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Lecture

On Crime, Criminal Lawyers, and O.J. Simpson: Plato's *Gorgias* Revisited*

George Anastaplo**

Socrates: . . . The evildoer will be happy, will he not, if he meets with justice and punishment?

Polus: Decidedly not. Under those conditions he would be most unhappy.

Socrates: Then according to you, if the evildoer is not punished, he will be happy?

Polus: That is what I say.

Socrates: But according to my opinion, Polus, the wicked man and the doer of evil is in any case unhappy, but more unhappy if he does not meet with justice and suffer punishment, less unhappy if he pays the penalty and suffers punishment from gods and men.

Polus: That is a preposterous theory you are attempting to uphold, Socrates.

—Plato¹

I.

Critical to any serious inquiry about world organizations and international understanding have been, as we have seen this month here in Rome,² questions about how different “cultures” approach vital moral issues that can shape relations between communities as well as between human beings. Thus, both personal relations and world affairs

* This Lecture was delivered in Rome, Italy, June 30, 1994, at the conclusion of a course for American law students in the Rome Program of the Loyola University Chicago School of Law. The by-then notorious O.J. Simpson case in Los Angeles, California provided the point of departure for this talk about contemporary moral standards and the administration of the criminal law in the United States. Footnotes for this June 1994 Rome Lecture were prepared in March 1995 for publication in the *Loyola University Chicago Law Journal*.

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1. PLATO, GORGIAS 472D-473A.

2. This June 1994 Rome program course, for American law students, was entitled “United Nations and World Government.”

may be illuminated by reminders of old-fashioned moral principles.³

Consider, for example, how the guilty (especially those guilty of the more violent criminal offenses) should conduct themselves. I put to the side, at least for the moment, the question that some raise about whether anyone should be considered *guilty* of anything. I also put aside the question of precisely what punishments are appropriate for various offenses. I avoid thereby the complications encountered in any system today in which capital punishment is used.⁴ I put aside as well the problem of which of the people condemned as criminals by a genuinely repressive regime should be considered innocent refugees entitled to political asylum. My primary concern here is not with how convicted persons should be treated, but with how defendants and their partisans should conduct themselves. This analysis provides a different approach to an inquiry into the administration of the criminal law, however much that approach *can* be affected by how the convicted are treated.⁵

Looking at these problems in this way can help us to see what the fundamental principles of community governance may be and how they should be understood and used. Also instructive here is a consideration of how fundamental principles are identified, with particular concerns about what the status is of nature as a source of guidance and about how educators should approach these matters.

II.

A case in point is provided by the O.J. Simpson-type of controversy. The Simpson case in Los Angeles has been very much in the news the past fortnight, offering us a useful illustration of chronic problems in criminal-law administration in the United States. Such cases (assuming that the dominant mass-media reports of what happened in Los Angeles are substantially correct) *are* rare in the form seen here, inasmuch as there is in the Simpson matter an unusual combination of three elements: the celebrity of the defendant, the ferocity of the violence inflicted by one or more persons on the two victims the night of June 12, 1994 and the apparently conclusive evidence soon

3. On "culture" properly understood, see LEO STRAUSS, *LIBERALISM ANCIENT AND MODERN* 3-8 (1968).

4. On capital punishment, see GEORGE ANASTAPLO, *THE AMERICAN MORALIST: ON LAW, ETHICS AND GOVERNMENT* 422-27 (1992); Robert M. Morgenthau, *What Prosecutors Won't Tell You: Capital Punishment is the Enemy of Law Enforcement*, N.Y. TIMES, Feb. 7, 1995, at A25. See also *infra* note 25 (noting that the prosecution is not seeking the death penalty in the O.J. Simpson trial).

5. On the criminal law generally, see ANASTAPLO, *supra* note 4, at 375-88.

available. We are reminded by this case that we make far too much of, and hence sorely tempt in many ways, celebrities who are of limited social capacities and who really do not know much. (The good sense of athletic stars and their most intimate associates, to say nothing of some of their fans, can often be questioned, as may be seen in the brutal action taken last January on Tonya Harding's behalf against Nancy Kerrigan.⁶ Irrationality may be so obvious in such matters that a kind of insanity can be suspected. We can be reminded by the continuing Woody Allen-Mia Farrow controversy, however, that self-destructive irrationality among celebrities is not limited to the unsophisticated.⁷)

We, of course, know nothing personally about the Simpson matter. We are even more removed than we would ordinarily be from reliable information about such a controversy, if only because we have not had access to the massive television and press coverage there has evidently been back home. But may not such removal permit us, if it does not even help us, to see things more clearly than we otherwise might? I should at once add that the abuses of the mass-media, which have become chronic in recent decades, are not my principal concern in these remarks.⁸

6. See, e.g., Jere Longman, *Lines Blur for Kerrigan and Harding: The Banned Skater Gets a Public Redemption; the Hero Shows Flaws*, N.Y. TIMES, Jan. 6, 1995, at B7. See also Dan Bickley, *Up Close Is Getting Too Close: Media Crush Squashes Heroes*, CHI. SUN-TIMES, Mar. 27, 1995, at 114.

7. See, e.g., Richard Perez-Pena, *Woody Allen Tells of Affair as Custody Battle Begins*, N.Y. TIMES, Mar. 20, 1993, § 1, at 25; *Fallow Tale Most Fallow*, USA TODAY, Feb. 28, 1995, at 3D. On the emptiness, if not despair, of the celebrity-oriented life of the O.J. Simpson household over the years, see John G. Dunne, *The Simpsons*, N.Y. REV. BOOKS, Sept. 22, 1994, at 34-39. Something of the painful compulsiveness promoted by such a life may be seen in the insistence by the victims' families that they attend the Simpson murder trial regularly.

