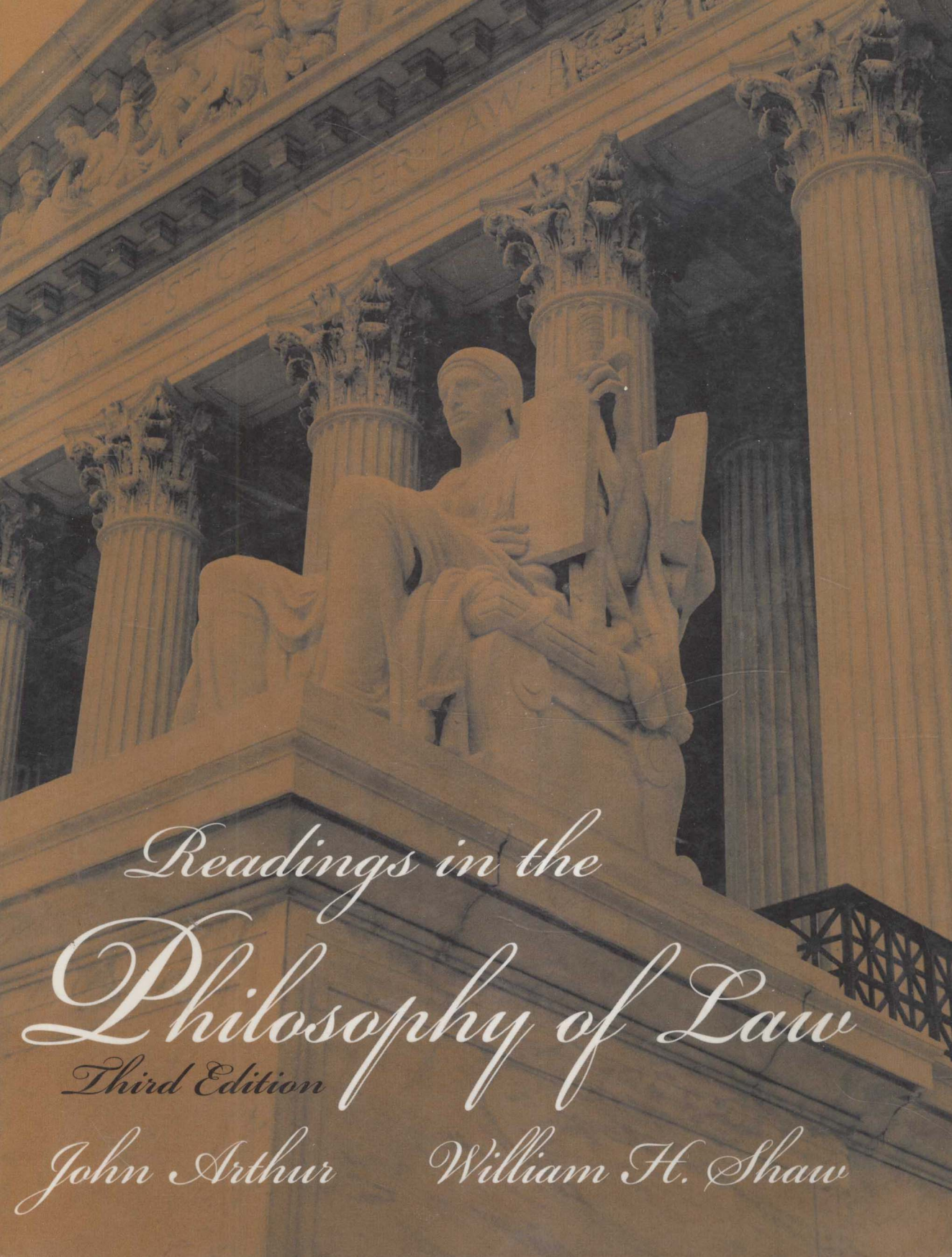

Readings in the Philosophy of Law

Third Edition

John Arthur William H. Shaw

Third Edition

READINGS IN THE PHILOSOPHY OF LAW

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PREFACE

We have been gratified by the reception that the first two editions of *Readings in the Philosophy of Law* have received. Each edition went through several printings, and many friends and colleagues have written to offer comments and suggestions. Like its predeccesors, this new edition reflects the conviction that legal philosophy is its own subject, best approached by paying attention to how the law is organized and to the particular issues it raises. The book is, therefore, not a book in applied ethics, nor one in political philosophy; it is its own subject with its own fascinating set of problems.

