Book Review
BOOK REVIEW

IN SPITE OF MEESE

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"Suspects who are innocent of a crime should [have the right to have a lawyer present during police questioning.] But the thing is, you don't have many suspects who are innocent of a crime. That's contradictory. If a person is innocent of a crime, then he is not a suspect."


America's primary response to the perceived dramatic increase in violent crime over the past decades has been to increase dramatically the level of punishment meted out on those who are convicted of these crimes. In many states, legislatures have passed mandatory minimum sentencing laws requiring judges to sentence all convicted offenders to severe sentences—no matter what the circumstances of the offense or the offender.1 On the federal level, the sentencing guidelines have created a new sentencing system which has served not only to cut down on judicial sentencing discretion, but also to enhance the severity of sentences.2 And the recently enacted crime bill adds more than fifty new crimes to the list of federal crimes eligible for the federal death penalty, and creates a new “three-strikes-and-you’re-out” provision, which requires mandatory life sentences for three time recidivists.3

* Professor of Law, Northwestern University School of Law. My thanks go out to Ethan Cohen, David Fisher, and Katrin Knudsen for helpful assistance on this essay. The essay is dedicated to my friend and client Rolando Cruz, with the fervent hope that he will soon join the ranks of those whose innocence has been officially declared.


3 See Violent Crime Control and Law Enforcement Act of 1994. At least 30 states are examining the “three-strikes-and-you’re-out” idea, “backed by Governors as disparate as Republi-
There is, of course, much room for debate about the sensibility of using enhanced sentences to cure the perceived explosion of violent crime on our streets. In the course of that debate, however, another major issue merits consideration. It is critical to consider whether the same spirit that is fueling the movement to stiffer penalties is also leading to a society which is less zealous in maintaining safeguards against the conviction of the innocent. It is entirely predictable that the more a society feels threatened by criminal activity, the more severely it will deal with those whom it convicts, and the more willing it will be to convict those whom it suspects. And it is entirely predictable that, once having convicted an individual, such a society might be increasingly unwilling to consider claims that it has convicted an innocent person.

Ironically, then, the very same “tough on crime” attitude that makes it more likely for individuals to be wrongly convicted, also makes it less likely for society to remedy that wrong. Whatever one makes of the phenomenon of enhanced sentences, the concomitant callousness towards the risk of erroneously convicting the innocent has severe social and constitutional implications. There could not, then, be a more opportune time for the publication of In Spite of Innocence, by Hugo Bedau, Michael Radelet, and Constance Putnam.

I. STUDYING MISCARRIAGES OF JUSTICE

Building on a study that Bedau and Radelet published in the Stanford Law Review in 1987, In Spite of Innocence describes 416 cases in
which defendants convicted of "capital or potentially capital crimes" have later been found to be innocent. Unlike the Stanford study which was geared toward legal and academic audiences, *In Spite of Innocence* is written to appeal to a general audience and contains thirteen chapter-length studies of specific cases among the 416.

The authors' criteria for including a case on their list is, in some ways, quite demanding. For example, they excluded cases in which the defendant caused the death of a person, but should not have been convicted of murder because he acted in self-defense, was provoked, or lacked the requisite mental state to be guilty of that crime. Nor are they concerned with procedural defects leading to convictions. Instead, they are concerned with cases in which the defendants were completely uninvolved in the crime for which they were convicted—what they call "wrong-person convictions."

The most difficult methodological challenge facing Radelet, Bedau, and Putnam was developing standards for deciding whether to include a case as a wrongful conviction. Predictably, the method they chose is controversial. They rely on evidence of innocence that falls into two categories: "official judgments of error" and "unofficial judgments."

About ninety percent of the cases in Radelet, Bedau, and Putnam's study involve what they call "official judgments of error." By this they mean official commutations or pardons; an award of indemnity (by the legislature or the courts) to the convicted defendant after release; the reversal of a conviction combined with a prosecutor's decision to drop charges against the defendant; or reversal of a conviction followed by acquittal. They do not include every case fitting these criteria on their list. A prosecutor's decision to drop charges after a reversal of a conviction may have nothing to do with an official recognition of innocence, but may relate simply to the unavailability of key prosecution witnesses. So, too, the naked fact that a governor has granted a pardon or clemency does not provide conclusive evidence of innocence. Thus, the authors exercise their judgment based on the facts of each case and explain that "the more of these official actions there are in a given case, the more complete is the evidence of official belief in the defendant's innocence—and, to that extent, the more

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7 Of the 416 cases that the book describes, approximately 150 involve defendants sentenced to death for first-degree murder; a few involve defendants sentenced to death for rape; and the remainder involve defendants sentenced to life in prison for murder.

8 Michael L. Radelet et al., *In Spite of Innocence* 17 (1992).

9 *Id.*
compelling the inference that the defendant really is innocent."

The remaining ten percent of the cases in the study involve "unofficial judgments" of error. In these cases, Radelet, Bedau, and Putnam rely on their ability to convince the reader that a miscarriage of justice has occurred, even though there has been no official action that supports the authors' conclusion. Some of these cases involve defendants who have been executed and, therefore, have no mechanism for seeking official exoneration. Others involve defendants who continue to be imprisoned despite evidence that convinces the authors that they are factually innocent.

In a great many of these cases, the authors are exercising their own judgment in concluding that the defendant has been wrongly convicted. This subjectivity has been the focus of intense criticism from those who view Radelet, Bedau, and Putnam's conclusions as posing a threat to America's willingness to stomach a death penalty in which innocent people may be executed. Most notably, shortly after the publication of Bedau and Radelet's Stanford Law Review Article, two Assistant Attorney Generals in the Meese Justice Department, Stephen Markman and Paul Cassell, published a rebuttal to Bedau and Radelet's study in which they dissected many of the cases and argued with Bedau and Radelet's conclusions about many specific defendants. According to Markman and Cassell, "[t] he overwhelming problem with the Bedau-Radelet study is the largely subjective nature of its

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10 Id. at 17.

