

1997

The O.J. Simpson Case Revisited

George Anastaplo

Prof. of Law, Loyola University of Chicago, School of Law

Follow this and additional works at: <http://lawcommons.luc.edu/lucj>

 Part of the [Civil Rights and Discrimination Commons](#), and the [Criminal Law Commons](#)

Recommended Citation

George Anastaplo, *The O.J. Simpson Case Revisited*, 28 Loy. U. Chi. L. J. 461 (1997).

Available at: <http://lawcommons.luc.edu/lucj/vol28/iss3/3>

This Article is brought to you for free and open access by LAW eCommons. It has been accepted for inclusion in Loyola University Chicago Law Journal by an authorized administrator of LAW eCommons. For more information, please contact law-library@luc.edu.

The O.J. Simpson Case Revisited

*George Anastaplo**

TABLE OF CONTENTS

Prologue	461
The Simpson Criminal Trial and its Aftermath.....	463
Appendix A. The Fate of the Jews During the Second World War.....	481
Appendix B. Affirmative Action and the Constitution.....	489
Appendix C. The Future of Race Relations in the United States.....	498
Epilogue.....	503

PROLOGUE

Nationwide interest in the O.J. Simpson case, although somewhat abated since 1995, continues. This is, in large part, because of the longstanding racial divisions exposed so dramatically in the varying responses to the October 1995 verdict in the criminal trial and the February 1997 verdict in the civil trial. Thus, it has been recently observed:

For two and a half persistent years, the O.J. Case has been a grotesque but nonetheless piercing alarm telling us that there is a racial gap so wide in this country that most white and black Americans view the exact same events, not to mention our civic institutions, in exactly opposite ways. . . .

[Polls show] that the gap revealed at the criminal trial's conclusion hadn't narrowed at all in the months since: while 74 percent of white Americans agree with the verdict in the civil case, only 23 percent of black Americans do.¹

* Loyola University Chicago School of Law; Professor Emeritus of Political Science and of Philosophy, Dominican University; and Lecturer in the Liberal Arts, The University of Chicago; A.B., 1948, J.D., 1951, Ph.D., 1964, The University of Chicago. (No e-mail reception.)

1. Frank Rich, *State of Denial*, N.Y. TIMES, Feb. 8, 1997, at 17. See also Chinta Strausberg, *Did Verdict Widen the Racial Gap?*, CHI. DEFENDER, Feb. 6, 1997, at 8; Chinta Strausberg, [Rev. A1] *Sampson, D.C. Lawyer [Mary Cox] Say O.J. Jury*

These racial divisions are discussed in a talk I gave in November 1995, which is set forth below. That talk followed Mr. Simpson's acquittal at the end of his criminal trial. The aftermath of that acquittal (including the February 1997 verdict in the civil trial) is touched upon in the notes to that talk. The racial divisions evident in the responses to the Simpson matter reflect the lack of confidence engendered among minorities who consider themselves the perennial victims of unrelenting prejudice.

Appendix A, following the November 1995 talk in this Article, records what can happen when prejudice becomes armed with the powers of government, especially if the most sadistic men in a country are allowed to take it over.² Appendix B considers the need for special efforts to raise up and empower chronically-depressed minorities, especially in the face of supposed constitutional limitations with respect to the use by government of affirmative-action measures.³ Appendix C concludes these explorations by speculating about the prospects of race relations in the United States at this time.⁴

'Tainted', CHI. DEFENDER, Feb. 6, 1997, at 8; Carl Rowan, *Both Simpson Juries Came to Correct Verdicts*, CHI. SUN-TIMES, Feb. 7, 1997, at 35; Chinta Strausberg, *Friend of O.J.'s Says Cochran to Blame for Poor Civil Trial Defense Team*, CHI. DEFENDER, Feb. 8, 1997, at 6. The "racial gap" here can remind one of the "political gap" in responses to the conviction of Alger Hiss almost a half century ago. On the Hiss case, see George Anastaplo, *The Occasions of Freedom of Speech*, 5 POL. SCI. REVIEWER 383, 387 (1975). I have benefitted in the preparation of this and other articles from the services of Sherman Lewis and Barbara West of the Loyola University Chicago School of Law Library. Thanks also to Eileen Berner, Cary R. Latimer, Angela Toscas Wilt and Stephen Wallenfelsz of the Loyola University Chicago Law Journal.

2. See George Anastaplo, *On Trial: Explorations*, 22 LOY. U. CHI. L.J. 765, 977 (1991) [hereinafter Anastaplo, *On Trial*]; GEORGE ANASTAPLO, *THE AMERICAN MORALIST: ON LAW, ETHICS, AND GOVERNMENT* 144, 161 (1992) [hereinafter ANASTAPLO, *THE AMERICAN MORALIST*].

3. See George Anastaplo, *Slavery and the Constitution: Explorations*, 20 TEX. TECH L. REV. 679, 766 (1989) [hereinafter Anastaplo, *Slavery and the Constitution*]; GEORGE ANASTAPLO, *THE AMENDMENTS TO THE CONSTITUTION: A COMMENTARY* 181-84, 236, 455 (1995). See also *infra* note 67.

4. See GEORGE ANASTAPLO, *HUMAN BEING AND CITIZEN: ESSAYS ON VIRTUE, FREEDOM AND THE COMMON GOOD* 175 (1975) [hereinafter ANASTAPLO, *HUMAN BEING AND CITIZEN*]; George Anastaplo, "Racism," *Political Correctness, and Constitutional Law: A Law School Case Study*, 42 S.D. L. REV. 108, 164 (1997); George Anastaplo, *Allan Bloom and Race Relations in the United States*, in *ESSAYS ON "THE CLOSING OF THE AMERICAN MIND"* 225, 267 (Robert L. Stone, ed., 1989). See also *infra* note 67 and accompanying text.

THE SIMPSON CRIMINAL TRIAL AND ITS AFTERMATH⁵

Knowledge of ignorance is not ignorance.
It is knowledge of the elusive character of
the truth, of the whole.

—Leo Strauss⁶

I.

My first extended commentary on the O.J. Simpson case was on June 30, 1994, in the last session of a month-long course I was teaching in Rome—that is, among a people who tend to be gentler and less color-conscious than Americans are apt to be. The Simpson case killings had occurred a fortnight before, on June 12, 1994. My next extended commentary on the case was, in effect, in the footnotes prepared (in March 1995) upon the publication of my June 1994 talk in the Spring of 1995.⁷ This talk today, my third commentary on the case, has been prepared for the last session of our semester-long Jurisprudence course on problems of evidence and proof.⁸

Our point of departure here can be taken from the talk I gave in Rome on June 30, 1994:

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." One need not know the people who may have

5. This talk was given in a Jurisprudence course at Loyola University Chicago School of Law, Chicago, Illinois, on November 21, 1995. It should be noticed that unanimity was required for a verdict in the Simpson criminal trial, but not in the civil trial. Both the 1995 criminal trial verdict and the 1997 civil trial verdict were unanimous.

6. LEO STRAUSS, *WHAT IS POLITICAL PHILOSOPHY?* 38 (1959).

7. See George Anastaplo, *On Crime, Criminal Lawyers, and O.J. Simpson: Plato's Gorgias Revisited*, 26 LOY. U. CHI. L.J. 455 (1995) [hereinafter Anastaplo, *On Crime*]. My fourth commentary on the Simpson case (as of March 1997) may be found in the prologue, epilogue, notes and appendices for this Article.

8. The principal texts for the Fall 1995 Jurisprudence course were Aristotle's *Physics* and Francis Bacon's *Novum Organum*. In later semesters, the principal texts have been the Bible and Shakespeare. See George Anastaplo, *On Freedom: Explorations*, 17 OKLA. CITY U. L. REV. 465, 724-26 (1992) [hereinafter Anastaplo, *On Freedom: Explorations*].

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.⁹

Immediately to be added to this account is the fact that a long-suffering jury, on October 3, 1995, acquitted Mr. Simpson on all criminal counts, after nine months of trial and five hours of deliberation.

The Simpson case cannot be discussed sensibly without at least a provisional opinion as to what the truth is about who killed the two victims. An inquiry into any matter has to work from premises. The sounder those premises, the better the inquiry is likely to be. Soundness here includes an awareness of one's provisional opinion and the limitations of that opinion. The perspective from which we approach such matters is not that of the professional investigator, but rather that of the citizen who assesses the information which happens to have been made available by investigators and others.¹⁰

My provisional opinion as to the truth in this matter is reflected in my expectations about the outcome of the criminal trial. First, there was my expectation in March 1995, at the time that I prepared my June 1994 talk for publication. I wrote in the final footnote for that article:

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.¹¹

Thereafter, the State's evidence was shown to be quite strong indeed. But, at the same time, various other factors, such as one police officer's obvious racism and the appearance of incompetence among some technicians used by police, permitted a plausible questioning of what the evidence meant. Even so, when we learned last month that the jury in the criminal case had decided as quickly as it did (after having asked to hear again only the limousine driver's testimony), I believed that conviction was likely. It seemed to me, that is, that the

9. Anastaplo, *On Crime*, *supra* note 7, at 458. The "bizarre efforts" referred to include the Bronco chase, which the prosecution did little, if anything, with in the criminal trial but which the plaintiffs' attorneys used in the civil trial. *See infra* notes 15, 25.

10. This double-killings case is considered closed by the Los Angeles Police Department. *See Anastaplo, On Crime*, *supra* note 7, at 465 n.23. *See also infra* note 39 and accompanying text.

11. Anastaplo, *On Crime*, *supra* note 7, at 470 n.33.

kind and amount of evidence provided by the State in the criminal case would have impressed at least a few on the jury, requiring some time for them to be argued into an acquittal by those disposed to acquit for whatever reason.

Still, it should be noted that most lawyers evidently did not expect a conviction. Thus, in late February 1995, this report was published:

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.¹²

On the second day of the State's closing argument (September 27, 1995) I polled my Constitutional Law II students by secret ballot. Of the 35 students who responded, only three of them indicated the belief that Mr. Simpson had not done the killings; 32 said he did them. Of these 32, eight students predicted he would be convicted; nine that there would be a hung jury; and 15 that he would be acquitted. Thus, of the 32 who believed Mr. Simpson had done the killings, only one-fourth believed he would be convicted. (This was even before defense counsel played whatever "race card" was used in closing argument.) After the students had voted, they asked me for my opinion. I replied that I believed both that Mr. Simpson had done the killings and that he would be convicted. Perhaps the most significant fact about all this is something that I have not seen referred to elsewhere: few if any of our fellow citizens (whether "pro-Simpson" or "anti-Simpson") believed that an innocent man would be convicted on this occasion. That could be interpreted as a sign of some progress in race relations in this country. Another such sign is the general impression that if Mr. Simpson is not responsible for these killings, they were not done by *any* African-American. The savagery unleashed here strongly suggests a "personal" relation between the killer or killers and at least one of the victims.

No one seems to dispute the opinion that in an ordinary murder trial, the kind and amount of evidence that was produced by the State in the Simpson trial would have secured a conviction, regardless of the race either of the defendant or of the jury. Circumstantial evidence can be very strong; sometimes it can be superior to more direct evidence (such as eyewitness testimony). We rely upon circumstantial evidence all the

12. *Id.* at 470 n.33.

time. Indeed, we would be virtually paralyzed in our everyday activities if we did not.

We have become so accustomed to, if not corrupted by, disparagements of government that we fail to appreciate what an elaborate, and hence highly vulnerable, chain of acts would have been required to establish and maintain the anti-Simpson conspiracy suggested by defense counsel in the Simpson case. Such an effort would have had to start quite early after discovery of the killings, without knowledge of what Mr. Simpson would be able to provide in the way of an alibi or other evidence in his defense. And it would have had to have been done with considerable skill, and at considerable risk to their careers, by people otherwise condemned by defense counsel as generally incompetent.¹³ If such a conspiracy was ever engaged in, any "repentant" participant could now make himself wealthy by exposing the plot. After all, fortunes have already been promised in contracts for other "inside stories" about the case.

