THE DECLINE OF EXECUTIVE CLEMENCY IN CAPITAL CASES

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I.

Of all the times in the year at which one might consider the issue of executive clemency, it is uniquely appropriate to have done so in the season of Passover when this paper was first delivered. The first phase of one of the most distinctive events in the history of Christianity arose at Passover from the refusal of a certain governor, with the power of executive clemency, to exercise that power in a capital case. There are four versions of the story;[1] here is how it is told by the Apostle Mark:

> Now at the feast he used to release for them one prisoner for whom they asked. And among the rebels in prison, who had committed murder in the insurrection, there was a man called Barabbas. And the crowd came up and began to ask Pilate to do as he was wont to do for them. And he answered them, "Do you want me to release for you the King of the Jews?" For he perceived that it was out of envy that the chief priests had delivered him up. But the chief priests stirred up the crowd to have him release for them Barabbas instead. And Pilate again said to them, "Then what shall I do with the man whom you call the King of the Jews?" And they cried out again, "Crucify him." And Pilate said to them, "Why, what evil has he done?" But they shouted all the more, "Crucify him." So Pilate, wishing to satisfy the crowd, released for them Barabbas; and having scourged Jesus, he delivered him to be crucified.[2]

Over the past two thousand years, the release of Barabbas has given much pause for reflection. It has also been the occasion for one impressive novel and one awful joke. The novel is *Barabbas* — disturbing and fascinating — by the Swedish Nobel Prize winner, Par Lagerkvist, a book much read in the 1950s but largely ignored today.[3] The joke is more recent, and is credited to New York's former State Senator James Donovan. During a speech in which he defended the death penalty, Senator Donovan is reported to have asked, with rhetorical disdain and finality, where Christianity would be today if "Jesus

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1. *Matthew* 27:15-26; *Mark* 15:6-15; *Luke* 23:13-25; *John* 18:28-40.

2. *Mark* 15:6-15. For further discussion of the crucification of Jesus, see S. BRANDON, THE TRIAL OF JESUS OF NAZARETH (1968) and W. WILSON, THE EXECUTION OF JESUS (1970).

3. P. LAGERKVIST, BARABBAS (A. Blair trans. 1951).

had got eight to fifteen years with time off for good behavior."[4]

The subject of executive clemency in capital cases is triangulated on one side by its history, on another by the current state of the law, and on the third by its rationale. The long history of executive clemency in capital cases begins even prior to the confrontation between Jesus and Pilate. It commences in another biblical episode, the judgment of Jehovah on the murderer Cain. For the murder of his brother Abel, Cain was banished, and all others were prohibited from assaulting him in revenge.[5] In spite of the biblical contributions, the history of the subject has rarely been examined.[6] On the current state of the law, however, reasonably complete, up-to-date information on executive clemency does exist due to a survey recently published as a government document.[7] This document obviates any need to review the matter here.

What does need to be done is to focus attention mainly on two aspects of executive clemency: the declining usage of it in capital cases nationally, and the problem of adequately explaining this decline. It will prove useful to look at these two topics against the rationale of executive clemency in general and as exercised in particular capital cases.

II.

At present, there are more than 2,300 persons under death sentence in nearly three dozen states.[8] In each of these states, the governor, acting alone or in concert with a board of pardons or some other administrative body, has the authority to commute these death sentences to lengthy prison terms.[9] Each of these death row prisoners has the privilege or the right to some form of clemency review by the chief executive or other official body. Normally, the most relevant and important form of clemency in a capital case is not pardon (because it entails release from custody) or reprieve (because it constitutes only a delay in carrying out sentence) but commutation of the sentence to a less severe punishment.

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4. Address by former New York State Senator James Donovan (Apr. 7, 1978), *quoted in* H. BEDAU, THE DEATH PENALTY IN AMERICA 305 n.1 (3d ed. 1982).

5. *Genesis* 4:1-16.

6. For a general discussion of the history of executive clemency, see Ringold, *The Dynamics of Executive Clemency*, 52 A.B.A. J. 240 (March 1966), *reprinted in* T. SELLIN, CAPITAL PUNISHMENT 226, 236 (1967). *See also* Note, *Executive Clemency in Capital Cases*, 39 N.Y.U. L. REV. 136 (1964).

7. NATIONAL INSTITUTE OF CORRECTIONS, U.S. DEP'T OF JUSTICE GUIDE TO EXECUTIVE CLEMENCY AMONG THE AMERICAN STATES (1988) [hereinafter DEP'T OF JUSTICE GUIDE]. Unfortunately, no special section is devoted to clemency in capital as opposed to other cases, nor is there any index to the legal provisions governing this aspect of the topic.

8. NAACP LEGAL DEFENSE AND EDUCATIONAL FUND, INC., DEATH ROW, U.S.A. 1 (May 2, 1990) (reporting 2,327 persons on death rows of one federal and thirty-four state jurisdictions).

9. Note, *Reviving Mercy in the Structure of Capital Punishment*, 99 YALE L.J. 389, 392 n.16 (1989) ("governors (as opposed to pardon boards) have the final clemency discretion in 22 of the 37 death penalty states," 11 states require concurrence of another body with the governor, and the remaining four death penalty states vest the entire power in a board of pardons).

The laws governing the exercise of clemency are diverse among the jurisdictions, but they share these basic features: Clemency decisions — even in death penalty cases — are standardless in procedure, discretionary in exercise, and unreviewable in result.[10] Short of constitutional amendment to remove or regulate this power, political and moral factors usually dominate the outcome of a clemency hearing.[11] As a result, the clemency hearing in capital cases constitutes a terminal stage of lawlessness in criminal justice decision making that is symmetrical with the lawlessness of the initial stage, controlled as it is by the prosecutor's comparably unregulated and discretionary decision making authority.[12]

Shifting attention from the laws to their underlying rationale, one finds considerable uncertainty, as Kathleen Dean Moore convincingly demonstrates.[13] There are at least three different accounts of the rationale for clemency. First, there is the traditional version that clemency generally and a fortiori commutation of a death sentence is a free "gift" of the executive,[14] an "act of grace",[15] or an act of arbitrary "mercy".[16] Chief Justice John Marshall, in a passage often cited from the Court's opinion in *United States v. Wilson*,[17] observed: "A pardon is an act of grace .... It is the private, though official, act of the executive magistrate ...."[18]

A second version of the rationale, favored by governors who take seriously their power to grant clemency, is that it is a quasi-judicial power providing the opportunity for a final review, one in which considerations not admissible in ordinary appellate review become relevant. Here is how Governor Winthrop Rockefeller put it in 1971, explaining his decision to commute the death sentences of Arkansas's entire death row population: "In a civilized society such as ours, executive clemency provides the state with a final deliberative opportunity to reassess the moral and legal propriety of the awful penalty which it intends to inflict."[19]

The third version might be said to stem from a passage in *Ex parte Grossman*, in which the Supreme Court, a century after Marshall's opinion in *Wilson*, wrote:

> Executive clemency exists to afford relief from undue harshness or evident mistake in the operation of the criminal law. The administration of justice by the courts is not necessarily always wise or cer-

10. *See* Leavy, *A Matter of Life and Death: Due Process Protection in Capital Clemency Proceedings*, 90 YALE L.J. 889, 891 (1981).