This text can be used in many different ways. It is designed so that each section stands on its own, enabling instructors to address the topics in any order and to skip certain topics if they wish. Readers familiar with the earlier editions will find in the third edition much continuity in the themes and issues treated. Believing it to be the soundest organizational structure, we continue to follow the traditional divisions among different fields of law. Initial sections on legal practice, legal reasoning, and the nature of law are followed by discussions of criminal, tort, contract, property, and constitutional law. These make up the major subdivisions in the book.

We have also expanded and redefined the early sections to deal with an array of topics either ignored or inadequately covered in other texts. In particular, we found it useful to begin undergraduate courses in philosophy of law with discussions of legal practice, the adversary system, the rule of law, obedience to law, and legal reasoning. Many philosophy of law students plan to attend law school, so these topics are a natural way to introduce them to the subject. We have been especially careful in selecting this introductory material to use readings that are accessible and interesting to discuss. The introductory section, "The Practice of Law," brings together four widely different viewpoints on the role and responsibilities of lawyers in an adversary system, while the readings on the rule of law focus on the practical problem of how to deal legally with people who worked with a previous, Nazi-like regime.

Readers will also notice many other new topics and essays in this edition. Part II, "The Nature of Law," now includes greatly expanded discussions of "Law and Economics" as well as "Critical Legal Theory and Feminist Jurisprudence." Material on criminal law now includes an essay on the O. J. Simpson trial, jury nullification, and racial politics, along with readings on the battered woman's defense and the cultural defense in criminal cases. Part V, on constitutional law, has also been revised and expanded. It now includes more focused discussions of the justification of judicial review and the nature of constitutional interpretation, as well as an essay comparing the American understanding of constitutionalism with that of the French and British. We have added an essay and cases on religious freedom. The last section, "Equality and the Constitution," begins with two new essays on the ideal of equality itself; it also includes new cases on sexual harassment and hate speech.

While seeking to present the readings in a coherent and interrelated format, we have at the same time sought to provide a textbook with ample resources to allow a variety of different courses to be taught, in different ways, and to different student audiences. These and related editorial decisions grow out of our experience in teaching courses in philosophy of law at several colleges and universities, both private and public, to undergraduates with varying degrees of philosophical background and academic preparedness. One of us teaches philosophy of law

to more than two hundred mainly lower-level students each year.

Philosophy of law is not a subject that can be made simple, but it can be made more accessible and more engaging to undergraduates than it has been in the past. Accordingly, we have endeavored to provide readings that students will find stimulating, yet that do justice to the subtlety and complexity of the philosophical problems in this field. We provide short introductions before each reading selection, and questions for review and discussion after each selection. These should enable even beginning students to follow the major arguments, at least in broad outline. In addition, we have edited the essays and cases with great care and abridged many of the readings from the previous edition in order to keep the focus sharply on the most relevant and important issues, avoiding needless technicality, immaterial digressions, and recondite issues.

John Arthur
William H. Shaw

CONTENTS

Preface ix

PART I ❖ LAW IN ACTION

1. The Practice of Law

Lawyers' Ethics in an Adversary System 3
Monroe H. Freedman

Building Power and Breaking Images: Critical Legal Theory and the Practice of Law 12
Peter Gabel and Paul Harris

The Lawyer as Friend 17
Charles Fried

The Lost Lawyer 26
Anthony Kronman

2. The Rule of Law

Magnitude and Importance of Legal Science 34
David Dudley Field

Eight Ways to Fail to Make Law 37
Lon Fuller

The Problem of the Grudge Informer 43
Lon Fuller

Grudge Informers and the Rule of Law 47
H. L. A. Hart

The Rule of Law and Its Virtues 49
Joseph Raz

3. The Moral Force of Law

Crito 56
Plato

The Justification of Civil Disobedience 63
John Rawls

On Not Prosecuting Civil Disobedience 71
Ronald Dworkin

4. Elements of Legal Reasoning

On Interpretation: The Adultery Clause of the Ten Commandments 78
Sanford Levinson

