— which has ordered you to be put to death. Day after day you do this, constantly, hour after hour. You learn something about this thing—the law: that it is not a fine, straight line from crime to trial to punishment; that it is a broad, waving line, where similar or worse crimes of the same type do not lead to the same punishment; that it is also a line of several links, in which each link has the power over the preceding link—only if you, yourself, usually poor and ignorant and friendless, can reach that next link, to seek to exert this power, by appeal, which is the link to life.

of premeditation or a carried weapon, and Crooker's potential for rehabilitation. Brown also makes the point, one frequently reiterated in the book, that he could not see how taking Crooker's life would deter future individuals from committing crimes of passion. Before leaving office, Brown would further commute Crooker's sentence to straight life. Crooker was eventually paroled and went on to lead a peaceful and productive life.

Another "success story" is that of Erwin "Machine Gun" Walker.[17] Walker was convicted of killing a police officer in a gun battle following the officer's attempt to arrest Walker for selling stolen goods. Walker had a history of mental problems exacerbated by his experiences in World War II, as did his family, evidenced by several suicides.[18] Walker's insanity plea at trial was denied, but he was later determined to be insane following a suicide attempt on death row, and thereby avoided execution for over twelve years. After reviewing this background and Walker's statements of contrition, Brown commuted his sentence to life imprisonment without possibility of parole on "the principle that the State of California did not spend thousands of dollars and thousands of man hours in putting together an admittedly broken mind only for the purpose now of placing that body in the gas chamber."[19] Too much time had passed for any possible retributive purposes to be served by the death penalty. Brown also further commuted Walker's sentence to straight life on leaving office, and Walker went on to be a successful designer of electronic technology after being paroled.

Not surprisingly, the book's longest chapter focuses on Governor Brown's most notorious clemency petitioner, Caryl Chessman.[20] Chessman was a career criminal convicted of committing a series of sexual attacks, robberies, and kidnappings. No lives were taken in the course of these crimes, but Chessman received the death penalty under California's "Little Lindbergh Law"[21] for kidnapping with in-

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B. PRETTYMAN, DEATH AND THE SUPREME COURT 253-54 (1961), *quoted in* E. BROWN, *supra* note 1, at 17.

17 E. BROWN, *supra* note 1, at 53-71.

18 Walker's father committed suicide after visiting his son on death row. *Id.* at 58.

19 E. BROWN, *supra* note 1, at 70. Walker's prison psychiatrist had written to Brown that "it almost seems that our society has healed the broken wing of the sparrow so that it can again fly, and that our society is now, by analogy, ready to wring the sparrow's neck." *Id.* at 66-67.

20 *Id.* at 20-52.

21 CAL. PENAL CODE § 209 (West 1955). Brown was not alone in being troubled by § 209's provision for the death penalty for kidnappings that did not involve a killing. *See, e.g.*, Enright, *California's Aggravated Kidnapping Statute—A Need for Revision*, 4 SAN DIEGO L. REV. 285 (1967); Note, *Struggling with California's Kidnapping to Commit Robbery Provision*, 27 HASTINGS L.J. 1335 (1976). Section 209 was amended in 1977 to delete the

tent to commit robbery. Chessman's flawed trial led to a Supreme Court decision in his favor,[22] but he was convicted again on retrial and again sentenced to death. Chessman authored three well-received books[23] in prison, and his case became a rallying point for both proponents and opponents of capital punishment.[24] Though the deliberate plan of sexual attacks and robberies, the use of a loaded gun, and Chessman's record of prior felonies served as part of the basis for Brown's denial of Chessman's clemency petition, it was Chessman's total lack of contrition or sympathy for his victims and his persistent "heckling of his keepers" that turned off Brown's compassion. Brown remains troubled by the execution to this day, however, largely because of the absence of any killing, and he states, "I should have found a way to spare Chessman's life."[25]

By his own admission, Governor Brown's worst mistake was Edward Simon Wein.[26] Like Chessman, Wein was convicted of a series of sexual attacks, robberies, and kidnappings that involved no killing and was sentenced to death under the Little Lindbergh Law. Unlike Chessman, however, Wein had no prior felony convictions and was not a heckler of his keepers. Brown commuted his sentence to life imprisonment without possibility of parole. Brown's mistake came later when, as in Crooker's and Walker's cases, he further commuted Wein's sentence to straight life. Wein was eventually paroled and subsequently committed a brutal murder. Brown's reflections on the ultimate outcome of his decisions with respect to Wein are poignant.[27]

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death penalty provision and to replace it with life imprisonment without possibility of parole. CAL. PENAL CODE § 209 (West 1988).

22 Chessman v. Teets, 354 U.S. 156 (1957).

23 C. CHESSMAN, CELL 2455, DEATH ROW (1954); C. CHESSMAN, THE FACE OF JUSTICE (1957); C. CHESSMAN, TRIAL BY ORDEAL (1955).

24 It also received attention in the legal literature. *See, e.g.*, Wirin & Posner, *A Decade of Appeals*, 8 UCLA L. REV. 768 (1961) (questioning whether Chessman received due process); Note, *The Caryl Chessman Case: A Legal Analysis*, 44 MINN. L. REV. 941 (1960) (concluding that Chessman received due process).

25 E. BROWN, *supra* note 1, at 52. Brown has previously criticized various aspects of the Chessman case. *See* Brown, Alarcon & Cooper, *The Death Penalty—The Caryl Chessman Case: Irreversible Error*, 11 SAN FERN. V.L. REV. 21 (1983).

