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COMMENTARY

THE PRINCE OF DARKNESS AND THE SHORTNESS OF MEMORY: HAROLD ROTHWAX'S *GUILTY: THE COLLAPSE OF CRIMINAL JUSTICE*^{*}

William E. Hellerstein[†]

Harold Rothwax's *Guilty: The Collapse of Criminal Justice* is a provocative but dangerous book. Written for general consumption and promoted via a plethora of book signings and talk show appearances, *Guilty* gives but one side of the argument to important questions about the American criminal justice system. It thereby skews the lay reader's perspective by failing to provide a balance of perspectives. Although Judge Rothwax raises serious questions about the relationship between truth-seeking and the adversary system¹ and makes several sensible recommendations, his unbalanced presentation and his attacks on illusory malefactors do a considerable disservice to the reader. To Judge Rothwax, whose cynicism and irascibility on the bench have earned him the title "Prince of Darkness,"² Supreme Court justices, whose decisions have protected defendants' rights, and defense attorneys, who insist on representing their clients effectively, are villains. Singled

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¹ In an eloquent and significant 1974 Cardozo lecture at the Association of the Bar of the City of New York, then U.S. District Judge Marvin E. Frankel raised troublesome issues concerning whether the adversary system undervalues the search for truth. Marvin E. Frankel, *The Search for Truth—An Umpirical View*, 30 RECORD OF THE ASS'N OF THE BAR OF THE CITY OF NEW YORK 14 (1975). The views there expressed were more extensively developed in a well-received book. MARVIN E. FRANKEL, *PARTISAN JUSTICE* (1980).

² See Jan Hoffman, *The Transformation of a Judge*, N.Y. TIMES, Feb. 4, 1996, at 35.

out for special opprobrium are the judges of the New York Court of Appeals who have more than occasionally found in the New York State Constitution broader protections for criminal defendants than are secured by the federal Constitution.³ "As I sometimes tell my law students," states Judge Rothwax, "the Court of Appeals is in session, we are all in danger."⁴ Unfortunately, the book arrived in the midst of the most frenzied attack on judicial independence in recent memory and fueled its fire.⁵

Judge Rothwax attacks the exclusionary rule (made applicable to the states by *Mapp v. Ohio*⁶), *Miranda v. Arizona*,⁷ the sixth amendment right to counsel (as construed in *Massiah v. United States*⁸ and *Brewer v. Williams*⁹), and the Fifth Amendment's privilege against self-incrimination (as interpreted in *Griffin v. California*¹⁰ to preclude the prosecution from commenting on the defendant's choice not to testify at trial). Judge Rothwax's line of fire also includes speedy trial statutes, pretrial discovery rules which he believes unduly favor the defense, peremptory challenges, unanimous verdicts and appellate reversals of convictions for "technical" reasons, which he sees as unrelated to "core values." In short, Judge Rothwax views the American criminal justice system as one that allows the citizen, "aided and abetted by the Constitution," to unduly thwart the prosecution's quest for the truth.¹¹

³ See Peter J. Galie, *State Constitutional Guarantees and Protection of Defendants' Rights: The Case of New York 1960-1978*, 28 BUFF. L. REV. 157 (1979); Daniel C. Kramer & Robert Riga, *The New York Court of Appeals and the United States Supreme Court, 1960-76*, 8 PUBLIUS 75 (1978). For an extensive critical analysis of the Court of Appeals' search and seizure decisions under the New York State Constitution, see Robert M. Pitler, *Independent State Search and Seizure Constitutionalism: The New York State Court of Appeals' Quest for Principled Decisionmaking*, 62 BROOK. L. REV. 1 (1996).

⁴ HAROLD J. ROTHWAX, GUILTY: THE COLLAPSE OF CRIMINAL JUSTICE 31 (1996) [hereinafter GUILTY].

⁵ See, e.g., Mark Green, *When Politicians Judge the Judges*, N.Y. L.J., May 6, 1996, at 2; Anthony Lewis, *Where Would You Hide?*, N.Y. TIMES, Apr. 8, 1996, at A15; Don Van Natta, Jr., *Doubting Harolds: Looking Inside a Judge's Mind*, N.Y. TIMES, Apr. 7, 1996, at 3.

⁶ 367 U.S. 643 (1961).

⁷ 384 U.S. 436 (1966).

⁸ 377 U.S. 201 (1964).

⁹ 430 U.S. 387 (1977).

¹⁰ 380 U.S. 609 (1965).

¹¹ GUILTY, *supra* note 4, at 132.

Judge Rothwax has aimed much of his argument at false targets. Even if his analysis of some key cases is correct,¹² the cases themselves are not perceived by a significant segment of the law enforcement establishment as serious impediments to the functioning of the criminal justice system. Although the system has serious deficiencies, cases such as *Mapp*, *Miranda*, *Massiah*, *Brewer* and *Griffin* are not viruses that plague it. Judge Rothwax may be in the right church, but he is in the wrong pew.

What ails the criminal justice system are its inexorable volume and the persistent lack of resolve in the body politic to allot adequate resources to cope with it. Judge Rothwax understands this, as his defense of plea bargaining attests.¹³ Nonetheless, he looks elsewhere for those factors which, in his estimation, have brought the criminal justice system into disrepute. He finds them primarily in the Bill of Rights—especially as construed by the Warren Court—the adversary system, and the defense bar in particular. Thus, he would scuttle many of the protections we have been given, reduce the role of defense counsel who represent “guilty” defendants to that of the proverbial potted plant, and have the American people look to England and Europe because, in his estimation, they outshine us in the search for truth.¹⁴

Judge Rothwax acknowledges that he has been influenced heavily by certain academic writers, such as Professors Joseph D. Grano, Craig M. Bradley and Gerald M. Caplan, who are among the staunchest critics of the Warren Court’s criminal law rulings. He makes no effort, however, to present the views of respected scholars who are equally articulate in their defense of the Warren Court, foremost of whom is Yale Kamisar, who the Supreme Court has cited and quoted more frequently

¹² But see *infra* note 18.

¹³ GUILTY, *supra* note 4, at 143-66.

¹⁴ GUILTY, *supra* note 4, at 235.

than any other scholar in the field.¹⁵ A more balanced use of scholarly legal sources would have served both the author and the public better.

