CAPITAL PUNISHMENT AND THE CRIMINAL JUSTICE SYSTEM: COURTS OF VENGEANCE OR COURTS OF JUSTICE?

Keynote address by Stephen B. Bright
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This is an important subject that we cover here today, the death penalty in the twenty-first century. And I want to reflect with you on some of the more difficult moral issues that the death penalty presents, not the question of whether we should have it or not, but a few others.

As Professor Robbins said this morning, in talking about why this is so important, the death penalty is growing in scope, at the same time that Congress and the states are cutting back on the protections for those under death sentences and speeding up the process.

There are now 3000 people on death row.[1] New York[2] and Kansas,[3] have recently adopted the death penalty. There are only twelve states in the Union now that do not have the death penalty.[4] The federal government recently passed a crime bill providing for over fifty federal capital offenses.[5]

We are in the midst of a crime debate, where the tone is becoming increasingly strident, one in which there are threats to

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1. NAACP Legal Defense & Educational Fund, Death Row, U.S.A. (Spring 1995), at 1 (stating that there are 3009 inmates on death rows on April 30, 1995).

2. FN122. Id. (listing those states which do and do not have capital punishment).

3. Id.

4. Id.

5. Violent Crime Control and Law Enforcement Act, Pub. L. No. 103-322, 108 Stat. 1796 (1995) (codified in scattered sections of 42 U.S.C.).

some of the protections of the Bill of Rights and threats to the integrity of our legal system.

There are some things we can agree on, and I want to mention those, and then talk about some other things on which I think there might be agreement, even between those who are for and those who are against the death penalty.

We can agree that we are opposed to crime and to violent crime in our society. I had the pleasure of meeting Anne McCloskey this morning, who is the Chair of the Maryland Coalition Against Crime. Of course there is no Maryland coalition for crime. We are all against crime, and all of us could join that coalition because there is nothing more unfair, nothing more arbitrary, nothing more outrageous than for innocent persons to lose their lives or to be put at fear or lose their property.

I know this from first hand experience. When I lived in Washington, D.C., I was held up on the street. I will never forget that experience. I will never forget the morning I picked up The Washington Post and saw that the doctor, the cardiologist who had helped me through one of the most difficult times in my life, had been shot and killed by an intruder in his home.

I am very aware of the fear of crime. Our office is one of two buildings that are not abandoned in the part of downtown Atlanta where we are. Every night when I leave at the end of the day, I look down the street and there are people selling drugs a little further down the street, and on down after that, there are people selling their bodies. The walk from the front door to the car every night is always questionable in terms of whether you are going to make it.

Certainly our society and our government has to do something about violence in society and about the fear that people have about it. Where we part company perhaps, and where there may be some disagreement is, how we best deal with that problem. One area of disagreement is the role of punishment, where punishment comes into play and how punishment best accomplishes the purpose of protecting the community.

There is debate about the evolving standards of decency -- or even whether there are evolving standards of decency -- that mark the development of a maturing society. Are there some kinds of punishment that are beyond the pale: whipping, the stocks, capital punishment?

Alabama recently brought back the chain gang.[6] The new Commissioner of Corrections in Alabama spent $17,000 to buy 300 pairs of chains.[7] You do not need to go to Singapore to find a chain gang. You can find one right there in Alabama.

I was in a debate with someone recently about the evolving standards of decency, and I said, well, now, boiling in oil,

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6. See Rick Bragg, Chain Gangs to Return to Roads of Alabama, N.Y. Times, Mar. 26, 1995, at 9 (describing Alabama's reinstitution of chain gangs).

7. Id.

whipping, the stocks; do you think those are still appropriate punishments today? He thought about it for a minute, and said, well, boiling in oil, no; whipping and the stocks, yes.

That is something to think about. Are there some kinds of punishment that we do not have because of questions of decency, because of questions of expense, because of questions of effectiveness? Robert Morgenthau, the District Attorney in Manhattan, has raised questions about the effectiveness of capital punishment.

I recently was called by a Scandinavian journalist who said, how long do you think it will be until the United States abolishes the death penalty? I said that is really not something I have been thinking much about lately, given the way the country is going right now. He said, but all the western countries have done away with the death penalty. Surely it is only a matter of time.

It reminded me that we are still a very young country and in some ways still a frontier society. We still have some distance to go in reaching our aspirations for the kind of society we want this to be.

But we are going to have the death penalty into the twenty--first century. There is no question about that. We are going to have much greater use of the death penalty than we have had before.

So I would like to leave those questions to one side and talk about what kind of death penalty we are going to have, and what kind of process we are going to have because for people who are lawyers, as many of you are, or will be, these questions are of paramount importance.

Whether we are for or against the death penalty, we can agree on the importance of the integrity of the process. Ms. McCloskey said this morning, in our panel, she said we are not just for vengeance, we are for justice. Justice is something that everyone has an interest in.

I want to talk about four principal ingredients of justice in our court system that are in jeopardy today, in part because of the crime debate, and the development of the use of the death penalty as a political litmus test for the crime issue.

One, we all agree that our legal system depends upon a judge who is fair and impartial, a judge who follows the law and the Constitution of the United States in presiding over a case.

Second, we agree that the prosecution of a case, any case but particularly a case involving the loss of human life, must be based upon the law and a responsible exercise of discretion, and not on politics, race and other factors, such as that.

Third, we can agree that for the adversary system to work, the person accused of a crime must be represented by competent counsel who has the resources and the ability to make the trial a reliable adversary testing process.

Finally, we should agree that it is absolutely essential with regard to the death penalty that we eliminate the role of race in influencing who is executed. We must realize that we are, to some extent, still captives of a history where the death

penalty and lynching have been used against people of color in this country. It was not that long ago that lynchings were replaced by the perfunctory death penalty trial to accomplish the same purpose but with the pretense of some process.[8]

All of us should agree that where those ingredients are not present, regardless of how one feels about the death penalty in the abstract, we should not carry out a death sentence.

Crime has become one of the most dominant political issues in this country, particularly after the fall of communism. It used to be a politician could not be soft on communism, but now one cannot be soft on crime.

Richard Nixon, in accepting the Republican nomination in 1968, promised a new attorney general, which set the agenda for the use of crime in the political climate in our country.[9]

Lee Atwater, in 1988, said that Republicans should embrace the crime issue because most Democrats -- this was 1988 and not that long ago -- most Democrats are against the death penalty.[10] He helped with the Willie Horton advertisements to elect President Bush in his campaign for president.

