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# ON MISJUDGING AND ITS IMPLICATIONS FOR CRIMINAL DEFENDANTS, THEIR LAWYERS AND THE CRIMINAL JUSTICE SYSTEM

Rodney J. Uphoff\*

## INTRODUCTION

Unquestionably, judges misjudge. Even the most arrogant of judges ultimately will concede that all judges err and, at some point, fail to apply governing law to the facts of the case accurately.<sup>1</sup> Although all might agree that judges err, not all judges, lawyers, and scholars agree on how judges should behave or on what constitutes good judging.<sup>2</sup> Not surprisingly, they also disagree about misjudging and the frequency with which it occurs.

In his provocative article *Misjudging*, Chris Guthrie contends that “misjudging is more common, more systematic, and more harmful than the legal system has fully realized.”<sup>3</sup> Based on my observations and discussions with many litigators over the past thirty years,<sup>4</sup> I have little doubt that Guthrie is

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<sup>1</sup> Chris Guthrie, *Misjudging*, 7 NEV. L.J. 420 (2007) (describing misjudging as a judicial failure to reach the “right” result when the law is clear and facts fully developed).

<sup>2</sup> Countless books and articles have been written about the proper role of the judge. For a thoughtful essay by Justice William Brennan reflecting on Justice Cardozo’s classic work *THE NATURE OF THE JUDICIAL PROCESS*, see William J. Brennan, Jr., *Reason, Passion and “The Progress of the Law,”* 10 CARDOZO L. REV. 3 (1988) (discussing the interplay between reason and passion in judicial decisionmaking). The remainder of Volume 10 of the *CARDOZO LAW REVIEW* contains a series of essays exploring Brennan’s essay and the nature of good judging. See, e.g., Martha L. Minow & Elizabeth V. Spelman, *Passion for Justice*, 10 CARDOZO L. REV. 37 (1988).

<sup>3</sup> Guthrie, *supra* note 1, at 421.

<sup>4</sup> My observations about judges and about the workings of the criminal justice system are a product of over thirty years of working in and writing about the system. I was a public defender in Milwaukee, Wisconsin for six years, ran criminal defense clinics in Wisconsin and Oklahoma for almost fifteen years, and was a member of the Terry Nichols defense team in the Oklahoma City bombing state trial. I also served as Vice Chair of the ABA’s Criminal Justice Section Defense Services Committee and on the Oklahoma Indigent Defense System Board, which oversees the operation of the indigent defense system in Oklahoma. I have lectured often at seminars and conferences on criminal practices and have spoken with hundreds of lawyers, judges, and criminal justice experts about the delivery of defense services and the operation of the criminal justice system. Finally, I have supervised interns working in prosecutors’ offices and judicial interns clerking for state and federal judges, practice as a civil litigator, and worked for a state regulatory agency.

right. Nonetheless, it also is very likely that many judges would disagree with Guthrie's conclusion. As Guthrie and his colleagues noted in an earlier article, "egocentric biases may make it hard for judges to recognize that they can and do make mistakes."<sup>5</sup>

This egocentric or self-serving bias is just one of three cognitive blinders that Guthrie argues influences judges and causes them to misjudge cases.<sup>6</sup> In *Misjudging*, Guthrie presents empirical evidence supporting his claim that these cognitive blinders, along with attitudinal and informational blinders, increase the likelihood that judges will reach incorrect results.<sup>7</sup> Guthrie concludes, therefore, that litigants and their lawyers should take the reality of misjudging into account when deciding which dispute resolution forum to use.<sup>8</sup>

As Part I of this Article reveals, I have little quarrel with most of Guthrie's conclusions in *Misjudging*. Indeed, in this piece and his earlier work,<sup>9</sup> Guthrie and his colleagues have provided important empirical evidence that tracks my own observations of how judges behave. That is, all judges bring to the task of judging their own perspective shaped by their educational background, life experiences, and legal career. This perspective – together with the blinders Guthrie describes – consciously and unconsciously influences the decisions that judges make.<sup>10</sup>

Unlike Guthrie, however, I do not think that the vast majority of trial judges are good or that most "try hard to get it right but are occasionally influenced by their attitudes or deeply held beliefs."<sup>11</sup> Instead of neutral and detached jurists who fairly and impartially apply the law, a significant number of judges are "bad judges"<sup>12</sup> whose strong biases and prejudices usually control

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<sup>5</sup> Chris Guthrie et al., *Inside the Judicial Mind*, 86 CORNELL L. REV. 777, 815 (2001). For additional support for the claim that judges, like other people, tend to overestimate their own abilities when evaluating themselves, see Guthrie, *supra* note 1, at 281-83 (discussing research that demonstrates that judges' assessments of their own abilities and behavior are affected by a self-serving bias). See, e.g., Theodore Eisenberg, *Differing Perceptions of Attorney Fees in Bankruptcy Cases*, 72 WASH. U. L.Q. 979, 982 (1994) (reporting on a study that showed that judges were affected by substantial egocentric biases when evaluating their own behavior).

<sup>6</sup> Guthrie, *supra* note 1, at 420-46.

<sup>7</sup> *Id.* at 423-45.

<sup>8</sup> *Id.* at 446-48.

<sup>9</sup> Guthrie et al., *supra* note 5; Andrew J. Wistrich, Chris Guthrie & Jeffrey J. Rachlinski, *Can Judges Ignore Inadmissible Information? The Difficulty of Deliberately Disregarding*, 153 U. PA. L. REV. 1251 (2005).

<sup>10</sup> Guthrie et al., *supra* note 5, at 784-821. Other commentators draw a similar conclusion. See, e.g., Debra Lyn Bassett, *Judicial Disqualification in the Federal Appellate Courts*, 87 IOWA L. REV. 1213, 1243-50 (2002); Donald C. Nugent, *Judicial Bias*, 42 CLEV. ST. L. REV. 1, 3 (1994).

<sup>11</sup> Guthrie, *supra* note 1, at 446, 458. Given the prestige, experience, and tenure of federal judges, the overall quality of the federal trial bench is superior to their state counterparts. My assessment is primarily based on my observations of – and articles about – the overall quality of state trial judges.

<sup>12</sup> When Guthrie uses the term "bad judging," he looks to an article by Geoffrey Miller. *Id.* at 421 n.8 (quoting from Geoffrey P. Miller, *Bad Judges*, 83 TEX. L. REV. 431, 432-33 (2004)). According to Miller,

[m]ost examples of bad judging can be grouped into the following categories: (1) corrupt influence on judicial action; (2) questionable fiduciary appointments; (3) abuse of office for personal

their decisionmaking. Consequently, I believe it is biased judging, not misjudging, that poses a major obstacle to the fair administration of justice.

Although I challenge Guthrie's overly optimistic view of trial judges, we both agree that judges generally are prone to error because of the informational, cognitive, and attitudinal blinders Guthrie identifies. If, in addition, I am correct that a significant number of judges engage in the bad judging that Geoffrey Miller highlights,<sup>13</sup> what does this mean for the criminal defendant and her counsel forced to appear in front of such judges? Simply put, it means trouble. Unfortunately, for the vast majority of criminal defendants and their lawyers, the forum selection alternatives that Guthrie discusses are not viable options. Part II begins, then, by examining the limited options available to the criminal defendant represented by conscientious defense counsel but saddled with a bad judge or one prone to misjudging.

As bad as the situation may be for the criminal defendant with an effective defense lawyer, many other criminal defendants are in even worse shape. Part II describes the harsh realities of the criminal justice system and explores the implications of Guthrie's work for those criminal defendants who do not have access to effective representation. Indeed, far too many criminal defendants are not afforded competent, zealous representation. As a result, many defendants lack the ability to meaningfully contest the charges they face and are pressured to accept a plea bargain regardless of their innocence or the weaknesses in the government's case.<sup>14</sup> For many criminal defendants, access to justice is, ultimately, merely an illusion.

gain; (4) incompetence and neglect of duties; (5) overstepping of authority; (6) interpersonal abuse; (7) bias, prejudice, and insensitivity; (8) personal misconduct reflecting adversely on fitness for office; (9) conflict of interest; (10) inappropriate behavior in a judicial capacity; (11) lack of candor; and (12) electioneering and purchase of office.

<sup>13</sup> For a look at a few of the many sources that document the significant problem of bad judging, see MAX BOOT, *OUT OF ORDER: ARROGANCE, CORRUPTION, AND INCOMPETENCE ON THE BENCH* (1998); CYNTHIA GRAY, *A STUDY OF STATE JUDICIAL SANCTIONS* (2002); Albert W. Alschuler, *Courtroom Misconduct By Prosecutors and Trial Judges*, 50 *TEX. L. REV.* 629, 677-85 (1972); Miller, *supra* note 12; Douglas Feiden, *Trial and Error in Queens Courts*, N.Y. *DAILY NEWS*, July 7, 2003, at 4; E. R. Shipp, *Chicago Court's Politics and Size Feed Fears Corruption is Endemic*, N.Y. *TIMES*, Dec. 27, 1983, at A14. In addition, a three part series in the *NEW YORK TIMES* entitled *Broken Bench* provides a powerful indictment of the justice courts that operate in 1250 towns and villages in New York State. See William Glaberson, *Broken Bench: "This is Not America,"* N.Y. *TIMES*, Sept. 25, 2006, at A1; William Glaberson, *Broken Bench: "You Learn by Mistakes,"* N.Y. *TIMES*, Sept. 26, 2006, at A1; William Glaberson, *Broken Bench: "Nothing Gets Done,"* N.Y. *TIMES*, Sept. 27, 2006, at A1.

<sup>14</sup> Rodney J. Uphoff, *Convicting the Innocent: Aberration or Systemic Problem?*, 2006 *WIS. L. REV.* 739, 752-53, 758-63, 779-82, 796-802. For a look at a few of the many articles that discuss the interplay between the lack of adequate counsel and the pressure on defendants to plead guilty, see ABA Comm. On Legal Aid & Indigent Defendants, Gideon's *Broken Promise* (2004), available at <http://www.abanet.org/legalservices/sclaid/defender/brokenpromises/fullreport.pdf> [hereinafter Gideon's *Broken Promise*]; Geri. L Dreiling, *'Meet-and-Greet Pleas' Not Good Enough*, ABA J. *E-REPORT*, June 24, 2005, available at <http://www.abanet.org/journal/ereport/jn24plead.html/>; Albert W. Alschuler, *Implementing the Criminal Defendant's Right to Trial: Alternatives to the Plea Bargaining System*, 50 *U. CHI. L. REV.* 931, 952-56 (1983); Stephen B. Bright, *Neither Equal Nor Just: The Rationing and Denial of Legal Services to the Poor When Life and Liberty are at Stake*, 1997 *ANN. SURV. AM. L.* 783, 788-89; Mary Zahn & Jessica McBride, *Inequal Justice (Part 1): Poor Often Left*

Yet, despite glaring systemic problems, too few judges are willing to shoulder their responsibility to ensure that the adversary system functions fairly and effectively.<sup>15</sup> This Article concludes by arguing that judges should take more responsibility for the fair administration of the criminal justice system. Courts ought not be so tolerant of incompetent defense lawyers or of indigent defense systems that routinely provide ineffective assistance of counsel. In addition, courts ought not continue to employ the harmless error doctrine so expansively, because doing so “increases the likelihood that a conviction will be preserved despite an error that actually affected the reliability of the trial.”<sup>16</sup> Nor should courts turn a blind eye to the persistent problem of prosecutorial misconduct. Finally, if appellate courts fail to act, then, under some circumstances, trial judges must have the courage to act to promote justice in an individual case.

### I. BIASED JUDGES

In theory, the American criminal justice is an adversarial system that relies on the clash of advocates to find the truth.<sup>17</sup> The trial judge’s role in that system is to ensure that procedural and evidentiary rules are followed, that the lawyers act in accordance with their responsibilities, and that the defendant’s constitutional rights are safeguarded.<sup>18</sup> The judge must be fair, respectful, impartial, and ultimately, must base all decisions in the case on the particular facts of that case.<sup>19</sup> In the end, justice is served if the defendant is convicted or acquitted based on the evidence presented to the fact finder.

