Courts Taking Shots From The Right And The Left

VIEWPOINT

By Harvey A. Silverglate

Some observers seemed surprised that the death penalty, defeated in the Massachusetts House of Representatives by one vote in 1997 and seven votes two years later, went down to a vote of 94-60 on March 12.

The reason did not appear to be any growing moral revulsion against the ultimate penalty. Rather, the answer is hinted at in a remark made by Rep. Robert Correia, D-Fall River, quoted in the Boston Herald: "My level of confidence is below the level I require to push that button for a death penalty. Flaws are showing up that you can't brush aside when you talk about putting someone to death."

One member of the chamber misread this development. "The House is getting more liberal — all the freshman members voted no," opined minority House leader Rep. Francis Marini, R-Hanson.

What really happened, however, is that there has been a remarkable and precipitous drop nationwide in popular confidence in the criminal justice system, and elected representatives can read the tea leaves as well as anyone.

What criminal defense lawyers have known and warned us about for more than two decades — since, in fact, the passing of the Warren court into the Berger and then the Rehnquist courts — is now becoming obvious.

The courts have essentially abdicated their proper role in policing the administration of justice in the station houses and prosecutors' officers across the nation, and, as a result, an alarming number of innocent men and women have been serving long prison sentences and, in some states, sitting on death row.

Underneath the concern at the most extreme end is the nagging thought — which is in fact a virtual certainty — that some innocent convicts have been executed.

Harvey A. Silverglate, a partner in the Boston criminal defense and civil liberties firm of Silverglate & Good, is co-author with Alan Charles Kors of "The Shadow University: The Betrayal of Liberty on America's Campuses" (paperback 1999 from HarperPerennial), and the co-founder of The Foundation for Individual Rights in Education (www.thefire.org).

Here in the Bay State, in a number of high-profile cases in recent years, men have been released from life sentences imposed as a result of error or corrupt police and prosecutorial practices.

How, one rightly asks, did the criminal justice system get into this mess, where the results of trials have been found to be so terribly wrong so terribly often in such terribly serious cases carrying such terribly harsh penalties?

The answer is provided by two recently published books. What is both interesting and revealing about these volumes is that one was written by two left-liberal criminal defense attorneys and former public defenders, Barry Scheck and Peter Neufeld, co-founders of the now-heralded Innocence Project at the Cardozo Law School at Yeshiva University, and their journalist cohort Jim Dwyer, Pulitzer Price-winning crime reporter and columnist for the New York Daily News.

"Actual Innocence: When Justice Goes Wrong and How to Make It Right"
By Barry Scheck, Peter Neufeld and Jim Dwyer
Signet Paperback, updated edition (March 2001, New York City)

"The Tyranny of Good Intentions: How Prosecutors and Bureaucrats Are Trampling the Constitution in the Name of Justice"
By Paul Craig Roberts and Lawrence M. Stratton
Forum Books, an imprint of Prima Publishing (2000: Roseville, Calif.)

Titled "Actual Innocence," the volume, published this March in paperback with a new and updated chapter (the hardcover appeared last year), is aptly subtitled "When Justice Goes Wrong and How to Make It Right."

The other book comes at the problem of the criminal justice system from the right of the political spectrum. "The Tyranny of Good Intentions: How Prosecutors and Bureaucrats Are Trampling the Constitution in the Name of Justice," is by Paul Craig Roberts, the well-known conservative political economist, and Lawrence M. Stratton, a non-practicing academic lawyer. The impact of this remarkable left-right pincer movement against business as usual in the criminal justice system is demonstrated the moment the reader picks up these volumes.

"Actual Innocence" sports jacket blurbs from conservative columnist George F. Will on the right and writer Arthur Miller from the left.

"The Tyranny of Good Intentions" produced agreement by Harvard Law School's Alan Dershowitz on the left and economist Milton Freedman and Watergate-burglar-turned-conservative-talk-show host G. Gordon Liddy on the right.

It is not, as Rep. Marini believed, that the Legislature is becoming more "liberal." Instead, liberals and conservatives have come to recognize, as George Will indelicately put it, that the criminal justice system is, after all, just "another government program."