Not nearly as noticed, but perhaps the saddest of all was when Bill Clinton went back to Arkansas to preside over the execution of Ricky Rector, a brain damaged man who killed a police officer and then put the gun to his own head and shot out the front part of his brain. Rector was tried by an all-white jury and sentenced to death.[11]

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8. See generally Dan T. Carter, Scottsboro: A Tragedy of the American South 115 (rev. ed. 1979); George C. Wright, Racial Violence in Kentucky, 1865- 1940: Lynchings, Mob Rule, and "Legal Lynchings" (1990); Douglas L. Colbert, Challenging the Challenge: Thirteenth Amendment as a Prohibition Against the Racial Use of Peremptory Challenges, 76 Cornell L. Rev. 1, 79 (1990); John F. Galliher et al., Criminology: Abolition and Reinstatement of Capital Punishment During the Progressive Era and Early 20th Century, 83 J. Crim. L. 538, 560-76 (1992). See also Alan Brudner, Retributivism and the Death Penalty, 30 U. Toronto L.J. 337 (1980) (discussing procedural implications of utilitarian and retributive arguments).

9. See Michael Tonry, Public Prosecution and Hydro-engineering, 75 Minn. L. Rev. 971, 980 (1983) (discussing Nixon administration's making crime re- election campaign issue); Larry W. Yackle, The Reagan Administration's Habeas Corpus Proposals, 68 Iowa L. Rev. 609, 614 (1983) (discussing Nixon administration's attempt to curb protection of constitutional rights in federal system).

10. See James Ridgeway, Race, Poverty, and Politics: Essential Ingredients for a Death Penalty Conviction, Village Voice, Oct. 11, 1994, at 23 (quoting Lee Atwater as claiming most Democratic candidates are opposed to death penalty).

11. See Panel Discussion, Politics and the Death Penalty:

Even the Arkansas Supreme Court said this was a case that suggested itself for executive clemency.[12] Read Marshal Frady's article about Ricky Rector's execution.[13] The logs at the prison show that in the days and hours leading to his execution, Rector was barking at the moon, howling like a dog, laughing inappropriately, and claiming he was going to vote for Clinton in the election.[14]

Ricky Rector had a habit of always putting aside his dessert until later in the evening, and then, before he went to bed, he would eat it. After they executed Ricky Rector, they went to his cell and found that he had put his pecan pie aside. He had so little appreciation for what death meant that he thought he was going to come back after the execution and finish his pie.

Recently in New York, candidates for both attorney general and governor got their biggest applause lines by promising to send Thomas Grasso back to Oklahoma where he could be executed.[15]

The use of crime by people in both parties to get elected has resulted in a non-debate. In Texas, candidates argue about who is most for the death penalty. In Georgia, who is most for the death penalty. There is no one on the other side. How this is spilling over into the judiciary and into our legal system? Is it corrupting our courts?

A. Pressures on Elected Judges in Capital Cases

A few years ago, the Governor of California pledged that unless two members of the California Supreme Court changed their votes in death penalty cases, he would campaign to take them off the court.[16] And he successfully did so.[17]

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Can Rational Discourse and Due Process Survive the Perceived Political Pressure?, 21 Fordham Urb. L.J. 239, 240 (1994) (discussing Bill Clinton's political considerations in attending execution in Arkansas after becoming U.S. President).

12. See Rector v. State, 638 S.W.2d 672, 673 (Ark. 1982).

13. See Marshall Frady, Death in Arkansas, New Yorker, Feb. 22, 1993, at 105, 132 (discussing Bill Clinton's use of execution of Ricky Rector to advance his campaign for President).

14. See George E. Jordan, Lawyer: Execution a Disgrace, Newsday, May 14, 1992, at 19 (describing Rector as incoherent).

15. Pataki on the Record: Excerpts from a Talk of 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 where he was executed on March 20, 1995. John Kifner, Inmate is Executed in Oklahoma, Ending N.Y. Death Penalty Fight, N.Y. Times, Mar. 20, 1995, at A1.

16. Steve Wiegand, Governor's Warning to 2 Justices, S.F. Chron., Mar. 14, 1986, at 1. Governor George Deukmejian had

Two years ago, Justice James Robertson was voted off the Mississippi Supreme Court because the attorney general and the prosecutors in that state campaigned against him because of his votes in death penalty cases.[18]

Last year, death penalty was a big issue in many judicial elections. Stephen Mansfield ran for the Texas Court of Criminal Appeals on a platform of greater use of the death penalty, more application of the harmless error doctrine, and sanctions against lawyers who raise frivolous issues in death penalty cases.[19]

Even though it was shown, right before the election, that he had lied about how long he had been in Texas -- he had only been there two years; he claimed he had been there a lot longer -- that he had lied about his criminal law experience -- he had little, he claimed it was extensive -- that he had actually been fined criminally for practicing law without a license in Florida,[20] he nevertheless was elected with fifty-four percent of the

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already announced his opposition to Chief Justice Rose Bird because of her votes in capital cases. Leo C. Wolinsky, Support for Two Justices Tied to Death Penalty Votes, Governor Says, L.A. Times, Mar. 14, 1986, at 3.

17. See James R. Acker & Elizabeth R. Walsh, Challenging the Death Penalty Under State Constitutions, 42 Vand. L. Rev. 1299, 1330 (1989) (discussing California voters' ouster of three Supreme Court justices who opposed death penalty); Frank Clifford, Voters Repudiate 3 of Court's Liberal Justices, L.A. Times, Nov. 5, 1986, pt. 1, at 1 (describing defeat of three justices after campaign commercials insisted "that all three justices needed to lose if the death penalty is to be enforced").

18. David W. Case, In Search of an Independent Judiciary: Alternatives to Judicial Elections in Mississippi, 13 Miss. C. L. Rev. 1, 15-20 (1992) (describing how Robertson was defeated by "law and order candidate" who had support of Mississippi Prosecutor's Association). Robertson was the second justice to be voted off the Mississippi Supreme Court in two years for being "soft on crime." Tammie Cessna Langford, McCrae Unseats Blass, Sun Herald (Biloxi, Miss.), June 3, 1990, at A1; Andy Kanengler, McCrae Overwhelms Justice Joel Blass, Clarion-Ledger (Jackson, Miss.), June 6, 1990, at 4A.

