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For the Defense

Robert L. Shapiro

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During a high-profile or controversial criminal case, emotions can often run as high outside the courtroom as they do inside, as television pundits, victims' family members, friends of the judge and attorneys, and average citizens all join the heated discussion concerning the intricacies and frustrations of the ongoing legal proceeding. A frequent focus of debate is the role of the defense attorney, and the questions come in a variety of ways. When questions are posed to me, my answers usually depend on who is asking—and why.

If a query comes from a friend or a family member, it often carries with it a mix of curiosity and genuine concern, and the operative word is *how*. How do I do my work? How do I meet the challenges? How, quite literally, do I mount a defense case? I can easily explain, to my sons or my friends, for example, how a lawyer might put a defense together for a client. Part textbook, part personal experience, my response can lay out the hypothetical circumstances and the details—the rule of law and legal procedures, the roles of the court, the police, the prosecution, and, if it comes to a trial, the jury—that will lead, ideally, to the appropriate resolution of a case.

But when the question comes from a citizen on the street, it inevitably comes as a challenge, carrying with it the implication that defending someone accused of wrongdoing is not a task for the righteous. In that instance, my answer comes not from a textbook or my own case experience, but from my passionate belief that what I do is not only righteous but ordained by and within my country's history.

We live in a nation founded on the principles of freedom and liberty. We fought and paid dearly for these principles, and be-

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cause a democracy is a fluid thing, subject to the will and might of its people, we continue to pay the price today. The American Constitution—and in particular, the ten amendments that make up the Bill of Rights—is where that price is clearly set out, in plain and simple English. The Founders, painfully aware of the injustices suffered by individuals at the hands of the Tudor-Stuart monarchies, left little to chance.

Of those first ten amendments, half are specific to the rights of citizens who find themselves in an adversarial relationship with the state and its judicial system. The Fourth Amendment is the safeguard against unreasonable search and seizure; the Fifth Amendment sets out the protections of due process, including the right against self-incrimination; the Sixth Amendment ensures a public trial and the assistance of counsel; the Seventh Amendment guarantees the right to a jury trial; the Eighth Amendment prohibits cruel and unusual punishment. It is the provisions in this document and nothing else—not good intentions, not patriotism, not capitalism, not orthodoxy—that stand like a sentry between us and our becoming a police state.

The Bill of Rights and an attorney's rules of professional conduct require—they do not suggest—that anyone accused of a crime is entitled to a lawyer. Defense attorneys are not allowed to adjust their efforts to fit the circumstances, no matter the crime, no matter how morally questionable the person accused of it may be, no matter the public or private assumptions of that person's guilt or innocence. Surgeons do not do less than their best when confronted with a person they detest on the operating table; neither do lawyers. They cannot: their respective professional codes of ethics expressly forbid it.[1]

Prosecution attorneys and defense attorneys are officers of the court, both bound by the same rules of evidence and the same rules of professional conduct. But our advocacy roles are different. The prosecutor's responsibility, according to the American Bar Association's *Model Code of Professional Responsibility*, is "to seek justice, not merely to convict."[2] The defense attorney's responsibility is to represent an accused individual's interests when the formidable resources of the state are arrayed against that person—"to represent his client zealously within the bounds of the

1. MODEL CODE OF PROFESSIONAL RESPONSIBILITY EC 5-21 (1980).
2. *Id.* EC 7-13.

law."[3] The resulting adversarial presentation, says the *Model Code*, "counters the natural human tendency to judge too swiftly in terms of the familiar that which is not yet fully known."[4]

In *Berger v. United States*,[5] the Supreme Court stated that the prosecutor "is the representative not of an ordinary party to a controversy, but of a sovereignty . . . whose interest . . . in a criminal prosecution is not that it shall win a case, but that justice shall be done."[6] But justice means different things to different people, and when most people talk about justice, they are talking about *moral* justice. Did someone commit a crime against the People? If so, that person should be tried, convicted, and appropriately punished. If not, he or she should be acquitted.

As a human being, I am not omniscient, and I have no better way of judging guilt or innocence than anyone else. As a defense attorney, however, I must view justice as our—that is, our country's—system of *legal* justice, which is based not on the assumption of guilt, but on the presumption of innocence. Guilt must be proven by the prosecution. It must be proven beyond a reasonable doubt and to a near certainty within the rules of constitutional law.

