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And Nothing but the Truth: A Review of Judge Rothwax's "Guilty: The Collapse of Criminal Justice"

GUILTY: THE COLLAPSE OF CRIMINAL JUSTICE. By Judge Harold J. Rothwax. † New York: Random House, 1996. Pp. xiv, 238. \$23.00.

Reviewed by Paul L. Seave*

The role of "truth"¹ in the American criminal justice system has become controversial. Until recently, the received wisdom in the legal profession was that truth somehow emerged from the battle "zealously"² pursued by adversarial counsel. Moreover, the profession generally accepted the limitations on truth-seeking imposed in the name of constitutionally-based values.

In the past several years, however, practitioners, academics, and judges have begun to question the efficacy of an adversary system that they now view as distorting the truth.³ Nonlawyers have begun to view the system as needlessly and offensively driven by lawyers' fealty to client and self rather than to truth.⁴

Judge Harold J. Rothwax, a trial judge on the New York Supreme Court for twenty-five years, and a former criminal defense lawyer, has joined this debate. In *Guilty: The Collapse of Criminal Justice*,⁵ Rothwax gives forth his decidedly conservative views of the criminal justice system.⁶ As heavy-handed with the reader as he proudly claims to be with criminal defendants,⁷ the judge has written a polemic proclaiming the very collapse of the criminal justice system. Alongside this high decibel message is his brief, though more interesting consideration of this country's

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1. The debate whether the adversarial system is sufficiently concerned with determining whether a crime was committed—that is, what are the actual historical facts—uses the term "truth" (with a small "t") to refer to those facts. This Article uses "truth" in the same pragmatic fashion.

2. See MODEL CODE OF PROFESSIONAL RESPONSIBILITY Canon 7 (1981) ("[A] Lawyer Should Represent a Client Zealously Within the Bounds of the Law."); MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 7-102 (1981) (setting forth the same language); MODEL RULES OF PROFESSIONAL CONDUCT Preamble (1996) ("As advocate, a lawyer zealously asserts the client's position under the rules of the adversary system.").

3. See *infra* note 34.

4. *Id.*

5. JUDGE HAROLD J. ROTHWAX, *GUILTY: THE COLLAPSE OF CRIMINAL JUSTICE* (1996).

6. ROTHWAX, *supra* note 5, at 13, 22.

7. Judge Rothwax states in the Prologue, "I know I have a reputation for being tough. Around Centre Street, some lawyers even refer to me as 'the Prince of Darkness,' and it is well known that many defense attorneys are loathe to appear before me." *Id.* at 12.

approach to criminal justice and truth. This Review examines both the jeremiad and the *sotto voce* discussion.

I. THE GUILTY GET-OFF!!!

The criminal justice system, Judge Rothwax explains, should reflect "equal measures of truth and fairness."⁸ The problem, according to the judge is that "the weight of other considerations"—principally the exclusionary rule applied in furtherance of the Fourth Amendment and *Miranda v. Arizona*⁹—"has actually made truth subordinate and even irrelevant."¹⁰ "The bottom line," according to Rothwax, is that "[c]riminals are going free."¹¹

The stories Rothwax uses to illustrate the bottom line, while always dramatic, are not always accurate. Perhaps most striking is his discussion of the U.S. Supreme Court's 1971 decision in *Coolidge v. New Hampshire*.¹² The police believed that defendant Coolidge had slashed a fourteen-year-old girl's neck, shot her in the head, and left her corpse in a snowdrift by the highway. After conducting a thorough and fruitful investigation, the police searched Coolidge's car pursuant to a warrant issued by the New Hampshire Attorney General in accordance with New Hampshire law. The constitutional problem, of course, was that the Attorney General, who headed the investigation, was hardly the "neutral and detached magistrate" called for by the Fourth Amendment.¹³ The Supreme Court so found, suppressed the fiber evidence obtained from the car, and reversed the conviction.¹⁴ Rothwax is outraged:

Although Coolidge's crime was a horrible one, and the conduct of the police could not have been more restrained or professional, the criminal went free because the constable blundered in the eyes of the U.S. Supreme Court. There was a total lack of proportionality. Coolidge was the recipient of a bonanza in our criminal justice sweepstakes. He won the lottery when he persuaded the Court to overlook his horrible acts and focus on a minor good-faith error by the police.

