
Truth: is it dead, endangered, or was it always an illusion?

Professor John Spencer, CBE

Professor Spencer takes a look at truth from a lawyer's perspective, casting his eye back over access to truth in the past, and the control of it, before considering how we view truth today in modern democracies of the West. What are the current threats to our understanding of the truth, and what might be done to counter these threats?

No doubt about it, says Professor Spencer, there is growing concern about the current pandemic of mass misinformation. Just look at the recent spate of books on the subject of fake news, by authors such as Stephen Pinker, Matthew d'Ancona and Evan Davis.

Here in the UK, concern peaked in 2016 with the Brexit referendum sparking an outpouring of information that was misleading or plain wrong. Remember the famous Vote Leave campaign bus emblazoned with the claim "We send the EU £50 million a day - let's fund our NHS instead".

Spencer calls this "a doubly misleading claim," arguing that the slogan both exaggerated the UK's contribution to the EU by about 25%, but also implied that the UK's contribution is a much larger proportion of our national expenditure than it actually is: nothing like enough to cover the costs of solving the problems of the NHS.

Far wilder claims were circulated in local campaigns, but for those who despaired that we were making the biggest fools of ourselves in the western world, what was happening in the United States showed that we were not alone. According to the Washington Post, by the end of his first year as President, Donald Trump had told 2140 lies or misleading statements: an average of around six a day.

These are worrying signs, says Spencer: "What is happening to truth if the president of the US isn't apparently doing himself any damage by continually lying on that scale?"

Back on this side of the Atlantic, MPs at Westminster are certainly worried. A parliamentary Select Committee for Digital, Culture, Media and Sport, which began an inquiry in February 2017, has helped to reveal the scale of the problem, detailing the extent of fake news and data targeting. As if the DCMS findings are not troubling enough, Professor Spencer points out other developments which he finds deeply disturbing, such as the evolution of Deepfake videos, which show people doing or saying things they never did or said.

Why does this matter?

The implications of all this are obvious, says Spencer: "If the public is widely misinformed it makes disastrous critical choices with potentially catastrophic results." There are philosophical reasons to worry too. Spencer cites Stephen Pinker's book which warns that if the achievements of enlightenment - based on reason and accurate knowledge - are undermined, so too are all the gains of the enlightenment in improving the human condition.

And from a legal standpoint, truth is central. Spencer acknowledges that lawyers often get bad press, but he argues that this is largely unfair. In our adversarial system, it is the duty of advocates to put their client's case, even when they *suspect* a case may well be false. It is only when the advocate *knows* a case to be false that they can refuse it; indeed, they must as to do otherwise would be breaking the ethics of their profession.

"From the Court's perspective, the aim of the justice system is to try to produce a truthful result," says Spencer, and while this is not always met, it is the publicly proclaimed aim; of Criminal Procedure Rules,

for example, which state that the overriding objective - and justly so - is acquitting the innocent and convicting the guilty.

So, what is the judge's eye view of fact-finding? Spencer outlines key considerations.

First, he explains that the courts accept the notion that there are primary facts - in other words, what actually happened - and that where these exist, they can in principle be found. For example: did the defendant's car bump into the back of the claimant's car, or did the claimant's car reverse into the defendant's car?

Establishing primary facts can be difficult, especially if time has passed, and the courts need to establish cause and effect. To do so, they sometimes have to resort to rules of thumb such as the burden of proof, where the prosecutor must prove beyond reasonable doubt what happened.

Secondly, Professor Spencer points out that the courts treat opinion differently to fact. The law of defamation does not allow you to state facts falsely, but you are allowed to make comments that others might violently disagree with. There is a body of law on the difference between a statement of fact and a comment.

Thirdly, the courts sometimes need to make predictions about future facts, for example in response to compensation claims that are made on the basis anticipated needs following injury. And this often raises the question of expert opinion.