26 E. BROWN, *supra* note 1, at 90-105.

27 Included in these reflections is an anecdote about a later meeting between Brown and Crooker, who had known Wein in prison. Crooker told Brown how he wished that he could have warned Brown prior to the second commutation, that he and the other prisoners knew that Wein was mentally sick and dangerous. Brown states:

> Crooker's comments stunned me into rare silence. The implications were at once obviously simple and subtly ironic. Here was a man whose life I had spared at least in part because of his intelligence and future potential, now out of prison and leading a useful life, telling me that he and other prisoners turned out to be better judges of the inner nature of another man whose life I'd spared—better judges than

The clemency decision that has troubled Governor Brown the most in hindsight, however, is neither Chessman's nor Wein's. It is that of Richard Arlen Lindsey, who was convicted of a horrifying rape and murder of a small child. Though legally sane, Lindsey had severe mental problems and a troubled family history. While Lindsey's crime "was the kind of crime which seemed to cry out for vengeance, for ritual punishment as swift and terrible as the act itself," Brown "couldn't for the life of [him] see how killing Lindsey would keep another madman from attacking another little girl somewhere down the road."[28] Brown's decision to deny clemency was not based on any of these factors, however, but on politics. Brown had a progressive farm labor bill in committee in the legislature and the swing vote was that of the legislator from the county in which Lindsey's crime was committed. Brown let Lindsey die so that migrant farm workers, such as the parents of Lindsey's victim, could earn a decent minimum wage.

The most common characteristic of the prisoners whose death sentences Governor Brown commuted, as well as those whose petitions he denied, for that matter, is mental illness. Mental illness was a factor in the commutations granted Crooker and Walker. Its absence was a factor of sorts in the denial of Chessman's petition. The failure to diagnose the extent of Wein's mental illness led to Brown's worst mistake, and its haunting presence in Lindsey's case is a reason that that case has continued to trouble Brown.

Beginning with Vernon Atchley, a convicted murderer with an IQ of 60, Brown routinely ordered the administration of electroencephalograph (EEG) tests as part of the clemency process.[29] If the EEG test revealed brain damage, Brown would commute. In effect, Brown took prisoners who had been found "sane" under the M'Naghten Rule, then convicted and sentenced to death, and found them "insane" under the Durham Rule and spared them. Under this approach, James Merkouris, Bertrand Joseph Howk, and Clarence Ashley had their sentences commuted to life imprisonment without possibility of parole.[30] Severe mental illness also was a major factor in Brown's decisions to commute the sentences of Charles

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a governor, several psychiatrists and a host of other skilled professionals. It seemed to me then and ever since an almost perfect parable about the entire death-penalty dilemma.

Id. at 104.

28 *Id.* at 83.

29 *Id.* at 80-83.

30 *Id.* at 85-89. Merkouris's violent prison career ended in death. *Id.* at 85. Howk committed suicide. *Id.* at 86. Ashley was eventually paroled and has maintained a clean record since. *Id.* at 89.

Golston, Earnest Leroy Jacobson, and Leo Lookado.[31]

Like many individuals who generally oppose the death penalty, Governor Brown identifies certain crimes for which, if it must exist, it might have some minimal merit. Such crimes include felonies such as robbery that are committed with a loaded gun and result in a killing, on the basis that it might have some deterrent effect, and murders for hire, on the basis that the mental intent element is so clear. The use of a loaded gun in a robbery that resulted in murder was a factor in the cases of Charley Luther Pike, Arlen Spencer, and Dovie Carl Mathis.[32] Though they did not use guns, the extremely violent nature of both the criminals and their crimes was a factor in the cases of Lawrence Jackson and Paul Eugene La Vergne.[33] The cases of Elizabeth "Ma" Duncan, Joseph Rosoto, John Vlahovich, Donald Franklin, and Allen Ditson all involved premeditated murders for hire.[34] In all ten cases, Brown denied the petitions for clemency and allowed the executions.[35]

Governor Brown was troubled by situations in which the imposition of the death penalty with respect to a particular individual represented disparate treatment of the condemned. The disparity took several forms. In the case of Harold Almus Langdon, it was the disparity between the crime—an attempted rape and kidnapping under the Little Lindbergh Law that involved neither robbery nor murder—and the punishment.[36] In the case of Charles Evan Turville, Jr., it was the disparity between his sentence and the sentence received by his codefendant—life imprisonment without possibility of parole—because his codefendant was a minor.[37] In the case of Stanley Fitzgerald, it was a geographic disparity, as he was given the death penalty in a rural locale for a murder that probably would not have been tried as a capital case in an urban area.[38] In the case of Norman Whitehorn, it was disparity with respect to culpability, as he received the death penalty while his codefendant, who had done the actual killing, received a sentence of life imprisonment without possibility of parole.[39] In the case of Carlos Cisneros, Dit-

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31 *Id.* at 135-40, 145-47.

32 *Id.* at 112-13, 114-15.

33 *Id.* at 113-14.

34 *Id.* at 107-12, 116-20.

35 Duncan was the only female clemency petitioner among the 59 Brown considered and only the fifth woman to be executed in California; Brown expresses a repugnance towards letting a woman die. *Id.* at 110.

36 *Id.* at 31.

37 *Id.* at 122-26. Turville was eventually paroled and has led an exemplary life. *Id.* at 126.

38 *Id.* at 126-28.

