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DEATH PENALTY: NATIONAL DISASTER VISITS CALIFORNIA

Walter L. Gordon, III*

I. INTRODUCTION: HUMAN RIGHTS

The United States is entering the final fateful decade of the 20th century. Fin-de-siècle themes of decay and decline are common in the literature. Violence is endemic in the nation; major American cities are the most homicidal in the industrial world. Unlike other economically developed democratic nations, the United States justifies and is deeply involved in killing. Over 2500 persons await execution on the nation's death rows.1 The United States is almost alone in executing persons for ordinary crimes.2 But even among the mainly third-world nations that retain the death penalty, the United States is among the most regressive and repressive.3 The United States permits the executions of minors4 and the mentally retarded,5


1. As of April 16, 1992, there were 2588 persons on death rows across the United States. Philip Hager, Plans for Harris Execution Renew National Debate, L.A. TIMES, Apr. 16, 1992, at A3. Over 98% of death row inmates were male, 40% were African-American and 90% had not gone to college. U.S. DEP'T OF JUSTICE, SOURCEBOOK OF CRIMINAL JUSTICE STATISTICS 705, tbl. 6.142 (1991) [hereinafter SOURCEBOOK 1991]. For transnational crime rates, see Carol B. Kalish, U.S. DEP'T OF JUSTICE, INTERNATIONAL CRIME RATES (May 1988); see also infra app. tbl. I.

2. The term "ordinary crimes" refers to penal code offenses prosecuted in state courts, such as robbery, rape, and murder. England, for example, does not execute for ordinary crimes but retains the penalty for wartime offenses such as treason. AMNESTY INT’L, UNITED STATES OF AMERICA THE DEATH PENALTY 228 (1987).

3. AMNESTY INT’L, supra note 2, at 73-87, 189-91. In 1990, the United States was the tenth leading state killer worldwide; the other nine were all third-world nations. Speaking of the Ultimate Punishment, L.A. TIMES, Apr. 21, 1992, at H5; see infra app. Table II.

4. See Stanford v. Kentucky, 492 U.S. 361 (1989) (permitting the execution of 16 and 17 year olds); see also Lisa K. Arnett, Comment, Death at an Early Age: International Law
although evolving international standards forbid execution of a member of one of these groups.  

Amnesty International has condemned the United States as a violator of human rights for the design and operation of its death penalty system. It found that the system designed in the United States was racially biased, unfair, and arbitrary. In its 1987 report on the issue, Amnesty International noted: "No means of limiting the death penalty can prevent its being imposed arbitrarily or unfairly. This is borne out by the experience in the USA, where the introduction of elaborate judicial safeguards has failed to ensure that the death penalty is fairly and consistently applied."

Amnesty's critique raises profound issues of social peace in a society deeply divided along race and class lines. It is certainly a legitimate question of political discourse to debate the wisdom and justice of the death penalty. The industrialized nations of Europe, including France and Germany, have eliminated the death penalty. The United Kingdom does not retain it for ordinary crimes. American society must join the international consensus against executions and introduce the principle and practice of nonviolence into the national political culture. For the foreseeable future, however, the United States is firmly committed to state killing, a lone ranger among industrialized-democratic nations.

II. UNITED STATES NATIONAL CHARACTER: VIOLENCE

The United States has a unique national character that is shaped by its own peculiar violent and racist history. Americans are fascinated by violent death. Nowhere is this national character more evident than in the varied killing techniques employed in the nation's execution chambers. Of those nations that still execute persons,

5. Penry v. Lynaugh, 492 U.S. 302 (1989) (permitting the execution of severely mentally retarded persons). In Lynaugh the defendant had the mental capacity of a six-and-a-half year old. Id. at 308; see John Blume & David Bruck, Sentencing the Mentally Retarded to Death: An Eighth Amendment Analysis, 41 Ark. L. Rev. 725 (1988) (arguing that mental retardation should be a mitigating factor in the sentencing process).
7. Id. at 189-91.
8. Id. at 54-64, 189.
9. Id. at 189.
10. Id. at 228.
12. See LAWRENCE A. GREENFELD, U.S. DEP’T OF JUSTICE, 1990 CAPITAL PUNISH-
most either hang or shoot them. The United States is exceptional for its many sanctioned methods of state killing. Of the thirty-six states and the federal government that have death penalty statutes, most kill either by lethal injection or electrocution, while several provide for gassing, shooting, or hanging, or a combination of these.

Lethal injection is the most recent technological innovation, with Charles Brooks, Jr., being the first to die by this method in Texas in 1982. The older methods of execution had disadvantages that made them troubling to some. One author noted: "The bloody destruction of the firing squad, the horrible disfigurement of a hanging, the burning flesh of an electrocution, and the agony of suffocation from the poisons of a gas chamber all act to temper strong desires for the execution of capital offenders."

Lethal injection is less likely to induce severe pain and to mutilate the body than the other killing techniques. The prisoner is put to sleep with massive doses of barbiturates and then the death drugs are administered. There are risks that the victim might wake up during the execution, that the drugs might be administered incorrectly, or that the method used might inflict pain. But most legislators and the public feel that lethal injection is the most humane way of killing condemned persons. A poll taken after California's first gassing in twenty-five years indicated that 63% of the public preferred lethal injection, while only 12% favored gas. This finding is supported by other polls.


13. See, e.g., Thomas O. Finks, Lethal Injection: An Uneasy Alliance of Law and Medicine, 4 J. LEGAL MED. 383, 386 (1983); Speaking of the Ultimate Punishment, supra note 3, at H5.

14. Greenfeld, supra note 12, at 4-5.


16. Finks, supra note 13, at 383.

17. Id.


Nonetheless, lethal injection raises unique ethical issues regarding the relationship between the medical profession and the execution chamber. Lethal injection is a medical technique to administer death and conflicts with the Hippocratic Oath taken by doctors.\(^2\) Moreover, it is a procedure that requires the executioners to lay hands on the victim when searching for a vein to inject the drugs.\(^3\) This search can take time if the person is diabetic or an intravenous drug user whose veins have collapsed.\(^4\) This is the reason California prison guards oppose lethal injection and prefer the killing distance of the gas chamber.\(^5\)

As the 20th century ends, the United States is nationalizing its executions. From 1977, when executions were resumed with the shooting of Gary Gilmore in Utah,\(^6\) until April 1, 1992, 168 persons have been executed.\(^7\) The numbers rise steadily. All but twenty-one of the 168 executions have occurred in the South, led by Texas, Louisiana, and Florida.\(^8\) However, in 1990 this pattern began to change. Illinois and Oklahoma had their first executions in decades.\(^9\) In April 1992, Arizona and California had their first executions in a quarter of a century.\(^10\) These executions are part of a trend of nationalization of executions, a spread into the industrial or Western states such as Illinois and Arizona. Other states with large death row populations such as Pennsylvania and Ohio wait in the wings.\(^11\) A comparison of the statistics shown in Tables IV and V\(^12\) indicates the regional pattern of executions and the potential for increase as executions spread outside the South. The nation is at a crossroads and it is appropriate to reconsider the path the nation has traveled in the past two decades. The United States has chosen a different path than other Western industrial nations which rejected

\(^2\) Finks, supra note 13, at 389-95.
\(^3\) Jacobs, supra note 15, at A17.
\(^4\) Finks, supra note 13, at 397; Execution Prolonged When Tube in Killer’s Muscular Arm Leaks, supra note 19, at 27; Amnesty Int’l, supra note 2, at 116.
\(^5\) Jacobs, supra note 15, at A17.
\(^6\) See generally Norman Mailer, The Executioner’s Song (1979) (describing the events leading to Utah’s execution of Gary Gilmore).
\(^7\) Hager, supra note 1, at A3.
\(^8\) Id.
\(^11\) Hager, supra note 1, at A3.
\(^12\) See infra app. tbls. IV & V.
the death penalty as a tool of social policy. The United States is destined to test, once again, the proposition that the way to end killing is to kill. In addition, the United States has further exacerbated the moral dilemma by designing a death system which is condemned by human rights watchdogs as violating human rights.

