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## CHARGED ADVOCACY: A CRITICAL REVIEW OF EMILY BAZELON'S *CHARGED*

By: Michael Conklin\*

### I. INTRODUCTION

This is a critical review of Emily Bazelon's 2019 book, *Charged: The New Movement to Transform American Prosecution and End Mass Incarceration*.<sup>1</sup> This review primarily focuses on the book's negative aspects, but overall, *Charged* is an effective advocacy piece. While the book covers a variety of criminal justice topics and at times makes strong points, this review is primarily limited to critiquing the book's problematic aspects. Although there are issues with the overall structure, the most severe problem is that the book is not a neutral assessment of potential criminal justice reforms. Rather, Bazelon uses the book to promote her preferred criminal justice policies. Her approach results in frequently presenting misleading information and ignoring important counterarguments.

### II. HYBRID FORMAT

The book attempts to strike a balance between an anecdotal, narrative approach and an analytical, statistical approach. For the narratives, Bazelon toggles between two detailed accounts of real-world trials. One is a routine firearm charge that involves a diversionary program.<sup>2</sup> The other is the high-profile Noura Jackson case in which she was convicted—and later exonerated—for killing her mother.<sup>3</sup> Between telling the two narratives, Bazelon presents information regarding legal history, the anatomy of the criminal justice system, and relevant statistics.

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<sup>1</sup> EMILY BAZELON, *CHARGED: THE NEW MOVEMENT TO TRANSFORM AMERICAN PROSECUTION AND END MASS INCARCERATION* (2019). Emily Bazelon is a staff writer for *The New York Times Magazine*, a professor at Yale Law School, bestselling author, and cohost of the Slate Political Gabfest.

<sup>2</sup> BAZELON, *supra* note 1, at xxiv, 196.

<sup>3</sup> *Id.* at 16, 270.

The format of using the two narratives has benefits and downsides. The casual reader will likely be surprised to learn just how involved the legal process is. Television legal dramas that portray the criminal justice process in a single episode distort the reality of the legal system. The resulting inaccurate view of the criminal justice system is especially important given the role that voters play in making decisions regarding it.<sup>4</sup> Additionally, the reader will likely benefit from seeing how the legal system affects not just the defendant, but also those close to the defendant.

One problem with this narrative approach is that the two cases and the general information about the legal system provided do not sync up to create an orderly experience for the reader. Rather, they create a somewhat schizophrenic experience where the reader is randomly thrown from topic to topic without a logical progression. The book relies so heavily on the two narratives that it comes at the cost of seeing the big picture. A great deal of the two trials' coverage contains completely trivial information, such as a meandering discussion of a social worker's immigrant story<sup>5</sup> and descriptions of the food available at a District Attorney's press conference.<sup>6</sup>

However, the most significant problem with the heavy reliance on the two narratives is that Bazelon selected them for their ability to promote her desired conclusions. She also selectively presented information about the two cases to further this goal. It is the equivalent of a book promoting "tough on crime" policies by predominantly discussing two cases where a criminal was released based on a technicality only to victimize more people. Like Bazelon's selected examples, this does occur, but by focusing so much on it, Bazelon provides uneducated readers with an inaccurate view of the legal system.

### III. INCENTIVES

Although Bazelon never explicitly points it out, she uses a consistent and interesting theme throughout the book: incentives. In our legal system, every actor faces incentives. For example, prosecutors face an incentive from the community to not let crimes go unsolved.<sup>7</sup> In addition, they face incentives from their peers to charge defendants with the most severe punishments possible (even though this is not always the best outcome for society).<sup>8</sup> And the rare instance of prosecutors being punished for their actions also corresponds to an incentive against their behavior being punished.<sup>9</sup> Conversely, increasing the frequency by which prosecutors are punished for their professional conduct

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<sup>4</sup> Sometimes directly, as when voting on capital punishment. Sometimes indirectly, as when voting for a "law and order" politician.

<sup>5</sup> BAZELON, *supra* note 1, at 126.

<sup>6</sup> *Id.* at 271.

<sup>7</sup> *Id.* at 18.

<sup>8</sup> *Id.* at 19.