8. On the mass media generally, see ANASTAPLO, *supra* note 4, at 245-74. This includes discussion of a proposal that broadcast television be abolished in the United States. *Id.* On the mass media coverage of a notorious trial of a quarter century ago (The Chicago Conspiracy Trial), see GEORGE ANASTAPLO, *THE CONSTITUTIONALIST: NOTES ON THE FIRST AMENDMENT* 312-23 (1971). On the Lindberg kidnapping trial, see Rupert Cornwell, *Forget O.J., This Was the Real Murder Trial of the Century*, INDEPENDENT ON SUNDAY, Feb. 19, 1995, at 18. On other notorious cases in recent decades, see *infra* note 28. On the relations among television, the spirit of football, and the Simpson trial, see *The Juice Squeezed*, ECONOMIST, Feb. 25, 1995, at 92. See also Benjamin A. Holden, *GDP of O.J. Trial Outruns the Total of, Say, Grenada*, WALL ST. J., Mar. 22, 1995, at A1; Peter Lewis, *Discussion of the O.J. Simpson Murder Trial Is On-Line as Well as on the Air*, N.Y. TIMES, Feb. 14, 1995, at A9; Laurie Mifflin, *At Simpson Trial, a Super Bowl for Legal Analysts*, N.Y. TIMES, Mar. 20, 1995, at A1. There is something unhealthy about the amount of attention devoted to the Simpson trial nationally, just as there was about the attention devoted to the Clarence Thomas-Anita Hill controversy (which should have been thoroughly examined and dealt with in closed hearings by the Senate

The distressing facts of the nightmarish Simpson case are, unfortunately, already well known. They include a history of serious spousal abuse by the principal suspect (with the *possibility* of the murdered ex-spouse having herself been somewhat provocative), remarkably violent attacks by someone upon the ex-spouse and her friend, and the principal suspect's bizarre efforts at postponing his arrest thereafter. (Not that the pursuit of Mr. Simpson by the authorities and the mass media was not also somewhat bizarre on this occasion.) The fatal attacks upon the two victims were evidently such that they could be depicted in the press as "a pair of unimaginably savage and bloody crimes."⁹ One need not know the people who may have been involved here to recognize that something is dreadfully wrong with the man or men who did what is reported here, whoever he or they may be.

III.

Let us suppose that the facts in this case *are* as they evidently seem to be to most informed observers. (It is significant, one way or another, that one of Mr. Simpson's lawyers has been quoted as saying that "there is an alibi witness.") Whatever may really be the facts in the Simpson case itself, there must be such cases as this one at least seems to be. How should such cases, *if not this one*, be handled?

I have indicated that I am not primarily concerned on this occasion with how the community should punish any particular criminal, except insofar as the community's response helps shape potential criminals. Rather, I am asking these questions: How, in such a situation in which O.J. Simpson apparently finds himself, should the defendant and his partisans act? What should be indicated to them by us about how they should act? What duty, if any, do they have to their community and to humanity generally? What is truly in the defendant's interest?

I do not believe it sufficient to approach such matters in the way that defendants have been taught they should be able to approach them, indeed in the way (it sometimes seems) that defendants have been taught they virtually have a duty to approach them. "Perry Mason" shows can be misleading here: it is salutary in those shows that justice be done again and again and that it be shown to be done—but it is unfortunate that the authorities are repeatedly exposed by Perry Mason

Judiciary Committee). The Simpson trial is developing into a powerful argument against the broadcasting of criminal proceedings.

9. Richard Price, *No. 32 to No. 4013970: A Hero Topples*, USA TODAY/INT'L EDITION, June 21, 1994, at 2A.

as being consistently (however usually inadvertently) on the side of injustice. Policemen and prosecutors in a civilized community are likely to be correct in the judgments they make about who is guilty of what, especially in those circumstances where neither political interest nor racial bias dictates the results.

We can be reminded of the difficulty that one people may have in understanding another because of radically different moral orientations when we consider such a transient controversy as the official flogging of an American teenager in Singapore.¹⁰ A more serious and more enduring aspect of the problem of international understanding may be seen in the issues facing the United States in determining what trade policies to pursue with a country such as China where severe human rights abuses are flagrant and of long standing.¹¹ On the other hand, leaders of such diverse communities as China and the Vatican could perhaps agree that the United States is too permissive, hedonistic, and in other ways undisciplined. Related to this, perhaps, is the complaint heard from many others as well, that the United States is excessively litigious, with the legal profession routinely exploiting the more productive members of the community.¹²

10. See, e.g., Kenneth L. Whiting, *Lashed Teen Michael Fay Headed Home*, USA TODAY/INT'L EDITION, June 21, 1994, at 1A.

11. Consider, for example, this recent report from China:

Talking to American [business] executives working in China, it is striking how many of them sound like members of Amnesty International these days. Why? Because businesses are learning that China's trade abuses and human rights abuses are just flip sides of the same coin—the absence of the rule of law. . . .

[W]hen we ask China's leaders to observe basic trade norms, we are asking them to institute commercial laws, independent courts, anti-corruption measures, equal treatment for foreigners and to do away with their heads-I-win-tails-you-lose way of doing business.

Thomas L. Friedman, *Foreign Affairs: China Syndrome*, N.Y. TIMES, Jan. 8, 1995, § 4, at 19. See also *Right to Punish China*, ECONOMIST, Feb. 11, 1995, at 15, 33, 60-61. The classic statement along the lines of these arguments about China may be Mark Twain's devastating account of Belgian atrocities in the Congo. See MARK TWAIN, *KING LEOPOLD'S SOLILOQUY* (1905). One can well wonder, upon reading Twain's parade of horrors, why anyone should have been willing to say they went to war in 1914 to protect Belgian neutrality.

