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In the excerpt from his book Guilty: The Collapse of the Criminal Justice System (1996) published in the Atlanta Journal/Constitution, Judge Harold J. Rothwax, using the O. J. Simpson trial as his focal point, argues that the criminal justice system is too lenient on criminals. He also takes the hardline approach so popular in many circles today and proposes that we curtail the rights of defendants and give more power to police and prosecutors. Rothwax could not be more wrong.

Throughout the centuries there have been judges like Harold J. Rothwax. They are supposed to preside fairly over criminal proceedings, but in fact exceed the police in their zeal to track down suspects, and surpass prosecutors in their desire to obtain at all costs the conviction of defendants they believe guilty. In the 13th century there was Conrad of Marburg, a German judge who waged a fanatical war against heretics. In the 17th century there was George Jeffreys, who presided over the Bloody Assizes in Western England. Here in the United States in the 19th century there was Isaac Parker, a judge of a court in Indian territory who is notorious for his unwavering determination to help prosecutors get a conviction in trials in his court.

Like other judges who are pro-prosecution, Rothwax pays only lip service to fairness for accused persons. Notice, for example, how in the book excerpt he underprizes the due process rights embodied in our Bill of Rights designed to protect persons charged with crime from oppression. He contemptuously refers to O. J. Simpson as a defendant "with seemingly bottomless resources"--as if it is somehow wrong to succeed financially. He cynically describes the right of a wealthy person such as O. J. who has been charged with crime to use his resources to provide himself with the best possible legal defense as the "right to purchase the best defense he can afford(!)." He agrees that we should "hold prosecutors to the highest standards of proof," but then castigates the O. J. jury for doing just that.

Rothwax's pro-law enforcement bias is also reflected in the targets he attacks. The defense counsel, he implies, "ignored ethics and decency in the process." The jury that acquitted O. J. is accused of stupidity and of deliberately choosing "not to deliberate." And O. J. is lambasted for not testifying at the trial and for speaking out after the trial.

Nowhere does Rothwax express concern about the most dangerous form of lawlessness of all--lawless law enforcement. He says nothing about the clear evidence of racism, corruption, ineptness, and perjury in the LAPD. He thinks it "mere speculation" that Detective Mark Fuhrman, the racist, lying cop, planted the bloody glove. He finds the police decision to enter a person's home at dead of night without a search warrant nothing to be concerned about. He is not alarmed by the ridiculous and obviously false reasons the police gave for making the entry. He omits talking about the blunders, misdeeds, and excesses of the Marcia Clark and her assistants; as far as he is concerned, Clark acted properly in browbeating witnesses, in insulting defense counsel, and in trotting out and fawning over Fuhrman (until he was exposed).

Rothwax assesses the evidence from the point of view of someone who paid careful attention
during the prosecution's presentation of evidence but then stopped watching when the defense put on its case. He ignores the fact that the defense furnished substantial, credible evidence of perjury and other suspicious or irregular activities by police; racism in the LAPD; planted evidence; incompetent criminalists; contamination in the crime lab; and bungling in the gathering, storage, and testing of evidence by police. No wonder he can't understand the jury's verdict.

Rothwax's attitudes about the O. J. trial amount to sour grapes. He thinks the jury was wrong and O. J. was guilty; and so he is determined to excoriate the defense and the jury, no matter how unfairly.

Rothwax blasts the jury for deliberating a short time; but if the jury had convicted after short deliberations, he would have praised it. He blasts jurors because after the trial they gave interviews and signed book contracts, even accusing them of "postur(ing)" in front of the cameras. But he would have had no problem with this if there had been a conviction. Rothwax (after previously criticizing wealthy persons for using their wealth to defend themselves) criticizes the jurors for not being wealthy—the jurors, he says, were "undereducated" and "disengaged from community life," "remarkably poor evaluators of the facts," and not "average." Would he have said these things if the jury had convicted? Wouldn't he have labeled the critics of the jury elitists?

Rothwax even criticizes the defense for asking for a speedy trial! Of course, if the defense had sought or obtained a postponement, Rothwax would have criticized it for delaying justice and engaging in dilatory tactics.

Rothwax doesn't seem to realize that defense counsel, acting properly and within legal limits, proved there was reasonable doubt about O. J.'s guilt. One detective had taken the stand, looked the jury in the eye, and flat out lied; and the fact that he had lied was proven by tapes of his own voice. (Later in the trial this same policeman pleaded the 5th amendment when asked if he had lied or planted evidence.) The defense produced an FBI agent and persons in the government's witness protection program to show that another police detective also had not told the truth. The defense proved some of O. J.'s blood on the gate at the victim's residence had been planted; the defense proved to the satisfaction of most people that Fuhrman almost certainly planted the bloody glove at O. J.'s residence. The defense also proved, under the principle "garbage in, garbage out" that the blood and DNA evidence could not be trusted because of errors in the way it was gathered, transported, and stored. Furthermore, there was no direct evidence that O. J. committed the crime.

