VERDICT means "Speaking Truth"

Review of Judge Harold J. Rothwax's *Guilty: The Collapse of Criminal Justice* (New York, 1996).
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"Judges get the lawyers they deserve. If [judges] tolerate misconduct they have it in abundance. If they don't run their courtrooms, then the lawyers will—with all the chaos that implies. I can still recall my dismay, early in the Simpson trial, when I heard Judge Ito tell defense attorney Peter Neufeld, 'That's the *thirteenth* time I've asked you not to ask that question'. I thought he sounded like an impotent parent who is full of threats but never carries them out. When Neufeld later appeared in my own courtroom, I warned him, 'Peter, you're not even going to get past the *first* time'. He shrugged and said, 'Don't blame me. Judge Ito let me do it'" (p. 227).

Thirty-seven years in criminal law, twenty-five as a judge on the New York State Supreme Court, Harold J. Rothwax has been a senior trial attorney for the Criminal Defense Division of the Legal Aid Society and a vice chairperson of the New York Civil Liberties Union. Lecturer at Columbia Law School for twenty-five years, in 1985 Rothwax received the New York State Bar Association Award for Outstanding Achievements in the field of Criminal Law Education.

Guilty is Rothwax's appeal to the general public to become more aware of our legal system that has grown so complex, interpretively inexplicable and subjective that lawyers, judges and police alike are virtually trapped in a quagmire of growing legal confusion and ever-changing technicalities. *Guilty* is a plea for change, changes which Rothwax delineates in careful presentation and fascinating if not bizarre case examples. Some of the subjects Rothwax critiques: "The Fourth Amendment and the Suppression of Evidence," "*Miranda* and the Quagmire of Coercion, Confession, and Conscience," "The Right of Counsel and the Rules of Investigation," "Speedy Trial Statutes," "How Liberal Discovery Laws Can Hide the Facts and Subvert the Truth," "Truth, a Defendant's Accountability, and the Fifth Amendment."

Typical of Rothwax's controversial insights: Rothwax considers *Miranda* a judicial mistake! He writes, "Using the Fifth Amendment standard against compulsion as a rationale, the Court declared that, prior to questioning, the police must warn a suspect in custody that he has the right to remain silent, any statements he makes might be used against him, and he has the right to the presence of counsel, retained or appointed…. [And] if police failed to give the warning, any statement however voluntary, would be treated as coerced and therefore suppressed" (p. 77). As he puts it, quoting Professor Gerald M. Caplan, the *Miranda* ruling "'treats a confession as an act of poor judgment by a vulnerable person outmaneuvered by the police'" (p. 79).

In an online Internet review of *Guilty*, Ian Kaplan claims that Rothwax is calling for a return to brutal police coercion of a suspect. "If we were to adopt all of Rothwax's recommendations," worries Kaplan, "more criminals would be convicted, but there would also be more innocent people sitting in jail cells" (*Free Speech Online*, Non-Fiction Reviews, 1996, p. 2). Kaplan's criticism, however, is rash and unfounded. Rothwax clearly states in his concluding chapter: "The *Miranda* ruling is an unnecessary overreaction to past abuses that videotapes and other technology can now preclude, and it should be abandoned" (p. 237); in other words, there are far better ways to protect a suspect from police coercion than *Miranda*, which by definition hampers the truth-finding procedures of an investigation.

Rothwax argues that applying the Sixth Amendment not only to the law court but also to the police investigation, creates, in the words of Justice Byron White, "another area of privileged testimony [and] additional barriers to the pursuit of truth" (p. 97). "The Constitution," explains Rothwax, "structured the criminal justice into two distinct phases. In the *investigative* phase the police have considerable leeway as long as they do not coerce the defendant. In the *judicial* phase, which marks the end of the investigative phase, the police may not approach the defendant unless they do so in a way that accords with the procedural protections of the accusatorial judicial process. So, after arraignment or indictment, the police may not contact the defendant without counsel's involvement" (pp. 102-103). In

other words, the right to counsel in court, not the police station, is what the Sixth Amendment protects. Non-coercive investigation is necessary for finding the truth, while it's the *judicial* phase which merits counsel for the accused.

