A PREFERENCE FOR VENGEANCE: THE DEATH PENALTY AND THE TREATMENT OF PRISONERS IN GEORGIA

A report on human rights violations in Georgia

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OUTLINE

INTRODUCTION AND SUMMARY

> The mood and temper of the public in regard to the treatment of crime and criminals is one of the most unfailing tests of the civilization of any country.
>
> - Winston Churchill

In its application to host the 1996 Olympic games, Atlanta described itself as "the birthplace of the Civil Rights Movement," "birthplace of the modern human rights movement," and "for many the modern capital of human rights," and promised that the "Atlanta Olympiad will stress the justice and equality inherent in fair play."

Yet the ideals of human rights, justice and equality are often not practiced in Georgia's treatment of crime and criminals. A report by the Georgia Supreme Court's Commission on Racial and Ethnic Bias in 1995 concluded that "there are still areas within the state where members of minorities, whether racial or ethnic, do not receive equal treatment from the legal system."[1]

Georgia has executed more people in this century than has any other state in the United States. Georgia has one of the highest rates of incarceration in the United States, the nation with the highest incarceration rate in the world. Although African Americans are only 27 percent of Georgia's population, almost 70 percent of those in Georgia's prisons are African American. Twelve of the 20 persons executed in Georgia's electric chair since 1976 have been African Americans.

One reason that members of racial minorities do not receive equal treatment is that they are excluded from important positions in the legal system where decisions are made. Although the majority of victims of crime and those accused of crimes in Georgia's courts at African American, African Americans are underrepresented among judges, prosecutors, jurors and attorneys. The state's law schools refused admission of African American students until well into the twentieth century. As a result, African Americans are underrepresented among lawyers in the state. That underrepresentation is most apparent among the more important decision-makers in the courts: judges and prosecutors. Only fifteen of Georgia's 169 Superior Court judges — eight percent — are African American. All 46 elected District Attorneys who prosecute cases in the courts are white.

To add insult to injury, the Confederate battle flag is displayed in most Georgia courtrooms. Georgia incorporated the Confederate battle flag into its state flag in 1956 to symbolize its rejection of the federal constitution and the United States Supreme Court's decision requiring integration of the public schools.[2] The flag has been described as follows by a United

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1. Georgia Supreme Court Commission on Racial and Ethnic Bias, *Let Justice Be Done: Equally, Fairly, and Impartially*, page 9 (August, 1995).

2. *Brown v. Board of Education*, 347 U.S. 483 (1954) (holding that racial segregation in the public schools violates the equal

States District Court judge:

> The predominant part of the 1956 flag is the Confederate battle flag, which is historically associated with the Ku Klux Klan. The legislators who voted for the 1956 bill knew that the new flag would be interpreted as a statement of defiance against federal desegregation mandates and an expression of anti-black feelings.[3]

Despite the fact that the flag stands for white supremacy, denial of equal protection of the laws to African Americans, and defiance of federal authority, it is displayed in most Georgia courtrooms. The City of Atlanta and a few other government agencies have refused to display the flag, but it remains in most of Georgia's courtrooms.

While it remains to be seen whether others will agree with the *New York Times* that there is a "distinct bargain-basement feel to the Olympic Stadium and the entire Games,"[4] there is no doubt that Georgia provides an inferior, bargain-basement quality of justice to poor people accused of crimes in its courts. The Georgia Supreme Court's Commission on Racial and Ethnic Bias also found that poor citizens of Georgia did not receive fair or equal treatment in the state's courts. Poor people seldom receive adequate legal representation. Usually, Georgia's elected judges appoint inexperienced, underpaid and overworked lawyers to represent poor people accused of crimes.

Those condemned to death by this system are electrocuted in Georgia's electric chair. Those who are sentenced to terms of incarceration are sent to prisons throughout the state. Over 33,000 people are in Georgia's prisons. The prisons are managed by Wayne Garner, an undertaker, a former state senator and a political crony of Georgia governor Zell Miller. Although he had no prior experience in prison management, Governor Miller named him Commissioner of the Georgia Department of Corrections. Garner has stated that "one-third of state prison inmates ain't fit to kill,"[5] and has implemented measures to make prison life

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protection clause of the U.S. Constitution); *Brown v. Board of Education*, 349 U.S. 294, 300 (1955) (requiring that desegregation of the public schools proceed "with all deliberate speed.").

3. *Coleman v. Miller*, 885 F.Supp. 1561, 1569 (N.D. Ga. 1995). *See also* Julius Chambers, *Protection of Civil Rights: A Constitutional Mandate for the Federal Government*, 87 Mich. L. Rev. 1599, 1601 n.9 (1989).

4. Jere Longman, "Olympian Problems," *New York Times*, June 19, 1996 at B10.

5. *Atlanta Constitution*, January 5, 1996, page F-1.

in Georgia as harsh and degrading as possible. Educational programs have been eliminated. As more prisoners are being sent to prison, costs have been cut.

This report was prepared by the Southern Center for Human Rights, a nonprofit, public interest human rights organization which focuses on the human rights of prisoners and those facing the death penalty in the South. For the last 14 years the Center, a regional program, has operated out of Atlanta and has been involved in dealing with issues of criminal justice and corrections throughout Georgia. While there are numerous areas in which Georgia needs to improve its human rights record in order to live up to its promises to the world, this report describes the human rights issues with regard to capital punishment and prisoners.

Atlanta, June 1996.

STATISTICS REGARDING GEORGIA'S CRIMINAL COURT SYSTEM

Georgia's prison population

Georgia's prison population	33,477
Percentage of Georgia's prison population that is African American	68
Georgia's death row population	103

Executions and lynchings in Georgia

Number of executions by the State of Georgia, 1608 - present	1,154
Number of lynchings documented in Georgia, 1608 - present	460
Number of children executed, 1608 - present	47
Number of women executed, 1608 - present	20
Number of executions by the State of Georgia since 1900:	673
Number of African Americans executed between 1930 and 1972:	337
Number of whites executed between 1930 and 1972:	75
Number of African Americans executed under current death penalty statue (upheld in 1976 by U.S. Supreme Court)	12
Number of white persons executed under current statute	8
Number of African Americans executed under current capital	

statute who were sentenced to death by all-white juries:	6
Percentage of homicides in Georgia in which the victim of the crime is African American	65
Percentage of cases in which executions have been carried out in which the victim of the crime was white	90
Number of death sentences imposed under current law adopted in 1973	324

Georgia's criminal justice system

Percentage of Georgia's population that is African American	27
Number of white judges on Georgia's Superior Courts	152 (90 %)
Number of African American Superior Court judges	15 (8 %)
Number of white District Attorneys in Georgia's 46 judicial circuits	46
Number of African American District Attorneys	0

Prosecutorial discretion in seeking the death penalty
(Georgia prosecutors have complete discretion in deciding whether to seek the death penalty in any eligible case)

Percentage of cases involving African Americans charged with crimes against white persons in which Georgia prosecutors seek death	70
Percent of the cases involving white persons charged with the murder of another white in which Georgia prosecutors seek death	32
Percentage of cases involving African Americans charged with the murder of another African American in which Georgia prosecutors seek death	15
Percentage of cases involving white persons charged with murders of African Americans in which Georgia prosecutors seek death	19

Sentencing disparities in capital cases*

Percentage of cases involving white victims in which death is imposed	11
Percentage of cases involving African American victims in which	

death is imposed	1
Percentage of cases involving a African American accused of a crime against a white in which the death penalty is imposed	22
Percentage of cases involving a white person accused of a crime against a white in which the death penalty is imposed	8
Percentage of cases involving an African American accused of a crime against an African American in which the death penalty is imposed	1
Percentage of cases involving a white person accused of a crime against a African American in which the death penalty is imposed	3

Sentencing disparities in drug cases

Percentage of those serving sentences of life imprisonment for a second drug offense who are African American	98.4
Percentage of those serving sentences of life imprisonment for a second drug offense who are white	1.6

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* Based on studies described in David C. Baldus, George G. Woodworth & Charles A. Pulaski, Jr., *Equal Justice and the Death Penalty: A Legal and Empirical Analysis* (1990).

