

# BOOK REVIEW

## Criminal Injustice

*Edward Rubin\**

JED S. RAKOFF, *WHY THE INNOCENT PLEAD GUILTY AND THE GUILTY GO FREE: AND OTHER PARADOXES OF OUR BROKEN LEGAL SYSTEM*, Farrar, Strauss & Giroux 2021. Pp. 208. \$27.00 Hardcover.

As its title suggests, *Why the Innocent Plead Guilty and the Guilty Go Free* is a wide-ranging critique of our criminal justice system.<sup>1</sup> While it is hardly the first, it offers a number of distinctive insights. Most of the now voluminous work on this topic is written by scholars, policy analysts, or journalists and is addressed to the legislature or the executive.<sup>2</sup> This certainly makes sense. External observers are well-positioned to critique a system that punishes without purpose, and the major determinants of its dysfunction are the legislature that enacts the criminal law and the executive that enforces it. In contrast, the author of this book, Jed S. Rakoff, is a sitting federal judge, and he provides a specifically judicial perspective.<sup>3</sup> This appears in at least two of the book's most notable features: its juxtaposition of its subject matter and its discussion of the way that general trends in our criminal law impact the work of judges.<sup>4</sup>

The study of American criminal law and criminal justice divides, very roughly, into two basic categories. One is discussion of trial procedures: the elements of particular crimes, the methods of proof, the quality of the evidence, and the protections afforded to defendants. The other consists of the administrative features of the criminal justice

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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. *See, e.g.*, MICHELLE ALEXANDER, *THE NEW JIM CROW: MASS INCARCERATION IN THE AGE OF COLORBLINDNESS* (2020).

3. RAKOFF, *supra* note 1, at 4.

4. *Id.* at 4–5, 17–18.

system as a whole: police, prisons, probation, and parole. The first category tends to be the preserve of legal scholars and teachers.<sup>5</sup> As scholars, they have certainly extended their attention to the second category—an aspect of the increasingly interdisciplinary character of legal research—but as teachers they continue to focus on trial procedures.<sup>6</sup> The 1L Criminal Law course is heavily devoted to the elements of crime that must be proved at trial, while the one upper class course on the criminal justice system that most law students feel obligated to take is Criminal Procedure. Other topics tend to be covered, if at all, in upper class “boutique” classes. The second category of criminal law and justice is the primary focus of criminologists and social scientists more generally, who tend to be reluctant to plunge into the thickets of legal doctrine or who consider it unimportant to do so.<sup>7</sup>

Judge Rakoff, who had extensive experience as a prosecutor before his appointment to the bench, succeeds in combining the doctrinal and institutional perspectives.<sup>8</sup> With respect to doctrine, he offers telling criticisms of the evidence admitted in criminal cases.<sup>9</sup> Eyewitness testimony is notoriously unreliable due to people’s faulty memories and susceptibility to suggestion.<sup>10</sup> Blind management of lineups and photo arrays can help, but cannot turn resentful or

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5. See, e.g., KATHERINE BECKETT & THEODORE SASSON, *THE POLITICS OF INJUSTICE: CRIME AND PUNISHMENT IN AMERICA* (2d ed. 2004); RUTH WILSON GILMORE, *THE GOLDEN GULAG: PRISONS, SURPLUS, CRISIS, AND OPPOSITION IN GLOBALIZING CALIFORNIA* (2007) (discussing imprisonment in terms of politics, economics, and geography); JEFFREY REIMAN & PAUL LEIGHTON, *THE RICH GET RICHER AND THE POOR GET PRISON* (12th ed. 2020) (describing criminal justice system in terms of general principles of class stratification).