III. GUIDED DISCRETION: THE POSTMODERN DEATH SYSTEM

A. Debate on Death

Between 1967 and 1977, a moratorium on executions existed in the United States, as debate raged on whether to follow the world trend and abolish capital punishment. Over six hundred persons were spared their lives during this period. In 1977 the debate was resolved in favor of executions, when Gary Gilmore was shot to death in Utah. The body politic reached a consensus as reflected in United States Supreme Court decisions and buttressed by a robust public opinion that the United States should reinstitute the death penalty. The Supreme Court sought to make the death penalty palatable by creating a mythology that the procedures it designed would eliminate the arbitrariness and capriciousness which defined the process in the past. This article will briefly examine these procedures, since they are the framework within which the state sys-

33. "The great majority of countries in Western Europe and North and South America have abandoned capital punishment." Rice, supra note 11, at 9. The reason for the rejection is that "[t]here is a growing international consensus that the death penalty is incompatible... with... the right to life and the right not to be subjected to cruel, inhuman or degrading treatment or punishment..." AMNESTY INT'L, supra note 2, at 178.

34. See generally AMNESTY INT'L, supra note 2, at 3-7, 189-91.


37. Id. at 544 n.8. See generally MAILER, supra note 26.


39. In 1976, 66% of the national public supported the death penalty. SOURCEBOOK 1985, supra note 1, at 76-77. This percentage increased to 72% in 1991. Id. A high point of 76% was reached in 1985. Id. In 1972, the year Furman v. Georgia, 408 U.S. 238 (1972), was decided, 53% favored and 39% opposed capital punishment. SOURCEBOOK 1985, supra note 21, at 175-77. Opposition to the death penalty peaked in 1966 and has since declined. Id. at 175-76.

40. Gregg, 428 U.S. at 188-95; AMNESTY INT'L, supra note 2, at 182-91.
tems, including California's system, fit.  

B. Design of the Death System

The moratorium on executions in the United States from 1967 to 1977 was made official in 1972 when the United States Supreme Court decided Furman v. Georgia. That decision declared all existing death penalty systems unconstitutional. Furman v. Georgia was a plurality decision with no single opinion by the Court. Hindsight indicates, however, that the key opinion was that by Justice Stewart who stated that the chief problem with the prevailing death penalty statutes was that they allowed uncontrolled discretion by the fact finder in determining who would receive the penalty. Only a year before, in McGautha v. California, the Court had decided this issue the other way, holding that it was not a violation of the Constitution if fact finders did not have standards to guide their decision to impose the death sentence. Justice Harlan noted in the lead opinion: "To identify before the fact those characteristics of criminal homicides and their perpetrators which call for the death penalty, and to express these characteristics in language which can be fairly understood and applied by the sentencing authority, appear to be tasks which are beyond human ability." A year later the Court reversed itself and struck down the existing state statutes because they did not guide the discretion of the juries. This unguided discretion resulted in the imposition of the death penalty in a freakish and wanton manner. It was not until 1976 that the United States Supreme Court indicated the procedural outlines of a death system it would accept, one, it maintained, that eliminated the vices of the earlier system.  

A primary defect of the pre-Furman death system was the

41. For the California system, see infra part VI.  
43. Id.  
44. Id. at 306-10.  
46. Id. at 204.  
belief that victims were selected by race. The United States has kept statistics on executions since 1930. Between 1930 and 1980, 3862 persons were executed and, of these, 2066 (53.5%) were black. On their face, these statistics raise an inference that race was an important factor in the selection process. However, at the time Furman was decided, research was not conclusive on the issue.

The basic challenge the Court faced was to design a system that would eliminate all arbitrary factors, such as race or income, when selecting those persons to be executed from the universe of those who committed murder. A study done in California illustrates the problem. Statistics from this study indicated that for every one hundred "special circumstances" murder cases (i.e., those in which the death penalty was at issue), 51% resulted in trial. Of those, only two-fifths went to a penalty phase in which the issue of death was tried. Of those that proceeded to the penalty phase, roughly 10% ended with a death sentence. How did this 10% differ from the 90% who committed first degree murder and did not receive a death sentence?

The Supreme Court's resolution was to design a set of procedures to eliminate unconstitutional bias and prejudice from the death selection process, and to ensure that the persons selected for execution were different substantively from the bulk of murderers who did not get death. On July 2, 1976 the Supreme Court decided five cases that set the new ground rules for the death penalty in this country. The Court overruled mandatory systems that inflicted the

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52. Id. at 575.
53. Furman v. Georgia, 408 U.S. 238, 310 (Stewart, J., concurring); id. at 389-90 n.12 (1972) (Burger, C.J., dissenting).
55. Id.
56. Id.
57. Id.
death penalty without consideration of the individual characteristics of either the crime or the defendant. The Court held that the fatal flaw of the pre-\textit{Furman} system was the unbridled discretion of the fact finder which often resulted in arbitrary and capricious decisions. The Court substituted a system of "guided discretion," characterized by: (1) A bifurcated trial, with separate fact finding and sentencing hearings; (2) specified statutes that set forth predetermined aggravating and mitigating circumstances determining those who are eligible for death; (3) proportionality in sentences for murders in similar circumstances; and (4) a system of appellate review of death sentences. This procedural system was based on proposals made by the American Law Institute in its Model Penal Code. The hallmark of this procedural system was discretion, guided by clear and objective standards, so that death was imposed fairly and consistently on the most deserving defendants.

Justice Potter Stewart wrote the key opinion in the 1976 death penalty cases and was a leading architect of the guided discretion framework. The death penalty decisions in his tenure generally limited the scope of the penalty to murder, allowed consideration of any mitigating circumstances, required fairly precise language in aggravating circumstances, and required an intent to kill by accom-

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63. \textit{Id.} at 204-07.

64. \textit{Id.} at 189-96.


68. See \textit{Lockett} v. Ohio, 438 U.S. 586 (1978) (stating fact finder must consider all factors in mitigation even if not enumerated in statute).

69. See \textit{Eddings} v. Oklahoma, 455 U.S. 104 (1982) (stating all evidence, including defendant's turbulent family history, must be considered in mitigation); \textit{Bullington} v. Missouri, 451 U.S. 430 (1981) (applying double jeopardy doctrine to sentencing stage of a capital case so that upon retrial a defendant may not be sentenced to death if a life sentence was received at first trial); \textit{Estelle} v. \textit{Smith}, 451 U.S. 454 (1981) (forbidding use of expert witness testimony on death sentence against defendant if based on an interview with defendant in which there was no advice regarding the right against self-incrimination); \textit{Godfrey} v. Georgia, 446 U.S. 420 (1980) (finding aggravating factors which are too vague will render death sentence unconstitutional); \textit{Adams} v. Texas, 448 U.S. 38 (1980) (forbidding exclusion of juror from a capital case unless reservations about the death penalty would prevent or substantially impair the
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plies in felony-murder killings. 70

Stewart's replacement by Sandra Day O'Connor resulted in a
shift in the direction of the Court. 71 The death penalty decisions
since 1983 have abandoned the finely crafted limits on the penalty
and lurched toward a system with an ever-expanding ambit for the
imposition of death. Before 1987, the two most significant decisions
of the post-Stewart Court were Pulley v. Harris, 72 which eliminated
the requirement that death sentences be proportionate in similar cir-
cumstances, and Wainwright v. Witt, 73 which cut the heart out of
Witherspoon v. Illinois 74 and made it easier for prosecutors to select
a so-called "death qualified jury;" i.e. one with no persons on it who
might have some scruples against the death penalty. 75 Essentially,
the vaunted "guided discretion" death penalty system has now
evolved to the point that once a death-qualified jury finds a single
aggravating factor, it has unlimited discretion to impose the death
penalty. 76

performance of juror's duties); Presnell v. Georgia, 439 U.S. 14 (1978) (stating jury must find
an aggravating factor before imposing the death penalty).

case must personally kill, attempt to kill, or intend to kill victim before a lawful capital sen-
tence can be imposed).