39 *Id.* at 132-35.

son's codefendant, it was also disparity with respect to culpability, as he was the ignorant dupe while Ditson was the mastermind of the crime.[40]

The absence of deliberate premeditation—a contributing factor in Governor Brown's decisions with respect to Crooker, Golston, and Turville—was a central factor in other decisions to grant clemency. The capital crimes committed by John Deptula and William Earl Cotter, Jr. were crimes of panic.[41] Those committed by Clyde Bates and Manuel Chavez were alcohol-inflamed crimes of rage.[42] Finally, Brown's decision to grant clemency in the case of William Lee Harrison was one of pure mercy.[43] Harrison was diagnosed with terminal liver cancer and after the commutation it "soon took the life that I was reluctant to charge to the already overloaded account of the State of California."[44]

Public Justice, Private Mercy is an introspective, plainly written book. Governor Brown recognizes that capital punishment "carries a load of emotional baggage that makes it hard to discuss, especially in the cool medium of print, without sounding pedantic or preachy."[45] He avoids both. While written without vitriol, the book does deliver a powerful message against capital punishment. This power flows in part from Brown's acknowledgment of the lasting effect that the fifty-nine clemency decisions had on him personally.[46] When he asks himself whether he would exchange the lives of the twenty-three criminals whose death sentences he commuted for the life of Wein's victim,[47] Brown's uncertainty as to his response is both genuine and illustrative of the enormous demands that the

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40 *Id.* at 117-20. Cisneros was eventually paroled, and has lived a religious and productive life since. *Id.* at 120.

41 *Id.* at 129-30, 143-44.

42 *Id.* at 147-52. Bates and Chavez were eventually paroled and have caused no further trouble. *Id.* at 152.

43 *Id.* at 130-32.

44 *Id.* at 132.

45 *Id.* at 154.

46 Governor Brown concludes the book with the following paragraph:

> I am eighty-three years old as I write these words. I've done many things during my life that have given me a great deal of pleasure and pride, and a few things that I'd either like to forget or to have another chance at. But the longer I live, the larger loom those fifty-nine decisions about justice and mercy that I had to make as governor. They didn't make me feel godlike then: far from it; I felt just the opposite. It was an awesome, ultimate power over the lives of others that no person or government should have, or crave. And looking back over their names and files now, despite the horrible crimes and the catalog of human weaknesses they comprise, I realize that each decision took something out of me that nothing—not family or work or hope for the future—has ever been able to replace.

Id. at 163.

47 *Id.* at xiii, 102-03.

clemency power makes of a public official. Wein was the only one of the twenty-three to commit a subsequent crime. The record with respect to the 430 non-capital felons to whom Brown granted rehabilitative pardons during his two terms as governor is even more impressive: two convicted of subsequent felonies, one parole violator, and twenty-seven convicted of misdemeanors.[48]

Politically, Governor Brown paid a high price for his principled use of the clemency power and his personal opposition to capital punishment.[49] The twenty-three commutations were far more than any previous governor of California; Earl Warren made just six commutations in eighty-eight clemency cases, and Goodwin Knight made six in forty-seven cases. Brown twice asked the California Legislature for a moratorium on the death penalty, in 1960 and 1963. In each instance he lost in the Judiciary Committee by an eight to seven vote. Richard M. Nixon used the issue against Brown in the 1962 gubernatorial election, as did Ronald Reagan, successfully, in 1966. Brown remained steadfast in his duty as an elected official to the end, refusing to issue blanket commutations to the sixty-four prisoners on death row as he left office in 1967.[50]

As Governor Brown reflects on his fifty-nine clemency decisions, he makes some passing observations concerning fundamental problems with respect to capital punishment. As already noted, Brown is troubled by the role insanity and other forms of mental illness play in capital crimes and the imposition of the death penalty. He makes a simple but effective argument for the "guilty but mentally ill" verdict to replace the "not guilty by reason of insanity" verdict.[51] Brown recognizes the tenuous relationship between the death penalty and the "next best" punishment—life imprisonment without possibility of parole. The fact that the latter sentence can be commuted to straight life by a governor in the future and can lead to a future parole board granting parole is a factor in many people's continued opposition to capital punishment. Skillful prosecutors use this apprehension on the part of jurors to obtain death sentences.[52] Brown is hesitant to take the power to commute a sentence of life imprisonment without possibility of parole away from a

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48 *Id.* at 104.

49 *Id.* at xiii, 20, 41-42, 51-52, 106, 121. It is interesting that, other than a passing reference, *id.* at 14, Brown is silent concerning the impact that the capital punishment issue had on the careers of his son, Governor Edmund G. (Jerry) Brown, and the younger Brown's appointee as Chief Justice of the California Supreme Court, Rose Bird.

50 *Id.* at 142. Brown commuted the sentences of just four of the 64 prisoners: Bates, Chavez, Cotter, and Lookado. *Id.*

51 *Id.* at 84-89.

52 *Id.* at 104-05, 131-32.

governor, because it denies him the "right to be humane and compassionate" in compelling cases, but he suggests "that it is more humane and compassionate than forcing him to constantly decide on the life or death of an individual."[53]

Governor Brown concludes *Public Justice, Private Mercy* with a brief chapter which sums up what the fifty-nine clemency decisions and his subsequent study of capital punishment has taught him. His conclusions are simple and echo those reached by others. First, capital punishment does not deter crime.[54] Second, the imposition of the death penalty clogs and pollutes the legal system at both the state and federal levels.[55] The long periods of time between the crime and the death sentence and between the sentence and the execution drain the death penalty of any marginal deterrent or retributive effect it may have had. State and federal courts are unable to address some serious issues because of the time that must be spent on writs and appeals made by death row prisoners. This lengthy process guarantees neither protection against the execution of innocent persons[56] nor racial equality.[57] Finally, the death penalty dam-

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[53] *Id.* at 105 ("If we could guarantee that nobody who committed a capital crime would ever get out of prison, there would be much less demand for the death penalty.").