6. See, e.g., SANFORD H. KADISH, STEPHEN J. SCHULHOFER & RACHEL E. BARKOW, *CRIMINAL LAW AND ITS PROCESSES: CASES AND MATERIALS* (10th ed. 2016) (chapter headings are: Institutions and Processes; The Justification of Punishment; Defining Criminal Conduct—The Elements of Punishment; Rape; Homicide; The Significance of Resulting Harm; Group Criminality; Exculpation; Theft Offenses; Discretion); PAUL MARCUS, LINDA A. MALONE, CARA H. DRINAN & WILLIAM W. BERRY III, *CRIMINAL LAW* (9th ed. 2020) (chapter headings are: The Province and Limits of the Criminal Law; The Decision to Punish; The Act Requirement; The Mental State; Parties to Crimes; Principal Offenses; The Inchoate Offenses; Defenses); JOHN KAPLAN, ROBERT WEISBERG & GUYORA BINDER, *CRIMINAL LAW: CASES AND MATERIALS* (9th ed. 2021) (chapter headings are: The Purposes and Limits of Punishment; The Criminal Act; The Guilty Mind; Causation; Intentional Homicide; Unintentional Homicide; Capital Murder and the Death Penalty; Defensive Force, Necessity, and Duress; Mental Illness as a Defense; Attempt; Complicity; Conspiracy; Rape; Theft Offenses; Perjury, False Statements, and Obstruction of Justice). This is not to suggest that these books entirely ignore issues such as policing, prisons, alternative punishment or the organization of public defender services, and certainly not that the various authors are unaware of these issues. Rather, the topics covered reflect the long-established and deeply ensconced curriculum of the first year criminal law course.

7. See *supra* note 5.

8. RAKOFF, *supra* note 1, at 4–5.

9. *Id.* at 35–36.

10. *Id.* at 35–45.

overwrought victims into experienced observers.<sup>11</sup> So-called forensic science is often decidedly unscientific, and thereby subject to manipulation by result-oriented prosecutors or crime labs.<sup>12</sup> While tests matching hair samples, clothing fibers, handwriting, and bitemarks are regularly relied upon by prosecutors, rigorous analysis reveals that they are often worse than nothing because they produce a false sense of certainty.<sup>13</sup> Even fingerprint analysis, the most venerable and widely used method of this sort, often depends on subjective interpretations of the data.<sup>14</sup> Polygraph tests are so unreliable that they are typically inadmissible.<sup>15</sup> Modern “brain science” offers a test of veracity based on firmer theoretical foundations and much more expensive machinery (the fMRI), but it cannot achieve the requisite level of reliability, at least so far.<sup>16</sup> The standard that the Supreme Court developed to determine the admissibility of scientific and other expert testimony in *Daubert v. Merrell Dow Pharmaceuticals, Inc.* is more sophisticated than prior standards but it is thereby virtually unusable in ordinary cases.<sup>17</sup>

A particularly disconcerting indication of these evidentiary inaccuracies is the surprisingly frequent reversal of convictions in death penalty cases.<sup>18</sup> The defendant is granted the most elaborate procedural protections when this ultimate sanction is demanded, so much so that execution often costs the state more than imprisoning the offender for life.<sup>19</sup> Yet the Innocence Project has obtained reversals in a number of these cases by demonstrating that the prosecutor convicted the wrong person.<sup>20</sup> On the basis of this level of inaccuracy, Judge Rakoff reports, he held the death penalty unconstitutional, but the Second Circuit reversed him.<sup>21</sup>

The second category of criminal justice research involves the structure of the system and focuses on police, punishment, and the institutional behavior of prosecutors, rather than their performance at trial. Here again, Judge Rakoff advances a number of significant and

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11. *Id.* at 38–42.

12. *Id.* at 57–70.

13. *Id.* at 57, 61.

14. *Id.* at 61–62.

15. *Id.* at 79.

16. *Id.* at 78–79.

17. *Id.* at 59–61; *Daubert v. Merrell Dow Pharms., Inc.*, 509 U.S. 579 (1993).

18. RAKOFF, *supra* note 1, at 54.

19. *Id.* at 53.

20. *Id.* at 54.