<sup>9</sup> *Id.* at 263 (providing an example of the rare occurrence of a prosecutor being punished).

would create an incentive for people not to pursue that career path.<sup>10</sup>

Incentives also affect the behavior of judges, defense attorneys, politicians, and defendants. About ninety percent of state judges face reelection, which can result in defensive decisions regarding bail and sentencing.<sup>11</sup> Judges are also initially assigned more cases than they could ever try.<sup>12</sup> Therefore, there is an incentive for judges to get as many of their cases pled out as possible. This incentive can lead to judges exerting undue pressure on defendants to take pleas.<sup>13</sup> The act of overcharging by the prosecutor, mandatory minimums, and indigent defendants' lack of faith in their public defender further incentivizes defendants to take plea offers.<sup>14</sup>

There is one incentive involving the criminal justice system that is noticeably absent from the book. Namely, how the severity of punishment and likelihood of receiving the punishment affect the incentives for committing crimes.<sup>15</sup> Not surprisingly, in the aggregate, people adjust their criminal behavior in response to the changing costs they may incur.<sup>16</sup> Bazelon likely omitted this aspect of criminal justice incentives because it does not strengthen the case for her proposed policy changes.

#### IV. GAPS IN KNOWLEDGE

##### 1. Gun Control Legislation

Unfortunately, there are some glaring gaps in Bazelon's subject-matter knowledge that quickly become apparent. The book discusses gun control legislation since one of the two main cases followed involved a firearm charge. On this topic, the author warns about "rapid-fire magazine clips."<sup>17</sup> This is puzzling because there is no such thing as a rapid-fire magazine clip. A magazine is the device that feeds the bullets into the chamber in most modern firearms.<sup>18</sup> The firearm's rate of fire is not controlled by the magazine.<sup>19</sup> Bazelon might be

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<sup>10</sup> This incentive is not explicitly addressed in the book.

<sup>11</sup> BAZELON, *supra* note 1, at 38.

<sup>12</sup> Emily Yoffe, *Innocence is Irrelevant*, ATLANTIC, Sept. 2017, at 67 (stating over ninety percent of felony convictions are the result of a plea).

<sup>13</sup> Richard Klein, *Due Process Denied: Judicial Coercion in the Plea Bargaining Process*, 32 HOFSTRA L. REV. 1349, 1357 (2004).

<sup>14</sup> The inability for defendants to make bail, and therefore have to await trial in jail, is an additional incentive to accept plea offers. And, the workload of public defenders can unduly incentivize them to recommend accepting pleas when a trial might be in the best interest of the defendant.

<sup>15</sup> Tim Friche & Thomas J. Miceli, *On Punishment Severity and Crime Rates*, 19 AM. L. & ECON. REV. 464, 464–66 (2017).

<sup>16</sup> *Id.*

<sup>17</sup> BAZELON, *supra* note 1, at 59.

<sup>18</sup> Tom Knighton, *Debbie Wasserman Schultz: Ban 'High Capacity, Rapid-Fire Magazines'*, BEARING ARMS (Mar. 2, 2018, 8:30 AM), <https://bearingarms.com/tom-k/2018/03/02/debbie-wasserman-schultz-ban-high-capacity-rapid-fire-magazines/> [<https://perma.cc/QG99-9EPJ>].

<sup>19</sup> *Id.*

carelessly repeating language she heard from Representative Debbie Wasserman Schultz, who erroneously referred to “high capacity, rapid-fire magazines.”<sup>20</sup>

Unfortunately, this is not an isolated incident and appears to be a common theme in Bazelon’s coverage of gun-control legislation. Previously, she made an even more glaring error by calling for a ban on “the sale of rapid-fire ammunition.”<sup>21</sup> Phrases like “rapid-fire magazines” and “rapid-fire ammunition” sound ominous, but are completely fictional. A citizen with no firearm experience is certainly excused for not knowing this distinction. However, Bazelon’s ignorance on the issue is inexcusable given her position as a journalist who writes books and articles purporting to educate people on the issue.

## 2. *Mass Incarceration*

While the book advocates for ending mass incarceration, it does so by focusing on rights of the accused and less severe sentences for those convicted of crimes. Largely absent from the book is a discussion about another way to reduce prison populations: decreasing crimes committed. Just one example of this distinction is illustrated in Bazelon’s coverage of Philadelphia District Attorney Larry Krasner.<sup>22</sup> Bazelon praises him for his “unbridled determination,”<sup>23</sup> and for turning the District Attorney’s office into a “progressive institution,”<sup>24</sup> but she makes no reference to how his policies have affected crime rates. A look at Philadelphia crime statistics gives a likely explanation for the omission. Krasner assumed office on January 1, 2018.<sup>25</sup> In 2018, the homicide rate was up ten percent to a new, ten-year high,<sup>26</sup> and the 2019 homicide rate was no better.<sup>27</sup> The percentage of people of color in the prison population has also increased during Krasner’s tenure.<sup>28</sup> To be fair, it should also be pointed out that the Philadelphia prison population has dropped more drastically than the increases in homicide and racial makeup of those imprisoned.<sup>29</sup>

<sup>20</sup> *Id.*

<sup>21</sup> Emily Bazelon, *Guns Must Be Paired with Safety Checks*, DALL. MORNING NEWS (Dec. 17, 2012, 10:56 PM), <https://www.dallasnews.com/opinion/commentary/2012/12/18/emily-bazelon-guns-must-be-paired-with-safety-checks/> [<https://perma.cc/7XHC-E2YM>].