Radelet, Bedau, and Putnam state that "[t]o the best of our knowledge, no state or federal officials have ever acknowledged that a wrongful execution has taken place in this century." Id. at 18. Perhaps the closest anyone has come is Massachusetts Governor Michael Dukakis's 1977 declaration of "Nicola Sacco and Bartolomeo Vanzetti Memorial Day," to commemorate the fiftieth anniversary of Sacco and Vanzetti's execution. Even then, though, Dukakis stated that "although he took no stand on whether the two were guilty or innocent, he wanted to remove 'any stigma or disgrace from the names of the families and descendants and so from the name of the Commonwealth of Massachusetts.'"


12 In announcing his new position that capital punishment is unconstitutional, Justice Blackmun mentioned the risk of executing the innocent as one of the many points that has changed his thinking on the issue. Citing the earlier work of Bedau and Radelet, he writes that "[e]ven the most sophisticated death penalty schemes are unable to prevent human error from condemning the innocent. Innocent persons have been executed, see Bedau & Radelet, supra note 6, at 173-79, perhaps recently, see Herrera v. Collins, 113 S. Ct. 853 (1993), and will continue to be executed under our death penalty scheme." Callins v. Collins, 114 S. Ct. 1127 (1994) (Blackmun, J., dissenting from the denial of cert.). For another recent collection of cases involving 48 wrongful convictions in capital cases, see Innocence and the Death Penalty: Assessing the Danger of Mistaken Executions, Staff Report by The Subcomm. on Civil and Constitutional Rights Comm. on the Judiciary, 103d Cong., 1st Sess. (1993); see also MARTIN YANT, PRESUMED GUILTY (1991) (collecting cases). For a dated but classic work on the subject, see EDWIN BORCHARD, CONVICTING THE INNOCENT (1932).

methodology and therefore of its conclusions." They therefore concluded that:

a neutral observer is entitled to be skeptical that this study contributes to a better understanding of the prevalence of error in the administration of the death penalty. The use of such questionable methodology invites readers to suspend use of their critical faculties and simply accept the results of this study on faith.

This criticism is valid—to a point. Without producing a multi-thousand page tome, *In Spite of Innocence* could not possibly provide elaborate detail about each of the cases that the authors believe qualify as miscarriages of justice. Instead, the initial study and *In Spite of Innocence* provide a detailed discussion of a sampling of cases to give the reader a sense of the kinds of standards that the authors use to assess whether a miscarriage of justice has taken place. With respect to these cases—thirteen chapter length case studies in the book which make up over 250 of the book’s 390 pages—the reader is not asked to simply take Radelet, Bedau, and Putnam’s word for the fact that a miscarriage of justice occurred. Rather, most of the study and (even more so) the book is about the telling of stories—stories about the evidence that led to convictions, and stories about the evidence that led the studies’ authors to conclude that the convictions constitute miscarriages of justice. Neither the initial study nor the book reproduces the entire trial transcript and every document and exhibit relevant to a case. But they do provide enough information to allow the reader to determine whether the authors have reached a reasonable conclusion that these thirteen cases represent miscarriages of justice.

If readers are left unpersuaded by these case studies, then they should most certainly be dubious about the index of 403 additional cases which the authors claim constitute wrongful convictions. If, however, they are persuaded by the thirteen case studies, then they may find it reasonable to conclude that Radelet, Bedau, and Putnam are using sensible standards and are arriving at sound conclusions. Readers may still not want to declare on faith that they agree with each of the 403 indexed cases, but they will surely conclude that there

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14 Id. at 126.
15 Id. at 128.
16 "Everyone knows that a good story is more gripping than the best sociological research or philosophical analysis." *Radelet et al.*, *supra* note 8, at ix-x.
17 Markman and Cassell have suggested that Bedau and Radelet's conclusions should be suspect because Bedau and Radelet both "strongly support abolition of the death penalty." *See Markman & Cassell, supra* note 13, at 128 n.41. It must follow, then, that Markman's and Cassell's criticism of Bedau and Radelet should be met with similar suspicion in view of Markman's and Cassell's zealous support for the death penalty.
are many cases of wrongful convictions. Personally, I find Radelet's, Bedau's, and Putnam's accounts quite compelling, but readers should not take my word on faith any more than they should blindly adopt the position of Radelet, Bedau, and Putnam, or Markman and Cassell. They should read the book and reach their own conclusions.

II. **What Do These Stories Tell Us About Capital Punishment?**

*In Spite of Innocence* and the study behind it are sure to play prominent roles in future debates about the death penalty. Within that debate, the important question is not whether each of the 416 cases discussed in *In Spite of Innocence* actually belongs on the list. Rather, the question is what to do with the obvious fact—a fact that Radelet, Bedau, and Putnam have driven home forcefully—that miscarriages of justice occur in capital cases.

Opponents of the death penalty have long argued that human fallibility in the administration of any system, including capital pun-

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18 The list is, in any event, far from complete. One of the most glaring omissions is the case of Rubin "Hurricane" Carter, the former top contender for the middleweight boxing crown who spent more than nineteen years in prison before he was granted habeas corpus relief, and charges against him were dropped. For an extraordinarily moving account of this case, see *Sam Chaillon & Terry Swinton, Lazarus and the Hurricane* (1991). Mr. Carter now lives outside of Toronto, Canada, and is Executive Director of the Association in Defense of the Wrongfully Convicted, a group which works to secure the freedom of the wrongly convicted.