Stare Decisis: The Use of Precedent 81
C. Gordon Post

Rules of Interpretation 90
William Blackstone

A Case Study in Interpretation: The Mann Act 92
Edward H. Levi

Cases Interpreting the Mann Act 97
Caminetti v. United States; Mortensen v. United States; Cleveland v. United States

Can a Murderer Inherit? 103
Riggs v. Palmer

PART II ❖ THE NATURE OF LAW

5. Natural Law and Legal Positivism: Classical Perspectives

Summa Theologica 111
Thomas Aquinas

The Province of Jurisprudence Determined 117
John Austin

6. Formalism and Legal Realism

Preface to *Cases on the Law of Contracts* 125
Christopher Columbus Langdell

A Treatise on the Conflict of Laws 126
Joseph H. Beale

The Path of the Law 129
Oliver Wendell Holmes

Realism and the Law 133
Jerome Frank

Interpretation as Formal 141
Tony Honoré

7. The Contemporary Debate: Hart versus Dworkin

Positivism and Separation of Law and Morals 147
H. L. A. Hart

Law as the Union of Primary and Secondary Rules 156
H. L. A. Hart

The Model of Rules 160
Ronald Dworkin

"Natural" Law Revisited 170
Ronald Dworkin

8. Law and Economics

The Economic Approach to Law 177
Richard A. Posner

Law and Economics: An Analysis and Critique 183
Andrew Altman

9. Critical Legal Theory and Feminist Jurisprudence

Critical Legal Studies 196
Robert W. Gordon

Toward a Theory of Law and Patriarchy 205
Janet Rifkin

Jurisprudence and Gender 212
Robin West

Legal Realism, Critical Legal Studies, and Dworkin 223
Andrew Altman

Skepticism, Objectivity, and Democracy 232
Ronald Dworkin

PART III ❖ PHILOSOPHICAL ISSUES IN CRIMINAL LAW

10. Punishment: Theory and Practice

Who Should be Punished? 242
The Case of the Dog Provetie

Capital Punishment 243
Gregg v. Georgia

The Utilitarian Theory of Criminal Punishment 250
Richard B. Brandt

Persons and Punishment 256
Herbert Morris

Restitution: A New Paradigm of Criminal Justice 263
Randy E. Barnett

Legal Cases in Criminal Law
Racial Bias in Sentencing 270
McClesky v. Kemp
Cruel and Unusual Punishment 272
Rummel v. Estelle

11. Problems of Criminal Liability

Survival on a Lifeboat 277
The Queen v. Dudley and Stephens

The Principles of Criminal Law 281
Richard B. Brandt

Intention 287
H. L. A. Hart

Attempting the Impossible 294
United States v. Ovieda; People v. Dlugash

Rape 301
Susan Estrich

The Battered Woman's Defense 309
Catharyn Jo Rosen

Is the Insanity Test Insane? 318
R. J. Gerber

What Is So Special about Mental Illness? 327
Joel Feinberg

The Cultural Defense in the Criminal Law 334
Editors, Harvard Law Review

12. The Rights of Defendants

Convicting the Innocent 343
James McCloskey

A Debate on the Exclusionary Rule 350
Malcolm Richard Wilkey and Stephen H. Sachs

Interrogation and the Right to Counsel 362
Miranda v. Arizona; Brewer v. Williams; Rhode Island v. Innis

Criminal Justice and the Negotiated Plea 378
Kenneth Kipnis

The Race Card and Jury Nullification 385
Randall Kennedy

PART IV ❖ PHILOSOPHICAL ISSUES IN CIVIL LAW

13. Compensating for Private Harms: The Law of Torts

Negligence 396
William Prosser

Foreseeability of Risk 403
Stone v. Bolton

Negligence and Due Care 406
Palsgraf v. Long Island Railroad Co.

