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Guilty: The Collapse of Criminal Justice. By Judge Harold J. Rothwax. New York, NY: Random House. 1996. Pp. 238. Hardcover. $23.00.

Have the scales of our criminal justice system tilted so much in favor of a defendant's due process rights that we have subordinated the search for the truth? Columbia law professor Judge Harold J. Rothwax shouts "yes" in his new book *Guilty: The Collapse of Criminal Justice.* While some commentators have characterized the chaos of the O.J. Simpson trial as an anomaly, Judge Rothwax believes the trial exemplifies everything that is wrong with our criminal justice system. He forcefully argues that the system is plagued by overly complex rules that: (1) give criminals unnecessary protections; and (2) encourage their lawyers to obfuscate the truth. While this rhetoric may sound like that of a "hanging judge" who "knows" that ninety-five percent of all defendants are guilty, readers will be surprised to learn that Judge Rothwax spent twelve years as a criminal defense attorney and was a vice-chairman of the American Civil Liberties Union. Nevertheless, Judge Rothwax's twenty-five years on the bench have convinced him that the due process "revolution" has gone too far. In *Guilty,* he uses dozens of compelling anecdotes to support his thesis that the legislature and appellate courts have protected criminal defendants' rights to the extent that society is now a victim of a paralyzed system that is unable to do justice.

In chapter one, "Anything but the Truth," Judge Rothwax condemns the Supreme Court expansion of the Fourth, Fifth and Sixth Amendments. He complains that the investigation for truth and justice has become mired in a quagmire of process and procedure. If the primary purpose of procedural rules is to enhance the discovery of truth, the question arises: What are the best methods to accomplish this and still stay within the bounds of a Constitution that protects citizens from excessive governmental power? Judge

Rothwax argues that while Americans have wrestled with the limits of government power since independence, we have stopped questioning the fundamental precepts of criminal procedure.

Chapter two, "Snowy Nights and Cars on the Run," details the terrible confusion surrounding the Fourth Amendment that has confounded a generation of law students, lawyers, judges, and police officers. Judge Rothwax exposes the problem with judicially created criminal procedure by chronicling the haphazard development of the exclusionary rule. He then openly criticizes the disproportionate remedies afforded criminals when law enforcement makes an innocent technical error during a search or seizure. Judge Rothwax's narrations effectively bring the Fourth Amendment to life. For example, he tells the story behind *Coolidge v. New Hampshire*, where, in the absence of police misconduct, a patently guilty murderer was set free simply because New Hampshire had allowed the attorney general to issue warrants.

Judge Rothwax illustrates the problems with reasonable suspicion, plain view, automobile search, and the other convoluted and often illogical doctrines that police officers are expected to understand. He declares that Fourth Amendment law is "arbitrary and unknowable." Moreover, the exclusionary rule, as presently designed, all too often results in the exclusion of reliable evidence and fails to deter police misconduct. Judge Rothwax proposes a discretionary exclusionary rule based on reasonableness that gives the courts the flexibility to make decisions on a case-by-case basis. Accordingly, the court would ask: (1) Was there probable cause?; (2) Was a search warrant obtained?; (3) Were there exigent circumstances that made obtaining a warrant unfeasible?; (4) What was the nature of the intrusion?; (5) What was the quantum of evidence?; (6) What was the seriousness of the crime under investigation?; and (7) Was the defendant believed to be dangerous?

In chapter three, "The Silence of the Fox," Judge Rothwax criticizes the *Miranda* rule as needless formalism that ignores the real issue of protection from police coercion. He refutes *Miranda's* underlying premise that all custodial interrogation is inherently coercive. Instead of simply protecting people from coercion, *Miranda* requires law enforce-

ment to *urge* suspects not to confess, thereby decreasing the likelihood that people will take responsibility for their crimes. Additionally, the expanded definition of custody has required law enforcement to give the *Miranda* warning whenever they speak to a suspect. According to Judge Rothwax, the endless pursuit of fairness has perverted the justice system into a game where a criminal is given a fair chance to escape punishment. Judge Rothwax's solution is simple, he wants *Miranda* overruled outright. The rigidness of *Miranda* forces courts to choose between two evils: invent asinine reasoning to get around the rule, or suppress an otherwise voluntary statement. Judge Rothwax believes that, in the age of videotaped confessions, there are already enough safeguards in place to protect people from police abuse.