19 Of the more than 400 cases of wrongful conviction that the book discusses, 23 are cases in which the defendant was actually executed. It is tempting to argue that this relatively small number shows that the system generally works and that even if a significant number of innocent people are sentenced to death, they are virtually always exonerated prior to execution of the sentence. Before one reaches that conclusion, though, it is imperative to think about why very few cases of wrongful conviction are likely to turn up after an individual is executed. As Radelet, Bedau, and Putnam note, this small number of cases "is an indication not of the fairness of the death penalty, but rather of its finality." *Radelet et al., supra* note 8, at 273.

As long as a defendant remains alive, he, his lawyers, and the activists working on his behalf have the ability and incentive to bring forth the proof of his innocence. The government, moreover, generally provides some forum (be it judicial or executive) for consideration of that evidence. Once the defendant has been executed, however, these opportunities and incentives to establish the defendant's innocence all but disappear. There is no governmental forum for asserting the innocence of the executed. And the defendant can no longer use his voice to declare his innocence and help marshal the necessary proof or media investigation to establish the error of his conviction. The lawyers and activists remain alive, but once the defendant has been executed, there are other clients and other causes that cry out for their attention. As Radelet, Bedau, and Putnam write with respect to the lawyers for James Adams, a man who was executed for a crime they conclude he did not commit: "Once Adams was dead, his attorneys had to turn their full attention to the plight of other death row clients. Time spent re-investigating the circumstances of the . . . murder in the hope of vindicating the late James Adams was time denied to clients still alive but facing the electric chair." *Id.* at 10.

20 As Bedau and Radelet demonstrate, miscarriages of justice do not always come about
ishment, should preclude human beings from carrying out the ultimate penalty. Indeed, the closing words of the text of In Spite of Innocence are the oft-quoted words of the Marquis de Lafayette: “Till the infallibility of human judgment shall have been proven to me, I shall demand the abolition of the death penalty.”

Others counter that a society must constantly make decisions that lead inevitably to the death of innocent individuals. For example, society continues to build high-speed highways and allow airplanes to fly, even though it is a virtual certainty that lives will be lost in highway accidents and airplane crashes. This is done because society deems the benefits of quick travel to outweigh the costs of the innocent lives that are lost. Similarly, even though it is clear that any system of criminal justice will erroneously imprison some individuals, society does not consider this a serious argument against imprisoning people, because the benefits of imprisonment clearly outweigh its costs. So, too, proponents of capital punishment argue, the benefits of the death penalty sufficiently outweigh the fact that innocent lives might be lost through its use. Thus, in recent testimony before Congress, Paul Cassell cited three benefits of the death penalty—incapacitation, deterrence, and just punishment—which in his view outweigh any costs associated with executing the innocent.

Whether the purported benefits of the death penalty outweigh its inevitable price is an issue that cannot be evaluated based only on lists of innocent people that have been executed. Theoretically, one could convince Paul Cassell that 1000 innocent people have been executed in the past year alone, and he could still argue that the advantages of capital punishment justify its cost. The debate over the death penalty is not, therefore, won or lost just on the proof that there are errone-

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because of fallibility, in the sense that the term is used to connote “innocent mistakes.” Take, for example, the case of Clarence Brandley, who was sentenced to death for the rape and murder of a teenage girl in Texas. Brandley and another janitor named Henry Peace had found the victim’s body, and the police concluded that one of them had committed the crime. According to Peace’s later testimony, the officer interviewing the two janitors said: “One of you two is going to hang for this.” The officer then turned to Brandley and added: “Since you’re the nigger, you’re elected.” Id. at 121. More recently, a former West Virginia state police chemist was indicted for fabricating inculpatory testimony in more than 100 cases. See Police Chemist Surrenders in Perjury Case, N.Y. TIMES, Aug. 5, 1994, at 14.

21 Radelet et al., supra note 8, at 281.

22 Radelet, Bedau, and Putnam reply to this argument by suggesting that, unlike drivers on highways, innocent individuals condemned to death have not necessarily consented to risk by engaging in dangerous activity. Id. at 276. This answer is not very satisfying, given the fact that highway accidents also kill pedestrians, and that airplanes sometimes crash into houses.

ous convictions, or on the evidence that there are a substantial number of them. Rather, the debate turns much more on the arguments about capital punishment’s contribution to incapacitation, deterrence, and just punishment, and on religious and moral views about the State’s authority to intentionally take a human life. Still, to the extent that people like Cassell claim to support the death penalty based on the kind of cost-benefit analysis described above, they should welcome the development of data about the level of erroneous executions—unless, of course, the point is to look at the purported benefits without ever considering the costs. Radelet, Bedau, and Putnam’s study is surely not conclusive on the debate. But it is consequential.

There is another sense in which In Spite of Innocence is an important contribution to the public and political debate over the death penalty. Supporters of the death penalty have learned how to use storytelling as an effective tool to further their goals. By describing in great detail the heinous crime for which a defendant has been convicted, death penalty proponents know they can trigger an intense emotional reaction that makes the listener more willing to accept the conclusion that the death penalty is appropriate, either as a general matter, or in a particular case. Those who are more dubious about the death penalty are severely handicapped here. They can describe the hideous process of execution, but even the most graphic description of the plight that awaits a convicted killer is unlikely to invoke much passion when compared to the fate suffered by an innocent victim.

Consider the following exchange between Justices Blackmun and Scalia. In the opinion announcing his view that the death penalty is unconstitutional, Justice Blackmun described death by lethal injection:

On February 23, 1994, at approximately 1:00 a.m., Bruce Edwin Callins will be executed by the State of Texas. Intravenous tubes attached to his arms will carry the instrument of death, a toxic fluid designed specifically for the purpose of killing human beings. The witnesses standing a few feet away, will behold Callins, no longer a defendant, an appellant, or a petitioner, but a man, strapped to a gurney, and seconds away from execution.