8. *Id.* at 22.

9. 384 U.S. 436 (1966).

10. ROTHWAX, *supra* note 5, at 23.

11. *Id.* at 40.

12. 403 U.S. 443 (1971).

13. *Id.* at 449-50 (quotation omitted).

14. *Id.* at 453-73.

. . . This case happened more than twenty years ago, but it rattles me every time I think about it. Did I become a judge for this? *Is this the system I am proud to be a part of? The Coolidge reversal makes me ashamed.*¹⁵

Why does *Coolidge* prompt Rothwax to question the “system”? As he surely knows but fails to mention, the criminal did not go free. Instead, defendant Coolidge was retried and convicted, this time without use of the tainted evidence.¹⁶

Rothwax likewise prefers drama over accuracy in his discussion of the Supreme Court’s 1977 decision in the “Christian burial speech” case, *Brewer v. Williams*.¹⁷ Defendant Williams, after being arrested and arraigned in Davenport, Iowa for allegedly abducting and killing a ten-year-old girl, was to be transported 160 miles to the Des Moines jail. The detectives who were to accompany Williams promised his lawyer that they would not question Williams during the trip. That promise was consistent with *Massiah v. United States*,¹⁸ which thirteen years previously had held that a formally-charged defendant could not be questioned without an attorney.¹⁹

During the trip to Des Moines, Detective Learning suggested to Williams that they should stop and locate the girl’s body because her parents were entitled to have their daughter receive a Christian burial. The detective knew that Williams, a recent escapee from a mental institution, was deeply religious. In response, the defendant made several incriminating statements and led police to the body. The Supreme Court suppressed that evidence under *Massiah*, and reversed the conviction. Again, Judge Rothwax is outraged:

Although Williams’[s] case would be argued and reargued in the courts for many years to come (including yet a second decision to overturn the conviction), there was never any real doubt that he committed the crime. There was no police abuse, coercion, or even questioning. He wasn’t threatened. [The detective] simply made an appeal to his conscience, to his decency as a religious man. And Williams responded.

. . . .

Sadly, this is where we’ve come: the point where a man who has committed a terrible wrong may not try to cleanse his conscience. There is no respect for the truth. And I challenge you to find the justice.²⁰

15. ROTHWAX, *supra* note 5, at 39 (emphasis added).

16. See Sol Wachtler, *Crime and Punishment*, NEW YORKER, May 1996, at 72, 76.

17. 430 U.S. 387 (1977).

18. 377 U.S. 201 (1964).

19. *Id.* at 206-07.

20. ROTHWAX, *supra* note 5, at 18.

Why is Judge Rothwax so troubled by *Brewer*? His reasons are for the most part contradicted by the facts. First, and most important: contrary to Rothwax's suggestion that Williams went unpunished, he was retried and convicted, and that conviction was sustained—not overturned—by the Supreme Court.²¹ Second, there appears to have been police abuse: after the detective promised defense counsel that he would not question the defendant, he questioned him.

Third, Rothwax's view that there was no police questioning is flat-out incorrect. The so-called Christian burial speech, set forth in the note below,²² patently reflects the detective's intention to elicit incriminating information from the defendant. The detective admitted this at trial.²³ The Iowa state courts assumed that the speech was "tantamount to interrogation."²⁴ Counsel for the prosecution acknowledged during argument before the Supreme Court that the speech constituted interrogation.²⁵ And the Supreme Court so found:

There can be no serious doubt . . . that Detective Leaming deliberately and designedly set out to elicit information from Williams just as surely as—and perhaps more effectively than—if he had formally interrogated him. . . . [H]e purposely sought during Williams'[s] isolation from his lawyers to obtain as much incriminating information as possible. Indeed, Detective Leaming conceded as much when he testified at Williams'[s] trial.²⁶

21. *Nix v. Williams*, 467 U.S. 431 (1984). In upholding the conviction, the Supreme Court reversed the Eighth Circuit's decision to overturn the conviction. See *Nix v. Williams*, 700 F.2d 1164 (1983), *rev'd.*, 467 U.S. 431 (1984). It is hoped that Judge Rothwax's statement that there was "a second decision to overturn the conviction" does not refer to the Eighth Circuit's rejected decision to reverse.