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*Defenseless in Courtroom, \$250 a Month Too Much to Qualify for a Public Defender*, MILWAUKEE SENTINEL, Dec. 7, 2002, at A1; Press Release, Nat’l Legal Aid and Defender Ass’n [NLADA], Forty Years After Landmark Supreme Court Ruling, Right to Counsel Still Denied to People Who Can’t Afford an Attorney (Mar. 12, 2003), available at [http://www.nlada.org/Defender/Defender\\_Public/Defender/Defender/Defender\\_Gideon/Defender\\_Gideon\\_Press](http://www.nlada.org/Defender/Defender_Public/Defender/Defender/Defender_Gideon/Defender_Gideon_Press).

<sup>15</sup> See ABA STANDARDS FOR CRIMINAL JUSTICE: SPECIAL FUNCTIONS OF THE TRIAL JUDGE, Standard 6-1.1 (3d ed. 2000); FED. R. EVID. 611(a) advisory committee’s note (“The ultimate responsibility for the effective working of the adversary system rests with the judge.”).

<sup>16</sup> *Brecht v. Abrahamson*, 507 U.S. 619, 653 (1983) (O’Connor, J., dissenting). For a few of the many articles critical of the Supreme Court’s harmless error jurisprudence, see, e.g., David R. Dow & James Rytting, *Can Constitutional Error Be Harmless?*, 2000 UTAH L. REV. 483 (2000); Bennett L. Gershman, *The Gate is Open but the Door is Locked – Habeas Corpus and Harmless Error*, 51 WASH. & LEE L. REV. 115 (1994); Rex L. Perschbacher & Debra Lyn Bassett, *The End of Law*, 84 B.U. L. REV. 1 (2004); Jason M. Solomon, *Causing Constitutional Harm: How Tort Law Can Help Determine Harmless Error in Criminal Trials*, 99 Nw. U. L. REV. 1053 (2005).

<sup>17</sup> *Evitts v. Lucey*, 469 U.S. 387, 394 (1985) (“The very premise of our adversary system of criminal justice is that partisan advocacy on both sides of a case will best promote the ultimate objective that the guilty be convicted and the innocent go free.” (quoting *Herring v. New York*, 422 U.S. 853, 862 (1975))).

<sup>18</sup> See ABA STANDARDS FOR CRIMINAL JUSTICE: SPECIAL FUNCTIONS OF THE TRIAL JUDGE, Standards 6-1.1 and 6-1.6 (3d ed. 2000); *Mitchell v. State*, 136 P.3d 671, 710 (“[t]rial judges are responsible for protecting and upholding the honor, dignity, and integrity of the proceedings held before them”).

<sup>19</sup> See ABA STANDARDS FOR CRIMINAL JUSTICE: SPECIAL FUNCTIONS OF THE TRIAL JUDGE, Standard 6-1.1 and Commentary (3d ed. 2000); MONROE H. FREEDMAN & ABBE SMITH, UNDERSTANDING LAWYERS’ ETHICS § 9.01, at 231 (3d ed. 2004) (noting that “[a]n impartial

Like many students, I entered law school with a naive view that judges were generally men and women of even temper, great intellect, and wise judgment who discharged their responsibilities in an evenhanded, detached manner. The more I read, however, the more my perspective began to change. Working in a clinic during my third year of law school, in which we defended people charged with municipal ordinance violations, it became readily apparent that few judges measured up to my lofty expectations. I witnessed curious rulings, short tempers, and judgments that seemed totally at odds with the law or my sense of what justice required. It was not until my first bench trial that year, however, that I experienced the full impact of judicial bias.

My client was a marginally competent young man who walked into the city clerk's office barefoot and wearing a cowboy hat. He announced loudly that he intended to run for President of the United States and, pointing to the portrait of Richard Nixon hanging on the wall, proclaimed that Nixon should be jailed. When he continued to insist loudly that he needed to file his nomination papers, one of the clerks called the police, who arrived quickly and promptly arrested my client for disorderly conduct.

Together with my supervising attorney, I tried to convince the city prosecutor to drop the charge, especially since my indigent client had already spent some time in custody before being released. When the prosecutor refused to budge, our client insisted on a trial before the county judge.<sup>20</sup> I was delighted to go to trial because I was convinced we had a sure winner. Although it may be that my assessment was colored by inexperience and my own blinders,<sup>21</sup> the law was clearly on our side. My client was not guilty of disorderly conduct because he had not engaged in any threatening or disruptive conduct but had only spoken loudly.<sup>22</sup> I expected, therefore, that my client would be acquitted and his right to free speech vindicated.

Sadly, I was wrong. After hearing the witnesses, Judge Archie Simonson ruled quickly, finding my client guilty. Even worse, he proceeded to chastise my client for his "weird" appearance and then angrily ordered him to leave town on the next bus and not return.<sup>23</sup> Judge Simonson not only misjudged the

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judge is an essential component of an adversary system, providing a necessary counterpoise to partisan advocates").

<sup>20</sup> For a municipal ordinance violation, the defendant did not have a right to a jury trial but only a bench trial.

<sup>21</sup> See Guthrie, *supra* note 1, at 437 (noting that lawyers suffer from self-serving biases that might cause them to overestimate their own case and abilities).

<sup>22</sup> The Madison ordinance tracked the language of WIS. STAT. ANN. § 947.01 (West 2000). Case law in Wisconsin at the time clearly required more than loud speech to support a disorderly conduct conviction. See *State v. Werstein*, 211 N.W.2d 437, 440-41 (Wis. 1973) (mere exercise of one's right of freedom of speech, albeit offensive to the listener, does not constitute disorderly conduct absent conduct that tends to cause or provoke a disturbance); *State v. Becker*, 188 N.W.2d 449 (Wis. 1971) (defendant's loud yelling was insufficient under the circumstances to support a conviction for disorderly conduct).

<sup>23</sup> During the testimony, the judge heard that my client had only recently moved to Madison from another state.

case – reached a wrong result by failing to apply clear law to the facts<sup>24</sup> – but he also engaged in “bad judging.”<sup>25</sup>

Fortunately, we were able to appeal Judge Simonson’s ruling to a circuit court judge. In a written decision, that judge corrected the misjudgment, finding that my client had not engaged in any conduct that fell within the reach of the ordinance, but that he was merely exercising his constitutional right to free speech. Accordingly, the guilty verdict was overturned and my client vindicated.<sup>26</sup>

It was not clear then and it is certainly not clear now exactly why Judge Simonson failed to apply clear law properly. In his article, Guthrie suggests that judges possess informational, cognitive, and attitudinal blinders that increase the likelihood that they will err.<sup>27</sup> By informational blinders, Guthrie means those obstacles to clear judgment that prevent judges and jurors from deliberately disregarding damaging but inadmissible evidence.<sup>28</sup> In other words, although the law insists that certain information not be given any weight in a decision, Guthrie’s research confirms that judges do not always ignore inadmissible information but instead may be affected by that information in rendering their decisions.<sup>29</sup>

Similarly, Guthrie reports on research on three cognitive blinders – anchoring, hindsight bias, and self-serving bias – that may influence judicial decisionmaking.<sup>30</sup> Anchoring is a heuristic that causes people making a numerical estimate to rely too heavily on the initial value available to them.<sup>31</sup> Hindsight bias refers to the tendency of people looking back at events to overestimate the predictability of those events given their current knowledge.<sup>32</sup> Self-serving bias reflects the tendency of people routinely to make inflated judgments about themselves, their abilities, or their beliefs.<sup>33</sup> Guthrie’s research shows that judges are influenced by all three of these cognitive blinders.<sup>34</sup>

Finally, by attitudinal blinders, Guthrie means that judges possess a set of beliefs or opinions that predispose them to rule in accordance with those beliefs or opinions.<sup>35</sup> According to attitudinal theorists, judges consciously make rulings to promote their policy preferences and attitudes so that judicial decisions

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<sup>24</sup> Guthrie, *supra* note 1, at 420.

<sup>25</sup> According to Miller, overstepping of authority and interpersonal abuse are two categories of bad judging. *See supra* note 12. In addition, Simonson’s ruling may have been dictated by his personal biases, which also characterizes bad judging. *Id.*

<sup>26</sup> Judge Simonson later made some inflammatory comments about the provocative dress of a rape victim and about sexually permissive behavior that provoked a firestorm of publicity and, ultimately, his removal from office in a recall election. For a look at this controversy, see *Simonson v. United Press International, Inc.*, 654 F.2d 478 (7th Cir. 1981).

<sup>27</sup> Guthrie, *supra* note 1, at 421-36. *See, e.g.*, W. Kip Viscusi, *How Do Judges Think About Risk?*, 1 *AMER. LAW & ECON. REV.* 26, 29 (1999).

<sup>28</sup> Guthrie, *supra* note 1, at 422-23.

<sup>29</sup> *Id.* at 423-25.

<sup>30</sup> *Id.* at 429-40.

<sup>31</sup> *Id.* at 430.

<sup>32</sup> *Id.* at 434.

<sup>33</sup> *Id.* at 436-37.

<sup>34</sup> *Id.* at 430-40.

<sup>35</sup> *Id.* at 440.

primarily reflect the politics and opinions of that judge.<sup>36</sup> According to Guthrie, however, judges tend to be blinded more by their attitudes rather than by a desire purposely to push a particular political agenda.<sup>37</sup> Nonetheless, Guthrie concludes that regardless of whether his assumption or that of the attitudinalists is correct, “judicial attitudes can lead to misjudging.”<sup>38</sup>

Given his comments about the defendant’s appearance and his obvious disdain for the defendant, Judge Simonson’s flawed decision seemingly reflects some strongly held opinions – his attitudinal biases. Perhaps Simonson believed that the defendant’s bizarre appearance and behavior were sufficiently bothersome that he warranted punishment regardless of the language of the statute. Perhaps he thought being tough on petty crime would send a positive message to the police and to the community.<sup>39</sup> Perhaps he felt he could bully a marginally competent, unemployed street person into leaving town, thereby saving Madison taxpayers money. Perhaps he was simply angry at having to spend several hours in an ordinance trial and wished to teach our client and our clinic a lesson for wasting his time. Whatever drove his decision, Simonson’s guilty finding was surely not the product of a careful, impartial application of existing law in light of the facts of the case.

Using Guthrie’s definition, Simonson misjudged because he failed to apply governing law to the facts of the case accurately.<sup>40</sup> Guthrie distinguishes misjudging from bad judging, which includes a range of behavior from incompetence to corruption.<sup>41</sup> It is difficult, however, to distinguish the attitudinal blinders that Guthrie claims causes misjudging from the bias, prejudice, and insensitivity that he and Miller contend mark bad judging. Certainly I can imagine cases in which well-intentioned, careful judges reach the wrong outcome as a result of unconscious attitudinal biases without Guthrie, Miller, or me characterizing the decisions as the product of bad judging. On the other hand, I suspect that both Guthrie and Miller would agree with me that Simonson was guilty of both misjudging and bad judging. Not only did his biases, prejudices, and insensitivity lead him to inaccurately apply the law to the facts of the case, but in an abusive and mean spirited manner he attempted to banish the defendant from Madison.

Although this was the first time I experienced the wrath of a biased judge who clearly reached the wrong result apparently because of his attitudinal biases, it would not be the last. In my years as a public defender, private lawyer, and clinical teacher, I have encountered many judges seemingly influenced

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<sup>36</sup> *Id.* at 440-46. For an extensive look at the attitudinal theory, see, e.g., JEFFREY A. SEGAL & HAROLD J. SPAETH, *THE SUPREME COURT AND THE ATTITUDINAL MODEL REVISITED* (2002).

<sup>37</sup> Guthrie, *supra* note 1, at 436.

<sup>38</sup> *Id.*

<sup>39</sup> Mayor Rudolph Giuliani and his first police commissioner, William Bratton, promoted an aggressive campaign against minor offenses such as prostitution, public drunkenness, illegal street-vending, and aggressive begging on the theory that failing to crack down on nuisance crimes encouraged more serious crimes. See Richard Tomkins, *Fix That Broken Window: New York Has Cut Serious Crime By Tackling Minor Offenses*, FINANCIAL TIMES, Dec. 27, 1996, at 10.

<sup>40</sup> Guthrie, *supra* note 1, at 420.