19. Janet Elliott & Richard Connelly, Mansfield: The Stealth Candidate; His Past Isn't What It Seems, Tex. Law., Oct. 3, 1994, at 1, 32 (describing Mansfield's campaign promises).

20. Id. (reporting that Mansfield claimed to be born in Texas, but was born in Massachusetts); 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 number of criminal cases he had handled); Q & A with Stephen Mansfield; 'The Greatest Challenge of My Life', Tex. Law., Nov. 21, 1994, at 8 (relating

vote, to the Texas Court of Criminal Appeals,[21] and he now sits on that court.

Norman Landford, a Republican judge in Houston, Texas, suffered the same consequence after he granted relief one time in a death penalty case. Johnny Holmes, the district attorney there, who has sent more people to death row than most states have, ran one of his assistants against the judge who defeated him in the Republican primary.[22]

In Alabama, a judge ran with advertisements in the paper there that said, "Mike Mansfield, some say he's too tough on criminals." And then there was a picture of the judge, and below it, it said in all capitals, "AND HE IS."

The Supreme Court has said the role of a judge is to hold the balance nice, clear and true, between the prosecution and the defense.[23] And yet here is a person who has been elected on a platform of being too tough on one class of people who come before him.

In Alabama, judges routinely override jury sentences of life imprisonment and impose the death penalty, but almost never override death verdicts and impose life imprisonment.[24] The same

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Mansfield's apology and response for statements he made); John Williams, Election '94: GOP Claims Majority in State Supreme Court, Houston Chron., Nov. 10, 1994, at A29 (reporting that Mansfield had been fined for practicing law without license in Florida).

21. Elliott, Unqualified Success, supra note 140, at 1 (reporting that Mansfield beat Judge Charles F. Campbell, former prosecutor, who had served 12 years on court).

22. Mark Ballard, Gunning for a Judge; Houston's Lanford Blames DA's Office for His Downfall, Tex. Law., Apr. 13, 1992, at 1 (reporting Lanford's assertion that prosecutors stalled cases in his courtroom in order to provide ammunition for judge's opponent).

23. See Offutt v. United States, 348 U.S. 11, 17 (1954) (reversing finding of criminal contempt because trial judge failed to represent "impersonal authority of law"); Tumey v. Ohio, 273 U.S. 510, 523 (1927) (stating that defendant's constitutional rights are violated when judge has personal interest in deciding case against defendant).

24. See, e.g., Harris v. Alabama, 115 S. Ct. 1031, 1037, 1040 (1995) (Stevens, J., dissenting) (stating that only Alabama grants its trial judges "unbridled discretion" to impose death penalty despite determination made by jury and noting that Alabama's elected judges have overridden jury sentences of life without parole and imposed the death penalty forty-seven times, but have rejected only five jury recommendations of death).

is true in Florida and other states that allow for override.[25]

As Justice Stevens pointed out in his dissent in Harris v. Alabama, it appears that those judges are responding not to what goes on in the courtroom in the cases before them, but to what is going to happen in the ballot box in the next election.[26]

A lot of my cases are heard in Butts County, Georgia, which is a small, rural community in Georgia that has one major industry, a huge prison which houses death row. In that community, almost everyone is associated with prison in one way or another -- they either work there or their family does. They elect two superior court judges who hear most of the cases involving people under death sentence.

The two judges that are in office now have never once granted relief in a death penalty case. And that's only half the story. They never will. The constituency that elects them does not elect them to enforce the Bill of Rights in death penalty cases. Of the cases that they have heard that have been reviewed by the federal courts, federal courts have found violations of the Constitution of the United States in three fourths of them and sent the cases back for either a sentencing or for new trials.

The fact that judges may lose their jobs if they follow the law raises serious questions about the impartiality of the judiciary in those states where judges are elected. It is time to abandon the legal fiction that all judges are impartial and acknowledge the political reality that too often that is not the case.[27]

B. The Exercise of Discretion by Prosecutors

For many people who become judges, the main route to a judgeship is through the prosecutor's office. The jurisdiction that sends the most people to death row in Georgia is Columbus, Georgia, Muscogee County. Two of the four superior court judges there are former prosecutors who made their name and got their exposure in the community by trying high profile death penalty cases, and then got elected to the bench. Right now, the current prosecutor has announced that he is going to seek the bench when a vacancy comes up.

Trying death cases has helped these prosecutors get in front

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25. Id. at 1040 n.8 (Stevens, J., dissenting).

26. Id. at 1039 (Stevens, J., dissenting) (noting that judges in electoral system must constantly agree with death penalty).

27. For further discussion of the political pressures on elected judges in capital cases, see Stephen B. Bright & Patrick J. Keenan, Judges and the Politics of Death: Deciding Between the Bill of Rights and the Next Election in Capital Cases, 75 Boston U. L. Rev. 759 (1995).

of the community. They call press conferences and announce they are going for the death penalty. Cameras in the court means that they are on television all during the trial, calling and arguing for the death penalty.

What is remarkable is that they benefit politically even when a death penalty case gets reversed because of prosecutorial misconduct. What did the prosecutor do? He called a press conference, talked about how the federal judges were hysterical, emotional, and personally opposed to the death penalty, and announced that he would seek the death penalty again.

What the local citizens got on television that night was a brief report that a federal court had reversed the death penalty and then some more great exposure for the prosecutor who was the person responsible for the reversal. Nobody knew that. All the citizens knew was here was a guy denouncing the federal courts and saying, we are going to see the death penalty in the next trial.

Race and class unfortunately often come into play in decisions by prosecutors. In another case in Columbus, Georgia, involving the death of the daughter of a contractor, the prosecutor, Bill Smith, called him up and said, do you want the death penalty, and the contractor said, yes, I do, for the person that killed my daughter.[28]

The prosecutor responded, that's all I need to know. It was not a very long discussion, it was not very thoughtful, but that was all he needed to know, and he got the death penalty in that case. And in the next election, the contractor contributed $5000 to his campaign when Smith ran for judge. That was by far the largest contribution that anybody contributed to that campaign.

A few years ago, we went to people in the African-American community in Columbus to see if Bill Smith had ever called any of them to ask them what they wanted. And not only did we find that never had an African-American family whose loved one was killed been called and asked whether they wanted the death penalty, we found they had not even been told when the case was plea bargained out.