21. *Id.* at 55.

severe critiques.<sup>22</sup> The book begins with an account of what he describes as the “scourge” of mass incarceration.<sup>23</sup> The scale is well known: more than two million Americans are in prison, a higher rate per capita rate than any other nation in the world.<sup>24</sup> The inequality is also well known: forty percent of those currently incarcerated are African American, with many serving time for nonviolent crimes.<sup>25</sup> Judge Rakoff concedes that there has been a notable decline in crime rates during the past two decades, and that some criminologists attribute this to our high levels of incarceration, operating either as a deterrent or a means of incapacitation.<sup>26</sup> But he also cites the work of other criminologists who argue that incarceration was not responsible for the decline.<sup>27</sup> The upshot is that we simply do not know.<sup>28</sup> In the face of this uncertainty, however, we have chosen a response that has enormous costs for the individuals who are serving excessively long sentences, for public budgets that must pay for this exceptionally expensive strategy, and for the minority families and communities that have been devastated by having so many of their members dragged away for long periods of time and returned as brutalized or broken people.<sup>29</sup>

Prosecutors, viewed from an institutional perspective, are a related source of concern. Many defendants, and particularly minority defendants, lack the resources to retain an attorney, and are therefore represented by public defenders.<sup>30</sup> However conscientious they are—and this obviously varies—they can rarely match the resources of a prosecutor who typically has in hand a police report, witness statements, and those forensic tests whose inaccuracies make them appear more intimidating than is justified.<sup>31</sup> This intrinsic imbalance is greatly amplified by the array of weapons that legislatures have granted prosecutors through the proliferation of offenses and increasingly harsh sentences that they have imposed.<sup>32</sup> It is further amplified by indigent defendants’ inability to post bail, so that a lengthy

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22. *Id.* at 7–34.

23. *Id.* at 7–18.

24. *Id.* at 7.

25. *Id.* at 8.

26. *Id.* at 7–8.

27. *Id.* at 9–12.

28. *Id.* at 9.

29. *Id.* at 12.

30. NAT’L RIGHT TO COUNS. COMM., JUSTICE DENIED: AMERICA’S CONTINUING NEGLECT OF OUR CONSTITUTIONAL RIGHT TO COUNSEL 49–101 (2009); Heather Baxter, *Gideon’s Ghost: Providing the Sixth Amendment Right to Counsel in Times of Budgetary Crisis*, 2010 MICH. ST. L. REV. 341, 349–51; Rebecca Marcus, *Racism in Our Courts: The Underfunding of Public Defenders and Its Disproportionate Impact Upon Racial Minorities*, 22 HASTINGS CONST. L.Q. 219 (1994).

31. See RAKOFF, *supra* note 1, at 24.

32. *Id.* at 22–23.

trial would subject them to the very conditions they are trying to avoid.<sup>33</sup> Mandatory minimums obviously make the situation worse, and sentencing guidelines do not make it any better.<sup>34</sup> The result, Judge Rakoff writes, is that prosecutors can compel hapless defendants to accept plea bargains instead of going to trial, thereby achieving a high conviction rate at limited expense.<sup>35</sup> At present, some ninety-seven percent of cases are plea bargained, Judge Rakoff reports.<sup>36</sup> This process creates a conveyor belt that gathers up arrestees, speeds them past the protections that trial is supposed to provide, and deposits them in prison, thereby turning what should be an exceptional sanction into mass incarceration.

But Judge Rakoff's institutional critiques seem to conflict with his concerns about the quality of evidence. If so many cases are plea bargained, why be concerned with the remaining three percent that go to trial? If, moreover, the prosecutor's ability to "bludgeon" the defendant into a disadvantageous bargain results from the defendant's reliance on public defenders and inability to post bail, then many of those three percent are likely to be wealthy individuals, the small minority already favored by the system in a variety of other ways, as Judge Rakoff notes.<sup>37</sup> It might be argued that plea bargaining must be carried out "in the shadow of the law," and that stricter controls on the evidence provided in trials will translate into advantages for the defendant at the plea bargaining stage.<sup>38</sup> But with such a small portion of defendants going to trial,<sup>39</sup> that shadow has become too attenuated to exercise much influence.<sup>40</sup>

The theme that connects the book's doctrinal and institutional concerns is an underlying attitude that Judge Rakoff reveals in his accounts of his own judicial role. We are a society that has based its governmental system upon the value of liberty. Yet we deprive our citizens of liberty in a mood of self-righteous severity that allows

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33. *Id.* at 29.

