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CAN JUDICIAL INDEPENDENCE BE ATTAINED IN THE SOUTH? OVERCOMING HISTORY, ELECTIONS, AND MISPERCEPTIONS ABOUT THE ROLE OF THE JUDICIARY

Stephen B. Bright[†]

INTRODUCTION

The question in some states is not whether judicial independence can be preserved, but whether it can be attained. Courts that have historically allowed racial, economic, political and other improper considerations to influence their decisions cannot easily shed a legal culture developed over decades. In addition, misperceptions about the role of the judiciary and the elections of judges may thwart any progress toward judicial independence and the rule of law. However, attaining an independent state judiciary is critically important because of the rapidly declining—some would say evaporating—role of the federal courts in enforcing the Bill of Rights on behalf of racial minorities, the poor, and others for whom the Bill of Rights is the only protection from the government.

While these issues can be raised in many parts of the country, consideration of them is particularly appropriate here in the South, where the state courts have not been independent and have played a major role in defiance of the law. I will discuss our history, the problems of elections, and the misperceptions and then assess whether we have much cause for hope that independence will be obtained and what we might do to help achieve it.

I. OVERCOMING HISTORY

The southern states and their courts have a long history of defying the rule of law, particularly federal constitutional law, in the areas of race and criminal justice.¹ This history has

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1. See DERRICK BELL, *RACE, RACISM AND AMERICAN LAW* (3d ed. 1992); A. LEON

profoundly influenced the state courts and judges. Federal courts played a central role in the 1960s and 1970s in ending injustices that state courts had tolerated or participated in for decades. They ordered an end to racial discrimination in every institution of society and to human rights abuses in prisons and mental institutions. They granted writs of habeas corpus when the state courts refused to recognize constitutional violations in criminal cases. More recently, however, the federal courts have been in full retreat as protectors of the Bill of Rights as the nation has moved into a new era of states' rights.

A. *State Court Defiance and Resistance*

Before the Civil War, one could at least argue that the Constitution sanctioned the "peculiar institution" of slavery, and that the failure of the state courts to protect the rights of Africans and their descendants brought here against their will was in conformity with the law, as unjust as it was. However, after the Civil War and passage of the Thirteenth, Fourteenth and Fifteenth Amendments, the courts had the constitutional obligation to provide equal protection of the law to all citizens and to guarantee the right to vote regardless of race.

However, the state courts in the South provided the freed slaves no protection at all. Instead, they played a major role in continuing their oppression. Perhaps the worst example of this defiance was the involvement of the courts in many states, including Alabama, Arkansas, Florida, Georgia, Mississippi, North Carolina, South Carolina, Tennessee, and Texas, in maintaining a system of convicting and leasing people that was the virtual perpetuation of slavery.² Convict leasing "was designed for black, not white, convicts."³ When a work force was needed, men would be arrested for vagrancy and other minor crimes, convicted and then leased to plantations, railroads, turpentine camps, or others who needed cheap labor.⁴ One participant in the practice admitted, "it was possible to send a negro to prison on almost any pretext but difficult to get a white

HIGGINBOTHAM, JR., IN THE MATTER OF COLOR: RACE AND THE AMERICAN LEGAL PROCESS (1978).

2. See DAVID M. OSHINSKY, "WORSE THAN SLAVERY": PARCHMAN FARM AND THE ORDEAL OF JIM CROW JUSTICE 35-37, 40-50, 55-81 (1996).

3. *Id.* at 41.

4. See *id.* at 74.

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there, unless he committed a very heinous crime.”⁵ Many convicts were literally worked to death.⁶ One historian has observed that “[t]he South’s economic development can be traced by the blood of its prisoners.”⁷

On the other hand, the legal system usually failed to punish whites who engaged in violence against African-Americans. At least 4743 people were killed by lynch mobs.⁸ More than ninety percent of the lynchings took place in the South, and three-fourths of the victims were African-Americans.⁹ The threat that Congress might pass an anti-lynching statute in the early 1920s led Southern states to “replace lynchings with a more [humane] . . . method of racial control”—the judgment and imposition of capital sentences by all-white juries.”¹⁰ Once again, the courts ignored the rule of law to satisfy popular passions. As one historian observed:

Southerners . . . discovered that lynchings were untidy and created a bad press. . . . [L]ynchings were increasingly replaced by situations in which the Southern legal system prostituted itself to the mob’s demand. Responsible officials begged would-be lynchers to “let the law take its course,” thus tacitly promising that there would be a quick trial and the death penalty. . . . [S]uch proceedings “retained the essence of mob murder, shedding only its outward forms.”¹¹

Mississippi’s legal system “allowed whites to exploit blacks without legal limit, to withhold the most basic rights and safeguards while claiming to be indulgent, paternalistic, and fair.

5. *Id.* at 72 (quoting J. C. Powell, *THE AMERICAN SIBERIA, OR FOURTEEN YEARS’ EXPERIENCE IN A SOUTHERN CONVICT CAMP* 332 (1881)).

6. *See id.* at 46 (mortality rate of Mississippi’s conviction population ranged from 9% to 16% in the 1880s).

7. *Id.* at 60.

8. These numbers come from the archives at Tuskegee University, where lynchings have been documented since 1882. Mark Curriden, *The Legacy of Lynching*, ATLANTA J. & CONST., Jan. 15, 1995, at M1; *see also* W. FITZHUGH BRUNDAGE, *LYNCING IN THE NEW SOUTH: GEORGIA AND VIRGINIA, 1880-1930* (1993); GEORGE C. WRIGHT, *RACIAL VIOLENCE IN KENTUCKY 1865-1940: LYNCHINGS, MOB RULE, AND “LEGAL LYNCHINGS”* (1990).

9. *See* Curriden, *supra* note 8, at M1.

10. Douglas L. Colbert, *Challenging the Challenge: Thirteenth Amendment as a Prohibition Against the Racial Use of Peremptory Challenges*, 76 CORNELL L. REV. 1, 80 (1990) (quoting MICHAEL BELKNAP, *FEDERAL LAW AND SOUTHERN ORDER* 22-26 (1987)).

11. DAN T. CARTER, *SCOTTSBORO: A TRAGEDY OF THE AMERICAN SOUTH* 115 (rev. ed. 1992).

Worse, perhaps, it turned the criminal justice system into a corrupt and capricious entity, utterly undeserving of respect."¹²

Shocking abuses in the criminal justice systems of the South were only occasionally corrected by the United States Supreme Court. In *Brown v. Mississippi*,¹³ the Court reviewed a decision by the Mississippi Supreme Court that upheld death sentences for three black men. Quoting from the dissenting opinion of a justice of the Mississippi court, the U.S. Supreme Court described how confessions had been obtained from the three defendants:

Upon [Ellington's] denial, [the deputy sheriff and other men] seized him, and with the participation of the deputy they hanged him by a rope to the limb of a tree, and having let him down, they hung him again, and when he was let down the second time, and he still protested his innocence, he was tied to a tree and whipped, and still declining to accede to the demands that he confess, he was finally released and he returned with some difficulty to his home, suffering intense pain and agony. The record of the testimony shows that the signs of the rope on his neck were plainly visible during the so-called trial.¹⁴

The authorities persisted until a confession was obtained:

A day or two thereafter the said deputy, accompanied by another, returned to the home of the said defendant and arrested him, and departed with the prisoner towards the jail in an adjoining county, but went by a route which led into the State of Alabama; and while on the way, in that state, the deputy stopped and again severely whipped the defendant, declaring that he would continue the whipping until he confessed, and the defendant then agreed to confess to such a statement as the deputy would dictate, and he did so, after which he was delivered to jail.¹⁵

The same techniques were used to extract confessions from the other two defendants:

The other two defendants, Ed Brown and Henry Shields, were also arrested and taken to the same jail. On Sunday

12. OSHINSKY, *supra* note 2, at 124.

13. 297 U.S. 278 (1936).

14. *Id.* at 281 (quoting *Brown v. State*, 161 So. 465, 470 (Miss. 1935) (Griffith, J., dissenting)).

15. *Id.* at 281-82 (quoting *Brown*, 161 So. at 470).

night, April 1, 1934, the same deputy, accompanied by a number of white men, one of whom was also an officer, and by the jailer, came to the jail, and the two last named defendants were made to strip and they were laid over chairs and their backs were cut to pieces with a leather strap with buckles on it, and they were likewise made by the said deputy definitely to understand that the whipping would be continued unless and until they confessed, and not only confessed, but confessed in every matter of detail as demanded by those present; and in this manner the defendants confessed the crime, and as the whippings progressed and were repeated, they changed or adjusted their confession in all particulars of detail so as to conform to the demands of their torturers. When the confessions had been obtained in the exact form and contents as desired by the mob, they left with the parting admonition and warning that, if the defendants changed their story at any time in any respect from that last stated, the perpetrators of the outrage would administer the same or equally effective treatment.¹⁶

While this passed for justice in Mississippi, the U.S. Supreme Court found that “the transcript reads more like pages torn from some medieval account, than a record made within the confines of a modern civilization which aspires to an enlightened constitutional government.”¹⁷

In *Chambers v. Florida*,¹⁸ the Court reversed a decision of the Florida Supreme Court upholding death sentences for several “ignorant young colored tenant farmers” who were put in prison, beaten, threatened, and questioned almost continuously until they “confessed.”¹⁹ Twice the Court reversed the convictions and death sentences of the “Scottsboro Boys,” the African-American youths sentenced to death for rape in Scottsboro, Alabama.²⁰ But the Court did not review many other cases, such as the conviction of Linnie Jackson, a black woman who was sentenced in the early 1950s to five years in an Alabama penitentiary for marrying a white man.²¹ It was not until 1967 that the Court

16. *Id.* at 282 (quoting *Brown*, 161 So. at 470).

17. *Id.* (quoting *Brown*, 161 So. at 470).

18. 309 U.S. 227 (1940).

19. *Id.* at 238-39.

20. See *Norris v. Alabama*, 294 U.S. 587 (1935) (reversing because of racial discrimination in jury selection); *Powell v. Alabama*, 287 U.S. 45 (1932) (reversing because of denial of counsel to the accused); CARTER, *supra* note 11, at 161-63, 322-24.

21. See *Jackson v. State*, 72 So.2d 114 (Ala. Ct. App.) *cert. denied*, 348 U.S. 888

held state miscegenation laws to be unconstitutional.²² The trial and execution of John Downer, an African-American man who was probably innocent of the rape for which he was put to death,²³ was one of many instances in which the state courts acquiesced to popular passions and prejudices instead of enforcing the law.²⁴

African-Americans were denied participation in the southern legal systems that had such an impact on their lives. Although the Supreme Court struck down in 1879 a West Virginia statute that limited jury service to white people,²⁵ states continued to exclude blacks or provide only token representation in jury pools.²⁶

The Georgia Supreme Court in 1955 openly defied the United States Supreme Court with regard to the exclusion of black people from jury service in the case of Aubrey Williams, an African-American man sentenced to death.²⁷ Williams, like the

(1954).

22. See *Loving v. Virginia*, 388 U.S. 1 (1967).

23. See Anne S. Emanuel, *Lynching and the Law in Georgia Circa 1931: A Chapter in the Legal Career of Judge Elbert Tuttle*, 5 WM. & MARY BILL OF RTS. J. 215 (1996).

24. See, e.g., CARTER, *supra* note 11, at 104-36.

25. See *Strauder v. West Va.*, 100 U.S. 303 (1879).

26. See, e.g., *Whitus v. Georgia*, 385 U.S. 545 (1967) (describing repeated efforts of jury commissioners in Mitchell County, Georgia to exclude blacks from jury service); *Reece v. Georgia*, 350 U.S. 85, 88 (1955) (finding that no black person had ever served on a grand jury in Cobb County, Georgia; that of 534 names on the grand jury list, there were only six blacks, one did not reside in the county, two were over 80, and one was partially deaf and the other in poor health, the other three were 62); *Akins v. Texas*, 325 U.S. 398, 406-07 (1945) (finding no equal protection violation even though jury commissioners in Dallas County, Texas admitted they "had no intention of placing more than one negro on the panel"); *id.* at 408-09 (Murphy, J., dissenting) (noting that no black person had ever served on a grand jury in Dallas County until the court's decision in *Hill v. Texas*, 316 U.S. 400 (1942), and expressing view that equal protection requires consideration of black citizens for jury service "without numerical or proportional limitation"); *Cassell v. Texas*, 339 U.S. 282 (1950) (finding that since *Akins*, Dallas County jury commissioners had limited number of blacks on grand jury to not more than one and holding this limitation unconstitutional); *Norris v. Alabama*, 294 U.S. 587 (1935) (reversing because of total exclusion of blacks from jury pool); CARTER, *supra* note 11, at 326-27 (describing resistance to decision in *Norris* in South). See generally Morris B. Hoffman, *Peremptory Challenges Should be Abolished: A Trial Judge's Perspective*, 64 U. CHI. L. REV. 809, 827-32 (1997) (discussing history of exclusion of blacks from juries).

27. *Williams v. State*, 210 Ga. 207, 78 S.E.2d 521 (1953), *extraordinary motion denied*, 210 Ga. 665, 82 S.E.2d 217 (1954), *remanded sub nom. Williams v. Georgia*, 349 U.S. 375 (1955), *reaffirmed*, 211 Ga. 763, 88 S.E.2d 376 (1955), *cert. denied*, 350 U.S. 950 (1956); Del Dickson, *State Court Defiance and the Limits of Supreme Court*

defendant in *Avery v. Georgia*,²⁸ was tried by a jury in Fulton County selected by drawing tickets which were one color for whites and another color for blacks. In *Avery*, the Court found that this system unconstitutionally excluded African-Americans and reversed the conviction and death sentence.²⁹ However, instead of reversing Williams' conviction, the Court held that "orderly procedure requires a remand to the State Supreme Court for reconsideration of the case,"³⁰ and expressed its confidence that "the courts of Georgia would [not] allow this man to go to his death as the result of a conviction secured from a jury which the State admits was unconstitutionally impaneled."³¹

The Court's confidence was misplaced. Two days after receiving the opinion, Georgia Chief Justice W. Henry Duckworth, writing for a unanimous court—without the benefit of briefs or arguments—issued an opinion quoting the full text of the Tenth Amendment "followed by a brief and contemptuous dismissal of the U.S. Supreme Court's judgment."³² Duckworth held that the U.S. Supreme Court had issued an unconstitutional judgment that the Georgia Supreme Court was not bound to respect.³³ The Georgia Supreme Court's opinion was widely reported and praised by newspaper columnists, legislators, justices of other state supreme courts and by the Georgia Bar, which passed a resolution congratulating the court.³⁴

Remarkably, the U.S. Supreme Court denied certiorari and Williams was put to death.³⁵ One scholar has thoroughly documented the developments in the case and argued that the U.S. Supreme Court's refusal to reverse Williams' conviction was part of an "informal strategy" of the Court to "avoid unnecessary confrontations with Southern governments over ancillary racial issues"³⁶ in hope of gaining compliance with *Brown v. Board of*

Authority: Williams v. Georgia Revisited, 103 YALE L.J. 1423 (1994).