Justice Scalia countered as follows:

Justice Blackmun begins his statement by describing with poignancy the

24 See Robin West, Narrative, Responsibility and Death: A Comment on the Death Penalty Cases from the 1989 Term, 1 MD. J. CONTEMP. LEGAL ISSUES 161 (1990). As West explains, these narratives typically “are not relevant, by any stretch of the legal issues raised on appeal.” Id. at 171.

death of a convicted murdered by lethal injection. He chooses, as the
case in which to make that statement, one of the less brutal of the
murders that regularly come before us—the murder of a man ripped by
a bullet suddenly and unexpectedly, with no opportunity to prepare
himself and his affairs,26 and left to bleed to death on the floor of a
tavern. The death-by-injection which Justice Blackmun describes looks
pretty desirable next to that. It looks even better next to some of the
other cases currently before us which Justice Blackmun did not select as
the vehicle for his announcement that the death penalty is unconstitu-
tional—for example, the case of the 11-year-old girl raped by four men
and then killed by stuffing her panties down her throat. . . . How envia-
bale a quiet death by lethal injection compared with that!27

It would appear that this is a competition that death penalty propo-
nents will win every time.

What Radelet, Bedau, and Putnam have provided, however, is an-
other type of story that is relevant to the death penalty debate. The
public might not care about Bruce Callins’s lethal injection, but per-
haps it does care about the fact that Randall Dale Adams—a man as
innocent as Bruce Callins’s victim—was once himself within three
days of lethal injection. (Adams was ultimately exonerated after the
true killer confessed to a national audience in the film “The Thin
Blue Line,” and his story is one of the thirteen in-depth case studies
contained in In Spite of Innocence.)28 And the public may well be
moved by the story of Gus Langley, who at one point was so close to
death that his head had been shaved in preparation for the electric
chair, but was later found to be innocent, and was released.29

The gripping accounts of wrongful convictions that the book
presents will surely repulse and outrage the reader in as dramatic a
fashion as Justice Scalia’s account of the awful death suffered by the
eleven-year-old victim in the case he described. As a matter of story-
telling, Randall Adams’s story, as well as the others that Radelet,
Bedau, and Putnam have presented, provides useful tools in revealing

26 The death of the victim in the Callins case is an awful tragedy, whether the death was
instant or not. One cannot but wonder, though, whether Justice Scalia would consider the
murder even more heinous had the victim been given a year’s notice that he would be
shot, thus affording him the “opportunity to prepare himself and his affairs.” Cf. People v.
Lucas, 548 N.E.2d 1003, 1023 (Ill. 1989) (“brutal or heinous” aggravating factor not satis-
fied where victim’s death was instantaneous); Spinkellink v. State, 313 So.2d 666 (Fla.
1975) (element satisfied even though victim was killed instantly by gunshot wound); see
generally Richard A. Rosen, The Especially Heinous Aggravating Circumstance In Capital Cases:

27 Callins v. Collins, 114 S. Ct. 1127 (1994) (Scalia, J., concurring with the denial of
cert.), (footnote added).

28 See Radelet et al., supra note 8, at 60-73. For an excellent account of Adams’s jour-
ney to freedom, see Randall Dale Adams, William Hoffer & Marilyn Mona Hoffer,

29 Radelet et al., supra note 8, at 275; see also id. at 214-15 (discussing Langley case).
a side of the death penalty debate that is often obscured by the details surrounding the victim's tragic death.

III. Changing Attitudes About Wrongful Convictions.

Ultimately, *In Spite of Innocence* and other books and films on the subject of wrongful convictions are unlikely to have direct impact on the broad question of whether the death penalty should be abolished outright. Rather, their real potential for impact is on a variety of less general, but intensely important questions and attitudes relating to the workings of our criminal justice system. Specifically, works such as *In Spite of Innocence* can have vital effects on the ways in which players at virtually every stage of the system envision their roles. The risk of erroneous conviction and execution may not be strong enough to convince the public or its lawmakers to abandon capital punishment, but it may well serve to prompt many individuals to take fresh looks at their attitudes toward the specific roles they play in the process.

Imagine two communities, the citizens of which hold views about the criminal justice system at extreme points in the spectrum. In one community, called Optiville, the public, the legislators who draft the statutes, those who enforce the laws, those who serve on juries, and those who act as judges believe that innocent people are never, or at least very rarely, criminally prosecuted, much less convicted. They believe that all police and prosecutors are honest and virtually infallible, that the prosecution does not present perjured testimony, and that the prosecution's eyewitnesses do not make mistakes. In sum, they agree with the former chief law enforcement officer of the United States, Edwin Meese, who stated that "if a person is innocent of a crime, then he is not a suspect,"[30] much less a defendant or convict. By contrast, in the other community, known as Pessivile, the public, the legislators who draft the statutes, those who enforce the laws, those who serve on juries, and those who act as judges believe that innocent people are criminally charged, and even convicted, with a great deal of frequency.

It is fair to assume that people in Optiville will view their roles quite differently from their counterparts in Pessivile. If jurors in Optiville believe there is virtually no risk of wrongful or erroneous charging and prosecution, then they can feel rather confident in believing the testimony of all prosecution witnesses and trusting, more generally, that the prosecution would not be charging an innocent person in the first place. So, too, judges in Optiville would have little reason

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to scrutinize prosecutors’ conduct, or to question juries’ guilty verdicts. As for the lawmakers in Optiville, what possible reason would they see to devote resources to resolving post-conviction claims of innocence when those in Optiville are sure that innocent people are never (or hardly ever) convicted? And governors of Optiville would be quite loathe to grant executive clemency on the basis of innocence, when everyone is confident that the court system works so well.

