

# JUDGE FRANKEL'S SEARCH FOR TRUTH

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The theme of Judge Marvin E. Frankel's Cardozo Lecture is that the adversary system rates truth too low among the values that institutions of justice are meant to serve. Accordingly, Judge Frankel takes up the challenging task of proposing how that system might be modified to raise the truth-seeking function to its rightful status in our hierarchy of values. His proposals, delivered with characteristic intellect, grace, and wit, are radical and, I believe, radically wrong.

Judge Frankel directs his criticism at the adversary system itself and at the lawyer as committed adversary. Challenging the idea that the adversary system is the best method for determining the truth, Judge Frankel asserts that "we know that others searching after facts—in history, geography, medicine, whatever—do not emulate our adversary system."<sup>1</sup> I would question the accuracy of that proposition, at least in the breadth in which it is stated. Moreover, I think that to the extent that other disciplines do not follow a form of adversarial process, they suffer for it. Assume, for example, a historian bent upon determining whether Edward de Vere wrote the plays attributed to William Shakespeare, or whether Richard III ordered the murder of the princes in the Tower, or even whether it was militarily justifiable for the United States to devastate Nagasaki with an atomic bomb. Obviously, the historian's inquiry would not be conducted in a courtroom, but the conscientious historian's search for truth would necessarily involve a careful evaluation of evidence marshalled by other historians strongly committed to sharply differing views on those issues. In short, the process of historical research and judgment on disputed issues of history is—indeed, must be—essentially adversarial. In medicine, of course, there is typically less partisanship than in historical research because there is less room for the play of political persuasion, and less

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<sup>1</sup> Frankel, *The Search for Truth: An Umpireal View*, 123 U. PA. L. REV. 1031, 1036 (1975).

room for personal interest and bias than in the typical automobile negligence case. Nevertheless, anyone about to make an important medical decision for oneself or one's family would be well advised to get a second opinion. And if the first opinion has come from a doctor who is generally inclined to perform radical surgery, the second opinion might well be solicited from a doctor who is generally skeptical about the desirability of surgery. According to one study, about nineteen percent of surgical operations are unnecessary.<sup>2</sup> A bit more adversariness in the decision-making process might well have saved a gall bladder here or a uterus there.

Moreover, as Professor Black has recently reminded us, it is well established in our law that the extent of due process—meaning adversary procedures—properly varies depending upon the matter at stake in litigation.<sup>3</sup> In medical research, the situation is similar, and recent instances of dishonesty at the Sloan-Kettering Institute and at Harvard illustrate the increasing importance of adversariness in medical research.<sup>4</sup> Prior to World War II, apparently, the material rewards of biological research were small, “scientific chicanery” was extremely limited,<sup>5</sup> and adversariness was of minimal concern, but the stakes have risen since then. Now that publication of discoveries has become essential to professional advancement and to obtaining large grants of money, rigorous verification, as through replication by a skeptical colleague, has become a common requirement.<sup>6</sup>

Having started from what seems to me to be a faulty premise that adversariness is essentially inimical to truth, Judge Frankel concludes his proposals for change with a proposal for a fundamental revision of the *Code of Professional Responsibility*.<sup>7</sup> Specifically, disciplinary rule 7-102 currently forbids the lawyer from knowingly and actively participating in fraud in the course of representation.<sup>8</sup> Under Judge Frankel's proposed draft of dis-

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<sup>2</sup> N.Y. Times, June 19, 1973, at 21, col. 1.

<sup>3</sup> C. BLACK, CAPITAL PUNISHMENT 32-35 (1974).

<sup>4</sup> Borek, *Cheating in Science*, N.Y. Times, Jan. 22, 1975, at 35, col. 2. See also Levine, *Scientific Method and the Adversary Model: Some Preliminary Thoughts*, 29 AM. PSYCHOLOGIST 661, 669-76 (1974).

<sup>5</sup> *Id.*

<sup>6</sup> *Id.*

<sup>7</sup> Frankel, *supra* note 1, at 1057-59.

<sup>8</sup> ABA CODE OF PROFESSIONAL RESPONSIBILITY, DR 7-102. Even that proposition is not as unambiguous as it might appear on first reading. See M. FREEDMAN, *LAWYERS' ETHICS IN AN ADVERSARY SYSTEM*, ch. 3 (forthcoming).

ciplinary rule 7-102, however, an attorney would have an affirmative duty: (a) to report to the court and opposing counsel the existence of relevant evidence or witnesses where the lawyer does not intend to offer such evidence or witnesses; (b) report to the court and opposing counsel any untrue statement, or any omission to state a material fact, even when committed by a client; and (c) to question witnesses "with a purpose and design to elicit the whole truth."<sup>9</sup> Moreover, in order to avoid the traditional sophistry used to evade responsibility in this area,<sup>10</sup> Judge Frankel provides that a lawyer "will be held to possess knowledge he actually has or, in the exercise or reasonable diligence, should have."<sup>11</sup>

To be fair to Judge Frankel—and, at the same time, as part of my attack on his thesis—I should note the repeated expressions of uncertainty with which Judge Frankel puts forth his own proposal. His article "makes no pretense to be polished or finished wisdom," but is intended "'to suggest problems and raise doubts, rather than to resolve confusion; to disturb thought, rather than to dispense legal or moral truth.'" In sum, his effort is only to "sketch" some "tentative lines" along which efforts to reform the adversary system "might" proceed.<sup>12</sup> Those substantial disclaimers are certainly disarming of criticism. At the same time, however, I trust that his audience will be particularly wary about adopting a view to which Judge Frankel has not yet succeeded in persuading himself.

