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The Plea of Innocence: Restoring the Truth to the American Justice System (Tim Bakken)

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**The Plea of Innocence:
Restoring the Truth to the American Justice System**

By Tim Bakken
(New York, NYU Press, 2022)
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In *The Plea of Innocence*, Tim Bakken argues that we need to introduce into our adversarial criminal justice system a better means by which the factually innocent can access exculpatory evidence. He proposes that an accused should be entitled to plead innocent, rather than just not guilty, and thereby enter an inquisitorial sort of process in which the accused would disclose what he knows to the investigating authorities in exchange for the authorities cooperatively searching for the truth rather than for evidence in support of conviction.

Bakken previously made this proposal in a journal article in 2008.¹ He does not develop the proposal much further in the book. This is unfortunate. The proposal is an interesting one, but it raises several questions and includes some curious elements, many of which are not adequately explored. The result is a provocative but ultimately unsatisfying book.

The Book

Bakken devotes most of the book to criticizing the American adversarial system. He says that it does not support the search for the truth. Instead, it “supports parties’ attempts to remain silent, suppress facts, and avoid revealing evidence for their advantage, regardless of the effects on society.”² Lawyers have control of the system and they emphasize procedure, which does not reduce factual error and may even increase it. The result is that the “adversarial system has come to accept, perhaps first from necessity but now as a matter of principled decision making, that due process is a replacement for seeking the truth.”³

This, according to Bakken, is a system that does not help the innocent. The guilty receive the lion’s share of the benefits of the rules and procedures. Investigators hunt in secret for evidence sufficient to arrest and convict, “as opposed to searching for the truth, which is a consideration but not a necessary part of their work.”⁴ Suspects have no right or ability to participate in the state’s search for evidence. Defense counsel do not usually have the expertise, time or resources to search for facts. Neither do most accused. Trial procedures are not very good at uncovering the true facts. Appellate procedures are no better.

¹ Tim Bakken, “Truth and Innocence Procedures to Free Innocent Persons: Beyond the Adversarial System” (2008) 41 U Mich JL Reform 547.

² Page 53.

³ Page 30.

⁴ Page 94.

Not only does the adversarial system not support a search for truth, it is structured so as to hide it. Police can lie to suspects and witnesses and engage in investigatory practices that produce false confessions and false guilty pleas. Lawyers engage in combat rather than an independent cooperative collection of facts. Defense counsel deflect or suppress evidence suggesting guilt and urge triers to reach conclusions they know are false. They also silence their clients, even though the innocent (unlike the guilty) want to talk. Prosecutors resist post-conviction review that threatens the integrity of convictions.

To reform the system, Bakken argues for a new procedure in which an accused can plead innocent. “Prior to a judge’s acceptance of the plea, defense lawyers will have to affirm their clients’ innocence.”⁵ The accused will consent to an interview with the prosecution. If an accused makes “a reasonable or plausible claim of innocence,”⁶ prosecution offices will be required to conduct good-faith searches for exonerating facts, with the guidance and possibly direction of a neutral magistrate.⁷ This will occur prior to trial when facts are fresh and more available. If unconvinced by the accused’s story and unable to find exonerating facts, the prosecutor could proceed to trial and introduce the accused’s pre-trial statements. In exchange, the prosecution would have to prove guilt to a standard higher than beyond a reasonable doubt and the accused would not be required to take an oath before testifying in his⁸ own defense. If the jury found that the prosecution did not fully investigate the reasonable or plausible claims of innocence, it could infer that a full investigation would have found some facts or evidence indicating innocence. It could also infer conscience of innocence from the accused fully answering all of the prosecution’s pre-trial questions, his prompt claim of innocence following an accusation, or “his demeanour or actions.”⁹ At trial, defense counsel would be prohibited from implying or arguing that witnesses they know to be truthful or accurate are lying or inaccurate.¹⁰

Review

Bakken makes a number of strong claims but does not set out to rigorously prove many of them. He relies mainly on references to other scholars, court rulings, case examples, historical analyses, cross-jurisdictional comparisons, and some of the available social science literature. It can make for some interesting reading, but his reasoning is sometimes hard to follow and occasionally effectively absent. For example, he questions whether cross-examination at trial can uncover the truth, but while he amply demonstrates how it can undermine truthful incriminating

⁵ Page 162.