28. 345 U.S. 559 (1953).

29. *See id.*

30. Williams v. Georgia, 349 U.S. 375, 391 (1955).

31. *Id.*

32. Dickson, *supra* note 27, at 1457. Another writer characterized the Georgia court's response as telling the U.S. Supreme Court to go to hell. *See* BARRETT PRETTYMAN, JR., DEATH AND THE SUPREME COURT 290 (1961).

33. *See* Williams v. State, 211 Ga. 763, 763-64, 88 S.E.2d 376, 376-77 (1955).

34. *See* Dickson, *supra* note 27, at 1468-71.

35. *See id.* at 1465; Williams v. Georgia, 350 U.S. 950 (1956).

36. Dickson, *supra* note 27, at 1472.

Education.³⁷ However—in addition to costing a man his life—the Court's retreat in *Williams* had the opposite result of encouraging further defiance.³⁸

The Florida Supreme Court engaged in similar defiance of the U.S. Supreme Court in preventing the admission of an African-American to the University of Florida College of Law in the 1950s.³⁹ In Alabama, George C. Wallace, as a young circuit judge, defied the federal courts to advance his political career. Upon learning that federal officials were investigating underrepresentation of African-Americans in jury pools in a Georgia county, Wallace proclaimed to an all-white grand jury in Bullock County, Alabama, that he would not allow the federal law-enforcement officials to inspect his records.⁴⁰ Wallace then called the Associated Press to report this "news."⁴¹ Wallace later defied an order by U.S. District Court Judge Frank Johnson to produce voting records and sought to be held in contempt in order to benefit politically from a confrontation with the federal court.⁴²

Defiance of federal law at the local level did not always receive as much attention, but it had the same effect of denying African-Americans participation in the justice system. For example, black citizens in Columbus, Muscogee County, Georgia were excluded for years and then underrepresented in the jury pools. In 1966, the Fifth Circuit Court of Appeals held that this discrimination violated the Constitution.⁴³ In 1972, the Supreme Court reached the same conclusion in another case from the county,⁴⁴ and three justices pointed out that the way in which juries were being selected in the county violated 18 U.S.C. § 243, which makes it a criminal offense to exclude persons from jury service on the basis of race.⁴⁵

Despite these federal court decisions, the unconstitutional, systematic underrepresentation continued throughout the 1970s.

37. 347 U.S. 483 (1954).

38. See Dickson, *supra* note 27, at 1472.

39. See Robert Jerome Glennon, *The Jurisdictional Legacy of the Civil Rights Movement*, 61 TENN. L. REV. 869, 879-84 (1994).

40. See JACK BASS, *TAMING THE STORM: THE LIFE AND TIMES OF JUDGE FRANK M. JOHNSON, JR., AND THE SOUTH'S FIGHT OVER CIVIL RIGHTS* 185 (1993).

41. See *id.*; DAN T. CARTER, *THE POLITICS OF RAGE* 84 (1995).

42. See BASS, *supra* note 40, at 187-92.

43. See *Vanleeward v. Rutledge*, 369 F.2d 584 (5th Cir. 1966).

44. See *Peters v. Kiff*, 407 U.S. 493 (1972).

45. See *id.* at 505-07 (White, J., concurring).

Continued underrepresentation was made possible in part because the judges appointed a lawyer to defend indigents who would not, as a matter of “policy,” file challenges to the underrepresentation of blacks in the jury pool for fear of incurring hostility from the community.⁴⁶

As a result, at the capital trial of a black man in Columbus, Georgia in 1977—eleven years after the Fifth Circuit decision and five years after the Supreme Court warned that the exclusion of black citizens violated federal criminal statutes—there were only eight black citizens in a venire of 160 persons.⁴⁷ A venire that fairly represented the community would have included fifty black citizens. The case was tried by an all-white jury,⁴⁸ which imposed the death penalty.⁴⁹

The few African-Americans who made it into jury pools and were called for possible jury service, were usually sent back home by the prosecutor’s use of peremptory challenges. The U.S. Supreme Court was presented with evidence in 1965 that no African-American had ever sat on a trial jury in Talladega County, Alabama, even though the population of the county was twenty-six percent African-American.⁵⁰ Over fifteen years later, the “standard operating procedure” of the District Attorney’s Office in Tuscaloosa County, Alabama was “to use the peremptory challenges to strike as many blacks as possible from the venires in cases involving serious crimes.”⁵¹ A federal court found that prosecutors in Tuscaloosa also “manipulated the trial

46. See *Gates v. Zant*, 863 F.2d 1492, 1498 (11th Cir.), *reh’g denied*, 880 F.2d 293, 293-97 (Clark, J., dissenting from denial of rehearing), *cert. denied*, 493 U.S. 945 (1989).

47. See Challenge to the Petit Jury Array filed in *State v. Brooks*, Indictment No. 3888 (Nov. 1977), *on appeal*, 244 Ga. 574, 261 S.E.2d 379 (1979), *vacated and remanded*, 446 U.S. 961 (1980), *on remand*, 246 Ga. 262, 271 S.E.2d 172 (1980), *cert. denied*, 451 U.S. 921 (1981) (conviction and death sentence vacated on other grounds sub nom.); *Brooks v. Kemp*, 762 F.2d 1383 (11th Cir. 1985) (en banc), *vacated and remanded*, 478 U.S. 1016 (1986), *decision adhered to on remand*, 809 F.2d 700 (11th Cir.) (en banc), *cert. denied*, 483 U.S. 1010 (1987).

48. See Trial Judge’s Report to the Georgia Supreme Court in *State v. Brooks*, Indictment No. 3888, at 6, § E(4).

49. See *id.*

50. See *Swain v. Alabama*, 380 U.S. 202, 205, 223 (1965). Nevertheless, the Court found that the defendant had not established a violation of equal protection because he had not demonstrated that prosecutors were responsible for the systemic exclusion of blacks from the juries. See *id.* at 224-26. The standard of proof established in *Swain* was later modified in *Batson v. Kentucky*, 476 U.S. 79 (1986).

51. *Jackson v. Thigpen*, 752 F. Supp. 1551, 1554 (N.D. Ala. 1990), *rev’d in part and aff’d in part, sub nom.*, *Jackson v. Herring*, 42 F.3d 1350 (11th Cir. 1995).

docket in their effort to preserve the racial purity of criminal juries. Inasmuch as they actually set the criminal trial dockets until 1982, they implemented a scheme in which juries with fewer black venirepersons would be called for the serious cases."⁵²

There has been defiance in other areas as well. The most significant has been the failure of state courts to implement the Supreme Court's decision in *Gideon v. Wainwright*,⁵³ requiring the states to provide lawyers for poor people accused of crimes. Poor people facing a loss of life or liberty in many states are routinely assigned—usually by a judge—a lawyer who lacks the knowledge, skills, resources, and often even the inclination to defend a case properly.⁵⁴

Georgia's Superior Court judges, along with the state's prosecutors, opposed the Georgia Bar's efforts after *Gideon* to establish a state-wide system of indigent defense.⁵⁵ That opposition delayed any state funding for years and has prevented to this day the establishment of a comprehensive indigent defense system. Many state courts, including the one in Sumter County, Georgia, still do not provide lawyers to poor people who can be jailed for minor offenses,⁵⁶ in defiance of the Supreme

52. *Id.* at 1555.

53. 372 U.S. 335 (1963); see also ANTHONY LEWIS, *GIDEON'S TRUMPET* (1964).

54. See William S. Geimer, *A Decade of Strickland's Tin Horn: Doctrinal and Practical Undermining of the Right to Counsel*, 4 WM. & MARY BILL OF RTS. J. 91 (1995); Richard Klein, *The Emperor Gideon Has No Clothes: The Empty Promise of the Constitutional Right to Effective Assistance of Counsel*, 13 HASTINGS CONST. L.Q. 625 (1986); *Poor Man's Justice*, AM. LAWYER, Jan.-Feb. 1993, at 45-87 (compromising 13 articles describing inadequacy of representation for indigent defendants in various parts of country). States still do not even provide adequate counsel in capital cases. See Ira P. Robbins, *Toward a More Just and Effective System of Review in State Death Penalty Cases*, 40 AM. U. L. REV. 1 (1990) (finding after an exhaustive study that "the inadequacy and inadequate compensation of counsel at trial" was one of the "principal failings of the capital punishment systems in the states today"); Stephen B. Bright, *Counsel for the Poor: The Death Sentence Not for the Worst Crime but for the Worst Lawyer*, 103 YALE L. J. 1835 (1994); Bruce A. Green, *Lethal Fiction: The Meaning of "Counsel" in the Sixth Amendment*, 78 IOWA L. REV. 433 (1993); Douglas W. Vick, *Poorhouse Justice: Underfunded Indigent Defense Services and Arbitrary Death Sentences*, 43 BUFF. L. REV. 329 (1995).

55. See MIKE MEARS, *A BRIEF HISTORY OF THE GEORGIA INDIGENT DEFENSE ACT* (1996) (available from the Georgia Indigent Defense Council, Atlanta, Georgia).

56. See Ann Woolner, *Guilty in Americus? Forget Lawyers, Just Plead Guilty*, FULTON COUNTY DAILY REP., Sept. 23, 1996, at 1 (describing failure to provide lawyers in Sumter County, Georgia); Klein, *supra* note 54, at 659 (collecting studies showing that defense systems throughout country are violating *Argersinger*).

Court's 1972 decision in *Argersinger v. Hamlin*,⁵⁷ which requires the appointment of counsel in such cases.

Usually, this history is simply ignored. It is nothing to be proud of and it is tempting to believe it no longer has an impact on courts today. But in the South, as Faulkner said, "The past is never dead. It's not even past."⁵⁸ Practices and attitudes developed over centuries become part of the legal culture and are not easily erased. The Confederate battle flag, part of the Georgia state flag,⁵⁹ is still displayed in Georgia's courtrooms. Some of the other more overt manifestations of racism have been replaced by more covert or unconscious racism.⁶⁰

The relationship of this history to what happens in criminal courts today is illustrated by the Texas case of Clarence Lee Brandley. A police officer charged Brandley, a janitor, with the rape and murder of a white high school student instead of white suspects because "the nigger," as the officer referred to Brandley, "was big enough to have committed the crime; therefore, 'the nigger [is] elected.'"⁶¹ Brandley was tried twice. On both occasions, the prosecutors used all their peremptory strikes against blacks to get all-white juries, as was the normal practice of the Montgomery County prosecutor's office.⁶² Although "a powerful feeling of prejudice and racial tension pervaded the courtroom" at the first trial,⁶³ the jury was unable to agree on a

57. 407 U.S. 25 (1972).

58. WILLIAM FAULKNER, *REQUIEM FOR A NUN* 92 (1950).

59. See *Coleman v. Miller*, 117 F.3d 527 (11th Cir. 1997) (upholding Confederate battle flag as part of Georgia's state flag).

60. See *Turner v. Murray*, 476 U.S. 28, 35 (1986) (acknowledging possible influence of unconscious racism on sentencing decision in capital cases). The way in which such racial prejudice may come into play in decisionmaking has been described in detail by many scholars. See, e.g., Peggy C. Davis, *Law as Microaggression*, 98 *YALE L.J.* 1559, 1571 (1989) (describing tendency of people to make decisions based on "racial stereotypes and assumptions"); Sheri Lynn Johnson, *Black Innocence and the White Jury*, 83 *MICH. L. REV.* 1611 (1985) (documenting tendency among whites to convict black defendants in instances when white defendants would be acquitted); Charles R. Lawrence, III, *The ID, the Ego, and Equal Protection: Reckoning with Unconscious Racism*, 39 *STAN. L. REV.* 317 (1987); Gary Peller, *Race Consciousness*, 1990 *DUKE L.J.* 758; Samuel H. Pillsbury, *Emotional Justice: Moralizing the Passions of Criminal Punishment*, 74 *CORNELL L. REV.* 655, 708 (1989) (describing psychological tendency of predominantly white decisionmakers to sympathize more with whites than with blacks).

61. *Ex parte Brandley*, 781 S.W.2d 886, 890 (Tx. Crim. App. 1989).

62. See *id.* at 926 (Campbell, J., dissenting) (quoting from findings of trial judge in post-conviction proceedings).

63. *Id.* at 927.

verdict. At a second trial, where a reviewing judge found that a “‘project like’ mentality” on the part of the judge, prosecutor and court clerk “overbore any sense of justice and decency,”⁶⁴ the all-white jury sentenced Brandley to death.

Brandley was freed after the CBS News program *60 Minutes* publicized his innocence,⁶⁵ and the Texas Court of Criminal Appeals was forced to acknowledge the unfairness of his trial.⁶⁶ The treatment of Brandley was consistent with the treatment that black people had long received in Montgomery County:

The story of Clarence Brandley rang with echoes from [the lynching of a black man a few days before Christmas in 1885]: the rules of law that had been abandoned; the judge who had fallen in with the mob; the press that had relished his fate; the “leading citizens of the county” who had committed the crime; the bodyguard of new civil rights that had turned and deserted him; the whole town that had stood by and let it happen. And that was the loudest echo of all.

....

