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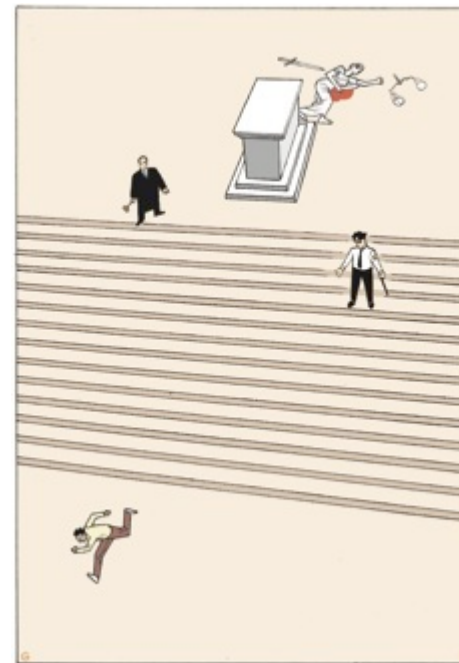
ANNALS OF LAW

DEATH IN GEORGIA

The high price of trying to save an infamous killer's life.

by Jeffrey Toobin

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A multiple-murder case illustrates a paradox in death-penalty law.

On the morning of March 11, 2005, Brian Nichols embarked on one of the most notorious crime sprees in recent American history. Nichols, a thirty-three-year-old African-American, was being retried on rape charges in Atlanta and was in custody at the Fulton County Courthouse, where his first trial had ended in a hung jury. In a holding cell on the eighth floor, where he was changing into the street clothes that he was to wear in court, he overpowered a sheriff's deputy and stole her gun. Then Nichols entered the courtroom and shot and killed Judge Rowland Barnes as well as the court reporter, Julie Ann Brandau, before escaping down a stairwell. On the sidewalk outside the building, he shot and killed another deputy sheriff, Hoyt Teasley.

Nichols immediately became the object of a frenzied manhunt in the Atlanta area. Over the next few hours, he hijacked as many as five cars and, apparently while looking for shelter, murdered a federal agent, David Wilhelm. Finally, Nichols took as hostage a woman named Ashley Smith and held her in her apartment in the suburb of Duluth for seven hours, until she persuaded him to surrender to the authorities.

Paul L. Howard, Jr., the district attorney of Fulton County, announced that he would seek the death penalty against Nichols. The case appeared to be open-and-shut: the first two murders, of the Judge and the court reporter, took place in front of several witnesses, and Nichols confessed to all four of the killings in statements to police. But almost three years later the case has stalled, caught in a bitter dispute over funding for Nichols's defense team, which has so far been paid about \$1.2 million by the state of Georgia. The state agency responsible for indigent defense has run out of money, and other cases are at risk of being delayed or derailed. Jury selection in Nichols's trial, which began more than a year ago, has not been, and may never be, completed. The prosecutor has petitioned, so far unsuccessfully, to have the trial judge removed from the case and to change the defense team. During a recent hearing, the judge, Hilton Fuller, implored members of the public to "write me an anonymous letter" with suggestions about how to bring the case to trial. Some Georgia legislators, furious about the delays, have advocated impeaching Judge Fuller.

The Nichols case illustrates a troubling paradox in death-penalty jurisprudence: the more heinous a crime—and the more incontrovertible the evidence of a defendant's guilt—the greater the cost of the defense may be. Death-penalty trials require juries not only to determine whether the defendant is guilty but also to make other complex moral judgments—why a defendant committed a crime, whether he is likely to do so again, what punishment fits the crime. Defendants are entitled to often costly expert assistance, including the services of psychiatrists, as they prepare their cases. Yet spending large sums of public money on the defense of capital cases is politically incendiary, and in Georgia the consequences may be cataclysmic. According to Stephen B. Bright, the senior counsel for the Southern Center for Human Rights, in Atlanta, "We are just now starting to see the ripple effect of Nichols. The question now is whether the whole thing is going to come crashing down."

In 1963, the Supreme Court ruled, in *Gideon v. Wainwright*, that indigent criminal defendants must be provided with lawyers free of charge. But the Court allowed local officials to decide whether to establish full-time staffs of defense lawyers for the poor or to assign private lawyers on a case-by-case basis, as well as to determine how much the government should pay for them. Until 2005, Georgia, like many states, lacked a coherent plan for providing attorneys. "Georgia has a hundred and fifty-nine counties, and each one had a different system of hiring lawyers for the poor," Bright told me.