12. On the moral limitations of contemporary legal practices, see William T. Braithwaite, *Why Lawyers Lie*, in THE GREAT IDEAS TODAY, 230-59 (1994). See also William T. Braithwaite, *On Legal Practice and Education at the Present Time*, in THE GREAT IDEAS TODAY, 44-100 (1989); George Anastaplo, *Lessons for the Student of Law*, 19 OKLA. CITY U. L. REV. (forthcoming 1995) (Part 6: "The Future of Legal Ethics"). Even so, it is prudent to keep in mind the caution that before we kill all the lawyers, we had better be clear about what we intend to replace them with. See DANIEL N. HOFFMAN, *OUR ELUSIVE CONSTITUTION: SILENCES, PARADOXES, PRIORITIES* (conclusion) (forthcoming 1996). See also *infra* note 30.

IV.

One enduring community interest everywhere should be in the promotion of the dignity and self-respect that come from recognizing and insisting upon the obvious. The general attitude and institutional approach here can affect how defendants regard and conduct themselves.

Common sense should be more obviously critical to the legal process than it sometimes seems to be in the United States these days. This bears upon a key question from the natural-right perspective: What is good and right, independent of the conventions of the day? Those conventions, which may be grounded in natural-right principles, include the criminal law and the established legal process that a people may happen to have.¹³

Particularly troublesome here is the loss of a publicly expressible self-confidence on the part of the more sensible and hence the more responsible people in the community. These people, who may be the large majority in the typical association, can be held hostage to the desire for immediate gratification and to the poor judgment of an uninhibited (all-too-often self-righteously uninhibited) minority.

That is, the sober majority (who *can* be dull people in many ways) has become reluctant to assert itself among us, repeatedly allowing instead an irresponsible minority to insist upon its "rights" to the detriment of all, including to the ultimate (and sometimes also to the immediate) detriment of the self-asserting minority as well. Such a headstrong minority can be so moved as to find itself immune to the powerful influence of shame, even when their betters, or at least their elders, are present.¹⁴ A different kind of power sometimes has to be exerted to curb such renegades.

A healthy community, determined to keep and to protect itself at a high level, does have to be confident of the standards it advocates and tries to live by—confident enough to put a stop to obvious excesses.

13. On natural-right principles, see LEO STRAUSS, *NATURAL RIGHT AND HISTORY* (1953). See also GEORGE ANASTAPLO, *HUMAN BEING AND CITIZEN: ESSAYS ON VIRTUE, FREEDOM AND THE COMMON GOOD* 46-60, 74-86 (1975); George Anastaplo, *Natural Law or Natural Right?*, 38 *LOY. L. REV.* (New Orleans) 915-30 (1993) (a last-minute printer's error changed "Right" to "Rights" in this title).

14. On shamelessness, see GEORGE ANASTAPLO, *THE AMENDMENTS TO THE CONSTITUTION: A COMMENTARY* 96, 112, 134, 225 (1995). See also Ellen J. Pollock, *Vince Foster's Death Is a Lively Business For Conspiracy Buffs*, *WALL ST. J.*, Mar. 23, 1995, at A1.

V.

How does all this apply to the situation of the Simpson-type defendant? (Another form of this kind of problem, on the civil side of the docket, may be seen in the outrageous *Pennzoil-Texaco Case*¹⁵ a decade ago, which testified to, among other things, the sad condition of the law courts in Texas.) What guides the high-powered, richly rewarded, and often successful legal teams recruited in such matters? Much of what is done by them is grounded in an overriding concern with self-interest, with particular emphasis placed upon the supposed immediate interests of the client. There is all too often plenty of money available to permit such self-interest to be serviced to the limit—and bad habits are confirmed, if not worsened, thereby. Improper desires are intensified by legal advisors even as such desires are made to appear legitimate.

Underlying this approach is an implicit Hobbesian analysis of civil society.¹⁶ Society exists only to serve the private interests of the individuals who make it up. There is, strictly speaking, no common good. There is, instead, an exaltation of individuality.¹⁷ Much is

15. *Pennzoil Co. v. Texaco, Inc.*, 481 U.S. 1 (1987). On the *Pennzoil-Texaco Case*, see, e.g., Thomas C. Hayes, *How Texaco Lost Court Fight*, N.Y. TIMES, Dec. 19, 1985, at D1; Thomas C. Hayes, *Spending Pennzoil's Billions*, N.Y. TIMES, July 30, 1989, § 3, at 1.

16. On the Hobbesian approach, see Laurence Berns, *Thomas Hobbes*, in HISTORY OF POLITICAL PHILOSOPHY 354-78 (Leo Strauss and Joseph Cropsey eds., 1963).

17. "The quarrel between the ancients and the moderns concerns eventually, and perhaps even from the beginning, the status of 'individuality.'" STRAUSS, *supra* note 13, at 323; see also ANASTAPLO, *supra* note 4, at 23.

The influence here of Christianity is considerable. See, e.g., ANASTAPLO, *supra* note 4, at 319-48; George Anastaplo, *Rome, Piety, and Law: Explorations*, 39 LOY. L. REV. (New Orleans) 1-149 (1993). The relation in modernity between religious liberty and the individualism so important in our criminal law is suggested in the following letter that I submitted to the *Wall Street Journal*, August 11, 1994:

Richard Epstein ("The Welfare State's Threat to Religion," *Wall Street Journal*, July 27, 1994) argues vigorously for "the minimal state" in which all public subsidies would be eliminated and in which therefore dubious restraints upon religious practices (as well as other manifestations of "the ever-expanding reach of government") would be less likely to oppress us than they now are.

The policies Professor Epstein advocates may sometimes be worth pursuing, but as moral and political objectives, not as the mandates he conveniently discovers in our Constitution. It is one thing for Mr. Epstein to challenge many aspects of "the welfare state," including the uses of subsidies to advance social programs. It is quite another thing for him to insist with his customary verve that the Founding Fathers provided for only a "minimal state."

