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# JUDGES AND THE POLITICS OF DEATH: DECIDING BETWEEN THE BILL OF RIGHTS AND THE NEXT ELECTION IN CAPITAL CASES

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*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.*

—Justice John Paul Stevens,  
dissenting in *Harris v. Alabama*<sup>1</sup>

The thunderous voice of the present-day "higher authority" that Justice Stevens described is heard today with unmistakable clarity in the courts throughout the United States. Those judges who do not listen and bend to political pressures may lose their positions on the bench.

Decisions in capital cases have increasingly become campaign fodder in both judicial and nonjudicial elections. The focus in these campaigns has been almost entirely on the gruesome facts of particular murders, not the reason for the judicial decisions. Judges have come under attack and have been removed from the bench for their decisions in capital cases—with perhaps the most notable examples in states with some of the largest death rows and where the death penalty has been a dominant political issue. Recent challenges to state court judges in both direct and retention elections have made it clear that unpopular decisions in capital cases, even when clearly compelled by law, may cost a judge her seat on the bench, or promotion to a higher court. This raises serious questions about the independence and integrity of the judiciary and the ability of judges to enforce the Bill of Rights and otherwise be fair and impartial in capital cases.

California has the largest death row of any state in the nation.<sup>2</sup> In 1986, Governor George Deukmejian publicly warned two justices of the state's supreme court that he would oppose them in their retention elections unless they voted to uphold more death sentences.<sup>3</sup> He had already announced his opposition to Chief Justice Rose Bird because of her votes in capital cases.<sup>4</sup> Apparently unsatisfied with the subsequent votes of the other two justices, the governor carried out his threat.<sup>5</sup> He opposed the

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<sup>1</sup> 115 S. Ct. 1031, 1039 (1995) (Stevens, J., dissenting) (quoting *Duncan v. Louisiana*, 391 U.S. 145, 156 (1968)).

<sup>2</sup> NAACP Legal Defense & Educ. Fund, Inc., *Death Row, USA* 13 (Spring 1995) (fact sheet on file with the *Boston University Law Review*) [hereinafter *Death Row, USA*] (cataloguing the 407 persons on California's death row as of April 30, 1995).

<sup>3</sup> Steve Wiegand, *Governor's Warning to 2 Justices*, S.F. CHRON., Mar. 14, 1986, at 1.

<sup>4</sup> Leo C. Wolinsky, *Governor's Support for 2 Justices Tied to Death Penalty Votes*, L.A. TIMES, Mar. 14, 1986, at 3.

<sup>5</sup> Henry Unger, *Will Vote Against Grodin, Reynoso, Deukmejian Says*, L.A. DAILY J., Aug. 26, 1986, at 1.

retention of all three justices and all lost their seats after a campaign dominated by the death penalty.<sup>6</sup> Deukmejian appointed their replacements in 1987.

The removal and replacement of the three justices has affected every capital case the court has subsequently reviewed, resulting in a dramatic change. In the last five years, the Court has affirmed nearly 97% of the capital cases it has reviewed, one of the highest rates in the nation.<sup>7</sup> A law professor who watches the court observed, "One thing it shows is that when the voters speak loudly enough, even the judiciary listens."<sup>8</sup> The once highly regarded court now distinguishes itself primarily by its readiness to find trial court error harmless in capital cases. The new court has "reversed every premise underlying the Bird Court's harmless error analysis," displaying an eagerness that reflects "jurisprudential theory" less than a "desire to carry out the death penalty."<sup>9</sup>

The voice of "higher authority" has also been heard and felt in Texas, which has the nation's second largest death row.<sup>10</sup> After a decision by the state's highest criminal court, the Court of Criminal Appeals, reversing the conviction in a particularly notorious capital case, a former chairman of the state Republican Party called for Republicans to take over the court in the 1994 election.<sup>11</sup> The voters responded to the call. Republi-

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<sup>6</sup> Frank Clifford, *Voters Repudiate 3 of Court's Liberal Justices*, L.A. TIMES, Nov. 5, 1986, pt. 1, at 1 (describing how Rose Bird's "box score" of 61 reversal votes in 61 capital cases became a "constant refrain of the campaign against her," and how campaign commercials against the other two justices in the last month of the race insisted "that all three justices needed to lose if the death penalty is to be enforced"); see also Philip Hager, *Grodin Says He Was "Caught" in Deukmajian's Anti-Bird Tide*, L.A. TIMES, Nov. 13, 1986, pt. 1, at 3 (quoting defeated Justice Joseph R. Grodin saying that he was defeated in a "tide of opposition to the chief justice and frustration over the death penalty").

<sup>7</sup> Maura Dolan, *State High Court Is Strong Enforcer of Death Penalty*, L.A. TIMES, Apr. 9, 1995, at A1 [hereinafter Dolan, *State High Court Is Strong Enforcer of Death Penalty*]; see also Maura Dolan, *State High Court Steering a Pragmatic Legal Course*, L.A. TIMES, Sept. 8, 1993, at A5 (describing the court's high rate of death-sentence affirmation in mandatory review cases).

<sup>8</sup> Dolan, *State High Court Is Strong Enforcer of Death Penalty*, *supra* note 7, at A1 (quoting Professor Clark Kelso).

<sup>9</sup> Elliot C. Kessler, *Death and Harmlessness: Application of the Harmless Error Rule by the Bird and Lucas Courts in Death Penalty Cases—A Comparison & Critique*, 26 U.S.F. L. REV. 41, 85, 89 (1991).

<sup>10</sup> Death Row, U.S.A., *supra* note 2, at 9, 36 (stating that Texas had carried out 93 executions between the reinstatement of capital punishment in 1976 and April 30, 1995, and that 398 people remained on death row awaiting execution).

<sup>11</sup> Janet Elliott & Richard Connelly, *Mansfield: The Stealth Candidate; His Past Isn't What It Seems*, TEX. LAW., Oct. 3, 1994, at 1, 32. The case was *Rodriguez v. State*, 848 S.W.2d 141 (Tex. Crim. App. 1993).

cans won every position they sought on the court.<sup>12</sup>

One of the Republicans elected to the court was Stephen W. Mansfield, who had been a member of the Texas bar only two years, but campaigned for the court on promises of the death penalty for killers, greater use of the harmless-error doctrine, and sanctions for attorneys who file "frivolous appeals especially in death penalty cases."<sup>13</sup> Even before the election it came to light that Mansfield had misrepresented his prior background, experience, and record,<sup>14</sup> that he had been fined for practicing law without a license in Florida,<sup>15</sup> 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 and his writing in the area of criminal law consisted of a guest column in a local newspaper criticizing the same decision that prompted the former Republican chairman to call for a takeover of the court.<sup>16</sup> Nevertheless, Mansfield defeated the incumbent judge, a conservative former prosecutor who had served twelve years on the court and was supported by both sides of the criminal bar.<sup>17</sup> Mansfield was sworn in to office for a six-year term in January 1995.<sup>18</sup> Among his responsibilities

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<sup>12</sup> John Williams, *Election '94: GOP Gains Majority in State Supreme Court*, HOUSTON CHRON., Nov. 10, 1994, at A29.

<sup>13</sup> Elliott & Connelly, *supra* note 11, at 32.

<sup>14</sup> *Id.* Before the election, Mansfield admitted lying about his birthplace (he claimed to be born in Texas, but was born in Massachusetts), the amount of time he had spent in Texas, and his prior political experience. *Id.*; Jane Elliott, *Unqualified Success: Mansfield's Mandate; Vote Makes a Case for Merit Selection*, TEX. LAW., Nov. 14, 1994, at 1 (reporting that Mansfield was unable to verify campaign claims regarding the number of criminal cases he had handled and had portrayed himself as a 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 reform of the judicial selection system in Texas and for an immediate challenge to Mansfield's election because he had "shaded the truth of virtually every aspect of his career"); *Q & A with Stephen Mansfield; 'The Greatest Challenge of My Life,'* TEX. LAW., Nov. 21, 1994, at 8 (printing a post-election interview with Mansfield in which he "retracts" a number of statements made before and during the interview). Also discovered after the election was Mansfield's failure to report \$10,000 in past-due child support when he applied for his Texas law license in 1992. *Child Support Allegations Threaten Judge Seat*, FT. WORTH STAR-TELEGRAM, Dec. 10, 1994, at 29.

<sup>15</sup> Williams, *supra* note 12, at A29.

<sup>16</sup> Elliott & Connelly, *supra* note 11, at 32. Mansfield received the support of victims' rights groups. *Id.*

<sup>17</sup> Elliott, *supra* note 14, at 1. Mansfield won 54% of the vote in the general election; his opponent, Judge Charles F. Campbell, received 46%. *Id.* Mansfield had previously won the Republican nomination for the seat, winning 67% of the primary vote in defeating John Cossum, a former state and federal prosecutor who was working as a criminal defense lawyer in Houston. Elliott & Connelly, *supra* note 11, at 32.

<sup>18</sup> Robert Elder, Jr., *The Conservative Era Begins: Mansfield, Keller, Owen Join High Courts*, TEX. LAW., Jan. 9, 1995, at 1.

will be the review of every capital case coming before the court on direct appeal and in postconviction review.

The single county in America responsible for the most death sentences and executions is Harris County, Texas, which includes Houston.<sup>19</sup> Judge Norman E. Lanford, a Republican, was voted off the state district court in Houston in 1992 after he recommended in postconviction proceedings that a death sentence be set aside due to prosecutorial misconduct, and directed an acquittal in another murder case due to constitutional violations.<sup>20</sup> A prosecutor who specialized in death cases, Caprice Cospers, defeated Judge Lanford in the Republican primary.<sup>21</sup> Lanford accused District Attorney John B. Holmes of causing congestion of Lanford's docket to help bring about his defeat.<sup>22</sup> In the November election, Cospers was elected after a campaign in which radio advertisements on her behalf attacked her Democratic opponent for having once opposed the death penalty.<sup>23</sup>

Judges in other states have had similar campaigns waged against them. Justice James Robertson was voted off the Mississippi Supreme Court in 1992. His opponent in the Democratic primary ran as a "law and order

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<sup>19</sup> By the end of February 1995, 37 persons sentenced to death in Harris County had been executed. Tamar Lewin, *Who Decides Who Will Die? Even Within States It Varies*, N.Y. TIMES, Feb. 23, 1995, at A1, A13. Another 114 persons sentenced to death in Harris County are awaiting execution on Texas' death row. Barry Schachter, *Texas' Execution Record Defies Sole Answer*, FT. WORTH STAR-TELEGRAM, Feb. 12, 1995, at A10 ("Death sentences from courts in Houston's county, Harris, alone have accounted for more executions than the second-ranking state, Florida. It now has 114 inmates on death row."). Only 11 states besides Texas have over 100 persons under death sentence. *Death Row*, U.S.A., *supra* note 2, at 10-41.

<sup>20</sup> Lanford became the center of controversy after he ruled that there had been an illegal arrest and ordered the acquittal of a man accused of killing a police officer. Barbara Linkin, *Controversial Judge Lanford to Leave Bench*, HOUSTON POST, June 13, 1992, at A-25. Lanford was also criticized for sentencing a man convicted of child abuse to "10 years deferred adjudication." Critics said that Lanford should have sentenced the man more severely, but Lanford stated that the sentence was the result of a plea bargain that the prosecutor had developed. *Network Affiliates Feature Bush Interview*, HOUSTON POST, Mar. 10, 1992, at A-13.

<sup>21</sup> *Criminal Court Races Northcutt, Cospers, 4 Incumbents Deserve to Win*, HOUSTON POST, Oct. 24, 1992, at A-28; *District Judge, Criminal Courts*, HOUSTON CHRON., Oct. 25, 1992, at 11. Cospers was Harris County's chief appellate prosecutor in post-conviction capital litigation prior to running for judge.

<sup>22</sup> The *Texas Lawyer* reported that "[c]ourthouse records, which show a dramatic increase in the number of cases on Lanford's docket in the months prior to the March 10 primary, lend credence to his claim that prosecutors stalled cases in a calculated effort to provide ammunition for the judge's opponent." Mark Ballard, *Gunning for a Judge; Houston's Lanford Blames DA's Office for His Downfall*, TEX. LAW., Apr. 13, 1992, at 1.

<sup>23</sup> Alan Bernstein, *Campaign Briefs*, HOUSTON CHRON., Oct. 26, 1992, at A14.

candidate" with the support of the Mississippi Prosecutors Association.<sup>24</sup> Among the decisions for which Robertson's opponent attacked him was a concurring opinion expressing the view that the Constitution did not permit the death penalty for rape where there was no loss of life.<sup>25</sup> Robertson's opponent exploited the opinion even though the U.S. Supreme Court had held ten years earlier that the Eighth Amendment did not permit the death penalty in such cases.<sup>26</sup> Opponents also attacked Robertson for his dissenting opinions in two cases that the U.S. Supreme Court later reversed.<sup>27</sup>

Robertson was the second justice to be voted off the court in two years for being "soft on crime." Joel Blass, whom the Governor had appointed to fill an unexpired term on the court, was defeated in 1990 for a full term by a candidate who promised to be a "tough judge for tough times" and to put criminals behind bars, and whom, like Justice Robertson's opponent, the Mississippi Prosecutors Association had endorsed.<sup>28</sup> Justice

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<sup>24</sup> David W. Case, *In Search of an Independent Judiciary: Alternatives to Judicial Elections in Mississippi*, 13 MISS. C. L. REV. 1, 15-20 (1992); *Death Penalty Caused Judge's Fall, Critics Say*, GREENWOOD COMMONWEALTH (Miss.), Mar. 13, 1992, at 3; *Incumbent Robertson Defeated*, GREENWOOD COMMONWEALTH (Miss.), Mar. 11, 1992, at 1; Carole Lawes & Beverly Kraft, *High Court Judge Coddled Criminals, Critics Say*, CLARION-LEDGER (Jackson, Miss.), Mar. 13, 1992, at 1B. The resolution of the prosecutors association asserted that Robertson's opponent "best represents the views of the law abiding citizens" and "will give the crime victims and the good, honest and law abiding people of this state a hearing that is at least as fair as that of the criminal in child abuse, death penalty, and other serious criminal cases." Case, *supra*, at 16 n.108.

<sup>25</sup> *Court's Ruling Morally Repugnant*, CLARION-LEDGER (Jackson, Miss.), July 2, 1989, reprinted in *On March 10, Vote for Judge James L. Roberts, Jr. for the Mississippi Supreme Court*, N.E. MISS. DAILY J., Mar. 7, 1992, Campaign Supp. at 6. The case was *Leatherwood v. State*, 548 So. 2d 389, 403-06 (Miss. 1989) (Robertson, J., concurring) (expressing the view that there was "as much chance of the Supreme Court sanctioning death as a penalty for any non-fatal rape as the proverbial snowball enjoys in the nether regions").

<sup>26</sup> *Coker v. Georgia*, 433 U.S. 584 (1977).

<sup>27</sup> Case, *supra* note 24; see *Minnick v. State*, 551 So. 2d 77, 101 (Miss. 1988) (Robertson, J., dissenting), *rev'd sub nom.* *Minnick v. Mississippi*, 498 U.S. 146 (1990); *Clemons v. State*, 535 So. 2d 1354, 1367 (Miss. 1988) (Robertson, J. dissenting), *rev'd sub nom.* *Clemons v. Mississippi*, 494 U.S. 738 (1990). Robertson's views were distorted in the campaign. Although in his dissenting opinion in *Clemons* Robertson had expressed the view that the trial court's instruction on the "heinous, atrocious or cruel" aggravating factor was unconstitutionally vague, *id.* at 1367-68 (Robertson, J., dissenting), a circular distributed during the campaign described his decision as "believing a defendant who 'shot an unarmed pizza delivery boy in cold-blood' had not committed a crime serious enough to warrant the death penalty." Case, *supra* note 24, at 18.

<sup>28</sup> Tammie Cessna Langford, *Two Vying for State's High Court*, SUN HERALD (Biloxi, Miss.), June 3, 1990, at B-1.

Blass expressed concern during the campaign that his opponent was misleading the public, explaining: "Neither a Supreme Court judge nor the whole court can send a person to prison."<sup>29</sup>

The voice of "higher authority" can also be heard in less direct, but equally compelling ways. As Justice Stevens observed in his dissent in *Harris v. Alabama*, some members of the United States Senate have "made the death penalty a litmus test in judicial confirmation hearings" for nominees to the federal bench.<sup>30</sup> Several challengers for Senate seats in the 1994 elections "routinely savaged their incumbent opponents for supporting federal judicial nominees perceived to be 'soft' on capital punishment."<sup>31</sup>

It is becoming increasingly apparent that these political pressures have a significant impact on the fairness and integrity of capital trials. When presiding over a highly publicized capital case, a judge who declines to hand down a sentence of death, or who insists on upholding the Bill of Rights, may thereby sign his own political death warrant.<sup>32</sup> In such circumstances, state court judges who desire to remain in office are no more able to protect the rights of an accused in a criminal case than elected judges have been to protect the civil rights of racial minorities against

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<sup>29</sup> *Id.* at B-5. Blass also raised the question of whether his opponent violated the canons of judicial ethics by promising to be tough on criminals. "The Supreme Court has the constitutional duty to see to it that every defendant gets a fair trial. It is not a question of guilt or innocence at that point, but a question of due process," Blass said. *Id.* Blass was handily defeated by an opponent who was not so constrained in his comments and who spent \$114,913, compared to Blass's \$48,533, in campaigning for a position that pays only \$75,800 per year. *Id.*; see also Andy Kanenglsner, *McRae Overwhelms Justice Joel Blass*, CLARION-LEDGER (Jackson, Miss.), June 6, 1990, at 4A; Tammie Cessna Langford, *McRae Unseats Blass*, SUN HERALD (Biloxi, Miss.), June 3, 1990, at A-1.

<sup>30</sup> *Harris v. Alabama*, 115 S. Ct. 1031, 1039 n.5 (1995) (dissenting opinion).

<sup>31</sup> *Id.*; see also Neal A. Lewis, *GOP to Challenge Judicial Nominees Who Oppose Death Penalty*, N.Y. TIMES, Oct. 15, 1993, at A26 ("Senate Republicans have given notice that they will challenge any . . . judicial nominees they consider insufficiently committed to the death penalty.").

<sup>32</sup> A classic example was provided in the case of the "Scottsboro Boys," the African-American youths sentenced to death for rape in Scottsboro, Alabama, whose convictions and sentences were twice reversed by the U.S. Supreme Court. *Norris v. Alabama*, 294 U.S. 287 (1935) (reversing because of racial discrimination in jury selection); *Powell v. Alabama*, 287 U.S. 32 (1932) (reversing because of denial of counsel to the accused). Alabama Circuit Judge James Edwin Horton granted the defendants a new trial in 1933 and was voted out of office the next year, ending his judicial and political career. DAN T. CARTER, *SCOTTSBORO: A TRAGEDY OF THE AMERICAN SOUTH* 265-73 (rev. ed. 1992). Horton had encountered no opposition when he ran for the judgeship four years earlier. *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. *Id.*

majority sentiment.<sup>33</sup> As Justice Stevens observed, "Not surprisingly, given the political pressures they face, judges are far more likely than juries to impose the death penalty."<sup>34</sup> In the three states that permit elected judges to override jury sentences in capital cases,<sup>35</sup> judges override jury sentences of life imprisonment and impose death far more often than they override death sentences and impose life imprisonment.<sup>36</sup> Judges have also failed to enforce constitutional guarantees of fairness. It has been observed that "[t]he more susceptible judges are to political challenge, the less likely they are to reverse a death penalty judgment."<sup>37</sup> Affirmance rates over a ten-year period suggest that "[n]ationally there is a close correlation between the method of selection of a state supreme court and that court's affirmance rate in death penalty appeals."<sup>38</sup> Even greater pressure exists at the local level. Elected trial judges are under considerable pressure not to suppress evidence, grant a change of venue, or protect other constitutional rights of the accused. An indigent defendant may face the death penalty at trial without one of the most fundamental protections of the Constitution, a competent lawyer, because judges frequently appoint inexperienced, uncaring, incompetent, or inadequately compensated attorneys.<sup>39</sup> State trial court judges in many states routinely dispose of complex legal and factual issues in capital postconviction proceedings by adopting "orders" ghostwritten by state attorneys general—

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<sup>33</sup> See, e.g., JACK BASS, *TAMING THE STORM; THE LIFE AND TIMES OF JUDGE FRANK M. JOHNSON, JR. AND THE SOUTH'S FIGHT OVER CIVIL RIGHTS 159-60* (1993) (describing the necessity for federal court intervention in civil rights cases because of the failure of elected state court judges to enforce constitutional guarantees).

<sup>34</sup> *Harris*, 115 S. Ct. at 1040 (Stevens, J., dissenting).

<sup>35</sup> The judge has the power to override the jury's decision on whether to impose the death penalty in Alabama, Delaware, Florida, and Indiana. *Id.* at 1038. Judges do not stand for election in Delaware. DEL. CONST. art. IV., § 3. In *Harris*, the Supreme Court, over the sole dissent of Justice Stevens, upheld Alabama's practice of allowing judges to override jury decisions on sentence. The Court had previously upheld judge overrides of jury recommendations of sentence in *Spaziano v. Florida*, 468 U.S. 447 (1984). The jury's sentence is final in 29 states. *Harris*, 115 S. Ct. at 1038. In four other death-penalty states, the jury plays no role in the sentencing decision. *Id.*

<sup>36</sup> *Harris*, 115 S. Ct. at 1040.

<sup>37</sup> Lisa Stansky, *Elected Judges Favor Death Penalty*, FULTON COUNTY DAILY REP. (Ga.), Nov. 24, 1989, at 11 (quoting Dean Gerald Uelman of Santa Clara University Law School, who has studied the relation between methods of selection and judicial behavior).

<sup>38</sup> Gerald Uelman, *Elected Judiciary*, in *ENCYCLOPEDIA OF THE AMERICAN CONSTITUTION* 170-71 (Leonard W. Levy et al. eds., Supp. I 1992).

<sup>39</sup> See 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). For a description of the failure of judges to discharge their constitutional responsibility to protect the Sixth Amendment right to counsel, see *id.* at 1855-57.



orders that make no pretense of fairly resolving the issues before the court.

This Article examines the influence of the politics of crime on judicial behavior in capital cases. A fair and impartial judge is essential in any proceeding, but perhaps nowhere more so than in capital cases, where race,<sup>40</sup> poverty,<sup>41</sup> inadequate court-appointed counsel,<sup>42</sup> and popular passions<sup>43</sup> can influence the extermination of a human life. The legal system

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<sup>40</sup> See U.S. GAO, DEATH PENALTY SENTENCING: RESEARCH INDICATES PATTERN OF RACIAL DISPARITIES 5 (1990) (analyzing 28 studies of capital sentencing and finding a "remarkably consistent" pattern of racial disparities); see also DAVID C. BALDUS ET AL., EQUAL JUSTICE AND THE DEATH PENALTY 3 (1990) (describing a study of capital sentencing in Georgia that found that the "worst offenders" are not always those executed, that many of the executed died for crimes that were *not* "among the most aggravated and therefore the most blameworthy cases," and that race is at least part of the explanation for this discrepancy); SAMUEL R. GROSS & ROBERT MAURO, DEATH & DISCRIMINATION: RACIAL DISPARITIES IN CAPITAL SENTENCING 212 (1989) (concluding that "de facto racial discrimination in capital sentencing is legal in the United States").

<sup>41</sup> Poor defendants are frequently assigned lawyers who are not provided funds for expert or investigative assistance. See, e.g., *Firsthand Accounts of Capital Justice*, NAT'L L.J., June 11, 1990, at 40 (relating that 54.2% of capital trial lawyers surveyed felt that courts provided inadequate funds for investigation and experts, and quoting one Louisiana appointed counsel's complaint that "[i]t was a waste of time to ask the court for funds. I knew the bastards."); Fredric N. Tulskey, *Poor Defendants Pay the Cost as Courts Save on Murder Trials*, PHILA. INQUIRER, Sept. 13, 1992, at A1, A18 (reporting that in 20 capital cases in Philadelphia in 1991 and 1992 the court paid for investigators in only eight, spending an average of \$605 in each, and provided funds for experts, both psychologists, in only two cases, costing \$400 in one case, \$500 in the other); see also Joseph W. Bellacosa, *Ethical Impulses from the Death Penalty: "Old Sparky's" Jolt to the Legal Process*, 14 PACE L. REV. 1, 13-16 (1994) (discussing the limits on fees for attorneys, investigation, and experts in capital cases); Jeff Rosenzweig, *The Crisis in Indigent Defense: An Arkansas Commentary*, 44 ARK. L. REV. 409, 410 (1991) (describing the denial of resources for expert and investigative assistance in capital cases in Arkansas). Class considerations may also come into play in the admission of victim-impact evidence. As one judge has noted:

Not only does the admission of Victim Impact Statements create two classes of defendants, those who kill worthy members of society and those who kill less worthy citizens, it necessarily creates classes of victims: those whose lives were so worthwhile that their killer should be put to death, and those whose lives are so worthless that their killer should only receive a sentence that will put them back into society in less than ten years.

*Livingston v. State*, 444 S.E.2d 748, 760 (Ga. 1994) (Benham, P.J., dissenting).

<sup>42</sup> Bright, *supra* note 39, at 1841-66; see also American Bar Ass'n, *Toward a More Just and Effective System of Review in State Death Penalty Cases*, 40 AM. U. L. REV. 1, 16 (1990) (finding that "the inadequacy and inadequate compensation of counsel at trial" are among the "principal failings of the capital punishment review process today").

<sup>43</sup> The Mississippi Supreme Court, while expressing the hope that "the days of

indulges the presumption that judges are impartial. The Supreme Court has steadily reduced the availability of habeas corpus review of capital convictions,<sup>44</sup> placing its confidence in the notion that state judges, who

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lynch mobs are past," has observed "that the emotions which compelled our forbears to such violence endure." *Johnson v. State*, 476 So. 2d 1195, 1214 (Miss. 1985). For other examples of the emotions that often accompany a capital trial, see *Coleman v. Kemp*, 778 F.2d 1487, 1489-1537 (11th Cir. 1985) (describing the pretrial publicity of six murders and the reaction of the community, including the testimony of one juror that community sentiment was "fry 'em, electrocute 'em"); *cert. denied*, 476 U.S. 1164 (1986); *Messer v. Kemp*, 760 F.2d 1080, 1086-88 (11th Cir. 1985) (relating that the father of a murder victim lunged toward the defendant during a trial in the presence of the jury screaming and shouting "He'll pay! You're liable!"), *cert. denied*, 474 U.S. 1088 (1986); *Angry Fathers Confront Gang Who Killed Their Daughters*, LEGAL INTELLIGENCER, Oct. 13, 1994, at 4 (relating how victims' fathers berated gang members, convicted of murder and rape, during the capital sentencing phase of a trial, saying among other things: "You are worse than spit. You belong in hell."); *Ex-Rosewell Woman's Killer Gets Life*, ATLANTA CONST., May 9, 1995, at C6 (describing the in-court attack by a victim's father after a defendant received a life sentence for murder and rape; the father attempted to strangle the defendant before four deputies pulled him off); Steve McVicker, *The Last Word: Judge Bill "Roy Bean" Harmon Grandstands at a Murder Trial—Again*, HOUSTON PRESS, Feb. 17-23, 1994, at 4 (reporting that a victim's father was allowed to yell obscenities at the defendant in the presence of jurors and the press); Don Plummer, *Slain Cop's Father: 'All I Can Do Is Cry'*, ATLANTA CONST., Nov. 8, 1994, at B1 (describing the testimony and tears of co-workers and relatives of a murder victim during the presentation of victim-impact testimony at the sentencing stage of a capital trial).