⁶ Page 162.

⁷ Defense counsel would have equal access to the magistrate.

⁸ I use the masculine pronoun when referring to the accused simply because most criminal defendants and exonerees are male. Obviously, individuals who are not male are sometimes wrongly accused and convicted.

⁹ Page 193.

¹⁰ It is possible that Bakken is claiming this prohibition should apply even when the accused pleads not guilty rather than innocent.

evidence, he relies on a single oblique scholarly reference to suggest that it does a poor job of exposing false incriminating evidence,¹¹ the issue that seems most critical to his argument. His suggested reform is a bit surprising. Below, I comment on its specifics, but at a more general level one would think that if the adversarial system is so deficient reform should involve much more than a supplemental procedure tacked on to the current system, available in only a subset of cases, and even then only at the choice of the accused. Surely, we care about getting accurate verdicts in all cases, including in cases where the accused is guilty.¹²

Perhaps Bakken is starting with the most important reform: that which protects the innocent. This would be understandable. But there are still some curious elements of his analysis. For example, Bakken emphasizes how the adversarial system allows lawyers to conceal facts and hide the truth, yet his focus is explicitly on defense counsel, even though concealment of exculpatory evidence by the prosecution is a well recognized contributor to wrongful convictions.¹³ Defence counsel do sometimes contribute to wrongful conviction by failing to adduce exculpatory evidence, but that it usually due to incompetence, laziness or inadequate resources rather than an attempt to take advantage of adversarial rules.¹⁴ Indeed, one would think that in most cases defense counsel would not intentionally hide exculpatory evidence.¹⁵

Even more curious is the fact that Bakken makes almost no attempt to support the critical assertion that underlies his ultimate proposal: the inability to find and collect exonerating facts is

¹¹ On p.129, he quotes Professor Park, who suggests that the greatest legal engine for the discovery of truth is probably not cross-examination but discovery and investigation: Roger Park, “Adversarial Influences on the Interrogation of Trial Witnesses” in Peter van Koppen and Steven Penrod, eds, *Adversarial versus Inquisitorial Justice: Psychological Perspectives on Criminal Justice Systems* (New York: Kluwer, 2003) at 131 and 166.

¹² Bakken himself says we must. For example, on p.33 he writes that “reforms have to be designed to prevent guilty people from escaping responsibility.”

¹³ See, e.g., Samuel Gross et al, *Government Misconduct and Convicting the Innocent Bakken: The Role of Prosecutors, Police and Other Law Enforcement* (National Registry of Exonerations, September 1, 2020), online at:

https://www.law.umich.edu/special/exoneration/Documents/Government_Misconduct_and_Convicting_the_Innocent.pdf, finding that concealing exculpatory evidence was the most common type of official misconduct, occurring in 44% of the first 2400 exonerations. Bakken recognizes that prosecutors withholding exculpatory evidence contributes to wrongful convictions (page 4).

¹⁴ See, e.g., Barry Scheck, Peter Neufeld and Jim Dwyer, *Actual Innocence: When Justice Goes Wrong and How to Make it Right* (New York: Signet, 2001) at ch.9; Brandon Garret, *Convicting the Innocent: Where Criminal Prosecutions Go Wrong* (Cambridge, Mass.: Harvard University Press, 2011) at ch.6; Adele Bernhard, “Effective Assistance of Counsel” in Sandra Westervelt and John Humphrey, eds, *Wrongly Convicted: Perspectives on Failed Justice* (New Jersey: Rutgers University Press, 2001) at ch.11; Ellen Yaroshesky, “Defense Lawyering and Wrongful Convictions” (2014), online at https://scholarlycommons.law.hofstra.edu/cgi/viewcontent.cgi?article=1930&context=faculty_scholarship

¹⁵ In some cases counsel could. The most obvious situation is where counsel might discourage an innocent accused from testifying in order to hide unfavourable aspects of his evidence, such as a criminal record. See Garrett, *ibid* at 162-163.