<sup>41</sup> See *id.* at 447-48.



by the blinders Guthrie describes. Few litigators, for example, would question Guthrie's conclusion that informational blinders make it difficult even for good judges to disregard relevant but inadmissible evidence deliberately.<sup>42</sup> Prosecutors routinely offer inflammatory evidence or present irrelevant but damaging information in an argument knowing full well that the judge will rule the evidence inadmissible or even berate counsel for the argument. Yet prosecutors continue to offer such evidence and make such arguments precisely because they believe that exposing the judge to such information is likely to affect the judge's rulings or the final sentence.<sup>43</sup>

Defense lawyers, of course, also attempt to bring inadmissible evidence to the court's attention; they just have fewer opportunities to do so. I once filed a motion in limine seeking a ruling that would allow me to offer my client's favorable polygraph result in the face of settled law holding such evidence inadmissible. I knew the court would never grant my motion, but I fashioned a good faith argument for the introduction of the evidence because I strongly suspected that the judge's attitude toward my client would be more positive upon hearing this information. In my experience, seasoned litigators recognize that many judges will be influenced by inadmissible information and act accordingly.<sup>44</sup>

In addition, Guthrie's research on the effects of cognitive blinders on judges rings true to my litigator's ear.<sup>45</sup> As Guthrie observes, people generally have a well-documented tendency to overestimate the predictability of a past event once they learn how that event turned out.<sup>46</sup> Guthrie's research shows that this "hindsight bias" also influences judicial assessments and decisionmaking.<sup>47</sup> Such a finding is wholly consistent with my observations of how judges behave in practice. It is difficult, for example, for a judge ruling on a suppres-

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<sup>42</sup> *Id.* at 429. For a further look at informational blinders, including a phenomenon known as "mental contamination," whereby people who became aware of misleading or inaccurate information may still unconsciously be affected by that information, see Wistrich, Guthrie, & Rachlinski, *supra* note 9, at 1260-70. In my view, "bad judges" tend to be so adversely affected by strong biases, that they only pretend to ignore inadmissible evidence.

<sup>43</sup> For a thorough examination of the negative effect of exposing judges to inadmissible evidence during the plea bargaining process and the proposed solution of excluding any judge who participated in that bargaining from presiding at trial should the defendant reject all plea bargains, see generally Albert W. Alschuler, *Trial Judge's Role in Plea Bargaining, Part I*, 76 *COL. L. REV.* 1059 (1976).

<sup>44</sup> Although some courts and commentators believe that "trial judges often have access to inadmissible and highly prejudicial information and are presumed to be able to discount or disregard it," *Gentile v. State Bar of Nev.*, 501 U.S. 1030, 1077 (1991) (Rehnquist, C.J., dissenting in part), other judges and scholars question the ability of judges to remain unaffected by inadmissible evidence. See, e.g., MIRJAN R. DAMASKA, *EVIDENCE LAW ADRIFT* 50 (1997) (noting that the professional judge has as much trouble ignoring the "tainted information" as do "amateur adjudicators"); *United States ex rel. Owens v. Cavell*, 254 F. Supp 154, 156 (M.D. Pa. 1966) (questioning whether a judge exposed to an allegedly involuntary confession would be able to decide the defendant's guilt without being influenced by the confession). On the other hand, savvy litigators also know that some judges will react very negatively to the inappropriate use of inadmissible evidence and will carefully weigh that reaction when deciding whether to bring inadmissible evidence to the judge's attention.

<sup>45</sup> See Guthrie, *supra* note 1, at 429-40.

<sup>46</sup> *Id.* at 434.

<sup>47</sup> *Id.* at 434-36.

sion motion challenging a magistrate's probable cause determination in issuing a search warrant, not to be affected by the fact that the police, acting pursuant to that warrant, found the drugs right where the anonymous tipster claimed they would be.<sup>48</sup> Judges themselves recognize the influence of hindsight bias in judicial decisionmaking.<sup>49</sup> Yet even such awareness does not immunize a judge from the effects of hindsight bias.<sup>50</sup>

Moreover, a judge's ruling on such a suppression motion is likely to be influenced by attitudinal blinders as well. A significant number of judges presiding in criminal cases were former prosecutors before taking the bench.<sup>51</sup> Given the highly competitive nature of the adversary system, it is understandable that judges who are ex-prosecutors might find it difficult to referee disputes between their former colleagues in the prosecutor's office and their former adversaries on the defense side.<sup>52</sup> That is not to say that all judges who are former prosecutors take a pro-prosecutorial stance or are hostile to criminal defendants.<sup>53</sup> I appeared before some excellent judges who were remarkably fair despite long prosecutorial careers. Nonetheless, a significant number of judges with prior prosecutorial experience bring a decidedly pro-prosecution attitude to the bench, and that attitude invariably influences their decisionmaking.<sup>54</sup> In front of such a judge, the effects of hindsight bias coupled with a

<sup>48</sup> *But see* Wistrich, Guthrie, & Rachlinski, *supra* note 9, at 1313-19 (reporting "surprising" results suggesting that probable cause determinations are not affected by hindsight bias, but speculating that more study needed given unexpected nature of those results compared with other studies showing that hindsight bias affects judges).

<sup>49</sup> As Justice Stewart noted, "[a]n arrest without a warrant bypasses the safeguards provided by an objective predetermination of probable cause, and substitutes instead the far less reliable procedure of an after-the-event justification for the arrest or search, too likely to be subtly influenced by the familiar shortcomings of hindsight judgment." *Beck v. Ohio*, 379 U.S. 89, 96 (1964) (quoted with approval in *Katz v. U.S.*, 389 U.S. 347, 358 (1967)). *See also* *Gates v. Illinois*, 462 U.S. 213, 293-94 (1983) (Stevens, J., dissenting) ("Given that the note's predictions were faulty in one significant respect, and were corroborated by nothing except ordinary innocent activity, I must surmise that the Court's evaluation of the warrant's validity has been colored by subsequent events.").

<sup>50</sup> Wistrich, Guthrie, & Rachlinski, *supra* note 9, at 1317.

<sup>51</sup> BUREAU OF JUSTICE STATISTICS, U. S. DEP'T OF JUSTICE, SOURCE BOOK (2003) available at <http://www.albany.edu/sourcebook/pdf/t1822005.pdf> (showing that between 1963-2005, between 38% and 50% of the Presidential appointees to U.S. District Court judgeships had prosecutorial experience); Profile of Texas Appellate and Trial Judges (2006), available at [http://www.courts.state.tx.us/pubs/AR2006/jud\\_branch/6-judge-profile-090106.pdf](http://www.courts.state.tx.us/pubs/AR2006/jud_branch/6-judge-profile-090106.pdf) (showing 47% of district court judges, 67% of the criminal district judges, and 56% of the Court of Criminal Appeals judges in Texas had prosecutorial experience).

<sup>52</sup> *See* Stephen B. Bright & Patrick J. Keenan, *Judges and the Politics of Death: Deciding Between the Bill of Rights and the Next Election in Capital Cases*, 75 B.U. L. REV. 759, 796-814 (1995); Roberta K. Flowers, *An Unholy Alliance: The Ex Parte Relationship Between Judge and Prosecutor*, 79 NEB. L. REV. 251, 268-70 (2000).

<sup>53</sup> Perhaps most notably, Chief Justice Earl Warren, praised and criticized as a champion of criminal defendants' rights, was a long-time prosecutor. *See* JIM NEWTON, *JUSTICE FOR ALL: EARL WARREN AND THE NATION HE MADE* (2006).

<sup>54</sup> *See* Bright & Keenan, *supra* note 52, at 781-85, 811-13 (commenting on the difficulties some judges have in relinquishing the prosecutorial role); Flowers, *supra* note 52, at 265-73 (describing the "team member" mentality that can develop between judge and prosecutor and the problems associated with such unduly close relationships); Christopher Slobogin, *Having It Both Ways: Proof that the U.S. Supreme Court is "Unfairly" Prosecution-Oriented*, 48 FLA. L. REV. 743 (1996) (arguing that a comparison of Supreme Court cases shows that the

predisposition to accept the testimony and arguments presented by the State increase the likelihood that the judge will err. Misjudging is particularly likely if granting a suppression motion will allow a guilty defendant to go free.

Guthrie's work offers solid empirical support to observations about judging made by Justice Cardozo many years ago and echoed by Justice Brennan more recently.<sup>55</sup> For Brennan and Cardozo, "judges, like common mortals, cannot divorce themselves completely from their personal, subjective vision."<sup>56</sup> Judges possess "subconscious loyalties" and respond, like "the rest of man," to "other forces, the likes and dislikes, the predilections and the prejudices, the complex of instincts and emotions, and habits and convictions."<sup>57</sup> In other words, a judge's assessment of facts and interpretations of law inevitably will be colored by the judge's filtering process, a process shaped by that judge's vision, accumulated life experiences, and biases.

Absolute impartiality is an unattainable goal, then, because all judges bring their own perspective and biases with them into the courtroom.<sup>58</sup> All judicial decisionmaking, therefore, is influenced to some extent by a judge's biases.<sup>59</sup> Nevertheless, most would agree that judicial impartiality is an important value that we want to promote as best we can. Thus, while we know judges will be influenced by their biases, we expect judges to strive to restrain their personal biases so that their decisions are not dictated or controlled by their personal prejudices or biases. At some point, a judge's failure to check his or her biases constitutes bad judging.

Good judging tends to be marked by evenhandedness. In contrast, bad judging often occurs when the judge's biases do more than just color decisionmaking; they dictate the judge's rulings. Admittedly, the line between coloring and dictating decisions is inexact. Moreover, our line-drawing problem is compounded by the fact that judges may be unaware of their biases.<sup>60</sup> A judge may be honestly struggling to be evenhanded without recognizing that unconscious biases are affecting his or her rulings.<sup>61</sup> Generally, however, good trial judges focus on the evidence and arguments presented in court and do not allow their personal prejudices to dictate their decisions.

*Misjudging* does not acknowledge the overlap between misjudging and bad judging. Nor does it take on difficult normative questions of when biased judging becomes bad judging, of the proper role of the judge, or how we ought

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Court generally has a pro-government orientation that is so pronounced that it willingly sacrifices the appearance of fairness to ensure the government wins). In my experience, state trial judges too often display a similar prosecutorial preference.

<sup>55</sup> See Brennan, *supra* note 2, at 3-5 (quoting approvingly from Cardozo's *THE NATURE OF THE JUDICIAL PROCESS* (1921) on the role of human experience, emotion, and passion in the judicial process).

<sup>56</sup> *Id.* at 4.

<sup>57</sup> BENJAMIN N. CARDOZO, *THE NATURE OF THE JUDICIAL PROCESS* 167-68, 175 (1921).

<sup>58</sup> Debra Lyn Bassett and John Leubsdorf are among many others who have made a similar observation. See Bassett, *supra* note 10, at 1232-50; John Leubsdorf, *Theories of Judging and Judge Disqualification*, 62 N.Y.U. L. REV. 237, 237-68 (1987).

<sup>59</sup> See Debra Lyn Bassett, *Recusal and the Supreme Court*, 56 HASTINGS L.J. 657, 667-69 (2005) (discussing the impact of unconscious bias on judicial decisionmaking).

<sup>60</sup> Bassett, *supra* note 10, at 1248-50 (citing considerable research demonstrating that judges, like other people, often are honestly unaware of their unconscious biases).

<sup>61</sup> See Bassett, *supra* note 59, at 666-69.

to evaluate judicial performance. As Guthrie indicates, the focus of his article is only on those cases “where the law is as clear as it can be, and where the relevant facts have been fully developed.”<sup>62</sup> Guthrie understandably focuses on this limited set of cases because it allows him to sidestep normative disagreements and get to the key point he wishes to illuminate. Even in those cases in which all commentators would concur as to how a judge ought to rule, judges still tend to get it wrong because of the blinders Guthrie identifies.

If these blinders make it hard for judges to get it right in easy cases, then these blinders also are likely to make it difficult for judges to get it right in cases in which the facts are uncertain or the law is unclear. For trial judges, this is a situation they confront in the vast majority of cases. Guthrie does not explicitly make this point, but the conclusion follows from his research. Thus, when a trial judge listens to conflicting testimony in a hearing, the manner in which the judge processes that testimony and resolves testimonial conflicts will be influenced by the blinders the judge possesses. Similarly, a trial judge’s application of uncertain law to those conflicting facts is also likely to be colored by the judge’s personal perspective.<sup>63</sup> Indeed, it may well be that the more unclear the law or the facts are, the more likely it will be that judge’s decisions will be influenced by the judge’s blinders. Although the judge may not have misjudged, using Guthrie’s definition, if the blinders lead him or her to reach a particular result, the judge may, nonetheless, have gotten it very wrong.