11. *Id.* at 893-94.

12. Rockefeller, *Executive Clemency and the Death Penalty*, 21 CATH. U.L. REV. 94, 96 (1971).

13. K. MOORE, PARDONS: JUSTICE, MERCY, AND THE PUBLIC INTEREST (1989).

14. *Id.* at 50, 51, 132, 193, 212.

15. Note, *supra* note 6, at 177; *see also* K. MOORE, *supra* note 13, at 50, 193.

16. Ringold, *supra* note 6, at 236.

17. United States v. Wilson, 32 U.S. (7 Pet.) 150 (1833).

18. *Id.* at 160.

19. Rockefeller, *supra* note 12, at 95.

> tainly considerate of circumstances which may properly mitigate guilt. To afford a remedy, it has always been thought essential . . . to vest in some other authority than the courts power to ameliorate or avoid particular criminal judgments. It is a check entrusted to the executive for special cases.[20]

The not altogether unambiguous view expressed in this passage has been transformed by Moore in her recent study of pardons[21] into a full-blown, single-minded retributive account of the rationale of pardon. Inspired by the extraordinary rise to dominance in recent years of retributive justifications for punishment generally,[22] she proposes that pardons, too, be justified solely on retributive grounds. Accordingly, she declares that pardons "are duties of justice, not supererogatory acts [like mercy]";[23] they "should be granted only when deserved";[24] unsurprisingly, she claims that the pardoning power "is abused when a pardon is granted for any reason *other than* that punishment is undeserved."[25]

It is tempting but not feasible at this point to argue about the merits of these different conceptions of the nature of clemency power. Nevertheless, two observations can be made. First, it may seem a matter of little moment to the issue of frequency with which clemency is granted in capital cases which of these three rationales dominates the thinking of governors and their advisers. Whereas such records as have been made public on the exercise (or denial) of clemency in capital cases readily show that each of these three alternative conceptions has played a role,[26] there is no evidence to show that the frequency of commutations in capital cases dramatically increases or decreases as a function of which rationale for its exercise prevails in gubernatorial thinking. Second, however, were the retributive theory of clemency to become dominant, it would have one of two effects: Either it would guarantee that few if any murderers on death row would receive executive clemency, or governors and their advisers would have to be convinced that retributive justice does not require

20. *Ex parte* Grossman, 267 U.S. 87, 120-21 (1925).

21. K. MOORE, *supra* note 13.

22. *See* M. Gardner, *The Renaissance of Retribution — An Examination of Doing Justice*, 1976 WIS. L. REV. 781; F. Kellog, *From Retribution to Desert: The Evolution of Criminal Punishment*, 15 CRIMINOLOGY 179 (1977); *Symposium: The New Retributivism*, 75 J. PHIL. 601 (1978).

23. K. MOORE, *supra* note 13, at 9.

24. *Id.* at 89.

25. *Id.* at 199 (emphasis in original).

26. For an example of commutation as an act of free grace, see the story of the commutations granted by Governor Coleman Blease in 1912 in South Carolina, as reported in K. MOORE, *supra* note 13, at 3. For an example of commutation for special reasons, see Rockefeller, *supra* note 12, and for an example of commutation as retribution (even though not described that way), see Commutation Statement of Governor Robert Meyner in New Jersey in 1960, *reprinted in* Bedau, *Death Sentences in New Jersey 1907-1960*, 19 RUTGERS L. REV. 1, 54-55 (1964) [hereinafter *Death in New Jersey*].

(or even permit) the carrying out of the death sentence in many cases.[27] Neither alternative is very attractive to opponents of the death penalty. The retributive attack on the death penalty is not without its articulate and persuasive advocates,[28] and it may be that the governors of death penalty jurisdictions can be persuaded by this reasoning. One cannot be confident, however, that this can be done. The two most recent mass commutations of death row prisoners — in 1971, by Governor Rockefeller,[29] and in 1986, by Governor Tony Anaya of New Mexico[30] — were not based on the judgment that the death penalty is retributively unjust. To that extent, at least, those who find attractive the retributive rationale of executive clemency must conclude that mass commutations such as these probably are an abuse of power and therefore wrong.

If one turns from the rationale for executive clemency to some practical considerations, especially where the death penalty is concerned, it is easy enough to see good reasons for preserving the clemency power and expecting it to be exercised with some frequency. First, the appellate courts can be counted on to define narrowly what will count as legally reversible error and what suffices to secure relief on this ground. The result is that not every error will be remedied by the courts, and these errors will go unremedied unless the executive steps in. Second, the legislature knows or should know that its criminal statutes are not self-enforcing any more than they are self-interpreting. As in the past, there will be inequities and inconsistencies in application of the laws. These can be remedied, if at all, only after they have occurred, and not all such remedies will be forthcoming from the appellate courts. Third, society should want some branch of government to have the power to reduce sentences where the punishment is inappropriately severe or excessive in a particular case. This concern should be especially strong where the failure to reduce a sentence entails the death of a prisoner by lawful execution. The natural place to lodge such power is with the executive, whose responsibility it is in any case to carry out legislatively authorized and judicially imposed sentences.

III.

Against this background, let us take a closer look at the reasons that governors have offered in explanation and justification of their exercise of the

27. Moore is sympathetic to such a development. *See* K. MOORE, *supra* note 13, at 175-77, 223.

28. *See* Reiman, *Justice, Civilization, and the Death Penalty: Answering van den Haag*, 14 PHIL. & PUB. AFF. 115 (1985); Pugsley, *A Retributivist Argument Against Capital Punishment*, 9 HOFSTRA L. REV. 1501 (1981). The author is not persuaded that the retributive critique of the death penalty is the best critique and has discussed the problem in part in H. BEDAU, DEATH IS DIFFERENT: STUDIES IN THE MORALITY, LAW, AND POLITICS OF CAPITAL PUNISHMENT 38-42, 55-63 (1987) [hereinafter DEATH IS DIFFERENT].