Judge Frankel does not, of course, adopt the simplistic notion that a system for administering justice is concerned solely with truth-seeking. Indeed, it is not even clear that Judge Frankel would make truth the paramount objective. His thesis is more modest—again, disarmingly so. It is not that truth has been denied its rightful place at the apex of our hierarchy of values, but only that it is now "too low" among the values that institutions of justice are meant to serve. One cannot fault Judge Frankel for failing to identify, in his initial and tentative effort, all of the values he might have in mind. However, before we proceed to think any more seriously about substantial modifications of our

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<sup>9</sup> All of the foregoing is subject to the qualifying phrase "unless prevented from doing so by a privilege reasonably believed to apply." Frankel, *supra* note 1, at 1057. I am not sure what that clause is intended to mean, but it could, of course, effectively nullify the entire proposal.

<sup>10</sup> See M. FREEDMAN, *supra* note 8, ch. 5.

<sup>11</sup> Frankel, *supra* note 1, at 1058.

<sup>12</sup> *Id.* 1031.

traditional—indeed, constitutional—system for administering justice, I think we ought to know just what values will be rearranged into what order of priorities.

For my own part, I think it is essential that any evaluation of the truth-seeking function of a trial be done in the context of our system of criminal justice<sup>13</sup> and, indeed, the nature of our society and form of government. We might begin, by way of contrast, with an understanding of the role of a criminal defense attorney in a totalitarian state. As expressed by law professors at the University of Havana, “the first job of a revolutionary lawyer is not to argue that his client is innocent, but rather to determine if his client is guilty and, if so, to seek the sanction which will best rehabilitate him.”<sup>14</sup> Similarly, a Bulgarian attorney began his defense in a treason trial by noting, “In a Socialist state there is no division of duty between the judge, prosecutor, and defense counsel. . . . The defense must assist the prosecution to find the objective truth in a case.”<sup>15</sup> In that case, the defense attorney ridiculed his client’s defense, and the client was convicted and executed. Sometime later the verdict was found to have been erroneous, and the defendant was “rehabilitated.”<sup>16</sup>

The emphasis in a free society is, of course, sharply different. Under our adversary system, the interests of the state are not absolute, or even paramount. The dignity of the individual is respected to the point that even when the citizen is known by the state to have committed a heinous offense, the individual is nevertheless accorded such rights as counsel, trial by jury, due process, and the privilege against self-incrimination. A trial is, in part, a search for truth; accordingly, those basic rights are most often characterized as procedural safeguards against error in the search for truth. We are concerned, however, with far more than a search for truth, and the constitutional rights that are provided by our system of justice serve independent values that may well outweigh the truth-seeking value, a fact made manifest when we realize that those rights, far from furthering the search for truth, may well impede it. What more effective way is there to expose a defendant’s guilt than to require self-incrim-

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<sup>13</sup> Judge Frankel makes no apparent distinction in his article between criminal and civil cases, and several references in the article indicate clearly that his modifications of the system are intended to reach criminal as well as civil trials.

<sup>14</sup> Berman, *The Cuban Popular Tribunals*, 69 COLUM. L. REV. 1317, 1341 (1969).

<sup>15</sup> N.Y. Times, Dec. 14, 1949, at 9, col. 1, cited in J. KAPLAN, CRIMINAL JUSTICE 264-65 (1973).

<sup>16</sup> *Id.* Apr. 4, 1956, at 1, col. 4.

ination, at least to the extent of compelling the defendant to take the stand and respond to interrogation before the jury? The defendant, however, is presumed innocent, the burden is on the prosecution to prove guilt beyond a reasonable doubt, and even the guilty accused has an "absolute constitutional right to remain silent" and to put the government to its proof.<sup>17</sup>