<sup>44</sup> The Court has limited the availability of the writ to vindicate constitutional rights by: adopting strict rules of procedural default, *see, e.g.*, *Smith v. Murray*, 477 U.S. 527, 533-36 (1986), *Engle v. Isaacs*, 456 U.S. 107, 130-34 (1982), *Wainwright v. Sykes*, 433 U.S. 72, 88-91 (1977), and Timothy J. Foley, *The New Arbitrariness: Procedural Default of Federal Habeas Claims in Capital Cases*, 23 LOY. L.A. L. REV. 193 (1989); excluding most Fourth Amendment claims from habeas corpus review, *Stone v. Powell*, 428 U.S. 465 (1976); requiring deference to factfinding by state court judges, *see, e.g.*, *Sumner v. Mata*, 499 U.S. 539 (1981), and *Patton v. Yount*, 467 U.S. 1025 (1984); making it more difficult for petitioners to obtain an evidentiary hearing to prove a constitutional violation, *Keeney v. Tamayo-Reyes*, 504 U.S. 1 (1992); adopting an extremely restrictive doctrine regarding the retroactivity of constitutional law, *Teague v. Lane*, 489 U.S. 288 (1989), and 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 (1991); reducing the harmless error standard for constitutional violations recognized in federal habeas review, *Brecht v. Abrahamson*, 113 S. Ct. 1710 (1993); and restricting when a constitutional violation may be raised in a second habeas petition, *McCleskey v. Zant*, 499 U.S. 467 (1991). *See generally* Louis D. Bilionis, *Legitimizing Death*, 91 MICH. L. REV. 1643, 1650 (1993) ("A strong theme[ ], embraced by a consistent and substantial majority of the Justices . . . [is] sharply reducing the involvement of the federal judiciary in the day-to-day business of reviewing capital cases"); Jordan Steiker, *Innocence and Federal Habeas*, 41 UCLA L. REV. 303, 303-04 (1993). Pending antiterrorism legislation includes even

take the same oath as federal judges to uphold the Constitution, can be trusted to enforce it.<sup>45</sup> This confidence, however, is frequently misplaced, given the overwhelming pressure on elected state judges to heed, and perhaps even to lead, the popular cries for the death of criminal defendants.

Part I of this Article briefly summarizes the increasing use of the crime issue in local and national politics and the extraordinary prominence of the death penalty as a litmus test for politicians, including politicians who serve as judges, purporting to be "tough" on crime. Part II examines the politics of becoming and remaining a judge in such a climate. Part III assesses the effect of this political climate on a judge's ability to preside impartially over highly publicized capital cases. Part IV proposes some modest steps that might limit the influence of politics and the passions of the moment on judicial behavior.

# I. CRIME IN POLITICS AND THE DEATH PENALTY IN THE POLITICS OF CRIME

During the Cold War, many politicians, seeking to avoid more contro-

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further restrictions of habeas corpus. The Comprehensive Terrorism Prevention Act of 1995, S. 735, 104th Cong., 1st Sess., 141 CONG. REC. S7857 (daily ed. June 7, 1995), requires deference by federal courts to decisions of state courts unless the decision is "contrary to, or involved an unreasonable application of, clearly established Federal law," *id.* § 604(3), establishes a statute of limitation for the filing of habeas corpus petitions, *id.* § 601, further restricts when a federal court may conduct an evidentiary hearing, *id.* § 604(4), and adds new barriers to hearing a successive habeas corpus petition, *id.* § 605. See David Cole, *Destruction of the Habeas Safety Net*, LEGAL TIMES, June 19, 1995, at 30.

<sup>45</sup> See, e.g., *Brecht*, 113 S. Ct. at 1721 (rejecting the argument that a less demanding harmless-error standard in federal habeas review will result in the state courts refusing to find error harmless, unless litigants showed "affirmative evidence that state-court judges are ignoring their oath"); *Sumner*, 449 U.S. at 549 (expressing the view that deference to state court factfinding is appropriate because "[s]tate judges as well as federal judges swear allegiance to the Constitution of the United States, and there is no reason to think that because of their frequent differences of opinions as to how that document should be interpreted, all are not doing their mortal best to discharge their oath of office"); see also *Rose v. Lundy*, 455 U.S. 509, 515 (1982) (requiring dismissal of a habeas corpus petition containing both exhausted and unexhausted claims and quoting *Ex parte Royall*, 117 U.S. 241 (1886): "State courts are 'equally bound to guard and protect rights secured by the Constitution.'"); *Duckworth v. Serrano*, 454 U.S. 1, 4 (1981) (relying upon and quoting *Ex parte Royall* to recall the duty of both state and federal courts to enforce the Constitution). But see *Stone*, 428 U.S. at 525 (Brennan, J., dissenting) (asserting that "[s]tate judges popularly elected may have difficulty resisting popular pressures not experienced by federal judges given lifetime tenure," and calling for an assumption that there is "a general lack of appropriate sensitivity to constitutional rights in the trial and appellate courts of the several States").

versial and difficult issues, professed their opposition to Communism. Because almost everyone aspiring to public office was against Communism, politicians sought in various ways—such as support for loyalty oaths and investigation of unamerican activities—to demonstrate just how strongly they were opposed to Communism. Those who questioned the wisdom of such measures were accused of not being sufficiently strident—“soft” on Communism.

Since the collapse of the Soviet Union and other Soviet-bloc governments, crime has emerged as an issue that appears equally one-sided. No one is in favor of violent crime. Politicians demonstrate their toughness by supporting the death penalty, longer prison sentences,<sup>46</sup> and measures to make prison life even harsher than it is already.<sup>47</sup> Those who question the wisdom, cost, and effectiveness of such measures are branded “soft on crime.” Whether sound public policy emerges from such a discussion of crime is a question to be addressed elsewhere.<sup>48</sup> The emergence of crime

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<sup>46</sup> See, e.g., Fox Butterfield, *New Prisons Cast Shadow over Higher Education*, N.Y. TIMES, Apr. 12, 1995, at A21 (reporting on California's plans to spend, for the first time, more on prisons than for its two university systems—because its prison population grew from 23,511 to 126,140 in 15 years and the state anticipated an even greater population due to the passage of a “three strikes and you're out” law); William Claiborne, *'Three Strikes' Tough on Courts Too*, WASH. POST, Mar. 8, 1995, at A1 (describing the impact on judiciaries and prisons of new California laws requiring twice the normal sentence for a person convicted of a second felony, and 25 years to life for a third felony); *25 Years for a Slice of Pizza*, N.Y. TIMES, Mar. 5, 1995, at 21 (relating that a 27-year-old man received a 25-year sentence under California's “three strikes and you're out” law for stealing a slice of pizza).

<sup>47</sup> See, e.g., Rick Bragg, *Chain Gangs to Return to Roads of Alabama*, N.Y. TIMES, Mar. 26, 1995, § 1, at 16 (reporting the Alabama prison commissioner's purchase of 300 sets of leg irons, at a cost of \$17,000, to make Alabama the first state in the nation to reinstitute chain gangs); Seth Mydans, *Taking No Prisoners, In Manner of Speaking*, N.Y. TIMES, Mar. 4, 1995, at 6 (describing how a 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, the Mississippi legislature's decision to clothe prisoners in striped uniforms with the word “convict” emblazoned on the back, and some Mississippi legislators' “talk of restoring fear to prisons, of caning, of making prisoners ‘smell like a prisoner’ ”); David J. Rothman, *The Crime of Punishment*, N.Y. REV. BOOKS, Feb. 17, 1994, at 34, 34-35, 37-38 (describing the severe overcrowding in U.S. prisons, pseudo-military “boot camps” for young offenders, and other aspects of the culture of punishment in this country, where the rate of incarceration—455 per 100,000—is one of the highest in the world).

<sup>48</sup> See DAVID VON DREHLE, *AMONG THE LOWEST OF THE DEAD: THE CULTURE OF DEATH ROW* (1995) (describing Florida's experience with its capital punishment statute enacted in 1973, the state's inability to impose the death penalty consistently and swiftly, and the burden the death penalty has placed on courts and other institu-

as a dominant political issue is, however, not only having an impact on the behavior of politicians seeking positions in the legislative and executive branches of government, but also on the behavior of judges who are sworn to uphold the Constitution, a document that protects the rights of those accused of even the most serious crimes.

Even before the end of the Cold War, Richard Nixon demonstrated the potency of the crime issue by promising, in campaign speeches and in his acceptance of the Republican nomination for President in 1968, to replace Democrat Ramsey Clark as Attorney General.<sup>49</sup> Clark's defense of civil liberties and procedural safeguards had led some, including Nixon, to denounce him as "soft on crime."<sup>50</sup> In 1988, Lee Atwater urged Republicans to concentrate on the crime issue because "[a]lmost every candidate running out there as a Democrat is opposed to the death penalty."<sup>51</sup> George Bush was elected President that year with the help of advertisements criticizing his opponent for allowing the furlough of Willie Horton, who committed a rape in Maryland while on a weekend furlough from a Massachusetts prison.<sup>52</sup>

As crime has become a more prominent issue in political campaigns, the death penalty has become the ultimate vehicle for politicians to demonstrate just how tough they are on crime. During California's 1990 gubernatorial primary, an aide to one Democratic candidate observed wistfully that the carrying out of an execution would be a "coup" for her

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tions); WENDY KAMINER, *IT'S ALL THE RAGE: CRIME AND CULTURE* (1995) (describing the gap between the crime debate in the United States and what is needed to deal with the problem of violent crime). See generally Rothman, *supra* note 47 (collecting authority to question the wisdom of crime policies in the United States).

For discussion of the wisdom of the "three strikes and you're out" laws that have been passed in many states, see Joe D. Whitley, *3 Strikes: More Harm than Good*, FED. SENT. REP., Sept./Oct. 1994, at 63, and Stephen R. Sady, *The Armed Career Criminal Act—What's Wrong with "Three Strikes, You're Out?"*, FED. SENT. REP., Sept./Oct. 1994, at 69.

<sup>49</sup> Martin F. Nolan, *In Riots' Political Fallout, Right May Gain Might*, BOSTON GLOBE, May 3, 1992, at 24 ("[Nixon] attacked Johnson's liberal attorney general, Ramsey Clark, by promising in every speech 'to appoint a new attorney general' . . .").

<sup>50</sup> See, e.g., David Zucchino, *Political Preoccupation with Crime Isn't New*, DALLAS MORNING NEWS, Dec. 8, 1994, at 43A ("Nixon told campaign crowds that crime was rising nine times faster than the population. When . . . Clark blurted out, accurately, that 'there is no wave of crime in this country,' he became the laughingstock of the campaign.").

<sup>51</sup> John Harwood, *Approving Atwater: GOP Committee Backs Its Chairman*, ST. PETERSBURG TIMES, June 17, 1989, at 1A.

<sup>52</sup> Stephen Engelberg, *Bush, His Disavowed Backers and a Very Potent Attack Ad*, N.Y. TIMES, Nov. 3, 1988, at A1. See generally Larry Martz et al., *The Smear Campaign*, NEWSWEEK, Oct. 31, 1988, at 16 (reporting on the general public dissatisfaction with the tenor of the 1988 presidential campaign).

opponent, the state attorney general.<sup>53</sup> Candidates for governor of Texas in 1990 argued about which of them was responsible for the most executions and who could do the best job in executing more people.<sup>54</sup> One candidate ran television advertisements in which he walked in front of photographs of the men executed during his tenure as governor and boasted that he had "made sure they received the ultimate penalty: death."<sup>55</sup> Another candidate ran advertisements taking credit for thirty-two executions.<sup>56</sup> In Florida, the incumbent gubernatorial candidate ran television advertisements in 1990 showing the face of serial killer Ted Bundy, who was executed during his tenure as governor. The governor stated that he had signed over ninety death warrants in his four years in office.<sup>57</sup>

The death penalty has been a dominant political issue in Florida for over fifteen years. Bob Graham demonstrated in two terms as governor and a successful race for the United States Senate that, as one observer noted, "nothing [sells] on the campaign trail like promises to speed up the death penalty."<sup>58</sup> Graham's signing of death warrants enabled him to reinvent himself as tough after being initially dubbed "Governor Jello."<sup>59</sup> He increased the number of warrants he signed when running for reelection as governor in 1982 even though he knew they would not be carried out,<sup>60</sup> and again stepped up the number of warrants he was signing each

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<sup>53</sup> Michael Kroll, *Death-Penalty Appeal in State's Governor Race*, SACRAMENTO BEE, Oct. 30, 1989, at B13. The comment came after the United States Court of Appeals for the Ninth Circuit upheld the death sentence of Robert Alton Harris. An aide to Dianne Feinstein (the latter was running against Attorney General John Van de Kamp in the Democratic primary) said, "What a coup for John [Van de Kamp] if Harris were executed in May just before the primary . . . . I think Van de Kamp will welcome the execution." Van de Kamp did not have the benefit of this hoped-for "coup"; California did not execute Harris until April 22, 1992. Katherine Bishop, *After Night of Court Battles, a California Execution*, N.Y. TIMES, Apr. 22, 1992, at A1.

<sup>54</sup> See Michael Oreskes, *Death Penalty Politics: Candidates Rush to Embrace Execution*, COURIER-JOURNAL (Louisville, Ky.), Apr. 8, 1990, at D1, D4.

<sup>55</sup> Richard Cohen, *Playing Politics with the Death Penalty*, WASH. POST, Mar. 20, 1990, at A19.

<sup>56</sup> *Id.* (describing the Democratic primary campaign strategy of state Attorney General Jim Mattox, and remarking that Mattox's opponent—then-Treasurer and later Governor Ann Richards, herself a proponent of the death penalty—may have found the "nonlethal nature of her office" a disadvantage in the competition).

<sup>57</sup> *Id.* Bob Martinez proclaimed that Bundy and the other 89 had each "committed a heinous crime that I don't want to choose to describe to you [sic]." *Id.*

<sup>58</sup> VON DREHLE, *supra* note 48, at 325.

<sup>59</sup> *Id.* at 268.

<sup>60</sup> *Id.* at 200-01. Federal courts were granting automatic stays of execution pending the decision of the U.S. Court of Appeals on an issue that affected every capital case in Florida. *Id.* at 200. One federal district court observed that the signing of the warrants "ranges between legally unsound and futile," but it had no effect on Graham. *Id.*

month when running for the Senate in 1986.<sup>61</sup> One assistant attorney general responsible for representing the state in capital cases had to work so hard as a result of Graham's warrant-issuing spree during his Senate campaign that the prosecutor commented, "Nine months of Bob Graham running for the Senate nearly killed me."<sup>62</sup>

Presidential candidate Bill Clinton demonstrated that he was tough on crime in his 1992 campaign by scheduling the execution of a brain-damaged man shortly before the New Hampshire primary.<sup>63</sup> Clinton had embraced the death penalty in 1982 after his defeat in a bid for reelection as governor of Arkansas in 1980.<sup>64</sup> In his presidential campaign ten years later, Clinton returned from New Hampshire to preside over the execution of Rickey Ray Rector, an African-American who had been sentenced to death by an all-white jury.<sup>65</sup> Rector had destroyed part of his brain when he turned his gun on himself after killing the police officer for whose murder he received the death sentence. Logs at the prison show that in the days leading up to his execution, Rector was howling and barking like a dog, dancing, singing, laughing inappropriately, and saying that he was going to vote for Clinton.<sup>66</sup> Clinton denied clemency and allowed the execution to proceed, thereby protecting himself from being labeled as "soft on crime" and helping the Democrats to take back the crime issue. Clinton's first three television advertisements in his bid for reelection—already begun a year and a half before the 1996 presidential election—all focused on crime and Clinton's support to expand the death penalty.<sup>67</sup>

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<sup>61</sup> *Id.* at 293.

<sup>62</sup> *Id.*

<sup>63</sup> Marshall Frady, *Annals of Law and Politics: Death in Arkansas*, NEW YORKER, Feb. 22, 1993, at 105, 105.

<sup>64</sup> George E. Jordan, *Campaign 92: Clinton & Crime; Supports Capital Punishment as Sign of Toughness*, NEWSDAY, May 4, 1992, at 3 (recounting Clinton's relatively liberal exercise of executive clemency during his first term and his later transformation into a death-penalty "hardliner"); Mark I. Pinsky, *Will Clinton Again Oppose Executions? Old Pal Says Maybe*, L.A. TIMES, Jan. 31, 1995, at A5 (describing Clinton's change from an opponent of the death penalty to a supporter).

<sup>65</sup> Frady, *supra* note 63, at 105, 115.

<sup>66</sup> *Id.* at 105.

<sup>67</sup> Todd S. Purdum, *Clinton Gets Early Start on Ad Campaign Trail*, N.Y. TIMES, June 27, 1995, at A12 (describing \$2.4 million worth of television advertising by the Clinton campaign to be run in two dozen markets nationwide in July 1995). In one advertisement, a police officer says, "It's not about politics. It's about a ban on deadly assault weapons. It's about a tough new death penalty law. President Clinton is helping us make this a safer nation." *Id.* In another advertisement, Clinton says, "Deadly assault weapons off our streets. 100,000 more police on the streets. Expand the death penalty. That's how we'll protect America." Todd S. Purdum, *The Ad Campaign*, N.Y. TIMES, June 27, 1995, at A12; see also Elizabeth Kolbert, *Clinton, Playing the Early Bird, Is Lining Up Campaign-Style Ads*, N.Y. TIMES, June 24, 1995, at 1

By 1994, crime had so eclipsed other issues that an official of the National Governor's Association commented that the "top three issues in gubernatorial campaigns this year are crime, crime, and crime."<sup>68</sup> Stark images of violence, flashing police lights, and shackled prisoners dominated the campaign, and candidates went to considerable lengths to emphasize their enthusiasm for the death penalty and attack their opponents for any perceived hesitancy to carry out executions swiftly.<sup>69</sup> Even after Texas carried out forty-five executions during Democrat Ann Richards's four years as governor, George W. Bush attacked Governor Richards during his successful 1994 campaign against her, complaining that Texas should execute even more people, even more quickly.<sup>70</sup> Bush's younger brother Jeb ran a television advertisement in his 1994 campaign for governor of Florida in which the mother of a murder victim blamed incumbent Governor Lawton Chiles for allowing the convicted killer to remain on death row for thirteen years.<sup>71</sup> Jeb Bush knew, and acknowledged when asked, that there was nothing Chiles could have done to speed up the execution because the case was pending in federal court.<sup>72</sup> Jeb Bush also argued that Florida's eight executions since Chiles's election in 1990 were not enough.<sup>73</sup>

In her quest to win the 1994 California gubernatorial race, Kathleen Brown found that her personal opposition to the death penalty was

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(describing as unprecedented Clinton's broadcasting of the advertisements a year and half before the election).

<sup>68</sup> Leslie Phillips, *Crime Pays as a Political Issue*, USA TODAY, Oct. 10, 1994, at 11A; see also Mark Horvit & Ken Herman, *Politicians on Anti-Crime Bandwagon*, HOUSTON POST, Jan. 9, 1994, at A-27 (reporting that candidates in the primary elections for state and national office in Texas were "waging a sound-bite war over who is the toughest crime-fighter among them"); Howard Kurtz, *In Political Ads Across the U.S., Crime Is the Weapon of Choice*, WASH. POST, Sept. 9, 1994, at A1, A4 (reporting that "[s]ix years after George Bush's presidential campaign turned furloughed murderer Willie Horton into a national symbol of Democratic softheadedness, the spirit of Hortonism is thriving" in television commercial wars with "crime . . . the 30-second weapon of choice").

<sup>69</sup> See, e.g., Bob Minzesheimer, *Executioner's Song Heard in Governor Races*, USA TODAY, Oct. 27, 1994, at 9A (reporting that "[f]rom California to Texas to Florida, candidates for governor sound as if they're running to be executioner"); Phillips, *supra* note 68, at 9A (describing various campaign appeals based on crime and quoting one Democratic media consultant as saying, "No matter how far to the right we get, Republicans get righter. We say 'Hang 'em.' They say, 'Gas 'em.'").

<sup>70</sup> *Bush Brothers Cast Foes as "Soft" for Not Killing Enough*, ARIZ. REPUBLIC, Nov. 3, 1994, at B5 ("That's one a month and sets a standard for the 50 states. But it's not good enough for George W., who apparently thinks the governor ought to administer the coup de grace herself.").

<sup>71</sup> *Id.*

<sup>72</sup> *Id.* ("[T]he ad is dishonest and exploitative, but Bush insists it's a good way to elevate the public discussion of crime . . .").

<sup>73</sup> *Id.*



widely viewed as a major liability<sup>74</sup> even though she promised to carry out executions as governor. She had to defend herself against Governor Pete Wilson's charges that, because of her personal moral convictions, she would appoint judges like Rose Bird. Governor Wilson, whose approval ratings had been "abysmal," recovered by following the advice of the old master, Richard Nixon, who told him to hit his opponent hard on crime.<sup>75</sup> Candidate Brown responded to the charges by producing an advertisement proclaiming her willingness to enforce the death penalty.<sup>76</sup> Nevertheless, she lost to Wilson. Both Illinois Governor Jim Edgar and Iowa Governor Terry E. Branstad similarly attacked their opponents' personal opposition to the death penalty.<sup>77</sup> Both were reelected. New York Governor Mario Cuomo faced heated attacks for his vetoes of death-penalty legislation during twelve years in office and his refusal to return a New York prisoner to Oklahoma for execution.<sup>78</sup> Cuomo defended himself by proposing a referendum on the death penalty,<sup>79</sup> but still lost his office to a candidate who promised to reinstate capital punishment and to send the prisoner back to Oklahoma for execution.<sup>80</sup>

As the public debate on crime and its solutions has become increas-

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<sup>74</sup> See, e.g. Dan Walters, *Odd Segments of "60 Minutes"*, SACRAMENTO BEE, Jan. 26, 1994, at A3.

<sup>75</sup> Howard Fineman, *Riding the Wave*, NEWSWEEK, May 22, 1995, at 19, 19 (describing how Wilson employed this strategy to win, linking his foe to every "them" feared by California voters, including "lenient judges" and "criminal-defense lawyers").

<sup>76</sup> Susan Yoachum, *Ad Wars Raise Politics of Blame*, S.F. CHRON., Sept. 29, 1994, at A6.

<sup>77</sup> *Vote '94: The Nation*, WASH. POST, Oct. 21, 1994, at A6. In Iowa, which does not have capital punishment, Governor Branstad, in response to polls showing his challenger, Bonnie Campbell, was in the lead, "turned to the crime issue, and specifically Campbell's opposition to capital punishment." *Id.* He followed the example of Governor Edgar, who had "built a huge lead over Democratic challenger Dawn Clark Netsch thanks in part to a barrage of television commercials stressing her opposition to the death penalty." *Id.*; see also Minzesheimer, *supra* note 69, at 9A (reporting that the issue of their opponents' personal opposition to the death penalty had "clearly helped" both Edgar and Wilson in their bids for reelection).

<sup>78</sup> See Ian Fisher, *Clamor over Death Penalty Dominates Debate on Crime*, N.Y. TIMES, Oct. 9, 1994, at 45, 48 (reporting that although Cuomo built more prisons than all New York governors before him combined, "[a] central paradox of Mr. Cuomo's 12-year tenure is that no matter what he has done on crime, he is judged most often by his opposition to the death penalty, even though crime rates are down, jail time is up and police forces have grown"); see also *Cuomo Takes Anti-Crime Stance*, WASH. POST, Jan. 6, 1994, at A9.

<sup>79</sup> James Dao, *Cuomo Proposes a Referendum on Death Penalty*, N.Y. TIMES, July 8, 1994, at B5.

<sup>80</sup> *Pataki on the Record: Excerpts from a Talk on Campaign Issues*, N.Y. TIMES, Oct. 10, 1994, at B4. Upon assuming office, Governor George Pataki carried out his promise and sent Grasso back to Oklahoma, and that state executed Grasso on March

ingly one-sided and vacuous, the death penalty has become the ultimate litmus test for demonstrating that one is not "soft on crime." The impact of this development has been felt not only in the executive and legislative branches of government, where popular sentiment is expected to play a major role in the development of policy, but also in the judiciary, where judges are expected to follow the law, not the election returns.

## II. THE POLITICS OF BECOMING AND STAYING A JUDGE

Judges in most states that have capital punishment are subject to election or retention. Although all judges take oaths to uphold the Constitution,<sup>81</sup> including its provisions guaranteeing certain protections for persons accused of crimes, judges who must stand for election or retention depend on the continued approval of the voters for their jobs and concomitant salaries and retirement benefits. A common route to the bench is through a prosecutor's office, where trying high-profile capital cases can result in publicity and name recognition for a prosecutor with judicial ambitions. A judge who has used capital cases to advance to the bench finds that presiding over capital cases results in continued public attention. Regardless of how one becomes a judge, rulings in capital cases may significantly affect whether a judge remains in office or moves to a higher court.

### A. Judges Face Election in Most States That Employ the Death Penalty

Almost all judicial selection systems fall into one of four categories.<sup>82</sup> First, judges in eleven states and the District of Columbia are never subjected to election at any time in their judicial careers.<sup>83</sup> Second, the

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20, 1995. John Kifner, *Inmate Is Executed in Oklahoma, Ending N.Y. Death Penalty Fight*, N.Y. TIMES, Mar. 20, 1995, at A1.

<sup>81</sup> U.S. CONST. art. VI, cl. 3 ("[A]ll executive and judicial Officers, both of the United States and of the several States, shall be bound by Oath or Affirmation, to support this Constitution . . .").

<sup>82</sup> Because some states employ different methods of judicial selection for different courts, the number of states in the four categories described exceeds 50.

<sup>83</sup> See CONN. CONST. art. 5, § 2 (governor nominates judges from a list that a judicial selection commission submits, for eight-year terms); DEL. CONST. art. IV, § 3 (governor appoints judges and justices, with advice and consent of the senate, for 12-year terms); 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); ME. CONST. art. 5, pt. 1, § 8 (governor nominates judicial officers, with confirmation by a committee from both houses of the legislature), art. 6, § 4 (judges hold office for seven-year terms); MASS. CONST. ch. 2, § 1, art. 9 (governor appoints all judicial officers, with advice and consent of the governor's council), pt. 2, ch. 3, art. I (judicial officers hold office during good behavior); MD. CONST. art. 41D (governor appoints district court judges, with advice and consent of the senate, for 10-year terms); N.H. CONST. pt. 2, art. 46 (governor and

judges of three states are elected by vote of the state legislature.<sup>84</sup> Third, the judges of twenty-nine states are subjected to contested elections, either partisan or nonpartisan, at some point in their careers,<sup>85</sup> whether

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council appoint judicial officers), art. 73 (judges hold office during good behavior); N.J. CONST. art. 6, § 6, paras. 1, 3 (governor appoints judges and justices, with confirmation by the senate, for initial seven-year terms; upon reappointment judges and justices serve during good behavior); N.Y. CONST. art. 6, § 2 (governor appoints court of appeals judges, with advice and consent of the senate, for 14-year terms); R.I. GEN. LAWS §§ 8-2-1, 8-8-7 (1985) (governor appoints superior court and district court justices, with confirmation by the senate; justices hold office during good behavior); VT. CONST. ch. II, §§ 32, 34 (governor appoints judges from a judicial nominating body's list of candidates, with advice and consent of the senate, for six-year terms; general assembly votes for retention; general assembly can vote by simple majority to remove); D.C. CODE ANN. § 11-1501 (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).

<sup>84</sup> R.I. CONST. art. 10, § 4 (vote of two houses of the legislature to select or remove supreme court judges; judges hold office until death, resignation, or removal by a vote of both houses); S.C. CONST. art. V, § 3 (general assembly elects supreme court justices for 10-year terms), § 8 (general assembly elects court of appeals judges for six-year terms), § 13 (general assembly elects circuit judges for six-year terms); VA. CONST. art. VI, § 7 (vote of both houses of the general assembly elects all judges and justices; supreme court justices serve 12-year terms, all other judges serve eight-year terms).

