

Book Review

Daniel S. Medwed ed., *Wrongful Convictions and the DNA Revolution: Twenty-Five Years of Freeing the Innocent*, Cambridge: Cambridge University Press, 2017, pp. 419, \$125.00.

Sharon Dolovich and Alexandra Natapoff eds., *The New Criminal Justice Thinking*, New York: New York University Press, 2017, pp. 346, \$45.00.

Reviewed by Thomas Morawetz

Both of these collections are inspired by the insight that the past two or three decades have been pivotal in the experience of criminal law. For Professor Medwed's authors, the DNA revolution and the light it has shed on wrongful convictions has uprooted confidence in the justice and impartiality of criminal trials, particularly in the reliability of diverse kinds of evidence. For Professors Dolovich and Natapoff, mass incarceration and the racial and class bias they reveal are a national crisis that has become ever more urgent. Both volumes invite us to rethink wide swaths of criminal law and theory.

As Daniel Medwed explains in his introduction to *Wrongful Convictions and the DNA Revolution: Twenty-Five Years of Freeing the Innocent*, modern testing technology enables scientists who have access to DNA (deoxyribonucleic acid) to "determine the genetic source of biological material with unparalleled accuracy" (2). Aside from its other uses, such as determining paternity and uncovering hereditary susceptibilities, DNA testing of samples left by offenders at crime scenes can provide near-irrefutable evidence of guilt or innocence.

Medwed's title makes clear that the public and social impact of DNA evidence has been not so much on assuring the guilt of those who are convicted, often in rape and homicide cases, but on freeing the innocent. While it would be hard to overestimate the prospective use of this evidence by prosecutors to convince juries (or other triers of fact) of guilt, the most widely publicized use is retrospective, to identify the wrongly convicted. The national role model for this movement has been the Innocence Project, co-directed by Barry Scheck and Peter Neufeld.¹

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1. The Innocence Project was founded by Scheck and Neufeld in 1992 under the umbrella of Cardozo School of Law at Yeshiva University. *Contact: Frequently Asked Questions*, INNOCENCE PROJECT, <https://www.innocenceproject.org/contact/> (last visited Nov. 8, 2017). It became

Medwed's volume of essays brings together conference papers originally presented at Northeastern University School of Law. They are wide-ranging, informative, and, in many cases, provocative. The adage or cliché about herding cats can reliably be applied to organizing academic conferences, and the proceedings of this conference, on the evidence of these essays, are no exception. Medwed does a sensible job of trying to sort the essays along a temporal dimension, distinguishing those essays that serve as a look back from those that "glance ahead" (4, 8). The distinction is hard to maintain with essays that are typically of the form "here's-how-the-problem-emerged-and-this-is-what-can-be-done-about-it." A more useful fault line can be drawn between the articles that are strictly factual and largely statistical and those that raise conceptual and theoretical concerns.

What is special about DNA evidence? The impact of the DNA revolution is partly scientific and partly sociological. Physical evidence, unlike witness identifications or informant testimony, can be examined directly by scientists. But some kinds of physical evidence yield more certainty than others. Fingerprint evidence, arson residue evidence, and ballistic evidence yield varying degrees of assurance depending on idiosyncratic factors (184-202). Experts can disagree on both the threshold of certainty for such evidence and the persuasiveness of evidence in a particular case. DNA evidence is special; investigators can tell with certainty whether a sample of DNA did or did not come from a particular individual.

The sociological dimension of the DNA revolution is a subtext of Medwed's collection. Countless critics have long argued that rape and murder convictions were especially susceptible to being corrupted by race and class bias.² Such bias can manifest itself in many ways: in misidentification by eyewitnesses, in biased investigative choices made by the police, in prejudicial prosecutorial decisions and strategies, in inadequate representation by defense attorneys, in nonobjective jury deliberations, and in careless judicial monitoring of trials. Bias of each kind can be implicit or explicit, unconscious or conscious.

In consequence, observers have long found it plausible that innocent defendants have been convicted, and they were able to identify many specific instances of presumptive injustice. Many of these convicts were on death row. Moreover, they argued that confessions were hardly conclusive evidence of guilt; they could be coerced or be the product of confusion, mental illness, or misunderstanding on the part of the defendant (45-47).

Accordingly, DNA evidence was the magic bullet for proving innocence and vindicating critics. Once it was established that the individual found

an independent nonprofit organization in 2004. *Id.* Fifty-six U.S. based and thirteen non-U.S. based organizations are part of the Innocence Network founded by the Innocence Project. *About the Innocence Network*, THE INNOCENCE NETWORK, <http://innocencenetwork.org/about/> (last visited Nov. 8, 2017).