We should be clear, in any event, what a criminal-trial jury verdict does and does not mean. An acquittal does mean—and virtually everyone agrees that it should continue to mean—that a defendant can never be prosecuted again by the same government for the same crime. Thus, Mr. Simpson is now "free" of any liability (in a California state court) for murder, whatever evidence may turn up hereafter. (Could he be tried for soliciting murder or a related crime if it should ever be learned that he got someone else to do a killing, or that he helped the killer do it, or that he helped him to escape detection?)

An acquittal in a case does *not* mean that a defendant did not do the crime. Nor does it mean that the community at large should regard an acquitted defendant as not having done the crime of which he has been acquitted. There are standards with respect to truth and falsity which a jury verdict may help us apply, but with respect to which such a verdict cannot be conclusive. Truth, in short, is not something that "automatically" results from an operation or a method.¹⁴

13. See Gale Holland & Jonathan T. Lovitt, *Jurors Detail the Thinking that went into their Ruling*, USA TODAY, Feb. 11, 1997, at 1A: "Most jurors said the defense put on a strong case [in the civil trial] of possible police contamination of evidence and conspiracy. But in the end, [defense] theories were too speculative, jurors said, too much of a reach." Professor Albert Alschuler, of the University of Chicago Law School, has observed, "The American justice system often gets it right the second time around." Ken Armstrong & Flynn McRoberts, *Civil Case Meant 2nd Trial Was in Different League*, CHI. TRIB., Feb. 5, 1997, § 1, at 20. See also *infra* note 40 and Editorial, *The Second Simpson Verdict*, CHI. TRIB., Feb. 6, 1997, § 1, at 26. Compare Yale Kamisar, *Call It Double Jeopardy*, N.Y. TIMES, Feb. 14, 1997, at A23.

14. Much the same can be said, for example, about what Oliver North's successful criminal-conviction appeal does and does not mean. Consider also how physicists

However much the purpose of a trial may be furthered by seeking the truth about the matter under consideration, a trial is not primarily a search for truth but rather a search for justice. That is, it is an effort, in accordance with established and known rules, to find the best way of dealing with a disputed matter of a legal character. It can be ominous when it is believed, as may be seen in my classroom poll, that the guilty—when skillfully represented—will not be convicted of a grave criminal offense. But whatever problems we may have with the verdict in the Simpson murder trial, perhaps all this can still be put to good use, especially if we try to understand the various participants and what they were thinking.

II.

What were the jurors in the criminal case thinking? Were they angry, frustrated, bamboozled—or simply doing what has traditionally been expected of them? Some have argued that this jury “sent a message,” exercising the power (if not the right) of “nullification” long available to determined juries. Precisely what the “message” was in this case may not be clear. The experts who predicted an acquittal placed special emphasis upon the “racial dynamics” in the situation and upon the deep sense of grievance among African-Americans about how they are routinely treated by the police and the criminal-justice system. There is certainly something to this explanation.

Other experts, commenting on the verdict, have been critical of the way the State conducted its investigation and presented its case.¹⁵ Even so, as I have noticed, it seems to be generally recognized that a defendant confronted with the “mountain of evidence” available in this case, and with no alibi evidence, will usually be convicted.¹⁶

operate—as, for example, when they look to a mechanical operation to determine what they call a “vacuum.” But must there not be a standard (of what a vacuum would truly be) that helps them see what operation or method does a better job in developing a vacuum? Also, I note in passing, it may not be possible to have a true vacuum if there are gravitons which are responsible for gravity: the pull of gravity is everywhere, however minute it may be in some places. On the mystery of Being and Nothingness, see GEORGE ANASTAPLO, *THE THINKER AS ARTIST: FROM HOMER TO PLATO & ARISTOTLE* 301 (1997) [hereinafter ANASTAPLO, *THE THINKER AS ARTIST*].

15. The same experts (such as Philip Corboy and Scott Turow) have spoken with more respect about how the civil trial against Mr. Simpson was conducted. See Bob Kurson, *Bottom Line for O.J.: He's Going to Suffer*, CHI. SUN-TIMES, Feb. 6, 1997, at 6. See also *supra* note 9; *infra* note 25.

16. Among the advantages that the plaintiffs' lawyers had in the civil trial, with its lower standard of proof to meet, was the damaging testimony of Mr. Simpson himself. See, e.g., Armstrong & McRoberts, *supra* note 13, § 1, at 20 (quoting Professor Jamie Carey of the Loyola University Chicago School of Law); Jonathan T. Lovitt & Richard Price, *Plaintiffs' Best Witness Was O.J.*, USA TODAY, Feb. 5, 1997, at 1A.

Typically, in fact, such a situation will find conscientious defense counsel negotiating a plea bargain with a view to avoiding a death sentence. That is, prosecutors who are far less prepared than the State was in the Simpson case routinely prevail in such cases—and there is not much doubt in the community at large about the guilt of almost all those who are imprisoned for crimes of violence in this country.

The verdict in the Simpson case raises questions about what “reasonable doubt” can mean in the typical case where circumstantial evidence is critical. Related to this are questions about what has been happening to the popular judgment, inundated as the public is by fanciful stories in the mass media about conspiracy theories, pseudo-sciences, abductions by aliens in UFOs, and the like. The general sense of the *probable* seems to need strengthening, even as sloppy thinking needs to be questioned.¹⁷

The Simpson jury might have been more tough-minded if it had been “qualified” for the death penalty.¹⁸ Certainly, a better educated jury is needed in cases where racial prejudice may be a problem and where scientific evidence has to be relied upon.¹⁹ There is much to be said for the English mode of selecting juries, which can produce competent juries within hours. Much is also to be said against extended sequestration of a jury, which is likely to affect adversely the mental balance of those subjected to such abuse.²⁰

It is likely that some of the defects of the Simpson trial and of this jury can be attributed to the way that the trial judge ran his courtroom.

Christopher Darden, a member of the unsuccessful criminal trial prosecution team, said the difference in the civil case was that Simpson had to testify. ‘O.J. lied in front of this jury, he lied to the black community, and he lied to the American public. This jury focused on the evidence, not on race or politics,’ he said.

Patrick Brogan, *Civil Defeat Has Simpson Facing Ruin*, GLASGOW HERALD, Feb. 6, 1997, at 13. What safeguards would be needed if defendants in non-political criminal cases were required to testify? Defense attorneys are sure, in any event, that juries do take into account the lack of testimony from defendants. See *infra* note 25.

17. See George Anastaplo, *Lessons for the Student of Law: The Oklahoma Lectures*, 20 OKLA. CITY U. L. REV. 17, 187 (1995). See also *infra* notes 23, 59.

18. On capital punishment, see ANASTAPLO, *THE AMERICAN MORALIST*, *supra* note 2, at 422. See also Editorial, *A Lawyerly Cry of Conscience*, N.Y. TIMES, Feb. 22, 1997, at 16; Editorial, *Reality Check on the Death Penalty*, CHI. TRIB., Mar. 3, 1997, § 1, at 14.

19. On the American jury, see Anastaplo, *On Crime*, *supra* note 7, at 470 n.33.

20. Our extended jury sequestrations are resorted to partly because of the considerable leeway usually allowed both to the mass media in covering a trial and to counsel in publicly commenting upon it daily. See, e.g., James Brooke, *Newspaper Says McVeigh Told [His Lawyers] of Role in Bombing*, N.Y. TIMES, Mar. 1, 1997, at 1. No extended sequestration was required in Mr. Simpson’s civil trial. A jury is somewhat like the fox in an organized hunt, defining the course that the chase is to follow.

(This is aside from concerns that observers have had about the corrupting effects upon participants, as well as upon the general public, of televising the trial of a celebrity.²¹) This entire matter should have been disposed of, at the trial level, before the end of 1994, rather than stretching out as it did to October of 1995. The tighter the trial run by a fair-minded judge, the more likely it is that the verdict will be rendered promptly and will be generally accepted as sensible. The way the judge in the Simpson criminal case permitted himself to be overwhelmed by high-powered lawyers was anything but reassuring.

Much can be said for continued reliance upon trial by jury in this country, however more disciplined everyone involved in a trial such as this should be. A properly supervised jury trial tends to assure people that only the guilty are likely to be convicted and that the State is likely to be held in check when it relies upon inadequate evidence or upon political prejudices. It is hard, therefore, to overestimate the social value of reliance upon trial by jury in contested cases.²² It is easy, but not sensible, to attribute to the criminal-law system in general the social and other failings exposed by this bizarre case.

Whatever reservations one may have about the caliber of the jury in the Simpson case, it is prudent to keep in view the extent to which ordinary citizens are being led astray by irresponsible people of influence who should know better. Consider, for example, the conspiracy theory, self-righteously insisted upon by well-financed partisans (month after month), which seems to question whether an unfortunate Presidential aide, Vincent Foster, really committed suicide. One can be reminded, by our own irresponsibility, of what has been happening in Israel in recent years:

At a gathering in Jerusalem of national religious parties [after the assassination of Prime Minister Yitzhak Rabin], one repentant leader, Rabbi Yehuda Amital from the Meimad Party, remarked that the assassin may have been following overzealous religious-Zionist teaching. Amital called for rabbis to stop mixing politics and religion: "We are guilty of educating an entire generation to primitive thinking through clichés."²³

21. Mr. Simpson's civil trial was not televised. On the abolition of broadcast television, see ANASTAPLO, *THE AMERICAN MORALIST*, *supra* note 2, at 245.

22. For an account of the woman with "second sight" in my parents' village in Greece, see *id.* at 388.

23. Storer H. Rowley, *As Crackdown Looms, Settlers Tone Down*, CHI. TRIB., Nov. 10, 1995, § 1, at 26. See also Arthur Schlesinger, Jr., *The Worst Corruption*, WALL ST. J., Nov. 22, 1995, at A10. See, as well, Anastaplo, *On Freedom: Explorations*, *supra* note 8, at 622-25; ANASTAPLO, *HUMAN BEING AND CITIZEN*, *supra* note 4, at 155-59. On Vincent Foster and related matters, see Robert L. Bartley, *Whitewater Reconstructed*, WALL ST. J., Mar. 22, 1996, at A12; Editorial, 'Pattern of Obstruction,' WALL ST. J.,

III.

We turn now from the jury and the judge to the lawyers in the Simpson case. What were those lawyers thinking? One could well wonder how much such sentiments as the following apply to their calculations about the ways they should conduct themselves:

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, . . . 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?²⁴

One suspects that the prospects of multi-million dollar book deals made much more sense to the lawyers in this case than the kind of "moralizing" evident in the sentiments just quoted.

A serious rebuke for the prosecuting lawyers is implicit in their inability to secure a conviction, or at least a hung jury, despite the considerable evidence they had available to them. The use they made of a racism-vulnerable detective was, to say the least, imprudent, especially after they elected to try the case where they did. The detail which the prosecutors insisted upon in making their case probably contributed to the deadening of the sensibilities, including the moral sensibilities, of the jury.²⁵

June 19, 1996, at A20; Editorial, *Mr. Foster & Mr. Livingstone*, WALL ST. J., July 12, 1996, at A12; Trude B. Feldman, *The President at 50*, WALL ST. J., Aug. 1, 1996, at A14; Editorial, *Privileged First Lady*, WALL ST. J., Aug. 23, 1996, at A10; Eugene H. Methvin, *Justice Without Fear or Favor*, WALL ST. J., Sept. 30, 1996, at A18; Editorial, *The White House Conspiracy*, WALL ST. J., Jan. 13, 1997, at A18; Clarence Page, *Paranoia Rules*, CHI. TRIB., Feb. 16, 1997, § 1, at 21; Anthony Lewis, *Ken Starr's Problem*, N.Y. TIMES, Feb. 21, 1997, at A19; Anthony Lewis, *Closure on Vince Foster*, N.Y. TIMES, Feb. 24, 1997, at A15. See also *supra* note 17.

24. Anastaplo, *On Crime*, *supra* note 7, at 468. See also ANASTAPLO, *THE AMERICAN MORALIST*, *supra* note 2, at 185. On how defendants should conduct themselves, see ANASTAPLO, *HUMAN BEING AND CITIZEN*, *supra* note 4, at 8, 203; the epigraph for *infra* Appendix A. Consider, as well, how attorneys for tobacco companies should conduct themselves.

