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THE
CONSTITUTION
THAT DELICATE BALANCE

Crime and Insanity

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Potter Stewart, Justice (retired), U.S. Supreme Court

Alan Stone, M.D., Professor of Law and Psychiatry, Harvard Law and Medical Schools

James Thompson, Governor, Illinois

CASE STUDY

Twenty-five year old Harvey Brink, son of prosperous parents, is a loner who lives in a world of bizarre fantasies. Brink is a college dropout who has no friends and is unable to work steadily.

He is obsessed with Oscar King, a 60-year-old actor who has portrayed tough, rugged cowboys throughout his film career. King has also achieved national prominence offscreen as a leading advocate of American military supremacy. Brink spends his days alone, watching videocassettes of old Oscar King movies. Latching on to King's characters, Brink begins to collect guns.

Brink writes to Oscar King seeking a staff position as press liaison. Receiving no reply, he then drafts several position papers for the candidate. After a failed attempt to contact King directly, he becomes disillusioned. Rejected by his hero, Brink feels betrayed. He now believes that he must rescue American citizens from Oscar King, a symbol of hypocrisy and corruption.

While King is addressing a group of prominent business executives at a fund-raising event, Brink, in the audience, shoots the candidate four times with .38-caliber revolver.

Crime and Insanity

FRED W. FRIENDLY, Columbia University School of Journalism: From the birthplace of the Constitution . . . Does the insanity defense serve to shield the guilty or does it work to protect the mentally ill?

Prof. CHARLES NESSON, Harvard Law School: How is the state going to go about determining whether your client is competent?

GERRY SPENCE, Attorney: They're going to hire an incompetent psychiatrist!

Judge IRVING KAUFMAN, U.S. Court of Appeals: And we're asking lay people to judge these expert psychiatrists and determine which one is telling the truth, and mind you, they're only giving opinions.

Dr. LOREN ROTH, Psychiatrist: It's implicit, understood, if you're working on a particular side, that you're going to identify with the aims and the objectives of that side. That would simply be human nature.

Justice JOAN DEMPSEY KLEIN, California Court of Appeals: Now if I can't rely on help from them, where am I going to get it and where is the juror going to get it?

Dr. ALAN STONE, Professor of Law and Psychiatry, Harvard University: The jury should be confused. We shouldn't clear it up for them, because to clear it up for them is to distort the realities.

Dr. WILLARD GAYLIN, Psychiatrist, The Hastings Center for Bioethics: We live in a society that assumes that people ought to be responsible for their actions. We also live in a society that has the minimal compassion to recognize that certain people are not responsible; they are a minority of people, but we recognize that limitation.

Rep. BARNEY FRANK (Massachusetts): People who shoot other people, and maybe I'm being particularly parochial, but people who shoot people who are candidates for public office make me very nervous and I would like to see them somehow, restrained.

GERRY SPENCE, Attorney: But how do you punish somebody who is not accountable? How do you punish somebody who is insane?

Mr. FRIENDLY: A century ago, a deranged Englishman attempted to shoot Queen Victoria. When a jury found him "not guilty by reason of insanity," the Queen was enraged: "What do you mean he's not guilty! I saw him do it!" she said.

In 1982, when the Washington jury found President Reagan's assailant "not guilty by reason of insanity," millions of Americans reacted with the same sense of rage: "Not guilty! We saw him do it on television!"

The insanity defense poses an almost unsolvable riddle. Is it a merciful tool of the courts to excuse a mentally disturbed offender from criminal responsibility? Or has it become a legal tactic to beat the system?

While it is rarely invoked, and seldom successful, the insanity plea itself is now on trail — in Congress, in courtrooms, and in living rooms across America.

Retired Supreme Court Justice Potter Stewart will join us later for commentary. But now let's move to Congress Hall where leading judges, lawyers and psychiatrists debate their disparate views on crime and insanity. The moderator is Harvard Law Professor Charles Nesson.

