ADVERSARY INFERENCES

THE HONORABLE FRANK H. EASTERBROOK*

Are there problems with lawyers in the adversary system? People tend to blame lawyers when things go wrong, and, although there are many definitions of what it means for things to "go wrong" (excess expense, needless delay, and incorrect outcomes are three common manifestations), there is a consensus that lawyers are at the heart of the problem. I think that this way of putting things is misleading and the common conclusion flawed. Let me explain why.

People respond to the rules they face. Over the long run they are helpful or manipulative or truthful or deceitful or uninformed because it pays to be so. Some lawyers are saints or sinners all the time; they do not respond strongly to rules. But for most people, most of the time, incentives matter. Let us concentrate on these people. To understand how lawyers as a group behave, and whether these behaviors are good or bad, we must look at the system of rules that govern litigation and not just at the lawyers.

An adversarial system is a system of party control rather than a system of court control, which lawyers call inquisitorial. But the difference between adversarial tribunals in the United States and inquisitorial tribunals in Europe is deeper than the question whether lawyers or judges take the lead in eliciting facts. In the United States, professionals make arguments to amateurs. Jurors are amateurs in almost all respects, often celebrated on that account, and even the judge, usually knowledgeable about law, is an amateur on many scientific and technical questions that come up in the course of litigation.

That professionals argue to amateurs has profound consequences for the way the adversary system works. Two sophisticated attorneys furnish evidence and argue inferences to a decisionmaker. But when the decisionmaker is not as

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sophisticated as the persons presenting the evidence, what happens? I invite you to step back from the two-party case in court and ask you how well the process of drawing inferences works in one-party cases: somebody tries to sell you something, say, a car or a share of stock.[1]

Any model of automobile has strong and weak points. A small car may get 35 miles to the gallon, but in an accident it behaves like an accordion, with the occupants in the middle. Think of the many other variables. There are differences among cars in the quality of ride, in the stopping distance, in whether the car includes four-wheel drive and other safety features, in whether everything works as planned, in repair rates and costs, and so on.

Assume for now that sellers always tell the truth, that rules against fraud in the marketplace and perjury in court are fully enforced. Still, to tell "nothing but the truth" is not to tell "the whole truth"; lawyers and salesmen are selective. What information does the seller furnish to the customer in order to make a sale? That depends on who is listening. Suppose the listener is naive. Then the seller stresses the good points. He might say: "This car gets at least 35 miles to the gallon" and keep silent about the bad points such as poor crashworthiness. A credulous customer assumes that, when the salesman says this car gets at least 35 miles to the gallon, that the salesman means, say, 40 miles to the gallon and that the car is crashworthy. Some truth is told, and no lies, but bad inferences are drawn.

Now suppose the buyer is sophisticated. A sophisticated buyer knows what attributes matter, and what the distribution of these attributes is among cars in general (although not necessarily which model has which attributes). The sophisticated buyer puts this knowledge to work through skepticism. A skeptical buyer reasons:

Aha! The seller told me the car gets at least 35 miles to the gallon. Thus I know that it gets exactly 35 miles to the gallon,

1. There is a substantial economic literature on questions such as this, to which I allude in this brief essay without developing the details. My own academic work has concentrated on the sale of financial instruments. A discussion of the process of disclosure and inference-drawing appears in FRANK H. EASTERBROOK & DANIEL R. FISCHEL, THE ECONOMIC STRUCTURE OF CORPORATE LAW 276-303 (1991). The approach to disclosure used in that book, and in this essay, has its genesis in Sanford F. Grossman, *The Informational Role of Warranties and Private Disclosure About Product Quality*, 24 J.L. & ECON. 461 (1981).

because if it got 36 miles to the gallon, the seller would have said so. It doesn't cost the seller extra to say that a model that gets 36 miles to the gallon does so, and I would be more likely to buy it if it did. So, if it got anything above 35, the seller would have crowed about it. He didn't, so it doesn't. The salesman didn't tell me anything about the bumpers. I assume therefore that they are the minimum required by law. If they were stronger, he would have said so.