25. For a preliminary account of the way the plaintiffs' case in the civil trial was presented, see Elaine Lafferty, *The Inside Story of How O.J. Lost*, TIME, Feb. 17, 1997, at 29. See also Christopher Darden, *Justice Is In the Color of the Beholder*, TIME, Feb. 17, 1997, at 38. Mr. Darden, a prosecutor in the Simpson criminal trial, concludes his article thus, "Given the wealth of evidence against Simpson, the fact he remains free while others are convicted on one-tenth the evidence is fundamentally unfair. I don't expect that he'll ever pay for his crimes." *Id.* at 39. Compare R. Bruce Dodd, *An Amazing State of Affairs*, CHI. TRIB., Feb. 7, 1997, § 1, at 27; *supra* notes 9, 15.

The defense lawyers may be, by far, the most interesting of all the “players” in this drama. They may also be the furthest from what they should have been, coming closest to the “rogue” status assigned by them to a few members of the Los Angeles Police Department. In a sense, the conduct of defense counsel has to be more self-regulated than that of any other officer in the criminal-justice system. Defense counsel, if “successful” at the trial level, are less subject to correction on appeal than are judges, juries, or prosecutors: if they should secure an acquittal from the jury the criminal case is almost certainly over. One consequence of this is that defense counsel may “safely” resort to sophistry and other abuses in the service of their client. This observation invites a question that is remarkably difficult for both law students and experienced lawyers to understand, let alone take seriously: If Mr. Simpson did the savage things that were done to the victims in this case, did his counsel act in his interest by securing his acquittal? It is easy, in the excitement of a case, to be caught up by the apparent goodness of “winning.” We repeatedly heard references to the “Dream Team” of lawyers engaged for the Simpson defense, as if this trial had been a basketball game. (The original “Dream Team,” contrived for the Olympic Games, was also misconceived. NBA professionals have no business competing in those Games—or, rather, basketball is too much of a business for them to be there. It is hardly their sporting thus to insist upon exhibiting what everyone knows about their preeminence.)

What did Mr. Simpson’s lawyers really believe about his guilt? Do they tend to believe that one is guilty only if a judge or jury so rules? This would be a peculiar way to define “justice,” however practical it may be for a decent community to rely considerably upon what the criminal-justice system happens to produce on any particular occasion. If lawyers do come to be seen as having no standards aside from what happens to be arrived at in court, then respect for the system itself will suffer:

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.²⁶

I have the impression that only a small minority of informed people in this country consider Mr. Simpson innocent. Do the Simpson lawyers now truly believe that he is innocent? Do they know something that most of us do not know? Or are they deluded because of their calling, perhaps becoming thereby the most serious victims of the legal system as it has developed? And yet these lawyers appear the most successful and the most sophisticated of lawyers. If the Simpson lawyers believe him to have done the killings, what good do they see for the community, as well as for him, in his "vindication"? All this is a sad state of affairs for practitioners who were probably first drawn to the law because of their high-minded dedication to the cause of justice and the common good.

IV.

I have considered what the jurors, and to some extent the judge, in the Simpson case were thinking. I have also considered what the lawyers in the case were thinking. What about Mr. Simpson himself? If he did do the two killings, it could not have been altogether on impulse. That is, there are indications that the killer made preparations, if only with respect to the knife, clothing, and schedule relied upon. If Mr. Simpson did the killings, what did he believe would happen? Did he wonder whether he, a "likely" suspect, would have an adequate alibi? How could Mr. Simpson, if he set out to kill, be sure that no one would see him in the neighborhood? The thoughtlessness evident here may be seen as well in the spousal-abuse episodes connected to him, episodes that would immediately make him a suspect when his ex-wife was slaughtered.²⁷

Those episodes testify to passions that may be hard to predict or to control altogether. Certainly there were intense passions exhibited in

26. Anastaplo, *On Crime*, *supra* note 7, at 468. See also George Anastaplo, *Individualism, Professional Ethics, and the Sense of Community: From Runnymede to a London Telephone Booth*, 28 LOY. U. CHI. L.J. 285 (1997); George Anastaplo, *Teaching, Nature, and the Moral Virtues*, in 1997 THE GREAT IDEAS TODAY (forthcoming 1997); George Anastaplo, *Natural Law or Natural Right?* 38 LOY. L. REV. 915 (1993). "It's that mixture of sophistry with conformity that frightens me about most lawyers. Perhaps it's because they're closer to the moral vacuum of our times than anyone else. The O.J. spectacle might not be law's embarrassment, but its true and empty core." Pat Kane, *Smooth Talkers Who Know the Score*, GLASGOW HERALD, Feb. 6, 1997, at 19. The well-meaning sophistry of Professor Alan M. Dershowitz, as a commentator on the Simpson cases, has been instructive.

27. On Mr. Simpson as a witness, see *supra* note 16.

the killings themselves, especially in the extension of the violence against what seems to have been an innocent bystander, the companion of the apparently targeted woman. Even so, it is becoming evident that Mr. Simpson is not of much consequence “personally,” however sincerely he could once be described by a veteran sportswriter as one of “the most genuinely good-natured people I’ve ever met.”²⁸

If Mr. Simpson did the killings, he is (in a layman’s terms) probably crazy.²⁹ Symptoms of craziness may be seen in his evident expectation that he would once again be able to hobnob with the rich and powerful upon his release, whereas the only people who now support him in sizable numbers are among the poor or alienated of his race, with whom he has had little to do since he became a celebrity. How did Mr. Simpson, if a savage killer, get to be the way he is? He can be accounted for by a peculiar combination of natural talent and early mistreatment, mistreatment of which we have had only glimpses thus far. (In more ways than one he seems to consider himself “abused.” There may be something to this.)

Has this man, if a killer, also come to consider himself truly innocent? However that may be, he probably is not so innocent even in his own estimation that he can admit to the deeds and still be able to justify them.³⁰ He is, in critical respects, a contrived figure, pointing up for us problems with the modern celebrity phenomenon. Unless there is a profound religious conversion, he can be expected to deteriorate in the years ahead, especially since there does not appear to be anything solid or enduring inside. He said, shortly after his acquittal, that he would devote himself to the pursuit of the killer of his ex-wife and her companion. He may have spoken more truly than he realized: one way or another he may be pursuing—that is, he may be trying to come to terms with—the killer within himself.

I return here to observations made in my June 1994 talk in Rome and published in my 1995 article on the Simpson case:

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

28. Anastaplo, *On Crime*, *supra* note 7, at 465 n.25 (quoting Bob Costas).

29. *See id.* at 464 (a comment upon the John Wayne Gacy case). On psychiatry and the law, *see* ANASTAPLO, *THE AMERICAN MORALIST*, *supra* note 2, at 407.

30. *Compare* Raskolnikov in FIODOR DOSTOYEVSKI, *CRIME AND PUNISHMENT*.

upon his wife over the years. Did he, with the aid of skillful counsel, really "get away with it" on *those* 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.³¹

What, then, would be truly good for a man in Mr. Simpson's dreadful circumstances? True repentance and facing up to what he has done and why, the old-fashioned moralist would have said. The recent NBC-interview fiasco is revealing: it is probably becoming apparent even to Mr. Simpson that there are limits now to the manipulation by him that can work in the conduct of his life. Brutal, even cruel, jokes about him suggest the hopelessness of the efforts that might now be made to rehabilitate him, jokes that began at once on the airwaves.³²

V.

The key issue never has been, it seems to me, whether Mr. Simpson serves time in prison. He is, if the killer, already a prisoner of his past and his passions. For most of us, it is as if he is already put away. For some, however, it remains vital that he be "officially" recognized as a killer.³³ The civil suits brought against him offer hope to some. They are looked to as a way of clarifying matters, as well as a way of keeping him from profiting financially from his notoriety. (There does not seem to be, unlike what happened to the police officers exposed on videotape in the 1991 Rodney King matter, the possibility of a federal criminal trial to begin to make up for what was not done in the state criminal trial.) But what more is there to learn from what is likely to be said by Mr. Simpson or by anyone else in court at this time? Perhaps the civil suits can at least help persuade impressionable people

31. Anastaplo, *On Crime*, *supra* note 7, at 466-67.

32. Particularly rough was the "humor" about Mr. Simpson on *Saturday Night Live* the first weekend after his acquittal. *Saturday Night Live* (NBC television broadcast, Oct. 7, 1995). For comments on the aborted television interview, see Bill Carter, *Simpson Cancels TV Interview, But Talks of Life Since Verdict*, N.Y. TIMES, Oct. 12, 1995, at A1; David Margolick, *Late Meetings Led to Cancellation*, N.Y. TIMES, Oct. 12, 1995, at B7; Frank Rich, *The Second Wind*, N.Y. TIMES, Oct. 14, 1995, at 19; Lawrie Mifflin, *NBC Confronts the 'What If's' of Simpson Coup That Wasn't*, N.Y. TIMES, Oct. 16, 1995, at D7.

33. See *Genesis* 4:15. Compare *supra* note 25, *infra* note 39.

that to escape conviction in a criminal trial does not mean that one has really “gotten away with it.” People also need to be persuaded that the rich and the powerful do not readily get away with murder in this country. The convictions of businessmen, members of Congress, and judges on lesser charges remind us that influence is not always enough to protect one in criminal proceedings. We can see as well that influential men and women can be trapped by the illusions spun around them. (Perjury prosecutions, of the type which some hope may follow upon Mr. Simpson’s testimony in a civil suit, seem to be rare.³⁴)

It will be interesting, in any event, to see what happens to Mr. Simpson’s support, such as it is, once a long-term opinion about him becomes settled. The degree of support for him in the African-American community is instructive. Part of that support is an instinctive “closing of ranks” by a people behind “one of their own.” This sort of response was seen, for example, on more than one occasion during the notorious political career of James Michael Curley in Boston, with the Irish-American community coming to his support again and again. Once, indeed, he was elected to office while serving time in jail.³⁵

Then there was the way that the Greek-American community closed ranks behind Spiro T. Agnew, even after it became evident that he had been accepting bribes (still “due” to him from his years as Governor of Maryland) while Vice President of the United States. It did not seem to bother most of the Greek-American community that Mr. Agnew (who preferred to be called “Ted” rather than “Spiro”) never showed much interest in the Greek community, except as a source of campaign contributions. Even worse was what the Greek-American community did, between 1967 and 1974, in supporting the Colonels’ coup in Greece, a coup which led eventually to the subjection, for more than twenty years, of a significant portion of Cyprus to Turkish rule. Without the pressure from the Greek-American community, the American State Department would probably have conducted itself more sensibly in dealing with the Colonels, including their irresponsible policy with respect to Turkey.³⁶

34. See, e.g., Editorial, *The Simpson Finale*, WALL ST. J., Feb. 6, 1997, at A14.

35. See JACK BEATTY, *THE RASCAL KING: THE LIFE AND TIMES OF JAMES MICHAEL CURLEY, 1874-1958* 77-91 (1992). One can be reminded here of the current career of Mayor Marion Barry in Washington, D.C.

36. On Spiro T. Agnew, see George Anastaplo, *Education of Agnew—and of Us All*, CHI. TRIB., Oct. 12, 1973, § 1, at 18. On Cyprus and the Greek Colonels, see George Anastaplo, *Bloodied Greece: No Way Out?* BALT. SUN, Apr. 19, 1974, reprinted in 120 CONG. REC. 14,371 (May 13, 1974); 120 CONG. REC. 15,597 (May 20, 1974).

Unlike the bulk of Greek-Americans, many others in this country could easily see the Greek Colonels for what they were: incompetent usurpers who were good for neither Greece nor the United States. It was not surprising that Americans at large were without the illusions that the more influential Greek-Americans had about the Colonels who flattered and appealed to them.³⁷ The same can be said about the large majority of whites who appreciated the considerable case that had been mounted against Mr. Simpson during his trial. Thus, African-American support for O.J. Simpson is, in part, rooted (how deeply remains to be seen) in the same kind of allegiance exhibited by Greek-Americans when they supported Spiro Agnew and the Colonels and by Irish-Americans when they supported James Curley. This sort of thing, it can be said, is natural.

VI.