<sup>22</sup> BAZELON, *supra* note 1, at 162.

<sup>23</sup> *Id.*

<sup>24</sup> *Id.*

<sup>25</sup> *Meet Larry*, KRASNER FOR DISTRICT ATT’Y, <https://krasnerforda.com/meet-larry> [<https://perma.cc/R4BB-R47T>].

<sup>26</sup> *Crime Maps & Stats*, PHILA. POLICE DEP’T, <https://www.phillypolice.com/crime-maps-stats/> [<https://perma.cc/Y3ZL-HF9J>] (citing to the citywide year-end 2018 *Crime Stats Report*).

<sup>27</sup> *Id.* (citing to the citywide year-end 2019 *Crime Stats Report*).

<sup>28</sup> FIRST JUDICIAL DIST. OF PA.: DEP’T OF RESEARCH & DEV., PHILADELPHIA JAIL POPULATION REPORT: JULY 2015 – MAY 2019 7 (2019), <https://www.phila.gov/media/20190718110848/May-2019-Full-Jail-Report.pdf> [<https://perma.cc/ZFD2-M8D6>] (finding an 88.2 percent to 89.5 percent increase in people of color in the prison population).

<sup>29</sup> *Id.* The average daily population in July 2015 was 8,106 compared to 4,601 in May 2019.

The point of this criticism is not to argue against progressive criminal justice policies. Rather, it is to point out the defect in praising these policies while ignoring the empirical data. Although it would have been inconsistent with the one-sided, advocacy nature of the book, the reader would have greatly benefited from an honest assessment of the benefits and downsides of Bazelon's proposed policies. The Krasner coverage would have been a great opportunity to do this by weighing the benefits of vastly reducing prison populations against the costs of increased homicides.

### V. CONFLATING INNOCENCE WITH WRONGFUL CONVICTION

Newspaper and television media accounts often conflate innocence with wrongful conviction, but this mistake is generally not committed in scholarly sources.<sup>30</sup> The ability of an Ivy League law professor such as Bazelon to fall prey to this error demonstrates how seductive it can be. For example, Bazelon confused innocence with wrongful conviction when, in the middle of a discussion about convicting the “innocent,” she explains how exonerations often stem from “suggestive photo lineups, coerced confessions, and misplaced reliance on jailhouse informants.”<sup>31</sup> However, exoneration and innocence are not equivalent.<sup>32</sup>

### VI. RACE

Bazelon demonstrates a peculiar preoccupation with race in the book. It is certainly appropriate to address the issue of race in a book about criminal justice reform, and there is legitimate evidence that race plays a role in various stages of the criminal justice system.<sup>33</sup> Bazelon cites to some of the research that shows

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<sup>30</sup> This error is generally limited to non-scholarly media outlets by non-experts. However, even Supreme Court justices have made this mistake. Justice David Souter, in the *Kansas v. Marsh* dissent, claimed that over 110 death row inmates had been released since 1973, “upon findings that they were innocent of the crimes charged.” *Kansas v. Marsh*, 548 U.S. 163, 209–10 (2006) (Souter, J., dissenting). In a concurrence, Justice Antonin Scalia pointed out that most of these allegedly “innocent” people were released due to technical issues—such as double jeopardy, inadmissible evidence, or the death of a key witness—not because of a finding of innocence. *Id.* at 193–98 (Scalia, J., concurring).

<sup>31</sup> BAZELON, *supra* note 1, at 225. Bazelon further conflates innocence with wrongful conviction in another instance, stating “[a]bout 18 percent of exonerations—DNA and non-DNA, death sentences and other penalties—involve defendants who pleaded guilty. At first this finding is confounding: why would someone who didn’t do it say they did?” *Id.* This statement by Bazelon is only valid if one first assumes that every defendant who enters a guilty plea and is later exonerated is innocent. While some of them may be innocent, there is no reason to believe that all of them are.

<sup>32</sup> Michael Conklin, *Innocent or Inconclusive? Analyzing Abolitionists’ Claims about the Death Penalty*, NEB. L. REV. 2–3 (Sept. 4, 2018), <https://lawreview.unl.edu/Analyzing-Abolitionists-Claims-About-the-Death-Penalty> [<https://perma.cc/9BJB-XB94>] (explaining that, while an exonerated person may be innocent, it is not necessarily the case). People can be exonerated for a number of non-innocent-related reasons.

