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Abroad at Home; Crime Against Justice

By ANTHONY LEWIS

One of the most shameful pages in the history of American justice was the 1915 case of Leo Frank. A Jewish businessman in Georgia, he was accused of murdering a young Christian woman he employed. He was tried, convicted and sentenced to death in a courtroom dominated by an anti-Semitic mob. The Georgia courts rejected his appeal.

Mr. Frank asked the Federal courts to free him on a writ of habeas corpus. But the Supreme Court held that Federal judges could not even hear his case, because it had had "a full review" in the Georgia courts. Georgia's governor then commuted his sentence, but a mob dragged him from jail and lynched him.

Justice Holmes dissented in the Supreme Court, saying that Federal judges should look into the claim that the trial had been a form of "lynch law." Eight years later the Court adopted his view. It held that five Arkansas blacks convicted of murder in a 45-minute trial were entitled to have a Federal court hear their claim of prejudice even though Arkansas courts had rejected it.

Ever since then the Federal courts have been open to claims that a state conviction was obtained unconstitutionally. Justice Hugo L. Black wrote in 1953:

"It is never too late for courts in habeas corpus proceedings to look straight through procedural screens in order to prevent forfeiture of life or liberty in flagrant defiance of the Constitution. . . . Perhaps there is no more exalted judicial function."

That Federal judicial function will soon be swept away, if the Bush Administration and the Senate have their way. The rule of the Leo Frank case will be restored.

Such an astonishing reversal of history would result from one section of the crime bill passed recently by the Senate -- a provision urged by the Administration. In a few words, it undoes the constitutional tradition that in criminal cases Federal judges are the ultimate guarantors of the Bill of Rights.

The provision would bar Federal judges from responding to the most compelling constitutional claim if it "has been fully and fairly adjudicated in state proceedings." The language is close to that used by the Supreme Court in the Frank case, apparently meaning simply that the defendant has had a regular state appeal -- no matter how benighted the substantive decision was.

Leo Frank had what the Supreme Court said was a "full" appeal through the Georgia courts. But they refused to see the overpowering reality: that he had been the victim of an anti-Semitic lynch

atmosphere.

Nearly 70 years later, in 1982, the state of Georgia tried to make amends to Leo Frank. He was declared not guilty of the crime and formally pardoned. But under the rule that the Supreme Court imposed in his case -- and that the Bush-Senate crime bill would restore -- he had no chance to make his case in a detached tribunal.

We can hope and believe that the level of justice is higher in state courts, on racial matters especially, than it was early in this century. But there are still reasons to retain the historic habeas corpus jurisdiction of the Federal courts as a last resort.

Most state judges are elected, for one thing. It is hard for them to stand against popular feeling in agitated cases. Indeed, prosecutors commonly ride agitated cases to election as judges.

Federal judges do not enjoy looking into state convictions. It is difficult work, and they do not like getting into conflicts with their state friends. But in recent years Federal judges, many of them Reagan appointees, have found violations of the Constitution in 40 percent of the state habeas cases they examined.

Why should the Senate have voted for such a crippling provision? The evident reason is that everyone wants to look "tough on crime." A careful bill was worked out by the Judiciary Committee, but senators voted for unexplained amendments -- including this one -- because they were described as "tough."

In the current mood on crime a particularly heavy responsibility rests on the Attorney General, whose office makes him not a mere prosecutor but a guardian of justice. That Dick Thornburgh chose to push for the most extreme provisions of this crime bill is a mystery to me. I thought I knew him. I did not believe he would want to go down as the man who revived the rule of the Leo Frank case.