71. Pascucci, supra note 35, at 1162-1216. Justice Potter Stewart retired in 1981 and
was replaced that same year by Sandra Day O'Connor. ELDER WITT, CONGRESSIONAL
QUARTERLY GUIDE TO THE U.S. SUPREME COURT 872, 879 (2d ed. 1990).


75. See id. at 439-63 (Brennan, J., dissenting); see also Lockhart v. McCree, 476 U.S.
162 (1986); AMNESTY INT’L, supra note 2, at 34-39.

76. The cases that eroded the guided discretion system and taken together have injected
arbitrariness are Tison v. Arizona, 481 U.S. 137 (1987) (eroding further the intent require-
ment in felony murder situation if participation is major and mental state is one of reckless
indifference to the value of human life); Cabana v. Bullock, 474 U.S. 376 (1986) (weakening
the holding in Enmund v. Florida, 458 U.S. 782 (1982), by holding that the relevant finding of
intent to kill can be made at the appellate level if not made by the trial court); Lockhart v.
McCree, 476 U.S. 162 (1986) (allowing exclusion of jurors with scruples against the death
penalty for cause at guilt phase of capital trial); Wainwright v. Witt, 469 U.S. 412 (1985)
(providing massive retreat from standard set in Witherspoon v. Illinois, 391 U.S. 510 (1968),
for elimination of jurors with scruples against capital punishment and insulating the finding by
a state court from review at the federal level); Heath v. Alabama, 474 U.S. 82 (1985) (finding
no double jeopardy claim if one state sentences a person to death for the same act of murder
that another state had previously sentenced the person to life imprisonment); Pulley v. Harris,
465 U.S. 37 (1984) (requiring no statewide proportionality review of death sentences); Strick-
in death cases); Spaziano v. Florida, 468 U.S. 447 (1984) (holding it is constitutionally permis-
sible for a judge to override a jury's life sentence and impose death if state law so provides);
Zant v. Stephens, 462 U.S. 862 (1983) (finding a death sentence is valid even if one of the
aggravating factors upon which it was based is later found invalid); Barefoot v. Estelle, 463
IV. Race and Guided Discretion

The United States Supreme Court maintains the fiction that the death penalty system it has imposed on the nation works in a neutral, non-arbitrary fashion. The post-Furman death penalty system has operated for over a decade. There is now enough empirical evidence to determine whether or not the system operates as designed. The evidence demonstrates that the system continues to operate perversely by selecting those who are sent to death row, not on the basis of standards mandated by statute, but on the race of the victim, as

U.S. 880 (1983) (finding death sentence based on psychiatrist's prediction of future violent conduct is lawful and procedures designed to restrict federal habeas corpus relief are unobjectionable); California v. Ramos, 463 U.S. 992 (1983) (finding Federal Constitution does not prohibit a mandatory jury instruction that a life without parole sentence could be commuted by the governor in the future); Wainwright v. Goode, 464 U.S. 78 (1983) (finding no constitutional defect if reliance is placed on an aggravating factor not found in statute); See generally Pascucci, supra note 35, at 1162-1216. Most importantly, see McCleskey v. Kemp, 481 U.S. 279 (1987); see infra text accompanying notes 84-105.

In fairness to the Court, not all of the death penalty cases decided since 1983 have undermined the restrictions made between 1977 and 1983. Except for McCleskey v. Kemp, the decisions on race have been progressive. See Turner v. Murray, 476 U.S. 28 (1986) (examining jurors about racial attitudes is acceptable in an interracial murder trial); Baston v. Kentucky, 476 U.S. 79 (1986) (discharging jurors peremptorily from a jury for racial reasons is unacceptable). Other decisions have generally reinforced rules already set down by the Stewart Court. See Hitchcock v. Dugger, 481 U.S. 393 (1987) (stating factfinder must consider all factors in mitigation of death sentence even if not statutory); Gray v. Mississippi, 481 U.S. 648 (1987) (excluding juror unacceptable and not harmless error unless opposition to death penalty would prevent or substantially impair the performance of duties as juror in accordance with instructions); Skipper v. South Carolina, 476 U.S. 1 (1986) (finding evidence that defendant adjusted well to prison life between arrest and trial admissible in mitigation); Caldwell v. Mississippi, 472 U.S. 320 (1985) (invalidating death sentence after prosecutor told jury that ultimate responsibility for death sentence was held by appellate court and not jury).

77. One study has found:

Although a race of victim influence was found in all stages of the judicial process across the studies, the evidence of race of victim influence was stronger for earlier stages in the judicial process (e.g. prosecutorial decision to charge defendant with a capital offense, decision to proceed to trial rather than plea bargain) than at later stages. This is because the earlier stages were comprised of larger samples allowing for more rigorous analyses.

well as the geographical location of the murder.\textsuperscript{76}

The statistical sophistication of social science research has increased sufficiently in the past decade to enable reliable answers to questions on the role of race in the death penalty system.\textsuperscript{79} In 1990, the United States General Accounting Office (hereinafter GAO) compiled a report on all the published and unpublished research on the issue.\textsuperscript{80} The testimony of a GAO expert concluded:

\begin{quote}
In summary, we found studies of sufficient quality to support the use of an evaluation synthesis approach to assess the relationship between race and death penalty sentencing. The results show a strong race of victim influence: the death penalty sentence was more likely to be sought and imposed for an offender if the victim was white.\textsuperscript{81}
\end{quote}

The empirical research has revealed that the magnitude of the post-\textit{Furman} racial disparity in death sentencing equals that found under the unconstitutional pre-\textit{Furman} statutes. In other words, the empirical evidence proves that the present death penalty system is racist\textsuperscript{82} because an arbitrary fact, namely the victim’s race, determines who is executed.\textsuperscript{83}

The Supreme Court considered this issue explicitly in \textit{McCleskey v. Kemp},\textsuperscript{84} decided in June 1987. McCleskey, a black defendant, killed a white person and received the death penalty in Georgia.\textsuperscript{85} McCleskey used the Baldus statistics\textsuperscript{86} to challenge his death sentence on the constitutional ground that the death penalty system was

\textit{Under Post-Furman Statutes, 74 J. CRIM. L. & CRIMINOLOGY 1067 (1983); Raymond Pater-}

\textsuperscript{78} See sources cited supra note 77.

\textsuperscript{79} On methodology, see Baldus et al., \textit{Comparative Review of Death Sentences, supra} note 77, at 670-98.

\textsuperscript{80} Dodge Statement, \textit{supra} note 77.

\textsuperscript{81} Id. at 6.

\textsuperscript{82} The GAO found the evidence was equivocal on “the influence of the race of defend-}
\textit{ant on death penalty outcomes.” DEATH PENALTY SENTENCING, \textit{supra} note 77, at 6. More than half the studies, two-thirds of them of high or medium quality, “found that race of defen-}
\textit{dant influenced the likelihood of being charged with a capital crime or receiving the death penalty.” Id.

\textsuperscript{83} Id. at 5-6.

\textsuperscript{84} McCleskey v. Kemp, 481 U.S. 279 (1987).

\textsuperscript{85} Id. at 282.

