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Book Reviews

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BOOK REVIEWS

Consensual Government

THE MORALITY OF CONSENT. By Alexander M. Bickel. New Haven and London: Yale University Press, 1975. Pp. vii, 156. $10.00.

*Reviewed by Ernest van den Haag**

When he died in his fiftieth year, Alexander Bickel left a body of work that had already earned him the respect of his colleagues and considerable prestige among the readers of journals of opinion. His death came too early not just for his family and his many friends: it also deprived the Republic of a most promising interpreter of its philosophy. The slim volume under review testifies—if further proof were needed—to the magnitude of our loss.

Bickel was a moralist for whom the law was "the value of values . . . the principal institution through which a society can assert its values."[1] His was a morality of restraint that insisted on acknowledging the moral value of moralities he did not share and, therefore, on using the law to restrict individual moral choice as little as compatible with the order needed to secure the possibility of making choices. He despised zealots. Asked by Kingman Brewster, President of Yale University, to tell "what is happening to morality today," Bickel charmingly rebuked him: "It threatens to engnlf us."[2] He was distressed by the "armies of conscience and . . . ideology" that "rode high . . . on the bench as well as off"[3] and produced an "assault upon the legal order by moral imperatives."[4] For "our legal order cannot endure too rapid a pace of change in moral conceptions . . . . [T]he legal order, after all, is an accomodation. It cannot sustain the continuous assault of moral imperatives . . . ." Further, Bickel insisted that "although [the legal order is] subject to evolutionary change . . . its own stability is itself a high moral value, in most circumstances the highest," and "more important than any momentary objective."[5]

Such convictions led Bickel to oppose "[t]he derogators of

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1. A. BICKEL, THE MORALITY OF CONSENT 5 (1975).
2. *Id.* at 119.
3. *Id.* at 121.
4. *Id.* at 120.
5. *Id.*

procedure . . . and other anti-institutional forces."[6] He tells with barely concealed horror of occasions "[w]hen a lawyer stood before [the Supreme Court, then headed by Earl Warren] arguing his side of a case on the basis of some legal doctrine or other, or making a procedural point, or contending that the Constitution allocated competence over a given issue to another branch of government than the Supreme Court or to the states rather than the federal government, the chief justice would shake him off saying, 'Yes, yes, yes, but is it . . . *right*? Is it *good*?' "[7] Bickel was opposed to the replacement of the law by the moral ideas or prejudices of the judiciary. His Frankfurterian task—to defend the law against the judiciary's attempt to use it as an instrument to enforce its moral ideas—was hard and lonely. Nevertheless, he persisted in opposing "the armies of conscience and ideology."

Bickel wanted to make the scope of the law comprehensive enough to proclaim the norms that are consensually perceived to be necessary to social life, yet to let individuals and groups pursue their choices without being forced to conform altogether to majority views or being strapped into judicial strait jackets. His work, and the unifying theme of this posthumous collection of essays, very largely consisted of elaborations of his answer to the question: how can we define the province of constitutional interpretation so as to make and keep our law effective with a maximum of consent and a minimum of force? His concern for the legal order on which freedom so largely depends led Bickel to oppose the "legalitarian society"[8] produced when judicial imperalism absorbs or overwhelms nonjudicial norm-giving institutions. I share Alexander Bickel's general outlook and admire his lucid, precise, and nuanced articulation of it. Yet I question some of his arguments and formulations.

For example, I share Bickel's belief in a broad although not unlimited tolerance of moral values that do not conform to the predominant values in society. On the other hand, I dispute Bickel's view that tolerance is necessarily founded upon relativism.

Although stopping short of Justice Holmes's "logical exaggeration"—Holmes believed that no values could objectively be proven—Bickel found it necessary to describe his own view[9] as relativistic in preference to "[t]he alternative . . . the tyranny of some of us over the others."[10] Is relativism the alternative to tyranny?

6. *Id.* at 121.
7. *Id.* at 120.
8. *Id.* at 8.
9. *See id.* at 3.
10. *Id.* at 4; *see id.* at 77.

Dostoyevski thought, on the contrary, that it would lead to tyranny. I think Bickel here confused tolerance as a psychological quality and philosophical doubt or uncertainty, a sign of intelligence, with "relativism" as an assertion, dogmatic, if you will, about the nature of the universe.