But there is even more to the African-American show of ethnic allegiance in the Simpson case than there is to how Irish-Americans and Greek-Americans have conducted themselves from time to time. The responses of African-Americans to the Simpson case, I have noticed, testify to depths of alienation, if not even of despair, that the other minority groups in this country (except perhaps for Native Americans) have not fallen into. (Both African-Americans and Native Americans do seem to be in need of whatever help can be provided them by sensible affirmative-action programs.) There *is* something desperate about the African-American situation, as may be seen in what kind of a man can be turned (albeit temporarily) into a "hero." (It may be significant that Colin Powell does not stir up the same degree of passion among African-Americans that certain other leaders of their race do, even though it should be evident that the more strident leaders in any minority group, not being apt to arouse much general support among the majority, will be of limited influence in the community at large.)

It is sometimes recognized that whites do not see what African-Americans routinely experience and see. That experience includes the kind of thing exposed in the vicious treatment of Rodney King by his arresting policemen in Los Angeles. Even worse may be what a largely white jury did in acquitting those policemen. But a critical difference should be noted (in addition to the successful, however

37. See ANASTAPLO, HUMAN BEING AND CITIZEN, *supra* note 4, at 3; GEORGE ANASTAPLO, THE ARTIST AS THINKER: FROM SHAKESPEARE TO JOYCE 331 (1983); ANASTAPLO, THE AMERICAN MORALIST, *supra* note 2, at 501; *infra* note 48.

questionable, effort we have seen to get at those policemen in a subsequent federal criminal trial). It has been reported that groups of African-American students all over this country responded with "jubilation" upon learning of the Simpson acquittal.³⁸ Perhaps such students could not "help themselves," a weakness that their teachers should try to remedy. But it should at least be recognized that there evidently was not such jubilation expressed by mainstream students of any color when Rodney King's assailants were acquitted. Would we not have been deeply troubled upon learning that any group of, say, white Loyola law students had publicly responded in this fashion on that occasion?

One hopeful sign in all of this is that those African-Americans who defend the Simpson criminal-trial verdict do *not* usually put it simply in terms of "payback time." Rather, they talk about "police conspiracy" and "reasonable doubt" in justifying the jury's refusal to defer to the considerable case evidently made against Mr. Simpson. That is, they do not want to seem or, indeed, be unprincipled or arbitrary on this occasion. They should be taken at their word as we try to assess what happened and why.

Two sets of opinions, from the sidelines so to speak, should be noted here. There is one set of opinions about the Simpson case that I have heard from several African-Americans during the past year. They have now and then expressed the conviction that although Mr. Simpson did not commit the killings, he knows who did them.³⁹ This bears thinking about, perhaps as a partial recognition of Mr. Simpson's role in all of this. Another set of opinions that bears thinking about may be found in a letter of October 10, 1995, from a white police officer whom I know and respect, written to me from a Northern California city:

When the verdict was read I was struck by a nearly overwhelming sense of despair. As a police officer, I thought I was familiar with the vagaries of our justice system, but still felt optimistic about the ability of the jurors to do what was right.

It was difficult to go to work the day of the verdict. We had lost our credibility. I realized that our effectiveness was not a

38. One such group seems to have been at the Howard University School of Law, Washington, D.C. See INDEPENDENT (London), Oct. 6, 1995. See also David K. Shieler, *Living Under Suspicion: Why Blacks Believe Simpson and Not the Police*, N.Y. TIMES, Feb. 7, 1997, at A17.

39. This could mean that Mr. Simpson is protecting a dangerous killer who is free to move around. See *supra* note 10. On the other hand, if Mr. Simpson *is* the killer, he is not likely to kill anyone else again, whatever he may do to himself spiritually or otherwise. See *supra* notes 25, 33.

function of our uniforms or guns, but rather was derived from our position in a larger scheme of justice: if there is no justice the police are merely an occupying army.

Several experiences that I have had since the verdict have revealed its meaning, I think. Shortly after the verdict my partner and I stopped a car driven by a black man. A group of people came out of their houses to heckle us. A woman yelled, "You're just mad because we won!" . . .

At the station yesterday, I overheard a black officer angrily tell a white officer that even though O.J. had committed the murders, "white America got what they deserved."

Despite working every day in the black community, I vastly underestimated the racial divide. It seems clear to me now that the verdict was an expression of deep resentment. . . .

This letter records the dismay and then the self-examination displayed by many whites in this country upon confronting what was for them the stunning verdict in the Simpson criminal case.⁴⁰

40. My Northern California police officer friend, Harry S. Stern, supplied me on February 11, 1997 with the following comment on the 1997 verdict in the Simpson civil trial:

The end of the criminal trial [in October 1995] was preceded by a big buildup. That verdict was intentionally announced the morning after it had been reached in order to give the police and others time to prepare. The public knew what time it would be read and thus could tune in at the appropriate time. My narcotics unit was placed on alert. We were to wear regular blue uniforms, have our helmets with us, and we were divided into squads.

The conclusion of the civil trial was not as climactic. There was no anticipation of unrest. The verdict was read shortly after it had been reached. My wife and I watched the reading of the verdicts on television. A friend called from Chicago and told me that a local station had information that there had been a defense verdict. This was upsetting news. I had never doubted that Simpson had stabbed Ron Goldman and Nicole Brown to death. There was no other explanation for their brutal deaths. So I was relieved when the rumors proved false; the jury had determined that Simpson was the killer.

The black people that I spoke with about the civil trial seemed resigned rather than angry. My sense is that, despite the results of so many polls and surveys, the belief by blacks in Simpson's innocence was not deeply held. Rather, blacks chose to support Simpson from what they deemed an attack from white institutions.

Thus, my view as a police officer is that the civil verdict was not a vindication of the justice system. The civil trial was in essence a dispute between private parties. The Goldman and Brown family brought their own cases against the man that they believed had killed their relatives.

In the criminal trial the most often repeated description of the police (and hence by association, the District Attorney and the State of California) was that they were "racist" and "bungling." From my perspective these enduring assessments represented the criminal defense's complete success in replacing Mr. Simpson with the police as the defendants. The police were put on trial, not O.J. Simpson.

VII.

There are, I have suggested, truths about legal controversies that do not depend upon what a jury happens to say. We need, in assessing such matters, a sense of what is knowable and of how it is to be known. Some have argued that the Simpson trial dramatizes defects in our criminal-law system. No doubt, various aspects of jury selection, trial management, and attorney conduct can be improved. But what we have seen in Los Angeles since June 1994 is much more an indictment of our popular culture than of our legal system. Our criminal-law system works fairly well, usually, making it highly unlikely that those now found in prison did not do either what they were charged with or something very much like it. (This does not rule out the practice sometimes resorted to by police, and not impossible in the Simpson case, of enhancing or perhaps even creating evidence to reinforce the case the authorities are certain of already.⁴¹)

What does not work very well is how we treat both those who are more likely to become criminals and those who have been identified as criminals. Something is dreadfully wrong, for which we shall all have to suffer for decades to come, when there is (as now) large-scale chronic unemployment in our inner cities (a decade-long depression) and when there are so many African-American young men (one-third, it is said) who are enmeshed by the criminal-law system, numbers that have been rising steadily.

The effects of this strategy, not unique to the Simpson case, are far-reaching and quite disastrous, I believe. A criminal trial is not merely a clinical inquiry; it has the potential to offer a moral lesson for both the accused (who must come to terms with his actions if responsible) and the community at large.

Although I did not follow the civil trial closely, I gathered that the plaintiffs prevailed, in part, because of their ability to distance themselves from the institutions that Simpson's criminal defense team had done so much to discredit. As I stated, the plaintiffs were private parties seeking a private remedy. Furthermore, in the civil arena the apparatus that places such a premium on ferreting out alleged police misconduct, the exclusionary rule, is not present. Accordingly, the civil defense could not delve into the "conspiracy theory" to the extent that their criminal counterparts had.

It seems to me, then, that for black people much less was at stake in the civil trial; they did not feel the same animosity toward the Goldman and Brown families that they felt toward the police. And in turn, the civil verdict did little or nothing to restore the reputation of California law enforcement.

Both of Mr. Stern's letters are printed in this Article with his permission. On the exclusionary rule, see George Anastaplo, *Constitutional Comment, in GERA-LIND KOLARIK, FREED TO KILL: THE TRUE STORY OF LARRY EYLER* 367 (1990). See also Akhil Reed Amar, *A Second Chance at Justice*, N.Y. TIMES, Feb. 6, 1997, at A21.

41. See, e.g., Eric Zorn, *Maybe O.J. Did It and The Cops Tried to Frame Him, Too*, CHI. TRIB., Feb. 6, 1997, § 2, at 1.

A social system in which these appallingly wasteful things become routine is deeply flawed. The responsibility for this state of affairs rests with all of us. This is not to deny that the way all too many of these young men, and their own people, respond to their deprivations can make matters worse, including for themselves. (We have long seen this kind of desperation in Sicily, where violent crime sometimes seems a "natural" way of life.) Nor is it to deny that the young criminal must be firmly dealt with, for his own good as well as for the good of the community, when he steps out of line. But that is only the beginning of a challenge that is ignored by those who believe that our salvation lies in building more and more prisons (corrupting though they may be) and then throwing their keys away after they are filled up.

I argued, in my June 1994 talk on the Simpson case, "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."⁴² This teaching applies not only to desperate defendants and their single-minded lawyers. It applies even more to the community at large, which sometimes seems blithely unaware of what it is doing to cripple, enrage, and otherwise damage so many of its youth. I have long believed that one useful place to begin, in an effort to remedy things in this country, would be with a massive public-works project, along with the funding of first-rate schools and intensive job training, for our inner cities.⁴³ After all, we were willing to undertake and sustain for a decade such a humane and morale-repairing experiment on an even larger scale, sixty years ago, when the Great Depression—unlike the persistent depression in our inner cities today—was colorblind.

42. Anastaplo, *On Crime*, *supra* note 7, at 469.

43. See, e.g., George Anastaplo, *What Is Still Wrong With George Anastaplo? A Sequel to 366 U.S. 82 (1961)*, 35 DEPAUL L. REV. 551, 627 (1986); ANASTAPLO, *THE AMERICAN MORALIST*, *supra* note 2, at 454. The Simpson case can be expected to remain a substantial "public-works project" for lawyers and journalists, with considerable litigation and many revelations yet to come.

The criminal case prompted many to say that Simpson was acquitted because he is wealthy. . . . Simpson's money gave him the best lawyers and the best possible chance. This is nothing new, but we hope the Simpson trials will prompt public discussion of the quality of legal representation available to the poor.

Editorial, *Important Lessons from Simpson Circus*, CHI. SUN-TIMES, Feb. 5, 1997, at 37.

APPENDIX A

THE FATE OF THE JEWS DURING THE SECOND WORLD WAR⁴⁴

Do listen to what happened to me, so that you may see that I would not yield even to one man against the just [course of action] because of a fear of death, even if I were to perish by refusing to yield. . . . I, men of Athens, never held any office in the city except for being once on the Council. And it happened that our tribe, Antiochis, held the prytany when you wished to judge the ten generals (the ones who did not pick up the men from the naval battle) as a group—unlawfully, as it seemed to all of you in the time afterwards. I alone of the prytanes opposed your doing anything against the laws then, and I voted against it. And although the orators were ready to indict me and arrest me, and you were ordering and shouting, I supposed that I should run the risk with the law and the just rather than side with you because of fear of prison or death when you were counseling unjust things.

Now this was when the city was still under the democracy. But again, when the oligarchy came to be, the Thirty [Tyrants] summoned five of us into the Tholos, and they ordered us to arrest Leon the Salaminian and bring him from Salamis to die. They ordered many others to do many things of this sort, wishing that as many as possible would be implicated in the responsibility. Then, however, I showed again, not in speech but in deed, that I do not even care about death in any way at all—if it is not too crude to say so—but that my whole care is to commit no unjust or impious deed. That government, as strong as it was, did not shock me into doing anything unjust. When we came out of the Tholos, the other four went to Salamis and arrested Leon, but I departed and went home. And perhaps I would have died because of this, if that government had not been quickly overthrown.