\textsuperscript{86} Id. at 286-92. For a report on the study, see Baldus et al., \textit{Comparative Review of Death Sentences, supra} note 77.
racially biased. The Court accepted as true the statistical findings by Baldus, among them that:

[D]efendants charged with killing white victims were 4.3 times as likely to receive a death sentence as defendants charged with killing blacks. According to this model, black defendants were 1.1 times as likely to receive a death sentence as other defendants. Thus, the Baldus study indicates that black defendants, such as McCleskey, who kill white victims have the greatest likelihood of receiving the death penalty.

Justice Powell, author of the lead opinion, found that the reality documented by Baldus did not violate the U.S. Constitution and did not invalidate the sentence. He used two basic arguments to reach this conclusion. First, McCleskey had the burden to prove by "exceptionally clear proof" that there was both an intent and actual discrimination in his particular trial even if the system was flawed. Powell's premise was that even a racially flawed death penalty system could produce a just result in a particular case; therefore, the burden of proof was on the accused to show his own trial was racially flawed. This is an impossible burden in most cases, reflecting the reality of the subtlety and sophistication of contemporary racism. Powell noted that while the Court has allowed statistical evidence to raise an inference of discriminatory intent in other contexts, such as employment discrimination, it would not allow it in the death penalty cases. Powell said such a result was justified because more variables were at work in death cases and it would undermine the discretion that is the essence of the death sentencing system designed by the Court. Second, Powell argued that even though there was a likelihood that race prejudice might enter the sentencing decision, the Court had surrounded the decision with protections, such as a jury trial and guided discretion, so that the sen-

87. McCleskey, 481 U.S. at 286.
88. Id. at 286.
89. Id.; see also Keith A. Green, Note, Statistics and the Death Penalty: A Break with Tradition, 21 Creighton L. Rev. 265 (1987).
90. McCleskey, 481 U.S. at 297.
91. Id. at 292-97.
92. Id. at 294.
94. McCleskey, 481 U.S. at 293-94.
95. Id.
96. Id. at 294-97.
tencing decision was as fair as possible.\textsuperscript{97} The Baldus findings, in light of these protections, argued Powell, did not "demonstrate a constitutionally significant risk of racial bias affecting the Georgia capital sentencing process."\textsuperscript{98}

The guided discretion system designed by the Court has not done away with biased decisions. The most important determinant of whether a person is executed is whether or not a white person is killed.\textsuperscript{99} Perhaps this is a natural outcome in a racist society where white people are more valued than persons of other races. In such a racist system,\textsuperscript{100} the execution of people who kill whites sends the message to other racial groups that they should kill in their own group, that their lives are worth less, and that if they kill a white person they will die at the hands of the state. This is the unspoken reality in the United States. The guided discretion system does not operate in a neutral way in selecting its victims, despite the vaunted procedures designed by the Court.

Powell argued that the jury system is the ultimate ensurer of the fairness of the process.\textsuperscript{101} This is a hollow argument since the Court's own decisions indicate that a jury is not constitutionally required to impose a death sentence. In addition, without violating the Constitution, a judge can override the decision of a jury to spare a life, and may impose a death sentence.\textsuperscript{102} The argument is made even more transparent by the Court's own disemboweling of Wither-\textsuperscript{103}spoon and, in effect, sanctioning the concept that death-qualified juries are perfect prosecutorial vehicles for death sentences.

The basic flaw in Powell's argument is his refusal to come to terms with the evidence that the guided discretion system is racially biased. Justice Brennan noted in his dissent:

Defendants challenging their death sentences thus never have had to prove that impermissible considerations have actually infected the sentencing decision. We have required instead that they establish that the system under which they were sentenced

\textsuperscript{97} Id. at 312-19.
\textsuperscript{98} Id. at 313.
\textsuperscript{99} Kennedy, supra note 93, 1440-43.
\textsuperscript{103} Witherspoon v. Illinois, 391 U.S. 510 (1968).
posed a significant risk of such an occurrence. McCleskey's claim does differ, however, in one respect from these earlier cases: it is the first to base a challenge not on speculation about how a system might operate, but on empirical documentation of how it does operate.104

The empirical evidence indicates that the arbitrary factor of race is a key determinant of the death penalty decision. This is a fatal flaw in the system because it does not recognize a basic human right to race-blind criminal sentences.105

V. Ethical Justifications for the Death Penalty

The American public overwhelmingly supports the death penalty; roughly 76% of adults back such a sentence for murder.106 Presently, public support for the death penalty is the strongest and most widespread in the last thirty years.107 Below the surface, however, public opinion on the issue is both dynamic and volatile. Gallup polls indicate that over a thirty year period, support for the death penalty declined from a high of 62% in 1936 to a low of 42% in 1966.108 The decline in public support paralleled a drop in executions from 184 in 1935 to two in 1967.109 After 1966, public support for the death penalty began to climb, coinciding with the de facto moratorium on executions which commenced in 1967.110 In 1972, when the Supreme Court declared all existing death penalty statutes unconstitutional, 53% of the American public supported the death penalty and 39% opposed it.111

The widespread public support for the death penalty conceals significant class, race, and gender differences. The strongest support

104. McCleskey, 481 U.S. at 324 (Brennan, J., dissenting).
105. Id. at 320-44 (Brennan, J., dissenting).
106. Sourcebook 1991, supra note 1, at 211, tbl. 2.45. After the April 1992 execution of Harris, 77% of the California public approved the execution. Skelton, supra note 20, at A18.
108. Vidmar & Ellsworth, supra note 107, at 1249.
110. Sourcebook 1985, supra note 21, at 175; Vidmar & Ellsworth, supra note 107, at 1249.
111. Sourcebook 1985, supra note 21, at 176, tbl. 2.37.
for the death penalty is found among upper-income, white males, who are Republicans. The strongest opposition is found among blacks and women, although support for the death penalty among these groups has grown since 1972. Polling data reveals that the public believes that the death penalty lowers the murder rate and reduces the general crime rate. In California, 64% of the public stated that retribution, "an eye for an eye," was the reason they supported executions.

The United States Supreme Court recognizes two ethical justifications for the death penalty: deterrence and retribution. The deterrence rationale holds that the act of execution itself will stop other people from killing, a benefit that does not accrue if a person is locked up for life. Poll data indicates that roughly 19% of those who now support the death penalty would cease to do so if they were convinced that it did not deter murder. The evidence on this issue, therefore, is critical. If it is proven that the death penalty does not deter murder, then a significant shift in public opinion might occur that would leave the body politic deeply split on the issue.

Prior to 1975, all empirical research on deterrence, using various research formats, agreed that executions had no deterrent effect. This changed in 1975 when Isaac Ehrlich published an article in the prestigious American Economic Review that concluded that the executions did deter. This study shifted the debate: most commentators indicated that the evidence on the issue was mixed and no firm conclusion was possible. Since 1975, deterrence has been the subject of numerous studies, an academic spin-off of the rising tide of executions. "With but two exceptions," wrote William C. Bailey, a leading student of the subject, "this new round of research

113. Sourcebook 1985, supra note 21, at 176-77, tbl. 2.37; Sourcebook 1991, supra note 1, at 212-13, tbl. 2.46.
114. Sourcebook 1985, supra note 21, at 185-86, tbls. 2.52, 2.54; Sourcebook 1987, supra note 107, at 166, tbl. 2.45; U.S. Dep't of Justice, Sourcebook of Criminal Justice Statistics 229, tbl. 2.45 (1988) (hereinafter Sourcebook 1988).
115. Skelton, supra note 20, at A18.
117. Sourcebook 1988, supra note 114, at 288, tbl. 2.44.
found no support for the hypothesis that either the provision for capital punishment or the certainty of execution had a significant deterrent effect on murder. In fact, there is empirical evidence that executions have an opposite effect by actually encouraging homicides, a so-called brutalization effect. The massive number of executions that will occur in the United States will provide additional data on the issue. One can speculate that it will largely confirm what is already known: that executions and homicide rates are not interrelated. All the studies, even Ehrlich's, indicate that the certainty of punishment, whether life in prison or death, and the amelioration of urban socio-economic conditions, especially black male unemployment, would reduce the murder rate.