This, in short, is the crux of the problem. How do we determine in the particular case if the judge, indeed, got it right or wrong? Judges – and law professors for that matter – often disagree bitterly among themselves as to the proper resolution of a particular case even when the facts are relatively clear. Most of the time, however, the facts are anything but clear. It is often incredibly challenging to make an accurate factual determination in light of the usual hurdles: incomplete, conflicting testimony about a past event by witnesses with imperfect memories, different perceptions, and varied motives. Inevitably, however, a judge’s factual determinations will be colored by the conscious and unconscious blinders or biases that Guthrie and others have described. Thus, factual disputes only compound the difficulty in identifying the “right” result. Ultimately, we are likely to view a judge’s decision as right or wrong if it reflects our ideology, policy preferences, and values.<sup>64</sup>

In *Misjudging*, Guthrie asserts that “trial judges seek to make accurate decisions under the law; according to this view, judges try hard to get it right but are occasionally influenced by their attitudes or deeply held beliefs.”<sup>65</sup> He contrasts his position with that of attitudinal theorists who posit that judges are

<sup>62</sup> Guthrie, *supra* note 1, at 420.

<sup>63</sup> See Brennan, *supra* note 2, at 3-5.

<sup>64</sup> I agree with Susanna Sherry that law and politics are not equivalent and that we ought to be critical of poorly reasoned decisions even though we agree with the result. Susanna Sherry, *Politics and Judgment*, 70 Mo. L. Rev. 973 (2005). Nonetheless, in the end, we are likely to label the decision that reached the result we deem correct as good or right even though the reasoning supporting that result may be suspect.

<sup>65</sup> Guthrie, *supra* note 1, at 436. Guthrie and his colleagues make the same claim in *Inside the Judicial Mind*, but cite only to two articles, one of which was written by a federal judge, to support their assertion. Guthrie et al., *supra* note 5, at 829.

"rational actors" who consciously seek to make decisions that further their policy preferences or attitudes.<sup>66</sup> In my view, most judges do not fall neatly into either camp.

I would agree that good judges try hard to get it right and are adversely affected by their deeply held attitudinal blinders only occasionally. As Guthrie's research shows, however, even these good judges may be unconsciously affected by blinders. On the other hand, a significant number of judges consciously promote their policy preferences. Too many state court trial judges have a pro-prosecution bias that not only colors their decisionmaking, but often controls that decisionmaking. Although such judges may begrudgingly make the right call in spite of their policy preferences on occasion, frequently their decisionmaking reflects their predispositions and attitudinal biases.

For many other judges, how hard they struggle to get it right or how often they act to push a particular agenda or to maximize their policy preferences depends on the circumstances of the individual case. For these judges, the decision to grant a suppression motion that will lead to the dismissal of a case involving a factually guilty defendant not only turns on the merits of a case, but also on a host of factors, including the seriousness of the case, the lawyers involved, the defendant's prior record, a pending election, and the amount or prospect of media coverage. In my experience, a judge may be willing to grant a suppression motion in a minor drug case, even though it results in a case being dismissed despite the judge's belief the defendant is guilty, when that same judge may balk at granting an identical motion in a murder case.<sup>67</sup> Regardless of our disagreement on the extent to which judges are affected by their attitudes, however, both Guthrie and I agree that judicial attitudes undoubtedly color judicial decisionmaking and may lead to misjudging.<sup>68</sup>

Finally, my only significant disagreement with Guthrie rests with his conclusion that the "vast majority" of the trial bench are good judges and only a small number might be "bad."<sup>69</sup> Given that Guthrie uses Geoffrey Miller's categorization of bad judging, which includes everything from corrupt judicial influence to bias, insensitivity, prejudice, and incompetence,<sup>70</sup> his assessment of the overall quality of trial judges is unduly optimistic. Not only have I read too many accounts of "bad" judging,<sup>71</sup> but I have experienced firsthand too

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<sup>66</sup> Guthrie, *supra* note 1, at 446.

<sup>67</sup> See Solomon, *supra* note 16, at 1066-68 (in a sample of cases analyzing the use of harmless error doctrine, the author noted that courts found errors harmless significantly more often in murder cases than in non-murder cases).

<sup>68</sup> Guthrie, *supra* note 1, at 446.

<sup>69</sup> *Id.* at 458. My more critical assessment of state court judges is shared by many lawyers from around the country with whom I have talked and echoed by an unnamed Kentucky prosecutor quoted by Nancy King and Rosevelt Noble. Nancy J. King & Rosevelt L. Noble, *Felony Jury Sentencing in Practice: A Three-State Study*, 57 VAND. L. REV. 885, 951 (2004). Describing elected judges in Kentucky and their "very low experience requirements," the prosecutor lamented that "[s]ometimes we get a great judge, mostly we get mediocre judges, sometimes we get absolute lunatics . . ." *Id.* See also JAMES W. JEANS, SR., TRIAL ADVOCACY 36 (2d ed. 1993) (describing the tyrannical judge as occurring with "sufficient frequency").

<sup>70</sup> Guthrie, *supra* note 1, at 421 n.8 (citing Geoffrey P. Miller, *Bad Judges*, 83 TEX. L. REV. 431, 432-33 (2004)).

<sup>71</sup> For a representative sampling, see the sources noted in footnote 13.

many instances of biased, improper, or incompetent judicial behavior to agree with such a rosy view.<sup>72</sup> In the end, state court judges are, for the most part, rational actors whose attitudinal biases reflect their self-interest and their backgrounds. Most are answerable to a tough-on-crime electorate and are often reluctant, therefore, to make risky political decisions upholding the constitutional rights of criminal defendants.<sup>73</sup> Guthrie is right to conclude that even good, well-intentioned judges are subject to blinders that may cause them to misjudge a case. Unfortunately, his assumption that the vast majority of trial judges are good is unfounded.<sup>74</sup>

## II. IMPLICATIONS

Guthrie claims that given the effects of the blinders he discusses, the prospect of misjudging is more widespread than most people suspect.<sup>75</sup> He concludes, therefore, that litigants should take into account the real possibility of misjudging in deciding what forum to select when resolving a dispute.<sup>76</sup> Moreover, Guthrie acknowledges that bad judging, electoral concerns, desire for promotion, and other non-legal factors increase the likelihood that a judge will not accurately apply governing law to the relevant facts.<sup>77</sup> Consequently, Guthrie encourages litigants to consider using other alternative dispute resolution fora instead of the courthouse.<sup>78</sup>

If I am correct – and the situation is even worse than Guthrie assumes because of his overly optimistic view of judges in general – where does that leave most criminal defendants? The vast majority of criminal defendants and

<sup>72</sup> For example, a Wisconsin state court judge in a suppression hearing involving a police stop scolded me for referring to *Terry v. Ohio*, 392 U.S. 1 (1968) – despite its obvious applicability – because she reminded me, we were in Wisconsin, not Ohio. A different Wisconsin judge refused to allow me to introduce a photograph solely because I did not have the photographer present who took the photo even though “there is no requirement that the photographer be the qualifying witness.” THOMAS A. MAUET & WARREN D. WOLFSON, TRIAL EVIDENCE 316 (1997). Finally, I had the misfortune to appear a number of times in front of a mean-spirited judge whose improper behavior included sexually assaulting a secretary from my office in the courthouse elevator. See *In re Seraphim*, 294 N.W.2d 485 (Wis. 1980) (suspending Judge Seraphim for three years). For an example of the intemperate and injudicious manner in which Judge Seraphim conducted himself on the bench, see *Walberg v. Israel*, 766 F.2d 1071 (7th Cir. 1985).

<sup>73</sup> Among the many commentators who have discussed the pressure on elected judges to avoid being seen as soft-on-crime, see, e.g., Bright & Keenan, *supra* note 52; King & Noble, *supra* note 69. Even federal judges tend to draw criticism when granting suppression motions that are perceived as rewarding guilty defendants. Take, for example, the furor that erupted after Federal District Judge Harold Baer, Jr. granted a suppression motion in a drug case. See *United States v. Bayless*, 201 F.3d 116 (2d Cir. 2000). Not only did two hundred members of Congress send a letter to President Clinton asking him to join them in urging Judge Baer to resign, but presidential candidate Bob Dole publicly called for Baer’s impeachment. *Id.* at 122-23. Judge Baer subsequently granted the government’s motion to reconsider and reversed his earlier ruling. *Id.*

<sup>74</sup> Guthrie’s experiments were not designed to – nor did they – provide any empirical support for his conclusions about the overall quality of the trial bench.

<sup>75</sup> Guthrie, *supra* note 1, at 421.

<sup>76</sup> *Id.* at 458-59.

<sup>77</sup> *Id.* at 447-48.

<sup>78</sup> *Id.* at 448.

their lawyers have absolutely no say in the forum selection process. Generally, it is the prosecutor who decides whether to issue charges and the jurisdiction in which the case will be heard.<sup>79</sup> The criminal defendant, therefore, is forced to live with the prospect of misjudging. Even worse, a significant number of criminal defendants are trapped in front of mediocre or “bad” judges whose attitudinal biases color their evidentiary rulings, factual determinations, and the sentences they mete out. If, in fact, the number of bad judges is significant, then the implications for criminal defendants and for the system are frightening.

Assume, for example, that you are a criminal defense lawyer practicing in Oklahoma County and defending a man accused of sexual molestation of a child. Although the child victim has positively identified your client as his attacker, your client insists that he is the victim of a mistaken identification. He has no prior record and seems quite credible, despite being unable to corroborate his whereabouts at the time of the offense. Your case has been assigned to Judge Susan Caswell, a former prosecutor in the Oklahoma County District Attorney’s office, who ran an aggressive election campaign promising to protect victims’ rights vigorously.<sup>80</sup> Based on her reputation and your prior experiences with Judge Caswell, you believe she is a biased jurist hostile to

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<sup>79</sup> The prosecutor must comply with certain jurisdictional and procedural requirements to launch a criminal prosecution but the choice to proceed is the prosecutor’s. *See, e.g.*, *Ball v. United States*, 470 U.S. 856 (1985) (recognizing broad prosecutorial discretion in charging decisions). Some states – Maryland, California, Florida, and Massachusetts among others – have instituted victim-offender mediation programs, but the criminal defendant generally does not have any ability to initiate the mediation alternative. In jurisdictions that provide for an alternative dispute resolution process, the use of such a process normally requires the consent of the prosecutor. *See* Nancy Hirshman, *Mediating Misdemeanors*, 7 *DISP. RES. MAG.* 12 (2000).

<sup>80</sup> As a result of statements Caswell made during her campaign, a complaint was lodged against her with the Oklahoma Council on Judicial Complaints. *See* Ed Godfrey, *Judge Gavels Down Opponent’s Claims*, *DAILY OKLAHOMAN*, Oct. 19, 1998, at 1. The Oklahoma Judicial Ethics Advisory Panel subsequently issued an advisory opinion stating that campaign statements expressing an intent to “balance the scales of justice for victims, especially little children” were not permitted by the Code of Judicial Conduct. *See* *Judicial Ethics Opinion 1998-15*, 86 P.3d 653, 654 (Okla. Jud. Eth. 1998). After Caswell’s election, a defendant in a child abuse case moved for Judge Caswell to recuse herself based on her work as a prosecutor specializing in child abuse cases and the promises she made in her campaign. Although Caswell refused to step down, the Oklahoma Criminal Court of Appeals ruled that Caswell should have recused herself from the case because of the positions she took during her campaign. *West v. Caswell*, MA-2000-425 (June 30, 2000) (on file with the author). The court agreed that given the “campaign rhetoric,” the facts of the case demonstrate that “Judge Caswell’s impartiality might reasonably be questioned.” *Id.* at 4, 6. Judge Charles Chapel in a concurring opinion would have gone farther. He argued that by continuing to use her campaign ads even after the Ethics Opinion declared her ads improper, she “deliberately violated the Rules by publicly announcing that she would be biased if elected.” *Id.* He concluded, therefore, because she “had promised to be biased generally in criminal cases, not just this one, she should be disqualified from all criminal cases.” *Id.* Caswell was later disqualified from a high profile murder case because she “turned her office into an investigative arm for the district attorney.” *Ellis v. Caswell*, MA-2000-1022 (Oct. 4, 2000) (Chapel, J., concurring). As Judge Chapel observed, “[i]ndeed, there are many serious and scary problems in this record, but the most serious difficulty is that in her zeal to assist the prosecution, this judge unilaterally and illegally denied the defendant in this case the benefits of our adversarial system.” *Id.* For a critical look at Judge Caswell and the justice system in Oklahoma County, see Glenna Whitley, *Oklahoma Railroad*, *DALLAS OBSERVER*, July 21,

defendants like your client. She will be extremely sympathetic to the victim and accommodating to her former colleagues in the prosecutor's office.