GEORGIA'S DEATH PENALTY: VIOLATIONS OF THE HUMAN RIGHTS OF RACIAL MINORITIES, THE POOR, AND THE DISADVANTAGED

> *We are killing the mentally retarded without serious qualm. We are killing persons for crimes they committed as children. And it is increasingly difficult not to notice and admit we are mainly executing people of marginal intelligence, doubtful sanity, debilitating poverty. The death penalty has become an act of class warfare, fought top-down against the poor and incompetent.*
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> - Tom Teepen, *Atlanta Journal & Constitution*, Sept. 5, 1987

> *[T]he only purpose for the death penalty, as I see it, is vengeance — pure and simple vengeance.*

- U.S. Attorney General Janet Reno, National Press Club, July 1, 1993

Capital punishment is society's final assertion that it will not forgive.
- Dr. Martin Luther King, Jr.

Georgia has carried out more executions in the twentieth century, 675, than any other state in the United States. In a case from Georgia, *Furman v. Georgia*, the United States Supreme Court held in 1972 that the death penalty violated the U.S. Constitution's prohibition of cruel and unusual punishment. Georgia was among the first states to enact a new death statute in 1973. That statute was upheld by the U.S. Supreme Court twenty years ago.[6] Since then, Georgia has carried out 20 executions. It would have carried out many more were it not for decisions of the U.S. Supreme Court and the lower United States courts preventing executions in particular cases. Over 100 people condemned to death await execution on Georgia's death row. Georgia carries out executions by electrocution, the modern equivalent of burning at the stake.

Three people condemned to die by Georgia's court system in the last twenty years were later found to be innocent. Jerry Banks spent five years on death row before his innocence was established and he was released. He committed suicide not long after his release. Earl Charles spend three and a half years on death row for a crime he did not commit. And Gary Nelson was released after 11 years on death row.

The use of the death penalty varies greatly throughout Georgia. While many murder cases are potentially capital cases, the death penalty is sought in only a small percentage of those cases. Whether to seek the death penalty is a decision left exclusively to each of Georgia's 46 prosecutors. The prosecutors (District Attorneys) are elected in judicial districts throughout the state. All 46 prosecutors are white. There are no statewide guidelines or standards governing when prosecutors may seek the death penalty.

Due in large part to the wide discretion given Georgia's prosecutors in deciding whether to seek the death penalty, capital punishment in Georgia is characterized by gross racial disparities. The death penalty is imposed primarily in cases in which the victim is white. If the person accused of the crime is

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6. The Supreme Court upheld Georgia's capital punishment statute on July 2, 1976, in the case of *Gregg v. Georgia*, 428 U.S. 153 (1976). The same day, the Court upheld the capital punishment statues of Florida and Texas. *Proffitt v. Florida*, 428 U.S. 242 (1976); *Jurek v. Texas*, 428 U.S. 262 (1976).

of African descent, it increases even further the likelihood that death will be imposed.

There are also great geographical disparities within Georgia. Some prosecutors seek the death penalty frequently. Some seldom or never seek it. Under Georgia's new death penalty law enacted in 1973, the most death sentences have come from the Chattahoochee Judicial Circuit, which includes the city of Columbus, in southwest Georgia near the Alabama border. Four people sentenced to death in Columbus since 1973, three of them African Americans, have been executed. That is more than in any other judicial circuit in Georgia. There are nine death penalty cases pending trial in the courts in Columbus at this time — more than in Atlanta or other parts of the state with greater populations and far more crimes.

The death penalty is almost exclusively for the poor. The major consequence of poverty for a poor person facing the death penalty is inadequate legal representation. The locally elected judge appoints a lawyer to defend a person who cannot afford a lawyer. Many judges appoint lawyers who are not capable or willing to investigate the facts and defend a case properly. Lawyers appointed to defend capital cases are inadequately compensated for the demanding task of defending a capital case and often provided no funds to investigate the case or present expert testimony. Many of the attorneys appointed to defend capital cases lack the competence and skills necessary to try a capital case.

Because of the inadequacy of the lawyers appointed and the denial of resources for expert witnesses or investigative assistance, mental retardation and mental illness are often not adequately addressed in many cases in which death is considered as a punishment. Georgia put to death two mentally retarded men before passing a law that prohibits further execution of the mentally retarded. Georgia law still allows the execution of persons suffering from schizophrenia and other major mental illnesses. Georgia law still allows the execution of children as young as 17.

All of Georgia's judges, at both the trial and appellate level, are popularly elected. (In contract, in the courts of the United States (the federal courts), judges are appointed by the President and confirmed by the United States Senate. Once confirmed, the judges have tenure for life.) As a result, capital cases tried in the state courts may be tried before judges who are more interested in winning the next election than in enforcing the protections of the Bill of Rights.[7]

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7. For a discussion of the political pressures that often affect state court judges, see Stephen B. Bright & Patrick J. Keenan, *Judges and the Politics of Death: Deciding Between the*

The case of Wilburn Dobbs, one of the condemned men on Georgia's death row, illustrates the racial discrimination and incompetent legal representation that is found in capital cases in Georgia. Dobbs, an African American man, was referred to at his trial as "colored" and "colored boy" by the judge and the defense lawyer and called by his first name by the prosecutor.[8] Two of the jurors who sentenced Dobbs to death for the death admitted after trial to using the slur "nigger."

Dobbs stood trial for his life only two weeks after being indicted for murder and four other offenses. He was assigned a court-appointed lawyer who later admitted that he did not know for certain until the day of trial that he was going to represent Dobbs, and "didn't know for sure what he was going to be tried for." On the morning set for trial, the lawyer asked for a postponement, saying that he was "not prepared to go to trial" and that he was "in a better position to prosecute the case than defend it." Nevertheless, the trial court denied the motion and the case proceeded to trial. A federal court described the defense lawyer's attitude towards African Americans as follows:

> Dobbs' trial attorney was outspoken about his views. He said that many blacks are uneducated and would not make good teachers, but do make good basketball players. He opined that blacks are less educated and less intelligent than whites either because of their nature or because "my granddaddy had slaves." He said that integration has led to deteriorating neighborhoods and schools and referred to the black community in Chattanooga as "black boy jungle." He strongly implied that blacks have inferior morals by relating a story about sex in a classroom. He also said that when he was young, a maid was hired with the understanding that she would steal some items. He said that blacks in Chattanooga are more troublesome than blacks in Walker County [Georgia]. . . .
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> The attorney stated that he uses the word "nigger" jokingly.[9]

During the penalty phase of Dobbs' trial, when the jury could have heard anything about his life and background and any

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Bill of Rights and the Next Election in Capital Cases, 75 Boston University Law Review 759 (1995).