29. Rockefeller, *supra* note 12.

30. N.Y. Times, Nov. 28, 1986, at A18, col. 1; *see also* Commutation Statement by Governor Toney Anaya, A Matter of Life or Death (Nov. 26, 1986) (privately printed pamphlet).

power to commute a death sentence to a prison sentence. The reasons are many[31] but the following nine suffice to indicate their range:

(1) *The offender's innocence has been established.* In 1975, Florida Governor Reuben Askew granted a full pardon to two death row prisoners, Wilbert Lee and Freddie Pitts, despite reaffirmance of their conviction on appeal. Governor Askew said: "I am sufficiently convinced that they are innocent."[32]

(2) *The offender's guilt is in doubt.* In 1963, Maryland Governor J. Millard Tawes commuted the death sentences of John G. Giles, James V. Giles, and Joseph E. Johnson, Jr. Newly discovered evidence supported the claim of innocence by the defendants, and Governor Tawes declared: "From what I know now, I would now have to vote for a verdict of not guilty."[33]

(3) *Equity in punishment among equally guilty co-defendants requires reduction of a death sentence to life imprisonment.* In 1960, New Jersey Governor Robert Meyner commuted the death sentence of Willie Butler, stating that since three of his co-defendants had been permitted to plead non vult to second-degree murder, "it would be manifestly unfair for this one defendant to suffer death when his co-defendants, all of whom may be of equal guilt, have received comparatively light punishment."[34]

(4) *The public has shown conclusively albeit indirectly that it does not want any death sentences carried out.* The 1964 campaign in Oregon to abolish the death penalty by constitutional referendum was in part a campaign over the fate of two men and one woman then sentenced to death. When the electorate gave its verdict at the polls to repeal the death penalty, Governor Mark Hatfield immediately commuted the three death sentences.[35]

(5) *A nonunanimous vote by the appellate court upholding a death sentence conviction leaves disturbing doubt about the lawfulness of the death sentence.* Two New York governors, Herbert Lehmann and Averill Harriman, refused to affirm any death sentence in which the appellate courts were nonunanimous in upholding the underlying conviction.[36]

(6) *The statutes under which the defendant was sentenced to death are unconstitutional.* In 1976, Virginia Governor Mills E. Godwin, Jr., commuted the death sentences of all five prisoners on death row, arguing: "Until Virginia

31. The authors of Note, *supra* note 6, at 159-77, list thirteen different reasons, but make no attempt to assess the relative frequency with which each is cited in the commutation statements examined. For the results of a recent survey citing reasons for commutation in capital, and non-capital, cases see DEP'T OF JUSTICE GUIDE, *supra* note 7, at 169 (table 5).

32. Bedau & Radelet, *Miscarriages of Justice in Potentially Capital Cases*, 40 STAN. L. REV. 21, 139-40 (1987).

33. F. STRAUSS, WHERE DID THE JUSTICE GO? viii (1970); *see also* Bedau & Radelet, *supra* note 32, at 117-18.

34. *Death in New Jersey*, *supra* note 26, at 54-55.

35. Bedau, *The 1964 Death Penalty Referendum in Oregon: Some Notes from a Participant-Observer*, 26 CRIME & DELINQ. 528, 535 (1980) [hereinafter *Death Penalty Referendum*]. These three commutations in November 1964 were not tallied as among those between 1903 and 1964. *See infra* notes 45-46 and accompanying text; Bedau, *Capital Punishment in Oregon, 1903-64*, 45 OR. L. REV. 1, 6 (table 1) (1965) [hereinafter *Capital Punishment in Oregon*].

36. Note, *supra* note 6, at 170.

has a death sentence statute over which there is no legal question, I do not feel anyone should be executed."[37] Governor Godwin also was quoted to the effect that he would urge the next General Assembly to enact a death penalty law that could pass constitutional muster.[38]

(7) *Mitigating circumstances affecting the death row prisoner's status warrant commutation to a lesser sentence.* In 1971, South Carolina Governor John C. West commuted the death sentence of Edward Williams on the ground that nine years on death row for a man then 81 years old "might well constitute cruel and unusual punishment."[39]

(8) *Rehabilitation of the offender while on death row undermines the rationale for carrying out the death sentence.* In 1962, Illinois Governor Otto Kerner commuted the death sentence of Paul Crump. The Governor argued that after seven years awaiting execution, "the embittered, distorted [Crump] who committed a vicious murder no longer exists," and said that he was commuting the sentence because "[u]nder these circumstances, it would serve no useful purpose to take this man's life."[40]

(9) *The death penalty is morally unjustified.* The mass commutations of death row prisoners in Arkansas by Governor Rockefeller and in New Mexico by Governor Anaya, as well as commutations in earlier years by such governors as Oregon's Robert Holmes and Massachusetts's Endicott Peabody, were rooted in their strong convictions that capital punishment was morally wrong.[41]

Today, all these reasons, except for the rationale that the public has shown that it does not want the death penalty to be imposed, remain plausible grounds for the exercise of clemency in capital cases. They also show that there are good reasons — even retributive reasons, in many cases — for granting clemency to a death row prisoner. Nor is it necessary for a chief executive or pardon board to base a commutation on personal moral opposition to the death penalty. As these cases show, neither extraordinary political courage nor a suicidal desire to end one's political career is always a necessary condition of exercising the power of executive clemency in a capital case.

IV.

Let us now turn from the rationale for executive clemency to the role that

37. N.Y. Times, Oct. 20, 1976, at 25, col. 6.

38. *Id.* Three years later, Professor Charles L. Black, Jr., argued that despite the Supreme Court's judgment in *Gregg v. Georgia* in which it ruled that the death penalty is not per se a "cruel and unusual punishment," state governors are lawfully free to commute all death sentences under their jurisdiction if they believe that the death penalty is, in fact, unconstitutional. C. Black, *Governors' Dilemma*, NEW REPUBLIC, Apr. 25, 1979, at 12-13.

39. N.Y. Times, June 13, 1971, at 53, col. 3.

40. H. BEDAU, THE DEATH PENALTY IN AMERICA 563 (1st ed. 1964).

41. *See* Rockefeller, *supra* note 12, at 25. For Governor Holmes' views, see *Death Penalty Referendum*, *supra* note 35, at 529-30. For Governor Peabody's views, see Note, *supra* note 6, at 173 n.135.

it has played in capital cases during this century in the United States, and the role that it currently plays and is likely to play during the rest of this century.