Judge Rothwax's grievances against the exclusionary rule for illegal searches and seizures are that its benefits "in protecting the privacy of the citizen are greatly outweighed by its burden on the truth-seeking process and [outweighed] by reduced crime control,"¹⁶ that "the legal doctrines the rule enforces are so complicated and tangled that the police (and even judges themselves) cannot determine in advance what a majority of the Supreme Court will find,"¹⁷ and that the rule is "mandatory."¹⁸

¹⁵ *Faculty Notes*, 39 U. MICH. L. QUADRANGLE NOTES 1, 10 (1966). All that Judge Rothwax tells us about Professor Kamisar is that "he wrote a piece some years ago in which he said he found it incomprehensible that the Constitution could require so much protection for the defendant in the 'mansion' of the courtroom and so little in the 'gatehouse' of the police station." *GUILTY*, *supra* note 4, at 80.

¹⁶ *GUILTY*, *supra* note 4, at 62.

¹⁷ *GUILTY*, *supra* note 4, at 64.

¹⁸ *GUILTY*, *supra* note 4, at 64. Judge Rothwax begins his attack with the accusation that *Mapp* was an "impulsive" decision because Mapp's own attorney did not even raise the issue of whether *Wolf v. Colorado*, 338 U.S. 25 (1949), should be overruled. Next, he singles out, as a decision which "makes [him] ashamed," *Coolidge v. New Hampshire*, 403 U.S. 443 (1971), which held that a search warrant issued by the State Attorney General pursuant to a state statute was unlawful. *GUILTY*, *supra* note 4, at 39.

That the Court reached out in *Mapp* to decide the issue is of little interest. Given the number of cases that involve illegal searches and seizures, it was only a question of time before the Court decided that the exclusionary rule should apply to the states. In fact, in *Mapp*, Justice Clark noted specifically that term after term since *Wolf*, the Court had been asked repeatedly to overrule *Wolf*. 367 U.S. 643, 654 (1961). He also thought it significant that after *Wolf*, more states had adopted an exclusionary rule than had rejected it. *Id.* at 651. What Judge Rothwax does not address is the fervor with which many years earlier a conservative Justice Day embraced the exclusionary rule in *Weeks v. United States*, 232 U.S. 383 (1914).

As to *Coolidge*, Judge Rothwax erroneously assesses the case as one in which the defendant goes free because "the constable blundered." The constable did not blunder; the New Hampshire legislature did by authorizing the Attorney General, the state's chief law enforcement officer, rather than an impartial magistrate, to issue search warrants. As the *Coolidge* majority pointed out, the Fourth Amendment contemplates the interposition of a neutral and detached magistrate in the assessment of probable cause. 403 U.S. 443, 449 (1971) (citing *Johnson v. United States*, 333 U.S. 10, 13-14 (1948)).

Of course, these criticisms are not new. The exclusionary rule's efficacy in protecting privacy has been long debated, and deterrence-principle scholarship is extensive.¹⁹ Unquestionably, Judge Rothwax has cast his lot with those who believe that the rule does not deter and that it is not cost-effective, as if that were its only value. However, he does not afford the reader the slightest glimpse of the substantial literature which disputes those claims. Most importantly, he also has apparently forgotten the course of events that led the Court to decide *Mapp* as it did. And if he has not forgotten, he mistakenly perceives that if the exclusionary rule were abolished, there would be no significant increase of illegal searches and seizures by the police.

In any discussion of the exclusionary rule, it is important to remember that it is the Fourth Amendment itself and not the exclusionary rule that cabins police conduct. Indeed, if the police abided by the amendment's proscriptions, the exclusionary rule would be superfluous. The issue thus narrows to whether exclusion is an appropriate remedy to secure the amendment's protections. Judge Rothwax concedes that to protect fourth amendment rights, there is a need for effective remedies. However, he concludes that "the hope that the exclusionary rule would be that 'effective remedy' has never been realized."²⁰ This misses the point; the issue is not whether the exclusionary rule provides a perfect or near perfect deterrent, but whether it is the best of the remedial lot. It is.

The *Mapp* plurality itself recognized that no other remedy was efficacious; police departments did not discipline their transgressing members and tort remedies were fanciful.²¹ Nor

¹⁹ See RONALD J. ALLEN ET AL., CONSTITUTIONAL CRIMINAL PROCEDURE 902 n.101 (3d ed. 1995).

²⁰ GUILTY, *supra* note 4, at 49-50.

²¹ Six years earlier the California Supreme Court in *People v. Cahan*, 282 P.2d 905 (Cal. 1955), adopted the exclusionary rule because it too believed that no effective alternative existed and that it was unlikely that one ever would. See Roger J. Traynor, *Mapp v. Ohio at Large in the Fifty States*, 1962 DUKE L.J. 319, 324. The *Mapp* Court's assessment of the effectiveness of nonexclusionary remedies has proven accurate. A 1986 Justice Department report observed that since 1971 plaintiffs had filed approximately 12,000 *Bivens* actions. See *Bivens v. Six Unknown Named Agents*, 403 U.S. 388 (1971) (establishing direct cause of action under the Fourth Amendment). In only five cases had damages been paid to the plaintiffs. With respect to suits against state officials under 42 U.S.C. § 1983, there were "fewer than three dozen reported fourth amendment cases over the

can it be said that in the thirty-five years since *Mapp*, the exclusionary rule has not significantly affected police behavior.²² Apart from the deterrence principle, the Court's decisions have had an educative effect on the police.²³ On the other hand, elimination of the exclusionary rule would return police behavior to a level of permissiveness not seen since before *Mapp*. In a 1980 study, based on many interviews with police commanders from all levels and with students training to be police officers, Professor Milton A. Loewenthal of the John Jay College of Criminal Justice concluded that

[there is] strong evidence that, regardless of the effectiveness of direct sanctions, police officers could neither understand nor respect a Court which purported to impose constitutional standards on the police without excluding evidence obtained in violation of those standards.

Most police officers interpret the *Wolf* case as not having imposed any legal obligation on the police since, under that decision, the evidence would still be admissible no matter how it was obtained.

