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"*WHY THE INNOCENT PLEAD GUILTY AND THE GUILTY GO FREE*: A CRITICAL ANALYSIS OF JUDGE RAKOFF'S BOOK"

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This is a review of Jed S. Rakoff's new book *Why the Innocent Plead Guilty and the Guilty Go Free: And Other Paradoxes of Our Broken Legal System*.[1] While the book has its merits, this review primarily focuses on critiques. These critiques cover the topics of the difference between innocence and wrongful conviction/exoneration, the death penalty, race, and plea bargaining. This review concludes by addressing the problematic breadth of the book and an unfortunate absence of citations.

I. INNOCENCE

A mistake that permeates much of the analysis on criminal justice issues is the conflation of factual innocence with both wrongful conviction and exoneration. For example, Rakoff mentions "the more than three hundred people whom the Innocence Project and its affiliated lawyers have proved were wrongfully convicted of such serious crimes as rape or murder—crimes that they did not in fact commit . . . ."[2] While a defendant who was wrongfully convicted may be factually innocent, all defendants who were wrongfully convicted are not factually innocent.

This same mistake is made when referencing exonerations. Rakoff claims that the National Registry of Exonerations (NRE) has documented over 2,400

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[1] JED S. RAKOFF, WHY THE INNOCENT PLEAD GUILTY AND THE GUILTY GO FREE: AND OTHER PARADOXES OF OUR BROKEN LEGAL SYSTEM (2021).
[2] *Id.* at 28.

convicted felons who "were thereafter determined by the courts to be both legally and factually innocent (i.e. exonerated)."[3] Again, an exonerated person may be innocent, but an exoneration does not prove innocence. The NRE even acknowledges that, while exonerees may be factually innocent, this is not required to be considered an exoneree.[4]

Incorrectly conflating exoneration and innocence is, unfortunately, not limited to this book. Even Supreme Court Justices have succumbed to its allure. In his *Kansas v. Marsh* dissent, Justice David Souter claimed that over 110 death row inmates had been released since 1973 "upon findings that they were innocent of the crimes charged."[5] Souter, however, was corrected by Justice Antonin Scalia, who explained that a large majority of these 110 allegedly "innocent" people were released due to technical reasons, such as inadmissible evidence, double jeopardy, or the death of a key witness, not because of a factual finding of innocence.[6]

Rakoff also claims that it is "widely accepted" that at least 4% of those executed are "innocent."[7] While no citation is provided for this claim, Rakoff is likely misinterpreting a 2014 study in which the end result involves the number 4.1% in the context of executed inmates.[8] However, the study that he relies on deals with exonerations—applying death row exoneration rates to executions using survival analysis—, not innocence.[9]

Rakoff's claim that more than 4% of those executed are innocent is peculiar when matched with the fact that neither he nor anyone else has been able to provide a single definitive example in the last fifty years. Even staunch death penalty abolitionists admit that out of the 1,532 inmates executed in the last fifty years, "no executed offender has been shown conclusively to be innocent."[10] If, as Rakoff claims, 4% of those executed inmates were innocent, that would be over sixty innocent inmates executed. The inability to produce a single, concrete example out of a group of sixty is highly suspect.

The most frequent attempt by death penalty abolitionists to produce an example of an innocent person executed in the last fifty years is Cameron Todd Willingham.[11] Willingham was convicted based on a jailhouse informant who has

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[3] *Id.* at 28–29, 36.
[4] *Glossary*, THE NAT'L REGISTRY OF EXONERATIONS, https://www.law.umich.edu/special/exoneration/Pages/glossary.aspx (last visited March 16, 2021).
[5] Kansas v. Marsh, 548 U.S. 163, 209–10 (2006) (Souter, J., dissenting).
[6] *Id.* at 185–99 (Scalia, J., concurring).
[7] RAKOFF, *supra* note 1, at 54.
[8] Samuel R. Gross et al., *Rate of False Conviction of Criminal Defendants Who are Sentenced to Death*, 111 PROC. NAT'L ACAD. SCIS. 7233 (2014).
[9] *Id.*
[10] BRANDON L. GARRETT & LEE B. KOVARSKY, THE DEATH PENALTY 210 (2018); *Executions Overview*, DEATH PENALTY INFO. CTR., https://deathpenaltyinfo.org/executions/executions-overview (last visited Mar. 16, 2021).
[11] Michael Conklin, *Innocent or Inconclusive? Analyzing Abolitionists' Claims About the Death Penalty*, NEB. L. REV.: BULL., Sept. 4, 2018, at 4–5, https://lawreview.unl.edu/Analyzing-Abolitionists-Claims-About-the-Death-Penalty.