For decades, Bright fought to change the system in Georgia and, over the years, developed the weary patience of a liberal in a conservative state. He has led the small, tenuously financed Southern Center for Human Rights for twenty-six years, overseeing a staff of nine lawyers who fight against the death penalty and for improved prison conditions. By the nineteen-nineties, the indigent-defense system, hobbled by cronyism, incompetence, and under-funding, had become an embarrassment for the state, and there was a broad consensus for reform. In the spring of 2003, the state legislature, with Bright's help, created public-defense offices for most of the state's forty-nine judicial circuits and a new agency, the Georgia Public Defender Standards Council, to oversee them. An office in Atlanta, now known as the Georgia Capital Defenders, was established to provide attorneys, all trained in the intricacies of death-penalty law, for indigent defendants in capital cases. In order to avoid the spectre of taxpayer money being used to pay for such an unpopular cause, the new law required that the defense lawyers' compensation be derived from fees assessed on plaintiffs in lawsuits and other participants in the court system.

The new regime went into effect on January 1, 2005. Ten weeks later, Brian Nichols was taken to the holding cell near the courtroom to change his clothes.

Over three decades, Nichols's life took a steady, then precipitous, descent from middle-class respectability to incomprehensible violence. He grew up in Baltimore, where his mother worked for the Internal Revenue Service and his father owned various small businesses. In 2003, Nichols's parents, who had retired, moved to Africa, and his mother, Claritha, took a job with the Tanzania Revenue Authority. The couple were in Africa when they learned that their son had been charged with four murders.

Brian was a football player in high school, and his skills as a linebacker won him admission to Kutztown University, in rural Pennsylvania. Nichols left during his sophomore year, after three arrests for minor charges, including disorderly conduct. He eventually enrolled in Newberry College, in South Carolina, but was asked not to return to school when, two years later, he was charged with stealing audio equipment from a dorm room. In 1995, he moved to the Atlanta area, where again he got into trouble with the law: he was caught with marijuana and was on probation from 1996 to 1999. For a time, Nichols worked for UPS.

During his years in Atlanta, Nichols had a steady girlfriend, a corporate executive with an M.B.A., who was as accomplished as Nichols was feckless. At one point, Nichols lived with her in the suburb of Sandy Springs; he drove a BMW that she gave him, and they worshipped together at a Word of God church in nearby Suwanee.

In April, 2004, the couple broke up, but started dating again that summer. Nichols had been seeing another woman, who became pregnant. News of the pregnancy was apparently enough to persuade Nichols's girlfriend to end their relationship for good. She began dating a minister at their church, which enraged Nichols. On two occasions in August, he confronted the minister outside the woman's apartment. After Nichols threatened to commit suicide, his ex-girlfriend sent his mother an e-mail, in which she wrote, "Things between Brian and I are spiraling out of control." Early on the morning of August 19th, Nichols again appeared at her apartment and, she later told police, raped her.

Nichols was arrested and held without bail. His first trial, before Judge Barnes, began on February 21, 2005, and he testified in his own defense. "From a defense perspective he was a very good witness," Ash Joshi, the assistant district attorney who cross-examined Nichols, told me. "He would take my question and then turn toward the jury and give the answer, the way you would teach a witness to do it. He was a charismatic individual." Nichols acknowledged that he was upset about his ex-girlfriend's relationship with the minister. "There's a section of the Bible that talks about qualifications for a pastor," he testified. "It says that a pastor should be blameless, you know. A person not covetous, merciful." But the core of Nichols's defense was his claim that the sex had been consensual. "We ended up being intimate," Nichols told the court. "It was with her consent, you know, which is why we're here. And, you know, let me say this: as a man, I've never put my hands on a woman." The jury could not agree on a verdict, splitting eight-to-four in favor of acquittal.

Judge Barnes ordered a retrial, which began on Monday, March 7th. The prosecutors called more witnesses this time, and the government lawyers felt confident that they would win the case. Nichols apparently agreed. At the lunch break on Wednesday, March 9th, he told Joshi, "You're doing a much better job this time." That evening, sheriff's deputies found two shanks—thick pieces of metal—in Nichols's shoes, and the next morning Judge Barnes called the lawyers into his chambers to discuss the matter. "We all decided that at the time of the verdict there would be a great deal more security in the courtroom," Joshi said. "When that verdict comes out, the Judge said he wanted nothing on the defense table—no pens, no pencils, nothing he could use as a weapon. But the sad part was we mistakenly thought that, once we got the shanks away from him, his plot had been foiled."