No matter what sanctions may be imposed in its stead, police officers are bound to view the elimination of the exclusionary rule as an indication that the fourth amendment is not a serious matter, if indeed it applies to them at all.

past 20 years." Office of Legal Policy, U.S. Dep't of Just., *Report to the Attorney General on the Search and Seizure Exclusionary Rule*, TRUTH IN CRIMINAL JUSTICE SERIES, REPORT NO. 2 (1986), reprinted in 22 U. MICH. J.L. REF. 573, 630 (1989). As to internal discipline, only seven investigations into fourth amendment violations by federal agents were conducted since 1981. *Id.*

²² Even the exclusionary rule's strongest skeptics have acknowledged that specific deterrence instances have occurred. See, e.g., J. DAVID HIRSCHER, *FOURTH AMENDMENT RIGHTS* 86-87 (1979) (Police responded more often than not that "exclusion of illegally seized evidence in court proceedings discourages police officers from making many kinds of searches they would otherwise make."); DALLIN H. OAKS, *Studying the Exclusionary Rule in Search and Seizure*, 37 U. CHI. L. REV. 665, 710 (1970) (describing police officers who care that evidence has been lost). For arguments and specifics as to general and "systemic" deterrence, see WILLIAM J. MERTENS & SILAS WASSERSTROM, *The Good Faith Exception to the Exclusionary Rule: Deregulating the Police and Derailing the Law*, 70 GEO. L.J. 365 (1981).

²³ See MERTENS & WASSERSTROM, *supra* note 22 (citing FRANKLIN E. ZIMRING & GORDON J. HAWKINS, *DETERRENCE: THE LEGAL THREAT IN CRIME CONTROL* 77-83 (1973)).

Since the rule has become functionally identified with the fourth amendment, the removal of the rule is likely to be interpreted as an implicit condoning of violations of the fourth and fourteenth amendments, no matter what substitute remedies may be applied.²⁴

Entwined with Judge Rothwax's skepticism about deterrence is his belief that "[p]olice officers do not have the time, inclination, or training to read and understand the nuances of appellate decisions that define standards of conduct."²⁵ This too is not an argument against the exclusionary rule. Rather, it is an argument against the substance of the Fourth Amendment itself. The complexity—if it is complexity—of search and seizure law results from the myriad factual permutations that arise from the multiplicity of police-citizen encounters. Responding to a similar assertion by Professor Grano, Professor Kamisar has pointed out that Grano

is confusing the content of the law of search and seizure with the remedy if that body of law is violated.

If the law of search and seizure is unrelated to the Fourth Amendment's essential role, the fault lies with the courts that have misinterpreted the fourth amendment, not with the exclusionary rule. If the law of search and seizure is too intricate or rigid, abolishing the exclusionary rule would not lift the restrictions or eliminate the intricacies. Only a change in the substantive law of search and seizure can do that.²⁶

Lastly, Judge Rothwax argues that if it is necessary to have an exclusionary rule, it should be a nonmandatory one.²⁷ However, to make the exclusionary rule nonmandatory would import the concept of proportionality into the law of search and seizure because it would measure the nature of the intrusion into an individual's privacy against the seriousness of the of-

²⁴ Milton A. Loewenthal, *Evaluating the Exclusionary Rule in Search and Seizure*, 49 UMKC L. REV. 24, 29-30 (1980) (quoted in Yale Kamisar, *Remembering the "Old World" of Criminal Procedure: A Reply to Professor Grano*, 23 MICH. J.L. REF. 537, 566-67 (1990)). Professor Daniel J. Meltzer suggests that one reason why so many academic commentators reject the deterrent theory is "that the Burger Court has relied upon the deterrent theory to justify cutbacks in the exclusionary rule that seem quite dubious, even when considered on their own 'deterrent' terms." Daniel J. Meltzer, *Detering Constitutional Violations by Law Enforcement Officials: Plaintiffs and Defendants as Private Attorneys General*, 88 COLUM. L. REV. 247, 272 (1988).

²⁵ GUILTY, *supra* note 4, at 63.

²⁶ Kamisar, *supra* note 24, at 557.

²⁷ GUILTY, *supra* note 4, at 64-65.

fense. But such a sliding scale approach not only would fail to protect a person's privacy because a breach of it is complete when the police have acted, it would afford the police no greater certainty as to what is permissible conduct under the Fourth Amendment. Functionally, a sliding scale would be little more than an expanded category of "exigent circumstances" that, as it currently exists, affords the police more than ample scope to deal with the need to investigate serious crimes quickly.²⁸

As we approach the twenty-first century, whether Judge Rothwax and his academic mentors are correct as to their view of the efficacy of the exclusionary rule is largely beside the point. Our nation has lived with it in the federal system for eighty-four years, and states that, prior to *Mapp*, had not established one of their own have now coped with it for thirty-five years. There is no conclusive evidence that the rule's operation significantly impedes crime control. Indeed, many studies have indicated that it does not.²⁹ Perhaps it is best to leave the subject with the late Professor John Kaplan's observation:

From a public relations perspective, it is the worst possible kind of rule because it only works at the behest of a person, usually someone who is clearly guilty, who is attempting to prevent the use against himself of evidence of his own crimes If there were some way to make the police obey, in advance, the commands of the

²⁸ See, e.g., *Mincey v. Arizona*, 437 U.S. 385, 394 (1978) (quoting *McDonald v. United States*, 335 U.S. 451, 456 (1948)); see also *United States v. MacDonald*, 916 F.2d 766, 777 (2d Cir. 1990) (Kearse, J., dissenting) ("After this decision there appears to be little left of the warrant requirement in narcotics cases."), *cert. denied*, 498 U.S. 1119 (1991).