2. A useful recent summary of data and contribution to such debates is GREGG BARAK, PAUL LEIGHTON & JEANNE FLAVIN, *CLASS, RACE, GENDER AND CRIME: THE SOCIAL REALITIES OF JUSTICE IN AMERICA* (3d ed. 2010).

guilty *could not* have been the rapist or murderer, the argument that the criminal process had been corrupted at various stages gained traction. The fruits of the Innocence Project have documented that blacks and the poor were by far the most likely persons to be unjustly convicted, that eyewitness accounts are very commonly unreliable, that defense attorneys often perform inadequately, and that prosecutors often fail to scrutinize evidence and seek justice.

The hard numbers with regard to exonerees are covered by two statistical compilations. The first roster, maintained by the Innocence Project in New York City, lists (as of the publication of the essays in 2016) upwards of 330 instances in which DNA evidence led to reversals of wrongful convictions (44).³ The second is the National Registry of Exonerations, begun in 2012 and housed at the University of Michigan, which includes both DNA and non-DNA exonerations. By December 2016, the latter list contained more than 1900 instances of post-1989 exonerations (59).

Brandon Garrett, in an essay that updates his 2011 book, *Convicting the Innocent: Where Criminal Prosecutions Go Wrong*, examines the DNA cases statistically by race of defendant, underlying crime, and, most important, by the kind of evidence bearing on the conviction, *e.g.*, forensic evidence, eyewitness accounts, informants, and confession (40). He discusses the inherent unreliability of each kind as well as the intransigence of investigators who continue to invest them with more credibility than is warranted. His “where we stand” factual dissection is complemented by Mark Godsey’s account of the global reach of the innocence movement (356). Garrett notes the persistent arrogance of those who insist, in the face of ever-increasing contrary evidence, that the system of conviction works largely without flaws.

Several essays raise theoretical concerns about the scope and implications of the DNA revolution. Keith Findley cautions us not to see these examples as a general vindication of science, as a vote of confidence for the presumed objectivity of scientific method over the subjectivity of human observations and reports (184-85). His examples of overconfidence in science involve head trauma abuse cases in which evidence of shaken-baby syndrome is the main theory of prosecution and arson cases in which prosecutors tend to rely on telltale signs of deliberately set fires. In these cases, science is used to establish causation, to infer the defendant’s mental state, and sometimes even to identify the perpetrator (190). As Findley shows, the underlying scientific theories are themselves matters of dispute. He concludes, more generally, that the reliability of all of the so-called “individualization” forensic disciplines (fingerprints, ballistic, bite marks, handwriting analysis, and hair and fiber tests) lacks a solidly objective foundation and is disputable among qualified experts (201-02).

3. That number has since increased. To date, the Innocence Project notes, DNA testing has led to the exoneration of 351 individuals who had been shown to have been wrongly convicted. *Exonerate the Innocent*, INNOCENCE PROJECT, <https://www.innocenceproject.org/exonerate/> (last visited Nov. 8, 2017).

The DNA revolution serves the value of truth in the trial process. Those who are exonerated on the basis of DNA evidence *cannot*, in fact, have been the persons who committed the criminal act. But truth is only one of the values that govern the trial process; rules of evidence and procedure often subvert the search for truth. Alexandra Natapoff's essay reminds us that overwhelmingly most determinations of guilt are the result of negotiation through plea bargaining and not trial (85-98). Truth and its basis in physical evidence play an equivocal role in these negotiations, which typically involve pressure on innocent people to plead guilty (86). As Natapoff suggests, the positive impact of the DNA revolution may be indirect—not so much on those who are exonerated and on our demand for evidentiary accuracy, but rather on calls for renewed attention to convicting the innocent in general and, in particular, in the process of negotiating pleas.

Richard Leo points out that the exoneration cases can mislead us into equating exoneration with proof of factual innocence (57-60). The DNA cases rise to the latter standard. But the National Registry of Exonerations includes cases in which the reexamination of evidence, often tainted, led merely to restoration of the presumption of innocence through reversal of a criminal conviction. Such exoneration might, for example, follow decisive proof that informants lied or that physical evidence had been tampered with. Leo effectively discusses the risks and rewards respectively of using the more and less restrictive concepts of innocence.

