Is Legal Ethics Asking the Right Questions?

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Thank you so much. Whenever Monroe asks me to do anything, I always say "yes." And when Monroe described the class in which he said I was exhilarating, it was for one reason—we were teaching it together. Monroe makes the most wonderful foil and counterpuncher in discussing any kinds of ethics issues. He mentioned that I'm sometimes called an attorney of last resort. I was so introduced in Israel a few years ago at the Hebrew University and the newspaper got it wrong in translation, and it came out that I was America's last resort lawyer, which is probably why Leona Helmsley hired me to represent her hotels.

Well, I'm going to start out with a story that takes place in Boston when poor Mr. Schwartz gets very sick and he's taken to the Massachusetts General Hospital, to the Phillips Pavilion, where only the fanciest people, the actors, the celebrities, the presidents go. He lasted there exactly one day and he insisted on being taken to Beth Israel, a smaller, not as distinguished hospital down in Brookline. And the intern in Beth Israel, who wished he had been an intern at Mass General said, "Mr. Schwartz, I see you agree with us that the medical care in Mass General is not what it's cracked up to be." Schwartz says, "No, it was wonderful over there. I can't complain." "The food? Was there too much watercress salad?" "No, no, the food was great. I can't complain." "Were the nurses too cold?" "The nurses were warm. I can't complain." The intern says, "Then why, Mr. Schwartz, did you shift to our hospital?" And Schwartz says, "Simple, here I can complain." And so today, I want to complain a little.

I want to complain about the agenda of legal ethics. Thirty years ago Monroe Freedman set the agenda for the debate over legal ethics in the United States in criminal cases by posing three provocative questions. You're probably all familiar with them, but I'll repeat them. Is it proper to cross examine for the purpose of discrediting the reliability or credibility of an adverse witness whom you know to be telling the truth? Is it proper to put a witness including the defendant on the stand when you know he will commit perjury? And is it proper to give your client
legal advice when you have reason to believe that that knowledge you give him will tempt him to commit perjury? These questions have been debated endlessly and productively in ethics classes, in bar associations, judicial opinions, and lawyers' bull sessions. Unfortunately, the focus of these debates has been almost exclusively on defense lawyers, never on prosecutors. Yet there has been little debate about whether prosecutors who know when they put a witness on the stand, that that witness is likely to be committing perjury, particularly a police witness, whether or not, it is proper for that prosecutor to engage in that kind of conduct. In fact, as anyone who has practiced criminal law will know - and that excludes virtually all of the current sitting United States Supreme Court justices of the United States - this problem arises far more frequently with prosecutors than it does with the defense attorneys. This is so for a very obvious reason: Defense attorneys rarely put on an affirmative case while prosecutors always put on an affirmative case.

The other two questions arise more frequently with defense attorneys but they do arise with a significant degree of frequency with prosecutors as well, yet there is little discussion of them also, except again in the context of the role of the defense attorney. This misfocus of attention sends precisely the wrong message and has contributed to the current crisis of confidence in our criminal justice system, and especially in the role of criminal defense counsel.

Let me start with the second and most provocative and most debated of the questions: witness perjury. A man who used to be the police commissioner of San José and before that was the police commissioner of Kansas City, and before that was a beat cop in New York, made the following statement in the Los Angeles Times of February 11, 1996 (just a month ago): "As someone who spent 35 years wearing a police uniform, I've come to believe," listen to this fact, "that hundreds of thousands of law enforcement officers commit felony perjury every year in testifying about drug arrests." He's limiting himself only to drug arrests. Commissioner Bratton of New York, formerly of Boston, at a conference in Harvard about six months ago, said he has come to believe that "testilying," which is the phrase used by New York police to describe what some of them do in search and seizure cases, particularly is a serious problem and must not be ignored. The Mollen Commission, the Knapp Commission, every commission that has studied the problem of police perjury, has in my view seriously understated the problem and yet has come to the conclusion that policy perjury is rampant. Judge Irving Younger, when he sat as a criminal judge in New York, described
the circumstances of dropsy testimony that came to his court on an almost daily basis in which the police officer sees a drug suspect, approaches him, and miraculously the drugs are dropped on the floor, thereby invoking two exceptions to the exclusionary rule at the very same time, this led Judge Younger to quip that there must be some impact that drugs have on the ability of the finger to hold the drugs or some other physical property. Judge Alex Kazinski of the Ninth Circuit recently said that every judge knows that police perjury in these kinds of cases is rampant.