In Pessiville, the population’s attitudes toward these matters are dramatically different. In Pessiville, jurors are very dubious about the police and prosecutors, and jurors view their role as protecting the public from the abuses of power to which these law enforcement officials are often prone. They believe that prosecution witnesses commit perjury with some frequency, and that eyewitnesses often make mistakes. Judges in Pessiville feel that strict judicial control of the trial process is critical because prosecutors cannot be trusted to consistently follow the maxim that a prosecutor

is the representative not of an ordinary party to a controversy, but of a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all; and whose interest, therefore, in a criminal prosecution is not that it shall win a case, but that justice shall be done.31

Further, the lawmakers in Pessiville are concerned about the prospects of wrongful convictions and are resolved to ensure that prisoners have meaningful opportunities to present their post-conviction claims of innocence. And the governor of Pessiville finds wide public support for his decisions to grant clemency to individuals he concludes have been wrongly convicted.

Both Optiville and Pessiville are, of course, extreme paradigms. The fifty states that makes up the United States fit in at various places between these two extremes. Moreover, within these states, attitudes often differ widely depending on the nature of a particular community and its economic and racial makeup.32 So much turns, though, on exactly where on the spectrum a particular community, juror,

32 See Jerome H. Skolnick, The Jury Was Never Meant To Be Rational, L.A. TIMES, May 1, 1992, at 7 (arguing that juries from suburban, relatively prosperous and unicommunities are likely to hold very different perception of police than jurors from urban, cosmopolitan, and multicultural communities); See also Terence Moran, For Simi Valley Jurors, Cop Credibility Was A Given, N.J. L.J., June 15, 1992, at 17 (“How you think about things like crime and cops in America depends to a large extent on where you live and, yes, what color you are.”); Poll Finds L.A. Residents Believe Police Brutality Is Common, UPI, March 10, 1991, available in Lexis, News Library, Wires File) (Among whites, 19% said police brutality was very common and 39% said it was fairly common. Among Hispanics, 33% said it was very common and 27% said it was fairly common. And among blacks, 44% said brutality was very common and 36% said it was fairly common.).
judge, legislator, or governor is located. Marginal changes in attitudes about the possibility of wrongful prosecution and conviction can make a world of difference in the attitudes that a juror takes toward the evidence in a particular case, and whether that juror votes to acquit or convict. So, too, marginal effects on judges, legislators, governors, and the public can have a significant effect on these actors’ willingness to temper their “tough on crime” rhetoric with a willingness to be tough on proving crime as well.

To explore this point, consider the roles of two groups of individuals—jurors and politicians—in preventing or remedying wrongful convictions. As will be seen, a strong case can be made that books like *In Spite of Innocence* can serve important roles in helping these actors appropriately define their roles.

A. JURORS

Every juror brings into the jury box a wide array of life experiences and perceptions of reality. If that sense of reality leans a bit toward the Optiville model, the juror will be prone to believe prosecution witnesses, trust the prosecutors’ decision to prosecute, and be less zealous in independently safeguarding the presumption of innocence. By contrast, if the juror’s sense of reality leans a bit toward the Pes-siville model, the jury will treat testimony for the prosecution with more skepticism, will not put much, if any, weight on the fact that the prosecutors have charged the defendant, and will be far more zealous in safeguarding the presumption of innocence.

A critical function of *In Spite of Innocence* is to provide data to help shape the public’s perception of reality on issues relating to criminal justice. Jurors evaluate evidence based on their sense of the realm of what is possible. By recounting stories of wrongful convictions, *In Spite of Innocence* serves to inform and remind everyone that: police do lie at times; eyewitnesses do make mistaken identifications; prosecutors do bring charges against innocent individuals; jurors and judges do convict innocent people; and each person does have a role to play in preventing these miscarriages of justice. This book is not alone in playing that role. Films such as *In The Name Of The Father* and *The Thin Blue Line* are also effective in publicizing the fact that the justice system can and does convict innocent people.

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33 Although the producers of *In The Name Of The Father* took much poetic license with the facts of the case, the essence of the portrayal of the police conduct in the case is accurate. See Alastair Logan, *In The Name Of The Father* (1994) (essay by one of the attorneys for the McGuire Seven).

34 There is room for this lesson in legal education as well. Stephan Landsman reports that a number of law students who took his course on miscarriages of justice, or what he
If members of the public are to play their roles as safeguards against miscarriages of justice, they must be exposed to these stories so that they understand that claims of factual innocence are not inherently implausible. A juror who has read In Spite Of Innocence or has seen The Thin Blue Line is in a better position to evaluate a defendant’s claim of innocence than a juror who has never been exposed to the possibility of police and prosecutorial misconduct.

The Rodney King beating tapes are a good example of this point. Assume that no videotape had ever been made of the beating, and that Rodney King had simply called a press conference in the days after the incident to tell the public about the horrors he had experienced. It seems rather clear that many people would dismiss his entire account as a lie. They would have considered it unimaginable, impossible, that police officers could have inflicted that kind of beating on an unarmed citizen. No matter how strong the physical evidence might have been, these people would have rejected King’s allegation because it was too far from the realm of possibility that their personal experiences would have allowed them to comprehend.

The tapes, of course, changed all of that. They changed many people’s sense of the possible, by exposing them to the fact that police can act viciously. In doing so, the effects of the tapes went far beyond Rodney King’s case. All across the country, prosecutors and defense lawyers began reporting that jurors were treating police testimony with newfound skepticism because the jurors no longer believed that police were beyond misconduct: the tapes seemed “to be undermining jurors’ traditional presumption in favor of police in civil calls “satanic cases,” reported that the course had shown them “how fragile the system really is.” See Stephan A. Landsman, Satanic Cases: A Means of Confronting the Law’s Immorality, 66 Notre Dame L. Rev. 785, 799 (1991).