—Socrates⁴⁵

44. This talk was prepared for a Chicago Conference on the Holocaust in Southern Europe, sponsored by the National Italian-American Foundation, October 7, 1994. Its original title was *The Fate of the Jews in Greece and Italy During the Second World War*. On the case for supporting Israel, see ANASTAPLO, HUMAN BEING AND CITIZEN, *supra* note 4, at 155-59. An earlier version of this 1994 talk (to which Theodora Vasils and Themis Vasils contributed) has been published in GEORGE ANASTAPLO, CAMPUS HATE-SPEECH CODES AND TWENTIETH CENTURY ATROCITIES 49 (1997).

45. PLATO, *The Apology of Socrates* 32A-E, in FOUR TEXTS ON SOCRATES (Thomas G. West & Grace Starry West trans., Cornell Univ. Press 1984).

I.

The fate of the Jews in Southern Europe during the Second World War differed from country to country—and, indeed, as in Greece, their fate could differ from one region to another in the same country. One constant factor everywhere in Occupied Europe was the insane determination of the Nazi savages to slaughter all the Jews that they could get their hands on.⁴⁶ How much murdering the Nazis could do depended, primarily, on the circumstances of the Jews in a particular place and on the degree of cooperation that the Nazis were able to get from the local population in their merciless campaigns against the Jews.⁴⁷

The Greeks, by and large, did not collaborate with the Germans during the Second World War—and for this they suffered grievously.⁴⁸ The German army was never welcome in Greece. Nor, of course, had the Italian army, which invaded Greece in October 1940, been welcome—but the Italians (whose hearts were not in that invasion) could be repelled by the Greeks, at least until the Germans came to the rescue of their humiliated ally. Greece could not do much (even with some help from the British) to withstand the massive German attack—but it, after having been obliged to surrender to the Germans in April 1941, could maintain significant Resistance efforts throughout the long and brutal German and Bulgarian Occupation that followed.

The most vulnerable Jews in Greece were always those in Salonika, “the Jerusalem of the Balkans” and the most eminent Sephardic settlement in Europe, where Jews had lived in large numbers since their expulsion from Spain in 1492. More than 55,000 Jews lived in the German zone of occupation, which included Salonika, with its closely-knit and highly conspicuous community of 53,000 Jews, or more than two-thirds of the Jews in Greece.⁴⁹ It proved to be a fairly simple matter for the Germans, in early 1943, to trap the Jews in Salonika for shipment to their death camps in Eastern Europe, particularly Auschwitz. The Germans did not need, for this deadly

46. See Anastaplo, *On Trial*, *supra* note 2, at 992. See also *infra* note 50.

47. On both the antecedents and the atrocities of the Nazis in Europe, see ARNO J. MAYER, *WHY DID THE HEAVENS NOT DARKEN? THE “FINAL SOLUTION” IN HISTORY* (1988).

48. See the article on modern Greece, to which I contributed, in *20 ENCYCLOPEDIA BRITANNICA* 178-204 (15th ed. 1993). See also *supra* notes 36, 37.

49. It has also been estimated that when Greece was overrun in 1941, between 5,000 and 6,000 Jews lived in the Bulgarian zone of occupation and about 13,000 lived in the Italian zone of occupation. See RAUL HILBERG, *THE DESTRUCTION OF THE EUROPEAN JEWS* 442 (1961).

operation, the cooperation of the Greeks, however much the worst elements among the Greeks (as elsewhere) were available for the most horrible deeds. What the Germans did need in Salonika, as was often the case elsewhere, was the ignorance among Jews as to what fate was intended for them, an ignorance made possible in large part by the very enormity of the evil that had been planned by the Nazis.⁵⁰

The safest places in Greece for Jews, or for other Greeks hunted by the Germans, were probably in those mountainous areas of the country that were controlled somewhat by the Greek Resistance. The next safest places for Jews and others were in the parts of Greece occupied by the Italian army. (This was true also in the parts of France and Croatia occupied by the Italians.⁵¹) The Greeks, however much they resented the unjustified Italian invasion of their country in 1940, recognized that the Italian zone of occupation was administered far more compassionately than either the Bulgarian zone or the German zone, so much so that the Germans came to have “serious doubts of the ‘sincerity of implementation’ [of German anti-Jewish measures] on the part of the Italians.”⁵² Yet even here there were anomalies. For example, the Bulgarian government which cooperated so readily with the Germans in hunting down Jews in Greece was reluctant to deliver the Jews in Bulgaria to the Nazis. Similarly, in Vichy France, the French collaborationist government was, at least for awhile, far more protective of French Jews than it was of foreign Jews living in France.

Outside of Salonika, the Jews of Greece were much more difficult to identify—and the Christian Greeks were not eager to be of help to the Germans there. Not that most Greeks were especially concerned about the fate of their Jews. What was done on behalf of those Jews seems to have been a part of what was done by Greeks generally to resist and frustrate the foreign tyrants who had imposed their will upon their country. I have been told that the level of anti-Semitism (that is, hatred of Jews) has always been low in Greece. (While I was growing up in St. Louis and in Southern Illinois in the 1930s, I heard

50. On the comprehensive madness and hence, “unbelievability” of that evil, see Anastaplo, *On Trial*, *supra* note 2, at 977-94. The occasional “Holocaust-denier,” even though he is likely to hate Jews, testifies to the enormity of the evil done to the Jews by his refusal to face up to the evidence of what his kind of hatred can lead to. See *infra* note 52.

51. See, e.g., LEON POLIAKOV & JACQUES SABILLE, *JEWS UNDER THE ITALIAN OCCUPATION* 160 (Howard Fertig Inc. 1983) (1955).

52. HILBERG, *supra* note 49, at 448. The German use here of *sincerity* is curious, reflecting as it does (in however perverted circumstances) the possible grounding of the moral virtues in nature. See Anastaplo, *Teaching, Nature, and the Moral Virtues*, *supra* note 26, Part III. See also *supra* note 50.

Turks occasionally disparaged by my Greek immigrant parents, but never the Jews.) Jewish officers were known to have distinguished themselves in the gallant defense of Greece in 1940-1941 and thereafter in the Resistance; this made it difficult for the Germans and their collaborators to portray the Jews in Greece in the way they were portrayed elsewhere—as bourgeois, exploitive, cosmopolitan, and hence unpatriotic. Thus, in Greece, the Jews outside of Salonika had far more to fear from desperate Jewish leaders who were driven to cooperate with the Germans (as happened all too often in other countries as well) than they had to fear either from the Greeks or from many of the Italian occupiers in Greece. Perhaps it was inevitable, considering how much the sense of community has always meant to Jews, that too many of their unreliable leaders would be trusted by Jews in the countries occupied by the Germans.⁵³

II.

It should not be surprising that the spirited Greeks would not cooperate with their German occupiers in any enterprise that the Germans set their hearts on. What *is* remarkable is the effective opposition by the fairly easygoing Italians to various German initiatives (not least against the Jews) in Greece, France, Croatia, and Italy. Again and again, Italian diplomats, military officers, and even some Fascist bureaucrats (as well as the common soldier and the population at large) refused to help the Germans do the terrible things that they tried to do. One consequence of this was that eighty percent of the fifty thousand Italian Jews survived the war. The survival rate of the Italian Jews would probably have been lower, however, if the German occupation of Italy had lasted as long as did the German occupation of Greece, where (largely because of the deadly Salonika trap) no more than twenty percent of the Greek Jews survived. It seems that perhaps half of the more than twenty thousand Jews in Greece outside of Salonika survived the war.

It certainly helped the cause of humanity in Italy that there were in that country no concentrations of distinctive-looking and foreign-sounding Jews such as there were in Salonika and Janina.⁵⁴ To outsiders such as the Germans, the Jews of Italy were not obviously

53. See, for example, Rachel Dalven, *The Holocaust in Janina*, in 2 J. OF MOD. GREEK STUD. 87 (1984). On the Nazi manipulation of Jewish "leadership," see ISAIAH TRUNK, *JUDENRAT: THE JEWISH COUNCILS IN EASTERN EUROPE UNDER NAZI OCCUPATION* (1972).

54. Also distinctive-looking, and hence vulnerable all over Europe, were the Gypsies, the forgotten victims of the Nazis. See Anastaplo, *Lessons for the Student of Law*, *supra* note 17, at 159-60.

distinguishable from other Italians. By the time the Germans occupied Italy (after the post-Mussolini government surrendered to the Allies in the Fall of 1943), most Italians were so opposed to the war that the Germans could not expect any reliable help from them. In fact, after September 1943 the Germans treated the Italians as another conquered people, even going so far as to gun down Italian troops who resisted them. About 640,000 Italian officers and men spent part of the war in German prison camps, where 30,000 of them died.⁵⁵ However blameworthy Italy may be for having helped make the Second World War possible, that country never threw itself anywhere into the racial programs of the Nazis. For one thing, a virulent anti-Semitism has never had deep roots in Italy, where there has been a substantial Jewish presence since Roman times (that is, even before Christianity came to Italy). However questionable official Vatican policies with respect to the Jews may have seemed to be at times during the war, many Italians (including priests, monks, and nuns) provided refuges and other help for Jews sought by the Nazis, often at the risk of their own lives. All this is not to deny, of course, that there were some Italians, just as there were some Greeks, who did things in collaboration with the Nazis that should not have been done by anyone anywhere.

What does seem to have deep roots among Italians is a sense of humanity—and the beneficiaries of this, during the Second World War, included (as I have said) the Jews, the Greeks, the French, and the Croatians. In fact, it can be added, the mainland Italians may be by and large the gentlest people in Europe today. This is reflected in how they treat their children. This is also reflected in the fact that most Italian Jews decided after the war “to remain in Italy rather than emigrate to Israel or the United States, as most German and Eastern European Jews did.”⁵⁶ Certainly, the Italians are the gentlest of the peoples that ring the Mediterranean. How they got to be this way can be debated. (Machiavelli, long ago, singled out the influence of the Roman Catholic Church in these matters.) Another question is whether such gentleness is always in the service of the common good: a determined toughness may sometimes be called for. (Here, too, Machiavelli can be instructive. This is related to Mussolini's effort to harden the Italian character by exposure to wars.) Too much, or the wrong kind, of gentleness can lead to intolerable conditions which open the way to a Strong Man who promises deliverance but who is

55. See SUSAN ZUCOTTI, *THE ITALIANS AND THE HOLOCAUST* 7 (1987).

56. ALEXANDER STILLE, *BENEVOLENCE AND BETRAYAL: FIVE ITALIAN JEWISH FAMILIES UNDER FASCISM* 13 (Summit Books 1991).

much more likely to deliver oppression. On the other hand, if the Greeks had more of the Italian gentleness, they probably would not have subjected themselves to the cruel civil war that followed the Second World War in Greece.⁵⁷

Thus, the Jews of Italy, like those of Denmark, owed their survival in such large numbers to special circumstances, not the least of which was the character of the peoples among whom they happened to be living when the Nazis made their evil demands. One suspects that Italian gentleness would not have sufficed in Denmark, where a highly disciplined evacuation program had to be organized. One also suspects that Danish honor would not have worked as well in Italy, where geographical and social circumstances made an almost instinctive "bending of the law" and passive resistance more effective.⁵⁸

III.

I have been asked to suggest on this occasion what we can do to protect ourselves in the future from such systematic atrocities as the Nazis inflicted upon the world a half century ago. I suspect that the term *protect* can lead us astray here. *Protection* tends to emphasize anticipating the sorts of things that the Nazis did and then setting up barriers against them. We are tempted to adopt this defensive approach when we recall that critical to the devastation that the Nazis wrought was the fact that few (if any) Europeans expected the Germans to do, so systematically and on so large a scale, the barbaric things which they certainly did. So despicable were the horrible things ordered by the Nazis that they usually did not dare admit even to their own people what they were doing. (It may be destined to remain a mystery how many Germans knew what and when. What is *not* a mystery is why so few Germans ever wanted to be publicly recognized, even while still in power, as personally responsible for the Nazi atrocities. Is there not something reassuringly natural about this? Also somewhat natural, unfortunately, is that so many Germans did not want to face up to what they must have sensed their government was doing.)

57. On the Greek civil war and its aftermath (the 1967-1974 rule of the Colonels), see *supra* notes 36, 37, 48 and accompanying text.