Tort Liability and Corrective Justice 413
Jeffrie G. Murphy and Jules L. Coleman

Legal Cases in Tort Law
Efficiency and the Law 421
United States v. Carroll Towing Company

Liability without Causation? 422
Summers v. Tice

A Duty to Rescue? 425
Yania v. Bigan; Farwell v. Keaton; McFall v. Shimp

Wrongful Life and Wrongful Birth 430
Berman v. Allan

14. Private Ownership: The Law of Property

Property 438
John Locke

Property and Sovereignty 444
Morris Raphael Cohen

Legal Cases in Property
Property Acquisition 450
Haslem v. Lockwood

Taking without Compensation 454
Penn Central Transportation Co. v. New York City

15. Private Agreements: The Law of Contract

The Basis of Contract 460
Morris Raphael Cohen

Contract as Promise 468
Charles Fried

Legal Cases in Contract Law
Surrogate Mother Contracts 476
In the Matter of Baby M

Employment Contracts 485
Lochner v. New York; Muller v. Oregon; Coppage v. Kansas; and West Coast Hotel Co. v. Parrish

PART V ❖ PHILOSOPHICAL ISSUES IN CONSTITUTIONAL LAW

16. Constitutional Government and the Problem of Interpretation

The Political Meaning of Constitutionalism: British, French, and American Perspectives 496
Ulrich K. Preuss

Debating Ratification of the U.S. Constitution 507
Robert Yates, Thomas Jefferson, James Madison, and Alexander Hamilton

The Notion of a Living Constitution 520
William H. Rehnquist

Constitutional Cases 526
Ronald Dworkin

Precommitment and Disagreement 535
Jeremy Waldron

Democracy, Judicial Review, and the Special Competency of Judges 545
John Arthur

Precedent, Legitimacy, and Judicial Review 553
Planned Parenthood v. Casey

17. Freedom of Religion, Free Speech, and Privacy

A Letter Concerning Toleration 560
John Locke

Legal Cases on Religious Freedom
School Prayer 564
Engel v. Vitale

Religious Freedom and Public Education 568
Wisconsin v. Yoder

Secular Humanism and Religious Establishment 571
Smith v. Board of Education of Mobile

On Liberty 575
John Stuart Mill

Legal Cases on Political Speech
Foundations of Free Speech 586
Schenck v. United States and Whitney v. California

Flag Burning 589
Texas v. Johnson

Nazi Marches 593
Village of Skokie v. National Socialist Party

Legal Cases on Obscenity and Pornography
Obscenity 596
Paris Adult Theatre v. Slaton

Pornography and Women 599
American Booksellers v. Hudnut

Privacy, Homosexuality, and the Constitution 602
John Arthur

18. Equality and the Constitution

Justice Engendered 611
Martha Minow

Equality, Race, and Gender 622
Peter Singer

Affirmative Action: An Exchange 636
Ronald Dworkin and Respondents

Wartime Internment of Japanese Americans 647
Korematsu v. United States

Gender Discrimination 653
Michael M. v. Sonoma County Superior Court

Legal Cases on Equality versus Free Speech
Speech Creating a "Hostile Environment" 655
Harris v. Forklift Systems

Campus Speech Codes 658
Doe v. University of Michigan

Appendix: The Bill of Rights and the Fourteenth Amendment 664

Acknowledgments 666

PART I

LAW IN ACTION

1

THE PRACTICE OF LAW

We begin this book with essays on the nature of the practice of law for two reasons. First, the selections are of great practical and moral interest: Many who study the philosophy of law will be thinking about becoming lawyers. The oft-heard criticisms of lawyers and of the practice of law will be all too familiar to them. We all know that lawyers often bear the brunt of jokes about the practice of law. They are also frequently accused of demonstrating a lack of integrity or a willingness to do what may seem to be immoral acts. Why, for instance, does society tolerate the confidentiality of the lawyer–client relationship when it means that useful information is being withheld from the police? Or why do the activities of lawyers make truthful people appear to be liars and liars appear to be truthful? Second, beyond these practical and moral issues, the essays in this section also begin our inquiry into some of the other important topics that arise throughout the text, which include the justification of the legal practices of excluding relevant evidence in certain cases, the connections between the law and politics, and the essential nature of the law.