[54] *Id.* at 155-57. *See* W. BOWERS, LEGAL HOMICIDE: DEATH AS PUNISHMENT IN AMERICA, 1864-1982, 381-83 (1984); F. ZIMRING & G. HAWKINS, CAPITAL PUNISHMENT AND THE AMERICAN AGENDA 167-86 (1986); Gottlieb, *The Death Penalty in the Legislature: Some Thoughts About Money, Myth, and Morality*, 37 U. KAN. L. REV. 443, 452-55 (1989); Kaplan, *The Problem of Capital Punishment*, 1983 U. ILL. L. REV. 555, 555-65.

[55] E. BROWN, *supra* note 1, at 157-61. *See* Powell, *Capital Punishment*, 102 HARV. L. REV. 1035, 1038-41 (1989); Note, *Pleas of the Condemned: Should Certiorari Petitions From Death Row Receive Enhanced Access to the Supreme Court?*, 59 N.Y.U. L. REV. 1120 (1984); Note, *Summary Processes and the Rule of Law: Expediting Death Penalty Cases in the Federal Courts*, 95 YALE L.J. 349 (1985). Justice Powell has observed that "[b]oth the retributive and deterrent purposes of capital punishment are imperiled by the current practice of repetitive review." Powell, *supra*, at 1041.

[56] Brown refers to Bedau & Radelet, *Miscarriages of Justice in Potentially Capital Cases*, 40 STAN. L. REV. 21 (1987). For subsequent debate on the subject, see Markham & Cassell, *Protecting the Innocent: A Response to the Bedau-Radelet Study*, 41 STAN. L. REV. 121 (1988); Bedau & Radelet, *The Myth of Infallibility: A Reply to Markham and Cassell*, 41 STAN. L. REV. 161 (1988).

[57] *See* Baldus, Pulaski & Woodworth, *Comparative Review of Death Sentences: An Empirical Study of the Georgia Experience*, 74 J. CRIM. L. & CRIMINOLOGY 661 (1983); Baldus, Woodworth & Pulaski, *Monitoring and Evaluating Contemporary Death Sentencing Systems: Lessons from Georgia*, 18 U.C. DAVIS L. REV. 1375 (1985); Barnett, *Some Distribution Patterns for the Georgia Death Sentence*, 18 U.C. DAVIS L. REV. 1327 (1985); Gross, *Race and Death: The Judicial Evaluation of Evidence of Discrimination in Capital Sentencing*, 18 U.C. DAVIS L. REV. 1275 (1985), *reprinted in altered form in* S. GROSS & R. MAURO, DEATH & DISCRIMINATION: RACIAL DISPARITIES IN CAPITAL SENTENCING chs. 8-10 (1989); Gross & Mauro, *Patterns of Death: An Analysis of Racial Disparities in Capital Sentencing and Homicide Victimization*, 37 STAN. L. REV. 27 (1984), *reprinted in altered form in* S. GROSS & R. MAURO, *supra*, chs. 1-8; Paternoster, *Prosecutorial Discretion in Requesting the Death Penalty: A Case of Victim-Based Racial Discrimination*, 18 LAW & SOC'Y REV. 437 (1984); Paternoster, *Race of Victim and*

ages the legal system by its high costs in terms of public money.[58]

It has been suggested that there is little left to be said on the subject of capital punishment.[59] Indeed, a great deal has been said.[60] What then does *Public Justice, Private Mercy* add to the literature concerning the death penalty?

First, Governor Brown's concerns with respect to capital punishment and the issues with which he wrestled in making his clemency decisions provide a reflective yet fresh look at many of the concerns and issues with which the United States Supreme Court has had to deal since its moratorium on capital punishment in *Furman v. Georgia*[61] in 1972 was lifted in *Gregg v. Georgia*[62] in 1976.[63]

The Supreme Court has shortened the catalog of crimes for which the death penalty is permissible to include only crimes that involve the taking of a life.[64] Within this catalog of crimes, only the individuals who participated actively in the killing may receive the

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Location of Crime: The Decision to Seek the Death Penalty in South Carolina, 74 J. CRIM. L. & CRIMINOLOGY 754 (1983); Zeisel, *Race Bias in the Administration of the Death Penalty: The Florida Experience*, 95 HARV. L. REV. 456 (1981); Comment, *Racial Disparities and the Law of Death: The Case for a New Hard Look at Race-Based Challenges to Capital Punishment*, 10 NAT'L BLACK L.J. 298 (1988).

58 *See* Kaplan, *supra* note 54, at 571-76; Nakell, *The Cost of the Death Penalty*, in THE DEATH PENALTY IN AMERICA 241 (H. Bedau 3d ed. 1982); Comment, *The Cost of Taking a Life: Dollars and Sense of the Death Penalty*, 18 U.C. DAVIS L. REV. 1221 (1985).

59 *See, e.g.*, F. ZIMRING & G. HAWKINS, *supra* note 54, at xiii; Lushing, *Capital Punishment: A Disputation*, 42 ARK. L. REV. 105, 105 (1989). Professor Lushing goes on to state that "it's not even plausible that everything possible has been said about capital punishment." Lushing, *supra*, at 105.