It was part of the corruption that had become a way of life. . . . Not only had the whites always got away with it, but they had also always been able to justify it. Killing one black man was a means of disciplining the whole of his community. Just as a secret police force tries to quell the courage of a whole people by arresting its figureheads, just as terrorists try to frighten a whole society by throwing fear into the lives of each of its members, so the white people of Montgomery County had for years ruled black people with fear by picking off their young men. Murder was disguised as a necessary social task.

....

The ordeal Clarence Brandley suffered was an attempt at a legal lynching. It was the law, not an old rope, that was twisted into a deadly weapon, but the intention of those who attacked him was just as surely to kill him, as their predecessors had killed young black men in the past.⁶⁷

Other vestiges of discrimination that occurred years ago still infect the courts and affect their decisions. One of the most

64. *Id.* at 928.

65. See NICK DAVIES, *WHITE LIES: RAPE, MURDER, AND JUSTICE TEXAS STYLE* 307-09 (1991).

66. See *Ex parte Brandley*, 781 S.W.2d at 894-95.

67. DAVIES, *supra* note 65, at 395-96, 402.

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significant is that African-Americans and other minorities remain largely excluded from the justice system. The history of legalized oppression has resulted in very few people of color sitting as judges. Of Alabama's 381 district, circuit, probate and appellate judges only eighteen are black.⁶⁸ Of Florida's 456 circuit judges,⁶⁹ only sixteen are black⁷⁰ and eighteen are Hispanic.⁷¹ Of Georgia's 152 Superior Court judges,⁷² only nineteen are black.⁷³ Of South Carolina's forty-three circuit judges,⁷⁴ only four are black.⁷⁵ Of Texas' 396 district court judges,⁷⁶ only twelve are black⁷⁷ and forty-two are Hispanic.⁷⁸ There is little likelihood that the bench will become more representative in the next several decades since states are allowed to elect judges from districts in which the voting power of black citizens is diluted.⁷⁹ Members of racial minorities continue to be underrepresented in jury pools and excluded in the jury selection process.⁸⁰

The absence of the perspectives of people who have had different life experiences has an adverse impact on the quality of decision making, which often is detrimental to the excluded minorities. An African-American member of the Georgia Supreme Court has observed that, "[w]hen it comes to grappling with racial issues in the criminal justice system today, often white

68. See Associated Press, *Blacks Trying for Judgeships Have Tough Time*, MONTGOMERY ADV., Jan. 13, 1998, at A3.

69. See DIRECTORY OF STATE COURT CLERKS & COUNTY COURTHOUSES 46 (Robert S. Want ed., 1997) [hereinafter DIRECTORY].

70. AMERICAN BAR ASSOCIATION, DIRECTORY OF MINORITY JUDGES OF THE UNITED STATES 29-30 (1997) [hereinafter ABA DIRECTORY].

71. See *id.* at 164-65.

72. See DIRECTORY, *supra* note 69, at 52.

73. See ABA DIRECTORY, *supra* note 70, at 34.

74. See DIRECTORY, *supra* note 69, at 232.

75. See ABA DIRECTORY, *supra* note 70, at 100.

76. See DIRECTORY, *supra* note 69, at 250.

77. See ABA DIRECTORY, *supra* note 70, at 106-07.

78. See *id.* at 209-12.

79. See *Brooks v. State Board of Elections*, 173 F.R.D. 547 (S.D. Ga. 1997) (dismissing challenge to Georgia's system of electing judges after settlement, which would have increased number of minority judges); *White v. Alabama*, 74 F.3d 1058 (11th Cir. 1996) (rejecting a settlement that would have resulted in an increase in number of minority judges on appellate courts in Alabama); *Nipper v. Smith*, 39 F.3d 1494 (11th Cir. 1994) (en banc) (rejecting challenge based on dilution of black vote in judicial elections in Florida); *League of United Latin Am. Citizens v. Clements*, 999 F.2d 831 (5th Cir. 1993) (en banc), *cert. denied*, 510 U.S. 1071 (1994) (upholding Texas' single-district system of electing state trial judges).

80. See AMERICAN BAR ASSOCIATION TASK FORCE ON MINORITIES AND THE JUSTICE SYSTEM, *ACHIEVING JUSTICE IN A DIVERSE AMERICA* 15 (1992).

Americans find one reality while African-Americans see another."⁸¹ Today, African-Americans and other minorities are more likely than white people to be arrested,⁸² put in chokeholds,⁸³ denied bail,⁸⁴ denied probation,⁸⁵ and given harsher sentences.⁸⁶

The past continues to resonate particularly in the criminal justice system when the legacy of racial oppression so often intersects with continued indifference to justice for the poor. The resistance to *Gideon v. Wainwright* in many states has resulted

81. *Lingo v. State*, 263 Ga. 663, 665, 437 S.E.2d 463, 468 (1993) (Sears-Collins, J., dissenting).

82. See Charles J. Ogletree, *Does Race Matter in Criminal Prosecutions?*, CHAMPION, July 1991, at 7, 10-12 (describing discriminatory practices by police against racial minorities); Mary Maxwell Thomas, *The African American Male: Communication Gap Converts Justice Into "Just Us" System*, 13 HARV. BLACKLETTER J. 1, 5 (1997).

83. See *Los Angeles v. Lyons*, 461 U.S. 95, 116 n.3 (1983) (Marshall, J., dissenting) (noting that although only 9% of residents of Los Angeles are black males, they have accounted for 75% of deaths resulting from chokeholds by police).

84. See Ian Ayres & Joel Waldfogel, *A Market Test for Race Discrimination in Bail Setting*, 46 STAN. L. REV. 987 (1994) (documenting discrimination in the setting of bail rates for African-Americans); Mary Maxwell Thomas, *supra* note 82, at 5.

85. Bill Rankin, *Unequal Justice: Whites More Apt to Get Probation*, ATLANTA J. & CONST., Feb. 8, 1998, at A1 (reporting that since 1990 white people convicted in Georgia were 30% to 60% more likely than blacks to get probation for various crimes even though prior criminal records were about same among blacks and whites); Keith W. Watters, *Law Without Justice*, NAT'L B. ASS'N MAG., Mar.-Apr. 1996 at 1, 23 (reporting that whites are more likely to be placed on probation than African-Americans, and that African-Americans make up only 12% of population and 13% of drug users, but comprise 55% of drug convictions).

86. See, e.g., *Stephens v. State*, 265 Ga. 356, 456 S.E.2d 560 (1995) (stating, of 375 persons serving life sentences for a second conviction for sale or possession with intent to distribute certain narcotics, 98.4% are African-Americans); *State v. Russell*, 477 N.W.2d 886 (Minn. 1991) (finding equal protection violation under state constitution due to more severe sentences imposed for possession of crack cocaine than for powdered cocaine when 96.6% of those charged with possession of crack cocaine are black and 79.6% of those charged with possession of powdered cocaine are white); U.S. GENERAL ACCOUNTING OFFICE, DEATH PENALTY SENTENCING: RESEARCH INDICATES PATTERN OF RACIAL DISPARITIES (Feb. 1990) (reporting a "remarkably consistent" pattern of racial disparities in death penalty sentencing throughout country); Gerald W. Heaney, *The Reality of Guidelines Sentencing: No End to Disparity*, 28 AM. CRIM. L. REV. 161, 165 (1991) (arguing that "most disturbing systemic disparity is the apparent disparate treatment of young, black males, who on the average receive guidelines sentences significantly longer than those received by their white counterparts for similar offenses"); see also JEROME G. MILLER, SEARCH AND DESTROY: AFRICAN-AMERICAN MALES IN THE CRIMINAL JUSTICE SYSTEM (1996); THE REAL WAR ON CRIME: THE REPORT OF THE NATIONAL CRIMINAL JUSTICE COMMISSION (Stephen R. Donziger ed., 1996); Samuel L. Myers, Jr., *Racial Disparities in Sentencing: Can Sentencing Reforms Reduce Discrimination in Punishment?*, 64 U. COLO. L. REV. 781 (1993).

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in representation of indigent defendants that is often a disgrace and trials that, on some occasions, are no different from the "legal lynchings" of the 1930s and 1940s.

Many jurisdictions award contracts to provide representation to indigent defendants to the lawyer who submits the lowest bid, without any regard to the quality of services provided.⁸⁷ Many states pay lawyers appointed to defend the poor such low rates that attorneys may make less than the minimum wage in some cases.⁸⁸ In Virginia, for example, lawyers are limited to \$100 for defending someone in a misdemeanor case in district court, \$132 for defending a misdemeanor case in circuit court, \$265 for defending a felony case when the punishment is less than twenty years, and \$575 when punishment is more than twenty years.⁸⁹

These fees were set by the legislature, but when state circuit judges in Henrico County were presented with a challenge to the limits as interfering with the right to counsel, they removed the lawyer making the challenge and refused to appoint any lawyer who would raise the issue.⁹⁰ The challenge was not a frivolous one. The attorney argued that once he exceeded the limit and

87. See, e.g., Clay Hall, *Public Defender is Hired*, THOMPSON (GA.) TIMES, Feb. 24, 1993, at 3A (describing how McDuffie County, Georgia, saved \$21,000 on amount it had paid the year before by awarding contract to a lawyer whose bid was almost \$20,000 lower than other two bids).

88. For example, in Alabama, lawyers are paid \$20 an hour for out-of-court preparation up to a limit of \$1000 to defend a non-capital case and \$2000 to defend a capital case. See ALA. CODE § 15-12-21(a) (Supp. 1992); Lawyers can be reimbursed for their overhead expenses. See *May v. State*, 672 So.2d 1307 (Ala. Crim. App. 1993). In some rural areas in Texas, lawyers receive no more than \$800 to handle a capital case. See Marianne Lavelle, *Strong Law Thwarts Lone Star Counsel*, NAT'L L.J., June 11, 1990, at 34. Generally, the hourly rate is \$50 or less. THE SPANGENBERG GROUP, A STUDY OF REPRESENTATION IN CAPITAL CASES IN TEXAS 157 (1993) (prepared for State Bar of Texas). In Mississippi, lawyers are paid \$1000 and reimbursed for their overhead expenses for defending a capital case. See *Wilson v. State*, 574 So. 2d 1338 (Miss. 1990). In Louisiana, some lawyers are not paid at all. See *State v. Wigley*, 624 So. 2d 425 (La. 1993) (holding that fees for lawyer's services need not be paid, but that lawyers were entitled to recover their reasonable out-of-pocket expenses and overhead costs). Louisiana had previously required the lawyer to pay all expenses and made no provision for overhead costs. See *State v. Clifton*, 172 So. 2d 657 (La. 1965).

89. See VA. CODE ANN. § 19.2-163 (WESTLAW 1998). The statute provides that on July 1, 1998, lawyers can receive up to \$735 in felony cases punishable by more than 20 years, but the other rates remain the same. The statute provides for a "reasonable amount" for the defense of a capital case. *Id.*

90. See Laura LaFay, *Virginia's Poor Receive Justice on the Cheap*, VIRGINIAN-PILOT, Feb. 15, 1998 at A1; *Felony Murder: Soup to Nuts-\$575*, CR. PRACTICE REP., Jan. 28, 1998, at 25, 27 [hereinafter *Felony Murder*].

was forced to work uncompensated, it created a conflict between his pecuniary interests and his duty to provide zealous representation.⁹¹ After the challenge had been made, one circuit judge announced at calendar call that any attorney raising the conflict of interest issue would be removed from the list of appointed counsel, and before appointing any lawyer to a case, the judge asked the attorney whether he or she intended to raise the issue.⁹²

Judges in Houston, Texas repeatedly appointed a lawyer known for hurrying through trials like "greased lightning," to defend indigent defendants in the last forty-five years.⁹³ Houston judges, who have taken an oath to uphold the Constitution, including the Sixth Amendment's guarantee of counsel, presided over two capital trials in which the lawyer slept during trial, and Texas courts upheld the convictions and death sentences on appeal.⁹⁴ After the capital defender program in Texas closed because its federal funding was eliminated, the Court of Criminal Appeals appointed two of its former law clerks to fourteen capital post-conviction cases and paid them \$265,000.⁹⁵ The two former clerks had no experience in representing capital crime defendants.⁹⁶ It would be impossible for even the most experienced lawyers to take on so many cases and provide adequate representation in all of them.

An Alabama judge presided over a capital case in which the attorney was so intoxicated that the trial had to be suspended for a day and the lawyer was sent to jail to sober up.⁹⁷ The Alabama Supreme Court had no hesitation in deciding *a capital*

91. See Lafay, *supra* note 90, at A1.

92. See *id.* at A10 (reporting that Judge James E. Kulp announced that he would remove any lawyer who raised issue from list of attorneys eligible for court appointments); *Felony Murder*, *supra* note 90, at 27.

93. Paul M. Barrett, *Lawyer's Fast Work on Death Cases Raises Doubts About System*, WALL ST. J., Sept. 7, 1994, at A1.

94. See *Ex parte Burdine*, 901 S.W.2d 456, 457 & n.1 (Tex. Crim. App. 1995) (Maloney, J., dissenting) (quoting testimony of clerk of court that "defense counsel was asleep on several occasions on several days over the course of the proceedings" and "was asleep for long periods of time during the questioning of witnesses"); David R. Dow, *The State, the Death Penalty, and Carl Johnson*, 37 B.C. L. REV. 691, 694-95 (1996) (describing case of Carl Johnson, who was executed by Texas even though his lawyer slept through much of proceedings).

95. See Kathy Walt, *Lawyers Who Aid Condemned Paid \$265,000*, HOU. CHRON., Oct. 3, 1997, at A33.

96. See *id.* at A33, A35.

97. See Bright, *supra* note 54, at 1835-36 (describing capital trial of Judy Haney).

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case on direct appeal even though the court-appointed lawyer filed a one-page brief and failed to show up for oral argument.⁹⁸ A court concerned about justice and the rule of law would have appointed lawyers to file a proper brief and insisted on oral argument so that the court could do its job properly in deciding the case.