Lawyers' Ethics in an Adversary System

Monroe H. Freedman

In this selection from his book Lawyers' Ethics in an Adversary System, *Monroe H. Freedman, professor of law and dean of the Hofstra University School of Law, examines the obligations of criminal defense lawyers in three difficult, morally troubling cases: whether to keep knowledge of a client's crime confidential, whether to allow a client to present perjured testimony, and whether to destroy a*

truthful witness through tough cross-examination. Freedman notes the conflicting obligations facing the conscientious attorney, but he defends zealous and aggressive advocacy in these cases as a necessary part of our adversarial criminal justice system.

WHERE THE BODIES ARE BURIED: THE ADVERSARY SYSTEM AND THE OBLIGATION OF CONFIDENTIALITY

In a recent case in Lake Pleasant, New York, a defendant in a murder case told his lawyers about two other people he had killed and where their bodies had been hidden. The lawyers went there, observed the bodies, and took photographs of them. They did not, however, inform the authorities about the bodies until several months later, when their client had confessed to those crimes. In addition to withholding the information from police and prosecutors, one of the attorneys denied information to one of the victims' parents, who came to him in the course of seeking his missing daughter.

There were interesting reactions to that dramatic event. Members of the public were generally shocked at the apparent callousness on the part of the lawyers, whose conduct was considered typical of an unhealthy lack of concern by lawyers with the public interest and with simple decency. That attitude was encouraged by public statements by the local prosecutor, who sought to indict the lawyers for failing to reveal knowledge of a crime and for failing to see that dead bodies were properly buried. In addition, the reactions of lawyers and law professors who were questioned by the press were ambivalent and confused, indicating that few members of the legal profession had given serious thought to the fundamental questions of administration of justice and of professional responsibility that were raised by the case.

One can certainly understand the sense of moral compulsion to assist the parents and to give the dignity of proper burial to the victims. What seems to be less readily understood—but which, to my mind, throws the moral balance in the other direction—is the obligation of the lawyers to their client and, in a larger sense, to a system of administering justice which is itself essential to maintaining human dignity. In short, not only did the two lawyers behave properly, but they would have committed a serious breach of professional responsibility if they had divulged the information contrary to their client's interest. The explanation of that answer takes us to the very nature of our system of criminal justice and, indeed, to the fundamentals of our system of government. . . .

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. Actually, however, a trial is far more than a search for truth, and the constitutional rights that are provided by our system of justice may well outweigh the truth-seeking value—a fact which is manifest when we consider that those rights and others guaranteed by the Constitution may well impede the search for truth rather than further it. What more effective way is there, for example, to expose a defendant's guilt than to require self-incrimination, 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.

Thus, the defense lawyer's professional obligation may well be to advise the client to withhold the truth. As Justice Jackson said: "Any lawyer worth his salt will tell the suspect in no uncertain terms to make no statement to police under any circumstances." Similarly, the defense lawyer is obligated to prevent the introduction of 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 using only truthful evidence, "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." . . .

Before we will permit the state to deprive any person of life, liberty, or property, we require that certain processes be duly followed which ensure regard for the dignity of the individual, irrespective of the impact of those processes upon the determination of truth.

By emphasizing that the adversary process has its foundations in respect for human dignity, even at the expense of the search for truth, 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 determining 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 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. Thus, the judge or jury is given the strongest possible view of each side, and is put in the best possible position to make an accurate and fair judgment. Nevertheless, the point that I now emphasize is that in a society that honors the dignity of the individual, the high value that we assign to truth-seeking is not an absolute, but may on occasion be subordinated to even higher values.