34. *Id.* at 22–23.

35. *Id.* at 25–31.

36. *Id.* at 20.

37. *Id.* at 85–101.

38. See, e.g., HARRY KALVEN, JR. & HANS ZEISEL, *THE AMERICAN JURY* 31–32 (1966); Thomas W. Church, Jr., *In Defense of "Bargain Justice"*, 13 *LAW & SOC'Y REV.* 509, 512–14, 523 (1979); Frank H. Easterbrook, *Criminal Procedure as a Market System*, 12 *J. LEGAL STUD.* 289, 309–17 (1983); William M. Landes, *An Economic Analysis of the Courts*, 14 *J.L. & ECON.* 61, 66–69 (1971).

39. See RAKOFF, *supra* note 1, at 20.

40. See Stephanos Bibas, *Plea Bargaining Outside the Shadow of the Trial*, 117 *HARV. L. REV.* 2463 (2004); Shawn D. Bushway & Allison D. Redlich, *Is Plea Bargaining in the "Shadow of Trial" a Mirage?*, 28 *J. QUANT. CRIMINOLOGY* 437 (2012); William J. Stuntz, *Plea Bargaining and Criminal Law's Disappearing Shadow*, 117 *HARV. L. REV.* 2548 (2004).

executions that our fellow democracies abhor, and yields an incarceration rate unmatched by any other nation, democratic or authoritarian.<sup>41</sup> We convict defendants on the basis of invalid evidence,<sup>42</sup> relying on the scrutiny of the adversary process that functions only for the wealthiest defendants.<sup>43</sup> We compel plea bargains,<sup>44</sup> introduce evidence at trials and impose savage punishment with the certainty that we are right, when in fact we are so often wrong<sup>45</sup>—wrong about the person we are punishing<sup>46</sup> or wrong about the level of punishment that is needed to achieve our purposes.<sup>47</sup> Of course, there are real criminals, and of course they should be punished in some way. But, recognizing that liberty is among our most treasured values, we should approach the potential deprivation of a person's liberty with a sense of humility, hesitation, and perhaps even trepidation. Those who manage the criminal justice system should interrogate themselves about the validity of their actions, and always remain open to the possibility that they are making a mistake.

Judges, the book suggests, can play a central role in instantiating a more self-reflective approach to criminal justice. They should be skeptical about the evidence introduced at trial, ready to exclude eyewitness testimony obtained by slovenly methods,<sup>48</sup> to warn jurors about the limitations of human perception and recollection,<sup>49</sup> and to reject overeager, unsubstantiated assertions based on the developing field of brain science.<sup>50</sup> They should have a role in monitoring plea bargaining, meeting separately with the prosecutor and defense attorney and then framing a recommendation about the proper outcome.<sup>51</sup> (To preserve the trial judge's objectivity, Judge Rakoff suggests that this monitoring function be carried out by a different judge, or possibly a magistrate appointed by the judge).<sup>52</sup> Judges should be able to bring this same sense of skepticism to prosecutors' demands for maximum or excessively long sentences, and the legislature should never deprive judges of this role by enacting mandatory minimums.<sup>53</sup>

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41. See RAKOFF, *supra* note 1, at 19, 27.

42. *Id.* at 35–46, 57–84.

43. *Id.* at 85–101.

44. *Id.* at 25–31.

45. *Id.* at 35–46, 57–84.

46. *Id.*

47. *Id.* at 22–23.

48. *Id.* at 35–46.

49. *Id.*

50. *Id.* at 71–84.

51. *Id.* at 32–33.

52. *Id.* at 32.

53. *Id.* at 31–32.

