FREEDOM WATCH

Not guilty

A new book exposes the death penalty's biggest flaw

by Harvey Silverglate

Erroneous convictions are not the only argument against the death penalty. But surely, in a society that calls itself just, they are a very powerful one.

In Spite of Innocence, subtitled "The Ordeal of 400 Americans Wrongly Convicted of Crimes Punishable by Death," by Michael L. Radelet, Hugo Adam Bedau, and Constance E. Putnam (Northeastern University Press, 399 pages, $29.95), drives the argument home with a compilation of erroneous capital convictions in the US in this century. By the authors' calculations, 23 innocent defendants were actually executed before the error was uncovered.

Radelet, associate professor of sociology at the University of Florida and editor of *Facing the Death Penalty*; Bedau, Austin Fletcher Professor of Philosophy at Tufts, editor of *The Death Penalty in America*, and author of the landmark book *Death Is Different*; and Putnam, a local writer specializing in social issues, have done us all an enormous service with this book. Yet it will likely have little impact on most supporters of the death penalty — if, indeed, they even read it.

Famed defense lawyer and civil libertarian Clarence Darrow explained the reason in 1924, when he said: "It is a question of how you feel, that is all. . . . If you love the thought of somebody being killed, why, you are for it. If you hate the thought of somebody being killed, you are against it." Much of what passes for death-penalty argumentation these days is really rationalization — efforts either to buttress or to fight a primordial lust for blood that seems to have resisted human evolution.

Nonetheless, history teaches the importance of bearing witness to the truth. The late Supreme Court Justice Felix Frankfurter was eloquent on the matter when he published his famous dissent after convicted atomic spies Julius and Ethel Rosenberg were executed in 1953.

At the 11th hour in that case, new defense attorneys argued that recent legislation may have ruled out the death penalty for the crime for which the Rosenbergs were convicted, and Justice William O. Douglas granted a stay of execution. Chief Justice Fred M. Vinson convened an extraordinary session of the Court to overrule the stay, and Frankfurter complained that he hadn't had time to study the issue before the execution took place. Since the US Constitution gives the federal courts jurisdiction to hear arguments only when there is an active "case or controversy," no federal court may even hear a petition or an appeal after an execution has rendered the case legally moot, or closed.

Frankfurter wrote:

> *To be writing an opinion in a case affecting two lives after the curtain has been run down upon them has the appearance of pathetic futility. But history also has its claims. This case is an incident in the long and unending effort to develop and enforce justice according to law. The progress in that struggle surely depends on searching analysis of the past, though the past cannot be recalled, as illumination for the future. Only by sturdy self-examination and self-criticism can the necessary habits for detached and wise judgment be established and fortified so as to become effective when the judicial process is again subject to stress and strain.*

Though Radelet *et al.* don't say so, their work is in large part a response to Frankfurter's admonition that "history also has its claims."

Governor Bill Weld, are you listening?

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In Spite of Innocence is organized into four sections, corresponding roughly to the major types of miscarriage of justice in capital cases.

Part I ("Bearing False Witness") consists of case histories in which convictions were obtained as a result of perjury by prosecution witnesses and mistaken eyewitness testimony, the most frequent causes of lethal error.

Part II ("Pride and Prejudice") chronicles cases in which there are major failures in police work, growing out of either negligence, incompetence, or overzealousness.

In Part III ("Corrupt Practices"), the authors take us through the territory of coerced confessions, prosecutors' suppression of exculpatory evidence, and the threat of the death penalty to get an innocent defendant to plead guilty in a plea bargain that avoids the death sentence.

In the final part ("Rush to Judgment"), the authors outline what they describe as "four quite different cases, each of which presents the spectacle of someone making the defendant fit the crime."

In each of the sections, the authors present three or four cases in considerable detail and describe several others more generally. A further "Inventory of Cases" appears with other tables and indices at the end of the book. (Hardly a static list, the authors point out, since new cases in-