Chapter four, "Clam Up and Call Your Lawyer," decries the growth of the Sixth Amendment right to counsel. Judge Rothwax traces the historic development of the right, and then argues that the "critical stage" theory of the right to counsel needlessly ties the hands of investigators searching for the truth. He castigates the Supreme Court for the *Massiah* and *Moulton* opinions that have prevented post-arrest investigation by law enforcement. According to Judge Rothwax, these excessive extensions of the right to counsel do not further the policy of preventing police coercion.

In chapter five, "The Rush to Nowhere," Judge Rothwax states that "speedy trial statutes do not guarantee rapid justice." Outrageous anecdotes from his courtroom illustrate how defendants use the New York speedy trial statute to avoid justice. He asks: Is dismissing the indictment really the best remedy for a one day technical violation of an arbitrary time requirement? In the author's experience, these rigid statutes only force the state to be ready for trial and do not serve the following policy goals behind the Sixth Amendment right to speedy trial: (1) protecting the accused from prolonged imprisonment and the stigma of public suspicion; (2) preserving evidence and witnesses' memories; and (3) ensuring society's and the victim's right to have prompt justice.

Judge Rothwax would ask: Is the *defendant* ready for a speedy trial? Does the defendant even want a speedy trial? He proposes to repeal mandatory speedy trial computations and institute a case-by-case analysis of whether the defend-

ant's right and desire for a speedy trial were actually prejudiced. Again, the standard would be based on reasonableness and focus on issues such as trial complexity and the defendant's diligence in trial preparation.

In chapter six, "The Theater of the Absurd," Judge Rothwax censures attorneys for their unprofessional behavior in the courtroom and the judges who let them get away with it. He agrees with the popular notion that theatrics have replaced the pursuit of truth as the foundation of many criminal trials. Judge Rothwax even goes so far as to question the fundamental principals of our adversarial system. He believes that defense attorneys have pushed the ethical bounds of zealous advocacy to the extent that attorneys now feel they have carte blanche to actively distort and subvert the truth. Without giving any specific suggestions, he recommends that the judiciary reevaluate the defense lawyer's role because the criminal bar will never voluntarily accept greater duties as officers of the court. He does assert that though this complex issue may initially appear to be an ethical one, it is a larger policy question that can best be addressed by reevaluating procedural and evidentiary rules.

Chapter seven, "The Plea Bargain," chronicles how the staggering volume of criminal cases forces the system to dispose ninety to ninety-five percent of the cases by plea bargain. While Judge Rothwax defends plea bargains as a necessary evil, he complains that this system gives defendants lighter sentences than they deserve only because of the need to avoid costly trials. He states that this unfortunate practice will continue until courts are given adequate resources and the rules of criminal procedure are streamlined.

In chapter eight, "Poker-Faced Justice," Judge Rothwax criticizes unfair discovery statutes that require full disclosure by the prosecution. He feels that divulging the state's case gives defendants and defense attorneys the opportunity to concoct a defense that is consistent with the evidence provided by the state. While a defendant should have the right to hear the evidence against him, Judge Rothwax believes this information is often misused to fabricate an alibi. He questions why prosecutors must disclose everything in their investigation when defense attorneys are only required to turn over information they intend to use at trial.

Judge Rothwax uses the O.J. Simpson trial to illustrate the problem. He quotes Robert Shapiro early in the case, "We'll devise a defense once we know what the state has to offer." He then recounts how the defense changed Simpson's story that he was sleeping during the time of the murders once the evidence revealed that he had made cellular phone calls at that time. Similarly, the Menendez brothers proclaimed their complete innocence until their confession was obtained by the prosecution. Only then, did the brothers tell their tale of violent sexual abuse by the father.

Judge Rothwax points out that in the O.J. Simpson trial, the defense did not have to disclose the results of their own DNA tests because they were not used at trial, presumably because they were incriminating. Meanwhile, the defense was able to spend enormous resources to create reasonable doubt about the state's DNA tests — tests that likely had identical results as their own. While the Fifth Amendment clearly protects against self-incrimination and the prosecutors should be forced to turn over any exculpatory evidence, Judge Rothwax notes that there is nothing in the Constitution requiring complete disclosure of the state's case before trial.