Prof. NESSON: Mr. Spence, you've read in the paper about Harvey Brink. Here's the story. Oscar King was a candidate for Senate in Piedmont. He'd been a prominent actor, a lot of movies, not great, kind of Westerns — John Wayne kind of character. Gotten out of the acting business, gone into politics. Harvey Brink, young fellow, twenty-five, college dropout, always had trouble keeping a grip on reality. Somehow he had gotten fascinated with Oscar King. And as time went on, Brink got fixated with the idea that, in fact, King was not the hero he thought he was, but in fact a very evil person. And one day when King was talking to a group of businessmen Harvey Brink, in the audience, pulled out a .38 and shot Oscar King — dead. Brink's parents call you. "Mr. Spence, you're the best. Our boy is in

trouble. He's been arrested and charged with murder in the first degree. The judge has already directed that he be taken to Piedmont Medical Hospital, going to see if he's competent to stand trial." Would you represent him?

Mr. SPENCE: Of course.

Prof. NESSON: Of Course. Do you have things to do right away?

Mr. SPENCE: Yes. We have some things to do, we— but the first thing that I want to do is to go see my client. I want to know who he is, I want to have a sense of him. He's a human being and he's afraid, and he's in a strange place, and he has committed a— a horrible crime, and I want to know who he is and I want to have a sense of him.

Prof. NESSON: And you talk to me, and you find out that I'm just as I described myself to you. Young kid . . .

Mr. SPENCE: Yeah . . .

Prof. NESSON: Buzzed out . . .

Mr. SPENCE: Yeah . . .

Prof. NESSON: Sitting there . . .

Mr. SPENCE: But you see, I— I want to know some more things about you than you've told me. Because you haven't told me very much about you at all; you haven't told me any of the things that have caused you—that permit me to understand you. And I want to understand you. I'd like to talk to you a good many times about a good many things. I'd like to kind of walk with you hand in hand through your life. I'd like to know where you've been how you felt. I want to know where you have hurt and where you have been smashed, and I want to know where you've been disappointed and I want to know a good many things about you as a human being. And so we'll spend a lot of time together, you and I.

Prof. NESSON: You're really going to analyze me.

Mr. SPENCE: I'm wanting not to analyze you but to have a sense of you, to kind of crawl inside your hide and to be you. Because, my friend, some time down the line I'm going to have to explain to a jury who you are, and some time down the line I'm going to have to speak for you.

Prof. NESSON: The reason why Brink is in the Piedmont Mental Hospital is he's being tested for competence. What is that? What is— what— explain to us what that's about.

Mr. SPENCE: Well, they want to know whether he can understand the nature and extent of— of his crime, of what he's committed, of what he's done, of his acts, and whether he can aid in his defense — the idea being that, somehow— you know, the law is— is a game in a way — a very serious game. And I don't mean by that to suggest anything more than the fact that there are rules in a sense of fairness. And so the law says, "We can't— we can't play our game, we just can't have any game here today if it can't be fair," because all games have to be fair or they're meaningless. So we— in order for it to be fair, this man has to be able to help his lawyer defend himself, and he has to understand some basic things before he can help his lawyer in his defense. So that's an issue of fairness.

Prof. NESSON: All right now, Mr. Spence, Harvey's parents have hired you because you're one of the great game players, and you're in this game right from the beginning, right?

Mr. SPENCE: That's right.

Prof. NESSON: Tell us whether you want the state to find your client competent or not.

Mr. SPENCE: I guess that I don't want Harvey to be found competent yet. If I could stop that I— I think I would.

Prof. NESSON: Got any ideas?

Mr. SPENCE: Yeah. If we could show the court that Harvey was incompetent, then at least we could delay the process a little. Maybe people will soften up down the line. Maybe they'll feel better in a year from now.

Prof. NESSON: So you want to stretch it out just as long as possible.

Mr. SPENCE: What I'd really like to do is to let a little time pass, so that the initial anger can also pass. And that would be nice, if we could let a little healing occur here so that justice

could do a better job.

Prof. NESSON: Now how is the state to go about determining if your client is competent?

Mr. SPENCE: They're going to hire an incompetent psychiatrist.

Prof. NESSON: And then what?

Mr. SPENCE: And then, after having paid his bill duly, they will have him testify that he meets all of the legal tests of competence; that he can aid in his own defense and understand the nature and extent of the act that he's committed. We all know how that game is going to come out before it's played, but due process requires that we play it, don't you think?