22. The Court's opinion states:

Addressing Williams as "Reverend," the detective said:

I want to give you something to think about while we're traveling down the road. . . . Number one, I want you to observe the weather conditions, it's raining, it's sleeting, it's freezing, driving is very treacherous, visibility is poor, it's going to be dark early this evening. They are predicting several inches of snow for tonight, and I feel that you yourself are the only person that knows where this little girl's body is, that you yourself have only been there once, and if you get a snow on top of it you yourself may be unable to find it. And, since we will be going right past the area on the way into Des Moines, I felt that we could stop and locate the body, that the parents of this little girl should be entitled to a Christian burial for the little girl who was snatched away from them on Christmas [E]ve and murdered. And I feel we should stop and locate it on the way in rather than waiting until morning and trying to come back out after a snow storm and possibly not being able to find it at all.

Brewer, 430 U.S. at 392-93.

23. *Id.* at 399.

24. *Id.* at 400 n.7.

25. *Id.* at 399 n.6.

26. *Id.* at 399.

Finally, Rothwax's claim that the Court refused to allow a "fragile man of conscience" to "cleanse his conscience" by identifying the body's location barely passes the "smile" test. If defendant Williams's admissions were truly acts of conscience, why did he challenge their admissibility? Then again, perhaps his attorney coerced this "fragile man of conscience" to agree to such a challenge.

Rothwax simply fails to provide any support for his eye-catching contention that "[w]henver [the exclusionary rule] is applied, a criminal goes free—no matter how serious the crime or minor the police intrusion."²⁷ Rothwax supplies no support for his contention because the support does not exist.

The corrective measures that Rothwax urges—measures that are "so simple that [they have]. . . escaped us for decades"²⁸—are themselves problematic. He could have proposed modification of the exclusionary rule—the deterrent effect of that rule has proven uncertain,²⁹ and the courts have shown their receptivity to "good faith"³⁰ and other exceptions.³¹ It is the exclusion of evidence, after all, that is Rothwax's major complaint. Instead, he goes much further and proposes the elimination of current Fourth Amendment and *Miranda* jurisprudence.

As to the Fourth Amendment, Rothwax suggests the adoption of a case-by-case "reasonableness" or "common sense" test:

This model uses *reasonableness* as a guide, and proposes that we not try to set detailed guidelines for police behavior in every possible situation. In its place the court will determine whether the search and seizure is reasonable by considering all relevant factors on a case-by-case basis.

. . . .

. . . [R]equiring police officers to use their common sense, and judging them by that standard, seems more likely to produce sensible results than does a set of unknowable rules and vague exceptions that neither the police nor the courts can understand.

27. ROTHWAX, *supra* note 5, at 64.

28. *Id.*

29. See, e.g., Harry Caldwell & Carol A. Chase, *The Unruly Exclusionary Rule: Heeding Justice Blackmun's Call to Examine the Rule in Light of Changing Judicial Understanding About Its Effects Outside the Courtroom*, 78 MARQ. L. REV. 45 (1994); Christine M. D'Elia, *The Exclusionary Rule: Who Does It Punish?*, 5 SETON HALL CONST. L.J. 563 (1995); Heather Jackson, *Arizona v. Evans: Expanding Exclusionary Rule Exceptions and Contracting Fourth Amendment Protections*, 86 J. CRIM. L. & CRIMINOLOGY 1201 (1996).

30. See, e.g., *United States v. Leon*, 468 U.S. 897 (1984).

31. See, e.g., *Murray v. United States*, 487 U.S. 533 (1988) (independent source and inevitable discovery); *Brown v. Illinois*, 422 U.S. 590 (1975) (attenuation).

And, oh, what a remarkable thing it would be if justice were applied with such a simple eye to common sense!³²

While it appears that the substance of Fourth Amendment law might change under this approach, it seems likely that the new law would be no less complex or tangled. In each case, an appellate court would have to determine whether the particular factors supported the trial court's conclusion that the search and seizure were or were not reasonable. Appellate courts would soon have to articulate Fourth Amendment principles that would be as numerous and complex as the factual circumstances faced by the police, leaving the police no less confused than they are now.

Rothwax's proposal to eliminate *Miranda* is based on his antipathy to the exclusionary rule (*i.e.*, defendants go free whenever evidence is suppressed), and philosophical reasons, such as his contention that *Miranda* warnings somehow make a suspect equal to the interrogating officers. Rothwax does not discuss, however, whether *Miranda* has materially undermined law enforcement, and there is good evidence to suggest that it has not.³³ The burden is on Rothwax to consider this question, or explain why it does not matter. He does neither.