Initially, any good criminal defense lawyer will conduct a thorough investigation to try to undermine the prosecution's case and develop facts demonstrating the defendant's innocence. Counsel will take whatever evidence he or she uncovers and will present it to the prosecutor if there is a realistic chance of persuading the prosecutor to drop or reduce the charges.<sup>81</sup> In some cases, especially misdemeanors or minor felonies, defense counsel may actually be able to persuade the prosecutor to divert a case from the criminal justice system.<sup>82</sup> In some instances, such diversion does not need the approval of a judge. A good lawyer may work with the prosecutor, police, social service agencies, and even the victim or a victim's family to secure a resolution that will divert the case from the system thereby eliminating or minimizing the influence of a biased judge.

In the vast majority of cases, however, the seriousness of the charge or the attitude of the prosecutor will preclude any possibility of diversion outside of the system. Certainly, it is highly unlikely that this kind of sexual molestation case would be diverted or dismissed in Oklahoma County absent significant proof problems. If you have been unable to corroborate an alibi and there is no exculpatory physical evidence, it also is extremely unlikely that you will be able to persuade the prosecutor to drop or to reduce the charges. As long as the prosecutor has sufficient confidence in her case to push it forward, you will be forced to defend your client in front of a judge you believe is biased against him.

A criminal defendant is, of course, entitled to a fair, impartial trial in front of a judge who is not tainted by any personal bias or prejudice against the defendant.<sup>83</sup> Consequently, in Oklahoma, as in other states and the federal system, the defendant can file a motion arguing that the assigned judge is biased and asking that the judge disqualify or recuse herself or himself from the case.<sup>84</sup> Defense counsel could seek to remove Judge Caswell by claiming that her prior employment with the district attorney's sex crime unit and the views she expressed publicly in her election campaign demonstrate her bias and

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2005, available at [http://www.dallasobserver.com/Issues/2005-07-21/news/feature\\_print.html](http://www.dallasobserver.com/Issues/2005-07-21/news/feature_print.html).

<sup>81</sup> In some instances the prosecutor may have demonstrated a complete unwillingness to dismiss the charges or to offer any significant concessions such that the defense will have no incentive to prematurely disclose any exculpatory evidence.

<sup>82</sup> See ABA STANDARDS FOR CRIMINAL JUSTICE: PROSECUTION FUNCTION Standard 3-3.8 (3d ed. 1993) (noting that a prosecutor should be familiar with diversion options and should consider, in appropriate cases, a noncriminal disposition).

<sup>83</sup> See, e.g., *Ward v. Vill. of Monroeville, Ohio*, 409 U.S. 57 (1972); *Tumey v. Ohio*, 273 U.S. 510 (1927); *Fitzgerald v. State*, 972 P.2d 1157, 1163 (Okla. Crim. App. 1998).

<sup>84</sup> See OKLA. STAT. ANN. tit. 12, ch. 2, app. 1, Rule 15(b) (West 2007). Although historically "recusal" and "disqualification" have not been synonymous, in modern practice the terms are used interchangeably. RICHARD E. FLAMM, *JUDICIAL DISQUALIFICATION: RECUSAL AND DISQUALIFICATION* § 1.1, at 5 (1996). In every jurisdiction, the specific grounds for disqualifying a judge from presiding in a particular case are spelled out by statute or court rule. These provisions often incorporate language from the ABA MODEL CODE OF JUDICIAL CONDUCT. For a thorough exploration of the inconsistencies and inadequacies of existing disqualification law, see generally Leubsdorf, *supra* note 58.



inability to sit as a fair, impartial judge in this type of case.<sup>85</sup> Such a generalized attack, however, is unlikely to be successful.<sup>86</sup>

It is true that the ABA *Model Code of Judicial Conduct*<sup>87</sup> and provisions in state and federal law addressing judicial recusal and disqualification expressly provide that a judge “shall disqualify himself or herself in a proceeding in which the judge’s impartiality might reasonably be questioned . . . .”<sup>88</sup> Although such a broad standard suggests that disqualification would be an effective remedy against a biased judge, in practice it generally is hard to force a biased judge off a case.<sup>89</sup> For the most part, disqualification works best in cases in which the judge has a familial relationship, financial interest, or prior involvement in a matter. When the issue is one of the personal bias or prejudice of a judge, however, the disqualification process tends to be invoked infrequently and only rarely results in a judge being forced to step aside.<sup>90</sup>

Not surprisingly, many criminal defense lawyers are reluctant to file a recusal motion because defense counsel must litigate the recusal motion initially in front of the judge whose bias counsel is attempting to prove. Filing such a motion may well provoke even more negative behavior and adverse rulings from the judge. Thus, defense counsel generally will be hesitant to file such a motion unless counsel is fairly confident of success in front of another court.<sup>91</sup> Nor is defense counsel likely to file such a motion just to make a

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<sup>85</sup> Such a motion was successfully raised in *West v. Caswell*, MA-2000-425 (June 30, 2000) (on file with author). In *Mitchell v. State*, 136 P.3d 671 (Okla. Crim. App. 2006), the defense brought a similar challenge including the additional facts that Caswell and her friend, Judy Busch, a prominent victim’s right advocate, both attended the wedding of Busch’s daughter to the brother of the victim in the case. Although Judge Caswell declined to recuse herself, the defendant failed to follow proper procedure and request a “rehearing” on the recusal motion before the chief judge. Nonetheless, the Oklahoma Court of Criminal Appeals ultimately found that the “significant and disturbing evidence of bias on the part of the trial court,” especially Caswell’s failure to condemn or ameliorate blatant prosecutorial misconduct, warranted a new resentencing in front of a new judge. *Id.* at 706-12.

<sup>86</sup> See Miller, *supra* note 12, at 460-62. The Caswell cases represent rare instances in which an outspoken judge provides unusually strong evidence of her deeply held biases. As John Leubsdorf wryly observes, “courts occasionally confront a showing of bias too clear for quibbling” (citing to Walker v. Lockhart, 726 F.2d 1238, 1255 (8th Cir.1984) in which the judge, speaking to three ministers about a defendant facing a retrial, said that “he intended to burn the S.O.B.”). Leubsdorf, *supra* note 58, at 243 n.36. Even in that case, Leubsdorf points out, the trial judge refused to recuse himself and it took one state and three federal appeals before the case was reversed. *Id.*

<sup>87</sup> ABA MODEL CODE OF JUDICIAL CONDUCT (2004) [hereinafter ABA MODEL JUDICIAL CODE].

<sup>88</sup> See ABA MODEL JUDICIAL CODE CANON 3E(1); 28 U.S.C. 144, 455 (2000).

<sup>89</sup> See Miller, *supra* note 12, at 460-62; Bassett, *supra* note 10, at 1235-42.

<sup>90</sup> See *id.* See also JEFFREY M. SHERMAN ET AL., JUDICIAL CONDUCT AND ETHICS § 4.04, at 113 (3d ed. 2000) (“Bias and prejudice are only improper when they are personal . . . . That a judge has a general opinion about a legal or social matter that relates to the case before him or her does not disqualify the judge from presiding over the case.”); see, e.g., Liteky v. United States, 510 U.S. 540, 555 (1994) (noting that under the federal recusal or challenge-for-cause statutes, prior judicial rulings or opinions almost never constitute a valid basis for a bias or partiality motion unless they display a deep-seated favoritism or antagonism that would render a fair judgment “impossible”).

<sup>91</sup> After the disqualification motion is denied, the defendant can request a “re-hearing” in front of another judge. See OKLA. STAT. ANN. tit. 12, ch. 2, app. 1, Rule 15(b) (2007). If the

record for appeal. Simply put, the costs of doing so – further alienating an already hostile judge in this and in other cases – are too high unless there is a realistic chance of successfully demonstrating judicial bias.<sup>92</sup>

Additionally, proving judicial bias can be quite difficult. Like most people, judges generally see themselves as fair and impartial despite their preferences.<sup>93</sup> A judge may be very biased but totally unaware of the extent to which her biases are affecting her judgment. In other instances, a judge like Susan Caswell may be very aware of her biases but honestly believes she is entitled to them and that they do not negatively affect her performance.<sup>94</sup> In either case, the most biased judges may well be the least likely to voluntarily step down and most defensive about a recusal motion.<sup>95</sup>

Judge Caswell's open expression of her strong views presents a rare case where a reviewing court has a clear record on which to rule. Although there are other pro-prosecution judges who harbor strong views, most will publicly express their fidelity to principles of neutrality and impartiality. Consequently, appellate courts usually will presume that a former prosecutor who becomes a judge will follow her oath of office to judge the cases before her impartially, without undue regard for her former position or colleagues.<sup>96</sup> Absent the intemperate, decidedly pro-victim statements made by Caswell, a pro-prosecution perspective or strong attitudes about crime and punishment will not be enough to demonstrate that a judge is unfit to sit in certain types of cases without a more specific showing. Although it may be abundantly obvious to everyone in the courthouse where a particular judge's loyalties lie, rarely will judges do enough or say enough to provide a basis for a recusal motion.<sup>97</sup>

So, where does that leave counsel in front of a judge like Susan Caswell, whose prejudices run so deep? In short, you and your client have two odious choices. Given the aggressive posture generally taken by the Oklahoma

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defendant loses that hearing, counsel can pursue a mandamus action in the Oklahoma Court of Criminal Appeals. *Id.* at Rule 15(c). For a discussion of the reasons counsel generally will be reluctant to employ the "high-risk strategy" of filing a recusal motion, see Miller, *supra* note 12, at 461-62.

<sup>92</sup> In rare circumstances, counsel may, by filing a recusal motion, generate positive publicity or send an effective message that will, in turn, cause a biased judge to temper her behavior.

<sup>93</sup> See Bassett, *supra* note 10, at 1242; Nugent, *supra* note 10, at 5 ("[J]udges are typically appalled if their impartiality is drawn into question[;] . . . believ[ing] themselves to be consistently objective, impartial and fair.").

<sup>94</sup> See Leubsdorf, *supra* note 58, at 243-44.

<sup>95</sup> See Bassett, *supra* note 10, at 1243-44; Leubsdorf, *supra* note 58, at 245.

<sup>96</sup> See, e.g., *United States v. Murphy*, 768 F.2d 1518 (7th Cir. 1985) (despite close personal friendship between trial judge and prosecutor recusal not mandated absent showing of actual impropriety); *In re United States*, 666 F.2d 690 (1st Cir. 1981) (close friendship between judge and defendant including fact that defendant appointed the judge and judge represented the defendant years earlier did not overcome presumption that judges should not be disqualified).

<sup>97</sup> Miller, *supra* note 12, at 461-62. See, e.g., *Mann v. Thalacker*, 246 F.3d 1092 (8th Cir. 2000) (due process did not require state trial judge to recuse himself in case involving sexual abuse of child despite the fact judge himself had been abused as a child because record did not reveal any statements or actions indicating actual bias and judge's personal history did not warrant a presumption of bias).

County District Attorney's Office,<sup>98</sup> your client will be extended a plea offer that involves substantial prison time. Thus, he can accept the offer and thereby avoid the risk of an even longer sentence should he go to trial and lose. By entering an *Alford* plea,<sup>99</sup> however, he would be agreeing to serve a significant prison term despite his claim of innocence.<sup>100</sup>

Alternatively, your client can choose to go to trial. You undoubtedly will recommend that your client choose a jury trial instead of a bench trial.<sup>101</sup> Given Judge Caswell's biases, the likelihood of a guilty verdict in a bench trial to Judge Caswell is a virtual certainty. Choosing a jury trial does expose your client to the potential harshness of jury sentencing.<sup>102</sup> Nonetheless, if your client elects to go to trial, he should select a jury trial because it gives him his best shot at an acquittal despite the risk of a far harsher sentence.<sup>103</sup>

Helping the client to decide whether to accept a plea bargain or go to trial is the essence of the counseling role for the criminal defense lawyer. Counsel must skillfully evaluate the client's options, clearly communicate those choices to the client, and then assist the client in making the best choice possible under the circumstances. One of the many difficult aspects of the evaluative process is predicting the extent to which the trial court's rulings will affect the defendant's chances for success at trial. Trials are always fraught with uncertainty, and even the best of lawyers struggle to predict what evidence will come in, how witnesses will perform, and how various arguments will appeal to an unknown but highly variable group of jurors.