The role of experts

In order to establish primary facts, and causation, judges often have to rely on experts, and that raises new difficulties. As Professor Spencer explains, there is judicial caution in relation to expert evidence for a number of reasons.

One of them is the problem of junk science, where a belief is held that has no basis in real scientific information. This is nothing new, says Spencer, citing a classic case from 1665, when an 'expert' in demonology - and a respected man of 'science' in his day - was called to testify in the infamous trial of the Lowestoft witches. The evidence he gave, says Spencer, was "complete and utter rubbish, as we now know".

Another reason for caution is the adversarial distortion of experts, where each side in a case can find an expert to say the thing they want their audience to hear; the use of "hired guns", as American lawyers call them. Spencer notes wryly that both junk science and adversarial distortion were a feature of the polarised and heated debates in the lead-up to the Brexit referendum in 2016.

Does objective truth exist?

The title of Spencer's talk implies that there is such a thing as objective truth, yet even this notion has been challenged. Post-modernist philosophy, with which the names of Frenchman Jacques Derrida have been associated, denies the existence of an objective truth, arguing that everything depends on the perception of person's experience. Derrida's work has been criticised for lacking clarity and rigour, and there was an outcry in 1992 from senior academics in Cambridge, who opposed the decision to give Derrida an honorary degree.

While the academic merits of Derrida's work on truth may be debatable, when it comes to a legal view, Spencer is unequivocal: "Any notion that there is no such thing as objective truth, at least as far as primary facts are concerned, is sharply at variance with the legal view."

From a legal perspective, such philosophy is "misleading and dangerous" for the very reason that it leads people to believe that objective truth simply does not exist - and hence no can be criticized for not telling it. And it is relevant today, he adds, where people who defend Donald Trump have used this idea in order to defend some of the false things he has said.

What about the concept of “truth”, and access to the truth, in history?

“It is certainly an illusion to imagine that there was ever a pure well of truth from which everyone could drink, and that well has now become polluted,” says Spencer.

For centuries, the church and state controlled what people thought and said, and the situation changed only gradually. It is illustrative to reflect on landmark moments in legal history, such as the end to the state licensing of books in 1695. Yet it remained dangerous to publish anything which offended the authorities for a long time after. At the end of the eighteenth century, the British government prosecuted those who tried to publish and distribute Thomas Paine’s ‘The Age of Reason’ - a popular and engaging critique of institutionalised religion and the legitimacy of the Bible - fearing it would spread revolutionary ideas.

By the nineteenth century, such laws were changed and eventually abolished, so that different ideas could be more freely shared. And yet, while the freedom to publish has now long been embraced, Spencer maintains that “the mass availability of information, and with it the spread of misinformation is very much a modern phenomenon.”

The causes of the current problem

At the start of the 20th century in Britain there were still a lot of people - especially older people - who could not read. For those who could, their main access to information would have been a newspaper. Today, not only is literacy widespread, so too is the choice of sources of information: newspapers, radio, television and search engines on laptops and smartphones. What, then, is the problem. “Why is misinformation being spread to the extent that we are getting worried about it?” asks Spencer.

Irresponsible journalism - and especially in the printed press - is top of Spencer’s list of causes. The impact of this in relation to the European Union is considerable, he says. A glance at the EU-sponsored website, Euromyths - which publishes corrections to incorrect information published about the EU - gives an indication of the scale of the problem. The website counters misleading stories under headlines such as “EU to ban corgis” (Daily Mail 2002) and “EU plans to stop barmaids showing cleavages” (The Sun 2005), and there are pages and pages of them.

At a party in 2015, Spencer overheard guests saying they’d read that the catastrophic floods in the north of England were due to EU environmental policy. The claim had been made in one of the tabloid newspapers and duly copied by two others, and Spencer calculated that at least six million people would have been likely to read it. “How many would have believed this?” he wonders. When Spencer checked the Euromyth website, the story had been duly corrected – but the page had only been visited 2,500 times.