60 *See, e.g.*, H. BEDAU, DEATH IS DIFFERENT: STUDIES IN THE MORALITY, LAW, AND POLITICS OF CAPITAL PUNISHMENT (1987); R. BERGER, DEATH PENALTIES: THE SUPREME COURT'S OBSTACLE COURSE (1982); W. BERNS, FOR CAPITAL PUNISHMENT: CRIME AND THE MORALITY OF THE DEATH PENALTY (1979); CAPITAL PUNISHMENT IN THE UNITED STATES (H. Bedau & C. Pierce eds. 1976); S. GETTINGER, SENTENCED TO DIE: THE PEOPLE, THE CRIMES, AND THE CONTROVERSY (1979); T. SELLIN, THE PENALTY OF DEATH (1980); V. STREIB, DEATH PENALTY FOR JUVENILES (1987); E. VAN DEN HAAG & J. CONRAD, THE DEATH PENALTY: A DEBATE (1983); W. WHITE, THE DEATH PENALTY IN THE EIGHTIES: AN EXAMINATION OF THE MODERN SYSTEM OF CAPITAL PUNISHMENT (1987); *Death Penalty Symposium*, 18 U.C. DAVIS L. REV. 865 (1985); *Symposium on Current Death Penalty Issues*, 74 J. CRIM. L. & CRIMINOLOGY 659 (1983); *see also* works cited *supra* notes 54-59 and *infra* notes 63, 67, 70, 72, 74, 79-80, 83, 88, 92-94.

61 408 U.S. 238 (1972).

62 428 U.S. 153 (1976). *Gregg*'s companion cases were Proffitt v. Florida, 428 U.S. 242 (1976); Jurek v. Texas, 428 U.S. 262 (1976); Woodson v. North Carolina, 428 U.S. 280 (1976); and Roberts v. Louisiana, 428 U.S. 325 (1976).

63 For an overview of the status of the Court's efforts in this regard, see W. WHITE, *supra* note 60, at 4-30; *Project— Eighteenth Annual Review of Criminal Procedure: United States Supreme Court and Courts of Appeals 1987-88*, 77 GEO. L.J. 489, 1151-1213 (1989).

64 Coker v. Georgia, 433 U.S. 584 (1977) (rape); *see also* Enmund v. Florida, 458 U.S. 782 (1982) (robbery); Eberheart v. Georgia, 433 U.S. 917 (1977) (per curiam) (kidnapping); Hooks v. Georgia, 433 U.S. 917 (1977) (per curiam) (robbery).

death sentence.[65] The Court has reaffirmed that a death sentence cannot be carried out with respect to a prisoner who is insane,[66] but it has been less definitive in determining what role mental illness short of insanity should play in the capital punishment process.[67] A majority of the Court has yet to accept the consistent racially disparate application of the death penalty as a basis for constitutional challenge.[68]

The Supreme Court has determined the nature and role of the juries that must decide[69] whether to sentence to death an individual found guilty of a crime. The jury may be "death-qualified" by excluding jurors whose personal opposition to capital punishment would preclude them from voting to impose a death sentence in all instances.[70] The jury must be fully cognizant of its role in the capital punishment process and of its responsibility for the imposition of

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65 *Enmund*, 458 U.S. at 782. *But see* Tison v. Arizona, 481 U.S. 137 (1987) (sufficient that individual was a major participant in the felony and showed reckless indifference to the killing).

66 Ford v. Wainwright, 477 U.S. 399 (1986). *But see* Penry v. Lynaugh, 109 S. Ct. 2934 (1989) (execution of retarded individual not categorically prohibited by eighth amendment).

67 *See, e.g.*, *Penry*, 109 S. Ct. at 2934 (failure to consider individual's mental retardation as a mitigating factor violative of the eighth and fourteenth amendments); Satterwhite v. Texas, 486 U.S. 249 (1988) (use at capital sentencing stage of testimony of psychiatrist concerning evaluation conducted without counsel violative of sixth amendment); Barefoot v. Estelle, 463 U.S. 880 (1983) (psychiatric evidence of probability of further violence and dangerousness is permissible at capital sentencing stage); Eddings v. Oklahoma, 455 U.S. 104 (1982) (failure to consider individual's history of emotional disturbance as a mitigating factor violative of the eighth and fourteenth amendments); *see* Entin, *Psychiatry, Insanity, and the Death Penalty: A Note on Implementing Supreme Court Decisions*, 79 J. CRIM. L. & CRIMINOLOGY 218 (1988); Liebman & Shepard, *Guiding Capital Sentencing Beyond the "Boiler Plate": Mental Disorder as a Mitigating Factor*, 66 GEO. L.J. 757 (1978); Note, *Mental Illness as an Aggravating Circumstance in Capital Sentencing*, 89 COLUM. L. REV. 291 (1989).

68 McCleskey v. Kemp, 481 U.S. 279 (1987) (statistical data showing disproportionate impact of capital punishment on blacks insufficient to sustain due process, equal protection, or cruel and unusual punishment challenge under the eighth and fourteenth amendments). The *McCleskey* decision was made in the face of substantial evidence of racial bias at each stage of the capital punishment process. *See* S. GROSS & R. MAURO, *supra* note 57, at 159-227; *see also supra* note 57 and *infra* notes 80-84 and accompanying text.

69 The Court has held, however, that the Constitution does not require a jury determination of a death sentence. Spaziano v. Florida, 468 U.S. 447 (1984); *see also* Clemons v. Mississippi, 110 S. Ct. 1441 (1990) (Court appears to hold that an appellate court may be able to "salvage" a defective death sentence by reweighing aggravating and mitigating circumstances).