<sup>85</sup> See ALA. CONST. amend. 328, § 6.13 (all judges elected); ALA. CODE §§ 12-2-1, 12-3-3, 12-3-4 (1986) (supreme court justices, court of criminal appeals judges, and court of civil appeals judges all elected for six-year terms); ARK. CONST. art. 7, §§ 6, 17, 29 (supreme court justices elected for eight-year terms; circuit court judges elected for four-year terms; county court judges elected for two-year terms); FLA. CONST. art. V, § 11 (circuit judges and county court judges elected in competitive elections; governor fills all vacancies from a judicial nominating commission's list); GA. CONST. art. 6, § 7, para. 1 (superior and state court judges elected in nonpartisan elections for four-year terms; supreme court justices and court of appeals judges elected in nonpartisan elections for six-year terms); IDAHO CONST. art. VI, § 7 (supreme court justices and district judges selected in nonpartisan elections); ILL. CONST. art. 6, § 12 (judges initially selected in partisan elections; thereafter judges subject to nonpartisan retention elections); KAN. CONST. art. 3, § 6 (district court judges selected in elections); KY. CONST. § 117 (all judicial officers elected in nonpartisan elections); LA. CONST. art. 5, § 22 (judges and justices elected in regular elections); MD. CONST. art. IV, § 3 (all trial judges except for district judges elected for 15-year terms), § 5 (governor appoints circuit court judges to fill unexpired terms or for one year, whichever is less; thereafter judges subject to election); MICH. CONST. art. VI, §§ 2, 8, 9, 12 (supreme court justices elected at nonpartisan elections for eight-year terms; court of appeals judges elected by district in nonpartisan elections for six-year terms; circuit judges elected at nonpartisan elections for six-year terms); MINN. CONST. art. 6, § 7 (all judges elected for six-year terms); MISS. CONST. art. 6, §§ 145, 145A, 145B, 149, 153 (supreme court justices elected by district for eight-year terms; circuit and chancery court judges elected for four-year terms); MONT. CONST. art. 3, ch. 2, §§ 202, ch.2, §§ 201, 203

during initial selection for the bench or after appointment by the governor.<sup>86</sup> The fourth category of judicial selection systems includes those systems in which the judge or justice is at some time subjected to a retention election but never faces an opponent. Thirteen states employ such a system.<sup>87</sup>

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(supreme court justices elected at general elections for eight-year terms; district court judges elected by district for six-year terms); NEV. CONST. art. 6, §§ 3, 5 (supreme court justices elected in general elections for six-year terms; district court judges elected by district for six-year terms); N.M. CONST. art. VI, § 33 (justices and judges initially selected in partisan elections; thereafter subject to nonpartisan retention elections; supreme court justices and court of appeals judges serve eight-year terms, district judges serve six-year terms, and metropolitan court judges serve four-year terms); N.Y. CONST. art. 6, § 6, 10 (supreme court justices elected for 14-year terms; county court judges elected for 10-year terms); N.C. CONST. art. IV, § 16 (judges and justices elected for eight-year terms); N.D. CONST. art. VI, § 6, 9 (supreme court justices elected for 10-year terms; district court judges elected for six-year terms); OHIO CONST. art. IV, § 6 (judges and justices elected for six-year terms); OKLA. CONST. art. 7, §§ 2-3 (justices and judges elected in nonpartisan elections; supreme court justices serve six-year terms); OR. CONST. art. VII, § 1 (judges and justices elected for six-year terms); PA. CONST. art. 5, § 13 (governor appoints judges and justices with advice and consent of the senate if senate is in session; after an initial 10-month term of office, judges and justices subject to election); S.D. CONST. art. V, § 7 (judges elected in nonpolitical elections for eight-year terms; governor appoints supreme court justices for a three-year term, then justices subject to nonpolitical ballot; thereafter justices serve eight-year terms with retention elections); TENN. CONST. art. VI, §§ 3-4 (supreme court justices elected in statewide races for eight-year terms; lower court judges elected by district for eight-year terms); TEX. CONST. art. V, §§ 2, 4, 6-7 (supreme court justices elected for six-year terms; court of criminal appeals judges elected for six-year terms; court of appeals justices elected for six-year terms; district judges elected for four-year terms); WASH. CONST. art. IV, §§ 3, 5 (supreme court judges elected statewide for six-year terms; superior court judges elected by county for four-year terms); W. VA. CONST. art. VIII, §§ 2, 5 (supreme court of appeals justices elected statewide for 12-year terms; circuit court judges elected by circuit for eight-year terms); WIS. CONST. art. VII, §§ 4-5, 7 (supreme court justices elected for 10-year terms; court of appeals judges elected for six-year terms; circuit court judges elected for six-year terms).

<sup>86</sup> For the purposes of this Article, "contested election" means an election in which the candidate runs against another candidate or candidates.

<sup>87</sup> See ALASKA CONST. art. IV, §§ 5-6 (governor appoints supreme court justices and superior court judges, upon nomination by a judicial council; judges subject to nonpartisan retention elections); ARIZ. CONST. art. 6, §§ 37-38 (governor appoints judges and justices; judges subject to nonpartisan retention elections); CAL. CONST. art. 6, § 16 (governor appoints judges or appoints candidates for judgeships to run in unopposed elections; judges subject to retention elections; supreme court justices serve for 12-year terms; superior court judges serve for six-year terms); COLO. CONST. art. 6, §§ 20, 25 (governor appoints judges and justices from a judicial nominating commission's list; thereafter judges and justices subject to retention elections); FLA. CONST. art. 5, § 10 (appeals court judges and supreme court justices subject to reten-

There are currently thirty-eight states that have capital punishment statutes.<sup>88</sup> Thirty-two states both elect their judges and sentence people to death.<sup>89</sup>

In nine states—including Alabama and Texas—judges run under party affiliations.<sup>90</sup> The success of the party in national or state elections may have a significant impact on the judiciary. For example, Texas Republi-

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tion elections after six-year terms; governor fills all vacancies from a judicial nominating commission's list); IND. CONST. art. 7, §§ 10-11 (governor appoints judges and justices; thereafter judges and justices subject to retention elections); IOWA CONST. art. 5, §§ 16-17 (governor appoints judges and justices from a judicial nominating commission's list; thereafter judges and justices subject to retention elections); KAN. CONST. art. 3., § 5 (governor appoints supreme court justices from a nominating commission's list; thereafter justices subject to retention elections); MD. CONST. art. IV, § 5A (governor appoints appellate court judges with advice and consent of the senate; judges subject to approval or rejection vote at polls after one year in office; thereafter judges serve 10-year terms); MO. CONST. art. 5, § 29(a), (c)(1) (governor initially appoints judges for a one-year term from a nonpartisan judicial commission's list; at end of that term and longer terms thereafter, judges subject to retention election); NEB. CONST. art. V, § 21 (governor appoints judges and justices from a judicial nominating commission's list; after three years in office, and at the expiration of six-year terms thereafter, judges and justices subject to retention elections); UTAH CONST. art. VIII, §§ 8-9 (governor appoints all judges and justices, subject to approval of senate, from a judicial nominating commission's list; at first general election after three years of service all judges subject to retention elections; thereafter supreme court justices have 10-year terms, other judges have six-year terms, all with retention elections); WYO. CONST. art. 5, § 4 (governor appoints all justices and district court judges from a judicial nominating commission's list; at first general election after one year of service all judges subject to retention elections; thereafter supreme court justices have eight-years terms, district court judges have six-year terms, all subject to retention elections).

<sup>88</sup> Death Row, U.S.A., *supra* note 2, at 1; see also James Dao, *Death Penalty in New York Reinstated After 18 Years; Pataki Sees Justice Served*, N.Y. TIMES, Mar. 8, 1995, at A1 (noting that New York Governor George E. Pataki's signing of a death penalty bill into law made New York the 38th state to have capital punishment).

The states with capital punishment statutes are Alabama, Arizona, Arkansas, California, Colorado, Connecticut, Delaware, Florida, Georgia, Idaho, Illinois, Indiana, Kansas, Kentucky, Louisiana, Maryland, Mississippi, Missouri, Montana, Nebraska, Nevada, New Hampshire, New Jersey, New Mexico, New York, North Carolina, Ohio, Oklahoma, Oregon, Pennsylvania, South Carolina, South Dakota, Tennessee, Texas, Utah, Virginia, Washington, and Wyoming.

<sup>89</sup> All of the states with death penalties except Connecticut, Delaware, New Hampshire, New Jersey, South Carolina, and Virginia employ elections at some stage in judicial selection or retention.

<sup>90</sup> Those states are Alabama, Arkansas, Illinois, Mississippi, North Carolina, Pennsylvania, Tennessee, Texas, and West Virginia. John Cornyn, *Ruminations on the Nature of Texas Judging*, 25 ST. MARY'S L. REV. 367, 380 n.40 (1993) (citing Orrin W. Johnson & Laura J. Urbis, *Judicial Selection in Texas: A Gathering Storm?*, 23 TEX. TECH L. REV. 525, 526, n.6 (1992)).

cans swept into state judicial offices as part of the party's general success in the 1994 elections. Republicans won every elected position they sought on the Texas Court of Criminal Appeals and the Texas Supreme Court.<sup>91</sup> Republican straight-ticket voting contributed to the defeat of nineteen Democratic judges and a Republican sweep of all but one of the forty-two contested races for countywide judgeships in Harris County, Texas, which includes Houston.<sup>92</sup> The dean of one Texas law school observed that "[i]f Bozo the Clown had been running as a Republican against any Democrat, he would have had a chance."<sup>93</sup> Such straight-ticket voting, which comprised one-quarter of all votes cast in Harris County, also resulted in the removal of the only three black judges and left only one Hispanic on the bench.<sup>94</sup>

The lack of racial diversity now found in Houston is consistent with the exclusion of minorities from the bench throughout the country.<sup>95</sup> One reason for the lack of minority judges is that in many states—particularly those in the "death belt" states such as Florida and Texas—judges have long been elected from judicial districts in which the voting strength of racial minorities is diluted.<sup>96</sup>

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<sup>91</sup> Williams, *supra* note 12, at A29 (describing the Republican sweep in the Texas elections for the state's highest civil and criminal courts).

<sup>92</sup> Alan Bernstein, *Judge Elections Debated Anew; Straight-Ticket Voting Helped Topple 19 Democrat Jurists*, HOUSTON CHRON., Nov. 10, 1994, at A1 (arguing that the explosion of Republican straight-ticket voting for Harris County judges indicates a need to elect judges in a nonpartisan manner). The one Republican judicial candidate who lost had been denounced by some conservative activists for accepting the endorsement of the Houston Gay and Lesbian Caucus. *Id.*

<sup>93</sup> Williams, *supra* note 12, at A29.

<sup>94</sup> Bernstein, *supra* note 92, at A1. One of the winning judicial candidates observed, "There were Republicans who spent a fortune and those of us who didn't spend a dime, and we are all in office today . . . because of the landslide." *Id.*

<sup>95</sup> Mark Curriden, *Racism Mars Justice in U.S., Panel Reports*, ATLANTA J. & CONST., Aug. 11, 1991, at D1, D3 (observing that only six of Georgia's 134 superior court judges were African-American, and those six were in three judicial circuits); *Second Black Alabama Supreme Court Justice Sworn In*, COLUMBUS LEDGER-ENQUIRER (Ga.), Nov. 2, 1993, at B-2 (noting that there was only one African-American among Alabama's 17 appellate court judges, and only 12 blacks among the state's 255 circuit and district court judges); see also Rorie Sherman, *Is Mississippi Turning?*, NAT'L L.J., Feb. 20, 1989, at 1 (reporting that only 2.6% of all state court judges in the United States were black).

<sup>96</sup> See *Nipper v. Smith*, 39 F.3d 1494, 1499-1509 (11th Cir. 1994) (describing dilution of the black vote in Duval County, Florida), *cert. denied*, 115 S. Ct. 1795 (1995); *League of United Latin Am. Citizens v. Clements*, 999 F.2d 831, 912 (5th Cir. 1993) (King, J., dissenting) (agreeing with the district court's findings that countywide elections of judges in Texas have resulted in dilution of the voting power of African-Americans and Hispanics), *cert. denied*, 114 S. Ct. 878 (1994).

### B. Prosecuting Capital Cases as a Stepping Stone to the Bench

One of the most frequently traveled routes to the state trial bench is through prosecutors' offices. A capital case provides a prosecutor with a particularly rich opportunity for media exposure and name recognition that can later be helpful in a judicial campaign. Calling a press conference to announce that the police have captured a suspect and the prosecutor will seek the death penalty provides an opportunity for a prosecutor to obtain news coverage and ride popular sentiments that almost any politician would welcome. The prosecutor can then sustain prominent media coverage by announcing various developments in the case as they occur. A capital trial provides one of the greatest opportunities for sustained coverage on the nightly newscasts and in the newspapers. A noncapital trial or resolution with a guilty plea does not produce such coverage.<sup>97</sup>

The relationship between prosecuting capital cases and moving to the bench is evident in Georgia's Chattahoochee Judicial Circuit, which sends more people to death row than any other judicial circuit in the state. Two of the four superior court judges in the circuit obtained their seats on the bench after trying high-profile capital cases. Mullins Whisnant, who now serves as chief superior court judge in the circuit, became a judge in 1978 after serving as the elected district attorney.<sup>98</sup> He personally tried many of the ten capital cases the office prosecuted in 1976 and 1977, five of which involved African-Americans tried before all-white juries for homicides of white victims.<sup>99</sup> His last capital trial as prosecutor involved a highly publicized rape, robbery, kidnapping, and murder of a white Methodist Church organist by an African-American.<sup>100</sup> The extensive news coverage of the case included electronic and photographic coverage of

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<sup>97</sup> See, e.g., Don Plummer, *Decision on Rower Costly for Taxpayers*, ATLANTA J. & CONST., Feb. 16, 1995, at E1 (noting that the political benefits of a capital trial are certainly not lost on Cobb County (Ga.) District Attorney Tom Charron, who, despite public pressure from the presiding judge, rejected a defendant's offer to plead guilty and waive his right to parole even though a trial would likely force the victim's young children to testify and would cost the county up to \$1,000,000); see also Chris Burritt, *Smith's Lawyers Pushing Hard for Plea Bargain Despite Refusal*, ATLANTA CONST., June 24, 1995, at C5 (describing the refusal of South Carolina prosecutor Tommy Pope to spare the death penalty for defendant Susan Smith, charged with the murder of her two children, in exchange for a guilty plea and defense assertion that the refusal was based on the prosecutor's "once-in-a-lifetime opportunity for celebrity and national exposure").

<sup>98</sup> Transcript of Hearing of Sept. 11-14, 1991, at 123, 124, 165, *Brooks v. State*, 415 S.E.2d 903 (Ga. 1992) (No. S92A0062) (on file with the *Boston University Law Review*).

<sup>99</sup> Defense Exhibits 1A, 2A (admitted at Hearing of Sept. 11-14, 1991), *Brooks* (No. S92A0062) (on file with the *Boston University Law Review*).

<sup>100</sup> *Brooks v. Kemp*, 762 F.2d 1383, 1387 (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).

the trial. Whisnant made a highly emotional plea to jurors to join a "war on crime" and "send a message" by sentencing the defendant to death.<sup>101</sup>

Once Whisnant became a judge, his chief assistant, William Smith, took over as the district attorney. Smith personally tried many of the fourteen capital cases that took place during his tenure before he joined his former boss on the bench in 1988.<sup>102</sup> One of those cases involved the highly publicized trial of an African-American accused of being the "Silk Stocking Strangler" responsible for the murders of several elderly white women in the community.<sup>103</sup>

And benefits other than publicity came to Smith's eventual campaign for judge as a result of his use of the death penalty as a district attorney. In a case involving the murder of the daughter of a local contractor, Smith contacted the victim's father and asked him if he wanted the death penalty.<sup>104</sup> When he replied in the affirmative, Smith said that was all he needed to know,<sup>105</sup> and subsequently obtained the death penalty at trial.<sup>106</sup> The victim's father rewarded Smith with a contribution of \$5000 during Smith's successful run for judge in the next election.<sup>107</sup> The contribution was the largest Smith received.<sup>108</sup> Smith's chief assistant succeeded him as district attorney and, after prosecuting eight capital cases, has announced an interest in the next opening on the Superior Court bench.<sup>109</sup> So close is the relationship between the judiciary and the prosecutor's office in the circuit that the prosecutor's office has made the assignments of criminal cases to judges for the last six years, assigning the

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<sup>101</sup> *Id.* at 1394-98, 1408-16 (holding that the prosecutor's improper expressions of personal belief in capital punishment, discussion of his policy of rarely seeking the death penalty, and his general "war on crime" speech did not render the defendant's sentencing hearing fundamentally unfair). The prosecutor's closing argument is set out in full in the appendix to the opinion of Circuit Judge Clark. *Id.* at 1443-48 (opinion concurring in part and dissenting in part).

<sup>102</sup> Transcript of Hearing of Sept. 11-14, 1991, at 137-48, *Brooks* (No. S92A0062).

<sup>103</sup> *Id.* at 139-40.

<sup>104</sup> Transcript of Hearing of Oct. 21, 1988, at 38, *Davis v. Kemp*, No. 86-V-865 (Ga. Super. Ct. Butts County 1988) (on file with the *Boston University Law Review*) (testimony of James Isham, father of the victim).

<sup>105</sup> *Id.*

<sup>106</sup> *Davis v. State*, 340 S.E.2d 862 (Ga. 1986) (affirming defendant's death sentence on appeal by holding that sufficient evidence existed to support the armed robbery and murder convictions), *cert. denied*, 479 U.S. 871 (1986). The conviction and death sentence were later set aside in a federal habeas corpus proceeding due to prosecutorial misconduct. *Davis v. Zant*, 36 F.3d 1538 (11th Cir. 1994).

<sup>107</sup> Clint Claybrook, *Slain Girl's Father Top Campaign Contributor*, COLUMBUS LEDGER-ENQUIRER (Ga.), Aug. 7, 1988, at B-1.

<sup>108</sup> *Id.*

<sup>109</sup> Jim Houston, *Ruling on Judgeship Opens the Door for New Faces*, COLUMBUS LEDGER-ENQUIRER (Ga.), Feb. 7, 1995, at A-1, A-8 (quoting prosecutor Doug Pullen as saying that he is "definitely interested" in a judgeship).



more serious drug and homicide cases to former prosecutors Whisniant and Smith.<sup>110</sup>

These prosecutors in the Chattahoochee Judicial Circuit have demonstrated that capital cases produce good publicity even when a guilty verdict is reversed for prosecutorial misconduct. After the United States Court of Appeals set aside a death sentence because of a lynch-mob-type appeal for the death penalty by then-District Attorney Smith, which the court characterized as a "dramatic appeal to gut emotion" that "has no place in a courtroom,"<sup>111</sup> Smith called a press conference, insisted he had done nothing wrong, and announced that he would seek the death penalty again in the case.<sup>112</sup> When a federal court set aside a second death sentence due to similar misconduct,<sup>113</sup> Smith called another press conference and expressed his "anger" at the decision, accused the reviewing court of "sensationalism" and "emotionalism," suggested that the "judges of this court have personal feelings against the death penalty," and vowed to seek the death penalty again.<sup>114</sup>

Attempts to exploit capital cases for political purposes may backfire, however, particularly if the prosecution is not ultimately successful in obtaining the death penalty. For example, a verdict of voluntary manslaughter instead of first degree murder transformed the case of Bruce R. Morris in St. Charles County, Missouri, from one in which a defendant's life was at stake to one in which a political career was at stake. "[C]ourthouse observers, including [the prosecutor's] former employees" criticized the prosecutor, who was a candidate for circuit court judge, and

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<sup>110</sup> Trisha Renaud, *DA's Office Assigned Cases to Judges*, FULTON COUNTY DAILY REP. (Ga.), Apr. 26, 1995, at 1, 2 (reporting the discovery of the assignment system by defense lawyers who noticed a pattern of assignments; prosecutor Doug Pullen, while acknowledging his office's involvement, dismissed it as "a wad of chewing gum on the legal shoe of life").

<sup>111</sup> *Hance v. Zant*, 696 F.2d 940, 952-53 (11th Cir.) (finding that the prosecutor's inflammatory remarks in the sentencing phase of the murder prosecution, which appealed to the jury's fears and emotions and were highly prejudicial to the defendant, rendered the sentencing hearing fundamentally unfair and unconstitutional), *cert. denied*, 463 U.S. 1210 (1983).

<sup>112</sup> Transcript of Hearing of Sept. 11-14, 1991, at 144-46, *Brooks v. State*, 415 S.E.2d 903 (Ga. 1992) (No. S92A0062) (on file with the *Boston University Law Review*); Defendant's Exhibit 40 (press release introduced at Hearing of Sept. 11-14, 1991), *Brooks* (No. S92A0062) (on file with the *Boston University Law Review*).

<sup>113</sup> In 1983, a panel of the United States Court of Appeals for the Eleventh Circuit set aside the death sentence due to the prosecutor's argument during the sentencing phase. *Brooks v. Francis*, 716 F.2d 780 (11th Cir. 1983). A petition for rehearing en banc was granted, *Brooks v. Francis*, 728 F.2d 1358 (11th Cir. 1984), although the en banc court ultimately set aside the conviction and sentence on other grounds, *Brooks v. Kemp*, 809 F.2d 700 (11th Cir.), *cert. denied*, 483 U.S. 1010 (1987).

<sup>114</sup> Phil Gast, *District Attorney Criticizes Court for Rejecting Sentence*, COLUMBUS ENQUIRER (Ga.), Sept. 17, 1983, at A-1, A-2.

stated that the trial was the prosecutor's first jury trial in memory.<sup>115</sup> They also accused him of taking the case to trial just because he was running for judge.<sup>116</sup>

Prosecutors may be criticized for failure to seek the death penalty, even when the law does not permit it. For example, a California prosecutor criticized a Colorado prosecutor for not seeking the death penalty against a defendant who had committed crimes in both states even though the Colorado prosecutor explained that there were no statutory aggravating circumstances that would permit him to seek the death penalty.<sup>117</sup>

Although it may be unethical and improper for prosecutors to campaign on promises to seek the death penalty or on their success in obtaining it,<sup>118</sup> there is no effective remedy to prevent the practice.<sup>119</sup> Moreover, capital cases produce so much publicity and name recognition that explicit promises to seek death are hardly necessary. As a result, prosecuting capital cases remains a way of obtaining a judgeship. As will be discussed later, some persons who reach the bench in this manner have difficulty relinquishing the prosecutorial role. But even when a prosecutor is not seeking a judicial post, or is unsuccessful in obtaining one, the political use of the death penalty in the discharge of prosecutorial responsibilities may spill over into elections for judicial office and influence the exercise of judicial discretion. The political consequences of decisions by both prosecutor and judge become apparent for all to see.

### C. *The Death Penalty's Prominence in the Election, Retention, and Promotion of Judges*

With campaigning for the death penalty and against judges who overturn capital cases an effective tactic in the quest for other offices, it is not surprising that the death penalty has become increasingly prominent in

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<sup>115</sup> Marianna Riley, *Morris Verdict of Manslaughter Draws Criticism*, ST. LOUIS POST-DISPATCH, Mar. 25, 1988, at 1.

<sup>116</sup> *Id.* He lost the election. Marianna Riley, *Democratic Judges Rush, Dalton Buck GOP Trend to Retain Seats*, ST. LOUIS POST-DISPATCH, Nov. 11, 1988, at 1.

<sup>117</sup> Ann Carnahan, *DA Under Fire on Death Penalty; Critics Say Ritter Should Have Made Capital Case in 3 Slayings*, ROCKY MTN. NEWS, Sept. 26, 1994, at 11A (describing how Denver District Attorney Bill Ritter was under fire for not having sought the death penalty against a triple-homicide suspect).

<sup>118</sup> Kenneth Bresley, *Seeking Justice, Seeking Election, and Seeking the Death Penalty: The Ethics of Prosecutorial Candidates' Campaigning on Capital Convictions*, 7 GEO. J. LEGAL ETHICS 941, 946-52 (1994) (arguing that seeking the death penalty for political reasons and campaigning on obtaining the death penalty violates a prosecutor's responsibility to see that justice is done, *Berger v. United States*, 295 U.S. 78, 88 (1935), as well as the MODEL CODE OF PROFESSIONAL RESPONSIBILITY (1986), AMERICAN BAR ASS'N, STANDARDS FOR CRIMINAL JUSTICE, THE PROSECUTOR'S STANDARDS (3d ed. 1993), and the NATIONAL PROSECUTION STANDARDS (2d ed. 1991)).

<sup>119</sup> *Id.* at 952-58.

contested and retention elections for judges. Not only the judge, but her political supporters as well, may suffer the consequences of an unpopular ruling in a capital case.

Judicial campaigns in which the death penalty is an issue can degenerate to almost Orwellian levels of absurdity, raising serious questions about the ability of judges to remain fair and impartial. An opponent can seize upon a judge's ruling in one case and, by focusing on the facts of the crime and completely ignoring the legal issue, make even the toughest judge appear "soft on crime." As one commentator has noted:

When the mother of a young daughter, who was brutally murdered and mutilated, complains in a television commercial about a judge vacating the killer's death sentence, the judge has little recourse. A judge can explain that a defendant's right was violated, which warrants a new trial, but the public, unfamiliar with constitutional law, sees only the grieving mother and a picture of the innocent victim.<sup>120</sup>

Opponents criticize judges for a lack of cruelty.<sup>121</sup> Judges seek public approval by announcing their delight in helping to extinguish human life.<sup>122</sup> Constitutional rights are dismissed as mere "technicalities." A few rulings in highly publicized cases may become more important to a judge's survival on the bench than qualifications, judicial temperament, management of the docket, or commitment to the Constitution and the rule of law.<sup>123</sup>

In the 1994 primary election for the Texas Court of Criminal Appeals, the incumbent presiding judge accused another member of the court of voting to grant relief for convicted defendants more often than other judges.<sup>124</sup> Although a Republican candidate for the second seat on the

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<sup>120</sup> Thomas M. Ross, *Rights at the Ballot Box: The Effect of Judicial Elections on Judges' Ability to Protect Criminal Defendants' Rights*, 7 LAW & INEQUALITY 111, 127 (1988).

<sup>121</sup> See Gerald F. Uelman, *Commentary: Are We Reprising a Finale or an Overture?*, 61 S. CAL. L. REV. 2069, 2072 (1988) ("The questions [debated in state judicial elections] are . . . simple: Should a judge who votes to reverse the conviction of a heinous killer be kept on the bench?" (citing *John Dixon Doesn't Think 20 Stab Wounds Are Enough*, SHREVEPORT TIMES, Sept. 18, 1988 (full page advertisement))).

<sup>122</sup> See Jerry Hicks, *O.C. Judge Decries Delay in Executing the 'Deserving'*, L.A. TIMES, June 9, 1991, at A1 (relating one judge's dismay that the six death sentences he imposed would not be carried out soon because of appellate review).

<sup>123</sup> Ross, *supra* note 120, at 111-12 (noting that elections can hamper a judge's ability to be an impartial, unbiased adjudicator in that there is a negative public reaction to what some see as the expansion of defendants' constitutional rights); see also Kurt E. Scheuerman, Note, *Rethinking Judicial Elections*, 72 OR. L. REV. 459, 481 (1993) (noting that an Oregon Supreme Court justice's defeat demonstrated how judicial elections can turn, not on qualifications, or even jurisprudence, but on political issues and results of individual cases).

<sup>124</sup> Gardner Selby, *3 Positions Open on State's Top Criminal Appeals Court*,

court lamented what he called the "lynch mentality" of the campaign,<sup>125</sup> two other candidates for the Republican nomination, both former prosecutors, indicated their willingness to treat defendants severely.<sup>126</sup> One stated that the role of the court is to ensure justice, not to reverse convictions because of "technicalities" or "honest mistakes,"<sup>127</sup> while the other called the Court of Criminal Appeals a "citadel of technicality" that neglected the interests of crime victims and citizens at large.<sup>128</sup> Two candidates for the third position on the court criticized the incumbent for granting a new trial to a man convicted of homicide.<sup>129</sup> One challenger promised to bring a "common sense" approach to such cases.<sup>130</sup>

An Alabama Court of Criminal Appeals judge, who was also a candidate for the state's supreme court, accused the Alabama Supreme Court of being "too left and too liberal" in capital cases and challenged the court to set execution dates in twenty-seven cases that were pending in the federal courts on habeas corpus review.<sup>131</sup> Similarly, Sacramento Municipal Court Judge Gary Mullen, a candidate for superior court in California in 1992, ran a television commercial that criticized the judicial system for taking too long to execute Robert Alton Harris, the first person executed under California's current death penalty law.<sup>132</sup> A former governor of Colorado announced a campaign to remove one of his own appointees from the state supreme court because of the appointee's votes in capital cases.<sup>133</sup> He also indicated he might oppose another of his appointees, warning that "[h]e's got four years [before his retention elec-

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HOUSTON POST, Feb. 13, 1994, at A-29 (describing the political jousting for three seats on the Texas Court of Criminal Appeals in the 1994 elections).

<sup>125</sup> *Id.* That candidate, Norman Lanford, who had previously been voted off the trial court bench in Houston after unpopular rulings in criminal cases, see *supra* note 19-23 and accompanying text, was defeated in the Republican primary. See *Results of Statewide Race*, HOUSTON POST, Apr. 13, 1994, at A-20.

