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WILL THE DEATH PENALTY EVER DIE?

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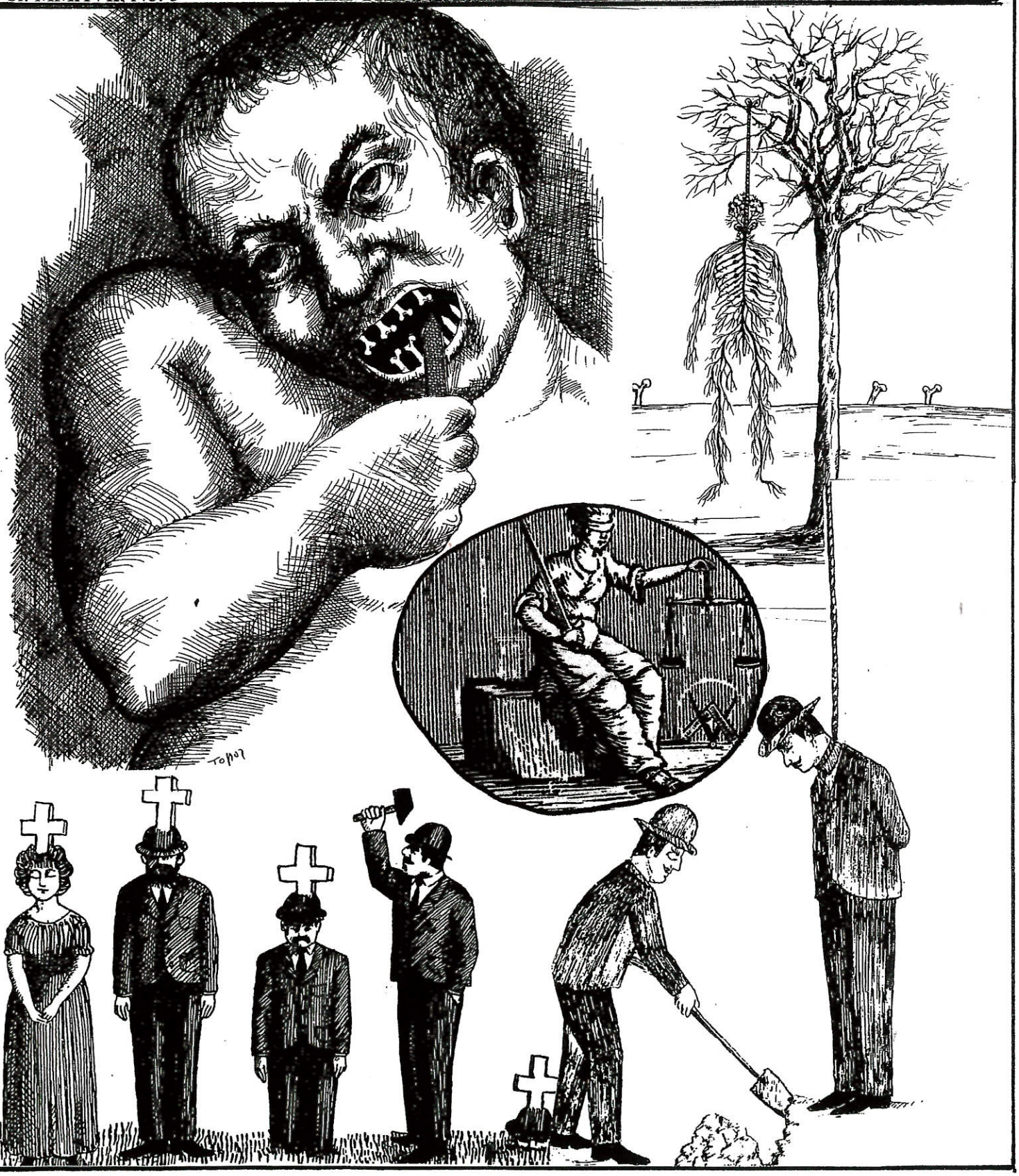


Will the Death Penalty Ever Die?
Jed S. Rakoff June 8, 2017 Issue
Courting Death: The Supreme Court and Capital Punishment
by Carol S. Steiker and Jordan M. Steiker

When my older brother Jan David Rakoff was murdered in 1985, bolts of anger and outrage not infrequently penetrated the black cloud of my grief. Though I knew almost nothing about Jan's confessed murderer except his name, I wished him dead.