It is hard to fathom how judges could preside over trials in which grossly incompetent attorneys represented the accused, especially in cases involving the death penalty.⁹⁹ But the judges not only tolerated the incompetence; in most instances, *they appointed the lawyers* to the case. In doing so, they breached their constitutional responsibility under *Gideon* and the Sixth Amendment.

History lives in other areas as well. In Alabama, state Judge Roy S. Moore has become "something of a celebrity for fighting, both in court and in the news, to keep a tablet of the Ten Commandments hanging behind his bench" despite a court order to remove it.¹⁰⁰ After a federal court prohibited state officials from permitting any officially sanctioned religious activity in the schools, Judge Moore declared that the federal order was not the law of Etowah County, where he presides, and constituted an "unconstitutional abuse of power" by the federal judiciary.¹⁰¹ Judge Moore apparently believes that defiance of the law remains as popular in Alabama today as it was in George Wallace's time.

B. *The Role of the Federal Courts*

The progress that has been made in the South to end racial discrimination in education, voting, housing, public accommodations, and other areas is largely attributable to the federal courts and the extraordinary persistence of federal judges when faced with resistance and outright defiance by the states.¹⁰² On the great legal and moral issue of racial equality,

98. *See id.* at 1860-61 n.154 (setting out in full, one-page brief filed in case of Larry Gene Heath, whose death sentence was affirmed by Alabama Supreme Court on basis of brief; Heath was executed); *see also id.* at 1843 n.55 (describing other grossly deficient briefs filed in capital cases).

99. *See id.* at 1862.

100. Kevin Sack, *In South, Prayer is a Form of Protest*, N.Y. TIMES, Nov. 8, 1997, at A7.

101. *Id.*

102. *See, e.g.*, JACK BASS, UNLIKELY HEROES (1981); BASS, *supra* note 40, at 159-60

the state courts stood in the way of justice instead of ordering it.¹⁰³

After the Supreme Court held that schools must be integrated in *Brown v. Board of Education*,¹⁰⁴ it was only because a group of extraordinary men that Jack Bass described as “unlikely heroes” happened to be on the Court of Appeals for the Fifth Circuit that schools in the southern states were integrated after years of resistance.¹⁰⁵ Judge A. Leon Higginbotham, Jr. described the role that the judges of the Fifth Circuit played:

In the 1950's and 1960's, many Southern officials, white citizens' councils and vigilante groups urged total defiance of the Federal courts' civil rights decrees. Despite the persistent hostility, virtually every Fifth Circuit judge—all appointed by President Eisenhower—repeatedly affirmed the constitutional rights of black citizens, among them Rosa Parks and Martin Luther King Jr.¹⁰⁶

Courageous federal district judges like Frank Johnson and J. Skelly Wright repeatedly ordered the states to meet their constitutional responsibilities to black citizens in education and other areas.¹⁰⁷ As Judge Johnson once observed:

[F]ederal courts in Alabama—in addition to ordering hundreds of public schools to desegregate—have ordered the desegregation of mental institutions, penal facilities, public parks, city buses, bus terminals, airport terminals, and public libraries and museums.

(describing necessity for federal court intervention in civil rights cases because of failure of elected state court judges to enforce constitutional guarantees); *see also*, TAYLOR BRANCH, PARTING THE WATERS: AMERICAN IN THE KING YEARS 1954-63 (1988); TAYLOR BRANCH, PILLAR OF FIRE: AMERICAN IN THE KING YEARS 1963-65 (1998).

103. *See* Robert Jerome Glennon, *The Jurisdictional Legacy of the Civil Rights Movement*, 61 TENN. L. REV. 869, 870 (1994) (“Southern state judges were unmistakably hostile to constitutional claims of African-American litigants.”).

104. 347 U.S. 483 (1954) (holding that racial segregation in public schools violates Equal Protection Clause); *see also* *Brown v. Board of Educ.*, 349 U.S. 294, 301 (1955) (requiring that desegregation of public schools proceed “with all deliberate speed”).

105. BASS, *supra* note 102.

106. A. Leon Higginbotham, Jr., *Breaking Thurgood Marshall's Promise*, N.Y. TIMES MAGAZINE, Jan. 8, 1998, § 6, at 28, 29.

107. *See* FRANK SIKORA, THE JUDGE: THE LIFE AND OPINIONS OF ALABAMA'S FRANK M. JOHNSON, JR. (1992); LIVA BAKER, THE SECOND BATTLE OF NEW ORLEANS: THE HUNDRED-YEAR STRUGGLE TO INTEGRATE THE SCHOOLS (1996) (describing Judge J. Skelly Wright's role in integration of New Orleans schools); BASS, TAMING THE STORM, *supra* note 40.

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Each case stood as a warning to state officials that the limits of their discretion to proceed at all deliberate speed had long since been exceeded. Yet, in reckless disregard of these repeated warnings, the state invested its time and energy in attempts to circumvent the responsibilities constitutionally required and spelled out in prior court orders.¹⁰⁸

Federal courts also ordered the end to the shameful, barbaric practices in southern prisons and mental institutions. Those who today complain about “judicial activism” and “micromanagement” of prisons by federal courts, fail to mention the practices and conditions in Alabama, Arkansas, Mississippi, and other states that prompted prisoners to seek protection from the federal courts: lashing prisoners with leather straps until their skin was bloody,¹⁰⁹ giving prisoners electrical shocks to sensitive parts of their body from a hand-cranked device,¹¹⁰ placing as many as six inmates “in four foot by eight foot cells with no beds, no lights, no running water, and a hole in the floor for a toilet which could only be flushed from the outside,”¹¹¹ and crowding prisoners into barracks where “[h]omosexual rape was so common and uncontrolled that some potential victims dared not sleep; instead they would leave their beds and spend the night clinging to the bars nearest the guards’ station.”¹¹²

Mississippi replaced convict leasing with a huge plantation prison known as Parchman Farm. State judges sentenced convicts to go to Parchman and did nothing about the conditions there. A federal lawsuit resulted in an examination of conditions at the prison by a federal judge, William C. Keady. His visits were described as follows:

Keady visited Parchman on four occasions, once taking his minister along. Wandering through the cages, talking privately to the inmates, he discovered an institution in

108. Frank M. Johnson, Jr., *The Alabama Punting Syndrome*, JUDGES’ J., Spring 1979, at 4, 6.

109. See *Hutto v. Finney*, 437 U.S. 678, 682 n.4 (1978) (describing whipping of Arkansas prisoners with wooden-handled leather strap five feet long for minor infractions); OSHINSKY, *supra* note 2, at 149-51 (describing whipping of prisoners in Mississippi with three-foot leather strap, known as “Black Annie”).

110. See *Hutto*, 437 U.S. at 682 n.5 (describing use of “Tucker telephone”).

111. *Pugh v. Locke*, 406 F. Supp. 318, 327 (M.D. Ala. 1976), *aff’d as modified*, 559 F.2d 283 (5th Cir. 1977), *rev’d in part on other grounds*, 438 U.S. 781 (1978) (per curiam).

112. *Hutto*, 437 U.S. at 681-82 n.3.

shambles, marked by violence and neglect. The camps were laced with open ditches, holding raw sewage and medical waste. Rats scurried along the floors. . . . At one camp, Keady found "three wash basins for 80 men which consist of oil drums cut in half." At all camps, he saw filthy bathrooms, rotting mattresses, polluted water supplies, and kitchens overrun with insects, rodents, and the stench of decay.

The convicts told him stories that supported [the claims made in the suit]. Parchman was a dangerous, deadly place. Shootings and beatings were common; murders went unreported; the maximum security unit was a torture chamber. Trusties brutalized inmates, who, in turn, brutalized each other. "One part of me had always suspected such things," the judge recalled. "The rest of me was angry and ashamed."¹¹³

Judge Keady required prison officials to protect inmates from physical assaults by other inmates, stop housing them in barracks unfit for human habitation, end racial discrimination against inmates, provide medical care, and end other barbaric and patently unconstitutional practices.¹¹⁴

Judge Frank Johnson found in Alabama prisons that violence was "rampant"¹¹⁵ and "robbery, rape, extortion, theft and assault [were] everyday occurrences among the general inmate population."¹¹⁶ Mentally disturbed inmates were "dispersed throughout the prison population without receiving treatment."¹¹⁷ The prisons were "horrendously overcrowded,"¹¹⁸ and "woefully understaffed."¹¹⁹ Inmates in punitive isolation were placed in a building locked from the outside with no guard stationed inside, given "only one meal per day, frequently without utensils," and "were permitted no exercise or reading material and could shower only every 11 days."¹²⁰

Judge Johnson also found that conditions in Alabama's mental hospitals, which served only to keep mentally ill people out of

113. See OSHINSKY, *supra* note 2, at 245.

114. *Id.* at 246-48; see also *Gates v. Collier*, 349 F. Supp. 881, 881-905 (N.D. Miss. 1972), *aff'd*, 501 F.2d 1291 (5th Cir. 1974).

115. *Pugh*, 406 F. Supp. at 325.

116. *Id.* at 324.

117. *Id.*

118. *Id.* at 322.

119. *Id.* at 325.

120. *Id.* at 327.

public view by warehousing them, were unconstitutional.¹²¹ He found, “[t]here can be no legal (or moral) justification for the State of Alabama’s failing to afford treatment—and adequate treatment from a medical standpoint—to the several thousand patients who have been civilly committed to [the state’s mental hospital] for treatment purposes.”¹²² Judge Johnson reserved his ruling to allow state officials the opportunity to promulgate and implement proper standards, but the State failed to comply, and Judge Johnson then ordered them to do so.¹²³ So great was Alabama’s resistance to properly treating its mentally ill, that the litigation has continued for over twenty-six years and has produced at least thirty-nine reported decisions.¹²⁴ Alabama’s practice of resistance and forcing federal authorities to order needed reforms occurred with such frequency that Judge Johnson termed it “The Alabama Punting Syndrome.”¹²⁵

Unfortunately, abuses in correctional institutions have not ended. State prisons and jails are again overcrowded as courts

121. See *Wyatt v. Stickney*, 325 F. Supp. 781 (M.D. Ala. 1971).

122. *Id.* at 785.

123. See *Wyatt v. Stickney*, 334 F. Supp. 1341 (M.D. Ala. 1971).

124. See *Wyatt v. Rogers*, No. CIV.A. 3195-N, 1998 WL 13830 (M.D. Ala. Jan. 6, 1998); *Wyatt v. Rogers*, No. CIV.A. 3195-N, 1997 WL 784491 (M.D. Ala. Dec. 15, 1997); *Wyatt v. Rogers*, 92 F.3d 1074 (11th Cir. 1996); *Wyatt v. Rogers*, 942 F. Supp. 518 (M.D. Ala. 1996); *Wyatt v. Poundstone*, 941 F. Supp. 1100 (M.D. Ala. 1996); *Wyatt v. Hanan*, 77 F.3d 498 (11th Cir. 1996); *cert. denied*, 117 S. Ct. 84 (1996); *Wyatt v. Poundstone*, No. CIV.A. 3195-N, 1995 WL 938444 (M.D. Ala. Dec. 5, 1995); *Wyatt v. Hanan*, No. CIV.A. 3195-N, 1995 WL 699616 (M.D. Ala. Nov. 8, 1995); *Wyatt v. Poundstone*, No. CIV.A. 3195-N, 1995 WL 569121 (M.D. Ala. Apr. 18, 1995); *Wyatt v. Poundstone*, No. CIV.A. 3195-N, 1995 WL 430939 (M.D. Ala. July 11, 1995); *Wyatt v. Poundstone*, 892 F. Supp. 1410 (M.D. Ala. 1995); *Wyatt v. Hanan*, 170 F.R.D. 189 (M.D. Ala. 1995); *Wyatt v. Poundstone*, 169 F.R.D. 155 (M.D. Ala. 1995); *Wyatt v. Hanan*, 871 F. Supp. 415 (M.D. Ala. 1994); *Wyatt v. Hanan*, 868 F. Supp. 1356 (M.D. Ala. 1994); *Wyatt v. King*, 985 F.2d 579 (11th Cir. 1993); *Wyatt v. King*, 811 F. Supp. 1533 (M.D. Ala. 1993); *Wyatt v. King*, 803 F. Supp. 377 (M.D. Ala. 1992); *Wyatt v. King*, 793 F. Supp. 1058 (M.D. Ala. 1992); *Wyatt v. Horsley*, 793 F. Supp. 1053 (M.D. Ala. 1991); *Wyatt v. King*, No. CIV.A. 3195-N, 1991 WL 640065 (M.D. Ala. Dec. 17, 1991); *Wyatt v. King*, No. CIV.A. 3195-N, 1991 WL 365043 (M.D. Ala. Oct. 28, 1991); *Wyatt v. King*, 781 F. Supp. 750 (M.D. Ala. 1991); *Wyatt v. Horsley*, 773 F. Supp. 1508 (M.D. Ala. 1991); *Wyatt v. Wallis*, No. CIV.A. 3195-N, 1986 WL 69194 (M.D. Ala. Sept. 22, 1986); *Wyatt v. Ireland*, 515 F. Supp. 888 (M.D. Ala. 1981); *Wyatt v. Ireland*, No. CIV.A. 3195-N, 1979 WL 48254 (M.D. Ala. Oct. 25, 1979); *Wyatt v. Ireland*, No. CIV.A. 3195-N, 1979 WL 48253 (M.D. Ala. Oct. 25, 1979); *Wyatt v. Aderholt*, 503 F.2d 1305 (5th Cir. 1974); *Wyatt v. Stickney*, 344 F. Supp. 387 (M.D. Ala. 1972); *Wyatt v. Stickney*, 344 F. Supp. 373 (M.D. Ala. 1972); *Wyatt v. Stickney*, 334 F. Supp. 1341 (M.D. Ala. 1971); *Wyatt v. Stickney*, 325 F. Supp. 781 (M.D. Ala. 1971).