I will never forget that at one of the breaks during the hearing on racial discrimination, one of the government witnesses came up to me -- it was a young black man, Morris Comer, Mr. Comer, who was testifying against our client at the trial. He tugged on my shirt and he said, Mr. Bright, the guy who killed my sister is already out on the streets again, and nobody called us. Nobody even told us when they plea bargained the case out.

C. The Lack of Adequate Representation for the Poor

On the other side of the street, defending capital case is not nearly so attractive, and it does not have the same political

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28. Id. (citing Clinton Claybrook, Slain Girl's Father Top Campaign Contributor, Columbus Ledger-Enquirer, Aug. 7, 1988, at B1).

benefits as prosecuting. In fact, in Columbus, one of the victims rights groups ran an advertisement against a defense lawyer who was running for mayor, not for prosecutor, and urged people to vote against him because he had defended criminal cases.

Not only is it not politically attractive, it often is not very financially attractive. In Alabama today, which has one of the largest death rows, particularly for its population, there is a statutory limit of $2000 for out- of-court time spent on a death penalty case.[29]

If a lawyer spends 500 hours preparing for a death case, which I think is not nearly enough -- the cases we have, normally one lawyer will spend at least a thousand hours -- but if one spends half that much time, 500 hours, that lawyer is going to get paid four dollars an hour.

Call the law firms here in Washington and tell them you want anything, the simplest kind of thing, a will, an uncontested divorce, a title search, and tell them you're willing to pay four dollars an hour, and see what you get.

It is time for all of us to acknowledge that the reality is you get what you pay for. One example is provided by a case in Houston, where the one lawyer appointed to defend a capital case was sleeping at times during the trial. A judge in Houston, Texas, a judge who had taken an oath to uphold the Constitution and the laws of the United States, said the Constitution guarantees a lawyer but it does not guarantee the lawyer must be awake during trial.[30]

Now we are not talking about some case that got thrown out on ineffective assistance of counsel. We are talking about a person who may be executed. The testimony in one case was that the prosecutor, aware that this lawyer was sleeping from time to time, would go over and hit the defense counsel table while

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29. See Stephen B. Bright, The Politics of Crime and the Death Penalty: Not "Soft on Crime," But Hard on the Bill of Rights, 39 St. Louis U. L.J. 479, 494 n.57 (1995) [hereinafter Bright, Politics of Crime] (citing Ala. Code s 15-12-21(d) (Supp. 1994)).
Although the statute limits payment for time spent out of court to $1,000, an opinion of the Alabama Attorney General has concluded that the sentencing phase of a capital case is to be considered a separate case, allowing a maximum payment of $2,000 for out-of-court time at a rate of $20 per hour.
Id. (citing Op. Ala. Att'y Gen. No. 91-00206 (Mar. 21, 1991)).

30. 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, 1843 n.53 (1994) [hereinafter Bright, Counsel for the Poor] (citing John Makeig, Asleep on the Job; Slaying Trial Boring, Lawyer Said, Hous. Chron., Aug. 14, 1992, at A35) (discussing lawyer sleeping during part of capital case).

presenting his case, to wake the lawyer up.[31]

There was a front page story about this lawyer in The Wall Street Journal not too long ago, Joe Cannon.[32] He has been appointed to a number of death penalty cases in Houston. It makes you wonder, what do the judges in Houston mean to accomplish by continuing to appoint a lawyer who, in several death penalty cases, has nodded off.

Judy Haney was represented by a lawyer who one morning came to court so drunk that the judge in Talladega County, Alabama, had to send the lawyer to jail, told the jury that he was recessing the trial for the day, and the next day produced both Ms. Haney and her lawyer from the jail; the trial resumed, and she got the death penalty.[33]

After I described that case one time, someone said, well, she had another lawyer, the drunk lawyer was not the only lawyer. She had another lawyer. And that is true, she did. I saw, in the Alabama Bar Reports, that her other lawyer was disciplined for missing the statute of limitations on two workmen's compensation cases.[34] So she had two lawyers, one who was drunk during the trial and one who is not competent to handle a workman's compensation case.

This is not a technicality. Judy Haney had been abused for fifteen years by the man whose death she caused. That does not make it okay, but it is something a court should take into account with regard to punishment. But because her lawyers were drunk and uninvolved, the jury that sentenced her to death and the judge who approved the jury's recommendation never knew the full extent of the abuse. In fact, the prosecutor argued it had

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31. See Ex parte Burdine, 901 S.W.2d 456, 457 (Tex. Crim. App. 1995) (Maloney, J., dissenting) (noting testimony of jurors and court clerk that defense attorney slept during trial); cf. Deborah Tedford, Killer Granted Stay in Dozing Lawyer Case, Hous. Chron., Apr. 11, 1995, at 14 (noting that Texas Court of Criminal Appeals refused to grant Burdine new trial despite fact that Burdine's counsel slept through parts of trial and U.S. district court judge subsequently granted Burdine stay of execution).

32. See Paul M. Barrett, On the Defense: Lawyer's Fast Work on Death Cases Raises Doubts About System, Wall St. J., Sept. 7, 1994, at A1 (noting that death penalty has been imposed on 10 men who were represented by Cannon and that "he boasts of hurrying through trials").

33. Haney v. Alabama, 603 So. 2d 368 (Ala. Crim. App. 1991) (stating that Haney was convicted of capital murder by Talladega County jury and sentenced to death); aff'd sub nom. Ex Parte Haney, 603 So. 2d 412, 413 (Ala. 1992), cert. denied, 113 S. Ct. 1297 (1993).

34. See Bright, Politics of Crime, supra note 149, at 493 n.55 (citing Disciplinary Report, Ala. Law., Nov. 1993, at 401).

never taken place, when in fact there were medical records right there in town of her and her daughter's broken bones and injuries that they had suffered at the hands of this abusive husband.[35]

This morning, one of the panelists on the first panel, talked about the day in the United States' attorney's office when the Westlaw was down and they could not do some legal research for a whole day.

There have been a number of people, including Billy Birt, who were represented in Georgia by a lawyer who was asked recently, when he was on the witness stand, to name all of the capital cases or all of the criminal cases from any court -- the Georgia Supreme Court, the United States Supreme Court, any court -- with which he was familiar.[36] He thought about it for a minute, and he said, well, there's the Miranda case, I know there's the Miranda case. Yes. So far, so good. Then he thought a little more and he said, and then there's the Dred Scott case.