Is it possible that hundreds of thousands of transparent cases of policy perjury are occurring every year in the courts of this country without prosecutors and judges knowing about it, and even encouraging it? I don’t think so. And I think that has to become a serious focus of our attention as legal ethics teachers. I want to illustrate the problem, and actually the three problems, by reference to an obscure case, that most of you probably never heard of, that involved a black man and a double murder in a Los Angeles area last year, and it was a case that I was involved in as a consultant as a potential appellate lawyer, but the case resulted in an acquittal, and so there was no appeal.

Obviously, I’m going to talk for a few minutes about the Simpson case, and use that to illustrate precisely the problems I’ve been talking about. Let me explain to you what I believe was in the mind of the police officers and in the mind of the prosecutors in that case, because I think it’s fairly typical. I think that Marcia Clark and Chris Darden and Judge Ito all sincerely believed that O.J. Simpson committed these double murders. That was their subjective state of mind. They believed it. That was their truth, their ultimate truth. They also believed that Officer Furman was now, at this point in time, a good cop.

Now let me tell you how I think they define a good cop. A good cop is defined as a policeman who would not plant evidence, though he might stretch the truth of a search and seizure to fit an exception to the exclusionary rule, a rule which in their view diserves ultimate truth. Clark and Darden knew however that Furman had in fact used the “N” word previously. It was very obvious because when he made a claim for a disability in 1983, in the very claim for a disability, he included an interview with a psychiatrist. In the interview with the psychiatrist, he used the “N” word. He said those “N’s” and Mexicans should be in jail. I don’t know why I have to treat them the way I have to treat them. And he talked about how outraged he was at “N’s” and Mexicans, and he used it in a very conversational way. They also knew that he was a racist, a liar, and potentially an evidence-planter. How did they know that?
Another district attorney named Lucien Coleman, a woman with 18 years of experience in the DA’s office went over to Marcia Clark and warned her to be really careful about Furman since she had been hearing bad things about him. Marcia Clark responded, “Oh, you’ve been listening to the defense.” And she said, No, no, I’ve been listening to my police officers. My police officers are telling me that this guy is an evidence-planter, this guy is a racist, this guy is a liar, this is a guy who put a swastika on the locker of a police officer who had recently married a Jewish woman. And story after story after story. And Marcia Clark threw her out of the office, saying stop interfering with my case. Everybody’s trying to get a piece of this big case. I don’t want to hear from you any more, and I’m going to put Furman on the witness stand. And she asked herself, since she believed that Furman didn’t plant the evidence and was now not a racist (this was her subjective state of belief), why, why should these old problems interfere with her being able to achieve the ultimate truth, the truth she maintained confidence in—namely the defendant was guilty.

They also knew, and Judge Ito knew this as well (let’s not mince any words about it), that the police account of the search was a cover story. Everyone suspected Simpson on the morning of the murders. In my book, Reasonable Doubts, I describe my reaction when I first saw the television news of the two victims, one of them being Simpson’s former wife, and heard an account of Simpson’s previous arrest for spousal abuse, I turned to my wife and said, of course O.J. is the obvious suspect. My wife and I had been at a birthing class just five years earlier in the same class with the Stewards. Remember the Stewards in Boston. And when Mrs. Steward was brutally murdered right outside the hospital, we were all told by our birthing instructor, be real careful, women, make sure you walk with your husbands because this is a very bad neighborhood. There are a lot of African-Americans in the neighborhood, it’s a mixed neighborhood, watch out for them, make sure you’re with your husband. Of course it then turned out that the husband had killed Steward, as is very typically the case in these kinds of situations.