8. *Dobbs v. Zant*, 720 F.Supp. 1566, 1578 (N.D. Ga. 1989), *aff'd*, 963 F.2d 1519, 1523 (11th Cir. 1991), *remanded*, 113 S.Ct. 835 (1993).

9. *Dobbs v. Zant*, 720 F.Supp. at 1577.

reasons why Dobbs should not have been sentenced to death, the lawyer presented no evidence. Nonetheless, despite the racism and the wholly inadequate legal representation, the courts of Georgia and the United States have repeatedly upheld Dobbs' conviction and sentence.

Racial discrimination

Racial discrimination remains a prominent feature of capital punishment in Georgia, as it has been throughout the state's history. Twelve of the 20 people executed by Georgia under the death penalty law adopted in 1973 have been African Americans. Six of the 12 African Americans executed were convicted and sentenced to death by all-white juries.

Although over sixty percent of the victims of murders in Georgia each year are African American, 18 of the 20 cases in which executions have been carried out under the current law involved white victims. Over eighty percent of those on Georgia's death row are there for the murders of white victims.

The history of racial violence

Georgia's death penalty is a direct descendant of racial oppression, racial violence and lynching. From colonial times until the Civil War, the criminal law in Georgia expressly differentiated between crimes committed by and against blacks and whites.[10] Georgia law required that the rape of a free white female by a black man be punished by death, while the rape by anyone else of a free white female was punishable by a prison term not less than two nor more than 20 years. The rape of a black woman was punishable "by fine and imprisonment, at the discretion of the court." Disparate punishments — exacted by both the courts and lynch mobs — based upon both race of victim and race of defendant continued in practice after the abolition of slavery.

The threat that Congress might pass an anti-lynching statute in the early 1920s led Georgia and other southern states to "replace lynchings with a more `[humane] . . . method of racial control' — the judgment and imposition of capital sentences by all-white juries."[11] As historian Dan Carter of Emory University

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10. A. Leon Higginbotham, Jr., *In the Matter of Color: Race in the American Legal Process*, page 256 (1978).

11. Douglas L. Colbert, *Challenging the Challenge: Thirteenth Amendment as a Prohibition Against the Racial Use of Peremptory Challenges*, 76 Cornell Law Review 1, 79 (1990) (quoting Michael Belknap, *Federal Law and Southern Order* 22-26

observed:

> Southerners . . . discovered that lynchings were untidy and created a bad press. . . . [L]ynchings were increasingly replaced by situations in which the Southern legal system prostituted itself to the mobs' demand. Responsible officials begged would-be lynchers to 'let the law take its course,' thus tacitly promising that there would be a quick trial and the death penalty . . . . [S]uch proceedings retained the essence of mob murder, shedding only its outward forms.[12]

The process of "legal lynchings" was so successful that in the 1930s, two-thirds of the people executed were black.[13]

As racial violence was achieved through the criminal courts instead of by lynch mobs, Georgia carried out more executions than any other state in the twentieth century. Georgia carried out 673 executions between 1900 and the end of 1994.[14] Between 1924 and 1972, Georgia executed 337 black people and 75 white people.[15]

In part because of this history of discrimination, the United States Supreme Court concluded in 1972 in a case from Georgia that the death penalty violated the prohibition of "cruel and unusual punishment" contained in the United States Constitution.[16] But the stop at what Justice Thurgood Marshall called "a major milestone in the long road up from barbarism" was only temporary. New death penalty statutes were enacted almost imme-
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(1987)).

12. Dan T. Carter, *Scottsboro: A Tragedy of the American South* (rev. ed. 1979) at 115.

13. Douglas L. Colbert, *Challenging the Challenge: Thirteenth Amendment as a Prohibition Against the Racial Use of Peremptory Challenges*, 76 Cornell Law Review 1, 80 (1990). *See also* W. Fitzhugh Brundage, *Lynching in the New South: Georgia and Virginia, 1880-1930* (1993).

14. "The Pace of Executions: Since 1976 . . and Through History," *The New York Times*, Dec. 4, 1994, § 4, p. 3.

15. Prentice Palmer & Jim Galloway, "Georgia electric chair spans 5 decades," *The Atlanta Journal*, Dec. 15, 1983, at page 15A. After adopting electrocution as a means of execution in 1924, Georgia put more people to death than any state and "set national records for executions over a 20-year period in the 1940s and 1950s." *Id.*

16. *Furman v. Georgia*, 408 U.S. 238 (1972).

diately by Georgia and a number of other states, and the United States Supreme Court upheld those statutes in 1976.

Discrimination under the current statute

Georgia's current death penalty statute allows imposition of the death penalty for any murder accompanied by a robbery, burglary, rape, or kidnapping, as well as any murder considered "outrageously horrible, vile and inhuman."[17] These provisions give prosecutors vast discretion to decide whether to seek the death penalty in the many cases for which it is authorized.

For the most part, African Americans have no voice in the two most important decisions that determine whether death will be imposed for a crime: the decision by the prosecutor with regard to whether to seek the death penalty and whether to resolve a case with a plea bargain and a sentence less than death. In many cases, the critical decisions whether the death penalty will be sought or imposed are made by persons who have overt or unconscious racial biases. Even after prosecutors make those decisions, African Americans may be excluded from later decisions about whether to impose death.

Dr. Joseph Lowery, President of the Southern Christian Leadership Conference, has observed that the criminal justice system is the institution least affected by America's Civil Rights Movement. Judges and prosecutors are still elected in judicial circuits drawn to dilute the voting strength of racial minorities. People of color are often excluded in the jury selection process. As a result, often the only person of color who participates in the process of deciding whether the death penalty will be imposed is the accused.

Race makes a case that would otherwise not be a capital case into one. Interracial murders are only a small percentage of the total homicides. However, Georgia prosecutors seek the death penalty in 70 percent of cases involving black defendants and white victims. They seek the death penalty in less than 35 percent of cases involving other racial combinations.

The perfunctory capital trial — the legal lynching — is not limited to Georgia's past. Capital trials may still last as little as two or three days. Those facing the death penalty are frequently represented by inept court-appointed lawyers, who may care little about their clients. In at least five cases tried in Georgia in which the death penalty was imposed in the last twenty years, the accused were referred to by racial slurs *by their own lawyers* during the trial. As will be discussed further in the

17. Off. Code Ga. Ann. §§ 16-5-1, 17-10-30.

next section, the poor quality of legal representation often leaves those facing the death penalty virtually defenseless.

Discrimination by prosecutors

An investigation of all of the murder cases prosecuted between 1973 and 1990 in Georgia's Chattahoochee Judicial Circuit, which includes the city of Columbus, revealed how race plays a role in the imposition of the death penalty. The study found that in cases involving the murder of a white person, prosecutors often met with the victim's family and discussed whether to seek the death penalty.[18]

For example, in a case involving the murder of the daughter of a prominent white contractor, the prosecutor contacted the contractor and asked him if he wanted to seek the death penalty. When the contractor replied in the affirmative, the prosecutor said that was all he needed to know. He obtained the death penalty at trial, and was rewarded with a contribution of $5,000 from the contractor when he ran successfully for judge in the next election.[19] The contribution was the largest received by the District Attorney in his campaign for judge.