What is known about the frequency, jurisdictional distribution, and the demographic characteristics of those who sought and received, and those who were denied, commutation of a death sentence? Readily accessible published information leaves much to be desired. The statistical data are of two kinds; statistics compiled by the federal government which purport to present a national picture and statistics compiled by states to present an internal picture.

Concentrating on the national picture, in 1952, one observer reported that for the seven-year period 1940 through 1946, 771 persons were sentenced to death throughout the nation but only 587 executed.[42] Of the remaining 184, it was conjectured (though without any evidence or explanation) that "[m]ost of [these prisoners] undoubtedly received commutations."[43] If so, then between a fifth and a quarter of all death sentences during the early and mid-1940s were disposed of by commutation. This may be the only information about the nation as a whole that is currently available for the period in question; in any case, the official source being relied upon by the author, the annual publication of commutation statistics by the Department of Justice's Bureau of Justice Statistics (as it is now called), did not commence until 1960.[44] The series of national data provided by the Department of Justice on death sentences presents a very incomplete picture; it is nonetheless the best available. Only further research in the archives of clemency proceedings, state by state, is likely to improve upon it. Meanwhile, Table 1 presents what the available published records from this federal source show:[45]

42. Scott, *The Pardoning Power*, 284 ANNALS 95, 99 (Nov. 1952) (citing BUREAU OF THE CENSUS, U.S. DEP'T COMMERCE, PRISONERS IN STATE AND FEDERAL PRISONS AND REFORMATORIES (annual reports for 1940-46)).

43. *Id.* at 99.

44. *Compare* BUREAU OF PRISONS, U.S. DEP'T OF JUSTICE, NATIONAL PRISONER STATISTICS 26 (March 1961) (commutation statistics for the year 1960 are disclosed in Figure A, Movement of Prisoners Under Sentence of Death by Offense: 1960) *with* FEDERAL BUREAU OF PRISONS, U.S. DEP'T OF JUSTICE, NATIONAL PRISONER STATISTICS 23 (February 1960) (commutation statistics for the year 1959 are not disclosed).

45. There is some question about the reliability of the commutation statistics in the 1980s as reported in Table 1. *See infra* note 46. Efforts by the NAACP Legal Defense and Educational Fund researchers to identify commutations outside Texas in 1982 and 1983 were unsuccessful. *See also* Letter from Richard Brody, Director of Research, Capital Punishment Project at NAACP Legal Defense Fund to Hugo Bedau (Aug. 20, 1985). Nevertheless, the Justice Department reported such commutations including two in Virginia in 1982. *See* BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, CAPITAL PUNISHMENT 1982, at 40 (table 17). For subsequent years, the Department of Justice did not publish statistics on a state by state basis but rather published only aggregate national totals of annual death sentence commutations. *See* BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, CAPITAL PUNISHMENT 1983, at 4, col. 3, and subsequent issues.

TABLE 1

U.S. DEATH SENTENCES AND COMMUTATIONS 1960-1988

Year	Death Sentences[46]			Commutations[47]
1960	(113	+ 77) =	190	22
1961	(136	+ 4) =	140	17
1962	(99	+ 4) =	103	27
1963	(91	+ 2) =	93	15
1964	(98	+ 8) =	106	9
1965	(67	+ 19) =	86	19
1966	(114	+ 4) =	118	17
1967			85	13
1968	(102	+ 36) =	138	16
1969	(97	+ 56) =	153	20
1970	(127	+ 6) =	133	29
1971	(104	+ 9) =	113	**
1972	(75	+ 8) =	83	**
1973			42	**
1974	(151	+ 14) =	165	**
1975	(285	+ 37) =	322	**
1976	(233	+ 16) =	249	**
1977	(133	+ 22) =	155	**
1978	(183	+ 14) =	197	1
1979			159	4
1980			187	2
1981			228	15
1982			264	10
1983			252	11
1984			280	1
1985			273	4
1986			297	7
1987			299	5
1988			296	4
Total			5,206	268

Source: Statistical compilations from the United States Department of Justice.

As Table 1 shows, there is a seven-year informational hiatus for commutations, from 1971 through 1977, which falls in the latter period of the

46. Numerals inside parentheses represent, first, the number of cases originally reported by the Department of Justice in its National Prisoner Statistics compilations for the year in question, plus additional cases later recalculated and reported by the Department for the years 1961 through 1966. *See* U.S. DEP'T OF JUSTICE, NATIONAL PRISONER STATISTICS BULLETIN, CAPITAL PUNISHMENT 1971-72, at 20 (table 4) (Dec. 1974). For statistics on 1968 through 1978, see BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, CAPITAL PUNISHMENT 1979, at 20 (table 6). The Department of Justice did not explain why it changed the number of death sentences from the number originally reported. The number outside the parentheses represents the total number of death sentences currently reported by the Department of Justice.

47. These numbers represent the number of commutations reported by the Justice Department in its National Prisoner Statistics compilations. Annual commutations were not reported for the period 1971-1977.

moratorium on executions brought about by constitutional litigation that began in 1967 and ended in 1978.[48] This is probably the very period when annual commutations began their precipitous drop, starting in 1978, that is so conspicuously documented in Table 1. In the decade 1961 through 1970, death sentences totalled 1,155 and commutations 182. This yields a ratio of one commutation for approximately every 6.3 death sentences. In the decade 1979 through 1988, death sentences totalled 2,535 but there were only sixty-three commutations. This yields a ratio of one commutation for approximately every 40.2 death sentences. Thus, in the 1980s, death row prisoners had about one-sixth as many commutations as did their counterparts of the 1960s.

