

# Fordham Law Review

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Volume 68 | Issue 5

Article 1

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2000

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### Recommended Citation

Monroe H. Freedman, *Ethics in Criminal Advocacy, Symposium, Forword: Ethics, Truth, and Justice in Criminal Litigation*, 68 Fordham L. Rev. 1371 (2000).

Available at: <https://ir.lawnet.fordham.edu/flr/vol68/iss5/1>

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## **Ethics in Criminal Advocacy, Symposium, Forward: Ethics, Truth, and Justice in Criminal Litigation**

### **Cover Page Footnote**

Lichtenstein Distinguished Professor of Legal Ethics, Hofstra University Law School.

## FOREWORD

### ETHICS, TRUTH, AND JUSTICE IN CRIMINAL LITIGATION

Monroe H. Freedman\*

IN this symposium, the editors of the *Fordham Law Review* present an important collection of articles on ethics, truth, and justice in criminal litigation. All of these Articles explore what the applicable standards of professional conduct mean and should mean as applied to prosecutors and defense attorneys. Although the authors participating in this symposium previously presented the substance of their Articles in a series of panel discussions—one on prosecutorial ethics and another on criminal defense ethics—which took place at the Association of American Law Schools Annual Meeting in January 2000, these Articles represent more detailed versions of their presentations.

Adding to his major contributions to the literature on evidence and ethics, Professor Stephen A. Saltzburg calls attention to the Supreme Court's "[apparent] lack of concern for false testimony—even in a capital case."<sup>1</sup> Professor Saltzburg focuses on *Strickler v. Greene*,<sup>2</sup> an illustration of the Court's appalling failure to respect the precept that "death is different,"<sup>3</sup> or to give even passing regard to the notion that a trial is a "search for truth."<sup>4</sup>

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1. Stephen Saltzburg, *Perjury and False Testimony: Should the Difference Matter So Much?*, 68 *Fordham L. Rev.* 1537, 1538 (2000).

2. 119 S. Ct. 1936 (1999).

3. See, e.g., *California v. Ramos*, 463 U.S. 992, 998-99 & n.9 (1983) ("The Court, as well as the separate opinions of a majority of the individual Justices, has recognized that the qualitative difference of death from all other punishments requires a correspondingly greater degree of scrutiny of the capital sentencing determination."); see also, e.g., *Ford v. Wainwright*, 477 U.S. 399, 411 (1986) (Marshall, J., plurality opinion) ("In capital proceedings generally, this Court has demanded that factfinding procedures aspire to a heightened standard of reliability. This especial concern is a natural consequence of the knowledge that execution is the most irremediable and unfathomable of penalties; that death is different." (citation omitted)); *Woodson v. North Carolina*, 428 U.S. 280, 305 (1976) (Stewart, J., plurality opinion) ("[T]he penalty of death is qualitatively different from a sentence of imprisonment, however, long.").

4. A trial is, indeed, a search for truth. Particularly in criminal cases, however, a

Professor Saltzburg fully discusses the weighty prosecution testimony of Anne Stoltzfus in *Strickler*, so I won't rehearse it here. In brief, Stoltzfus testified in dramatic narrative and vivid detail to Strickler's commanding role in abducting and brutalizing the victim in a capital murder case. Stoltzfus was also the only witness who graphically characterized Strickler as a violence-prone "Mountain Man" and his codefendant, by contrast, as a "Shy Guy" who literally took a back seat to Strickler in the victim's stolen car.<sup>5</sup> In light of Stoltzfus's "exceptionally good memory,"<sup>6</sup> both the jury and appellate courts found her testimony compelling with regard to Strickler's guilt of a capital offense. Not surprisingly, the prosecutor specifically relied on Stoltzfus's testimony in arguing to the court that the evidence presented by the state was sufficient to sustain the capital murder charge.<sup>7</sup> In addition, the prosecutor argued to the jury:

[W]e are lucky enough to have an eyewitness who saw [what] happened out there in that parking lot. [In a] lot of cases you don't. A lot of cases you can just theorize what happened in the actual abduction. But Mrs. Stoltzfus was there, she saw [what] happened.<sup>8</sup>

Stoltzfus's testimony was also influential in the sentencing hearing,<sup>9</sup> in which the jury decided that Strickler should be killed.

