

Truth and Justice Prevail

I write in response to Dorothy Rabinowitz's July 9 editorial-page commentary "Gerald Amirault Has Reason to Celebrate."

The decision of the Massachusetts Parole Board in Gerald Amirault's case, more than most of the judicial opinions that have been written in the various day-care-center and other mass child sex-abuse cases around the country, touches upon the central moral and legal question of whether the defendant was in fact guilty of the crime—not just whether he had a fair trial, not just whether the process was lawful and fair, but whether a flawed process gave way to the darker forces of the human soul and mind in order to convict obviously innocent people.

This is a profound development, because it makes the point that there is a very good reason our Constitution provides for fair process: When the process goes wrong, the likelihood of an erroneous outcome (that is to say, the conviction of an innocent person) goes way up. Fair processes have a moral justification of their own, but they also have a decidedly practical side: They make miscarriages of justice less likely. The Parole Board's opinion in Gerald's case touches upon the board's obvious sense that an innocent man was convicted, as well as its sense that the process went sufficiently awry to produce the wrongful conviction, and stayed sufficiently awry to defeat even recent efforts to undo the injustice by court processes. Although lower court judges saw the case as it was, the state's highest court, composed of justices who are more removed from the nitty-gritty of daily life, remained blind. Yet the members of the Parole Board—in some cases less sophisticated and less well-educated and all lower in rank than the Supreme Judicial Court's justices—saw it clearly. (This is an excellent advertisement for government by the people, rather than by elites only.)

Yet the board did not come to this realization out of the clear blue. Had this case come to the board 10 years ago, it is almost certain that commutation would not have been recommended. What happened in the past decade that so dramatically altered the scene to produce a unanimous vote for commutation by what is acknowledged to be one of the toughest, if not the toughest, most pro-prosecution parole boards in the country?

The answer, in my view, is easy to understand if you think about what we just celebrated during our July 4th Independence Day. Those who founded this country understood that while elites have their place, they are far from infallible, and they are prone to arrogance and self-assur-



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Pursuing a long and honored tradition, Dorothy Rabinowitz and The Wall Street Journal undertook a long, sustained, intelligent and well-documented effort to tell truth to power. This was an essential stimulus for many others in the country to become associated with the effort. Others who earlier were convinced of the Amiraults' guilt suddenly had to take a second look. Some judges (in this case, in the Superior Court) recognized the injustices that had been inflicted and sought to correct the errors, although they did so by focusing first on procedural errors (Judge Robert Barton's emphasis on the right to confrontation), and then on newly discovered evidence (Judge Isaac Borenstein's conclusion that scientific knowledge of the susceptibility of children to suggestive questioning techniques might have altered the jury's view of the case). These judges stopped short of saying they thought these errors had resulted in the conviction of innocent people, although sophisticated readers could read between the lines and understand that these seasoned judicial and judicious observers of both court processes and human nature felt that innocent people had indeed been convicted.

Yet because the lower court decisions were made on the basis of legal errors committed at trial, the Supreme Judicial Court was able to reverse those decisions, either not recognizing or simply ignoring the conviction of obviously innocent defendants. By pretending that the processes

had been done correctly, the high court justices were able to cleanse their consciences. And on what basis did the justices so conclude? On the basis that *they* were the ultimate arbiters of process, and so *their* word was final. In effect, they made a mockery of the oft-quoted jest that the highest court is supreme not because it is always right, but is always right because it is supreme.

Yet eventually even the efforts of the state's highest judges were insufficient to perpetuate this fraud on public justice: While the Supreme Judicial Court is the ultimate arbiter of process, it is not, in a free society, the ultimate arbiter of truth. Neither are the prosecutors (who remain in high office today), nor the professional frauds who wield the weapons of "science" and "compassion for the children" in their twisted crusades. Truth and justice prevailed because, eventually, the culture changed, the atmosphere improved, and truth and rationality were emerging triumphant. The pendulum began to swing and it continued to do so, eventually with a vengeance. The swing came later to Massachusetts than elsewhere, but it came.