II. IS THE CRIMINAL JUSTICE SYSTEM ADEQUATELY CONCERNED ABOUT THE TRUTH?

Even if Rothwax is wrong that the criminal justice system is in collapse—that defendants are going free whenever the exclusionary rule is imposed—his predicate assertion that the legal system has lost its concern for truth joins a national chorus that something is wrong with the legal system. This chorus cannot be ignored. More people than ever dislike lawyers. Lawyers themselves are increasingly disillusioned with their profession, and numerous books and articles have been written attempting to explain these phenomena.³⁴

32. ROTHWAX, *supra* note 5, at 64-65.

33. Recent studies have found that in serious cases *Miranda* is responsible for the loss of a conviction in few cases. Compare Paul G. Cassell, *Miranda's Social Costs: An Empirical Reassessment*, 90 NW. U. L. REV. 387 (1996) (3.8%), with Stephen J. Schulhofer, *Miranda's Practical Effect: Substantial Benefits at Vanishingly Small Social Costs*, 90 NW. U. L. REV. 500, 502 (1996) (near 1%).

34. See, *e.g.*, WALT BACHMAN, *LAW V. LIFE: WHAT LAWYERS ARE AFRAID TO SAY ABOUT THE LEGAL PROFESSION* (1995); ANTHONY KRONMAN, *THE LOST LAWYERS: FAILING IDEALS OF THE LEGAL PROFESSION* (1993); SOL M. LINOWITZ, *THE BETRAYED PROFESSION: LAWYERING AT THE END OF THE 20TH CENTURY* (1994); Sissela Bok, *Can Lawyers Be Trusted?*, 138 U. PA. L. REV. 913 (1990); Harry T. Edwards, *A Lawyer's Duty to Serve the Public Good*, 65 N.Y.U. L. REV. 1148 (1990); Barry Sullivan, *Professions of Law*, 9 GEO. J. LEGAL ETHICS 1235 (1996); H. McNeil, *The Good Life?*, ARIZ. ATT'Y, Oct. 1994, at 16; Joel Reck, *Achieving Greater Professional Fulfillment*, BOST. B.J., Sept./Oct. 1996, at 2; Randall Samborn, *Anti-Lawyer Attitude Up*, NAT'L L.J., Aug. 9, 1993, at 1.

Has truth become a subordinate value in our judicial system? One way to consider this issue is to ask the broad question whether the system yields “truthful” results. Judge Rothwax attempted to answer that question by asserting, albeit without any support (as discussed in Part I), that large numbers of defendants are going free because reliable evidence of their guilt is being suppressed.

A second way to consider this issue is to ask the narrower question: even if the system yields truthful results, are there particular rules of the system or particular responsibilities of attorneys that are so at odds with “truth seeking” that they are unacceptable? Judge Rothwax considered this question in his discussion of the adversary system, the attorney-client privilege, and plea bargaining. Indeed, these three topics are central to any analysis of truth in the criminal justice system. I now turn to them.

A. *Adversary System*

As every law student knows, our litigative process is structured along adversarial lines. Each lawyer puts forth to a *passive*, neutral decisionmaker a version of the facts favorable to the client. The neutral decisionmaker—the judge and jury—is supposed to resolve these conflicting versions in a manner that yields something akin to the truth. Thus, at its most fundamental level, our system requires lawyers primarily to advance their clients’ interests with “zeal,”³⁵ not to seek the truth. Not surprisingly, attorneys reap rewards to the extent their clients win these battles.