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<sup>98</sup> See Whitley, *supra* note 80. For a devastating critique of the Oklahoma County District Attorney's office and of the operation of the criminal justice system in Oklahoma County, see MARK FUHRMAN, *DEATH AND JUSTICE* (2003).

<sup>99</sup> In *North Carolina v. Alford*, 400 U.S. 25 (1970), the Supreme Court recognized the validity of a guilty plea entered even though the defendant continued to insist he was innocent. Most state courts permit a defendant to enter a guilty plea while continuing to maintain his or her innocence in order to take advantage of a plea bargain. See Curtis J. Shipley, Note, *The Alford Plea: A Necessary But Unpredictable Tool for the Criminal Defendant*, 72 IOWA L. REV. 1063, 1067-68 (1987).

<sup>100</sup> In some instances, an Oklahoma defendant might decide to turn down a plea bargain and plead guilty with both sides free to argue for the appropriate sentence. *But see* T. Scott Randall, *Pleading Guilty in Arkansas: A Journey Down the Rabbit's Hole*, 55 ARK. L. REV. 401, 406-15 (2002) (noting that prosecutors in Arkansas can block a defendant from pleading guilty and insist on trial while prosecutors in all other states are powerless to prevent a defendant from pleading guilty). In this hypothetical case, however, Judge Caswell would not have to accept the defendant's *Alford* plea. *Stewart v. State*, 568 P.2d 1297 (Okla. Crim. App. 1997). Nor is it likely that even if she would accept such a plea, she would give a sentence lower than that recommended by the State.

<sup>101</sup> In some states, a defendant's choice to have a bench trial can be vetoed because the prosecutor has a right to insist on a jury trial. See, e.g., *State v. Taylor*, 391 S.W.2d 835, 837 (Mo. 1965).

<sup>102</sup> Oklahoma is one of six states in which the jury plays a major role in sentencing. See OKLA. STAT. tit. 22, § 926.1 (2000). For a fascinating look at how jury sentencing works in three states and why jurors often give higher sentences, see King & Noble, *supra* note 69.

<sup>103</sup> It is exceedingly difficult to predict how a jury will react to all of the facts and circumstances at a trial. It is quite common, however, for a jury to recommend sentences that are much higher than that contemplated by a proposed plea bargain and even higher than that which would have been imposed by a tough, biased judge after a bench trial. For a study confirming that jurors give higher sentences and discussing the pressure jury sentencing puts on defendants to plead guilty, see King & Noble, *supra* note 69.

Defense counsel's task is complicated by the fact that discovery in criminal cases generally is quite limited. Given the limited discovery tools available to most criminal defense lawyers,<sup>104</sup> defense counsel often will have only a summary of the likely testimony of the government's witnesses and little sense of how those witnesses will testify. Because of the nature in which trial testimony unfolds, a good defense lawyer recognizes that a judge's evidentiary rulings may well be critical and can greatly influence the course of a trial even without knowing all of the evidentiary issues that might arise. What every experienced litigator also knows is that a judge's evidentiary rulings may be influenced by the blinders Guthrie discussed. That is especially so because evidentiary questions often present themselves without any time for reflection or research and often without any clear answer.<sup>105</sup> In my experience, judges tend to fall back on their own evidentiary compass to resolve their uncertainty. If a judge is biased against one party, however, that judge will resolve many, if not most close evidentiary questions, in favor of the other side. Moreover, the more biased a judge, the more likely she or he will "misjudge." That is, the judge will sustain or overrule objections despite clear law to the contrary. Given that appellate courts rarely overturn convictions based on erroneous evidentiary rulings,<sup>106</sup> biased trial judges can exert considerable influence on a trial with little fear of a reversal.

At first blush, then, it may appear that counsel's evaluative task is somewhat easier when the judge is as biased as Judge Caswell. Given her strong bias, counsel can expect that she will decide all close questions in favor of the State. Nevertheless, because testimony develops and evidentiary questions arise in an almost unlimited number of variations, it is still difficult for counsel to predict how badly a biased trial judge is going to hurt his or her case or unfairly help the other side at a particular trial.

It is not just in ruling on evidentiary questions that a biased judge affects the outcome of a trial. The judge rules on a host of pretrial issues ranging from discovery disputes and *Brady* motions<sup>107</sup> to suppression motions. The resolu-

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<sup>104</sup> RICHARD SINGER, *CRIMINAL PROCEDURE II: BAIL TO JAIL* 76 (2005) ("[W]hile trial by ambush is no longer quite the order of the day," criminal discovery is still more limited than in the civil arena.). Missouri, for example, is one of a handful of states that permits a discovery deposition in criminal cases. See MO. REV. STAT. § 545.415 (2000); MO. S. CT. RULE 25.15 (2000).

<sup>105</sup> See Guthrie et al., *supra* note 5, at 783 (observing that "judges make decisions under uncertain, time-pressured conditions that encourage reliance on cognitive shortcuts that sometimes cause illusion of judgment").

<sup>106</sup> See, e.g., Margaret A. Berger, *When, If Ever, Does Evidentiary Error Constitute Reversible Error?*, 25 LOY. L.A. L. REV. 893, 894-96 (1992) (documenting rare reversal rate for evidentiary error in federal system); additionally, appellate judges frequently excuse trial judges' mistakes by finding their errors harmless. See *supra* note 16.

<sup>107</sup> In *Brady v. Maryland*, 373 U.S. 83 (1963), the Supreme Court ruled that prosecutors are obligated to provide the defense exculpatory evidence in their possession that is material to guilt or punishment. Despite a constitutional obligation and an ethical command, MODEL RULES OF PROF'L CONDUCT R. 3.8 (2004), some prosecutors take a very narrow view of this duty while others chose to ignore it. For a look at a few of the many articles documenting the failure of prosecutors to disclose exculpatory evidence, see Lissa Griffin, *The Correction of Wrongful Convictions: A Comparative Perspective*, 16 AM. U. INT'L L. REV. 1241, 1254-55 (2001); Ken Armstrong & Steve Mills, *Death Row Justice Derailed*, CHI. TRIB., NOV. 14,

tion of these issues can have a substantial influence in determining the eventual outcome of the trial.<sup>108</sup> In addition, the judge's demeanor at trial and her attitude toward the parties, the lawyers, and the witnesses are closely observed by the jurors and can influence the jurors' assessment of the credibility of all of the trial participants.<sup>109</sup> Judges also instruct the jury and control or fail to control the arguments of counsel. Once again, Guthrie's work suggests that blinders can unconsciously influence judicial behavior at all stages of the proceedings. Unquestionably, a bad or biased judge can have a pronounced effect on the events at trial and, ultimately, on the verdict.

That does not mean that a criminal defendant is powerless in the face of a biased judge. Although the defendant faces an uphill battle, conscientious counsel will fight to overcome the adverse effects of a biased judge. Indeed, the proper operation of our adversarial system of justice depends on defense lawyers playing the role demanded of them.<sup>110</sup>

Fortunately, jurors do, for the most part, try to get it right. Sometimes jurors will sense that a judge is trying too hard for one side and not being evenhanded. Even though jurors generally accord judges considerable respect,<sup>111</sup> they may react negatively if a judge displays too much favoritism to

1999, § 1, at 1; Ken Armstrong & Maurice Possley, *How Prosecutors Sacrifice Justice to Win, The Verdict Dishonor*, CHI. TRIB., Jan. 10, 1999, § 1, at 1; Bill Moushy, *Win At All Costs*, PITTSBURGH POST-GAZETTE, available at <http://www.post-gazette.com/win/>.

<sup>108</sup> See STEPHEN A. SALTZBURG & DANIEL J. CAPRA, *AMERICAN CRIMINAL PROCEDURE* 1243 (7th ed. 2004) (noting that trial judges have a significant impact on jury decisions through their decisions on questions of evidence, procedure, and pretrial issues).

<sup>109</sup> See *Rush v. Smith*, 56 F.3d 918, 921-22 (8th Cir. 1995) (en banc) ("It is obvious that under any system of jury trials the influence of the trial judge on the jury is necessarily and properly of great weight, and that his [or her] lightest word or intimation is received with deference, and may prove controlling."); LaDoris H. Cordell & Florence O. Keller, *Pay No Attention to the Woman Behind the Bench: Musings of a Trial Court Judge*, 68 IND. L. J. 1199, 1207 (1993) ("I no longer wonder about whether or not we judges influence juries, but rather how much and in what way we influence them."); ABA STANDARDS FOR CRIMINAL JUSTICE: SPECIAL FUNCTIONS OF THE TRIAL JUDGE Standard 6-1.4 (3d ed. 2000), commentary at 22. For a look at the extent to which a judge's verbal and nonverbal behavior can unfairly influence the trial process, see Peter David Blanck, Robert Rosenthal, Allen J. Hart & Frank Bernieri, *The Measure of the Judge: An Empirically-Based Framework for Exploring Trial Judges' Behavior*, 75 IOWA L. REV. 655 (1990); Peter David Blanck, Robert Rosenthal & LaDoris H. Cordell, *The Appearance of Justice: Judges' Verbal and Nonverbal Behavior in Criminal Jury Trials*, 38 STAN. L. REV. 89 (1985).

<sup>110</sup> As Justice Powell observed:

In our system a defense lawyer characteristically opposes the designated representative of the State. The System assumes that adversarial testimony will ultimately advance the public interest in truth and fairness. But it posits that a defense lawyer best serves the public, not by acting on behalf of the State or in concert with it, but rather by advancing "the undivided interests of his client."

*Polk County v. Dodson*, 454 U.S. 312, 318-19 (1981). For a thorough discussion of defense counsel's role, see ABA STANDARDS FOR CRIMINAL JUSTICE: DEFENSE FUNCTION (3d ed. 1993).

<sup>111</sup> See *United States v. Harper*, 466 F.3d 634, 646 (8th Cir. 2006) (stating that the judge is "the most authoritative figure in the courtroom"); Cordell & Keller, *supra* note 109, at 1204 ("Judges are, almost universally, held in high esteem and accorded special status."); Arthur H. Patterson & Nancy L. Neuffer, *Removing Juror Bias By Applying Psychology to Challenges for Cause*, 7 CORNELL J. L. & PUB. POL'Y 97, 101 (1997) (noting that jurors perceive the judge as a very high status person).

one side.<sup>112</sup> In the end, some criminal defendants will be acquitted at trial despite the adverse effects of a biased judge.<sup>113</sup>

In practice, however, our adversarial criminal justice system often fails to function as it is designed.<sup>114</sup> Sadly for many defendants, especially those who are indigent or those ineligible for appointed counsel but too poor to retain competent counsel, the right to counsel is illusory.<sup>115</sup> Without adequate counsel, defendants have no meaningful right to challenge the evidence against them. For such defendants, the added risk that the judge may err is almost totally irrelevant. These defendants live in a world of limited information, little choice, and, ultimately, little justice.<sup>116</sup>

The overwhelming majority of criminal defendants in this country cannot afford to retain private counsel.<sup>117</sup> In some jurisdictions, many indigent defendants are represented by defense lawyers with the skill, time, and resources to provide their clients effective assistance.<sup>118</sup> Many other states, however, provide woefully inadequate funding for their indigent defense system, so that indigent defendants are routinely served by overworked public defenders or poorly compensated appointed counsel carrying enormous

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<sup>112</sup> See Ann Burnett & Diane Badzinski, *Judge Nonverbal Communication on Trial: Do Mock Trial Jurors Notice?*, J. OF COMM., 209, 217-18 (2005).

<sup>113</sup> Additionally, if the judge's bias is sufficiently blatant, it may constitute reversible error. See, e.g., *State v. Barron*, 465 S.W.2d 523, 527 (Mo. 1971) (reversing conviction in which trial judge, upon hearing the defendant's brother testify that the defendant was with him at the time the burglary occurred, placed his hands on the sides of his head, shook it negatively, and then leaned back swiveling his chair 180 degrees).

<sup>114</sup> See, e.g., JAMES S. LIEBMAN ET AL., A BROKEN SYSTEM: ERROR RATES IN CAPITAL CASES, 1973-1995 (2000), available at <http://www.thejusticeproject.org/press/reports/liebman-part-1.html>; JAMES S. LIEBMAN ET AL., A BROKEN SYSTEM, PART II: WHY THERE IS SO MUCH ERROR IN CAPITAL CASES, AND WHAT CAN BE DONE ABOUT IT (2002), available at <http://www.thejusticeproject.org/press/reports/a-broken-system-part-ii.html>; DAVID COLE, NO EQUAL JUSTICE (1998). For an extended discussion of some of the inadequacies of the criminal justice system and its failure to protect the innocent, see generally Uphoff, *supra* note 14.