A number of the contributions are tantalizing opening gambits for academic debates about responses to the DNA revolution. Paul Cassell suggests reexamination of the prophylactic rules that secure constitutional rights but that inhibit the search for truth and the use of probative kinds of evidence (264-81). Adele Bernhard explores ways of enhancing judicial monitoring of ineffective assistance of counsel and analogizes the responsibility of judges for the performance of lawyers to that of teachers for the students (226-41).⁴ More questionable is the suggestion in one essay that some kinds of allegations, *e.g.*, the rape of white women by black assailants, are so tainted by bias and procedural irregularities that one might consider not case-by-case but categorical exoneration (291).

At least a third of the essays are loosely, if at all, related to the DNA revolution, although for the most part they review important aspects of criminal justice. Rob Warden examines public policy and practice with regard to recantations and questions the wisdom of discouraging such testimony with threats of perjury (106-10). He examines particularly egregious examples of such threats working to frustrate the truth process. Two essays consider the factors that explain the recent decline of support for the death penalty and the revival of the argument that it violates the prohibition on cruel and unusual punishment (138, 159). It is clear, of course, that the Innocence Project and DNA exonerations have affected this debate by showing that innocents

4. The significant disanalogies between these situations are perhaps underexplored in the essay.

have been executed and condemned to death, but these articles are general discussions. Other highly disparate articles address the role of law school clinics in exoneration cases (117); the ways in which situations involving systemic irregularities—for example, cases involving a significant number of similarly tainted convictions—can be handled with regard to notification and availability of counsel (314); and the inadequacies of the ways we deal with the death of innocents in war (379). The article that seems to stretch the mandate of this volume most ambitiously is one that analogizes the wrongly convicted to captive (nonhuman) animals and proposes *habeas corpus* for chimpanzees and other intelligent creatures in unfree conditions (334).

Medwed's valuable collection of articles is a smorgasbord. It achieves the purpose stated in its title in two ways. It provides a factual update and analysis of what is justifiably regarded as a revolution in criminal justice. And it describes a sea change in practice and theory. We have had to look with renewed skepticism at the use and abuse of both physical and testimonial evidence. We are entering the twilight of the DNA revolution as the backlog of relevant cases in which DNA residues are available and probative slowly diminishes. The legacy of the exoneration cases will outlive the relevant work of litigation insofar as it has planted virile seeds of uncertainty and mistrust. Sophisticated observers have long seen the general reliability of the trial process as fraught with doubts and causes of concern. The DNA revolution stands for the validation of those doubts.

The New Criminal Justice Thinking also first saw the light of day as a conference. It also rests on the claim that the current period in criminal law jurisprudence and practice is a time for reassessment. But the editors, Professors Sharon Dolovich and Alexandra Natapoff, focus not on a specific precipitating cause such as the availability of DNA evidence, but rather on a widespread realization that the thirty-year-old so-called war on crime “with its exponential growth in arrests and convictions, increasingly harsh sentences, unprecedented prison building, and profligate use of probation and other noncarceral penalties” (1) is working badly and unjustifiably in both practical and moral terms. A high percentage of their essays are provocative, convincing, and significant. However, they have tried to present much more than a miscellany of insightful papers. The book is put forward as “new . . . thinking” not merely to reflect the criminal law system and its problems as they exist today, but to offer an integrated approach grounded in sociological methods (2-5). Before examining that implicit claim, I will look at particular essays and dialogues in the book in terms of their analyses, arguments, and suggestions; I will look first at the parts, then the whole.

The essays for the most part are diagnostic rather than prescriptive. The diagnoses are pessimistic rather than hopeful. To be sure, there are vague gestures toward a better future; several authors ironically put their faith for amelioration of the morally flawed system in fiscal rather than moral discipline, in the realization by political movers and shakers that the system is too costly and inefficient.

Structurally, the essays are grouped in four parts, followed by a reflective historical coda. The conference format of leading-paper-followed-by-respondents survives for the most part; generally, in each part the first paper is the most ambitious and sets an agenda for the commentators who follow.

The first part is given over to an assessment of the administrative complexity of the “criminal regulatory state.” One theme that colors these several essays is that the internal dynamics and the relative autonomy of the machinery of criminal law institutions have been insufficiently understood, that many observers describe their function with simplistic analogies to inputs and outcomes and with insensitivity to the system’s opacity.

The second part explores a particular kind of opacity, the system’s resistance to and evasion of constitutional norms. These essays show how the Supreme Court regularly confounds the intuition that defendants can rely on a robust framework of protections. The analysis here is in equal parts analytic and normative.

The third section (oddly titled “Getting Situated”) is hard to distinguish topically from the first; here again, the essays direct us to attend more carefully the internal perceptions, communications, and ordering practices that constitute the internal dynamics (and the internal rigidities) of what several authors call “the criminal law system.” The fourth section, in which one essay is candidly titled “Dignity Is the New Legitimacy,” commends the norm of dignity and respect as a parameter of understanding and defending newly evolving constitutional rights.