And so it goes. An assume-the-worst position enables the customer to learn everything important with a minimum of words. The seller reveals, through speech or silence, every salient attribute. Every good attribute is revealed by the seller, and on every bad attribute the seller can be silent and the buyer assume the worst. There's no need for an extended conversation.

What makes it possible to get the truth from an interested presentation, that is, a statement by a party with an interest in the outcome of the transaction, and who slants what can be slanted? The process works only when some strong conditions are satisfied.[2]

One is truth, which has two components. The statement must be verifiable (the buyer can find out after purchase what mileage the car gets). And a statement that is not verified must carry penalties. The warranty behind anything that's spoken must be enforced, fully.

Second, the listener must know what the interested party's slant is: in this case, that the person is trying to sell you a car.

Third, the listener must know what information matters. The sophisticated, skeptical listener had to know that bumpers matter, that there is a range of strengths and a legal minimum, and so on. If the listener did not know these things, this process wouldn't work.

Fourth, the listener needs to know what subjects the speaker knows about. That is, a sophisticated listener draws an inference when the auto salesman is silent about something he could tell you if he wanted. Otherwise, the inference from silence is not a good one.

Fifth, the listener has to be sophisticated enough to make an

2. *See* Paul Milgrom & John Roberts, *Relying on the Information of Interested Parties*, 17 RAND J. ECON. 18 (1986).

accurate decision if he possesses all the information.

By and large, these criteria are not directly satisfied in the automobile market, but they can be satisfied by proxy. Sophisticated buyers and scientists shop and test, and then write reviews for the auto magazines and Consumer Reports, whose team swings a "bumper basher" that reveals how much damage the car receives. Information then can be disseminated cheaply, because the product is standardized. One 1996 Ford Tempo is much like another. Moreover, sophisticated shoppers protect others by influencing the price at which these models sell.

Now what about the legal system? None of the five criteria holds, and the legal system does not have the same proxies as do economic markets. Sad to say, lies are told in court without detection or punishment. Jurors and judges know the party's slant in a general way (plaintiffs want to receive maximum awards, for example) but do not know the full agenda, which may include arrangements out of court and interests in other cases. They do not know what information each side possesses; even the parties do not know this, because discovery is not fully revealing. They do not know what information matters (this is just a restatement of the proposition that they are amateurs). They do not draw sophisticated inferences.

Let me come back to the question how society deals with informational asymmetries (the technical term) in daily life. Think about the securities market. Very complex and sophisticated institutions cope with these problems. Underlying assets can be inspected. There are third-party reviewers, who we call auditors. There are third-party guarantors, who we call investment bankers. There are bonds of good faith: for example, the managers of corporations own stock, and you believe what they say about the firms to the extent that they're putting their money where their mouths are. There are payouts (dividends and repayments of debt) that are very hard for people who are trying to fake you to duplicate, because they don't have the money to pay out regularly. There are markets for stock, where professionals set the price and get the benefit of trading at the price the professionals deem right. And there are, of course, legal guarantees. Penalties for fraud in the securities business are quite high.

The judicial system does not use any of those devices, not a one of them. Penalties for perjury, and ethical discipline of

lawyers, come closest, but there is, alas, a weak relation between false testimony in a courtroom and prosecution for perjury. The idea of the adversarial system is that, in lieu of these complicated institutions and sophisticated users of information (as inquisitorial judges are supposed to be), we put another sophisticated speaker in the room.[3]

When the prosecutor is done talking, the defense lawyer gets up. After the prosecutor has said certain things about the evidence, the defense lawyer says, "You know, he hasn't told you about the bumpers yet, has he? They're flimsy." But how well does a two-sided presentation substitute for a sophisticated user of information? Poorly, I fear. Let us go through the five conditions once again.

1) Even with two speakers in the room, we need a rule against fraud, for now either side may be trying to mislead. One lawyer may have told it straight, and the other may introduce bogus evidence. As I say, we don't have strong enforcement of the rule against fraud, because to enforce that rule we must be able to prove the truth beyond a reasonable doubt. But unlike a physical item, which can be inspected or tested, the propositions advanced in litigation usually do not have simple true-false properties. What did Smith see on the evening of January 23? What did Green say to Jones? What is the best definition of an economic market? How many false positives were there when testing suspects for drugs? We use the legal system to work out the answers to these questions, and we do not have a solid method external to the system to verify the answers and enforce penalties for deceit.

