Complicity of Judges In Wrongful Convictions

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Front cover images: “Honest Tex’s used judges” (1994) (Etta Hulme) and
“Corrupt Judiciary Corrupt Elections” (Twitter)

Dedicated to every innocent person wrongly branded as a criminal due to the malevolence, incompetence, indifference, cowardice, or corruption of judges.

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Preface

The mantra the more things change the more they remain the same applies to the role of judges in the legal system. That is because a judge or a panel of judges sit at the front of every courtroom or hearing chamber. They control judicial proceedings just as they have for many hundreds, if not thousands of years.

The prosecution, conviction, and imprisonment of an innocent person for a crime he or she didn't commit does not occur in a vacuum – their trial, and then appeal, are presided over by judges at each stage of the process.

This book is an expansion of a law review article I wrote describing the integral role of judges in the process of convicting innocent people.* It can be argued the process detailed in that article has worsened with the blatant politicization of the judicial system. There is no longer even the pretense that a prospective trial level or appellate judge is impartial – they openly achieve their position precisely because their personal ideology caters to a sufficiently powerful political force or majority electorate. That doesn't take into consideration corrupt judges who exchange tipping the scale of justice for a financial reward, or some other consideration.

This book specifically describes the U.S. legal system, but the general process of convicting innocent people it describes occurs in every country to one degree or another.

Hans Sherrer
July 2023

* Hans Sherrer. "The Complicity of Judges in the Generation of Wrongful Convictions" *Northern Kentucky Law Review*. Vol. 30 No. 4 (October 2003.)

Introduction

Wrongful convictions do not occur in a vacuum of judicial indifference. Every wrongful conviction results from a deliberative process involving law enforcement investigators, prosecutors, and one or more trial level and appellate judges.[1] Although prosecutors, police investigators, defense lawyers and lab technicians have all been lambasted in books and magazines for their contribution to wrongful convictions, judges have, by and large, been given a free pass.[2] This hands-off attitude may be due to the fact that sitting in their elevated positions, judges are often thought of by lay people and portrayed by the news and other broadcast media, as impartial, apolitical men and women who possess great intelligence, wisdom, and compassion, and are concerned with ensuring that justice prevails in every case.[3] Reality, however, is far different from that idealistic vision.[4]

In *Courts on Trial: Myth and Reality in American Justice*, one of the few serious critiques of this countries judiciary by an insider, Judge Jerome Frank wrote, "Our courts are an immensely important part of our government. In a democracy, no portion of government should be a mystery. But what may be called "court-house government" still is mysterious to most of the laity."[5] Judge Frank's book was in stark contrast to what he referred to as "the traditional hush-policy concerning the courts."[6] That unspoken policy continues to obscure the inner workings of the courts.

Peering beneath the public façade that has long protected judges from serious scrutiny, reveals that from their lofty perch they are the most crucial actor in the real-life drama of an innocent person's prosecution and conviction.[7] This theme is explored in this book.

This critique of the judiciaries contribution to creating a broad group of legally disadvantaged people – those who are wrongly convicted – is offered in the spirit of increasing an understanding of the nature of their involvement in the process. It is only by criticism's such as this that a constructive dialogue can hope to be initiated toward lessening the judiciaries enabling role in the wrongful conviction process, without which their can be no expectation of a reduction in their incidence.

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[1] *See* Thomas P. Sullivan, *Repair or Repeal: Report of the Illinois Governor's Commission on Capital Punishment*, 49 Fed. Law. 40 (2002) (discussing and examining the suggestions made by the Illinois Commission on Capital Punishment, including improvements in police investigations, the use of in-custody informants and accomplice testimonies during trial and the sentencing phase).

[2] *See* Steven F. Shatz & Lazuli M. Whitt, *The California Death Penalty: Prosecutor's Use of Inconsistent Theories Plays Fast and Loose with the Courts and the Defendants*, 36 U.S.F. L. Rev. 853 (2002) (concluding that a prosecutor's use of inconsistent factual theories in separate trials for a defendant and a co-defendant is unconstitutional and urging judicial intervention).

[3] *See* Vincent Bugliosi, *The Betrayal of America: How the Supreme Court Undermined the Constitution and Chose Our President* 23-24 (Thunder's Mouth Press 2001).

[4] See *id*.

[5] Jerome Frank, *Courts on Trial: Myth and Reality in American Justice* 1 (1973) (Jerome Frank was a judge on the United States Court of Appeals for the Second Circuit).

[6] *Id*. at 1.

[7] *See* Gerry Spence, O.J. *The Last Word* 170-72 (1997) (pointing out how much power and control judges hold over the courtroom).

I. Judges Are Political Creatures

Contrary to their carefully cultivated public image of being independent and above the frays of everyday life, judges are influenced and even controlled by powerful and largely-hidden political, financial, personal and ideological considerations.[8] Renowned lawyer Gerry Spence clearly recognized in *From Freedom To Slavery* that judges are, first and foremost, servants of the political process:

> We are told that our judges, charged with constitutional obligations, insure equal justice for all. That, too, is a myth. The function of the law is not to provide justice or to preserve freedom. The function of the law is to keep those who hold power, in power. Judges, as Francis Bacon remarked, are 'the lions under the throne'. . . . Our judges, with glaring exceptions loyally serve the . . . money and influence responsible for their office.[9]

Despite never ending proclamations of their independence, members of the judiciary, all the way from a local judge in small town USA to a U. S. Supreme Court justice, are inherently involved in all manners of political intrigue and subject to a multitude of political and other pressures.[10] The political nature of judges that affects their conduct and rulings is an extension of the fact that there is not a single judge in the United States, whether nominated or elected, whether state or federal, that is not a product of the political process as surely as every other political official whether a city mayor, a county commissioner, a state representative, a member of Congress or the President.[11]

Vincent Bugliosi, the former L.A. deputy D.A. most well known for prosecuting Charles Manson, clearly understands that every judge in this country is only a thinly veiled politician in a black robe:

> The American people have an understandably negative view of politicians, public opinion polls show, and an equally negative view of lawyers. Conventional logic would seem to dictate that since a judge is normally both a politician and a lawyer, people would have an opinion of them lower than a grasshopper's belly. But on the contrary, the mere investiture of a twenty-five-dollar black cotton robe elevates the denigrated lawyer-politician to a position of considerable honor and respect in our society, as if the garment itself miraculously imbues the person with qualities not previously possessed. As an example, judges have, for the most

> part, remained off-limits to the creators of popular entertainment, being depicted on screens large and small as learned men and women of stature and solemnity as impartial as sunlight. *This depiction ignores reality*.[12]

A high level of knowledge, understanding, compassion and independence of thought is not a necessary prerequisite for a person to become a judge. A person typically goes through the motions of being a judge while neither *doing* the grunt work and studious research required to do a competent *or* conscientious job, nor *having* the critical thinking skills necessary to do so even if they wanted to.[13]

However, the depth of a person's loyalty to the prevailing political ideology, which is an indicator of how they will rule once in power, is an essential attribute for an aspiring judge.[14] Law Professor John Hasnas explains in *The Myth of the Rule of Law* that if a person's world-view is inconsistent with the prevailing political ideology, they will not knowingly be considered, nominated or otherwise endorsed to be a state or federal judge:

> Consider who the judges are in this country. Typically, they are people from a solid middle-to upper-class background who performed well at an appropriately prestigious undergraduate institution. . . . To have been appointed to the bench, it is virtually certain that they were both politically moderate and well-connected, and, until recently, white males of the correct ethnic and religious pedigree. It should be clear that, culturally speaking, such a group will tend to be quite homogeneous, sharing a great many moral, spiritual, and political beliefs and values.[15]

Although state judicial candidates are typically "merit" rated by a professional organization, such as a state bar, and federal judicial candidates by the American Bar Association, all so-called "merit" valuation processes are fraught with political considerations and an undercurrent of backroom wheeling and dealing by power brokers.[16] The inherently political nature of the judiciary stands in stark contrast to what children are taught in school: that judges should be venerated as fountains of wisdom protecting the rights of the people and trying to do the right thing.[17] Given that a judge's political leanings and societal position has a profound impact on his or her perspective and decision making process, it is to be expected that their rulings will be consistent with the multitude of factors making up his or her roots.[18] As noted in *Injustice For All*:

> Until laws are applied to facts, they are paper law only. Until facts are selected out of the variety each side urges, their weight is purely hypothetical. The judge brings both to earth and life. He chooses for belief particular facts; chooses that law which, he states, applies to those facts; and declares his ruling – backed by government's coercive power.[19]

That observation emphasizes the role of a judge's belief system in how a case turns out, because it dictates every aspect of how he or she deals with it.

The existence of identifiable voting blocks among appellate judges from the Supreme Court on down that are definable by the political leanings of the judges belonging to them, is just one indicator that regardless of an issue or the relative merits of an appellant, the political inclinations of the judges is the most identifiable factor deciding how they vote.[20] The politically less powerful party, particularly in federal court, is the least likely to be the winner of these voting contests.[21]

That is to be expected considering the economic, educational, and ideological world of judges is far removed from the poor, modestly educated or otherwise politically impotent segment of society occupied by the people most often attacked by the law enforcement process.[22] Since such people are outside the caste from which judges are drawn, it is not a political priority for them to be protected, and no judge will unduly risk using any political capital to do so.[23] A consequence of politically impotent people being most often subject to a criminal prosecution is that they are also the most common victims of a wrongful prosecution and conviction.[24] A prime example of that are the four lower class, politically impotent innocent men on Illinois' death row who had to be pardoned by Governor George Ryan on January 10, 2003 because judges had failed to release them.[25]

Thus, the political nature of the state and federal judiciary significantly contributes to the immersement of innocent men and women even deeper into the quicksand-like depths of the law enforcement system without their innocence being detected. Those people are at best only peripherally related to the attainment or retainment of a judge's position, so their welfare is not a political necessity for a judge to be concerned about.[26]

The political and ideological circumstances underlying a judge's position results in the philosophical alignment of his or her decisions with the biases and prejudices that naturally follow from them.[27] A judge's loyalty to the roots of his or her power results in their adoption of the amoral attitude of aligning a decision to be consistent with them, and not

to the letter or the spirit of the law. Thus when a judge actually exercises the independent judgment one would expect from such a person on a daily basis, it is not only newsworthy, but it can be suicidal for his or her career.[28] In *Breaking the Law, Bending the Law*, Michael W. McConnell wrote about what can happen when a federal judge actually exercises independent judgment and makes an unorthodox decision that he or she considers in their mind and heart to be consistent with the dictates of their conscience, and not just politically correct:

> Federal Judge John E. Sprizzo will never again be promoted or advanced, for he has committed an unpardonable act of courage in defense of conscience. On January 13, 1997, in the U. S. District Court in Manhattan, Judge Sprizzo acquitted an elderly bishop and a young priest of the crime of "quietly praying with rosary beads" in the driveway of an abortion clinic, in violation of a court injunction and the Federal Access to Clinic Entrances Act. His reasons? That these two offenders did not act with "bad purpose" and, even if they did, he would exercise a judicial version of jury nullification. Because their act was 'purely passive' – meaning nonviolent – and 'so minimally obstructive,' it justified 'the exercise of the prerogative of leniency.' Because the parties waived a jury trial, the judge's decision is equivalent of a jury verdict of acquittal, and cannot be appealed.[29]

Needless to say, it is only because of the pervasive influence of politics and everything it encompasses in the judiciary of this country that the act of Judge Sprizzo is considered to be courageous, and not something that all judges are expected to do every day.[30] All too often the influences on a judge's decision work to give short shrift to the men and women who appear before them, so that the guilty and the innocent are incestuously commingled and not distinguished.[31]

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[8] *See* Gerry Spence, *From Freedom to Slavery: The Rebirth of Tyranny in America* 109 (1995) (noting that judges serve those responsible for putting them in power).
[9] *Id.*
[10] *See* Tony Mauro, *Thurgood Marshall helped the FBI*, USA Today, Dec. 2, 1996, at A1 (detailing how Justice Marshall had worked as a mole for the FBI while inside the NAACP, and at the same time, he publicly criticized the agency).

[11] *See* Joel Grossman, *Lawyers and Judges* 24-39 (John Wiley ed. 1965) (discussing how judges are appointed by the political parties that are in power on a national and state level).
[12] Bugliosi, *supra* note 3, at 23-24 (emphasis added).
[13] *See*, *e.g*., Anne Strick, *Injustice For All* 159 (1996) (quoting one judge as saying, "People think that alcoholism is the occupational disease of judges. It is not alcoholism; laziness is our occupational disease. It is terribly difficult to make some judges work.") (footnote omitted).
[14] Spence, *supra* note 8, at 109 (noting that judges "loyally serve the . . . money and influence responsible for their office"). See also Grossman, *supra* note 11, at 24-39 (discussing the appointment of judges according to the controlling political parties).
[15] John Hasnas, *The Myth of the Rule of Law*, 1995 Wis. L. Rev. 199, 215 (1995). Professor Hasnas writes:

> Consider, for example, people's beliefs about the legal system. They are obviously aware that the law is inherently political. The common complaint that members of Congress are corrupt, or are legislating for their own political benefit or for that of special interest groups demonstrates that citizens understand that the laws under which they live are a product of political forces rather than the embodiment of the ideal of justice. Further, as evidenced by the political battles fought over the recent nominations of Robert Bork and Clarence Thomas to the Supreme Court, the public obviously believes that the ideology of the people who serve as judges influences the way the law is interpreted.

Id. at 200.
[16] This process ensures that the sort of judges described by Professor Hasnas as, "homogeneous, sharing a great many moral, spiritual, and political beliefs and values," continue to be seated. *See id*. at 215.
[17] *See* Bugliosi, *supra* note 3, at 23-24 (observing the elevated status of the judge in society).
[18] *See* Hasnas, *supra* note 15, at 215 (explaining that the reason the law tends to be stable is due to the fact that judges share similar moral, ethnic, political and religious backgrounds upon which they draw their presuppositions).
[19] Strick, *supra* note 13, at 148.
[20] *See* Hasnas, *supra* note 15, at 215.
[21] A lawyer with considerable experience in federal court described it to the author as the "rich man's court," because the wealthiest litigant in a civil case is most likely to prevail. By inference that means apart from any other prejudices of a judge supporting the government's position, it would be expected to win most cases simply because no defendant can match its "wealth." This same lawyer also emphasized to the author that the most important qualification to become a federal judge was to have the right political connections.
[22] *See* Hasnas, *supra* note 15, at 215 (noting that judges are typically from middle to upper-middle class backgrounds, well educated and until recently, white males).

[23] *See*, *e.g.*, Abraham S. Blumberg, *The Scales Of Justice* 21 (Abraham S. Blumberg ed., 2d ed. 1973) (observing that the poor, middle class and less dominant social groups are disproportionately targeted by the criminal justice system compared to dominant social groups).

[24] Statistics from the Bureau of Justice reveal that "at current levels of incarceration, newborn black males in this country have greater than a 1 in 4 chance of going to prison during their lifetimes, Hispanic males have a 1 in 6 chance and white males have a 1 in 23 chance." *See* U.S. Department of Justice, at, https://bjs.ojp.gov/library/publications/lifetime-likelihood-going-state-or-federal-prison (last visited July 5, 2023).

[25] For an analysis of Governor Ryan's perspective that the judicial system had utterly failed to protect those innocent men, see Hans Sherrer, *Illinois Governor George Ryan Pardoned Four Innocent Men Condemned to Death On January 10, 2003, and the Next Day He Cleared Illinois' Death Row*, Justice Denied, Vol. 2, Issue 9, 2003 at 25.

[26] *See* Spence, *supra* note 8, at 109 (stating that judges serve those who are responsible for their office).

[27] *See* Hasnas, *supra* note 15, at 215 (observing that judges make rulings based on their own presuppositions that are composed from their backgrounds).

[28] *See* Michael W. McConnell, *Breaking the Law, Bending the Law*, First Things, June-July 1997, at 13-15 (detailing the account of Judge Sprizzo in his acquittal of two defendants).

[29] *Id*.

[30] *See* Spence, *supra* note 8, at 109 (suggesting that judges rule according to political influences rather than to the duty to ensure equal justice).

[31] *See* McConnell, *supra* note 28, at 13-15.

A. Federal Judges

All federal judgeships at the district court, appellate court and Supreme Court level are lifetime political appointments for as long as a person exhibits "good behavior,"[32] which in today's climate translates into politically acceptable behavior. Men and women appointed to the federal bench attain their positions through political patronage, inside connections and behind the scenes maneuvering.[33] Consequently, as a product of the political process, a federal judge is as political a person as any in this country. The lifetime tenure accorded them does not breed judicial independence because they are invisibly tethered to the pole of their roots and their peer group,[34] as well as possible ruination by public disclosure of the skeletons in their closet if they get too far out of line.[35]

The largely overlooked truth that the best of federal judges are first and foremost political actors pretending to be above the political fray is clearly explained in *Injustice For All*, "The robe, in fact, is most usually an item of barter in the political swap-meet: either purchased openly with legal tender, awarded as payoff for personal or political debts, or acknowledged as an IOU toward future favors. 'Political rewards, personal friendships, party service, and even prior judicial experience have been the major qualifications' for appointment to the United States Supreme Court."[36] Prominent New York defense attorney Martin Erdman echoed that assessment when he said, "I would like to [be a judge], but the only way you can get it is to be in politics or buy it – and I don't even know the going price."[37] Those observations are consistent with the insistence on seating federal and state judges that adhere to the core beliefs of the dominant political party.[38] A prime example is that during Ronald Reagan's presidency, 97% of all new federal judges were Republicans.[39] In the face of such evidence, only the intellectually dishonest or the unconscious can maintain a straight face while denying the political partisanship of federal judges.