Considering some of the meanings of the word, one is forced to conclude that relativism either is irrelevant to Bickel's argument or is based on a logical mistake. "New York is farther from Los Angeles than Washington" is a "relative" statement. It is also a "relative" assertion that an object "weighs two pounds and is five inches long," or "is very hot." Indeed, all our measurements are relative to one another, or to some postulated standard, and are therefore objective. Our values too are relative to one another, or to a standard: surely in any system some values are more important and central, others less. "More" or "less" are "relative." I know of no philosophy that would deny this kind of "relativism."

Bickel certainly had more and different things in mind. Did he mean that values must be explained as arising from specific cultural and social processes? Whether such a cultural explanation is true depends on what is meant by the term "explained" other than "associated with" or "produced by." Do we mean that cultural processes are merely necessary to explain a value system, or are they also sufficient to produce it? What is included among "cultural processes"? Even if it is true that values can be explained by cultural and social processes, the explanation of values would have no bearing on their justification. The source of values is irrelevant to the moral justification that concerned Bickel. (It goes without saying that legal, as distinguished from moral, validation can depend on the origin of a rule.)

Bickel's relativism seemed concerned with denying the possibility of ultimately justifying moral values. It meant that values are justifiable only, or mainly, within a culture. Laws, as Hans Kelsen stressed,[11] must be legally justifiable within a legal system. However necessary, is such a justification sufficient? Moreover, is no moral justification possible for the system as such? Thoroughgoing relativists say moral justification is not possible. Some even conclude that each culture and its value system has an equal claim to value. This last surely is a logical mistake: if we have no intercultural measurements that entitle us to assert the superiority of one culture over another, neither can we claim that one is equal to the other. This is

11. *See generally* H. KELSEN, PURE THEORY OF LAW (M. Knight transl. 1970).

because assertions of equality, like assertions of superiority, must rest on the measurement we do not have. Bickel did not go that far. Not even Holmes, although he denied the possibility of justifying values within a culture, treated value systems as equal. Both Holmes and Bickel were aware that our Constitution does not so treat them. Each man preferred a particular value system, and both included tolerance of diversity among their values.

It is not clear, however, how far Bickel intended his relativism to go. Both Holmes and Bickel seem to have been convinced that the nondemonstrability of terminal values entails their subjectivity. This does not follow: although demonstrability entails objective truth, objective truth need not entail and does not depend on demonstrability. That we cannot show that a black cat is in a dark room does not prove that there is no truth to an assertion of the cat's presence, even if the presence remains forever undemonstrable. More relevantly here, the tolerant, consensual, and limited legal system Bickel favored, and interpreted the Constitution to favor, does not require a relativistic outlook. Nonrelativists need only include tolerance—for whatever reason—among the values that they believe to be objective truths. They may insist on minimal restrictions because they are principled (and nonrelativist) libertarians, or simply because they stress the difference between sin and crime—the difference between morality and what they perceive to require legal regulation. Finally, one may share Bickel's outlook on law for the factual reason he gives, which makes his own moderate relativism quite redundant: effective legal order must rest on the consensual authority of the law, and such authority is available only if the law's scope is restricted.

As Bickel would be the first to say, it matters how one arrives at a shared conclusion; here it is important to point out that one need not be a relativist to share Bickel's view on the appropriate scope of the law, as I do.

On first amendment matters, I share most of Bickel's conclusions, though once more I arrive at them through reasoning he might not have shared. As Bickel demonstrated in the *Pentagon Papers* case,[12] which he argued before the Supreme Court, the first amendment excludes prior restraint (censorship) unless grave and irreparable injury to important legitimate interests can be shown. Thus, for instance, prior restraint is excluded, even if the documents to be published are illegitimately procured. Here it may be interesting to

12. New York Times Co. v. United States, 403 U.S. 713 (1971).

ask why, if in the interest of not abridging the freedom of the press a newspaper can print illegitimately procured documents, a court cannot admit them as evidence in the interest of justice. Is freedom of the press so much more important or so much more protected by the Constitution than is doing justice? But let that go. Bickel did not ask the question, though he shared Cardozo's negative attitude toward the exclusionary rule.