My brother, aged forty-four, had just begun to come into his own. His innovative educational theories were starting to attract attention, and, just as important, he had come to terms with his homosexuality, which for many years he had struggled to suppress. While on a trip to Manila, he engaged the services of a male prostitute, but at the end they quarreled over money. In a fit of rage, the prostitute assaulted my brother with a pipe burner and an ice pick, bludgeoning and stabbing him to death. To cover his tracks, the prostitute then set fire to the bungalow where my brother was staying; but the smoke attracted the attention of a security guard, who apprehended the fleeing assailant. Later that evening, the prostitute provided a full written confession.

When my brother's body arrived back in the United States, his face and head were barely recognizable, so vicious had been the assault. My heart cried out for vengeance. Although the death penalty was then available in the Philippines, the defendant, taking full advantage of a corrupt legal system, negotiated a sentence of just three years in prison. Had, instead, the prosecutor recommended the death penalty, I would have applauded.

It took many years before I changed my mind.

The law professors Carol S. Steiker and Jordan M. Steiker (sister and brother) have written a revealing book about the history of the death penalty in the US and, in particular, the continued difficulties the Supreme Court has had in attempting to regulate capital punishment so that it conforms to constitutional standards. If I have a criticism of their otherwise trenchant account, it is of their failure to give more than passing attention to the moral outrage that provides much of the emotional support for the death penalty—outrage felt not only by the family and friends of a murder victim, but also by the many empathetic members of the public who, having learned the brutal facts of the murder, feel strongly that the murderer has forfeited his own right to live.

For the Steikers, the debate over the death penalty is "first and foremost" a symbolic battle over cultural values, with a strong current of racism running just below the surface. This may well be true, but unless one acknowledges that rational human beings can feel such revulsion at the taking of an innocent life as to wish the taker dead, one misses part of the reason that the death penalty continues to enjoy significant popular support, even in many of the states and countries that have banned it.

At the same time, it can hardly be denied that the death penalty is imposed in this country in a racially unjust manner. As the Steikers fully document, throughout the nineteenth and twentieth centuries, and even now, death sentences are disproportionately imposed on black men who commit crimes against whites, especially white women, and those who are actually executed are even more disproportionately men of color. While most states still permit the sentence of capital punishment, it is mainly in the South that executions take place, reflecting, in the Steikers' view, "the South's historical practice of chattel slavery and of slavery's enduring racial legacy."

The confinement of executions chiefly to the southern states is also the product, according to the Steikers, of the South's history of violent racial tension. Legal executions aside, more than three thousand people were lynched in the South between 1880 and 1930, nearly all of them black men, whereas there were comparatively few lynchings in the West and virtually none in the North. As the Steikers note, "One of the strongest predictors of a state's propensity to conduct executions today is its history of lynch mob activity more than a century ago."

Since the death penalty is primarily imposed on southern black males, it is hardly surprising that the first successful attacks on capital punishment in the Supreme Court were led by the NAACP Legal Defense Fund. Somewhat ironically, however, the NAACP and its lawyers found that their most successful strategy was to attack capital punishment not so much on the ground that it was racially unjust, but rather on the ground that it was imposed in a way so lacking in standards as to be unconstitutionally arbitrary. It was on this ground that the Supreme Court, in Furman v. Georgia (1972), held the death penalty unconstitutional as then applied.