A classic example of the political scheming involved in the seating of a federal judge that goes on undetected by the public's radar, is starkly revealed in the personal diaries of the late Supreme Court Justice Thurgood Marshall.[40] He candidly recorded how before becoming a federal circuit court judge in 1961, he was an FBI mole inside the NAACP while employed as one of the organizations attorneys and publicly criticizing the agency.[41] As a transparently duplicitous act, Justice Marshall continued to publicly criticize the FBI *after* his

appointment to the federal judiciary.[42]

Another example is the backroom cronyism underlying Justice William O. Douglas' seating on the Supreme Court in 1939 as detailed in a 2003 biography, *Wild Bill: The Legend and Life of William O. Douglas*.[43] William O. Douglas was so well connected that without any prior judicial experience, at the age of 40 he went from being the presidentially appointed Chairman of the Security and Exchange Commission to filling Justice Brandeis' vacated seat on the Court.[44]

The circumstances of the appointments of Justices Marshall and Douglas to the Supreme Court are just two indicators that there is every reason to think a story waits to be discovered and told about the behind the scenes political shenanigans every federal judge in the United States is involved in, both prior to and after they take office. [45] Particularly since each federal judicial nominee must pass the scrutiny of an FBI investigation that compiles every known scrap of information about their life.[46]

Former L.A. Deputy D.A. Vincent Bugliosi scratched the surface of several such stories about current Supreme Court Justices in *The Betrayal of America: How the Supreme Court Undermined the Constitution and Chose Our President*.[47] In that book, he analyzed some of the political considerations influencing the decision of the five members of the Supreme Court that voted in favor of George Bush's position in *Bush v. Gore*.[48] The value of Mr. Bugliosi's analysis is to demonstrate that the decisions of Supreme Court justices are as likely to be the result of deep-rooted personal and political prejudices and influences as are those of every federal and state judge in this country.[49]

However, Mr. Bugliosi does not play favorites, since he recognizes appointing ideologically supportive judges is considered to be a political spoil for *whoever* holds the reigns of power at a given time:

> As to the political aspect of judges, the appointment of judgeships by governors (or the president in federal courts) has always been part and parcel of the political spoils or patronage system. For example, 97 percent of President Reagan's appointments to the federal bench were Republicans. Thus, in the overwhelming majority of cases there is an umbilical cord between the appointment and politics. Either the appointee has personally labored long and hard in the political vineyards, or he is a favored friend of one who has (oftentimes a generous financial supporter of the party in power). As Roy Mersky, professor at the University of Texas Law School, says: "To be appointed a judge, *to a great extent* is a result of one's political activity.[50]

It is difficult to overstate the corruption involved in a federal judicial appointment, and the process predictably results in the instilling of shady, untoward and marginally, or even wholly, unqualified people at all echelons of the federal judicial system.[51] The relative cushiness of a federal judgeship is one of the job's prime attractions to the type of people that seek it. It has prestige, passable pay to live an upper middle class lifestyle, excellent medical, holiday, vacation and retirement benefits, and an easy work schedule with "much less pressure than is found in practice."[52] However, as appealing as those conditions may seem, they serve to filter out bright, ambitious, highly motivated men and women with razor sharp minds whose services are most in demand and who have the highest incomes, since becoming a federal judge would involve a dramatic reduction in their compensation and standard of living.[53]

The near anonymity in which federal judges function tends to exacerbate their ability to rely on overtly political considerations when making decisions.[54] A recent poll showed two-thirds of Americans cannot name a single Supreme Court Justice, and Diogenes might have a hard time finding anyone other than someone in the legal profession who could name a single federal circuit court judge.[55]

Mr. Bugliosi makes it clear that federal judges are not special people possessing wisdom or divinity, but can more likely be described as black-robed, second tier lawyers with extraordinary political connections.[56] Becoming a judge does not magically bestow admirable qualities on a person where they were lacking beforehand.[57] So the very process by which a person becomes ensconced as a judge ensures that he or she will be unlikely to rise above their own self-interest and make decisions that fundamentally conflict with their political, ideological and economic background or interests.[58]

Thus, the men and women selected for federal judgeships are as politically partisan and biased in their attitudes as are state judges. However, unlike state judges, once seated a federal judge is virtually assured of being in office until he or she either dies or retires, whichever occurs first.[59] The one avenue for removing a federal judge involves the same process required for removal of a President, impeachment by the House of Representatives[60] and conviction after a trial by the Senate.[61] It has been used so rarely that for all practical purposes it is a non-factor as a consideration, or a threat, for ending a federal judge's career before he or she does so either by choice or by nature following its course.[62] Since 1791, only seven federal judges have been convicted by the Senate, and only three since 1936.[63]

Federal judges are only slightly less immune to being reprimanded for egregious conduct, than they are to being removed from office. In *Judges Escape Ethical Punishment*, reporter Anne Gearan revealed that out of 766 ethics complaints filed against a federal judge in 2001, only one resulted in any punishment.[64] That judge suffered the mild punishment of a private censure, although neither the judge's name nor details of the conduct were released to the public.[65] That is confirmation of law professor Paul Rice's observation that judges cover each other's back by ignoring everything possible because they never know when they might be on the hot seat, or as he put it, "We don't like burning brothers in the bond, because you don't know whose ox is going to be gored in the future."[66]

It has also been recognized that the wanton conduct of federal judges is just one indicator that while the breadth of their power is greater than state judges, their character and susceptibility to the allure of financial influences is not.[67] As noted in *Injustice For All*, a federal judge is,

> all too often a person 'whose ignorance, intolerance and impatience are such as to sicken anyone who stops to think about them . . . [the federal judiciary is overloaded with] bias, intolerance, cowardice, impatience, and sometimes graft . . . [t]hat some judges are arbitrary and even sadistic . . . is notoriously a matter of record.' [68]

He neglected to include the small-minded judges who can use their position to express their prejudice towards blacks, Hispanics, Arabs, Asians and other racial or religious groups.[69]

Lord Acton's oft repeated admonition that "power tends to corrupt, and absolute power corrupts absolutely," needs no more proof that it is grounded in reality than the conduct of federal judges nationwide.[70] The permanence of federal judgeships and the sort of person chosen a judge creates a perfect environment for enabling the basest attitudes of a person so empowered to be exercised. The most dramatic and recent example of what is the norm behind the scenes was the decision of five Supreme Court judges in *Bush v. Gore*,[71] which was an expression of their preference for George Bush to be President.[72] Such unconscionable conduct is a predictable consequence of empowering generally unprincipled mortals with the ability to exercise power that has no effective check or balance. The pervasiveness of such conduct is cause for concern by people of all political persuasions, since there is a constant cycle of reversing political fortunes.

It is reasonable to think Vincent Bugliosi's carefully reasoned conclusion that the five Supreme Court Justices who voted with the majority in *Bush v. Gore*[73] are sophisticated criminals of the worst sort who used their privileged position to commit a grave crime, could in different circumstances be said of all federal judges.[74] The most disturbing aspect of this situation, as Mr. Bugliosi notes, is that "Though the five Justices clearly are criminals, no one is treating them this way."[75] The same blind-eye is being given to federal judges across the country engaging in untoward conduct that negatively affects "ordinary" Americans.[76] Given the short-shrift justice the Supreme Court majority accorded the defendant of a contrary political persuasion in a case effectively determining the outcome of a presidential election,[77] one can just imagine the dismissive attitude those judges hold towards politically powerless defendants.

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[32] U.S. Const. art. III, § 1 (stating in pertinent part, "The Judges both of the Supreme Court and inferior Courts, shall hold their Offices during good Behaviour . . .").

[33] *See* Strick, *supra* note 13, at 160.

[34] An example of how those forces are translated into real life, are the remarkably lenient sentences given by federal judges in white-collar cases, the cases most likely to involve people with like- minded values. See, *Federal Judges: Measuring Their Sentencing Patterns*, TRAC Reports, (February 4, 2003), *at* http://trac.syr.edu/tracreports/judge/judge_medtimeG.html (last visited July 5, 2023). During the three year period of fiscal year 2000 to fiscal year 2002, 91 of the 614 District Court Judges handling 50 cases or more – 15 percent - ordered a median sentence in white-collar cases of *zero* prison time. *Id.* Only 6 judges – *less than 1 percent* - ordered a median sentence of 24 months or more. *Id.* In contrast, drug cases involving people least likely to involve someone from the judges "class," resulted on the low end of not a single judge not ordering a prison sentence in a single case. *Id.* One hundred eighty-nine judges ordered median sentences of three years or less, and on the high end of 126 judges ordered median sentences of six years or more. *Id.*

[35] *See*, *e.g.*, Alexander Charns, *Cloak and Gavel: FBI Wiretaps, Bugs, Informers, and The Supreme Court* (1992) (describing the FBI-Supreme Court relationship and how the FBI spied on the Supreme Court and its Justices).

[36] *See* Strick, *supra* note 13, at 160 (footnote omitted).

[37] *Id*. at 160 (footnote omitted).

[38] *See* Grossman, *supra* note 11, at 24-39.

[39] *See* Bugliosi, *supra* note 3, at 24.

[40] *See* Tony Mauro, *Thurgood Marshall helped FBI*, U.S.A. Today, Dec. 2, 1996, at A1.

[41] *Id*.

[42] *Id.* The author recognizes that during his tenure on the Supreme Court, Justice Marshall was one of the Court's most consistent supporters of positions related to the politically powerless that were contrary to the Court's majority. However, his taking those positions was safe precisely because he was typically in the minority, and thus, he may have unwittingly served the vital function of aiding the appearance that contrary opinions were given a full airing by the Court – when in fact any majority decision, whether 5-4, 6-3 or 8-1 is enforceable as the Court's decision.

[43] Bruce Allen Murphy, *Wild Bill: The Legend and Life of William O. Douglas*, 172-175 (2003). After being seated on the Supreme Court, Justice Douglas maintained his intimate political ties by regularly playing poker at President Roosevelt's poker parties: "Douglas sat at the table with Secretary of the Treasure Henry Morgenthau, Solicitor General Robert Jackson, Press Secretary Stephen Early, and presidential intimate Colonel Edwin M. 'Pa' Watson. … 'Bill was a terrible poker player,' his friend Clark Clifford recalled. But blessed with what FDR called 'his fund of good dirty stories,' his quirky sense of humor, and his ability to drink with the best of them, Douglas quickly became a favorite at FDR's own table." *Id*. at 185.

[44] *Id.* at 172-175. Douglas' insider status is reflected in the passing of only sixteen days from the time President Roosevelt told him on March 19, 1939, "I have a new job for you," and the Senate's 62-4 vote confirming him to the Supreme Court on April 4, 1939. *Id*. 173, 175. Justice Douglas aspired to the Presidency, *id.* at 175, and he came within a hairsbreadth of being selected as President Roosevelt's vice-presidential running mate in 1944 instead of Harry Truman. *Id.* at 212-32. If he had been selected his desire would have been fulfilled after FDR's death in 1945, and instead of "Give Em' Hell Harry" it would have been President "Wild Bill." Justice Douglas' involvement with politics while on the Court continued, and in 1948 he turned down Harry Truman's offer to be his vice-presidential running mate, thinking that he could run for President in 1952, since "By then anyone will be able to beat him." *Id.* at 265. Justice Douglas' frustrated Presidential aspirations continued until 1960. *Id.* In fairness to Justice Douglas it should be noted that as his political aspirations receded, he increasingly expressed opinions contrary to political orthodoxy. The Justice Douglas of 1970, e.g., would have been unlikely to vote with the majority in *Korematsu v. United States*, 323 U.S. 214 (1944) (upholding the executive order interning Japanese-Americans on the basis of their ethnicity), of which he wrote "[M]y vote to affirm was one of my mistakes." William O. Douglas, *The Court Years, 1939-1975: The Autobiography of William O. Douglas* 39 (Random House 1980). The political backlash against Justice Douglas' pro-free speech opinions culminated in a resolution by Gerald Ford (R MI) (with over 100 co-sponsors) submitted to the House Judiciary Committee in 1970 to consider his impeachment. *Id*. at 362.

[45] The release to the public of Justice Thurgood Marshall's personal papers was disturbing to the Court's judges because it tended to strip away the mystique that underpins its authority and legitimacy. *See*, *e.g.*, Linda Greenhouse, *High Court's Anger Over Marshall Papers Is Fueled by More than Pomp and Privacy*, N.Y. Times, May 27, 1993, at 1 ("But there is something else at work here: a belief among the judges that to strip any court of its mystique is also inevitably to strip it of some of its authority and legitimacy."). See also generally Edward Lazarus, *Closed*

Chambers: The First Eyewitness Account of the Epic Struggles Inside the Supreme Court (1998) (detailing the inner workings of the Supreme Court as witnessed by a law clerk to Supreme Court Justice Harry Blackmun).

[46] *See*, *e.g*., Charns, *supra* note 35 (describing the FBI-Supreme Court relationship and how the FBI spied on the Supreme Court and its justices). This is to be expected considering the FBI has the "dirt" on every federal judge that can be held like a silent but everpresent Sword of Damocles over a judge's head to keep him or her from getting too far out of line. *See id.* The judiciaries subservience at all levels – local, county, state, and federal – to the political interests that enabled them to attain their positions in the first place, is illustrated by the incestuous political relationship between the U. S. Supreme Court and its support of FBI policies. *Id.* Since a favorable FBI report is necessary for anyone to become a federal judge, it is reasonable to consider, for example, that Justice Marshall's appointment as a federal circuit court judge, or at least the FBI's lack of opposition to his appointment, was the political payoff for his loyalty to J. Edgar Hoover and his politically powerful allies. *Id*.

[47] *See generally*, Bugliosi, *supra* note 3 (discussing the controversial decision of the Supreme Court in *Bush v. Gore*, 531 U.S. 98 (2000)).

[48] *Id*. at 24-29. *See also* Martin Garbus, *Courting Disaster: The Supreme Court and the Unmaking of American Law 2* (2002) (criticizing the Supreme Court's decision in *Bush v. Gore*, 531 U.S. 98 (2000)). Garbus stated:

> A lawyer's adage is, 'If you can't change the facts and the law, then change the judges.' The wretched *Bush v. Gore* decision ending election 2000, effectively decided by five, played a valuable role in showing us the naked partisanship of this Court. . . . Politics has always gone on in the judiciary, and the shock people expressed reminded me of Claude Raine's quip in Casablanca when he says, 'I am shocked, shocked' to see gambling going on in Rick's back room. *Id*.

[49] *See* Bugliosi, *supra* note 3, at 24-29. There is nothing about the political, ideological and economic factors related by Mr. Bugliosi that influence or indicate the direction of a decision by those five Supreme Court justices, that excludes *any* other federal or state judge from being subject to a similar analysis.

[50] *Id.* at 24.

[51] The author was told by a federal law enforcement officer and others speaking from their personal knowledge, that a federal Senior District Court Judge in the District of Oregon is routinely intoxicated during court proceedings and he has expressed his contempt for people of color. Two other District Court Judges in Portland are known to have the prejudice that every indicted person is guilty and should proceed straight to sentencing. Undoubtedly, the District of Oregon is not unique in this regard, and the same or similar sorts of personal conduct and attitudes prevail in federal courts throughout the U.S.

[52] William M. Richman & William L. Reynolds, *Elitism, Expediency, and the New Certiorari*, 81 Cornell L. Rev. 273, 337-38 (1996).

[53] This is evident to an even greater degree in the people that seek much less prestigious state judicial positions that are typically parceled out to legal hacks whose primary qualification is success at cultivating politically influential friends.

See, e.g., Strick, *supra* note 11, at 159 (quoting one lawyer who referred to judges as hacks and small time lawyers with big time friends).

[54] *See* Garbus, *supra* note 48, at 7.

[55] *Id*.

[56] *See* Bugliosi, *supra* note 3, at 23-24.

[57] *Id*.

[58] The federal judiciary only superficially hides its loyalty to those factors. In *Payne v. Tennessee*, 501 U.S. 808 (1991), Justice Marshall wrote in the last dissent of his Supreme Court tenure how the Court would protect "property and contract" rights, but would apply a free flowing standard to criminal "procedural and evidentiary rules" that predominantly affect the politically powerless who have much less need to have their "property and contract" rights protected: "Considerations in favor of stare decisis are at their acme" the majority explains, "in cases involving property and contract rights, where reliance interests are involved; the opposite is true in cases such as the present one involving procedural and evidentiary rules." *Id*. at 850-51 (Marshall, J. dissenting). Justice Marshall also made the observation that the Court's decision was indicative that, "Power, not reason, is the new currency of this Court's decisionmaking." *Id*. at 844.

[59] U.S. Const. art. III, § 1.

[60] U.S. Const. art. I, § 2, cl. 5.

[61] U.S. Const. art. I, § 3, cl. 6.

[62] The few federal judges that have been removed demonstrate how egregious their behavior must be before any action is taken to remove them. For example, Harry E. Claiborne (D.C. Nev.) was removed in 1986 after he was convicted of intentionally falsifying his income tax returns, stemming from his acceptance in the early 1980's of two bribes of $55,000 that were paid to influence his rulings. *See Paragons of Corruption*, Freedom Magazine., Vol. 27, Issue 6, 1995, at 15. In 1989, Walter Nixon (D.C. Miss.) was removed after he was convicted in federal court of two counts of perjury related to lying about his receipt of bribes to influence his decisions in the early 1980's. *Id*. Concluding a saga that began in 1980, Alcee Hastings (S.D. Fla.) was removed as a federal judge after the Senate convicted him of eight impeachable offenses, including conspiring as a federal judge to obtain a $150,000 bribe to influence a ruling. *Id*. In voting to impeach him by a 413 to 3 vote, the House noted his misconduct struck "at the heart of our democracy." *Id*. Hastings was the last federal judge removed from office. *Id*. In a remarkable twist, Hastings ran for a seat in the U.S. Congress in 1992, won, and continues to represent Florida in that capacity today. *Id*.

[63] *See* Ruth Marcus, *Senate's Quandary: Does a Trial Have to Look Like 'Perry Mason'?*, Washington. Post, January 7, 1999, at A12.

[64] *See* Anne Gearan, *Judges Escape Ethical Punishment*, (August 6, 2002).

[65] *Id.*

[66] *Id.*

[67] *See, e.g.*, Mark Terry & Tina Terry, *The Best Judges Money Can Buy*, (1997), *at* http://www.jail4judges.org/JNJ_Library/stak0/corrupt/Bribe.htm (last viewed July 5, 2023) (Exploring the corruption of federal judges by the carrot of special cash payments made to them by the federal government).

[68] Strick, *supra* note at 13, at 159 (citation omitted) (footnotes omitted).

[69] *See* Richman & Reynolds, *supra* note 52 (observing that groups with little political power receive lesser treatment than more powerful groups and stating "That justice is dispensed on different tracks . . . although it is not generally known outside judicial circles").

[70] Letter from Lord Acton to Bishop Mandell Creighton (Apr. 3, 1887), *in* 1 *The Life and Letters of Mandell Creighton* ch. 13 (Louise Creighton ed. 1904), available at https://www.google.ca/books/edition/Life_and_Letters_of_Mandell_Creighton_D/5H4_AAAAYAAJ?hl=en&gbpv=1&pg=PA2 (last visited July 5, 2023).

[71] 531 U.S. 98 (2000).

[72] *See* Bugliosi, *supra* note 3, at 48. Bugliosi states, "If, indeed, the Court, as the critics say, made a politically motivated ruling (which it unquestionably did), this is tantamount to saying, and this can *only* mean, that the Court did not base its ruling on the law." *Id*.

[73] 531 U.S. 98 (2000).

[74] Bugliosi, *supra* note 3, at 48-49. Bugliosi states:

> The stark reality, and I say this with every fiber of my being, is that the institution Americans trust the most to protect its freedoms and principles committed one of the biggest and most serious crimes this nation has ever seen – pure and simple, the theft of the presidency. And by definition, the perpetrators of this crime *have* to be denominated criminals.

Id. at 48. Given their overall lower quality, the same can certainly be said of state judges.

[75] *Id*. at 49.

[76] For an illustration of individuals who have been wrongfully convicted, see *Justice Denied, The Innocents Database, at,* http://www.justicedenied.org/wronglyconvicted/innocents.htm (last visited July 5, 2023).

[77] *See Bush v. Gore*, 531 U.S. 98 (2000).

B. State Judges

The pervasive influence of political considerations on the decisions of trial and appellate judges is not limited to the federal judiciary, but dominates the decisions of state judges as well.[78] As would be expected, the same dynamics interact to corrupt the rulings of appointed state judges that affect federal judges.[79] However, rather than short circuiting that process, the alternate methods of electing state judges are at best merely deceptive window dressing that conceals the power behind the judicial throne, and at worst, compounds the flaws inherent in appointing judges.[80] Given the number of judges that run unopposed and the number of incumbents re-elected, the voting process functions more to confirm state judges than to elect them.[81]

The corruption of state judges, whether appointed or elected, has been widely exposed in recent years.[82] A PBS *Frontline* program, *Justice For Sale*, reported how the favoritism of Pennsylvania, Louisiana and Texas judges is bought like cattle at an auction.[83] The same is true of every other state's judicial elections.[84] A judge's position on a case can reliably be predicted by an awareness of the nature and source of their campaign contributions, in conjunction with their political ideology.[85] It was also suggested in a cover article in The Nation, *State Judges For Sale*, that the corruption rife in state judiciaries can be expected to worsen after the Supreme Court opened the door for judicial candidates to publicly take politically partisan positions.[86] In *Republican Party of Minnesota v. White*,[87] a five-to-four majority ruled that it is an infringement of a judicial candidates free speech rights for a State to restrict the candidate from announcing his or her views on disputed legal or political issues.[88] The Supreme Court's decision will have less of an impact than The Nation's article presupposes, because it merely permits judicial candidates to publicly express their position on issues that they have previously openly expressed privately.[89]

The open bazaar-like atmosphere of buying judicial favoritism is as much an element of a non-partisan as a partisan election, since a judge's preferences are as important to political and monied interests in the former form of election process as the latter.[90] For example, the cost of winning a seat on the Oregon Court of Appeals in that state's non-partisan election process was estimated to be over $500,000 twenty years ago.[91] That was for an election in which slightly more than one and a quarter million people voted, or about forty cents was spent *per* voter by *both* of the candidates, for what on the surface appears to be a relatively obscure

position in a small state.[92] That highlights how coveted it is to possess influence with appellate judges who set precedents applicable to lower courts.[93]

There is nothing new about the blatant politization of the judiciary, which is now becoming more evident to the public.[94] For example, in the 1993 booklet, *Justice For Sale*, it was disclosed that business interests began a concerted effort in 1971 to gain and maintain control of the judicial system in the U.S. to serve their own ends.[95] The manifesto of that effort was a memorandum written for the U.S. Chamber of Commerce by Virginia attorney and future Supreme Court Justice, Lewis Powell.[96] Tactics such as those are indicative of how much effort is expended in an effort to ensure that state and federal judges do not function independently. The lack of judicial independence throughout the country is so apparent that the Brennan Center for Justice at the NYU School of Law maintains an ever-expanding website that lists hundreds of news stories, studies and reports on the subject.[97]

A general lack of public awareness, however, does not detract from the impact of judges representing those people and organizations to which they are politically, ideologically and financially beholden.[98] A judge need only pay lip service to voters and other people in society that lack the muscle to curry special favor with the judge. Judge Samuel Rosenman observed with no hint of cynicism, but simply as a statement of the cold hard facts:

> The idea that the voters themselves select their judges is something of a farce. The real electors are a few political leaders who do the nominating. . . . Political leaders nominate practically anybody whom they choose . . . the voters, as a whole, know little more about the candidates than what their campaign pictures may reveal. For example . . . [a poll] showed that not more than one per cent of the voters in New York City could remember the name of the man they had just elected Chief Judge of the Court of Appeals – our highest judicial post. In Buffalo, not a single voter could remember his name. [99]

The fact that most state judges are elected in near anonymity by voters who do not know who they are, compounds the effects of the corrupting nature of the campaign process that ensures their lack of impartiality.[100] Thus, the circumstances under which state judges are elected or nominated and confirmed, creates a situation in which the people who become state and federal judges serve their own interests and those who are responsible to, and not those of society at large.[101]

An awareness of the sort of people that typically become judges can help one's understanding of the corruption pervading the judicial process.[102] As noted in *Injustice For All*:

> Most judges . . . are ex-prosecutors, ex-cops, ex-officials who worked on the hard side of government, or ex-party workers. Most of them were hacks – small-time lawyers with big-time friends – and some were crooks the week before they went on the bench . . . Most of those men have no respect for the individual and no interest in his character or his future. And many of them are outright bigots, too.[103]

In the same book another commentator had a similar lament, "Let us face this sad fact: that in many – far too many – instances, the benches of our courts in the United States are occupied by mediocrity's – men of small talent, undistinguished in performance, technically deficient and inept."[104] One astute observer of the situation in Oregon, which has a non-partisan election process, recognized, "Our system of judicial selection is nothing more than an "old boys network" of insiders and lawyers."[105] The same could be said of judges and the judicial selection process in virtually every state in the country.