So everybody suspected O.J. Simpson, with the exception of five people, that is, the five police officers who swore under oath that they didn’t suspect Simpson. As Van Atter put it, I no more regarded O.J. Simpson as a suspect than I did you, Mr. Shapiro. Now there is no way anybody can believe that story. And yet two judges and many prosecutors claimed to believe it. The two judges are much, much more guilty in this respect because the judges had to make credibility determinations,
whereas you might argue prosecutors don’t have to make credibility
determinations. Those two judges held their noses, closed their ears, and
shut their eyes, and said that they believed this evidence. There is no
way they could have believed that evidence. They pretended to believe
that evidence. Why? In the interest of truth. Why did they participate in
a lie in the interest of truth? They participated in a lie because they knew
that if they allowed that intermediate truth to be registered, namely that
this was a false cover story, evidence of Mr. Simpson’s guilt would be
excluded, and that would thwart the search for ultimate truth.

Now Professor Hodes of Indiana who’s here today will of course
ask the question, what do you mean “know”? And he has challenged the
defense bar and said, when the Supreme Court in *Nix v. Whiteside*
and the rules of ethics say “know,” they don’t mean know only in the sense
of “did the client confess to you.” They mean common sense “know”.
Certainly by Professor Hodes’ standards, Marcia Clark and Chris Darden
knew that that story was a phony cover story. They’ve heard it dozens
and dozens of times. It’s number seven in the Letterman Top Ten List of
favorite cover stories that the police tell. The Mollen Commission in fact
has a list and it quotes a police supervisor giving a police officer a choice
of which of the cover stories are most likely to succeed. And I don’t
even want to trivialize the intelligence of this audience by suggesting for
a minute that you can make an argument that under that standard of
knowledge, the prosecutors didn’t know. Of course they knew. We’re
going to have an interesting debate, and Professor Hodes and I had that
debate, as to whether or not the same standard of know should apply to
defense attorney as should to prosecutors. I believe it should not.

Defense attorneys do have a conflict, that is, they have zealous rep-
resentation of their client, they are confronted with a situation under
which if they don’t put a witness on the stand, they can be held as inef-
effectively assisting their client because as the Second Circuit recently held
in the DeLuca case, the defendant has a constitutional right to take the
stand. And if a lawyer doesn’t put the defendant on the stand, the lawyer
can be held to a standard of ineffective assistance of counsel. Even under
the so-called breathing on the mirror standard in the Strickland case, the
Second Circuit recently reversed a conviction because the lawyer did not
put a defendant on the witness stand notwithstanding there being some
questions about why that decision was made, and whether or not it was
ethically based. So the defense attorney has a real conflict. He learned it
in confidence from a client, he has an obligation to satisfy the constitu-
tional right of the client to take the witness stand.
There are no conflicts of that kind with a prosecutor. A prosecutor is not in a lawyer-client relationship with a police witness. The police witness has no right to take the stand. The levels of zealous advocacy for a prosecutor are different than the levels of zealous advocacy for a defense attorney, and I think it should be clear that the standard of knowledge, whatever it may be, whether it be the Hodes standard or some other standard for the defense attorney, it is surely at the very least the Hodes standard for a prosecutor. And I’d like to hear from anybody an argument that that standard was not met in this case, either as to Furman’s use of the “N” word or as to Van Atter’s testimony concerning whether or not he regarded O.J. Simpson as a suspect.

Now, you might try to wiggle out of that by invoking an argument that I made in my novel Advocate’s Devil and that is to point to the following issue which is in fact rarely discussed in the literature, and which is again far more common. You know, when Monroe Freedman asked the question, should a defense counsel be able to put a witness on the stand, he is addressing one part of that dilemma. But the far more frequent occurrence is going to a situation where you put your client on the stand and you don’t elicit a lie from him on direct, but you know that on cross a lie will be elicited naturally by the cross-examination. And I challenge you to find in all the vast discussion of legal ethics an answer to that question. It’s just not there. Are you as a defense attorney or as a prosecutor obliged to stand up and correct your witness’s perjured testimony, when it’s elicited on cross-examination? You would think there would be some discussion of that. I don’t expect that discussion to occur in the Supreme Court because again, when you allocate to nine people, none of who have any experience to speak of, in real administration of criminal justice, really understanding the dynamics of lawyer-client relationships from their own experience, it’s very, very hard to expect that they will anticipate these problems instead of discussing them in an abstract context or in the context of a particular case that comes before them.