Mr. Epstein is not as much in the sober tradition of the Federal Constitution and its Framers as he evidently believes himself to be. He is, instead, more in the tradition of the Confederate Constitution of 1861, which imitates, but

made thereby of self-defense and personal gratification, even at the expense of the interests of the community which is made up, after all, of a lot of individuals who can be hurt by the self-seeking individual. A telling illustration of this approach is provided by Thomas Hobbes himself: a justly condemned criminal may, in Hobbes' view, properly try to do whatever he deems appropriate to escape his assigned punishment; he may, in the extreme case, even kill his jailors.¹⁸

with significant revisions, the Federal Constitution of 1787. The impetuous Secessionists of 1861 deliberately kept out of the Confederate Constitution the two references to the General Welfare found in the Federal Constitution. In addition, those 1861 revisionists added explicit prohibitions upon various governmental subsidies. In these ways at least, it can be said, Mr. Epstein's Constitution is closer to the 1861 Confederate Constitution than it is to the 1787 Federal Constitution that he invokes.

Also faulty is what seems to be the Epstein (as well as the current Supreme Court) approach to the Religion Clauses of the First Amendment. Those clauses were never intended by their draftsmen as barriers to substantial cooperation between secular and religious authorities in the United States. Mr. Epstein's questionable mode of constitutional interpretation may be seen as well in his reading of the Taking Clause of the Fifth Amendment. That modest clause is, for him, so much in the service of the minimal state that it invalidates most twentieth century governmental regulations in this country, a curious state of affairs indeed.

Governing is limited for Mr. Epstein to "preserving order, protecting property, and enforcing contracts." This is far less than what is expected from government both by the Declaration of Independence of 1776 and by the Constitution of 1787. Thus, it must seem to Mr. Epstein that neither the government nor the community which it serves should have any significant role in shaping that citizen morality which must be depended upon to encourage a general respect for the property and persons of others and to cherish those among us willing to make the greatest sacrifices for the common good.

Has not morality always been critical to a healthy constitutional system, both as a condition of law-abidingness and as an end of many laws? So far as Mr. Epstein's minimal-state theory applies, one is left free (if one is not even obliged) to look out primarily, if not exclusively, for oneself.

In short, the individualism-minded Minimalist goes along, but only halfway, with Hillel when he asked two thousand years ago, "If I am not for myself, who will be for me? But if I am only for myself, what am I?"

We can see here how the Cult of Individuality which is so evident in the administration of the criminal law among us finds expression elsewhere in American life as well. On the Religion Clauses in the Constitution, see George Anastaplo, *The Religion Clauses of the First Amendment*, 11 MEM. ST. U. L. REV. 151-230 (1981); George Anastaplo, *Church and State: Explorations*, 19 LOY. U. CHI. L.J. 61-193 (1987); ANASTAPLO, *supra* note 14, at 58-60. On the Confederate Constitution of 1861, see *id.* at 125-34, 344-61.

18. See THOMAS HOBBS, *LEVIATHAN*, chap. 21. See also Berns, *supra* note 16, at 366. Hobbes would counsel jailors to take precautions against such "natural" self-serving conduct on the part of condemned prisoners. Compare the related arguments in Plato's *Crito*, *Gorgias*, and *Republic*. See also Anastaplo, *supra* note 12, at app. A-1 ("Socrates as a Teacher of Law").

It should at once be added that we obviously want safeguards against official arbitrariness (whether or not based upon a moralistic attitude), against governmental mistakes (if not even malice),¹⁹ and against popular prejudices (including racial bias). But this does not mean that we should not appreciate what the situation usually is, in our country at least, when criminal defendants are brought before the bar of justice.

Also, concern for due process and a proper administration of the criminal law does not mean that we should ignore what the effect is likely to be upon the community when it is considered legitimate, perhaps even necessary, to “pull out all stops” in helping a defendant avoid the likely consequences of his acts, even when the acts are horrible and notorious. The extreme case here may be seen in Thucydides’ account of what the Corcyreans had become accustomed to when factions were unleashed against each other during their terrible civil war:

The sufferings which revolution entailed upon the cities were many and terrible, such as have occurred and always will occur, as long as the nature of mankind remains the same; though in a severer or milder form, and varying in their symptoms, according to the variety of the particular cases. In peace and prosperity, states and individuals have better sentiments, because they do not find themselves suddenly confronted with imperious necessities; but war takes away the easy supply of daily wants, and so proves a rough master, that brings most men’s characters to a level with their fortunes. Revolution thus ran its course from city to city, and the places which it arrived at last, from having heard what had been done before, carried to a still greater excess the refinement of their inventions, as manifested in the cunning of their enterprises and the atrocity of their reprisals. Words had to change their ordinary meaning and to take that which was now given them.²⁰

We are seeing in Rwanda these days still another exhibition of such extremity, albeit on a larger scale (but not in an uglier form) than was possible in an ancient Greek city.²¹

19. On the rationale for the Exclusionary Rule, for example, see ANASTAPLO, *supra* note 14, at 71-73, 76. See also *infra* note 28. Cf. Gregory J. Wallace, *The Exclusionary Rule’s Price to Society Is Too High*, WALL ST. J., Jan. 25, 1995, at A17. Professor James P. Carey, of the Loyola University Chicago School of Law, reports that, although defense counsel occasionally resort to questionable practices that pervert the legal system, prosecutors are considerably more likely to do so.

20. THUCYDIDES, HISTORY OF THE PELOPONNESIAN WAR, III, 82.

21. See, e.g., William E. Schmidt, *Refugee Missionaries from Rwanda Speak of Their Terror, Grief and Guilt*, N.Y. TIMES, Apr. 12, 1994, at A6; see also George Anastaplo, *An*

VI.

What is it that American defendants and their lawyers have come to believe they are *entitled* to, even in a situation where all the participants in the case know (or should know) that the defendant “did it” and where they also know that the general community is largely correct in its grasp of what has happened? What do such lawyers believe about what society is “out to do” to its criminals? It is evident that lawyers, by defending “to the last ditch,” have come to treat the legal forum as a war zone—and Thucydides teaches us about the extremes to which war can drive otherwise decent people. This seems to be related to that breakdown of civility within the legal profession about which we have heard so much.