Retribution is the other justification for capital punishment. This theory is based on a view that society is a system that is pushed out of equilibrium when a crime is committed, and that punishment is needed to rectify the imbalance. The underlying rationale is that the punishment must fit the crime. From this perspective, it is just that a life taken is balanced by a life surrendered. In addition, retribution satisfies the population's need for revenge. If the state does not satisfy this need, there is always the threat that the population will resort to vigilantism. This threat is not an idle one in the


123. Since 1984, the number of executions has averaged in double digits each year. With the spread of executions outside the South, the prospect is for ever-increasing numbers as the years pass. Greenfeld, supra note 12, at 10.


125. Ernest van den Haag, an articulate spokesperson for the death penalty, justified retribution in these terms:

Justice, blindfolded, so as not to be distracted by the person of the offender, or of his victim, weighs the gravity of the crime on her scales to reestablish the equilibrium disturbed by the offense through an equally weighty punishment.

Retribution is to restore an objective order rather than to satisfy a subjective craving for revenge.

Ernest van den Haag, Punishing Criminals 11 (1975).
United States with its long history of "lynch law." The flaw with this justification for capital punishment is that it is based on the premise that only the guilty will receive punishment. Once it is conceded that the death system carries the risk that innocent persons will die, then the system-balancing rationale for the death system, an eye for an eye notion, disappears. It is ethically corrupt to execute innocent persons in order to prevent the guilty from escaping. It is an obscene reversal of the traditional ethical value that ten guilty persons should go free before one innocent person is destroyed. A recent study estimates that 350 innocent persons have been sentenced to death in the United States in this century, and that twenty-three of these were executed.

The experience of Joseph Brown makes the point vivid. Brown was released from prison in May 1987 after serving thirteen years on death row for a murder he did not commit. Brown, a poor black man with an eighth grade education, was convicted by a Florida jury of murdering a white woman. He was represented by a young white attorney, in only his fourth jury trial, who was opposed by an experienced prosecutor, using perjured testimony and unscrupulous tactics. For years, higher courts upheld the conviction until finally, when Brown was just fifteen hours away from the electric chair, already having been measured for his death suit, a skilled appellate lawyer, using $50,000 of his own money, got a stay of execution that ultimately resulted in a reversal of the convic-

127. "The heart of the retribution rationale is that a criminal sentence must be directly related to the personal culpability of the criminal offender." Tison v. Arizona, 481 U.S. 137, 149 (1987). What is left of the retribution rationale if the certainty of executing innocent persons is a cost of the system? If murder is, by definition, a killing without justification, then the state murders when it executes innocent persons. This means society murders to deter or expiate other murders, a patent absurdity. This is not an abstract point. In January 1993, the United States Supreme Court, by a 6 to 3 vote, denied a habeas corpus hearing to a man who had sufficient evidence of innocence to convince a district court judge to grant him a hearing. Herrera v. Collins, 113 S. Ct. 853 (1993). The tenor of the opinions indicates that the Court would rule that it is not a federal constitutional violation to execute an innocent person so long as the state trial was free of constitutional error. Id. The final sentence in Justice Blackmun's dissent notes: "The execution of a person who can show that he is innocent comes perilously close to simple murder." Id. at 884 (Blackmun, J., dissenting); see also Reinhardt, supra note 122, at 215-16.
130. Id.
131. Id. at A20.
132. Id. at A1, A18.
A humane system would err, if at all, on the side of life, rather than death. Joseph Brown himself states the point most eloquently:

I have firsthand experience that the system doesn’t work. Only certain people saved me. The judicial system tried, convicted and sentenced me to death. . . . How do you know a person is guilty? Are we willing to have a sentence with such finality, when that question looms? How can we tell whether a person is guilty or not? Are we that infallible? Are we that sure? 134

The risk of the execution of the innocent is another reason for the substitution of long-term imprisonment, including life without parole, in place of the death sentence. It is clear, however, that as the 20th century ends, the United States is irrevocably committed to executions. The first California execution in over two decades constituted a quantum leap forward in the process. 135

VI. CALIFORNIA’S DEATH PENALTY SYSTEM

Prior to the 1992 execution of Robert Alton Harris, the last execution in California had occurred twenty-five years previously during the 1967 administration of Ronald Reagan. 136 The victim at that time was Aaron Mitchell, a black man. 137 Since that execution, the death penalty has had a turbulent history in the state. In 1972, before the United States Supreme Court acted in Furman, the California Supreme Court declared the state’s death penalty cruel and unusual. 138 The decision of the court, with only one dissent, was written by a chief justice appointed by Reagan. 139 “We have concluded that capital punishment is impermissibly cruel,” noted the opinion. “It degrades and dehumanizes all who participate in its processes.” 140

133. Id. at A1, A19.
134. Id. at A20.
135. California is a key industrial state. Trends often start here and spread nationwide. The California execution adds momentum to the spread of executions outside the South. Erwin Chemerinsky, As California Goes . . . In Legal Matters, California is Often the Proving Ground for the Rest of the Nation, CAL. L. REV., Aug. 1992, at 47.
The public reacted to this decision the following year by amending the state constitution to allow capital punishment. The legislature drafted new death penalty laws which created a mandatory death penalty scheme. This system, invalidated by the precepts of Gregg v. Georgia, was declared unconstitutional by the state supreme court in 1976. In 1977, over the veto of Governor Jerry Brown, the legislature passed new death penalty legislation which met federal constitutional standards. In 1978, the voters passed another initiative which expanded the scope of the death penalty, repealing the 1977 statute. People were sentenced to death under both laws, and both laws have passed constitutional muster. California's death penalty jurisprudence is complicated by this reality, since there are significant differences between the two death penalty statutes. The key difference lies in the treatment of felony murder.

California has followed the federal guidelines and created a bifurcated system for the prosecution of capital cases. In the first part of the proceeding, the issue is the guilt of the defendant and the truth of the allegations of special circumstances, including felony murder. If a defendant is convicted of first degree murder, with at least one special circumstance, then the second proceeding takes place. Here the issue is one of sentence, with the choice being either death or life in prison without the possibility of parole. At the second proceeding the fact finder must weigh aggravating and mitigating circumstances and reach a decision on the penalty.

The felony murder rule provides a shortcut for the prosecution

142. Id. at 468.
147. Howard, 749 P.2d at 321-22; Rodriguez, 726 P.2d at 143-44.
149. CAL. PENAL CODE § 190.1-.3 (West 1988 & Supp. 1993); Rodriguez, 726 P. 2d at 143.
150. See supra note 149.
151. See supra note 149.
152. See supra note 149.
153. See supra note 149.
to prove first degree murder.\textsuperscript{154} It is a strict liability rule which holds that a person who engages in certain enumerated felonies is held strictly accountable if a death takes place, even if there was no intent to kill.\textsuperscript{155} The rule eases the prosecutor’s burden of proof and, as a result, is “a doctrine often criticized as imposing punishment disproportionate to culpability and for that reason strictly construed by the courts.”\textsuperscript{156} Both the 1977 and the 1978 death penalty laws in California allowed proof of felony murder as a means to prove first degree murder.\textsuperscript{157} They also allowed felony murder to serve as a special circumstance which qualified a person for the death penalty.\textsuperscript{158} At this point there was a major variance between the two statutes. The 1977 law would allow a death sentence for a defendant only if he or she was “physically present at the crime scene” and “intentionally commit[ted] or aid[ed] a deliberate and premeditated murder.”\textsuperscript{159} The 1978 statute, on the other hand, required no intent to kill, allowing the execution of persons who killed negligently or accidentally.\textsuperscript{160} The issue of whether the California Supreme Court should require an intent to kill in the 1978 statute became the most controversial issue before the court. The issue was pregnant with racial and class implications. The most common characteristic of felony murder is that it occurs during the commission of a robbery, frequently involving a black perpetrator and a white victim.\textsuperscript{161} The California Supreme Court first considered this issue during

\textsuperscript{154} The felony murder rule dispenses with the prosecutor’s need to prove malice aforethought or premeditation. Carlos v. Superior Court, 672 P.2d 862, 866 (Cal. 1983), overruled by People v. Anderson, 742 P.2d 1306 (Cal. 1987); George P. Fletcher, Reflections on Felony-Murder, 12 Sw. U. L. Rev. 413, 415-19 (1981).