58. On civil disobedience, see ANASTAPLO, *THE AMERICAN MORALIST*, *supra* note 2, at 537-54. For extended accounts of the slaughter of the Jews during the Second World War, see GERALD REITLINGER, *THE FINAL SOLUTION: THE ATTEMPT TO EXTERMINATE THE JEWS OF EUROPE 1939-1945* (2d rev. and augm. ed. 1968); LUCY S. DAWIDOWICZ, *THE WAR AGAINST THE JEWS 1933-1945* (1st ed., Holt, Rinehart & Winston 1975).

No doubt, something is to be said for a useful wariness, including an awareness of the monstrous things that human beings can indeed do to one another. But wariness should not be permitted to deteriorate either into paranoia or (because of exhaustion) into passivity, both of which can have corrosive effects by constantly exposing one's imagination to horrors. One should be cautious, that is, about either expecting or dwelling upon the worst, generation after generation. This can be routinely crippling, whereas the monstrous rarely appears. In these matters, that is, constant apprehensiveness, a spirit of surrender, and a sense of perpetual grievance all tend to become obstacles to a proper maturation.

A far healthier approach here, and usually more truly practical, is to encourage and equip the finest human beings among us. A morbid preoccupation either with erecting barriers against the worst possible eventuality or with feeling helpless in expectation of dreadful things can keep the best souls from flourishing. The role of chance in such matters is evident, even distressingly evident, to anyone familiar with Holocaust stories. *Being good*, which includes having the capacity to figure out and then to do whatever is called for, is probably the most reliable protection in a variety of circumstances. One needs to be able to identify accurately and to think sensibly about the unpredictable challenges one happens to confront if one is to improvise effectively in the extreme cases that do chance to arise. Such effectiveness depends upon being guided in the face of the monstrous by a sense of decency and upon being strengthened in the most dangerous situations by a sense of honor. It should be emphasized that the proper response to evil programs varies from place to place and from time to time. Automatic responses in these matters are likely to be self-defeating. It also helps, if one is to conduct oneself as one should in response to the most terrible demands, to keep within reasonable limits that oppressive "fear of prison or death" which Socrates warned against. The role here of a sound education cannot be overestimated, however discouraging the 1933-1945 experiences of the highly cultured German people may have been.⁵⁹

59. On the cultural foundations for the political sobriety of the English-speaking peoples (to which Shakespeare has made a significant contribution), see GEORGE ANASTAPLO, *THE CONSTITUTION OF 1787: A COMMENTARY* 1, 11, 13, 74-88 (1989). See also ANASTAPLO, *THE AMENDMENTS TO THE CONSTITUTION*, *supra* note 3, at 107. On another argument for sobriety, see *supra* note 17 and the following letter-to-the-editor I prepared in April 1997:

The orchestrated "suicides" of thirty-nine Heaven's Gate cult members in San Diego remind us of the deadly folly that can result from bizarre delusions that are not adequately challenged by the community at large. The form and

In any event, it is prudent to notice that the worst atrocities organized in the 1940s by the Nazis were done under cover of war. Therefore it is also prudent, especially at a time when military technology and modern governments can be so devastating, for us to be most reluctant to countenance recourse to war by anyone, however much power it may be our duty to hold in reserve in order to be able to intimidate the unruly. Men and women of good will should be heartened somewhat, as well as instructed, upon contemplating and even cherishing the salutary (however flawed) gentleness of the remarkably good-natured Italian people. Also to be contemplated, with both awe and gratitude, are the great Jewish people who have contributed so much to civilizing the Western World, something that resentful savages can never understand.⁶⁰

consequences of such fatal nonsense vary according to time and other circumstances, depending in part upon the temperament and experiences of the more susceptible among us.

The recklessness, if not cynicism, of those who concoct, peddle, and promote dangerous delusions should be recognized. Also to be recognized, far more than it sometimes seems to be, is the duty that sensible people have to challenge and thereby to help discipline those who habitually talk nonsense or who are peculiarly responsive to the nonsense they hear.

Those privileged to know something about what "evidence" means should not shrink from being publicly "judgmental" when the occasion demands, however careful they should be not to sound moralistic in their championing of a sound morality. The Heaven's Gate debacle should be even more troubling than it naturally is when it is recognized that there were probably some murder victims (and hence at least a few murderers) among the thirty-nine "suicides" in San Diego.

See, e.g., USA-TODAY, May 8, 1997, at 13-A.

60. See, e.g., *Deuteronomy* 4:1, 5-8; *1 Samuel* 17: 1-51; *Proverbs* 29:18. On the case for supporting Israel, see ANASTAPLO, HUMAN BEING AND CITIZEN, *supra* note 4, at 155-59. On the power of gentleness, see a 1965 poem by Sara Prince Anastaplo inspired by the sounds and sight of the goats, donkeys, and birds in and around Delphi, Greece:

Delphi

Delphi is the sound of bells
 Beaten copper, twisted thin
 Folded nailed with copper pegs,
 Brilliant sparks from metal shells
 Struck by fur and skeleton
 In rhythms moved by legs.

The mountain's thrust, the birds' wild wings
 Scarce touch the air that bears their stress.
 This world declares that gentleness
 Is strength and bell-like sings.

For other poems by this poet, see ANASTAPLO, THE THINKER AS ARTIST, *supra* note 14, at v, 139-40, 384. See also LAW AND PHILOSOPHY: THE PRACTICE OF THEORY 2, 1033 (John

APPENDIX B

AFFIRMATIVE ACTION AND THE CONSTITUTION⁶¹

[I]t must be remembered that, during most of the past two hundred years, the Constitution as interpreted by [the United States Supreme Court] did not prohibit the most ingenious and pervasive forms of discrimination against the Negro. Now when a State acts to remedy the effects of that legacy of discrimination, I cannot believe that this same Constitution stands as a barrier.

—Thurgood Marshall⁶²

I.

Does the United States Constitution—which is established to serve the common good—sometimes undermine that common good, or at least stand in the way of dedicated efforts to advance it? What is the relation between what the Constitution says, or is taken to say, and the enduring interests of the community? I hope you are patient as I return to this question again and again on this occasion.

Consider, for example, how the First Amendment is read, that part of the Constitution which provides that Congress shall make no law “abridging the freedom of speech, or of the press.” Would it be consistent with such a provision to regulate publication of pre-election opinion polls? If your answer is that the First Amendment does not permit restrictions upon the publication of such polls, does this mean that the Constitution may keep us from doing what we believe is sensible to be done in order to have proper election campaigns and a healthy political life? (On the other hand, it can be argued that pre-election polling minimizes the disruptive element of surprise in our political system. But does this argument against regulation bear more on the political than on the constitutional issues here?)

A. Murley, Robert L. Stone & William T. Braithwaite, eds., 1992).

61. This talk was given at the Calumet College of St. Joseph, Hammond, Indiana, November 9, 1988. See also George Anastaplo, *An Introduction to 'Ancient' African Thought*, in 1995 THE GREAT IDEAS TODAY 146 (1995). For a useful survey of affirmative-action issues, see RALPH A. ROSSUM, REVERSE DISCRIMINATION: THE CONSTITUTIONAL DEBATE (1980). See also NORMAN C. AMAKER, CIVIL RIGHTS AND THE REAGAN ADMINISTRATION 157 (1988).

62. *Regents of the Univ. of California v. Bakke*, 438 U.S. 265, 387 (1978) (Marshall, J., concurring in the judgment and dissenting in part).

Take another case under the First Amendment. What if one believes, as I have believed for many years, that broadcast television has had an awful effect upon most Americans, that it has been disastrous for political life in this country, and that for these and for other reasons it should be completely abolished?⁶³ Does the First Amendment prohibit such abolition? If it does, do we have here another instance of prudent policy suggesting one thing even as a constitutional prohibition keeps our governments from pursuing that policy?

Take still another case. There is an amendment, the Second, which says that the people have the right "to keep and bear Arms." Suppose one believes, as many of us believe, that there is something very troubling about the American appetite for the personal arsenals we have built up with which we kill ourselves at a very high rate, probably at a higher rate than any other people in the world, except where there are civil wars going on. Is it true that the Second Amendment prohibits severe legal restrictions upon the purchase or possession of personal firearms—and if it does, is not this another instance in which the Constitution says one thing and a sensible policy says something quite different? (In this case, as in the others, there might be an argument as to what a sensible policy would truly be, aside from the issue of whether the Constitution really does prohibit public control of the private ownership and use of guns.)

We have been noticing legal measures desired for public policy purposes—for the good of the community, salutary measures that are sincerely believed by some to be prohibited by the Constitution. Of course, we must also recognize the possibility that there may be measures devised that would be constitutional and yet wrongheaded, if not even unjust and "counterproductive."

That is, it should be emphasized both that a measure is not unconstitutional simply because it is unjust and foolish, and that a measure is not just and sensible simply because it is constitutional. For example, a legislature can pass a tax bill which wrecks an economy, but there may not be anything unconstitutional about it. It may be the height of folly; it may even be unjust in many ways; but there need not be an issue raised thereby of its constitutionality. We see, therefore, that there can be a difference between what some people

63. See ANASTAPLO, *THE AMERICAN MORALIST*, *supra* note 2, at 245-316. On freedom of speech and the First Amendment, see GEORGE ANASTAPLO, *THE CONSTITUTIONALIST: NOTES ON THE FIRST AMENDMENT* (1971); ANASTAPLO, *THE AMENDMENTS TO THE CONSTITUTION*, *supra* note 3, at 47.

may consider good or bad policy and what the same people consider constitutional or unconstitutional.

II.

I should now like to consider at greater length a particular constitutional issue, or set of issues, made even more acute by the Presidential election results yesterday.⁶⁴ We now have a national administration returned to office which is generally regarded by a sizable racial minority in this country as unresponsive, if not even hostile, to their interests. Whether that minority, *which is not represented in my audience on this occasion*, is correct in regarding the administration in this way can no doubt be debated. It is wondered, in any event, what the United States Supreme Court will do with race-related issues as members are added to it by a "conservative" President during the next few years. How will this affect what the Supreme Court permits various American governments, state and national, to do with respect to race relations in the 1990s?⁶⁵

It is essential to notice, at the outset of our discussion, that considerable progress has been made in American race relations since the Second World War. It is foolish and even dangerous to deny that such progress has been made, so obvious is it to the well-informed. If one denies that progress has been made, is not one denying in effect that there are any standards by which progress can be measured?

Although considerable progress *has* been made since the Second World War, chronic problems remain, as testified to by the massive unemployment and underemployment in our inner cities. Those afflictions are most dramatic among one racial group. The serious disturbances in our cities include the crime rate, the prevalence of drugs, the rate of illegitimacy, the deterioration of families as well as of the city itself, and a general demoralization. It is no wonder, then, that parts of our cities have become unsafe both for the people who live there and for anybody who comes into them from the outside. (The "outside" may be only a few blocks away in some instances.)

Not only are large residential parts of our cities, as well as many commercial areas, effectively closed off to the majority much of the

64. The election referred to was on November 8, 1988, the day before this talk was given in Hammond, Indiana. Critical to all talks of this kind are the circumstances in which they are given. An awareness of circumstances can, if one is responsible, very much affect the emphasis that should be given to various points. Or, as Socrates noticed in Plato's *Menexenus*, it is easy to praise Athens to Athenians.

65. See Charlotte Saikowski, *A Turn to the Right on Civil Rights*, CHRISTIAN SCI. MONITOR, Nov. 18, 1988, at 19.

time, but the productivity and general prosperity of the entire country suffer as a result of the persistent misuse of resources evident in the inner cities. Misuse may be seen in the fact that millions of people are not gainfully employed but rather have to be supported by the taxpayer—or have to be policed, imprisoned, or managed in other ways.

Some of those who grow up in these depressed areas do manage to rise out of them. We all know such people; we are heartened by them. But what about the bulk of their neighbors? What is needed from the community at large—in the training and advancement of depressed racial minorities—if they are to be brought much more into the life of the national community (and economy) than they now are? It becomes a pressing question of public policy what the community can do to bring them in—to make them much more productive, much happier, much more useful for everybody, much less dangerous or less apparently dangerous, than they are now.

