

LAWYERS AS THE ENEMIES OF TRUTH

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In these brief remarks, I will focus on a single aspect of the relationship between lawyers and truth. I will discuss why the issue of truth in the legal system reveals a fundamental tension between lawyers and the public. The public benefits from truth-eliciting rules in the legal system, but lawyers can benefit from truth-obscuring rules. Truth-eliciting rules are an important part of the rule of law, because they assure that courts base legal decisions on relevant factual states of the world. Unfortunately, lawyers often have an interest in truth-obscuring rules because legal complexity and uncertainty can be a source of business. Hence, we face a sad paradox: the class that should be the great guardian of truth in law may instead have the greatest interest in subverting it.

As a matter of intellectual history, it is not surprising that the search for truth is an important part of the rule of law. We inherited both the modern concept of the rule of law and the empirical sciences from the Enlightenment, and both are similarly rooted in an ideal of objectivity. The rule of law requires that society be governed by abstract legal rules whose application is objective, in the sense that it does not vary with the status or rank of the parties to a particular dispute. The scientific idea of empirical truth is also objective in that the real world is the same for everyone regardless of personal perspective or social status. The alliance of these concepts seems clear from recent postmodernist attacks on objectivity in both law and science.

Moreover, in the Anglo-American tradition similar modes of competition have been used to facilitate the search for truth in both science and law. Scientists seek the truth in a decentralized process of peer review, in which rival colleagues test and critique each other's results. It is only when a consensus emerges from the competing perspectives that we accept a given finding as true. Similarly, we have rejected an inquisitorial

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system of legal fact finding in favor of an adversarial system largely because we fear the power of the centralized state to skew the truth. Institutionalized conflict among self-interested individuals underlies the validity of classic defenses of the adversarial system: “[cross-examination is the] greatest legal engine ever invented for the discovery of truth.”¹ Our adversarial system is thus better than the alternatives because it decentralizes accountability for truth seeking. Each litigant has an incentive to ferret out the facts, no matter how uncomfortable those facts may make the government or society at large.

Arbiters of truth, whether legal or scientific, need to be insulated from direct government control. In the West scientists are rarely simply government functionaries, but instead enjoy genuine independence through employment at a network of universities and non-profit institutions. Scientists are more likely to assess the world accurately because a centralized authority does not directly govern their pursuits. Similarly, we have separated the judiciary from the rest of the government and provided federal judges with life tenure to increase the likelihood that legal rules will be correctly applied without fear of political retaliation.

The beneficial results of the Enlightenment have been as great in law as in science. The rule of law, including truth eliciting rules, is one of the greatest goods a society can enjoy. Coherence, clarity and stability are the hallmarks of the rule of law. Indeed, by reducing the number of uncertainties in our dealings with one another, the rule of law generates wealth more pervasively than any single scientific invention in human history. Truth-eliciting rules similarly facilitate wealth creation by helping courts reach factually accurate decisions, thus increasing both the predictability and effectiveness of law.

Unfortunately, one of the greatest obstacles to maintaining the rule of law, including truth-eliciting rules, is the profound interest that lawyers have in subverting it. As legal rules become less clear, more litigation is necessary to resolve disputes, resulting in higher incomes for lawyers. When rules are frequently changed, clients must consult lawyers more often to understand their legal responsibilities. If a legal rule is

1. JOHN HENRY WIGMORE, *A TREATISE ON THE ANGLO-AMERICAN SYSTEM OF EVIDENCE IN TRIALS AT COMMON LAW* § 1367, at 29 (3d ed. 1940).

incoherent, individuals will have difficulty understanding its essence and will become more dependent on lawyers. If the law expands into areas where it is unnecessary, society will incur additional costs, but lawyers will prosper.

Further, if legal rules either obscure the truth or are poorly designed to discover it, society bears added costs, while lawyers have more work. For instance, evidentiary rules permitting the use of junk science cost society money. These rules permit recovery for torts even when fault or causation is lacking, and therefore, they discourage useful innovations. But such “evidence” permits more suits, enriching both the plaintiff and the defense bars. The exclusionary rule from *Miranda v. Arizona* may similarly frustrate an accurate reconstruction of a crime,² thus weakening criminal deterrence and imposing social costs. Nevertheless, such rules complicate criminal actions and create additional work for prosecutors and the criminal defense bar. While one party (the plaintiff in the case of torts and the accused in criminal proceedings) systematically gains an advantage from poor truth-eliciting rules, lawyers, as a class, almost always benefit. Lawyers, whether prosecuting or defending criminal and civil actions, all enjoy a greater amount of work and demand for their services when establishing the truth at a trial becomes more of an obstacle course.

Corporate law, too, may not be immune from such pathologies. Society benefits from disclosure rules that provide the optimal amount of transparency at the lowest possible cost. Once again, it is not clear that lawyers benefit financially from efficient truth-eliciting rules in corporate disclosure. Complexity and loopholes are income-producing devices for the corporate bar that make clients ever more dependent on lawyers. Thus, one would expect that lawyers would push for rules that are more complex than optimal.

In any society, therefore, lawyers are potentially the deadliest enemies of truth-eliciting rules. Because of the especially important political position that lawyers hold in America, lawyers have a greater capacity for advancing their interests and inflicting damage on our

2. See *Miranda v. Arizona*, 384 US 436, 444 (1966) (excluding confession extracted without “the use of procedural safeguards effective to secure the privilege against self-incrimination”). I am not here contesting the correctness of *Miranda*. But even if that case optimally advances civil liberties, it also advances the professional interests of lawyers as well.

society. Tocqueville saw the legal profession as the class most closely approximating an aristocracy.³ Lawyers in the United States, even more than elsewhere, are generally entrusted through various structures, including court appointed commissions and bar associations, with actually writing many of the rules that elicit truth in a legal context. Even when lawyers do not actually write laws, they exert a disproportionate influence on their formation, interpretation, and application.

Perhaps once upon a time, in the age of the statesmen lawyers, about whom Dean Kronman has so eloquently written, we could conceivably have relied on key leaders of the bar to transcend self-interest.⁴ Today, however, I think it best to view lawyers collectively not as statesmen, but as a self-interested faction. They are another interest group in the regulatory state, with particular influence over the shape of legal rules and a strong incentive to complicate the truth seeking process.

Given these sad facts, society should consider stripping lawyers of any positions in which they have a special responsibility for crafting legal rules. Instead, the rules should be made by institutions controlled by more encompassing interests, including the businesses and individuals who will be affected by the rules. Thus, legislatures should be loath to delegate to courts the responsibility for crafting rules of civil procedure and courts should be loath to delegate to lawyers the responsibility for crafting and enforcing ethics rules.

The Federalist reminds us that social structures must take account of human ambitions and frailties. For too long, however, our institutions for creating legal rules, particularly truth-eliciting rules, have assumed that the professionalism of lawyers exempts them from such passions. One does not have to accept Bernard Shaw's dictum that all professions are conspiracies against the laity to believe that any reliance on the collective altruism of lawyers to generate sound truth-eliciting rules is misplaced. Lawyers are necessary to carry out the rule of law, but they cannot be trusted to keep the rules themselves in good repair.

3. See ALEXIS DE TOCQUEVILLE, DEMOCRACY IN AMERICA 242-248 (J. P. Mayer & Max Lerner eds., Harper & Row 1966).

4. See, e.g., ANTHONY T. KRONMAN, THE LOST LAWYER: FAILING IDEALS OF THE LEGAL PROFESSION (1993).