TRUTH OR JUSTICE[1]

REVIEWED BY MAJOR EDWARD J. MARTIN[2]

A recent trial in the New York State Supreme Court involved a defendant charged with robbing a Belgian tourist in midtown Manhattan. Plainclothes police observed the entire incident. After being interviewed and providing personal information, the victim returned to Belgium and refused to come back for the trial. The defense counsel requested a jury instruction that the government's failure to produce the witness should permit the inference that, if called, the witness would not support the prosecution's case. During argument, the defense counsel admitted telephonically speaking with the witness and that the victim stated the defendant robbed him. Judge Harold J. Rothwax asked, "Doesn't your own statement belie the information you're seeking?" The defense counsel replied, "It does, but my client is entitled to it."

It is this type of conflict between the truth and rights granted to defendants in our criminal justice system that troubles Judge Rothwax. Judge Rothwax has been a member of the New York State Supreme Court for twenty-five years. He has thirty-seven years of experience in criminal law, including twelve years as a defense counsel. In his book *Guilty: The Collapse of Criminal Justice,* the judge uses compelling anecdotes to provide examples of problems with the American justice system. In layperson terms, Judge Rothwax uses cases he presided over, United States Supreme Court cases, the O.J. Simpson trial, and the discussions of legal commentators to conclude that the concept of fairness in criminal procedure has transcended the concern for truth.

To Judge Rothwax's credit, not only does he point out problems with the criminal justice system, but he attempts to provide commonsense answers to these issues. Judge Rothwax finds problems throughout the system; from the police investigation stage to jury verdicts. Many of the suggested solutions involve increased deference to the judiciary. Legal

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1. HAROLD J. ROTHWAX, GUILTY: THE COLLAPSE OF CRIMINAL JUSTICE (Random House, New York 1996); 238 pages, $23.00 (hardcover).

2. Judge Advocate General's Corps, United States Army. Written while assigned as a student, 45th Judge Advocate Officer Graduate Course, The Judge Advocate General's School, United States Army, Charlottesville, Virginia.

commentators have criticized the more controversial proposals. However, Judge Rothwax sees his role as standing at the center of the adversarial system and keeping the scales in balance. While he often seems partial toward the prosecution, the truth is his objective. Judge Rothwax's most controversial suggestions surround the Warren Court's interpretations of the Fourth, Fifth, and Sixth Amendments to the United States Constitution.

The Court's interpretation of the Fourth Amendment is what guarantees that justice will not be done. The judge illustrates a number of cases in which people who are "clearly guilty" have evidence suppressed due to technical errors. One case involves a kidnapped child who, upon being freed from captivity in the defendant's apartment, leads the police to weapons in the apartment. Since the police did not have a search warrant, and the weapons were not in plain view, the weapons were suppressed. The judge criticizes a law that protects the privacy of a man when the facts prove that he locked a child in an apartment for four days. However, the Judge does not explain where in the Fourth Amendment it says that individuals who are guilty of serious crimes are no longer protected from unreasonable searches and seizures. The judge indicates that the benefits of the exclusionary rule in protecting the privacy of citizens are greatly outweighed by its burden on the truth bearing process. He proposes making the exclusionary rule discretionary, and allowing judges to utilize reasonableness as a guide.

Judge Rothwax also believes that decisions relating to *Miranda* rights have led to "judicial chaos." He feels the Supreme Court was mistaken in attempting to create an objective standard that would free courts from the task of determining whether a defendant was actually coerced into making a confession. The judge feels that *Miranda* requires the police to urge suspects not to confess, thereby providing guilty individuals with a fair chance to escape. He feels rules such as *Miranda* make a criminal trial into a sporting contest in which the public is indifferent about the outcome. The judge argues that such indifference is hardly appropriate in the administration of justice and that the *Miranda* rules result in decreasing the likelihood that people will take responsibility for their crimes. These rules force courts to decide between finding inventive ways to circumvent the law or suppressing an otherwise voluntary statement. Judge Rothwax concludes that *Miranda* should be overruled. He claims that videotaping and other

technology can now prevent the coercion which *Miranda* was designed to prevent.

Judge Rothwax's interpretation of the Sixth Amendment also differs from that of the Supreme Court. He agrees that the Sixth Amendment provides a right to counsel as an essential component of the right to a fair trial. However, Judge Rothwax insists that the Sixth Amendment provides no right to counsel during police investigations. He maintains that to argue otherwise would assist defendants in protecting themselves against the possibility that an investigation will be successful. New York courts provide suspects even more protections than required by the Supreme Court. In one murder case, the suspect (West) was represented by counsel during a lineup. At that time, the defense counsel instructed the police not to question West in counsel's absence. West was not charged, but three years later the police arrested another individual (Davenport) for an unrelated offense. Davenport admitted his involvement in the earlier murder and agreed to tape conversations with West in exchange for leniency. West made incriminating statements which after conviction were suppressed on appeal by the New York Court of Appeals which held that the police had the burden to determine whether or not representation continued even three years after the right to counsel first attached. Judge Rothwax maintains that asking questions and receiving answers from a suspect is a legitimate aspect of conducting criminal investigations. He believes the right to an attorney should not become a factor during the investigation stage.