How should we begin to deal with and make use of such people? How can we help prepare them to fit in and to work out? Consider what happens when merit selection is used to choose among candidates for specialized training, such as in a medical school or with a police department or a fire department. Objective tests are often relied upon. What is our use of such tests likely to mean in practice? This is the sort of problem that has to be addressed here.

The use of objective tests means that the number of people selected for advancement from depressed minorities in the inner cities, or anywhere else in our country, is likely to be well below the proportion of those minorities in the general population, except perhaps in the field of athletics. It is realistic to notice that this discrepancy need not be due to any bias in the preparation, administration, or grading of the tests employed. Even if “cultural bias” and other kinds of bias should be kept out of the testing and selection, there would still be significant deficiencies in the ability of depressed minorities to do as well as most other groups in the community. It is prudent to face up to the problems here and to what, if anything, can be done about them.

If “equality of opportunity” is the standard to be employed, with no preferences shown for any group, we should expect members of the more depressed racial-minority groups not to achieve much compared either to the general population or to various other groups. This is not likely to change for some time. Although official discrimination against minorities is now eliminated, at least as a matter of law, we can expect the consequences of our former patterns of discrimination to be with us for some time to come. If racial discrimination had not been

believed to have enduring effects, it probably would not have been taken as seriously as it was for decades by both its proponents and its opponents.

That is, we suspect that the consequences of past official adverse discrimination and of some, perhaps much, continuing unofficial discrimination are pervasive, affecting family life, neighborhoods, habits, opportunities, and expectations. If the various racial and other groups among us are roughly equal by nature, one can anticipate significant differences in consequences because of differences in the way that racial minorities have been treated for years. Are not those consequences likely to be enduring?

The point I want to stress here is that the removal of legal discrimination and an insistence upon fair treatment now, in the form of "equal opportunity," may not do much, at least for a long time, to improve the lives of many among us who have been discriminated against, or whose forebears were systematically discriminated against, for a very long time. We have to consider, therefore, the tension between the common good, on the one hand, and (as we shall see) what is fair in particular cases, on the other hand. It may even be suggested that the venerable principle of equality in *certain* of its manifestations may have to be subordinated to the common good.

III.

Should deliberate special efforts be made to advance depressed racial minorities in this country? Various immigrant groups in this country have evidently been less fettered, less crippled, than these racial minorities by their contacts with the dominant groups that have run the country for centuries. Why should those immigrants have been able to do so well so quickly? How much does a people's rate of success in this country depend upon the achievements and conditions of that people's forebears for centuries past in "the old country"? How much does the rate of improvement depend upon former conditions in this country, including the condition of servitude or the condition thereafter of systematic hostility that found expression in a network of oppressive legislation? How much do continuing disabilities depend upon color differences, which make it relatively easy to identify "them"? In various ways we can be again reminded of what long-term shaping can mean to human beings.

I state the following proposition starkly in order that we may face up to the race-relations issue as it sometimes presents itself to us today: to make special efforts to raise up any minority that has been deprived for a long time can mean, at least in the short run, that the community as a

whole is likely to be deprived in some ways. For example, if special efforts are made to admit minority candidates to a medical school, some of the doctors developed thereby are likely to be inferior to those who would have been admitted to that medical school in their places, assuming that the overall mode of selection ordinarily used is a sensible one.

Furthermore, if efforts are made to correct the long-term consequences of centuries of racial exploitation and discrimination, some individuals in the currently dominant group will not get what they otherwise would have gotten which they have in a sense earned. This may be seen, for example, when seniority is modified, with a view to racial adjustments, in determining who gets laid off by a company or by government. Such attempted correction of injustices or of the effects of past injustices may not go smoothly, especially when the individuals who are thereby denied what they would otherwise have gotten are not themselves personally guilty of racial prejudice or of discriminatory conduct.

Still, does not something have to be done if the community is not to continue to suffer because of large minorities left in their inadequacies and in their resentments? Doing something to correct these matters, it is argued, may have to include significant preferential treatment of those who are members of a group which has been systematically deprived for years. This is where the issue begins to become highly controversial for us. Such preferential treatment can include affirmative action, quotas, reverse discrimination, and special services. Some of that preferential treatment can be concealed; it can be provided without acknowledging that it is being given. But one wonders how long and how effectively that sort of thing can be hidden. Is it not usually prudent, at least in such matters, to face up to what is being done and why it is being done?

Is it not also prudent to face up to the fact that what is being done may not work well, and may even have to be discarded for another experiment? Certainly, it should be recognized that a number of such efforts, which can be quite costly, may not do anybody much good—and may even be harmful, especially if they should somehow or other corrupt those who are given preferential treatment. And, we have noticed, such experiments, even if properly explained, are likely to disturb those people who consider themselves deliberately denied what they would otherwise have gotten.

The anger to be expected here is bitter testimony to another fact: the community is not united, it is not a true community. A close-knit family, for example, is not likely to resent extra help for the crippled

child among them, even if the child's disability should be considered partly its own fault. The presence of uncharitable attitudes helps us recognize that it is not a single community that is being dealt with in these matters but rather an uneasy association of groups who do not see themselves either as needing each other or as wanting to help those most obviously in need of help, even for the good of all eventually.

IV.

The resentment aroused by resort to preferential remedies can no doubt have political consequences. Those consequences may make it difficult, if not impossible, for a government to institute or to persist in a particular program. Suppose, however, that a community, acting through its legislature, decides that a program of preferential treatment is needed. There is then the problem of constitutional challenges with which I began these remarks.

That is, what if that which is believed to be desirable for the common good suggests one way of proceeding and that which the Constitution says seems to keep the community from going the desired way? Constitutional challenges here will, in most instances, probably take the form of the objection that any kind of preferential treatment (especially if race-related) is a denial of the equal protection of the laws assured by the Fourteenth Amendment. The people who would otherwise have gotten the medical school admissions, the jobs on the police force, or whatever else we are talking about, can be expected to protest, with some force, that they have been denied equal protection of the laws.

The question then becomes what "equal protection of the laws" means. What can be discerned from the language and known circumstances of the Fourteenth Amendment, ratified just after the Civil War, which provides guidance here? Equal protection cannot mean that everyone must be treated the same without regard to circumstances. Few would deny that a legislature has to be able to notice different conditions, or to notice some distinctions as compared to other distinctions, which permit it to provide different things for different people. Furthermore, is not the primary intention of the Equal Protection Clause to keep the dominant group in the community from systematically denying the benefit of law, or of the social-economic system itself, to a minority, especially to any racial minority, in its midst? Is not that what the Clause is mostly about—to keep an entrenched majority from singling out politically-helpless minorities for deprivations and burdens? Is not that what an investigation of the development of the Fourteenth Amendment suggests? One is naturally

led, therefore, to this question: Does the Equal Protection Clause apply to situations in which a dominant group has deprived itself for the sake of a minority with a view to improving thereby the community as a whole? In these circumstances, the majority, which is in charge of its self-deprivation, can always reclaim what it is denying itself.

But how about the individual member of the majority group who believes himself to be suffering personally from what the majority is doing both for the sake of the minority and for the sake of the community as a whole? Is he being deprived of an equal-protection right? Does he become thereby a member of an ill-treated minority? Or should he be told, when he invokes what he is *entitled* to, that he would benefit from the same law if he (or his forebears in this country) had also endured and been crippled by certain demoralizing experiences and certain systematic deprivations?

V.

What *does* "entitled" mean in these circumstances? When someone says that he is due something on the basis of test scores or seniority or other such criteria, what does that mean? Do not most entitlements depend in large part upon the conditions, including the public policy, laid down in the laws of the country? If an affirmative-action program is properly developed *and explained*—this is far easier said than done—all should be able to feel that everyone can eventually benefit substantially from what is happening even though the immediate beneficiaries are intended to be the members of the minority which is specially helped in some way.

There is one other thing that should be noticed here. The provision in the Fourteenth Amendment that equal protection should not be denied to any person applies to the States. There is in the Constitution no such provision with respect to the National Government. This reminds us of the fact that slavery, which remains critical to the background of the race-relations problem in this country, was primarily a State-protected, if not even State-sponsored, institution. Consequently, only the States were addressed by the Fourteenth Amendment after the War which had destroyed slavery. It is rarely noticed by those who talk about these matters that the Government of the United States is *not* explicitly governed by any general equal protection prohibition in the Constitution. Since the United States is less likely than particular States to be controlled by entrenched groups,⁶⁶ the National Government does not need to have this

66. See THE FEDERALIST NO. 10. On American federalism, see ANASTAPLO, THE

constitutional restraint placed upon it, or so the framers of the Fourteenth Amendment evidently believed. Perhaps they also believed that the power to "discriminate" must be left somewhere in the system, prudently providing thereby for extreme cases.

VI.

I recapitulate: The key question in considering the problem of race relations in this country may be whether the constitutional issues are as important here as many have believed. Far more important than constitutional provisions may be the moral sensibilities and the political judgment of the community. It is vital that the community be able to think things through and to face up to what its alternatives, as well as its disabilities, truly are. Both majorities and minorities can have severe disabilities. The disabilities of racial minorities among us are obvious. The disabilities of majorities are less obvious, particularly those disabilities which are in effect sustained by mistaken (if not even Pollyannish) opinions about the nature of race relations and about what might be done to improve them.

Constitutional issues are rooted ultimately in questions of right and wrong, including the sense of the rightness of respecting a properly-ordained constitution. The Constitution of 1787 itself is grounded in the Common Law and in what used to be called natural right, that system of permanent moral standards which we all rely upon, almost instinctively at times. We need, for the proper handling of issues, sensible moral and political discourse, not merely the sloganeering and "power plays" we have become accustomed to in our public life. I suggest that we should first determine what the right and proper things to do are, not only with respect to race relations but also with respect to any serious issue that we encounter. Once we have determined what the proper and right things to do are, we should usually be able to find constitutional ways of doing them.

It is important to add, before I leave this inquiry for the time being, that I do not see why the United States should not have, in confronting race-relations difficulties and other such problems, the flexibility and resources that other large and civilized countries in the Western World have. Or is there some principle (appreciated only by us) that should keep the United States from having recourse to what other respectable countries consider to be sensible and decent measures with respect to these matters?⁶⁷

CONSTITUTIONALIST, *supra* note 63, at 171-201.

67. On affirmative action, see ANASTAPLO, *THE AMENDMENTS TO THE CONSTITUTION*,

VII.

It is also important to add, if only in passing on this occasion, that the key measures that should be considered by the community in dealing with most constitutional issues that are apt to arouse public passions should probably be primarily legislative rather than judicial. Measures that have to go through a legislature are more likely to be examined and explained in a way that most people can grasp and are more likely to be accommodated to. (Our experience with the abortion controversy is instructive here.)

Is it not prudent to believe, in any event, that the United States Constitution does not absolutely forbid local governments, as well as the nation as a whole, to experiment in a responsible way with the sensible and decent measures (including affirmative-action programs) that seem somewhat likely among us to help establish justice and to help insure domestic tranquillity?

APPENDIX C

THE FUTURE OF RACE RELATIONS IN THE UNITED STATES⁶⁸

When David offered himself to Saul to fight Goliath the Philistine challenger, Saul, in order to give him courage, armed him with his own arms, which as soon as David had them, he rejected, saying that he could not be of as good worth with them as by himself, and that he therefore wished to find the enemy with his sling and with his knife.

—Niccolò Machiavelli⁶⁹

I.

I have been asked, by students in this class, for my opinion about what is likely to happen to race relations in the United States. Those prospects are relevant to this course, so much of which is devoted to the race-conscious Fourteenth Amendment cases in the United States Supreme Court.

supra note 3, at 181f, 236. *See also supra* note 4.

68. This Lincoln's Birthday talk was given in a Constitutional Law course, Loyola University Chicago School of Law, Chicago, Illinois, February 12, 1997.

69. NICCOLÒ MACHIAVELLI, *THE PRINCE*, ch. 13 (Leo Paul S. de Alvarez trans., Waveland Press, 1989). *See also 1 Samuel* 17: 38-40, 45-47.