A certain caution, however, is advisable in the interpretation of these data, which apparently document a radical decline in the commutations of death sentences.[49] Table 1 gives a measure of frequency of commutation relative to the number of death sentences. It does not give a measure of commutations relative to the number of applications, or to the number of death row prisoners applying, for clemency. Filing an application is a necessary condition of receiving clemency; it is not known how many death row prisoners since *Gregg v. Georgia*[50] have filed such an application and been turned down. It is known that not every death row prisoner executed since *Gregg* has filed for clemency; some post-*Gregg* death sentences were carried out on "volunteers" — prisoners who by definition refused to seek full appellate review or clemency.[51]

A somewhat different picture emerges, one that partially overlaps with the national data reported in Table 1, when information from various states is examined. The data reported in Table 2 come from a non-random sample of a dozen state jurisdictions scattered across the nation and spanning different years (with the sole exception of Georgia, the periods covered antedate the death penalty moratorium of the 1960s and 1970s). Unfortunately, there is no uniform reporting scheme or locus of publication for state data on commutations of death sentences.[52]

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48. During the period extending from June 1967 (subsequent to the execution in Colorado of Luis Monge) to January 1977 (prior to the execution of Gary Gilmore in Utah), the courts stayed all executions as a result of a national litigation campaign to abolish the death penalty on constitutional grounds. *See generally* H. BEDAU, THE COURTS, THE CONSTITUTION, AND CAPITAL PUNISHMENT (1977) [hereinafter COURTS, CONSTITUTION, AND CAPITAL PUNISHMENT]; M. MELTSNER, CRUEL AND UNUSUAL: THE SUPREME COURT AND CAPITAL PUNISHMENT (1973); B. WOLFE, PILEUP ON DEATH ROW (1973).

49. The author is indebted to S. Adele Shank, Ohio Public Defender Commission, for provoking discussion on the point that follows in the text.

50. 428 U.S. 153, *reh'g denied*, 429 U.S. 875 (1976).

51. NAACP LEGAL DEFENSE AND EDUCATIONAL FUND, INC., EXECUTION UPDATE (Jan. 18, 1990) (lists 15 of the 121 prisoners executed between 1977 and January 1990 as having been "volunteers").

52. Note, *supra* note 6, at 191-92 (citing commutation data from several states but giving no sources for the data).

TABLE 2

DEATH SENTENCES AND COMMUTATIONS IN SELECTED STATES FOR SELECTED YEARS, 1900 TO 1985

State	Years Span	Years Total	Death Sentences	Commutations
California[53]	1943-66	24	192	35
Florida[54]	1925-65	41	**	57
Georgia[55]	1976-85	10	**	0
Maryland[56]	1936-61	46	122	34
Massachusetts[57]	1900-58	59	101	30
New Jersey[58]	1907-60	54	232	34
New York[59]	1920-36	17	252	83
North Carolina[60]	1909-54	46	660	229
Ohio[61]	1950-59	10	60	23
Oregon[62]	1903-64	62	92	26
Pennsylvania[63]	1914-58	45	439	71
Texas[64]	1924-68	45	483	85
Total			2,633	707

These data show that in the years prior to *Furman v. Georgia*,[65] the ratio

53. SUBCOMMITTEE OF THE JUDICIARY COMM. ON CAPITAL PUNISHMENT, PROBLEMS OF THE DEATH PENALTY AND ITS ADMINISTRATION IN CALIFORNIA, 20 ASSEMBLY INTERIM COMM. REPS. NO. 3, at 14 (Table IX) (1955-1957); and E. BROWN, PUBLIC JUSTICE, PRIVATE MERCY: A GOVERNOR'S EDUCATION ON DEATH ROW xiii (1989).

54. D. von Drehle, *Clemency Exists Only in Theory*, Miami Herald (special reprint of a four-part series originally published July 10-13, 1988) at 8. These 57 cases represented 21.3% of 268 clemency applications reviewed. The total death sentences for the period were not reported.

55. Bentele, *The Death Penalty in Georgia: Still Arbitrary*, 62 WASH. U.L.Q. 573, 628-29 (1985). Seven clemency applications are reported during this decade; total death sentences for the period are not reported.

56. LEGISLATIVE COUNCIL OF MARYLAND, REPORT OF THE COMM. ON CAPITAL PUNISHMENT 10 (1962).

57. COMMONWEALTH OF MASSACHUSETTS REP. AND RECOMMENDATIONS OF THE SPECIAL COMM'N ESTABLISHED FOR THE PURPOSE OF INVESTIGATING AND STUDYING THE ABOLITION OF THE DEATH PENALTY IN CAPITAL CASES, MASS. H. REP. NO. 2575, at 29 (1958).

58. *Death in New Jersey, supra* note 26, at 7 (table I).

59. Scott, *supra* note 42, at 99 (citing SELECT COMMITTEE ON CAPITAL PUNISHMENT, MINUTES OF EVIDENCE 551 (1930)).

60. Johnson, *Selective Factors in Capital Punishment*, 36 SOC. FORCES 165, 166 (1957).

61. OHIO LEGISLATIVE SERVICE COMM'N, CAPITAL PUNISHMENT, STAFF RESEARCH REP. NO. 46, at 62 (table 14) (1961).

62. *Capital Punishment in Oregon, supra* note 35, at 6 (table I).

63. Wolfgang, Nolde & Kelly, *Comparison of the Executed and the Commuted Among Admissions to Death Row*, 53 J. CRIM. L. & CRIMINOLOGY 301 (1962).

64. Koeninger, *Capital Punishment in Texas, 1924-68*, 15 CRIME & DELINQ. 132, 135, 140 (1969).

65. 408 U.S. 238 (1972).

of commutations to death sentences was approximately three to eight. (Even if one excludes North Carolina, which accounts for twenty-five percent of all death sentences and nearly a third of all commutations, on grounds that it is an anomaly, the ratio drops only to two in eight.) Of these dozen states, the one whose pattern of clemency in capital cases has been studied most closely over the course of the century is Florida. In the decade following *Gregg v. Georgia,*[66] from 1976 to 1986, Florida governors gave clemency review in 202 capital cases.[67] In Governor Robert Graham's first six years in office, his forty-four reviews resulted in clemency in six cases.[68] Since 1982, neither he nor Governor Robert Martinez, his successor, has granted clemency in even one case,[69] despite efforts to obtain it in more than one case where substantial doubts lingered over the guilt of the condemned man.[70] Governor Graham, to be sure, did refuse to sign some twenty death warrants, thereby creating a kind of half-way house on death row for these inmates, suspending them indefinitely between execution (for which no date was set) and a life term in prison.[71]

V.

Some years ago, observers reported that about one out of every four or five death row prisoners had had his sentence commuted to life in prison.[72] Today, as was shown in Table 1, the frequency has dwindled to barely one in forty, a reduction by at least a factor of ten. Commentators have noticed this decline, leading some to conclude that clemency for death row prisoners has become unavailable in practice.[73] What explains this precipitous decline in commutations (assuming, without evidence, that the rate of clemency applications per death row prisoner has been relatively constant)? There are several hypotheses to consider, which are not mutually exclusive.