70 Lockhart v. McCree, 476 U.S. 162 (1986); Wainwright v. Witt, 469 U.S. 412 (1985); *see* W. WHITE, *supra* note 60, at 162-94; Cox & Tanford, *An Alternative Method of Capital Jury Selection*, 13 LAW & HUM. BEHAV. 167 (1989); Luginbuhl & Middendorf, *Death Penalty Beliefs and Jurors' Responses to Aggravating and Mitigating Circumstances in Capital Trials*, 12 LAW & HUM. BEHAV. 263 (1988).

the death penalty,[71] though it is permissible to instruct the jury concerning the governor's ability to commute a sentence of life imprisonment without possibility of parole to straight life.[72]

The Supreme Court has held that a death sentence cannot be mandatory,[73] but rather must be based on the existence of one or more aggravating factors.[74] Such circumstances may include the criminal record of the convicted individual and the heinousness of the crime,[75] but not evidence concerning the victim.[76] The capital sentencing jury must be permitted to consider all mitigating factors in reaching its decision,[77] including family history and mental ill-

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71 Caldwell v. Mississippi, 472 U.S. 320 (1985) (death sentence by jury which was led to believe that responsibility for the ultimate result is elsewhere—the state supreme court— is violative of the eighth amendment).

72 California v. Ramos, 463 U.S. 992 (1983). The *Ramos* Court approved the use of the "Briggs Instruction" to this effect in California as required by statute. CAL. PENAL CODE § 190.3 (West 1988). The "Briggs Instruction" was incorporated into the California Penal Code as the result of a 1978 voter initiative popularly known as the Briggs Initiative. *Ramos*, 463 U.S. at 995. It no doubt at least partially represents a legacy of Governor Brown's clemency decisions.

See Paduano & Smith, *Death by Errors: Juror Misperceptions Concerning Parole in the Imposition of the Death Penalty*, 18 COLUM. HUM. RTS. L. REV. 211 (1987); Note, *The Meaning of "Life" for Virginia Jurors and Its Effect on Reliability in Capital Sentencing*, 75 VA. L. REV. 1605 (1989); Comment, *Jury Coercion in Capital Cases: How Much Risk Are We Willing To Take?*, 57 U. CIN. L. REV. 1073 (1989).

73 Sumner v. Shuman, 483 U.S. 66 (1987). *But see* Boyde v. California, 110 S. Ct. 1190 (1990).

74 Blystone v. Pennsylvania, 110 S. Ct. 1078 (1990); Maynard v. Cartwright, 486 U.S. 356 (1988). The Court has not been particularly rigorous or consistent with respect to this requirement. *See, e.g.*, Lowenfield v. Phelps, 484 U.S. 231 (1988) (permissible that sole aggravating circumstance was identical to an element of the capital crime); Barclay v. Florida, 463 U.S. 939 (1983) (permissible for sentencer to consider evidence of criminal record even though not a permissible aggravating circumstance under state law); Zant v. Stephens, 462 U.S. 862 (1983) (permissible to carry out death sentence when one of three aggravating circumstances subsequently held unconstitutional by state supreme court). *But see* Johnson v. Mississippi, 486 U.S. 578 (1988) (impermissible to base death sentence in part on an invalid felony conviction as an aggravating circumstance).

See Pillsbury, *Emotional Justice: Moralizing the Passions of Criminal Punishment*, 74 CORNELL L. REV. 655, 698-710 (1989); Note, *A Continuing Source of Aggravation: The Improper Consideration of Mitigating Factors in Death Penalty Sentencing*, 41 HASTINGS L.J. 409 (1990).

75 Barclay v. Florida, 463 U.S. 939 (1983); Godfrey v. Georgia, 446 U.S. 420 (1980).

76 South Carolina v. Gathers, 109 S. Ct. 2207 (1989) (impermissible to argue inferences from victim's religious tract and voter registration card at capital sentencing stage); Booth v. Maryland, 482 U.S. 496 (1987) (impermissible to introduce victim impact statement at capital sentencing stage).

77 Mills v. Maryland, 486 U.S. 367 (1988); Hitchcock v. Dugger, 481 U.S. 393 (1987); Skipper v. South Carolina, 476 U.S. 1 (1986); Lockett v. Ohio, 438 U.S. 586 (1978).

The Court recently held that a capital sentencing scheme requiring unanimity among jurors with respect to any and each mitigating circumstance was impermissible under the eighth amendment. McKoy v. North Carolina, 110 S. Ct. 1227 (1990).

ness.[78] It is particularly noteworthy, if not ironic, in the context of Governor Brown's book that the Court has implicitly concluded that mercy need not be a consideration in the capital sentencer's decision.[79]

Second, the book illustrates that the imposition of the death penalty is unavoidably arbitrary. Even in the hands of a well-intentioned and principled public official such as Governor Brown, the ultimate result—that thirty-six people died for crimes for which other criminals committing identical crimes did not—was basically arbitrary. The path to death row is marked by numerous decisions—whether or not to prosecute, who will prosecute, who to appoint as defense counsel, whether or not to plea bargain, whether or not to seek the death penalty, which jurors to select, what instructions to give the jury, and whether or not to impose the sentence recommended by the jury. If any one of these decisions is made in the individual's favor, the path ends. It is asking a lot to conclude that in any given case each of these decisions has been made in a totally rational manner such that infliction of the death penalty at the end of the path will not be arbitrary and capricious.[80]

A review of the Supreme Court decisions since *Gregg* and the related commentary[81] identifies perhaps the most troubling source of arbitrariness in the capital punishment process—the appellate review of death sentences in the state courts, where the decision is made whether or not to reverse the result of any of the foregoing decisions. The Court has labored for thirteen years now at the task of establishing an evenhanded, objective procedure for imposing the death penalty in a rational manner. Even if the Court is ever able to establish such a procedure, it appears increasingly clear that

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78 Penry v. Lynaugh, 109 S. Ct. 1860 (1989); Eddings v. Oklahoma, 455 U.S. 104 (1982). *But see* Burger v. Kemp, 483 U.S. 776 (1987) (reasonable basis existed for counsel not to raise age and family history as mitigating factors at capital sentencing stage).