Prof. NESSON: Mr. Merola, is he being fair? He says you're going to hire a psychiatrist who's going to find the fellow competent. That's a foregone conclusion.

MARIO MEROLA, District Attorney Bronx County, New York: Well— well, it's not a foregone conclusion, but the . . .

Prof. NESSON: But close, huh?

Mr. MEROLA: But the . . . the inexactness of the science of psychiatry is such that I suspect that you can get psychiatrists on all different sides of an . . . a particular issue. I think it is the obligation of a prosecutor to get this individual off the street, to protect the interests of society, because he is a violent individual.

Prof. NESSON: Mr. Fuller, what happens to the client if he's found incompetent? What does the road look like if you can succeed as his defense lawyer in having him found incompetent to stand trial?

VINCENT FULLER, Attorney: I think it's very unlikely you'll be successful in doing that. I will say, however, that if you're able to demonstrate he's incompetent you've done your client a great service for, as Mr. Spence points out, time does heal many wounds.

Prof. NESSON: What happens to him while he's incompetent?

Mr. FULLER: Generally, he would remain incarcerated until such time as he was declared competent.

Prof. NESSON: You mean in a prison?

Mr. FULLER: Generally in a mental institution.

Prof. NESSON: In a hospital?

Mr. FULLER: Well, qualified, yes.

Prof. NESSON: And what happens to the charges against him during that time?

Mr. FULLER: They remain pending.

Prof. NESSON: So if we found somebody incompetent, that's it. Goodbye and good luck?

Mr. FULLER: The incompetent— accused is — the judge's term — he's off the street. So that part of the problem is resolved. He's not a threat to society. He may be a threat to those people who are taking care of him, but presumably they're qualified to handle that aspect of it.

Prof. NESSON: Dr. Roth, interview me, here I am, I'm Harvey Brink. I'm sitting there in Piedmont Mental. You go to the hospital, yes?

Dr. LOREN ROTH, Psychiatrist: Yes.

Prof. NESSON: You walk in?

Dr. ROTH: Yes, naturally.

Prof. NESSON: You walk in. Here I am, I'm sitting in the corner. I'm staring at the wall.

Dr. ROTH: Well, the first thing is, I don't just look at you. I should not examine the client from either perspective until I have cleared the nature of what I'm doing with the attorney so that he knows.

Prof. NESSON: Well, talk to Mr. Spence, you've got to clear— let's clear it with you.

Dr. ROTH: Well, I want to know what Mr. Spence has learned about his client.

Prof. NESSON: What are you going to tell him, Mr. Spence?

Mr. SPENCE: Oh, I don't know that I want to talk to him at this point.

Prof. NESSON: Another one of those incompetent psychiatrists, right? Well that was good, you found out a lot from him. You want to try Merola here? You want to talk to him? Go ahead, talk to Merola.

Mr. MEROLA: I'd say, "Did Harvey know Oscar?"

Dr. ROTH: Right.

Mr. MEROLA: And did he— did he aim the gun at him and hit him with it?

Dr. ROTH: I— I need to know—

Prof. NESSON: You're arguing your case already, right? You're saying if this guy's competent enough to kill somebody he's competent enough to stand trial for it.

Mr. MEROLA: I didn't quite say that. Not quite.

Prof. NESSON: Not quite.

Mr. MEROLA: Not quite. I said did he know Oscar, did he shoot at Oscar, or did he shoot at a windmill— that's what I'd like to know but I wouldn't put it that way. I'd ask if he knows Oscar, did he shoot him?

Prof. NESSON: So that's your standard of competence: If this guy— if this guy thought—

Mr. MEROLA: It's as good as any standard, let me put it that way.

Prof. NESSON: It's as good as any.

Mr. MEROLA: As good as any that I know of.

Prof. NESSON: Let me see if I've got it.

Mr. MEROLA: All right, let's go.

Prof. NESSON: Your reading of the defense strategy is, unless the guy is a drooling idiot he's going to be found competent.

Mr. MEROLA: I suspect so.