Beginning in 1967, with the national litigation campaign to abolish the death penalty on federal constitutional grounds, the courts stayed all executions for roughly a decade.[74] This judicially-imposed moratorium on executions had several interrelated consequences. First, no death sentence could receive final appellate review during the pendency of a federal judicial decision on the very constitutionality of the death penalty itself.[75] As a result, few death row prisoners were in a position to file a clemency application, and governors could indefinitely defer clemency hearings on the ground that no death

66. 428 U.S. 153, *reh'g denied*, 429 U.S. 875 (1976).
67. D. von Drehle, *supra* note 54, at 8.
68. *Id.*
69. *Id.*
70. Radelet, *Rejecting the Jury: The Imposition of the Death Penalty in Florida*, 18 U.C. DAVIS L. REV. 1409, 1427-30 (1985).
71. D. von Drehle, *supra* note 54, at 8.
72. W. BOWERS, EXECUTIONS IN AMERICA 76 n.b. (1974); Scott, *supra* note 42, at 99.
73. Note, *supra* note 9, at 393.
74. *See* H. BEDAU, *supra* note 4, at 247.
75. *Id.*

case was ripe for such a final review. Governors, for the first time in history, thus found themselves positioned safely outside the network of decision making in particular capital cases. To some extent they could also stand aside from the growing controversy over abolishing or restoring the death penalty. The typical governor was loath not only to intervene in individual death cases but also to play any conspicuous role in the legislative arena on this issue, since intervention on either side could only result in lost votes. What governors first learned a generation ago and enjoyed for a decade, their successors practice today.

Attractive though this hypothesis may be, it is largely conjectural and is, at least in part, apparently contradicted by the facts. Table 1 shows that during the first four years of the decade 1967 through 1976, for which data is available, commutations proceeded at a fairly steady annual rate and constituted a significant percentage of the final disposition in all death sentences. So governors during at least the first half of this period did not entirely stand aside; they did intervene to grant commutations, just as their predecessors had intervened prior to the litigation campaign that began in 1967.

A second hypothesis concerns commutations granted by Governor Rockefeller of Arkansas and most other governors during the decade from *Maxwell v. Bishop*[76] to *Gregg*. They were done in the belief (or, as in Rockefeller's case, the hope) that capital punishment would soon be declared unconstitutional and abolished by the federal courts once and for all. Commutations made under this belief were quite unlike those made in earlier years, and not surprisingly they dried up after 1976, when it was clear that the campaign to abolish the death penalty nationally on constitutional grounds probably would not succeed.

Like its predecessor, this hypothesis suffers from a lack of empirical evidence to support it; at present, it is entirely conjectural. At best, like the first hypothesis, it warrants further investigation. At the moment, all one can do is put it to one side and move on to other considerations.

There is a third hypothesis, also to some extent conjectural, but worthy of consideration and not without support from a fairly steady observation of the domestic political scene over the past generation. Some agreement with, and perhaps even support for, the following arguments can also be found in the recent report by Amnesty International on the death penalty in the United States,[77] as well as in some other sources.[78] For reasons that will become clearer, it is tempting to call the central feature of the hypothesis the Pilate Syndrome. On reflection, however, this name has one conclusive objection

76. Maxwell v. Bishop, 398 F.2d 138 (8th Cir. 1968), *vacated and remanded*, 398 U.S. 262 (1970).

77. AMNESTY INTERNATIONAL, UNITED STATES OF AMERICA: THE DEATH PENALTY 102-03 (1987).

78. F. ZIMRING & G. HAWKINS, CAPITAL PUNISHMENT AND THE AMERICAN AGENDA 100 (1986).

against it. After all, though Pilate refused to spare the innocent Jesus, he did spare the guilty Barrabas.

The hypothesis now to be considered is based principally on three perceptions widely held by those in public life, especially over the past decade or so. First, there is the perception that a governor who commutes a death sentence verges on committing political suicide. This perception appears to be the inevitable consequence of two relatively new factors in electoral politics: the high level of apparent public support for capital punishment[79] and the proven willingness of gubernatorial candidates to use a rival's opposition to the death penalty in whatever form it might take (commutation of a death sentence, veto of a death penalty bill, or the intention to so act) as evidence of being a "bleeding heart liberal" or "soft on crime."[80] In 1966, what may have been the first of the modern "law and order" political campaigns was run with great success in California; its triumph was the election of Ronald Reagan, then a second-rate Hollywood actor, as governor.[81] Two years later, on the national scene, the same strategy succeeded in putting Richard Nixon in the White House and Democrat liberals in the outhouse.[82] Examples of governors in the past twenty years who have achieved election or reelection despite a publicized record of commuted death sentences, or of an advertised willingness to commute death sentences, are hard to find.

Second, there is the perception — at least, in the states in which executions have once again become frequent — that death sentences are now meted out by trial courts with all the fairness that is humanly possible, even if in the dark pre-*Furman* past they were not. The constitutional collapse of that old standby, mandatory death sentences,[83] the introduction of the bifurcated capital trial that divides the deliberation over guilt from the deliberation over sen-

79. "Apparent" because various surveys indicate that the level of public support for the death penalty drops dramatically as soon as various follow-up questions to the facile question of whether or not they support the death penalty are asked, notably when respondents are presented with the alternative punishment of life imprisonment without parole. *See* Fox, Radelet & Bonsteel, *Death Penalty Opinion in the Post-Furman Years*, 18 N.Y.U. REV. L. & SOC. CHANGE 499, 511-15 (1990-91); Bowers, *The Death Penalty's Shaky Support*, N.Y. Times, May 28, 1990, (Editorial), at A21, col. 2.

80. *See, e.g.*, Bedau, *The Politics of Capital Punishment*, San Francisco Recorder, Mar. 26, 1990, Special Pullout Section, at ii; Dingerson & Rust-Tierney, *Politicians and Death*, Lifelines: Newsletter of the National Coalition to Abolish the Death Penalty, Mar.-Apr. 1990, at 1; Goodavage, *Cover Story: Death Penalty Politics*, USA Today, Mar. 29, 1990, at 1; Lacayo, *The Politics of Life and Death*, TIME, Apr. 2, 1990, at 18; *The Death Penalty and Politics in 1990*, 2 NATIONAL LEGAL AID & DEFENDER ASS'N CAPITAL REPORT, Jan.-Feb. 1990, at 8; Oreskes, *The Political Stampede on Execution*, N.Y. Times, Apr. 4, 1990, at A16, col. 1.