Most courts in Atlanta are housed in one of two buildings connected by sky bridges: the old Fulton County Courthouse, a Beaux Arts building dating from 1914, and, directly behind it, the Justice Center Tower, which was completed in 1995. By 2005, virtually all of the judges had moved to courtrooms in the tower, but Judge Barnes preferred the homier charms of the older building.

Barnes, who was sixty-four at the time of his death, was a popular judge, a bearded, genial man who had been on the bench since 1998. At 8:30 A.M., on Friday, March 11th, an hour before Nichols's trial was to resume, Barnes heard a legal argument on a motion in a contract dispute. Richard Robbins, a partner in

a large Atlanta law firm, who had argued many cases before Judge Barnes, was representing the plaintiff. “As soon as he took the bench that morning, I could tell I was going to win—just the look on his face,” Robbins told me. One of the lawyers for the defendant spoke first. “She was going on and on, and I was watching the clock,” Robbins recalled. “It was within a moment or two of nine. She said I had argued a contrary position in an earlier case. And Judge Barnes looked at me and smiled, and said, ‘Wait a minute, you mean our Mr. Robbins?’ And he winked at me.

“Then I heard a loud sound. Nichols had come into the courtroom and shot the Judge and shot the court reporter, but I honestly don’t have a memory of seeing him do that. The first thing I have a memory of is seeing the Judge slump over. I knew he was dead. Then Nichols was standing right in front of me. I remember thinking he was very nice-looking. He looked like a law clerk, not the usual kind of thug you see around the courthouse. And I remember thinking, He’s going to kill the prosecutor, too, and I am at the prosecution table. He had this totally calm, methodical look on his face. There was no point in lying down or hiding. I thought, He’s going to shoot me next.”

Almost three years later, Judge Barnes’s courtroom remains a crime scene, its main door locked and shielded from view by a large folding screen. Robbins took me to the hall to describe what happened next. “I ran straight ahead, right here, to one of the sky bridges to the new building,” he said. “Nichols didn’t follow me, but turned left and went down the stairs. As I was running in one direction, I saw a deputy running after Nichols to the stairs. That was Hoyt Teasley, and Nichols killed him when they got to the sidewalk. When I got to the new tower, I pushed through a locked security door like it wasn’t even there. After about an hour, I realized that I had broken my hand on it.”

The response by law-enforcement officials to Nichols’s crimes was marred by terrible errors. After the shanks were discovered, Judge Barnes said he wanted the sheriff’s department, which handles security in the courthouse, to provide Nichols with additional guards, yet he was escorted to court by a single female deputy sheriff. Part of his attack on the deputy was captured by surveillance cameras, but no one was monitoring them. The Atlanta police, who did not begin searching for Nichols until forty minutes after the first shootings, failed to seal off access to two parking garages where Nichols had been seen; he escaped from both. During a subsequent investigation, five sheriff’s deputies were found to have lied about their actions with regard to Nichols. Eight deputies were fired for misconduct, all but two of whom were later rehired.

The courts have done little better in handling Nichols’s case. In the nineteen-seventies, the Supreme Court struck down mandatory death-penalty laws passed by many states. Instead, after jurors in a capital case find a defendant guilty, there is now a separate mini-trial, known as the penalty phase, in which they decide whether to impose a death sentence. “Ever since the Court started allowing the death penalty again, it has been trying to make it a rational process—make sure that jurors have legitimate reasons for imposing death,” Carol Steiker, a professor at Harvard Law School, said. “So the Court says the state must list any of the so-called ‘aggravating factors’ that justify a death sentence, like murder of more than one person, or murder of a law-enforcement officer.” At the same time, the Court ruled that defendants may present evidence—known as mitigating factors—suggesting why they do not deserve the death penalty. “The jury has to be free to consider anything about the defendant that might call for a sentence of less than death,” Steiker said.

The Court took an additional step in 1985, ruling that the state must pay for experts who could present mitigating evidence about capital defendants to juries. “This is partly why death-penalty cases are so much more expensive than other cases,” Steiker said. “It’s not just that there is a separate penalty-phase proceeding, but the defense has the right, even the obligation, to go find mitigating evidence.”