<sup>33</sup> Radley Balko, *There’s Overwhelming Evidence that the Criminal-Justice System Is Racist*.

this.<sup>34</sup> However, she also goes further, interjecting race where the issue does not seem to be involved. As one such example, she points out that a three-judge panel was “all white,”<sup>35</sup> but she never discussed race with respect to the hearing these white judges presided over. Even coming up with a possible race-based implication is difficult. It was a professional responsibility hearing for a prosecutor’s alleged *Brady* violation in a case involving a white defendant.<sup>36</sup>

At one place in the book, Bazelon presents a chart, showing the percentage of declined marijuana prosecutions in Brooklyn.<sup>37</sup> The chart shows, and Bazelon expressly states, that whites are more likely than Blacks and Hispanics to have their marijuana arrests go uncharged by the District Attorney, implying that this is the result of racist treatment.<sup>38</sup> However, the same chart also shows that Asians and Indians are even more likely than whites to have their charges dropped.<sup>39</sup> Applying the same, earlier logic leads to the conclusion that the District Attorney’s office is also racist against whites in favor of Asians and Indians, which would be highly peculiar.

In other places, generic references are made to uncited studies that purportedly prove racism in the criminal justice system. In one example, she asserts that “[s]tudies also show that the death penalty is applied in a racially discriminatory manner.”<sup>40</sup> However, Bazelon makes no attempt to name the studies, their methodologies, or their specific findings. Studies certainly do exist that purport to show that the death penalty is applied in a racially discriminatory manner.<sup>41</sup> However, there are also studies that show the opposite.<sup>42</sup> It is a nuanced issue that requires the careful consideration of evidence on both sides—not an unsubstantiated assertion.

## VII. ADVOCACY PIECE

This book is primarily an advocacy piece. Bazelon carefully curated the presented information in a way to guide the reader to her desired conclusions, frequently ignoring evidence that conflicts with her view on the criminal justice

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*Here’s the Proof.*, WASH. POST (Sept. 18, 2018, 8:00 AM), <https://www.washingtonpost.com/news/opinions/wp/2018/09/18/theres-overwhelming-evidence-that-the-criminal-justice-system-is-racist-heres-the-proof/> [https://perma.cc/ZGQ3-G9MQ].

<sup>34</sup> See generally BAZELON, *supra* note 1.

<sup>35</sup> *Id.* at 252.

<sup>36</sup> *Id.* at 250.

<sup>37</sup> *Id.* at 357.

<sup>38</sup> *Id.*

<sup>39</sup> *Id.*

<sup>40</sup> BAZELON, *supra* note 1, at 333.

<sup>41</sup> Michael Conklin, *Painting a Deceptive Portrait: A Critical Review of Deadly Justice*, 22 NEW CRIM. L. REV. 223, 229–30 (2019).

<sup>42</sup> See, e.g., *id.* (concluding that “[the death penalty] would be a very peculiar racist system against blacks [given that it results] in whites being more likely to receive the death penalty, more likely to be executed after receiving the death penalty, executed at a faster rate, and to have these results more prominent in the South”).

system. In the unlikely event that a reader does not see this desired result, the book concludes with a list of 144 bullet points covering twenty-one principles for Bazelon's preferred criminal justice policies.<sup>43</sup>

However, the book's biased nature does not mean it is split down politically ideological lines. Much of what Bazelon advocates for can be supported by liberals and conservatives alike. The concern for those wrongfully convicted of crimes likely appeals more to liberals while the concern for a costly and inefficient system likely appeals more to conservatives. In recent years, criminal justice reform has become one of the few issues on which Republicans and Democrats have found some common ground.<sup>44</sup> Bazelon even cites to a Koch Foundation study regarding the harms of our current bail system.<sup>45</sup>

### VIII. CONCLUSION

While this review has primarily focused on the negative aspects, Bazelon's book excels as an advocacy piece. Bazelon provides an overall engaging story of two trials, interspersed with facts and figures, that lead to her desired conclusions. However, there are glaring gaps in Bazelon's knowledge of relevant issues such as gun control, race, and the conflation of innocence with wrongful convictions. Although never expressly pointed out by Bazelon, the careful reader will likely notice the underlying theme of incentives throughout the book. The credibility of Bazelon's arguments and overall position, however, would be enhanced by addressing the problems discussed in this review.

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<sup>43</sup> BAZELON, *supra* note 1, at 315–35.

<sup>44</sup> Maggie Astor, *Left and Right Agree on Criminal Justice: They Were Both Wrong Before*, N.Y. TIMES (May 16, 2019), <https://www.nytimes.com/2019/05/16/us/politics/criminal-justice-system.html> [<https://perma.cc/TY8M-EKXL>].

<sup>45</sup> BAZELON, *supra* note 1, at 343.