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[78] *See, e.g.*, Michael Sherer, *State Judges for Sale*, The Nation, Sep. 2, 2002, at 20-24 (observing that politicization of the bench is growing among the 39 states that elect appellate judges).

[79] For related material see *id*. Although it may be more reliably reported on publicly than in the past, the pervasiveness of judicial corruption is as much of a taboo subject within the legal fraternity today as it was in 1949 when Judge Jerome Frank wrote in *Judges on Trial*, "The [law] schools should also concern themselves with the problem of the effect of judicial corruption. Of that problem, law students learn little or nothing. … What would be thought of a college course in city government in which no mention was made of 'graft' and 'pull?' How can we afford to have men practice law who have been educated to shut their eyes to the effect of those factors on decisions?" Frank, *supra* note 5, at 240. Judge Frank recognizes the real world dilemma faced by a lawyer that encounters a corrupt judge, and his concerns are as valid today as they were five decades ago: "But lawyers engaged in practice before the courts find that a most perplexing problem: If some particular lawyers try to cause the removal of a judge they suspect of corruption, and if they fail, *that judge probably will, in roundabout ways, visit his wrath on their clients. For that reason, practicing lawyers usually hesitate to initiate such removal proceedings*." *Id*. at 241 (emphasis added). In other words, the willingness of an amoral judge to stop at

nothing to protect their turf is what enables them to continue their activities unabated.

[80] *See, e.g.*, Strick, *supra* note 13, at 161-62 (stating that the real electors of judges are the few political leaders who nominate the judge).

[81] For example, of the 57 judicial seats open in Oregon's 2002 primary, 47 were uncontested, and in only one of the races involving an incumbent was there an opponent. See *Measure 21 – Arguments in Favor*, *Bob Harris*, November 5, 2002. *See also* Ashbel S. Green, *Oregon's System of Seating Its Judge Under Heavy Fire From Various Sides*, The Oregonian, Jan. 27, 2000, at D4. Another tactic that politicizes the judiciary in Oregon even more than it naturally is, is the practice of judges retiring prior to the expiration of his or her term, which empowers the Governor to then appoint an interim replacement. *Id*. That appointed judge can then run as the incumbent at the next election, which historically has almost guaranteed they will win. *Id.*

[82] *See, e.g.*, *Frontline: Justice For Sale* (PBS television broadcast, Nov. 1999) (providing an investigation into how campaign cash is corrupting America's courts), available at, https://www.pbs.org/wgbh/pages/frontline/shows/justice/ (investigating the corruption of American courts caused by campaign cash) (last visited July 5, 2023) [hereinafter *Frontline*].

[83] *See id*.

[84] *See, e.g.*, Sherer, *supra* note 78, at 20-24 (stating that in the 39 states that elect appellate judges, politicization of the bench is growing). *See also* Warren Richey, *Justice For Sale? Cash Pours Into Campaigns*, The Christian Sci. Monitor, October 25, 2000, at 2 (discussing the increased spending and campaigning for state supreme court elections).

[85] *See Frontline*, *supra* note 82.

[86] *See* Sherer, *supra* note 78. That article focused on the 39 states that elect appellate judges, but the same dynamics apply to trial level state judges. *Id.*

[87] 536 U.S. 765 (2002).

[88] *Id*. at 788.

[89] The ruling concerned a Minnesota Supreme Court canon of judicial conduct, which prohibited judicial candidates from announcing their views on political or disputed legal issues. *Id*. at 768.

[90] *See*, *e.g.*, Garret Epps, *The Price of Partisan Judges*, The Oregonian, May 5, 2002, at C1. (commenting on the increased spending and campaigning in Oregon's non-partisan judicial elections). The degree to which monied interests value the special consideration that contributions to political and judicial candidates provide them with, is indicated by Arianna Huffington's observation in *Pigs At The Trough: How Corporate Greed and Political Corruption Are Undermining America*, (Crown Publishing Group, January 2003), "Over the last 10 years [through 2002], corporations have doled out more than $1.08 billion in soft-money contributions. This down payment on preferential public policy has extended across party lines, with $636 million going to Republicans and $449 million to Democrats." *Id.* at 20. As the previously cited articles suggest, a significant portion of that money was earmarked for state judicial candidates.

[91] *See id*.

[92] For more information, see Oregon Secretary of State Web Site, *Statistical Summary 2002 General Election*, *at* http://records.sos.state.or.us/ORSOSWebDrawer/Record/6873550 (last visited July 5, 2023)

[93] *See* Catherine Crier, *The Case Against Lawyers* 190 (2002). Crier wrote:

> In the late 1990s, an organization calling itself Texans for Public Justice began tracking political contributions to the high court to look for any correlation with outcomes. It didn't prove that money purchased results, but it did make a convincing case that it bought access. Only 11 percent of *all* appeals presented to the Court were accepted for review, but your chances *quadrupled* if you were a contributor. In fact, the justices "were *ten times* more likely to accept petitions filed by contributors of more than $250,000 than petitions filed by non-contributors." *Id*. (emphasis added).

[94] *See generally* Nan Aron & Barbara Moulton, *Justice For Sale: Shortchanging the Public Interest for Private* Gain (1993) (discussing the efforts of corporations to instill a more conservative approach in legal doctrine and the judiciary in order to benefit their economic interests). A summary of this book is located *at* http://www.ratical.org/corporations/Justice4sale.html (last visited July 5, 2023).

[95] *Id*.

[96] *Id*.

[97] *See* Brennan Center for Justice at N.Y.U. School of Law.

[98] *See Frontline*, *supra* note 82.

[99] Strick, *supra* note 13, at 161-62.

[100] *See, e.g*., Strick, *supra* note 11, at 161-62 (noting that most voters in New York did not remember the name of the elected chief judge on the court of appeals).

[101] *See generally* Aron & Moulton, *supra* note 94 (discussing the efforts of corporations to instill a more conservative approach in legal doctrine and the judiciary in order to benefit their economic interests rather than society's at large).

[102] *See* Strick, *supra* note 13, at 159 (noting that most judges are ex-prosecutors, ex-cops and ex-officials).

[103] *Id.* (footnote omitted).

[104] *Id*.

[105] Bob Tiernan, *Judging the Judges: Oregon voters denied real democracy because lawyers have fixed the game*, The Oregonian, Feb. 13, 1998, at D13.

C. Legislative Influences

One indication that judges have a strong tendency to conform with outside pressures is when they succumb to the influence of periodic media and politically inspired hysteria campaigns to get tough on the "bad" people who commit crimes.[106] These campaigns and the judicial pressure they exert can be local as well as national.[107] Furthermore, they typically have no basis in fact, but are opportunistic devices to boost the poll number of politicians and the ratings or readership of television or print media, respectively.

Representative of this process was a U. S. News & World Report cover story published on January 17, 1994 and entitled, *Violence in America*. The article encouraged judicial action to stem the growing tide of violent crime in America.[108] However, the article and others like it made a grossly false call to action because, at the time it was written, violent crime had not risen in 20 years and had, in fact, been in general decline since the early 1970's.[109] As a result of the media-generated hysteria campaign, Congress was able to enact the Violent Crime Control and Law Enforcement Act of 1994,[110] without even deliberating the statute's merits.[111]

The Anti-Terrorism and Effective Death Penalty Act of 1996 (AEDPA) is another example of legislation developed and enacted through the hysteria process.[112] It was enacted on the basis of a false public hysteria whipped up by media proclamations of a non-existent wave of terrorism in the United States, and an unfounded belief inculcated in the general public and politicians that criminals were filing large numbers of frivolous federal habeas corpus petitions challenging the legality of their convictions or sentences.[113] The AEDPA places a general one year time limitation on the filing of a federal habeas corpus petition by a convicted person after the exhaustion of their direct appeal, and in federal cases it gives the trial judge both the power to grant or deny that petition, and the power to determine whether the denial can be appealed.[114] A glimpse into the inequities built into the AEDPA is provided by considering that even though the judge that presided over a person's wrongful conviction is the judge most likely to be biased towards upholding the conviction, and thus the judge most incapable of making an impartial determination about evidence supporting the person's innocence, the merits of a federal defendant's 28 U.S.C. § 2255 petition filed under the AEDPA is reviewed by the one judge in the world who should *not* do so: the trial judge.[115]

The AEDPA's limitations on filing a federal habeas corpus petition is an example of how legislation enacted on the basis of an emotional response to

media and political rhetoric that has no basis in fact, can compound the wrongful conviction of an innocent person by impairing their ability to pursue, or outright denying, one of the few potential avenues available to correct the error.[116] It is also cause for concern that the federal judiciary did not maintain an arm's length distance from the debate underlying the AEDPA's restrictive provisions, since they were a reflection of Supreme Court Chief Justice William Rehnquist's longstanding support for restrictions on the filing and consideration of habeas corpus petitions.[117] However, there is no apparent concern by politicians, judges and prosecutors that an innocent defendant is likely to be harmed by an ill-advised law that results from a public hysteria campaign, imposes procedural bars to their vindication and empowers the judge most biased against him or her to rule on the merits of a legal challenge to their conviction.[118]

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[106] One such politically inspired hysteria campaign is the Anti-Terrorism and Effective Death Act of 1996. *See* Anti-Terrorism and Effective Death Act of 1996, Pub. L. No. 104-132, 110 Stat. 1214 (1996).

[107] One powerful reason for the success of these campaigns are the large number of former prosecutors on both the federal and state level that are legislators, who write the laws, or judges, who interpret and enforce those laws.

[108] Ted Gest et al., *Violence in America*, U.S. News & World Rep., Jan. 17, 1994, at 22.

[109] The rate of violent crime was significantly lower in 1994, and it still is today, than it was in 1973 when the National Crime Victimization Survey was begun. *See* U. S. Department of Justice, Bureau of Justice Statistics, *Criminal Victimization 1996*, available at, https://bjs.ojp.gov/redirect-legacy/content/pub/pdf/cv96.pdf (last visited July 5, 2023).

[110] Violent Crime Control and Law Enforcement Act of 1994, Pub. L. No. 103-322, 108 Stat. 1796.

[111] For an analysis of how Congress shirked its duty to debate the merits of the Crime Bill, particularly considering that it was estimated to involve an expenditure of $33 billion and increased the number of crimes for which the death penalty could be imposed, see Dave Ketchum, *Bad Procedure Gets Bad Law*, 1998.

[112] Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, § 735, 110 Stat. 1214, 1214.

[113] According to a report by the Department of State, there was not a single confirmed act of terrorism in the United States in 1995. *See* Terrorist Research and Analytical Center, *Terrorism in the United States 1995* (Counterterrorism Threat Assessment and Warning Unit, National Security Division, Washinton D.C.), 1995, at 1. The one *possible* terrorist incident, the Oklahoma City Federal Building bombing, does not meet the FBI's definition of a terrorist act and this one possible

terrorist act was described as a dramatic increase over the number that occurred in 1994. *Id*.

[114] A state prisoner files a petition under 28 U.S.C. § 2254, and a federal prisoner files a petition under 28 U.S.C. § 2255.

[115] *See* 28 U.S.C. § 2255 (2000).

[116] *Id*.

[117] *See, e.g*., Stephen Bright, *Does the Bill of Rights Apply Here Any More? Evisceration of Habeas Corpus and Denial of Counsel to Those Under Sentence of Death*, The Champion, Nov. 1996, at 25 (relating the Court's erosion of habeas corpus over a period of years during Justice Rehnquist's tenure as Chief Justice, and prior to the passage of the AEDPA).

[118] *See* 28 U.S.C. § 2255 (2000).

II. The Violence of Judges

An extreme danger inherent in the political nature of federal and state judges is the awesome violence available at their beck and call.[119] In his essay, *Violence and the Word*, Yale Law Professor Robert Cover explained that *every* word a judge utters takes place on a field of pain, violence, and even death.[120] Judges are, in fact, among the most violent of all federal and state government employees.[121] The violence judges routinely engage in makes the carnage of serial killers seem insignificant in comparison. Attorney Gerry Spence echoed Professor Cover's observation when he wrote, "Courtrooms are frightening places. Nothing grows in a courtroom – no pretty pansies, no little children laughing and playing. A courtroom is a deadly place. People die in courtrooms, killed by words."[122]

The very position of being a judge is literally defined by their ability to engender violence by the utterance of words from their lofty perch.[123] Furthermore, the more violence a judge can command, or the more people they can elicit obedience from in carrying out their orders, the more respected judges are considered to be. State Supreme Court justices can direct more people to carry out the violence implicit in their directives than a county judge can, and they are consequently accorded more deference and respect. Similarly, U.S. Supreme Court justices can direct and countenance the commission of more violence than a federal circuit court judge, a federal district court judge, or any state judge, and they also have a more exalted public persona.

The violence under the control of judges takes many forms.[124] In one of its more innocuous expressions, a state judge can direct a person convicted of driving while intoxicated to spend a certain number of weekends in jail and pay a fine.[125] The police or sheriffs under the direction of the judge will physically seize and drag the defendant to jail if he or she declines to comply with either judicial command.[126] In much the same way, a federal judge can issue a command that federal law enforcement officers will physically force compliance with, if it isn't voluntarily complied with.[127] As Gerry Spence noted in *From Freedom To Slavery*, "One judge has more power than all the people put together, for no matter how the people weep and wail, no matter how desperate, how deprecated and deprived, a single judge wielding only the law, can stand them off. Judges are keenly aware of their power, and power . . . longs to be exercised."[128]

Yet, in spite of the regularity with which the violence of judges is exercised, their "iron fist in the velvet glove" is effectively hidden by the shield of having *others* actually commit the violence embodied in their oral and written words.[129] Judge Patricia Wald recognized this phenomena in *Violence under the Law*, in which she noted how the relationship between judges and the violence they are a part of is obscured by paperwork and procedures: "Often by the time the most controversial and violence-fraught disputes reach the courts, they have been sanitized into doctrinal debates, dry legal arguments, discussions of precedents and constitutional or statutory texts, arcane questions of whether the right procedural route has been followed so that we can get to the merits at all."[130] Hence, the violence inflicted on a defendant by a judge is masked as just another detail amidst the legalese that dominates every aspect of a criminal case.

The public veneer of civility concealing the inner workings of the judicial process serves vital deceptive purposes. Two of the most important of those are: (1) hiding the political nature of all judicial decisions, and (2) masking the inherent violence seething underneath the pomp and ceremony of judicial proceedings and a judge's officious pronouncements.[131] Diversion of the public's attention away from the violence carried out under the direction of a judge also provides a self-serving illusion of dignity for the judge's themselves, by presenting a façade of scholarliness that conceals the violent dirty work they are intimately involved in.[132]

The finely honed skill of a judge in the art of creating false images that is evident by their concealment of the violence permeating everything they do, is further displayed by their manner of recording the controversies they are involved in.[133] That was implied by Judge Wald in *Violence Under the Law*, "A historian would do poorly to gauge the flavor of our society by reading its legal tomes."[134] The sanitized version of the passionate life and death struggles presided over by judges and the violence they trigger with a flick of their pen or a stroke of their gavel is not accurately represented in the bureaucratic paperwork they produce.[135] This is by design. U.S. Supreme Court Justice Hugo Black, for example, told his fellow Justice Harry Blackmun to "never show the agony" he felt about a case in his written decisions.[136] That attitude exemplifies one way judges are complicit in concealing from the public's view or conscious awareness, the awful life-destroying violence inflicted on people by their written and oral words.

The aura of officialdom surrounding judicial proceedings is a primary reason why the attention of the general public has successfully been diverted for so long from the true nature of the horrific violence occurring every minute of every day in state and federal courthouses nationwide.[137] There is no greater expression of that violence than when it is committed against a person that has his/her life utterly destroyed by being wrongly branded as a criminal and then is treated as such while imprisoned as well as after his/her release. The magnitude of that violence is hinted at by the human toll manufactured by an average of *at least one innocent man or woman being sentenced to prison every minute that courts are in regular session in the United States.*[138] That amounts to well over 100,000 innocent people sentenced to prison every year for something they did not do.[139] The blood of that nearly incomprehensible wave of violence is on the hands of every judge that presides over the proceedings that falsely condemn any one of those innocent people, and it further stains the hands of every judge reviewing those proceedings who does not do everything in his or her power to rectify the wrong.

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[119] For a more detailed discussion, see Robert M. Cover, *Violence and the Word*, 95 Yale L. J. 1601, 1607 (1986).

[120] *See id.*

[121] *Id.* (discussing a judge's power to impose punishment on defendants and their authority to have that punishment carried out).

[122] Spence, *supra* note 7, at 170.

[123] A judge who issued orders that were not given heed, would be one in name but not effect, since he or she would merely be engaging in endless mental masturbation. The lowliest traffic court judge does not do that, since a person that refuses to pay a levied fine of $10 can have the might and power of the state brought to bear against them for their recalcitrance. *See* Cover, *supra* note 119, at 1619 (observing that a judge's sentence is carried out through a system of social cooperation between the judge, the police and jailers).

[124] *Id.*

[125] *Id.* at 1607 n.16 (explaining that his use of criminal law is the most persuasive example for the purposes of discussion, but suggesting that property law also has violence).

[126] *Id.* at 1619.

[127] *Id.*

[128] Spence, *supra* note 8, at 113.

[129] *See, e.g.*, Patricia M. Wald, *Violence under the Law: A Judge's Perspective*, *in Law's Violence* 77, 77 (Austin Sarat & Thomas R. Kearns eds.1992) (exploring the use of violence to enforce the law from a judge's perspective).