Those were the only two "criminal" cases this lawyer could name, Miranda and Dred Scott.

The result for Billy Birt was pretty substantial.[37] He was tried in Jefferson County, Georgia, where the population is fifty-two percent African American.[38] The jury commissioners there had always under-represented, and almost excluded African Americans from participation. It was patently unconstitutional, but nobody ever challenged them.

Billy Birt's lawyer, as you might imagine, if all the law he knew was Miranda and Dred Scott, was not aware of the Supreme Court cases that hold that a fifty percent under-representation of African Americans on the jury violates the Sixth and Fourteenth Amendments.[39]

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35. See Richard Lacayo, You Don't Always Get Perry Mason: Judy Haney, Time, June 1, 1992, at 38, 38 (noting that defense attorney was unable to locate medical records until after defendant was sentenced).

36. See Bright, Counsel for the Poor, supra note 150, at 1839 n.32 (citing Transcript of Hearing of April 25-27, 1988, at 231, State v. Birt (Super. Ct. Jefferson County, Ga. 1988) (No. 2360)).

37. Birt v. Georgia, 225 S.E.2d 248, 250 (Ga.), cert. denied, 429 U.S. 1029 (1976) (stating that Birt was found guilty of one count of burglary, two counts of armed robbery by use of offensive weapons, and two counts of murder).

38. Birt v. Montgomery, 725 F.2d 587, 598 n.25 (11th Cir.) (stating jury pool statistics), cert. denied, 469 U.S. 874 (1984).

39. See Bright, Counsel for the Poor, supra note 150, at 1839 n.30 (citing U.S. Const. amends. VI, XIV; Whitus v. Georgia, 385 U.S. 545 (1967); Strauder v. West Virginia, 100 U.S. 303 (1879)).

Billy Birt was no fool. He came to court and he said, I want a new lawyer. My lawyer has not been to see me, he's not prepared, he doesn't care about me. And the judge said, we're paying the lawyer, not you.[40] The judge denied the motion to replace counsel.

The case went to trial, and when the case got to the United States Court of Appeals for the Eleventh Circuit, it held that the jury claim was waived because the lawyer never raised it, and it also held that the lawyer was not ineffective for the representation that he provided.[41] The Sixth Amendment to the United States Constitution guarantees you no more than a lawyer who knows Miranda and Dred Scott.

The death penalty was upheld in a case out of Pennsylvania,[42] where the lawyer tried the case under the impression that the trial was governed by a death penalty statute that had been declared unconstitutional three years before because it unconstitutionally limited the evidence that could be put on at the penalty phase.[43]

Now those of you here at law school, let me just tell you, when you get out of law school, you ought to check to see if the statute your client is being tried under is the right one. That is fundamental. And if you have a law degree, you should be able to do that.

The federal district court in Pennsylvania agreed and held that was ineffective assistance of counsel.[44] The Court of Appeals reversed and upheld the death sentence.[45]

There are a lot of other examples.[46] Increasingly the right

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40. Bright, Counsel for the Poor, supra note 150, at 592 n.10 (quoting Birt's testimony at state habeas proceeding).

41. Birt, 725 F.2d at 601.

42. See Bright, Counsel for the Poor, supra note 150, at 1842-43 n.49 (noting that court reversed finding that defendant had ineffective representation) (citing Frey v. Fulcomer, 974 F.2d 348, 359 (3d Cir. 1992)).

43. See Commonwealth v. Moody, 382 A.2d 442, 447 (Pa. 1977) (holding statute unconstitutional because it prevents jury from sufficiently considering mitigating circumstances), cert. denied, 438 U.S. 914 (1978).

44. See Frey v. Fulcomer, No. 89-4248 1991 WL 53662, at * (E.D. Pa. Mar. 28, 1991), vacated in part, 974 F.2d 348 (3d Cir. 1992), cert. denied, 113 S. Ct. 1368 (1993).

45. See Frey v. Fulcomer, 974 F.2d 348, 369 (3d Cir. 1992) (upholding death sentence), cert. denied, 113 S. Ct. 1368 (1993).

46. See Bright, Counsel for the Poor, supra note 150, at 1837-66 (describing examples where defendant facing death penalty received ineffective assistance of counsel).

to counsel is seen as one of those unfunded mandates that the states are not required to fulfill.

And the result of that is that juries are not getting the information that is necessary to do their jobs. Gary Nelson spent eleven years on Georgia's death row, convicted on the basis of expert testimony about a hair found on the victim's body that supposedly matched that of Gary Nelson.[47]

Unlike the O.J. Simpson case or some of the others we see, he had no expert witness. His lawyer was never was able to check that out. And when later, a law firm in Atlanta took the case pro bono and did have it analyzed, it turned out the hair was not a head hair or pubic hair, which are subject to microscopic analysis; it was a chest hair, and in fact it was of no forensic value whatsoever. Gary Nelson was released after eleven years on death row.

Now some have argued that Nelson's case is a great example of the system working. I must say, I am troubled if people really think that spending eleven years on death row for a crime one did not commit is an example of the system working. The trial should be the main event. It should be that a person accused of a capital crime, who is on trial for his life, should have the expert assistance.

Someone said this morning, well, once you know the person stuffed the panties down the person's throat and she gagged on it, then that is all we need to know. But you need to know more because you might not have the right person. There may be other issues there about the role that the person played. Often that information is not before the juries and the adversary system cannot work.

Often when these cases are appealed and there are fundamental violations of the Bill of Rights that have not been preserved by lawyers such as the one who represented Billy Birt, courts refuse to examine the issues and executions take place.

The first person executed in Georgia after Furman was John Eldon Smith, who had been sentenced to death by a jury from which women had been completely excluded,[48] as was his co-defendant. The co-defendant's lawyer raised the issue. Of course it was denied by the elected state judge.[49] He had no choice in the

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47. David Lundy, Bondurant's Costly Death Appeal, Fulton County Daily Rep., Aug. 18, 1989, at 6.

48. Machetti v. Linahan, 679 F.2d 236, 241 (11th Cir. 1982), cert. denied, 459 U.S. 1127 (1983); see Bright, Counsel for the Poor, supra note 150, at 1839 n.34 (noting that Georgia's "opt--out" provision, which allowed women to decline to serve on juries, caused under-representation of women and was unconstitutional).

