

3 Takeaways Podcast Transcript

Lynn Thoman

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Ep. 29: Why the Innocent Plead Guilty and Jury Trials are Now a Myth with Judge and Former Prosecutor Jed Rakoff

INTRO male voice: Welcome to the 3 Takeaways podcast, which features short memorable conversations with the world's best thinkers, business leaders, writers, politicians, scientists, and other news makers. Each episode ends with the three key takeaways that person has learned over their lives and their careers, and now your host and board member of schools at Harvard, Princeton, and Columbia Lynn Thoman.

Lynn Thoman: Hi everyone. It's Lynn Thoman. Welcome to another episode. Today, I'm delighted to be here with Judge Jed Rakoff. He's a senior judge for the famed US District Court for the Southern District of New York. He is also a former federal prosecutor and criminal defense attorney. As a judge, former prosecutor and former criminal defense attorney, he brings a very broad and unique perspective.

I'm excited to find out why the innocent plead guilty and the guilty go free, which just so happens to be the title of his new book. I am honored that he has chosen me and 3 Takeaways for a conversation on the very day that his book is being published. Welcome Jed, congratulations on your book and thanks so much for being here today.

Jed Rakoff: It's my pleasure.

LT: So, Jed, why do the innocent plead guilty?

01:15 JR: In the 1960s, 1970s and 1980s, crime rates were increasing dramatically in the United States. And the reaction to that was to pass laws that impose very severe penalties for criminal activity, even fairly minor criminal activity. These were laws that took away the discretion of the judges and mandated mandatory minimums of 5, 10, 15, 20 and, in some cases, as much as 45 years in prison. Also, career offenders statutes which mandated life imprisonment, if you were convicted of three felonies, even if they were fairly minor felonies and sentencing guidelines, which originally were mandatory now are discretionary, but are still very harsh.

The result of all that is that no one can take the risk of going to trial, even innocent people, because, if they are convicted, they will face huge amounts of time in prison. They plea bargain and the statistics are that between 1980 and 2000, the number of cases that were plea bargained went from 80% to 97%.

And it has continued to add, or even been slightly higher in state courts today where most criminal activity is prosecuted. Cases that go to jury trials are less than 2%. Instead of what the Constitution contemplated, which was a trial by jury, the sort of thing you see still on the media and on TV, the reality is you got to plead guilty or you will face huge penalties if you lose.

Now, of course, if you're innocent, you have a chance of being acquitted, but the system is not so perfect. And we know now that through the work of the Innocence Project, that quite a number of people who go to trial, are in fact innocent. And we

only learned that many years later. Plus most defendants, and it's particularly poor people of color, are very cynical about the system.

And so they don't have much faith that they will be acquitted, even if they are innocent. So, the bottom of all of this is that the pressure created by these harsh laws is so great that even innocent people plead guilty. And that's roughly about 10% of all criminal defendants presently incarcerated.

3:50 LT: Defendants used to be in a much stronger position when they had trial by jury, because, first, they'd have to be found guilty beyond a reasonable doubt and, second, they would have to be convicted by a unanimous jury. Now that most cases are decided by plea bargains, does the prosecutor have a lot more power than the defendants?

4:14 JR: Putting aside the pressures that create plea bargains that I've just described, which again, have become 97 to 98% of all cases, the reason you get wrongful verdicts in cases that go to trial, the reasons innocent people are convicted are several, but the single most common one, according to the Innocence Project, accounting for about 70% of the cases where they've exonerated defendants, is wrongful eyewitness testimony.

Human perception and human memory is much frailer than we believe.

This has now been established through many scientific studies. So, I'll give you just two examples. There is the racial effect, people of one race are not very good at discerning the fine facial features of people of another race. This is true with whites identifying blacks. It's true with blacks identifying whites. It's across the board. Many times, someone feels quite confident in selecting the person they're picking out of a lineup or out of a photo array, when in fact, all they really have is a very vague and ambivalent memory of what really occurred.

An example of this is you're an eye witness to say, a robbery, you see the robber's face, but maybe only for a minute; you're more focused on his gun. You're very stressed about the situation. Maybe three hours later the police will show you a photo array of seven photos. And they will say study these carefully and tell us of any of them or the person you saw.