[130] *Id*.
[131] *See id*. (explaining that the violence is obscured through doctrinal and legal debates as well as discussion of constitutional and statutory texts).
[132] An example of this was provided by Vincent Bugliosi throughout *The Betrayal of America* in which he analyzed aspects of the Supreme Court's decision in *Bush v. Gore*, 531 U.S. 98 (2000). *See* Bugliosi, *supra* note 3, at 46-50 (noting that at most, the justices of the Court lost the respect of observers even though their politically motivated ruling was "tantamount to a crime"). On one level he revealed how the dignity associated with the Supreme Court was used to direct the federal government to effectuate the imposition of George Bush as President under circumstances that would have perhaps caused the violence inherent in enforcing their decision to have been expressed openly without the authority of the Court backing the decision – however transparently unfounded the basis of the Court's decision was. *Id*. at 47 (noting the weakness of the criticism offered by observers). In other words, if the Court's identical decision had been made in a less stable country – such as Venezuela is today – the federal government may have needed to use troops to quell the rioting that might have been triggered by what was in effect the Supreme Court's installation of George Bush as President based on the ability of the Court to direct the might and power of the federal government to enforce their will when it is necessary to do so.
[133] Wald, *supra* note 129, at 77.
[134] *Id*.
[135] *See, e.g*., *id*. (noting that "[a] historian would do poorly to gauge the flavor of our society by reading its legal tomes").
[136] Michael Mello, *Dead Wrong* 38 (1997). Toward the end of his Supreme Court tenure Justice Blackmun disregarded that advice in writing several passionate and clearly heartfelt dissents. *See, e.g*., *Herrera v. Collins*, 506 U.S. 390, 446 (1993) (Blackmun J. dissenting) (describing the Court's majority as endorsing the "simple murder" of an evidently innocent man).
[137] *See* Wald, *supra* note 129, at 77.
[138] This is derived from the estimate that at any given time in this country there are over 1.3 million innocent people immersed within the law enforcement system. *See* Hans Sherrer, *The Innocents: the Prosecution, Conviction, and Imprisonment of the Innocent*, Introduction (Part One), *Justice: Denied*, Vol. 1, Issue 2, 1999, at 32, 32. That estimate is supported by a detailed analysis that over 14 percent of all convictions in state and federal courts are of innocent people. *See* Hans Sherrer, *How Many Innocents Are There?* 43 (Feb. 8, 2003) (unpublished manuscript, on file with the author). *See also infra* note 145 and accompanying text.
[139] *See* Sherrer, *supra* note 138, at 43.

III. The Judicial Irrelevance of Innocence

Americans are taught to think that the awesome, latent physical violence at the beck-and-call of judges is restrained by strict controls that prevent their abusive use of it.[140] This is particularly important for people to believe because one of the most heinous and tragic ways a judge's power can be used is to contribute to the prosecution, conviction, imprisonment, and possible execution of an innocent person.

However, the over 1.3 million men and women enmeshed at any given time in the law enforcement system that are not guilty provides ample proof that the internal checks restraining the exercise of judicially instigated violence against the innocent are inadequate.[141] This is not an accidental or happenstantial occurrence. On the contrary, it is a predictable consequence of the manner in which judges preside over the law enforcement process. In *Dead Wrong*, lawyer and law professor Michael Mello pointed out to lay readers what is well known in legal circles: "In federal court, innocence is irrelevant. The Supreme Court says so, and the lower [courts] listen – as they're required to do."[142] Not only do lower federal courts listen to Supreme Court decisions such as *Herrera v. Collins*, in which the Court downplayed the relevance of a defendant's innocence,[143] but state courts do as well. In a subsequent book, *The Wrong Man*, Professor Mello documented how federal and Florida state courts ignored the relevance of death row prisioner Joe Spaziano's innocence for over 20 years.[144]

Of course, the ultimate injustice that can be committed by a judge is to countenance the execution of an innocent person.[145]

Make no mistake about it, even though their role is protected from the glare of the spotlight, as surely as if they were doing it in person, the velvet-gloved fist of the trial and appellate judges involved is on the switch, lever, trigger, or syringe plunger used to snuff out the life of someone that is innocent. Considering the large number of judges involved in any given case, it is reasonable to think that cumulatively more than a thousand state and federal judges may have been involved in the dozens of known executions of innocent people in this century alone.[146]

A person's innocence is discounted by judges for the simple reason that it is not a constitutional issue.[147] The Constitution has been judicially interpreted to provide the innocent no more procedural protection than the guilty.[148] This is consistent with the Supreme Court's holding in *Herrera v. Collins* that "a claim of 'actual innocence' is not itself a constitutional

claim."[149] The Constitution only guarantees that procedural formalities are to be followed, it does not guarantee that the outcome of those procedures will be correct or fair.[150] As the Supreme Court has made crystal clear in *Herrera* and its progeny, neither does the Constitution assure that a defendant's innocence will be considered any more relevant to the outcome than his/her sex, age or the city of birth.[151]

The shock to a person who first learns of the irrelevance of his/her innocence *after* being wrongly convicted *and* then losing on appeal(s) is compounded when he/she files a federal habeas corpus petition.[152] Although it may be common for people to think that a federal judge will intervene to protect an apparently innocent person when no one else will – such a thought is far more of a romantic fantasy than a belief grounded in reality.[153] That fantasy is fed by movies such as *The Hurricane*, in which Federal District Court Judge Lee Sarokin is shown granting Rubin "Hurricane" Carter's habeas corpus petition in 1985 after he had been imprisoned for almost 20 years for a triple murder he did not commit.[154] What is not revealed is that Judge Sarokin may have been the only federal judge in the country that would have granted that writ under the circumstances of Carter's case, and to this day he is castigated for having done so.[155] So it is only by sheer luck that "Hurricane" Carter and his co-defendant John Artis are free men today instead of still caged in a New Jersey prison.[156] But people see and believe the Hollywood myth instead of the reality facing innocent people squarely in the face.

Professors James S. Liebman and Randy Hertz, authors of the authoritative *Federal Habeas Corpus Practice and Procedure*, explain the legal predicament that hamstrings factually innocent people such as "Hurricane" Carter: "Habeas corpus is not a means of curing factually erroneous convictions."[157] Yet, a habeas corpus petition is the only way a state prisoner can challenge his/her conviction in federal court and it is one of only two ways a federal prisoner can challenge his/her conviction.[158] In the absence of a defendant's demonstrable claim of being denied a recognized constitutional protection, the mere allegation of innocence is, quite literally, irrelevant to judges in this country.[159]

Notes:

[140] *Id*.
[141] *Id.*
[142] Mello, *supra* note 136, at 238.
[143] 506 U.S. 390 (1993).
[144] *See* Mello, *supra* note 136, at 219-47 (detailing the story of death row inmate "Crazy Joe" Spaziano and how his conviction was the product of among other things, "formulaic judges"). Convicted in 1976, Spaziano's murder conviction was vacated in 1996 after the state's witness recanted. Re-indicted in 1997, Spaziano agreed in 1998 to plead no-contest to second-degree murder after prosecutors pressured him with threats of seeking the death penalty if he was convicted after a retrial. Michael Mello, *The Wrong Man* (2001).
[145] The extent of wrongful convictions in capital crimes is hinted at by the finding of a study that included all 4,578 capital appeals finalized in the U.S. between 1973 and 1995. James Liebman, Jeffrey Fagan & Valerie West, *A Broken System: Error Rates in Capital Cases*, June 12, 2000, report available in its entirety from The Justice Project: https://scholarship.law.columbia.edu/faculty_scholarship/1219/. A summary of the report is: Hans Sherrer, *Landmark Study Shows the Unreliability of Capital Trial Verdicts*, Justice Denied, Vol. 2, Issue 2, at, http://www.justicedenied.org/landmarkstudy.htm (last visited July 5, 2023).

Overseen by Columbia University School of Law Professor James Liebman, the study stated that, "7% of capital cases nationwide are reversed because the condemned person was found to be innocent." That figure doesn't include the innocent capital defendant's who fell through the cracks of the appellate process by being unable to produce evidence of either a recognized constitutional error in the record of their case, or compelling new evidence of their innocence. *Id*. It was also found that reversible error was found in 68 percent of all capital cases finalized during the 23-year study period. *Id*. Considering that capital cases are investigated more thoroughly than other cases, and procedures are adhered to more faithfully at the trial and appellate stages than in non-capital cases, it is reasonable to assume that under the same level of scrutiny a comparable number of all criminal convictions in the country would be reversed. *Id*. This indicates the magnitude of the negative impact that the use of non-citable unpublished opinions or one line orders (which in federal cases is over 85 percent of all cases, FAS Project *supra* note 205) is having on causing the wrongful conviction of an untold numbers of innocent men and women to forever remain undetected. *Id*.
[146] The author created and maintains the world's largest database of wrongly convicted people. Included are over 40 innocent men and women that were executed. See Justice Denied, The Innocents Database, at, http://www.justicedenied.org/wronglyconvicted/innocents.htm (last visited July 5, 2023).
[147] *See Herrera*, 506 U.S. at 404 (holding that a claim of actual innocence is not a constitutional claim in a habeas corpus petition).
[148] For a more in-depth discussion of this with many citations, see James S. Liebman & Randy Hertz, *Federal Habeas Corpus Practice and* Procedure § 2.5 (3d ed. 1998).
[149] *Herrera*, 506 U.S. at 404.

[150] *See id.* at 400. In *Herrera v. Collins*, the Court stated that newly discovered evidence of innocence alone was not sufficient for habeas corpus relief unless a constitutional violation occurred in the underlying criminal proceeding. *Id*.
[151] *Id. See also* Liebman & Hertz, *supra* note 148, at § 2.5 (stating that "innocence is indeed irrelevant").
[152] *See, e.g.*, *Herrera*, 506 U.S. at 400 (stating that it is a "principle that federal habeas courts sit to ensure that individuals are not imprisoned in violation of the Constitution – not to correct errors of fact"). The Court was responding to the petitioner's claim that newly discovered evidence demonstrated that he was factually innocent. *See id*.
[153] *See, e.g.*, *id* at 400 (holding that a claim of factual innocence has never been held to state a ground for federal habeas corpus relief).
[154] *Carter v. Rafferty*, 621 F. Supp. 533 (D.N.J. 1985), *aff'd,* 826 F.2d 1299 (3d Cir. 1987), *cert. denied*, 484 U.S. 1011 (1988) (granting the petition on the basis that the prosecution had withheld critical exculpatory evidence and improperly argued racial hatred as the motive for the crime).
[155] *See, e.g.*, *Hurricane Carter: the other side of the story*, *at* http://www.graphicwitness.com/carter/ (last visited July 5, 2023).
[156] *Id.*
[157] *See* Liebman & Hertz, *supra* note 148, at § 2.5.
[158] A state prisoner files a petition under 28 U.S.C. § 2254 (2000), and a federal prisoner files a petition under 28 U.S.C. § 2255.
[159] This principle is embodied in the AEDPA of 1996 and that Act's requirements for the filing of federal habeas corpus petitions by both state and federal prisoners. *See* 28 U.S.C. § 2255. *See supra* note 114 and accompanying text. There does seem to be a very small number of state judges who have expressed the opinion that innocence *does* matter. *Id.* For example, based on a petition for a stay filed hours before Freddie Lee Wright's schedule execution in March 2000, Alabama Supreme Court Justice Johnstone was joined by one other justice in his dissent from its denial, because "…his petition recites persuasive facts that support the conclusion that he is innocent and that his conviction results from lack of a fair trial…. Whether Wright is electrocuted or injected seems insignificant compared to the likelihood that we are sending an innocent man to his death." *Ex parte Wright*, 766 S.2d 215, 216 (Ala. 2002). Mr. Wright was executed hours after the court majority rejected Justice Johnstone's argument that compelling evidence of his innocence was relevant. In contrast, the Alabama Court of Appeals in August 2002, vacated the "best interest" guilty plea of Medell Banks, Jr. to manslaughter, related to the death of a baby that was scientifically proven to have never existed. *Banks v. State*, 845 So.2d 9 (Ala. Crim. App., Aug. 9, 2002). A majority of the three-judge panel agreed that Mr. Banks' case was a "classic example of a manifest injustice." *Id.* However, there does not seem to be a corresponding number of federal judges that have done so. *See supra* note 28 and accompanying text. New York District Judge Sprizzo's acquittal of the two defendants he thought were innocent was definitely an anomaly. *Id.*

IV. Control of Defense Lawyers By Judges

There is one possible crink that can interfere with the smooth operation of the law enforcement process presided over by state and federal judges: defense lawyers. It is not unusual for a conscientious and knowledgeable defense lawyer to find him or herself in the position of having to choose whether to appear unruly and disrespectful in an effort to get a biased judge to observe the most meager standards of civilized fairness in conducting a trial.[160] However, when that path is chosen it is rarely successful, because it is easy for a biased judge to cast a defendant in a bad light with the jury by reprimanding and rebuking a vigorous and conscientious defense lawyer.[161]

Ironically, lawyers who believe their clients to be innocent are the most vulnerable to being smeared by a judge in front of a jury. This is because they are most likely to be intolerant and outraged by the way the proceedings determining their client's fate are being conducted by the judge. Yet, despite such frustrations, for all practical purposes there is little a defense lawyer can do in the courtroom about the velvet black jack wielded by a judge. *The Appearance of Justice* explained this dilemma in the following way:

> What alternatives are open to counsel? He must know his judge and be sure that registering an objection will not put him or his client at a disadvantage in the case before His Honor - and the next case, and the case after that.
>
> On paper, each judge is subject to some higher court review, but as a practical matter, the judge who acquires an aversion to certain counsel can destroy the lawyer's effectiveness in countless unreviewable ways. Simple matters such as continuances, the privilege of filing a slightly late brief, such courtesies of the courtroom as a full oral hearing – all these and many more amenities are sometimes unavailable to the attorney who is in disfavor with the court.
>
> The dilemma for the lawyer from out of town is no less acute though he may never have to face the same judge again. More likely than not he is able to appear at all only by the court's indulgence and must associate himself with local counsel whose own relationship with the judge could be jeopardized by any excessive zeal on the part of the visiting lawyer.
>
> Counsel must of course weigh the advantages and disadvantages of further delay in his case caused by a

> reassignment to another judge and also the imponderables of who that successor judge might be. Counsel must consider all this very rapidly and respond without hesitation, for the magistrate is there calling for an immediate answer on the suggested or implied waiver of his technical disqualification. . . .
>
> John P. Frank, one of the few longtime students of judicial ethics, described the waiver phenomenon as "nothing more than a *Velvet Blackjack*." Essentially, the Velvet Blackjack is a game based on assumed relationships of mutual confidence; it is, in other words, a species of confidence game. In the typical confidence game, the perpetrator engages his victim in a joint venture that requires the brief loan of the victim's treasure; the critical point in the transaction is when the intended victim has to decide – usually quickly, in a fluid situation – whether to surrender his valuables ever so briefly in the interest of acquiring something more valuable. The victim must decide not only whether to repose his trust in the individual, but more humanly wrenching, he must weigh the consequences of betraying apparent distrust and the risks of offending the other party. When the other party is a black-robed judge and the decision falls upon the lawyer, there is an extra dimension of human difficulty. . . . But the ordinary lawyer with the ordinary judge, while he is anything but happy to be governed by such a practice, may have no choice.[162]

Consequently, a lawyer forced to settle for a judge known to be biased against his or her client is an integral part of the judicial process.[163] This occurs even when a lawyer genuinely wants to help a defendant, but is precluded from doing so by settling for a judge that, at best, will project the illusory appearance to the jury of being fair to the defendant.

When defense lawyers challenge judges on the grounds of their impartiality, it is unlikely to result in their removal.[164] This is true even in cases where there is overwhelming evidence of a blatant conflict of interest or egregious prejudicial behavior by a judge.[165] The offending judge is typically protected by his or her fellow judges from being removed to maintain the illusion of judicial impartiality and decorum.[166]

Appeals courts also aid in the effective control of diligent defense lawyers.[167] The Ninth Circuit Court of Appeals has gone so far as to rule that it is not reversible error for a judge to make inaccurate and insupportable vitriolic remarks about a defense attorney's competence and "patriotism" in front of a jury.[168] The Ninth Circuit further held that it is not reversible error for a judge to order the same attorney handcuffed and

removed from the courtroom by the U.S. Marshalls in front of the jury after the attorney persisted in trying to get the judge to correct what was, in fact, an erroneous ruling contradictory to a previous ruling by the judge.[169]

The protection of a prejudicial trial judge by his or her brethren is encouraged by the legal doctrine of "the presumption of regularity," which presumes "that duly qualified officials always do right."[170] This idea seems similar to the monarchical doctrine that "The King can do no wrong." Thus, individually and as member of the good old boys network, judges can effectively function to control any defense lawyer that becomes too contentious in his or her efforts to defend a client – and those vigorous efforts are most likely to occur when that client's innocence is apparent from the evidence.

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[160] As author John P. MacKenzie notes, "judges have been much more forthcoming with public criticism of defendants and lawyers, particularly defense counsel." *See* John P. MacKenzie, *The Appearance of Justice* 22 n.86 (1974).

[161] *Id*.

[162] MacKenzie, *supra* note 160, at 95-97 (emphasis added).

[163] *Id*. at 97 (observing that lawyers often have to accept the fact that the judge is biased or has a conflict of interest and that challenging the judge shows distrust).

[164] In fact, a judge's impartiality may be upheld so long as his actions are not clearly prejudicial to the rights of the defendant. *See, e.g*., United States v. Burt, 765 F.2d 1364 (9th Cir. 1985) (holding that defendant's right to effective counsel was not interfered with even though the court disapproved the judge's treatment of the defendant's counsel).

[165] *See, e.g*., *United States v. Elder*, 309 F.3d 519 (9th Cir. 2002) (making an exception to the judge's disparaging remarks to defendant's counsel and for having the attorney shackled and removed from court in front of the jury).

[166] *See* Dave Reinhard, *Junk and Judgment*, The Oregonian, Feb. 20, 1997, at E12 (documenting how Oregon U. S. District Court Judge Robert E. Jones, whose wife had a mastectomy and silicon breast implants, refused to excuse himself from a suit involving breast implants). In discarding a challenge to have Judge Jones removed from the case, one of his fellow federal judges in Portland said that there was "no basis for the claim that Jones' impartiality could be reasonably questioned." *Id.*

[167] *See, e.g*., *Elder*, 309 F.3d at 520 (upholding the district judge's conduct in what would normally have been held to be prejudicial).

[168] *Id*.

[169] *Id*.

[170] MacKenzie, *supra* note 160, at 97.

V. Appellate Courts Cover Up the Errors of Trial Judges

There are two significant and complementary ways the political nature of judges contributes to victimization of the innocent. The first method is the use of the harmless error rule to dismiss the grounds upon which a wrongful conviction or prosecution is challenged.[171] The second method is the use of unpublished opinions to minimize attention given to an appeal and to conceal the details of the appeal's resolution.[172]

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[171] *See* 28 U.S.C. § 2111 (2000) (enumerating the harmless error rule). The statute provides: "On the hearing of any appeal or writ of certiorari in any case, the court shall give judgment after an examination of the record without regard to errors or defects which do not affect the substantial rights of the parties." *Id.*

[172] *See* Richman & Reynolds, *supra* note 52, at 275-76 (noting that cases involving weaker litigants get less judicial attention and involve a draft opinion rather than a published opinion).