Given the complexity of Nichols’s case, Georgia Capital Defenders, the organization created by the 2003 reform, assigned four lawyers to it. (The state usually assigns two defense lawyers in death-penalty cases.) But in May, 2005, two months into the assignment, Nichols’s lawyers learned that one member of their team had moved to Georgia from out of state and let his bar membership lapse. On the theory that further representation by any one of them could taint Nichols’s defense, all four lawyers asked for, and got, Judge Fuller’s permission to withdraw.

Fuller, a judge from DeKalb County, had retired in 2004, but agreed to return and take on the case after the judges in Fulton County recused themselves, on the ground that they had been colleagues of Judge Barnes. Fuller, who is sixty-five and still has a boyish cowlick, won election to his judgeship in 1980

and had developed a reputation as a moderate. His current chambers are behind an unmarked door in the Fulton County Justice Center Tower, not far from the stairs by which Nichols escaped. Fuller does not hide his bewilderment at how he has become an object of contempt and ridicule.

“This case is different from any other case that anyone has tried anywhere in the world,” he told me in December. He said that he wished he hadn’t allowed the entire Georgia Capital Defenders’ team to resign, but that at the time he believed there were satisfactory replacements. In July, 2005, he approved the Georgia Public Defender Standards Council’s selection of Henderson Hill, an accomplished criminal-defense lawyer from Charlotte, North Carolina, who specializes in death-penalty cases, to lead a new team of four. “I felt that this case was difficult enough that we needed someone away from the local Atlanta legal community,” Fuller said. “The indictment was fifty-four counts, there are eleven different crime scenes, and it was just a complicated case. The local criminal-defense bar did not come flocking to this case. I went to one of the best defense lawyers in Atlanta to ask him about taking this case, and he said, ‘Heavens, no. I knew Judge Barnes too well.’ Judge Barnes was loved by everyone here. That decision—hiring the lawyers from North Carolina—has been the thing that caused the most trouble, because it’s been expensive to have people come in from out of state.”

Defense costs for travel and lodging have been substantial, though Hill cut his usual hourly rate from three hundred and fifty dollars to a hundred and seventy-five dollars, and his colleagues—Jacob Sussman, from Hill’s North Carolina firm, and Robert L. McGlasson, a veteran death-penalty specialist in Atlanta—are working for less. A fourth lawyer, Penny Marshall, volunteers her time. Still, there is no doubt that using the salaried Capital Defenders would have been cheaper, and the council’s open-ended commitment to pay hourly rates to private lawyers remains at the heart of the controversy.

Hill and his team work out of an office in the Capital Defenders’ headquarters, in downtown Atlanta, in a mock courtroom that is normally used for training. The prosecution has indicated that it may call as many as four hundred witnesses, and in Hill’s office are twenty-seven black binders, spanning eight feet of floor space, containing witness statements and other evidence gathered by the district attorney. The prosecution has also produced more than forty thousand pages of other material, and there are more than four hundred hours of tapes of telephone calls that Nichols has made from jail. On the wall are twenty sheets of yellow paper, each one representing a location relevant to the case.

Hill, a fifty-one-year-old alumnus of Harvard Law School, has an easy manner and the melodic voice of a soft-rock d.j., but few lawyers in the country have more experience trying death-penalty cases. After examining the evidence against Nichols, he sought to make a deal. In a letter to Paul Howard, the Fulton County district attorney, on December 12, 2006, he wrote:

Surely it is stating the obvious to say that the violence on March 11 [was] utterly without justification or excuse. Words fail. On an occasion such as this, however, it is both healthy and important to articulate fundamental truths. In contemplating what justice system response would reduce the burdens on surviving family members and maximize opportunities for emotional, physical and spiritual recovery, I suggest that a marathon, contested capital trial and sentencing proceeding may be the least well designed judicial intervention.

Instead, Hill wrote, Nichols was prepared to plead guilty to every count in the indictment and accept a sentence of life in prison if Howard agreed to abandon his quest for the death penalty.

Howard said no. As an elected official, he had little to lose by taking a hard line against one of the most notorious criminals in the country. The long wait to bring Nichols to trial has been frustrating for Howard, who works in an office in the old courthouse, five floors beneath the murder scene. Defending his decision to reject Hill’s plea offer, Howard told me, “My belief is that punishment is a question that should be decided by the community. It is not appropriate to kill four people and outline for the citizens what his punishment should be. I don’t think the defendant should choose his own punishment.”