Whereas the question of prior restraint is satisfactorily resolved by court interpretations of the first amendment, the question of *a posteriori* punishment for misuse of speech, in my view, is not. Consider political uses of speech first. Here Bickel relied (with some qualifications) on the Holmes test of gravity and proximity: only clear and present danger permits even *post factum* penalization for any use of first amendment freedoms.[13] In my opinion, the last forty years have shown this test to be of limited usefulness. Total reliance on it is too hazardous. Once a group has become a clear and present danger to free institutions through its use of first amendment freedoms, judicial penalization will not stop it. At that stage penalties become ineffective, whereas before the danger became imminent, penalization could have stopped the expansion of the group, or the acceptance of its doctrine. The rise of Nazism, largely by the use of persuasion, illustrates this matter all too well. There may be a "tipping point." Once an antidemocratic doctrine, or one that favors violence, has been spread far enough by persuasion so that democratic institutions are in imminent danger, it is too late, it is futile, to penalize those who spread the doctrine, however effective it may have been to do so before the tipping point was reached. The Holmes doctrine asks us to wait until the tipping point has been passed, which is too late. The clear and present danger doctrine was formulated prior to the worldwide expansion of totalitarian regimes. In view of the totalitarian threat to free institutions, the doctrine should now be modified. Advocacy of unlawful action (as distinguished from analysis or scholarly discussion) should itself be unlawful, even if an unlawful action is not imminent.

With respect to the use of the first amendment to protect obscenity, Bickel rejected the arguments of those who insist that obscenity publicly for sale can be regarded as a private affair that does not intrude on those who refrain from purchasing it. When displayed and advertised, it obviously does intrude, just as the act of an exhibitionist does. Is this intrusion permissible? Bickel felt that

13. A. BICKEL, THE MORALITY OF CONSENT 64-67 (1975).

the law should protect the "overwhelming majority of people [endeavoring] to sustain the style and quality of life minimally congenial to them." He came near to arguing that the law must preserve traditionally shared values, even though "[i]t must avoid tyrannical enforcement of supposed majority tastes."[14] I emphatically agree: while the law cannot create, it can preserve shared values, and without these neither law nor civil society is possible. The idea that people can pursue happiness by independently following widely disparate values is unrealistic. The founding fathers never fully faced the problem because their political society was more homogeneous than ours, and they believed that *nature* would lead us all to pursue the same range of values. It does seem now that nature needs the help of the legal system if even a broadly defined range is not to be exceeded, and it cannot be exceeded without eroding the social bond on which law and society itself must rest.

When the law permits the subversion of the shared range of values, people become impatient and clamor for tyrannical and excessive rules. Whenever the law did not protect what is "minimally congenial" to people, this has been the reaction instead of the boundless individual choice hoped for by doctrinaire libertarians.

Our courts have not interpreted the first amendment in the absolutist sense favored by the late Justice Hugo Black. In effect, they have held that all rights, including the right to free speech, are limited by other rights, and by the rights of others. The courts, however, have held that whatever protection is extended to speech is extended to most other forms of expression. One may question this interpretation. Did the framers really intend to cover anything but cognitive exposition, or informational prose? Did they intend at all to cover pictures, fiction, poetry, art, and other noncognitive communications? If they did not, questions about obscenity could be resolved by legislation not limited by the prohibition of abridgement of freedom of speech or of the press, except insofar as the cognitive exposition of facts or ideas is concerned. Pornography is not concerned with cognition. I do not know whether Bickel would have agreed with this interpretation. I do know that he opposed the tendency of the courts to impose on legislatures their views of what is and is not legitimate—which courts often do under the most transparent disguises and with little regard for constitutional or legislative intent. Thus Bickel questioned the justification for the

14. *Id.* at 75.

imposition of the Supreme Court's "model statute" for the regulation of abortion. He found the "model statute . . . generally intelligent" but wondered, "[W]hat is the justification for its imposition? If this statute, why not one on proper grounds of divorce, or on adoption of children?" He concluded, "The Court never said."[15] Indeed, no serious constitutional reasoning can be found to justify what Justice Byron White called an "extravagant exercise" of judicial power.[16]

The Supreme Court's action with respect to the death penalty is equally extravagant, particularly when it is noted that the framers were quite aware of and obviously rejected the reasoning that led the Court to find imposition of the death penalty in certain circumstances "cruel and unusual."[17] In the early days of the Republic the death penalty was imposed more capriciously than in recent times. Moreover, the arguments used by the Court now do not differ from those expounded by Cesare di Beccaria, whose *Dei delitti e delle pene* (*Of Crimes and Punishments*, 1764) was published in French in 1766,[18] with a commentary by Voltaire, and was famous throughout the world at the time.