We from Chicago have seen this sort of thing close up in the decade-long case of John Wayne Gacy, another of those cases complicated by the capital-punishment issue.²² The Gacy defense had to rely primarily upon an insanity plea. There is, of course, obviously something dreadfully wrong, even “crazy,” with any man who does the sort of things that Mr. Gacy did in killing dozens of young men and hiding their corpses in his house. The law has always “known” that the worst criminals, if not almost all serious criminals, are woefully irrational. Even so, it was obvious that Mr. Gacy knew he was killing human beings and that he knew there were social prohibitions of and major sanctions for such killings. It was also obvious that he was very careful when and how he killed and what he did with the bodies of his victims. Conduct of this kind by a defendant is all that a sensible community needs to establish in order to consider someone guilty for the purposes of the criminal law. However complicating the death-sentence issue may be in such cases, there was, once the Gacy atrocities had been exposed to public view, never any serious doubt about Mr. Gacy’s culpability, with overwhelming evidence available about what he had done and how.

The attitudes encouraged, however, in all too many highly publicized criminal trials can undermine respect for the administration of justice in the community. The role of celebrity-counsel in the more

Introduction to ‘Ancient’ African Thought, in GREAT IDEAS TODAY (forthcoming 1995).

22. See, e.g., *Gacy v. Page*, 24 F.3d 887 (7th Cir. 1994); *People v. Gacy*, 530 N.E.2d 1340 (Ill. 1988); *People v. Gacy*, 468 N.E.2d 1171 (Ill. 1984). The Gacy execution took place on May 10, 1994, pursuant to a death sentence pronounced in March 1980. See Susan Kuczka & Matt O’Connor, *Gacy’s Late Pleas for Stay Denied; Prison Official Says He Accepts His Fate*, CHI. TRIB., May 10, 1994, § 1, at 1; see also Joan Beck, *Death For Gacy: A Case of Better Late Than Never*, CHI. TRIB., May 5, 1994 (Perspective) at 31; William Grady, *Gacy Case Appeals Grind On*, CHI. TRIB., Mar. 5, 1993, § 2, at 1. On capital punishment, see *supra* note 4.

notorious cases dramatizes and perhaps contributes to such subversion of a general faith in law and order.²³

A healthier community approach was evident during a conversation I happened to have last week with an Alabama woman I met in an airlines office here in Rome. She is a trial consultant, an expert on selecting juries, who had interesting things to tell me about defense preparations for the recent Menendez brothers' murder trial in California.²⁴ She could even speculate knowingly about factors to be considered in selecting a jury for the Simpson case, if it comes to trial. But she could also say, when I asked her how she would conduct herself as a juror for a Simpson trial, that "he should be put away if he did what he is charged with doing." This is, I suspect, what "middle America" is inclined to say about such matters. Whatever happens in the Simpson case itself, we are not likely to be plagued there by the effects of recourse to the death sentence by the community. Indeed, most of us would probably be relieved if this personable suspect should turn out to be truly innocent. Capital punishment, in any event, is rarely visited upon people we "know."²⁵

23. This subversion has been contributed to by such ill-conceived exercises of power as the involvement of the United States in the Vietnam War. See, e.g., ANASTAPLO, *supra* note 4, at 225-44. On the demoralizing aspects of the Rosenberg Espionage Case, see ANASTAPLO, *supra* note 8, at 632 nn.74-75; ANASTAPLO, *supra* note 4, at 204-07, 241. This Lecture (of June 1994) argues for enhanced respect for common sense in our criminal-law processes. Common sense shines through one revealing exchange between defense counsel and the detective in charge of investigating the Simpson-Goldman killings. The detective conceded that he had not followed all leads connecting acquaintances of the victims with expensive drug habits. The account continues:

Mr. [Johnnie L.] Cochran then asked why, if the investigation is ongoing, Mr. [Tom] Lange had still not pursued the matter [of a drug connection to the killings]. "You don't turn a blind eye on evidence just because it might point toward Mr. Simpson's innocence, do you?" [Cochran] asked. "The fact that a victim's friend uses drugs is of very little consequence to me," the detective replied. "The fact that every bit of evidence that I have in this case points towards the defendant has a lot more to do with it."

David Margolick, *Simpson Defense Links Killings to Drugs*, N.Y. TIMES, Mar. 9, 1995, at A7. According to Peter Arenella, a University of California law professor commenting on the O.J. Simpson case: "There are often unresolved questions, things that don't completely add up, but they don't necessarily create a reasonable doubt of guilt." David Margolick, *Evasive Solutions to a Simpson Mystery*, N.Y. TIMES, Mar. 22, 1995, at A8.

24. On the Menendez brothers and the "abuse excuse," see Stephanie B. Goldberg, *Fault Lines*, A.B.A. J., June 1994, at 40-44.

25. Bob Costas, the veteran sportscaster, has described Mr. Simpson as one of "the most genuinely good-natured people I've ever met." Price, *supra* note 9, at 2A. Cf. Joe Queenan, *I Am Not a Brutal Murderer. Honest.*, WALL ST. J., Mar. 20, 1995, at A12 (a book review of *I Want to Tell You*, written by O.J. Simpson and Lawrence Schiller). The prosecution announced in September 1994, well before the beginning of the Simpson trial in January 1995, that it would not seek the death penalty in this case. See Linda

The attitudes that have developed among us (in part because of how lawyers carry on) affect potential defendants, misleading them and actually making them more vulnerable. That is, it is not good for many of the people who might commit serious criminal acts to have these attitudes, which make so much of avoiding the natural consequences of one's deeds, become respectable in the community. Nor is it good for the partisans of such criminals to be encouraged to believe that social condemnation of criminality is due primarily to prejudice. That belief can be demoralizing and even explosive.²⁶

Thus, would it not be better for someone in O.J. Simpson's situation (*if* that situation is indeed what it appears to be) simply to acknowledge what he did and thereafter to accept the appropriate punishment *and treatment*? It should now be obvious that Mr. Simpson himself, whether or not guilty on this occasion, was not served well by the legal system (and perhaps by his counsel) when he was questioned about severe attacks upon his wife over the years.²⁷ Did he, with the aid of skillful counsel, really "get away with it" on *those*

Deutsch, *No Death Penalty For O.J.*, CHI. SUN-TIMES, Sept. 10, 1994, at 3; Vincent J. Schodolski, *Simpson Isn't Likely to Land on Death Row*, CHI. TRIB., July 17, 1994, § 4, at 1. What does all this say about the death sentences sought for ordinary people who also do terrible things? See *supra* note 4. See also *Genesis* 4:11-15.