A second theme in Judge Rakoff's book is the way that general trends in our criminal law impact the work of judges. The book refers to several such trends, but the most notable one is collective fear or panic. Unfortunately, democratic government does not provide adequate protection against this reaction. A genuine concern, demanding a solution based on the public debate and conscientious representation of the people's views, can be transformed into collective panic by the populace's passing mood, or by political entrepreneurs who use the Schumpeterian process of electoral competition for their personal advancement.<sup>54</sup> This is what happened during World War II, when legitimate concerns about espionage led to the internment of 250,000 Americans of Japanese descent, while the loyalty of tens of millions of Americans with German and Italian origins went unquestioned.<sup>55</sup> It happened again after World War II, when an exaggerated fear of Communism led us to betray our basic principles and punish people for their political opinions.<sup>56</sup> That same panic led us into a catastrophic war that cost us nearly 60,000 fatalities and untold billions against a small southeast Asian nation that not only posed no threat to us but wanted to be our ally—and really had to be our ally in geopolitical terms—because it decided to nationalize its paltry industries and collectivize its little farms.<sup>57</sup>

One contemporary example to which Judge Rakoff alerts us in this book is the so-called War on Terror.<sup>58</sup> Obviously, the attack on the World Trade Center demanded a response on our part. To some extent, that response consisted of a rational extension of our established modes of governance.<sup>59</sup> We organized a new administrative agency to coordinate our efforts to protect ourselves, we strengthened the surveillance capacities of existing law enforcement agencies such as the Federal Bureau of Investigations and the New York City Police and Fire

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54. See JOSEPH A. SCHUMPETER, CAPITALISM, SOCIALISM AND DEMOCRACY 269–83 (3d ed. 1950).

55. See *Korematsu v. United States*, 323 U.S. 214 (1944) (upholding constitutionality of the internment); see e.g., TETSUDEN KASHIMA, JUDGMENT WITHOUT TRIAL: JAPANESE AMERICAN IMPRISONMENT DURING WORLD WAR II (2004); RICHARD REEVES, INFAMY: THE SHOCKING STORY OF THE JAPANESE INTERNMENT IN WORLD WAR II (2015).

56. RAKOFF, *supra* note 1, at 135; see, e.g., DAVID CAUTE, THE GREAT FEAR: THE ANTI-COMMUNIST PURGE UNDER TRUMAN AND EISENHOWER (1978); GEOFFREY R. STONE, PERILOUS TIMES: FREE SPEECH IN WARTIME: FROM THE SEDITION ACT OF 1798 TO THE WAR ON TERRORISM 311–426 (2004).

57. See, e.g., FRANCES FITZGERALD, FIRE IN THE LAKE: THE VIETNAMESE AND THE AMERICANS IN VIETNAM (1972); STANLEY KARNOW, VIETNAM: A HISTORY (rev. ed. 1997).

58. RAKOFF, *supra* note 1, at 127–37.

59. *Cf. id.*

Departments, and we punished the perpetrator of the attack.<sup>60</sup> These responses have proved to be effective and testify to our strength and competence as a democratic nation.

But panic, perhaps triggered by the initial failure to prevent the attack, an abiding hostility to modern administrative government, and racism (contrast our response to Timothy McVeigh's bombing of the Oklahoma City Federal Building and the January 6 assault on the Capitol)<sup>61</sup> led us to betray our principles. As Judge Rakoff documents, we established a horrific prison outside our national boundaries and intentionally separated from our legal system. We tortured suspects with methods that violated both our treaty obligations and our standards of due process. We criminalized political speech that fell into a vaguely defined category of being "in coordination with" any terrorist organization, including ethnic liberation movements that posed no threat to us and in one case (the Kurds) had been our ally.<sup>62</sup> There is no indication that any of these abuses have been effective; coerced confessions, for example, have been known for many centuries to provide unreliable information.<sup>63</sup> Panic, it would seem, has induced us to engage in illegal activity under the misimpression that our principles weaken us, and that immoral action makes us strong.<sup>64</sup>

A second case of panic is the one that constitutes this book's primary theme, which is our response to the increase in crime during the 1960s and 70s.<sup>65</sup> We cannot be faulted for demanding a response to this situation, but the mechanisms for responding, that is, standard provisions of criminal law, were already established in American law.<sup>66</sup>