<sup>126</sup> Selby, *supra* note 124, at A-29.

<sup>127</sup> *Id.*

<sup>128</sup> *Id.*

<sup>129</sup> *Id.* The court "ordered a new trial because the names of potential jurors had been shuffled one too many times at the original trial." *Id.*

<sup>130</sup> *Id.*

<sup>131</sup> Tom Hughes, *Montiel Challenges Court to Schedule Executions*, MONTGOMERY ADVERTISER (Ala.), May 19, 1994, at 3B.

<sup>132</sup> Dan Bernstein, *Race for Superior Court Seat Getting Political*, SACRAMENTO BEE, May 31, 1992, at B1 (describing the "political" campaigning tactics two candidates used for the 1992 judicial elections to California's superior court). Despite these tactics, the candidate lost the election. See *Capitol Digest*, SACRAMENTO BEE, July 21, 1992, at A4 (noting that Lloyd Connelly would take office as a Sacramento County superior court judge in January 1993).

<sup>133</sup> Burt Hubbard & Ann Carnahan, *Angered Over Death Penalty, Lamm Assails Two Judges: Colorado High Court Justices' 'Disregard Vote of People,' Former Governor Charges*, ROCKY MTN. NEWS, Mar. 12, 1994, at 5A.

tion]. Maybe he'll change his mind."<sup>134</sup>

Chief Justice James Exum survived an effort to remove him from the North Carolina Supreme Court, but only with considerable financial cost and loss to the standing of the court.<sup>135</sup> The person spearheading the campaign against Exum stated that the defeat of Chief Justice Rose Bird in California had demonstrated that "you can mount a significant race against a chief justice on the basis of the death penalty."<sup>136</sup> Exum's critics noted that he had voted against the death penalty while a member of the North Carolina legislature and dissented from eighteen of the supreme court's twenty-four rulings upholding a death sentence.<sup>137</sup>

Challengers are not the only ones to use the death penalty. Incumbent judges have used capital cases to advance their chances of reelection or retention. A Florida Supreme Court justice recalled that when he was responsible for assignments as a trial court judge, judges facing reelection asked him for assignments to criminal cases because it would help get their names in the press.<sup>138</sup> In Louisville, Kentucky, a judge sought to have a colleague who was four days away from an election preside over the arraignment of an African-American defendant accused of the highly publicized murder of a white deputy sheriff.<sup>139</sup> Local television stations set up numerous cameras in the courtroom.<sup>140</sup> The judge on whose docket the case appeared summoned defense counsel to chambers and explained that Judge Jim Shake would preside at the arraignment because "Jim's on the ballot Tuesday."<sup>141</sup>

In another example of judicial exploitation of capital cases, Bob Austin,

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<sup>134</sup> *Id.*

<sup>135</sup> See Maura Dolan & Don Irwin, *Anti-Bird Drive Inspires Moves in Other States*, L.A. TIMES, Oct. 25, 1986, pt. 1, at 1, 18 (estimating that campaign costs would reach between \$500,000 and \$1,000,000 for a job that pays \$75,000 per year, and reporting that well-financed conservative forces had also targeted leading jurists in North Carolina and Ohio as well, emphasizing their judicial records on the death penalty and drugs, among other issues). See generally *Politics and the Death Penalty: Can Rational Discourse and Due Process Survive the Perceived Political Pressure*, 21 FORDHAM URB. L.J. 239, 271-73 (1994) (reprinting Chief Justice Exum's remarks made as part of an ABA Section of Individual Rights and Responsibilities program) (noting that even a recent unanimous decision reversing a death sentence was prominently criticized in the newspaper).

<sup>136</sup> Dolan & Irwin, *supra* note 135, at 18.

<sup>137</sup> *Id.*

<sup>138</sup> *Electing Judges Is Poor Policy, Overton Tells Panel*, FLA. B. NEWS, May 1, 1989, at 4.

<sup>139</sup> Motion to Disqualify Present and Former Members of Jefferson Circuit Court and Jefferson District Court and to Obtain Appointment of a Special Judge from Outside Jefferson County 3-4, Commonwealth v. Bard, No. 93CR2373 (Ky. Cir. Ct. Jefferson County Nov. 9, 1993) (on file with the *Boston University Law Review*).

<sup>140</sup> *Id.* at 5.

<sup>141</sup> *Id.* at 3. Defense counsel responded by filing a motion to recuse all members of

a lower court judge who was a candidate for circuit court in Alabama, was appointed to preside at a capital trial that began just two weeks before he stood for election.<sup>142</sup> Austin refused to continue the case even though the defense lawyer sought a continuance because he was suffering from a serious infection that was a complication of polio.<sup>143</sup> In addition, the defense sought to disqualify Austin because he was running a "law and order" campaign for judge and would appear on the ballot in just two weeks.<sup>144</sup> Austin denied both motions.<sup>145</sup> The denial of the continuance was front-page news in the two local newspapers the weekend before trial began.<sup>146</sup> The denial of a motion to recuse Austin and the denial of a change of venue were front-page news the following week as jury selection began.<sup>147</sup> Austin presided over the trial, and the jury convicted and

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the court. As a result of defense counsel's opposition, the judge who was on the impending ballot did not preside at the arraignment. *Id.* at 6.

<sup>142</sup> Record at 159-69, *Adkins v. State*, No. CC 88-22 (Ala. Cir. Ct. St. Clair County 1988) (on file with the *Boston University Law Review*), *aff'd*, 600 So. 2d 1054 (Ala. Crim. App. 1990), *aff'd in part and remanded*, 600 So. 2d 1068 (Ala. 1992). The trial began on October 24, 1988; the election was held on November 8. Austin, who was a district court judge, sought to move up to the circuit court, the highest trial-level court in Alabama. *Id.* at 1061-62. Austin was the Democratic nominee for the circuit court position. His Republican opponent was a former FBI agent who had served eight years as the U.S. Attorney for the Northern District of Alabama and eight years as county solicitor. *Tuesday Means the End of Politicking*, ST. CLAIR NEWS-AEGIS (Ala.), Nov. 6, 1988, at 1A, 5A.

<sup>143</sup> *Adkins v. State*, 600 So. 2d 1054, 1060 (Ala. Crim. App. 1990), *aff'd in part and remanded*, 600 So. 2d 1068 (Ala. 1992).

<sup>144</sup> *Id.* at 1061-62; *see also* Record at 161-62, *Adkins* (No. CC 88-22). One of Austin's newspaper advertisements quoted Alabama Governor Guy Hunt as saying, "Elect judges on their qualifications . . . It makes no difference whether a judge called upon to hand down a death sentence to a murderer is a Republican or a Democrat." *How Do You Elect Good Judges?*, S. DEMOCRAT (Oneonta, Ala.), Nov. 2, 1988, at B-6 (advertisement for Bob Austin for Circuit Judge) (omission in original).

<sup>145</sup> *See Adkins*, 600 So. 2d at 1060-63 (affirming the denial of the motions). During jury selection, defense counsel pointed out to Judge Austin that he had excused jurors who had less serious health problems than defense counsel. *Id.*; *see also* Record at 163, *Adkins* (No. CC 88-22).

<sup>146</sup> Kelly Bryan, *Adkins' Trial Will Start on Schedule*, ST. CLAIR NEWS-AEGIS (Ala.), Oct. 23, 1988, at 1A (reporting that District Judge Bob Austin, who was presiding over the case by special appointment, had denied the motion for a continuance); Carol Pappas, *Ricky Adkins to Go on Trial Monday; Continuance Denied*, DAILY HOME (Talladega, Ala.), Oct. 22, 1988, at 1 (reporting that Austin denied the continuance and a motion to suppress statements).

<sup>147</sup> Carol Pappas, *Jury Selection to Begin Today in Adkins Capital Murder Trial*, DAILY HOME (Talladega, Ala.), Oct. 25, 1988, at 1 (reporting that defense counsel cited Judge Austin's "current political campaign for circuit judge" and "speculated that the judge may not be able to give the case a fair and impartial hearing"); Scottie Vickery, *Murder Trial Won't Be Moved*, BIRMINGHAM NEWS, Oct. 25, 1988, at 1E

recommended the death penalty before the election. Austin won the election, and, after being sworn in as circuit judge, followed the jury's recommendation and imposed the death penalty.<sup>148</sup>

A judge's votes in capital cases can threaten his or her elevation to a higher court. No matter how well qualified a judge may be, perceived "softness" on crime or on the death penalty may have consequences not only for the judge, but also for those who would nominate or vote to confirm the judge for another court. For example, in 1992 groups campaigned against the retention of Florida Chief Justice Rosemary Barkett for the Florida Supreme Court because of her votes in capital cases.<sup>149</sup> Then in 1994 Barkett's nomination to the U.S. Court of Appeals for the Eleventh Circuit came under fire because of her record on capital punishment during nine years on the Florida Supreme Court.<sup>150</sup> After a long delay, the Senate finally confirmed Barkett by a vote of sixty-one to thirty-seven.<sup>151</sup>

Despite Barkett's confirmation to the Eleventh Circuit, campaigns against her and other judges tagged as "soft on crime" continued. Bill Frist, in his successful campaign to unseat Tennessee Senator Jim Sasser, attacked Sasser for voting for Barkett and for having recommended the nomination of a federal district judge who, two months before the election, granted habeas corpus relief to a death-sentenced man.<sup>152</sup> Frist appeared at a news conference with the sister of the victim in the case in which habeas relief had been granted.<sup>153</sup> After the victim's sister criticized Sasser for recommending U.S. District Judge John Nixon for the federal bench, Frist said that Sasser's vote to confirm Judge Barkett showed that he "still hasn't learned his lesson."<sup>154</sup>

In Virginia, challenger Oliver North attacked Senator Charles Robb

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(reporting the denial of change of venue and that Judge Austin was running for circuit judge in the November election).

<sup>148</sup> Marie West Cromer, *Newly Sworn Judge Metes Death to Adkins*, BIRMINGHAM POST-HERALD, Nov. 22, 1988, at 1D.

<sup>149</sup> Lucy Morgan, *Persistence Marks Barkett Fray*, ST. PETERSBURG TIMES, Oct. 21, 1992, at 1B (describing how the National Rifle Association and other groups vigorously lobbied against Barkett in her retention election because of her alleged softness on crime, despite the fact that she voted with the court's majority 91% of the time).

<sup>150</sup> See, e.g., Jeanne Cummings, *Republicans Grill Clinton Nominee; Senators Hone In on Death Penalty Views*, ATLANTA J. & CONST., Feb. 4, 1994, at A10 (noting how conservatives accused the judge of being too "soft on crime," and criticized her opinions on the death penalty, among other issues).

<sup>151</sup> Craig Crawford, *Senate Confirms Florida Chief Justice Barkett for Federal Judgeship*, ORLANDO SENTINEL, Apr. 15, 1994, at A1 (noting that the Florida Chief Justice's Senate confirmation for the federal judgeship sparked the most heated debate so far over President Clinton's bench nominees).

<sup>152</sup> *Political Notebook*, COM. APPEAL (Memphis), Oct. 8, 1994, at 3B.

<sup>153</sup> *Id.*

<sup>154</sup> *Id.*

for voting to confirm the nomination of Judge Barkett, and of Judge H. Lee Sarokin's elevation to the Third Circuit.<sup>155</sup> Senator Edward M. Kennedy's opponent attacked him in an advertisement for voting to confirm Barkett; the advertisement described Barkett as a judge who tried "to block the death penalty for a man convicted of murdering two policemen" because of her vote in a case while a justice on the Florida Supreme Court.<sup>156</sup> Senator Diane Feinstein was also attacked for voting for Barkett: Challenger Michael Huffington's advertisements described Judge Barkett as having overturned the death penalty "even more than Rose Bird."<sup>157</sup> A Huffington television commercial concluded by stating, "Feinstein judges let killers live after victims died."<sup>158</sup> In full-page newspaper advertisements, the Huffington campaign described the grisly facts of three capital cases in which Barkett had voted to reverse.<sup>159</sup> None of the advertisements attacking Barkett mentioned the legal basis for her decision or that she had voted to uphold more death sentences than she voted to reverse.<sup>160</sup>

Although pro-death-penalty campaigns are not always successful in defeating judges, even the threat of such a campaign may intimidate a judge. Challenges also make retaining a judgeship more expensive than it would otherwise be,<sup>161</sup> thereby forcing a candidate to raise more money and contributing to the perception that those who contribute to judicial campaigns can get more justice than others.<sup>162</sup> One of the saddest and

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<sup>155</sup> *On the Trail*, HOUSTON POST, Oct. 27, 1994, at A-9.

<sup>156</sup> Scott Lehigh & Frank Phillips, *Romney, Kennedy Air Another Round of Attack Ads*, BOSTON GLOBE, Oct. 31, 1994, at 21.

<sup>157</sup> David Leshner, *Huffington Attacks Rival on Judges*, L.A. TIMES, Sept. 30, 1994, at A3. Huffington also criticized Feinstein for voting to confirm Judge Sarokin's elevation, charging that Sarokin once voted to free a "cop killer" without noting that the defendant's conviction was overturned because the prosecution withheld evidence. *Id.* at A23; see also William Endicott, 'Feinstein's Judges': A False Link, L.A. DAILY J., Oct. 19, 1994, at 6 (commenting that Huffington's advertisements regarding Feinstein's votes for Barkett and Sarokin were both "irresponsible and untruthful").

<sup>158</sup> Leshner, *supra* note 157.

<sup>159</sup> *Here Are the Facts in a REAL Murder Case. See if You Agree with the Judge's Decision*, L.A. TIMES, Sept. 22, 1994, at 17A (advertisement).

<sup>160</sup> Leshner, *supra* note 157; see also Endicott, *supra* note 157.

<sup>161</sup> See, e.g., Mark A. Grannis, Note, *Safeguarding the Litigant's Constitutional Right to a Fair and Impartial Forum: A Due Process Approach to Improprieties Arising from Judicial Campaign Contributions from Lawyers*, 86 MICH. L. REV. 382 (1987) (noting that regardless of which electoral system a state uses to select judges, the candidate will always have to raise money); see also Robert F. Utter, *Selection and Retention—A Judge's Perspective*, 48 WASH. L. REV. 839, 845 (1973) (noting that in recent Washington Supreme Court elections, the campaign forced some judges to use most of the proceeds from the sale of their homes to pay for the extraordinary campaign costs).

<sup>162</sup> See, e.g., Cornyn, *supra* note 90, at 378 (Cornyn, a justice of the Texas Supreme



most recent examples is the bitter campaign waged for chief justice of Alabama's supreme court in 1994. The challenger accused the incumbent of shaking down attorneys who had cases before the court for contributions, while the incumbent ran advertisements in which the father of a murder victim accused the challenger of being an accomplice to the murder.<sup>163</sup>

Whether the "hydraulic pressure" of public opinion that Justice Holmes once described<sup>164</sup> and the political incentives accompanying it are appropriate considerations for publicly elected prosecutors is doubtful,<sup>165</sup> but clearly such considerations have no place in the exercise of the judicial function.<sup>166</sup> Yet in jurisdictions where judges stand for election—often with the prosecution in a position tantamount to that of a running mate—judges are subject to the same pressures. As a result of the increasing prominence of the death penalty in judicial elections as well as

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Court, stating 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."); Orrin W. Johnson & Laura J. Urbis, *Judicial Selection in Texas: A Gathering Storm?*, 23 TEX. TECH L. REV. 525, 545-52 (1992) (discussing the rising campaign costs in Texas judicial elections); Utter, *supra* note 161, at 843-44 (noting that lawyers who support the victors or the losers in a political campaign subsequently have reason to question the legitimacy of judgments made by judges). A related problem is the efforts of interest groups—such as personal-injury lawyers as well as insurance and business concerns—to fund the campaigns of preferred candidates who will support their interests on the bench. The perceived results of such interest-group domination in Texas judicial elections was described by one commentator 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 the fact findings of trial judges, all in the pursuit of desired results. . . . Case by case results-oriented decisions have replaced the rule of law.

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.

<sup>163</sup> Bill Poovey, *Hooper Criticizes Chief Justice for Soliciting from Lawyers*, TUSCALOOSA NEWS, July 20, 1994, at 8B; Phillip Rawls, *Justice Race Another Political Brawl*, COLUMBUS LEDGER-ENQUIRER (Ga.), Dec. 10, 1994, at B-2.

<sup>164</sup> Northern Sec. Co. v. United States, 193 U.S. 197, 400-01 (1904) (Holmes, J., dissenting) (noting that the judiciary must construe a statute that has generated immediate and overwhelming public interest with a sense of natural interpretation that one would use if the same question arose in a similar act that had not elicited any public attention).

<sup>165</sup> See *supra* note 118.

<sup>166</sup> The judge's responsibility is to "hold the balance nice, clear and true between the State and the accused." *Tumey v. Ohio*, 273 U.S. 510, 532 (1927); see discussion of this case *infra* text accompanying notes 318-22; see also MODEL CODE OF JUDICIAL CONDUCT Canon 3B(2) (1990) (stating that a judge "should not be swayed by partisan interests, public clamor or fear of criticism").

other campaigns for public office, judges are well aware of the consequences to their careers of unpopular decisions in capital cases.

### III. THE IMPACT ON THE IMPARTIALITY OF JUDGES

The political liability facing judges who enforce the Bill of Rights in capital cases undermines the independence, integrity, and impartiality of the state judiciary. Judicial candidates who promise to base their rulings on "common sense,"<sup>167</sup> unencumbered by technicalities,<sup>168</sup> essentially promise to ignore constitutional limits on the process by which society may extinguish the life of one of its members. Justice Byron White once observed, "If [for example,] a judge's ruling for the defendant . . . may determine his fate at the next election, even though his ruling was affirmed and is unquestionably right, constitutional protections would be subject to serious erosion."<sup>169</sup> Justice William Brennan noted that the risk of a biased judge is "particularly acute"<sup>170</sup> in capital cases:

Passions, as we all know, can run to the extreme when the State tries one accused of a barbaric act against society, or one accused of a crime that—for whatever reason—inflames the community. Pressures on the government to secure a conviction, to "do something," can overwhelm even those of good conscience. When prosecutors and judges are elected, or when they harbor political ambitions, such pressures are particularly dangerous.<sup>171</sup>

Rulings in a publicized case can have major political effects, such as loss

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<sup>167</sup> See, e.g., George Skelton, *Governor Pledges Common-Sense Court*, L.A. TIMES, Jan. 6, 1987, at 13, 16 (quoting California Governor George Deukmejian's inaugural promise that "all of my appointees to our courts will be common-sense judges who embody the qualities of experience, fairness, integrity and intelligence.") Alluding to the Bird Court's overturning of death penalty sentences, Deukmejian also asserted that the voters "told us again . . . that life is sacred and that we must do everything we can to protect the lives of innocent citizens." *Id.*; see also *supra* text accompanying note 130.

<sup>168</sup> There appear to be few candidates for judicial office who share the courage of former Nebraska Supreme Court Justice Norman Krivosha, who once said that he was "eager to respond when the public complained about judges 'getting crooks off on technicalities.' I studied those technicalities in school . . . they were (portions of) the Constitution of the United States." Sheila Macmanus, *Changes in Code of Judicial Conduct, Judicial Campaigns and Alcohol Abuse Among Topics Debated at 11th National Conference*, 72 JUDICATURE 185, 185 (1988) (quoting Justice Norman Krivosha, Address Opening the 11th National Conference for Judicial Conduct Organizations (Sept. 1988)).

<sup>169</sup> Ruth Marcus, *Justice White Criticizes Judicial Elections*, WASH. POST, Aug. 11, 1987, at A5.

<sup>170</sup> *Wainwright v. Witt*, 469 U.S. 412, 459 (1985) (Brennan, J., dissenting).

<sup>171</sup> *Id.* (citations omitted).

of one's position or any hope of promotion, and judges are aware of this as they make controversial decisions, particularly in capital cases.

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."<sup>172</sup> In no other area of American law are so many tough decisions presented as in a capital case. And no other cases demonstrate so clearly the validity of the ABA Commission's finding.

A judge who faces election is more likely to sentence a defendant to death than a jury that heard the same evidence. In some instances, political considerations make it virtually impossible for judges to enforce the constitutional protections to a fair trial for the accused, such as granting a change of venue or continuance, or suppressing evidence. Judges have failed miserably to enforce the most fundamental right of all, the Sixth Amendment right to counsel, in capital cases. And many judges routinely abdicate their judicial responsibility and allow the lawyers for the state to write their orders resolving disputed factual and legal issues in capital cases.

#### A. Overrides of Jury Sentences

Four states—Alabama, Florida, Indiana, and Delaware—permit a judge to override a jury's sentence of life imprisonment and impose the death penalty.<sup>173</sup> Alabama judges, who face partisan elections every six years,<sup>174</sup> have overridden jury sentences of life without parole and imposed the death penalty forty-seven times, but have vetoed only five jury recommendations of death.<sup>175</sup> Between 1972 and early 1992, Florida trial judges, who face contested elections every six years, imposed death sentences over 134 jury recommendations of life imprisonment, but overrode only fifty-one death recommendations.<sup>176</sup> Between 1980 and early 1994, Indiana judges, who face retention elections every six years, imposed death sentences over eight jury recommendations of life imprisonment, but overrode only four death recommendations to impose

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<sup>172</sup> American Bar Ass'n, *Report of Commission on Professionalism*, 112 F.R.D. 243, 293 (1986).

<sup>173</sup> ALA. CODE § 13A-5-47(e) (1994); FLA. STAT. ANN. § 921.141(3) (West 1985); IND. CODE ANN. § 35-50-2-9(e) (West Supp. 1994); DEL. CODE ANN. tit. 11, § 4209(d) (Supp. 1994); see also *Spaziano v. Florida*, 468 U.S. 447 (1984) (upholding the constitutionality of judicial overrides).

<sup>174</sup> ALA. CODE § 17-2-7 (1987).

<sup>175</sup> *Harris v. Alabama*, 115 S. Ct. 1031, 1040 (1995) (Stevens, J., dissenting) (recounting Alabama override statistics compiled by the Alabama Prison Project).

<sup>176</sup> *Id.* at 1040 n.8 (citing Michael L. Radelet & Michael Mello, *Death-to-Life Overrides: Saving the Resources of the Florida Supreme Court*, 20 FLA. ST. U. L. REV. 195, 196, 210-11 (1992)).

sentences of life imprisonment.<sup>177</sup> Delaware did not adopt the override until 1991,<sup>178</sup> and that state's judges do not stand for election;<sup>179</sup> the first seven times judges used it, they overrode jury recommendations of death and imposed life sentences.<sup>180</sup>

Indeed, the sentencing decisions of some judges are a foregone conclusion. Members of the U.S. Supreme Court have noticed the tendency of Jacksonville, Florida judge Hudson Olliff to override jury sentences of life imprisonment and impose death.<sup>181</sup> An override could also be anticipated from another Florida circuit judge, William Lamar Rose, who protested the U.S. Supreme Court's decision in 1972 finding the death penalty unconstitutional<sup>182</sup> by slinging a noose over a tree limb on the courthouse lawn.<sup>183</sup> In Alabama, three judges account for fifteen of the forty-seven instances in which jury sentences of life imprisonment were overridden and death imposed.<sup>184</sup>

Commenting on judicial overrides of jury decisions, Justice Stevens has observed:

[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

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<sup>177</sup> *Id.* at 1040 n.8 (citing Memorandum from Paula Sites, Legal Director, Indiana Public Defender Council, to Supreme Court Library (Feb. 8, 1994) (on file with the Clerk of the Supreme Court)).

<sup>178</sup> DEL. CODE ANN. tit. 11, § 4209 (Supp. 1994).

<sup>179</sup> See *supra* note 83.

<sup>180</sup> Katheryn K. Russell, *The Constitutionality of Jury Override in Alabama Death Penalty Cases*, 46 ALA. L. REV. 5, 11 n.52 (1994).

<sup>181</sup> *Barclary v. Florida*, 463 U.S. 939, 980-81 & 981 n.12 (1983) (Marshall, J., dissenting) (observing Judge Olliff's use of the same boilerplate language in three different cases in overriding jury sentences and imposing the death penalty).

<sup>182</sup> *Furman v. Georgia*, 408 U.S. 238 (1972).

<sup>183</sup> VON DREHLE, *supra* note 48, at 414-18 (describing Judge Rose's override in favor of the death sentence in the case of Doug McCray, and the eventual reversal of that conviction after 17 years in the Florida state courts).

<sup>184</sup> Statistics compiled by the Alabama Prison Project (Nov. 29, 1994) (lodged with the clerk of the U.S. Supreme Court in *Harris v. Alabama*, 115 S. Ct. 1031 (1995)) (showing that six of the overrides were by Judge Ferrill McRae; five were by Judge Randall Thomas, who overrode the jury and imposed death on Louise Harris, the petitioner in *Harris v. Alabama*, and four were by Judge Braxton L. Kittrell, Jr.; see also Amended Motion for Recusal 7-8, *Whisenant v. State*, No. CC 77-697 (Ala. Cir. Ct. Mobile County Feb. 7, 1991) (on file with the *Boston University Law Review*) (showing that although there are nine circuit court judges in Mobile, Judge McRae had presided over 30% of the capital cases because he assigned a large number of such cases to himself).

recommendation of life?<sup>185</sup>

Justice Stevens has also noted that jurors, even those who support candidates who are "tough on crime," are not subject to the same political pressures as judges:

I am convinced that our jury system provides reliable insulation against the passions of the polity. Voting for a political candidate who vows to be "tough on crime" differs vastly from voting at the conclusion of an actual trial to condemn a specific individual to death. Jurors' responsibilities terminate when their case ends; they answer only to their own consciences; they rarely have any concern about possible reprisals after their work is done. More importantly, they focus their attention on a particular case involving the fate of one fellow citizen, rather than on a generalized remedy for a global category of faceless violent criminals who, in the abstract, may appear unworthy of life.<sup>186</sup>

Justice Stevens was a single voice. The other eight members of the Supreme Court, without even addressing his concern about the political influences on jury overrides, held in *Harris v. Alabama* that Alabama judges could continue to override jury sentences in capital cases, simply relying on the Court's earlier decision allowing judicial overrides by judges in Florida.<sup>187</sup>

#### B. *Failure to Protect the Constitutional Rights of the Accused*

The Bill of Rights guarantees an accused certain procedural safeguards, regardless of whether those safeguards are supported by popular sentiment at the time of the trial, in order to protect the accused from the passions of the moment. But nothing protects an elected judge who enforces the Constitution from an angry constituency that is concerned only about the end result of a ruling and may have little understanding of what the law requires. Judges who must keep one eye on the next election often cannot resist the temptation to wink at the Constitution.

As previously discussed, some judges have scheduled capital cases for before an election or have refused to continue a case until after an election in order to gain the publicity and other political benefits that accom-

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<sup>185</sup> *Walton v. Arizona*, 497 U.S. 639, 713 n.4 (1990) (Stevens, J., dissenting); see also *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 do judges because juries more accurately reflect the composition and experiences of a community as a whole).

<sup>186</sup> *Harris v. Alabama*, 115 S. Ct. 1031, 1039 (1995) (dissenting opinion).

<sup>187</sup> *Id.* at 1034-36 (O'Connor, J.) (relying on *Spaziano v. Florida*). Justice Stevens also pointed out the political pressures on Florida's elected trial judges in his dissent in *Spaziano*, 468 U.S. at 486-87.

pany presiding over such a trial.<sup>188</sup> In these situations, the judge is under immense pressure to make rulings that favor the prosecution because an unpopular decision will quickly turn the anticipated benefits of association with the case into a major liability that could result in defeat in the election.

But even in less politically charged circumstances, judges face conflicts between personal political considerations and their duty to enforce the law in making decisions on a wide range of issues. For example, among the many decisions by trial judges to which reviewing courts defer are determinations under *Batson v. Kentucky*<sup>189</sup> of whether the use of peremptory jury strikes was racially motivated.<sup>190</sup> As previously discussed, many judges are former prosecutors. Before going to the bench, a judge may have hired the prosecutor appearing before him as an assistant. Even if the judge is not personally close to the prosecutor, she may be dependent upon the prosecutor's support in the next election to remain in office.<sup>191</sup> Therefore, it may be personally difficult or politically impossible for a judge to reject a the prosecutor's proffered reason for striking a minority juror.<sup>192</sup>

Judges may find it difficult to make other decisions required by law and remain popular with the voters. The Mississippi Supreme Court has acknowledged that the discretion to grant a change of venue places a "burden" on the trial judge because "the judge serves at the will of the citizenry of the district . . . [and] might be perceived as implying that a fair trial cannot be had among his or her constituents and neighbors."<sup>193</sup>

Even when a judge grants a change of venue, the objective may not be to protect the right of the accused to a fair trial. The clerk of a circuit

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<sup>188</sup> See *supra* parts II.B-C.