Judge Rothwax's recommendations that are the most controversial with defense attorneys include his views on discovery and the defendant's right against self incrimination. He believes that defense attorneys regularly take unfair advantage of liberal discovery guidelines to manipulate the system. The problem is that discovery provides the defendant with a complete overview of the government's case without requiring from the defendant, his own version of the facts. An example used by the judge is a recent case in which a Lebanese man shot at a van carrying Hasidic students. Upon arrest, his attorney first claimed that his client was innocent because he was not present at the scene of the shooting. Upon receipt of discovery placing the defendant at the scene, the defense claimed self-defense. When later discovery indicated that the students did not threaten or attack the accused the defense theory of the case switched to insanity.

In another example of this use of discovery, O.J. Simpson's attorney, Robert Shapiro, early in the case, stated that his team would devise a defense after they knew what the state had to offer. The judge notes that

O.J. Simpson's defense later changed their initial story that Simpson was sleeping at the time of the murders once discovery revealed that he had made cellular phone calls at that time. To avoid such "manipulation" the judge believes that access to the government's case should be conditioned upon the defendant's willingness to give up the right to misuse the evidence. His "sealed envelope proposal" would require formally charged defendants who want discovery to write down their version of the facts and seal them in an envelope. After presenting this envelope to the judge, the defense would receive discovery. The envelope is never opened unless the defendant testifies. If the defendant testifies, the envelope is opened to ensure his initial version of the facts is consistent with the trial testimony. The government would be able to impeach the defendant with the initial statement if there are any major inconsistencies.

In addition, if the defendant fails to testify and the evidence presented indicates the defendant could reasonably explain or deny the evidence, the judge would have discretion to instruct jurors that they may consider the defendants failure to testify. Judge Rothwax interprets the Fifth Amendment literally. He argues that although no person can be compelled to testify against himself, there is no prohibition against drawing an adverse inference from a defendant's failure to testify. Unfortunately, the judge does not discuss the fact that such a judicial instruction may in fact force defendants to testify against themselves or commit perjury on the witness stand. Such an instruction might also prevent candid conversations between defense attorneys and their clients.

Judge Rothwax also recommends a number of reforms that are already part of Military Criminal Procedure. These include such areas as speedy trial rights, jury preemptory challenges and allowing less than unanimous verdicts. While the judge believes that accused citizens have a right to a speedy trial, he feels that speedy trial statutes based on a precise formula of days and weeks only protect those who are most interested in getting away with crimes and manipulating the system. A New York case cited involved a defendant and his attorney who arrived at court for an arraignment. They sat in the back of the courtroom without informing anyone of their presence. Due to an administrative error, the case was not called. By the time the government realized their error, the indictment had to be dismissed due to a speedy trial violation. Similar to the military rules, Judge Rothwax recommends that speedy trial issues be determined based on the reasonableness of the delay and the potential prejudice to the defen-

dant. In addition, the judge would consider the defendant's desire and willingness to accept a speedy trial.

Judge Rothwax seems to have lost faith in the jury system. He believes that "educated" people are either excused from jury duty or are preempted by defense attorneys. Since a vast majority of defendants are guilty, defense counsel seek jurors who cannot evaluate the evidence. The judge believes that the jury in the O.J. Simpson case was the product of this process. Judge Rothwax argues that the O.J. Simpson jury failed to examine the evidence, and their post-trial statements indicate they made no distinction between factual evidence and attorney suggestion. Judge Rothwax suggests limiting the number of preemptory challenges in a criminal case to three or less. He also believes that efficiency would be increased without harming accuracy by permitting jury verdicts of eleven to one or ten to two.

The reaction to Judge Rothwax's book was diverse. Nonlegal commentators were quick to agree that the book provided examples of serious problems with our legal system, and commonsense solutions to those problems.[3] However, legal commentators seem critical of the book. Most argue that relatively few cases are dismissed or result in an acquittal due to technical errors in criminal procedure, or legal rulings that protect defendants.[4] The outcome of most cases are determined by the facts. In addition, commentators feel the judge oversimplified many constitutional issues[5] and that he failed to discuss recent Supreme Court decisions that carved out exceptions to the rules that provide protection to defendants, such as the good faith exception to the exclusionary rule.[6]

Judge Rothwax's book is not designed to be an academic analysis of complex legal issues. The judge is an interesting story teller with some innovative ideas. Lawyers may find themselves disappointed with the book's simplicity, but it is an entertaining and thought provoking look at some important criminal law issues.

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3. Richard Bernstein, *Judge Says Too Many Rights Is All Wrong*, SUN-SENTINEL (Ft. Lauderdale, Fla.), Feb. 25, 1996, at 9D, *available on* N.Y. TIMES NEWS SERVICE.

4. Edward P. Ryan Jr., *Jaded View Of Justice*, MASS. LAWYERS WEEKLY, Apr. 1, 1996, at B4.

5. Harry I. Subin, *Where's The Collapse?*, N.Y. L.J., Apr. 25, 1996, at 2.

6. Jim Zafris, *Judge Delivers Simplistic Verdict on Justice System*, THE PLAIN DEALER (Cleveland, Ohio), Mar. 31, 1996, at 12.