So these are questions that I think have to be debated. And I think they have to be debated far more frequently in the context of the role of the prosecutor and in the context of the role of the judge. The time has come to shift the focus away from its almost exclusive past focus on the defense attorney.

Let me illustrate the problem of cross-examination by brief reference to the Simpson case. In the Simpson case, a woman named Kathleen Bell, who hated O.J. Simpson, who thought he was probably guilty, who wanted him to be convicted, called the prosecution and the defense
(first the prosecution and they didn’t return the call, and then the defense), and said, you know, this guy Furman, he may have been telling the truth about the glove. I don’t know. But I have to tell you I once had an encounter with him, and he used the “N” word repeatedly and he told me that he would arrest any black man he saw with a white woman and make up a cover story, and he would like to round up all African-Americans (he didn’t use that word) and burn them all to death. It was the most horrible thing anybody ever said to me. I’ll never forget it.

Let me tell you what Marcia Clark set out to do to this good samaritan, decent woman. She set out to absolutely destroy that woman’s life. She put investigators on her, she encouraged private investigators to be put on her. She sent messages to this woman over and over again, if you testify, we will find everything out about your sex life, about your background, about your work life. If you testify in this case, you will be destroyed and demolished. And she would have done it and she knew that Kathleen Bell was telling the truth. How did she know that Kathleen Bell was telling the truth? Because it was consistent with everything else that other people, police officers and others, were saying, and because she knew Kathleen Bell had no motive to testify falsely in this case. Fortunately, we came upon those tapes, and as the result of those tapes, and here’s something that I think the media hasn’t understood, what was important was not the fact that Judge Ito allowed us two snip-its from the tape, showing that in fact he had used the “N” word. I was in favor of not even using those two snip-its because they made it sound like they were two snip-its that could have been used by anybody, a comedian or something, they were in such an innocent context. And also, he could have easily have said, “Gee, I don’t remember that.” The importance of the tape is that with the tape, Marcia Clark knew she couldn’t cross-examine Kathleen Bell, because if she tried to prove that Kathleen Bell was lying about remembering a statement about burning the African-Americans, we had something on tape which said the exact same thing, and we then would have been able to use that piece of tape to resurrect her cross-examined testimony. So the impact of the tape was not on what the jury heard, but it’s on what the jury didn’t hear. It precluded Marcia Clark from doing what she fully intended to do, that is, destroying a decent woman who she knew what telling the truth. Why? In the interest of truth. Marcia Clark honestly and genuinely believed that if Kathleen Bell testified, the jury would misfocus its attention on whether or not Furman was telling the truth, a small minor truth, about whether or not he had used the “N” word, and that would obscure a larger truth,
namely that he didn’t plant the glove and that Simpson was in fact guilty in her view.

So this problem occurs I think quite frequently and quite dramatically, and yet I saw no attention by legal ethicists, by the media, to this question. Because we have become so wedded to the issue of defense attorneys’s ethics in the context of a world where prosecutorial misconduct in these kinds of cases is not only rampant, but is approved by the judiciary and is felt to be right. Why? Because they’re on the side of the angels and we are on the side of the devils. Because the vast majority of criminal defendants are in fact guilty, and thank God for that. Would any of us want to live in a world where the vast majority of people charged with crime are innocent? China, Iraq, Iran, maybe. Not the United States of American. But because ultimate truth resides in most cases with the prosecution, they are far less sensitive to issues of intermediate truth and we as ethicists are far less sensitive to these issues of intermediate truth. We see the issue in the broad abstraction of truth. Read Harold Rothwax’s new book *Guilty*. Monroe says don’t read it. I will compromise and say borrow it from the library. It’s an important exhibit to read because he never discusses the ethics of prosecutors. He only focuses on the ethics of defense attorneys. He said in one very interesting episode, “prosecutors come to me all the time *ex parte*, and tell me about the ethical problems. I don’t have any memory of any defense attorney coming to me *ex parte* and telling me about the ethical concerns that he may have heard about putting on a false witness.” Judge Rothwax, wake up. What defense attorney in his right mind would confide in you an ethical dilemma about representing a guilty client? It would be disbarable conduct. And yet, the focus of the entire book is only on the lack of ethics by defense attorneys.