In several other cases in Columbus, the District Attorney issued press releases announcing that he was seeking the death penalty after meeting with the family of a white victim. On the other hand, when a poor African American who had served in the U.S. military was killed on the streets of Columbus, the District Attorney was not even aware of the death. Prosecutors did not meet with African Americans whose family members had been murdered. Most African American families were not even notified that the case had been resolved. As a result of these practices, although African Americans were the victims of 65 percent of the homicides in the judicial circuit that includes Columbus, 85 percent of the capital cases in that circuit involved white victims.

Exclusion of racial minorities from juries

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18. The evidence was gathered and presented in the case of *State v. Brooks*, Super. Ct. of Muscogee Co., Ga., Indictment Nos. 3888, 54606 (1991) [cited hereinafter as "Hearing on Racial Discrimination"]. The evidence is collected in *Chattahoochee Judicial District: The Buckle of the Death Belt*, published by the Death Penalty Information Center, Washington, DC, 1991.

19. Clint Claybrook, "Slain girl's father top campaign contributor," *Columbus (Ga.) Ledger-Enquirer*, Aug. 7, 1988 at page B-1.

The prosecutor's decision to seek the death penalty may never be reviewed by a person of color sitting as a juror. Many capital cases are tried in predominantly white suburban communities, such as Cobb and Douglas Counties, where there are so few persons of color in the community that there is little likelihood that they will be represented on the jury. But even in communities where there is a substantial number of people of color in the population, prosecutors are often successful in preventing or minimizing participation by minorities.

During jury selection for a capital trial, the judge or the prosecutor asks potential jurors if they are conscientiously opposed to the death penalty. If they are and cannot put their views aside, the state is entitled to have those people removed from the jury.[20] This "death qualification" process normally results in the removal of more prospective jurors who are African American than of white persons because African Americans often have reservations about the death penalty because it has been used in a racially discriminatory manner.

Once a group of people have been qualified for jury service, each side is given a number of additional discretionary strikes to remove potential jurors. The prosecution is given 10 strikes in a capital case in Georgia law. Many prosecutors use these discretionary strikes to remove any African Americans who are left as potential jurors from service.

Joseph Briley, the prosecutor in Georgia's Ocmulgee Judicial Circuit tried 33 death penalty cases in his tenure as district attorney between 1974 and his resignation in 1994. Of those 33 cases, 24 were against African American defendants.[21] In the cases in which the defendants were black and the victims were white, Briley used 94 percent of his discretionary jury challenges — 96 out of 103 — against black citizens.[22] When a prosecutor uses the overwhelming majority of his jury strikes against a racial minority, that part of the community is barred from participating in the process. The jury does not reflect the conscience of the community.

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20. *Wainwright v. Witt*, 469 U.S. 810 (1985); *Witherspoon v. Illinois*, 391 U.S. 510 (1968).

21. Charts showing most of the prosecutor's capital trials are included in *Horton v. Zant*, 941 F.2d 1449, 1468-70 (11th Cir.1991), *cert. denied,* 117 L.Ed.2d 652 (1992). Two other capital cases were tried against white defendants before the prosecutor left office. *Tharpe v. State*, 416 S.E.2d 78 (Ga. 1992); *Fugate v. State*, 431 S.E.2d 104 (Ga. 1993).

22. *Horton v. Zant*, 941 F.2d at 1458.

African Americans and other people of color continue to be excluded from jury service, even after the Supreme Court's decision in *Batson v. Kentucky*,[23] which was supposed to end the discrimination that had taken place in the jury selection process. Under the procedure adopted in the *Batson* decision, if a prosecutor strikes a disproportionate number of black jurors, he or she is required to give reasons for the strikes. Georgia's elected trial judges then decide if the strikes are due to race or some legitimate reason having nothing to do with race.

Many judges are former prosecutors who may have hired the district attorneys appearing before them. Even if the judge is not personally close to the prosecutor, he or she may be dependent upon the prosecutor's support in the election to win reelection and remain in office. Thus, it may be personally difficult and politically dangerous for a judge to reject a reason proffered by a prosecutor for striking a person of color.

The Georgia Supreme Court has shown very little willingness to scrutinize the use of jury strikes to eliminate people of color from juries. The Court routinely upholds convictions and death sentences where a grossly disproportionate number of African Americans have been excluded from jury service by the prosecutor's discretionary jury strikes.

Racial disparities in infliction of death

The lack of racial diversity among judges, jurors, prosecutors and lawyers has a substantial impact on the quality of justice which people of color receive in Georgia's courts. An African American member of the Georgia Supreme Court has observed that "[w]hen it comes to grappling with racial issues in the criminal justice system today, often white Americans find one reality while African Americans see another."[24] Yet when the criminal justice system decides whether an African American will lose his life or freedom, the decision is too often based only on the version of "reality" seen by white people.

Racial disparities occur in all types of sentencing in the courts of Georgia, but they are particularly evident in death penalty cases. Although African Americans were the victims of 63.5 percent of the murders in Georgia between 1976 and 1980, 85 percent of the cases in which death was imposed during that

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23. 476 U.S. 79 (1986).

24. *Lingo v. State*, 437 S.E.2d 463, 468 (Ga. 1993) (Sears-Collins, J., dissenting, in case in which the majority of the court upheld a prosecutor's striking of 11 African Americans during jury selection in a capital case).

period involved murders of whites.[25]

A comprehensive study of sentencing patterns in Georgia found that prosecutors are more likely to seek and juries are more likely to impose the death penalty where the victim is white.[26] Defendants charged with murders of white persons received the death penalty in 11 percent of the cases, while defendants charged with murders of blacks received the death penalty in only one percent of the cases. Defendants charged with killing white victims were 4.3 times more likely to receive a death sentence than defendants charged with killing blacks.

Nevertheless, the United States Supreme Court, by a 5-4 vote, held in *McCleskey v. Kemp*[27] that Georgia could carry out its death penalty law despite such racial disparities. The Court accepted the racial disparities as "an inevitable part of our criminal justice system" and expressed its concern that "McCleskey's claim, taken to its logical conclusion, throws into serious question the principles that underlie our entire criminal justice system." Justice William Brennan, in dissent, characterized this concern as "a fear of too much justice."

Racial bias in the infliction of the death penalty is not limited to Georgia. Eleven of the first 14 persons executed in neighboring Alabama under its current death penalty law have been African American.[28] Three of the four executed by Mississippi since 1976 have been African American. An analysis of 28 studies by the U.S. General Accounting Office found a pattern of racial disparities in capital sentencing throughout the country:

> In 82 percent of the studies, race of the victim was found to influence the likelihood of being charged with capital murder or receiving the death penalty, i.e., those who murdered whites were found to be more likely to be sentenced to death than those who murdered blacks. This finding was remarkably consistent across data sets, states, data collection methods, and analytic techniques.[29]

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25. Samuel R. Gross & Robert Mauro, *Death & Discrimination: Racial Disparities in Capital Sentencing*, pages 43-43 (1989).

26. The studies are discussed extensively in Baldus et al., *Equal Justice and the Death Penalty* (1990), and in the Supreme Court's decision in *McCleskey v. Kemp*, 481 U.S. 279 (1987).

27. 481 U.S. 279 (1987).