The concept of a right to counsel is one of the most significant manifestations of our regard for the dignity of the individual. No person is required to stand alone against the awesome power of the People of New York or the Government of the United States of America. Rather, every criminal defendant is guaranteed an advocate—a "champion" against a "hostile world," the "single voice on which he must rely with confidence that his interests will be protected to the fullest extent consistent with the rules of procedure and the standards of professional conduct." In addition, the attorney serves in significant part to assure equality before the law. Thus, the lawyer has been referred to as "the equalizer," who "places each litigant as nearly as possible on an equal footing under the substantive and procedural law under which he is tried."

The lawyer can serve effectively as advocate, however, "only if he knows all that his client knows" concerning the facts of the case. Nor is the client ordinarily competent to evaluate the relevance or significance of particular facts. What may seem incriminating to the client, may actually be exculpatory. For example, one client was reluctant to tell her lawyer that her husband had attacked her with a knife, because it tended to confirm that she had in fact shot him (contrary to what she had at first maintained). Having been persuaded by her attorney's insistence upon complete and candid disclosure, she finally "confessed all"—which permitted the lawyer to defend her properly and successfully on grounds of self-defense.

Obviously, however, the client cannot be expected to reveal to the lawyer all information that is potentially relevant, including that which may well be incriminating, unless the client can be assured that the lawyer will maintain all such information in the strictest confidence. "The purposes and necessities of the relation between a client and his attorney" require "the fullest and freest disclosures" of the client's "objects, motives and acts." If the attorney were permitted to reveal such disclosures, it would be "not only a gross violation of a sacred trust upon his part," but it would "utterly destroy and prevent the usefulness and benefits to be derived from professional assistance." That "sacred trust" of confidentiality must "upon all occasions be inviolable," or else the client could not feel free "to repose [confidence] in the attorney to whom he resorts for legal advice and assistance." Destroy that confidence, and "a man would not venture to consult any skillful person, or would only dare to tell his counselor half his case." The result would be impairment of the "perfect freedom of consultation by client with attorney," which is "essential to the administration of justice." Accordingly, the new Code of Professional Responsibility provides that a lawyer shall not

knowingly reveal a confidence or secret of the client, nor use a confidence or secret to the disadvantage of the client, or to the advantage of a third person, without the client's consent. . . .

That is not to say, of course, that the attorney is privileged to go beyond the needs of confidentiality imposed by the adversary system, and actively participate in concealment of evidence or obstruction of justice. For example, in the *Ryder* case, which arose in Virginia several years ago, the attorney removed from his client's safe deposit box a sawed-off shotgun and the money from a bank robbery and put them, for greater safety, into the lawyers's own safe deposit box. The attorney, quite properly, was suspended from practice for 18 months. (The penalty might well have been heavier, except for the fact that Ryder sought advice from senior members of the bench and bar, and apparently acted more in ignorance than in venality.) The important difference between the *Ryder* case and the one in Lake Pleasant lies in the active role played by the attorney in *Ryder* to conceal evidence. There is no indication, for example, that the attorneys in Lake Pleasant attempted to hide the bodies more effectively. If they had done so, they would have gone beyond maintaining confidentiality and into active participation in the concealment of evidence.

The distinction should also be noted between the attorney's knowledge of a past crime (which is what we have been discussing so far) and knowledge of a crime to be committed in the future. Thus, a major exception to the strict rule of confidentiality is the "intention of his client to commit a crime, and information necessary to prevent the crime." Significantly, however, even in that exceptional circumstance, disclosure of the confidence is only permissible, not mandatory. Moreover, a footnote in the Code suggests that the exception is applicable only when the attorney knows "beyond a reasonable doubt" that a crime will be committed. There is little guidance as to how the lawyer is to exercise the discretion to report future crimes. At one extreme, it seems clear that the lawyer should reveal information necessary to save a life. On the other hand, as will be discussed [below], the lawyer should not reveal the intention of a client in a criminal case to commit perjury in his or her own defense.