26. See *infra* note 33. "An NBC-News-Wall Street Journal poll released Thursday [March 9, 1995] found that half of whites think Simpson is guilty, compared with 7 percent of blacks; 54 percent of blacks but only 16 percent of whites consider him innocent." *Outside Court*, CHI. SUN-TIMES, Mar. 19, 1995, at 3. "A Harris poll last month found 61 percent of whites thought Mr. Simpson was guilty, while 68 percent of blacks said he was not guilty. While results for whites were virtually unchanged from a similar poll in November, only 8 percent of blacks said he was guilty, down from 15 percent in the earlier poll." Kenneth B. Noble, *The Simpson Defense: Source of Black Pride*, N.Y. TIMES, Mar. 6, 1995, at A8. I am reminded of how Greek-Americans stuck by Spiro T. Agnew long after it was generally apparent that he was corrupt. See George Anastaplo, *The Education of Spiro T. Agnew—and of Us All*, CHI. TRIB., Oct. 12, 1973, § 1, at 18. See also Earl O. Hutchinson, *Black Jurors Will Vote on Evidence, Not O.J.'s Race*, CHI. TRIB., Mar. 6, 1995, § 1, at 11. The complicated aftermath of the March 3, 1991 Rodney King beating (in Los Angeles) is instructive about race relations in the United States. Similarly instructive are what public opinion polls reveal about the deep-seated reservations that African-Americans have about the criminal justice system in the United States. Consider, also, the current Joseph Jett controversy at the Kidder, Peabody brokerage firm. See, e.g., Michael Siconolfi, *Report Faults Kidder for Laxness in Jett Case*, WALL ST. J., Aug. 5, 1994, at C1. See also Saul Hansell, *For Rogue Traders, Yet Another Victim*, N.Y. TIMES, Feb. 28, 1995, at C1; Richard W. Stevenson, *The Collapse of Barings: The Overview; Young Trader's \$29 Billion Bet Brings Down a Venerable Firm*, N.Y. TIMES, Feb. 28, 1995, at A2.

27. If Mr. Simpson did not kill his ex-wife and her companion, is he not a remarkably unlucky man in having had his personal marital history and the available murder-scene evidence conspire to incriminate him to the extent that they seem to do? If he is indeed physically responsible for these killings he may be unlucky in not having had immediate recourse, upon apprehension, to an insanity defense. See *infra* note 33.

occasions? Perhaps he was encouraged to believe that *he* was the victim, that there was a conspiracy against him, etc. It is natural for the perpetrator of awful deeds to try to blame them upon, if not even physically to assign them to, someone else. Intense guilt can often lead one to desperate efforts to wish away, to deny, indeed to blot out of one's memory, what has been done. But in whose interest is it that one should be allowed to live a lie in this way for the remainder of one's years? Certainly, a healing and enduring peace of soul is not to be secured thus.

VII.

What, then, should be expected in a Simpson-type case?²⁸ A Simpson-type case *should* be substantially settled within weeks (aside, again, from the complications introduced by the death-penalty issue).

Different "cultures" may approach the obviously guilty differently. We tend to treat all cases, especially when elaborate legal defenses and media campaigns can be financed on behalf of the defendant, as if they are the most uncertain. This sort of thing can undermine, as we have seen, the instruction that a healthy community can provide as to what the best responses should be (including recourse, as Plato's *Gorgias*

28. The following comment, made by me at a 1979 University of Chicago Conference on Psychiatry and the Law, troubled a number of the psychiatrists who first encountered it:

Certain kinds of people, badly disturbed though they may be, should be quickly and decisively dealt with by the law when it becomes known that they have done certain things. Something is wrong with the law (or with psychiatry, if an insanity defense is involved) when such people are not dealt with quickly and decisively. I am thinking of people such as, to use recent notorious instances, Berkowitz, Gacy, Manson, Oswald, Ruby, Sirhan, and Speck. All of us can be expected to be somewhat familiar with these people. My impression, based upon press reports alone, is that each of these men was competent enough for the purposes of the law: the purposes both of having guilt assigned to them and of being able to stand trial. (The latter consideration, it can be argued, is secondary. See 40 *University of Chicago Law Review* 66 [1973].)

ANASTAPLO, *supra* note 4, at 408. On another notorious case, see DOLORES KENNEDY, WILLIAM HEIRNES: HIS DAY IN COURT (1991); Dennis Byrne, *Heirens' "Conspiracy" Is Laughable*, CHI. SUN-TIMES, Mar. 5, 1995, at 33; Ed McManus, *Life and Death: Heirens Hoping for Parole After 48 Years*, CHI. SUN-TIMES, Mar. 4, 1995, at 16. For an even more recent case of a notorious character, see GERA-LIND KOLARIK & WAYNE KLATT, FREED TO KILL: THE TRUE STORY OF LARRY EYLER (1990). My constitutional comment on this case, especially on the Exclusionary Rule, may be found in ANASTAPLO, *supra* note 4, at 418-21. See also *supra* note 19. Still another case of this character is that of the Milwaukee serial killer, Jeffrey Dahmer. See, e.g., Rogers Worthington, *Inmate Charged In Dahmer Killing Says God Ordered It*, CHI. TRIB., Dec. 16, 1994, § 1, at 3. Jeffrey Dahmer was probably the least competent of all the men I have named in this Lecture.

teaches us, to a proper contrition and the imposition of penalties that fit the crime as well as the criminal). Instead, as we have also seen, the most violent killers can be encouraged to regard themselves as victims, so much so that there are never any acknowledged victimizers with which to deal.