81. Governor Edmund "Pat" Brown attributes his loss to Ronald Reagan in the gubernatorial campaign of 1966 in part to his handling of the Caryl Chessman case in the late 1950s. *See* E. BROWN, PUBLIC JUSTICE, PRIVATE MERCY: A GOVERNOR'S EDUCATION ON DEATH ROW xiii, 51-52, 121 (1989); *see also* B. WOLFE, *supra* note 48; Culver, *The Politics of Capital Punishment in California*, in THE POLITICAL SCIENCE OF CRIMINAL JUSTICE 14-26 (S. Nagel, E. Fairchild & A. Champagne eds. 1983).

82. DEATH IS DIFFERENT, *supra* note 28, at 149-53.

83. Sumner v. Shuman, 483 U.S. 66 (1987); Woodson v. North Carolina, 428 U.S. 280 (1976).

tencing,[84] and the constitutional authority for the defense to introduce just about anything in mitigation during the sentencing phase, on the ground that it might persuade the jury to favor a prison sentence[85] — these are three important features of the new system of capital punishment at the trial level that make any death sentence (except in states like Florida, with a judicial override provision[86]) appear more than ever before to be the product of democratic process. Any chief executive who commutes a death sentence thus appears to flout the popular will — and to do so on unprincipled or perplexing grounds.

Third, there is also the perception that if a death sentence is unfairly imposed in a particular case by the trial court, then the appellate courts — and especially the federal courts — can be counted on to rectify the injustice and order a new trial. Appeal at the state level is now virtually mandatory, automatic, and universal,[87] and appeal in the federal courts (although neither mandatory nor automatic) is virtually guaranteed.[88] Significantly, half or more of all death sentences are reversed in state or federal appellate courts;[89] this is hardly surprising given the mediocre quality of defense counsel in many capital trials and the superior quality of defense counsel on appeal — indeed, the very best that pro bono services can provide.[90]

As a result, the perceived performance of trial and appellate courts in capital cases is a powerful factor in rationalizing gubernatorial refusal to commute death sentences.[91] Of course, in the judgment of critics with considerable experience litigating capital cases, there is no basis whatever for complacency about any aspect of the way the criminal justice system currently handles capital cases. In the view of these critics, what is really happening is the "deregulation of death"[92] and the "death of fairness"[93] in the administration of capital punishment in this country. The conspicuous fight over the

84. Gregg v. Georgia, 428 U.S. 153, *reh'g denied*, 429 U.S. 875 (1976).

85. Lockett v. Ohio, 438 U.S. 586 (1978).

86. *See* Radelet, *supra* note 70.

87. Goodpaster, *Judicial Review of Death Sentences*, 74 J. CRIM. L. & CRIMINOLOGY 776 (1983); Davis, *The Death Penalty and Current State of the Law*, 14 CRIM. L. BULL. 7, 15 (1978). *But see* Whitmore v. Arkansas, 110 S. Ct. 1717, 1729 (1990) (Marshall, J., dissenting) (Supreme Court refused to invalidate an Arkansas death sentence "even though no appellate court ha[d] reviewed the validity of [the capital] conviction or [death] sentence.").

88. On the development of federal appeals in capital cases, see H. BEDAU, *supra* note 4, at 18-21.

89. Federal habeas corpus litigation in federal appeals of state-imposed death sentences alone "result in as many as half of all death sentences being overturned." Greenhouse, *Judicial Panel Urges Limit on Appeals by Death Row Inmates*, N.Y. Times, Sept. 22, 1989, at B20, col. 3.

90. *See* Lardent & Cohen, *The Last Best Hope: Representing Death Row Inmates*, 23 LOY. L.A.L. REV. 213 (1989); Mello, *Facing Death Alone: The Post-Conviction Attorney Crisis on Death Row*, 37 AM. U.L. REV. 513 (1988); Stout, *The Lawyers of Death Row*, N.Y. Times, Feb. 14, 1988, (Magazine), at 46.

91. Note, *supra* note 9, at 394.

92. Weisberg, *Deregulating Death*, 8 SUP. CT. REV. 305 (1983).

93. Bentele, *supra* note 55; 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).

future of habeas corpus litigation[94] is but one of many such indications. There is much evidence that in recent years the federal courts, especially the Supreme Court, increasingly refuse to act in accordance with the belief that "death is different."[95]

Given the prevailing perceptions, however contrary to the facts they may be, to commute a death sentence requires an unusual combination of personal attributes in a governor. These attributes are rarely manifested except when combined with the loss of further political ambition. This last factor played a considerable role in the commutation decisions of Governor Rockefeller in 1971 and Governor Anaya in 1986. Each made commutation of his state's death row prisoners his political swan song. Few governors with death row populations want to sing that tune.[96]

VI.

If the foregoing hypothesis, with its stress on both the perceived fairness of capital sentences and the risks of intervention, does indeed explain the decline of clemency in today's capital cases, what can be done to keep clemency hearings from becoming an empty formality, as some observers have complained has already happened?[97] What if anything can be done to get governors and pardon boards to exercise their authority to review meaningfully:

> whether an execution should take place . . . , whether a death sentence is imposed because of the race or social status of the victim, or because the jury wanted to keep the defendant in jail longer, and whether a death sentence is unfair in view of such mitigating factors

94. *New Threat to Adequate Federal Review of Death Sentences*, LEGAL DEFENSE FUND NEWS, Winter 1989, at 1; Kaufman, *Speedy Justice — At What Cost?*, N.Y. Times, May 1, 1990, at A23, col. 1; Greenhouse, *Chief Justice is Off Cue as Curtain is Lifted*, N.Y. Times, Mar. 16, 1990, at A12, col. 5; Greenhouse, *Vote is a Rebuff for Chief Justice*, N.Y. Times, Mar. 15, 1990, at A16, col. 4; Greenhouse, *The Court Cuts Off Another Exit from Death Row*, N.Y. Times, Mar. 11, 1990, at E5, col. 1; *The Court's Deadly New Rules*, N.Y. Times, Mar. 10, 1990, at 24, col. 1; Greenhouse, *Justices Limit Path to U.S. Courts for State Prisoners on Death Row*, N.Y. Times, Mar. 6, 1990, at A1, col. 1; Office of the Governor of Florida, Press Release: Governor Calls for Reform of Federal Criminal Appeals to Reduce Capital Punishment Delays (Feb. 1, 1990) [hereinafter Governor of Florida Press Release].