Let me turn back to the basic thrust of Bickel's work. He realized that the legal order can do no more than articulate the social order and must change with it. The legal order can reflect social changes, but the judiciary has neither the authority nor the capacity to bring them about, or for that matter, to stop them. Attempts to exceed its consensual authority merely discredit the judiciary.

Bickel was aware that lawbreaking, such as occurs in civil disobedience, may affect the social and, ultimately, the legal order. He tried to keep civil disobedience within narrow bounds and to distinguish it carefully from revolutionary action, which in a democracy must necessarily be antidemocratic. Within such narrow bounds civil disobedience, unlike revolution, could be morally legitimate. I agree, although I do not think Bickel sufficiently distinguished conscientious objection, which in principle can be legal, from civil disobedience, which, whether or not morally legitimate, can never be legal when the disobeyed law is lawfully enacted and constitutional. Furthermore, civil disobedience, however motivated, is a political

15. *Id.* at 27-28.

16. Doe v. Bolton, 410 U.S. 179, 222 (1973) (White, J., dissenting from *Doe v. Bolton* and Roe v. Wade, 410 U.S. 113 (1973).

17. Furman v. Georgia, 408 U.S. 238 (1972).

18. C. BECCARIA, DES DELITS ET DES PEINES (1965). *See generally* M. MAESTRO, CESARE BECCARIA AND THE ORIGINS OF PENAL REFORM (1973); C. PHILLIPSON, THREE CRIMINAL LAW REFORMERS: BECCARIA, BENTHAM, ROMILLY 3-106 (1970).

act by definition; it is intended at least to persuade others or at most to coerce them. Conscientious objection, on the other hand, need not be a political act; it may be intended to affect the conduct of only the objector.

We have known since Condorcet that majority decision may not reflect majority wishes.[19] If democratic government is only a little better than others in actualizing majority wishes, then it becomes especially important that it remain a limited and consensual government. That will be its main virtue. Realizing this by instinct as much as by theory, Bickel resisted the continuous attempts of the judiciary to impose a "legalitarian society"—a government neither limited nor consensual. His opposition to a legalitarian society is nowhere more eloquently expressed than in his last book, *The Morality of Consent.*

19. Condorcet's ideas have been worked out lately by Arrow and others. *See, e.g.,* K. ARROW, SOCIAL CHOICE AND INDIVIDUAL VALUES 93-96 (2d ed. 1963).

Ethical Problems of the Legal Profession

LAWYERS' ETHICS IN AN ADVERSARY SYSTEM. By Monroe H. Freedman. Indianapolis and New York: Bobbs-Merrill Co., Inc., 1975. Pp. xiii, 270. $12.50.

*Reviewed by James F. Neal**

The advocate may allow his client to take the stand and give perjurious testimony, at least in a criminal proceeding. By this resolution of the "perjury trilemma"—the conflict among the obligations of a lawyer to learn all relevant facts known to his client, to hold his client's disclosures in strictest confidence, and to be candid with the court[1]—Dean Freedman confronts the legal profession, the American Bar Association, and the Code of Professional Responsibility. Most of the rest of this provocative book involves an attempt to justify the author's conclusion as the only candid and workable resolution of conflicting obligations piously imposed by the conventional wisdom of the legal profession on the criminal defense lawyer.

Dean Freedman begins to approach the perjury trilemma in the first chapter by pointing out the values theoretically deemed important in an adversary system of justice. Among these values is respect for individual dignity, as reflected by such constitutional provisions as the privilege against self-incrimination and rights to due process, counsel, and trial by jury. Another value is truth. Dean Freedman could have added that the public has never understood these values and their relative importance. Indeed, he could have explained that even practicing lawyers and active trial judges have differing views of the purpose of criminal trials. For example, the Watergate Special Prosecutor in 1973 sought to enjoin public hearings of the Ervin Committee, or at least the televised public hearings, on the grounds that such hearings could affect possible criminal trials and that criminal trials are capable of informing the public of the abuses of power known as Watergate. Judge Sirica also viewed the Watergate "cover-up" trial as a means of getting at the truth.