It is a government program, however, where critical checks and balances seem to have broken down. Police and government agents take all manner and kind of short cuts in order to appear to solve crimes; prosecutors present evidence that results from these techniques without asking themselves or the officers too many questions; courts allow such evidence to be presented to juries and then invent, sometimes with the help of legislatures, doctrines that prevent the future reopening of even dubious and troubling cases; and governors and presidents seek election and re-election by stoking the flames of public fear of crime rather than concern for loss of liberty.

Scheck, Neufeld and Dwyer come at the problem from a close examination of the techniques that result in wrongful convictions in the most serious cases — for the most part those ending in the imposition of the death penalty or life imprisonment.

They chronicle how judges give defense lawyers inadequate time to investigate and prepare their cases; exclude relevant exculpatory evidence; allow eyewitness identification testimony tainted by notoriously and fatally misleading procedures; admit false and coerced confessions that easily could have been, but were not, audiotaped or videotaped; bless "expert" testimony that gives stark meaning to the term "junk science"; sit quietly day in and day out listening to the most palpably false police testimony without ever so much as calling for an investigation of such officers or of the prosecutors who present them; blithely allow jailhouse "snitch" testimony from those ubiquitous souls who always seem to be at the right place (jail or prison) at the right time to hear a defendant — often innocent — "confess" the crime in a moment of weakness or excessive candor, and allow trials to proceed in which defendants are represented by palpably incompetent defense counsel.

The proliferation of these problems, exacerbated by the increasingly limited role of judges in policing the lower rungs of the criminal justice system (on the federal side, the once-useful McNabb-Mallory "supervisory powers" rules went into disuse when they began to uncover too much) and the virtual destruction of post-conviction review procedures, have allowed serious errors to die in prisons and gas chambers.

Resisting the temptation to resort to pure cynicism, defense lawyers have noted that just about the time when post-conviction proceedings, particularly in death penalty cases, began to uncover many of the errors caused by the techniques described in these two books, the legal avenues for such review were cut off by state and federal supreme courts (including, alas, our own Supreme Judicial Court in the infamous *Amirault* child sex-abuse litigation) as well as by Congress and state legislatures.

(Bill Clinton can look for a legacy all he wants, but to many in the criminal justice system his administration will always be known for its championing of the destruction of habeas corpus in an effort to make the Comeback Kid appear tough on crime.)

Roberts and Stratton come at the problem somewhat differently. Neither has had the experience of Scheck and Neufeld in investigating and trying criminal cases, much less in pioneering the use of DNA science to exonerate dozens of innocent men on death row and those serving life sentences.

But from their perch, Roberts and Stratton have as keen a view of the defects of the system as do Scheck and his cohorts. They demonstrate how changes in the law over the last couple of decades have eviscerated rights that Americans used to have, and that Englishmen have had since before the American Revolution.

Prosecutors, especially federal prosecutors, who target individuals and then concoct investigations and evidence to fit preconceived theories, get away with it because judges no longer see their role as protecting liberty.

Roberts and Stratton lump together these

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Food For Thought

To WIT

By Paul J. Martinek

I made the mistake of buying an old house that had the kitchen from hell, or at least the 1940s. So, as soon as I was finished gutting the rest of the dump, paying someone lots of money to put it back together and sending him a Chapter 93A demand letter over the quality of his efforts, I ripped everything out of the kitchen and started from scratch there, too.

and waited but the delivery truck never showed up. The plumber who had arranged to be there to install the dishwasher wasn't very happy.

I called the store and, in my best indignant-lawyer voice, told them they'd better the heck get the stuff there on Monday or else ... well, they didn't want to know what was going to happen. It was going to be ugly. They assured me that Monday was a go.

Monday came and, at about 2 p.m., my contractor called me and told me that the delivery truck had arrived. But there was a problem. They brought the stove but for-

As soon as I hung up, the doorbell rang. It was my contractor from across the street.

"So, how do you like it?" he gleamed.

"Well," I said. "It's great. Except the dishwasher is the wrong color. It's blue."

He walked into the kitchen. "Oh, that's just the film they put over it," he said, peeling off the blue and revealing the stainless steel underneath.

I withered and tried to imagine exactly what I was going to say when I called the store back. (First choice: "You're not going to believe this but I understand that someone has been going around leaving voice-

Although I've always yearned to be a gourmet food enthusiast myself, the fear of operating a vegetable chopper has always stood in the way. So I opened "LegalEats" with a sense of determination that this would be the book that finally motivated me to turn on the stainless steel oven that for more than a year has sat lifelessly in my kitchen-that-cost-more-than-a-mob-hit.