Although there was no single opinion in Furman that commanded a majority of the Court, the largest plurality of justices joined an opinion by Justice Potter Stewart that read in part as follows:

These death sentences are cruel and unusual in the same way that being struck by lightning is cruel and unusual. For, of all the people convicted of rapes and murders in 1967 and 1968, many just as reprehensible as these, the petitioners are among a capriciously selected random handful upon whom the sentence of death has in fact been imposed. My concurring Brothers [Justices Thurgood Marshall and William O. Douglas] have demonstrated that, if any basis can be discerned for the selection of these few to be sentenced to die, it is the constitutionally impermissible basis of race.... But racial discrimination has not been proved, and I put it to one side. I simply conclude that the Eighth and Fourteenth Amendments cannot tolerate the infliction of a sentence of death under legal systems that permit this unique penalty to be so wantonly and so freakishly imposed.

Whatever its rationale, Furman suspended the death penalty—but not for long. Responding to Justice Stewart's opinion that the death penalty was unconstitutional because it was imposed in an arbitrary fashion, no fewer than thirty-five states, in the space of less than four years, enacted statutes supplying standards that supposedly would apply the death penalty in a nonarbitrary way. In 1976, in the case of Gregg v. Georgia, the Supreme Court upheld these laws, and capital punishment was restored.

Since then and until fairly recently, the history of the death penalty in the Supreme Court has largely been a matter of reviewing and refining these standards, which in most jurisdictions take the form of "aggravating" and "mitigating" factors that a judge or jury must consider in deciding whether or not to impose the death penalty. As the Steikers show in devastating detail, this "regulatory" approach (as they term it) has been something of a disaster. For one thing, the Supreme Court has mandated that the standards not be so rigid or precise as to deprive judges and juries of meaningful discretion to take account of the particulars of each case. But this in turn has led the Court to approve broad and vague standards that, in practice, accord judges and juries the same unfettered discretion that led to the problem of arbitrariness that the plurality in Furman condemned.

For example, a common aggravating factor that a judge or jury is supposed to consider in deciding whether to impose the death penalty on someone convicted of murder is whether the defendant committed the murder in the course of committing some other crime. But the list of such other crimes—typically including rape, robbery, burglary, assault, and so forth—is frequently so all-encompassing as to apply to the great majority of situations in which murders are committed. So this factor does little to meaningfully limit or define the exercise of discretion. Another common aggravating factor is that the defendant exhibited "utter disregard for human life" when he committed the murder. How many murderers cannot be fit into this category? And doesn't this mean that, in practice, imposition of the death penalty is still effectively standardless?

Moreover, litigation over the wording and application of these standards, coupled with many judges' growing discomfort with the death penalty, has led to years-long delays between the imposition of the death penalty and the actual execution. This has effectively deprived the death penalty of much of the supposed retributive and deterrent force that, as the Supreme Court held in Gregg, justified its imposition.

As noted by Justice Stephen Breyer, dissenting in the recent case of Glossip v. Gross (2015), these "unconscionably long delays...undermine the death penalty's penological purpose." Even Congress's attempt in 1996 to reduce such delays through the Antiterrorism and Effective Death Penalty Act (AEDPA) has proven totally ineffective in this respect (though AEDPA has had the terrible collateral effect of largely eliminating meaningful federal review of violations of defendants' rights in noncapital cases). Notwithstanding AEDPA, the time between imposition of the death penalty and actual execution is now, on average, fifteen years.

Further still, the costs of all this litigation and delay—which are chiefly borne not by the federal or even state governments but by local communities—are huge, in some cases actually threatening to bankrupt the locality and in others diverting much-needed resources away from the rest of law enforcement. A state commission in California, for example, has determined that when one adds up the costs to the state and to local municipalities in California of litigating death penalty cases through their complicated proceedings, incarcerating the defendants in separate death-row facilities, constructing and maintaining execution chambers, and arranging for all the other special features of a death penalty case, the expense to the public of maintaining a death penalty system in California is more than ten times what the cost would be if the defendants were sentenced instead to life imprisonment without parole.

In short, the Supreme Court's regulatory approach has proven endlessly slow, immensely expensive, counterproductive to the supposed purposes of the death penalty, and nearly as arbitrary as the system it replaced.