A few of us in the Special Prosecutor's office, perhaps those with more trial experience, recognized that a criminal proceeding is a poor method of revealing the total truth. Indeed, the truth is not

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1. M. FREEDMAN, LAWYERS' ETHICS IN AN ADVERSARY SYSTEM 27 (1975).

the purpose of such a proceeding any more than a fair and impartial jury is the goal of an advocate involved in the jury selection process. Perhaps the mythical originator of the adversary system believed the total truth would emerge because each side would think it in its interest to bring out the facts the other side decided not to disclose. In practice, criminal proceedings do not lay bare the total truth. At best the evidence produces different sanitized and truncated versions of some of the facts, and the fact finder must choose not between the total truth and untruth but between the advocates' versions of hypothetical past events. All of this is just a recognition that the reality of past events cannot be recreated. Of course, much truth does emerge in a trial, just as jurors generally try to be fair and impartial, but a criminal trial has a much more modest goal than the total truth. That goal is the determination of the guilt or nonguilt of the individual on trial pursuant to a set of rules that enhance the dignity and importance of the individual. In a free society this is *the* legitimate interest of the state, and the adversary system is admirably suited to vindicate this interest.

Dean Freedman recognizes both the purpose of the criminal trial and the tools necessary to that end. The bedrock of the adversary system is the advocate, selected by the individual to present his position, and the belief of the client that he may inform the advocate of the facts in complete confidence. The author emphasizes the high value our system places on this confidentiality in his account of the furor raised in a recent New York case. Two lawyers were told by their client where he had hidden the bodies of victims yet unknown to the police. The lawyers did not divulge to authorities or to the victims' parents the locations of bodies hidden by their client. Even lawyers must remind themselves of the necessity of total confidentiality between attorney and client when a situation as stark as that one is revealed. Yet the New York lawyers certainly acted with complete propriety in retaining their client's confidence. Dean Freedman emphasizes the importance of confidentiality as he works toward his solution of the perjury trilemma.

As Dean Freedman recognizes, one consideration for a lawyer facing the perjury trilemma is his duty to advocate zealously his client's position. Perhaps the weakest part of his book, however, is the chapter in which Freedman explores the requirements of, and emphasizes the need for, zealous advocacy. Here the author uses the technique of destroying straw men. He states that James St. Clair, the able advocate for Richard Nixon during the last period of Nixon's presidency, was criticized for even representing Mr. Nixon.

He then proceeds to lay waste to persons engaging in such criticism. This reviewer never heard any person criticize Mr. St. Clair for representing Mr. Nixon. Indeed, most informed citizens admired his ability. The criticism Mr. St. Clair encountered was for failing to insist on knowing all his client knew and for continuing to act and take untenable positions based on lack of knowledge. Even this criticism was muted, however, among experienced advocates, for very few, if any, have not been misled and even deliberately deceived by clients at some time in their careers.

Zealous advocacy in the client's interest is indeed vital to the adversary system, however. In criminal matters, the advocate frequently finds himself alone as the client's friends and associates run for cover. Every experienced criminal lawyer at some time has been told by a client about a friend of the client who has exculpatory information, only to be informed by that friend that he does not want to be called to testify because he would harm the defense.

One interesting aspect of zealous advocacy is mentioned by the author, but it could stand further treatment. It is popular today for some lawyers to contend they will not become "hired guns"—that they will only represent causes in which they believe. This writer submits that this attitude is destructive of the adversary system. An advocate *is* a hired gun. He is supposed to possess a sense of relevancy, an ability to marshall facts, a capacity for objectivity, and the power of a clear statement. He is not required to embrace the position he advocates, only the principle that everyone is entitled to his day in court with his advocate. It is submitted that abuses in some recent trials have resulted, in part, from lawyers who have espoused causes, who have merged the roles of advocate and client, and who view a trial as only one battle in a broader and all-pervasive war.