“the primary reason why innocent people are convicted.”¹⁶ The assertion is not implausible, but neither is it self-evident. Bakken himself seems to acknowledge that the collection of facts will not help accused persons who committed the *actus reus* and whose innocence depends on a correct understanding of their mental state at the time (e.g., what they perceived or intended) or a correct application of a legal rule (e.g., an assessment of the reasonableness of actions taken in self-defense). Even when an accused did *not* commit the *actus reus*, when a wrongful conviction is a product of eyewitness misidentification, false confession, forensic error, perjured testimony, or racism, it will not always be true that further investigation could have uncovered the truth. A suspect who is incorrectly identified as the perpetrator, for example, will not always have an alibi or other proof that the witness is mistaken.¹⁷

Maybe this isn't critical. It is undeniable that in some cases further investigation could help establish innocence.¹⁸ It does mean, however, that Bakken's reform will be of no use to some innocent accused and maybe even dangerous for them to pursue, given that they will be exposing themselves to potentially extensive pre-trial questioning.¹⁹ Those accused will still have the chance to plead not guilty, but must rely on the hope that the jury will not make anything of the failure to plead innocent. This is another issue that, unfortunately, Bakken does not spend a lot of time considering: the effect of an innocence plea on the factually innocent who cannot benefit from it (a.k.a. the third verdict problem). He says that “they would retain all the rights they currently possess”²⁰ and refers briefly to jury selection procedures²¹ and rather half-heartedly to an accused's ability to ask for a jury direction telling jurors not to draw an inference from the failure to plead innocent.²² Additional analysis was needed.

Bakken's proposed procedure that would follow a plea of innocence is at times curious and at times incomplete. The requirement for defense counsel to affirm the accused's innocence is perplexing. This is partly because it not clear what defense counsel must actually assert. Bakken suggests it is their personal belief. Why it matters what a particular lawyer happens to believe is hard to fathom. It is even harder to understand why an innocent accused should be precluded from pleading innocent just because he has sceptical counsel. Surely what matters is whether the accused has admitted guilt to his representative.²³ This raises the question of whether, with a plea of

¹⁶ Page 129.

¹⁷ Bakken himself refers to this example but does not follow it up.

¹⁸ This is what contributes to many exonerations.

¹⁹ Bakken recognizes this when discussing the example above of the misidentified suspect who has no proof of innocence: “By pleading innocent, he will have to tell prosecutors that he was home alone when the assault occurred. This kind of statement is virtually always a significant benefit for the prosecution” (p.172).

²⁰ Page 178.

²¹ He quotes an article by Daniel Medwed arguing that a *voir dire* during jury selection could allow a lawyer to exclude from the panel prospective jurors who believe that factual innocence is a *sine qua non* for an acquittal: p.191, citing “Innocentrism” 2008 U Illinois L Rev 1549 at 1567-1568.

²² He follows this up immediately by saying “Moreover, defendants might be in a better position by not requesting such an instruction,” since research suggests jurors might react negatively to it (p.191).

²³ An asserted belief in innocence does not necessarily imply that the accused has not admitted guilt. A lawyer could believe that the accused is mistaken, confused, mentally ill, or making a false confession to protect the real perpetrator.

innocence, the accused would be deemed to waive privilege over communications with his counsel. In his earlier article, Bakken indicated that the accused would,²⁴ but he leaves the matter unclear in the book.