79 *See* Saffle v. Parks, 110 S. Ct. 1257 (1990) (jury instruction to "avoid any influence of sympathy" not violative of eighth amendment); Franklin v. Lynaugh, 487 U.S. 164 (1988) (jury instruction as to "residual doubt of guilt" as a mitigating factor not constitutionally required); California v. Brown, 479 U.S. 538 (1987) (jury instruction not to be "swayed by mere sentiment, conjecture, sympathy, passion, prejudice or public opinion or feeling" not violative of eighth and fourteenth amendments); *see also* K. MOORE, PARDONS: JUSTICE, MERCY, AND THE PUBLIC INTEREST (1989); Peter & Pincu, *Mercy and the Death Penalty: The Last Plea*, 10 CRIM. JUST. J. 41 (1987); Note, *Reviving Mercy in the Structure of Capital Punishment*, 99 YALE L.J. 389 (1989).

80 *See* C. BLACK, CAPITAL PUNISHMENT: THE INEVITABILITY OF CAPRICE AND MISTAKE (1974); B. NAKELL & K. HARDY, THE ARBITRARINESS OF THE DEATH PENALTY (1987). Prosecutorial discretion is a significant but largely ignored source of arbitrary punishment by death. B. NAKELL & K. HARDY, *supra*, at 152-58; W. WHITE, *supra* note 60, at 31-50.

81 *See supra* notes 61-79 and accompanying text.

it will never be implemented in such a way as to avoid the starkly disparate results of the procedure.[82] State appellate courts seem unwilling or unable to give capital cases both the procedural and the proportionality review essential to the Supreme Court's scheme.[83] And while the factor of race is recognized as the most compelling example of the disparate impact of capital punishment, other factors such as gender, socioeconomic status, geographic location, and culpability remain as strong as they were when Governor Brown was making his clemency decisions.[84] Certain of these factors may be relevant to an inquiry into the demographics of crime and criminals, but their existence is unacceptable in the context of justifying the most severe of all punishments for crime.

Third, the book is a strong piece of evidence refuting the argument that to oppose capital punishment is to be "soft on crime." Contrary to his critics, Governor Brown's "opposition to the death penalty is a deeply felt moral issue, not some offshoot of misguided liberalism."[85] Brown's career record shows that he was committed to law enforcement and the punishment of criminals in a manner that deters future crime, rehabilitates the criminal, and does not offend our constitutional principles. People such as Brown who oppose capital punishment on moral grounds are just as troubled by the terrible rate of crime, particularly violent crime, in the United States as are proponents of the death penalty. They simply believe that there are better solutions to the problem than further violence in the form of state-sanctioned killings.

Because it is such a polarizing issue, however, like abortion and gun control, abolitionists are better off not trying to convince retentionists to change their moral view. Rather, abolitionists should work to convince retentionists that the main justifications for capital punishment— deterrence and retribution—are not being achieved and that capital punishment can indeed have the totally opposite

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82 *See* Tison v. Arizona, 481 U.S. 137, 184-85 (1987) (Brennan, J., dissenting) ("Arbitrariness continues so to infect both the procedure and substance of capital sentencing that any decision to impose the death penalty remains cruel and unusual.").

83 *See* Pulley v. Harris, 465 U.S. 37, 64 (1984) (Brennan, J., dissenting); Godfrey v. Georgia, 446 U.S. 420, 437-42 (1980) (Marshall, J., dissenting). The *Pulley* majority held that the eighth amendment does not require proportionality review by appellate courts in every instance. *See also* B. NAKELL & K. HARDY, *supra* note 80, at 160-61; Dix, *Appellate Review of the Decision to Impose Death*, 68 GEO. L.J. 97 (1979); Note, *A Critical Evaluation of State Supreme Court Proportionality Review in Death Sentence Cases*, 73 IOWA L. REV. 719 (1988).

84 *See* Pulley v. Harris, 465 U.S. 37, 67-68 (1984) (Brennan, J., dissenting); *see also* W. BOWERS, *supra* note 54, at 379-81.

85 E. BROWN, *supra* note 1, at 151.

results.[86] It would be better to take the millions of public dollars, the thousands of court hours and the other high costs of executing the handful of criminals that have committed particularly heinous crimes and reinvest them in other solutions to the very real problem of crime, such as uncontrolled guns, drug and alcohol abuse, poverty, lack of education, child abuse, untreated mental illness, and deteriorating prison systems.

Fourth, the book leads the reader to consider again the possibility that only direct exposure to the realities of the death penalty will change the minds of proponents of capital punishment. Perhaps soon the Supreme Court will finish its task of refining the process—the crimes for which it may be imposed, the criminals who may be executed, the selection of the jury that will render it, the instructions to such jury concerning its role, the nature of aggravating and mitigating factors to be considered by the sentencer, the extent and quality of the appellate process—of imposing the death sentence. Executions will resume. With over 2,400 prisoners on death row nationwide, it will take several months or years to get rid of the backlog. Only then will capital punishment lose the unreal quality that it has attained and only then will "people begin to see the death penalty in all its naked ugliness."[87]

This last point raises an important question. Should this sacrifice of human lives be made for however long it takes for a majority of Americans to realize that capital punishment in any form is incompatible with "the evolving standards of decency that mark the progress of a maturing society"?[88] Or should judges, executives, and legislators act in advance of the majority and turn their energies and the public's money toward more sophisticated solutions to the very real problems of crime and criminals? In nearly every other Western industrial nation, the death penalty has been abolished. In most instances, abolition has occurred because legislators have led "from the front," and public opinion has followed.[89] In the United States, however, legislators tend to lead from the rear in terms of public opinion, and the decision to abolish capital punishment would presumably have to come from the Supreme Court.[90]

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86 Gottlieb, *supra* note 54, at 458-60.