More recently, the Court has also begun to impose some limitations on the death penalty by holding it unconstitutional when applied to adolescents and to mentally disabled persons. But these decisions are premised on what is perceived by the Court's majority to be a national "consensus" on such issues, a rationale that seems unlikely to apply to capital punishment as a whole. Inevitably, these decisions have also engendered their own litigation, for example over what tests can properly be applied to determine if a defendant is mentally disabled.

Polls suggest that while a majority of Americans still favor the death penalty, they do so less strongly than they once did. This does not appear, however, to be a function of the regulatory problems discussed above. Partly it is a result of declining crime and murder rates. It can also be attributed, as the Steikers acknowledge, to the by now overwhelming evidence that the death penalty has been imposed in dozens, if not hundreds, of cases in which it was ultimately proven that the defendants were actually innocent.

The discovery that we were executing, or coming perilously close to executing, scores of wholly innocent people was originally the work of the Innocence Project and its innovative use of DNA testing in cases, such as rape-related murders, in which samples of bodily fluids or tissues had been retained long after the convictions. In many such cases, DNA testing disclosed that the semen removed from the victim of a rape-murder was not that of the death row defendant convicted of the crime but rather of some other suspect whom the police had chosen not to pursue.

Other organizations eventually joined the Innocence Project in reopening closed cases, with the result that, according to a list maintained by the University of Michigan, dozens of defendants convicted of death-eligible offenses have now been completely exonerated by the courts, many after having spent years on death row. One can only imagine how many of the defendants who were actually executed were similarly innocent, but one widely accepted study puts the figure at no less than 4 percent.

It should also be noted that the main reasons for the wrongful convictions in death-eligible cases were inaccurate eyewitness identifications, perjured testimony, and flawed evidence from forensic experts. These problems are endemic to the American criminal justice system but not meaningfully addressed in any of the Supreme Court's death penalty decisions.

These exonerations may constitute only a small percentage of the exonerations yet to come. At present, testing for DNA can yield definitive results only in cases where the crime scene evidence consists of DNA mixtures from no more than two people, and in many cases, no crime scene DNA samples are available at all. But much work has already been done toward developing effective ways to assess DNA samples containing the DNA of three or four or even more persons—so that, for example, one can determine who was, or was not, involved in a gang rape, or in an assault with a firearm handled by several persons. Such developments will doubtless provide proof leading to new exonerations (and new convictions). Similarly, fingerprint evidence, which in its current form is often unreliable because of the large measure of subjectivity involved in its interpretation, has been the subject of much recent work to improve its accuracy in ways that may likewise lead to further exonerations.

But what good are all these future possibilities of reliable exonerations if the defendants have already been put to death? It was on this basis that in 2002, in United States v. Quinones, I declared the federal death penalty unconstitutional. Specifically, I held that under the due process clause of the Constitution, an innocent person never loses his legal right to prove his innocence, but that he has been effectively deprived of that right if he is executed.

My decision was promptly reversed by a panel of the Second Circuit Court of Appeals, which, wrongly in my view, interpreted a 1993 Supreme Court case, Herrera v. Collins, as holding that even an innocent defendant eventually loses his right to be exonerated by proving his innocence (even though the critical fifth vote for the majority in Herrera, by Justice Sandra Day O'Connor, expressly stated the contrary). But because of that interpretation, the Steikers, after kindly mentioning my decision, conclude that "powerful as the innocence issue may be as a policy concern, the lack of precedent supporting the argument likely undermines its use as the sole ground for a constitutional attack on the death penalty."

Perhaps they are right. But it still seems to me that the execution or near execution of the innocent is the factor most likely to deprive the death penalty of its moral force, and thereby its ultimate legal justification. For how can one applaud capital punishment knowing that those executed may well be innocent?