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60. See Homeland Security Act of 2002, Pub. L. 107-296, 116 Stat. 2135, codified in 6 U.S.C. ch. 1 § 101; GWEN HOLDEN, ET AL., LEARNING FROM 9/11: ORGANIZATIONAL CHANGE IN THE NEW YORK CITY AND ARLINGTON COUNTY, VA., POLICE DEPARTMENTS (2009) (sponsored by the National Institute of Justice); Bruce Dearstyne, *The FDNY on 9/11: Information and Decision Making in Crisis*, 24 GOV. INFO. Q. 29 (2007); Holly Ventura Miller, J. Mitchell Miller & Mathieu Deflem, *Governmentality and the War of Terror: FBI Project Carnivore and the Diffusion of Disciplinary Power*, 13 CRITICAL CRIMINOLOGY 55 (2005).

61. See LOU MICHEL & DAN HERBECK, AMERICAN TERRORIST: TIMOTHY MCVEIGH AND THE OKLAHOMA CITY BOMBING (2001); RICHARD A. SERRANO, ONE OF OURS: TIMOTHY MCVEIGH AND THE OKLAHOMA CITY BOMBING (1998).

62. RAKOFF, *supra* note 1, at 128–35.

63. *Id.* at 128–29.

64. See STONE, *supra* note 56 (documenting the extent to which the U.S. commitment to free speech has crumbled during every major war); Sahar F. Aziz, *Caught in a Preventive Dragnet: Selective Counter-Terrorism in a Post-9/11 America*, 47 GONZ. L. REV. 429 (2011); John Mueller & Mark G. Stewart, *The Terrorism Delusion: America's Overwrought Response to September 11*, 37 INT'L SEC. 81 (2012). For Fascists, this is a necessary rather than undesirable reaction. See CARL SCHMITT, DICTATORSHIP (Michael Hoelzl & Graham Ward trans., 2014).

65. RAKOFF, *supra* note 1, at 13–15.

66. See *id.* at 15 (discussing how laws passed in response to high crime may not have helped the problem).



Further responses were an expression of collective panic, ignited and enflamed by unscrupulous political leaders.<sup>67</sup> The public was inundated with frenzied accounts of “super-predator” adolescents, highly organized nationwide gangs, drug-crazed habitual offenders, and remorseless African American revolutionaries.<sup>68</sup> As a result, rehabilitation, the guiding principle for conscientious corrections officials and the moderating force for prisons as institutions was rejected in favor of retribution.<sup>69</sup> Sentences that were already sufficiently or excessively severe were repeatedly lengthened through direct “enhancement” and mandatory minimums as politicians competed for the reputation of being “tough on crime.”<sup>70</sup> The Prison Litigation Reform Act constrained the discretion of federal judges to decide challenges to conditions of confinement,<sup>71</sup> while the Antiterrorism and Effective Death Penalty Act limited the ability of state prisoners to obtain federal habeas corpus review of their convictions.<sup>72</sup>

Judge Rakoff argues that both these panic reactions inadvisably restricted the discretion of judges.<sup>73</sup> This raises a question about why such restrictions were imposed. For the most part, judges are respected figures; in any case, they are rarely the targets of widespread political hostility unless they are handing down a major constitutional decision with far-reaching implications.<sup>74</sup> It was terrorists and criminals that the populace feared, not judges. Perhaps the reason that responses to these fears so often involved limits on judicial decisionmaking is related to the essential role of the judge in our legal system. Judges, by image and often in reality, represent deliberation and reflection. At the federal level, they are insulated from the political process by job tenure, salary protections, and a panoply of legal rules and established norms against *ex parte* contacts and similar intrusions on their decision making process.<sup>75</sup> The purpose of these protections is to separate judges from

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67. See *id.* (discussing political backlash against high crime rates).

68. *Id.* at 8, 12.

69. *Id.* at 14–15; see MALCOLM M. FEELEY & EDWARD L. RUBIN, JUDICIAL POLICY MAKING AND THE MODERN STATE: HOW THE COURTS REFORMED AMERICA’S PRISONS 252–71 (1999); Edward L. Rubin, *Just Say No to Retribution*, 7 BUFF. CRIM. L. REV. 17 (2003).