²⁹ See, e.g., Thomas Y. Davies, *A Hard Look at What We Know (and Still Need to Learn) About the "Costs" of the Exclusionary Rule: The NIJ Study and Other Studies of "Lost" Arrests*, 1983 AM. B. FOUND. RES. J. 611. Davies observed that the "most striking feature of the data is the concentration of illegal searches in drug arrests (and possibly weapons possession arrests) and the extremely small effects in arrests for other offenses, including violent crimes." *Id.* at 680. Thus, he concluded that "available empirical evidence casts considerable doubt on both the alleged 'high costs' of the exclusionary rule and the purported prevalence of 'legal technicalities' as the cause of illegal searches." *Id.*; see Peter F. Nardulli, *The Societal Cost of the Exclusionary Rule: An Empirical Assessment*, 1983 AM. B. FOUND. RES. J. 585. Nardulli reported that an empirical study of almost 7500 cases of criminal courts in nine counties in Illinois, Michigan and Pennsylvania disclosed that "none of the motions [to suppress evidence] granted in offenses against persons involved exceptionally serious cases such as murder, rape, armed robbery, or even unarmed robbery. The motions granted were in indecent exposure, simple battery, and aggravated assault cases." *Id.* at 596 n.47.

Fourth Amendment, we would lose at least as many criminal convictions as we do today, but in that case we would not know of the evidence which the police could discover only through a violation of the Fourth Amendment. It is possible that the real problem with the exclusionary rule is that it flaunts before us the price we pay for the Fourth Amendment.³⁰

In calling for the overruling of *Miranda*, Judge Rothwax alludes only to the writings of the anti-*Miranda* academicians, Professors Grano,³¹ Caplan³² and Bradley.³³ As a result, his discussion of *Miranda* is as one-sided as his discussion of the exclusionary rule. He argues that *Miranda* "is not a wise or necessary decision—nor a harmless one," and that it "has sent our jurisprudence on a hazardous detour."³⁴ He asserts further that *Miranda* "manifests the *least* regard for truth-seeking"; that it "was decided at a time when effective alternatives for restraining unlawful police conduct were ripe for implementation but were subsequently never pursued"; and that "*Miranda's* rigidity has led to judicial chaos."³⁵ He assures us that "[t]here is no reason to fear that overruling *Miranda* will return us to the Dark Ages of police abuse. As long as we are firm in our judicial commitment to freedom and the protection of citizen's rights, we will achieve results that are honest and fair."³⁶

Some of us are not quite as sanguine. Judge Rothwax either has forgotten, or he no longer considers it important, to recall why the Court decided *Miranda* when it did. *Miranda* was nothing if not the logical culmination of the Court's long and constant exposure to coercive police behavior in custodial settings. Much of this behavior was visited upon racial and ethnic minorities, especially in the South.³⁷ It is impossible, therefore, to separate the Warren Court's criminal procedure revolution, of which *Miranda* was the lodestar, from the broad-

³⁰ JOHN KAPLAN, CRIMINAL JUSTICE 215-16 (2d ed. 1978).

³¹ See, e.g., JOSEPH D. GRANO, CONFESSIONS, TRUTH AND THE LAW (1993).

³² Gerald M. Kaplan, *Questioning Miranda*, 38 VAND. L. REV. 1417 (1985).

³³ CRAIG M. BRADLEY, THE FAILURE OF THE CRIMINAL PROCEDURE REVOLUTION (1993).

³⁴ GUILTY, *supra* note 4, at 86.

³⁵ GUILTY, *supra* note 4, at 86.

³⁶ GUILTY, *supra* note 4, at 87.

³⁷ Herbert L. Packer, *The Courts, the Police, and the Rest of Us*, 57 J. CRIM. L., CRIMINOLOGY & POLICE SCI. 238, 240 (1966).

er civil rights struggles of the 1960s.³⁸ The Court simply despaired of its institutional inability (and that of lower courts as well) through case-by-case voluntariness rulings to affect abusive police behavior in the custodial context.³⁹ Although many feared that the Court would interdict all questioning of suspects by extending the sixth amendment rationale of *Escobedo v. Illinois*,⁴⁰ that fear was not realized. As Yale Kamisar has pointed out, "the Court did not flatly prohibit police questioning of suspects. Nor did it condition such questioning *on the presence of counsel*. Nor did it require that a suspect be advised of his rights by a defense lawyer or by a disinterested magistrate."⁴¹ *Miranda* thus was a compromise between the "totality of circumstances" test then used to determine the voluntariness of confessions and more extreme proposals that would prohibit all police interrogation of suspects.⁴² The debate as to the legitimacy of *Miranda* remains with us, and the lineup of able scholars on both sides of the issue is formidable.⁴³ However, the correctness of each side's argument cannot be resolved here. It suffices to point out that Judge Rothwax makes *no* effort to present both sides of the controversy. By merely signing on to the anti-*Miranda* school, he again short-changes his audience, most of whom will never explore the scholarship that is favorable to *Miranda*.

More disturbing than the doctrinal one-sidedness of Judge Rothwax's *Miranda* discussion is the implication that *Miranda* constitutes a serious impediment to law enforcement, which is not necessarily what the data shows. In 1986, Professor Welsh

³⁸ See A. Kenneth Pye, *The Warren Court and Criminal Procedure*, 67 MICH. L. REV. 249, 256 (1968).

³⁹ See *New York v. Quarles*, 467 U.S. 649, 683 (1984) (Marshall, J., dissenting).

⁴⁰ 378 U.S. 478 (1964).

⁴¹ Yale Kamisar, *The Warren Court and Criminal Justice: A Quarter Century Retrospective*, 31 TULSA L. REV. 1, 11 (1995).

⁴² *Id.* Professor Kamisar reminds us that the current Court accepts that *Miranda* sought to reconcile two "competing concerns"—"the need for police questioning as an effective law enforcement tool and the need to protect custodial suspects from impermissible coercion." *Id.* (citing Justice O'Connor's opinion for the Court in *Moran v. Burbine*, 475 U.S. 412, 426 (1986)).

⁴³ See, e.g., Stephen J. Markman, *The Fifth Amendment and Custodial Questioning: A Response to Reconsidering Miranda*, 54 U. CHI. L. REV. 938 (1987); Office of Legal Policy, *supra* note 21; Stephen J. Schulhofer, *The Fifth Amendment at Justice: A Reply*, 54 U. CHI. L. REV. 950 (1987); Stephen J. Schulhofer, *Reconsidering Miranda*, 54 U. CHI. L. REV. 435 (1987).