125. *Johnson*, *supra* note 108.

send more people to prison than ever before even as crime rates decline.¹²⁶ The “war on crime” being waged by politicians competing to show how tough they are has led to a return to primitive practices and mistreatment of prisoners.¹²⁷ For example, Georgia’s commissioner of corrections, an undertaker, after announcing that “one-third of [state prison] inmates ‘ain’t fit to kill,’”¹²⁸ fired academic and vocational teachers, recreation directors and counselors,¹²⁹ eliminated hot lunches for prisoners,¹³⁰ placed inmates in ninety-day boot camp programs on a diet of sandwiches and water,¹³¹ and requires inmates to walk miles a day.¹³² The commissioner also led raids on the prisons in purported searches for drugs and contraband, in which unresisting inmates were beaten and degraded.¹³³ A lieutenant who heads one of the squads that participated in one of the raids described the brutal assault on inmates as a “dad-gum shark frenzy.”¹³⁴ Another correctional officer described seeing an unresisting inmate’s face shoved into a wall: “Blood went up the wall. Blood went all over the ground, all over the

126. See Fox Butterfield, “Defying Gravity,” *Inmate Population Climbs*, N.Y. TIMES, Jan. 19, 1998, at A10 (reporting that despite decline in crime rate over past five years, number of inmates has continued to rise each year, that over 1,700,000 inmates are in prisons and jails and that national incarceration rate of 645 inmates per 100,000 people is more than double rate in 1985).

127. See, e.g., Seth Mydans, *Taking No Prisoners*, In *Manner of Speaking*, N.Y. TIMES, Mar. 4, 1995, at 6 (describing how sheriff in Maricopa County, Arizona substituted bologna sandwiches for hot lunches, discontinued all movies, banned cigarettes and coffee, and housed some prisoners in tents); Adam Nossiter, *Making Hard Time Harder, States Cut Jail TV and Sports*, N.Y. TIMES, Sept. 17, 1994, at 1 (describing efforts to take away television and exercise for prisoners in many states); Rick Bragg, *Chain Gangs to Return to Roads of Alabama*, N.Y. TIMES, Mar. 26, 1995, at 16 (describing return of chain gangs to Alabama).

128. Rhonda Cook, *A Tough Chief of Prisons*, ATLANTA J. & CONST., Dec. 15, 1996, at G1.

129. See Rhonda Cook, *235 Prison Teachers Fired in \$8 Million Cost-Cutting Move*, ATLANTA J. & CONST., Dec. 7, 1996, at A1.

130. See Cook, *supra* note 128.

131. See *id.*

132. See *id.*

133. See Rhonda Cook, *Prison Officials Recall Blood Bath*, ATLANTA J. & CONST., May 17, 1997, at D2 [hereinafter Cook, *Blood Bath*] (reporting on deposition testimony by prison officials taken in lawsuit filed in connection with case); Rhonda Cook, *Depositions Detail Abuse of Inmates*, ATLANTA J. & CONST., Sept. 9, 1997, at C1 (reporting that latest revelations suggest a system-wide belief that beating prisoners is acceptable).

134. Rhonda Cook, *Guard Recalls Beatings as Payback Time*, ATLANTA J. & CONST., June 29, 1997, at C1.

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inmate. I heard it. I heard a sickening cracking sound."¹³⁵ Prisoners will continue to be treated in this manner unless courts enforce constitutional protections and provide remedies when rights are violated.

The federal courts also played an important role in vindicating constitutional rights that continued to be denied by the state courts in criminal trials. After Supreme Court decisions regarding the power of federal courts to hold hearings and review state court convictions in habeas corpus actions,¹³⁶ federal courts set aside a number of convictions obtained in state courts in violation of the Constitution. In two recent examples, habeas corpus relief was granted where constitutional violations may have resulted in innocent people being sentenced to death.¹³⁷ One person was released after eleven years on Louisiana's death row in February, 1998.¹³⁸ There are many other cases in which federal courts granted habeas corpus relief after state courts had refused to recognize or correct glaring constitutional errors.¹³⁹

135. Cook, *Blood Bath*, *supra* note 133 (quoting from deposition of guard Phyllis Tucker).

136. See *Fay v. Noia*, 372 U.S. 391 (1963); *Townsend v. Sain*, 372 U.S. 293 (1963).

137. See *Schlup v. Delo*, 513 U.S. 298 (1995); *Schlup v. Bowersox*, No. 4:92CV433-JCH, Memorandum Opinion and Order of May 2, 1996 (D. Mo. 1996) (granting habeas relief based on finding that constitutional violation led to conviction of Schlup even though he was probably innocent); *Kyles v. Whitley*, 115 S. Ct. 1555 (1995) (finding a violation of due process by prosecution due to failure to turn over exculpatory evidence).

138. See Pamela Coyle, *Jubilant Family Welcomes Kyles*, *TIMES PICAYUNE*, Feb. 19, 1998, at A1, A13 (describing release of Curtis Lee Kyles after fourth hung jury on whether he was guilty of crime; prosecution declined to try case again).

139. See, e.g., *Amadeo v. Zant*, 486 U.S. 214 (1988) (ordering habeas corpus relief because prosecutor had secretly directed jury commissioners to under-represent African-Americans in jury pools); *Horton v. Zant*, 941 F.2d 1449 (11th Cir. 1991), *cert. denied*, 503 U.S. 952 (1992) (granting relief in capital case because of racial discrimination and other constitutional violations); *Tiller v. Esposito*, 911 F.2d 575 (11th Cir. 1990) (granting writ when state court failed to hold hearing to establish petitioner's competency to plead guilty); *Horace v. Wainwright*, 781 F.2d 1558 (11th Cir. 1986) (granting relief because petitioner was mentally incompetent at time of guilty plea); *Jordan v. Lippman*, 763 F.2d 1265 (11th Cir. 1985) (granting relief when trial court's failure to allow inquiries to jury panel violated defendant's constitutional rights to an impartial jury and due process); *Grant v. Wainwright*, 496 F.2d 1043 (5th Cir. 1974) (granting writ when conviction based on an involuntary confession); *Collins v. Beto*, 348 F.2d 823 (5th Cir. 1965) (granting writ when conviction based on involuntary confession). Federal courts found constitutional error in 40% of the first 361 capital judgments reviewed in habeas corpus proceedings between the restoration of the death penalty in 1976 and mid-1991. James S. Liebman, *More Than "Slightly Retro:" The Rehnquist Court's Rout of Habeas Corpus Jurisdiction in Teague v. Lane*, 18 N.Y.U. REV. L. & SOC. CHANGE 537, 541 n.15 (1991); see also Ronald J. Tabak,

Federal courts had to enforce the Constitution in these and other areas because the state courts simply were not independent and did not enforce the law. A Georgia Supreme Court justice acknowledged that the elected justices of that court may have overlooked errors, leaving federal courts to remedy them via habeas corpus, because “[federal judges] have lifetime appointments. Let them make the hard decisions.”¹⁴⁰ The consequences of an unpopular decision by an elected judge is illustrated by the experience of Alabama Circuit Judge James Edwin Horton, who, convinced that the “Scottsboro Boys” were innocent, granted them a new trial in 1933.¹⁴¹ Horton was voted out of office the next year, ending his judicial and political career.¹⁴² Horton had encountered no opposition when he ran for judge four years earlier.¹⁴³ Horton was replaced on the case by a judge who railroaded the defendants through trials that resulted in convictions and death sentences that satisfied Alabama’s voters.¹⁴⁴ Today, state court judges are haunted not by the memory of Edwin Horton, but by the more recent experiences of Rose Bird, James Robertson, Charles Campbell, Penny White and other judges who have been voted out of office because of unpopular decisions.¹⁴⁵

But the federal courts no longer play the role described by Justice Hugo Black as “havens of refuge for those who might otherwise suffer because they are helpless, weak, outnumbered, or because they are . . . victims of prejudice and public excitement.”¹⁴⁶ Part of the Court of Appeals for the Fifth

Habeas Corpus as a Crucial Protector of Constitutional Rights: A Tribute Which May Also be a Eulogy, 26 SETON HALL L. REV. 1477 (1996).

140. Katie Wood, *Not Just a Rubber Stamp Anymore*, FULTON COUNTY DAILY REP., Jan. 25, 1993, at 1, 4.

141. See CARTER, *supra* note 11, at 262-73.

142. See *id.*

143. See *id.* at 273. In the same election that saw Judge Horton voted out of office, the state’s attorney general, who had personally prosecuted the Scottsboro defendants, was elected lieutenant governor. See *id.*

144. See CARTER, *supra* note 11, at 279-302.

145. See Stephen B. Bright, *Political Attacks on the Judiciary: Can Justice Be Done Amid Efforts to Intimidate and Remove Judges From Office for Unpopular Decisions?* 72 NYU L. REV. 308, 313-15, 331-36 (1997) [hereinafter *Political Attacks*] (describing defeat of Penny White); Stephen B. Bright & Patrick J. Keenan, *Judges and the Politics of Death: Deciding Between the Bill of Rights and the Next Election in Capital Cases*, 75 BOS. U. L. REV. 759, 760-66 (1995) (describing removal of judges in Texas, California, and Mississippi).

146. *Chambers v. Florida*, 309 U.S. 227, 241 (1940).

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Circuit, which once played such a heroic role in ending segregation, is now the Eleventh Circuit.¹⁴⁷ Both courts, now dominated by Reagan-Bush appointees, have followed the Supreme Court's retreat from protecting the rights of racial minorities, the poor and other disadvantaged groups. The Fifth Circuit has taken the lead in eliminating programs to increase minority enrollment in education,¹⁴⁸ and restricting the scope of the Voting Rights Act.¹⁴⁹ It gives very short shrift to habeas corpus cases, even those in which the death penalty has been imposed, once allowing an execution to be carried out after spending less than one day to review the first and only appeal of a condemned person, supposedly reviewing the state court record in the process.¹⁵⁰

The judges of the Eleventh Circuit, sitting en banc, have made clear in overruling decisions of panels of the court, that the court is no haven for the victims of sexual harassment,¹⁵¹

147. The Fifth Circuit now includes Louisiana, Mississippi, and Texas. The Eleventh Circuit includes Alabama, Florida, and Georgia.

148. See *Hopwood v. Texas*, 78 F.3d 932 (5th Cir.), *cert. denied*, 518 U.S. 1033 (1996).

149. See *League of United Latin Am. Citizens v. Clements*, 999 F.2d 831 (5th Cir. 1993) (en banc), *cert. denied*, 510 U.S. 1071 (1994) (overruling district court's ruling that single-district system of electing state trial judges in Texas violated Voting Rights Act; refusing to remand for entry of a consent decree agreed to by plaintiffs and Attorney General but opposed by judges; and holding that Texas had a substantial interest in maintaining linkage between electoral and jurisdictional bases of its trial court judges); *League of United Latin Am. Citizens v. Roscoe Ind. Sch. Dist.*, 123 F.3d 843 (5th Cir. 1997) (finding no violation of Voting Rights Act in a school district's at-large system for electing trustees); *Rollins v. Fort Bend Ind. Sch. Dist.*, 89 F.3d 1205 (5th Cir. 1996) (holding that at-large voting system used in school district did not violate Voting Rights Act and Fourteenth Amendment despite history of racial discrimination in area and fact that only three minority candidates had been elected in twenty years). *But see* *Teague v. Attala County*, 92 F.3d 283 (5th Cir. 1996), *cert. denied*, 118 S. Ct. 45 (1997) (holding that Mississippi district court's findings that black voters were not politically cohesive, that there was no racial block voting, and that black voters had just as much opportunity as white voters to participate in political process and elect candidates of their own choosing were clearly erroneous).

150. See *Gosch v. Johnson*, No. 97-7521, 1998 WL 19660 (U.S. Feb. 23, 1998) (Souter, J., concurring in denial of certiorari).

151. See *Davis v. Monroe County Bd. of Educ.*, 120 F.3d 1390 (11th Cir. 1997) (en banc) (holding suit based on school officials' failure to remedy students' sexual harassment of student did not state a claim), *overruling*, 74 F.3d 1186 (11th Cir. 1996). The dissent noted that the majority opinion held that "no matter how egregious—or even criminal—the harassing discriminatory conduct may be, and no matter how cognizant of it supervisors may become—a teacher could observe it directly and regularly—there would be no obligation to take any action to prevent it

discrimination because of sexual orientation,¹⁵² or those who received incompetent representation at capital trials.¹⁵³ The court had previously shown it was not a haven for refugees,¹⁵⁴ or African-Americans seeking meaningful participation in elections under the Voting Rights Act.¹⁵⁵ The court has also frequently found those accused of racial discrimination or other constitutional violations to be immune from suit.¹⁵⁶

under the very law which was passed to eliminate sexual discrimination in our public schools." *Id.* at 1412 (Barkett, J., dissenting).

152. *See* *Shahar v. Bowers*, 114 F.3d 1097 (11th Cir. 1997) (en banc) (holding that Georgia Attorney General's withdrawal of offer of employment because of prospective employee's lesbian marriage did not violate prospective employee's right of association), *overruling* 70 F.3d 1218 (11th Cir. 1995).

153. *See* *Waters v. Thomas*, 46 F.3d 1506 (11th Cir. 1995) (finding that defense counsel's presentation of damaging evidence and failure to present mitigating evidence did not constitute ineffective assistance of counsel), *overruling* 979 F.2d 1473 (11th Cir. 1992).

154. *See, e.g.,* *Haitian Refugee Ctr. v. Baker*, 953 F.2d 1498 (11th Cir. 1992) (finding Haitian refugees interdicted on high seas had no right to judicial review over a dissent that argued that majority accepted "a pure legal fiction when it holds that these refugees are in a different class from every other 'excludable alien' "); *Borden v. Meese*, 803 F.2d 1530 (11th Cir. 1986) (reversing district court's grant of release to alien from federal penitentiary); *Garcia-Mir v. Meese*, 788 F.2d 1446 (11th Cir. 1986) (reversing district court and holding that Cuban refugees who came to United States on Mariel boatlift were not entitled to parole revocation hearings); *Perez-Perez v. Hanberry*, 781 F.2d 1477 (11th Cir. 1986) (reversing district court and holding that Cuban detainees were not entitled to counsel and had not exhausted administrative remedies); *Garcia-Mir v. Smith*, 766 F.2d 1478 (11th Cir. 1985) (reversing district court and holding that court lacked subject matter jurisdiction to take any action with regard to Cuban refugees' eligibility for asylum on basis of newly presented evidence when they had not exhausted their administrative remedies).