Prof. NESSON: I mean competence, in your notion, is an extremely minimal concept.

Mr. MEROLA: That is correct.

Prof. NESSON: As long as this guy knew he wasn't shooting at a windmill—

Mr. MEROLA: And he knew Oscar—

Prof. NESSON:—and he knew Oscar—

Mr. MEROLA:—and he knew he had a gun—

Prof. NESSON:—and he knew he had a gun—

Mr. MEROLA: Let's move on.

Prof. NESSON: Let's move on. Let's get on—

Mr. MEROLA: Let's get with it. Now—

Prof. NESSON: He can be— he can be crazy as a bedbug.

Mr. MEROLA: We'll worry about that later.

Prof. NESSON: Dr. Stone, do you think Harvey Brink is better off if he's found incompetent than if he's found competent and pushed through the system?

Dr. ALAN STONE, Professor of law and psychiatry, Harvard Law and Medical Schools: Let me say this: At this point, in the way psychiatry relates to the criminal justice system, competency is going to be a short stop. It may get some delay, as Mr. Spence and Mr. Fuller are talking about, but the pattern that used to be present, before the Supreme Court decided a case dealing with competence and the length of time you can confine people, has really changed the situation so that you are going to get to trial. Most patients now can be treated, even if they have serious mental illness it will be possible to treat them, restore them to competence. So that the best—the delay that there's going to be is a matter of a few months.

Prof. NESSON: When you say he's restored to competence, can you describe that a little bit for us, what do you mean by that?

Dr. STONE: Restored to competence is that he understand the charges against him, he can

cooperate with his lawyer, and he understands pretty much just those two things; what the charges are, what the legal situation is, and that he can cooperate.

Prof. NESSON: He can still be in a pretty minimal state of command of reality.

Dr. STONE: He certainly can, that's right.

Prof. NESSON: Mr. Fuller, we're now thinking about going forward with the defense, planning it. What shall the defense be? You look at the evidence, and it looks terrible for your client. I mean there's no defense on whether he did it. There were fifty businessmen that watched him.

Dr. FULLER: That's conceded.

Prof. NESSON: Conceded. The only shot you think you've got is insanity defense.

Mr. FULLER: That's clear.

Prof. NESSON: Clear. Do you just— are you free to just go ahead and plead the insanity defense or do you have to get my permission — I'm Harvey Brink?

Mr. FULLER: Over time, I would hope that I will establish a relationship with you, in which you trust me and you have confidence in me and you believe that I am competent and able to effectively represent you, and given those—

Prof. NESSON: You're telling me— you're telling me that I'm crazy.

Mr. FULLER: That's correct.

Prof. NESSON: I'm not crazy. What do you think I shot this guy for? Because I was crazy? I shot him because he was an evil person and he was about to do the world great damage, and me great damage.

Mr. FULLER: Well, that may be—

Prof. NESSON: And you're telling me that I'm crazy.

Mr. FULLER: That may be the best defense, you've just laid out. You may be suffering from such delusions, and be so detached from reality to make those assumptions. I may have a fantastic case of insanity.

Prof. NESSON: If you can persuade me to let you plead it.

Mr. FULLER: Well, if I could persuade you, yes. But again, I believe I can do that.

Prof. NESSON: You think you can.

Mr. FULLER: Yes, I'm confident I could do that.

Prof. NESSON: You figure you could manipulate your client to a point where he'll do anything you want.

Mr. FULLER: You use the terminology you want. I believe, given the record I'm dealing with, I believe that I can make a case to any accused in that situation to pursue the insanity defense. The alternative is maybe the gas chamber.

Prof. NESSON: Mr. Spence, how are you going to persuade me?

Mr. SPENCE: I'm going— we're going to talk about our need to stay out of the gas chamber, and we're going to talk together about some things that you know about. One of the things that you really know about right now is that you're afraid, you don't like where you are, you're afraid of what's going to happen to you in the future, you feel trapped. I know what that's about, I have feelings like that myself. I sometimes am afraid too, and sometimes am trapped. And we want out of this trap.

Prof. NESSON: This is— this is to get-into-bed-with-him-and-bring-him-along theory. "I know how you feel. I've been there myself."