28. NAACP Legal Defense and Educational Fund, *Death Row U.S.A.*, at 4-7 (Winter 1995).

29. U.S. General Accounting Office, *Death Penalty Sentencing: Research Indicates Pattern of Racial Disparities*, page 5

Nevertheless, public officials and courts in Georgia and elsewhere have been remarkably indifferent to the racial discrimination in the criminal justice system. After it was discovered that a prosecutor instructed jury commissioners in one county to underrepresent black citizens on the master jury lists, Georgia Attorney General Michael Bowers defended the prosecutor's actions all the way to the United States Supreme Court, insisting upon the death penalty for an 18-year old youth sentenced to death by the unconstitutional jury. The U.S. Supreme, however, struck down the conviction and sentence.[30]

William Henry Hance was executed by Georgia in 1994, even though jurors admitted in affidavits that racial slurs had been used during deliberations.[31] No court even held a hearing on the racial attitudes of the jurors who sentenced Hance to death. The Georgia Supreme Court upheld the death sentence in another case where racial slurs were used by jurors during their deliberations.[32]

And the Georgia Supreme Court has refused even to order a hearing on racial disparities in drug sentencing, even though 98.4 percent of those serving sentences of life imprisonment for certain narcotics offenses are African American.[33] The Georgia Supreme Court initially ordered a hearing, but backed down in the face of pressure from Attorney General Bowers who, along with the state's 46 district attorneys, petitioned for rehearing of the decision, arguing it threatened the state's death penalty law.[34]

Legal representation provided the poor in capital cases

The quality of representation in capital cases in Georgia has been so bad that it was singled out by an American Bar Association study of the capital punishment process and described as
(..continued)
(February 1990).

30. *Amadeo v. Zant*, 486 U.S. 214 (1988).

31. *Hance v. Zant*, 463 U.S. 1210 (1994) (Blackmun, J., dissenting from denial of certiorari); Bob Herbert, "Mr. Hance's 'Perfect Punishment,'" *N.Y. Times*, Mar. 27, 1994, at D17; Bob Herbert, "Jury Room Injustice," *N.Y. Times*, Mar. 30, 1994, at A15.

32. *Spencer v. State*, 398 S.E.2d 179 (Ga. 1990).

33. *Stephens v. State*, 456 S.E.2d 60 (Ga. 1995).

34. Emily Heller, "Second Thoughts on Second-Offense Law," *Fulton County Daily Report*, April 3, 1995, at 1, 10.

follows:

> Georgia's recent experience with capital punishment has been marred by examples of inadequate representation ranging from virtually no representation at all by counsel, to representation by inexperienced counsel, to failures to investigate basic threshold questions, to lack of knowledge of governing law, to lack of advocacy on the issue of guilt, to failure to present a case for life at the penalty phase. Even in cases in which the performances of counsel have passed constitutional muster . . . and executions have been carried out, the representation provided has nevertheless been of very poor quality. In some instances, mistakes by counsel have resulted in the execution of one person while that person's codefendant has obtained relief on the identical issue.[35]

The vice president of the Georgia Trial Lawyers Association once described the "simple test used in a lot of counties to show if a defendant receives adequate counsel," called the "mirror test." "You put a mirror under the court-appointed attorney's nose, and if the mirror clouds up, that's adequate counsel."[36]

In many capital cases, judges simply appoint members of the bar in private practice to defend indigents accused of crimes. The lawyers appointed may not want the cases, may receive little or no compensation for the time and expense of handling them, may lack any interest in criminal law, and may not have the skill to defend those accused of crime. In contrast to the prosecutor's virtually unlimited access to experts and investigative assistance, the lawyer defending the indigent accused in a capital case may not have any investigative and expert assistance to prepare for trial and present a defense. As a result, the poor are often represented by inexperienced lawyers who view their responsibilities as unwanted burdens, have no inclination to help their clients, and have no incentive to develop criminal trial skills.

The American Bar Association report pointed to numerous

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35. American Bar Association, *Toward a More Just and Effective System of Review in State Death Penalty Cases*, 40 American University Law Review 1, 65-67. For further discussion of the impact of poverty on the imposition of the death penalty due to the quality of representation provided by court-appointed counsel *see*, Stephen B. Bright, *Counsel for the Poor: The Death Sentence Not for the Worst Crime but for the Worst Lawyer*, 103 Yale Law Journal 1835 (1994).

36. Hal Strauss, "Indigent legal defense called 'terrible,'" *Atlanta Journal-Const.*, July 7, 1985, at A1, A12.

capital trials in Georgia in which attorneys appointed to defend a capital case failed to offer any evidence in mitigation, were unaware of the law, distanced themselves from their clients, and gave arguments that either conceded guilt or did more harm than good. Some people were sentenced to death at trials where they were represented by attorneys trying their first case, by attorneys who slept during parts of the trial, or by attorneys who were absent during parts of the trial.

In one case, two attorneys presented different and conflicting defenses for the same client. One attorney, a former Grand Dragon of the Ku Klux Klan, presented an incredible alibi defense while the other lawyer asserted a mental health defense that acknowledged the accused's participation in the crime.[37]

For a number of years, judges in Columbus appointed a lawyer to capital cases who would not challenge the underrepresentation of black citizens in the jury pools for fear of incurring hostility from the community.[38] As a result, six African Americans were tried by all-white juries in capital cases in that judicial circuit. Many others were tried before juries in which African Americans were underrepresented.

One person who received such representation was Gary Nelson, who spent eleven years on Georgia's death row for a crime he did not commit. Nelson was represented at his capital trial in 1980 by a lawyer who had never tried a capital case. The lawyer was paid at a rate of only $20 per hour. His request for a second lawyer on the case was denied.

The case against Nelson was entirely circumstantial, based on the questionable opinion of a prosecution expert that a hair found on the victim's body came from Nelson. Nevertheless, the appointed lawyer was not provided funds for an investigator and, knowing that a request would be denied, did not seek funds for an expert. The lawyer's closing argument was only 255 words long. He was later disbarred for other reasons.

Nelson had the good fortune to be represented on a *pro bono* basis in post-conviction proceedings by lawyers willing to spend their own money to investigate his case. They discovered that the hair found on the victim's body, which had been linked to Nelson, lacked sufficient characteristics for microscopic comparison. Indeed, the Federal Bureau of Investigation had examined the hair and found that it could not be compared.[39] As a result,

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37. *Ross v. Zant*, 260 Ga. 213, 393 S.E.2d 244, 245 (1990).

38. *See Gates v. Zant*, 863 F.2d 1492, 1497-1500 (11th Cir. 1989), *rehearing en banc denied*, 880 F.2d 293 (1989), *cert. denied*, 493 U.S. 945 (1989).

39. *Nelson v. Zant*, 261 Ga. 358, 405 S.E.2d 250 (1991).

Gary Nelson was released after eleven years on death row. But many are not as fortunate as Nelson and such errors are never discovered.

Inadequate legal representation also leaves the poor without the protections of the Bill of Rights in cases where their lives are at stake. The first person executed under Georgia's current death penalty law, John Eldon Smith, was sentenced to death by an unconstitutionally composed jury, as was another person involved in the same crime who was tried separately in the same county. The other defendant's lawyers challenged the jury composition in state court; Smith's lawyers did not because they were unaware of the Supreme Court decision prohibiting gender discrimination in juries.[40]

A new trial was ordered for the codefendant by the federal court of appeals.[41] At that trial, a jury which fairly represented the community imposed a sentence of life imprisonment. The federal courts refused to consider the identical issue in Smith's case because his lawyers had not preserved it.[42] He was executed. Had the other defendant been represented by Smith's lawyers in state court and vice versa, the other defendant would have been executed and Smith would have obtained federal habeas corpus relief.