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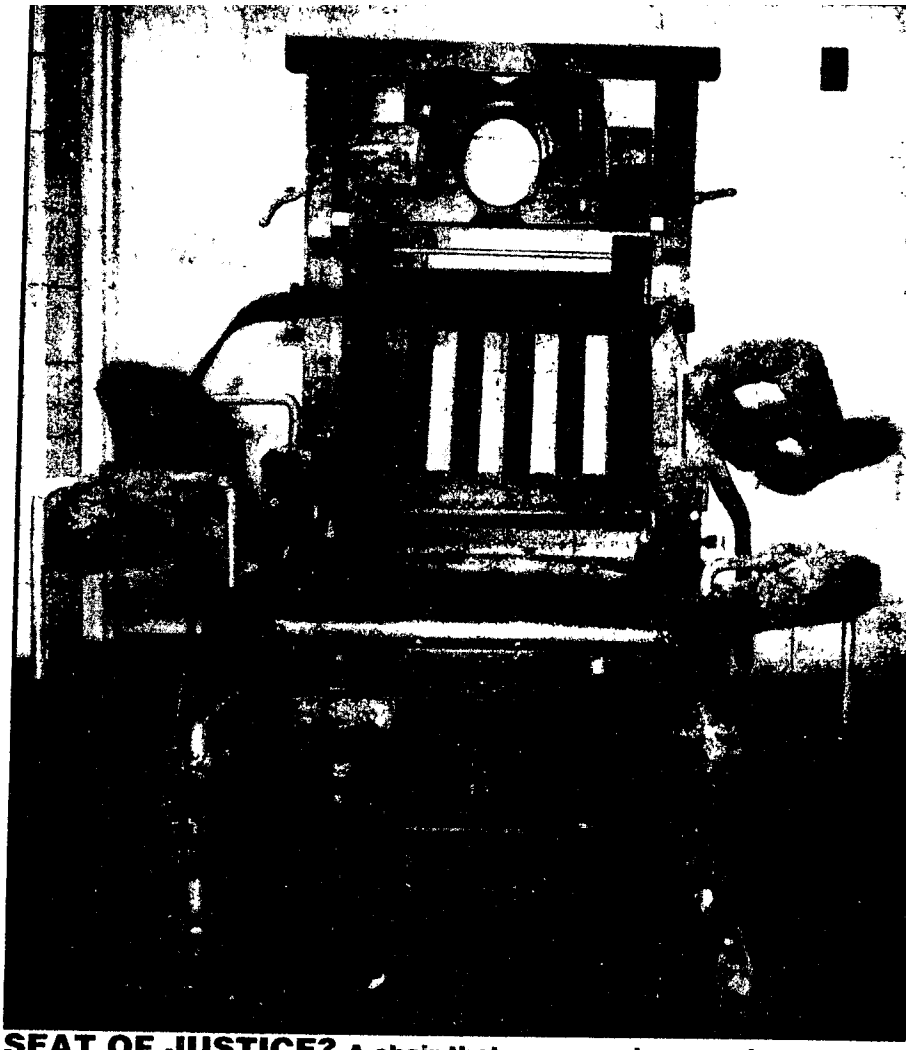

SEAT OF JUSTICE? A chair that goes nowhere — photographed at the Stateville Penitentiary, in Joliet, Illinois, in 1963.

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The most frightening aspect of this series of case studies is that the authors have probably grossly underestimated the actual number of erroneous executions among the 7000 carried out so far this century. "The errors, blunders, and tragedies recounted in the pages of this book," they acknowledge, "barely scratch the surface."

There are a number of reasons for the underestimate. First, once a defendant is executed, it is only in the most extraordinary case that lawyers, investigators, and supporters bother to carry on the fight for vindication. Not only is the legal system not allowed to focus on moot cases, but, given the critical shortage of lawyers and investigators on these complex cases, those who are out in the field turn their attention to defendants who can still be saved rather than seeking to vindicate those who have already been killed.

Second, the authors' criteria for determining when an innocent person has been wrongfully convicted are very conservative. They exclude, for example, cases in which a legitimate claim of self-defense was

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Freedom

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wrongfully withheld from the jury. Their compilation does not include persons who actually caused the deaths for which they were convicted even if they did not deserve conviction or execution because of some legally available defense.

Finally, the authors point out, the judges, prosecutors, witnesses, and even jurors responsible for the official ghastly act of retribution strive mightily to deny the existence and meaning (and even to obstruct the discovery) of any evidence that they have made a horrible mistake.

The book recounts, for example, the reaction of the Texas jurors who condemned Randall Dale Adams to death in 1977, when they were shown *The Thin Blue Line*, the ground-breaking and award-winning documentary film by Cambridge resident Errol Morris that provided the foundation for the legal proceeding that ultimately vindicated Adams and fingered the real killer (who had testified as the chief prosecution witness at the original trial).

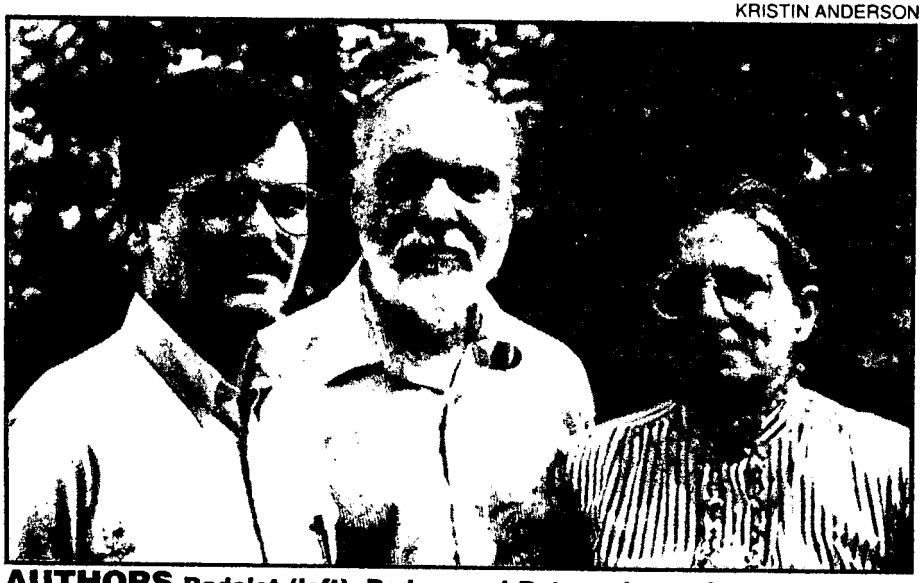
According to Randy Schaffer, Adams's appellate attorney, who worked with Morris, the film failed to persuade any of the jurors that they had the wrong man: "I think a decision of this magnitude of sentencing another human being to death is one that is not arrived at lightly. But once you've arrived at it, I think it would take wild horses to convince you that you have convicted someone in error."