Judge Rothwax is disgusted with the game-playing and distortions of truth that occur in the course of zealous representation. He makes this abundantly clear in his chapter titled “The Theater of the Absurd: Anything Goes in the Modern American Courtroom”:

The aspect of our criminal justice system that frustrates people the most is that it seems so rife with game playing. Too often, attorneys appear to be so involved with their own concerns that the issues of justice and fairness become secondary. Such behavior only encourages cynicism on the part of the public. And as an officer of the court, I have the unpleasant task of making sure that the games stay out of my courtroom. It’s not always in my power to succeed³⁶

35. See *supra* note 2.

36. ROTHWAX, *supra* note 5, at 121.

At a trial, we have two gladiators in the ring—the defense and the prosecution. The defense lawyer's only goal is to represent his client. His only interest is his client—not society, not the victim.³⁷

In a court of law, only the prosecution is assigned the task of seeking the truth. Since we know the truth is not the sole or even the primary objective, we give the side that's not seeking the truth ample opportunity to suppress the truth within the law.³⁸

Sadly, the culture that the defense lawyer inhabits today is one that says it's okay to push the envelope, to brush against the ethical barrier and occasionally slip over. The temptation to be overzealous can be very great. . . . [Defense lawyers are] constantly representing guilty people. That's how the envelope gets pushed. That's where the line gets crossed between pure zeal and the excessive zeal that is designed to confuse, cloud, or hide the truth.³⁹

[O]ur adversarial system in its attention to fairness has spawned excesses—most notably, an excessive tolerance of efforts by the contestants to distort the truth.

In 1980, Marvin Frankel, then a federal district judge, wrote in a short book, *Partisan Justice*, that the "search for truth" in the courtroom "fails too much of the time." Frankel maintained that "our adversary system rates truth too low among the values that institutions of justice are meant to serve."⁴⁰

The way our adversarial system presently works not only *diminishes* the possibility of truth, it *encourages* and fosters excess on the part of the lawyers vying for the upper hand. The goal has become victory, not truth. Our courtrooms have become casinos, with a professional culture of misconduct so pervasive and so profound that it is often unrecognizable as justice. Because we have ceased to see it clearly, we have also ceased to question it honestly and rigorously.⁴¹

37. *Id.* at 129.

38. *Id.* at 129-30.

39. *Id.* at 130.

40. *Id.* at 132.

41. *Id.* at 133.

Despite Rothwax's extreme unhappiness with the extent to which game-playing exceeds truth-seeking, he makes no suggestions for change, except to note that it will have to be structural in nature.⁴² His silence is surprising, because there has been so much thought dedicated to this issue, particularly since the O.J. Simpson criminal trial.⁴³ The types of changes under discussion range from the incremental to the drastic. Commentators have suggested the following incremental changes: (1) Having judges ask more questions of witnesses, (2) allowing jurors to ask questions in writing, (3) allowing only the judge to engage in voir dire of prospective jurors, (4) abolishing or drastically limiting peremptory challenges, and (5) allowing nonunanimous verdicts.⁴⁴ Those advocating more extreme change have encouraged the adoption of the nonadversarial criminal justice systems used in most western European countries. The trials in those systems are dominated by the judges, not the attorneys:

The Continental court usually consists of a single professional judge in minor cases and a mixed bench, usually one professional and two lay judges or, in more serious cases, three professional and two to nine lay judges. The court, comprised of the professional judges and lay assessors, decides questions of guilt and punishment in one proceeding. The dossier [i.e., a comprehensive case file, which includes witness interviews, analyses of physical evidence, etc., compiled by a prosecutor or magistrate] resides with the presiding judge during the trial. The prosecutor and the defense attorney will have reviewed the dossier, but it will not be available to the lay judges.

....

[T]he presiding judge calls witnesses and questions them. . . . Each witness presents a narrative account and then responds to questions asked by the presiding judge and by counsel. Questioning is informal, with few, if any, objections by counsel and with the opportunity for lengthy explanations and narrative responses.⁴⁵

....

42. The closest Rothwax comes to suggesting a change is to ask wistfully: "[C]an we conceive—and *should* we conceive—of a system in which defense attorneys would be more willing to view themselves as part of a system of law, and less willing to see themselves as the alter ego of their client?" *Id.* at 139-40.

43. See, e.g., Philip Carrizosa, *State Debates New Rules for Jury Verdicts*, L.A. DAILY J., Mar. 6, 1996, at 1 (part 3 of *On Trial: Reforming the Criminal Process*); Philip Hager, *Criminal Trial System Is Seen as Losing Its Bearings*, L.A. DAILY J., Mar. 4, 1996, at 1 (part 1 of *On Trial: Reforming the Criminal Process*); Mike Lewis, *Outlook for Reform Uncertain as Legislators Weigh Options*, L.A. DAILY J., Mar. 7, 1996, at 1 (part 4 of *On Trial: Reforming the Criminal Process*); Laura Mansnerus, *Truth in the Simpson Trials: The Devil Is in the Details*, N.Y. TIMES, Jan. 12, 1997, at 4-1; Charley Roberts, *In Wake of Simpson, Some Experts Call for Bigger Role by Judges in the Proceedings*, L.A. DAILY J., Mar. 5, 1996, at 1 (part 2 of *On Trial: Reforming the Criminal Process*).