A. The Harmless Error Rule

The harmless error rule is a relatively recent development in this country, having been adopted federally in 1919.[173] It is codified in the Federal Rules of Criminal Procedure as Rule 52 and it states that a harmless error is, "[a]ny error, defect, irregularity or variance which does not affect substantial rights shall be disregarded."[174] The states followed the federal government's lead and adopted a variation of the harmless error rule applicable in their courts.[175]

Prior to adoption of the harmless error rule, structural omissions or errors in an indictment, search warrant or jury instructions, and a trial judge's judgmental errors in such matters as evidentiary rulings, limiting witness testimony, or motions for a judgment of acquittal that were related to essential facts of a case, were presumed to prejudice a defendant, and thus constituted grounds for automatic reversal of a conviction and a retrial or possible dismissal of the charges.[176] That was consistent with the common law rule that review of a conviction did not involve any re-examination of the facts, which was the sole province of the jury, *and* that was the law applied to Americans at the time the Constitution was written and the federal judiciary was created. [177]

Before codification of the harmless error doctrine, it was recognized that structural errors in documents such as an indictment or search warrant could be due to the possible inability of the prosecution to correct them, and defects that *could* be cured by the prosecution would be.[178] Trial and appellate judges did not interpose their opinion about the relative strength or weakness of the government's pleadings, but merely ascertained if it met the legal standard for sufficiency and summarily rejected those that did not. The harmless error rule turned that common sense standard on its head by allowing a judge to determine if errors or omissions that made a pleading, document, or jury instructions insufficient were irrelevant, if in the judge's opinion it had no effect on the proceedings.[179] In other words, the harmless error rule elevated the expression 'good enough for government work,' which means conduct and work that is third-rate, shoddy, and not worthy of praise, to *the sub-standard* by which *all* legal pleadings in a criminal case affecting a person's life and liberty are judged.[180]

Before the harmless error rule, the jury was considered to be the sole arbiter of a case's facts and any failure by jurors to consider essential facts of a case or to consider the impact of facts on essential elements of an offense, was assumed to have impaired their judgment, and thus,

constituted the deprivation of a fair trial to a defendant and warranted reversal of the conviction.[181] Prior to 1919, there was effectively a presumption that trial level errors could prejudice a defendant to a judge and jurors exposed to them, since the State's painting of a person as a criminal carries with it a strong *de facto* presumption of guilt.[182] Thus, the State must be bound to follow the proper procedures to ensure that an innocent person is not erroneously colored by that *de facto* presumption of guilt.[183] Consequently, trial level errors embody the presumption that they are prejudicial, some in ways that may remain unseen to anyone outside of the jury: so recognition of their prejudicial effect on a defendant's right to a fair trial and their possible contribution to an adverse verdict is essential to preserve not just the integrity of the judicial process, but the appearance of the system's integrity.[184]

The automatic reversal of a conviction acted as an important shield of protection for innocent defendants from the structural and judgmental errors of a judge, prosecutors and police.[185] Its obliteration began in 1919, and decades later is virtually complete: only a hollow pretense of judicial concern for determining the soundness of any conviction remains.[186]

The harmless error rule is defended in a criminal context as contributing to judicial economy by allowing a judge to avoid ruling in a defendant's favor when reasonable grounds can be stated that in the judge's opinion, an error by the police, prosecutors or a judge in a case did not alter the outcome of the issue being considered.[187] The Supreme Court has extended that rationale to encompass the most serious violations of a defendant's express protections under the Bill of Rights.[188] The end result of that rationale was expressed in *Arizona v. Fulminate*, a case involving a confession obtained in violation of the defendant's Fifth Amendment right against self-incrimination.[189] The Court has not only continued to apply the rationale that a constitutional violation does not mandate a conviction's automatic reversal, but it has extended it in subsequent cases to encompass indictments and jury instructions that fail to include essential elements of a defendant's alleged criminal offense.[190] Thus, the assessment of a case's facts and deficient prosecution documents and pleadings by a judge who owes his position to the same political establishment to which the prosecutor belongs, has effectively replaced the jury that symbolically represents the community, as the final arbiter of the weight to be given to those facts that the judge cannot possibly view from a disinterested perspective.[191]

It was predictable in 1919 that the 'harmless error rule' would result in less attention to critical details at every stage of a criminal investigation, prosecution and review of a conviction, given the overtly political nature of the state and federal judiciaries, and the panoply of political considerations that are the overriding criteria used to fill those positions and that affect the decisions of judges.[192] So even though details are the life blood of a criminal prosecution and the protection of all criminal defendants is shielded by the presumption of innocence, the liberal application of the 'harmless error rule' has enshrined 'close enough for government work' as the motto that most accurately expresses the standard applicable to misdeeds, errors and constitutional violations committed during the course of a case by judges, prosecutors and the police.[193]

The grave danger posed to the innocent by the Supreme Court's extension of the 'harmless error' principle to an every increasing panoply of prosecution related errors was conclusively proven by the aftermath of its ruling in *Arizona v. Youngblood*.[194] Convicted of the 1983 kidnapping and sexual assault of a 10 year old boy based solely on the victims testimony, the Arizona Court of Appeals reversed Larry Youngblood's conviction in 1986 on the ground that the failure of the police to preserve semen samples from the victim's body and clothing that there was substantive reason to believe could have exonerated him, violated his Due Process right to a fair trial.[195] In 1988 the Supreme Court reversed, holding that such destruction of material evidence by the prosecution must be done in "bad faith" to constitute a Due Process violation.[196] The Court's majority acknowledged that although the actions of the police in Youngblood's case could be "described as negligent," they didn't act in "bad faith."[197]

However, in 2000 a preserved rectal swab sample taken from the victim containing the attackers semen was discovered.[198] When subjected to state of the art DNA testing unavailable at the time of his trial, Mr. Youngblood was excluded as the assailant.[199] Mr. Youngblood's exoneration, *after* he had served his prison term, vindicated Justice Blackmun's concern that the Court was using his case to erroneously expand when destruction of material evidence by the prosecution was constitutionally permissible:

> The Constitution requires that criminal defendants be provided with a fair trial, not merely a 'good faith' try at a fair trial. Respondent here, by what may have been nothing more than police ineptitude, was denied the opportunity to present a full defense. That ineptitude, however, deprived respondent of his guaranteed right to due process of law.

…

> The evidence in this case was far from conclusive, and the possibility that the evidence denied to respondent would have exonerated him was not remote. The result is that he was denied a fair trial by the actions of the State, and consequently was denied due process of law.[200]

Yet in spite of Mr. Youngblood's actual innocence being later proven and Justice Blackmun's correct analysis of why the Court should have affirmed the Arizona Court's reversal, the Court's decision continues to be the controlling authority insofar as whether the prosecution's destruction of material evidence violates Due Process or is merely 'harmless.' It is reasonable to surmise that the Court erred as egregiously in other applications of the harmless error principle to possible Constitutional violations as it did in its as yet uncorrected *Youngblood* ruling.[201]

One logical consequence of the ever more liberal use the 'harmless error rule' is the two pronged evil of a nationwide acceptance of wrongful convictions as the norm, and the failure of appellate courts to reverse convictions that it would have unhesitatingly declared as unsafe mere decades ago.[202] Thus, adoption of the 'harmless error rule' is a largely unseen factor that has evolved into being one of the keys necessary to trigger and sustain what has become nothing less than a tsunami of wrongful convictions in the United States.

Notes:

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[173] Act of Feb. 26, 1919, Pub. L. No. 281, 40 Stat. 1181.

[174] *Fed. R. Crim. P.* 52(a). The harmless error is codified for appeals in 28 U.S.C. § 2111.

[175] For example, North Dakota codified the harmless error rule as N.D. SCT. R. 52.

[176] John H. King, Jr., *Prosecutorial Misconduct: The Limitation Upon the Prosecutor's Role as an Advocate*, 14 Suffolk U. L. Rev. 1095, 1108 (1980). The article states: "The harmless error legislation effectively eliminated the common law practice mandating automatic reversal." *Id.* at 1109.

[177] Brutus, Anti-Federalist Paper #81, *The Power of the Judiciary*, *available at* https://thefederalistpapers.org/antifederalist-paper-81 (last viewed July 5, 2023). The Anti-Federalists warned prior to adoption of the Constitution that the door to creation of what is today known as the 'harmless error rule,' and the discarding of the Common Law rule of appellate review was embedded in the Constitution:

> *They will therefore have the same authority to determine the fact as they will have to determine the law, and no room is left for a jury on*

appeals . . . If we understand the appellate jurisdiction in any other way, we shall be left utterly at a loss to give it a meaning. *The common law is a, stranger to any such jurisdiction: no appeals can lie from any of our common law courts, upon the merits of the case*. The only way in which they can go up from an inferior to a superior tribunal is by habeas corpus before a hearing, or by certiorari, or writ of error, after they are determined in the subordinate courts. *But in no case, when they are carried up, are the facts re-examined, but they are always taken as established in the inferior court*. *Id*. (emphasis added).

[178] This is implicit in the aftermath of a reversal, when a prosecutor cures defects that are not fatal to a case, so there is no need for a judge to interpose his or her judgment into the process.

[179] See *Fed. R. Crim. Pro*. 52(a).

[180] Stephen Bright, Director of the Southern Center for Human Rights, has used the phrase "close enough for government work" to describe the minimal standard of competence federal judges apply to judge the competence of a death penalty lawyer. Stephen Bright, Speech at the Univ. of Washington School of Law (Feb. 28, 2002).

[181] Under the harmless error rule, the appellate court reviews the trial record to determine if an error affected a substantial right of one of the parties. See Wayne R. LaFave, Jarold H. Isreal & Nancy J. King, *Criminal Procedure* § 27.6 (3d ed. 2000).

[182] *Id*.

[183] *See* King, *supra* note 176, at 1108-09.

[184] *See* LaFave, Isreal & King, *supra* note 181, at § 27.6 (stating that "the presumption of prejudice was designed to ensure that the appellate court did not encroach upon the jury's fact-finding function by discounting the improperly admitted evidence and sustaining the verdict on its belief that the remaining evidence established guilt").

[185] *Id*.

[186] *See, e.g*., *Neder v. United States*, 527 U.S. 1, 7 (1999) (observing that the harmless error rule applies to all errors, but a limited class of fundamental constitutional errors defy harmless error analysis and require automatic reversal, all other errors are subject to rule).

[187] Prior to the adoption of the harmless error rule, appellate courts were criticized for allowing retrials on even the most insignificant errors. *See* LaFave, Isreal & King, *supra* note 181, at § 27.6.

[188] *See, e.g*., *Arizona v. Fulminate*, 499 U.S. 279, 309 (1991) (noting that a total deprivation to counsel at trial is a violation that is not subject to the rule).

[189] *Id*.

[190] *See, e.g*., *Neder*, 527 U.S. at 5 (holding harmless error rule applies to refusals to submit the issue of materiality to the jury regarding charges of tax fraud).

[191] By interposing the judgment of judges for that of a jury in regard to the weight to be given a case's facts, the effect of the 'harmless error rule' has been to significantly alter the manner in which the Bill of Rights' guarantees of due process and trial by jury apply to a criminal defendant. It has long been recognized that the jury is intended to stand as a protective shield between an accused and the government's representatives in the form of the judge, the prosecutor and the police.

See, *e.g.*, *Duncan v. Louisiana*, 391 U. S. 145, 155 (1968) (recognizing a right to a jury trial in a criminal case was designed to prevent government oppression). The court stated:

> A right to jury trial is granted to criminal defendants in order to prevent oppression by the Government. Those who wrote our constitutions knew from history and experience that it was necessary to protect against unfounded criminal charges brought to eliminate enemies and against judges too responsive to the voice of higher authority. The framers of the constitutions strove to create an independent judiciary but insisted upon further protection against arbitrary action. *Id.*

Yet the 'harmless error rule' empowers a judge, a government actor that the trial by jury was intended to protect an accused against, to be the final arbiter of the one aspect of a case that for this country's first 120 years (1789-1919) was the sole province of the jury - the weight to be given the facts of a case.

[192] *See* Act of Feb. 26, 1919, Pub. L. No. 281, 40 Stat. 1181.

[193] *See supra* note 180 and accompanying text.

[194] 488 U.S. 51 (1988).

[195] *Arizona v. Youngblood*, 734 P. 2d 592 (1986).

[196] *Youngblood*, 488 U.S. at 58.

[197] *Id*.

[198] Barry Scheck, Peter Neufeld & Jim Dwyer, *Actual Innocence* 334-36 (Pengun Putnam 2001).

[199] *Id*.

[200] *Youngblood*, 488 U.S. at 61-62 (J. Blackmun dissenting).

[201] *See, e.g.*, *Neder*, 527 U.S. 1, 5 (1999) (holding harmless error rule applies to refusals to submit the issue of materiality to the jury regarding charges of tax fraud).

[202] The dramatic reduction in published opinions has significantly contributed to this trend. *See* Richman & Reynolds, *supra* note 52, at 274 n.15. It is in the past few decades that the use of unpublished opinions has become so commonplace as to have a decisive negative impact on the system as a whole, and reduced the quality of the decision in any particular case. *Id.* It is also notable in this regard that the harmless error rule has been aided by the time and procedural limits imposed by 1996's Anti-terrorism and Effective Death Penalty Act on the filing of federal habeas corpus petitions by state and federal prisoners challenging their convictions. *See* 28 U.S.C. § 2255 (2000).

B. Unpublished Opinions and Unprecedential Law

The replacement of a written opinion explaining the rationale underlying an appellate court decision, with an unpublished opinion or one line or one word orders has become a pervasive phenomenon in the last three decades.[203] As recently as 1950, a written opinion was issued in all federal appeals as a right.[204] Today, however, over 85% of all federal circuit court opinions are unpublished.[205] The increased use of unpublished opinions since the late 1960's and early 1970's somewhat parallels the growth in the number of people imprisoned since then.[206] It is common for both federal and state appellate courts to use an unpublished opinion to dismiss a defendant's challenges to a conviction based on misconduct, errors and omissions by a judge, prosecutor and the police, as constituting 'harmless error.'[207]

The authors of *Elitism, Expediency, and the New Certiorari*, recognize the negative consequences of the trend toward less public disclosure of the reasons underlying a judicial decision:

> The implications of these changes are enormous. Federal appellate courts are treating litigants differently, a difference that generally turns on a litigant's ability to mobilize substantial private legal assistance. As a result, judicial procedures no longer permit judges to fulfill their oath of office and 'administer justice without respect to persons, and do equal right to the poor and to the rich.' In short, those without power receive *less* (*and different*) justice. [208]

Given the political nature of the judiciary, it is to be expected that the expanded use of unpublished opinions is disproportionate in cases involving people that are politically powerless and who do not have substantial financial resources.[209] Their deficient political and financial circumstances have a significant impact on the outcome of their case by putting them on a "different track" than more well-heeled and connected defendants.[210]

Even less well known to all but legal insiders is the minimal amount of first hand knowledge an appellate judge has about the merits of the majority of the cases he or she makes a decision about.[211] That lack of attention to the details of an appeal is disproportionately weighted towards cases involving defendant's from the lower strata of society.[212] Such defendants are not only involved in the majority of criminal appeals,

but they are the ones most likely to have been the subject of a shoddy police investigation, coercive questioning, threatening or intimidation of witnesses, prosecutorial misconduct, or judicial inattention to crucial details involving witnesses, procedures and evidence.[213] Those are the cases that *require* the most intense scrutiny on appeal because they involve the greatest human cost and the greatest likelihood of an injustice, yet in an Alice in Wonderland type twist of reality, they receive the least personal attention by an appellate judge.[214]

It is unsurprising that the politically and financially powerless, rather than the powerful, suffer the harmful effects of judicial shortcuts exemplified by the issuing of an unpublished decision, given that judges owe their position to the latter and not the former.[215] There are at least four significant ways the different judicial tracks of justice are manifested.

First, the issuance of an unpublished decision by a state or federal circuit court panel is the kiss of death to a defendant, because it effectively ends the appeal process in all but name.[216] An unpublished decision sends a powerful signal to any further reviewing court that the issues involved are too insignificant to bother with explaining, and thus they are not important enough to warrant careful review by any other court.[217] A one line or one word order sends the same message even more powerfully.[218]

Second, an unpublished opinion typically goes hand-in-hand with non-citability of the decision.[219] In *Anastasoff v. U.S.*, Circuit Judge Richard S. Arnold clearly explained that since the days of Blackstone over 200 years ago, the doctrine of precedent has been recognized as one of the few checks on the arbitrary exercise of judicial power, and that all judicial opinions are precedential, not just those that are published.[220] Consequently, the ability of a court to ignore a previous court's opinion regarding a factually and legally similar case removes the only bar preventing judges from substituting their personal opinions for what the law has been declared to be in those circumstances.[221] Thus, the non-citability of an opinion breeds and ensconces judicial lawlessness by allowing judges to avoid any accountability to abide by any precedents applicable to a case.[222] It allows imposition of de facto judicial ex post facto pronouncements.[223] That underscores the all too likely possibility that a person whose case is resolved by an unpublished opinion did not have it determined according to established precedents, but by the personal preferences of the judges involved.[224] Those preferences are likely to be different than those of a defendant from a different social and economic place in society than the judges.[225]

The Supreme Court recognized in *Hutto v. Davis*, that judicial

anarchy is the result of lower courts choosing which precedents they want to follow.[226] The Court stated, "Unless we wish anarchy to prevail within the federal judicial system, a precedent of this Court must be followed by the lower federal courts no matter how misguided the judges of those courts may think it to be."[227]

The danger posed to a defendant by an unpublished opinion's non-citability is compounded by the fact that few people other than lawyers have ready access to unpublished opinions.[228] Whatever check on judicial lawlessness that may exist from the public notice of a precedentially *contrary* opinion is, therefore, effectively eliminated.[229] The injustice embodied in the non-cited opinion is not buried in legal books sitting on dusty shelves – it is as if the opinion never existed in the first place – other than its effect on the hapless appellant victimized by it.[230]

In an uncommon display of judicial courage, an Eighth Circuit three judge panel ruled in *Anastasoff* that the circuit rule on the non-citability of an unpublished opinion is unconstitutional.[231] The panel declared the non-citability rule "expands the judicial power beyond the limits set by Article III by allowing us complete discretion to determine which judicial decision will bind us and which will not. Insofar as it limits the precedential effect of our prior decisions, the Rule is therefore unconstitutional."[232] All of the federal circuits and most, if not all, of the states have rules resembling the one declared unconstitutional in *Anastasoff*.[233]

Third, a case resolved by an unpublished decision typically receives little or no personal attention from the judges involved.[234] The judges only invest the minimal amount of time and energy necessary to process the final order or decision that is prepared, and that may in fact have been determined to be the appropriate resolution by the judge's support staff.[235] In such cases the judge functions as more of an administrative bureaucrat removed from dealing with a case's details.[236] That is in sharp contrast to what is traditionally thought of as a judge's hands-on role in all aspects of deciding a case. This routine hands-off role by judges raises serious Constitutional issues about the administration of justice in this country, because unseen and unknown bureaucratic functionaries are surreptitiously making judicial decisions that affect litigants and the public without any constitutional authority to do so, and without the litigants or the public being informed of their shadow participation as de facto judges.[237]

Fourth, the quality of unpublished decisions is of significantly lower quality than published decisions.[238] As Professors Richman and Reynolds noted, "The primary cause lies in the absence of accountability and

responsibility; their absence breeds sloth and indifference."[239] There has been fourteen additional years for the quality of unpublished decisions to deteriorate since Fourth Circuit Chief Judge Markey described them in 1989 as "junk" opinions.[240]

The serious deficiencies inherent in unpublished decisions are indicative of the presumption that exists in every case resolved by an unpublished opinion that consideration of the defendant's issues was given short shrift.[241] Implicit in that presumption is that the decision may have, in fact, been incorrectly decided.[242] In a criminal case it means the possibility that an innocent person was victimized by a wrongful affirmation and forced to suffer an unjust punishment, up to and including execution.

Notes:

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[203] *See* Richman & Reynolds, *supra* note 52 at 274 ("The federal circuit courts, responding to a dramatic increase in caseload, have transformed themselves radically in the last quarter century.") The casual dismissal of appeals by an unwritten opinion is often accompanied by the denial of oral argument. *Id.* at 274 n.15.

[204] *Id*. at nn.13, 17.

[205] FAS Project on Government Secrecy, *Unpublished Court Decisions Challenged*, (May 15, 2001), *at* http://www.fas.org/sgp/news/secrecy/2001/05/051501.html (last visited July 5, 2023).

[206] *See* Richman & Reynolds, *supra* note 52, at n.3. There has been a more than 10 fold growth in the jail and prison population in the U.S. during the past 30 years. *See* U.S. Department of Justice, *Bureau of Justice Statistics*, at http://www.ojp.usdoj.gov/bjs/ (last visited July 5, 2023).

[207] *See, e.g.*, Richman & Reynolds, *supra* note 52, at 282 (noting that decisions that do not "make law" or are not novel often do not get published).

[208] *Id*. at 277 (emphasis added).

[209] *Id*. at 286 (observing that the poor and weak litigants suffer because they do not have the influence to ask for publication of favorable precedent).

[210] As Professors Richman and Reynolds describe the situation, "That justice is dispensed on different tracks is not really a secret, although it is not generally known outside judicial circles." *Id*. at 276.

[211] *Id*. at 276 (quoting U.S. Supreme Court Chief Justice William Rehnquist).

[212] *Id*. at 289 (noting that clerks of a judge often review and write the opinions of less important cases).

[213] This author created the world's largest database of wrongly convicted people, and it is apparent from the tens of thousands of cases it documents, that those are among the factors contributing singly or in concert to a significant number of the wrongful convictions in this and other countries. *See* Forejustice, *The Innocents Database*, *at* http://forejustice.org/search_idb.htm (last visited July 5, 2023).