2) Neither side is fully informed about what the other knows, and therefore neither adversary knows what is essential to highlight shortcomings on the other's presentation. Unless it is possible to distinguish information withheld (and from which an adverse inference should be drawn) from information unknown, the method of sophisticated skepticism won't get us to astute inferences.

3) The process of inference-drawing works only when all

3. *See* Luke M. Froeb & Bruce H. Kobyashi, *Naive, Biased, yet Bayesian: Can Juries Interpret Selectively Produced Evidence?*, 12 J.L. ECON. & ORG. 257 (1996). Froeb and Kobyashi give a qualified "yes" to the question in their title for reasons similar to those explored in Milgrom & Roberts, *see supra* note 2. My answer in the text is "no" because I do not think the essential conditions of that approach are satisfied.

inferences are allowable. What made the auto exchange so informative was that the sophisticated buyer could say: "He didn't say a thing about the bumpers, so I assume that they are weak." The parallel is that the trier of fact must be allowed to draw adverse inferences from silence, yet we have legal rules that constrain that. A prosecutor is not allowed to argue to the jury that the defendant didn't testify, and that inferences therefore should be drawn, even if this process of reasoning is sound.[4] Many inferences are forbidden or discouraged for substantive reasons.

4) Only when the topic of the exchange is precisely defined will the inferential process work. It's clear in the auto transaction exactly what's going on. Somebody is trying to buy the best auto for the lowest price, and the seller is trying to get the maximum price he can for the auto he has to sell. There is no similar constraint in trials, a subject covered in the previous Panel. Extraneous matter often is introduced into the trials by such things as send-them-a-message arguments. The prosecutor asks the jurors to "send a message" that drugs can't be tolerated, or the defense asks the jurors to "send a message" that police brutality is unacceptable, or the plaintiff that deep-pocket corporations can't make unsafe products. Send-them-a-message arguments often are extraneous to the issue and, therefore, violate the conditions that make an inferential process work.

5) Given that decisionmakers are amateurs, lawyers play to their audience. Many find that it does not pay to learn the technical details of a subject, because the information will not prove useful. So we see the spectacle of lawyers making arguments pro and con about the etiology of a disease by citing only judicial opinions,[5] or contending that scientific disputes can be resolved by cross-examination rather than by scientific method.[6]

Once more, consider how we deal with difficulties outside the courtroom, because I have been talking about ordinary weaknesses of the human existence. We aren't calculating machines. We deal with these problems regularly outside the courtroom, but largely through the medium of markets. People

4. *See* Griffin v. California, 380 U.S. 609 (1965).
5. *See* Freeman United Coal Mining Co. v. Hilliard, 65 F.3d 667 (7th Cir. 1995).
6. *See* United States v. Pierre, 47 F.3d 241 (7th Cir. 1995).

make their own choices, and if they choose wrongly, they pay for their errors. If they buy a bad car the first time, they are penalized for it. They learn from their mistakes. Those who do not learn still can buy at prices that to a substantial degree reflect the strengths and weaknesses of a product, because informed buyers influence prices strongly.[7]

We deal with these problems by training and education, so that people don't have to learn from their own errors but can learn from other people's errors. We deal with them by expertise. Some people have trained longer and harder in this field than others; their information is passed on in books and magazines and newspapers. Finally, we deal with them by selection. If we have to have someone else make choices for us, we choose those who, by reason of their training or experience or background or learning, are least likely to commit errors.

Yet in the adversarial trial, we disdain all of these devices. Jurors are one-shot deciders, screened for ignorance rather than expertise, and they don't pay for their errors either directly or indirectly. To convict the innocent or acquit the guilty has very large costs for the people involved but very low costs for the jurors, because although either convicting the innocent or acquitting the guilty slightly reduces deterrence, the amount at the margin in one trial is so small as to be outside the jurors' sphere of concern. That makes it a lot easier in these cases to persuade amateur deciders to follow the send-them-a-message line. This is your 15 minutes of fame. Take a stand. If you don't send a message, at least produce more fairness, an ex post equality of distribution, even though the legal system needs to be greatly concerned with ex ante incentives.[8]