His solution is called the "Sealed Envelope Proposal." Once a defendant is formally charged, he would be required to write down his version of what happened and place it in a sealed envelope. A judge would hold the envelope and the contents would never be seen by the state unless the defendant testified. If he did, the envelope would be opened to confirm that the defendant's original story is consistent with his testimony. If it was not, the defendant's prior statement would be available to impeach him. Judge Rothwax would condition the defense's full access to the state's case with delivery of the sealed statement. He argues that this rule does not increase the risk of an erroneous convictions, it simply prevents a defendant from lying on the witness stand. This proposal will likely provoke outrage from the defense bar and civil libertarians, yet Judge Rothwax raises an often overlooked question: Are procedural rules unfair simply because they make the conviction of a defendant more likely?

In chapter nine, "Speak No Evil," Judge Rothwax blasts the *Griffin* and *Carter* Supreme Court decisions that require a judge to tell the jury it cannot draw adverse inferences from

a defendant's failure to testify at trial. He finds it ironic that while an innocent witness to a murder is forced to testify, the defendant, the one who likely knows the most about the crime, is given an a extra layer of protection. Judge Rothwax proposes that, "[i]f it appears from the evidence that the defendant could reasonably be expected to explain or deny evidence against him, the jury should be instructed that they may consider his failure to do so . . . ."

In chapter ten, "A Jury of Our Fears," Judge Rothwax confesses his lack of faith in our jury system. He argues that the jury selection process does not result in representative and capable juries. He echoes the popular rhetoric that juries may be getting "dumber" because educated people either easily avoid service, or are eliminated by defense attorneys' preemptory challenges. Judge Rothwax argues that limiting both sides to three preemptory challenges would simplify the process and undercut the power of "scientific" jury consultants. Additionally, he proposes allowing eleven-to-one or ten-to-two jury verdicts in criminal cases. He argues that unanimous verdicts are not necessarily more reliable. One study shows that the first ballot usually determines the outcome of a trial. Moreover, the study suggests that juries rarely change holdout votes through analytical reasoning; instead, pressure and intimidation are frequently employed.

In the final chapter, "Judgment Day," Judge Rothwax proffers the O.J. Simpson trial as smoking gun (or bloody glove) proof of a system "dangerously out of order." His indictment condemns the trial's needless length. He attributes this to the jury selection process, abstruse procedural rules, inflammatory defense attorneys who created " 'evidence' out of innuendo" and tried the case in the media, and a weak judge who failed to take control of the attorneys. He explains that his disgust with the case is not with the verdict itself, but with the jury's failure to examine the evidence. Unfortunately, Judge Rothwax seems to have lost faith with juries as a whole, writing that, "juries are fragile bodies subject to emotion, suggestion, and speculation . . . who [often] lack the capacity to intelligently evaluate the evidence."

Although Judge Rothwax admits that most cases are not like the O.J. Simpson trial, he asserts that under our current system, many could be. This assertion is flawed however, because most defendants do not have the resources to hire a

"dream team" of criminal defense lawyers. Instead most defendants are poor and are represented by an overworked public defender. The author forgets that most public defenders do not have the time or resources to hire a team of investigators and experts or launch a counter-attack against the prosecutor by filing hundreds of pre-trial motions.

Guilty is well written and is recommended reading to lawyer and lay person alike. Judge Rothwax's story telling ability, trenchant analysis, and innovative solutions are all well synthesized into a incisive indictment of the status quo. Civil libertarians will vigorously oppose his proposals and label them oppressive. Notwithstanding these predictable recriminations, America needs to rationally debate the policies behind our current rules and ask whether these rules actually further these polices.

Legislators campaigning to get tough on crime are likely to champion Judge Rothwax's proposals. However, his reforms should not necessarily be viewed as a panacea. Clearly, Judge Rothwax's stories of guilty criminals getting off on "technicalities" invoke outrage. Nevertheless, one should temper this anger with the knowledge that these egregious cases are rare exceptions. Admittedly, this does not abate the injustices done in these cases. However, legislators bent on cracking down on legal "loopholes" are urged to carefully deliberate any proposed changes to our system. Criminal justice reform that is driven by anecdote, and ignores systematic research, has dangerous implications when it proposes to abrogate fundamental constitutional protections.

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