44. Hager, *supra* note 43, at 9.

45. Gordon Van Kessel, *Adversary Excesses in the American Criminal Trial*, 67 NOTRE DAME L. REV. 403, 422-24 (1992) (citations omitted).

Since the court has independent responsibility for the accuracy and justness of its decision, the court, rather than the parties, determines the sequence of proof and may call witnesses on its own. However, the court must examine all witnesses nominated by the parties unless their testimony would be inadmissible in evidence.⁴⁶

In sum, there is an active and complex debate among those in the legal profession about the numerous potential changes to our adversarial system. Judge Rothwax's silence in this debate is surprising. Nevertheless, his complaints about attorneys' distortions of the truth ring true, and will give further momentum to those working to inject more truth-seeking into the adversarial process.

B. Attorney-Client Privilege

Any discussion of truth and the criminal justice system leads to the attorney-client privilege. Yet Rothwax pays it little attention.

The privilege, it appears, creates an intractable dilemma: once defense counsel has learned the client's view of the truth through privileged discussions, can counsel properly put on a defense that he knows to be inconsistent with his client's view (e.g., by impeaching adverse witnesses who have testified truthfully, and eliciting testimony inconsistent with the truth)?

At first blush, it seems obvious that defense counsel should not knowingly present an untruthful defense. The attorney-client privilege, however, seeks to encourage a client's full and candid disclosure to counsel by prohibiting counsel from revealing that disclosure (voluntarily or under compulsion). Shouldn't the privilege therefore, consistent with its goal of full disclosure and its promise of confidentiality, prevent the client from being prejudiced by his disclosure? At minimum, doesn't the privilege promise that the client will not be *harmed* by his full disclosure to counsel? And if that is the case, must not counsel put on the best defense regardless of its conflict with the client's disclosure?

The answers to these questions are best derived from a client's perspective. An attorney who asks the client for full disclosure should advise that anything the client says will not be disclosed. If the attorney adds that he will not advance any defense inconsistent with the client's view of the truth, regardless of how much the client will benefit from that untruthful defense, the client will be much less likely to make full and honest disclosure, or any disclosure at all. Such a result, however, would undermine the rationale for the privilege.

46. *Id.* at 423 n.78 (citations omitted).

Rothwax acknowledges these conclusions. He initially observes that in 1966 Professor Monroe Freedman concluded in his *The Three Hardest Questions*⁴⁷ (of a criminal defense lawyer) that a defense attorney can properly disregard his knowledge of the truth and impeach an honest witness, elicit false testimony, and give legal advice that will tempt a client to commit perjury.⁴⁸ The judge ruefully notes that the answers advanced by Professor Freedman “are, unfortunately, everyday practices of the criminal defense lawyer.”⁴⁹ Rothwax concludes by noting that “because [these practices] grow out of the confidentiality of the attorney-client privilege, they never reach visibility within the system.”⁵⁰

While Judge Rothwax is surely correct that this lack of truth-seeking is cloaked by the attorney-client privilege, it does not arise from the privilege. Eliminating the attorney-client privilege would not end the presentation of false defenses; instead, it would reduce both the number of clients who make full and candid disclosures and the number of attorneys who asked for such disclosures. Abrogating the privilege would thus increase the number of attorneys who deliberately fail to learn their clients’ full and candid views of the truth. These attorneys would ignorantly, rather than knowingly, present false defenses. Under either regime, the adversary system would be no better off.

This brings us back to the adversary system. The problem of truth cannot be addressed by modifying privileges and ethical rules. The problem, and the solution, are to be found in the operation of the adversary system.⁵¹

C. *Plea-Bargaining*

For all Rothwax’s discussion about the distortions in adversarial proceedings, it is plea-bargaining that dominates the criminal justice system. The vast majority of all criminal cases are resolved through the plea-bargain process.⁵² That process has been the subject of much criticism,⁵³ the major concern being whether a plea to avoid

47. Monroe Freedman, *Professional Responsibility of the Criminal Defense Lawyer: The Three Hardest Questions*, 64 MICH. L. REV. 1469 (1966).