since wavered and expert testimony that exaggerated the evidence of guilt.[12] This opens the door to posit that Willingham was wrongfully convicted. However, it does not prove his innocence nor refute the remaining evidence of his guilt.[13] Even the staunchly anti-death penalty advocacy group Death Penalty Information Center only goes as far as to say that Willingham is "possibly innocent," which, of course, is true of all 1,532 executed inmates.[14]

II. ABOLISHING THE DEATH PENALTY

Rakoff's strong position against the death penalty is no surprise. In 2002, while judge of the U.S. District Court for the Southern District of New York, Rakoff declared the death penalty unconstitutional under a theory that the Due Process Clause of the Fifth Amendment perpetually protects an inmate's right to prove his or her innocence (a right that would be denied when an inmate is executed).[15] The Second Circuit Court of Appeals unanimously reversed Rakoff's creative attempt to abolish the death penalty, as it violated "well-settled" Supreme Court precedent.[16]

Rakoff's support for abolishing the death penalty and his emphasis on wrongful convictions are incompatible. This is because death row inmates are significantly more likely to be exonerated than their counterparts serving life sentences, due to the increased attention they receive.[17] This reality is likely the impetus behind a majority of California death row inmates opposing Proposition 34, which would have retroactively replaced capital sentences with life without parole.[18]

III. RACE

Rakoff's attempts to interject race into the legal topics he discusses are often contrary to the evidence. For example, he mentions "a strong current of racism running just below the surface" of the death penalty.[19] However, whites are more likely to receive the death penalty upon conviction, are more likely to be executed after receiving the death penalty, and are executed at a faster rate.[20] These factors would all be inconsistent with a death penalty that contains such a "strong current

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[12] *Id.* at 4.
[13] *Id.* at 4–5.
[14] *Executed but Possibly Innocent*, DEATH PENALTY INFO. CTR., https://deathpenaltyinfo.org/policy-issues/innocence/executed-but-possibly-innocent#Cameron_Willingham (last visited Mar. 14, 2021).
[15] U.S. v. Quinones, 196 F. Supp. 2d 416, 418 (S.D.N.Y. 2002).
[16] U.S. v. Quinones, 313 F.3d 49, 69 (2d Cir. 2002).
[17] Gross et al., *supra* note 8, at 7230 (pointing out that the likelihood of exoneration "drops sharply" moving from a capital sentence to a life sentence).
[18] Jonathan Simon, *Why Death-Row Inmates Oppose Life Without Parole*, BERKELEY BLOG (Sept. 25, 2012), https://blogs.berkeley.edu/2012/09/25/why-death-row-inmates-oppose-life-without-parole/.
[19] RAKOFF, *supra* note 1, at 48.
[20] Michael Conklin, *Painting a Deceptive Portrait: A Critical Review of Deadly Justice*, 22 NEW CRIM. L. REV. 223, 228–30 (2019).

of racism" against black defendants.[21] The only evidence presented by Rakoff to support his claim of the death penalty's racism is that executions disproportionately take place in the South and are therefore the result of racism in the South.[22] However, the evidence does not support this claim. The three racial disparities mentioned above—black people are less likely to receive the death penalty, are less likely to be executed after receiving it, and are executed at a slower rate than whites—are more prevalent in the South.[23] Therefore, it appears that the South is less racist in its implementation of the death penalty.

IV. PLEA BARGAINING

Much of Rakoff's criticism of the plea-bargaining process stems from a misunderstanding regarding the appropriate frame of reference. Rakoff makes the common mistake of utilizing the plea offer as the starting reference point through which the option of a trial is viewed as a penalty (the "trial penalty" as Rakoff describes it).[24] This is misguided because the trial is the default starting point, not the plea offer. Therefore, the severe punishment one receives from conviction at trial is the baseline to which other options should be compared. Having established this correct frame of reference, it becomes clear that interjecting an alternative to conviction at trial in the form of a generous plea offer is far from a *trial penalty* but rather a *plea reward*. The fact that more than ninety-seven percent of federal criminal defendants choose a plea bargain over trial is a testament to how favorably defendants view the plea option.[25]

As with many of the issues addressed in the book, Rakoff fails to discuss counterarguments. The following are benefits to plea bargaining that—along with the downsides—the reader must consider in judging the merits of the practice:

- Plea bargaining frees up valuable law enforcement resources.[26]
- The confession of guilt required to accept a plea is instrumental to the rehabilitation process.[27]
- Plea bargaining provides numerous benefits to crime victims, such as immediate closure, spared traumatic experience of reliving their victimization by testifying at trial, reducing the risk of watching their victimizers go free, and receiving an admission of guilt.[28]