Reasonable doubt is the standard of common sense at the heart of our system of justice. Judges have grappled with the complexities of the jury instruction on reasonable doubt since the beginning of that system. If there is doubt, there is no right to convict. In fact, there is an explicit imperative to acquit, no matter the burdensome weight of the evidence that coexists with the doubt. Judge William Blackstone anticipated society's struggle with this when he said, more than two hundred years ago, "it is better that ten guilty per[s]ons e[s]cape, than that one innocent [s]uffer."[7]

When society is confronted with the virulence of modern crime, however, Judge Blackstone's caution can seem like a musty anachronism. Not so long ago, a United States attorney general even suggested that if a person was arrested under suspicion of committing a crime, in all likelihood he was guilty.[8] In the face of

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3. *Id.* EC 7-1.
4. *Id.* EC 7-19.
5. 295 U.S. 78 (1935).
6. *Id.* at 88.
7. 4 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 352 (Oxford, Clarendon 1769).
8. *Reagan Seeks Judges with "Traditional Approach,"* U.S. NEWS & WORLD REP., Oct. 14, 1985, at 67 (interview with former Attorney General Edwin Meese).

society's frustration and anger, it is almost inevitable that defense attorneys, rather than criminals, begin to carry the onus of crime. No longer seen as protectors of anyone's rights, or of constitutional rights, lawyers are "hired guns," and the public does not care for us much. That is, until the moment in many people's lives when they or someone near and dear to them is arrested. At that point the first question asked is, "What are my rights?" The second question is, "Where is my lawyer?"

Unless and until that moment happens, crime is not committed by "us"; those accused of crimes are not "us." Therefore, "they" are not entitled to the same constitutional protections to which "we" are entitled. Or as one defense attorney once put it, "Everybody in town hates my guts—until two o'clock in the morning, when their kid gets arrested."

To be sure, defense attorneys have brought some of this criticism on themselves, by their courtship of and relationship with the press. There is a natural symbiosis between big trials and the media, with both caught up in the playing-field drama of game plans, strategy, key players, winning, and losing. For the broadcast and print correspondents reporting during the long months of O.J. Simpson's criminal trial, career reputations were made and enhanced, and the aura of celebrity-hood surrounded them all. How could it have been otherwise for the lawyers? The tremendous egos that motivate attorneys to win inside the courtroom are not immune to the adulation that comes from the outside, as we spin our successes and in the process become talk-show staples, Sunday-morning-TV-pundits, and trial commentators.

There is a popular misconception among the general public that celebrity defendants not only get a better or a higher quality defense than an average citizen but also somehow receive better handling from the prosecutor. Nothing could be further from the truth. In a paper published in a law journal two years before the *Simpson* case, I wrote that in my experience, the district attorney and the chief of police call a press conference immediately after a celebrity arrest, announce that they have solved the crime, that the celebrity is without question the culprit, and that swift justice will be the order of the day.[9]

In most jurisdictions the district attorney's position is an

9. Robert A. [sic] Shapiro, *When the Press Calls: A Lawyer's View*, 5 CAL. LITIG., Fall 1991, at 3.

elected one. A district attorney cannot afford to appear slow to act, or "soft on crime," or too gentle with a celebrity defendant. In fact, it is more often the case that district attorneys will lean hard the other way, muddying the jury pool in the process. Most sophisticated city and county prosecutorial offices now have professional public relations personnel to manage press coverage and disseminate information about an ongoing case. Most defense attorneys, however, do not. It is usually the case that the press cannot speak with an accused defendant, either because of the will of the court or on advice of counsel. Thus, as attorneys we find ourselves not only preparing a defense—as well as aiding the defendant in putting financial, personal, and complex psychological affairs in order—but also mounting counterattacks in what begins as a criminal case and quickly becomes a *Rashomon*-like contest of newspaper profiles and television sound bites.

In addition to media management, defense attorneys in high-profile cases must also contend with the sheer firepower honing in on our clients. There has been no shortage of commentary about the size and cost of the *Simpson* criminal defense team, but we might have been forgiven for believing that we were outgunned from the beginning. There are 8,000 to 9,000 members of the Los Angeles Police Department (L.A.P.D.),[10] there are nine hundred-plus deputy district attorneys.[11] It is, in fact, the largest local prosecutorial agency in the nation.[12] In an ordinary murder case, two deputy district attorneys are assigned to the case; ultimately the case involved forty-five prosecutors, not to mention the resources of the L.A.P.D., the assistance of the Chicago Police Department, the FBI, and Interpol. Millions of dollars were thrown at the case: Taxpayers would be within their rights to wonder if that money was appropriately spent.

The attendant "Dream Team" glitz, however, should not blind society to the fact that defense attorneys, in addition to zealously representing their clients, also offer an ongoing, vital, and *real* civics lesson in the rights of individuals. This is especially true in high-profile cases. We cannot ignore the powerful role of popular culture in shaping—or misshaping—public perceptions and expectations. Movies and television cop shows, both fictional and non-

10. *More Cops, More Equipment,* L.A. TIMES, July 10, 1996, at B8.

