

Books

New thinking on miscarriages of justice

by Michael L. Radelet

When Law Fails: Making Sense of Miscarriages of Justice, edited by Charles J. Ogletree, Jr., and Austin Sarat. New York University Press. 2009. 349 pages. \$70.00 cloth; \$22.00 paperback.

Scholarship on erroneous convictions has come a long way in the past 25 years. While excellent books and articles presenting details of individual cases of the wrongly convicted has been available since the early 1930s, scholarly analysis of these cases did not appear until the mid-1980s. Before 1989, when David Vasquez in Virginia became the first prisoner exonerated by DNA, critics often claimed that prisoners released with claims of innocence were, with few exceptions, factually guilty. By mid-2009, DNA had not only exonerated 240 prisoners, but it also exonerated the scholars from the 1980s and earlier who had claimed that a wide assortment of problems in the criminal justice system was regularly leading to miscarriages of justice.

In short, DNA has confirmed what those earlier case studies had suggested: innocent defendants are regularly (albeit infrequently) convicted because of such factors as tunnel vision by the police, prosecutorial suppression of exculpatory evidence, erroneous eyewitness identification, false confessions, and poor represen-

tation by the defense. As such, DNA is important beyond its benefits for the prisoners who have been freed by its use. It has also given us a clear window through which many of the shortcomings of the criminal justice system can be viewed, at least by those who care to learn the lessons.

When Law Fails is the most recent addition to the growing number of books on erroneous convictions. The editors, Charles Ogletree and Austin Sarat, are among the country's leading students of the criminal justice system. Ogletree is Executive Director of the Charles Hamilton Houston Institute for Race and Justice at Harvard Law School, and Sarat, who has already authored or edited some five dozen books, is Professor of Jurisprudence and Political Science at Amherst College. Any work by two such distinguished scholars is bound to attract big audiences.

Pushing the edge

The goal of the book is to push the edge. It does not attempt to present more and more case descriptions in which rogue cops beat the stuffing out of vulnerable defendants until false confessions are obtained. Instead, the editors have compiled chapters that force readers to expand how we conceptualize and think about "miscarriages of justice."

Among the best chapters in the book are those written by the editors. Ogletree gives an account of the 1921 race riots in Tulsa and their aftermath. The Tulsa tragedy began when an angry white mob invaded a black area of town in pursuit of a man who had accidentally stepped on the foot of a white woman. Many businesses

and over 1,000 homes were leveled, and as many as 300 people were massacred. In 2001, a Commission established by the Oklahoma legislature recommended reparations and, later, Ogletree himself was involved in efforts to sue for damages. Nonetheless, the victims and their descendants never received a dime. Ogletree uses this to show that in several ways, the "rule of law" was useless in protecting the interests of citizens. While the riot's history includes no erroneous convictions, it is, he argues, a history that unquestionably involves countless (and ongoing) miscarriages of justice.

Sarat's essay examines miscarriages of justice from the angle of how the criminal justice system deals with the guilty, not the innocent. He analyzes themes in recent clemency petitions for death row inmates. Recognizing that the odds of winning executive clemency in a death penalty case these days are miniscule, Sarat conceptualizes clemency applications as ways of "memorializing" miscarriages of justice for future generations to study. Five major themes that permeate clemency applications are identified: innocence, ineffective assistance of counsel, faulty weighing of mitigation, bias in how cases are processed, and failure to adequately acknowledge mitigating issues related to the defendant's family, religion, and/or contrition.

There are eight additional essays in the volume. In one, University of Southern California Law Professor Mary Dudziak tells the story of Jimmy Wilson, an African American sentenced to death in Alabama in 1957 for the theft of \$1.95 from his

employer, an elderly white widow. The harshness of the sentence attracted worldwide outrage, which in turn led the governor of Alabama to commute the sentence to life imprisonment. Dudziak makes the case that once the sentence was commuted, the story became how Alabama's legal system could argue to the world that it was enlightened and progressive. Wilson, on the other hand, was forgotten.