S. White observed that "[t]he great weight of empirical evidence supports the conclusion that *Miranda's* impact on the police's ability to obtain confessions has not been significant."⁴⁴ A recent study, although calling for more and better empirical evidence, concluded nonetheless that "[t]he available data thus seem[s] to demonstrate that more suspects invoke their right to remain silent, and the rate of confessions is roughly the same."⁴⁵

On the other hand, Professor Paul G. Cassell argues that despite the "conventional academic wisdom" to the contrary, "*Miranda* has significantly harmed law enforcement efforts in this country."⁴⁶ Cassell maintains that *Miranda's* effects "should be measured not by looking at suppression motions filed after police have obtained a confession, but rather by examining how many confessions police never obtain because of *Miranda*."⁴⁷ Under that analysis, according to Cassell, "the existing empirical data supports the tentative estimate that *Miranda* has led to lost cases against almost four percent (3.8%) of all criminal suspects in this country who are questioned."⁴⁸ Professor Schulhofer has disputed Cassell's analysis, stating that "the properly adjusted attrition rate is not 3.8% but *at most* only 0.78%."⁴⁹ In fact, Schulhofer argues, even this adjusted figure "still substantially overstates *Miranda's* current effect."⁵⁰ Cassell replies that his data shows that "over the long haul, law enforcement never recovered from the blow inflicted by *Miranda*."⁵¹ Despite this debate in the academy, Judge Rothwax concludes that *Miranda* is not "harmless."⁵² However, he neither supports his claim

⁴⁴ Welsh S. White, *Defending Miranda: A Reply to Professor Caplan*, 39 VAND. L. REV. 1, 18 n.99 (1986).

⁴⁵ George C. Thomas III, *Dialogue on Miranda: Is Miranda a Real-World Failure? A Plea for More (and Better) Empirical Evidence*, 43 UCLA L. REV. 821, 832 (1996).

⁴⁶ Paul G. Cassell, *Miranda's Social Costs: An Empirical Reassessment*, 90 NW. U. L. REV. 387, 390 (1996).

⁴⁷ *Id.* at 391.

⁴⁸ *Id.* at 438.

⁴⁹ Stephen J. Schulhofer, *Miranda's Practical Effect: Substantial Benefits and Vanishingly Small Social Costs*, 90 NW. U. L. REV. 500, 502 (1996).

⁵⁰ *Id.* at 546.

⁵¹ Paul G. Cassell, *All Benefits, No Costs: The Grand Illusion of Miranda's Defenders*, 90 NW. U. L. REV. 1084, 1091 (1996).

⁵² GUILTY, *supra* note 4, at 86.

with data, nor does he even intimate that respectable scholarship differs on the question. More fundamentally, despite the periodic energization over *Miranda* within the academic community, the law enforcement community does not appear pre-occupied with the case.⁵³

As to Judge Rothwax's complaint that *Miranda* does not aid the truth-seeking function, he once again ignores the underlying constitutional principle at stake. In this instance, it is the privilege against self-incrimination in the custodial setting which the *Miranda* Court recognized. However, the privilege was not adopted to facilitate the quest for truth in criminal prosecutions. As Dean Erwin N. Griswold observed, the emergence of the privilege is "one of the great landmarks in man's struggle to make himself civilized";⁵⁴ it is "an expression of the moral striving of the community"⁵⁵ and "a firm reminder of the importance of the individual."⁵⁶ The *Miranda* Court sought to secure the sanctity of the privilege in the venue where, in modern times, the Court concluded the privilege was at risk.⁵⁷ The inadequacy of the case-by-case voluntariness quest, it believed, left it little choice. If the Court perceived correctly that the values embodied by the privilege were imperiled in custodial settings, then criticism of *Miranda* implicates those values. And, as with much else in criminal procedure, there are as many arguments against the privilege as there

⁵³ Indeed, Professor Kamisar has suggested that "[o]verruling *Miranda* seems to be an idea whose time has come and gone." He points out that various studies and surveys establish that law enforcement officials—prosecutors, judges and police officers—do not view *Miranda* as a barrier to effective law enforcement. See Kamisar, *supra* note 41, at 24, 25; see also Schulhofer, *supra* note 49, at 546-47 ("[T]he great weight of the evidence confirms that police have now adjusted to the *Miranda* requirements and overcome the limited difficulties experienced in the immediate post-*Miranda* period.").

⁵⁴ ERWIN N. GRISWOLD, *THE FIFTH AMENDMENT TODAY* 7 (1955).

⁵⁵ *Id.* at 73.

⁵⁶ *Id.* at 76.

⁵⁷ See LEONARD LEVY, *ORIGINS OF THE FIFTH AMENDMENT: THE RIGHT AGAINST SELF-INCRIMINATION* 427 (1968) (arguing that the Framers' inclusion of the privilege in the Fifth Amendment, rather than in the Sixth, which secures post-indictment procedural rights, proves that the privilege was meant to apply to witnesses and to all stages of the criminal process). But see LEWIS MAYERS, *SHALL WE AMEND THE FIFTH AMENDMENT* 178-92 (1959) (arguing that the language of the earliest state and federal provisions evinced the Framers' intent not to constitutionalize the witness' privilege).

are for it. Insofar as he believes that the court erred terribly in protecting the privilege in the station house, Judge Rothwax has earned a niche in the "privilege-lite" school.

The antipathy that Judge Rothwax harbors for *Miranda* is no less fervent when it comes to a suspect's pretrial right to counsel. He bemoans the decisions in *Massiah*,⁵⁸ *Brewer*,⁵⁹ *United States v. Henry*⁶⁰ and *Maine v. Moulton*,⁶¹ in which the Court determined that the commencement of adversary judicial proceedings is a significant event—one that alters the government's access to a defendant for criminal investigation purposes in the absence of his or her counsel. Judge Rothwax thinks even less of the right to counsel jurisprudence of the New York Court of Appeals, a court that prides itself on affording people greater protection under the right to counsel provision of the New York State Constitution than the Supreme Court does under the Sixth Amendment.⁶² Judge Rothwax argues that once a defendant has been provided with and confers with counsel (and may well have been told by counsel not to talk to the police), "there is simply no constitutional prohibition against the use of incriminating information *voluntarily* obtained from an accused despite the fact that his attorney may not be present."⁶³ If truth-seeking is the only legitimate value at issue, this argument would have some force. Yet is there nothing to be said for the rationale of *Massiah* and its progeny; that once a person is formally charged, and the right to counsel has attached, fair dealing requires that the government not engage in an end-run around the defendant's attorney? There is more at stake here than mere formalism; a

⁵⁸ *Massiah v. United States*, 377 U.S. 201 (1964).