And you will now, in the calmness of that situation, very carefully look at those photos and you will notice that in one photo, the guy has a scar above his right eyebrow. And that's the guy who also seems most like the guy you remember. Now, you didn't really notice his scar above his eyebrow, the guy you saw, but what will happen next is you go to testify a year later, or even when you go to the prosecutor's office three months later to be questioned about the incident, those two memories will have glommed and you will now, unconsciously but honestly, think you noticed his scar at the time of the event.

What brought it to your attention was your very careful study of the photo arrays, but now those two memories have glommed together. And you think that's what you saw at the beginning. Faulty eyewitness testimony accounts for 70% of all the exonerations that the Innocence Project has undertaken.

7:10 LT: One of my earlier conversations is with Barry Scheck, one of the co-founders of The Innocence Project, who's gotten over 300 people out of jail by

proving that they are wrongfully convicted through eyewitness misidentifications or misuse of forensic science. He is fascinating. So, if anybody's interested, you should go back to that episode.

Jed, you talked about the fact that now 97/ 98% of cases are settled through plea bargains, as opposed to through trials. How do plea bargain sentences compare to trial sentences, if a defendant is found guilty?

7:52 JR: They're usually one half to one third of what they would get if they went to trial, that's called the trial penalty. The plea bargain is designed from the defendant's standpoint to get him a lower penalty than he would face if he was convicted at trial.

It's not to be unexpected that a plea bargain sentence on average would be lower than the similar sentences imposed after a trial.

So, you might be a low-level guy in a big drug distribution, conspiracy, and say cocaine distribution, conspiracy. The guy at the top of say, 14 defendants. That it would be a typical case in my court. Yeah, he's a really bad guy and he distributed tons of cocaine and he ought to go away for a long time. Down at the bottom is what I might call a schnuck, a person who is maybe a courier who transported a few grams of cocaine from one place to another in return for a few hundred dollars. But under the law, all the conspirators are considered collectively for sentencing purposes, and so, the conspirators each of them face a 40-year mandatory minimum because of the many kilos of cocaine that the conspiracy as a whole had distributed.

You now are representing Mr. Schnuck and you go to the prosecutor and you say, "How can you give my guy 40 years? He admits that he was involved in one little transportation of a few grams. And the prosecutor says, "Yeah, you're right. I'll tell you what, since I don't want to go to the trouble of going to trial against the guy, if you plead guilty in two weeks, I will give you a ten-year count."

To an outsider, like me, 10 years sounds an awful lot of time for someone who just transported a few grams of cocaine, but to the guy himself, it's a huge reduction from the 40 years he would face if he went to trial, and was convicted as part of this conspiracy. He never thinks he's getting a good deal, but he thinks he is getting a deal he can live with. But it's still very harsh.

10:16 LT: One of the objectives of the mandatory sentencing that you talked about that was passed on a bipartisan basis by Congress in the 1980s was consistent sentencing. Did that work, did sentencing become more consistent? Did it become fairer?

10:35 JR: No, and this is something that is not so well known even to some of my colleagues, what happened was that sentencing in effect was transferred from the judge to the prosecutor. In the cases I've just given the prosecutor is saying, "You'll plea to a 10-year count rather than go to trial on a 40-year count."

There's no judge who would give that guy more than 10 years for transporting a few ounces of cocaine. Maybe a lot of judges would love to give him much less, but they can't because the law says they must impose these mandatory minimums. Sentencing is really being determined by the prosecutor. Now there are prosecutors and prosecutors. Even within the same office, you will find relatively tough prosecutors and relatively softer, prosecutors. It's the line prosecutor who always makes these

decisions. If you're lucky and Mr. X is the prosecutor, he may give you a five-year count in the example I just gave, whereas Mr. Tough Guy may say, I'll give you a ten-year count, but only if you plead within the next week and otherwise it goes up to 20 years. So, the prosecutor is determining the sentence, but there's tremendous variation among the prosecutors.

And, therefore, you still have variations in sentencing that are totally irrational.

No one knows this because unlike the old days where you could compare the sentences of one judge at one district to another, now there's no data to the sentence given by Prosecutor Smith, with the sentence, given by Prosecutor Jones, it's all arrived at in oral, secret agreements in the prosecutor's office. And no one knows anything other than the bottom line. He's going to plead guilty to, a five-year count, a ten-year count or 20 count or whatever.