155. *See, e.g.,* *White v. Alabama*, 74 F.3d 1058 (11th Cir. 1996) (rejecting a settlement that resulted in increasing number of minority judges on appellate courts in Alabama); *Johnson v. DeSoto County Bd. of Comm'r*, 72 F.3d 1556 (11th Cir. 1996) (reversing decision of district court that electing school board members through an at-large voting scheme violated the Voting Rights Act); *Nipper v. Smith*, 39 F.3d 1494 (11th Cir. 1994) (en banc) (finding that Florida's interest in maintaining its judicial election scheme precluded implementation of remedies for the dilution of the black vote in judicial elections), *overruling* 1 F.3d 1171, *cert. denied*, 514 U.S. 1083 (1995).

156. *See, e.g.,* *Mencer v. Hammonds*, 134 F.3d 1066 (11th Cir. 1998) (reversing district court and finding qualified immunity for Board of Education and Superintendent of Schools after they were sued for discrimination on basis of race and gender in failing to appoint a teacher principal of an elementary school); *Woods v. Gamel*, 132 F.3d 1417 (11th Cir. 1998) (reversing district court and finding absolute legislative immunity for county commissioners sued for jail conditions); *Johnson v. City of Fort Lauderdale*, 126 F.3d 1372 (11th Cir. 1997) (reversing district court and finding qualified immunity for claims made under 42 U.S.C. §§ 1981, 1983, but not § 1985 for fire department officials sued for race discrimination, harassment, and retaliation); *Gold v. City of Miami*, 121 F.3d 1442 (11th Cir. 1997) (reversing district court and finding qualified immunity for police officers sued by an arrestee).

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Members of Congress, ignoring history, have created and exploited resentment of the federal courts for enforcing the Constitution in cases involving prisoners and vindicating constitutional rights through habeas corpus. They have enacted legislation restricting the power of the federal courts. Those most in need of the protections of the Bill of Rights—the poor, racial minorities, and the mentally ill—have no political action committee or access to legislators or governors to remind legislators of this history or to lobby against this return to states' rights.

In the Prison Litigation Reform Act, Congress stripped the federal courts of much of their power to remedy unconstitutional conditions or practices in prisons and jails.¹⁵⁷ Congress also has prohibited legal services programs from representing prisoners in any kind of case,¹⁵⁸ and limited the attorney fees recoverable in a successful prison suit to discourage lawyers in private practice from taking those cases.¹⁵⁹ Even before Congress acted, the Supreme Court had made it very difficult for inmates to prevail in challenges to cruel and inhuman conditions and, as a result, all sorts of abuses and degradation have been found not to violate the Constitution.¹⁶⁰

The Antiterrorism and Effective Death Penalty Act of 1996¹⁶¹ placed new, unprecedented restrictions on the power of the federal courts to vindicate, in habeas corpus cases, the

157. See Prison Litigation Reform Act, Pub. L. No. 104-134, §§ 802-803 (amending 18 U.S.C. § 3626 (1996) and other statutes); Kristin L. Burns, *Return to Hard Time: The Prison Litigation Reform Act of 1995*, 31 GA. L. REV. 879 (1997).

158. See Omnibus Consolidated Rescissions and Appropriations Act of 1996, Pub. L. No. 104-134, § 4504(a)(15), 110 Stat. 1312.

159. See Prison Litigation Reform Act, Pub. L. No. 104-134, § 803(d) (1996) (amending 42 U.S.C. § 1988 (1996)).

160. See, e.g., *Hosna v. Groose*, 80 F.3d 298 (8th Cir. 1996) (holding that denial of exercise may be a constitutional violation only when inmate's muscles atrophy or if inmate's health is threatened); *Crowder v. True*, 74 F.3d 812 (7th Cir. 1996) (rejecting claims of paraplegic inmate that he was denied wheelchair, physical therapy sessions, exercise, recreation, hygienic care, and medical care because of inability to meet the Supreme Court's standard of "deliberate indifference" on the part of prison officials); *Shakka v. Smith*, 71 F.3d 162, (4th Cir. 1995) (holding refusal to allow prisoner to take shower for three days after human excrement and urine were thrown on him by other inmates did not violate Eighth Amendment when inmate was provided with "water and cleaning materials" to clean himself and cell); Hedieh Nasheri, *A Spirit of Meanness: Courts, Prisons and Prisoners*, 27 CUMB. L. REV. 1173, 1188-99 (1996-97).

161. See Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, 110 Stat. 1214 (amending scattered sections of 28 U.S.C.).

constitutional rights of people convicted in state courts.¹⁶² Even before passage of the Act, the Supreme Court adopted and rigorously enforced strict rules of procedural default,¹⁶³ excluded Fourth Amendment claims from habeas corpus review,¹⁶⁴ made it more difficult for a habeas petitioner to obtain an evidentiary hearing to prove a constitutional violation,¹⁶⁵ adopted an extremely restrictive doctrine regarding the retroactivity of constitutional decisions,¹⁶⁶ reduced the burden on the states to establish harmless error once a constitutional violation was found,¹⁶⁷ and erected barriers to the filing of a second habeas petition.¹⁶⁸

This diminished role of the federal courts ushers in a new era of states' rights. States are free to revert to practices that existed before federal court intervention or to take on the responsibility of enforcing the law equally for all citizens. In order to prevent a return to the discrimination and human rights abuses of the past, achieving independent state courts that will base their decisions on the law, not political expediency, is a matter of great urgency.

II. OVERCOMING ELECTIONS

Judges are not independent when they are beholden to special interest groups that finance their elections or know that an

162. The Act established a one-year statute of limitations of general applicability, *see id.* §§ 101, 105 (amending 28 U.S.C. § 2244(d)(1) (1996)), and a statute of limitations of 180 days for states which meet certain standards of providing counsel in capital post-conviction proceedings, *see id.* § 107 (codified at 28 U.S.C. § 2263 (1996)). It prohibits federal courts from granting habeas corpus relief unless the decision of the state court "was contrary to, or involved an unreasonable application of, clearly established Federal law," *id.* § 104(3)(1) (codified at 28 U.S.C. § 2254(d)(1) (1996)); severely limits when a federal court may conduct an evidentiary hearing, *see id.* § 104(4) (codified at 28 U.S.C. § 2254(3)(2) (1996)); and prohibits second or "successive" petitions for habeas corpus relief except in very narrow circumstances. *See id.* §§ 105, 106 (codified at 28 U.S.C. §§ 2255, 2244(b) (1996)).

163. *See, e.g.,* *Coleman v. Thompson*, 501 U.S. 722 (1991); *Dugger v. Adams*, 489 U.S. 401 (1989); *Smith v. Murray*, 477 U.S. 527, 533-36 (1986); *Engle v. Isaac*, 456 U.S. 107, 130-34 (1982); *Wainwright v. Sykes*, 433 U.S. 72, 88-91 (1977); *Timothy J. Foley, The New Arbitrariness: Procedural Default of Federal Habeas Corpus Claims in Capital Cases*, 23 LOY. L.A. L. REV. 193 (1989).

164. *See* *Stone v. Powell*, 428 U.S. 465 (1976).

165. *See* *Keeney v. Tamayo-Reyes*, 504 U.S. 1 (1992).

166. *See* *Teague v. Lane*, 489 U.S. 288 (1989); *Liebman*, *supra* note 139.

167. *See* *Brecht v. Abrahamson*, 507 U.S. 619 (1993).

168. *See* *McCleskey v. Zant*, 499 U.S. 467 (1991).

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unpopular decision in the case before them may cost them their jobs. The rule of law is not served when judges must violate the Code of Judicial Conduct by promising certain results in order to get elected or stay on the bench.¹⁶⁹

The rapidly growing role of special interest groups—from oil and tobacco companies, the insurance defense bar, prosecutors, and the religious right, to labor unions, the plaintiffs personal injury bar and other litigants—seeking to secure the election of judges who will decide in their favor has been documented elsewhere,¹⁷⁰ as have the enormous political pressures placed on elected judges due to the threat of being voted out of office for unpopular decisions.¹⁷¹

Everyone who cares about judicial independence and the rule of law should be alarmed when the president of a large state's bar comments, "[t]he people with money to spend who are affected by Court decisions have reached the conclusion that it's a lot cheaper to buy a judge than a governor or an entire

169. See MODEL CODE OF JUDICIAL CONDUCT, CANON 5A(3)(d)(i), (ii) (1990) (stating a judge "shall not: (i) make pledges or promises of conduct in office other than the faithful and impartial performance of the duties of the office; [or] (ii) make statements that commit or appear to commit the candidate with respect to cases, controversies or issues that are likely to come before the court").

170. See John Cornyn, *Ruminations on the Nature of Texas Judging*, 25 ST. MARY'S L.J. 367, 378 (1993). Cornyn, a justice of the Texas Supreme Court, states that "[t]he gravest concern that inheres in the elective system . . . is that judicial candidates are compelled to raise campaign funds: money and judges simply do not mix." See also Orrin W. Johnson & Laura Johnson Urbis, *Judicial Selection in Texas: A Gathering Storm?*, 23 TEX. TECH L. REV. 525, 545-52 (1992) (discussing rising campaign costs in Texas judicial elections); Sheila Kaplan & Zoë Davidson, *The Buying of the Bench*, NATION, Jan. 26, 1998, at 11 (describing amounts spend for judicial races around country); Jason Miles Levien & Stacie L. Fatka, *Cleaning Up Judicial Elections: Examining the First Amendment Limitations on Judicial Campaign Regulation*, 2 MICH. L. & POL'Y REV. 71, 76 (1997) (noting that contributions by lawyers and their law firms represent largest share of contributions to judicial elections and that these contributions understandably create the perception that attorneys who practice before a judge by day are same attorneys who host expensive fundraisers for them by night); Maura Anne Schoshinski, *Towards and Independent, Fair, and Competent Judiciary: An Argument for Improving Judicial Elections*, 7 GEO. J. LEGAL ETHICS 839, 840 (1994) (arguing that judicial elections, due to their requirements of political and financial support, erode "public's confidence in an independent judiciary and put jurists in an ethically compromising position"); Gerald F. Uelman, *Crocodiles in the Bathtub: Maintaining the Independence of State Supreme Courts in the Era of Judicial Politicization*, 72 NOTRE DAME L. REV. 1133, 1151-54 (1997) (describing campaigns in Ohio, Kentucky, and Texas).

171. See Uelman, *supra* note 170, at 1133 (describing judges who must face an election to keep their jobs as "tadpole[s] in a pond full of crocodiles"); Bright, *Political Attacks*, *supra* note 145; Bright & Keenan, *supra* note 145.

legislature and [the judge] can probably do a lot more for you."¹⁷² The comment was made after a candidate spent \$1 million to defeat the incumbent Chief Justice of Ohio who spent \$1.7 million. The newly-elected chief justice then voted to rehear thirty cases that had been decided in the final weeks of the incumbent's term.¹⁷³ Equally disturbing is the comment made by the director of the Christian Coalition of Florida that judicial elections are the next "hot-button" issue for his group.¹⁷⁴ The "buying" of judges by special interest groups is not consistent with judicial independence.

The impact of race, politics and judicial elections on judicial decisionmaking is illustrated by the Georgia Supreme Court's about face in a case involving gross racial disparities in sentencing for drug offenses.¹⁷⁵ The court first held by a four-to-three vote that a prima facie case of racial discrimination was established by evidence that 98.4% of those serving sentences of life imprisonment for certain narcotics offenses were black. Statistics from the Georgia Department of Corrections established that less than one percent of the whites eligible for life sentences for narcotics offenses—just one in 168—received a life sentence, while 16.6% of African-Americans—202 of 1219—received a life sentence.¹⁷⁶

However, just thirteen days after finding that these remarkable disparities raised a question of racial discrimination, the court reversed itself¹⁷⁷ in response to a petition for rehearing filed by the Attorney General of Georgia and all the forty-six district attorneys in the state, arguing that the court's decision took a "substantial step toward invalidating" the state's death penalty law and would "paralyze the criminal justice system."¹⁷⁸ One justice changed his vote and the court held that the racial disparities did not even raise a question of discrimination.

172. Uelman, *supra* note 170, at 1151 (quoting Robert Kaplan, *Justice for Sale*, COMMON CAUSE MAG., May-June, 1987, at 29-30).

173. *See id.*

174. Kaplan & Davidson, *supra* note 170.

175. *See* Stephens v. State, 265 Ga. 356, 456 S.E.2d 560 (1995).

176. *See id.* at 357, 456 S.E.2d at 561.

177. *See* Emily Heller, Stevens v. State: *Second Thoughts on Second-Offense Law*, FULTON COUNTY DAILY REP., Apr. 3, 1995, at 1, 10.

178. Emily Heller, *Racial Test Put to the Test*, FULTON COUNTY DAILY REP., Mar. 30, 1995, at 1, 4.

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Two recent examples show the dangers posed to judicial independence by both direct elections and retention elections. In Texas, candidates for judicial office run with a political party affiliation. In 1994, a former chairman of the state Republican Party called for Republicans to take over the Texas Court of Criminal Appeals after the court reversed the conviction in a capital case.¹⁷⁹ Stephen W. Mansfield ran as the Republican candidate against the author of the decision, a conservative former prosecutor, Charles Campbell, who had served twelve years on the court and had been supported by both sides of the criminal bar.¹⁸⁰ Mansfield ran on promises of greater use of the death penalty, greater use of the harmless-error doctrine, and sanctions for attorneys who file “frivolous appeals especially in death penalty cases.”¹⁸¹ Before the election, it came to light that Mansfield had misrepresented his prior background, experience, and record,¹⁸² that he had been fined for practicing law without a license in Florida,¹⁸³ and that—contrary to his assertions that he had experience in criminal cases and had “written extensively on criminal and civil justice issues”—he had virtually no experience in criminal law.¹⁸⁴ Nevertheless, Mansfield received fifty-four percent of the votes and now sits on the Court.¹⁸⁵ After his election, the *Texas Lawyer* declared Mansfield an “unqualified success.”¹⁸⁶

Retention elections provide no greater guarantee of judicial independence. Justice Penny White was voted off the Tennessee Supreme Court in a retention election after a surprise attack shortly before the election by the Republican Party and right-wing groups. The attack was based primarily on a single case,

179. See Janet Elliott & Richard Connelly, *Mansfield: The Stealth Candidate; His Past Isn't What it Seems*, TEX. LAW., Oct. 3, 1994, at 1, 32.