The trouble with Stoltzfus's testimony is that it was false. Several documents withheld from the defense demonstrated that she originally had only "muddled memories" of what had happened. Moreover, what Stoltzfus presented at trial as a dramatic and brutal abduction, she had previously "totally [written] . . . off as a trivial episode . . ."<sup>10</sup> Indeed, Stoltzfus's coherent narrative of the abduction, including her identification of "Mountain Man" Strickler, was the result of "persistent" prompting by Detective Daniel Claytor.<sup>11</sup> As she wrote to Claytor, had it not been for the detective's "patience," Stoltzfus "never would have made any of the associations that you helped me make."<sup>12</sup> Also, in a letter written to a newspaper after the trial, Stoltzfus admitted:

It never occurred to me that I was witnessing an abduction. In fact, if it hadn't been for the intelligent, persistent, professional work of Detective Daniel Claytor, I still wouldn't realize it. What sounded

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trial is also a striving for justice, as justice is defined in our constitutionalized adversary system. See generally Monroe H. Freedman, *Understanding Lawyers' Ethics* 13-42 (1990) (discussing the adversary system).

5. See *Strickler*, 119 S. Ct. at 1944.

6. *Id.*; see also *id.* at 1953 (deciding that even without Stoltzfus's testimony, Greene would have been convicted).

7. See *id.* at 1959 (Souter, J., concurring in part and dissenting in part).

8. *Id.* at 1953.

9. See *id.* at 1959-60 (Souter, J., concurring in part and dissenting in part).

10. *Id.* at 1945.

11. See *id.* at 1944-45, 1950 n.26.

12. *Id.* at 1945.

like a coherent story at the trial was the result of an incredible effort by the police to fit a zillion little puzzle pieces into one big picture.<sup>13</sup>

In short, Stoltzfus's testimony was false, and it was known to at least one member of the prosecution team to have been so. And *Strickler* was a death case. Nevertheless, the Supreme Court affirmed Strickler's conviction on the ground that the documents that had been withheld from the defense were not "material" under *Brady v. Maryland*.<sup>14</sup>

With careful analysis and restrained outrage, Professor Saltzburg takes the Supreme Court and other courts to task for "ignor[ing] false testimony, either because they cannot recognize it or do not care about it."<sup>15</sup> As he shows, the Court does this in *Strickler* by treating the case as one involving only *Brady* violations, when the case should have been dealt with as one involving false testimony. The difference in the standard for reversal of a conviction under the two lines of authority is significant. For *Brady* violations, where "materiality" is an element, the inquiry is whether there is a "a reasonable *probability* that [the] conviction or sentence *would* have been different had these materials been disclosed."<sup>16</sup> In a false testimony case, however, the inquiry is whether there is "any reasonable *likelihood* that the false testimony *could* have affected the judgment of the jury."<sup>17</sup> Even under this latter standard, of course, an accused can be convicted and sentenced to death despite the fact that there is a *reasonable possibility* that his conviction *could have been* the result of unlawfully suppressed evidence.

There is another disheartening aspect to *Strickler*. No one on the Court—or, apparently, anywhere else—seems to have been concerned with the fact that Detective Claytor created Stoltzfus's detailed narrative of a brutal abduction out of nothing more than Stoltzfus's "muddled memories" about a "trivial" event.<sup>18</sup> Arguably, Claytor did not suborn perjury, because Stoltzfus came to believe the falsehoods she told; thus, she didn't commit perjury; therefore, he couldn't be said to have suborned perjury. But this is nonsense. How could Stoltzfus have believed that she had "an exceptionally good memory" when she had acknowledged before the trial that her memory about the entire event was "muddled," and when she acknowledged after the trial that she "still wouldn't realize" that she had even witnessed an abduction—let alone the accompanying brutality to which she

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13. *Id.* at 1950 n.26.

14. *Id.* at 1955.

15. Saltzburg, *supra* note 1, at 1579.

16. *Strickler*, 119 S. Ct. at 1955 (emphasis added).

17. *United States v. Agurs*, 427 U.S. 97, 103 (1976).