<sup>189</sup> 476 U.S. 79 (1986).

<sup>190</sup> *Id.* at 98; *Purkett v. Elem*, 115 S. Ct. 1769 (1995) (holding that a prosecutor's explanation that a black juror was stricken because he had long, unkempt hair, a moustache, and a beard was a "race-neutral" reason, and deferring to the state court's finding that the prosecutor did not have a discriminatory intent).

<sup>191</sup> See *supra* notes 19-23 and accompanying text (describing how Houston District Attorney Johnny B. Holmes, dissatisfied with a judge's rulings in two cases, helped cause the judge's defeat by causing congestion of the judge's docket).

<sup>192</sup> For a discussion of the types of reasons that trial courts often accept when ruling on *Batson* claims, see *United States v. Clemmons*, 892 F.2d 1153, 1159-63 (3d Cir. 1989) (Higginbotham, J., concurring) (citing cases and articles to demonstrate that in cases since *Batson* "superficial or almost frivolous excuses for peremptory challenges with racial overtones have been proffered and accepted," including "reasons that are clearly, but subtly, racial in nature"), *cert. denied*, 496 U.S. 927 (1990); Kenneth B. Nunn, *Rights Held Hostage: Race, Ideology and the Peremptory Challenge*, 28 HARV. C.R.-C.L. L. REV. 63 (1993); Michael J. Raphael & Edward J. Ungvarsky, *Excuses, Excuses: Neutral Explanations Under Batson v. Kentucky*, 27 U. MICH. J.L. REF. 229 (1993).

<sup>193</sup> *Johnson v. State*, 476 So. 2d 1195, 1209 (Miss. 1985).

court in Florida revealed several years after the death sentence was entered against Raleigh Porter that the presiding judge, Richard M. Stanley, had told the clerk that he was changing the venue to another county that had "good, fair minded people here who would listen and consider the evidence and then convict the son-of-a-bitch. Then, Judge Stanley said, he would send Porter to the chair."<sup>194</sup> The jury returned the expected verdict and Judge Stanley, wearing brass knuckles and a gun at the sentencing hearing, sentenced Porter to death.<sup>195</sup>

In *Coleman v. Kemp*,<sup>196</sup> a Georgia trial judge denied a change of venue from a small rural community inundated with media coverage of six murders committed by Maryland prison escapees. The media coverage included strong anti-defendant sentiments, such as those of the local sheriff, who publicly expressed his desire to "pre-cook [the defendants] several days, just keep them alive and let them punish," and of an editorial writer who compared the defendants to rattlesnakes and rabid dogs.<sup>197</sup> A local citizen who served as a juror in one of the cases testified that news of the murders spread in the small community "like fire in a broom sage," that "everybody was so excited and upset over it," and that the sentiment of "everybody" prior to trial was "fry 'em, electrocute 'em."<sup>198</sup> The elected trial judge, faced with a choice between his community's urge for a quick and violent response to the crime and the defendants' constitutional rights, refused to grant a change of venue. The local jury convicted the defendants and the elected Georgia Supreme Court upheld the convictions.<sup>199</sup>

The difficult job of setting aside the convictions obtained at three trials that lacked any semblance of fairness was left to the judges serving life tenure on the United States Court of Appeals for the Eleventh Circuit.<sup>200</sup> The political consequences of protecting the rights of the accused became even more apparent after the grant of habeas corpus relief. Citizens throughout Georgia presented petitions containing over 100,000 signa-

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<sup>194</sup> *Porter v. Singletary*, 49 F.3d 1483, 1487 (11th Cir. 1995) (remanding for a hearing on whether the petitioner could establish "cause" for failing to present previously his claim that he was denied a fair and impartial judge).

<sup>195</sup> *Id.* at 1488.

<sup>196</sup> 778 F.2d 1487 (11th Cir. 1985), *cert. denied*, 476 U.S. 1164 (1986).

<sup>197</sup> *Id.* at 1493, 1518. For a detailed account of the massive pretrial publicity and community attitudes, see *id.* at 1491-1537.

<sup>198</sup> *Id.* at 1533-34.

<sup>199</sup> See *Dunfee v. State*, 227 S.E.2d 746 (Ga.) (per curiam) (affirming George Dunfee's death sentence), *cert. denied*, 429 U.S. 986 (1976); *Isaacs v. State*, 226 S.E.2d 922 (Ga.) (per curiam) (affirming Carl Isaacs's death sentence), *cert. denied*, 429 U.S. 986 (1976); *Coleman v. State*, 226 S.E.2d 911 (Ga. 1976) (affirming Wayne Coleman's death sentence), *cert. denied*, 431 U.S. 909 (1977).

<sup>200</sup> *Coleman*, 778 F.2d at 1543 (granting habeas relief to Wayne Coleman); *Isaacs v. Kemp*, 778 F.2d 1482, 1487 (11th Cir. 1985) (granting habeas relief to Carl Isaacs and George Dunfee), *cert. denied*, 476 U.S. 1164 (1986).

tures to the U.S. House of Representatives Judiciary Committee's Subcommittee on Courts, urging it to impeach the three members of the Court of Appeals panel who voted unanimously for the new trials.<sup>201</sup>

A judge's decision to allow electronic and photographic coverage of court proceedings may also be influenced by political considerations at the expense of the constitutional rights of the defendant. In *Estes v. Texas*,<sup>202</sup> the Supreme Court described the potential for abuse of televising judicial proceedings:

Judges are human beings also and are subject to the same psychological reactions as laymen. Telecasting is particularly bad where the judge is elected . . . . The telecasting of a trial becomes a political weapon, which, along with other distractions inherent in broadcasting, diverts his attention from the task at hand—the fair trial of the accused.<sup>203</sup>

The Court later noted that if one judge in a district allows telecasting, then other judges in that district are almost obliged to do the same—“[e]specially . . . where the judge is selected at the ballot box.”<sup>204</sup> As a result of the greater allowance of cameras in court, a judge or prosecutor can film his or her campaign commercials using real defendants.

Judges elected at the ballot box are under even greater political pressure in some of the other decisions that they make. A good example is Georgia's postconviction relief system. Voters elect two superior court judges in Georgia's Flint Judicial Circuit, comprising four rural counties. The Georgia Diagnostic and Classification Center, the prison that houses Georgia's death row, is a major employer in the circuit. Because state postconviction actions must be brought in the county of the prison in which the inmate is incarcerated, local judges preside over a large number of those actions. In the last ten years, the two local judges—two former prosecutors—have never once granted habeas corpus relief to an inmate sentenced to death.<sup>205</sup> In reviewing these cases, however, the federal courts have found constitutional violations requiring that either the convictions or sentences be vacated in almost two-thirds of the cases.<sup>206</sup>

Political considerations are also inescapable for appellate judges who must stand for election or retention. Former California Supreme Court

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<sup>201</sup> Robert Doherty, *House Panel Says Impeachment of Judges Not Appropriate in Alday Case*, UPI, Oct. 16, 1986, available in LEXIS, News Library, UPI File.

<sup>202</sup> 381 U.S. 532 (1965).

<sup>203</sup> *Id.* at 548.

<sup>204</sup> *Id.* at 549.

<sup>205</sup> In a few cases judges visiting from other parts of the state have granted relief.

<sup>206</sup> The authors reviewed the cases of 75 individuals sentenced to death in Georgia in which the federal courts reviewed petitions for habeas corpus relief after the Flint Judicial Circuit Superior Court denied relief. In 57 of those cases, the federal court ordered either a new trial or a new sentencing proceeding. In the remaining 18 cases, the federal court denied all relief.



Justice Joseph R. Grodin described the tension that he felt when deciding cases. He admitted that it was difficult to assure himself that his vote had been entirely on the merits of the case and in no way related to the case's possible electoral implications.<sup>207</sup> 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."<sup>208</sup>

The ouster of Justice Grodin and two other justices for their alleged softness on the death penalty has produced a California Supreme Court that is markedly more likely to affirm the convictions and sentences of capital defendants. In the last five years, the Court's affirmance rate in capital cases has climbed to almost 97%, one of the highest rates in the country.<sup>209</sup> A group of professors at California law schools criticized the court for its sometimes sloppy and unclear opinions and its willingness to allow errors in the trial court to go uncorrected in capital cases. In the words of one professor, "I think they're doing the job they're supposed to do. The people wanted death. They got some justices who read the election returns and the law is certainly indeterminate enough in many cases that it can be read the way the California Supreme Court is

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<sup>207</sup> Joseph R. Grodin, *Developing a Consensus of Constraint: A Judge's Perspective on Judicial Retention Elections*, 61 S. CAL. L. REV. 1969, 1980 (1988) (echoing the admission of Justice Grodin's former colleague on the California Supreme Court, Justice Otto Kaus, that his votes in critical cases may have been subconsciously influenced by his awareness that the outcomes could affect upcoming judicial elections).

<sup>208</sup> Katie Wood, *Not Just a Rubber Stamp Anymore*, FULTON COUNTY DAILY REP. (Ga.), Jan. 25, 1993, at 1, 5. Although the justice maintained that the Georgia Supreme Court is now more willing to enforce the Constitution than it had been previously, the state's attorney general has made it clear that some of the members of the court may pay at the polls as a result. Attorney General Michael Bowers has called the court "the most liberal in the country" and asserted that the court, led by Justice Robert Benham, an African-American, is on a path to abolish the death penalty. Bill Shipp, *The State Scene: Benham and the Rare High Court Fuss*, MONROE COUNTY REC. (Ga.), Apr. 5, 1995, at 4 (opinion column circulated in many Georgia newspapers). Although no objective observer would share Bowers' characterization of the Georgia Supreme Court or its purpose with regard to the death penalty, the comments by Bowers, who recently changed party affiliation from Democrat to Republican, served notice that Benham may be challenged in 1996 by a Republican candidate. Peter Mantius, *Speaking His Mind: A Decision that Robert Benham Wrote Last Year Could Bring Conservative Opposition at the Polls*, ATLANTA CONST., July 3, 1995, at 2B.

<sup>209</sup> Dolan, *State High Court Is Strong Enforcer of Death Penalty*, *supra* note 7, at A1; see also Gerald F. Uelmen, *How the Justices Stack Up*, L.A. DAILY J., June 4, 1993, Report at 7, 10 (observing only five reversals out of 89 cases decided between 1990 and 1993).

reading it."<sup>210</sup>

The price paid for an elected judiciary in Alabama, California, Georgia, Texas, and other states has been the corruption of the judges and the courts of those states. Once a judge makes a decision influenced by political considerations, in violation of the oath he or she has taken to uphold the law, both the judge and the judicial system are diminished, not only in that case, but in all cases. The realization that a ruling in a case was made with more of an eye toward the next election than the requirements of the law can irreparably damage a judge's self-perception and commitment to justice. After the first such breach of one's judicial responsibility, it is more easily repeated in future cases. Once the public understands that courts are basing their rulings on political considerations—even when the courts are giving the voters the results they want, as the California Supreme Court is now doing—it undermines the legitimacy and the moral authority of courts as enforcers of the Constitution and law.

C. *Appointment and Tolerance of Incompetent Counsel for Indigent Persons*

Judges often fail to enforce the most fundamental protection of an accused, the Sixth Amendment right to counsel, by assigning an inexperienced or incompetent lawyer to represent the accused. As a result of appointments by state court judges, defendants in capital cases have been represented by lawyers—and in at least one instance a third-year law student<sup>211</sup>—trying their first cases<sup>212</sup> or with little or no experience in trying serious cases,<sup>213</sup> lawyers who were senile or intoxi-

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<sup>210</sup> Claire Cooper, *Experts Rap Court on Death Penalty Rulings*, SACRAMENTO BEE, Sept. 20, 1988, at A1 (quoting Professor Gary Goodpaster).

<sup>211</sup> See Bright, *supra* note 39, at 1845 n.56 (1994) (describing a Mississippi case in which a third-year law student and an attorney represented a capital defendant).

<sup>212</sup> See, e.g., *Paradis v. Arave*, 954 F.2d 1483, 1490-91 (9th Cir. 1992) (reviewing the adequacy of a capital defendant's representation when the attorney had passed the bar exam just six months prior to his appointment as defendant's counsel, had not taken any classes in criminal law, criminal procedure, or trial advocacy during law school, and had never tried a jury or felony trial), *vacated and remanded*, 113 S. Ct. 1837 (1993); see also Bright, *supra* note 39, at 1845 n.56 (listing numerous other examples of the inexperience of court-appointed counsel in capital cases).

<sup>213</sup> See, e.g., *Parker v. State*, 587 So. 2d 1072, 1100-03 (Ala. Crim. App. 1991) (upholding the trial court's refusal to allow an appointed lawyer to withdraw from a capital case despite the lawyer's asserted inexperience in defense of criminal cases); *State v. Wigley*, 624 So. 2d 425, 427 (La. 1993) (reporting that three of the four attorneys appointed to defend two defendants were "civil practitioners with little criminal law experience"); *Johnson v. State*, 476 So. 2d 1195, 1204 (Miss. 1985) (finding no error when the accused was represented by one attorney with only one prior criminal case and another who was a recent graduate from law school with no criminal or civil trial experience, and the trial court denied their motion to withdraw based upon complexity of the case).

cated<sup>214</sup> or under the influence of drugs<sup>215</sup> while trying the cases, lawyers who were completely ignorant of the law and procedures governing a capital trial,<sup>216</sup> lawyers who used racial slurs to refer to their clients,<sup>217</sup> lawyers who handled cases without any investigative or expert assistance, lawyers who slept<sup>218</sup> or were absent during crucial parts of the trial,<sup>219</sup> lawyers who lacked even the most minimal skills, lawyers who filed one-page to ten-page briefs on direct appeal,<sup>220</sup> and other equally incompe-

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<sup>214</sup> See *People v. Garrison*, 765 P.2d 419, 440-41 (Cal. 1989) (describing how counsel, an alcoholic, was arrested en route to court one morning and found to have a blood-alcohol level of 0.27 mg/l; nevertheless, the court was unwilling to create a rebuttable presumption against the competence of attorneys under the influence of alcohol).

<sup>215</sup> See Bright, *supra* note 39, at 1859 (recounting the case of John Young, who was executed in Georgia after being represented by an attorney whose dependence on amphetamines and other drugs affected his ability to concentrate and who pleaded guilty to state and federal drug charges a few weeks after his client had been sentenced to death).

<sup>216</sup> See, e.g., *Douglas v. Wainwright*, 714 F.2d 1532, 1555-56 (11th Cir. 1983) (describing a Florida capital case during which the trial judge had to explain to defendant's attorney in a conference in the judge's chambers that the attorney should present mitigating evidence, not argument, during the penalty phase of the trial, to which the attorney replied, "Judge, I'm at a loss. I really don't know what to do in this type of proceeding. If I'd been through one, I would, but I've never handled one except this time."), *vacated and remanded*, 468 U.S. 1206 (1984); see also Bright, *supra* note 39, at 1842 n.49 (listing numerous other examples of the defense counsel's lack of familiarity with law and procedure).

<sup>217</sup> See, e.g., *Goodwin v. Balkcom*, 684 F.2d 794 (11th Cir. 1982) (reporting that during the sentencing phase of Terry Goodwin's capital trial, his attorney described Goodwin to the jury as "a little old nigger boy"), *cert. denied*, 460 U.S. 1098 (1983); see also Bright, *supra* note 39, at 1843 n.51 (citing other uses of racial slurs).

<sup>218</sup> Paul M. Barrett, *Lawyer's Fast Work on Death Cases Raises Doubts About System*, WALL STREET J., Sept. 7, 1994, at 1 (describing several reports of lawyers sleeping during trials); John Makeig, *Asleep on the Job; Slaying Trial Boring, Lawyer Said*, HOUSTON CHRON., Aug. 14, 1992, at A35 (describing a defendant's complaint that his lawyer slept during the trial).

<sup>219</sup> See *House v. Balkcom*, 725 F.2d 608, 612 (11th Cir.), *cert. denied*, 469 U.S. 870 (1984) ("During the state's direct examination of Sgt. Fitzgerald, Ben Atkins, then lead counsel, was not in the courtroom, but outside parking his automobile. Despite this absence, Ben Atkins conducted the cross-examination of Sgt. Fitzgerald, having never heard his direct testimony.").

<sup>220</sup> See, e.g., *Morgan v. Zant*, 743 F.2d 775, 780 (11th Cir. 1984) (reviewing a claim of ineffective assistance when defense counsel's filed brief containing only five pages of argument, counsel filed it only in response to threat of sanctions against him, and counsel failed to file a requested supplemental brief); *Banda v. State*, 768 S.W.2d 294, 297 (Tex. Crim. App.), *cert. denied*, 493 U.S. 923 (1989) (reporting that a court-appointed counsel only raised a single point of error in a brief whose substantive portion contained only 150 words); see also Bright, *supra* note 39, at 1843 n.55 (citing numerous other examples of grossly inadequate briefs).

tent lawyers who were deficient in a number of other respects.<sup>221</sup>

When the community that elects the judge is demanding an execution, the judge has no political incentive to appoint an experienced lawyer who will devote large amounts of time to the case and file applications for expert and investigative assistance, all of which will only increase the cost of the case for the community. As a result, judges frequently assign lawyers who are not willing or able to provide a vigorous defense.

For example, judges in Houston, Texas have repeatedly appointed an attorney who occasionally falls asleep in court, and is known primarily for hurrying through capital trials like "greased lightning" without much questioning or making objections.<sup>222</sup> Ten of his clients have received death sentences.<sup>223</sup> Similarly, judges in Long Beach, California, assigned the representation of numerous indigent defendants to a lawyer who tried cases in very little time, not even obtaining discovery in some of them.<sup>224</sup> The attorney has the distinction of having more of his clients sentenced to death, eight, than any other attorney in California.<sup>225</sup>

Local elected judges in Georgia have repeatedly refused to appoint for retrials of capital cases the lawyers who had successfully represented the defendants in postconviction proceedings,<sup>226</sup> even after the Georgia Supreme Court made it abundantly clear that counsel familiar with the case should be appointed.<sup>227</sup>

Local elected judges may base their assignment of counsel to indigent

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<sup>221</sup> For numerous other examples of instances of inadequate representation by court-appointed lawyers and the tolerance of such shameful representation by presiding judges and state appellate courts, see Bright, *supra* note 39, at 1835-43, 1846-49, 1855-66; Marcia Coyle et al., *Fatal Defense: Trial and Error in the Nation's Death Belt*, NAT'L L.J., June 11, 1990, at 30, 30-44 (examining the quality of representation in six states).

<sup>222</sup> Barrett, *supra* note 218, at A1. One judge in Harris County, responding to a capital defendant's complaints about his lawyer sleeping during the trial at which death was imposed, stated, "The Constitution doesn't say the lawyer has to be awake." Makeig, *supra* note 218, at A35.

<sup>223</sup> Barrett, *supra* note 218, at A1.

<sup>224</sup> Ted Rohrlick, *The Case of the Speedy Attorney*, L.A. TIMES, Sept. 26, 1991, at A1. According to a local public defender, judges liked the lawyer, Ron Slick, "because he was always ready to go to trial, even when it seemed he had inadequate time to prepare." *Id.* A substantial number of his clients asked judges to appoint someone else to defend them, but their motions were denied. *Id.*

<sup>225</sup> *Id.*

<sup>226</sup> Roberts v. State, 438 S.E.2d 905, 906 (Ga. 1994); Davis v. State, 403 S.E.2d 800 (Ga. 1991); Birt v. State, 387 S.E.2d 879, 879-80 (Ga. 1990).

<sup>227</sup> Amadeo v. State, 384 S.E.2d 181, 181 (Ga. 1989) (reversing a trial court's appointment of two lawyers with no experience in capital punishment litigation; the lawyers and defendant objected after the trial court refused to appoint previous counsel with death-penalty experience who had won a new trial for the defendant in the U.S. Supreme Court).

defendants on political ties or other considerations than the ability of the lawyer to provide competent representation. A defense attorney in Cleveland contributes thousands of dollars toward the reelection campaigns of judges and is "notorious for picking up the judges' dinner and drink tabs. They, in turn, send [the attorney] as much business as he can handle in the form of case assignments."<sup>228</sup> A study of capital cases in Philadelphia found that "Philadelphia's poor defendants often find themselves being represented by ward leaders, ward committeemen, failed politicians, the sons of judges and party leaders, and contributors to the judge's election campaign."<sup>229</sup> The lawyer who received the most appointments one year to homicide cases in Philadelphia was a former judge whom the state's supreme court removed from the bench for receiving union money.<sup>230</sup> He handled thirty-four murder cases in that year and submitted bills for \$84,650 for fees and expenses.<sup>231</sup>

As might be expected, treating the assignment of criminal cases as part of a judicial patronage system does not always result in the best legal representation. The study of capital cases in Philadelphia found that "even officials in charge of the system say they wouldn't want to be represented in Traffic Court by some of the people appointed to defend poor people accused of murder."<sup>232</sup>

Regardless of the basis for selection, assignment of cases to lawyers by judges undermines the fairness and integrity of the adversary system in other ways. Lawyers who owe their livelihood to judicial appointments may be unwilling to provide zealous representation out of fear that it will cost them future appointments. So long as this system continues, neither the judges nor the lawyers are truly independent and able to play their proper role in the adversary system.

#### D. *Delegating the Judicial Function to the Prosecutor*

Many state trial judges engage in the routine practice of adopting, usually verbatim, judicial orders that prosecutors or attorneys general have actually written. These orders are not short, routine form orders regarding minor procedural or management matters such as scheduling, but long and detailed opinions, often over forty pages in length, containing extensive factual characterizations and legal analysis. Such ghostwritten orders are not the impartial findings of disinterested judges, but rather

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<sup>228</sup> James F. McCarty, *Law and Disorder with Rumpled Suits and Befuddled Ways, Thomas Shaughnessy Has Managed to Become the Matlock of Cuyahoga County*, PLAIN DEALER (Cleveland), Oct. 23, 1994, at 8, 13.

<sup>229</sup> See Fredric N. Tulsky, *Big-time Trials; Small Time Defenses*, PHILA. INQUIRER, Sept. 14, 1992, at A1, A8.

<sup>230</sup> Roxanne Patel & Fredric N. Tulsky, *The Former City Judge Who Defended 34 Murder Suspects in a Year*, PHILA. INQUIRER, Sept. 14, 1992, at A8.

<sup>231</sup> *Id.*

<sup>232</sup> Tulsky, *supra* note 229, at A8.

the briefs of advocates, containing one-sided, exaggerated "findings" that prosecutors have tailored for strategic advantage on appeal and in post-conviction review. Besides representing the nadir of judicial independence, this practice is a blatant abdication of the judiciary's duty to safeguard a defendant's constitutional right to a fair and impartial trial. It shows an unwillingness of many state court judges to wrestle with the difficult issues presented and to come to their own determination of the issues.

A Georgia Superior Court judge denied postconviction relief in a capital case in 1992 in an order that named a witness who had never testified in the proceeding or had any relation to the case.<sup>233</sup> This error and the marked similarity of the order to the Attorney General's brief in the case led to the discovery that the judge's law clerk had called the assistant attorney general handling the case and asked for an order denying the habeas corpus petition.<sup>234</sup> The order had been "spit out by the word processors at the state attorney general's office without even correcting spelling errors and other mistakes that originally appeared in the state's . . . reply brief."<sup>235</sup> The judge signed the order without modification, not even noticing that he found "irrelevant" the testimony of a witness who never appeared. Nevertheless, the Georgia Supreme Court, in upholding the denial of relief, accorded the order no less deference than usual, despite the state's concession that it had written the order, and found immaterial the order's mistake concerning the witness who never testified.<sup>236</sup>

In 1993, a district court judge in Dallas, Texas, entered a one-page order adopting the state's response as the court's findings and conclusions, even though the response took the unprecedented position that procedural default barred a claim of ineffective assistance of counsel.<sup>237</sup> Six days later, the Texas Court of Criminal Appeals approved the district court judge's handling of the case in a standard one-page order.<sup>238</sup> A circuit judge in Florida recently acknowledged that the "customary prac-

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<sup>233</sup> Katie Wood, *Challenging Ghost-Written Habeas Orders*, FULTON COUNTY DAILY REP. (Ga.), Nov. 25, 1992, at 1.

<sup>234</sup> *Id.* at 2.

<sup>235</sup> *Id.* at 1.

<sup>236</sup> *Jefferson v. Zant*, 431 S.E.2d 110, 112 (Ga. 1993), *cert. denied*, 114 S. Ct. 1577 (1994).

<sup>237</sup> Order, *Lewis v. State*, No. W86-73713-H(A) (Tex. Dist. Ct. Dallas County Feb. 10, 1993) (on file with the *Boston University Law Review*), *aff'd*, *Ex parte Lewis*, No. 24,429-01 (Tex. Crim. App. Feb. 16, 1993) (per curiam) (on file with the *Boston University Law Review*). A claim of ineffectiveness could not have been raised previously because the trial lawyer could not assert his own ineffectiveness.

<sup>238</sup> *Ex parte Lewis*, No. 24,429-01 (Tex. Crim. App. Feb. 16, 1993) (on file with the *Boston University Law Review*); see also, e.g., *Nichols v. Collins*, 802 F. Supp. 66, 79 (S.D. Tex. 1992) (finding that in a capital case a Houston judge resolved the merits of a state habeas corpus petition by signing 35 pages of findings of fact and conclusions

tice" in capital cases before him was for the prosecutor's office, acting as "the 'eyes and ears' of the Court," to prepare sentencing orders in capital cases for him.<sup>239</sup> The Alabama courts recently upheld on appeal a thirty-four-page order drafted by the assistant attorney general, with the trial court merely correcting one typographical error and replacing of the words "dismissed and denied" on the last page with a single "DENIED."<sup>240</sup>

Such routine approval of the prosecution's ghostwritten orders has become the standard practice in Alabama. Trial court judges throughout Alabama enter orders denying postconviction relief in capital cases that are virtually identical in structure, language, organization, findings, syntax, and overreaching. These ghostwritten orders are highly argumentative and notably selective in overemphasizing the state's evidence while discounting or entirely ignoring the defendant's evidence. For example, defense counsel's acts and omissions are universally deemed "strategic"—no matter how preposterous such an assertion may be—so as to defeat a potential claim of ineffective assistance of counsel under *Strickland v. Washington*.<sup>241</sup> In addition, the ghostwriting assistant attorneys general also repeatedly "find" that even if defense counsel had presented certain evidence, it would have made no difference so as to defeat the prejudice prong of *Strickland*.<sup>242</sup> In one case, when an appointed lawyer who defended a capital case for only \$1000 admitted that it was "malprac-

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of law that were "a verbatim adoption of the State's proposed findings and reflect no independent input from the state district judge").

<sup>239</sup> *Card v. State*, 652 So. 2d 344, 345 (Fla. 1995) (remanding for an evidentiary hearing on whether the defendant was denied an independent weighing of aggravating and mitigating circumstances; the judge stated that he did not dictate findings to the prosecutors before the sentencing orders were prepared).

<sup>240</sup> *Compare* Opinion and Order (Draft), *Grayson v. State*, No. CV 86-193 (Ala. Cir. Ct. Shelby County Jan. 19, 1993) (on file with the *Boston University Law Review*) (proposed opinion and order rejecting Grayson's coram nobis petition) with Opinion and Order, *Grayson* (No. CV 86-193) (on file with the *Boston University Law Review*) [hereinafter *Grayson Order*] (same order, with the noted alterations), *aff'd*, No. CR-92-0875, 1995 Ala. Crim. App. LEXIS 16 (Jan. 13, 1995).

