The Problem of Truth:
Discussion of a Lawyer's Duty

There is an inherent flaw in the United States criminal justice system. The adversarial nature of formal dispute resolution upon which our common law system is based often fails to provide American citizens with justice. Clearly justice can be defined in a litany of different ways, and justice cannot be regarded as one definite, universally accepted ideal. For the purposes of this discussion, however, the function of criminal trials in the U.S. will be defined in the most basic of terms: the discovery of the truth in a given situation through due process of law, such that those who are guilty of crimes delineated by codified laws are punished through fines, incarceration, and other established reprimands. This truth, however, is sometimes not reached in trials, and the adversarial system is often to blame for this failure. More specifically, it is the roll that attorneys play within this system in which it is the duty of these officials only to win cases with any means legally possible, not to aid the discovery of true facts that impedes the system's ability to uncover the truth in matters. Thus, the adversarial roll of lawyers within the legal system obstructs the pursuit of discovering who, in fact, is innocent, and who is guilty in legal disputes and trials, effectively hindering the system's ability to achieve its purpose in the aforesaid context.

Macaulay has argued that "when two men argue…on opposite sides…it is certain that no important consideration will altogether escape notice."[1] However, in the presenting of these "considerations" through exhibits and testimonies, lawyers often attempt to question their validity, thus distorting the legitimacy of any evidence that a Jury or Judge is introduced to. According to Jerome Frank:

[1] Jerome Frank, The "Fight" Theory Versus the "Truth" Theory (Princeton University Press;1976)

> "…the partisanship of the opposing lawyers blocks the uncovering of vital evidence or leads to a presentation of vital testimony in a way that distorts it…we have allowed the fighting spirit to become dangerously excessive…in short, the lawyer aims at victory, at winning in the fight, not aiding the court in discovering facts. He does not want the trial court to reach a sound and educated guess, if it is likely to be contrary to his client's interest. Our present trial method is thus the equivalent of throwing pepper in the eyes of a surgeon when he is performing an operation…."[2]

For many lawyers, procedure often takes precedence over truth in trials. Even if they know their client is guilty, an attorney may still legally make efforts to delegitimize the case of the prosecution. Frank states: "an experienced lawyer uses all sorts of stratagems to minimize the effect on the judge or jury of testimony disadvantageous to his client, even when the lawyer has no doubt of the accuracy and honesty of the testimony."[3] In this sense, lawyers work directly against the pursuit of justice, using skill and knowledge of the legal system to skew the discovery of their client's guilt. The only means with which to discover the truth are facts and testimonies presented by lawyers and prosecutors, and creating confusion as to which are truthful and legitimate only further hinders a judge or jury from reaching sound, correct deliberation. This is a blatant contrast with the purpose of the legal system within the scope of this argument, and thus is a normative hindrance to the pursuit of truth in a given matter.

In his article The Criminal Lawyer's "Different Mission": Reflections on the "Right to Present a False Case, this sentiment is articulated by Harry I. Subin through an experience he had as an attorney. When representing a client accused of rape, Subin grew suspicious of his client's claimed innocence, as certain nuances of the case didn't logically support his alibi. Subin states:

> "I had my suspicions about…the client's version of what had occurred, and I supposed a jury would as well. The problem was theirs, however, not mine. All I had to do was present my client's version of what occurred in the best way that I could…Or was that all that was required? Committed to the adversarial spirit…, I decided that it was not. The 'different mission' took me

[2] Jerome Frank, The "Fight" Theory Versus the "Truth" Theory (Princeton University Press;1976)
[3] Jerome Frank, The "Fight" Theory Versus the "Truth" Theory (Princeton University Press;1976)

> beyond the task of presenting my client's position in a legally correct and persuasive manner, to trying to untrack the state's case in any lawful way that occurred to me, regardless of the facts."[4]

Subin would later discover that his client was, in fact, guilty of the rape. While compelled morally, Subin ultimately decided that "knowing the truth in fact did not make a difference to my defense strategy." The case never reached trial, as it was eventually plea bargained. However, at the end of his article, Subin contemplates his planned strategy as contrary to the purpose of the judicial system, and morally irreprehensible. Subin states: "I was prepared to stand before the jury posing as an officer of the court in search of truth, while trying to fool the jury with a wholly fabricated story."[5] In identifying himself as "in search of truth," Subin identifies his duty within the legal system as contrary to its purpose; his duty was to discredit the presentation of facts and testimonies he knew would give a judge and jury an accurate representation of the truth.