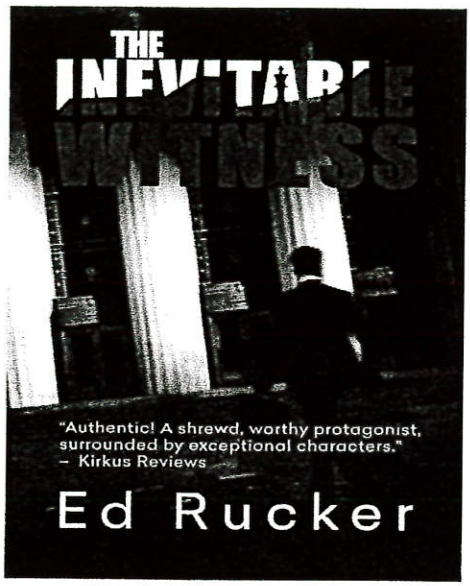
The Steikers instead express the hope that the death penalty—whose demise they fervently desire—will ultimately founder on the inability of the Supreme Court to devise a consistent and effective way of squaring it with Furman's mandate that the ultimate punishment not be imposed in an irrational, arbitrary fashion. They conclude that the abolition, if it happens at all, will come about "because of particular features of the American terrain, most notably the failed and impossible effort to improve capital punishment with the lofty but limited power of the Constitution." But having detailed in their excellent book how ingrained support for the death penalty is in American culture and politics, they seem rather pessimistic about the future. One can only wonder how many more wrongly convicted, innocent people will have to go to the death chamber before these ingrained attitudes will change for others, as they did for me.

THE INEVITABLE WITNESS

From the "Bobby Earl" series, volume 1 by Ed Rucker

KIRKUS REVIEW

A Los Angeles lawyer defends a professional safecracker accused of murder in Rucker's debut legal thriller.



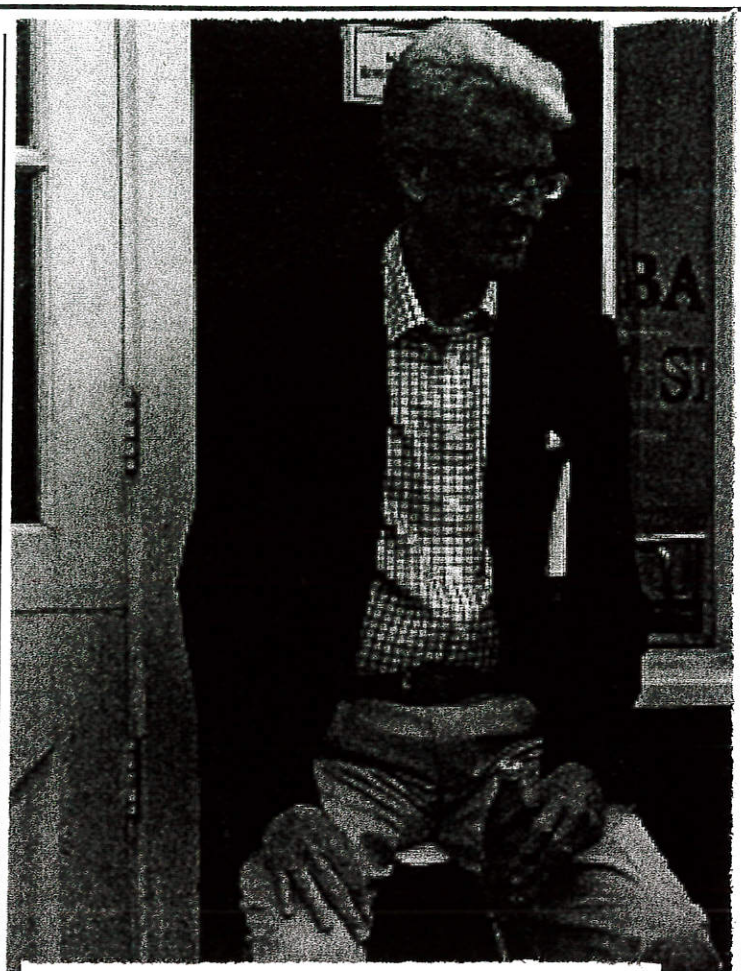
Criminal defense attorney Bobby Earl gladly takes a case when the public defender is unavailable, especially after a judge assures him that he'll be paid. Sydney Seabrooke is facing a murder charge, and evidence points to his presence at a Chinese restaurant where the body of LA cop Terry Horgan was found.