<sup>115</sup> See Gideon's *Broken Promise*, *supra* note 14, at 1 (stating that a detailed study of indigent defense services in this country "has led to the inescapable conclusion that, forty years after the *Gideon* decision, the promise of equal justice for the poor remains unfulfilled in this country"): Norman Lefstein, *In Search of Gideon's Promise: Lessons from England and the Need for Federal Help*, 55 HASTINGS L.J. 835, 906 (2004) ("[T]here is overwhelming evidence that defense representation in the United States often is egregiously inadequate."). For a powerful indictment of the criminal justice system, arguing that there are really two systems – one for the privileged and another for the less privileged, who also happen to be disproportionately black – see COLE, *supra* note 114.

<sup>116</sup> *Kimmelman v. Morrison*, 477 U.S. 365, 377 (1986) ("Without counsel the right to a fair trial itself would be of little consequence, for it is through counsel that the accused secures his other rights." (citations omitted)). See also Uphoff, *supra* note 14, at 779-82, 796-802 (detailing how the failure to provide adequate counsel with access to investigative and expert assistance drives many defendants to plead guilty because they are unable to challenge the evidence against them at trial).

<sup>117</sup> Nationally, over 80% of felony defendants are indigent and provided counsel at public expense. CAROLINE WOLF HARLOW, BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, DEFENSE COUNSEL IN CRIMINAL CASES 1, 5 (2000).

<sup>118</sup> See Uphoff, *supra* note 14, at 764-67. Colorado, Massachusetts, Minnesota, and Oregon have been identified as states that have quality indigent defense programs. Laura Parker, *8 Years in a Louisiana Jail, But He Never Went to Trial*, USA TODAY, Aug. 29, 2005, at A1.

caseloads.<sup>119</sup> Excessive caseloads mean defense lawyers have virtually no time to conduct legal research, locate and interview witnesses, undertake a factual investigation, litigate pretrial motions, file briefs, hire experts, or do any of the tasks necessary to mount an effective defense. In underfunded jurisdictions, then, defense counsel is often little more than a plea facilitator. Criminal defendants represented by such lawyers have little choice but to accept the proffered plea bargain. The defendant can, and sometimes will, insist on going to trial even though counsel is ill-prepared to do so. That choice is often disastrous.<sup>120</sup> Realistically, however, the option of going to trial with counsel who is not ready, willing, and prepared to challenge the government's case is virtually meaningless.

The situation is equally dire for most of the working poor. Although jurisdictions vary markedly in how indigency determinations are made, a significant number of the working poor ultimately will be deemed ineligible for an indigent defender.<sup>121</sup> Many of these defendants eventually end up representing themselves.<sup>122</sup> Low income defendants who do muster a modest retainer generally find it exceptionally difficult to locate a capable lawyer willing to devote the hours necessary to prepare for and to try most serious felony cases. Most of these defendants – and virtually all of the defendants representing themselves – are left, therefore, with a bitter choice: accept whatever plea bargain is offered or go to trial without well-prepared counsel.

In our plea bargaining driven system of justice, many judges push relentlessly to move cases along and discourage trials. Defendants are constantly threatened with much harsher sentences if they insist on going to trial, so few

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<sup>119</sup> See, e.g., ABA & NAT'L LEGAL AID AND DEFENDER ASS'N, GIDEON UNDONE: THE CRISIS IN INDIGENT DEFENSE FUNDING (1982); LAURENCE A. BENNER, NAT'L LEGAL AID AND DEFENDER ASS'N, THE OTHER FACE OF JUSTICE (1973); Gideon's *Broken Promise*, *supra* note 14; RICHARD KLEIN & ROBERT SPANGENBERG, ABA SECTION OF CRIMINAL JUSTICE, INDIGENT DEFENSE CRISIS (1993); SPECIAL COMM'N ON CRIMINAL JUSTICE IN A FREE SOC'Y, ABA SECTION OF CRIMINAL JUSTICE, CRIMINAL JUSTICE IN CRISIS (1988). In addition, the Spangenberg Group, a nationally recognized consulting group, has studied the delivery of indigent defense services in virtually every jurisdiction in the United States. Many of the group's reports document severe funding problems in the jurisdiction being evaluated. See, e.g., THE SPANGENBERG GROUP, A COMPREHENSIVE REVIEW OF INDIGENT DEFENSE IN VIRGINIA (2004), available at <http://www.abanet.org/legalservices/downloads/sclaid/indigentdefense/va-report2004.pdf> [hereinafter SPANGENBERG GROUP, VIRGINIA] (finding that Virginia's indigent system is "deeply flawed" and fails to provide many indigent defendants with effective assistance of counsel, and documenting scores of other reports with similar findings).

<sup>120</sup> For a look at a few of the many stories of innocent defendants who went to trial represented by incompetent or unprepared counsel, see Ken Armstrong & Steve Mills, *Inept Defenses Cloud Verdicts*, CHI. TRIB., Nov. 15, 1999, at 1; BARRY SCHECK, PETER NEUFELD & JIM DWYER, ACTUAL INNOCENCE 163-203 (2003); Barry C. Sheck & Sarah L. Tofte, *Gideon's Promise and the Innocent Defendant*, CHAMPION, Jan.-Feb. 2003, at 38-40.

<sup>121</sup> See Gideon's *Broken Promise*, *supra* note 14, at 7, 12, 26 (reporting that each year thousands of accused poor people who cannot afford counsel are, nonetheless, denied indigent representation).

<sup>122</sup> See Press Release, *supra* note 14, at 1 (estimating that over eleven thousand people annually in Wisconsin go unrepresented because they have an annual income of more than \$3,000).

are willing to risk trial given such threats.<sup>123</sup> The pressure on defendants to plead guilty is particularly intense for the many defendants represented by lawyers who lack the time or resources to provide effective assistance of counsel. Not surprisingly, the vast majority of criminal defendants succumb to that pressure and plead guilty.<sup>124</sup>

In my view, the attitudinal blinders that many judges possess contribute significantly to the inadequacies of the criminal justice system. Most judges, especially those with prosecutorial experience, presume that most defendants are, in fact, guilty, even though some are, in fact, innocent.<sup>125</sup> This presumption of guilt, pro-prosecution perspective not only affects the manner in which many judges rule on motions, evaluate witnesses, and exercise their discretion, but it also adversely affects the willingness of many judges to police law enforcement agents and prosecutors.<sup>126</sup> Judges tolerate sloppy police work because they do not want to be viewed as micro-managing the police.<sup>127</sup> Judicial reluctance to let the guilty go free has meant a decreased use of the exclusionary rule.<sup>128</sup> Similarly, courts are hesitant to dismiss cases because of *Brady* violations or take other steps to reign in prosecutorial misconduct.<sup>129</sup>

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<sup>123</sup> The perception among criminal defendants that they will receive a more severe sentence if they go to trial is almost universal. WILLIAM F. McDONALD, U.S. DEP'T OF JUSTICE, PLEA BARGAINING: CRITICAL ISSUES AND COMMON PRACTICES 100-02 (1985). Indeed, research indicates that most defendants plead guilty because they fear a harsher sentence should they go to trial and lose. *Id.* at 32, 93-107. See also King & Noble, *supra* note 69, at 895-949; *supra* note 13.

<sup>124</sup> Ninety-six percent of the defendants who were convicted in federal courts in 2003 pled guilty or no contest. Bureau of Justice Statistics, U.S. Dep't of Justice, Federal Justice Statistics, <http://www.ojp.gov/bjs/fed.htm> (last visited Feb 18, 2007). Fewer than 5% of state felony cases are resolved by trial. BRIAN OSTROM ET AL., NAT'L CTR. FOR STATE COURTS, EXAMINING THE WORK OF STATE COURTS 44 (2003), available at [http://www.ncsconline.org/D\\_Research/csp/2003\\_Files/2003\\_Criminal.pdf](http://www.ncsconline.org/D_Research/csp/2003_Files/2003_Criminal.pdf). For an extended look at the reasons why innocent defendants plead guilty, see Uphoff, *supra* note 14.

<sup>125</sup> See Alschuler, *supra* note 43, at 1110 (quoting Alaska Superior Court Judge C. J. Occhipinti, "[e]ven in the absence of plea bargaining, I know that ninety-nine percent of all defendants are guilty, but I still give them their fair trials"); David L. Bazelon, *The Defective Assistance of Counsel*, 42 U. CIN. L. REV. 1, 26 (1973) (acknowledging that most federal judges had "the belief - rarely articulated, but . . . widely held - that most criminal defendants are guilty anyway"). For an excellent discussion of the widespread presumption of guilt that permeates the criminal justice system, see Daniel Givilber, *Meaningless Acquittals, Meaningful Convictions: Do We Reliably Acquit the Innocent?*, 49 RUTGERS L. REV. 1317, 1326 (1997).

<sup>126</sup> See Slobogin, *supra* note 54, at 743-45. For an example of the judicial reluctance to curb law enforcement misconduct, see *United States v. Payner*, 447 U.S. 727, 731-33 (1980) (holding that the government's intentional exploitation of the standing doctrine did not warrant exclusion of evidence secured by illegal conduct because the defendant's own Fourth Amendment rights were not violated); *United States v. Russell*, 411 U.S. 423, 435-36 (1973) (drastically limiting the use of the supervisory power doctrine to address questionable law enforcement tactics).

<sup>127</sup> See *Arizona v. Youngblood*, 488 U.S. 51, 58-59 (1988). For a further discussion of the *Youngblood* case, a case in which police negligence led to the conviction and imprisonment of an innocent man, see Uphoff, *supra* note 14, at 767-79, 782-85, 788-90.

<sup>128</sup> See *Hudson v. Michigan*, 126 S. Ct. 2159, 2163-68 (2006) (holding that a violation of the knock-and-announce requirement does not trigger the exclusionary rule).

<sup>129</sup> See, e.g., *United States v. Hasting*, 461 U.S. 499, 499 (1983) (holding that supervisory power doctrine could not be invoked to reverse a conviction in order to discipline offending



Finally, even when courts find error, too many errors are deemed harmless. The expanded use of harmless error not only allows questionable verdicts to stand, it does little to discourage misconduct and sloppy practices in the administration of justice.<sup>130</sup>

Most importantly, judicial attitudinal blinders lead judges to tolerate inept defense lawyers and preside over trials that bear little resemblance to the adversarial contests purportedly demanded by the Constitution. Ignoring their obligation “of raising on his or her initiative, at all appropriate times and in an appropriate manner, matters which may significantly promote a just determination of the trial,”<sup>131</sup> too many trial judges sit idly by while defense counsel makes a mockery of the defendant’s right to effective assistance of counsel.<sup>132</sup> For too many judges, moving cases through the system is of paramount concern.

Nor do appellate judges generally jealously safeguard the defendant’s right to adequate representation. As numerous commentators have observed, appellate courts, including the Supreme Court, have put little teeth into the ineffective assistance of counsel standard.<sup>133</sup> Shockingly poor representation provided by sleeping defense counsel<sup>134</sup> or intoxicated or disbarred lawyers<sup>135</sup> has passed constitutional muster. Moreover, the many reported cases of shoddy

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prosecutors because their conduct was harmless error). Many commentators have highlighted the serious systemic problem of prosecutorial misconduct and criticized judicial inattention to the problem; see Alschuler, *supra* note 13; ANGELA J. DAVIS, *ARBITRARY JUSTICE: THE POWER OF THE AMERICAN PROSECUTOR* (2006); LIEBMAN ET AL., *supra* note 114; Stephen A. Salzberg, *Perjury and False Testimony: Should the Difference Matter So Much?*, 68 *FORDHAM L. REV.* 1537, 1538-39 (2000); Tom Stacy, *The Search for the Truth in Constitutional Criminal Procedure*, 91 *COLUM. L. REV.* 1369 (1991); Steve Weinberg, *The Ctr. for Public Integrity, Anatomy of Misconduct* (2003), <http://www.publicintegrity.org/pm/default.aspx?act=sidebarsb&aid=33>.

<sup>130</sup> See *supra* note 16.