Bakken offers almost no guidance regarding the prosecution's interview of the accused. He implies that it would be recorded and that defense counsel could be present, but does not explain where it would occur, how long it could last, whether breaks would be required, how many times it could occur (including whether it could follow an initial post-arrest interrogation), whether objections to specific questions could be adjudicated, whether there would be any limitations on topics or forms of questioning, whether certain tactics would be prohibited (like presentation of false evidence), whether procedures must be tailored to account for vulnerabilities of the accused (such as intellectual disability), and so forth. All we know is that the jury would be entitled to infer the accused was concealing information if he did not fully answer the prosecution's questions. An obvious risk is that an unregulated interview could generate a false confession or admission.²⁵ Another risk is that an accused, subjected to unfair questioning, would eventually stop answering, leading to the inference that he is hiding something. In either case, the innocent accused would be worse off than if he had not pled innocent; indeed, a false confession could be decisive at trial despite the higher burden of proof. None of this is to say that a fair and reasonable procedure for the interview could not be devised. It is simply to say that the details are critical.

Bakken makes the prosecution's obligation to conduct good-faith searches for exonerating facts – the primary benefit for the innocent accused – conditional on the accused making a “reasonable or plausible” claim of innocence. The jury would be the ultimate arbiter of when a claim is reasonable or plausible, but it seems that the prosecution would make the initial decision, presumably after the completion of the interview. This creates the risk that in some cases it could collect the statement (and maybe otherwise privileged communications between the accused and his counsel), conduct no searches, and argue at trial that the jury should not draw an adverse inference because the claim of innocence was plainly incredible. That could be a big risk for an innocent accused to assume, especially when the most he can hope for is an inference that a full investigation would have found some unknown facts or evidence indicating innocence to some unknowable extent. It is surprising that Bakken does not consider whether it would be wiser to call on the neutral magistrate, after the accused makes initial disclosure of his story and before follow-up questioning, to make a ruling binding on the prosecution as to whether the claim of innocence is reasonable or plausible.

Another protection given to the accused who pleads innocent is that the prosecution would have to prove guilt to a standard higher than beyond a reasonable doubt. Bakken suggests that the standard could be beyond any doubt (although not to a certainty). Whether a jury or judge would

²⁴ *Supra* note 1 at 549, 567, 571.

²⁵ For an overview of how factors like lengthy questioning, specific interview tactics (like maximization-minimization and presentation of false evidence), and suspect-vulnerabilities can contribute to false confession, see Saul Kassin et al, “Police-Induced Confessions: Risk Factors and Recommendations” (2010) 34 *Law & Hum Behav* 3.

be able to appreciate and apply this subtle difference is far from clear.²⁶ Bakken is also inconsistent about precisely when the enhanced standard would be required. At one point, he states that it would be required in cases “where defendants plead innocent and consent to being interviewed by prosecutors.”²⁷ At another point, he states that the accused would be entitled to the higher standard only if the jury finds that he “fully answered the questions of the prosecution and made a reasonable or plausible claim of innocence.”²⁸ The latter would mean that an accused who pled innocent could never be confident of the standard that will be applied, or even if the different members of the jury all applied the same standard.

Bakken would grant an accused who pled innocent the right to testify at trial without taking an oath.²⁹ The goal would be to allow him to avoid a perjury charge if he was acquitted but the prosecutor disbelieved his story. But Bakken gives no consideration to how jurors and judges might react to unsworn testimony. They might be inclined to give it less or no credit, making the risk of a perjury charge the least of the innocent accused’s worries.

I do not mean to be harshly critical of Bakken’s book. He makes some valuable observations. The accused does need greater access to the resources of the state; investigators do need to seriously consider and explore the defense position; additional facts can help some innocents.³⁰ The seeds of a potentially important reform are present. Bakken just needed to let them germinate.

²⁶ Indeed, Bakken himself criticizes current definitions of beyond a reasonable doubt and cites research indicating that jurors do not understand the instructions judges give them (p.176-177).

²⁷ Page 174.

²⁸ Page 193.

²⁹ Whether he would otherwise have to promise to tell the truth is not stated.

³⁰ An excellent example of all three can be found in the case of *State of Florida v. Gerald Wayne Lewis*, described in Chris Fabricant, *Junk Science and the American Criminal Justice System* (New York: Akashic Books, 2022) at 112-120.