The central theme of *Guilty* is truth; *getting at the truth!* Interesting idea. When the criminal justice system loses sight of the main goal of truth-finding, establishing the truth "beyond a reasonable doubt," such a system, in Rothwax's words, "makes law a lottery." For example, given the problem with liberal "disclosure laws," which allow the defense to know the prosecution's case in full, but not visa-versa, the question arises, "Does the concept of fairness in criminal procedure transcend the concern for truth?" (p. 180).

One aspect of the problem with disclosure laws, or "rules of discovery," concerns witness intimidation. "Sadly," writes Rothwax, "witness intimidation is a reality I have seen in my own courtroom. And I am mindful of a New York case involving a gang of assassins called The Vigilantes. When two members were charged with murder, the district attorney argued against turning over the name of the witness to the defense. He told the judge there was a real concern about the safety of the witness. The judge, abiding by the strict rules of discovery, denied the prosecution's request. The name of the witness was given to the defense the day before the trial was to begin. That night, the witness was murdered" (p. 178).

If one step in reform of our criminal justice system is reestablishment of a non-coercive, yet reasonable police investigative process, another step is the reform of the jury-selection process. As Rothwax puts it, "The jury is considered the jewel and the centerpiece of the American criminal justice system…. No one can be convicted or condemned except by the judgment of his peers. By its 'verdict' (which literally means 'to speak the truth'), a community of citizens, drawn from a cross-section of the population, determines the validity of the government's charges…. But how well does the jury serve as a truth finder? How well does it serve as a voice of impartial justice? To what extent do our procedures and rules of evidence facilitate or impede the reliability of its findings?" (p. 199).

At the time of writing *Guilty*, the O. J. Simpson case was in full swing, and Rothwax refers to it often, not as a high-profile *judicial aberration*, but as a paradigm of the problems with our criminal justice system. "Although attorneys and judges will often proclaim their admiration of a jury's ability to reach the truth, privately they will acknowledge that a trial before a jury is a crapshoot, a roll of the dice…. If juries are getting dumber…it's because attorneys (especially defense attorney) want them that way" (p. 200).

The defense will seek the most malleable, most easily manipulated jury by means of highly-sophisticated jury-selection procedures. Two examples of such procedures are: virtually unlimited "preemptory challenges"—elimination of a prospective juror for an attorney's private reasons—as well as continued challenges as to the "inadmissibility of evidence" before the jury. And often, explains Rothwax, a jury does not get to see key evidence due to wholly unrelated legal *technicalities*. Once again, concludes Rothwax, the search for truth is subordinated to a growing body of vague and convoluted precedences and irrelevant judgments.

A third concern Rothwax has with the jury system is the demand for jury unanimity in verdicts. He sees no reason why our jury system would not serve the cause of justice better if we required only an eleven-to-one or even a ten-to-two decision. "Although the U.S. Constitution does not require unanimous verdicts, and although thirty-three states permit non-unanimous verdicts in civil cases, forty-eight of our fifty states require unanimous verdicts in criminal cases, and so do the federal courts. It's hard to know why this is so; it is simply a subject we don't discuss. It's a sacred cow" (p. 213).

Note: in the Nuremberg international war-crimes trials of Nazi leaders (1945-46) "full disclosure" was practiced in the most liberal sense, giving defense complete access to the prosecution's case; and while every opportunity to show the world the accused Nazi leaders were given a fair hearing, with counsel of their choosing and every defense considerations, it was nonetheless ruled just that it should take only three out four Judges to convict.

In Rothwax's view, the central goal of truth-finding in a case demands the kinds of changes he outlines in *Guilty*. Appeals courts more and more take the view that "a criminal defendant is entitled not only to a fair trial, but to a perfect one" (p. 216), with jury unanimity, and "reversals" often handed down on technicalities which have no bearing on truth-finding.

Likely, one will not agree with all Rothwax's conclusion, nor with some of his suggested reforms. Nonetheless, his insights and illustrations are compelling, highly qualified, and make fascinating reading! For attorneys, for educators, for those blown away by the Rodney King and O. J. Simpson trials, and for anyone who watches "Law And Order," Rothwax's book is a *wild* read (and a fairly quick one, too, at only 238 pages). Especially good for an election year.

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