This inquiry has been inspired by the verdict last week in the O.J. Simpson civil trial and the quite different responses along racial lines in the country at large both to that verdict and to the 1995 acquittal in Mr. Simpson's criminal trial.⁷⁰ We are reminded thereby that many, if not most, African-Americans have long found it hard to believe that our law-enforcement authorities can be relied upon to be fair to them.

The videotaped savaging of Rodney King, by Los Angeles police in 1991, dramatized what is implied by the sobering fact that one-third of African-American males under thirty are entangled with the criminal-law system. The framers of the capital-punishment resolution passed last week by the American Bar Association House of Delegates, calling for a moratorium on official executions in this country, are disturbed by, among other things, apparent racial discrimination in how death sentences are allocated.

This is *not* to deny that there has been, since the Second World War, considerable progress in American race relations, as well as in the status worldwide of women (whatever natural differences remain to be sorted out). Consider, for example, the implications of these entries buried in a "Headline History" for 1989:

Kristin M. Baker is the first female to become First Captain of the West Point Corps of Cadets (Aug. 8), Army Gen. Colin L. Powell is the first black to become Chairman of Joint Chiefs of Staff (Aug. 9), . . . L. Douglas Wilder, Democrat, is elected as first black governor of Virginia (Nov. 7), New York City elects David N. Dinkins, Democrat, its first black mayor (Nov. 7) . . .

⁷¹

Indeed, far more progress has been made in race relations in this country than seemed possible to me when I first observed, during my wartime Air Corps career, how determined and thoroughgoing segregation was in the Deep South a half-century ago. To refuse to acknowledge the obvious progress there has been in recent decades is to say, in effect, that there are no standards by which such matters may be judged. If there really are no standards, then there is neither anything to be done nor, strange to say, anything to worry about.

The emergence of a substantial African-American middle class has been significant in recent decades, whatever the effects have been of the consequent stripping from inner-city neighborhoods of their natural leaders. But even the more successful of that middle class seem to

70. The verdict in the civil trial was announced February 4, 1997. See *supra* note 1.

71. THE 1991 INFORMATION PLEASE ALMANAC 127 (Houghton Mifflin 1991). Compare Don Pierson, *Black Coaches Want Answers on NFL Hiring*, CHI. TRIB., Mar. 23, 1997, § 3, at 13.

find it difficult to shake off their sense of vulnerability as members of a race that has endured centuries of systematic abuse.

Whatever progress there has been, even more toleration of (if not also a genuine concern for) minorities needs to be developed among the still-powerful majority in this country. The state of public opinion (which *has* become more civilized with respect to these matters) can be vital here, something that the law can help shape and maintain, just as the law should be used to try to curb tyranny, exploitation, and simple cruelty.

In short, the opinions of the majority in a republic such as ours always need to be challenged, corrected, and ennobled by informed and responsible citizens. Appeals to self-interest can be useful here. The merits and conditions of domestic tranquillity should be explained to white Americans. In addition, they should be counseled to help establish now the norms in race relations that they want their great-grandchildren to be protected by if they should become a minority in this country in the twenty-first century.⁷²

II.

More critical than desirable changes either in "the system" or in the opinions and conduct of the majority may be what African-Americans do for themselves in taking advantage of the opportunities that happen to be available to them, however inferior those opportunities all too often remain. (For example, the substantial differences, from one neighborhood to another in the public schools within one state after another, remain a scandal.) African-Americans need to be able to take more control of their lives, however limited anyone's control is ultimately bound to be. This includes, perhaps must even begin with, controlling what is routinely done among African-Americans to themselves. This point is not unrelated to why Africans were vulnerable to enslavement in the first place: they were not equipped to defend themselves properly against the ever more greedy and ruthless white men who preyed upon them century after century, leaving everyone involved worse than they were when Africans and

72. See THOMAS JEFFERSON, NOTES ON THE STATE OF VIRGINIA 156 (Thomas Perkins Abernathy ed., Harper & Row 1964), Query XVIII :

Indeed I tremble for my country when I reflect that God is just: that his justice cannot sleep forever [with respect to slavery]: that considering numbers, nature and natural means only, a revolution of the wheel of fortune, an exchange of situation is among possible events: that it may become probable by supernatural interference!

See also the letter by John Van Doren quoted in the Epilogue to this Article.

Europeans first encountered each other. Victimization is rarely good either for the victim or for the victimizer.⁷³

African-Americans need to equip themselves to maximize talents and to minimize liabilities. For this, education is critical—both the instruction provided by schools and the guidance coming from churches. Education helps one to be flexible, making more likely the nurturing of that prudence which permits one to exploit opportunities and to adapt to circumstances. African-American youngsters face here the obstacles faced by youngsters generally in this country. Most students today do far less with their educational resources and opportunities than their grandparents did. One adverse influence here, especially among the poor, is the unrelenting television industry.

Related to this massive adverse influence, perhaps most devastating these days among African-Americans, are the delusions that have been fostered about the opportunities for advancement offered to the young by the sports and entertainment industries. However remarkable the best practitioners may be in such pursuits, it does not make sense for youngsters to be diverted from the sound guidance that a proper education can provide for decent and productive lives.

It is worth noting here, too, the progress in race relations that there has been, whatever the dubious features of our turning African-Americans into our professional gladiators. The very best among African-American entertainers and athletes in my lifetime may be two men I have been fortunate to be able to watch up close for hours at a time: Louis Armstrong and Michael Jordan. (Michael Jordan seems to be genuinely respected here and abroad, in a way that not even Louis Armstrong was at his peak.) I recall a long evening that an electrifying Louis Armstrong performed at the officers' club on our air base, toward the end of the Second World War. I also recall that, however accomplished he obviously was on that occasion, I could hear some of my fellow-officers (after a few drinks) muttering racial slurs, slurs that one is not likely to have to deal with in similar circumstances today. (Michael Jordan I was able to appreciate even in the "insane" venue of Chicago Stadium.)

III.

The Jewish people provide, with respect to the primacy of education in the modern world, a model for African-Americans to take to heart. No other people, at least in the Western World, have been subjected to

73. See Anastaplo, *An Introduction to 'Ancient' African Thought*, *supra* note 61, at 159, 174 n.5. See also *id.* at 170 n.37 (on Joseph Conrad's *HEART OF DARKNESS*).

the systematic savagery on a large scale that the Jews have endured in this century, with at least two-thirds of their total numbers in Europe deliberately slaughtered in one decade. The trauma of that fiendish assault will take many decades, if not centuries, to cure. (The same can be said about such devastation as that wrought by Pol Pot in Cambodia.) Even so, there has been a remarkable recovery by Jews worldwide during the past half-century. That ancient people has drawn effectively upon a way of life grounded in a Book, a way which has always made much of the family, law-abidingness, education, and life itself.⁷⁴

If education is to have its salutary effects among African-Americans, opportunities must be taken advantage of by them, including special services that are provided by governments. Sensible affirmative-action programs (whatever they are called) may still be needed, especially programs that are properly explained and carefully monitored. Such programs, it should be emphasized, can be for the good of the whole, not just for the benefit of the minority that happens to be immediately ministered to. This is like insisting upon rigorous public health measures for all members of a city, with inoculations, medication, and therapy subsidized for those who cannot afford them—and all this with a view to heading off or dealing with deadly epidemics, festering particularly among the underprivileged, which threaten everyone.

However much education is extolled, it is still prudent to keep in mind what did happen, sixty years ago in Germany, to the most educated Jews in the modern world living among the most cultured people of their time. Had those “assimilated” Jews, forgetting how distinctive and hence vulnerable they remained, ceased to rely enough upon their own resources? A dangerous dependency can take more than one form. Proper education usually equips one to distinguish between healthy wariness and crippling paranoia.

Three grand objectives should be advocated for any people: Do the right thing whenever possible; try to understand what *is* (this requires an awareness of what is happening); advance your legitimate interests—and hence be truly happy. Among the things to be understood, if not even celebrated, is that there is a limit to anyone’s ability to control events, which is to recognize in effect that human beings are indeed mortal. Even so, Abraham Lincoln’s career testifies to what can be accomplished by anyone determined to make use of the meager opportunities that may happen to become available.

74. See *supra* Appendix A. See also Anastaplo, *On Trial*, *supra* note 2, at 854f, 935f.

I conclude these Lincoln's Birthday remarks by returning to the inquiry with which I began: What is likely to happen to race relations in the United States? I have suggested that what happens among us, in the foreseeable future, may well depend, in large part, upon what we decide to do and to say.

EPILOGUE

Among the consequences of the Simpson trials has been the instructive probing it has prompted of our chronic social problems. Consider, for example, the following thoughtful letter by John Van Doren in response (on February 12, 1997) to my talk, "The Future of Race Relations in the United States":⁷⁵

. . . The problem is intractable. Charity will not serve, nor is it proper in social relations, where justice is required. Self-interest will not serve; we do not believe our own advantageous position will be lost, or if it may be it is as the sun is going to burn out—too far off to matter (except in Los Angeles). Law will not serve; we find ways to avoid or disobey it.

There are only two paths to the establishment of minorities in this country: one is money, the other, politics. In the case of African-Americans, neither of these is likely because they require a cohesion that African-Americans lack.

Perhaps we should be thinking about ways to create such cohesion, absent which any group is incapable of self-help. Malcolm X went to Mecca and came back stunned to realize that there was a world in which his kind was not despised—the world of Islam—and in which all his old, terrible insecurity fell away. Maybe we should encourage the adoption of Islam among African-Americans.

We could also decide to undertake social efforts that would require their labor, for which we would have to pay, as in repairing our infrastructure. But that would have to take in others as well, and is not foreseeable without another Depression. Meantime we have plenty of Hispanics to substitute. If the Chinese economy falters, as it shows signs of doing, we'll have a billion Chinese to exploit as well.

Not that the steps you suggest won't be good. They will be, some. I am glad you lay them out so well. But they won't cure black anger, black despair, I don't think.

Mr. Van Doren (whose letter is used here with his permission) seems to me eminently sensible in looking to the help available at this

75. See *supra* Appendix C. See also *supra* Appendix B.

time from religious institutions.⁷⁶ But it also seems to me that support of the still-influential African-American churches is a more reliable course in our circumstances than promotion of Islam, which would be encumbered by the liabilities of the Black Muslim movement in this country. (The most prominent spokesman today of that movement has, for example, refused to notice publicly the substantial African slavery permitted by his wealthy Arab sponsors in North Africa.⁷⁷) Besides, would it be useful for African-Americans to be further segregated, in effect, by their religion?

Highly publicized trials can contribute to the training of citizens, affecting thereby the forms that social problems and their attempted solutions take. It should not hurt, and may even help, to have our lawyers (and hence our judges) better educated than they can now be. The best students respond to the best, as I have found in my law school jurisprudence courses using the Bible and Shakespeare.⁷⁸

76. For the perspective from which he approaches these matters, see John Van Doren, *Poetic Justice*, in 1996 THE GREAT IDEAS TODAY 258 (1996).

77. See, e.g., Paul Liben, *Farrakhan Honors African Slavers*, WALL ST. J., Oct. 20, 1995, at A12. On what can be said for the Black Muslims, see Anastaplo, *Slavery and the Constitution*, *supra* note 3, at 778. On Islam, see Anastaplo, *An Introduction to Islamic Thought*, in 1989 THE GREAT IDEAS TODAY 234 (1989).

78. See Anastaplo, *Individualism, Professional Ethics, and the Sense of Community*, *supra* note 26, parts 5 and 6. See also *supra* note 8.

Justice Antonin Scalia, in a conference at Loyola University Chicago (April 1997), scoffed at my suggestion that his "legal realism" jurisprudence is really "in the mainstream." See *Scalia Answers Critics*, BLACKACRE, Loyola University Chicago School of Law, April 22, 1997, at 1. My remarks about Justice Scalia on that occasion had concluded with these observations:

The critiques I have collected here are anything but new. This should again assure us that the reservations I have ventured to express about Justice Scalia's constitutionalism are directed not against him personally but rather against the dominant scholarly opinion today, a positivistic opinion which our esteemed guest shares in principle, however much he may dissent on secondary points which are not really as important as they may for the moment appear.

My complete remarks may be found in BLACKACRE, May 6 1997. Further discussion of Justice Scalia's work is scheduled for the 1997 Annual Convention of the American Political Science Association.