[214] This attitude is reflected in the U.S. Supreme Court's noticeable reduction in hearing criminal appeals. *See* Richman & Reynolds, *supra* note 52, at 284 n.51.
[215] *See id.* at 292 (discussing judicial shortcuts and noting that they most often injure the poor – the group in most need of judicial services).
[216] *Id*. at 295 (noting that judicial shortcuts effectively transform the courts of appeal into certiorari courts).
[217] *Id.* at 283-84. Stating:

> Non-publication also diminishes the possibility of additional review. For all practical purposes, the courts of appeals are the courts of last resort in the federal system; fewer than one percent of their decisions receive plenary review by the Supreme Court. The limited appellate capacity of the Supreme Court makes it extremely unlikely that it will review an unpublished opinion. After all, a cogent explanation also makes it possible for a reviewing court to understand the case. Without that explanation, the likelihood of discretionary review by an en banc court or by the Supreme Court decreases to the vanishing point. Moreover, a reviewing court is far less likely to spend its own resources on a case already determined to be without precedential value. Although review is very unlikely anyway, a litigant should not have the chances of review further reduced merely because a panel did not think the case worthy of an opinion. *Id*.

[218] *Id*. at 285 ("However poor the quality of unpublished opinions, they are Cardozoesque in comparison to the practice of issuing mere "Orders" – dispositions that contain no explanation at all. Orders fail any quality test.").
[219] *Id.* at 282.
[220] *Anastasoff v. United States*, 223 F.3d 895, 901 (8th Cir. 2000). The court stated:

> "If judges had the legislative power to "depart from" established legal principles, "the subject would be in the hands of arbitrary judges, whose decisions would be then regulated only by their own opinions." *Id*. In other words, the non-citability of opinions effectively turns every judge into a de facto dictator who can exercise their prerogative in accordance with Lord Acton's observation about the corrupting nature of power. As Judge Arnold explained, historically all judicial opinions have precedential value, whether or not they were recorded in writing. *Id*. at 903.

[221] *Id*. at 904.
[222] *See, e.g*., *Hutto v. Davis*, 454 U.S. 370, 375 (1982).
[223] *See, e.g*., Frank *supra* note 5, at 268 (quoting attorney John Chipman Gray).
[224] *See* Richman & Reynolds, *supra* note 52, at 283 (stating that unpublished opinions rarely have authors and often are designated as Per Curiam, which has the consequence of diffusing the accountability or responsibility of judges).
[225] *See* Hasnas, *supra* note 15, at 215 (observing that judges tend to come from middle to upper-middle class backgrounds, having politically moderate views with good connections and until recently, they were overwhelmingly white males).
[226] *Hutto*, 454 U.S. at 375.
[227] *Id*. The same sentiment was recently expressed by a federal circuit judge: "As an inferior court, we may not tell the Supreme Court it was out to lunch when it last

visited a constitutional provision." *Silveira v. Lockyer*, 328 F. 3d 567 (9th Cir., May 6, 2003) (Circuit Judge Kozinski dissenting from denial of rehearing en banc).
[228] *See* Richman & Reynolds, *supra* note 52, at 285 (noting that "circuit courts limit public access to unpublished opinions by restricting their distribution").
[229] *Id*. at 283 (observing that unpublished opinions reduce the incentive for judges to get it right because judges are not held accountable for their reasoning and logic).
[230] *Id*. (pointing out that an absence of explanation for the judge's decision makes the likelihood of discretionary review practically vanish).
[231] *Anastasoff*, 223 F.3d at 901, 905.
[232] *Id.* In *Anastasoff v United States*, 235 F.3d 1054 (8th Cir. 2000), the Eighth Circuit en banc vacated the panel's decision on technical grounds unrelated to the precedential value of non-published opinions, and consequently the issue of their precedential value reverted to the unresolved state that existed prior to the panel's decision. *Id.*
[233] *Id*. at 899. The rule provided that unpublished opinions were not precedent and should not be cited. *Id*.
[234] *See* Richman & Reynolds, *supra* note 52, at 341.
[235] *Id*. at 276.
[236] *Id*. at 286-94 (discussing how the use of para-judicial personnel removes a judge from working personally with the details of a case).
[237] At the very least, the rampant practice of using non-judges to perform judicial functions behind closed doors undermines the legitimacy of the judiciary. *See* Richman & Reynolds, *supra* note 52, at 291-92. Federal judicial power is vested by Article 3, Section 1 of the United States Constitution, and it does not refer to the exercise of any "judicial" function by anyone other than a constitutionally empowered "judge." Given the corresponding increase in state caseloads, it is possible that bureaucratic support staffs are likewise performing judicial functions without state constitutional authority. The performance of federal and state judges as public mouthpieces for decisions made behind the scenes by career bureaucrats also reveals the transparency of their incestuous link to the political process. *See e.g.*, Hans Sherrer, *The Inhumanity of Government Bureaucracies*, Indep. Rev., Fall 2000, at 256 ("bureaucracies reflect the image of the political institutions empowering them to act.").
[238] *Id*. at 284-85.
[239] *Id*. at 284.
[240] *Id*. at 284 n.53.
[241] *Id.* at 283 (stating that without explanation, no one knows if the judge treated the case seriously).
[242] *Id*. at 291-92.

C. Appellate Opinions Must Be Published and Precedential[243]

The judgment of every state and federal trial and appellate judge in the United States is subject to being colored by varying shades of a pro-prosecution bias.[244] This is to be expected because of the effectively similar politically laden processes that are used to elect or select both state and federal judges and prosecutors.[245] The country recently witnessed the prevalence of judicial bias by the confirmation of two judges to the U.S. Supreme Court with a track record of being overly solicitous to executive power.[246] Deference of judges to executive authority can manifest itself subtly and not-so-subtly in rulings, body language, verbal queues, and courtroom treatment of prosecutors and their witnesses, as well as in numerous other ways from the time of a defendant's arraignment through resolution of his or her final habeas appeal. [247] This judicial attitude only occasionally appears to weaken in a case that may involve particularly egregious conduct by police or prosecutors.

In this country there are two checks on conscious displays of judicial bias.

One is the conducting of proceedings in public, and the ready availability of a case's documents and transcripts. The rare instance of when a judge is admonished for ethical misconduct occurs only because of public proceedings. The Fifth Amendment wisely requires the process of a "public" trial, which arguably isn't concluded until after a convicted defendant's judgment and sentence are finalized when his or her direct appeal is exhausted.

The second is *stare decisis*, which is expressed in the common law as the 'doctrine of fairness.'[248] That simply means that fairness requires that similarly situated litigants should be treated equally irrespective of the judge(s) involved. If defendant Jones' case was dismissed because of a particular police impropriety, then stare decisis dictates that defendant Smith's identical case under a different judge needs to likewise be dismissed.

That all decisions of a court have precedential value was a given for the first 175 years of the United States' history, and it is integral to the common law upon which this country's legal heritage rests. It is also integral to the common law that whatever aspect of a particular decision is precedential can only be determined by a court in the future confronted with similar circumstances – not by the court issuing the opinion. [249]

Two Tier System of Appellate Opinions Created

A revolutionary assault on precedent, a critical component of this country's legal system, was launched in 1964 when the Judicial Conference of the United States issued a report that recommended, "that the judges of the courts of appeals and the district courts authorize the publication of only those opinions which are of general precedential value and that opinions authorized to be published be succinct."[250] The impetus behind the Conference's recommendation was to limit the growth in the number of legal volumes necessary to store opinions – by creating a heretofore unknown class of non-precedential decisions that were not published as an opinion of the court.[251] The idea was based on the assumption that most cases involve factual situations resolvable by established legal rules, and consequently it would be duplicative to publish any case that followed the precedent setting case. The time and energy of judges spent thinking about and writing decisions would thus be saved for "important" first-tier cases involving new legal issues, while all others would be relegated to second-tier non-published status.

In 1971 the First Circuit Court of Appeal became the first federal court to authorize the judges deciding a case to issue an unpublished opinion that would be barred from citation as precedent.[252] Within the next few years all the federal circuit courts adopted rules that to varying degrees restricted publishing and citation of selected opinions. A majority of state appellate courts did likewise.[253] Thus the creation was begun in this country of an underworld of what Supreme Court Justice John Paul Stevens described in 1985 as "a body of secret law," that only applies to the litigants of the particular case under review.[254]

For three decades the revolutionary new system of appellate courts routinely issuing decisions that were neither published nor allowed to be considered precedential was implemented with little fanfare. Members of the general public, and even some lawyers, only became aware of it if they happened to be involved in a civil or criminal case secretly disposed of with an order or memorandum stamped Do Not Publish or Not For Publication. The practice expanded to the point that in 2005 about 80% of federal circuit court decisions were non-published, and in 2004, 92% of California Appeals Court decisions were non-published.[255]

Non-published Opinions Hit The Radar Screen

The general public became aware that something was seriously amiss when the Supreme Court issued its December 2000 decision in *Bush v. Gore*, 531 U.S. 98 (2000). The public controversy was generated because it was an obviously partisan decision that effectively determined the

outcome of the presidential election.[256] Although it attracted less publicity, *Bush* was also significant because the Court mimicked the common practice of the lower federal courts by declaring that its decision was to be considered non-precedential, although in doing so it created the precedent of *publishing* its non-precedential decision.[257]

The public furor over the Court's decision in *Bush* was a reflection of the furor created in legal circles four months earlier when a panel of federal Eighth Circuit judges ruled that Circuit's non-precedential (non-citation/non-publishing) rule violated Article III of the U.S. Constitution.[258] Based on the historical common law tradition predating the U.S. Constitution of judges relying on the precedential value of any prior decision to decide a case, Judge Richard Arnold wrote for the panel in *Anastasoff v. U.S.*, 223 F.3d 898 (8th Cir. 8/22/2000), that the rule "insofar as it would allow us to avoid the precedential effect of our prior decisions purports to expand the judicial power beyond the bounds of Article III."[259]

The Eighth Circuit subsequently vacated that decision as moot when the civil dispute between Anastasoff and the IRS that gave rise to the case was settled.[260] However, the controversy triggered by the decision resulted in numerous articles in law reviews and legal publications discussing the pros and cons of non-precedential and/or non-published decisions, and the creation of at least one website devoted to the subject.[261] The research inspired by *Anastasoff* supports several basic conclusions:

- Classification of selected appellate court decisions as non-precedential was a radical departure from the centuries old practice of considering every decision as precedential.[262] As Richard Cappalli observed in *The Common-Law's Case Against Non-Precedential Opinions*, "The non-precedent regimen starkly reverses centuries of common law tradition."[263]
- A significant percentage of cases categorized as non-precedential establish recognizable new rules of law or refine existing ones.[264] These hidden precedential opinions have been described as a "shadow body of law"[265] created by judges inappropriately exercising their unchecked discretion to designate an opinion for non-publication.[266] One commentator described as "frightening," the common practice of sweeping "under the rug" decisions involving controversial, difficult or complex issues, by their designation as non-precedential.[267] One consequence of this practice is that judges are routinely violating court rules by designating what they know are precedential decisions for non-publication.

- Less attention is devoted to producing non-published decisions.[268] That is indicated by a June 2005 Federal Judicial Center report analyzing 650 randomly selected cases from all thirteen federal circuit courts.[269] The *15%* of the opinions that were published averaged 5,137 words. That is *648%* longer than the non-published opinions that averaged 793 words.[270] This situation is particularly pronounced in four circuits: in the Fourth Circuit 98% of the opinions were non-published and they averaged 273 words; in the Fifth Circuit 94% of the opinions were non-published and they averaged 390 words; in the Ninth Circuit 92% of the opinions were non-published and they averaged 557 words; and, in the Eleventh Circuit 98% of the opinions were non-published and they averaged 557 words.[271] The report's findings were consistent with the belief that the Fourth, Fifth and Eleventh Circuits are defendant unfriendly federal appeals courts, while it also indicates that in spite of its reputation to the contrary, the Ninth Circuit may be no better for defendants.[272]
- The quality of non-published decisions is so inferior that they have been described as "dreadful in quality."[273] This can be partially attributable to a judge's lack of reviewing a case once it is assigned for "second class" processing by the bureaucratic decision of the judge's clerk or staff attorney who filtered the case based on factors that can include its anticipated precedential value, or if it concerns an issue of particular interest to the judge, or possibly the staff member(s) filtering it.[274] The lesser quality of non-published opinions can also be attributed to them typically being reasoned and written by a clerk or staff attorney [275] who may lack experience or training in "legal methods" of understanding and interpreting case law and statutes.[276]
- Publishing only selected opinions allows the weighing of those opinions to favor prosecution friendly arguments consistent with the executive deferential world-view of the judges involved, while defendant favorable decisions are more likely to be designated for non-publication status.[277] Indeed, less and different justice is reserved for those without political power or influence.[278]
- The designation of a case for non-publication status and the lesser attention to details devoted to it can be due to judicial laziness, since many appellate judges view their position as a form of semi-retirement. [279] Designating cases for non-publication status is an effective method of reducing a judge's work by clearing his or her caseload by disposing of those cases without personally spending time considering their merits. That may be one reason "that judges

support the non-precedent policy *en masse* against the near unanimous opposition of lawyers and academics."[280]

- Non-publishing an opinion allows the arbitrariness and inconsistency that underlies it to go undetected.[281] It also encourages their use since it enables the deliberate discretionary application of precedents due to a bias or preference for a particular appellant or issue by the judge, or possibly the clerk or staff attorney who screened the case.[282] A defendant with case law favorable to the facts of his or her case can be ruled against by a court that either ignores or misstates applicable case law, or ignores or misstates the key fact(s) so it doesn't appear the case law applies, with the subterfuge tucked away in a non-published opinion.[283] Thus by such devices as "fact stretching or shrinking," non-published opinions allow a precedent to "rule" publicly in name, while being ignored in practice.[284] The consequence of this situation is most pronounced in capital cases, and there are many opportunities for it to happen. A recent study of a random sampling of capital cases from six leading death penalty states found that overall, 40% of the state and federal appellate decisions in those cases were non-published.[285]
- Designating selected opinions as non-precedential may violate the Fifth Amendments "equal protection" and "due process" clauses.[286] It is legitimate to ask whether a litigant is deprived of due process by being accorded the significantly less attention to his or her case that is indicated by the issuing of a non-published opinion. Is that same person also deprived of equal protection by their second class treatment compared to a litigant whose opinion is published?
- No discernable justification for a decision is set forth in many non-published opinions.[287] Those decisions are issued without substantive legal support based on the case's facts. That can be due to a lack of understanding about a cases facts or ignoring those facts, or possibly their deliberate misrepresentation. As law Professor Richard Cappalli phrased it, "Today's appellant wins and tomorrow's appellant loses on the same basic facts."[288] A decision's designation for non-publication status, however, virtually eliminates the likelihood that the judges involved will experience any negative public or professional fall-out from issuing what to all appearances is an insubstantial opinion.
- Contrary to court rules, when making a decision judges are known to secretly rely on non-published opinions as if they had precedential effect.[289] This is being done unbeknownst to the parties involved in

jurisdictions that either bar citing a non-published opinion, or only permit doing so for its persuasive value in supporting an argument.[290]

- There is an aura of secrecy enveloping a non-published opinion that is contrary to the procedural transparency guaranteed by the constitutional requirement for public trials. This secrecy is particularly odious when non-published opinions disproportionately involve affirmation of a conviction or rejection of a habeas petition. In overturning a rape conviction, during the trial of which the judge cleared the courtroom of all spectators when three prosecution witnesses testified the Eighth Circuit (in a published opinion) recently stated: "While the Supreme Court has held that the right of access to a criminal trial is 'not absolute,' *the Court has never actually upheld the closure of a courtroom during a criminal trial or any part of it*, or approved a decision to allow witnesses in such a trial to testify outside the public eye."[291] Non-published opinions are inconsistent with the requirement that the trial proceedings about which the opinion is concerned must be conducted publicly. The intuitive insight that non-published opinions are given less attention than published decisions is born out by their known lesser quality, and as Professors William Reynolds and William Richman observed in *The Non-Precedential Precedent*, "Justice must not only be done, it must also appear to be done."[292] Non-published and non-precedential opinions are outside of our system of justice, and even under the lowest level of scrutiny they don't even appear to do justice.
- Practical observations about the negative aspects of non-published/non-precedential opinions are compounded by the ethical and legal considerations related to non-judicial bureaucrats who routinely and surreptitiously perform tasks that the public, the media and the litigants believe are performed by the judge(s) involved. Yet the only association a judge may have with a non-published opinion is reviewing his or her staff person's summary of the case and signing off on its assignment to non-precedential status, and then signing the opinion/memorandum/order written by a clerk or staff attorney.[293] It is possible that the judge has not read a single word of the petition or briefs, so he or she doesn't even have the knowledge necessary to challenge the staff member's opinion of the case.[294] For all practical purposes, the actual judge(s) of the case were the bureaucrats involved whose judgment determined its outcome. Thus behind the scenes the role of the judge and his or her staff members has been reversed: the judge is the bureaucrat and the staff members act as the judge.

Non-published Opinions Victimize Innocent People

There is no hard data on how many innocent people have been adversely affected by the negative consequences of issuing non-published opinions. However, a hint of the problems magnitude can be gleaned by considering the number of non-published opinions that are issued. It is conservatively estimated that from 1980 to 2005 some 460,000 non-published federal appeals court opinions were issued.[295] Forty-five states (plus the Dist. of Columbia) limit non-published decisions to non-precedential status,[296] and state courts handle many times more appeals than federal courts. About 48% of federal appeals involve a criminal case,[297] and in the state of California, for example, 50% of appeals involve a criminal case.[298] So it can conservatively be surmised that something more than a million non-published opinions were issued by state and federal courts in the past quarter-century.

For example, if only 1% of only one million state and federal non-published decisions from 1980 to 2005 involved a criminal case in which an innocent defendant's conviction was affirmed or habeas relief was denied, that would amount to 10,000 innocent defendants directly impacted by the scheme of designating select opinions for non-precedential status.

Another consideration is that even if there were 10,000 wrongly decided cases during the past twenty-five years involving an innocent person, it would still be a significant understatement of the impact non-published opinions have had on the innocent. Consider, e.g., their effect on the plea bargaining process. About 95% of state and federal convictions are obtained by a plea bargain.[299] Defendants claiming innocence may agree to a plea bargain at the goading of a defense lawyer who may be convinced that the prosecution slanted case law relied on by the trial judge, and if necessary the appellate judges, is adverse to the facts of the defendant's case, or that there is the possibility the case's facts or a precedent favorable to the defendant could be manipulated or ignored in a non-published opinion.

Conclusion

An enormous body of non-precedential opinions has been created by the selective publishing rules instituted as an experiment to reduce the number of legal volumes necessary to be published, purchased and stored for reference purposes.[300] That justification has evaporated due to the ability of unlimited numbers of opinions to be electronically stored and readily accessed for a reasonable cost. However, in an example of the moving goalpost, since the original justification for publishing only

selected opinions is no longer legitimate, it has been replaced by the argument that the present number of judges is insufficient to devote the time and energy necessary to carefully analyze and write a complete opinion outlining the facts of each case, the applicable case law, and the judge's reasoning for deciding for or against the relief sought by a litigant.[301]

That argument ignores that if a person allegedly committed an offense serious enough to warrant the expenditure of the considerable resources necessary to investigate, prosecute, convict and punish him or her, then it is reasonable to require a full, public and precedential explanation of the reasons used to justify upholding that person's conviction and sentence. If that necessitates more appellate judges, so be it.[302] That would be a minor additional expenditure to increase confidence in not just the fairness of the judiciary's treatment of all defendants, but the legitimacy of the law enforcement process itself. Yet while there have been stopgap measures offered to diffuse the broad based opposition to disallowing the citation of non-published opinions, to date no judicial organization has favored restoring precedential status to all appellate decisions.[303]

Considering the plethora of negatives associated with non-published decisions, there is no sustainable argument in favor of continuing the experimental procedure of selectively publishing opinions as precedential. Consequently, the non-publishing experiment should be abandoned and all appellate opinions should be published and considered precedential without restriction. This restoration of precedentiality to all opinions should not be delayed. Innocent people are being mistreated by the judiciary every day that non-published and non-precedential decisions are allowed to be issued in obscurity and form an underworld of rulings.

Notes:

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[243] This chapter is based on "Commitment To Justice Requires All Appellate Opinions Must Be Published and Precedential," *Justice Denied*, Issue 31, 29-32.