A statement recently was made by the police commissioner of New York, Police Commissioner Bratton. When a prosecutor is really determined to win, the trial prep procedure may skirt along the edges of coercing or leading the police witness. In this way, some impressionable young cops learn to tailor their testimony to the requirements of the law. This is a very serious and recurring problem. It’s not that prosecutors tell the police witnesses to lie. It’s that prosecutors give lectures at police academies, brief police witnesses, outline them the parameters of the exceptions to the exclusionary rule, and then turn a blind eye to the amazing coincidence that virtually every search happens to fit into one of the exceptions to the exclusionary rule. Now these days there are so many exceptions to the rule that it’s not hard to fit it into one. Prosecutors must have an obligation not only to make sure that their witnesses
testify consistent with the way they want them to testify, but to make sure that they testify truthfully.

The time has come to shift the focus back to prosecutors. The time has come for the courts to understand that they are a serious part of the problem. If there are hundreds of thousands of cases every year of transparent perjury, and only handfuls of cases where the judges disbelieve that transparent perjury, there is an ethics problem involving judges. Judges at every level of every court. Judges who are the ones who say they believe it. The appellate judges who say we believe the judges who said they believe it. And the Supreme Court justices who say we believe the appellate judges who said that they believe the district judges who believe it. The time has come to cut that Gordian knot and for some judges to show the courage of their convictions and to start doing in public what they are perfectly prepared to do in private. To start doing in specific what they are prepared to do in the abstract. Judges will tell you that police perjury is rampant, but look for an opinion in which it is actually stated and used as a basis to justify the exclusion of evidence. Just look at what happens to a judge like Harold Baer when he tries to do it. He becomes a subject of potential impeachment. He becomes a subject of presidential politics. He becomes a subject of abuse by the mayor and by the governor, and a few courageous former judges and others stand up for him, and they are to be praised. I don’t know what the facts in those circumstances are. I can tell you what the message is. The message to judges is don’t do what Harold Baer did. Don’t get yourself into that situation, particularly if you’re young and if you have a judicial career in front of you. Don’t ever become a subject of this kind of criticism. Forget about the independence of the judiciary. You are part of the political system.

So, I think we have to begin to look more realistically at the criminal justice system. It has been wonderful to have academics debate this issue, to have judges in the abstract debate this issue, to have ethicists debate this issue, but we have to begin to look statistically and empirically at what the problem is and start to focus attention more on where the problem is most serious, and I think it is most serious with judges, with prosecutors, without diminishing the seriousness and importance of continuing to maintaining pressure on defense attorneys to act in the highest ethical manner possible. I’m not here suggesting any diminishing in the ethics of defense attorneys. What I am suggesting is an elevation in the ethics of prosecutors.

Let me just end with a quote from the Bible which says “Justice, justice shalt thou pursue.” The commentators ask the question, why is
justice mentioned twice? And one of the most beautiful commentaries to the Bible says that the reason that justice is mentioned twice is that it was intended to refer to the two kinds of justice—the means of justice and the ends of justice. And today we focus far too much on the ends of justice. And the message I believe of the Bible and the message of legal ethics must be that one cannot trust the ends of justice unless the means of justice, the intermediate truth, is also paid considerable attention.

So I want to congratulate Monroe Freedman for having set the agenda for the debate about legal ethics for the first thirty years of its adulthood and I want to wish Monroe thirty more good, active, healthy years in which he can reset the agenda in order to include both prosecutors and judges.