18. For a discussion of the ethics of preparing witnesses, including a discussion of the psychology of memory, see Freedman, *supra* note 4, at 143-60.

testified—were it not for Claytor’s “persistent” help?<sup>19</sup>

In the general lack of concern with Claytor’s fabrication of Stoltzfus’s testimony, is there a lesson for police officers and lawyers about how to “prepare” witnesses? Although effective, is what Claytor did good police work? And, if a prosecutor was involved, directly or indirectly, in Claytor’s creation of Stoltzfus’s narrative, did that prosecutor act ethically? Professor Saltzburg suggests that the Model Rules and the ABA Standards could be used to remedy the courts’ disturbing tolerance for false testimony. As he shows, the knowing presentation of false testimony by the prosecution may not be grounds for reversal of a conviction, but it can be grounds for professional discipline of a lawyer, regardless of the “materiality” of the falsehood. Unfortunately, however, prosecutors can avoid “knowing” the truth as well as can other lawyers—regardless of how disingenuous that lack of knowledge may be.<sup>20</sup> For example, there is no reason to believe that Claytor needed the help of anyone in the prosecutors’ office in constructing Stoltzfus’s testimony. For purposes of the ethical rules, therefore, the prosecutor could have taken the case to trial without knowing what Claytor knew about the source of Stoltzfus’s testimony.

Professor Stanley Z. Fisher picks up the discussion at just that point.<sup>21</sup> As he notes, the Supreme Court has affirmed the prosecutor’s duty under *Brady* to disclose exculpatory evidence to the defense even if the police have not revealed the evidence to the prosecutor.<sup>22</sup> The problem, he explains, is that we have relied on self-regulation by law enforcement agencies and the efforts of prosecutors to achieve that end. Neither resort, he notes, has been, or promises to be, effective in ensuring regular prosecutorial access to exculpatory evidence known to the police. Although a legislative solution would be best, it is not likely to happen.<sup>23</sup> Accordingly, Professor Fisher proposes amendments to the ethical rules to require that prosecutors make reasonable efforts to obtain access to exculpatory evidence known to the police, and to guide prosecutors on how to carry out that responsibility.<sup>24</sup>

I support Professor Fisher’s proposals in the hope that such amendments to the rules of professional responsibility would ultimately have at least an educative effect on some prosecutors. But

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19. With regard to the creation of false memories, see generally Elizabeth Loftus & Katherine Ketcham, *The Myth of Repressed Memory* (1994).

20. For a discussion of how Model Rule 3.3 has been undercut by disingenuous use of the “knowing” requirement, see Freedman, *supra* note 4, at 139-141, app. B-1 to -8.

21. See Stanley Z. Fisher, *The Prosecutor’s Ethical Duty to Seek Exculpatory Evidence in Police Hands: Lessons from England*, 68 *Fordham L. Rev.* 1379 (2000).

22. See *id.* at 1379-80.

23. *Id.* at 1380.

24. *Id.* app. B.

would the new rules be enforced? Would disciplinary committees add the threat of professional sanctions to prompt prosecutors to do their duty? And, if not, would amendments to the ethical rules be any more effective than the constitutional obligations that the Court has already recognized?

Particularly in the light of those questions, I support Professor Ellen S. Podgor's proposals for more educational efforts in prosecutors' offices and in law schools regarding the appropriate exercise of prosecutorial discretion.<sup>25</sup> Indeed, Professor Fisher's recommended amendments to the ethical rules would facilitate Professor Podgor's proposals. Nevertheless, the most effective remedy for prosecutorial abuse is probably the effective use of the professional disciplinary system.

Also recognizing that prosecutors can be overzealous, Professor H. Richard Uviller has an intriguing suggestion. He advocates making the prosecutor's discretionary role a less adversarial one in the earlier stages of a case.<sup>26</sup> He would accomplish this through a structural change in prosecutors' offices, by assigning the investigative and quasi-adjudicative prosecutorial functions to lawyers who would not be involved in the adversarial aspects of trying cases. Thus, he seeks to establish a "dedicated detachment" on the part of those prosecutors who exercise discretion in the pretrial stages.<sup>27</sup> The proposal seems impractical to me, however, because of necessary overlapping in these prosecutorial functions, a difficulty that Professor Uviller recognizes. Not having Professor Uviller's considerable experience as a prosecutor,<sup>28</sup> however, I defer to his judgment and endorse his proposal.

All of these concerns with the exercise of prosecutorial discretion are given more urgency by Professor Kevin C. McMunigal's insightful Article. He argues persuasively that, in important respects, prosecutorial standards are no less adversarial than those affecting other lawyers are, and that prosecutors, in some instances, are placed in a more adversarial role than other lawyers are.<sup>29</sup> As one example, Professor McMunigal shows that the prosecutor's discovery obligations under *Brady* are more limited, and therefore less cooperative and more adversarial, than the civil litigator's discovery

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25. See Ellen S. Podgor, *The Ethics and Professionalism of Prosecutors in Discretionary Decisions*, 68 Fordham L. Rev. 1511, 1534 (2000).