\textsuperscript{155} Carlos, 672 P.2d at 872-73.

\textsuperscript{156} Id. at 865.

\textsuperscript{157} Id. at 866-73.

\textsuperscript{158} Id.

\textsuperscript{159} Id. at 867.

\textsuperscript{160} Id. at 868.

\textsuperscript{161} A 1974 study of felony murder by the FBI found that 60% were committed in connection with robbery offenses. 63% of felony murder victims were white, while 38% were black. Fed. Bureau of Investigation, Uniform Crime Reports 1974, at 18-19 (1974) [hereinafter FBI-Ucr 1974]. While most homicides are intra-racial, that is, whites killing other whites and blacks killing other blacks, there is another pattern for stranger murder involving robbery. Among persons serving time for murder in the nation’s prisons, over 90% of white inmates had murdered a victim of their own race. Among blacks the pattern was different. Over 60% of black inmates in prison for robbery had robbed a white victim and over 25% in prison for murder had killed a white. These statistics suggest that a common pattern of felony murder is blacks robbing and killing whites. Fed. Bureau of Investigation, Uniform Crime Reports 1991, at 17 (1991)[hereinafter FBI-Ucr 1991]; Christopher A. Innes & Lawrence A. Greenfeld, U.S. Bureau of Justice Statistics, Violent State Prisoners and Their Victims 5 (1990).
the tenure of Chief Justice Rose Bird. The Bird court, as one might expect, resolved all ambiguities in the statute in favor of life, ruling that the 1978 law required proof of intent to kill for both killers and their accomplices before a person could receive death or life in prison without parole. This 1983 ruling, *Carlos v. Superior Court*, became the major reason for reversal of death sentences during the Bird tenure. During Chief Justice Bird's tenure, sixty-four of sixty-eight death penalty verdicts were reversed. In most cases, the guilty verdict was affirmed but the sentence was reversed for further consideration, frequently on the issue of whether the defendant had the intent to kill. The conservative scrutiny that the Bird court gave death sentences outraged the public, including many judges. Conservatives made the position of the Bird court judges on the death penalty a major political issue. In the election of 1986, Chief Justice Bird and two other justices were removed from the court by the electorate. Chief Justice Bird was rejected by 66% of the voters, the highest rejection rate among her peers. The state's judges' vote paralleled that of the public, with an estimated 64% of them voting against one or more of the three supreme court justices. The death penalty was the main reason for the rejection.

**VII. THE LUCAS COURT**

The upshot of the election was that Governor George Deukmejian was able to appoint three justices, creating a five man
block of appointees on the court, with his former law partner, Malcolm Lucas, as the new chief justice.\textsuperscript{173} The post-war reality of California having the most progressive state court in the nation, one on the cutting-edge of law reform, came to a screeching halt overnight. After the conservatives on the supreme court consolidated their dominance in April 1987, Lucas granted his first interview as chief justice. He noted that the court had 175 death penalty cases pending at that time, with two or three added each month. "We do spend a significant amount of the court's time on them," he stated, "and it may be to the detriment of some of the civil aspects of the court's duties."\textsuperscript{174} Lucas also indicated that he felt the court should reconsider \textit{Carlos v. Superior Court},\textsuperscript{175} in light of new United States Supreme Court precedent.\textsuperscript{176} While denying that the court meekly followed polls or election returns, he said:

\begin{quote}
I do think, however, that in the broadest of senses, every member of the judiciary, United States Supreme Court or otherwise, should have an understanding of the feel of the nation. I don't think that's inappropriate at all. When you're talking about broad principles, and we occasionally get into policy matters, it seems appropriate at least to have some background understanding of the acceptability of your rulings with the nation as a whole, and in our case with the State as a whole.\textsuperscript{177}
\end{quote}

The interview revealed that Lucas had a conservative agenda for the court. Action soon followed these words.

In August 1987, the Lucas court affirmed its first death sentence.\textsuperscript{178} The majority on the court was ideologically conservative.\textsuperscript{179} Generally this political position includes the doctrine of judicial restraint and honor for tradition and precedent, including judicial precedent. The Lucas majority showed no respect for precedent, when it conflicted with its strongly held political-judicial opinions. In October 1987, the court took a major step and overruled \textit{Carlos v. Supe-
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rior Court. This ruling was estimated to affirm the death sentences in as many as sixty-four of the 190 capital cases then pending before the court. Essentially the court held that the prosecutor must prove intent to kill by aiders and abettors in a felony murder killing but not for the actual killer. The actual killer was to be strictly liable for such a killing, making the person eligible for the death penalty.

A hypothetical situation illustrates the implications of this rule. Assume that a young black man robs a store with no intent to kill. During the robbery his gun accidentally misfires, due to an unknown defect, and a person is killed. Contrast this with the situation where a man methodically plans a murder, collects the weapons, and tracks and kills the victim. In the first situation, the accidental killer could be found guilty of first degree murder on a strict liability theory. Since felony murder is a special circumstance, it qualifies him for the death sentence, and he will then either face death or life in prison without the possibility of parole. In the second situation, the case of the cold-blooded killer, who had both subjective and objective culpability, there are no special circumstances present; therefore, this person will be given a life sentence with the possibility of parole.

In Carlos v. Superior Court, the Bird court held that such a result was unjust and that there was no theory of capital punishment that would justify it. First, by definition, it is impossible to deter an accidental killing: an accident is not a rational, controllable event. Second, since the accidental killer was less culpable than the intentional killer, the theory of retribution was not satisfied. Carlos v. Superior Court did not mention racial overtones, but they do exist, since a high proportion of people imprisoned for felony murder is black.

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182. Anderson, 742 P.2d at 1325.
183. Id. at 1325 n.8.
184. The hypothetical raises the issue of whether the actual killer should get death if the killing was accidental. In Carlos, the Bird court stated that such a sentence would raise grave moral issues. Carlos v. Superior Court, 672 P.2d 862, 875 (Cal. 1983), overruled by People v. Anderson, 742 P.2d 1306 (Cal. 1987). The Lucas court had no qualms about sentencing the actual felony murder killer to death even if the killing was accidental. Anderson, 742 P.2d at 1329 n.8.
185. Carlos, 672 P.2d at 875-77.
186. In addition to the statistics cited earlier, see supra note 161. Nationally in 1990, over 60% of the people arrested for robbery were black. This percentage was by far the highest percentage among blacks for any major felony offense. Blacks were arrested for 37% of the aggravated assaults, 34% of the burglaries, 33% of the larcenies, and 54% of the murders.
The Lucas majority, joined by Justice Stanley Mosk, who wrote the opinion in *People v. Anderson*, blithely dismissed the concerns of the Bird court. The new court, Mosk indicated, was no longer concerned that serious constitutional flaws were present in "a statutory classification which impose[s] a minimum penalty of death or imprisonment without parole upon persons who did not intend to kill, while permitting some deliberate killers to escape with a sentence of life with possibility of parole." Mosk wrote:

Whether or not we approve of the wisdom of the statutory classification, it appears to be generally accepted that by making the felony murderer but not the simple murderer death-eligible, a death penalty law furnishes the "meaningful basis [required by the Eighth Amendment] for distinguishing the few cases in which [the death penalty] is imposed from the many cases in which it is not." Soon after *Anderson* was decided, the court took a step to insulate the death penalty from attack on racial grounds. In May 1984, the Bird court appointed a retired judge to inquire how the race and sex of killers and victims influenced the imposition of death sentences. This required state and local prosecutors, with much protesting and outrage, to produce the records of thousands of homicide cases. In October 1987, the Lucas court ordered a halt to the investigation, indicating that *McCleskey* had rendered the issue moot. The termination of this investigation meant that there will be no hard empirical data on the racist nature of the death penalty in California, allowing executions to proceed.