Thus, the defense lawyer's professional obligation may well be to advise the client to withhold the truth: "[A]ny lawyer worth his salt will tell the suspect in no uncertain terms to make no statement to police under any circumstances."<sup>18</sup> Similarly, the defense lawyer is obligated to prevent the introduction of some evidence that may be wholly reliable, such as a murder weapon seized in violation of the fourth amendment or a truthful but involuntary confession. Justice White has observed that although law enforcement officials must be dedicated to "the ascertainment of the true facts, . . . defense counsel has no comparable obligation to ascertain or present the truth. Our system assigns him a different mission. . . . [W]e . . . insist that he defend his client whether he is innocent or guilty."<sup>19</sup> Such conduct by defense counsel does not constitute obstruction of justice. On the contrary, "as part of the duty imposed on the most honorable defense counsel, we countenance or require conduct which in many instances has little, if any, relation to the search for truth."<sup>20</sup> Indeed, Justice Harlan noted that "the lawyer in fulfilling his professional responsibilities of necessity may become an obstacle to truthfinding,"<sup>21</sup> and Chief Justice Warren has recognized that when the criminal defense attorney successfully obstructs efforts by the government to elicit truthful evidence in ways that violate constitutional rights, the attorney is "exercising . . . good professional judgment . . . . He is merely carrying out what he is sworn to do under his oath—to protect to the extent of his ability the rights of his client. In fulfilling this responsibility the attorney plays a vital role in the administration of criminal justice under our Constitution."<sup>22</sup>

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<sup>17</sup> *Escobedo v. Illinois*, 378 U.S. 478, 491 (1964); *Malloy v. Hogan*, 378 U.S. 1, 8 (1964).

<sup>18</sup> *Watts v. Indiana*, 338 U.S. 49, 59 (1949) (Jackson, J., concurring and dissenting).

<sup>19</sup> *United States v. Wade*, 388 U.S. 218, 256-57 (1967) (White, J., dissenting in part and concurring in part).

<sup>20</sup> *Id.* at 258.

<sup>21</sup> *Miranda v. Arizona*, 384 U.S. 436, 514 (1966) (Harlan, J., dissenting).

<sup>22</sup> *Id.* at 480-81 (opinion of the Court).

Obviously those eminent jurists would not arrive lightly at the conclusion that an officer of the court has a professional obligation to place obstacles in the path of truth. Their reasons go back to the nature of our system of criminal justice and to the fundamentals of our system of government. Before we will permit the state to deprive any person of life, liberty, or property, we require that certain processes which ensure regard for the dignity of the individual be followed, irrespective of their impact on the determination of truth. By emphasizing that the adversary process has its foundations in respect for human dignity, I do not mean to deprecate the search for truth or to suggest that the adversary system is not concerned with it. On the contrary, truth is a basic value and the adversary system is one of the most efficient and fair methods designed for finding it. That system proceeds on the assumption that the best way to ascertain the truth is to present to an impartial judge or jury a confrontation between the proponents of conflicting views, assigning to each the task of marshalling and presenting the evidence for its side in as thorough and persuasive a way as possible. The truth-seeking techniques used by the advocates on each side include investigation, pretrial discovery, cross-examination of opposing witnesses, and a marshalling of the evidence in summation. The judge or jury is given the strongest case that each side can present, and is in a position to make an informed, considered, and fair judgment. Nevertheless, the point that I now emphasize is that in a society that respects the dignity of the individual, truth-seeking cannot be an absolute value, but may be subordinated to other ends,<sup>23</sup> although that subordination may sometimes result in the distortion of the truth.

As indicated earlier, Judge Frankel is neither ignorant of nor insensitive to such concerns. In his Cardozo Lecture, however, he seems to me to give them substantially less than their due, pausing only to note briefly, near the end of his article that

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<sup>23</sup> See ABA PROJECT ON STANDARDS FOR CRIMINAL JUSTICE, STANDARDS RELATING TO THE ADMINISTRATION OF CRIMINAL JUSTICE 59-60 (1974). Cf. *Tehan v. United States ex rel. Shott*, 382 U.S. 406, 416 (1966) (Stewart, J.):

The basic purpose of a trial is the determination of truth . . . . By contrast, the Fifth Amendment's privilege against self-incrimination is not an adjunct to the ascertainment of truth. That privilege, like the guarantees of the Fourth Amendment, stands as a protection of quite different constitutional values . . . . To recognize this is no more than to accord those values undiluted respect.

it is "strongly arguable . . . that a simplistic preference for the truth may not comport with more fundamental ideals—including notably the ideal that generally values individual freedom and dignity above order and efficiency in government."<sup>24</sup>

One suspects that in minimizing his advertence to that critical aspect of the problem, the umpireal judge was backsliding into a bit of lawyerly adversariness. For if we ask, as I think we must, just how strongly arguable is the case for the "more fundamental ideals," we will find either that we are being asked to sacrifice those ideals in some substantial measure, because the case for them is not sufficiently strong, or that Judge Frankel's proposal is wholly impractical, because regard for those ideals precludes a single-minded search for truth. Moreover, if the former be the case, then I think we would be compelled to turn our attention to some fearsome questions thus far elided by Judge Frankel: precisely which parts of the fourth, fifth, and sixth amendments are we being asked to scrap, and how can the requisite amendments to the Bill of Rights be phrased without doing irreparable damage to some of the most precious aspects of our form of government?

In sum, Judge Frankel has succeeded in what he set out to do: He has suggested problems, raised doubts, and disturbed thought. Moreover, he has done so in a way that charms and delights. However, as Judge Frankel warned us at the start of his article, his proposals for radical surgery on the adversary system neither resolve confusion nor dispense truth.

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<sup>24</sup> Frankel, *supra* note 1, at 1056-57.