49. See Smith v. Kemp, 715 F.2d 1459, 1469 (11th Cir. 1983) (stating that co-defendant's lawyer raised issue of jury composition at first habeas corpus proceeding and, while failing to obtain state relief, succeeded in first federal habeas corpus appeal).

matter if he wanted to remain on the bench. John Eldon Smith's lawyer was not aware of Taylor v. Louisiana[50] that had been decided by the United States Supreme Court, which said that discrimination against women in jury selection violates the Constitution.[51]

Both co-defendants were sentenced to death.[52] When the cases got to federal court, the co-defendant was granted a new trial, was tried before a jury that fairly represented the community, and a life sentence was imposed.[53]

When John Eldon Smith's case got to federal court, the court held that because his lawyers had not preserved the issue, it was waived, was forfeited, and he was executed.[54] If you switched the lawyers in these two cases, it would have switched the outcome. The co-defendant would be dead today, and Smith would be alive. That is the difference that a lawyer makes in these cases.

I'm not terribly optimistic that this situation is going to change. Robert Kennedy, when he was Attorney General, said a poor person accused of a crime has no lobby, and that is certainly true today. I do not think it was true then because Robert Kennedy was actually a very effective voice for the poor and the disadvantaged and people of color in our society. He championed the Criminal Justice Act[55] being passed by the Congress.

When Gideon v. Wainwright[56] was before the United States Supreme Court in the sixties, and Florida was arguing that a person like Clarence Earl Gideon had no right to counsel in a criminal case, and asked other states to join them in supporting that, Walter Mondale and others who were the Attorneys General of twenty-two states decided to come in on Gideon's side, and argue that poor people are entitled to counsel because the system cannot work if the accused are not represented by counsel.[57] The

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50. 419 U.S. 522 (1975).

51. Taylor v. Louisiana, 419 U.S. 522, 537 (1975).

52. Smith v. Kemp, 715 F.2d 1459, 1476 (Hatchett, J., concurring in part and dissenting in part) (describing both cases).

53. Id. (Hatchett, J., concurring in part and dissenting in part).

54. See Smith, 715 F.2d at 1469-72, 1476 (Hatchett, J., concurring in part and dissenting in part).

55. Criminal Justice Act of 1964, Pub. L. No. 88-455, 78 Stat. 552 (1964) (codified as amended at 18 U.S.C. s 3006A (1994)).

56. 372 U.S. 335 (1963).

57. Gideon v. Wainwright, 372 U.S. 335, 335-36 (1963) (listing 22 states and commonwealths supporting indigent defend-

only two states that supported Florida were North Carolina and, of course, Alabama.[58]

Today, we do not have this kind of leadership. Even the most minimal efforts to improve the quality of representation in cases are opposed by the Attorneys General Association and the District Attorneys Association. Recently Dan Lungren, the Attorney General of California, opposed what was a totally inadequate proposal that required two lawyers be appointed to defend a death penalty case because in a lot of cases in California, they do not provide two lawyers, which seems remarkable to me. Even down South, we provide people with two lawyers.

The Attorneys General of the United States, both Republicans and Democrats, have opposed efforts to improve quality of counsel in these cases.

There is never going to be adequate funding and there is certainly never going to be a sufficient number of lawyers to respond to the need, although I hope some of you will when you leave this law school. But at the very least, public defender offices could be established.

Most of the states where I practice have no public defender office at all. Local lawyers are appointed by the judges, totally at the whim of the judge. There is no group of lawyers, like on the prosecution's side, who specialize in the defense of criminal cases who stay in an office for some period of time, who learn the skills, who go to conferences, who do the things you need to do to be an effective advocate.

If we are not going to spend much money as a society on these cases, we at least have to do better than just simply appointing young, inexperienced, and often uncaring lawyers and paying them $2000 or $3000, which is the system in many, many states, particularly down in the South where most people are being sentenced to death.

D. Indifference to Racial Discrimination

Let me just finally say something about race. One case that shows the convergence of counsel and race issues in these cases is a case of a man named Wilburn Dobbs that Georgia plans to execute. Dobbs was sentenced to death after a trial where he was called by his first name by the prosecutor and he was called "colored" and "colored boy" by the judge and the defense attorney.[59]

(..continued)
ant's right to counsel in criminal trial and joining in brief as amici curiae).

58. Id. (listing Alabama and North Carolina as supporting Florida on amicus curiae brief).

59. Dobbs v. Zant, 720 F. Supp. 1566, 1578 (N.D. Ga. 1989), aff'd, 963 F.2d 1519 (11th Cir. 1991), remanded, 113 S. Ct. 835 (1993).

He was represented by a lawyer who said that right up until the day of trial, he did not know he was going to be the lawyer in the case and he did not know the state was going for the death penalty.[60]

The judge nevertheless denied his continuance. The lawyer admitted later in testimony some pretty pronounced racial biases -- that he believes black people make good basketball players but not good teachers.[61] That if he ever calls a state agency and an African American answers the phone, he just hangs up. That he uses the slur "nigger" from time-to-time.[62] This lawyer put on no evidence at the penalty phase, and for a closing argument, he read Justice Brennan's concurring opinion in the case of Furman v. Georgia.[63]

It was not the best opinion to read because of course, at that time, Justice Brennan was saying the death penalty was unconstitutional and could not be carried out.[64] If a prosecutor gave that argument that the death penalty would not really be carried out, it would be reversed under the Supreme Court's decision in Caldwell v.Mississippi.[65]

But nonetheless, that is what he did, and the federal district court recently ruled that such representation was not ineffective assistance of counsel,[66] and, beyond that, that the lawyer's racism was irrelevant because the lawyer did not sentence Mr. Dobbs.[67]

This case shows two things: how indifferent the courts are to poor quality of representation and how indifferent they are to

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60. Id. at 1577.

61. See id. (discussing district court's summary of Dobb's trial attorney's racial views).

62. Id.

63. 408 U.S. 238 (1972); see Dobbs v. Zant, 113 S. Ct. 835, 837-38 (1993) (Scalia, J., concurring) (agreeing with lower courts that reading excerpts from Brennan's dissent in Furman in closing argument did not constitute ineffective assistance of counsel).

64. See Furman v. Georgia, 408 U.S. 238, 305 (1972) (Brennan, J., concurring) (contending that death penalty constitutes "cruel and unusual punishment" and that states may not impose it as form of punishment).

65. 472 U.S. 320 (1985).

