

Barred: Why the Innocent Can't Get Out of Prison

By Daniel Medwed

Distinguished Professor of Law and Criminal Justice, Northeastern University
Boston, U.S.A.

(New York; Basic Books, 2022)

Reviewed by Valena Beety,

Law Professor, Arizona State University Sandra Day O'Connor College of Law
Phoenix, U.S.A.

The United States is at a critical juncture. The American Supreme Court is stripping protections of certain long-standing rights, and actions that were previously legal can now be criminal, such as obtaining an abortion or even providing information about abortion. In this moment, what is innocence and guilt? How do we fight to prevent wrongful convictions and help people that have already been wrongly convicted? With the changing laws, there's a renewed sense that any of us can be wrongly convicted. Wrong state, wrong race, wrong time.

This is where *Barred: Why the Innocent Can't Get Out of Prison* ("Barred"), written by Professor Medwed, steps in. The book teaches us about the longer-standing struggle, the barriers enacted over decades at each stage of that struggle, and the long fight to free people from wrongful convictions. As Professor Medwed says, "*procedure* is the key." If the rules are going to change, these are the rules that need changing.

For three decades, the innocence movement has focused on proving "factual innocence" with DNA evidence. Bodily fluids collected and tested shows it wasn't Jon who committed the crime, it was James. Substance.

But as Professor Medwed details, far more people are wrongly convicted than those who can rely on exculpatory DNA evidence. DNA has been crucial to exposing the many causes of wrongful convictions: faulty forensic evidence, police and prosecutor misconduct, mistaken eyewitnesses, unreliable informants, false confessions, and racism. DNA opens the doors to recognizing these other causes of wrongful convictions. But what next?

Barred walks us through the procedural barriers at each step a wrongly convicted person takes toward freedom. As Medwed describes it, "the rule regime is stacked *against* the innocent, contrary to the popular belief that the post-conviction process is full of escape hatches from the prison cell, those imaginary 'technicalities' that let people loose[...] You can have evidence of innocence – and no one willing to hear it."

Professor Medwed does not come by his wealth of knowledge easily, nor by simply reading books. He has litigated with both winning and losing outcomes across his body of work. He has represented people as a defense attorney, a post-conviction litigator, and an innocence advocate. He has also, in his years as a professor, warned us of problems in the criminal legal system that

keep innocent people locked up. We are lucky to have his wealth of insight gathered together into one book: *Barred*.

Through the pages of *Barred*, Medwed turns to the topic of procedure for the next stage of innocence work. If it is procedure that creates the bars, then it is those bars we must bend to free innocent people. As Michelle Alexander says about the criminal legal system in *The New Jim Crow*, every birdcage has its door. That door can be the rules of criminal pre-trial and post-conviction litigation, which are rules which Medwed knows well.

Barred is handily divided into four sections: trial and direct appeal; post-conviction litigation; clemency or pardons through the executive branch; and paths forward.

Medwed's analysis of each stage of the criminal process and how it traps innocent people shines light on how *all* people are treated within the criminal justice system at these different stages. For example, plea bargaining is foisted on innocent people – as well as on 95% of the population, out of fear that a trial will mean they face a more severe sentence for exercising their constitutional right to a jury trial. As Medwed says, the jury trial “is practically extinct” and with it “what’s lost is a public reckoning.”

Medwed also shares a story when describing the procedural bar at each stage of a case. We fall into people's lives, captured by the insanity of their incarceration and the clarity of their innocence. But Medwed provides us an escape as well – suggestions for changing procedure. What about limiting the size of the trial tax? Making crime labs and other evidence equally accessible to all parties rather than relying on prosecutors to review and then disclose the evidence to defendants? Banning guilty pleas from including an automatic waiver of the person's right to appeal? All of these are doable.

Medwed identifies that the true culprit of wrongful convictions is the fixation by the criminal justice system on finality. Reviewing courts give tremendous deference to the decisions by the trial court, and even if something goes wrong, that error can be dismissed as “harmless.” In reviewing DNA exonerations where the incarcerated person had previously challenged their conviction without success, Medwed shares “the most distressing thing about the harmless error doctrine is that its guilt-based approach lets wrongful convictions slip through the cracks because appellate courts misjudge the strength of the trial evidence.”

In post-conviction litigation, we learn about the importance of state trial courts and the closed door of federal court. The barriers to relief in federal court include deference to said state courts, obstacles to appeal, and time restrictions.

These time restrictions are serious and damning. Medwed elucidates this point by discussing Jeff Deskovic's case. Jeff's attorney called the court clerk to determine if his client's habeas petition needed to be put in the mail and stamped by April 24, or received by April 24. He was told having it in the mail by April 24 was sufficient. It was not, and a federal court refused to hear Jeff's petition because it was “untimely.” Nine years later, DNA evidence finally exonerated him. He could have been freed earlier had a federal court only reviewed his case, instead of dismissing it out of hand.

Jeff's case is but one of many shared in *Barred*. The stories of shared lives and struggles of the wrongly convicted can inform all of us about both problems and solutions.

In reading *Barred*, I'm reminded of author Alexis Pauline Gumbs advice, "listening is not only about the normative ability to hear, it is a transformative and revolutionary resource that requires quieting down and tuning in." It may be hard to tune in. It may be a challenge to hear the barriers laid out by Medwed. But it is through listening that we can ultimately communicate, with the goal of transforming those barriers into open doors. Medwed's insights and poignant stories leave my heart aching, but my spirit stirred for change.