35 See Gary A. Hengstler, How Judges View Retrial of L.A. Cops, A.B.A. J., Aug. 1993, at 70 (62% of judges polled believed that the two convicted officers at the federal trial would not have been convicted without the videotape as evidence).

36 It is probable that part of the public’s difficulty in accepting the possibility of police misconduct is the horror that comes with that realization. It is a frightening prospect to realize that virtually any police officer has the ability to claim that he saw illegal drugs on the front seat of a car during a traffic stop, and that many jurors would convict on that testimony alone. Or perhaps, as Stanley Milgren’s experiments showed, “even when the destructive effects of their work become patently clear, and they are asked to carry out actions incompatible with fundamental standards of morality, relatively few people have the resources needed to resist authority.” STANLEY MILGREN, OBEDIENCE TO AUTHORITY: A EXPERIMENTAL VIEW 6 (1974).

37 Ironically, even though no one could deny that King had been beaten, the Simi Valley jury that acquitted his attackers apparently did so based on their continuing assumptions about the integrity of the police. See Linda Deutsch, The Jury, The Media—and the Riot: Jurors Toe The Thin Blue Line, Chi. Trib., Apr. 30, 1992, at 8 (“The jury that acquitted four Los Angeles police officers in the Rodney King beating heeded defense lawyers’ warnings that police are ‘the thin blue line’ separating the law-abiding from the lawless.”).
As one California judge put it: "[o]ne of the standard questions is, 'Will you believe a police officer just because he's a police officer'? . . . Usually people answer yes. Now you may get the opposite response."

Of course, too much skepticism can be as bad as no skepticism at all. If a juror is only exposed to stories of police and prosecutorial mistake, misconduct, and perjury, and is led to believe that police never tell the truth and that prosecutors never charge the guilty person, then that juror's attitude toward police will distort the factfinding process as much as the attitude of the juror who believes that police and prosecutors never make mistakes and never engage in misconduct. In Spite of Innocence does not seek to convince anyone that they live in a Pessiville-like world. The point of the stories told in In Spite of Innocence is not to convince anyone that there is a probability of error or malice in any given case. The point is to convince people that there is always a possibility of error or malice making its way into the system, and that the public's job is to evaluate evidence fairly—not to rely on general claims about police and prosecutors always or never acting properly.

This message is sorely needed. A 1992 poll of people who sat on juries found that twenty-eight percent of all jurors believe that a de-

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38 See L.A. Beating Tape Affects Other Cases, CHI. TRIB., Apr. 25, 1991, at 12; see also 1993 Juries Show Doubts about Police, NAT'L L.J., Jan. 17, 1994, at S15 (quoting attorney who won case against police as stating that "[t]he trend following the Rodney King case is that people are a lot more sensitive to police issues . . . ").

39 David Wharton, Opinions On King Case are Jeopardizing Prosecutions, L.A. TIMES, Mar. 30, 1991, at 1. Many juries are instructed not to value testimony of police officers more than other witnesses, but, as Justice Jackson wrote, "[t]he naive assumption that prejudicial effects can be overcome by instructions to the jury all practicing lawyers know to be unmitigated fiction." Krulewitch v. United States, 336 U.S. 440, 453 (1949) (Jackson, J., concurring) (citation omitted).

40 Another way of delivering this message would be to allow expert testimony about the historical incidence of wrongful convictions and the kind of factors that are typically involved in such cases. This is an approach that many have advocated with respect to exposing the frailty of eyewitness testimony, and the courts are quite split on the admissibility of expert testimony in that context. See generally Cindy J. O'Hagan, When Seeing is Not Believing: The Case for Eyewitness Expert Testimony, 81 GEO. L.J. 741 (1993) (surveying literature and caselaw).

In the mid-1980s, a number of courts allowed Michael Radelet (and a number of others) to testify about wrongful convictions at capital sentencing hearings. See Michael L. Radelet, Sociologists as Expert Witnesses in Capital Cases: A Case Study, in EXPERT WITNESSES: CRIMINOLOGISTS IN THE COURTROOM 119 (Patrick R. Anderson & L. Thomas Winfree, Jr. eds., 1987). In the three cases in which Radelet testified, the jury refused to impose the death penalty. In one of those cases, a number of jurors reported that the testimony about erroneous convictions was responsible for their decision. Many other courts, however, have refused to allow expert testimony on this subject. See id. at 127; People v. Pride, 833 P.2d 643, 683 (1992), cert. denied, 113 S. Ct. 1929 (1993) (expert evidence on convictions of innocents is inadmissible).
fendant who is charged is either guilty or probably guilty, and forty-two percent of white jurors and twenty-five percent of black jurors said that "in a conflict of testimony between a law enforcement officer and a defendant, the law enforcement officer's [testimony] should be believed." These numbers are disturbing in their own right, but are even more disturbing when one realizes how many of the respondents must have agreed with these statements but refused to tell the pollster, just as they must have refused to tell the judge or lawyer who asked them about these points in voir dire.

The following true story reveals the nature of the problem. In the summer of 1990, I was among the venire being chosen for a criminal trial at the infamous courthouse at 26th and California in Chicago, Illinois. After the judge asked each of us a number of questions about our backgrounds and occupations, he asked whether we were able to accept the presumption of innocence. Each of us told that judge that we could. Later, while we were waiting to find out who among us had been excused, one of the members of the venire asked me why the "criminal" had a right to decide who should be on the jury. I questioned her use of the term "criminal," explaining that it would be the jury's job to decide if he was or was not a "criminal." She responded honestly: "Honey," she said, "they don't charge 'em unless they're guilty." This sentiment was, of course, diametrically opposite of what she had told the judge just minutes earlier. Predictably, though, she was chosen for the jury; I was excused. I am quite confident that this juror never read any articles or books about wrongful convictions. I hope that she has a chance to pick up In Spite of Innocence before she is next called to jury service.