66. Dobbs v. Zant, No. 4:80-CV-247-HLM (N.D. Ga., Order of July 29, 1994).

67. Id.; see also Dobbs v. Zant, 720 F. Supp. 1566, 1578 (N.D. Ga. 1989), aff'd, 963 F.2d 1519 (11th Cir. 1991), remanded, 113 S. Ct. 835 (1993).

the influence of racial prejudice in these cases.

To represent a person in a case, one has to know that client and has to investigate his life and background, and has to know his family and the people he works with and all that. And if that lawyer believes those people are inferior, if he does not believe those people are really worthy of saving, then he is not going to do a very adequate job.

We tolerate race discrimination in the criminal justice system that would not be tolerated in any other area of American life today.

The District Attorney in Jackson, Mississippi, the largest city in Mississippi, Ed Peters, has said both publicly in the newspaper[68] and under oath in a deposition,[69] that when he picks a jury, his policy is to get rid of as many black people as possible.

What other public official, what school, what housing authority, what employer, could have a policy of getting rid of people based on their race? And yet in the case of Leo Edwards, an African American tried by an all-white jury, both the district court[70] and the Fifth Circuit[71] upheld that and Leo Edwards was executed.

Recently, our office handled a case in Chambers County, Alabama. At the time we were there, they still kept the marriage license books engraved "White" and "Colored." The prosecutor had used twenty-six jury strikes to exclude twenty- six African Americans from Albert Jefferson's case.[72] Jefferson was a men-

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68. See Edwards v. Scroggy, 849 F.2d 204, 207 (5th Cir. 1988) (stating that July 1983, newspaper article quoted Peters as saying that he tried to "get African Americans off of jury panels"), cert. denied, 489 U.S. 1059 (1989).

69. See id. (noting that when Peters was deposed he stated that "he had a philosophy of striking the black juror when presented with a choice between a white and black juror and all other factors were equal" because "blacks were more sympathetic to the defense than white jurors are").

70. See Edwards v. Thigpen, 682 F. Supp. 1374, 1379-80, 1387 (S.D. Miss. 1987) (vacating stay of execution), aff'd sub nom. Edwards v. Scroggy, 849 F.2d 204 (5th Cir. 1988), cert. denied, 489 U.S. 1059 (1989).

71. See Edwards v. Scroggy, 849 F.2d 204, 206 (5th Cir. 1988) (applying standard from Swain v. Alabama, 380 U.S. 202 (1965), and noting that subsequent standard from governing state preemptory challenges in Batson v. Kentucky, 476 U.S. 79 (1986), is not applicable to this case), cert. denied, 489 U.S. 1059 (1989).

72. See Bryan A. Stevenson & Ruth E. Friedman, Deliberate Indifference: Judicial Tolerance of Racial Bias in Criminal Justice, 51 Wash. & Lee L. Rev. 509, 520 & n.45 (1994) (citing

tally retarded African American charged with a crime against a white person.

That was bad enough, but when we started going through some records at the courthouse, we found that the prosecutor had divided the prospective jurors up into four lists. One list marked "strong" contained approximately twenty-five people. Another list was marked "medium;" I guess those were the people he did not think would be as good jurors for the state. One list was marked "weak," and then a fourth list was marked "black."[73] He had listed all of the African Americans on that last list.

Again, what other person in public life could divide people up on the basis of race and exclude all the people of one race, and get away with it? Well, you can in Chambers County, Alabama. The court held no race discrimination because the prosecutor had a race-neutral reason for all twenty-six strikes.[74]

Alabama now has scheduled two people for execution, two more African Americans. Of the ten people executed in Alabama, seven have been black.

The saddest and worst record in the area of race and the death penalty unfortunately is the federal government. Of the first thirty-seven federal prosecutions under the Anti-Drug Abuse Act,[75] all but four were against members of racial minorities.[76]

Janet Reno recently approved the death penalty for a case in Washington over the objection of the local United States Attorney,[77] a case where it is extremely hard to find any federal interest in the case.

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Transcript of Post Conviction Rec. at 39- 56, State v. Jefferson, No. CC-8-87, Cir. Ct., Chambers County, Ala., Jan. 25, 1989, rev'd on other grounds, 645 So. 2d 313 (Ala. Crim. App. 1994)).

73. Id.

74. Alabama v. Jefferson, No. CC-81-77, Cir. Ct., Chambers County, Ala., (Order of Oct. 2, 1992), rev'd on other grounds, 645 So.2d 313 (Ala. Cr. App. 1994).

75. Anti-Drug Abuse Act of 1988, Pub. L. No. 100-690, s 7001, 102 Stat. 4181, 4387 (codified at 21 U.S.C. s 848(e) (1994)).

76. See Bright, Politics of Crime, supra note 149, at 481 nn.6 & 8 (citing Staff Report by the House Subcommittee on Civil and Constitutional Rights, Racial Disparities in Federal Death Penalty Prosecutions 1984-94, 103d Cong., 2d Sess. 2 (1994); Kenneth J. Cooper, Racial Disparity Seen in U.S. Death Penalty, Wash. Post, Mar. 16, 1994, at A5).

77. Locy, supra note 3, at A1 (reporting that Reno persuaded U.S. Attorney for District of Columbia, who had originally recommended that death penalty not be sought, to seek death penalty against Donzell McCauley for murder of Officer Jason E. White).

Of the first ten cases that Janet Reno approved for the death penalty as Attorney General of the United States, all were against African Americans.[78]

The Anti-Drug Abuse Act that was passed in 1988, was supposedly for "drug kingpins" who were involved in homicides. Where are these drug kingpins?

Where might you think? Detroit? New York? Some parts of California? If you look at how that Act has been used, for some reason, they all seem to be in the Eastern District of Virginia, and in fact, most seem to be in Norfolk.

Despite that sad record by our federal government, Congress last year, when it passed the Crime Bill, refused to adopt the Racial Justice Act,[79] to allow courts to at least start dealing with those kind of disparities and try to see if there are race--neutral reasons behind them. I must say, in all sadness, I was not terribly surprised.

Back in the 1930s and the 40s, when people were being lynched in this country, there were repeated efforts to pass an anti-lynching statute, it was always opposed.[80] At that time, the federal government was more interested in pursuing moonshiners than it was in preventing the lynching of people.[81] Unfortu-

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78. See Joseph P. Cosco, Federal Government Gearing Up for Executions; A Death Row Will House Felons, Virginian-Pilot (Norfolk), Jan. 28, 1994, at A1 (stating that all of death penalty prosecutions to which Attorney General Reno consented were against African Americans).