It has been suggested that the information regarding the two bodies in the Lake Pleasant case was not relevant to the crime for which the defendant was being prosecuted, and that, therefore, that knowledge was outside the scope of confidentiality. That point lacks merit for three reasons. First, an unsophisticated lay person should not be required to anticipate which disclosures might fall outside the scope of confidentiality because of insufficient legal relevance. Second, the information in question might well have been highly relevant to the defense of insanity. Third, a lawyer has an obligation to merge other, unrelated crimes into the bargained plea, if it is possible to do so. Accordingly, the information about the other murders was clearly within the production of confidentiality. . . .

In summary, the Constitution has committed us to an adversary system for the administration of criminal justice. The essentially humanitarian reason for such a system is that it preserves the dignity of the individual, even though that may occasionally require significant frustration of the search for truth and the will of the state. An essential element of that system is the right to counsel, a right that would be meaningless if the defendant were not able to communicate freely and fully with the attorney.

In order to protect the communication—and, ultimately, the adversary system itself—we impose upon attorneys what has been called the "sacred trust" of confidentiality. It was pursuant to that high trust that the lawyers acted in Lake Pleasant, New York, when they refrained from divulging their knowledge of where the bodies were buried. . . .

PERJURY: THE CRIMINAL DEFENSE LAWYER'S TRILEMMA

Is it ever proper for a criminal defense lawyer to present perjured testimony? . . . That question cannot be answered properly without an appreciation of the fact that the attorney functions in an adversary system of criminal justice

which . . . imposes special responsibilities upon the advocate.

First, the lawyer is required to determine "all relevant facts known to the accused," because "counsel cannot properly perform their duties without knowing the truth." The lawyer who is ignorant of any potentially relevant fact "incapacitates himself to serve his client effectively," because "an adequate defense cannot be framed if the lawyer does not know what is likely to develop at trial."*

Second, the lawyer must hold in strictest confidence the disclosures made by the client in the course of the professional relationship. "Nothing is more fundamental to the lawyer-client relationship than the establishment of trust and confidence." The "first duty" of an attorney is "to keep the secrets of his clients." If this were not so, the client would not feel free to confide fully, and the lawyer would not be able to fulfill the obligation to ascertain all relevant facts. Accordingly, defense counsel is required to establish "a relationship of trust and confidence" with the accused, to explain "the necessity of full disclosure of all facts," and to explain to the client "the obligation of confidentiality which makes privileged the accused's disclosures."

Third, the lawyer is an officer of the court, and his or her conduct before the court "should be characterized by candor."

As soon as one begins to think about those responsibilities, it becomes apparent that the conscientious attorney is faced with what we may call a trilemma—that is, the lawyer is required to know everything, to keep it in confidence, and to reveal it to the court. Moreover, the difficulties presented by those conflicting obligations are particularly acute in the criminal defense area because of the presumption of innocence, the burden upon the state to prove its case beyond a reasonable doubt, and the right to put the prosecution to its proof.

Before addressing the issue of the criminal defense lawyer's responsibilities when the client indicates to the lawyer the intention to commit perjury in the future, we might note the somewhat less difficult question of what the lawyer should do when knowledge of the perjury comes after its commission rather than before it. Although there is some ambiguity in the most recent authorities, the rules appear to require that the criminal defense lawyer should urge the client to correct the perjury, but beyond that, the obligation of confidentiality precludes the lawyer from revealing the truth. . . .

If we recognize that professional responsibility requires that an advocate have full knowledge of every pertinent fact, then the lawyer must seek the truth from the client, not shun it. That means that the attorney will have to dig and pry and cajole, and, even then, the lawyer will not be successful without convincing the client that full disclosure to the lawyer will never result in prejudice to the client by any word or action of the attorney. That is particularly true in the case of the indigent defendant, who meets the lawyer for the first time in the cell block or the rotunda of the jail. The client did not choose the lawyer, who comes as a stranger sent by the judge, and who therefore appears to be part of the system that is attempting to punish the defendant. It is no easy task to persuade that client to talk freely without fear of harm. . . .