B. POLITICIANS

Increased public recognition about the possibility of wrongful convictions will not only have effects on the ways in which juries evaluate evidence of guilt and innocence, but could have significant effects

42 Racial Divide Affects Black, White Panelists, Nat'l L.J., Feb. 22, 1993, at S8. 51% of the respondents disagreed with this statement. According to one expert jury consultant, "[t]hat statistic . . . is unequivocally because of what happened in Rodney King." Id. A bit of reflection about that 51% figure is appropriate before one concludes, as one former prosecutor did, that the "figure speaks well for the defense. That 51% disagree is a good sign for the defendant—that he has at least a 50-50 chance. . . ." Id. The fact that 51% of the respondents were willing to weigh police and defendant's testimony without putting a thumb on the scale is no great tribute to the fairness of the system. 100% of the jurors take an oath and are instructed to do that.
43 When I informed the court of what she had said; she simply denied it. At that point, however, the court excused her.
on the public's—and hence elected officials’—attitudes toward many issues surrounding the criminal justice system. For now, consider the effect that public opinion might have on two important issues: judicial procedures for considering claims of innocence and executive clemency.

Senator Allen Simpson once summed up his attitude toward capital sentencing with these words: "let’s fry ‘em fast." He is, quite clearly, not alone in this sentiment. Presidents Bush and Reagan often complained about the delays in executing condemned prisoners, and President Clinton made this a recurring theme of his presidential candidacy. The call to stop the appeals and to get on with the executions has become a central element in “tough on crime” platforms at the federal, state, and local levels throughout the land.

These calls for closing the courts and starting the executions are wildly popular. When a politician speaks of the fourteen years that passed between the time that the state condemned John Wayne Gacy and the time it executed him, many listeners develop a sense of outrage. No one seemed to have held any serious doubts about Gacy's guilt, and many see no point in the prolonged appellate process that delayed Gacy's execution. Given Americans' current views on capital punishment, this is an argument that anti-death-penalty advocates are not about to win. A plea to keep the courts open so that people like Gacy can raise technical legal arguments about their convictions or sentences is not likely to garner much public support.

The effects of public focus on cases like Gacy can be potentially devastating. In February 1994, a bill was introduced in the Illinois Senate that would do away entirely with all post-conviction procedures and habeas corpus for death row inmates in Illinois! Whether or not this bill goes anywhere, its introduction provides strong evidence

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47 One recent poll found that 77% of Americans favor capital punishment. See Nancy Gibbs, Laying Down the Law, TIME, Aug. 23, 1993, at 22.
48 See Eric Zorn, Execution Makes Sense—For Gacy, CHI. TRIB., Nov. 7, 1993, at B1 (arguing that focus on cases like Gacy takes attention away from hard cases).
about the extent to which focus on cases like Gacy's—and in the public's mind most death row inmates are not very much different from Gacy—can have on political debate.

This is why *In Spite of Innocence* can play such an important role in the current debate over reforms to expedite executions and close off avenues of appeal. *In Spite of Innocence* teaches that not every death row inmate is a John Wayne Gacy. If the public can be convinced that there is a risk that innocent people will be sentenced to death, then there is some hope for preventing the courthouse doors from being slammed so tight that they preclude consideration of non-frivolous claims of factual innocence. Again, the risk of executing the innocent may not be strong enough to convince the relevant decisionmakers to do away with capital punishment completely. But it may be sufficient to convince the public and its legislative bodies to take all reasonable steps, short of abolishing the death penalty, to protect against executing the innocent.

For example, although the Crime Bill\footnote{50} does not contain the provision, a bill supported by the Congressional Black Caucus, provides:

> At any time, and notwithstanding any other provision of law, a district court shall issue habeas corpus relief on behalf of an applicant under sentence of death, imposed either in Federal or in State court, who offers credible newly discovered evidence which, had it been presented to the trier of fact or sentencing authority at trial, would probably have resulted in:

> (1) an acquittal of the offense for which the death sentence was imposed; or (2) a sentence other than death.\footnote{51} The bill provides that an applicant who meets these standards is entitled to have the court "order his or her release, unless a new trial or, in an appropriate case, a new sentencing proceeding, is conducted within a reasonable time."\footnote{52} It is difficult to predict whether this proposal will ever find its way into law. If it does, though, it will be because books like *In Spite of Innocence* have convinced enough people that the problem of wrongful convictions is significant enough to justify judicial attention (and even to justify delay in executing some prisoners).

Unless this type of provision for habeas corpus reform passes into

\begin{footnotes}
\item[52] H.R. 3315, 103d Cong., 2d Sess. (1993). Because it is limited to defendants sentenced to death, this provision creates an interesting anomaly with respect to prisoners not sentenced to death who have new evidence to prove their innocence. Nothing in this provision entitles them to a day in court and they can be forced to live out life sentences with no judicial mechanism for asserting their new evidence of innocence. One would hope that this anomaly would be cured by extending the right to a habeas corpus hearing based on new evidence of innocence to all prisoners.
\end{footnotes}
law, however, the vast majority of prisoners who have new evidence to support their innocence will continue to have no judicial forum in which to seek relief. For these prisoners, their only hope is to seek some form of executive clemency. As the Supreme Court explained in Herrera: "Clemency is deeply rooted in our Anglo-American tradition of law, and is the historic remedy for preventing miscarriages of justice where judicial process has been exhausted." Indeed, Chief Justice Rehnquist approvingly cites In Spite of Innocence in support of his assertion that "[r]ecent authority confirms that over the past century clemency has been exercised frequently in capital cases in which demonstrations of 'actual innocence' have been made."