48. ROTHWAX, *supra* note 5, at 140.

49. *Id.* at 141.

50. *Id.*

51. *See supra* notes 44-46 and accompanying text.

52. In 1995, 92% of all convicted federal defendants pleaded guilty, and 78% of all charged federal defendants pleaded guilty. KATHLEEN MAGUIRE & ANN L. PASTORE, U.S. DEP’T OF JUSTICE, SOURCEBOOK OF CRIMINAL JUSTICE STATISTICS—1995, 476 tbl.5.27 (1996). In 1992, 92% of all state defendants who were convicted for committing the most serious offenses pleaded guilty. *Id.* at 498 tbl.5.47.

53. *See, e.g.*, Robert E. Scott & William J. Stuntz, *Plea Bargaining as Contract*, 101 YALE L.J. 1909, 1968 n.4 (1992).

a harsh prison term is a coerced plea.⁵⁴ Rothwax's summary response—that (1) plea-bargaining is a necessary evil in view of the complexity and volume of criminal cases, and (2) defendants plea-bargain not as a result of coercion, but to obtain the benefit of a better sentence⁵⁵—is not very satisfactory. What is significant is that Rothwax never evaluates plea-bargaining from a truth-seeking perspective—his book's *raison d'être*.

One standard by which to determine whether plea-bargains reflect the truth is to compare the plea-bargaining process to our constitutionally-enshrined trial procedures: Do plea-bargains approximate the truth to the same extent as trials?⁵⁶ At trial, proof of guilt is provided by the prosecution's evidence, tested by cross-examination, and assessed by a jury under a reasonable doubt standard. The trial, moreover, is open to public scrutiny (with the exception of jury deliberations), which helps maintain conformity to procedure.

The plea-bargaining process is very different. In a typical plea-bargain, a defendant pleads guilty in exchange for a sentence that is lower than the sentence that would be imposed if the defendant went to trial and were convicted. The offer and acceptance process, moreover, are conducted in secrecy. The primary basis of truth-determination in this process is the defendant's admission of guilt when entering the guilty plea in court. It is assumed that a defendant would rarely admit guilt, with all that is entailed—restriction of freedom, a criminal record—unless he committed the crime. Indeed, many federal judges require defendants to state that they are pleading guilty because they are guilty.

As the Supreme Court has recognized,⁵⁷ however, defendants sometimes accept a plea bargain, despite their assertions of innocence, because they believe that the risk of conviction is unacceptably high. The defendant's evaluation of the inducement to plead guilty is therefore critical to understanding a defendant's admission of guilt.

The evaluation begins with defense counsel, who determines both the probability of conviction if the defendant goes to trial and the sentence that will likely follow if there is a conviction. Then the defendant weighs the bargain—the certainty of a reduced sentence—against the risk of conviction by trial and the greater sentence.

54. See, e.g., Stephen J. Schulhofer, *Plea Bargaining as Disaster*, 101 YALE L.J. 1979, 1981 (1992).

55. ROTHWAX, *supra* note 5, at 144, 150, 157-58, 166.

56. Most plea-bargaining studies focus in part on whether innocent defendants are pleading guilty. While that question reflects the ultimate concern with plea-bargaining, those studies ultimately fail because there is no data on who is really guilty or really innocent. The approach used below above avoids this pitfall to some degree.

57. See *North Carolina v. Alford*, 400 U.S. 25, 31-32 (1970) (holding that a defendant can plead guilty even if he maintains his innocence, so long as the plea is the product of an intelligent and knowing waiver of his right to a jury trial).

If defense counsel correctly concludes that there is a substantial likelihood of trial conviction, then a resulting guilty plea would approximate the truth to the same extent as a conviction by trial. A defendant could decide to plead guilty, however, on counsel's *erroneous* recommendation that a trial conviction was very likely. In that case, the guilty plea would not approach the truth as determined by trial standards, for the trial would likely end in acquittal. A defendant could also decide to plead guilty, despite counsel's correct assessment that trial conviction would be unlikely, because of extreme risk averseness; again, such a plea would not represent truth from the perspective of trial procedures. It therefore appears that a defendant's guilty plea—by itself—cannot assure us, to the same degree as a trial verdict, that the defendant is guilty.