26. See H. Richard Uviller, *The Neutral Prosecutor: The Obligation of Dispassion in a Passionate Pursuit*, 68 Fordham L. Rev. 1695, 1718 (2000).

27. See *id.*

28. Professor Uviller joined the office of the District Attorney of New York County in 1954 and served chief of its appeals bureau from 1961-1968. See Columbia University, *Faculty and Administration—H. Richard Uviller* (visited Mar. 27, 2000) <<http://www.law.columbia.edu/faculty/huviller.html>>.

29. See Kevin C. McMunigal, *Are Prosecutorial Ethics Standards Different?*, 68 Fordham L. Rev. 1453, 1453 (2000).

obligations.<sup>30</sup> In view of the fact that the prosecutor “wields the most terrible instruments of government,”<sup>31</sup> Professor McMunigal’s analysis provides strong reason for concern about unrestrained use of prosecutorial discretion.

Another article on prosecutors, by Dean Kenneth B. Nunn, deals with a wholly different issue—the so-called “Darden Dilemma,” which raises the question of whether African-Americans should be prosecutors.<sup>32</sup> An important part of the analysis, of course, returns us to the issue of prosecutorial discretion.

Dean Nunn first posits his premises: (1) American society is racist; (2) The criminal justice system is arguably the most racist institution in the United States, both in its treatment of African-Americans and in the attitudes of its participants; (3) Prosecutors exercise significant discretion within the criminal justice system. Therefore, Dean Nunn concludes, African-Americans should not be prosecutors.<sup>33</sup> As Professor Austin Scott used to say, I understand everything but the therefore.

I agree, of course, with Dean Nunn’s premises. His conclusion, however, is breathtaking, on its own and in its implications. Corporate America is also racist, both in its treatment of African-Americans and in the attitudes of its participants. How, then, could an African-American be associated with a law firm doing corporate practice, especially when that firm’s clients might selectively pollute the environment, with selective emphasis on Black communities? Alternatively, how can an African-American big-firm-lawyer work with clients who in the course of their real estate dealings, discriminate against Blacks; or clients who are banks that discriminate; and so on? Logically, Dean Nunn would also bar African-American lawyers from serving as law clerks for judges, who are key participants in our racist criminal justice system.<sup>34</sup> Indeed, Dean Nunn suggests that the only job an African-American lawyer can take in good conscience is as a public interest lawyer or a legal aid

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30. *See id.* at 1464-65.

31. *Martin v. Merola*, 532 F.2d 191, 196 (2d Cir. 1976) (Lumbard, J., concurring) (quoting Felix Frankfurter, Letter, *N.Y. Times*, Mar. 4, 1941).

32. *See* Kenneth B. Nunn, *The “Darden Dilemma”: Should African Americans Prosecute Crimes?*, 68 *Fordham L. Rev.* 1473 (2000).

33. *See id.* at 1509.

34. Thus, for him, the efforts to get the Supreme Court to hire more Black law clerks would appear also to be counter-productive. *See generally*, Tony Mauro, *U.S. Court Justices Grilled Over Lack of Diversity Among Clerks*, *N.J. L.J.*, Mar. 20, 2000, (reporting on a recent congressional hearing concerning the paucity of minority law clerks selected by Supreme Court justices); Editorial, *Needed: Minority Clerks at the Court*, *N.Y. Times*, Mar. 18, 1999 (advocating an increase in the number of minority law clerks that Supreme Court justices hire); Tony Mauro, *Burnish Supreme Court’s Minority Hiring Image*, *USA Today*, Mar. 14, 2000 (discussing public response to the scarce number of minority law clerks selected by Supreme Court justices).



attorney “working on the root causes of crime.”<sup>35</sup>

These are worthy jobs and can be gratifying, but the proposal puts a rather severe limitation on job opportunities for young African-American lawyers with student loans to repay. More important, it is out of touch with reality. In several years of doing indigent criminal defense work, I came to realize that you can do far more good as a conscientious prosecutor than as a fire-eating defense lawyer. Some of the most important cases that I defended were cases that a decent prosecutor would never have pursued in the first place. That is, we are returning to prosecutorial discretion—a discretion that I, and I hope Dean Nunn, would want exercised with what Professor Uviller calls “dedicated detachment,”<sup>36</sup> which does not exclude an element of understanding and compassion.