180. See Jane Elliott, *Unqualified Success: Mansfield's Mandate; Vote Makes a Case for Merit Selection*, TEX. LAW., Nov. 14, 1994, at 1.

181. Elliott & Connelly, *supra* note 179.

182. See *id.*; Elliot, *supra* note 180, at 1 (reporting that Mansfield was unable to verify campaign claims regarding number of criminal cases he had handled and had portrayed himself as political novice despite having twice unsuccessfully run for Congress); see also *Do It Now*, FT. WORTH STAR-TELEGRAM, Nov. 12, 1994, at 32 (editorial calling for an immediate challenge to Mansfield's election because he had “shaded the truth of virtually every aspect of his career”).

183. John Williams, *Election '94: GOP Gains Majority in State Supreme Court*, HOUSTON CHRON., Nov. 10, 1994, at A29.

184. Elliott & Connelly, *supra* note 179, at 32.

185. See Elliot, *supra* note 180, at 1.

186. *Id.*

State v. Odum,¹⁸⁷ the only capital case decided by the court during Justice White's nineteen-month tenure on the court. Justice White did not write the majority opinion, a concurring opinion or a dissenting opinion in the case. Odum's death sentence was reversed and the case was remanded for a new sentencing hearing because all five members of the Tennessee Supreme Court agreed that there had been at least one legal error which required a new sentencing hearing.¹⁸⁸

However, Tennessee voters were told that Justice White had personally overturned *the conviction* in the case,¹⁸⁹ even though the conviction was upheld and the sentence was reversed by the entire court. Voters were also given a graphic description of Odum's crime and told that Odum "won't be getting the punishment that he deserves[t]hanks to Penny White,"¹⁹⁰ even though the entire court remanded the case for a new sentencing trial at which Odum could well be sentenced to death again or life imprisonment. Voters were also told that unless they voted White off the bench, she would "free more and more criminals and laugh at their victims."¹⁹¹ Justice White was unable to respond to these distortions of *Odum* before the election because a motion for rehearing was pending in the case until the election and the Canons of Judicial Conduct prohibited her from commenting on a pending case.

Tennessee's governor and both its United States Senators, all Republicans, opposed the retention of Justice White.¹⁹² The Republican Party mailed a brochure to voters titled, "Just Say NO!" with the slogan, "Vote for Capital Punishment by Voting NO on August 1 for Supreme Court Justice Penny White."¹⁹³

187. *State v. Odom*, 928 S.W.2d 18 (Tenn. 1996).

188. In an opinion by Justice Birch three members of the court held that there were three errors requiring reversal. *See id.* at 32-33. The remaining two members of the court concurred with regard to one error, but dissented with regard to the other two. *See id.* at 33 (Anderson, C.J., concurring in part and dissenting in part).

189. *See* Letter to Voters by John M. Davies, President of the Tennessee Conservative Union, at 2, in Bright, *Political Attacks*, *supra* note 145, at 331-34 (reproducing letter in full). The letter twice says that the conviction was overturned. *See id.* at 332.

190. *Id.* at 331.

191. *Id.* at 332.

192. *See* Jeff Woods, *Public Outrage Nails a Judge*, NASHVILLE BANNER, Aug. 2, 1996, at A1, A2 (reporting that Gov. Sundquist and Sens. Fred Thompson and Bill Frist all announced their opposition to White); Jeff Woods, *Sundquist Admits Early Ballot to Boot White*, NASHVILLE BANNER, July 26, 1996, at B2 (reporting that "White's foes are casting the election as a referendum on the death penalty").

193. Bright, *Political Attacks*, *supra* note 145, at 335-36 (reproducing brochure in

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Immediately after the retention election, the Governor of Tennessee, Don Sundquist, said: "Should a judge look over his shoulder [in making decisions] about whether they're going to be thrown out of office? I hope so."¹⁹⁴ Another justice, who had been targeted for defeat by the groups that opposed White, announced that he would not seek to stay on the court in retention elections in 1998.¹⁹⁵

The campaigns waged to win a seat on the bench often produce judges whose independence and impartiality are subject to question by any observer and certainly by litigants who come before the courts. For example, in his campaign for reelection to the Nevada Supreme Court, Justice Cliff Young "formed a highly-visible political alliance with the State's attorney general, who in numerous campaign advertisements publicly 'urged all Nevadans' to vote for Justice Young."¹⁹⁶ Justice Young ran campaign advertisements proclaiming that he had a "record of fighting crime" which included voting to uphold the death penalty seventy-six times.¹⁹⁷ Young was reelected. A condemned man whose case came before the court moved to recuse Judge Young because the state was represented by the attorney general. During the pendency of the case, Justice Young had "repeatedly published his appreciation for the attorney general's support and how much he 'welcomed' her support . . . because of the attorney general's 'role as the State's top law enforcement officer.'"¹⁹⁸

Nevertheless, the Nevada Supreme Court denied the motion to disqualify Justice Young.¹⁹⁹ Justice Springer dissented saying:

"Tough on crime" claims made by judges in election campaigns are so common in Nevada as to go almost unnoticed. Our judicial discipline authorities customarily ignore this kind of judicial misconduct once the judge becomes elected or reelected. It goes beyond "tough on crime"

full).

194. Paula Wade, *White's Defeat Poses Legal Dilemma; How is a Replacement Justice Picked?*, MEMPHIS COM. APPEAL, Aug. 3, 1996, at A1.

195. See Tom Humphrey, *Justice Will Not Seek New Term*, KNOXVILLE NEWS-SENTINEL, Nov. 26, 1997, at A6 (reporting that Justice Lyle Reid, "listed as a top target of some who worked for the 1996 ouster of former Supreme Court Justice Penny White," announced that he would not seek another eight-year term).

196. *Nevius v. Warden*, 944 P.2d 858, 860 (1997) (Springer, J., dissenting), *reh'g denied with opinion*, 1998 WL 341017 (Nev. 1998).

197. *Id.*

198. *Id.*

199. See *id.* at 859.

for a judge to claim that he is a "crime fighter," especially when, on top of this, the judge identifies his principal election supporter as being the State's attorney general. Judges are supposed to be *judging* crime not fighting it.²⁰⁰

A Missouri trial judge who was seeking reelection issued a press release announcing his decision to switch parties from Democrat to Republican just six days before the capital trial of Brian Kinder, an indigent African-American.²⁰¹ The press release stated:

The truth is that I have noticed in recent years that the Democrat party places far too much emphasis on representing minorities such as homosexuals, people who don't want to work, and people with a skin that's any color but white. Their reverse-discriminatory quotas and affirmative action, in the work place as well as in schools and colleges, are repugnant to me I believe that a person should be advanced and promoted, in this life, on the basis of initiative, qualifications, and willingness to work, not simply on the color of his or her skin, or sexual preference.

While minorities need to be represented, or [sic] course, I believe the time has come for us to place much more emphasis and concern on the hard-working taxpayers in this country. . . . That majority group of our citizens seems to have been virtually forgotten by the Democrat party.²⁰²

The Missouri Supreme Court upheld the judge's refusal to disqualify himself from the case.²⁰³ Justice White, the only African-American on the Court, dissented saying:

The slur is not ambiguous or complex (nor, unfortunately, original): "While minorities need to be represented . . . , I believe the time has come for us to place much more emphasis and concern on the hard-working taxpayers in this country. . . ." No honest reading of this sentence can show that it says anything other than what it says: that minorities are not hard-working taxpayers. . . . The mere fact that a judge who issues a racially derogatory press release a week later claims to treat equally people who are "white, black,

200. *Id.* at 860 (Springer, J., dissenting).

201. *See State v. Kinder*, 942 S.W.2d 313 (Mo. 1996), *cert. denied*, 118 S. Ct. 149 (1997).

202. *Id.* at 340 (White, J., dissenting).

203. *See id.* at 321.

red, yellow, or whatever,” hardly “set[s] to rest any concern” about his impartiality. I would feel much more comfortable with the judge’s decision not to recuse if he had used his press release to trumpet his “prejudice toward upholding each individual’s constitutional rights[,]” rather than filling it with race-baiting nonsense.²⁰⁴

The influence of political pressures on the decisions of elected judges in high profile cases, such as death penalty cases, is undeniable. The American Bar Association’s Commission on Professionalism found that “judges are far less likely to . . . take . . . tough action if they must run for reelection or retention every few years.”²⁰⁵ Supreme Court Justice John Paul Stevens has pointed out that in states that allow judges to override jury sentences in capital cases, judges frequently override sentences of life imprisonment and impose death, but seldom override death sentences.²⁰⁶ He observed that:

[E]lected judges too often appear to listen [to] the many voters who generally favor capital punishment but who have far less information about a particular trial than the jurors who have sifted patiently through the details of the relevant and admissible evidence. How else do we account for the disturbing propensity of elected judges to impose the death sentence time after time notwithstanding a jury’s recommendation of life?²⁰⁷

In *Harris v. Alabama*, Justice Stevens warned:

The “higher authority” to whom present-day capital judges may be “too responsive” is a political climate in which judges who covet higher office—or who merely wish to remain judges—must constantly profess their fealty to the death penalty The danger that they will bend to political pressures when pronouncing sentence in highly publicized capital cases is the same danger confronted by judges beholden to King George III.²⁰⁸

204. *Id.* at 340 (White, J., dissenting).

205. AMERICAN BAR ASS’N, REPORT OF COMMISSION ON PROFESSIONALISM (1986).

206. *See Harris v. Alabama*, 513 U.S. 504, 521-22 (1995) (Stevens, J., dissenting); *Walton v. Arizona*, 497 U.S. 639, 713 n.4 (1990) (Stevens, J., dissenting); *Spaziano v. Florida*, 468 U.S. 447, 486-87 (1984) (Stevens, J., concurring in part and dissenting in part) (arguing that juries make decisions based on community values more reliably than judges because juries more accurately reflect composition and experiences of a community as a whole).

207. *Walton*, 497 U.S. at 713 n.4 (Stevens, J., dissenting).

208. *Harris v. Alabama*, 115 S. Ct. at 1039 (1995) (Stevens, J., dissenting) (quoting

The independence and impartiality of judges is also called into question when they preside over cases in which a party or lawyer has contributed to the judge's campaign.²⁰⁹ The perceived results of such interest-group domination over judicial elections were described by one observer as follows:

The Texas Supreme Court in a virtuoso performance of judicial activism has, in recent years, ignored precedent, invalidated on Texas constitutional grounds long-accepted legislative enactments, interpreted Texas statutes so as to render them meaningless, and glossed over and misinterpreted fact findings of trial courts, all in pursuit of desired results.

....

Case by case results-oriented decisions have replaced the rule of law.²¹⁰

This is no way to run a system of justice. Judicial elections, whether direct elections or retention elections, discourage good lawyers from becoming judges and result in untenable pressures on judges once in office to ignore the law and satisfy their financial supporters or public sentiment to avoid being voted out of office.

III. OVERCOMING MISPERCEPTIONS ABOUT THE ROLE OF THE JUDICIARY

Misperceptions about the judicial role are a major barrier to attaining an independent judiciary that makes decisions based on the law. Because of the increasing dominance of special interest groups in judicial elections, the promises that the selection or removal of particular judges will produce certain results, and the attacks made on both the state and federal judiciary, many citizens perceive judges as no different from other politicians who

Duncan v. Louisiana, 391 U.S. 145, 156 (1968)).

209. See, e.g., Collier v. Griffith, 1992 WL 44893, *6-*7 (Tenn. Ct. App. 1992) (holding trial judge should have recused himself in case in which one party's attorney was the finance chairman for the judge's ongoing election campaign); Robert F. Utter, *Selection and Retention—A Judge's Perspective*, 48 WASH. L. REV. 839, 843-45 (1973) (observing that lawyers who support victors or losers in political campaign subsequently have reason to question legitimacy of judgments made by judges).

210. Robert D'Agostino, *The Decline of the Law in the Texas Supreme Court*, 2 BENCHMARK 171, 171 (1986). See generally Stephen J. Adler, *The Texas Bench: Anything Goes*, AM. LAW., Apr. 1986, at 11.

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make decisions heavily influenced by the wishes of their constituents or, more likely in today's world, the major contributors to their campaigns. However, judges, unlike legislators or governors, are not expected to gauge public opinion before making their decisions.

There are few voices reminding citizens of the role of judges described by Judge William Cranch as interpreting and applying the law "undisturbed by the clamor of the multitude."²¹¹ Those voices are being drowned out by others urging that judges who do not heed the clamor of the multitude should be removed from office either in elections or by impeachment.²¹²

Few point out the importance of the rule of law. Particularly disturbing is the denigration of the Bill of Rights by politicians as nothing more than a collection of technicalities that frustrate a whole range of popular activities from prayer in schools to convicting and executing criminals. People need to be reminded of the importance of the Bill of Rights in protecting the individual from the government, as described by Justice Robert Jackson:

The very purpose of a Bill of Rights was to withdraw certain subjects from the vicissitudes of political controversy, to place them beyond the reach of majorities and officials and to establish them as legal principles to be applied by the courts. One's right to life, liberty, and property, to free speech, a free press, freedom of worship and assembly, and other fundamental rights may not be submitted to vote; they depend on the outcome of no elections.²¹³

However, Alabama Governor Fob James argued to a federal judge as recently as 1997 that the Bill of Rights did not apply in Alabama.²¹⁴ While as a matter of law this should not be true, all too often the Bill of Rights does not apply to the citizens of Alabama who most need its protections because they either have no access to the courts or the state courts will not enforce the Bill of Rights and the federal courts will do nothing to protect their rights.

211. 1 CHARLES WARREN, *THE SUPREME COURT IN UNITED STATES HISTORY* 303 (1947).