<sup>241</sup> 466 U.S. 668 (1984) (establishing the legal standards for evaluating a defendant's Sixth Amendment claim that his attorney did not render effective assistance). The *Strickland* Court held that "strategic choices made after thorough investigation . . . are virtually unchallengeable; and strategic choices made after less than complete investigation are reasonable precisely to the extent that reasonable professional judgments support the limitation on investigation." *Id.* at 690-91.

<sup>242</sup> The Supreme Court held in *Strickland* that even if a lawyer's performance was deficient at trial, relief on ineffectiveness ground was not to be granted unless the defendant established "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would be different." *Id.* at 694. The Court added that "[a] reasonable probability is a probability sufficient to undermine confidence in the outcome." *Id.*

tice" not to consult with an expert about some of the issues in the case, the order ghostwritten by the assistant attorney general and signed by the judge never mentioned that testimony or any of the other deficiencies in counsel's representation.<sup>243</sup>

Indeed, Alabama prosecutors apparently now feel uncomfortable when a judge undertakes to decide the case on his own. In one Alabama case in which the trial judge denied postconviction relief in his own order before the state submitted one, the state made a motion for additional findings and submitted findings denying relief on procedural grounds.<sup>244</sup> The assistant attorney general even asked the state appellate court to delay the briefing schedule on the appeal to give the trial judge time to sign the state's proposed order.<sup>245</sup> The trial judge overruled the defendant's objections and entered an order adopting the proposed findings.<sup>246</sup>

In the case of Cornelius Singleton, a mentally retarded black man who was executed after being sentenced to death by an all-white jury, a state court judge in Mobile signed off on at least four ghostwritten orders.<sup>247</sup>

<sup>243</sup> Grayson Order, *supra* note 240, *passim*.

<sup>244</sup> See *Luke v. State*, 484 So. 2d 531, 535 (Ala. Crim. App. 1985) (recounting the state's filing of a motion for clarification of the trial court's November 30, 1984 order denying Luke's coram nobis petition).

<sup>245</sup> Motion to Suspend Rules and Change Time Within Which Appellee's Brief Must Be Filed, *Luke v. State*, 484 So. 2d 531 (Ala. Crim. App. 1985) (No. 4-Div. 417) (on file with the *Boston University Law Review*).

<sup>246</sup> See Order, *Luke v. State*, No. CC 82-320 (Ala. Cir. Ct. Russell County June 10, 1985) (on file with the *Boston University Law Review*) [hereinafter *Luke Order*] (order amending trial court's November 30, 1984 order, which denied Luke's coram nobis petition, by adding findings of fact regarding that petition), *ignored*, 484 So. 2d 531, 536 (Ala. Crim. App. 1985) (affirming the denial of Luke's coram nobis petition, but refusing to consider the trial court's June 10, 1985 order in doing so), *cert. denied* 484 So. 2d 538 (Ala. 1986).

<sup>247</sup> Second Amended Sentence Order, *Singleton v. State*, No. 1 Div. 361, slip op. app. (Ala. Crim. App. Apr. 24, 1984), *available in* LEXIS, Ala Library, Alcts File), *aff'd*, *Ex parte Singleton*, 465 So. 2d 443 (Ala. 1985); Memorandum Opinion, *Singleton* (No. CC-78-117) (Ala. Cir. Ct. Mobile County Dec. 26, 1986) (on file with the *Boston University Law Review*), *appeal dismissed*, 492 So. 2d 675 (Ala. Crim. App. 1986); Memorandum Opinion, *Singleton* (No. CC-78-117) (Ala. Cir. Ct. Mobile County July 1, 1988) (on file with the *Boston University Law Review*) [hereinafter *Third Singleton Order*], *aff'd*, 541 So. 2d 87 (Ala. Crim. App. 1988), *aff'd sub nom. Ex parte Singleton*, 548 So. 2d 167 (Ala. 1989); Order and Opinion, *Singleton* (No. CC-78-117) (Ala. Cir. Ct. Mobile County Nov. 27, 1990) (on file with the *Boston University Law Review*) [hereinafter *Fourth Singleton Order*], *aff'd*, 587 So. 2d 1117 (Ala. Crim. App. 1991). The same judge, Ferrill McRae, has signed off on at least five other orders that the Alabama Attorney General's office submitted in other capital cases.

The order sentencing Phillip Tomlin to death, which is appended to the opinion of the Court of Criminal Appeals in *Tomlin v. State*, 516 So. 2d 790 app. (Ala. Crim. App. 1986), *aff'd sub nom. Ex parte Tomlin*, 516 So. 2d 797 (Ala. 1987), is identical to the order drafted by the assistant attorney general and submitted to Judge McRae.



In Singleton's 1983 state postconviction proceeding, the judge signed a ghostwritten order that went beyond the record to defeat Singleton's claim of racial discrimination based on the prosecution's striking nine black jurors to obtain an all-white jury. In applying the standard of *Swain v. Alabama*,<sup>248</sup> the order stated that "[the] Court knows from having presided over dozens of cases tried by the two prosecutors who tried the present case that they did not remove all black veniremen from the juries in all or even a majority of the cases they tried."<sup>249</sup> This finding was made without evidence. A federal court evaluating the same claim of a *Swain* violation in another case involving the same prosecutors based on evidence found a systematic practice of racial discrimination.<sup>250</sup>

In 1988, the same state trial judge signed another order and memorandum opinion in Singleton's case, the day after receiving that order from

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Apparently not aware that the order was prepared by one side, the Court of Criminal Appeals wrote in its decision that "the very able trial judge [had] prepared and issued" the order. 516 So. 2d at 791. Subsequently the Alabama Supreme Court reversed the conviction because of the prosecutor's improper closing arguments. At the new trial a jury unanimously recommended that the defendant be sentenced to life imprisonment. Judge McRae then solicited another order from the Alabama attorney general's office, overriding the jury's verdict and imposing the death penalty; the judge signed that order. Sentencing Order, *State v. Tomlin*, No. 89-481 (Ala. Cir. Ct. Mobile County Apr. 19, 1990) (on file with the *Boston University Law Review*).

The Alabama Attorney General's office also wrote the order used by Judge McRae to sentence Thomas Warren Whisenant to death in 1987. Compare the Letter from Ed Carnes, Assistant Attorney General, Alabama, to Ferrill McRae, Judge of the Alabama Circuit Court for Mobile County (Apr. 14, 1987) (on file with the *Boston University Law Review*) (containing, as an enclosure, proposed "Sentence Findings and Order") with the virtually identical Sentence Findings and Order, *State v. Whisenant*, No. CC-77-697 (Ala. Cir. Ct. Mobile County Apr. 23, 1987) (on file with the *Boston University Law Review*), *aff'd*, 555 So. 2d 219 (Ala. Crim. App. 1988).

<sup>248</sup> 380 U.S. 202, 223 (1965) (holding that the defendant must show that a prosecutor made race-based peremptory challenges "in case after case, whatever the circumstances, whatever the crime and whoever the defendant or the victim" in order to establish a prima facie case of purposeful discrimination), *overruled in part*, *Batson v. Kentucky*, 476 U.S. 79, 94 (1986) (holding that defendant must only show that he is a member of a cognizable racial group and that the prosecutor used race-based peremptory challenges to exclude veniremen from the defendant's petit jury to establish a prima facie case of purposeful discrimination).

Although the Supreme Court decided *Batson* before this court rejected Singleton's purposeful discrimination claim, the court applied the *Swain* standard because *Batson* does not apply retroactively to appellate review of convictions that became final before the Supreme Court handed down *Batson*. See *Allen v. Hardy*, 478 U.S. 255, 258 (1986) (holding *Batson* nonretroactive).

<sup>249</sup> See Memorandum Opinion at 4-5, *Singleton* (No. CC-78-117) (Ala. Cir. Ct. Mobile County Dec. 26, 1986) (on file with the *Boston University Law Review*) (denying Singleton's coram nobis petition).

<sup>250</sup> *Jones v. Davis*, 906 F.2d 552 (11th Cir. 1990), *cert. denied*, 498 U.S. 1109 (1991).

the state.<sup>251</sup> And then, in November 1990, the judge adopted another ghostwritten order, forty-seven pages long, without modification.<sup>252</sup> Much of the language in this order is identical to the language of an order signed by a different judge, in another case, in another part of the state, *Holladay v. State*.<sup>253</sup> Both cases involved questions of whether the defendants' rights were violated because of their trial counsel's failure to present mitigating evidence of the defendants' mental retardation.<sup>254</sup>

During postconviction proceedings in each case, the lawyers for the condemned defendants presented two mental health experts who testified about the defendants' mental retardation.<sup>255</sup> In both cases, the state relied on Dr. Joe Dixon, a psychologist who does mental examinations on behalf of the state.<sup>256</sup> The portions of the orders discussing the mental health evidence closely resemble each other. The courts accepted Dr. Dixon's testimony in full, yet found the testimony of each of Singleton and Holladay's mental health experts—one psychiatrist and three psychologists—to be completely lacking credibility.<sup>257</sup> The order in *Singleton*, signed on November 27, 1990, stated:

This Court credits the testimony of Dr. Dixon and does not credit the testimony of Dr. Albrecht and Dr. Baroff for a number of reasons.<sup>258</sup>

The order in *Holladay*, entered in that case on December 5, 1991, stated:

This Court credits the testimony of Dr. Dixon and does not credit the testimony of Dr. Fisher and Dr. Norko for a number of reasons.<sup>259</sup>

The orders then related the reasons for not crediting the defendants' experts in highly argumentative "findings" regarding the four defense

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<sup>251</sup> Third *Singleton* Order, *supra* note 247.

<sup>252</sup> Fourth *Singleton* Order, *supra* note 247.

<sup>253</sup> Order, *Holladay v. State*, No. CC-86-1057.60ST, (Ala. Cir. Ct. Etowah County Dec. 5, 1991) (on file with the *Boston University Law Review*) (denying and dismissing coram nobis petition) [hereinafter *Holladay* Order], *aff'd*, 629 So. 2d 673 (Ala. Crim. App. 1992), *cert. denied*, 114 S. Ct. 1208 (1994). Interestingly, the order is stamped "filed" on two different dates: once when the Capital Litigation Division of the Attorney General's office filed it as a proposed order, and again when the judge signed it as the order in the case.

<sup>254</sup> Compare Fourth *Singleton* Order, *supra* note 247, at 35-37 (discussing Singleton's mitigating circumstances claim) with *Holladay* Order, *supra* note 253, at 28-36 (discussing Holladay's mitigating circumstances claim).

<sup>255</sup> Compare Fourth *Singleton* Order, *supra* note 247, at 10-19, 36 (testimony of Drs. Albrecht and Baroff) with *Holladay* Order, *supra* note 253, at 29-35 (testimony of Drs. Fisher and Norko).

<sup>256</sup> Compare Fourth *Singleton* Order, *supra* note 247, at 9-19, 36 (testimony of Dr. Dixon) with *Holladay* Order, *supra* note 253, at 29 (same).

<sup>257</sup> Fourth *Singleton* Order, *supra* note 247, at 11-19, 36; *Holladay* Order, *supra* note 253, at 30.

<sup>258</sup> Fourth *Singleton* Order, *supra* note 247, at 11.

<sup>259</sup> *Holladay* Order, *supra* note 253, at 30.

witnesses.<sup>260</sup> Although such arguments may have been suitable for an advocate's brief, they certainly had no place in a judicial order. In *Holladay*, for example, the "findings" were so audacious as to describe testimony by the defense witnesses with the following phrases: "no credibility," "outrageous," and "without credibility and without merit."<sup>261</sup>

Such similarities appear in other cases. Courts deny ineffective assistance of counsel claims in orders that clearly came off the same word processor that produced the attorney general's brief. These orders invariably begin with the same summary of the legal standard and end with similar refrains. For example, compare the following:

These cases provide the framework for analyzing petitioner's ineffective assistance of counsel claim. John Gruenewald [sic] representation of petitioner was not deficient and petitioner was not prejudiced by his actions at trial.<sup>262</sup>

These cases provide the framework for analyzing petitioner's ineffective assistance of counsel claim. Jock Michael Smith's representation of petitioner was not deficient and petitioner was not prejudiced by his actions at trial.<sup>263</sup>

These cases provide the framework for analyzing petitioner's ineffective assistance of counsel claims. Hank Fannin and R.D. Pitt's representation of petitioner was not deficient and petitioner was not prejudiced by his [sic] actions at trial.<sup>264</sup>

In each order a description of the court-appointed lawyer followed, with

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<sup>260</sup> See Fourth Singleton Order, *supra* note 247, at 11-13, 16, 36-37 (criticizing Drs. Albrecht and Baroff); *Holladay* Order, *supra* note 253, at 30-35 (criticizing Drs. Fisher and Norko).

<sup>261</sup> *Holladay* Order, *supra* note 253, at 31, 35. In another case, the court used the identical boilerplate but gave no reason for crediting the state's experts and discrediting the defendant's experts. See *Grayson* Order, *supra* note 240, at 30 ("Further, this Court credits the testimony of Dr. Harry McClaren, and does not credit the testimony of Drs. Phillips and Zimmerman. Grayson is not entitled to relief.").

<sup>262</sup> Proposed Findings of Fact and Conclusions of Law 6 [hereinafter *Magwood* Order], incorporated in Court's Order Denying Petition for Writ of Error Coram Nobis, *State v. Magwood*, No. CC-81-303 (Ala. Cir. Ct. Houston County June 27, 1987), *aff'd*, 553 So. 2d 635 (Ala. Crim. App. 1989), *cert. denied*, 1989 Ala. LEXIS 966 (Dec. 1, 1989), *cert. denied*, 495 U.S. 923 (1990).

<sup>263</sup> *Weeks v. State*, 568 So. 2d 864 app. at 868 (Ala. Crim. App. 1989) (reprinting the Aug. 12, 1988 order of the Circuit Court of Macon County, denying Weeks's petition for a writ of error coram nobis), *cert. denied*, 1990 Ala. LEXIS 132 (Feb. 23, 1990), *cert. denied*, 498 U.S. 882 (1990).

The *Weeks* court did nothing to hide the ghostwritten nature of the order, merely signing the document that the prosecutor submitted. The reprinted version appearing in West Publishing's *Southern Reporter* begins with the heading "Respondent's Proposed Findings of Fact and Conclusions of Law." *Id.* app. at 866.

<sup>264</sup> *Waldrop v. State*, 523 So. 2d 475 app. at 481 (Ala. Crim. App. 1987) (reprinting

the court finding him "experienced and capable." The orders also included the percentage of the court-appointed lawyer's work devoted to criminal defense cases and a finding that the lawyer "investigated" the case by at least talking to the defendant and perhaps some witnesses.<sup>265</sup>

The "findings" then address specific issues regarding counsel's performance, almost always concluding that whatever counsel did was "reasonable and strategic" in order to insulate him from a finding of ineffectiveness. For example, in the case of Arthur Lee Jones, whom Alabama executed in 1986, the state court's ineffective assistance order contained a finding that counsel's failure to give an opening statement, put on any evidence about the defendant's life, and even to give a closing argument on the issue of penalty were all "strategic" decisions.<sup>266</sup> In another case in which prosecutors used their jury strikes to eliminate all African-Americans from the jury pool, the ghostwritten order found the defense lawyers' failure to object to be "reasonable" and "strategic."<sup>267</sup> In defending an African-American facing the death penalty for a crime

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the July 28, 1986 order of the Circuit Court of Talladega County, denying Waldrop's petition for a writ of error coram nobis), *cert. denied*, 488 U.S. 871 (1988).

<sup>265</sup> For examples of this oft-repeated litany, see *Jones v. Smith*, 599 F. Supp. 1292 app. at 1307-08 (S.D. Ala. 1984) (reprinting the December 12, 1984 order of the Circuit Court of Mobile County), *aff'd*, 772 F.2d 668 (11th Cir. 1985), *cert. denied*, 474 U.S. 1073 (1986); *Weeks*, 568 So. 2d 864 app. at 868 (reprinting the Aug. 12, 1988 order of Circuit Court of Macon County); *Harrell v. State*, 526 So. 2d 646 app. at 652 (Ala. Crim. App. 1988) (reprinting the January 23, 1987 order of the Circuit Court of Jefferson County, Besemer Division), *cert. denied*, 488 U.S. 934 (1988); *Bell v. State*, 518 So. 2d 840, 844 (Ala. Crim. App. 1987), *cert. denied*, 486 U.S. 1036 (1988); *Thomas v. State*, 511 So. 2d 248, 251-52 (Ala. Crim. App. 1987); *Magwood Order*, *supra* note 262, at 6-7; *Luke Order*, *supra* note 246, at 1-3. This list is by no means exhaustive.

<sup>266</sup> See *Jones*, 599 F. Supp. 1292 app. at 1310 (citing Dec. 12, 1984 order of Circuit Court of Mobile County); see also *Baldwin v. State*, 539 So. 2d 1103, 1106 (Ala. Crim. App. 1988) (finding that counsel's "decision not to request a psychiatric examination was a reasonable strategic decision which is not subject to second guessing"), *cert. denied*, 493 U.S. 874 (1989); *Horsley v. State*, 527 So. 2d 1355, 1362 (Ala. Crim. App. 1988) (stating that counsels' "strategic decision not to pursue a psychiatric examination was made after an extensive investigation and is not to be second-guessed"), *cert. denied*, 489 U.S. 1059 (1989); *Waldrop*, 523 So. 2d 475 app. at 486 (citing July 28, 1986 order of the Circuit Court of Talladega County) ("Trial counsel's strategic decision not to call witnesses is not subject to second guessing."); *Bell*, 518 So. 2d at 845 ("Trial counsel's strategic decision not to call witnesses is not subject to second guessing."); *Jackson v. State*, 501 So. 2d 542, 550 (Ala. Crim. App. 1986) ("Trial counsel's strategic decision not to call witnesses is not subject to second-guessing."), *cert. denied*, 483 U.S. 1010 (1987); *Coulter v. State*, 494 So. 2d 895 app. at 903-04 (Ala. Crim. App. 1986) (reprinting the July 16, 1985 memorandum opinion of the Circuit Court of Colbert County) (labeling the petitioner's trial attorney's decision not to present mitigating evidence as "strategic").

<sup>267</sup> See *Magwood Order*, *supra* note 262, at 9 (trial counsel's failure to challenge

against a white person, it is difficult to imagine a reasonable strategy in allowing the prosecutor to obtain an all-white jury. This is simply fiction packaged by the state's advocate in the guise of a judicial finding.

In these and many other cases, state court judges repeatedly gave prosecutors a blank check to say anything they wanted in proposed orders, and then signed on the bottom line, converting advocate's briefs into judicial orders. Regardless of what any court has said to the contrary,<sup>268</sup> the adoption of such orders has the appearance of impropriety and shows, at the very least, not only lack of independence, but also complete indifference on the part of many judges to what should be the most important work of the judiciary.

#### E. *Judges Acting as Prosecutors*

The prosecution of high-profile capital cases is often a stepping stone to a judgeship, as has been described. Unfortunately, more than a few prosecutors who become judges continue to prosecute from the bench. Although they fail to discharge their responsibility to be neutral, disinterested judges, they may continue to reap the same political benefits from capital cases that they received as prosecutors.

In a recent Georgia capital trial, a sitting superior court judge took the witness stand to tell the jury why, while serving as district attorney, he had sought the death penalty and had refused to agree to a plea disposition in the case.<sup>269</sup> After testifying that the governor appointed him to the bench after having "serve[d] the citizens of Hall and Dawson count[ies] as their district attorney" for six years,<sup>270</sup> the judge summarized the factors he had considered in making the decision as prosecutor to seek the death penalty for Stephen Anthony Mobley:

[The defendant's] lack of remorse and a personality of "pure unadulterated meanness";

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prosecutor's peremptory strike of all black jurors to get an all-white jury was a "reasonable, strategic decision").

<sup>268</sup> While courts have disapproved the practice of trial judges signing off on ghost-written orders, *see, e.g.*, *United States v. Marine Bancorporation, Inc.*, 418 U.S. 602, 615 n.13 (1974); *United States v. El Paso Natural Gas Co.*, 376 U.S. 651, 656 n.4 (1964) (quoting J. SKELLY WRIGHT, *THE NONJURY TRIAL—PREPARING FINDINGS OF FACTS, CONCLUSIONS OF LAW AND OPINIONS, SEMINARS FOR NEWLY APPOINTED UNITED STATES DISTRICT JUDGES* 159, 166 (1963)), they have nevertheless allowed the practice, even deferring to findings of fact made in one-sided orders prepared by advocates for one party, *see, e.g.*, *Anderson v. Bessemer City*, 470 U.S. 564, 572 (1985) (refusing to reverse such findings unless shown to be clearly erroneous); *Hubbard v. State*, 584 So. 2d 895, 900 (Ala. Crim. App.), *cert. denied*, 584 So. 2d 895 (Ala. 1991), *cert. denied*, 502 U.S. 1041 (1992); *Morrison v. State*, 551 So. 2d 435, 436-37 (Ala. Crim. App.), *cert. denied*, 551 So. 2d 435 (Ala. 1989), *cert. denied*, 495 U.S. 911 (1990).

<sup>269</sup> *Mobley v. State*, 455 S.E.2d 61, 69-70 (Ga. 1995).

<sup>270</sup> *Id.* at 71 n.1 (Hunstein, J., dissenting in part).

The financial cost of death cases to taxpayers;  
Discussion with the victim's family and their support for a death sentence as the appropriate penalty;  
Consideration of whether the "last minutes of [the victims'] lives were more horrible to them than in other cases";  
[The judge's] feeling that Mobley's description of the murder to [one victim] was "unmerciful";  
The strength of the State's evidence.<sup>271</sup>

The judge summarized his decision by stating that "I've handled many cases with heinous facts of a killing, but I have never, never seen a defendant like Mr. Mobley."<sup>272</sup> Remarkably, the Georgia Supreme Court upheld Mobley's death sentence over the dissent of only a single member.<sup>273</sup>

Edward D. Webster, a former prosecutor in Riverside, California, publicly criticized a federal court of appeals for its decision in a capital case, even though he is now the presiding superior court judge in Riverside. Judge Webster, speaking "as a former prosecutor," expressed his "outrage" at a decision by the United States Court of Appeals for the Ninth Circuit remanding a capital habeas corpus case on grounds that the federal district court had failed to provide funds for expert assistance in support of the habeas petition.<sup>274</sup> Judge Webster accused the federal court of anti-death-penalty bias and called upon Congress to prevent all federal courts except the Supreme Court from reviewing death-penalty cases.<sup>275</sup>

A former prosecutor who now presides as a judge over capital cases in Houston, Texas, William Harmon, stated to a defendant during a 1991 capital trial that he was doing "God's work" to see that the defendant was

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<sup>271</sup> *Id.* at 71-72.

<sup>272</sup> *Id.* at 72.

<sup>273</sup> *Id.* at 70. The Georgia Supreme Court had previously held in a pretrial appeal in the case that the defendant could present evidence that he had offered to plead guilty in mitigation of punishment. *Mobley v. State*, 426 S.E.2d 150 (Ga.) (appeal after mistrial and before retrial), *cert. denied*, 114 S. Ct. 198 (1993). The judge testified at the subsequent trial in response to evidence of Mobley's offer to plead guilty. Upon review of the defendant's conviction and death sentence, and the consequences of its earlier ruling, the court overruled its earlier decision and disapproved the admission of plea offers and the testimony regarding the rejection of such offers by counsel in future cases. *Mobley*, 455 S.E.2d at 69-70. Nevertheless, a majority of the court held that the judge's testimony in Mobley's case was not "inflammatory or highly prejudicial," thereby allowing it to affirm the death sentence. *Id.* at 70; *cf.* *Brown v. Lynaugh*, 843 F.2d 849 (5th Cir. 1988) (granting habeas corpus relief from a conviction at a trial in which a Texas judge who was presiding over the case testified as the prosecution's first witness).

<sup>274</sup> Matthew Heffer, *Judge Criticizes 9th Circuit for Death Penalty Decision*, L.A. DAILY J., July 31, 1995, at 1, 30.

<sup>275</sup> *Id.* at 30.

executed.<sup>276</sup> In the same case, Judge Harmon taped a photograph of the "hanging saloon" of Texas Judge Roy Bean on the front of the bench with his own name superimposed over Judge Bean's, and referred to the judges of the Texas Court of Criminal Appeals as "liberal bastards" and "idiots."<sup>277</sup> In another capital case, Judge Harmon, upon a witness's suggestion that some death row inmates should be transported to court, stated, "Could we arrange for a van to blow up the bus on the way down here?"<sup>278</sup> In another capital trial in 1994, Judge Harmon allowed the victim's father to yell obscenities at the defendant in the presence of jurors and the press.<sup>279</sup>

These are among the more pronounced examples of judges who have continued the prosecutorial role upon assuming the bench. Other judges may be more sophisticated in understanding their role and more subtle in their approach to capital cases.<sup>280</sup> A judge does far more to undermine the fairness of a trial and hasten the imposition of a death sentence by appointing deficient counsel and in making discretionary rulings, as previously described, than by engaging in conduct such as Judge Harmon's.

It is not surprising that such judges are produced by a system that rewards prosecutors for obtaining the death penalty by giving them the public recognition and support needed to be elected judges. But this system often does not produce judges who will be fair and impartial in capital cases. It is most difficult for a prosecutor who has made his name prosecuting capital cases to refrain as a judge from further exploitation of capital cases upon assuming the bench.

#### IV. REMEDIES FOR THE RESULTING LACK OF IMPARTIALITY

Elected judges are expected to "remain faithful to the values and sentiments of the people who elected them, and to render decisions using common sense rather than newfangled legalisms."<sup>281</sup> But remaining

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<sup>276</sup> Brent E. Newton, *A Case Study in Systematic Unfairness: The Texas Death Penalty, 1973-1994*, TEX. F. CIV. LIB. & CIV. RTS., Spring 1994, at 1, 24.

<sup>277</sup> *Id.* Judge Harmon was reprimanded for his conduct. Clay Robison, *State Panel Reprimands District Judge Harmon*, HOUSTON CHRON., Apr. 1, 1993, at A29.

<sup>278</sup> *Nichols v. Collins*, 802 F. Supp. 66, 78-79 (S.D. Tex. 1992) (granting writ of habeas corpus).

<sup>279</sup> Newton, *supra* note 276, at 24.

<sup>280</sup> A description of how a judge can influence the course of a case by his tone, body language, relations with counsel, and rulings on evidentiary points is provided in the account of Judge William Callahan's handling of the trial of the "Scottsboro Boys" in CARTER, *supra* note 32, at 274-302.

<sup>281</sup> Cornyn, *supra* note 90, at 374. Justice Cornyn describes the forces that resulted in an elected judiciary in that state. *Id.* (citing T.R. FEHRENBACH, *LONE STAR: A HISTORY OF TEXAS AND THE TEXANS* 435 (1983) ("No judge who had to run for reelection regularly was expected to decide cases against the popular feeling, on some new fangled point of law.")). Similar populist sentiments led to systems of elected

faithful to popular sentiment is sometimes inconsistent with a judge's duty to mete out equal justice and to enforce the Bill of Rights. As Justice Jackson wrote:

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.<sup>282</sup>

Florida Supreme Court Justice Ben Overton has observed that it was "never contemplated that the individual who has to protect our individual rights would have to consider what decision would produce the most votes."<sup>283</sup> The more a judge sees his or her fate as tied to community sentiment, the greater temptation there is to "allocate justice in a manner which conforms to community values and prejudices"<sup>284</sup> and forget that "[a]ll of our people are entitled to equal justice under law."<sup>285</sup> The difficulty of ensuring both equal justice under law and the public perception of a fair and independent judiciary when judges must stand for election was described by Justice Cornyn of the Texas Supreme Court:

Implicit in our national creed of "equal justice under law," and in the public acceptance of the judicial function generally, is the idea that judges are not respecters of differences of persons. But when judges are required to be political animals, the hard decisions that they are frequently called upon to make can too readily be cast as essentially corrupt, and excoriated as payoffs to political constituencies, instead of appearing to be the products of serious reflection and lofty principle. If true, such conduct should be condemned in the harshest terms. But if charges of political judging are false, our elective system can be viewed only as giving tacit credence to such an accusation.<sup>286</sup>

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judges in other states. LARRY BERKSON ET AL., *JUDICIAL SELECTION IN THE UNITED STATES: A COMPENDIUM OF PROVISIONS* 3 (1980) (discussing the forces of change at work in the 1830s and 1840s).