Generally speaking, a community's dignity and self-respect would be best served if the obvious and the obviously just were acted upon promptly. Would not everyone be usefully shaped and properly restrained by such an approach? Instead, as we have seen as well, the most celebrated lawyers in our country are licensed to practice systematic distortion of the truth and avoidance of the just dispositions of cases. Should we not be almost as vigilant about defense counsels' misconduct here as about prosecutors' misconduct?

Much of what we are witnessing these days in the Simpson case may be the ritual dances that can serve as preliminaries to serious plea bargaining.²⁹ But what is said and done in the process can lower public esteem for lawyers, however useful proper plea bargaining may be. There is some hope to be found in the fact that Mr. Simpson's primary lawyer has been referred to by the Los Angeles police as a clearly honorable man.³⁰

Whenever lawyers conduct themselves in questionable ways it is not likely to be good for the community, or for the lawyers' clients (whether individuals or the state), or for the lawyers themselves. Such conduct tends to promote cynicism, self-centeredness, and eventually the feeling among lawyers (as well as among others) that the legal profession, if not life itself, is meaningless. Particularly worrisome here is that the legal profession, which should be and should appear to be made up of reliable ministers of justice, is steadily demeaned, even as there is radical disaffection in the subverted community.

We have discussed this month in Rome how natural-right doctrines bear upon our assessments of regimes and laws and upon the development of a moral order in international relations. On the personal level, moreover, natural right can help us make the best possible use of the

29. "Nearly ninety percent of all federal criminal cases involve guilty pleas and many of these cases involve some form of plea agreement." UNITED STATES SENTENCING COMMISSION, GUIDELINES MANUAL (Nov. 1, 1994), Part A, para. 4(c), at 6. I have found helpful the suggestions supplied by James P. Dolan of the Administrative Staff of the United States District Court of Chicago. See *infra* note 33.

30. See USA TODAY/INT'L EDITION, June 21, 1994, at 38. (The reference was to Robert L. Shapiro.) Cf. Edward Felsenthal, *Controversy Surrounds Lawyer F. Lee Bailey; So, What Else is New?*, WALL ST. J., Mar. 20, 1995, at A1; Vincent J. Schodolski, *Ethics Watchers Raise Brows at Simpson Lawyers' Actions*, CHI. TRIB., Mar. 19, 1995, § 1, at 19.

potentially crippling adversities (whether physical, racial, moral, social, or financial) we happen to confront. Neither rage nor paralysis is called for in such situations.

Might not the sad Simpson matter help us begin to think about what we should expect from lawyers and the legal system? In such ways even the most unfortunate episodes can do some good. The perpetrator of the ugliest deeds, if he is properly dealt with, can be made better than he might otherwise be—certainly better than he would be if he should be encouraged and helped to try to “get away with it.” Particularly harmful is the teaching, all too common among us these days, that it is fitting and proper to evade having to face up to what one has done.³¹

I return to what the Simpson matter and our professional responses to it suggest about the divergent opinions that can be expected around the world about the constitutional and legal institutions that we display. How should a highly disciplined people elsewhere regard a community such as ours which permits, and even encourages, as much evasiveness and manipulation in dealing with obvious guilt as we have become accustomed to in the United States?³² The merits of the due process and presumption-of-innocence principles that we make so much of are likely to be overlooked, if not even disparaged, by outsiders in such circumstances. On the other hand, what must we as a liberal democracy take into account when assessing what more traditional societies do, lest we so misconceive the very nature of things that we condemn the salutary firmness of others as harshness, if not even as tyranny? The deepest tyranny in these matters consists in being determinedly ignorant of the truth.³³

31. This has been dramatized most recently by the trial in New York of a man who conducted his own defense on the charges that he had killed 6 people and injured 19 others in a December 7, 1993 rampage on the Long Island Rail Road. See, e.g., John T. McQuiston, *Jury Finds [Colin] Ferguson Guilty of Slayings on the L.I.R.R.*, N.Y. TIMES, Feb. 18, 1995, § 1, at 1; John T. McQuiston, *L.I.R.R. Killer Plans Appeal Based on the Insanity Issue*, N.Y. TIMES, Feb. 19, 1995, § 1, at 1; Frank Rich, *Send In the Clowns: Two Trials [the Simpson and Ferguson Trials], Two Circuses*, N.Y. TIMES, Jan. 22, 1995, § 4, at 15; Janny Scott, *A Murder Trial, Through the Looking Glass*, N.Y. TIMES, Feb. 4, 1995, § 1, at 1. But see Michael T. Kaufman, *And Now, Justice Without Fanfare*, N.Y. TIMES, Feb. 18, 1995, § 1, at 25. See also *infra* note 32.

32. On the Colin Ferguson case, see, e.g., John Carlin, *An Indefensible Case of Murder*, INDEPENDENT ON SUNDAY, Feb. 5, 1995, at 17. See also John T. McQuiston, *L.I.R.R. Gunman Sentenced to Spend the Rest of His Life in Prison*, N.Y. TIMES, Mar. 23, 1995, at B8.