⁵⁹ *Brewer v. Williams*, 430 U.S. 387 (1977).

⁶⁰ 447 U.S. 264 (1980).

⁶¹ 474 U.S. 159 (1985).

⁶² Judge Rothwax erroneously attributes the Court of Appeals' "absurdly broad definition of the right to counsel" to "decades of generous interpretation of the Sixth Amendment." *GUILTY*, *supra* note 4, at 91. He fails to appreciate that the Court of Appeals has found steadfastly (and before the Supreme Court decided its major Sixth Amendment cases) in article I, section 6 of the New York Constitution, an independent juridical base for a liberal application of the right to counsel. See, e.g., *People v. Donovan*, 13 N.Y.2d 148, 193 N.E.2d 628, 243 N.Y.S.2d 841 (1963); *People v. DiBiase*, 7 N.Y.2d 544, 166 N.E.2d 825, 200 N.Y.S.2d 21 (1960).

⁶³ *GUILTY*, *supra* note 4, at 93-94.

defendant's right to counsel should not be eviscerated by exploitation through direct, and frequently surreptitious, approaches to the defendant in his or her counsel's absence.⁶⁴

For Judge Rothwax, the less than niggardly approaches to the right to counsel by both the Supreme Court and the New York Court of Appeals are condemnable as impediments to truth. He yearns for the old days as he remembers them, when "our criminal justice system was relatively simple: A person was arrested, indicted, and tried."⁶⁵ If those days were "simple," they were not necessarily reflective of a democracy's commitment to fair procedure and equal protection of the laws. The "simplicity" of the pre-Warren Court era was largely attributable to the reality that for most people the criminal process was a relatively one-sided affair. Indigent defendants, who have always made up the overwhelming bulk of the defendant population, did not always have the bedrock protections of the right to counsel in all felony prosecutions,⁶⁶ the right to a trial transcript⁶⁷ or counsel for purposes of appeal,⁶⁸ the right to a speedy trial,⁶⁹ and numerous other protections in the Bill of Rights. Even today, particularly in capital cases, the lack of competent counsel for indigent defendants is a national disgrace.⁷⁰ And yet Judge Rothwax somehow believes that overruling cases such as *Miranda* would not return us to the "Dark Ages."⁷¹ Nowhere in *Guilty*, however, is there a discussion of the considerable number of innocent persons who have been

⁶⁴ To the extent that such an approach is part of an ongoing investigation into other crimes, *Massiah*, *Henry* and *Moulton* do not impede the government from using a defendant's statements in prosecutions for those crimes; the government simply may not use those statements, if deliberately elicited, in the prosecution of the indictment to which the right to counsel has already attached. Given the value we place upon the sixth amendment right to counsel, this compromise may strike some as not unreasonable.

⁶⁵ *GUILTY*, *supra* note 4, at 24.

⁶⁶ See *Betts v. Brady*, 316 U.S. 455 (1942), *overruled by* *Gideon v. Wainwright*, 372 U.S. 335 (1963).

⁶⁷ *Griffin v. Illinois*, 351 U.S. 12 (1956).

⁶⁸ *Douglas v. California*, 372 U.S. 353 (1963).

⁶⁹ *Klopfer v. North Carolina*, 386 U.S. 213 (1967).

⁷⁰ See generally Stephen B. Bright, *Counsel for the Poor: The Death Sentence Not for the Worst Crime But for the Worst Lawyer*, 103 YALE L.J. 1835 (1994).

⁷¹ *GUILTY*, *supra* note 4, at 87.

convicted erroneously⁷² as the result of police and prosecutorial overreaching in custodial and other investigative settings.⁷³

Judge Rothwax is at his best when pointing out the sorry state of New York's speedy trial jurisprudence. Accepting that "the idea of a speedy trial is a good one,"⁷⁴ he rightly reminds us that current speedy trial rules "do not govern the time within which a trial must commence. They deal only with the subject of when the People must be ready for trial. The fact that the People are ready to proceed does not mean the trial is at hand."⁷⁵ Accurately, he observes that "this does not take into account the terrible congestion that afflicts our courts,"⁷⁶ and he is on firm ground when he states that "our government has chosen to tunnel its vision and resolve the matter with a rigid set of rules that often doesn't lead to a just result."⁷⁷

However, Judge Rothwax offers no real solution to the speedy trial dilemma. Although he correctly notes that all that we now have is a "prosecutorial readiness" rule,⁷⁸ he proposes that "we begin by cancelling mandatory time periods in favor of evaluation on a case-by-case basis."⁷⁹ He would then require that to establish a denial of a speedy trial, a defendant should have to "demonstrate that he had at least some interest in a speedy trial in the first place."⁸⁰

A return to case-by-case adjudication of speedy trial claims would set matters back to where they were thirty years ago. What Judge Rothwax has forgotten is that the entire movement to mandatory standards on both federal and state levels was a reaction to the unsatisfactory nature of the ad hoc adjudication experience. Concern was widespread about the lack of

⁷² See, e.g., DONALD S. CONNERY, *GUILTY UNTIL PROVEN INNOCENT* (1977); MICHAEL RADELET ET AL., *IN SPITE OF INNOCENCE* (1992); MARTIN YANT, *PRESUMED GUILTY* (1991); *THE DEATH PENALTY IN AMERICA* (Hugo A. Bedau ed., 3d ed. 1982).

⁷³ See, e.g., Richard Jerome, *Suspect Confessions*, N.Y. TIMES MAG., Aug. 13, 1995, at 28; *Prosecutors Are Faulted in Dallas Murder Case*, N.Y. TIMES, Mar. 23, 1989, at A9; *Use of Jailhouse Informers Reviewed in L.A.*, N.Y. TIMES, Jan. 3, 1989, at A14.

⁷⁴ *GUILTY*, *supra* note 4, at 113.

⁷⁵ *GUILTY*, *supra* note 4, at 112.

⁷⁶ *GUILTY*, *supra* note 4, at 113.