“So, leading up to EU referendum we had had years and years of persistent misinformation about the EU in sections of our printed press,” he says. And yet, the law has little power to do anything about this.

Where false or distorted information is spread about people, there is a case for civil liability in defamation or breach of privacy laws. But, with a few exceptions, if it is about anything else - the EU included - “you can say what you like, however false, and no-one can do anything about it.”

Next on Spencer’s list is social media’s exploitation of the internet, which leads to extraordinary false stories spreading like wildfire. In 2016, a story that Hilary Clinton was linked to a child sex ring run from a pizzeria in Washington went viral, prompting a man to drive for 6 hours in order to shoot up the pizzeria. How can this happen?

Spencer points the finger at the business models on which social media giants are built. The more times that browsers click around a site, the more social media companies, like Facebook, can charge in advertising rates. Using ‘bots’, these companies work out what people want to see, and then use news feeds to slip in items that match their interests.

“A large part of the problem is the abusive use of the internet by social media organisations in order to boost their advertising revenue,” says Spencer, and he is particularly concerned for the young, some of whom are checking their phones up to 150 times a day.

“Lots of people - especially young people - get their knowledge of the news and current affairs by looking at news feeds from social media sources, all of which tend to be slanted by companies trying to send them stuff that will excite them rather than what is true.”

If this is what is happening, what are we going to do about it?

Possible solutions?

One option is to tighten the law with new criminal offences, but would these do any good, asks Spencer. A number of countries have enacted holocaust denial offences; elsewhere there are offences for publishing false information to influence election outcomes. But well-intended laws can be interpreted in different ways: in the Second World War, it was an offence in Britain to spread alarm and despondency; such a law could be used by a dictatorial state to silence critics.

Spencer sees grave difficulties in extending the criminal law in this area, and points out that criminal offences are of limited use because you need to be able to identify the culprit and catch them. He quotes Jonathan Swift, who said: “Laws are like cobwebs which catch small flies, but let wasps and hornets break through.”

Another solution - no less complicated - is regulation. Spencer’s view is that broadcasting has been effectively regulated in the UK by OFCOM since 1984, but he is less impressed by regulation of the written press.

Self-regulation by the industry under the Press Complaints Commission came under repeated fire, and was criticised as not fit for purpose by the Leveson Enquiry. Questions about whether there should be a statutory body to regulate the regulators have divided opinion and while a new regulatory body, IPSO, has taken the place of the PCC, a number of newspapers do not subscribe to it.

As for social media, much has been said, written and proposed recently, not least in the report of the House of Commons committee for Digital, Culture, Media and Sport. Its recommendations include

- regulation along the lines of the OFCOM model
- new legal status for tech companies to make them responsible for content published on their platforms
- a clear legal duty for tech companies to take down harmful and illegal material
- a code of ethics for tech companies
- international action - e.g. an international code of practice
- digital education, to teach people about the signs and risks of false information.

So far, Spencer says he sees no signs that the government is following up on any of them.

A plea for more truth, less waffle

Perhaps we need to step back and take a look at the bigger picture, he suggests, if we are to feel more optimistic. He cites Evan Davis’ recent book, *Post Truth*, in which he argues that people are susceptible to fake news if they are genuinely worried about things, and people have been genuinely worried about how the EU manages currency and immigration. Davis suggests that politicians would do well to attend to these grievances; to tell us things more truthfully, and not waffle and misrepresent things.

Professor Spencer ends with a reference to the Old Testament story of the prophet Jonah, who sulked when the people of Ninevah heeded his warnings and repented of their sins so that God spared them terrible

repercussions. “To me,” says Spencer, “the message is, if you preach doom, you shouldn’t do so with a secret wish in your heart that things will work out badly at the end so you can say: ‘I told you so.’”

“We do have problems but it behoves us all to adopt a constructive attitude and to think of solutions to them.”