<sup>282</sup> *West Virginia State Bd. of Educ. v. Barnette*, 319 U.S. 624, 638 (1943).

<sup>283</sup> *Electing Judges Is Poor Policy, Overton Tells Panel*, *supra* note 138, at 4.

<sup>284</sup> GEORGE F. COLE, *POLITICS AND THE ADMINISTRATION OF JUSTICE* 188-91 (1973).

<sup>285</sup> Tom C. Clark, *The Need for Judicial Reform*, 48 WASH. L. REV. 806, 810 (1973). Justice Clark wrote further: "We hear much about maintaining order, but before we can attain it we must listen and respond to pleas for justice. History teaches us that we will have neither order nor justice until we can attain both." *Id.*

<sup>286</sup> Cornyn, *supra* note 90, at 380.



In contrast, federal judges have life tenure<sup>287</sup> and are appointed by the President with the advice and consent of the Senate<sup>288</sup> in order to ensure the independence of the judiciary and to guarantee that the courts will perform their roles as protectors of "the rights of individuals."<sup>289</sup> Recognizing that "a steady, upright, and impartial administration of the laws" was essential because "no man can be sure that he may not be tomorrow the victim of a spirit of injustice, by which he may be the gainer today,"<sup>290</sup> Alexander Hamilton wrote in the *The Federalist* No. 78: "That inflexible and uniform adherence to the rights of the Constitution, and of individuals, which we perceive to be indispensable in the courts of justice, can certainly not be expected from judges who hold their offices by temporary commission."<sup>291</sup>

The state bench also differs from the federal bench in that it is more likely to be a stepping stone to a higher political office.<sup>292</sup> In comparing the state and federal judiciary, Chief Justice William Rehnquist has pointed out that the life tenure of federal judges makes for a "different kind of judge" than someone "looking out of one corner of his eye for the

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<sup>287</sup> U.S. CONST. art. III, § 1.

<sup>288</sup> U.S. CONST. art. II, § 2, cl. 2.

<sup>289</sup> THE FEDERALIST No. 78, at 469 (Alexander Hamilton) (Clinton Rossiter ed., 1961).

<sup>290</sup> *Id.* at 470.

<sup>291</sup> *Id.* at 466 (stating also that "the complete independence of the courts of justice is peculiarly essential in a limited constitution"); see also THE FEDERALIST No. 81, at 483 (Alexander Hamilton) (Clinton Rossiter ed. 1961) ("Every reason which recommends the tenure of good behavior for judicial office militates against placing the judiciary power, in the last resort, in 'a body composed of men chosen for a limited period.'").

<sup>292</sup> For example, early in his career as a circuit judge in Alabama, George C. Wallace, upon learning that federal officials were investigating underrepresentation of African-Americans in jury pools in a Georgia county, proclaimed to an all-white grand jury Bullock County, Alabama, that he would not allow the federal law-enforcement officials to inspect his records. Wallace then called the Associated Press to report this "news." BASS, *supra* note 33, at 185. 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. *Id.* at 187-92.

In a more recent example, a state district judge in Texas announced her campaign for attorney general by issuing a press release that said "a Valentine's Day capital murder, which landed in her courtroom, compelled her to run for the office of attorney general." Mark Horvit & Ken Herman, *Politicians on Anti-Crime Bandwagon*, HOUSTON POST, Jan. 9, 1994, at A-25, A-27. Some politicians also move from other state elective offices to the judiciary. For example, John Patterson, who defeated George Wallace in the 1958 Alabama governor's race, and who defended segregation as attorney general and governor, BASS, *supra* note 33, at 159, 185-86, is now a judge on the Alabama Court of Criminal Appeals.

next political opportunity that comes along.”<sup>293</sup> However, the politics of crime have increasingly had an impact on nominations to the federal judiciary<sup>294</sup> and even the Supreme Court has seemed responsive to the political potency of the crime issue.<sup>295</sup>

Nevertheless, although some appointees may take a political agenda with them to the federal bench, life tenure still insulates judges from the threat of being voted out of office for an unpopular decision. Every new election reminds state judges of their vulnerability to popular sentiment. Such constant reminders make it politically and practically impossible for many judges to enforce the Constitution when doing so would be unpopular.

If courts are to have integrity and credibility, judges must be selected, evaluated, and assigned cases in a way that makes it possible for them to uphold the law without imperiling their jobs. Political considerations will always be a factor in the selection and promotion of judges in both the state and federal courts, and some who become judges will allow their personal prejudices to interfere with the faithful discharge of their duties, regardless of how they are selected. But the selection and promotion process should not allow a judge's ruling in a particular case to dominate his or her prospects for remaining on the bench. If this is not the case, judges will continue to work under unreasonable pressures and the public will not view their decisions as fair, impartial, and legitimate. The judiciary and bar should exercise leadership in bringing about the replacement of judicial elections—both retention and contested—with merit selection and periodic performance review. Although such systems are desirable and may be more likely after elections that have significantly diminished the standing of the courts in Alabama, California, Mississippi, Texas, and other states,<sup>296</sup> one can expect that elections will

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<sup>293</sup> Chief Justice William Rehnquist, Press Conference 5 (Mar. 15, 1989) (unofficial transcript, on file with *Boston University Law Review*).

<sup>294</sup> Lewis, *supra* note 31, at A26. Other political issues have also come into play, particularly with regard to nominations for the Supreme Court. See Cornyn, *supra* note 90, at 367, 381-83 (observing how the “crusade between contending ideological factions” on the issue of abortion has become a factor in nominations to the Supreme Court).

<sup>295</sup> See, e.g., *Payne v. Tennessee*, 501 U.S. 808, 834 (1991) (Scalia, J., concurring) (noting the “nationwide ‘victim’s rights’ movement” in voting, after the retirement of Justice Brennan, to overrule two recent 5-4 decisions, thus allowing victim-impact evidence at the penalty phase of capital trials); *id.* at 867 (Stevens, J., dissenting) (expressing that it was a “tragedy” that such political pressures influenced the Court’s decision to take the case and to reach unnecessarily the constitutional question, and even its substantive resolution of the constitutional issue).

<sup>296</sup> Calls for new methods of judicial selection frequently come after elections or other events that diminish the standing of the courts. See, e.g., Johnson & Urbis, *supra* note 162, at 563-67 (calling for merit selection of judges in Texas to remedy the problems caused by expensive judicial campaigns there); Norman Krivosha, *Acquir-*

remain in many jurisdictions.

As long as judges are selected at the ballot box, several less effective measures, small and large, should be taken to reduce the influence of political considerations on judicial rulings. Judges must recognize their constitutional and ethical responsibility to disqualify themselves in cases in which one might reasonably question their impartiality due to political pressures. Capital cases should be assigned to judges who do not face the voters from the locality of the crime. The discretion of trial judges in areas where they are under political pressures should be limited and reviewing courts should give more careful scrutiny to rulings that are susceptible to influence by political considerations. Regardless of how judges are selected, they should not appoint counsel for indigent defendants. Removal of appointment responsibility from judges is necessary to ensure the independence of the judiciary and the zealous defense of the accused.

A. *Using Diffuse and Indirect Citizen Input in Appointment and Evaluation Systems*

The elimination of direct and retention elections is a necessary step to improve the fairness and impartiality of the judiciary. Eleven states and the District of Columbia already employ systems in which judges never face election.<sup>297</sup> The systems in those states provide for removal of judges only for misbehavior or other ethical improprieties,<sup>298</sup> avoiding the opportunity to turn a judicial election into a popular referendum on a judge's rulings in controversial cases.

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*ing Judges by the Merit Selection Method: The Case for Adopting Such a Method*, 40 S.W. L.J. Special Issue May 1986, at 15, 20-21 (noting such a public call for "fundamental change in the way judges are selected in Illinois" after a Chicago scandal, because of the lack of judicial independence and public perception that judges are not impartial as a result of fundraising needed for campaigns); *Do It Now*, *supra* note 14, at 32 (calling for reform of judicial selection system in Texas after the election of Stephen Mansfield to the Texas Court of Criminal Appeals in 1994); *Election Is a Lousy Way to Choose State's Judges*, GREENWOOD COMMONWEALTH (Miss.), Feb. 27, 1992, at 4 (criticizing the election of judges in Mississippi); *Judicial Elections*, CLARION-LEDGER (Jackson, Miss.), June 7, 1990, at 14A (expressing the view that "electing judges is a screwy way to decide who shall mete out justice" because "[i]t invites—requires to some extent—partisan activity while it officially prohibits it"); *Re-elect Robertson; Stop Electing Judges*, N.E. MISS. DAILY J., Mar. 6, 1992, at 8A (observing that "men and women expected to impartially interpret the law sometimes become embroiled in campaigns based on emotions and feelings that have nothing to do with what the law clearly requires"); *Supreme Court: State District Dispute Settled Now?*, CLARION-LEDGER (Jackson, Miss.), July 19, 1992, at 4G (expressing the view that "Mississippi Supreme Court justices should not be selected on the whim of popular politics, but on the basis of competence, demeanor and experience").

<sup>297</sup> See *supra* note 83.

<sup>298</sup> See provisions collected *supra* note 83.

Although judicial elections appear to be immensely popular in the United States, judges were not always selected and retained this way. The American colonial governments utilized executive selection of judges and service during good behavior in an effort to depoliticize the judiciary. Resentment toward the Crown's control of the judiciary resulted in a shift from judges serving at the pleasure of the executive<sup>299</sup> to judges serving during good behavior.<sup>300</sup>

Dissatisfaction with the appointed judiciary during the period of populist Jacksonian democracy led to the election of judges.<sup>301</sup> The public viewed judges as too protective of the interests of property owners. States began to adopt systems of electing judges in an effort to divorce the judiciary from property owners.<sup>302</sup> However, it became apparent that popular election resulted in a highly politicized judiciary, with political machines often controlling judges.<sup>303</sup> States again began to tinker with judicial selection methods, with some eventually adopting a selection plan that included gubernatorial appointment from a list compiled by a judicial selection committee, with a subsequent retention election after a certain period of time.<sup>304</sup> This reform sought to depoliticize the judiciary and allow judges to make decisions unswayed by political considerations while still allowing for some form of input from citizens.<sup>305</sup> But, as has been the case in California, Florida, and other places, even a retention election can degenerate into a referendum on a judge's rulings in capital or other controversial cases.<sup>306</sup> Indeed, a strong argument can be made that retention elections are even worse than direct elections where the incumbent is challenged. In retention elections, there is no comparison to

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<sup>299</sup> Joseph H. Smith, *An Independent Judiciary: The Colonial Background*, 124 U. PA. L. REV. 1104, 1112 (1976) ("[I]t appears that by 1700 judges in the royal colonies were commissioned uniformly during pleasure by the Governor on his own initiative or upon warrant from the Crown.").

<sup>300</sup> *Id.* at 1153-55 (cataloging the constitutional provisions of all original 13 states, which provided for judicial tenure during good behavior, with some removal power in the executive with consent of the legislature, and noting that all plans for a national judiciary submitted at the Constitutional Convention in 1787 contained good-behavior provisions).

<sup>301</sup> BERKSON ET AL., *supra* note 281, at 3.

<sup>302</sup> *Id.* at 4 (noting that by the time of the Civil War, 24 of 34 states had established elected judiciaries and that as new states joined the Union, all adopted popular elections for some or all judges until the admission of Alaska in 1959).

<sup>303</sup> *Id.* (discussing the perception of judges as corrupt).

<sup>304</sup> *Id.* at 5-6 (discussing the advent of judicial selection commissions).

<sup>305</sup> See SUSAN B. CARBON & LARRY C. BERKSON, *JUDICIAL RETENTION ELECTIONS IN THE UNITED STATES* 1 (1980) (discussing the dual desire for judicial accountability and independence from public emotion).

<sup>306</sup> For a review of this phenomenon in the 1986 California judicial elections, see John T. Wold & John H. Culver, *The Defeat of the California Justices: The Campaign, the Electorate, and the Issue of Judicial Accountability*, 70 JUDICATURE 348 (1987).

be made among candidates. The judge standing for retention may be a target for negative votes from various groups dissatisfied with decisions on issues ranging from crime to abortion. Voters may want to express their disapproval of the judge with no consideration of whether the replacement judge will be any better.

The independence of the judiciary can be best preserved by a merit selection system in which a bipartisan judicial qualifications commission nominates a slate of qualified candidates to the executive, who then nominates a judge subject to confirmation by at least one branch of the state legislature.<sup>307</sup> Meaningful citizen input can come by ensuring that a substantial number of persons on the judicial qualifications commission are not lawyers, but people who represent various segments of the public. Such a system should provide for terms for judges of substantial length, such as ten to fifteen years. Retention in office for additional terms should depend upon an evaluation of the judge's performance by the commission, not a retention election.

One state that employs such a system is Hawaii, where the governor selects judges with the consent of the senate, from a list of nominees that a judicial selection commission compiles.<sup>308</sup> The judicial selection commission's list must contain not less than six nominees.<sup>309</sup> If a judge indicates at least six months before the end of his term that he wishes reappointment, the commission determines whether the judge should be retained.<sup>310</sup> The primary purpose of the retention process is to "exclude or, at least, reduce partisan political action."<sup>311</sup>

There are many positive aspects to Hawaii's selection and retention process. First, it provides for diffuse and indirect input in the judicial selection and retention process by allowing the governor, the president of the senate, and the speaker of the house of representatives, all of whom are elected, to appoint a total of five members of the commission.<sup>312</sup> Thus, there is public accountability in a selection process that provides a layer of protection for judges who may make unpopular decisions.

Second, a judge serves a term of ten years, after which time the judicial selection commission again evaluates and either retains or rejects the

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<sup>307</sup> For arguments supporting merit selection and criticizing the popular election of judges as inconsistent with the duties and functions of a judge, see generally Krivosha, *supra* note 296.

<sup>308</sup> HAW. CONST. art. VI, § 3.

<sup>309</sup> *Id.*

<sup>310</sup> *Id.*

<sup>311</sup> William S. Richardson, *Judicial Independence: The Hawaii Experience*, 2 HAW. L. REV. 1, 47 (1979). Richardson was the Chief Justice of the Hawaii Supreme Court when he wrote this article.

<sup>312</sup> HAW. CONST. art. VI, § 4. The judicial commission consists of nine members in all. *Id.* The chief justice of the supreme court and members in good standing of the Hawaii bar each choose two of the remaining four members. *Id.*

judge.<sup>313</sup> Commission review allows an informed body to evaluate a judge's entire ten-year record. The commission sees any unpopular or controversial decisions in the context of a broader record. In addition, the commission can review the legal reasons for the judge's decision, not just the result.

Third, commission review avoids judicial electoral campaigns, some of which can be demagogic, undignified, and unsophisticated. Judges create complicated records of rulings on a variety of issues, and an informed body representing the public can examine a judge's entire record rather than merely focus on a judge's rulings in the most notorious or highly publicized cases. Because a judge knows that an informed body will review her performance, she will be less susceptible to community pressures and will be more likely to enforce constitutional and statutory law. Such a method of selection would also result in better judges. Many capable and highly qualified individuals are unwilling to seek judgeships where they must stand for election, knowing that the responsible discharge of their duties in a controversial case could cost them their positions. Such individuals may also be unwilling to solicit campaign contributions to finance a judicial campaign, knowing that it creates an appearance of impropriety,<sup>314</sup> engage in campaign tactics that are inconsistent with the Model Code of Judicial Conduct but may be necessary to

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<sup>313</sup> HAW. CONST. art. VI, § 3; *see also* D.C. CODE §§ 11-1501 to 11-1530 (1995) (providing 15-year terms for judges in the District of Columbia with an independent commission empowered to remove judges for cause).

<sup>314</sup> Norman Krivosha, as Chief Justice of Nebraska, observed:

One may be the most ethical individual in the world and, yet, if one must seek funds as the other two branches of government do when running for office, one inevitably creates the appearance of impropriety. . . . How does a judge maintain his or her appearance of impartiality and propriety if he or she is identified as a "labor judge" or as a "management judge" or as a "plaintiff's judge" or as a "defendant's judge?"

Another serious question is from whom are the funds to be solicited? Obviously, one must solicit from all lawyers practicing before the court. All lawyers, obviously, want to contribute to the campaign of a sitting judge!

Krivosha, *supra* note 296, at 19-20; *see also* American Bar Ass'n, *Report of Commission on Professionalism*, 112 F.R.D. 243, 293 (1986) (finding that "many of the best potential candidates [for a judgeship] never apply" in part because "[n]o matter how hard a judge may try to be fair to contributors and non-contributors alike, the necessity and the practicalities of campaign fundraising can only create the public expectation that judges will not be impartial"); Johnson & Urbis, *supra* note 162, at 540-42 (describing how fundraising has "seriously tarnished" the Texas judiciary's image because the cost of a successful judicial campaign has "skyrocketed," potential candidates have refused to seek judicial office, and the chief justice of the Texas Supreme Court resigned in a show of support for a judicial selection system that would "take the money out of judicial politics' ").

obtain office,<sup>315</sup> or assume the bench knowing that they will be unable to defend themselves when attacked politically for a single ruling or decision.

Fourth, the public may have more confidence in and respect for the judiciary because it knows that judges who do not have to worry about offending a particular segment of the population in order to raise campaign funds or stay in office are more likely to be impartial. At the same time, periodic review of judicial behavior protects the public from those who are unfit for judicial service.

Finally, and most importantly, such a system ensures that when an individual takes the bench, he or she is independent in the sense that former United States Supreme Court Justice Owen Roberts described:

When a man goes on the Court he ought not to have to depend upon the strength . . . of his own character to resist the temptation to shade a sentence in an opinion or shade a view. [He should not have] to put an umbrella up in case it should rain. He ought to be free to say his say, knowing as the founding fathers meant he should know, that nothing could reach him and his conscience was as free as could be.<sup>316</sup>

To be independent, a judge must be free to disregard public sentiment when required by the law, and to take unpopular, but constitutionally mandated, action.

Until recently judicial elections, whether direct or retention, attracted little public attention. Judges seldom encountered opposition either from opponents or from interest groups opposing their retention.<sup>317</sup> However, this is no longer the case. The judiciary in states all across the nation is becoming increasingly politicized. The success in defeating incumbent judges in some states is leading to new efforts in others. No judge can risk alienating a powerful special interest group or being viewed as "soft on crime." The elimination of both direct and retention elections is essential if courts are to be responsive to the commands of the law and Constitution instead of the will of the majority.

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<sup>315</sup> See *supra* notes 138-48 and accompanying text; *infra* notes 327-28, 331, and accompanying text.

<sup>316</sup> Robert W. Raven, *Does the Bar Have an Obligation to Help Ensure the Independence of the Judiciary?*, 69 JUDICATURE 66, 67 (1985) (quoting Justice Roberts).

<sup>317</sup> Arthur Vanderbilt, *Judges and Jurors: Their Functions, Qualification and Selection*, 36 B.U. L. REV. 1, 37 (1956) (observing that the only thing that had saved the popular election of judges was the fact that most often judges were initially appointed to fill a vacancy and then ran unopposed in subsequent elections); see also JEROME R. CORSI, JUDICIAL POLITICS: AN INTRODUCTION 112 (1984) (noting that "in the forty-five-year history of retention elections [through 1980], . . . only 1.6 percent of all judges in retention elections were defeated"); Ross, *supra* note 120, at 166 (noting that before 1986 appellate judges "had generally not been challenged and had enjoyed job security because of public indifference to judicial elections").

### B. *Judicial Disqualification When Rulings Could Imperil Election*

In jurisdictions in which judges stand for election or retention, judges should be disqualified from presiding over cases in which there is the appearance that political considerations could tempt judges in their rulings. The law of judicial disqualification and due process currently provides for this, but courts fail to apply this law properly, relying on fictions of impartiality while ignoring political realities.

In *Tumey v. Ohio*,<sup>318</sup> the Supreme Court held as violative of due process a judicial system in which a mayor sat in judgment of alleged violators of a Prohibition ordinance, and was not paid unless he convicted and fined at least some of those brought before him. The Court concluded such a system deprives the accused of due process in several ways. First, it "subjects [a defendant's] liberty or property to the judgment of a court the judge of which has a direct, personal, substantial, pecuniary interest in reaching a conclusion against him in his case."<sup>319</sup> Second, "It is certainly not fair to each defendant, brought before the Mayor for the careful and judicial consideration of his guilt or innocence, that the prospect of such a loss by the Mayor should weigh against his acquittal."<sup>320</sup> Third, any system that "offer[s] a possible temptation to the average man as a judge to forget the burden of proof required to convict the defendant, or [that] might lead him not to hold the balance nice, clear and true between the State and the accused, denies the latter due process."<sup>321</sup> Fourth, given the mayor's position, "might not a defendant with reason say that he feared he could not get a fair trial or a fair sentence from one who would have so strong a motive to help his village by conviction and a heavy fine?"<sup>322</sup>

In *Ward v. Village of Monroeville*,<sup>323</sup> the Court extended the *Tumey* principle to prohibit a mayor from acting as a judge in a case in which his financial interest was not personal, but in which his general mayoral responsibilities included revenue production.<sup>324</sup> The Court rejected the village's argument that this system does not deprive defendants of due process because the mayor's decisions were correctable on appeal and trial de novo in the County Court of Common Pleas.<sup>325</sup> Justice Brennan wrote that "there is nothing to suggest that the incentive to convict would be diminished by the possibility of reversal on appeal . . . . [The defendant] is entitled to a neutral and detached judge in the first instance."<sup>326</sup>

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<sup>318</sup> 273 U.S. 510 (1927).

<sup>319</sup> *Id.* at 523.

<sup>320</sup> *Id.* at 532.

<sup>321</sup> *Id.*

<sup>322</sup> *Id.* at 533.

<sup>323</sup> 409 U.S. 57 (1972).

<sup>324</sup> *Id.* at 60.

<sup>325</sup> *Id.* at 61.

<sup>326</sup> *Id.* at 61-62; see also *Aetna Life Ins. Co. v. Lavoie*, 475 U.S. 813 (1986) (holding that an Alabama Supreme Court justice with a direct, personal, substantial, and pecu-



The impartiality of judges who promise to be "tough on crime" is also called into question by the Model Code of Judicial Conduct. Canon 3 provides that a judge "should not be swayed by partisan interests, public clamor or fear of criticism."<sup>327</sup> Canon 5 provides that 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."<sup>328</sup>

The *Tumey* situation is analogous to a typical capital case tried, appealed, or brought for postconviction review before an elected judge. The justices of the Supreme Courts of California and Mississippi, the judges of the Texas Court of Criminal Appeals, and trial judges in Houston and other jurisdictions certainly know that their future on the courts and their judicial salaries and pensions are closely related to their decisions in capital cases. At the very least, these pressures create the appearance of partiality:

A fair trial in a fair tribunal is a basic requirement of due process. Fairness of course requires an absence of actual bias in the trial of cases. But our system of law has always endeavored to prevent even the probability of unfairness . . . . [T]o perform its high function in the best way "justice must satisfy the appearance of justice."<sup>329</sup>

To take one example, a reasonable person has a basis for questioning Alabama Circuit Judge Mike McCormick's impartiality in criminal cases after he ran advertisements proclaiming: "Some complain that *he's too tough on criminals*, AND HE IS . . . We need him now more than ever."<sup>330</sup> Proclaiming that one is "too tough" on crime is incompatible with holding "the balance nice, clear and true between the State and the accused."<sup>331</sup> Similarly, a reasonable person has a basis for doubting the

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niary interest in the outcome of a case was barred from hearing the case); *Dugan v. Ohio*, 277 U.S. 61 (1928) (holding that a mayor acting as the judge did not deprive a defendant of due process when the mayor received his salary regardless of whether he convicted or acquitted the defendant, and when the mayor's connection to the general fund from which he was paid was remote enough to preclude a presumption of bias).

<sup>327</sup> MODEL CODE OF JUDICIAL CONDUCT Canon 3B(2) (1990). For further discussion of the Model Code of Judicial Conduct and elected judges, see Ross, *supra* note 120, at 128-30 (applying the 1972 Model Code to the problem of elected judiciaries).

<sup>328</sup> MODEL CODE OF JUDICIAL CONDUCT Canon 5A(3)(d)(i), (ii) (1990).

<sup>329</sup> *In re Murchison*, 349 U.S. 133, 136 (1955) (quoting *Offutt v. United States*, 348 U.S. 11, 14 (1954)).

<sup>330</sup> Committee to Re-elect Judge Mike McCormick, BIRMINGHAM NEWS, Nov. 4, 1994, at 4C (advertisement); Committee to Re-elect Judge Mike McCormick, BIRMINGHAM NEWS, Nov. 6, 1994, at 21P (advertisement).

<sup>331</sup> *Tumey v. Ohio*, 273 U.S. 510, 532 (1927). Not only did Judge McCormick's proclamation suggest partiality, but it may in fact have been a violation of the Model Code of Judicial Conduct, which prohibits judicial candidates, including incumbent

impartiality of elected judges in Georgia's Flint Judicial Circuit,<sup>332</sup> where the prison where executions take place is a primary employer of voters, especially when federal courts find the decisions of those judges to be in error in three out of every four capital cases.<sup>333</sup>

The legitimacy of judicial decisions depends on the appearance of fairness, and elected judges hearing capital cases too often make rulings that appear to be patently unfair. It is apparent not only to Justice Stevens<sup>334</sup> but also to those who observe the courts that judges are frequently responding to a "higher authority" than the Constitution. In some instances, that voice sounds too much like the cries of a lynch mob. *Tumey* commands judges not have an improper temptation to rule in one way or the other.<sup>335</sup> A judge who will lose his position by ruling against the prosecution in a single case is under far greater pressure not to "hold the balance nice, clear and true between the state and the accused"<sup>336</sup> than is a judge whose salary comes from fines that may be imposed in some of the many cases that come before him. It is possible to construct fictions of impartiality and impute them to every judge, but the reality is that capital punishment is popular<sup>337</sup> and judicial elections can become referenda on the death penalty.

One step in the right direction would be to permit disqualification of at least one judge without attempting to assess the question of impartiality. For example, in Maryland, a party who believes that a fair and impartial trial cannot be had before the assigned judge may file a suggestion that the judge is incapable of affording him or her an impartial trial and the case must be removed to another court.<sup>338</sup> A judge in a capital case may not refuse to grant the motion. This at least allows the defendant to decide if the judge originally assigned to his case may not be in a position

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judges, from making "pledges or promises of conduct in office other than the faithful and impartial performance of the duties of the office." MODEL CODE OF JUDICIAL CONDUCT Canon 3B(2) (1990); see *In re Kaiser*, 759 P.2d 392 (Wash. 1988) (censuring a district judge for his campaign statements that he was "toughest on drunk driving," and "tough on drunk driving," because they singled out a special class of defendants and suggest that the judge would subject those cases to a higher standard); ABA Comm. on Ethics & Professional Responsibility, Informal Op. 1444 (1980) (promise to have a "strict sentencing philosophy" violates the Canon).

<sup>332</sup> See *supra* notes 205-06 and accompanying text.

<sup>333</sup> See *supra* note 206.

<sup>334</sup> See *supra* text accompanying note 1.

<sup>335</sup> See *supra* text accompanying notes 318-22.

<sup>336</sup> *Tumey v. Ohio*, 273 U.S. 510, 532 (1927).

<sup>337</sup> See, e.g., Lynne Duke, *In Arkansas, a Death Row Struggle and Doubt*, WASH. POST, Jan. 9, 1994, at A1, A8 (noting a recent Gallup Poll showing that 76% of Americans support the death penalty); Linda Greenhouse, *The Nation: A Capacity to Change as Well as to Challenge*, N.Y. TIMES, Feb. 27, 1994, § 4, at 4 (noting polls showing over 75% of people support the death penalty).

<sup>338</sup> MD. RULES 4-254.

to put aside political considerations, such as a judge facing a tough election. This system is attractive because it does not operate on the presumption that judges become somehow immune to influences that would weigh strongly on non-judges. This system does not attempt to discern a judge's actual biases, but recognizes that the appearance of bias may make it appropriate for another judge to hear the case. On the other hand, when there is no concern about improper influences, the judge will remain on the case. There is no assurance, however, that the new judge assigned to a case will not also be facing a tough reelection campaign and be subject to the same pressures.