[244] This bias is due in part to the vetting of prospective state and federal judges by state and/or national professional organizations (police, prosecutors, bar association), and special interest groups (victims rights, etc.) who will only endorse a candidate or nominee who fits the mold of generally deferring to the exercise of police power. Being identified as soft on crime is the kiss of death to a judicial hopeful. This attitude is visible in even the lowest level courts, such as a municipal court that typically processes traffic, parking, and city or county ordinance violations. One can sit in the gallery of such a court for days on end and observe that in every case the judge or magistrate unreservedly accepts a police or enforcement officers allegations

of wrongdoing, and at most may only consider the accused person's defense of innocence to mitigate the punishment. This unabashed tendency to favor the prosecution that occurs in the courts most accessible to the public and in which the public is most likely to be a defendant, is just as real in all state and federal trial and appellate courts up to the U.S. Supreme Court. Consider the following:

> "One need look no further for confirmation than the overwhelming percentage of rulings that a trial judge makes in favor of the government during a prosecution. All things being equal, the law of averages would dictate that the defense and the government would be *expected* to be considered "right" on a roughly equal number of issues during the course of a case. In reality that is a Pollyanna pipe dream. It is inconceivable that a single judge in this country rules in favor of the defense on average anywhere close to half the time. It is irrelevant whether the prejudicial attitude of judges that stacks the deck heavily against a defendant from the beginning is conscious or unconscious, since its impact is the same either way." Hans Sherrer, *The Complicity of Judges in the Generation of Wrongful Convictions*, 30 N. Ky. L. Rev. 539, 575-6 (2003).

[245] For an explanation of the political nature of the state and federal judiciaries, see e.g., Hans Sherrer, esp. 540-555. For an explanation of the general homogeneous that judges exhibit irrespective of political differences, see, John Hasnas, *The Myth of the Rule of Law*, 1995 Wis. L. Rev. 199 (1995):

> "Consider who the judges are in this country. Typically, they are people from a solid middle-to upper-class background who performed well at an appropriately prestigious undergraduate institution. . . . To have been appointed to the bench, it is virtually certain that they were both politically moderate and well-connected, and, until recently, white males of the correct ethnic and religious pedigree. It should be clear that, culturally speaking, such a group will tend to be quite homogeneous, sharing a great many moral, spiritual, and political beliefs and values." *Id*. at 215.

For an analysis of how the political affiliation or leaning of a judge can affect their decisions, see Vincent Bugliosi*, The Betrayal of America: How the Supreme Court Undermined the Constitution and Chose Our President* 23-24 (Thunder's Mouth Press 2001). In that book Bugliosi, who as an LA County Deputy District Attorney was the lead prosecutor of Charles Manson and other high profile criminals, explained how the five Supreme Court judges who voted affirmatively for George Bush's position in *Bush v. Gore* was reflective of their known pro-Republican political views.

In addition, a significant percentage of federal and state judges are a former prosecutor and/or veteran of a state or federal executive enforcement agency. That career experience and the personal inclination contributing to a person deciding to be a part of such an agency, may be indicative of a prosecutorial mindset that at its most fundamental can be described as a core belief that a suspect or accused person is 'guilty until proven innocent.'

[246] During his 15 years as a federal circuit court judge Samuel Alito voted in favor of the prosecution's position in about 90% of the cases he participated in. Most

prominent of these cases is one in which he approved of the warrantless strip search of a ten-year-old girl and her mother in their home. See, *Doe v. Groody*, 361 F.3d 232 (3d Cir. 03/19/2004). During his two years as a federal circuit court judge John Roberts consistently voted in favor of the government's position, most notably in, *Hedgepeth v. Washington Metropolitan Area Transit Authority*, No. 03-7149 (D.C.Cir. 10/26/2004), that involved the arrest, search, handcuffing, and jailing of a 12-year-old girl for putting a single french-fry in her mouth while waiting at a Washington, D.C., Metro station, which had a no eating policy. Any doubt about Roberts pro-prosecution bias was erased by minority dissent he wrote in *Georgia v. Randolph* 547 U.S. 103 (2006). Roberts argued his position that a dwelling can legally be searched without a warrant so long as one occupant consents, irrespective of the refusal of other occupants to consent.

[247] The investigation and prosecution of criminal and civil cases are expressions of executive authority.

[248] Ronald Dworkin, *Taking Rights Seriously* (1977), p. 113.

[249] Richard B. Cappalli, The Common Law's Case Against Non-precedential Opinions, *Southern California Law Review*, Vol. 76:755, 774- 775 (2003).

[250] Joshua R. Mandell, Trees That Fall In The Forest: The Precedential Effect Of Unpublished Opinions, *Loyola of Los Angeles Law Review*, 34:1255, 1259, April 2001.

[251] Richard B. Cappalli, supra at 756 ("The selective publication policy evolved in the precomputer era when courts and judicial councils worried about their physical ability to publish hard copies of the ever-increasing number of court opinions, the costs to the legal community of acquiring and storing voluminous law reporters, and overwhelming law-finding devices.")

[252] Tim Reagan, Citations to Unpublished Opinions in the Federal Courts of Appeals, Federal Judicial Center, June 1, 2005, 124.

[253] California Court Rule 976 that barred publication of opinions deemed by the ruling court to be non-precedential was instituted in 1964, the year of the Judicial Conference's report, so it predated the First Circuit's rule by seven years.

[254] *County of Los Angeles v. Kling*, 474 U.S. 936, 937 (1985) (Stevens. J., dissenting).

[255] Percentage of Majority Opinions Published Courts of Appeal, Fiscal Year 2003–04 Table 9, 2005 Court Statistics Report (California), p. 29.

[256] For an analysis of the Republican partisanship of the five justices who voted with the majority in *Bush*, see, see Vincent Bugliosi*, The Betrayal of America: How the Supreme Court Undermined the Constitution and Chose Our President* 23-24 (Thunder's Mouth Press 2001).

[257] *Bush v. Gore*, 121 S.Ct. 525, 531 U.S. 98 (U.S.2000) ("Our consideration is limited to the present circumstances, for the problem of equal protection in election processes generally presents many complexities." *Id*. ¶35.)

[258] *Anastasoff v. United States*, 223 F.3d 898 (8th Cir. 8-22-2000).

[259] *Id*., at 900.

[260] *Anastasoff v. United States*, 235 f.3d 1054 (8th Cir. 12-18-2000).

[261] http://www.nonpublication.com

[262] Richard B. Cappalli, supra at 757, note 9.

[263] Richard B. Cappalli, 772.

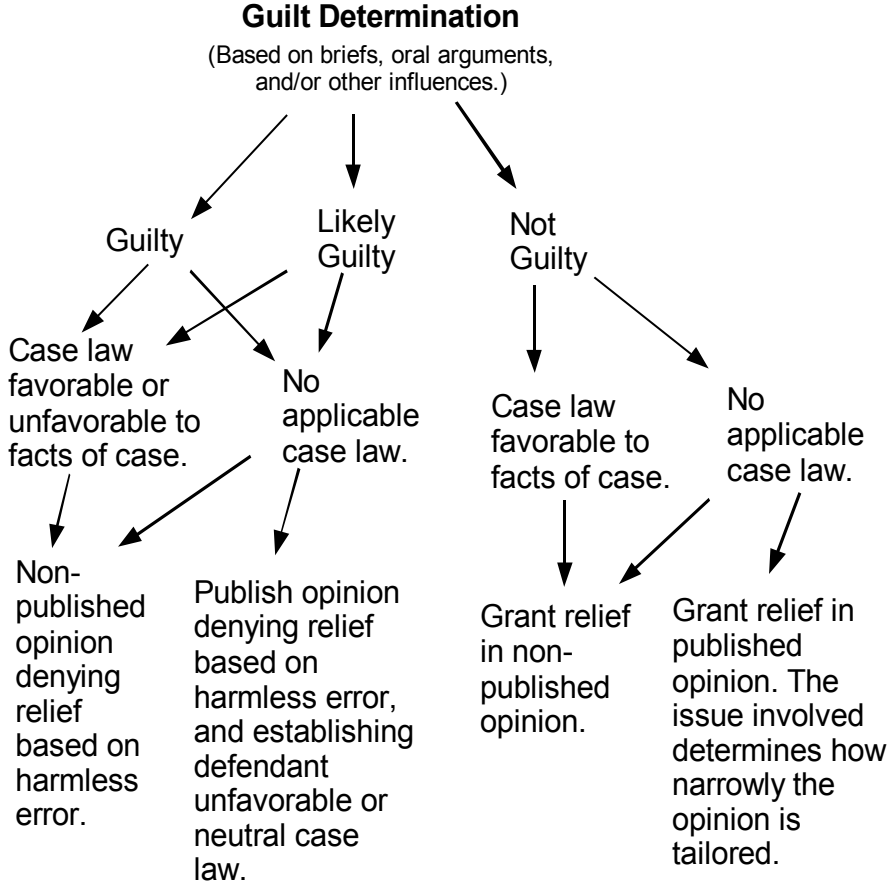
[264] Richard B. Cappalli, 764, note 53; and, 791-2, and accompanying notes.
[265] Richard B. Cappalli, 764, note 52, and also note 53.
[266] Joshua R. Mandell, supra, 1264.
[267] Joshua R. Mandell, supra, 1264.
[268] Richard B. Cappalli, supra at 785.
[269] Tim Reagan, *supra*.
[270] Tim Reagan.
[271] *Id.*
[272] The Ninth Circuit, e.g., had the shortest published decisions at an average of 2,284 words. That was less than half the average length of Fifth Circuit published opinions (4,805 words), and one-third the length of Fourth Circuit published opinions (7,716 words). Reagan, *supra*.
[273] Richard B. Cappalli, supra at 789.
[274] Richard B. Cappalli, 785. Professor Anthony D'Amato has observed that personal factors can also influence a Supreme Court justice's decision of whether to support certiorari: "Sometimes judges have voted against certiorari … because they believed that the result in the lower court, which they liked, would probably be reversed by the Supreme Court if the Court got to hear the case!" Anthony D'Amato, How Does the Supreme Court Decide Which Cases to Hear? in George Gallup, editor, *America Wants to Know* 488 (1983).
[275] Richard B. Cappalli, supra at 785.
[276] Richard B. Cappalli, 790.
[277] Richard B. Cappalli, 791, esp. note 160. See also, *Id*. at 792, "governments and corporations, and the issues related to them, had a significantly greater chance of having their decisions published than "underdogs" – criminals, civil rights appellants, prisoner appellants, and welfare beneficiaries.."
[278] See e.g., William M. Richman & William L. Reynolds, Elitism, Expediency, and the New Certiorari: Requiem for the Learned Hand Tradition, 81 Cornell L. Rev. 273, 277 (1996) ("[T]hose without power receive less (and different) justice." *Id*. at 277).
[279] Stephen R. Barnett, No-Citation Ruels Under Siege, The Journal of Appellate Practice and Process, Vol. 5, No. 2 (Fall 2003).
[280] Richard B. Cappalli, *supra* at 760. (citation omitted)
[281] Richard B. Cappalli, supra at 786-787.
[282] Richard B. Cappalli, 788, note 143.
[283] See e.g., Anthony D'Amato, *The Ultimate Injustice: When A Court Misstates the Facts*, 11 Cardozo LR 1313 (1990). See also, Richard B. Cappalli, supra at 769, "After studying non-precedent opinions issued by the Seventh Circuit, a student author surmised that the appellate bench was stretching case facts to fit within precedents or stretching precedents to fit the facts before them." *Id*. at 769.
[284] *Id.*
[285] See, David R. Dow and Bridget T. McNeese, *Invisible Executions*, Justice:Denied, Issue 31 (Winter 2006), 33.
[286] Richard B. Cappalli, 759, note 33.
[287] Richard B. Cappalli, supra at 789, note 147.
[288] Richard B. Cappalli, 787.

[289] Kenneth J. Schmier and Michael K. Schmier, Justices Carve Exception to No-Cite Rule, The Recorder, November 4, 2005.
[290] For citation rules in all the states, see, Melissa M. Serfass & Jessie L. Cranford, Federal and State Court Rules Governing Publication and Citation: An Update, 6 J. App. Prac. & Process 349 (2004). Available at, https://lawrepository.ualr.edu/appellatepracticeprocess/vol6/iss2/9 (last viewed July 5, 2023)
[291] *United States v. Thunder*, No. 04-3780 (8th Cir. 02/22/2006).
[292] William Reynolds and William Richman, *The Non-Precedential Precedent – Limited Publication and No-Citation Rules in the Untied States, 78 Colum. L. Rev. 1167, 1175 (1978).*
[293] Richard B. Cappalli, *supra* at 785.
[294] Richard B. Cappalli, 790.
[295] Richard B. Cappalli, *supra* at 769-770, note 71.
[296] See, Hans Sherrer, "Commitment To Justice Requires All Appellate Opinions Must Be Published and Precedential," *Justice Denied*, Issue 31 (Winter 2006), 31.
[297] U.S. Court of Appeals – Judicial Caseload Profile (2000-2005). This includes direct federal criminal appeals and state and federal habeas corpus petitions (including 28 USC §§2254 and 2255 petitions.)
[298] Summary of Filings Courts of Appeal, Fiscal Years 1994–95 Through 2003–04 Table 4, , 2005 Court Statistics Report (California), p. 24.
[299] The most current state figures are for 2002. See, Matthew R. Durose and Patrick A. Langan, Ph.D., *Felony Sentences in State Court, 2002*, Bureau of Justice Statistics, December 2004, NCJ 206916.
[300] Richard B. Cappalli, *supra* at 756.
[301] Richard B. Cappalli, 757, esp. note 12.
[302] Federal Ninth Circuit Judge Alex Kozinski is a proponent of unpublished opinions, but he has the intellectual integrity to acknowledge that more judges are necessary to change the status quo of how cases are processed.
[303] Typical of the band-aid approach to trying to quell criticism without meaningful change is that as of January 1, 2007 the Federal Rule of Appellate Procedure 32.1 was changed to: a) Citation Permitted. A court may not prohibit or restrict the citation of federal judicial opinions, orders, judgments, or other written dispositions that have been:
(i) designated as "unpublished," "not for publication," "non-precedential," "not precedent," or the like;

What is noteworthy is this rule change to allow citation of "unpublished," "not for publication," not precedent," etc. didn't eliminate non-published opinions as a separate category, and it doesn't change their non-precedential status. See e.g., Kenneth J. Schmier and Michael K. Schmier, "Has Anyone Noticed the Judiciary's Abandonment of Stare Decisis?," *Justice:Denied*, Issue 31 (Winter 2006), 35-40.

D. Guilt Determination

The most important determination an appellate judge makes is deciding if the defendant is guilty, likely guilty, or not guilty.



A defendant determined to be guilty or likely guilty will likely be denied relief based on harmless error, and the case will likely be disposed of in a non-published opinion, irrespective of the factual or legal issues involved. So the superficial appearance of a defendant's culpability can be the most important consideration in both the outcome of the case, and whether it is disposed of in a non-published opinion, memorandum or order, of memorialized in a published opinion.

However, it needs to be observed that if personal or political considerations are involved, the case's disposition is decided by factors other than whether the defendant is perceived to be guilty or not guilty.

VI. Why The Judiciary Is Dangerous For Innocent People

The pervasiveness of outside influences dominates and even controls the decisions of judges at all levels from the lowliest city traffic court magistrate to the justices of the U.S. Supreme Court.[304] The infection of politics throughout the judicial process helps one to understand how it can be that the U.S. Supreme Court found that it is constitutionally permissible for a person to be denied the opportunity to have proof of their actual innocence duly considered before they are carted off to be executed like an abandoned dog or cat in an animal shelter.[305] In *Herrera v. Collins*, Leonel Herrera's four affidavits attesting to his innocence, including one from a person who attested to knowing who the real killer was, were dismissed as constitutionally insufficient to prevent his execution for a murder that he evidently did not commit.[306] In his dissent, Justice Blackmun valiantly rallied against the virtual lawlessness the Court's majority was endorsing: "Of one thing, however, I am certain. Just as an execution without adequate safeguards is unacceptable, so too is an execution when the condemned prisoner can prove that he is innocent. The execution of a person who can show that he is innocent comes perilously close to *simple murder*."[307]

Mr. Herrera's case is symbolic in that the foremost duty of a judge is to ensure the conveyor belt of the law enforcement system is kept moving, and if the receipt of justice by innocent men and women is sacrificed, that is just too bad for them.[308] As one lawyer put it, "judges are conductors whose job is to ensure trainfuls of defendants continue to be processed in a timely and uninterrupted manner."[309] Perhaps more disturbing is that state and federal judges do not necessarily engage in rubber stamp justice to satisfy political needs, but because they are as integral a part of the political process as are state and federal representatives, senators and other elected and appointed public officials.[310]

One need look no further for confirmation than the overwhelming percentage of rulings that a trial judge makes in favor of the government during a prosecution. All things being equal, the law of averages would dictate that the defense and the government would be *expected* to be considered "right" on a roughly equal number of issues during the course of a case. In reality that is a Pollyanna pipedream. It is inconceivable that a single judge in this country rules in favor of the defense on average anywhere close to half the time. It is irrelevant whether the prejudicial

attitude of judges that stacks the deck heavily against a defendant from the beginning is conscious or unconscious, since its impact is the same either way.

That emphasizes the great danger posed to defendants by how amazingly easy it is for a judge to fix the outcome of a trial. Judges do this by such methods as: manipulating the jury selection process; deciding which witnesses can testify and what testimony they are allowed to be give; determining the physical and documentary items that can be introduced as evidence; deciding which objections are sustained or overruled; conveying to the jurors how the judge perceives the defendant by the tone and inflections in his voice and his body language toward the defendant and his or her lawyer(s); and by the instructions that are given to the jury as to the law and how it should be applied to the facts the judge permitted the jurors to see and hear.

The entire process makes it remarkably easy for the outcome to be rigged against a defendant disfavored by the judge, who all the while can make the proceedings have the superficial appearance of being fair towards the defendant being judicially sandbagged.[311] As sociologist and legal commentator Abraham Blumberg noted, "A resourceful judge can, through his subtle domination of the proceedings, impose his will on the final outcome of a trial."[312] Thus, in a very real sense, any criminal trial in the U.S. is potentially what is called a show trial in other countries, since the judge's opinion of a person's guilt or innocence can be the primary determinate of a trial's outcome, and not whether the person is actually innocent or guilty.

Playing an important role in a judge's subtle manipulation of the proceedings in his/her courtroom is the judge's use of mind control techniques on jurors – the same techniques that are known to be used by law enforcement interrogators to extract false confessions from innocent men and women.[313] The use of these insidious techniques is a virtually unexplored aspect of how judges operate in courtrooms today, and it is a significant contributor to wrongful convictions.[314] That is to be expected given the known role of those techniques in generating false confessions.[315] Needless to say, this power is often used to the detriment of innocent men and women, because a judge can use all the methods and nuances of his craft to steer a trial in the direction of concluding in the way he or she has pre-determined it should end.[316]

One of the mind control techniques in a judge's arsenal is to use the "light of truth" throughout a trial – from *voir dire* through the issuing of jury instructions – to influence jurors to arrive at a conclusion consistent with what the judge desires. The "light of truth" works when the judge

uses his position as the purveyor of truth and goodness to influence the jurors to make a "false confession" about what they believe when they return their verdict.[317] It is not uncommon for jurors, after the artificial influences they were subjected to in a courtroom have worn off, to say they would vote differently if they had it to do over again. In some cases one or more jurors have publicly proclaimed the innocence of the person they voted to convict.[318] A recent well known example of this is that at least two jurors who voted to convict former Ohio State Representative James Traficant publicly stated after his trial that they thought he was innocent and had been wrongly convicted. There are also accounts of jurors aiding in the overturning of a conviction of someone they voted to convict, but who they became convinced was innocent.[319]

In a similar vein, jurors have been known to comment after a trial that they thought the defendant was not guilty, but based on what the judge told them to do, or perhaps only implied they must do (through his tone of voice and body language), they felt like they had to vote guilty, if for no other reason than to make the judge happy.[320] A well known example of a jury convicting someone they did not think was guilty, was when baby doctor and author Benjamin Spock was convicted for aiding draft resisters during the Vietnam War.[321] In Jessica Mitford's book about his case, *The Trial of Dr. Spock,* jurors are quoted as saying he was not guilty, but they thought the judge's jury instructions gave them no choice but to convict him.[322] This is an indicator of the effectiveness of the psychological manipulation techniques used on jurors by judges: they are able to induce jurors to vote someone guilty that the jurors believe at the time to be innocent. It is a real life confirmation of how lay people acted in Professor Stanley Milgram's famous Yale University experiments, when they applied what they thought was life threatening voltage to an innocent person strapped to a chair simply because they were instructed to do so by an authority figure in a white coat.[323] Judges wearing a black robe instead of a white technician's smock confirm the validity of Professor Milgram's experiments every day in courtrooms all across the country. So what has subtly gone on in courtrooms for over a hundred years, since the Supreme Court's decision in *Sparf v. United States*,[324] is nothing less than a sophisticated form of psychological manipulation of the jurors to produce the judge's desired verdict.[325]

Of course, once a conviction is obtained, whether solely by psychologically torturing the jurors or a combination of multiple juror manipulation techniques, it is extraordinarily difficult for a defendant's conviction to be reversed on appeal to a higher court.[326] Even when a higher court rebukes a trial judge, it often has no effect on the judge's

conduct or rulings.[327] In some cases a judge will simply ignore the order of the higher court that has no real power to force compliance with their edict.[328]

The fact based documentary-drama, *Without Evidence*, about the trial and conviction of Frank Gable for the 1989 murder of Oregon Department of Corrections Director Michael Franke, graphically demonstrates how blatantly a trial judge can, to all appearances, successfully fix the conviction of what may be an innocent man, and how difficult it is for a defendant to have those prejudicial actions undone on appeal.[329] Judges are literally able to do this with near impunity because of the discretion they are given to determine the ebb and flow of a trial by appellate courts reluctant to reverse lower court rulings.[330] A skilled judge can use the latitude they are granted to express their preferences about a defendant while superficially appearing to the casual observer to be primarily concerned with protecting the dignity of the proceedings.[331] It is also important to consider that even when a judge does not have a pre-judgment about a defendant, his/her typical prosecutorial bias can express itself in the form of a conscious or unconscious leaning toward the defendant's guilt.[332] Although judges vary in the obviousness of expressing their preference for a defendant's conviction, they are all able to effectively do so whenever it suits them.