Wilson ended up serving 16 years for the \$1.95 theft, a fate better than death, one supposes. But such an extreme sentence for a minor crime raises the question of whether "extreme punishments" should be included in discussions of miscarriages of justice. Ohio State University Law Professor Douglas Berman discusses this in his contribution to the volume. Berman's position is that the recent focus on innocence has taken the spotlight away from cases in which guilty defendants have been given sentences that are "exceptionally disproportionate" to the severity of their crimes. He also argues that focusing on the death penalty as an unjust sentence distracts attention from the fact that the vast majority of those serving unjust sentences are not on death row.

While few observers today would disagree with the assertion that mercy is appropriate in a case in which a man is condemned to death for a \$1.95 crime, Linda Ross Meyer of Quinnipiac School of Law struggles with distinguishing between cases in which mercy is appropriate and those where it is not. As such, this chapter, like Sarat's, focuses on how the criminal justice system deals with defendants who are in all likelihood guilty. Focusing on military

courts, Meyer develops a theory of mercy that is interconnected with conceptualizations of justice, under an intriguing title, "Miscarriages of Mercy."

Jonathan Simon, Professor of Law at Boalt Hall, tells readers about two defendants: Frank Lee Smith, who spent 14 years on Florida's death row for a Ft. Lauderdale murder before being vindicated by DNA in 2000, and Jerry Townsend, imprisoned for 22 years before his vindication. Unfortunately, however, Smith died of pancreatic cancer while on death row, 11 months before the actual culprit in his case, and Townsend's, was identified. What lessons can be learned? Simon tells the story of a Ft. Lauderdale detective who took the time to build rapport in the community rather than relying on interrogation and the use of informants — less reliable methods of investigation that have become more prominent in police work because of efforts to slow the drug trade. In the end, the detective was right: the murders attributed to Smith and Townsend had actually been committed by another man. Simon concludes that community policing works and has a much lower risk of error.

Readers of *Judicature* will be especially interested in two of the remaining chapters, one by Northeastern University Professor Daniel Givelber and another by Stanford Professor Robert Weisberg. Givelber focuses on the accuracy of jury decisions and the frequency with which judges and juries agree on guilt verdicts. Today jurors acquit more than judges would, but the difference has narrowed in recent decades. Givelber argues that improvements in due process have restricted the amount

of information that jurors can hear, causing some sacrifices in factual accuracy. Weisberg, on the other hand, grapples with the "harmless error doctrine," which prevents courts from dealing with various miscarriages of justice.

To be sure, some of the essays in the book are rather complex and will require unusual amounts of concentration from readers. For example, one contributor writes, "At the heart of the hegemonic, then, is the maintenance of the contradictory consciousness such that the epistemological authority of everyday experience is unequipped to mount a challenge to the world as it is presented and 'inherited from the past'" (p. 316). I say this not to question the value of the scholarly points being made, but to show that we have come a long way from the days when "making sense of miscarriages of justice" involved reading relatively straightforward stories of defendants getting screwed by overzealous prosecutors or cops or under-zealous defense attorneys.

Taken together, the distinguished scholars who contributed to this volume offer a persuasive argument that most studies of miscarriages of justice are too narrow, and that we need to broaden our attention to include a wider array of areas in which the law fails to bring about justice. Three cheers for Ogletree and Sarat for bringing these authors together. ☛

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Ardent advocates

by Bert Brandenburg and Rachel Paine Caufield

In Defense of Judicial Elections, by Chris W. Bonneau and Melinda Gann Hall. Routledge. 2009. 200 pages. \$30.95.

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Amid growing concern about trends in judicial elections, a backlash has stirred. In *Defense of Judicial Elections* is the work of two ardent advocates of elections, professors Chris Bonneau and Melinda Gann Hall, who have little patience for good-government concerns with the system of partisan judicial con-

tests they endorse. Although the book is marketed as a comprehensive argument, it actually focuses on a very limited slice of the debate about whether and how to elect judges. The authors have compiled substantial data, and present some interesting empirical analysis. But the book's conclusions frequently