[21] RAKOFF, *supra* note 1, at 48.
[22] RAKOFF, *supra* note 1, at 49.
[23] Conklin, *supra* note 21, at 228–30.
[24] RAKOFF, *supra* note 1, at 25.
[25] *Id.* at 20.
[26] Michael Conklin, *The Alford Plea Turns Fifty: Why it Deserves Another Fifty Years*, 54 CREIGHTON L. REV. 1, 9 (2020).
[27] *See* Stephanos Bibas, *Harmonizing Substantive-Criminal-Law Values and Criminal Procedure: The Case of Alford and Nolo Contendere Pleas*, 88 CORNELL L. REV. 1361, 1389 (2003).
[28] Conklin, *supra* note 26, at 16.

- Plea bargaining takes an adversarial system and transforms it into a more collaborative process with win-win outcomes. This may result in criminals acquiring a more positive perception of law enforcement.[29]

- Plea bargaining allows defendants to trade risk for certainty based on their own personal preference for risk aversion.[30]

- Plea bargaining allows prosecutors to extract valuable information from low-level offenders, leading to more successful and efficient prosecutions higher up the criminal hierarchy.[31]

- Plea bargaining essentially trades a few defendants receiving maximum justice for many defendants receiving moderate justice. This is preferable to the inverse tradeoff because a high probability of some punishment is a greater deterrence than a low probability of high punishment.[32]

V. CONCLUSION

Rakoff attempts to cover far too many topics in this 193-page book. This results in very superficial coverage of each topic. The following is a sampling of some of the topics Rakoff attempts to cover in this short book:

- Japanese internment camps[33]
- The *Magna Carta*[34]
- Guantanamo Bay[35]
- Antiterrorism and Effective Death Penalty Act of 1996[36]
- Torture (history, legality, effectiveness, extraordinary rendition)[37]
- Free speech[38]
- Reductions in successful habeas corpus petitions[39]
- John Marshall's journey to the Supreme Court[40]

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[29] Michael Conklin, *In Defense of Plea Bargaining: Answering Critics' Objections*, 47 W. ST. U. L. REV. 1, 6 (2020).
[30] *Id.* at 23.
[31] Dylan Walsh, *Why U.S. Criminal Courts are so Dependent on Plea Bargaining*, THE ATLANTIC (May 2, 2017), https://www.theatlantic.com/politics/archive/2017/05/plea-bargaining-courts-prosecutors/524112/.
[32] S.K., *Longer Jail Sentences do Deter Crime, but Only up to a Point*, ECONOMIST (Mar. 29, 2016), https://www.economist.com/free-exchange/2016/03/29/longer-jail-sentences-do-deter-crime-but-only-up-to-a-point ("[There is] little evidence that criminals responded to harsher sentencing, and much stronger evidence that increasing the certainty of punishment deterred crime.").
[33] RAKOFF, *supra* note 1, at 127–28.
[34] *Id.* at 116–22.
[35] *Id.* at 120–123, 132–33.
[36] *Id.* at 115–25.
[37] *Id.* at 128–34.
[38] *Id.* at 134–37.
[39] RAKOFF, *supra* note 1, at 115-25.
[40] *Id.* at 140–42.

- *Marbury v. Madison*[41]
- Tribal sovereignty[42]
- The judiciary's deference to executive action[43]
- Mandatory arbitration clauses[44]
- The problem with how "retrieved memories" often result in implanting false memories[45]
- Issues prosecuting high-level executives[46]

To make matters worse, Rakoff often meanders from topic to topic. Because Rakoff provides very few citations, a reader who wants to examine in greater detail any given topic may find such an attempt difficult. This overbreadth is further problematic because it means Rakoff often does not provide any proposed solutions or address any counterarguments.

Readers who are even moderately familiar with criticisms of the U.S. criminal justice system will likely not learn anything significant from the book that they did not already know. There are, however, occasional pieces of information that may spark interest in the reader. One example is a proposal to require all prosecutors to spend six months every three years serving as defense attorneys for indigent defendants, similar to the British system.[47] For the time being, the book offers insight into modern issues, such as the First Step Act, which retroactively reduced mandatory minimums for nonviolent drug offenders, and how COVID-19 affects the criminal justice system.[48] However, these examples are incredibly sparse, and when they do arise, they are exceedingly short. Unfortunately, these examples are not nearly enough to justify reading the book.

[41] *Id.* at 146–49.
[42] *Id.* at 150–51.
[43] *Id.* at 153–63.
[44] *Id.* at 171–73.
[45] RAKOFF, *supra* note 1, at 76.
[46] *Id.* at 85–101.
[47] *Id.* at 33–34.
[48] *Id.* at 9.