What then was the jury supposed to do in a system in which proof beyond a reasonable doubt is required and (in Rothwax's own words) where prosecutors are to be "held to the highest standards of proof"? When lead detectives have been shown to be liars, how are the jurors to know which, if any, other police have also testified untruthfully? If some of the evidence has been tampered with, how can the jury be confident that the other evidence of guilt is reliable? If the prosecutors have vouched for a witness who turns out to be a perjurer, how much trust can they place in the prosecutors? Rothwax naively thinks that because it was "virtually impossible" for all the incriminating evidence to have been planted, the jury should have somehow separated
the reliable evidence from the unreliable evidence. Rothwax completely fails to grasp the corrupting influence of proven police and prosecutorial misconduct. He cannot see that the source of the problem is not the jury, which engaged in no misconduct, but the police and prosecutors, who did.

Rothwax proposes changes in the court system, but many of his proposals have nothing to do with the O. J. trial. He asks for nonunanimous jury verdicts to make it easier to convict, even though the O. J. jury was unanimous. He seeks abolition of the Miranda decision even though O. J. voluntarily went to the police station and answered questions put to him by police.

To sumarilly answer some of the other issues discussed by Rothwax:

1. The reason why we don't permit a judge to tell the jury that they may infer guilt from a defendant's failure to take the stand is that it is unconstitutional. The 5th amendment guarantees the right not to be forced to testify; and as the Supreme Court held over 30 years ago, to tell the jury to infer guilt from the exercise of the right amounts to punishing a citizen for exercising a constitutional right.

2. The reason why Miranda should not be abandoned is that it is a necessary reaction to past and present abuses in police interrogation of suspects in their custody. Videotaping of interrogations is desirable, but it does not eliminate the need for Miranda, which only guarantees the right to suspects in custody to have an attorney present if they want. Rothwax omits revealing that police themselves have been the principal opponents of videotaping interrogation sessions.

3. Although Rothwax proposes that the right to an attorney should extend to pretrial and trial phases of a criminal prosecution but not to the investigative phase, he neglects to discuss the complications and difficulties this would cause, or the enormous advantages it would give to police or prosecutors, who could manipulate or delay the filing of formal charges in order to prevent a suspect from having counsel. And why in the United States of America, regardless of whether formal charges have been lodged, should a person arrested by the police, held in custody at a stationhouse, and subjected to incommunicado interrogation techniques, not be entitled to have an attorney present to protect his rights?

4. It is not true that in recent years an increasing number of major criminal convictions have been reversed on "technical" or "irrational" grounds. If there have been such cases, Rothwax should mention at least one. The fact is that for the last 25 years Republican presidents have been stacking the Supreme Court with conservatives whose views are more akin to Rothwax's than mine. William Rehnquist is Chief Justice; 7 of the 9 members of the Court are Republican appointments; and two-thirds of the lower federal courts were appointed by Republicans. Is Rothwax claiming that right-wing judges appointed by Republican presidents are too liberal?

5. It was not Johnny Cochran who played the race card. The race card was first played by the LA DA's office when it named Christopher Darden to the prosecution team. The police played the race card even earlier--when they hired, retained, and promoted that ugly racist Fuhrman.

6. The reason why evidence seized in violation of the 4th amendment is inadmissible in court is
simple. As the Supreme Court said back in 1914, if police can violate the amendment in order to obtain evidence and then use that evidence in court, then the amendment "is of no value" and "might as well stricken from the Constitution."

7. The search for truth in a criminal case is not a no-holds barred search. It is a search for legal truth, not extorted truth. To protect citizens from heavyhanded government, the Bill of Rights imposes limits on the search for truth. In investigating crime police may not, for example, conduct unreasonable searches and seizures. Nor may they compel suspects to incriminate themselves. To exclude evidence obtained unconstitutionally means only that police are not allowed to use evidence they were forbidden to obtain in the first place. It means only that police search and seizure and interrogation practices, and other investigative techniques, must comply with the Constitution. As long there was such compliance, the evidence is admissible. If Rothwax's view of the search for truth were valid, then true confessions of guilt obtained by torture or brutality would be admissible under the guise of satisfying the search for truth. One can picture the scene in Rothwax's court if his sinister view of the search for truth were the law. Suppose the issue was the admissibility of a confession. The defendant would say (truthfully): "Your honor, I confessed only because the police punctured my kneecaps with an electric drill to make me confess." And Judge Rothwax would say: "All that is highly regrettable. But is what you said true? Because if it is, I will admit it."

If Rothwax's views are adopted, trial transcripts in this country will, in the words of a Mississippi judge of less benighted outlook, come to more resemble "pages torn from some medieval account, than a record made within the confines of a modern civilization which aspires to an enlightened constitutional government."