95. In Gregg v. Georgia, 428 U.S. 153, 188, *reh'g denied*, 429 U.S. 875 (1976), the plurality acknowledged that "the penalty of death is different in kind from any other punishment imposed under our system of criminal justice," a sentiment echoed in many later opinions by several members of the Court. For articles questioning whether the Court still believes that "death is different," see White, The Death Penalty in the Eighties: An Examination of the Modern System of Capital Punishment (1987); Tabak, *supra* note 93; Weisberg, *supra* note 92.

96. There is evidence that Governor Jerry Brown's refusal to commute any of California's death row prisoners after his defeat for reelection was owing to the desire "not [to] prejudice his future in public life with this sort of dramatic and controversial act." Letter from Henry Schwarzschild, Director of the ACLU, to Signers of the Commutation Plea Addressed to Govenor Jerry Brown of California (Dec. 20, 1982).

97. Note, *supra* note 9, at 395 ("For all practical purposes, mercy is no longer available from the executive branch."); D. von Drehle, *supra* note 54 ("Clemency exists only in theory, like UFOs and Bigfoot.").

as the defendant's mental retardation?[98]

One possibility is to elect more courageous governors, or governors with no ambitions beyond one term in office. This is not a promising tactic; one can pretty well dismiss it out of hand. Another possibility is to change public opinion so that it no longer supports capital punishment and instead tolerates commutation of death sentences, at least in certain cases. A cynical observer might sneer that this is impossible, arguing that it is evident that efforts by abolitionists in this country over the past three decades have left death penalty opponents worse off today than ever before (not a judgment with which I concur).[99] Another possibility is to sentence to death offenders that evoke more sympathy than the present lot. Yet another is to return to the old pre-*Furman* system of death penalties that cried out for executive intervention to remedy flagrant injustices. Many will consider all of these to be frivolous suggestions.

Here, then, are a few suggestions that are more serious. First, opponents of the death penalty have to give sober consideration to advocating the severe alternative to the death penalty of life without possibility of parole.[100] In this way, and perhaps only in this way, given the present climate of public opinion, something can be done to alleviate public anxiety over parole or other releases of convicted murderers deemed either unrehabilitated or undeserving of leniency. Coupled with persuasive argument showing that the overwhelming public support for the death penalty is really only skin deep and an artifact of inadequate survey research,[101] it might well be possible to make room for the serious consideration of commutations. Second, opponents of the death penalty have to consider whether it may not be more effective to concede that clemency should be viewed, like punishment itself, from a retributive point of view. This would free them to launch an attack on at least some death sentences as retributively unfair or unjustified, as indeed many are. Third, opponents of the death penalty need to explore whether it may be possible to persuade a governor or two to consider clemency earlier in the post-sentencing phase, before, rather than after, hundreds of thousands of tax dollars have been spent in the appeal process.[102] Perhaps governors could be persuaded that real savings in public expenditure could be made if the current system of protracted appeals was smothered in the crib. Not by speeding up federal

98. Tabak, *supra* note 93, at 846.

99. For a partial scorecard measuring progress in abolishing the death penalty as measured from various temporal baselines see Bedau, *Death Penalty in America: Yesterday and Today*, 95 DICK L. REV. (1991) (forthcoming); DEATH IS DIFFERENT, *supra* note 28, at 131-34.

100. *See* Note, *Life-Without-Parole: An Alternative to Death or Not Much of a Life at All?* 43 VAND. L. REV. 529 (1990). Except for the fact that it may be politically expedient as a step in abolishing the death penalty, this author has never advocated life imprisonment without the possibility of parole. *See* Bedau, *supra* note 40, at 228-31; Bedau, *Imprisonment vs. Death: Does Avoiding Schwarzchild's Paradox Lead to Sheleff's Dilemma*, 54 ALB. L. REV. (1991) (forthcoming).

101. *See* Fox, Radelet & Bonsteel, *supra* note 79; Bowers, *supra* note 79.

102. *See* Spangenberg & Walsh, *Capital Punishment or Life Imprisonment? Some Cost Considerations*, 23 LOY. L.A.L. REV. 45 (1989).

appeals (favored in some quarters[103]), but by preemptive commutation of the death sentence itself. One should not be optimistic that any of these suggestions, separately or together, will come to pass, until such time as the public is less tolerant of the idea of capital punishment.

Society approaches the year 2000 surrounded by a disheartening climate of public opinion that envelops many issues on the nation's domestic social agenda. The lingering presence of opinion tolerant of the death penalty is only one of them. Executive leadership at the state and federal level shaping this agenda is increasingly rare, as negative sound-bite electoral politics confirms anew the inescapability of Gresham's Law. Nor is it hopeful that the experience of signing death warrants, followed by actual executions, will provoke governors to reconsider their current all-too-enthusiastic support for the death penalty. What governors in southern states during the past decade have proved capable of doing when appellate litigation fails and death row prisoners finally confront the executioner probably can be learned by their northern, eastern, and western counterparts.

The prospect is not cheering, at least not for those who oppose the death penalty, and only small consolation can be offered. Government by executive decree is in principle not one that constitutional democrats should favor. The criminal justice system in its normal operation should not be expected to allot a large role to executive clemency. The exercise of clemency is and must remain a rare exception in the final disposition of an offender's sentence. Those who oppose the death penalty cannot realistically hope to have state governors save them from popular folly. At a time when trial juries in this nation are willing to send two to three hundred prisoners to their deaths each year,[104] popularly elected chief executives cannot be expected to block the execution of those sentences except rarely. Opponents of the death penalty can only make renewed efforts to secure commutations wherever possible and to expose unrelentingly the moral and other harms that our system of capital punishment inflicts.[105]

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103. In particular, see articles by Linda Greenhouse, *supra* note 94 (views of Chief Justice Rehnquist), Governor of Florida Press Release, *supra* note 94 (view of Governor Martinez), and Powell, *Commentary: Capital Punishment*, 102 HARV. L. REV. 1035 (1989) (views of retired Associate Justice Lewis F. Powell Jr.). Unlike the Chief Justice and the Governor, former Justice Powell has threatened to throw down the gauntlet to the legislatures if the appellate review system is not drastically streamlined: "If capital punishment cannot be enforced even where innocence is not an issue, and the fairness of the trial is not seriously questioned, 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." *Id.* at 1046.

104. On annual death sentences in the 1980s, see Table 1, *supra* notes 45-47 and accompanying text.

105. For a recent critique of the death penalty from the moral point of view, see DEATH IS DIFFERENT, *supra* note 28, at 9-63, 92-128, 238-47; S. NATHANSON, AN EYE FOR AN EYE? THE MORALITY OF PUNISHING BY DEATH (1987).