Notwithstanding the book’s complex architectonic, it is easy to see and praise many of the essays as stand-alones. The editors, in this respect, do themselves proud with lucid contributions. Sharon Dolovich breaks down the “canons of evasion” by which the Supreme Court systematically sidesteps the apparent import of constitutional mandates affecting justice (111-42). Examples include discriminatory jury selection, ineffective assistance of counsel, inhumane prison conditions, and disproportionate sentences. With each doctrine, the Court, according to Dolovich, uses three strategies separately and in tandem: deference to nonjudicial decision-makers, counterintuitive presumptions of constitutionality, and purposeful substitution of a new question for the one before it. Her conclusions are pessimistic: judicial review is “not meaningfully holding state actors to constitutional account” (142), and therefore citizens may question whether “the outputs of the criminal system [are] consistent with the core constitutional commitments essential to the legitimate exercise of the state’s penal power” (142).

Alexandra Natapoff seeks to reconcile two stories about the criminal law system, one whereby rulebound practices shape outcomes for the most part and ensure fairness and consistency, and the other whereby the system is flagrantly unfair, inconsistent, and disrespectful of rules—a tool of class and race oppression (71). Her attempt to reconcile the two stories, which she finds in legal theory on one hand and in (some kinds of) sociology on the other,

involves appeal to the metaphor of a pyramid. At the narrow peak are well-scrutinized, well-funded cases in which participants are scrupulously at the top of their legal game. At the bottom is the great mass of cases, many of them misdemeanors, in which efficient and peremptory disposition matters most. Here defendants as well as lawyers and judges have incentives to participate in assembly-line justice; at the very least, lacking resources and sophistication, they have no other recourse. Natapoff mines the moral import of these two extremes with only a tentative expression of hope for change: “[T]he bottom [of the penal pyramid] needs to matter to everyone who participates in it” (92).

Organizational sociology can prime a scholar to notice legal phenomena that are otherwise elusive. In her compelling essay, Issa Kohler-Hausmann argues that “law in action” offers counterevidence to our expectation that prosecutors are essentially players on one side in adversarial contests (246-67). In fact, she notes, they have taken on the role of quasi-administrators who guide and determine the disposition of cases. She also uses the example of drug prosecutions in New York over three decades to explore “the routine disposition of cases with little factual or legal deliberations in lower criminal courts.” In these ways she deftly employs sociological analysis to unpack instances of questionable justice at the bottom of Natapoff’s pyramid.

Jonathan Simon and Jeffrey Fagan in separate essays discuss the tantalizing notion of dignity as a constitutional constraint on criminal process (275-302, 308-18). An overriding question is whether an idea with obvious intellectual appeal has legs as a tool for legal doctrine. Simon compares the “legality revolution” with the prospect of a “dignity revolution,” describing the legal and conceptual victories that proceeded from the argument that legal actors can act only under color of legality. He contends that the legality principle has run its course, and that moral abuses (such as mass incarceration) that conform to legality can best be criticized as violations of dignity. But shared linguistic principles and practices frame debates about the meaning and scope of law and thus allow for at least the color of objectivity when we debate legality; it is unclear whether similar rules govern debates about the moral and social concept of dignity. Alarming, the social and political world that envelops the criminal law process is one in which dignity seems an ever more alien and disparaged desideratum.

I alluded above to tension between two aims for these essays, supplying a scheme or vision of a new perspective on criminal justice and offering a miscellany of insights that sharpen our doctrinal and moral perceptions. Here we have the hedgehog and the fox all over again, one big idea or countless smaller ones.⁵ In their introduction the editors struggle for the former, listing four “dimensions” of their “vision.” In fact, the most compelling essays emanate not from general theory but from empirical sensitivity and “small” theory. The least nourishing essays here are the most theoretical, including

5. See ISAIAH BERLIN, *THE HEDGEHOG AND THE FOX: AN ESSAY ON TOLSTOY’S VIEW OF HISTORY*, (Simon & Schuster 1970) (1953). Berlin cites the Greek poet Archilochus for the observation, “The fox knows many things, but the hedgehog knows one big thing.” *Id.* at 1.

one that seems intended to flout every rule in Strunk and White and dwells, among other things, on “multifarious actualizations” (199). The value of these essays lies in the phenomena the authors notice, in their adeptness at explaining them, and in the robust moral commitments that make possible and underlie these explanations.