Assume the following situation. Your client has been falsely accused of a robbery committed at 16th and P Streets at 11:00 P.M. He tells you at first that at no time on the evening of the crime was he within six blocks of that location. However, you are able to persuade him that he must tell you the truth and that doing so will in no way prejudice him. He then reveals to you that he was at 15th and P Streets at 10:55 that evening, but that he was walking east, away from the scene of the crime, and that, by 11:00 P.M., he was six blocks away. At the trial, there are two prosecution witnesses. The first mistakenly, but with some degree of persuasiveness, identifies your client as the criminal. At that point the prosecution's case depends upon that single witness, who might or might not be believed. The second prosecution witness is an elderly woman who is somewhat nervous and who wears glasses. She testifies truthfully and accurately that she saw your client at 15th and P Streets at 10:55 P.M. She has corroborated the erroneous testimony

**American Bar Association Canons of Professional Ethics*, 15.

of the first witness and made conviction extremely likely. However, on cross-examination her reliability is thrown into doubt through demonstration that she is easily confused and has poor eyesight. Thus, the corroboration has been eliminated, and doubt has been established in the minds of the jurors as to the prosecution's entire case.

The client then insists upon taking the stand in his own defense, not only to deny the erroneous evidence identifying him as the criminal, but also to deny the truthful, but highly damaging, testimony of the corroborating witness who placed him one block away from the intersection five minutes prior to the crime. Of course, if he tells the truth and thus verifies the corroborating witness, the jury will be more inclined to accept the inaccurate testimony of the principal witness, who specifically identified him as the criminal.

In my opinion, the attorney's obligation in such a situation would be to advise the client that the proposed testimony is unlawful, but to proceed in the normal fashion in presenting the testimony and arguing the case to the jury if the client makes the decision to go forward. Any other course would be a betrayal of the assurances of confidentiality given by the attorney in order to induce the client to reveal everything, however damaging it might appear. . . .

For example, how would [one] resolve the following case? The prosecution witness testified that the robbery had taken place at 10:15, and identified the defendant as the criminal. However, the defendant had a convincing alibi for 10:00 to 10:30. The attorney presented the alibi, and the client was acquitted. The alibi was truthful, but the attorney knew that the prosecution witness had been confused about the time, and that his client had in fact committed the crime at 10:45. (Ironically, that same attorney considers it clearly unethical for a lawyer to present the false testimony on behalf of the innocent defendant in the case of the robbery at 16th and P Streets.) Should the lawyer have refused to present the honest alibi? How could he possibly have avoided doing so? Was he contributing to wise and informed judgment when he did present it?

The most obvious way to avoid the ethical difficulty is for the lawyer to withdraw from the case, at least if there is sufficient time before trial for the client to retain another attorney. The client will then go to the nearest law office, realizing that the obligation of confidentiality is not what it has been represented to be, and withhold incriminating information or the fact of guilt from the new attorney. In terms of professional ethics, the practice of withdrawing from a case under such circumstances is difficult to defend, since the identical perjured testimony will ultimately be presented. Moreover, the new attorney will be ignorant of the perjury and therefore will be in no position to attempt to discourage the client from presenting it. Only the original attorney, who knows the truth, has that opportunity, but loses it in the very act of evading the ethical problem.

The difficulty is all the more severe when the client is indigent. In that event, the client cannot retain other counsel, and in many jurisdictions it is impossible for appointed counsel or a public defender to withdraw from a case except for extraordinary reasons. Thus, the attorney can successfully withdraw only by revealing to the judge that the attorney has received knowledge of the client's guilt, or by giving the judge a false or misleading reason for moving for leave to withdraw. However, for the attorney to reveal knowledge of the client's guilt would be a gross violation of the obligation of confidentiality, particularly since it is entirely possible in many jurisdictions that the same judge who permits the attorney to withdraw will subsequently hear the case and sentence the defendant. Not only will the judge then have personal knowledge of the defendant's guilt before the trial begins, but it will be knowledge of which the newly appointed counsel for the defendant will very likely be ignorant.

Even where counsel is retained, withdrawal may not be a practical solution either because trial has begun or it is so close to trial that withdrawal would leave the client without counsel, or because the court for other reasons denies leave to withdraw. Judges are most reluctant to grant leave to withdraw during the trial or even shortly before it because of the power that that would