Whether one agrees with Chief Justice Rehnquist's position that clemency can be an effective tool for addressing claims of innocence, or with Justice Blackmun's view that the vindication of an innocent defendant's rights should not be "made to turn on the unreviewable discretion of an executive official or administrative tribunal," one

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53 Whether federal habeas remains open for some small class of death row inmates who have overwhelming new evidence to prove their innocence remains an open question based on the various opinions in Herrera v. Collins, 113 S. Ct. 853 (1993). Justices White, Blackmun, Stevens, and Souter most certainly believed that an individual facing capital punishment is entitled to judicial consideration of new evidence to support a claim of factual innocence. See Herrera, 113 S. Ct. at 875 (White, J., concurring) ("I assume that a persuasive showing of 'actual innocence' made after trial, even though made after the expiration of the time provided by law for the presentation of newly discovered evidence, would render unconstitutional the execution of petitioner in this case."); id. at 882 (Blackmun, J., with whom Stevens and Souter, J.J., join, dissenting) ("a truly persuasive demonstration of 'actual innocence' made after trial would render the execution of a defendant unconstitutional"). It is unclear, though, whether a fifth vote will be forthcoming. The other five justices in Herrera joined an opinion assuming "for the sake of argument" that "a truly persuasive demonstration of 'actual innocence' made after trial would render the execution of a defendant unconstitutional." 

Id. at 869 (per Rehnquist, C.J., with O'Connor, Scalia, Kennedy & Thomas, J.J., joining). Two of the five who were willing to assume this then wrote separately, however, explaining that notwithstanding their willingness to join the majority opinion assuming that point for the sake of argument, they found it "perfectly clear what the answer is: There is no basis in text, tradition, or even in contemporary practice (if that were enough), for finding in the Constitution a right to demand judicial consideration of newly discovered evidence of innocence brought forward after conviction." Id. at 874-75 (Scalia, J., with whom Thomas, J., joins, concurring). Two others among the five, moreover, have joined an opinion warning that "[r]esolving the issue is neither necessary nor advisable in this case. The question is a sensitive and, to say the least, troubling one." Id. at 871 (O'Connor, J. & Kennedy, J., concurring).

54 Id. at 866.

55 Id. at 868. Chief Justice Rehnquist uses this finding from In Spite of Innocence to support his position that clemency can be an effective tool in remedying miscarriages of justice. Yet, when confronted with these scholars' other finding—that 23 innocent persons this century have not been granted clemency and have been executed—the Chief Justice takes to questioning the worth of the study: "we note that scholars have taken issue with this study. See Protecting The Innocent: A Response To The Bedau-Radelet Study, 41 STAN. L. REV. 121 (1988)."

Herrera, 113 S. Ct. at 868 n.15.

56 Herrera, 113 S. Ct. at 881.
thing remains certain: executive clemency is an intensely political
device.

Former Ohio Governor Michael DiSalle has written quite can-
didly about the clemency process:

The problem of getting at the truth is difficult enough. But when all the
elements in the decision have been examined and weighed, the execu-
tive still faces the pressures of practical politics. These pressures can be
resisted . . . but they cannot be ignored. . . . Ignoring an application for
parole or commutation is bound to escape criticism. Releasing a con-
victed murderer, even after twenty years of honorable behavior and ap-
parent rehabilitation, is just as certain to arouse political hornets.57

Governors are keenly sensitive to anticipated public reaction to par-
dons in death penalty cases. The political message of Willie Horton is
not easily forgotten, as is evidenced by the fact that so many grants of
executive clemency come from lame duck governors and presidents
who have no further political aspirations.58

The potential political volatility of pardons means that those who
seek them are well advised to prepare the political landscape of public
opinion beforehand. If the public can be convinced that a miscar-
riage of justice has occurred in a particular case, then a governor con-
sidering a petition for clemency will not have to treat the petition as
an invitation to political suicide. In Spite of Innocence begins to sow
these seeds in the political landscape. Once the relevant public is con-
vinced, as they should be from this book, that miscarriages of justice
can occur, then half the battle has been won. The other half is to
convince the relevant public that a miscarriage of justice has occurred
in the particular case at issue.

IV. CONCLUSION

Edwin Meese made his infamous statement that “if a person is
innocent of a crime, then he is not a suspect” in 1985—several years
before he, himself, became a suspect in the Wedtech investigation.59

Given his strong protestations of innocence in the Wedtech matter,60
it seems safe to assume that Mr. Meese’s views on the presumption of

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57 Michael V. DiSalle & Lawrence G. Blochman, The Power of Life or Death 175-
76 (1965).

58 See Daniel T. Kobil, Do the Paperwork or Die: Clemency, Ohio Style?, 52 Ohio St. L.J. 655,
,656 (1991) (discussing Ohio governor Richard Celeste’s lame duck grants of clemency to
68 individuals); Toney Anaya, Statement by Toney Anaya on Capital Punishment, 27 U. Rich. L.
Rev. 177 (1993) (former New Mexico Governor Anaya discussed his pardons at the end of
his term).

59 See generally James C. McKay, Report of the Independent Counsel in re Edwin

60 See, e.g., Ronald J. Ostrow, Meese Blames 2 Ex-Aides for Causing Outside Probe, L.A. Times,
July 26, 1988, col. 1, at 1.
innocence may have changed as a result of his personal ordeal. One would also hope, though, that each and every American need not undergo that sort of personal ordeal before he or she can appreciate the constant risk that our criminal justice system will investigate, charge, convict, sentence, and execute innocent people. *In Spite of Innocence* provides the irrefutable evidence that miscarriages of justice can and do happen. As Rubin “Hurricane” Carter has put it, though: “true justice will never be achieved until those who have not been injured become as outraged as those who have.”61

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61 Address to Forum on Wrongful Convictions at Northwestern University School of Law (February 7, 1994) (tape available at Northwestern University Law School Library).