Another significant contribution bearing on the trial as a search for truth is Professor Ellen Yankiver Suni’s Article on blame-shifting in criminal cases.<sup>37</sup> As she points out, the rules of evidence in most jurisdictions prohibit the introduction of alternative-perpetrator evidence unless there is a “direct connection” established between the evidence and the crime.<sup>38</sup> Consequently, a defense that another person committed the crime cannot be maintained unless there is “substantial evidence tending to directly connect that person with the actual commission of the offense.”<sup>39</sup> Here again, we are concerned in part with the unwillingness of courts to pursue truth in the form of evidence that tends to establish a reasonable doubt about the State’s case. Courts have refused to allow evidence that an alternative perpetrator had the motive and the means to commit the crime, or that he made threats against the victim, or that he was seen with blood on his hands in the vicinity of the crime, or that he had assaulted the victim two weeks before the crime.<sup>40</sup> All of these proffers satisfy the requirement of relevance, that is, a “rational tendency to engender a reasonable doubt with respect to an essential feature of the State’s case,” or “tend[ing] in any way, even indirectly, to establish a reasonable doubt of [a] defendant’s guilt.”<sup>41</sup> Each of the proffers was inadmissible, however, because of a lack of “direct connection.”<sup>42</sup>

In an original and thoughtful Article, Professors Christopher Slobogin and Amy Mashburn take on one of the most difficult issues

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35. See Nunn, *supra* note 32, at 1506. That is a fantasy that I would like to share, but it is far removed from the triage and the plea bargaining of actual practice in legal aid and public defender offices.

36. See Uviller, *supra* note 26, at 1718.

37. Ellen Yankiver Suni, Who Stole the Cookie from the Cookie Jar?: *The Law and Ethics of Shifting Blame in Criminal Cases*, 68 *Fordham L. Rev.* 1643 (2000).

38. See *id.* at 1675.

39. See *id.* at 1676.

40. See *id.* at 1677.

41. See *id.* at 1692.

42. See *id.*

in the ethics of criminal defense—how to represent the client who suffers from a mental disability.<sup>43</sup> For me, indeed, the issue is not just difficult but impossible to resolve in a principled way,<sup>44</sup> because my system of lawyers' ethics is premised on an autonomous client who, by axiom, is competent to make decisions affecting her own life.<sup>45</sup> Professors Slobogin and Mashburn conclude, paradoxically, that the lawyer shows respect for the incompetent client's autonomy by refusing to heed the client's expressed wishes.

There is a way to resolve that paradox. In *The Odyssey*, wanting to hear the Sirens but not wanting to be destroyed by them, Odysseus commands his men to plug their own ears with wax, to tie him to the mast, and to disobey any commands to untie him that he would later give under the influence of the Sirens.<sup>46</sup> Like Odysseus, the incompetent client who gives commands against his true interests would not really, in a rational state, want those commands carried out. How do we know that? We can't. But we can make a Rawlsian judgment that each of us, in a rational state but recognizing the possibility of later incompetence, would want any irrational, self-harming commands to be ignored. Thus, the lawyer respects the client's autonomy, in a Rawlsian rational state, by ignoring the incompetent client's irrational, self-harming demands.

Taken together, the Articles in this symposium advance to a new level the discussion of longstanding ethical issues in criminal procedure. These Articles also shed more light upon the quality of criminal representation available in the United States and help focus future discussions on the applicable standards of professional conduct.

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43. Christopher Slobogin & Amy Mashburn, *The Criminal Defense Lawyer's Fiduciary Duty to Clients with Mental Disability*, 68 Fordham L. Rev. 1581, 1582 (2000).

44. I confess that when I represented several incompetent clients during the 1960s, I simply made an ad hoc decision in each case about how I should proceed, based on my own subjective judgment of the best interests of the client. These judgments were made without the benefit of any systematic, or perhaps any rational, criteria of how to determine the best interests of the client.

45. See generally Freedman, *supra* note 4, at 43-64 (discussing client autonomy).

46. See Homer, *The Odyssey* bk. XII, ll. 185-98, at 214 (Robert Fitzgerald trans., Farrar, Straus & Giroux 1998) (n.d.).