Howard has assigned five lawyers to work on the case, and has hired at least eight independent experts to assist them. These include a crime-scene specialist, two psychiatrists, and a psychologist. Of course, the D.A. has also been assisted by the local sheriff, the Atlanta police, and the F.B.I.

The defense has attempted to respond in kind. An early round of litigation concerned a motion by the defense to disqualify Howard’s office. (Several

members of the D.A.'s staff are expected to be witnesses at the upcoming trial.) Fuller allowed Howard to remain. The defense also filed an unusual motion to change the "situs," or site, of the trial: Hill wanted to move the trial from the courthouse where the crime took place, while still drawing on the Fulton County jury pool, which is substantially black and, he believed, reluctant to impose the death penalty. Fuller tried to find another courtroom, but the local federal court and Fort McPherson, a nearby Army base, refused his entreaties to host the trial. "The concept of trying it in this complex is something I would like to avoid if I could," Fuller told me. "We rode around to several little municipal courthouses, seeing if we could do it there. But these other places didn't just say no—they said hell, no." Eventually, he denied the defense motion.

If the case ever gets to trial, the defense will offer an even more contentious argument: that Nichols, who has pled not guilty, acted out of a "delusional compulsion" (a version of the insanity defense allowed under Georgia law). "That's their only defense, because everyone in the world knows he did it," Judge Fuller told me. In court papers, the defense cited, among other things, Nichols's "peculiar thinking and behavior at or about the time he was charged with rape in August 2004." Such a defense requires the testimony of expert witnesses, especially forensic psychiatrists, to which Nichols is entitled.

The Supreme Court has recently established another expensive entitlement for defendants in capital cases. In a 2003 case, Justice Sandra Day O'Connor's opinion overturned a death sentence against a Maryland man because of his attorneys' "failure to investigate his background and present mitigating evidence of his unfortunate life history." O'Connor noted that "among the topics counsel should consider presenting are medical history, educational history, employment and training history, family and social history, prior adult and juvenile correctional experience, and religious and cultural influences." It is now more or less mandatory for defense attorneys to hire social workers and investigators to compile mini-biographies of their clients, known as "social histories." In general, the investigators pay particular attention to a defendant's childhood, in an effort to determine whether he suffered abuse. Of course, such research is expensive.

By the beginning of 2007, Hill's team had been at work for almost a year and a half, and told the Judge that it needed still more time. Fuller felt that the only way to keep the case moving was to schedule jury selection and force the trial to start. On January 11, 2007, he brought the first round of prospective jurors to the courthouse, to fill out a questionnaire. But in March, with no jurors selected, the Georgia Public Defender Standards Council informed the court that its funds were running low and that it had to petition the state legislature for more, and the Judge suspended the proceedings. The legislature turned the request down. In July, the council announced that, having paid Hill's team \$1.2 million, it was now out of money.

The lawyers kept working anyway, and on October 10th Fuller ordered the council to start paying the defense lawyers again, to no avail. Still, five days later, Fuller began to question prospective jurors. After two days of jury selection, Nichols's lawyers filed a motion to stop the process, asserting, "The defense simply cannot continue coming to court on a daily basis without financial backing."

That day, Fuller stopped jury selection. "This case is not going to go on long, no matter what stage we're in, without adequate funding if I'm the presiding judge," he said in open court. "It affects every aspect of this case, and I don't know what else I can say about that."

Fuller's handling of jury selection caused outrage in Georgia. Craig L. Schwall, a Fulton County judge, sent an e-mail to his colleagues on the bench, in which he wrote that Fuller was a "fool" and a "disgrace." Howard, the district attorney, filed a highly unusual motion in the Georgia Supreme Court questioning whether Fuller and the defense team should remain on the case. On November 30th, the court said that Howard's gambit was premature, but the chief justice, in a concurring opinion, registered her impatience with all sides, including Fuller.