79. The House passed the Violent Crime Control and Law Enforcement Act of 1994, H.R. 4092, 103d Cong., 2d Sess., with the Racial Justice Act, H.R. 4017, inserted as title IV. See 140 Cong. Rec. H2608 (daily ed. Apr. 21, 1994) (recording passage of H.R. 4092 with Racially Discriminatory Capital Sentencing provision intact). H.R. 4092 was then inserted into the Amendments to Omnibus Crime Control and Safe Streets Act of 1968, H.R. 3355, 103d Cong., 1st Sess. (1993). 140 Cong. Rec. H2609 (daily ed. Apr. 21, 1994). The Senate then adopted a nonbinding resolution instructing the conferees to demand that title IX be dropped from the final bill. 140 Cong. Rec. S5526 (daily ed. May 11, 1994); see also 140 Cong. Rec. S6018-S6104, S6106-08 (daily ed. May 19, 1994) (relating full text of H.R. 3355 and Senate's dissatisfaction with title IX). The provision was ultimately omitted by the conference committee. H.R. Conf. Rep. No. 711, 103d Cong., 2d Sess. 388, reprinted in 1994 U.S.C.C.A.N. 1839, 1856. The Act became law without the provision. Violent Crime Control and Law Enforcement Act of 1994, Pub. L. No. 103-322, 108 Stat. 1796 (approved Sept. 13, 1994) (to be codified at 42 U.S.C. s 13701).

80. W. Fitzhugh Brundage, Lynchings in the New South: Georgia and Virginia, 1880-1930, at 238-44 (1993).

81. For further discussion of the influence of race on the imposition of the death penalty and the failure of legislatures

nately, things have not changed that much.

E. Challenges for the Twenty-First Century

These things go to questions of the integrity of the system. What are we going to do about it?

For those of you who are law students, you face tremendous temptations. You can make a fortune practicing law doing some fairly trivial things that are not very stress producing. You have to think about where you are going to put your energies, and are you going to do that, or are you going to respond to some of the more desperate needs in our society.

Elie Wiesel, when he accepted the Nobel Peace Prize, said our lives are not our own; they belong to those who need us desperately.[82]

I would suggest to those of you who are going into the legal profession, that there are many desperate needs, but one area where the needs are most desperate is poor people facing the death penalty.

There are many people like Judy Haney and many people like the others that I have described, who, with all of society, the prosecutors, the power of government against them, and the public hue and cry for execution, do not have even one person to stand up and argue for their humanity and why they should be preserved.

Beyond that, I think all of us must realize that there should be some limits on our system. We have here today the pleasure of hearing from some of the most responsible prosecutors in the country; people who have exercised discretion in ways that are consistent with the intent of these laws.

But they are not the only people who prosecute. Particularly in systems where people are elected, where people are advancing their political careers, the court system often is abused. Society has entrusted important functions, like the prosecution of cases, to people, some of whom are wonderful people but some of whom are not really the people who should be entrusted with that kind of responsibility.

In addition, we have to realize that the Bill of Rights is not a collection of technicalities. There must be some effort by responsible people to refrain from demagoguery on the crime issue. We have to get away from this notion that to avoid being soft on crime, you must be hard on the Bill of Rights. We have to realize that the passions of the moment and politics often come into play in these cases because they are so one-sided.

I go to jurisdictions all over the South where people won't

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and courts to deal with the problem, see Stephen B. Bright, Discrimination, Death and Denial: The Tolerance of Racial Discrimination in the Infliction of the Death Penalty, 35 Santa Clara L. Rev. 433 (1995).

82. Elie Wiesel, This Honor Belongs to All the Survivors, N.Y. Times, Dec. 11, 1986, at A12.

drink out of the same Coke machine with me. And the thing I hear from lawyers more than anything else when I say we must move to recuse this judge because he is racist, or we must move to recuse this prosecutor, or we must file a motion challenging the under-- representation of black people on the jury is, "I've got to live here."

For example, in Columbus, Georgia, there was under-representation of African Americans in the juries for years. The local so-called public defender, who handled 500 cases at a time -- he was "public" but I am not sure he was a defender -- had a policy against filing challenges to under-representation of black people on the juries because, as he put it, he had to live there.

Lawyers and courts must recognize and struggle with the role of race in these cases because otherwise we will never eliminate the influence of racial prejudice. The goal of the courts now is just to sweep it under the rug, pretend it is not there, act like it is not going on, when everybody knows what is happening.

I recall a hearing in Cowetta County, Georgia, in James Ford's case. The prosecutor had used most of his jury strikes to get all the African-American people off the jury. The case had been remanded for the prosecutor to give his reasons for the jury strikes. The prosecutor took the witness stand, and an assistant prosecutor was examining him, and the assistant prosecutor would ask him each time why he struck the person. For each juror, the prosecutor had some reason, such as one juror worked at a video-tape store, and if you watch videotapes, you're more likely to give a life sentence. Those kinds of reasons were given for striking people.

Each time, after giving one of the reasons, the assistant prosecutor would say, well, now, did race have anything to do with it? And the prosecutor, under oath, would reply oh, no, race had nothing to do with it.

I was struck by it. I thought, he knows he's lying. I mean, you don't strike nine out of ten black people out of coincidence. He knows he's lying. The judge who was presiding had been a prosecutor himself. That's how he got to be a judge; he had struck all the black people from the jury when he was a prosecutor. He had taught this prosecutor how to do it. He knew the prosecutor was lying. He knew how the game was played, he had played it himself most of his career.

We know he's lying. Then I thought about the people out in the courtroom, whether they are white or black, everybody in that courtroom knew that the prosecutor was lying.[83] I thought this is

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83. The prosecutor's reasons did not withstand scrutiny by the Georgia Supreme Court on appeal and James Ford's conviction and sentence were set aside. Ford v. State, 423 S.E.2d 245 (Ga. 1992). More often, however, reasons given by prosecutors, no matter how fanciful, for striking African- American jurors are upheld by trial and appellate courts. See generally 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 Expla-

not a court of justice. This is a court of vengeance. We are here not for justice, but for a different agenda. That is the thing we have to remember, that so long as we have courts of vengeance, we will never have courts of justice.

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nations Under Batson v. Kentucky, 27 U. Mich. J.L. Ref. 229 (1993).