70. *Id.* at 13–18, 32.

71. 42 U.S.C. § 1997e (1996); see John Boston, *The Prison Litigation Reform Act: The New Face of Court Stripping*, 67 BROOK. L. REV. 429 (2001).

72. RAKOFF, *supra* note 1, at 122–24; see Mark Tushnet & Larry Yackle, *Symbolic Statutes and Real Laws: The Pathologies of the Antiterrorism and Effective Death Penalty Act and the Prison Litigation Reform Act*, 47 DUKE L.J. 1 (1997).

73. RAKOFF, *supra* note 1, at 13–14.

74. See *id.* at 16 (federal judges are unelected and publicly well regarded).

75. *Id.*

the clamor of political controversy, to create a secure space where they can consider issues calmly and engage in thoughtful and sustained analysis. When fear takes hold, however, people turn to simplistic and unqualified responses. Thus, political leaders, in their haste to induce or capitalize on excessive fear of terrorism and crime, have enacted measures to replace careful distinctions with categorical punishments and to foreclose critical re-evaluation by means of inflexible rules.<sup>76</sup>

How should judges respond to these attacks on their decisionmaking role? As Judge Rakoff concedes, the executive and the legislature have the primary responsibility for making public policy, and the legislature sets the rules that judges are supposed to follow.<sup>77</sup> The institutional insulation of judges, and the expectation that they remain neutral and apolitical, further constrains their range of action. Nonetheless, the judiciary can play an important role in combatting panic-driven decisionmaking that betrays our guiding principles. Judge Rakoff argues that constitutional courts have been excessively deferential, particularly to the executive branch.<sup>78</sup> Moreover, by erecting barriers to review such as the standing and political question doctrines, the Supreme Court has subtracted itself from the governmental process in a number of important areas where its voice might have made a difference.<sup>79</sup> In the most notable administrative law decision of the current era, *Chevron, U.S.A., Inc. v. National Resources Defense Council, Inc.*,<sup>80</sup> the Supreme Court held that federal courts should adopt a deferential stance toward agencies on matters of statutory interpretation.<sup>81</sup>

I would take issue with Judge Rakoff on *Chevron*, which I think embodies a profound insight about the centrality of statutory interpretation by the agency in the administrative process.<sup>82</sup> But I agree with the underlying point that judges should not relinquish their important role; I would recommend that they do so by enforcing administrative law principles more vigorously, particularly when the agency circumvents the notice and comment process that can provide the agency with useful information, or when it fails to enforce legally mandatory regulations, as was common during the Trump

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76. *Id.* at 13–18.

77. *Id.* at 119–25.

78. *Id.* at 139–52.

79. *Id.* at 157–59.

80. 467 U.S. 837 (1984).

81. RAKOFF, *supra* note 1, at 159.

82. See Edward L. Rubin, Auer, *Chevron* and the Future of Kisor, 48 FLA. STATE L. REV. 719, 735–47 (2021).

Administration.<sup>83</sup> More generally, with regard to panic-driven public policies like the so-called wars on terror and crime, Judge Rakoff is exactly right about the judges' obligation to fight back against executive and legislative efforts to curtail their discretionary role.<sup>84</sup> They can do so through judicial decisions that construe such efforts narrowly, or—when doctrinally possible—to hold them unconstitutional. They can also do so by public statements that alert citizens to the dangers of eliminating judgment and reflection from the governmental process. These dangers are likely to be much greater than any incremental value (often non-existent or negative) that results from categorical or automatic punishments and prohibitions. In taking such actions, the judiciary is not being partisan or overly “political.” Rather, it is championing the value of judgment as an antidote to panic, and thereby reasserting its own long-established role in our governmental system.

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83. See Edward L. Rubin & Joanna K. Sax, *Administrative Guidance and Genetically Modified Food*, 60 ARIZ. L. REV. 539, 564–86 (2018).

84. RAKOFF, *supra* note 1, at 119–25.