The critical point of this book is reached when the author, having emphasized the obligation to learn all the client knows, to keep his client's confidence, and to advance his client's interest zealously, poses the question: "Is it ever proper for a criminal defense lawyer to present perjured testimony?"[2] The perjury trilemma, the author declares, presents conflicting obligations: first, to learn all the client knows; secondly, to keep in strict confidence the client's disclosures; and thirdly, to be candid with the court. The author translates this into "to know everything, to keep it in confidence, and to reveal it to the court."[3] Before getting to the

2. *Id.*
3. *Id.* at 28.

author's resolution of a very difficult problem, one must note the trick in translation. To be candid with the court does not mean to tell all to the court. That is, being candid with the court does not involve an obligation to tell the court what has been received in the confidence of an attorney-client relationship. Thus the perjury trilemma as postulated by Dean Freedman does not exist.

Nevertheless, a dilemma, at least in its secondary meaning of a difficult or perplexing situation or problem, does exist. Moreover, it is easy to agree that there is, as subsequent chapters in Freedman's book point out, difficulty in determining what one knows, and difficulty in interrogating clients without suggesting self-serving and perhaps inaccurate testimony. It is also true that canons and codes do not provide a satisfactory guide. Having admitted all of that, this reviewer takes issue with the author's conclusion that the advocate, to protect other important values such as confidentiality and zealous representation, should first try to talk the client out of his intentions and, failing that, should put him on the stand and allow him to commit perjury, then argue that perjury to the fact finder. The author presents a situation in which the representation has been agreed upon and the client has made full disclosure and has advised the advocate of his intention to commit perjury. At this point the lawyer cannot reveal disclosures made in confidence; neither can he withdraw under circumstances that would leave the client in a worse condition than when the representation was first undertaken. The author is certainly correct when he contends that the worst of all alternatives is simply to put the client on the stand without questioning him but allowing him to narrate his testimony, and then to refrain from arguing his testimony to the fact finder. There is another way, however, and that is simply to avoid this situation. A lawyer undertaking the representation in a criminal proceeding should establish at the outset that he will not knowingly permit perjured testimony to be used in the defense of the charge. He can explain that he will attempt to learn all the facts both from the client and from other sources and that experience indicates that the lawyer's knowledge of all the facts is in the client's interest, even if total knowledge results in nothing more than an attempt to prevent the prosecution from proving its case beyond a reasonable doubt. Finally, he can advise the client that he will withdraw if the client insists on taking the stand and committing perjury. With this understanding, the advocate can withdraw during the course of the representation, without injuring the other values stressed by the author, if the client insists on giving untrue testimony.

Admittedly, this solution could result in the client's attempting to deceive the advocate. Moreover, the client could take the stand and commit perjury without forewarning the lawyer. This writer believes both risks are preferable to the author's solution. While total truth may not be the ultimate goal in a criminal proceeding, the legal profession does owe the public the obligation to expose as much of the truth as is consistent with the preservation of other values, and the profession certainly owes the public the duty to refrain from actively participating in a fraud on the court. No witness has a right to lie, and no advocate has the duty to assist in a lie. It is the obligation of the advocate to avoid a situation in which one value, the confidence of the client, must be sacrificed to preserve another. If the client is advised of the condition on which any confidential relationship will be accepted, he cannot complain if the lawyer subsequently withdraws when the condition is violated.

The trial lawyer, and particularly the criminal defense lawyer, lives in moral twilight. Nothing is ever clear-cut and every problem engages one's sense of fairness in his perception of right and wrong. Almost equaling the perjury trilemma in difficulty is the question whether one should use personally embarrassing or worse information to destroy the credibility of a witness who has given truthful but damaging testimony. The author discusses this old dilemma but relates it to his solution of the perjury issue. Is there a difference, he asks, between the lawyer who would allow his client to give perjured testimony and the lawyer who would induce the jury to disregard truthful testimony and thereby accept a distorted version of reality? The question is disturbing, and one tends to resort to canons and codes as an anodyne for the pain. To his credit the author does not accept the easy answer that the cross-examiner is merely bringing out the truth; he recognizes that the ultimate issue of truth in the trial may arguably thereby be distorted. Of course, Freedman does not provide an answer either.