12:37 LT: That is horrifying. If you look at the several million people that are in prisons in the United States. Can you talk about what their criminal activity they were convicted of was and what the average sentences are? What do we know about the people in our prisons?

JR: We know that the United States leads the world by a substantial margin in the number of people that it puts in prison and jails. For the last 20 years, it's been over 2 million every year. That is 25% of all the people in jail and prison in the world.

We used to say when I was growing up the United States, who was the leader of the free world, well, now we're the leader of the unfree world, in a sense of, we lock up so many people. The second thing we know is that even when crime rates go down, it doesn't affect that statistic.

So, crime rates have decreased every year up to this year. This year is a little special because of the pandemic, but every other year from 1996 to the present crime rates have gone down. They are now, taking the year before this, as the example, at levels that we haven't seen since the early sixties.

Despite that, we still have 2.2 million people locked up year after year. Why is that? Because under these laws, the courts are giving ever longer sentences. And an ever-greater percentage of people who are charged are sentenced to long periods of time. For example, something like 19% of all presently incarcerated people are doing mandatory life sentences. Many of them not because they committed murder or things like that, but because they committed three felonies, and even though the felonies may not have been individually that major, under career offender laws, three strikes and you're out so they get mandatory life imprisonment.

In terms of what crimes these people are committing, aside from the 10% that are completely innocent and didn't commit any crime. It varies a lot from state to state or jurisdiction to jurisdiction. In the federal system is mostly drug cases often minor drug cases, but drug cases, that's the biggest part of the federal incarceration. In many states.

it's minor robberies burglaries, in some other states it's assaults. We're a big country and there is a lot of variation. So, there's no one crime that sticks out. But the overall result is pretty much the same everywhere.

15:28 LT: And how do the sentences compare to other countries?

15:33 JR: We lead the world both in, on a per capita basis and on an absolute number basis, by a substantial margin. We're not even close to China or Russia. We're much higher than either of those countries in terms of number of people we lock up and we've been the leader, I'm sorry to say, for the last 20 years.

We're locking up mostly people of color, 60% of that group. Even more so people who are poor at 80% of the group and we are ruining their lives.

We are ruining their family's lives. We are ruining their communities in many respects. By the way it's very expensive. It costs \$160 billion a year to lock up all those folks. So, it's having a devastating effect. If you are a black male, your chances of being arrested sometime in your lifetime are one in three. If you are a black male, your chances of spending time in jail or prison sometime in your lifetime, is one out of nine. So, these are huge proportions of black male society that are being ripped away from their families, usually at a very important time in their life, taken away from their jobs and they will never be able to get to the same kind of jobs again.

17:01 And yes, some of them did commit crimes, but not crimes warranting, this kind of punishment.

17:08 LT: If somebody has drugs, let's say two ounces of marijuana. What kind of sentence would they get in the United States as compared to another country? Or if they break and enter a home, how would a US sentence compare to other countries?

17:27 JR: So, US sentences are usually much higher than most Western countries. The sentences on paper in China are even harsher than our sentences. Lots of death sentences on paper, but the number of people who were actually locked up in China or executed in China is much smaller than in the United States.

But taking countries like Germany, France the Scandinavian countries like that, their average sentences are typically about one third to one quarter of what ours are.

LT: Wow. So much less. The sentences are very different between the US and Western countries and even the US and China or Russia. But how do the justice systems themselves compare?

Do other countries have this plea bargain arrangement or are they trial by judge or trial by jury?

JR: The jury system is pretty much unique these days, to the United States and to countries that come out of the Anglo-American system.

So, they were former British colonies or, things like that. most countries don't have a jury system. I think that's a shame. The jury system is a terrific system.

The trouble is we've now devised a system where no one ever gets a jury trial because they never get to trial. But in most countries, other than those that were once part of the British empire, a judge makes the decision. I think the biggest difference is that judges are much more powerful in many countries than they are in the United States when it comes to the criminal justice system. There are no mandatory minimums in most of these countries. There are no career offenders' statutes in most of these

countries. The judge often plays an investigative role at the outset of the case, something that is completely foreign to the American system.