From all of this, it should be clear that wagging fingers at the lawyers is not productive. They take the system as given, advancing their clients' interests as best they can given these limitations. I did not come here, however, just to pronounce doom and despair. Most disputes are resolved out of court, between professionals, and I think that these settlements and

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7. *See* Alan Schwartz & Louis L. Wilde, *Intervening in Markets on the Basis of Imperfect Information*, 127 U. PA. L. REV. 630 (1979); Alan Schwartz & Louis L. Wilde, *Competitive Equilibria in Markets for Heterogeneous Goods Under Imperfect Information: A Theoretical Analysis with Policy Implications*, 13 BELL J. ECON. 181 (1982).

8. *See* Carroll v. Otis Elevator Co., 896 F.2d 210, 212 (7th Cir. 1990) (Easterbrook, J., concurring).

plea bargains are reliable in the main. They reflect the probabilities of what a court will do, for legal decisions (even those influenced by amateurs) are more reliable in the aggregate than in any individual case; settlement reflects the median outcome of litigation rather than the tails of the distribution.[9] Changes to make the anticipated outcome more accurate are nonetheless both possible and desirable, even if committing more decisions to professionals (not judges per se, but judicial experts, of the kind specialized tribunals elsewhere in the world use) is not a likely development in the United States.

1. If we cannot commit decisions to professional adjudicators, we can at least increase the level of sophistication in the jury. For example, we can follow the approach of other countries—the United Kingdom, for example—and allow or encourage jurors to be repeat players, to hear many trials and not just one. Members of the grand jury sit for months at a time. Petit jurors also can develop greater sophistication by spending more time in the courtroom. When scientific evidence is to be used, we can screen the jury for knowledge rather than screening for ignorance, as seems to be today's norm. The "blue ribbon jury" should be common. Parties have a right to unbiased jurors, not to ignorant or stupid ones. Mixed lay-and-professional factfinding bodies could be employed, as they are in some other nations.[10]

2. We can impose steeper penalties for fraud. Penalties can be direct or indirect. The major risk for a lawyer who tries to mislead a tribunal in most of the world is not that a damages award will be entered or that he'll lose his license but that the judge will lift his eyebrow. Such a response is very serious, because with a smaller bar before a smaller bench, all the lawyers are repeat players, and losing credibility has very large cost.[11] Although the United States has both a large bar and a large bench in the major cities, which diminishes reputational penalties, the effective size of both bench and bar can be

9. I expand on this point in *Plea Bargaining as Compromise*, 101 YALE L.J. 1969 (1992); *Justice and Contract in Consent Judgments*, 1987 U. CHI. LEGAL F. 19; and *Criminal Procedure as a Market System*, 12 J. LEGAL STUD. 289 (1983).

10. *See, e.g.*, Gerhard Casper & Hans Zeisel, *Lay Judges in the German Criminal Court*, 1 J. LEG. STUD. 135 (1972).

11. *See generally* Frank H. Easterbrook, *Discovery as Abuse*, 69 B.U. L. REV. 635 (1989).

diminished through specialization. Bankruptcy courts handle the business with greater dispatch (and apparently less deceit) because both bench and bar are specialized; this is true in tax and patent cases as well.

3. A third option is to allow more freedom to use probative evidence and draw sound inferences. A start has been made on excluding "junk science" from the courtroom,[12] but curtailing access to misleading information is inferior to improving the ability of the legal system to draw good inferences from the whole body of evidence. This is not the place to develop an argument on the question whether the exclusionary rule should be relaxed, or whether a prosecutor should be allowed to comment on a defendant's decision not to testify. For the present, my only point is that adjudication in an adversarial system will be more accurate, the more logical inferences are permitted.

As more of society's disputes are drawn into the adversary process, it is vital to understand the limits of adjudication, and to explore simple steps that can be taken to make adjudication more accurate. By exploring the logical limitations of the existing inferential process we can see which options hold the most potential for constructive change.

12. *See* Daubert v. Merrell Dow Pharmaceuticals, Inc., 509 U.S. 579 (1993); Gacy v. Welborn, 994 F.2d 305 (7th Cir. 1993).