Seabrooke professes his innocence, but the fact that he was at the scene of the crime in order to break into a safe doesn't look good. But Earl is inclined to believe Seabrooke, who says he was pulling the job for bondsman Johnny Aradano in exchange for bail for an earlier, unrelated arrest. It also turns out that Horgan wasn't an upstanding officer; although the cop didn't own the restaurant, he did own the safe inside it, and Earl suspects that its contents—bulky stacks of cash—may have been the spoils of Horgan's involvement with drug dealers. Before the trial begins, there's a break-in at Earl's office, and jailhouse snitch Jake "The Snake" Snyder claims that Seabrooke confessed to the murder.

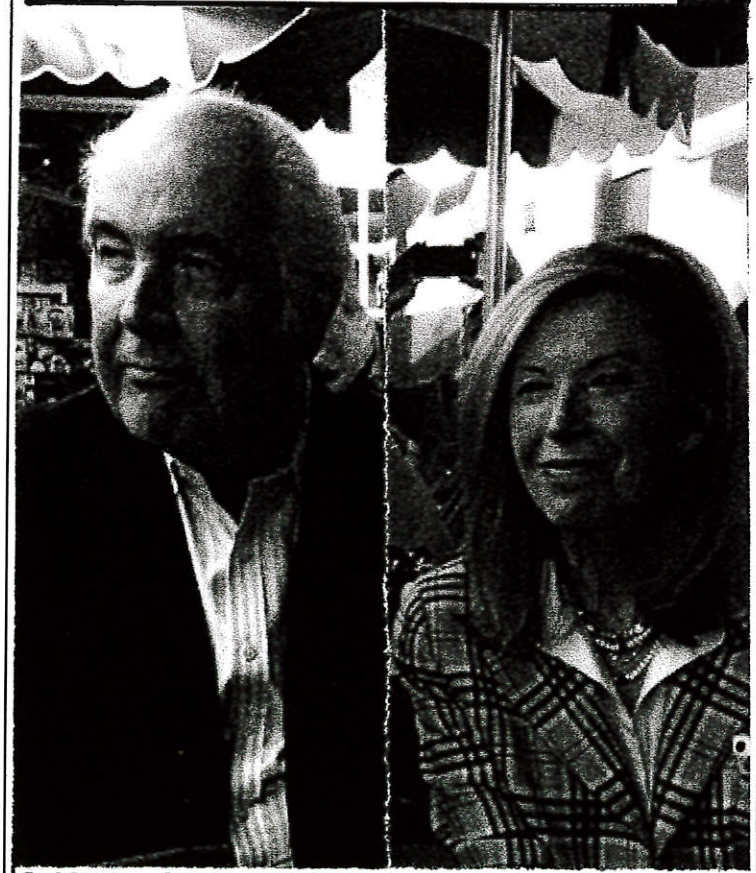
The attorney's investigation into the seedy world of drugs provokes some dangerous people, but he still hopes to find a witness for the defense—or maybe even a killer. Rucker's muted thriller steers clear of convention; there's no glaring piece of evidence, for example, that guarantees that Earl will save his client. The story acknowledges its realism with humor, including nods to the TV series Law & Order("most young women DA's had chosen to emulate the female television prosecutors on 'Law and Order,' which meant exuding a toughness just short of announcing 'mine are bigger than yours' ").

Earl faces some other hurdles before and during the trial: he unintentionally irks television personality Thomas Glass (aka "The Thumb," who has a knack for tipping scales of opinion one way or the other), and someone else threatens and takes a few shots at the lawyer. Overall, Earl's a shrewd, worthy protagonist, surrounded by exceptional characters, including reliable investigator Manny Munoz and second-chair district attorney Samantha Price.

This novel certainly doesn't skimp on twisty plot turns, but retains an understated, authentic approach to the law.



the author himself. Books sold **out!**



Subject: [ABCL-US] Spotted at Ed Rucker's book signing

James Campbell and Linda DeMetrick

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