Perhaps the greatest weakness of our legal system, however, is the reluctance of judges to acknowledge error, not only in cases over which they have presided, but in all cases. Those who work in the criminal-justice system have a powerful desire to protect the public's perception of the institution's fairness and accuracy. Admitting error is frequently seen as damaging to that image and to public confidence.

(As the authors point out, it is virtually unheard of for a government to acknowledge a wrongful conviction in a capital case, and they have found not a single example of a government — state or federal — in this century that has admitted that an innocent person was actually executed.)

This is perhaps one of the reasons that the current Supreme Court, under Chief Justice William Rehnquist, has been engaged in a campaign to reduce the opportunities for federal courts to review the fairness and accuracy of state and federal capital cases. Procedural obstacles have been erected to post-conviction (habeas corpus) review in these cases; "finality" has been elevated far above notions of justice. The appearance of a book like *In Spite of Innocence* is enormously important in the face of such callous and at times even lawless conduct by the highest court in the land.

KRISTIN ANDERSON



AUTHORS Radelet (left), Bedau, and Putnam have given the layman a vivid account of legal blunders in cases that call for the death penalty.

Yet this book is not aimed primarily at criminal-justice professionals. The service the authors perform is in making a lay audience privy to the inner workings of the system and the myriad ways in which people get wrongly accused and convicted of capital crimes. Understanding this phenomenon means absorbing the details of cases, and Radelet, Bedau, and Putnam have managed to provide sufficient detail to get the point across while keeping the stories vivid. The book is both legally accurate and readable.

The ghoulish nature of a legal system grown insensitive to issues of life and death is perhaps best demonstrated by a recent case not chronicled by the authors, since it is not yet over.

In the case of Leonel Herrera, argued a few weeks ago before the Supreme Court, the issue is whether the US Constitution prohibits the execution of a defendant who has uncovered evidence of his innocence but who has no judicial forum that allows the presentation of such evidence after all normal judicial proceedings have been concluded — thus pitting the desire for finality against the demand for justice. Four justices saw fit last year to review this question, and since four out of nine votes is sufficient to place a case on the Court's docket for argument and decision, Herrera got to first base.

However, he nearly tripped on his way to second, since the Supreme Court's rules require five votes to grant a stay of execution pending completion of the appeal process, and there was not a fifth justice on the Court willing to postpone Herrera's execution long enough for the Court to decide the case. Herrera would have been executed — and the case rendered legally moot — had a state-court judge not entered a last-minute stay, allowing the litigation to proceed to a decision.

I'm not optimistic about the Herrera case, given the Rehnquist Court's insensitivity. After all, in a similar case recently, a majority of the justices took extraordinary steps, convening in the middle of the night by telephone and electronic mail, in order to vacate an order of the Court of Appeals for the Ninth Circuit (in California) postponing the execution of one Robert Alton Harris.

The issue in the Harris case was whether execution by gas constitutes cruel and unusual punishment, in violation of the Eighth Amendment. Seven of the nine justices, from their beds, in an unprecedented and almost certainly unlawful order, commanded the lower federal courts to enter no more stays of execution, regardless of the reasons, and then allowed California to execute Harris before the Eighth Amendment issue was resolved (which it likely will be in a class-action case now pending in US District Court in California).

The conduct of the majority of justices was so egregious that it prompted an extraordinarily courageous member of the Ninth Circuit, Judge Stephen Reinhardt, to protest the High Court's actions on the op-ed pages of the *New York Times*. A few days later, on April 25, 1992, Judge Reinhardt gave an address at Yale Law School in which he questioned the very authority of the US Supreme Court to order the lower federal courts not to perform their duty to review cases and enter orders, including stays of execution. He questioned the Supreme Court's morality in death-penalty cases.

Though his speech was presented in terms of the need for lower federal courts ultimately to obey the US Supreme Court, he issued a powerful condemnation of the High Court's own failure to obey the law. An influential appellate judge, he thus added substantial support to the thesis promulgated by Radelet, Bedau, and Putnam.

Continuing reports of miscarriages of justice only confirm the wisdom of the Marquis de Lafayette, quoted at the end of *In Spite of Innocence*: "Till the infallibility of human judgment shall have been proved to me, I shall demand the abolition of the death penalty." ❑