Sourcebook 1991, *supra* note 1, at 446, tbl. 4.9. The arrest data is corroborated by the data on victimization. In 1990, the perceived race of the robber was black in over 50% of the reports, while this was true in 26% of the rapes and 22% of the assaults. *Id.* at 303, tbl. 3.53. 187. *People v. Anderson*, 742 P.2d 1306, 1309 (Cal. 1987). Justice Mosk, the longest serving member on the court, has a schizophrenic flair on the death penalty. He sided with the majority in 1972 when it was declared cruel and unusual. He sided with the majority when *Carlos* was decided by the Bird court. He then made a complete break with his past, authoring the opinion in *Anderson* that overruled *Carlos*. Philip Carrizosa, *The Elusive Stanley Mosk*, CAL. L. REV., Mar. 1989, at 63, 64. The only principle at work in Mosk's behavior is the attraction to the center of power and influence, whatever its ideological outlook. 188. *Anderson*, 742 P.2d at 1331 (quoting *Carlos v. Superior Court*, 672 P.2d 862, 874 (Cal. 1983)). 189. *Id.* (quoting *Furman v. Georgia*, 408 U.S. 238, 313 (Cal. 1972)). 190. Philip Hager, *State Court Ends Probe of Death Sentencing Bias*, L.A. TIMES, Oct. 27, 1987, at A3. 191. *Id.* 192. *Id.* 193. *Id.* 194. *Id.* at A3, A26.
DEATH PENALTY

under a cloak of ignorance and darkness.¹⁹⁵

After several terms, certain trends defining the Lucas court have appeared. First, the priorities of the court are radically different than those of the Bird court. The agenda of the Lucas court is dominated by death penalty and attorney discipline cases, while the Bird court had focused on civil and non-death penalty criminal cases. The Lucas court has affirmed the death sentence in over 70% of the cases decided.¹⁹⁶ When it has reversed, it affirmed the underlying conviction at a 90% rate.¹⁹⁷ Despite the priority given death penalty cases, no real dent in the backlog has occurred.¹⁹⁸

Second, the Lucas court protects the interests of the rich and powerful in contrast to the bias of the Bird court in favor of the downtrodden. The Lucas court generally rules in favor of landlords, corporations, law enforcement, and the state.¹⁹⁹ For a conservative court, traditionally associated with notions of judicial restraint and respect for 19th century values, the Deukmejian appointees show no reluctance to overturn established precedents. In 1988, the court overturned a landmark case that had granted insurance consumers rights against insurance companies that had refused to settle with them in good faith.²⁰⁰ The precedent was nine years old and well-established. By its decision the court eliminated an entire area of tort litigation, the third-party bad faith lawsuit.²⁰¹ Finally, with respect to capital cases, it is clear that the Lucas court will follow the lead of the United States Supreme Court, moving away from affording capital defendants more protection than required by federal law. The Lucas court relies heavily on the harmless error doctrine,²⁰² while holding defense counsel to minimal standards of competence.²⁰³ The decision in People v. Wade²⁰⁴ illustrates the latter point.

195. Id.

196. Uelmen, supra note 165, at 39; Philip Carrizosa, Court's Focus Has Shifted In Lucas Years, L.A. DAILY J., Apr. 26, 1990, § 1, at 1, 11.

197. Uelmen, supra note 165, at 40; see also Gerald F. Uelmen, Losing Steam, CAL. LAW., June 1990, at 33, 44.

198. Uelmen, Losing Steam, supra note 197, at 44.


203. The problem of competent counsel is acute at the appellate level. Robert Egelko, Politics at the Gallows, CAL. LAW., June 1992, at 19.

In *People v. Wade*, Melvin M. Wade, a 24 year old male, beat his ten year old stepdaughter to death in a cruel and brutal killing. Wade had a history of mental illness. As a child he had suffered physical and sexual abuse. There was evidence that he had multiple personalities. Defense counsel told the jury that his wife despised Wade and had, in fact, sent flowers to the victim's funeral. Defense counsel indicated that he was disgusted by the crime but had a duty to defend Wade. At the end of his argument he told the jury:

I just want to conclude with, considering the disorder, the emotional disturbance that the evidence has suggested to you by way of the physicians in this case and the psychologists, I don't think that Melvin Wade, Melvin Meffery Wade, can actually, can be said to lose this case. As has been expressed to me by Melvin on many occasions, he can't live with that beast from within any longer and if in your wisdom you think the appropriate punishment is death, you may be also giving an escape once again by analogy the gift of life to Melvin Meffery Wade to be free from this horror that he and only he knows so well.

The Lucas majority held that this argument was "not tantamount to advocating his client's death;" on the contrary, it was reasonable, tactical, and calculated to appeal to the jury's sympathy. The Lucas court rapidly cleared all legal obstacles to the resumption of executions in California.

205. *Id.* at 796-97.
206. *Id.* at 798-99.
207. *Id.* at 798.
208. *Id.* at 798-99.
209. *Id.* at 810 (Broussard, J., dissenting).
210. *Id.* at 809-10 (Broussard, J., dissenting).
211. *Id.* at 812 (Broussard, J., dissenting).
212. *Id.* at 807. Justice Broussard in his dissent argued:

To the extent such an argument is directed at 'gaining the jury's sympathy for the defendant,' it does so only by commending him to death. A defense attorney who argues death as 'an escape' and the 'gift of life' for his client is not an adversary of the prosecution. Rather, he comes very close to being exactly what counsel told the jury he was not: a second prosecutor.

*Id.* at 812 (Broussard, J., dissenting). The conservative majority also holds that it is harmless error if defense counsel fails to present evidence of mitigation if the defendant objects. *Id.* at 805-07. In effect, the court allows the defendant a right to execution. See, e.g., *People v. Williams*, 751 P.2d 901 (Cal. 1988); *People v. Miranda*, 744 P.2d 1127 (Cal. 1987).

213. Uelmen, *Losing Steam*, supra note 197, at 44.
VIII. CONCLUSION

The courts in the United States, as well as society in general, have failed to come to grips with the immorality of the death penalty system. The preservation of human life ought to be the premiere value of the state. When the decision to take life is made, it should be based on the most compelling reasons. It is corrupt to base the decision on arbitrary factors, such as race, which is the practice in the United States.\textsuperscript{214} This is particularly true because a non-violent alternative exists, namely, life in prison without parole. In a just society, the state should err, if at all, on the side of life, rather than death. If two punishments protect society equally, then the state should select the one that preserves life. Selecting a nonviolent alternative would have the added benefit of introducing the concept and practice of nonviolence into the culture of this most violent of industrial nations.\textsuperscript{215} The state apparatus can set the moral tone in a nation. At the present time, the United States prides itself on its military prowess abroad, which is reflected domestically in the use of state killing to control violent crime.