The cookbook is one that has cute names for all the recipes ... and a little of that went a long way for me.

Sure "Magistrate's Mushroom Chili" sounds yummy and it would probably be the perfect thing to whip up when Joyce London Alexander and Charles Swartwood pop over for a quick bite (though I might

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lost rights somewhat quaintly but accurately as "the rights of Englishmen." They focus on some of the same tactics that Scheck and Neufeld conclude place innocent people on death row: pressure on witnesses to testify according to prosecutors' scripts; threats to charge relatives (holding them as veritable hostages) unless a defendant or witness "cooperates"; exchanging leniency for the "right" testimony; seizure of a defendant's assets so as to deprive him of the funds to mount a defense.

In only one major area do these books sharply differ. Scheck, Neufeld and Dwyer argue that race has a lot to do with a person's chances of being wrongly convicted. There is the well-known suspicion that police have of minority group members; the high degree of error in cross-racial eyewitness identifications; the correlation of race and poverty, and of poverty and an inadequate defense.

Roberts and Stratton, on the other hand, intentionally play down the role of race and consider it a divisive distraction, one that divides liberals and conservatives from the crucial task of joining together to force a massive overhaul of the system if liberty is going to be saved.

Robert and Stratton posit that disputes about law — the jurisprudence of "original intent" versus "legal activism," for example — between liberals and conservatives "are interesting but irrelevant," as are disputes over the role of race.

The system has been so degraded, they argue, that the Constitution is now incapable of protecting all citizens. To divide citizens by focusing on the disadvantages of any one race detracts from the non-partisan, cross-spectrum coalition needed to beat back the tide and restore liberty.

Even though Scheck and Neufeld are doubtless correct that the defects in the system disproportionately hurt minority group members, Roberts and Stratton are probably right that it will prove more effective to organize a color-blind and cross-ideological coalition to revamp the system, rather than risk having the public see criminal justice reform as just another demand by a victimized minority group for special treatment.

Both of these books took courage, or at least an unbending dedication to principle, to write.

Scheck and Neufeld operate in the criminal courts, and yet they are merciless in their criticism of police, prosecutors and especially judges, right up to the current chief justice of the United States, whose intellectually dishonesty or extraordinary naivete — or combination of both — has produced some remarkable opinions that distort how the system really works and that make it virtually impossible to prevent or correct the most obvious miscarriages of justice.

Roberts and Stratton, on the other hand, risk the wrath of their fellow conservatives when they take on not only Chief Justice Rehnquist and his ilk, but the entire "law and order" set.

"Actual Innocence" is the more practical of the two volumes, which is not to detract one whit from the grand historical perspective of "The Tyranny of Good Intentions."

Scheck and Neufeld posit a checklist of "reforms to protect the innocent." The list would instantly make sense to anyone who has participated in the system: expand use and availability of DNA testing and other forensic tests and provide for the preservation of evidence; take simple steps to avert the epidemic of mistaken eyewitness identifications; videotape or audiotape witness and suspect interrogations to avoid false reports of admissions or coerced confessions; devise a system for pre-screening jailhouse snitch testimony; take simple steps to avert forensic fraud and junk science in the courtroom; investigate bad prosecutors and corrupt cops; monitor the competence of lawyers in the courtroom, and other simple, obvious steps.

Scheck's and Neufeld's prescriptions, and their pioneering use of DNA to absolve the innocent, have come to the Bay State with a bang, not a whimper.

In mid-March, a Superior Court judge released Kenneth Waters from a life sentence, after he served 18 years for a crime that he obviously did not commit. Scheck's and Neufeld's Innocence Project, working with Waters' heroic sister, Betty Anne Waters, demonstrated with DNA technology that Waters could not have committed the 1980 murders of Katharine Brow.

(Betty Anne Waters actually went to law school in order to be able to investigate the case and represent her brother in post-conviction proceedings, having had her fill of expensive and inadequate lawyers.)

Working on the case as well was the New England Innocence Project, a joint undertaking of the Scheck-Neufeld Cardozo Innocence Project, the Massachusetts Association of Criminal Defense Lawyers, and a group of lawyers and paralegals from the Boston firm of Testa, Hurwitz & Thibeault operating pro bono.

