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Rakoff Book Colors Outside the Lines

By Joel Cohen

If you want the views of a judge who has seriously studied the issues and can give you his objective views, leaving his self-applause in the cloak room, read this book.

"Why the Innocent Plead Guilty and the Guilty Go Free (and Other Paradoxes of Our Broken Legal System)"

By Jed S. Rakoff

Farrar, Straus and Giroux, 180 pages, $27

Very soon after Judge Jed Rakoff was appointed to the District Court bench, I found myself representing someone in an SEC case against 10 defendants. It was assigned to him even though each defendant had also been charged criminally for the same conduct and that case was pending before another judge in his courthouse. Judge Rakoff directed a conference at 8 a.m. *8 o'clock ?* An obvious workaholic. Or drill sergeant, perhaps.

Along with the SEC and the U.S. attorney, each defendant had consented to hold the SEC case in abeyance—the criminal case resolution would take priority. Typically, given everyone's consent, a judge would reflexively "so order" any such agreement—a resolution of the criminal case would likely obviate the need for extensive and largely unnecessary litigation over the SEC's civil case. Not Rakoff: Paraphrasing, "You bring a case before me, be prepared to proceed. Otherwise, I'll dismiss it, and remove it from my docket" (reluctantly, I imagine, with*out* prejudice).

In a joint defense meeting later that morning, everyone, in disbelief given the unanimous consent, turned to a graybeard Brahmin of the bar, since deceased, for his thoughts on what had surprisingly occurred moments before in the rookie judge's courtroom. Yes, he was whimsical. But, unsatisfactorily to the rest of us litigating the case, he simply noted what would become obvious— that, in Rakoff, we would face a judge far different than most. That is, a judge unwilling to umpire the game played in his courtroom necessarily employing conventional practices. He would, we had no doubt, travel to the beat of his own drum—even if almost every other judge in the courthouse would have simply granted the mutually agreed-upon adjournment, and called his next case (by the way, at 9:30 a.m. or later).

As it turned out, it would not only be in his courtroom that Rakoff would come to demonstrate that uniqueness; but also in how he would use his judgeship—on and off the court—to advance the law. Not only by his sometimes-aggressive, outside-the box decisions like declaring the death penalty unconstitutional or rejecting SEC settlements with banks as too miserly. But also in the vast extracurricular writings that would be read by the bar, and the "real world", most frequently in the New York Review of Books. And now, with the

seeds having been planted in the Review, in his hot off the presses book, "Why the Innocent Plead Guilty and the Guilty Go Free (and Other Paradoxes of Our Broken Legal System)."

The compelling issues raised by the title would be troubling enough if written by a practicing lawyer willing to expose the imposing little secrets inherent in the criminal justice system. But this book is written by a sitting federal judge—overtly troubled by the scourge of mass incarceration; the inside- baseball reality that far too many actually-innocent individuals plead guilty; the often-wrong eyewitness testimony relied upon, particularly in cross-racial identifications; the frequently horrendous failures of forensic science; the scandal that high level executives so often escape prosecution; and why, going for broke on this one, the Supreme Court (which may actually review some of his decisions) is "unduly subservient"—Rakoff's phrase—to the executive branch of government.

He also explains how mandatory minimums imposed by the legislative branch "provide prosecutors with weapons to bludgeon defendants into effectively coerced plea bargains," and which, needless to say, remove judicial discretion. Defense lawyers often can't meet with their clients—jailed when, notwithstanding bail reform, the financial price for freedom is beyond their means. And consider the effect of COVID-19 on this phenomenon.

Rakoff doesn't rely solely on what happens in his courtroom. He was co-chair of the National Academy of Science's Committee on Eyewitness Identification and has written a number of articles on the subject. Here, he reminds us of horrifying statistics. The Innocence Project has established the actual innocence of more than 360 people, serving an average of 14 years in prison, through DNA testing. In more than 40% of the cases, forensic evidence was adduced at trial to prove guilt— evidence which was later proved to be wrong through the use of DNA evidence. And eyewitness identification—an eyewitness testified in nearly 70% of those 360 cases and nearly a third were wrong. Imagine—a witness helping to put someone away was just mistaken.