212. See Bright, *Political Attacks*, *supra* note 145.

213. *West Virginia State Bd. of Educ. v. Barnette*, 319 U.S. 624, 638 (1943).

214. See Sack, *supra* note 100, at A7.

Governor James has also said that the state legislature and governor should be able to override decisions of his state's highest court²¹⁵ and, on the federal level, that the President and Congress should simply ignore court decisions they believe are wrong.²¹⁶ Former judge and rejected Supreme Court nominee Robert Bork has proposed that Congress should be given the power to override court decisions.²¹⁷

Others also suggest that judges should be compliant to the will of the majority and not let the law get in their way. Presidential candidates and members of Congress tell the public that federal judges should be impeached for unpopular decisions.²¹⁸ The politicians who criticized federal judge Harold Baer for suppressing cocaine evidence, later bragged when he reversed himself²¹⁹ that "they bullied federal judge Harold Baer into reversing his controversial ruling. . . ."²²⁰

Right wing groups in Tennessee, emboldened by their successful campaign to oust Justice Penny White from the state supreme court, set their sights on federal district judge John Nixon, urging his impeachment because he granted habeas corpus relief in several capital cases.²²¹ They collected over

215. See Adam Cohen, *A Governor With a Mission*, TIME, Sept. 4, 1995, at 32 (reporting that James had introduced bill that would allow legislature and governor to overturn rulings of Alabama Supreme Court from which three or more judges dissent); *James Pushes Restructuring of State's Judicial Branch*, COLUMBUS [GA.] LEDGER-ENQUIRER, May 3, 1995, at B2 (describing proposal and reporting that Gov. James "sees Alabama judges acting like schoolyard bullies").

216. See *James: President, Congress Should Ignore Supreme Court*, COLUMBUS LEDGER-ENQUIRER, June 17, 1996, at B2; *James Apologizes for Kowtowing to Judiciary*, COLUMBUS LEDGER-ENQUIRER, Aug. 12, 1995, at B2.

217. See ROBERT H. BORK, *SLOUCHING TOWARDS GOMORRAH: MODERN LIBERALISM AND AMERICAN DECLINE* 117 (1996).

218. See, e.g., Linda Greenhouse, *Judges as Political Issues; Clinton Move in New York Case Imperils Judicial Independence, Bar Leaders Say*, N.Y. TIMES, Mar. 23, 1996, at A1 (reporting that federal judge Harold Baer had been criticized by the White House, Presidential candidate Robert Dole and other politicians for suppressing cocaine in a case); Don Van Natta, Jr., *Judges Defend A Colleague From Attacks*, N.Y. TIMES, Mar. 29, 1996, at B1, B4 (reporting that "[o]n the Presidential campaign trail in California on Saturday, Senator Dole called for Judge Baer's impeachment").

219. See *United States v. Bayless*, 921 F. Supp. 211 (S.D.N.Y.) (finding that police officers had "reasonable suspicion" of criminal activity sufficient to support their stop of defendant), *vacating* 913 F. Supp. 232 (S.D.N.Y. 1996) (finding that cocaine and heroin was seized in violation of Fourth Amendment).

220. Paul M. Barrett, *Dole Campaign May be on Shaky Ground in Bid to Brand Another Clinton Judge as Soft on Crime*, WALL ST. J., Apr. 3, 1996, at A16.

221. See Kirk Loggins, *Law on His Side Against Impeachment, They Say*, TENNESSEAN, May 25, 1997, at 1A.

27,000 signatures on petitions urging impeachment.²²² The Tennessee Senate passed a resolution by a vote of twenty-eight to five, urging the United States Congress to begin impeachment proceedings against Nixon.²²³ The state House of Representatives voted eighty-seven to eight in favor of a resolution calling for Nixon not to hear any more death cases.²²⁴ However, Judge Nixon's decisions in capital cases have been upheld by the Court of Appeals.²²⁵ As one Tennessee lawyer noted, "If the 6th Circuit U.S. Court of Appeals says that Judge Nixon is right . . . do we then impeach those three judges? . . . At what point do you stop this?"²²⁶

The attacks on judges to remove them from office for unpopular rulings make no allowance for the fact that judges are circumscribed in their decisions by the law. Instead, they suggest to the public that a judicial ruling is no different than a vote by a legislator. Attacks on judges almost never deal with the legal basis for their ruling, but are based entirely on the facts of the crime and the result, such as whether a death sentence was upheld or reversed. Often there is not even the recognition that the defendant will be tried again and is still subject to the same punishment. Instead, the public is led to believe that the judge let a murderer go free. The results are perceptions and expectations on the part of voters, which put even greater pressures on state court judges to avoid unpopular decisions in order to stay in office.

IV. SHALL WE OVERCOME?

Any honest assessment of the situation must recognize that the prospects for obtaining judicial independence in the states of

222. *See id.*

223. *See* Paula Wade, *Impeach Nixon, Senate Urges*, MEMPHIS COM. APPEAL, May 20, 1997, at A7 (reporting on Tennessee Senate resolution calling for Judge Nixon's impeachment).

224. Loggins, *supra* note 221.

225. *See, e.g.*, Rickman v. Bell, 131 F.3d 1150 (6th Cir. 1997) (upholding Nixon's grant of relief because counsel's repeated expressions of hostility to petitioner amounted to constructive denial of his right to assistance of counsel); Groseclose v. Bell, 130 F.3d 1161 (6th Cir. 1997) (upholding Nixon's ruling that trial counsel's ineffectiveness warranted habeas corpus relief); Austin v. Bell, 126 F.3d 843 (6th Cir. 1997) (upholding Nixon's grant of relief because trial counsel ineffective during the penalty phase); Houston v. Dutton, 50 F.3d 381 (6th Cir. 1995) (upholding Nixon's grant of relief because "heinous, atrocious, or cruel" jury instruction was unconstitutionally vague and uninformative).

226. Loggins, *supra* note 221.

the Old Confederacy are not good. There are many indicators from the symbolic to the substantive that many state judges are not independent and committed to the rule of law.

An Alabama judge makes a public spectacle of displaying the Ten Commandments in his courtroom and defying a federal court order regarding prayer in schools. Georgia judges display the Confederate battle flag, part of the state's flag, in their courtrooms, even though the flag represents racial oppression and defiance of the law to some of the citizens who come before the courts.

State court judges continue to tolerate indigent defense systems which are a disgrace to the legal profession and their states. Such systems cannot possibly assure fairness to the thousands of people—mostly black and mostly poor—processed through the criminal courts. Nor can they assure that judges make informed decisions in imposing sentences, which range from probation to prison to death. Many state court judges still dispose of capital and other important cases by signing off on one-sided orders prepared by state attorneys.²²⁷ State courts still fail in too many instances to protect racial minorities from discrimination and to protect the rights of poor people accused of crimes. No one seriously thinks that state courts in the South will correct constitutional violations in the prisons, jails and juvenile facilities in the region. State court judges show little concern for the fact that increasingly only the wealthy have meaningful access to the courts.

Indeed, there is a strong possibility that things will get worse. Judicial decisions are becoming the new "hot button" issues for politicians and special interest groups who will distort both the facts and the role of courts to advance their goals. The amounts spent on judicial elections are escalating at an alarming rate. Only the most naive doubt that the purpose and effect of this spending is to influence judicial decisionmaking. There is grave danger that the number of people of color in the legal profession will be reduced rather than increased in the future as law schools deny admission to minority applicants.²²⁸ Nevertheless, there is tremendous resistance to replacing elections with a different

227. See Bright & Keenan, *supra* note 145, at 803-11.

228. See Higginbotham, *supra* note 106, at 28, 29 (documenting decline in minority enrollment at law schools in wake of Fifth Circuit's opinion in *Hopwood v. State of Texas*, 78 F.3d 932 (5th Cir. 1996), *cert. denied*, 518 U.S. 1033 (1996)).

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system of judicial selection and to taking affirmative steps to include in the system of justice those who have been traditionally excluded.

It is remarkable that, in light of these developments, so little concern has been shown by those who should care greatly about the independence of the judiciary, including members of the legal profession. States will develop an independent judiciary and adherence to the rule of law only if responsible leaders realize the urgency of the situation, come forward, and speak over the clamor of those who mislead the public about the judicial role. They must educate the public about the role of the courts and the importance of an independent judiciary, and secure the adoption of new selection procedures that insulate judges from the influence of money and other improper pressures. Many of those leaders will not be lawyers, but lawyers, as trustees of our system of justice, have a special role to play in educating leaders and the public about the proper role of the judiciary.

It will be possible to overcome history only when we acknowledge it and its influence on the present. As Justice William Brennan observed:

[I]t has been scarcely a generation since this Court's first decision striking down racial segregation, and barely two decades since the legislative prohibition of racial discrimination in major domains of national life. These have been honorable steps, but we cannot pretend that in three decades we have completely escaped the grip of a historical legacy spanning centuries. . . . [W]e remain imprisoned by the past as long as we deny its influence in the present.²²⁹

Ignoring the past and engaging in wishful thinking that the state courts are independent will not make independence a reality. Citizens, judges, lawyers, and public officials must recognize the lack of independence, acknowledge the historic role the courts have played in defiance of the law, explore the influence of that history on the present, and realize how far the courts have to go to reach independence. States must take major, serious steps—not minor, token gestures—to increase the participation in the justice system of racial minorities who have been historically excluded as judges, jurors, and attorneys. As the population of the United States becomes more diverse, courts should reflect

229. *McCleskey v. Kemp*, 481 U.S. 279, 344 (1987) (Brennan, J., dissenting).

that diversity if they are to understand and provide equal justice to all who come before them.

Conscientious state court judges must begin a process of serious self examination in response to the new responsibilities they have as a result of the diminished role of the federal courts in protecting individual rights. They must ask themselves to what extent they have been influenced, even subconsciously, in making their decisions by the need for public approval to stay in office,²³⁰ and whether that influence is compatible with their constitutional responsibilities as judges. Are they politicians or judges? Do they base their decisions on what will get them elected or the dictates of Supreme Court opinions, which may, in a particular case, be very unpopular?

State court judges must also question whether they should continue long-standing practices. For example, should appointments to defend poor people accused of crimes continue to be the source of employment of last resort for lawyers who cannot do anything else? Should judges, who are supposed to be fair and impartial referees, even be appointing lawyers to defend the poor? Should judges and prosecutors continue to work as a team, as occurs in so many jurisdictions today? Should judges delegate writing of orders to lawyers for the state and then rubber stamp those orders without even reading them? Should the judge be independent of the lawyers for both sides?

To overcome misperceptions about the role of the judiciary which are a major barrier to reform, the bar and other leaders must engage in public education efforts with a seriousness that has been lacking thus far. This task is not insurmountable. Most people want the protections of the law for themselves, but they have been convinced by those calling for an all-out war on crime that constitutional protections should not apply to those accused of crimes.²³¹ It should not be impossible to convince people that laws which are applied only when convenient protect no one and that judges must be independent in order to enforce the laws.

230. See Joseph R. Grodin, *Developing a Consensus of Constraint: A Judge's Perspective on Judicial Retention Elections*, 61 S. CAL. L. REV. 1969, 1980 (1988) (discussion by Grodin, a former justice of the California Supreme Court, about whether votes of justices in critical cases may have been subconsciously influenced by the awareness that the outcomes could affect upcoming judicial elections and his efforts to assure himself that his vote had been entirely on the merits of the case).

231. See Stephen B. Bright, *The Politics of Crime and the Death Penalty: Not "Soft on Crime," But Hard on the Bill of Rights*, 39 ST. LOUIS U. L.J. 479 (1995).

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But prominent members of the legal profession, who have the wealth and power to be heard, must take time off from the relentless pursuit of money, get off the golf courses and out of the skyboxes and take up these efforts.

Educating the public about the role of the judiciary is essential to replacing judicial elections with merit selection systems. Candidates for a judicial position should be nominated on the basis of qualifications by a committee chosen to assure diverse citizen input and not controlled by any one person or political party. The District of Columbia, Hawaii, and other jurisdictions have such systems that serve as models.²³² These systems foster judicial independence by isolating judges from political pressures. Judicial tenure commissions should periodically review the performance of judges to decide whether they should be reappointed.

Neither retention elections nor allowing judges to respond to attacks will produce an independent judiciary. Retention elections have the same potential for intimidation and a chilling effect on judicial decisionmaking as direct elections, as demonstrated by the removal of Justice White from the Tennessee Supreme Court and Governor Sundquist's comment afterwards that judges should be looking over their shoulder in making decisions. Allowing judges to respond to attacks only creates the questions of impartiality that arose in Nevada when Justice Young, "responding to an assertion, based on one case, that he was soft on the death penalty,"²³³ campaigned as a crime fighter who had affirmed seventy-six capital cases.

Does a merit selection system completely eliminate politics and always produce perfect judges and perfect decisionmaking? Of course not. No system can do that. Any selection process, from awarding the Nobel prize to the selection of the Pope by the College of Cardinals, involves some politics. And, unfortunately, some individuals, no matter how selected, will bring to the bench

232. See D.C. CODE ANN. §§ 11-1501 to 11-1502 (1995) (President selects judges from names that a commission recommends, with advice and consent of the Senate, for 15-year terms; judicial qualification commission reviews performance); HAW. CONST. art. VI, § 3 (governor appoints judges, from a judicial selection commission's list of nominees and with consent of the senate, for 10-year terms; judicial selection commission determines retention). For further discussion of desirable features of merit selection systems, see Bright & Keenan, *supra* note 145, at 817-21.

233. *Nevius v. Warden*, 944 P.2d 858, 859 (1997), *reh'g denied with opinion*, 1998 WL 341017 (Nev. 1998).

an agenda or become arrogant, self righteous, erratic, overbearing, and rude upon becoming judges. That is why a system of periodic review by a judicial qualifications commission may be preferable to life tenure for judges.

However, a merit selection system along the lines previously described is more likely to produce good judges than elections and to insulate judges from the influence of money and the passions of the moment so that they can make decisions based on the law. Unless the southern states adopt such systems in the near future, those most in need of protections of the courts and the law will be left unprotected, and the new era of states' rights will be little more than a less blatant form of the Jim Crow justice and legal lynchings of the recent past.