Waters was not the first Massachusetts convict to walk free because of the efforts of the New England Innocence Project (NEIP) working with its parent in New York and with the Committee for Public Counsel Services.

Last year, Neil Miller of Boston was exonerated by DNA evidence after Suffolk District Attorney Ralph Martin II agreed in September 1999 to permit DNA testing, and then consented to Miller's release when the tests demonstrated the miscarriage of justice.

NEIP continues to investigate the Waters case, in order to ascertain what went wrong that produced testimony that was so obviously in error or worse, as well as to look into other cases of suspected wrongful conviction.

The movement to produce accountability for gross error has now moved to the point where the crusaders for justice are not satisfied releasing the innocent; they are now cataloguing how and why the innocent got convicted. They are, in short, insisting on accountability.

It is obvious that the landscape of the criminal justice system at all levels is in for some serious scrutiny and change in the next few years.

Spurred by the science of DNA analysis and other forensic techniques, and a newfound skepticism in the probity and accuracy of the system from the neighborhood precinct to the chief justice of the United States, people and groups interested in seeing a restoration of liberty and justice do not seem ready to pull back.

Having achieved a veritable revolution in public opinion toward a system once deemed — erroneously — to be sacrosanct, these activists on both the right and the left are not likely to be stopped or ignored. MLW

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THE WEEK'S OPINIONS

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■ District Court/BMC Appellate Division

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by the trial judge. We find no error.

"A review of the transcript indicates that the Dubrows sought to hear testimony from a witness who was never identified prior to trial to Kelly. The judge heard arguments offered by counsel for the Dubrows as well as counsel for Kelly. Since the witness was never identified in a pre-trial conference report, or otherwise prior to trial, the judge sustained the objection by Kelly's counsel and excluded the witness. Counsel for the Dubrows indicated that he could go forward with his defense without the witness and otherwise made no other objection at trial, nor did he request a ruling of law specifically on the issue of excluding the witness.

"Rule 46 of the Mass Rules of Civil Procedure requires the objecting party at the time the ruling or order of the court is made or sought, makes known to the court the action which he desires the court to take or his objection to the action ofthe court and his ground therefore. The Dubrow's counsel did not object and state the grounds for the objection, or in arguing indicate how the excluded witness would harm him. The judge's exclusion was well within his discretion. ... '[Appellate Courts will] not interfere with the judge's exercise of discretion in the absence of a showing of prejudicial error resulting from an abuse of discretion.'"

Final Matter

"The last issue for review concerns the amount of the judgment and interest on defendant's counterclaim. It is not contested that there is error in the entry of judgment in both the amount entered for the Dubrows on their counterclaim for rent owed and the absence of interest upon that award. The trial judge found for the Dubrows in the amount of $1,740.00. Judgment entered as $1,470.00. No interest was awarded as provided by G.L.c. 231, §6C.

"The finding of the trial court is affirmed. The case is remanded to the trial court where the clerical error shall be corrected pursuant to Mass.R.Civ.P. 60(a), that judgment entered for $1,740.00.

"Pre-judgment interest pursuant to G.L.c. 231, §6C is a ministerial act and shall be corrected by the clerk upon motion under Mass. R.Civ.P. Rule 60(a). ..."

Kelly v. Dubrow, et al. (Lawyers Weekly No. 13-017-01) (7 pages) (Creedon, J.) (Appellate Division, Southern District) Appealed from a judgment entered by Wheatley, J., in the Orleans Division. John S. Dale for the plaintiff; Thomas M. Dickinson for the defendants (App. Div. No. 1313).

■ Land Court

Real Property

Denial Of 'ANR' Endorsement - Summary Judgment

Where (1) a defendant planning board denied the plaintiffs' request for an "Approval Under the Subdivision Control Law Not Required" endorsement for the plaintiffs' subdivision plan, (2) the defendant stated that the denial resulted from the subdivision having no frontage on a public way, (3) the plaintiffs filed suit, asserting that the way on which the subdivision fronted was public, not private, and (4) the defendant moved for summary judgment, I hold that the summary judgment motion must be denied as factual questions remain for trial bearing upon whether the subject roadway is, or is not, public.