Sitting judges don't usually color outside the lines and tell the bar, not to mention the public, exactly what's—often grotesquely—wrong with "the System." They usually don't even discuss it, except perhaps when having a drink with a colleague in a totally off the record setting. Not Rakoff! If the practices of the law are bad, if the law is working unjustly, the public deserves, even needs, to know about it. Indeed, unlike other sitting or retired judges who write books, the word "judge" doesn't appear on the cover. Rakoff is not "selling," for lack of a better word, his title; rather, this book is about his thoughts based on his unique and considerable experience, and ruminations over it.

One might conclude that if a judge authors a book that raises such concerns he might present in his courtroom as if were a Che Guevara constrained by no guardrails. Can he use his courtroom practices and protocols incorporating his visions of how the practices of the law should properly be implemented? Good question. Yes and no. Where he can, Rakoff will put into place an individual rule aimed at balancing the playing field (often followed by others)—for example, *Giglio* material must be disclosed four weeks prior to a guilty plea. And judges shouldn't, in his view, simply rubber stamp settlement agreements by regulatory bodies.

Rakoff may be skeptical about cases brought or defenses raised in his courtroom, he has taken an oath and finds himself obligated to comply with the law and legal authority—even if he strenuously disagrees with it. Rakoff has been a guest speaker in a class I teach called "How Judges Decide," and I have heard him tell my students that 95% of the cases before him *require* that he rule one way or another. It's the other 5%—those which pose tricky or untested questions—where Rakoff's curiosity and creativity may come through, and might be suggested by some thoughts he presents in his book.

One area of possible disagreement with His Honor, though. You will remember that 20 years ago, as part of the Enron investigation, Arthur Andersen, one of the foremost accounting firms in the world, was indicted and

convicted. Even though Andersen's conviction was ultimately reversed in the Supreme Court, it was too late. Andersen was dead. The end. The concept of "too big to fail" had fallen on deaf ears at the Enron Task Force.

Judge Rakoff's chapter isn't really about Andersen, but he does rail about the reality that many companies and their principal executives get away with murder in the form of deferred prosecution agreements that sometimes in the process, too often in his view, immunize key executives. He talks about Pfizer in particular which was a recidivist corporate offender.

Now, criminal lawyers—guilty here, among them—can make strong arguments why deferred prosecution agreements may serve the public interest, and inoculate innocent shareholders who might themselves be victims of the wrongdoer corporations; and why the individuals should not be prosecuted. Rakoff acknowledges that the Andersen debacle may have influenced DOJ's thinking, but: "if we are talking about prosecuting individuals, the excuse becomes entirely irrelevant, for no one I know has ever contended that a big financial institution would collapse if one or more of its high-level executives were prosecuted, as opposed to the institution itself."

Even though Rakoff doesn't address whether Pfizer itself—the corporation—should have been required to go to trial or plead guilty, let's assume that the Justice Department, on its own, had gotten tired of Pfizer's repeated "screwing around" in the face of its promises of compliance—and it led to the result that befell Andersen. Just imagine America without Pfizer today! (And I'm a Moderna guy).

There's unquestionably much to be said in Judge Rakoff's argument, and my glib hypothetical— probably motivated by the seat in which I sit in the criminal justice system—is unfair to the Judge's position. But that's the whole point. I could debate *with prosecutors* all day long about who is right regarding leniency for corporations and their chief executive officers. More valuable, though, than debaters with skin in the game, is a judge who is willing to publicly share his views. He is the man with the gavel willing to step forward, unconcerned that a litigator might use his candid remarks when that litigator next appears for duel in the judge's courtroom.

So if you want a courtroom participant's view describing the problems with "the System" who may well pat himself on the back as he describes how he snatched victory from the jaws of defeat, read Louis Nizer, or Alan Dershowitz, or Johnnie Cochran, or Melvin Belli or Gerry Spence—great lawyers all. If, however, you want the views of a judge who has seriously studied the issues and can give you his objective views, leaving his self-applause in the cloak room, read this book.

Oh—and as for Rakoff being a workaholic—he does have a reputation. A Law360 headline just last week, reporting on the absence of trials in the Southern District due to COVID-19, announced: "Next SDNY White Collar Trial Before, You Guessed It, Rakoff."

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