Each lawyer must develop his own code for these problems, and the young lawyer must realize they will be encountered daily. Our adversary system is calculated to advance certain principles, among which are the presumption of innocence, the corresponding right of an accused to be acquitted unless the prosecution proves his guilt beyond a reasonable doubt, and the right to an advocate who brings out every relevant fact that might tend to deflect the prosecution from its goal. No overriding value is damaged by the use of accurate but embarrassing personal information, and the defense counsel must go forward if he decides it is tactically wise to do so. His

immediate tool is truth even if the ultimate result is a false impression. If one shies away from inflicting damage on a witness, his best course is to specialize in estate planning.

For one who seeks to pursue an ethical course through his legal career, no problem is more delicate than the interrogation of a client and, indeed, other potential witnesses. If one cannot ethically permit perjured testimony to be adduced when the perjury is all the client's creation, he cannot in the course of interrogation be an active participant at the creation of the perjury. The author bores in on this problem without letting the reader rest upon the pious position that he, as counsel, would not *knowingly* use perjured testimony. How does one approach interrogation? The client does not know the law and whether a change in one fact could be critical. An example given is whether the client accused of murder with a knife habitually carried the weapon involved or carried the weapon only on the date of the event.[4] Most clients faced with a murder charge would accept either version they consider more helpful. May the lawyer point out that one tends to show premeditation, and the other is at least neutral? An experienced trial lawyer will recognize how easy it is to suggest answers, particularly, as the author points out, when one recognizes that the process of remembering is a process of reconstructing not equivalent to putting a stylus in the groove of a record. Indeed, after several interrogations it may be difficult to remember just what the client's statement was when he was first interviewed.

A procedure that may avoid many ethical problems and pitfalls is to delay interrogation of the client until the advocate investigates the matter from other sources, including representatives of the prosecution. When the time comes for an extensive interview with the client, the lawyer can not only give the warning mentioned earlier regarding perjury, but he can also advise the client of some of the facts arrayed against him and make some general statements of the law involved. The client can then state his position in narrative fashion without interruption. Some would insist that the client is being given a meaningful opportunity to fabricate a story. At least he does not have the cooperation of his lawyer. Moreover, the client's narrative at this point should be reduced to writing: either the client should submit his position in writing, or a secretary should put it in memorandum form. Thereafter, the client should be examined carefully on points that conflict with the information

4. *Id.* at 71.

from other sources. In the last analysis, the client has the right to have his word accepted by his advocate unless it is patently and demonstrably absurd.

The above procedure gives the client full opportunity to present his position to his advocate. The advocate should not thereafter accept facile changes in the narrative merely because in the course of numerous conferences the client develops a more finely tuned sense of relevancy. If the advocate is the hired gun with a brief to present, he should be adequately armed. If he eschews the hired gun role and embraces the cause, he may be tempted to contemplate other means to "right a wrong."[5]

This reviewer cannot conclude without disputing the author on his comments with respect to the asserted persecution of Jimmy Hoffa by former Attorney General Robert Kennedy. In properly condemning prosecutions based on personal prejudice, the author states that the Department of Justice under Kennedy brought more prosecutions against Hoffa than there were civil rights cases in Mississippi.[6] The truth is that only three prosecutions were brought against Hoffa during the Kennedy years. Moreover, one of these was a continuation and expansion of the so-called *Sun Valley* case that was brought during the tenure of William Rogers, Attorney General under President Eisenhower. Another of the three resulted from directions of a federal judge to the Department of Justice to investigate wholesale efforts to tamper with the jury in the *one* case that was solely and exclusively initiated by the Kennedy Department of Justice. Dean Freedman's perception of Robert Kennedy's motives is as faulty as his facts are inaccurate.

The reviewer's reaction to this book is to applaud the author for posing and pursuing difficult questions and to recoil from some of his suggested answers.

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5. Several years ago the reviewer had the difficult task of prosecuting a lawyer for obstruction of justice in connection with a famous case. That lawyer enjoyed a fine reputation and may have been led to attempt to approach a juror because of what he came to view as the improper tactics of the government. It has always appeared to the reviewer that this lawyer merged to too great an extent the role of an advocate with that of his client.

6. M. FREEDMAN, LAWYERS' ETHICS IN AN ADVERSARY SYSTEM 82 (1975).