⁷⁷ *GUILTY*, *supra* note 4, at 113.

⁷⁸ N.Y. CRIM. PROC. LAW § 30.30 (McKinney 1992).

⁷⁹ *GUILTY*, *supra* note 4, at 120.

⁸⁰ *GUILTY*, *supra* note 4, at 120.

clarity as to what constituted a speedy trial violation, and the vagaries of speedy trial jurisprudence made it relatively easy for courts to disregard violations of the speedy trial right, especially when serious crimes were at issue.⁸¹ New York's adoption of a prosecutorial readiness rule was a compromise between a temporal standard that is mandatory—but still does not account for court congestion—and the unsatisfactory product of a case-by-case process of adjudication. Although a readiness rule is far from optimal, at least it provides a structural framework within which the speedy trial guarantee can be given more meaning. That some judicial decisions have reached unreasonable results is unfortunate, but no more so than in other areas of the law. Courts can and should decide statutory speedy trial claims sensibly. That they fall short at times does not counsel abandonment of an attempt to improve upon what was an even less desirable state of affairs.

Judge Rothwax's views about speedy trial requirements are undoubtedly driven by his belief that "most defendants and defense attorneys don't *want* a speedy trial."⁸² Thus, he allows his cynicism to denigrate the constitutional right to a speedy trial. He has forgotten that rights under the Constitution are individual rights,⁸³ and he overlooks the significant number of defendants who are unable to post bail and who do want a speedy trial, especially those who are innocent and thus urgently desire and need a prompt resolution of their predicament. The value of a constitutional right is not and should not be measured by the number of people who claim it.

New York's legislative efforts to buttress the constitutional right to a speedy trial, undertaken a quarter of a century ago, are commendable, and Judge Rothwax does not make the case for their abandonment. Even though New York is neither ready nor willing to tie the right to a speedy trial to a specified

⁸¹ In 1971, the Second Circuit attempted to bring some order to this chaotic state of affairs by inviting members of the New York Bar and other interested parties to present their views on the speedy trial issue in the hope that the Court would be able to fashion a general rule. Despite the plethora of briefs *amici curiae* that were filed, the Court still found itself unable to arrive at a decision of any general applicability. *United States ex rel. Frizer v. McMann*, 437 F.2d 1312 (2d Cir. 1971).

⁸² GUILTY, *supra* note 4, at 114.

⁸³ See, e.g., *Hill v. Texas*, 316 U.S. 400, 406 (1942).

time period irrespective of court congestion, its prosecutorial readiness rule is preferable to the free form of case-by-case adjudication that antedated its enactment.

The most distressing chapter of *Guilty* is entitled "The Theater of the Absurd—Anything Goes in the Modern American Courtroom."⁸⁴ It is here that Judge Rothwax reveals his deep distaste for the American criminal defense lawyer, a distaste that is counter-matched by his deep affection for, and abiding faith in, the American prosecutor. According to Judge Rothwax, it is the defense attorney for whom "the temptation to be overzealous can be very great."⁸⁵ Because Judge Rothwax estimates that "about 90 percent of the people who go to trial in this country are guilty,"⁸⁶ he notes that defense lawyers are put "in a situation where they're constantly representing guilty people."⁸⁷ From this fact, he concludes that defense attorneys are prone to "push the envelope."⁸⁸ Not so with the prosecutor, says Judge Rothwax. "Why," he asks, "would prosecutors [in a volume-laden system] undertake to charge persons whom they did not believe were probably guilty and then assume the burden of proving the charges?"⁸⁹

How do we answer such a question? Do we cite the volumes written on convicting the innocent? Do we cull recent news stories of wrongful convictions? Do we ignore the numerous abuses of the prosecutorial office for political gain? Do we shy away from our history of racial discrimination in the charging process? Do we overlook the consequences of erroneous identifications or sloppy police investigations? Should judges ignore what they know as men and women?

For Judge Rothwax, unlike a defense attorney, a prosecutor's life is "a constant call to accountability."⁹⁰ He asserts that "[e]very time a prosecutor makes a mistake and the defendant is convicted, the case may be called up on appeal. Too often, the appellate court, the arbiter of courtroom rules, reverses convictions based on a small mistake or a technical

⁸⁴ GUILTY, *supra* note 4, at 121.

⁸⁵ GUILTY, *supra* note 4, at 130.

⁸⁶ GUILTY, *supra* note 4, at 130.

⁸⁷ GUILTY, *supra* note 4, at 130.

⁸⁸ GUILTY, *supra* note 4, at 130.

⁸⁹ GUILTY, *supra* note 4, at 133.

⁹⁰ GUILTY, *supra* note 4, at 130.

error."⁹¹ To Judge Rothwax, "That's accountability!"⁹² Statements like these cause this reader to wonder whether Judge Rothwax is as perceptive as he is given credit for being. Clearly, he ignores the fact that appellate courts bend over backwards to avoid reversing convictions, especially through their generous application of the harmless error doctrine.⁹³

Judge Rothwax also does not tell us the type of prosecutorial misconduct he considers a "small mistake" or "technical error." Thus, we do not know whether he would consider a prosecutor's appeal to racial prejudice or a prosecutor's vouching for the credibility of his or her witnesses a serious or a trivial error. Nor does he tell us that courts in their decisions generally do not publish the name of the prosecutor whose conduct has been deemed unacceptable, a practice that shields an errant prosecutor from the deterrent effects of professional opprobrium. Nor does he tell us that prosecutors who violate defendants' rights are regularly subjected to internal discipline by their superiors—because they aren't and he can't.⁹⁴

The essence of Judge Rothwax's thesis is that the adversary system is "out of control," and that "perhaps the best place to start [looking for a cure] is with a serious reevaluation of the role of the defense attorney."⁹⁵ Coming from a jurist who believes that our liberties are better safeguarded by the good offices of the prosecutor rather than by defense attorneys who "don't argue innocence, they argue reasonable doubt,"⁹⁶ this is not startling. But the implication is clear: Once a defense attorney concludes that his or her client is guilty, counsel should do little or nothing at all. Judge Rothwax never quite says it so baldly; instead, he suggests that it is improper for a defense attorney to cross-examine an adverse witness who the

⁹¹ GUILTY, *supra* note 4, at 130.