33. The murder trial of O.J. Simpson began in late January 1995. It is expected to last six months. See Jeffrey Abramson, *When Lawyers Play the Race Card*, N.Y. TIMES, Sept. 2, 1994, at A27; Cheryl Lavin, *Pleading His Case: Alan Dershowitz Talks About the Gray Area Where Lawyers Live*, CHI. TRIB., Feb. 1, 1995, § 5, at 1; Anthony Lewis,

Mocking Justice, N.Y. TIMES, Dec. 12, 1994, at A12; David Margolick, *The [National] Enquirer: Required Reading in Simpson Case*, N.Y. TIMES, Oct. 24, 1994, at A6; Seth Mydans, *Meter's Ticking for Costly Simpson Defense*, N.Y. TIMES, July 31, 1994, § 1, at 14. See, as instructive about the prospects of civilization, WILLIAM H. MCNEILL, REASON AND VIOLENCE (Center for International Studies, Princeton University, Monograph Series No. 2, 1994). See also *supra* note 20.

The eventual outcome of this trial has been guessed at by lawyers:

As the trial of O. J. Simpson moves into its fourth week, 70 percent of the nation's lawyers have come to believe the celebrity defendant will [because of racial differences among the jurors] not be convicted of killing his ex-wife, Nicole Brown Simpson, and her friend, Ronald Goldman—an increase of nearly 10 percent from five months ago.

Andrew Blum, *Poll: More Lawyers See O.J. Walking*, NAT'L L.J., Feb. 27, 1995, at A1. On the role of the racial factor in the Simpson case, see Nina Burleigh, *Preliminary Judgments*, ABA J., Oct. 1994, at 55-61. See also *supra* note 26. My own guess is that if the trial does happen to end in a hung jury (an outright acquittal seems highly unlikely), the prosecution will probably consider itself obliged to try the defendant again, especially if the State's evidence has been revealed to be as strong as it now appears it will be. By then the defense, with its material (and perhaps spiritual) resources depleted, may be disposed (if Mr. Simpson is physically responsible for the killings) to enter into a plea bargain on an insanity-related manslaughter charge. See *supra* note 27. If the Simpson criminal process should be inconclusive, civil suits filed by the victims' relatives may prove instructive. See, e.g., *Simpson is Sued by the Mother of Slain Man*, N.Y. TIMES, July 28, 1994, at A8.

Highly-publicized trials are bound to promote concerns as to what contributes to an enduring respect in the United States for trial by jury. The brief remarks about trial by jury that I prepared for the Clarence Darrow Memorial Meeting, Jackson Park and the Museum of Science and Industry, Chicago, Illinois, March 13, 1994, had as their epigraph this observation by Mark Twain: "Trial by jury is the palladium of our liberties. I do not know what a palladium is, having never seen a palladium, but it is a good thing, no doubt, at any rate."

My March 1994 remarks, entitled "Trial by Jury as an American Palladium," follow:

A distinguished Chicago lawyer, Leon Despres, has suggested that Clarence Darrow regarded the traditional right of trial by jury as the palladium of American liberties. *Palladium* refers to the statue or icon of Pallas Athena upon which the fate of an ancient city might depend. Troy, for example, was considered safe from capture so long as its palladium remained secure within the walls of that city. For that reason, Odysseus volunteered to remove the statue by stealth. (The Israelites could regard the Ark of the Covenant in somewhat the same way that some pagans did a palladium. Devout moderns are more apt, in such circumstances, to look to patron saints and the like for protection.) Anyone who designates trial by jury as our palladium is probably very much in the Anglo-American legal tradition. He draws, indirectly if not directly, upon the usage of Judge Blackstone in his famous *Commentaries on the Laws of England*, where it is said that "the liberties of England cannot but subsist, so long as this palladium [trial by jury] remains sacred and inviolate." (IV, 343)

The emphasis upon trial by jury by twentieth century lawyers, and perhaps by William Blackstone, seems to be primarily with a view to a humane application of the criminal law. Executive tyranny is also held in check thereby. A contemporary of Blackstone's, however, could see another traditional right as paramount: "The liberty of the press is the palladium of all the civil, political, and religious rights of an Englishman." (*Letters of Junius*,

Ded. 6) This competing approach, an obviously political approach, is more concerned with shaping and guiding the community than it is with the conduct of trials. A political approach can include efforts to form the character and to develop the competence of citizen-jurors in this country. After all, is there likely to be an enduring respect for trial by jury if the typical juror cannot be relied upon to recognize, to want, and (perhaps most important here) to be able to do the right thing?

The old-fashioned, now easily ridiculed, notion of a city-preserving palladium reminds us of what could once be taken for granted about the dependence of a people's rights and liberties upon a due reverence (and not only in official oaths) for the sacred, whatever forms the sacred might happen to take from time to time. This suggests the intimate relation in everyday life, ever since antiquity, between the "political" and the "religious." This also suggests that our so-called Separation of Church and State is always in need of reconsideration. We may well wonder whether the iconoclastic tradition, which Mark Twain, Clarence Darrow, and their freethinking successors could find so exhilarating, leaves a sufficient place in its scheme of things for the salutary influence of the sacred and hence of the truly pious in the community. If it does not, what if anything can or should be done about that now—and by whom?

Professor George Anastaplo, Address at the Clarence Darrow Memorial Meeting, Jackson Park and the Museum of Science and Industry, Chicago, Illinois (Mar. 13, 1994). Professor Albert W. Alshuler, of the University of Chicago Law School, was the principal speaker on this March, 1994 occasion, devoted to discussion of trial by jury. See, on trial by jury, ANASTAPLO, *supra* note 8, at 217-19, 312-23, 695-97; Anastaplo, *supra* note 14, 84-88; GEORGE ANASTAPLO, *THE CONSTITUTION OF 1787: A COMMENTARY* 143-44 (1989).

It is prudent to keep in view what the primary purposes of our institutions are. A current *Advertising Age* billboard shows, against the background of the White House, this roster of couples: "Ron and Nancy. George and Barbara. Hillary and Bill." Then we are informed, "IT'S ALL ABOUT MARKETING." But is not serious politics properly about the Common Good, not about Marketing, just as genuine law is properly about Justice?