<sup>131</sup> See ABA STANDARDS FOR CRIMINAL JUSTICE: SPECIAL FUNCTIONS OF THE TRIAL JUDGE Standard 6-1.1 (3d ed. 2000).

<sup>132</sup> See, e.g., Stephen B. Bright, *Elected Judges and the Death Penalty in Texas: Why Habeas Corpus Review By Independent Federal Judges Is Indispensable to Protecting Constitutional Rights*, 78 *TEX. L. REV.* 1805, 1812-13 (2000) (noting that trial judges continued to appoint Joe Cannon to defend capital murder cases despite his habitual ineptness).

<sup>133</sup> Many commentators, including Justice Blackmun, have bemoaned the “impotence” of the ineffective assistance of counsel standard established in *Strickland v. Washington*, 466 U.S. 668 (1984). *McFarland v. Scott*, 512 U.S. 1256, 1259-60 (1994) (Blackmun, J., dissenting). For a sampling of the many articles critical of the manner in which courts generally have handled the issue of ineffective assistance of counsel, see COLE, *supra* note 114, at 76-81 (lamenting the extent to which *Strickland* and its state equivalents tolerate abysmal defense lawyering); Matthew J. Fogelman, *Justice Asleep is Justice Denied: Why Dozing Defense Attorneys Demean the Sixth Amendment and Should Be Deemed Per Se Prejudicial*, 26 *J. LEGAL PROF.* 67, 81 (2002) (“The states have almost uniformly adopted the *Strickland* standard . . .”); Bruce A. Green, *Criminal Neglect: Indigent Defense From a Legal Ethics Perspective*, 52 *EMORY L.J.* 1169, 1189-90 (2003) (describing *Heath v. State*, 574 S.E.2d 852 (Ga. Ct. App. 2002), *rev’d*, 588 S.E.2d 738 (Ga. 2003) as “the rare and welcome exception” to the usual judicial toleration of deficient defense representation).

<sup>134</sup> See, e.g., Editorial, *Snoozing Lawyer Ruling Mocks Assistance of Counsel Right*, *HOUSTON CHRON.*, Nov. 2, 2000, at A36 (criticizing the ruling in *Burdine v. Johnson*, 262 F.3d 336 (5th Cir. 2001) (en banc), *cert. denied*, 535 U.S. 1120 (2002) (finding lawyer who admitted sleeping through substantial portion of a capital murder trial effective)).

<sup>135</sup> See Bright, *supra* note 14, at 785-86.

representation are only the tip of a much larger iceberg. Those defendants whose arms were twisted into a guilty plea by a lawyer who has spent no time on the defendant's case are in no position to complain about counsel's inadequate performance.<sup>136</sup> In the end, too many defendants receive too little justice from our criminal justice system.

## CONCLUSION

In light of the growing number of DNA exonerations, more commentators are arguing that many of our underfunded state criminal justice systems are broken and badly in need of reform.<sup>137</sup> Over the past thirty years, a host of reports have highlighted the crisis in funding for indigent defense services and documented the abysmal representation provided many criminal defendants.<sup>138</sup> Yet, reform is difficult in part because every state criminal justice system needs a significant infusion of new funding. In addition to adequately funding defense services, more money should be spent to develop well-structured, well-supervised community sentencing alternatives. Increased funding also is needed to hire more prosecutors, to retain good police officers, and to improve the ability of the police to gather, store, and analyze forensic evidence. Those same dollars, however, are also needed for better roads, schools, and health care. In tough budget times, state legislators win few votes supporting funding increases earmarked for the fair operation of the criminal justice system.

If reform is to come, it is more likely to be spurred by the judiciary. Indeed, some courts have rendered decisions regarding the delivery of indigent defense services that have forced legislative action.<sup>139</sup> Some judges have spearheaded the push for reexamining the justice system and have been receptive to the need for reform.<sup>140</sup>

For the most part, however, the judicial branch has not been diligent enough in ensuring the fair administration of our criminal justice systems. The appellate courts have condoned too much incompetent defense lawyering, too

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<sup>136</sup> For a discussion of the extremely difficult struggle a represented defendant faces in obtaining relief following a guilty plea, see Margaret H. Lemos, Note, *Civil Challenges to the Use of Low-Bid Contracts for Indigent Defense*, 75 N.Y.U. L. REV. 1808, 1821-22 (2000).

<sup>137</sup> See, e.g., COLE, *supra* note 114; Gideon's *Broken Promise*, *supra* note 14; LIEBMAN ET AL., *supra* note 114.

<sup>138</sup> See *supra* notes 14, 119 and accompanying text.

<sup>139</sup> See, e.g., State v. Smith, 681 P.2d 1374 (Ariz. 1984); Arnold v. Kemp, 813 S.W.2d 770, 777 (Ark. 1991); *In re Order on Prosecution of Criminal Appeals*, 561 So. 2d 1130, 1139 (Fla. 1990); Stephan v. Smith, 747 P.2d 816, 849 (Kan. 1987); State v. Peart, 621 So. 2d 780, 791 (La. 1993); State v. Robinson, 465 A.2d 1214, 1217 (N.H. 1983); State v. Lynch, 796 P.2d 1150 (Okla. 1990).

<sup>140</sup> For example, Chief Justice I. Beverly Lake, Jr. of the North Carolina Supreme Court initiated the discussion that led to the creation of the North Carolina Actual Innocence Commission. See Christine C. Mumma, *The North Carolina Actual Innocence Commission: Uncommon Perspectives Joined by a Common Cause*, 52 DRAKE L. REV. 647, 648-49 (2004). See also Justice John Paul Stevens, Assoc. Justice, Supreme Court of the United States, Address to the ABA Thurgood Marshall Awards Dinner Honoring Abner Mikva (Aug. 6, 2005), [http://www.supremecourtus.gov/publicinfo/speeches/sp\\_08-06-05.html](http://www.supremecourtus.gov/publicinfo/speeches/sp_08-06-05.html) (noting that there are "serious flaws in our administration of criminal justice").

much prosecutorial misconduct, and too much overreaching by the police. In the end, judicial tolerance of so much unacceptable behavior may in part be influenced by the blinders that Guthrie describes, but may also be a product of a more limited vision of the judge's role.<sup>141</sup> Articulating such a vision, Chief Justice Rehnquist argued that the Court should defer to the legislative branch, which has the "primary responsibility" for making difficult policy choices that are part of any sentencing scheme.<sup>142</sup> In his view, "[w]e do not sit as a 'superlegislature' to second-guess these policy choices."<sup>143</sup>

Appellate judges cannot continue to be so deferential to the legislative and executive branches on matters relating to the fair administration of the criminal justice system. Rather, it is the judiciary that must serve as an "excellent barrier to the encroachments and oppressions of the representative body."<sup>144</sup> It is the duty of the co-equal, independent judiciary to

guard the Constitution and the rights of individuals from the effects of those ill humors, which the arts of designing men, or the influence of particular conjectures, sometimes disseminate among the people themselves, and which though they speedily give place to better information, and more deliberate reflection, have a tendency, in the meantime, to occasion dangerous innovations in the government, and serious oppressions of the minor party in the community.<sup>145</sup>

Admittedly, declaring a state's system for delivering defense services to be constitutionally deficient, for example, which in turn forces the state legislature to allocate millions of dollars of additional funding, may draw the ire of the other two branches and of the public as well. It requires, however, "an uncommon portion of fortitude in the judges to do their duty as faithful guardians of the Constitution, where legislative invasions of it had been instigated by the major voice of the community."<sup>146</sup>

The nation's Founders heeded the advice given in *The Federalist Papers* and provided for an independent federal judiciary with appointed positions not subject to the whim and pressures of the electorate.<sup>147</sup> Elected state appellate judges are not so fortunate. Appellate judges have been publicly attacked and voted out of office, not for misjudging or bad judging, but for taking positions perceived by some as pro-criminal defendant.<sup>148</sup> It is incumbent on the bar of

<sup>141</sup> For a vigorous defense of this more limited role, see *Dickerson v. United States*, 530 U.S. 428, 449-65 (2000) (Scalia, J., dissenting). See also William J. Stuntz, *The Uneasy Relationship Between Criminal Procedure and Criminal Justice*, 107 *YALE L.J.* 1, 76 (1997) (opining that judicial reluctance to impose restraints on the criminal process "seems to have been motivated by a desire not to trench on the prerogatives of the politicians").

<sup>142</sup> *Ewing v. California*, 538 U.S. 11, 28 (2003).

<sup>143</sup> *Id.*

<sup>144</sup> *THE FEDERALIST* NO. 78, at 465 (Alexander Hamilton) (Clinton Rossiter ed., 1961).

<sup>145</sup> *Id.* at 469.

<sup>146</sup> *Id.*

<sup>147</sup> *Id.*

<sup>148</sup> Richard Carelli, *Judge Pays Price of Her Convictions*, *L.A. TIMES*, Dec. 1, 1996, at A44 (reporting that Tennessee Supreme Judge Penny White lost a retention election for voting to overturn a murderer's death sentence); Abner J. Mikva, *Judicial Pest Control*, 148 *N.J. L.J.* 1059 (1997) (observing that Chief Justice Rose Bird of California was denied a second term by California voters because of her positions in several death penalty cases). For an excellent look at the extent to which political pressures negatively affect the fairness of capital cases, see Bright & Keenan, *supra* note 52.

each state, therefore, to do its best to educate the public about the importance of an independent judiciary and to promote the value of non-partisan, impartial judicial decisionmaking.

Given electoral politics and the pro-prosecution perspective of a significant numbers of appellate judges, it is hard to be particularly optimistic about criminal justice reform. Certainly some judges do change dramatically during their tenure on the bench.<sup>149</sup> Nonetheless, unless and until more judges recognize the effects of their attitudinal blinders and acknowledge the significant flaws in our criminal justice system, it is unlikely that we shall see many appellate courts taking a more active role in policing the system.

Finally, I have argued that biased judging at the trial level also threatens the fair operation of our criminal justice system. Indeed, if we are to provide criminal defendants the fair trial promised them by our Constitution, it is critical that judges strive to keep their biases in check. As Guthrie's article demonstrates, that will not be easy. At the same time, we also need more trial judges to heed the advice given by Justice Brennan in his lecture on judging honoring Justice Cardozo.<sup>150</sup> Brennan recognized that the brutality of a criminal case often threatens to overwhelm even the most "seasoned judge."<sup>151</sup> "Yet the judge's job is not to yield to the visceral temptation to help prosecute the criminal, but to preserve the values and guarantees of our system of criminal justice, whatever the implications in an individual case."<sup>152</sup> Good judges not only "unite the requisite integrity with the requisite knowledge,"<sup>153</sup> but they possess the courage to do what is right regardless of the personal consequences. Doing what is right may even mean that a good trial judge may purposefully "misjudge" in a compelling case.<sup>154</sup>

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<sup>149</sup> See Randall Coyne, *Marking the Progress of a Humane Justice: Harry Blackmun's Death Penalty Epiphany*, 43 U. KAN. L. REV. 367, 368 (1995) (describing Justice Blackmun's transformation to a death penalty opponent). *But see* Martha J. Dragich, *Justice Blackmun, Franz Kafka, and Capital Punishment*, 63 MO. L. REV. 853 (1998) (arguing that while Justice Blackmun's position on the death penalty changed over the years his personal views remained constant).

<sup>150</sup> Brennan, *supra* note 2.

<sup>151</sup> *Id.* at 11.

<sup>152</sup> *Id.*

<sup>153</sup> See THE FEDERALIST NO. 78, *supra* note 144, at 471.

<sup>154</sup> In *Rummel v. Estelle*, 445 U.S. 263 (1980) and in *Ewing v. California*, 538 U.S. 11 (2003), the Supreme Court declared that enhanced sentences under recidivists statutes were not grossly disproportionate under the Eighth Amendment such that the life sentence in *Rummel* and the twenty-five to life sentence in *Ewing* did not constitute cruel and unusual punishment. Many judges find themselves, therefore, in the difficult dilemma of having to impose a life sentence on a defendant for a third conviction involving a minor felony even though the judge feels that such a sentence is unjust because the defendant's crime does not warrant such a harsh result. If the judge "misjudges" and refuses to impose the life sentence, he or she is very likely to be reversed should the state decide to appeal. Arguably, a conscientious judge is not engaging in bad judging by failing to follow clear law in such a case, if she feels justice demands it and clearly sets forth her reasons for her decision. A full discussion of this point is, however, beyond the scope of this article.