Fuller has frequently been criticized in the State Capitol, where the political balance has shifted toward the Republican Party since the 2003 reform was passed. The budget for the Georgia Capital Defenders has been cut each year since 2005, although the revenue from the fees that are supposed to finance the council keeps rising. The Speaker of the Georgia House has appointed a committee to investigate grounds for impeaching Judge Fuller, and the majority whip wrote, in a letter to Fuller, "The people of Georgia are entitled to know if the Court's approval of the excessive expenditure of public funds is being used to indirectly subvert the ends of justice." And last week Fuller, who has refused to step down, granted Howard's request to appeal to the Georgia Supreme Court to throw him off the case. In his brief, Howard wrote, "The Court has exhibited a course of conduct that can only be described as advocacy for the defendant's trial

strategy in this case.”

Mack Crawford, a former Republican state legislator who was appointed director of the Georgia Public Defender Standards Council last July, told me, “I live out in the country, sixty miles south of Atlanta. Every morning, I get a sausage and biscuit in a country store. The people there are all pissed off that the state spent the money. The question I get is ‘What is the cost of a reasonable defense?’ ”

It’s a question without a clear answer. The 2003 reform in Georgia established a comparatively generous, open-ended compensation system for defense lawyers in capital cases. By contrast, Florida caps legal fees in death-penalty cases at fifteen thousand dollars, and South Carolina and Oklahoma allocate twenty-five thousand. Expenses for experts, however, often push the total cost in those states to six figures; in Georgia the average death-penalty defense costs about three hundred thousand dollars, and so it is not surprising that a case as complicated as Nichols’s has cost a great deal more.

Last month, Fulton County allocated a hundred and twenty-five thousand dollars for a psychiatric evaluation of Nichols and for other defense experts, but the standoff over the other costs of his defense remains unresolved. On January 18th, the Georgia council asked Judge Fuller to assign the case back to the state Capital Defenders. Hill would not comment, but Stephen Bright, of the Southern Center for Human Rights, called the move “a gross violation of the right to counsel.” Both Judge Fuller and Nichols’s defense team have argued that changing lawyers at this point would violate Nichols’s rights. Ironically, the refusal of state authorities to continue to pay Nichols’s legal fees has only increased the chances that he will avoid the death penalty. (“If this case was properly funded, it would have been over a year ago,” Fuller told me.) And, in the meantime, the Georgia council’s financial problems are beginning to affect other trials. In November, a judge in a murder case in rural Pike County removed two private attorneys because the council could no longer afford to pay them.

Nichols himself continues to make his lawyers’ jobs even more difficult. In 2005, he began exchanging letters and phone calls with Lisa Meneguzzo, a thirty-eight-year-old woman from Beacon Falls, Connecticut, who visited him in jail. She has since told authorities that Nichols asked her to help him escape. According to investigators’ records obtained by the Associated Press, Nichols asked Meneguzzo to go to a Home Depot and buy a masonry saw, a circular saw, and other tools for cutting through cinder block. In a letter to Meneguzzo, Nichols said that, once he was outside the walls, a van driven by a friend who would pose as a Red Cross volunteer would pick him up. A special prosecutor is investigating Meneguzzo’s story as a basis for adding additional charges to Nichols’s indictment.

One witness to Nichols’s crimes who is certain to testify at his trial is Ashley Smith, who briefly became famous following his arrest. After Nichols took Smith hostage in her apartment, he tied her up with masking tape and an extension cord. Smith convinced Nichols to untie her and directed him to a stash of methamphetamine she had in her room, and, after he snorted the powder, they talked all night. Smith told him about her husband, who was stabbed to death in 2001, and her daughter, of whom she had given up custody because of her drug use. In the morning, she made pancakes for Nichols and read to him from Rick Warren’s inspirational best-seller “The Purpose-Driven Life.” Smith co-wrote a book of her own about her ordeal, “Unlikely Angel,” and her daughter is now living with her again. “I hoped Brian knew he had done the right thing” by surrendering, she wrote. “And that his heavenly Father was pleased with the choice he made to give himself up.” In an e-mail to me, Smith said, “My opinions of Brian Nichols haven’t changed.”

Smith’s heroism stands in quiet counterpoint to the noisy failure of the legal system to bring any kind of resolution to Nichols’s case. Judge Fuller seems to despair of finding a way forward. “I’ve been floundering,” he said, when we spoke in his chambers. “A lot of people say just bring out the gallows.” His voice trembling, Fuller went on, “It’s about got me to the point that I am frustrated by it. My demeanor is someone who can hold his cool and not get flustered. I am about to get flustered.” ♦

ILLUSTRATION: GUY BILLOUT