Taking an even more extreme stance on the matter is long-time public defender Martin Endermann, who goes as far as to claim that "I have nothing to do with justice…justice is not even part of the equation." Endermann maintains that lawyers do not serve clients, but merely serve the system, maintaining stability through constant plea bargaining. Describing Endermann, James Mills states:

> "If there is fault, it is not with Endermann himself, but with the system. Criminal law to the defense lawyer does not mean…proper punishment…It means getting everything he can for his client. The government needs guilty pleas to move cases out of court, and the defendants are selling their guilty pleas for the only currency the government can offer- time. But no matter what sentence is finally agreed upon…the guilty always win. The innocent always lose."[6]

Endermann describes a legal system in New York that is bogged with cases. The system is so much so, that guilty pleas are taken in return for reduced sentences. This leads to clear misrepresentations of the truth in many matters. For instance, Endermann describes

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[4] Harry I. Subin, The Criminal Lawyer's "Different Mission": Reflections on the "Right" to Present a False Case (vol. 1;The Georgetown Journal of ethics; 1987)

[5] Harry I. Subin, The Criminal Lawyer's "Different Mission": Reflections on the "Right" to Present a False Case (vol. 1;The Georgetown Journal of ethics; 1987)

[6] James Mills, I have nothing to do with Justice (Random House; 1971-75)

a situation where a client who adamantly claimed innocence eventually pleaded guilty to a crime, rather than pleading innocence in trial, simply because in return for the guilty plea he was sentenced to time in prison already served, and was subsequently released. In this case, a jury never even had an opportunity to weigh facts and evidence in order to discover the truth. The truth, rather, is discarded in order to maintain stability within the system, and according to Endermann, it is the attorney's job within the system to facilitate this.

The problem of the adversarial system can also be identified from the point of view of the prosecution. In his article Killer Instincts, Jeffrey Toobin describes the issue of prosecutors needing to break the bounds of the legal system, resorting to misleading jurors in order effectively prosecute those they feel to be truthfully guilty. According to Toobin: "[prosecutors] get wedded to a theory and then ignore evidence that doesn't fit…once [prosecutors] get to the point where [they] believe [their] instincts must be right, [they] quickly…just deep-six inconvenient evidence."[7] Toobin focuses his article to the example of Kenneth Peasley, an Arizona prosecutor who was disbarred for perjury. Peasley, prosecuting suspects of a triple murder he strongly felt were guilty of this crime, lied in order to further legitimize the testimony of the criminal who fingered the suspects in return for a reduced sentence. Peasley claimed that the informant, Keith Woods, had named the suspects before the police had ever been aware of them, or knew of their relation to the crime; whereas the truth was that they had given Woods the names, and he had merely identified them as guilty. Thus, in order to uncover what he felt to be the truth in the matter, Peasley had to break the rules of the legal system, as the lawyer's ability to delegitimize his informant's testimony would hinder his ability to do so. Thus, in

[7] Jeffrey Toobin, Killer Insitncts (The New Yorker; 2005)

Peasley's view, the legal system is not a forum in which the truth can properly be discovered, and one must break the rules of this system in order to achieve its purpose.

The cases of Subin, Enermann, and Peasley all identify the inherent problem with the adversarial system. If the purpose of the system is to send the guilty to jail, and to absolve the innocent, then why do lawyers work in a manner so contrary to this? The answer is that the adversarial system, while stable, has many inherent flaws, and must be changed into a system more concerned with facilitating the discovery of the truth. Until such changes are made, justice, as defined in the context of this argument, will often be discarded in the name of stable process.