It may be that practical considerations prevent courts from acknowledging the appearance of partiality of elected judges due to political pressures. If an entire state supreme court is disqualified, how is the case decided? If a judge is disqualified from all criminal cases because he promised to be "too tough on criminals,"<sup>339</sup> how is the criminal docket to be managed? The answer to these practical problems, however, is not to substitute legal fictions for political reality.

The popular frustration regarding crime is making it increasingly difficult for courts to discharge their constitutional obligation of fairness. Judges who realize they cannot hold the balance nice, clear, and true between the state and the accused in particular cases because of political considerations have a duty to recuse themselves. Lawyers have a duty to move for the disqualification of judges who are subject to the temptation to give in to political pressures in the cases before them. In reviewing disqualification issues, trial and appellate courts should face the reality of the political pressures that are present instead of hiding behind legal fictions. If disqualification in cases in which one might reasonably question judges' partiality due to political pressures begins to burden dockets, the legislature and the bar will be forced to devise different selection systems that will minimize the influence of political pressures on judges.

### C. *Altering Judicial Assignment Systems*

One way to reduce the political pressures on elected judges is to prohibit those judges from presiding over capital cases in the districts that elect them. This could be accomplished through the judicial assignment system.

For example, in both North<sup>340</sup> and South Carolina,<sup>341</sup> judges rotate among judicial districts within the state. When out of his county of resi-

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<sup>339</sup> See *supra* note 330 and accompanying text.

<sup>340</sup> N.C. CONST. art. IV, § 11 (mandating the rotation of superior court judges among various districts within a judicial division); N.C. GEN. STAT. § 7A-41 (1989) (organizing the state into judicial divisions and superior court districts); *id.* § 7A-47.3 (1989) (implementing the constitutionally mandated rotation of superior court judges).

<sup>341</sup> S.C. CONST. art. V, § 10 (mandating the rotation throughout the state of all

dence, the judge is relieved from the political pressure of having to portray himself as the protector of his community; a judge would not necessarily stand for election in the very place in which he had made controversial rulings.

This system would help to diminish the role of political pressure on judicial decisionmaking, but would not eliminate it. A judge could still seek to impress the voters at home with his toughness in the case before him in another district. In a highly publicized case, a controversial ruling would still be well known and, even if it were not, an opponent could still seize upon an unpopular but correct ruling and use it in opposing the judge. Additionally, in any system a judge who intends to run for higher office may want to use his or her position for visibility.

D. *Limiting the Deference Reviewing Courts Give to Judges Influenced by Political Pressures*

So long as judges are subject to election or retention, the discretion of trial judges on crucial matters should be limited by objective standards that are carefully reviewed on appeal and in postconviction proceedings. Reviewing courts should acknowledge the reality of the political pressures on trial judges, and, where the potential for such influence is present, they should carefully scrutinize rulings without the normal deference accorded to trial judges.

Appellate courts routinely defer to findings of fact of state trial judges, and review decisions of trial judges under the highly deferential abuse-of-discretion and clearly-erroneous standards on critical issues such as granting of a change of venue,<sup>342</sup> allowing a continuance,<sup>343</sup> the extent and

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circuit court judges); S.C. CODE ANN. § 14-3-390 (Law. Co-op. 1977) (implementing the constitutionally mandated rotation of circuit court judges).

<sup>342</sup> See, e.g., *Parker v. State*, 587 So. 2d 1072, 1080-81 (Ala. Crim. App. 1991) (finding that a trial court's refusal to grant change of venue was not an abuse of discretion even though 65 out of 93 members of the jury venire had prior knowledge of the crime); *People v. Cooper*, 809 P.2d 865, 882 (Cal.) (declaring that in order to overrule a trial court's decision not to change venue, "the defendant must show both that the court erred in denying the change of venue motion, i.e., that at the time of the motion it was reasonably likely that a fair trial could not be had in the current county, and that the error was prejudicial, i.e., that a fair trial was not *in fact* had"), *cert. denied*, 502 U.S. 1016 (1991); *Welch v. State*, 229 S.E.2d 390, 395 (Ga. 1976) (holding that the decision whether to grant a change of venue is within discretion of the trial court and will not be reversed absent an abuse of discretion).

<sup>343</sup> See, e.g., *Adkins v. State*, 600 So. 2d 1054 (Ala. Crim. App. 1990) ("The decision to grant or deny a motion for continuance will not be reversed unless the trial judge has abused his discretion."), *aff'd in part and remanded*, 600 So. 2d 1068 (Ala. 1992); *People v. Mickey*, 818 P.2d 84, 106 (Cal. 1991) (decision whether to grant continuance within discretion of trial court), *cert. denied*, 113 S. Ct. 65 (1992); see also GA. CODE ANN. § 17-8-22 (1990) (prescribing that all applications for continuances are addressed to "sound legal discretion of the court"); *Anderson v. State*, 365 S.E.2d

scope of voir dire,<sup>344</sup> whether there has been racial discrimination in the exercise of jury strikes,<sup>345</sup> the impartiality of prospective jurors,<sup>346</sup> and

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421, 424 (Ga. 1988) (holding that a refusal to grant a continuance will be disturbed only if "it clearly appears that the judge abused his discretion").

<sup>344</sup> In most jurisdictions, the trial court determines whether jurors may be questioned individually or in a group and what questions may be asked. *See, e.g.,* *Mu'Min v. Virginia*, 500 U.S. 415, 427-32 (1991) (upholding, as within discretion of the trial judge, the conduct of mere limited, conclusory questioning regarding pretrial publicity); *Turner v. Murray*, 476 U.S. 28, 37 (1986) (leaving within the discretion of the trial court the form and number of questions regarding racial prejudices to be asked of prospective jurors, including whether the venire is questioned individually or collectively); *Kuenzel v. State*, 577 So. 2d 474, 484 (Ala. Crim. App. 1990) (stating that the decision whether to grant voir dire individually or collectively is within discretion of trial court), *aff'd sub nom. Ex parte Kuenzel*, 577 So. 2d 531 (Ala.), *cert. denied*, 502 U.S. 886 (1991); *see also* *Hill v. State*, 427 S.E.2d 770, 773 (Ga.) (finding no abuse of discretion when a trial court remained in session until 11:00 p.m. on the first day of voir dire but adjourned between 6:00 and 8:00 p.m. on the remaining days), *cert. denied*, 114 S. Ct. 396 (1993).

<sup>345</sup> *Batson v. Kentucky*, 476 U.S. 79, 98 n.21 (1986) (concluding that the trial judge's findings regarding a prosecutor's reasons for striking jurors who are members of cognizable class are subject to "great deference"); *Daniel v. State*, 623 So. 2d 438, 442 (Ala. Crim. App. 1993) (repeating that a trial court is entitled to "great deference" in ruling on *Batson* claims; reversal was required only if a trial court's determination is clearly erroneous); *Lingo v. State*, 437 S.E.2d 463 (Ga. 1993) (applying *Batson's* requirement of "great deference" to uphold the trial court's findings that a prosecutor had racially neutral reasons for exercise of all 11 peremptory strikes against the first 11 African-American venire members called).

<sup>346</sup> A trial court finding of juror impartiality may be overturned only for "manifest error." *Mu'Min*, 500 U.S. at 428; *Patton v. Yount*, 467 U.S. 1025, 1031 (1984); *see also* *Harris v. State*, 632 So. 2d 503, 521 (Ala. Crim. App. 1992) (stating that the trial court's ruling on challenges for cause based on pretrial knowledge of the case will not be disturbed on appeal unless clearly shown to be an abuse of discretion), *aff'd, Ex parte Harris*, 632 So. 2d 543 (Ala. 1993), *aff'd, Harris v. Alabama*, 115 S. Ct. 1031 (1995); *Sheperd v. State*, 325 So. 2d 551, 555-56 (Ala. Crim. App. 1975) (finding that the decision of whether a juror could be impartial despite a friendship with an assistant district attorney is within discretion of the trial court), *cert. denied*, 325 So. 2d 557 (Ala. 1976); *Hittson v. State*, 449 S.E.2d 586, 594 (Ga. 1994) (stating that the trial court's findings regarding venire members' capability to serve as impartial jurors are entitled to deference on appeal), *cert. denied*, 115 S. Ct. 2005 (1995); *Ledford v. State*, 439 S.E.2d 917, 922 (Ga. 1994) (stating that an appellate court defers to trial court's findings that jurors could be impartial despite equivocation on question of whether they would automatically impose death penalty), *cert. denied*, 115 S. Ct. 740 (1995); *Adanandus v. State*, 866 S.W.2d 210, 222 (Tex. Crim. App. 1993) (repeating that whether a juror should be stricken for cause is within discretion of the trial court), *cert. denied*, 114 S. Ct. 1338 (1994); *Cantu v. State*, 842 S.W.2d 667, 681-82 (Tex. Crim. App. 1992) (discussing the need for deference to trial court's rulings with respect to juror impartiality), *cert. denied*, 113 S. Ct. 3046 (1993).

the admission of certain types of evidence.<sup>347</sup> Federal courts, when reviewing state court judgments in habeas corpus proceedings, are required to give a presumption of correctness to findings of fact by the state courts.<sup>348</sup> The notion that the trial judge, having observed the demeanor of the witnesses and heard all of the evidence first hand, is in a better position to make determination of credibility forms much of the basis for the deference accorded the trial judge.<sup>349</sup> This deference also rests upon the prevailing legal fiction that assumes the impartiality of judges.

In reality, however, political considerations may be more important than legal principles or the demeanor of witnesses. As previously discussed, judges are under immense political pressure in making discretionary rulings in high-profile capital cases. A classic example is the case of *Sheppard v. Maxwell*.<sup>350</sup> The murder trial of Dr. Samuel H. Sheppard started, after extensive pretrial publicity, just two weeks before a November election in which the chief prosecutor was a candidate for judge and the trial judge was a candidate for reelection.<sup>351</sup> The Supreme Court held that Sheppard was entitled to habeas corpus relief because the trial court had failed to protect his right to a fair trial by taking measures such as continuing the case until after the election, changing venue, and controlling the trial participants' release of prejudicial information to the press.<sup>352</sup>

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<sup>347</sup> See, e.g., *Hart v. State*, 612 So. 2d 520, 528 (Ala. Crim. App.) ("The decision to receive photographs into evidence is within the discretion of the trial court."), *aff'd*, 612 So. 2d 536 (Ala. 1992), *cert. denied*, 113 S. Ct. 2450 (1993); *Haney v. State*, 603 So. 2d 368, 396 (Ala. Crim. App. 1991) (concluding that the admission of "gruesome and ghastly" photos is within discretion of trial court); *People v. Cox*, 809 P.2d 351, 377 (Cal. 1991) (upholding the admission of autopsy photographs in the absence of "manifest abuse of discretion"), *cert. denied*, 502 U.S. 1062 (1992); *Capehart v. State*, 583 So. 2d 1009, 1012-13 (Fla. 1991) (stating that the decision whether to qualify expert and permit expert testimony is within the discretion of trial court), *cert. denied*, 502 U.S. 1065 (1992); *Taylor v. State*, 640 So. 2d 1127, 1133 (Fla. Dist. Ct. App.) ("A trial court's rulings with regard to the relevancy and admissibility of evidence . . . are subject to an abuse of discretion standard of review."), *review denied*, 649 So. 2d 235 (Fla. 1994).

<sup>348</sup> 28 U.S.C. § 2254(d); see, e.g., *Wainwright v. Witt*, 469 U.S. 412, 426-35 (1985) (holding that a trial court's finding that a venireperson is disqualified due to views on the death penalty are subject to presumption of correctness); *Patton v. Yount*, 467 U.S. 1025, 1038 (1984) (holding that a trial judge's finding that jurors were impartial despite pretrial publicity is entitled to a presumption of correctness).

<sup>349</sup> See, e.g., *Batson*, 476 U.S. at 98 n.21 (holding great deference to the trial judge appropriate because the decision regarding exclusion of jurors "largely will turn on evaluation of credibility").

<sup>350</sup> 384 U.S. 333 (1966).

<sup>351</sup> *Id.* at 342.

<sup>352</sup> *Id.* at 358-63; see also *Delaney v. United States*, 199 F.2d 107, 115 (1st Cir.

Unfortunately, since *Sheppard*, the Supreme Court has not mandated procedures to minimize the risk of prejudice in such volatile situations or required careful scrutiny based on objective standards of similar discretionary decisions by trial judges.<sup>353</sup> The Court has also retreated from its earlier pronouncements that because of the exceptional and irrevocable nature of the death penalty, capital cases require a heightened degree of procedural protection.<sup>354</sup>

A few state supreme courts have recognized the political pressures on trial judges and have fashioned more objective standards and mandatory procedures to reduce the discretion of trial judges in making rulings that may be politically unpopular. For example, the Mississippi Supreme Court, after acknowledging the political pressures that may influence a judge's decision on whether to grant a change of venue, decided that "some objective standards should be available to shield the [trial] court

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1952) (holding that a trial court erred when it refused to continue a case that had become a hot political issue until after an election).

<sup>353</sup> See, e.g., *Mu'Min v. Virginia*, 500 U.S. 415 (1991) (upholding the denial of individual voir dire in a capital case even when pretrial publicity was pervasive and contained prejudicial details about the crime and the defendant's criminal history); *Patton v. Yount*, 467 U.S. 1025 (1984) (holding that a trial court did not commit "manifest error" in finding the jury as a whole impartial despite pretrial publicity and in denying challenges for cause of jurors who had been exposed to pretrial publicity).

<sup>354</sup> For examples of the earlier pronouncements, see *Eddings v. Oklahoma*, 455 U.S. 104, 118 (1982) (O'Connor, J., concurring) (noting that the Court has required "extraordinary measures" to ensure the reliability of decisions regarding both guilt and punishment in a capital trial); *Beck v. Alabama*, 447 U.S. 625, 637-38 (1980) (prohibiting the state from withdrawing from the jury the option to hear a lesser-included-offense instruction in capital cases because to do so "introduces a level of uncertainty and unreliability into the factfinding process that cannot be tolerated in a capital case"); *Lockett v. Ohio*, 438 U.S. 586, 604 (1978) (recognizing that the "qualitative difference between death and other penalties calls for a greater degree of reliability when the death sentence is imposed" and holding that a capital defendant has a constitutional right to offer any aspect of his or her "character or record and any of the circumstances of the offense" as a mitigating factor warranting a sentence less than death); *Gardner v. Florida*, 430 U.S. 349, 357-58 (1977) (holding that it is of "vital importance to the defendant and to the community that any decision to impose death be, and appear to be, based on reason rather than caprice or emotion"); *Woodson v. North Carolina*, 428 U.S. 280, 305 (1976) (observing that death "is qualitatively different from a sentence of imprisonment" and that "[b]ecause of that qualitative difference, there is a corresponding difference in the need for reliability in the determination that death is the appropriate punishment in a specific case"). Justice Blackmun observed the Court's retreat from this approach in his dissenting opinion in *McCleskey v. Kemp*, 481 U.S. 279 (1987): "The Court today seems to give a new meaning to our recognition that death is different. . . . [and] relies on the very fact that this is a case involving capital punishment to apply a *lesser* standard of scrutiny under the Equal Protection Clause." *Id.* at 347-48 (dissenting opinion).

from even the appearance of such subtle coercion."<sup>355</sup>

The Mississippi Supreme Court described the political reality for elected trial judges in considering a motion to change venue:

[B]y perennially holding that a change of venue is granted solely at the discretion of the court, we perpetuate a burden on the trial judge. On the one hand, the judge is to act impartially, dispassionately and with scrupulous objectivity. On the other hand, in reality, the judge serves at the will of the citizenry of the district; the judge is, after all, a public official who must occasionally, perhaps even subconsciously, respond to public sentiment when making the decision to refuse a change of venue. It must be observed that, in granting a change, the trial judge might be perceived as implying that a fair trial cannot be had among his or her constituents and neighbors.<sup>356</sup>

To keep such sentiment from influencing the judge, the court held that the accused has a right to a change of venue when it is doubtful that an impartial jury can be obtained; such doubt is implicit when there is present strong public sentiment against the defendant; upon proper application, there arises a presumption that such sentiment exists; and, the state then bears the burden of rebutting that presumption.<sup>357</sup>

The court also emphasized the importance of fairness in capital cases:

A heightened standard of review is employed on appeal where the defendant's life is at stake. . . . It follows then that the trial court should, likewise, be particularly sensitive to the need for a change of venue in capital cases.<sup>358</sup>

The Georgia Supreme Court also modified its standard of review of denials of motions for a change to venue and directed trial judges in Georgia to grant changes of venue when a capital defendant makes "a substantive showing of the likelihood of prejudice by reason of publicity."<sup>359</sup> The Court rejected the argument of the dissent that the determination of the trial judge was subject to "special deference" and should not be overturned unless it was "manifestly erroneous."<sup>360</sup>

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<sup>355</sup> *Johnson v. State*, 476 So. 2d 1195, 1209 (Miss. 1985).

<sup>356</sup> *Id.*

<sup>357</sup> *Id.* 1210-11. In applying the standard in the case before it, the court found that the state could not rebut the presumption of community prejudice in light of the testimony of 15 witnesses regarding specific reasons that the defendant could not receive a fair trial in the community. *Id.* at 1213.

<sup>358</sup> *Id.* at 1214; *see also* *Fisher v. State*, 481 So. 2d 203, 220-23 (Miss. 1985) (applying the *Johnson* presumption and holding that the trial judge abused his discretion by not granting a change of venue in a case in which every juror had been exposed to extensive negative pretrial publicity).

<sup>359</sup> *Jones v. State*, 409 S.E.2d 642, 643 (Ga. 1991).

<sup>360</sup> *Id.* at 644 (Hunt, J., dissenting). This had been the court's approach in previous



Venue decisions are but one example of potential for the influence of improper political considerations on judicial rulings and the need for reviewing courts to remedy politically influenced decisions by adopting and applying objective standards. Where a particularly notorious crime produces volumes of publicity, that publicity often creates pressure on the judge to score political points. The more objective standards that the Supreme Courts of Mississippi and Georgia have adopted lessen the discretion allowed the trial judge, and allow courts a greater distance from the political influences to review trial decisions.<sup>361</sup> A reviewing court can examine the testimony, the newspaper articles, and the tapes of broadcasts and make its own determination of whether there is a "likelihood of prejudice"<sup>362</sup> or the prosecution has rebutted a defendant's showing that public sentiment makes the likelihood of an impartial jury doubtful.<sup>363</sup>

Although these decisions of the Supreme Courts of Georgia and Mississippi providing for greater protection of the rights of the accused than the decisions of the U.S. Supreme Court may appear encouraging, they say more about the retreat of the U.S. Supreme Court from protecting the rights of the accused than it does about the willingness—or political practicality—of the state courts upholding the Constitution in these situations.<sup>364</sup> Most courts have shown little inclination to face reality with regard to many other discretionary decisions of trial judges that political considerations may influence. Decisions recognizing the political pressures on elected judges and adopting and applying more objective standards to limit discretion are the rare exceptions to thousands of decisions routinely deferring to decisions by trial judges on a wide range of issues. The deference in federal habeas corpus actions to state court factfind-

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cases. See, e.g., *Isaacs v. State*, 386 S.E.2d 316 (Ga. 1989), *cert. denied*, 497 U.S. 1032 (1990); *Devier v. State*, 323 S.E.2d 150 (Ga. 1984), *cert. denied*, 471 U.S. 1009 (1985).

<sup>361</sup> Of course, where a case has generated statewide publicity and community sentiment, see, e.g., *supra* notes 78-80 and accompanying text, or when the state supreme court's handling of all capital cases has become a political issue, as in California, the greater distance will still not free the state appellate courts from political influences. Moreover, because of the political consequences of an unpopular decision at either level, elected judges on both the trial and appellate benches may not fairly and consistently apply any objective standard that is established. Therefore, more objective standards are only a small interim step until judicial selection systems can be reformed along the lines discussed *supra* part IV.A.

<sup>362</sup> *Jones*, 409 S.E.2d at 643.

<sup>363</sup> *Johnson v. State*, 476 So. 2d 1195, 1210-11 (Miss. 1985).

<sup>364</sup> The two decisions discussed are quite fragile. The composition of the Mississippi Supreme Court has changed because of the opposition of prosecutors to such modest steps toward fairness. See *supra* notes 24-29 and accompanying text. The Georgia Supreme Court's decision in *Jones* was by a 4-3 vote over a vigorous dissent by Chief Justice Hunt. 409 S.E.2d at 644. The Georgia Attorney General has already accused one of the court's justices, who faces election in 1996, of leading an effort to abolish the state's death penalty. See *supra* note 208.

ing,<sup>365</sup> as well as other increasingly severe restrictions on habeas review,<sup>366</sup> insulate many decisions by state courts from federal review.

Nevertheless, a reexamination of the deference given to elected judges on discretionary matters is urgently needed. The outcomes of the judicial elections in California, Texas, Mississippi, and other states discussed in this Article are exposing for all to see the political pressures that influence the decisions of judges who face election or retention. It is of course impossible to know the number of judges who simply give in, either consciously or subconsciously, to their political pressures or the number of judicial rulings and opinions that political considerations influence. But the political realities are apparent to anyone who practices in the courts and observes these pressures at work. In many of the jurisdictions where the death penalty is frequently imposed, the political reality is that the elected state court judge cannot even consider granting relief to one facing the death penalty.

If judges continue to be voted off trial and appellate courts for their decisions in capital cases and are replaced with judges who are little more than conductors on railroads to the execution chambers, it will be impossible for courts to maintain the fiction that judges who face election are impartial without risking public ridicule and immense damage to the perception of the legitimacy and credibility of the courts. Until more fundamental reform of judicial selection is feasible, courts must acknowledge and deal with the political pressures on judges. In addition, full federal habeas corpus review of state court convictions should be restored. The once Great Writ of habeas corpus barely survives the blows that have rained upon it from the efforts of the Supreme Court and the Congress to expedite executions, achieve finality, and reduce friction between the state and federal courts.<sup>367</sup> Yet as numerous examples set out in this Article make clear,<sup>368</sup> only federal judges have the independence and job

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<sup>365</sup> See authority collected *supra* note 348.

<sup>366</sup> See cases collected *supra* note 44.

<sup>367</sup> See *supra* note 44; see also *Galtieri v. Wainwright*, 582 F.2d 348, 375 (5th Cir. 1978) (en banc) (Goldberg, J., dissenting) (decrying "the allure of faddish modernity, of a stop-watch style of jurisprudence" and the trading away of the "most precious legacy of Lord Coke, the power to discharge from custody even one imprisoned by order of the King" for "a mess of pottage, a gruel composed of questionable notions of efficiency and vague notions of federalism"); *Bass v. Estelle*, 696 F.2d 1154, 1160-62 (5th Cir.) (Goldberg, J., specially concurring) (expressing the view that the "plethora of statutory and judicial procedural barriers" that have obstructed access to federal habeas corpus review "profoundly regrettable"), *cert. denied*, 464 U.S. 865 (1983).

<sup>368</sup> See especially *supra* notes 196-201, 205-06, 208 and accompanying text. Even with the development of many procedural barriers to federal habeas corpus review, federal courts found constitutional error in 40% of the first 361 capital judgements reviewed in habeas corpus proceedings between the restoration of the death penalty in 1976 and mid-1991. Liebman, *supra* note 44, at 541 n.15. In some states, such as Georgia, the percentage has been much higher. See *supra* note 206. Thus, state court

security that enable them to enforce the protections of the Constitution when doing so would be vastly unpopular. If the Constitution is to serve its purpose as fundamental law that protects us from "our baser selves" when there is "a demand for vengeance on the part of many persons in the community against one who is convicted of a particularly offensive act,"<sup>369</sup> its enforcers must be judges who cannot be swept from office for making a controversial decision.

#### E. *Appointment of Counsel Independent of Judges*

Regardless of how judges are selected, they should not be responsible for the appointment of counsel for poor persons accused of crimes. An independent judiciary should be independent not only of political influences and the prosecution, but also of the defense. Judges have a different role to play in the adversary system than the management of the defense. In addition, defense counsel should be independent of the judge in order to fulfill the obligation of providing zealous representation to the accused.

The American Bar Association recommends that there be a defender office or a special appointments committee to select counsel for indigent defendants.<sup>370</sup> Removing the responsibility for the representation of defendants from judges and placing it with a program charged with protecting only the best interests of the defendants<sup>371</sup> will not completely depoliticize the process or always ensure adequate counsel, but it would be an important step toward a properly working adversary system and effective representation of indigent defendants.

#### CONCLUSION

Justice Hugo Black once observed that "[u]nder our constitutional system, courts stand against any winds that blow as havens of refuge for

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judges—at both the trial and appellate level—failed to correct constitutional error in at least 40% of the capital cases. It is impossible to know how many other constitutional errors were barred from federal review. It is remarkable that with such a dismal track record, it would be seriously contended that the elected state court judges will enforce the Constitution in such controversial cases.

<sup>369</sup> *Furman v. Georgia*, 408 U.S. 238, 344-45 (1972) (Marshall, J., concurring).

<sup>370</sup> AMERICAN BAR ASS'N, GUIDELINES FOR THE APPOINTMENT AND PERFORMANCE OF COUNSEL IN DEATH PENALTY CASES Guideline 3.1 (1989); see also American Bar Ass'n, *supra* note 42, at 19, 254.

<sup>371</sup> Such programs must not only be charged with responsibility for providing zealous representation to the accused; the governing boards and staffs must be made up of people who understand and are committed to the defense function in the adversary system. Cf. Charles J. Ogletree, Jr., *From Mandela to Mthwana: Providing Counsel to the Unrepresented Accused in South Africa*, 75 B.U. L. REV. 1, 43-44 (1995) (suggesting the same as a partial remedy for the lack of adequate representation in post-Apartheid South Africa).

those who might otherwise suffer because they are helpless, weak, outnumbered, or because they are . . . victims of prejudice and public excitement."<sup>372</sup> This role is of particular importance in capital cases, where the winds of public excitement blow especially hard against the poor, members of racial minorities, and the despised who stand accused of heinous crimes. Judges are not legislators; they have a different role than simply carrying out the wishes of their constituents to impose the death penalty.

Capital cases put extraordinary pressures on all participants in the legal system. Even the most conscientious and independent judge faces an enormous challenge of reining in the emotions that accompany a brutal crime and the loss of innocent life. If decisions about guilt and punishment are to be made fairly, objectively, and reliably,<sup>373</sup> it is critical that judges be guided by the Constitution, not personal political considerations.

Yet in high-visibility capital cases in which public opinion is overwhelmingly one-sided though often ill-informed, the political pressures may be so great that a judge who has an interest in remaining on the bench cannot ignore them. In today's political climate, a commitment to fairness is too often perceived as "softness" on crime—a political liability for a judge who must run for office. The lack of electoral clout of those facing the death penalty makes the political equation easy; however, the cost to justice and the rule of law is significant.

Nevertheless, it appears unlikely that even the most modest proposals discussed in this Article will be implemented in many jurisdictions—particularly those where they are most urgently needed—in the near future. In part, this is because there are many people who prefer judges who follow the election returns to judges who follow the law. It is also partly because the judiciary and the bar persist in hiding behind the legal fiction that judges are impartial instead of acknowledging the reality that in many instances they are not. The U.S. Supreme Court indulges in wishful thinking about what the state courts should be, instead of facing what they are, including the political pressures on those judges.

It is, however, time for open and honest discussion of the political pressures on judges who must stand for election and retention. The integrity, credibility, and legitimacy of the courts are at stake. Judges themselves should lead the discussion by disqualifying themselves *sua sponte* from cases in which they recognize that political considerations may keep them from holding the balance "nice, clear and true."<sup>374</sup> But it may be necessary for lawyers to prompt the discussion by filing motions for recusal in cases in which such pressures are present. The judiciary and the bar have

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<sup>372</sup> *Chambers v. Florida*, 309 U.S. 227, 241 (1940).

<sup>373</sup> A "fundamental idea" of due process is that life is not to be "forfeited as capital punishment" unless the case is "fairly tried in a public tribunal free from prejudice, passion, excitement, and tyrannical power." *Id.* at 236-37.

<sup>374</sup> *Tumey v. Ohio*, 273 U.S. 510, 532 (1927).

a duty to explain to the public the difference between the representative function of legislative bodies and the adjudicatory function of courts. These steps are urgently needed to bring about reforms that will increase the likelihood that the only "higher authority" to which judges are responsive is the Constitution and laws of the United States.