87 E. BROWN, *supra* note 1, at 163. Since 1976, 130 prisoners have been executed in 14 predominantly southern states. N.Y. Times, June 19, 1990, at A17, col. 1.

88 Trop v. Dulles, 356 U.S. 86, 101 (1958); *see* Zeisel, *The Deterrent Effect of the Death Penalty: Facts v. Faiths*, 1976 SUP. CT. REV. 317, 343 (resumption of executions may lead to "natural experiment" that will prove (again) that capital punishment does not deter crime).

89 F. ZIMRING & G. HAWKINS, *supra* note 54, at 3-25.

90 *Id.* at 148-66.

A strong majority of the current Supreme Court, however, believes that capital punishment does not constitute cruel and unusual punishment prohibited by the eighth amendment. Justices Brennan and Marshall, who both dissented in *Gregg*,[91] have remained steadfast and often eloquent proponents of the belief that it does.[92] The late former Justice Goldberg, an ardent opponent of capital punishment who continued to urge the Supreme Court as a body to change its view,[93] had nevertheless concluded that the abolitionist attack must focus on the Congress, the legislatures of the thirty-seven states that have death penalty statutes, and the state courts.[94] Retired Justice Powell, a coauthor of *Gregg* and a believer in the constitutionality of capital punishment, has recently concluded that, in view of the seemingly insurmountable problems of implementing the death penalty, "perhaps Congress and the state legislatures should take a serious look at whether the retention of a punishment that is being enforced only haphazardly is in the public interest."[95]

Finally, *Public Justice, Private Mercy* correctly identifies capital punishment for what it really is—a symbol, "a kind of talisman against the dark forces that surround and threaten us all."[96] The American people are genuinely and justifiably afraid of the violent crime that seems to pervade our society. The problem of violent crime often appears insoluble, so Americans cling to the belief that

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91 Gregg v. Georgia, 428 U.S. 153, 227 (1976) (Brennan, J., dissenting); *Id.* at 231 (Marshall, J., dissenting).

92 *See, e.g.*, Clemons v. Mississippi, 110 S. Ct. 1441, 1452 (1990) (Brennan, J., concurring and dissenting); Saffle v. Parks, 110 S. Ct. 1257, 1274 (1990) (Brennan, J., dissenting); Boyde v. California, 110 S. Ct. 1190, 1212 (1990) (Marshall, J., dissenting); Blystone v. Pennsylvania, 110 S. Ct. 1078, 1092 (1990) (Brennan, J., dissenting); Johnson v. Mississippi, 486 U.S. 578, 591 (1988) (Brennan, J., concurring); Mills v. Maryland, 486 U.S. 367, 389 (1988) (Brennan, J., concurring); Maynard v. Cartwright, 486 U.S. 356, 366 (1988) (Brennan, J., concurring); Lowenfield v. Phelps, 484 U.S. 231, 246-47 (1988) (Marshall, J., dissenting); Tison v. Arizona, 481 U.S. 137, 159 (1987) (Brennan, J., dissenting); California v. Brown, 479 U.S. 538, 547 (1987) (Brennan, J., dissenting); Baldwin v. Alabama, 472 U.S. 372, 392 (1985) (Brennan, J., dissenting); Wainwright v. Witt, 469 U.S. 412, 439 (1985) (Brennan, J., dissenting); Barclay v. Florida, 463 U.S. 939, 974 (1983) (Marshall, J., dissenting); Barefoot v. Estelle, 463 U.S. 880, 916 (1983) (Blackmun, J., dissenting); Zant v. Stephens, 462 U.S. 862, 904 (1983) (Marshall, J., dissenting); Enmund v. Florida, 458 U.S. 782, 801 (1982) (Brennan, J., concurring); Eddings v. Oklahoma, 455 U.S. 104, 117 (1982) (Brennan, J., concurring); Godfrey v. Georgia, 446 U.S. 420, 433 (1980) (Marshall, J., concurring); Lockett v. Ohio, 438 U.S. 586, 619 (1978) (Marshall, J., concurring); Coker v. Georgia, 433 U.S. 584, 600 (1977) (Brennan and Marshall, J.J., concurring); Dobbert v. Florida, 432 U.S. 282, 304 (1977) (Brennan and Marshall, J.J., dissenting); *see also* Marshall, *Remarks on the Death Penalty Made at the Judicial Conference of the Second Circuit*, 86 COLUM. L. REV. 1 (1986).

93 Goldberg, *The Death Penalty Revisited*, 16 HASTINGS CONST. L.Q. 1, 3 (1988).

94 Goldberg, *Death and the Supreme Court*, 15 HASTINGS CONST. L.Q. 1, 5-6 (1987).

95 Powell, *supra* note 55, at 1046.

96 E. BROWN, *supra* note 1, at 153.

only by retaining the option of executing the worst of these violent criminals will we have a chance. Politicians skillfully feed on this fear, holding the death penalty aloft as a symbol of their commitment to fight crime.[97] They thereby obscure their consistent failure to develop and implement more meaningful responses to their constituents' concerns, making it even more unlikely that Congress and the state legislatures will lead from the front and abolish capital punishment.

Therefore, the burden is on the opponents of capital punishment to continue to make their case and build up the evidence for abolition. Governor Brown has made a significant contribution to this cause with *Public Justice, Private Mercy*.

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97 Gottlieb, *supra* note 54, at 458-60.