The second person executed in Georgia was a mentally retarded offender, convicted despite a jury instruction which unconstitutionally shifted the burden of proof on intent; he was denied relief because his attorney did not preserve the issue for review.[43] The other person involved in the crime, who was more culpable, was granted a new trial on the very same issue.[44] Again, as with the case of John Eldon Smith, a switch of the lawyers would have reversed the outcomes of the cases.

Other cases in which executions have been carried out have had the same poor quality of legal representation. For example,

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40. *Smith v. Kemp*, 715 F.2d 1459, 1469 (11th Cir. 1983) (observing that the unconstitutional jury "provision applied to both juries"), *application denied*, 463 U.S. 1344 (1983), *cert. denied*, 464 U.S. 1003 (1983).

41. *Machetti v. Linahan*, 679 F.2d 236, 241 (11th Cir. 1982), *cert. denied*, 459 U.S. 1127 (1983).

42. *Smith v. Kemp*, 715 F.2d at 1469-1472. *See also id.* at 1476 (Hatchett, J., dissenting).

43. *Stanley v. Kemp*, 737 F.2d 921 (11th Cir.), *application for stay denied*, 468 U.S. 1220 (1984).

44. *Thomas v. Kemp*, 800 F.2d 1024 (11th Cir. 1986).

John Young was represented at his capital trial by an attorney who was dependent on amphetamines and other drugs which affected his ability to concentrate. The attorney was also suffering severe emotional strain, was physically exhausted, and was distracted because of marital problems, child custody arrangements, difficulties in a relationship with a lover, and the pressures of a family business. Young was sentenced to death. A few weeks later, Young met his attorney at the prison yard in the Bibb County Jail. The attorney had been sent there after pleading guilty to state and federal drug charges. Georgia executed John Young on March 20, 1985.

James Messer was given a court-appointed lawyer who, at the guilt phase, gave no opening statement, presented no defense case, conducted cursory cross-examination, made no objections, and then emphasized the horror of the crime in some brief closing remarks. Even though Messer's severe mental impairment was important to issues at both the guilt and penalty phases, the lawyer presented no evidence regarding it because he failed to make an adequate showing to the judge of his need for a mental health expert.[45] He also failed to present evidence of Messer's steady employment record, military record, church attendance, and cooperation with police. In his closing argument to the jury, he repeatedly hinted that death was the most appropriate punishment for his own client.[46] Messer was executed July 28, 1988.

Despite such shocking instances of inadequate representation, the judiciary, the bar and the legislature have done little to improve the situation. Although a Multi-County Public Defender office was established within the Georgia Indigent Defense Council to provide specialists to defend capital cases, the office has never grown beyond four attorneys and thus its impact is limited. As a result, most poor people facing the death penalty in Georgia continue to receive poor quality representation.

Conclusion

There is no likelihood that Georgia will follow the example of South Africa, whose Constitutional Court unanimously concluded last year that the punishment of death is cruel, unusual and degrading.[47] The Constitutional Court, after reviewing the

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45. *Messer v. Kemp*, 831 F.2d 946, 951 (11th Cir. 1987) (en banc), *cert. denied*, 485 U.S. 1029 (1988).

46. *Messer v. Kemp*, 760 F.2d 1080, 1097 (11th Cir. 1985) (Johnson, J., dissenting), *cert. denied*, 474 U.S. 1088 (1986) (Marshall, J., dissenting from denial of certiorari).

47. *In the matter of The State v. Makwanyane and Mchunu*, Constl. Ct. of South Africa No. CCT/3/94, June 6, 1995.

history of capital punishment, concluded, as did Justice Harry A. Blackmun of the U.S. Supreme Court, that "the death penalty experiment has failed" because "no combination of procedural rules or substantive regulations ever can save the death penalty from its inherent constitutional deficiencies."[48]

Georgia lacks leadership to make change. The state's politicians argue over who is most in favor of the death penalty, who is the toughest on crime, who can cause executions to occur more rapidly. This is unfortunate. Georgia, like South Africa, has had capital punishment as part of its harsh legal heritage. Georgia's past, like South Africa's, included repression, apartheid and prejudice. South Africa's enlightening is marked by a changing outlook, in the words of one member of its Constitutional Court, from "vengeance to an appreciation of the need for understanding." Georgia should join South Africa in moving to a new day, but instead it clings to a primitive, racist and discredited form of punishment. It cannot claim to be part of the modern human rights movement and the community of enlightened nations so long as it continues to engage in such primitive practices.

GEORGIA PRISONS AND JAILS: A "GET TOUGH" POLICY THAT IGNORES FUNDAMENTAL HUMAN RIGHTS

A society should be judged not by how it treats its outstanding citizens but by how it treats its criminals.

-Fyodor Dostoevski

One-third of state prison inmates ain't fit to kill.

- Wayne Garner, Commissioner of the Georgia Department of Corrections.[49]

Vengeance and retribution can only go so far... There's a difference between expecting a lot and [maintaining] discipline, and the unconstitutional, demeaning, sadistic types of things some people think are in vogue now.

- Allen Ault, former Commissioner of the Georgia Department of Corrections[50]

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48. *Callins v. Collins*, 114 S.Ct. 1127 (1994) (Blackmun, J., dissenting from the denial of certiorari).

49. *Atlanta Constitution*, January 5, 1996, p. F-1.

50. "Vengeance and Retribution Can Only Go So Far," *Atlanta*

If a society is to be measured by the way it treats those in its custody, Georgia must be judged very harshly. The philosophy of the Georgia prison system is a simple one: keep Georgia's increasing number of inmates incarcerated in the harshest and most degrading conditions at the lowest cost. As ex-Commissioner Ault observed, rehabilitation has become an outmoded concept. Several recent developments in Georgia's prisons have confirmed his observation. Educational programs that gave prisoners the opportunity to earn college degrees are no longer available. Weights and exercise equipment have been removed from prisons. Georgia Attorney General Michael Bowers recently endorsed "removing the frills from prisons, and . . . confining more inmates in barracks-style dormitories" as cost-saving measures.[51] And programs that provided legal assistance to prisoners, while always inadequate, have been cut back even further.

The most dramatic development, however, has been the naming of Wayne Garner as Commissioner of the Georgia Department of Corrections. Garner is an undertaker, a former state senator and a political crony of Governor Zell Miller. He has no prior experience in prison management. Commissioner Garner recently summed up his thoughts on operating Georgia's prison system by stating, "My goal is for the prison experience not to be a pleasant one."[52]

This "get tough on crime" approach is not unique to Georgia. Neighboring Alabama recently reinstituted the chain gang, requiring prisoners to work along roadsides while chained to one another.[53] Other states have also adopted the chain gang and other primitive and degrading methods of punishment.

In the past 15 years, the prison and jail population in the United States has tripled. The United States now has one of the highest incarceration rates in the world. The South has the highest rate of incarceration of any region within the United States. Georgia's rate of incarceration exceeds even this regional average.[54] Georgia's prison population increases at the

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Constitution, November 20, 1995, p. B-1.

51. Mike Bowers, "Making a Case for More Prisons," *Atlanta Constitution*, June 19, 1996, p. A-15.

52. *Atlanta Constitution*, January 5, 1996, p. F-1.

53. Under the threat of a federal lawsuit, however, Alabama recently halted its use of chain gangs. Inmates on road work crews still have their ankles chained together, but they are not chained to other inmates.