19:23 LT: It sounds like the justice system has changed over time where defendants used to have much more power on their side. They had to be proven guilty beyond a reasonable doubt by a jury and to be judged guilty, it required a unanimous verdict by a jury. It sounds like that's all changed. And now with most cases being settled by plea bargains, the prosecutors have all the power.

19:50 JR: Think what a departure that is from what the founding fathers had in mind when they crafted the Constitution. They had just gone through a period under British colonial rule, where they saw phony trials and judges not being fair and juries not being given an opportunity to all. So, they put into the constitution of the United States, all the protections you're talking about, the presumption of innocence, that need for proof beyond a reasonable doubt, the Fifth Amendment right to silence the, right to have total to process. these are all embedded in our Constitution.

20:30 LT: And what can we do to improve our criminal justice system?

JR: It would be terrific to do away with all mandatory minimum laws, all career offender laws, but even more so to reduce the penalties involved.

The second thing that should happen is more attention should be paid to why it is that people don't want to go to trial even when they're innocent because of wrongful convictions with bad evidence, because of a cynicism about the system, because of feeling that the lawyers are not really representing them. That is all changeable.

Most of it could be changed with money and greater resources. A third thing, a more subtle thing, is to moderate the position, the attitudes of prosecutors That's one of the reasons wrote my book, frankly, was to make people more aware of this, including prosecutors.

Now I have another specific proposal that I don't think is going to come to be, but in my ideal world, it would happen, which is that every prosecutor would spend six months out of every three years being a criminal defense lawyer for indigent defendants in another district, in other districts so there'd be no conflicts.

They would see things from both sides. Having seen it both as a prosecutor and as a defense counselor, I think it makes a huge difference in how fair you are when you can see both sides. It would also cause prosecutors to be much more careful in taking, the evidence provided to them by the police. The police are 99% of the cases, honest, there are some rotten apples, but that's not what I'm talking about. I'm talking about the fact that they only see one side of things and they only report one side of things. And therefore, the prosecutor is getting a skewed view which could be counteracted by the prosecutor saying how about that other suspect?

22:32 LT: So far, we've talked about criminal justice and criminal laws, but the courts were also designed by the founders of the United States, the authors of our Constitution, to act as a check on the president and Congress. How effectively are they doing this?

22:49 JR: I think that much more attention has been paid by the Supreme Court to legislation than to executive orders. There's been tremendous hands-off in terms of

the executive. You think back to Guantanamo and the war on terror, we still have, to this very day, 40 people sitting there in Guantanamo who been there for what, 20 years, who have never been charged with anything, let alone convicted.

They're just sitting there in violation of, many people would argue, of the Geneva Convention, said the United States is a party to, in violation of our own due process, in violation of what's called the writ of Habeas Corpus, which the Constitution specifically gives to the Court to allow them to deal with situations like that. But, instead, the prevailing view of the courts, not in every case, but in too many cases, has been this is within the discretion of the Executive. We don't want to screw up what the Executive is doing on the war on terror. So, we won't scrutinize scrutinized it.

We won't even take many of these cases. And if we do take the cases, we'll defer to that discretion. The most extreme example of this in modern times, and it's very illustrative, is the internment, during World War II, of 200,000 Japanese Americans many of them American citizens who were locked up just because they were Japanese ancestry.

24:26 And this went up to the Supreme Court and the Supreme Court in a decision written by a well-known liberal, Hugo Black said, "Oh, this is part of the war effort. We can't get into it. It's none of our business. We defer to the generals. We defer to the Executive." And the result was that totally innocent people who were no threat to our country, many of whom were ideal citizens were locked up in, frankly, kinds of concentration camps. Consider the irony here when we were fighting against Hitler and his concentration camps and what we were doing, we were locking up tens of thousands of Japanese American citizens.

25:13 LT: Was that done by executive order of President Roosevelt?

JR: Yes. Specifically, he gave one of his generals carte blanche, and that general came back and said, I think there's a potential fifth column type threat and so here's the solution. And Roosevelt, according to what I've read at least more or less, just signed off on it without thinking it through.

But the real check should have come from the judiciary and it didn't come at all.

