

Why the Innocent Plead Guilty and the Guilty Go Free: And Other Paradoxes of Our Broken Legal System

By Jed S. Rakoff

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The Honorable Jed S. Rakoff, Senior Judge in the Southern District of New York, takes seriously Canon 4 of the Code of Conduct for United States Judges. Specifically, Canon 4(A)(1) states: “*Speaking, Writing, and Teaching.* A judge may speak, write, lecture, teach, and participate in other activities concerning the law, the legal system, and the administration of justice.” Furthermore, the Commentary to Canon 4 states:

Complete separation of a judge from extrajudicial activities is neither possible nor wise; a judge should not become *isolated* from the society in which the judge lives. As a judicial officer and a person specially learned in the law, a judge is *in a unique position* to contribute to the law, the legal system, and the administration of justice, including revising substantive and procedural law and *improving criminal and juvenile justice.* To the extent that the judge’s time permits and *impartiality is not compromised*, the judge is encouraged to do so, either independently or through a bar association, judicial conference, or other organization dedicated to the law. ... (Emphasis added.)

Judge Rakoff is certainly not isolated. In fact, he is well-known inside as well as outside the legal community for his prolific writing as well as speaking about ways the legal system could and should be reformed.

Judge Rakoff is in a unique position to write this book. After graduating from Harvard Law School, Judge Rakoff served as a law clerk to Judge Abraham Freedman of the U.S. Court of Appeals for the Third Circuit. He has worked both sides of the courtroom, as a defense lawyer for two New York firms and as a federal prosecutor with the U.S. Attorney for the Southern District of New York. He was nominated to the federal bench by President Clinton and began his service in 1996. He has thought deeply and critically about the cases before him, for instance, declaring the death penalty unconstitutional in *U.S. v. Quinones* and refusing to accept the initial settlement agreement in *Securities and Exchange Commission v. Bank of America*, stating that it was “done at the expense, not only of the shareholders, but also of the truth.”

The title of this book is drawn from a practice Judge Rakoff finds troubling, the ubiquitous plea bargaining in the federal system. Since 2010, less than 3 percent of all criminal cases

went to trial. He believes that even the innocent are forced into pleading guilty by a multitude of factors including mandatory minimums and sentencing guidelines – what he calls “weapons to bludgeon defendants into effectively coerced plea bargains.” (p. 23). During this time, prosecutors enjoy a huge advantage in terms of access to resources and information, in addition to charging power. Defense lawyers are not always in the position to challenge all of this, and this is one of the drivers of mass incarceration. Judge Rakoff believes that only a groundswell of opposition to the above practices will force change. And his book and other writings are part of creating that groundswell.

Make no mistake: Judge Rakoff’s impartiality is not compromised, as cautioned by the Commentary. He does not reflexively standup for those suspected or accused of wrongdoing, and in fact, criticizes the Government for not having more backbone when it comes to prosecutions. In one chapter titled “Why High Level Executives are Exempt from Prosecution,” Judge Rakoff faults the Government for not criminally prosecuting the banking and other executives whose actions caused the Great Recession. And in the following chapter “Justice Deferred is Justice Denied,” he criticizes the growing practice of the Government’s entering into deferred prosecution agreements with companies rather than prosecuting the companies outright as well as the high-level officials responsible for those actions.

Judge Rakoff’s judicial career, on and off the bench, has been devoted to improving criminal justice. Those efforts have not always been free of challenge, for instance, his service on the National Commission on Forensic Science. Judge Rakoff was the sole representative of the Federal Judiciary from the time of its founding in 2013 until 2015 when he resigned as a matter of principle over the Department of Justice’s decision that pre-trial discovery relating to forensic expert testimony was beyond the scope of the Commission’s work. *Why the Innocent Plead Guilty* devotes a chapter to the shortcomings of forensic science, the overreliance on it, and the failure of the judiciary to understand it.

You might think that in a book arguing for improving the criminal justice system, a trial judge would use the lives of the individual litigants before him or her or that the book would be a collection of war stories. But instead, Judge Rakoff marshals facts and figures from across the criminal justice system to alert the public to the depth and breadth of the problems. One of this book’s greatest advantages is that because of its relatively small size (less than 200 pages and footnote-free) and conversational tone, should an attorney recommend this book to a non-attorney, the attorney can be relatively confident that the other party will be enlightened and perhaps, inspired to be part of the groundswell of support for reform which Judge Rakoff believes is so necessary.