54. Bureau of Criminal Justice Statistics, *1994 Sourcebook*

rate of about 10 percent a year, which substantially exceeds the national growth rate. It ranks in the top ten American states in rates of incarceration, and its prison population growth is the second highest of the 50 states.[55] Nevertheless, Attorney General Bowers, the state's chief law enforcement official, recently wrote that in his view Georgia locked up too few prisoners for too little time, and that the state should spend a higher portion of its revenues on prisons.[56]

This report will first describe the situation in Georgia's prisons, the state institutions that house prisoners convicted of more serious crimes (felonies). It then describes the conditions in jails, the institutions run by municipal and county governments throughout the state. Jails house individuals either awaiting trial, convicted of minor offenses, or convicted of major offenses who have not yet been transferred to the state prison system.

Georgia's prisons

As Georgia's prison population sharply *increases*, the Georgia Department of Corrections (DOC) is attempting to *decrease* significantly its spending on housing and caring for prisoners. It is doing so by several methods: privatization of prisons and reductions in prison staff, programming, and essential expenditures, such as medical care.

Georgia is a national leader in the move to privatize prisons. The next three prisons it builds will be turned over to private contractors. The goal is to save $15-20 a day per inmate in costs. This savings will be at a substantial cost in danger to the lives of inmates and guards. The state hopes to save money in large part through cheap labor: a 1993 study by the Georgia Department of Corrections showed that starting salaries at private prisons were 19% lower than those at government run institutions. Georgia already pays its correctional staff low salaries. Entry-level staff receive a lower salary than officers in 30 other states. Experienced corrections officers receive

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of Criminal Justice Statistics, p. 541. This book is published annually. The 1994 Sourcebook (published in 1995) is the most recent collection of criminal justice statistics by the federal government. Georgia's prison population has increased from 16,241 in 1985 to 33,477 in 1995. Georgia Department of Corrections, *Fiscal Year 1995 Annual Report*, p. 14.

55. *1994 Sourcebook of Criminal Justice Statistics*, pp. 541-42.

56. Mike Bowers, "Making a Case for More Prisons," *Atlanta Constitution*, June 19, 1996, at A-15.

lower pay than staff in 36 other states.[57]

The practice of hiring cheap labor to run prisons has been tried by other agencies, occasionally with spectacularly unsuccessful results. The United States Immigration and Naturalization Service (INS) detention facility in Elizabeth, New Jersey, was run by a private firm paying low wages to its employees. After a wave of reports about employee abuses of inmates, and a subsequent riot by inmates, the facility had to be closed.[58]

To save costs, the Georgia DOC has contracted out prison medical care to a small company that offered to run prison medical services at a price substantially below that offered by other private contractors. This has led to inadequate and unqualified medical staffing at a number of Georgia prisons, including one of the state's largest, the Georgia State Prison in Reidsville, and could lead to more untreated illnesses and medical problems among prisoners.[59]

To carry out these major changes in Georgia prisons, the state needed a "tough" prison commissioner whose primary focus would be on saving money, not on providing secure and humane prison conditions. The state's previous commissioner, Alan Ault, was forced out because he was considered by correctional hardliners to be part of the "therapy" crowd. Although Ault noted that "I've always thought of myself as a conservative," his brand of conservatism was not good enough.[60]

He was replaced by Wayne Garner. Commissioner Garner is vigorously pursuing his mandate. He has deemphasized rehabilitation. Inmates are no longer eligible to pursue college degrees. Spending for prison programming will be drastically cut.

Commissioner Garner has applied this same cost-cutting approach to his own department. He intends to replace over 1000 correctional employees. These reductions are primarily slated to come from administrative positions. However, given the DOC's emphasis on saving money, reductions in the number of correction

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57. "Prisons Are Going Private," *Atlanta Constitution*, January 10, 1996, p. B-2. *Sourcebook of Criminal Justice Statistics*, p. 98.

58. "Prisons Are Going Private," *Atlanta Constitution*, January 10, 1996, p. B-2.

59. "Firm Hired To Provide Medical Care at Georgia Prisons Fined For Staff Shortages," *Atlanta Constitution*, April 23, 1996, p. E-5.

60. "Vengeance and Retribution Can Only Go So Far," *Atlanta Constitution*, November 20, 1995, p. B-1.

officers are inevitable. The safety of both staff and inmates will almost certainly be jeopardized as a result.[61]

Commissioner Garner's actions mark a return to America's troubled past, when inmates were kept in abysmal conditions. Inhumane conditions at prisons in Georgia and other states were corrected only by federal court orders. In one case, the United States Supreme Court found the following conditions in an Arkansas prison:

(a) homosexual rape so common "that some potential victims dared not sleep";

(b) inmates "lashed with a wooden-handled leather strap five feet long and four inches wide";

(c) the "Tucker telephone", a hand-cranked device used to administer electrical shocks to various sensitive parts of an inmate's body;

(d) "most of the guards were simply inmates who had been given guns";

(e) a prison system run on the principle of trying to turn a profit (through using inmates as slave labor), which the trial judge characterized as "a dark and evil world completely alien to the free world."[62]

While this description may sound like something from the distant past, sadly it is not. The Georgia Department of Corrections has recently been sued over conditions that are as shocking to the conscience as those described above. In one case, filed by the Southern Center for Human Rights, inmates at a Georgia prison were regularly subjected to placement on the "motorcycle," a metal bed on which their hands, feet, and back were chained for days at a time. A football helmet was placed over each inmate's head. The inmates regularly urinated and defecated on themselves. This type of chaining produced agonizing physical and mental pain.[63] In another recent case, involving Georgia's Autry State Prison, inmates were handcuffed almost nude to fences for

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61. Georgia's prisons are not overstaffed: the state currently has a correction officer to inmate ratio which places it 27th among the 50 states. *Sourcebook of Criminal Justice Statistics*, pp. 94-95.

62. *Hutto v. Finney*, 437 U.S. 678 (1978).

63. The case is *Hannor v. Brinson*. It was filed by the Center in February 1996, in the United States District Court for the Southern District of Georgia, in Savannah.

disciplinary purposes.[64]

Georgia continues to lock up a disproportionate number of African Americans in its prisons. This disparity has existed since the Civil War. In 1899, for instance, there were 2,201 prisoners in Georgia. 1953 of those were African American; only 248 were white.[65] In the wake of the civil rights movement, Georgia's discriminatory treatment of black prisoners was challenged in federal court. For instance, in 1974 a federal court ordered the state' maximum security prison in Reidsville, the Georgia State Prison, desegregated.[66] Still, approximately 68% of inmates in Georgia's prisons today are African American.[67]

Roughly 20 state prisons in Georgia are the subject of court orders mandating improvements in their operations. Commissioner Garner, however, is no friend to judicial oversight of prison conditions. Referring several years ago to a U.S. Supreme Court ruling that inmates should be given access to law books, Garner stated, "To me its an outrage. It just goes to show some of the ridiculous things that the Supreme Court makes us do."[68]

To prevent more "ridiculous things" from happening, Commissioner Garner and his aides have moved to cut off inmates' access to the courts. The DOC recently ended a contract with the Prisoners' Legal Counseling Project, a twenty-year-old organization designed to provide inmates with adequate legal resources. The replacement organization (with two-thirds the funding and one-half the attorneys) is called the "Center for Prisoners' Legal Assistance." It is composed of recent law school graduates, inexperienced lawyers who happen to be friends of a lawyer for the DOC.[69]

The United States Congress recently made it easier for administrators such as Commissioner Garner to escape judicial oversight. In April Congress passed the "Prison Litigation

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64. "Inmate Lawsuit Alleges Abuses," *Atlanta Constitution*, April 26, 1996, p. C-2.