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[304] *See* Spence, *supra* note 8, at 109 (suggesting that judges rule according to political influences rather than according to duty to ensure their equal justice).
[305] *Herrera*, 506 U.S. at 400.
[306] *Id*. at 417.
[307] *Id*. at 446 (emphasis added).
[308] Blumberg, *supra* note 23, at 21.
[309] This is a paraphrase of an observation made to the author in 1996 by a prominent defense attorney.
[310] *See* Richman & Reynolds, *supra* note 52, 286-94 (discussing various judicial shortcuts used by courts in order to handle the increasing caseloads).
[311] For further reading on this concept, see Abraham S. Blumberg, *The Practice of Law As Confidence Game*, 1 Law & Soc'y Rev. 15, 23 (1967) (describing the court and defense lawyers as an institution that is geared toward obtaining plea bargains and guilty pleas).
[312] *See, e.g.*, *id* at 23 (discussing devices used "to collapse the resistance of an accused person" as well as other shortcuts to combat increased caseloads).
[313] For details on the plethora of psychological techniques used to extract false confessions, see Hans Sherrer, *The Great Plague*, Ch. 7 (unpublished manuscript)

(2002), available at http://forejustice.org/write/the_scourge_of_false_confessions.pdf (last visited July 5, 2023).
[314] *Id*. at 2.
[315] *See generally* Sherrer, *supra* note 313 (discussing techniques of psychological coercion in order to illicit false confessions).
[316] *See* Blumberg, *supra* note 23, at 23.
[317] *Id.*
[318] *See* Hans Sherrer, *Seven Jurors Revolt After Learning A Federal Judge and Federal Prosecutors Duped Them into Convicting an Innocent Man* (Feb. 28, 2003) (unpublished manuscript), *available at* http://forejustice.org/wc/seven_jurors_tricked.htm (last visited July 5, 2023).
[319] *See generally* Jessica Mitford, *The Trial of Dr. Spock* (1969) (discussing a case in which jurors felt they had convicted an innocent man).
[320] This same psychological technique, slightly different than the "light of truth," is used on criminal suspects to induce a confession, which are often found to be false.
[321] *See generally* Mitford, *supra* note 319 (discussing the Benjamin Spock case).
[322] *Id.* at 232.
[323] *See* Sherrer, *supra* note 237, at 251-52. *See generally*, Stanley Milgram, *Obedience To Authority* (1975).
[324] 156 U.S. 51 (1895). *Sparf v. United States* gave the Supreme Court's approval to the proposition that the judge may instruct the jury about the law they should apply to a particular case. *Id.* at 106. In other words, the law applicable to the person in the street is what the government's representative in the form of the judge, says it is. *Id*. Various commentators have opined about various aspects of how Sparf's underlying premise is that the government is an entity in and of itself and the laws it creates should not be subject to outside review by the people in the form of a jury.
[325] There are a number of books that deal extensively with the techniques of mind control and propaganda, which is one of the ways it is commonly used in society as a whole, not just the courtroom. See generally, Edward Hunter, *Brain-washing in Red China* (1951) (describing techniques of brain washing and propaganda used by the government of communist China to indoctrinate resentment of the United States among its citizens); William Walters Sargant, *Battle for the Mind* (Edgar H. Schein, Inge Schneier & Curtis H. Barker eds., W. W. Norton 1971) (studying the methods of influencing the brain and the physiological aspects of religious and political conversion that are used by religious and political groups); J. Michael Sproule, *Channels of Propaganda* (1994) (discussing the various areas where propaganda is used and the issues particular to those areas); Anthony Pratkanis & Elliot Aronson, *Age of Propaganda: The Everyday Use and Abuse of Persuasion* (1991) (detailing how propaganda is used and in what forms and how to be critical of propaganda without becoming completely cynical); Jacques Ellul, Propaganda*: The Formation of Men's Attitudes* (Konrad Kellen and Jean Lerner trans. 1973) (presenting a comprehensive analysis of propaganda, from its characteristics to its effects both psychological and socio-political and evaluating the effectiveness of propaganda).
[326] *See* MacKenzie, *supra* note 160, at 119-20.
[327] *Id*. (stating that judges enjoy vast discretion and are given the benefit of a doubt by higher courts).

[328] *See, e.g*., *id*. at 119-20 (observing that many trial judges do not have the ability to match the control and deference that they are given).

[329] Kevin Francke, the brother of the slain Michael Francke actively participated in the making of the film, which presents the possibility that Francke's 1989 murder was an inside job by people working in Oregon's criminal justice system who framed Frank Gable for the murder. Michael Francke is thought to have been getting close to revealing that Oregon State Police and Oregon Department of Corrections officials were funneling drugs into Oregon state prisons. Gable was a smalltime hood who was a convenient patsy, and the case against him was based on speculation and innuendo. Apparently it was thought that no one would care about Frank Gable if he was framed. However, in a strange twist, Kevin Francke, convinced of Gable's innocence, relocated to Oregon and continues the investigation on his own to find his brother's killer. The screenwriter of the movie, Phil Stanford, a former columnist for *The Oregonian* newspaper, continues to believe that Gable was framed. *Without Evidence* (Eric R. Epperson, producer, 1995). For general information about the documentary, see, https://www.imdb.com/title/tt0176326/ (last viewed July 5, 2023)

[330] *See, e.g*., MacKenzie, *supra* note 160, at 119-20 (observing that many trial judges do not have the ability to match the control and deference that they are given).

[331] *See id*. at 119-20 (noting the broad discretion and deference granted to trial judges).

[332] *See* Strick, *supra* note 13, at 165. This author has never heard of any state or federal judge described as having a general bias towards defendants. Any judge that exhibited such an attitude would soon be facing a media onslaught of negative publicity – because the prosecutor's office would likely direct the state or federal government's well-honed public relations machinery to paint the judge as "soft on crime" in the print and television media, when all the judge might want is for a defendant in his or her courtroom get a fair shake.

VII. Unaccountability of Judges

The judiciary has a central role in the immersment of enormous numbers of men and women in the depths of the law enforcement system. As thinly veiled political functionaries who are not first tier legal thinkers,[333] it is predictable that judges in this country would actively participate in the criminal proceedings that result in the conviction of innocent people. However, all manners of protection cloak the judges involved in these cases from accountability for the egregious harm they inflict. The most fundamental of these is the blanket of absolute immunity protecting judges from being sued by anyone for anything they do in their capacity as a judge.[334] In *Pierson v. Ray* the U. S. Supreme Court stated:

> This immunity applies even when the judge is accused of acting maliciously and corruptly, and it 'is not for the protection or benefit of a malicious or corrupt judge, but for the benefit of the public, whose interest it is that the judges should be at liberty to exercise their functions with independence and without fear of consequences.' [335]

In other words, an innocent man or woman convicted as a result of the deliberate and malicious actions of a judge – even when it is known that the judge knew the person was innocent – has no civil recourse against that judge for the harm he/she caused. And the Supreme Court has blessed that lack of personal accountability by judges. Beyond that, it is unknown if a single judge has been disciplined for his participatory role in the conviction of an innocent person. This emphasizes that there is simply no cost to a judge for presiding over the wrongful conviction of an actually innocent person.

The shield of immunity judges have granted to themselves from being civilly responsible for the damage they inflict on people who appear before them highlights that, for all intents and purposes, judges have no real accountability to the general population in the United States.[336] This is true whether they are a political appointee or elected to their position. For an elected state judge to be voted out of office for outrageous conduct is no punishment when that judge then gets to retire and take life easy on a comfortable pension paid by the very people that voted the judge out of office. Appointed federal judges do not even have the check of being removable when "the people" get upset with them, since they cannot be removed for anything less than committing a serious crime.[337]

The disturbing reality of total judicial unaccountability was recognized by former U. S. Supreme Court Chief Justice Harlan Fiske Stone when he wrote, "While unconstitutional exercise of power by the executive or legislative branches of the Government is subject to judicial restraint, the only check upon our own exercise of power is our own sense of restraint." [338] In a similar vein, lawyer and social commentator Gerry Spence wrote in *From Freedom To Slavery*:

> Judges can commit nearly every variety of injustice that satisfies their whim of the moment. ... Worse is the intellectual and moral lethargy judges demonstrate year after year with empty droning opinions – opinions without meat or bone that leave the people starving for justice. Judges can go crazy – indeed many seem mad – but unless they are foaming at the mouth and tearing their robes into small pieces, they are permitted to send men to prison, to deny the helpless their just dues, and to interpret the laws of the land.[339]

Operating under conditions of personal non-accountability that effectively make them independent from censure by the people, judges are safe to perform their role as the conductors who keep the assembly-line of the law enforcement system humming smoothly along.[340] The huge numbers of innocent men and women who are thrown on the conveyor belt and crushed as the gears grind away are treated as if they are unknown, faceless, and their sole value as a human being is being used as fuel to keep the "law enforcement" machine running. If a judge ever has a pang of conscience about his or her complicity in this process for which they have no accountability, they can console themselves by engaging in the same flight of fantasy that Federal Judge Learned Hand did when he wrote: "Our procedure has always been haunted by the ghost of the innocent man convicted. It is an unreal dream." [341]

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[333] *See* Bugliosi, *supra* note 3, at 23-24 (suggesting judges are disguised politicians).

[334] The common-law granted absolute immunity to judges for "acts committed within their judicial jurisdiction." *See Bradley v. Fisher*, 13 Wall. 335 (1872). This immunity was ruled to extend to suits under 42 U.S.C. § 1983 in *Pierson v. Ray*, 386 U.S. 547, 554-55 (1967).

[335] *Pierson*, 386 U.S. at 553-54.

[336] Judicial immunity is judge made law in the United States, because there is no bar in the U.S. Constitution relieving judges from being as personally accountable in a

civil lawsuit for what would be actionable harm if caused by any non-governmentally employed person.

[337] *See* U.S. Const. art. I, § 1.

[338] Richard J. Neuhaus, *The Judicial Usurpation of Politics*, First Things, Nov., 1997, at 19.

[339] Spence, *supra* note 8, at 113.

[340] Blumberg, *supra* note 23, at 23.

[341] *United States v. Garsson*, 291 F. 646, 649 (S.D.N.Y. 1923).

VIII. Conclusion

In 1804 Judge William Cranch wrote: "In a government which is emphatically styled a government of laws, the least possible range ought to be left for the discretion of the judge."[342] Based on that standard it is reasonable to conclude that insofar as the criminal law is concerned, there is no longer any such thing as the "rule of law" in the United States.[343] In criminal cases there is the rule of the subjective personal opinions of the trial judge and the judges considering the appeal of a conviction.[344] Although rulings reflect the subjective opinion of the judge(s) involved and any outside influences on them, a veneer of objectivity must be maintained:

> "Of course, the motives of a judge's opinion may be almost anything – a bribe, a woman's blandishments, the desire to favor the administration or his party, or to gain popular favor or influence; but those are not sources which jurisprudence can recognize as legitimate."[345]

The overtly subjective evaluation inherent in the 'harmless error rule' is symbolic of the degree to which a judge's personal assessment of a case is the primary factor determining its outcome at the trial level, and then on appeal.[346] Another indicator of that subjectivity is the prevalence of one or two vote majority decisions in appellate courts that reflect the ideological alignment of the judges.[347] These subjective evaluations are most freely expressed in unpublished decisions in which precedents interfering with a desired resolution can effectively be disregarded.

Far from condemning the blatant judicial disregard for the rule of law, the Supreme Court majority is driving it. In his last Supreme Court dissent, Justice Thurgood Marshall recognized that "Power, not reason, is the new currency of this Court's decision making."[348] That condition can have particularly far reaching consequences for the politically powerless, one of which is the *de facto* third-world treatment of those people by state and federal judges. As the gatekeeper of the law enforcement system, the conduct and attitude of judges is at the forefront of the reasons contributing to the entrapment of unconscionable numbers of innocent, but powerless, people within that system, up to and including the strapping of them to gurneys carried into death chambers.[349]

The many widely publicized cases of innocent men being released after years on death row represent only a minute fraction of the innocent men and women entrenched at any given time within the state and federal

law enforcement system.[350] The ongoing generation of wrongful convictions indicates that they are not an aberration, but result from the system functioning as it is intended to.[351] As the overseers of that system, judges perform an essential role in the assembly line production of those illegitimate convictions.[352] Furthermore, the complicity of judges in the generation of those wrongful convictions underscores how out of touch they are with the human cost of the violence they participate in.[353]

The reality of today is that the law enforcement process presided over by judges has blurred its distinguishment of the guilty from the innocent to the point that they routinely appear to those in that system to be one and the same. Given that skewered thinking, it is apropos to paraphrase a comment Aleksandr Solzhenitsyn made about the Soviet system in his essay *The Smatterers*, 'judges stand crookedly from which position the vertical seems a ridiculous posture.'[354]

This book only scratches the surface of exploring the multitude of factors and their nuances related to the state and federal judiciaries contribution to wrongful convictions. However, it can confidently be said that until state and federal judgeships are depoliticized and judges are held personally, directly and openly accountable for the violence they initiate with the words they speak and write, they will continue to inflict egregious harm on multitudes of innocent people with scant regard for the human consequences of their actions.

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[342] William Cranch, Preface, 1 Cranch iii (1804), *available at* The Founders' Constitution, https://press-pubs.uchicago.edu/founders/documents/a3_1s28.html (last visited July 5, 2023).

[343] John Paul Stevens expressed this sentiment in his dissent in *Bush*, 531 U.S. at 128-29 (Stevens, J. dissenting). He stated, "Although we may never know with complete certainty the identity of the winner of this year's Presidential election, the identity of the loser is perfectly clear. It is the Nation's confidence in the judge as an impartial guardian of the rule of law." *Id*.

[344] In *Judges on Trial*, Judge Jerome Frank devoted a number of pages to explaining that every step of the judicial process is inherently fraught with the judge's subjective evaluation and emotional responses to the case. Frank, *supra* note 5, at 167-178. Even such outwardly objective aspects of a case, such as "'finding' of 'facts' … is inherently subjective." *Id*. at 169. Judge Frank cites Tourtoulon's observation that an experienced judge can make rulings based on the length of the opposing party's noses and no one would be any the wiser. *Id*. at 169. Judge Hutcheson made it clear the dominant role of emotions in a judge's decisions is only unknown to those outside the judicial loop, when he noted judges "really decide by feeling, by hunching, and not by ratiocination." *Id*. at 170 (quoting from Joseph C. Hutcheson, Jr., *The Judgment Intuitive: The Function of the 'Hunch' in Judicial Decisions*, 14 Cornell L.Q. 274 (1929)). Judge Frank quantifies the subjectivism of judicial decision making in the formula RxSF=D:

> R (A judge's interpretation of the legal rules and laws applying to a case)
> x
> SF (The judge's subjective evaluation of a case's facts)
> =
> D (The judge's decision)
> *Id.* at 326.
> Judge Frank also offers a formula for explaining the inner works of how the judge arrives at his subjective interpretations and evaluations, SxP=D:
> S (Stimuli that influence the judge)
> x
> P (Personality of the judge)
> =
> D (Decision of the judge

Id. at 182. Judge Frank observes the real world effect of the subjective decision making process is, "The uniformity and stability which the rules may seem to supply are therefore often illusory, chimerical." *Id*. at 328.

[345] *Id.* at 178 (quoting attorney John Chipman Gray).

[346] *See* LaFave, Israel & King, *supra* note 181.

[347] Although no one will dispute that two plus two equals four regardless of any contrary opinion, there is nothing to prevent a judge seeking to support a personal or political agenda from subjectively voting in a case the equivalent that two plus two equals five. A judge's subjective opinions are not constrained by the rigors of

mathematical logic or scientific facts. Judges do not limit basing case decisions on subjective personal considerations, but extend it to their interpretation of constitutional provisions. *See, e.g.*, *Silveira v. Lockyer*, 328 F. 3d 567 (9th Cir., May 6, 2003) (demonstrating Judge Kozinski's admonishment to his colleagues against "using our power as federal judges to constitutionalize our personal preferences.") (dissenting from denial of rehearing en banc).

[348] *Payne*, 501 U.S. at 844. Justice Marshall also noted the Court's pattern of ignoring its own precedents in cases involving "procedural and evidentiary rules" while adhering to them in "property and contract" rights cases. *Id.* at 850-51. The former types of "rules" predominately affect the politically impotent, while the latter predominately affect the politically powerful. *Id.*

[349] See supra note 145 and accompanying text ("7% of capital cases nationwide are reversed because the condemned person was found to be innocent."). However the many erroneous capital convictions that are not rectified is indicated by the execution of over 40 people that have convincing cases they were innocent, and the many more that remain imprisoned. *See* Forejustice, *The Innocents Database*, *at* http://forejustice.org/search_idb.htm (last visited July 5, 2023).

[350] *See, e.g.*, Sherrer, *supra* note 138, at 43 (estimating that there are over 1.3 million innocent people at any given time within the custody of the law enforcement system in this country).

[351] *See* Forejustice, *The Innocents Database*, *at* http://forejustice.org/search_idb.htm (last visited July 5, 2023). Since 1900 the two decades with the least known wrongful convictions are 1900-1909 and 1910-1919, which would be expected given that the harmless error rule wasn't adopted in this country until 1919. *Id.*

[352] *See, e.g.*, American Friends Service Committee, *A Struggle For Justice: A Report on Crime and Punishment in America* 8 (1971) ("Urban courts dispense 'discount' justice by methods that are openly contemptuous of individual liberty, mass-producing both illegitimate convictions and disrespect for the law.").

[353] Accepting the veracity of Lord Acton's adage about the corrupting nature of power – "Power tends to corrupt, and absolute power corrupts absolutely." – leads to the logical conclusion that since this is the wealthiest and most powerful country in the world, that the state and federal judiciaries integrally involved in protecting that system of money and power are the most corrupt of any country in the world. *See* Letter from Lord Acton to Bishop Mandell Creighton (Apr. 3, 1887), *in* 1 *The Life and Letters of Mandell Creighton,* at ch. 13, 372 (Louise Creighton ed. 1904), https://ia801402.us.archive.org/22/items/in.ernet.dli.2015.210613/2015.210613.Life-And.pdf.

[354] This is a paraphrase from an observation of Aleksandr Solhenitsyn, in which he "describes the intelligentsia's position as *standing crookedly* - from which position the vertical seems a ridiculous posture." Aleksandr Solzhenitsyn, *From Under The Ruble* 249 (Aleksandr Solzhenitsyn ed. 1975).

About the Author

Hans Sherrer is the author of several books and over 1,000 articles related to wrongful convictions, and created a website and database that documents cases of injustice. He is president of The Justice Institute, and became editor and publisher of *Justice Denied*: *the magazine of the wrongly convicted*, in 2003. He has assisted in the exoneration of several people, most notably Kirstin Blaise Lobato in Nevada.