25:42 LT: Recent US presidents of both parties and especially our two most recent presidents, President Biden and before him, President Trump, have extensively used executive actions and they've used them on immigration, on Medicare, climate change, prisons, and international agreements. How do you see executive actions by the president?

26:08 JR: The normal reaction of most people is if you're a president, the guy you voted for is in power and he's carrying out the policy you like, you're all for executive action unfettered. Yeah, we shouldn't have to go through Congress- they're always talking, they're always full of stalemate. Let's get the job done and we'll let the president do it.

And then of course someone comes along, who's from a different political party or a different political viewpoint. And now you're horrified that, what? All these things are being carried out because the president said do it. And no one ever voted even a law that pertains to it.

My view is that's precisely what the founding fathers had in mind when they talked about checks and balances, that there would be a check on the executive just as there would on the legislature.

LT: Before I ask you for your 3 key takeaways, is there anything else you'd like to discuss that you haven't touched upon?

JR: Yes, real briefly, we've talked so much about the criminal justice system, but it should be of equal concern to people that everyday folks can't get into court and can't have a lawyer if they're dragged into court, even in everyday civil matters. So, the statistics are that 20 years ago if you were an individual who was either bringing a case as a plaintiff or forced into a case as a defendant, you had a lawyer in almost every case.

Now, two thirds of those people don't have lawyers. In housing court and family court, which are the two courts where the most people get involved on civil matters, in some states, not all, in some states is as much as 90% of the individuals don't have lawyers. The statistics again are overwhelming. If you have a lawyer, you do much better as you would expect than if you don't have a lawyer.

There are many reasons why this has come about. Lawyers have priced themselves out of that market. Their market has become the market of corporations, rich folks. There has been a decline in things like labor unions, which used to supply lawyers to their membership. There's been a push supported by the Supreme Court to force cases to go to arbitration rather than to go to the court.

Even though in an arbitration, you don't have a jury, you don't have due process. You don't even have often the rules of evidence. There's been increasing similar deference to sending matters to administrative agencies rather than into the courts. And there again, the courts have tended to say, yeah, that's fine. We give great deference to what is decided by a so-called administrative law judge who is someone typically selected by the head of the agency and who not surprisingly decides for the agency in 90% of the cases.

Without multiplying, there are other causes as well, there is a real lack of access to the civil justice system on the part of everyday individuals.

29:17 LT: As everyday individuals, we all sign agreements. If we want to use products or services, and none of us have any idea what is in the fine print of those many page agreements.

29:31 JR: And even if we did, we have no power to change those agreements. Can you imagine going to Amazon saying this says I have to go to arbitration if you sell me a faulty product. I would like to go to court and have a class action. And I'm sure there are many other people similarly situated. The laws of the United States, they get lost.

You agreed to go to arbitration. And you don't have a power to change it.

29:57 LT: Last question. What are the 3 key takeaways you'd like to leave the audience with today?

30:03 JR: I guess the first is that none of these problems are beyond being fixed. in my book, I suggest solutions for each and every one of them. But even if you don't like my solutions the point is that they can be fixed. There's nothing inevitable about any of this. The second thing is to fix it, [requires] a change in attitude of the American public. One of the reasons for those very harsh criminal laws is that most voters are big supporters of law and order. And it's not because they're inherently unfair people. It's just because they read about the crimes and they don't read much about the mass incarceration and the harsh penalties and all the other things.

It's a question of educating the American people. That may sound awfully Pollyannish view. But I think that is at the heart of changing the system and the third. if you really want to know what is going on in the system, you got to read my book.

31:12 LT: Thank you, Jed. This has been great. I did enjoy your book.

31:16 JR: Thank you so much. Thank you.

OUTRO male voice: If you enjoyed today's episode and would like to receive the show notes or get new fresh weekly episodes, be sure to sign up for our newsletter at <https://www.3takeaways.com/> or follow us on Instagram, Twitter, and Facebook. Note that 3Takeaways.com is with the number 3, 3 is not spelled out. See you soon at 3Takeaways.com (<https://www.3takeaways.com/>).

The book referred to in the episode is Why the Innocent Plead Guilty and the Guilty Go Free: And Oher Paradoxes of Our Broken Legal System by Jed S. Rakoff.