And this, in microcosm, is how the United States of America works. Yes, it makes mistakes. It institutionalized the practice of human slavery. It deemed women second-class citizens without the right to vote. It incarcerated American citizens of Japanese ancestry during World War II on the basis of erroneous (some

Dorothy Rabinowitz is one of those hardy souls. She saw the truth and proceeded to tell it, time and time and time again, with increasing moral and intellectual force with each telling, since each subsequent telling garnered additional strength from all that went before. And she was able to do so not only because she was protected by the First Amendment, but because she found shelter in a powerful instrument of civil society, The Wall Street Journal, under the leadership of an editor, Robert Bartley, who was willing to take the risk that this would be a worthy expenditure of the newspaper's accumulated store of credibility, and intellectual and financial capital. So it was the combination of legal institutions protective of modal liberty and of civil society, and the availability in civil society of a powerful and respected organ of the Fourth Estate, led by an editor who understood the solemn obligations he and his newspaper had to truth and to history that gave free reign to an extraordinary and talented reporter/writer with a burning moral and intellectual vision—that led to where we are today in the Amirault case, as well as in other situations. (I won't here go into the service done by this same team in fighting the Orwellian assault on liberty on American college campuses.)

So I congratulate them, and everyone associated with them and with their great newspaper, not only for the Pulitzer, but also for their victory thus far in the extraordinary struggle we here in Massachusetts have been waging for too long—the struggle to free not only Gerald Amirault, but to free all of the citizens of Massachusetts from a blot on the history of the commonwealth and its institutions. In the end those institutions, coupled with the efforts of some extraordinary individuals, pulled through. Outrageous injustices happen in this country, but they don't last forever. Our institutions and our people make permanent error, not to mention tyranny of every sort, virtually impossible.

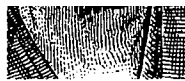
Dorothy Rabinowitz, Bob Bartley and The Wall Street Journal are heroes. Fortunately, we live in a nation that attracts, perhaps breeds, and certainly gives breathing space to such heroes. And every so often we reward our heroes—even if sometimes a bit late.

HARVEY A. SILVERGLATE

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(Mr. Silverglate is a Boston civil-liberties and criminal-defense lawyer and author, with Alan C. Kors, of "The Shadow University: The Betrayal of Liberty on America's campuses," and co-director of the Foundation for Individual Rights in Education.)

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The answer, in my view, is easy to understand if you think about what we just celebrated during our July 4th Independence Day. Those who founded this country understood that while elites have their place, they are far from infallible, and they are prone to arrogance and self-assurance. Those with power also tend to abuse that power, inevitably. This observation was certainly not new at the time of our Revolution, but the solution to it was indeed new. That solution empowered a vast civil society to function free of governmental interference. Our founding governing documents provided, in particular, for freedom of speech, of thought, of press and of association. Later, some other societies provided in their governing charters for similar rights. The difference is that in the United States there has arisen a tradition of *using* those rights.

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And this, in microcosm, is how the United States of America works. Yes, it makes mistakes. It institutionalized the practice of human slavery. It deemed women second-class citizens without the right to vote. It incarcerated American citizens of Japanese ancestry during World War II on the basis of erroneous (some would say fraudulent) governmental information supplied solemnly to the courts, including the Supreme Court. It allowed and excused, for a time, the excesses of the McCarthy era. These and other historical mistakes were eventually stopped and corrected, and even atoned for, because democratic processes and the liberty of citizens and of civil society were allowed to do their good work.

We are very lucky in this country. It's not that the people born here are genetically better than those born elsewhere. It is that our institutions are such that the better side of the human being is cultivated and given room and opportunity, while the darker side is kept in check. And we are lucky, too, because there are in this nation a small number of extraordinary individuals whose paths cross extraordinary situations and who answer the call of history.

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