⁹² GUILTY, *supra* note 4, at 130.

⁹³ See, e.g., Steven H. Goldberg, *Harmless Error: Constitutional Sneak Thief*, 71 J. CRIM. L. & CRIMINOLOGY 421 (1980); Stephen Saltzburg, *The Harm of Harmless Error*, 59 VA. L. REV. 988 (1973); Tom Stacy & Kim Dayton, *Rethinking Harmless Constitutional Error*, 88 COLUM. L. REV. 79 (1988).

⁹⁴ See Bennett L. Gershman, *Prosecuting Prosecutors*, N.Y. L.J., Dec. 20, 1996, at 2 ("The American justice system has been extremely tolerant of prosecutors who misbehave.").

⁹⁵ GUILTY, *supra* note 4, at 139.

⁹⁶ GUILTY, *supra* note 4, at 134.

attorney "knows" is telling the truth.⁹⁷ He also bemoans that "when the defendant is guilty [which for Judge Rothwax is almost always], the defense attorney's role is to prevent, distort, and mislead."⁹⁸ Others might say "test." Judge Rothwax also condemns defense attorneys for "seeding the record" with error so that a reversal may be obtained later.⁹⁹ Some of us would call this "protecting the record." When one adds it up, there is no camouflaging the reality of Judge Rothwax's vision—that for the defense attorney who knows his or her client is guilty, either serve as little more than an adornment or face extinction.

Apart from the general factors that have shaped Judge Rothwax's negative perspectives of the criminal justice system, the trial of O.J. Simpson unquestionably has exacerbated his cynicism. For him, the Simpson trial is not aberrational; it is, he states, "a sterling example of everything that is wrong with our criminal justice system rolled into one spectacular event."¹⁰⁰ For numerous reasons, however, the Simpson trial is an extremely poor paradigm of the everyday criminal trial. It was excessive in so many ways, and much of the blame for its excesses can be traced to Judge Ito's management of the trial. In this regard, Judge Rothwax himself acknowledges that "[j]udges get the lawyers they deserve. If they tolerate misconduct they have it in abundance. If they don't run their courtroom, then the lawyers will—with all the chaos that implies."¹⁰¹

Would Judge Rothwax, the "Prince of Darkness," have conducted the Simpson trial as did Judge Ito? Few who know Judge Rothwax would suggest such a thing. However, what Judge Rothwax fails to recognize is that it is equally true that lawyers get the judges they deserve. The loss of dignity in the trial process that he imputes to defense lawyers frequently can be laid at the feet of the trial judge. When that is the case, it is the defense attorney who must struggle to preserve the dignity of the proceedings. There can be no quarrel with Judge

⁹⁷ GUILTY, *supra* note 4, at 140.

⁹⁸ GUILTY, *supra* note 4, at 141.

⁹⁹ GUILTY, *supra* note 4, at 135.

¹⁰⁰ GUILTY, *supra* note 4, at 222.

¹⁰¹ GUILTY, *supra* note 4, at 136.

Rothwax's call for greater dignity, but the judge is no less responsible for its maintenance than are the advocates in the well.

It is difficult to avoid the conclusion that the Simpson trial has significantly affected Judge Rothwax's perspective. Several of his recommendations, such as limiting peremptory challenges and the elimination of unanimous verdicts, became hot topics in the immediate aftermath of the trial and have gained adherents as the result of widespread dismay about the Simpson acquittal. In addition, Judge Rothwax's ad hominem attack on Peter Neufeld, one of Simpson's lawyers, whose obligations to Simpson's trial conflicted with his scheduled appearance in Judge Rothwax's courtroom, is especially troubling.¹⁰² First, because the attack on Neufeld is irrelevant to the book's purpose, it displays a surprising pettiness. Second, and more significantly, Judge Rothwax's disproportionate discussion of his encounter with Neufeld suggests that his grievances about the defense function may be driven as much by emotion as by reason.

Because the defense lawyer's role in the adversary process drives Judge Rothwax to distraction, he proposes that we look for new ideas to some aspects of current procedures in Great Britain and to continental European systems, where magistrates are more active than American judges in the pursuit of truth, and the defense attorney's role is more muted. Undoubtedly, there are aspects of other systems that are worthy of examination. But, again, Judge Rothwax has not made the case for doing so. He has singled out subjects that are no longer of great concern. He has selected individual absurdities that are unrepresentative of the system. Most importantly, he has accepted as an article of faith the idea that in the criminal justice system, prosecutors and judges are the best ensurers of fairness. Defense attorneys are not included in his fairness universe. Nor are constitutionally based rulings that require

¹⁰² Nine of twenty-one pages in the chapter criticizing the function of the American defense attorney are devoted to Judge Rothwax's contretemps with Neufeld in the *Pedro Gil* case. See GUILTY, *supra* note 4, at 121-29.

the government to turn square corners.¹⁰³ In short, he has forgotten where we have been and the why of how we got there. If Judge Rothwax's way is the wave of the future, there should be widespread alarm about where we are going.

The editor's note at the end of *Guilty* states that Judge Rothwax "has been a trial judge in the New York State Supreme Court for over twenty-five years, prior to which he was a defense attorney and card-carrying member of the ACLU." One wonders if this point was intended to credit Judge Rothwax's qualifications as a critic of the constitutional foundations of our criminal justice system, or to suggest the great distance that he has traveled from his pre-judicial career. Perhaps it was meant to do both. Clearly, Judge Rothwax is well-qualified to critique the system's faults. However, it is also evident that he has changed a great deal from his defense counsel and ACLU days. Indeed, for such a lawyer to acquire, as a judge, the title Prince of Darkness takes work. That is why *Guilty*, although provocative, is a sad book. It resonates with a convert's zeal and with the cynical grumblings of a judge who "feel[s] as though [he has] seen it all,"¹⁰⁴ a tired cynicism that does not serve the judicial office well.

¹⁰³ Justice Holmes once stated that "[m]en must turn square corners when they deal with the government." *Rock Island, Ark. & La. Ry. v. United States*, 254 U.S. 141, 143 (1920). I have always believed that that admonition applies with equal force to the government when it deals with individuals.

¹⁰⁴ *GUILTY*, *supra* note 4, at 22.