If the violence endemic to American social life is to disappear, the nation must transcend its own violence-ridden culture. When this cultural attitude is joined with the easy availability of firearms, stark social-economic inequalities, and racism, a fertile mix for violence exists. Table I is testimony to this reality.\textsuperscript{216} Current social policy, including the death penalty, is brutalizing the culture. At some point reason will force the nation to consider non-violent means of dispute resolution. The United States should end its isolation among industrial nations and embrace the international consensus that the death penalty is a violation of human rights.\textsuperscript{217} The death penalty should be cast into history's dust bin.

The reality in 1992, however, is that the United States, including California, is committed to the death penalty. California has joined the states that kill, accelerating in the process the national

\textsuperscript{214} Dodge Statement, \textit{supra} note 77, at 4.


\textsuperscript{216} \textit{See infra} app. tbl. I.

\textsuperscript{217} Since 1965, 27 countries have abolished the death penalty and nine more have de facto abolition. \textit{AMNESTY INT'L, supra} note 2, at 228; \textit{ROGER HOOD, THE DEATH PENALTY: A WORLDWIDE PERSPECTIVE} (Cal. 1989), \textit{reviewed in 22 CRIM. JUST. ABSTRACTS}, June 1990, at 310; Rice, \textit{supra} note 11, at 9.
spread of executions. The fight to outlaw the death penalty cannot depend on the judiciary to redress this violation of human rights. The minds of the judges are closed, their consciences congealed. The battle must shift to other arenas: the legislative halls and the forum of public opinion.

A perusal of the poll data suggests that the point of attack for shifting public opinion on the death penalty is deterrence.\textsuperscript{218} It was noted earlier\textsuperscript{219} that the weight of the empirical evidence indicates that executions do not deter homicides, and, in fact, might cause them to rise. The spate of executions that will take place in the years ahead will provide more macabre evidence on the point. The Gallup poll data reflected that roughly 19\% of those who now support the death penalty would cease to do so if they were convinced that it does not deter murder.\textsuperscript{220} The evidence on this issue needs to be aggressively conveyed to the public. If 19\% of the present supporters shifted, it would create either deep-seated public division or a slim majority in opposition to executions. Public education on deterrence is the opening wedge in the struggle to eliminate capital punishment in the United States. Success, if it occurs, will arrive only after an arduous, uphill battle.\textsuperscript{221}

\textsuperscript{218} Sourcebook 1988, supra note 114, at 229, tbl. 2.44.
\textsuperscript{219} See supra notes 118-24 and accompanying text.
\textsuperscript{220} Sourcebook 1988, supra note 114, at 228, tbl. 2.44.
\textsuperscript{221} Since 1976, national public support has ranged from a high of 76\% in 1985 to a low of 66\% in 1976 and 1978. Sourcebook 1991, supra note 1, at 212-13, tbl. 2.46. In 1991, public support was 72\%. Id. A 19\% shift against the penalty would lead to deep public division on the issue. However, there is substantial evidence that death penalty attitudes are not based on reason and will not respond to empirical data that refute the attitudes premise. Instead such attitudes are rooted in personality type and are symbolic of personality traits implanted in childhood. Tom R. Tyler & Renée Weber, Support for the Death Penalty: Instrumental Response to Crime, or Symbolic Attitude?, 17 Law & Soc'y Rev. 21 (Cal. 1982).
APPENDIX

Table I
City by City Homicides
(January 1990 - June 1990)

<table>
<thead>
<tr>
<th>City</th>
<th>Population (in thousands)</th>
<th>Homicides per Thousand</th>
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</tr>
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</tr>
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Source: N.Y. TIMES, Aug. 5, 1990, at 4/E.

Table II
Nations with Most Executions
(1986-1990)

<table>
<thead>
<tr>
<th>Nation</th>
<th>Executions</th>
</tr>
</thead>
<tbody>
<tr>
<td>Iran</td>
<td>4677 +</td>
</tr>
<tr>
<td>China</td>
<td>1461 +</td>
</tr>
<tr>
<td>South Africa</td>
<td>463 +</td>
</tr>
<tr>
<td>Nigeria</td>
<td>322 +</td>
</tr>
<tr>
<td>Saudi Arabia</td>
<td>228 +</td>
</tr>
<tr>
<td>Taiwan</td>
<td>182 +</td>
</tr>
<tr>
<td>Lebanon</td>
<td>106 +</td>
</tr>
<tr>
<td>Mauritania</td>
<td>100 +</td>
</tr>
<tr>
<td>Yemen</td>
<td>99 +</td>
</tr>
<tr>
<td>USA</td>
<td>93</td>
</tr>
</tbody>
</table>


Table III
Method of Execution
(April 1992)

<table>
<thead>
<tr>
<th>Method</th>
<th>Count</th>
</tr>
</thead>
<tbody>
<tr>
<td>Electrocution</td>
<td>90</td>
</tr>
<tr>
<td>Lethal Injection</td>
<td>66</td>
</tr>
<tr>
<td>Gas</td>
<td>9</td>
</tr>
<tr>
<td>Firing Squad</td>
<td>3</td>
</tr>
<tr>
<td>Total</td>
<td>168</td>
</tr>
</tbody>
</table>

Table IV
Deaths by State
(January 1977 - April 1992)

<table>
<thead>
<tr>
<th>State</th>
<th>Deaths</th>
</tr>
</thead>
<tbody>
<tr>
<td>Texas</td>
<td>46</td>
</tr>
<tr>
<td>Florida</td>
<td>27</td>
</tr>
<tr>
<td>Louisiana</td>
<td>20</td>
</tr>
<tr>
<td>Georgia</td>
<td>15</td>
</tr>
<tr>
<td>Virginia</td>
<td>13</td>
</tr>
<tr>
<td>Alabama</td>
<td>9</td>
</tr>
<tr>
<td>Missouri</td>
<td>6</td>
</tr>
<tr>
<td>Nevada</td>
<td>5</td>
</tr>
<tr>
<td>Mississippi</td>
<td>4</td>
</tr>
<tr>
<td>North Carolina</td>
<td>4</td>
</tr>
<tr>
<td>South Carolina</td>
<td>4</td>
</tr>
<tr>
<td>Utah</td>
<td>3</td>
</tr>
<tr>
<td>Arkansas</td>
<td>3</td>
</tr>
<tr>
<td>Oklahoma</td>
<td>3</td>
</tr>
<tr>
<td>Indiana</td>
<td>2</td>
</tr>
<tr>
<td>Illinois</td>
<td>1</td>
</tr>
<tr>
<td>Arizona</td>
<td>1</td>
</tr>
<tr>
<td>Delaware</td>
<td>1</td>
</tr>
<tr>
<td>Wyoming</td>
<td>1</td>
</tr>
</tbody>
</table>


Table V
States with Largest Death Rows
(April 1992)

<table>
<thead>
<tr>
<th>State</th>
<th>Deaths</th>
</tr>
</thead>
<tbody>
<tr>
<td>Texas</td>
<td>349</td>
</tr>
<tr>
<td>California</td>
<td>329</td>
</tr>
<tr>
<td>Florida</td>
<td>315</td>
</tr>
<tr>
<td>Illinois</td>
<td>145</td>
</tr>
<tr>
<td>Pennsylvania</td>
<td>140</td>
</tr>
<tr>
<td>Oklahoma</td>
<td>125</td>
</tr>
<tr>
<td>Alabama</td>
<td>115</td>
</tr>
<tr>
<td>Georgia</td>
<td>110</td>
</tr>
<tr>
<td>North Carolina</td>
<td>105</td>
</tr>
<tr>
<td>Ohio</td>
<td>104</td>
</tr>
<tr>
<td>Tennessee</td>
<td>100</td>
</tr>
<tr>
<td>Arizona</td>
<td>99</td>
</tr>
</tbody>
</table>