11. Paul Pringle, *Menendez Trial Gives Garcetti a Boost but He's Still No Shoo-in in Tomorrow's Primary,* SAN DIEGO UNION-TRIB., March 25, 1996, at A3.

12. *Id.*

fictional, routinely portray illegal search and seizure, the physical abuse of suspects, and manipulation of evidence, all in the interests of getting the bad guy.

But real trials, and the people and complexities in them, are not so neatly resolved. A "trial junkie" learns to his or her surprise that a deposition is not testimony; a tell-all book is not evidence. The "legal loophole" that frees a defendant can often be prosecutorial or police error. Television's "plea bargain," with all its negative connotations, is in fact the prosecutor's successful case resolution. If every case went to trial, the court system would quickly choke on its own calendar, and we would see cases systematically dismissed. This would satisfy neither defense nor prosecution, and would be a gross infringement on the rights of the citizenry.

Americans seem increasingly willing to forego the Bill of Rights, convinced that it protects the sinners rather than the sinned-against. "Well, the Founding Fathers couldn't have foreseen gang wars," goes the rationale. Nor could they have foreseen crack, insider trading, contraband automatic weapons, drugs, sexual abuse of children, serial killers, or domestic terrorist bombings. To that, I would counter that neither could the Founders have envisioned the possibility that guilt or innocence might rest on a small laboratory slide containing an even smaller amount of deoxyribonucleic acid—DNA. Reasonable doubt takes on new meaning in cases informed by science and determined by the fallible men and women who interpret, manipulate, and define data. The cast of characters in a trial is composed of human beings, and there are very few of them—lawyers, judge, witnesses, and jury included—who are capable of coming into a courtroom totally absent an opinion, a prejudice, or an agenda.

As the country's perception of crime goes up—and its intellectual understanding of the constitutional protections and the justice system correspondingly goes down—everybody believes that the solution to "the problem" is tougher sentencing, more jails, and bigger prisons. But from the Holocaust to McCarthyism, to the brutal civil wars in Africa and the former Soviet Union, there is no shortage of object lessons illustrating what happens when the rules that govern a people's conscience are, for whatever "expedient" reason, set aside.

If we cannot set aside the Constitution, seems the response, why, then, let us amend it. While it may be desirable that the

document is perceived as fluid as the democracy it protects, an amendment is not a cure-all to be applied each time the country has a cultural upheaval or social crisis it cannot contend with—or each time a politician wants to appear to be as muscular as James Madison. There have been thousands of amendments proposed in the Constitution's history;[13] indeed more than 100 proposed amendments have surfaced during the current-104th-Congress.[14] Recent proposals at both the state and federal levels—weakening the admissibility standards on hearsay evidence and creating a statute of limitations on death row appeals, for instance—are just the tip of the iceberg.

There is no question that crime hurts and affects every citizen of this country. I would argue, however, that bending the Bill of Rights out of all recognizable shape is at best only a cosmetic solution to the difficulties that face us. Proposing legislation in response to an unpopular case or verdict may ease a grieving heart or get someone elected, but it makes for bad law.

These days, anybody can accuse anybody of anything. Indeed, in civil law, anybody can *sue* for anything. If our country has lost patience with constitutional lectures or reminders of the role of the defense attorney, than a simple Q&A might be in order: What if a neighbor does not like you, or a business competitor wants to weaken you, and so files a false report of wrongdoing? What if your ex-wife calls the IRS and tells them you are cheating on your income taxes? Or what if your ex-husband calls the vice squad and tells them you are running a prostitution ring in the same home where your young children are living? Do you want the police coming into your home and office, going through your records, through your closets, without a warrant? What if eye-witness testimony sent someone to death row five years ago and recent DNA evidence points conclusively to innocence? Should a man sit in a cell for the rest of his life because the three-year window for appeals has slammed shut?

I have had days in court that I would rather not repeat, as well as clients and adversaries I have despaired of. I have seen, and participated in, regretful displays of impatience with the flawed human beings—myself among them—who either struggle mightily

13. LEONARD W. LEVY ET AL., ENCYCLOPEDIA OF THE AMERICAN CONSTITUTION 47 (1986).

14. Victor Kamber, *Don't Mess with Our Constitution*, L.A. TIMES, June 26, 1995, at B9.

within the justice system or stand safely outside it and criticize. But overall, for more than twenty-five years, I have taken a constant pride in what I do and in the knowledge that I have a constitutionally mandated job. An accusation of wrongdoing is more often than not sufficient to destroy a life. An indictment and a trial holds that life up to the scrutiny and judgment of society. Put simply, a defense attorney's job is to see to it that the man or woman who stands under that scrutiny does not stand alone.