65. Lawrence M. Friedman, *Crime and Punishment in American History*, p. 156.

66. *Guthrie v. Evans*, 93 F.R.D. 390, 391 (S.D. Ga. 1981).

67. *1994 Sourcebook of Criminal Justice Statistics*, p. 546.

68. "Inmates' Legal Access Angers Some Officials," *Columbus (Georgia) Ledger-Enquirer*, July 12, 1989, p. D-4. Garner made this comment when he was a state senator.

69. "Cost of Inmates' Legal Advice Cut," *The Atlanta Journal*, March 30, 1996, p. D3.

Reform Act" (PLRA), which makes it more difficult for prisoners to file lawsuits challenging illegal prison conditions and limits what federal courts can do to correct abuses in prisons.

The PLRA erects a series of hurdles for prisoner litigants. Court orders directing improvements in prison conditions can only last for two years (making it necessary for prisoners to file a new case every several years in order to maintain court oversight over prisons with unconstitutional conditions). The Act restricts the ability of courts to remedy overcrowding by placing restrictions on the power of the courts to issue orders limiting prison populations. Few conditions lawsuits will end in settlement because to settle a case, prison administrators will have to admit that they violated inmates' rights (something that prison administrators are extremely reluctant to do, even if they would otherwise agree to remedy various violations). In cases where prisoners win, their attorneys will be entitled to substantially lower fees than attorneys litigating other types of civil rights claims; these limitations will make it virtually impossible for most private attorneys to represent prisoners.

Given its current practices and the likelihood of reduced oversight by the federal courts, the Georgia prison system can be expected to return to its inhumane conditions of old.

Georgia's jails

Georgia jails have suffered from the same trends as Georgia prisons.[70] The Georgia jail population has more than doubled in the past ten years, a growth rate which has exceeded even the high national growth rate. Georgia now has approximately 20,000 jail inmates.[71] When combined with the state's prison population, the total inmate population of the state is almost 60,000.

Many county jails in Georgia are overcrowded. In April 1996, 36 jails in Georgia exceeded their population capacity. The jail in Clayton County, located just south of Atlanta, held 835 inmates, which was 149% of its rated capacity of 560 inmates. The Spaulding County Jail held 242 inmates — 209% of its rated capacity. The Muscogee County Jail in Columbus held 756 inmates

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70. A jail is an institution run by a city, town, or county. There are 159 counties in Georgia. Almost every one runs its own jail, and some more populated counties operate more than one jail.

71. *1994 Sourcebook of Criminal Justice Statistics*, p. 534 (for information on jail population increase). Georgia Department of Community Affairs, *County Jail Information Report* (April 23, 1996) (current jail population).

— 132% of its rated capacity.[72]

The Civil Rights Division of the U.S. Department of Justice (DOJ) has investigated a number of Georgia jails. On June 1, 1995, for instance, the DOJ issued a report on the Muscogee County Jail in Columbus, Georgia.[73] The report observed the following conditions:

(a) staffing at the jail was "seriously inadequate" (the DOJ's corrections consultant found the jail to be "one of the most dangerously understaffed jails that I have ever evaluated");

(b) medical care at the jail was extremely limited: one doctor provided medical care for five hours a week for 1000 inmates;

(c) mental health care in the jail was almost nonexistent: inmates were forced to wait three to four weeks to see a psychiatrist, no matter how severe their mental problem;

(d) the general sanitation of the jail was "grossly inadequate": the DOJ's expert environmental consultant found sanitation practices to be "totally unsatisfactory"; many toilets and showers were unusable, those that did work were filthy, floor and wall surfaces were in poor condition, inmates were not given cleaning supplies, windows were missing, and light fixtures were broken and dangerous;

(e) as a result of severe overcrowding, inmates were forced "to sleep on dilapidated mats and crowded floors," pillows and even toilet paper were not provided to inmates;

(f) the food service operation needed "a major overhaul" because "problems existed in almost every phase of the operation, creating serious risks of food-borne disease";

(g) parts of the jail — especially the kitchen — were infested with roaches.

The DOJ's report is confirmed by statements of the jail's

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72. *County Jail Information Report*.

73. U.S. Department of Justice, *Notice of Findings from Investigation of Muscogee County Jail*, June 1, 1995.

own officials. For instance, shortly before he resigned, Muscogee County Medical Director Dr. Jerry Chase stated, "Due to inadequate funding, insufficient number of personnel, and inadequate equipment provided by the City [of Columbus], the Medical Section is forced to provide substandard care."[74]

The Muscogee County Jail's population is composed overwhelmingly of African Americans. The County's mistreatment of its prisoners is consistent with its long history of racial prejudice and flagrant violations of the rights of African Americans and poor whites. This attitude sadly extends to its judiciary. The state courts in Columbus have a long history of racial exclusion and racial discrimination. Moreover, the federal district judge who sits in Columbus, J. Robert Elliott, was described by a national legal publication as "less a judge than a despot" and "an old-line segregationist who flaunts his deep rooted prejudices against blacks, unions, and criminal defendants."[75]

Abysmal jail conditions do not exist only in Georgia's larger cities, such as Columbus. They can also be found in many of Georgia's rural counties.

For example, Terrell County (a small county located near Albany, Georgia) has also been the subject of a Department of Justice investigation. In its investigation, the DOJ found the following:

(a) staffing, supervision, and staff training were inadequate;

(b) inmates only received one hour a week out of their cells;

(c) inmates were not permitted any reading material other than the Bible;

(d) inmates requesting medical care suffered significant delays;

(e) dental care was "nonexistent";

(f) the general sanitation of the jail was "grossly inadequate": the pest control system was "totally inadequate," and the DOJ officials touring the jail observed "numerous showers and lavatories with significant soil residue and mold growth";

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74. Letter of Dr. Jerry Chase to City of Columbus and Muscogee County Administration, May 16, 1994.

75. *The American Lawyer*, July/August 1983, p. 115.

(g) food service was inadequate, and inmates were only fed twice daily.[76]

In response to the DOJ report, Terrell County promised in July of 1995 to make significant improvements. Yet an investigation in January 1996 by the Southern Center for Human Rights revealed that no significant improvements in the jail's conditions have been implemented.

Muscogee and Terrell County are not unique. Twenty-seven Georgia county jails are currently the subjects of court orders, directing their administration to improve conditions and eliminate discriminatory and abusive practices.

The recently passed Prison Legal Reform Act (PLRA), discussed in the preceding section, applies to jails as well as prisons. The PLRA will make it very difficult for courts to improve inhumane jail conditions. Court orders covering jails will be of short duration (necessitating costly and time-consuming relitigation); it will be almost impossible for courts to issue orders limiting overcrowding; settlements short of a trial will be very difficult; and attorneys' fees for inmates' lawyers will be sharply reduced, making it impossible for most private attorneys to handle such litigation in the future.

As the Georgia jail population continues to grow, jail conditions will thus continue to deteriorate. With judicial intervention now limited by the PLRA, conditions in most jails may come to resemble those now found in jails such as Muscogee and Terrell.

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76. U.S. Department of Justice, *Notice of Findings from Investigation of Terrell County Jail*, June 1, 1995.