If the trial court could examine defense counsel's assessment of litigation risk, the court could perhaps determine whether the guilty plea met the standards for truth established by trial procedures. But such assessments are protected from judicial scrutiny by the attorney-client privilege. Moreover, the court, given its passive role in the adversarial system, would have little basis to evaluate counsel's risk assessment. For example, the court could not competently determine if there are witnesses who could establish an alibi defense.

What the court does is "mak[e] such inquiry as shall satisfy it that there is a factual basis for the plea."⁵⁸ In practice, this means that the prosecutor provides a brief summary of the evidence that bears on the elements of the pertinent crimes. Questions from the bench about the summary are necessarily a rarity given a court's lack of independent knowledge and cross-examination by defense counsel is of course virtually nonexistent since defense counsel wants the court to accept the plea bargain.

There is another factor that possibly justifies the criminal justice system's confidence in, and reliance on, plea bargains. There is a general belief among most judges, many defense attorneys, and much of the public that a charged defendant is a guilty defendant. This belief is not based on knowledge of prosecutors' particular charging decisions: those decisions are rarely reviewable,⁵⁹ and the adequacy of evidence presented to a federal grand jury is never reviewable.⁶⁰ Instead, this belief is based on familiarity with this nation's prosecutors: they are highly profes-

58. FED. R. CRIM. P. 11(f).

59. Charging decisions are reviewable only when there are founded allegations of selective or vindictive prosecution. *See, e.g.,* *Wayte v. United States*, 470 U.S. 598, 607-08 (1985); *Blackledge v. Perry*, 417 U.S. 21, 28-29 (1974).

60. *See, e.g.,* *United States v. Williams*, 504 U.S. 36, 50-51 (1992).

sionalized, governed by strict standards of conduct, and loathe to bring cases they cannot win. It is this belief in the good faith, competence, and diligence of prosecutors that provides the basis for believing that guilty pleas resulting from plea bargains approximate the truth.

Another view of plea bargain is that urged by the leading academic critics of the process. These iconoclasts call for the abolition of plea-bargains, arguing that the additional resources needed to prosecute all defendants by trial would not be exorbitant.⁶¹ Other academic critics contend pretrial and trial procedures are so complex and time-consuming, that the prosecution and judiciary feel compelled to press defendants for guilty pleas. Simplification of criminal procedure, they hypothesize, will reduce the pressure for guilty pleas and result in more trials.⁶²

Given Judge Rothwax's willingness to cast aside existing Fourth Amendment and *Miranda* jurisprudence, it is surprising that he accepts the short-term necessity of plea-bargaining as a bar to discussion of its truth value.

III. CONCLUSION

Judge Rothwax's fundamental criticism of the criminal justice system—that it unduly disregards the truth—reflects the general dissatisfaction with our criminal justice system, legal system, and public institutions. That dissatisfaction has occurred, I would suggest, because television and the print medium have brought these once-distant institutions into microscopic public view. The personal lives of our public figures are now fair game for national viewing, and the media offers up endless chatter about them.

If the public believes that its institutions are run by egoistic, self-interested individuals, it will be hard-pressed to believe that those institutions, by their design, can and do govern on the basis of truth and wisdom. To the extent that cynicism is a deep feature of our national landscape, public institutions may need some modification to give more emphasis to their truth-seeking capabilities. Our adversary system is particularly subject to this problem because truth is sought indirectly through the clash of self-interested claimants.

Judge Rothwax's book has captured the public's imagination by providing a superficial thesis to rationalize the public's dissatisfaction with the criminal justice system. It is a shame that Judge Rothwax fails to exploit his opportunity to educate the public more fundamentally about the adversary system's role in the truth-determination process.

61. See, e.g., Albert W. Alschuler, *Implementing the Criminal Defendant's Right to Trial: Alternatives to the Plea Bargaining System*, 50 U. CHI. L. REV. 931, 969-72 (1983).

62. See, e.g., *id.* at 931; John H. Langbein, *Torture and Plea Bargaining*, 46 U. CHI. L. REV. 3, 14-19 (1978); Schulhofer, *supra* note 54, at 2004-05 (describing that less than 20% increase in total judicial resources would be needed).