Mr. SPENCE: Well, you know, I guess maybe you'd like somebody to represent you that knows something about how you feel.

Prof. NESSON: Mr. Fuller, here's what I'm troubled about. I mean I watch the run of these cases, and I think, well, who is the looniest defendant I can think of in my lifetime, and Charles Manson comes to mind. No insanity defense. Go down the list a little bit. The fellow that shot John Lennon. No insanity defense. And I ask myself, "Why not? Why not?"

Mr. FULLER: I ask the same question. I—

Prof. NESSON: They just didn't have a lawyer who was as persuasive as you? They were so attached to their own delusions, that they weren't prepared to say "I'm crazy,"?

Mr. FULLER: I have a threshold problem, and I don't understand how in some of those cases a court could permit a defendant to waive an insanity defense, given the facts of those cases.

Prof. NESSON: Let's find out. Mr. Giuliani, as the prosecutor, when you see a defendant who is clearly looney tunes, why isn't it your obligation to see that he pleads the defense?

RUDOLPH GIULIANI, U.S. attorney, New York: Well...

Prof. NESSON: In fact, why don't you just concede?

Mr. GIULIANI: Well, some of these cases get worked out that way. If, in fact, their psychiatrist and our psychiatrist agrees that the person is whatever standard you're using, insane, then very often you can work out a plea bargain. It's when we dispute—when we have a dispute as to whether the person is insane that the case is going to go to trial.

Prof. NESSON: Mr. Fuller, let's just take some other aspects of it. Your client is in charge of your case, right?

Mr. FULLER: No.

Prof. NESSON: You're in charge of his case.

Mr. FULLER: I'm in charge of his case. The condition of my agreeing to represent Mr. Brink is that I am in control of the li—the management of the case.

Prof. NESSON: And so, if your client says, for example, "I want to take the stand. I want to testify", and you think it's a terrible idea—

Mr. FULLER: I'll keep him off.

Prof. NESSON: And once again, it's just a matter of persuading the client.

Mr. FULLER: He can always fire me. He may find another lawyer who will acquiesce to all his irrational demands and blow his case.

Prof. NESSON: He's competent, right? We found him competent.

Mr. FULLER: He's been adjudicated competent, that's right.

Prof. NESSON: Could he fire you and defend himself?

Mr. FULLER: It's been done. I don't think that—I think it's at the court's discretion. And I think that most judges would be better advised, and justice would be better served, if he did not allow the defendant to represent himself.

Prof. NESSON: Judge Kaufman, could he fire Fuller and defend himself?

Judge IRVING KAUFMAN, U.S. Court of Appeals: He can try, but—

Prof. NESSON: Somebody else is going to persuade him, now.

Judge KAUFMAN: Nobody is going to persuade him. In the first place, I don't think the court would permit it, without a good reason being stated in chambers. And at the very worst, would insist that the lawyer remain in the case, at least to assist, or perhaps take charge of the case while someone whom he desires, participates in the case. But I don't see this ability on the part of the client to fire his lawyer.

Prof. NESSON: You're in a little bit of a bind, though, aren't you Judge? I mean, you found this fellow competent—

Judge KAUFMAN: I've been in a bind many times. I found him competent. That's right.

Prof. NESSON: And now, he wants to put on a defense that's his defense.

Judge KAUFMAN: Yeah.

Prof. NESSON: He can plead guilty if he wants.

Judge KAUFMAN: That's right.

Prof. NESSON: He can use subpoena power to call the witnesses he wants.

Judge KAUFMAN: That's right.

Prof. NESSON: He can take the stand if he wants.

Judge KAUFMAN: That's right. Now—

Prof. NESSON: And you can't stop him, can you?

Judge KAUFMAN: You must understand that we have another party involved in every piece of criminal litigation. And that's society. What would happen to the criminal justice system if a defendant could merely, glibly decide he doesn't like the way his lawyer's trying the case, and so he's out?

Prof. NESSON: What would happen?

Judge KAUFMAN: What happens? What happens? Well you'll never have a case that's tried. Back on the calendar, the calendars are far behind already. Start all over. A new lawyer wants to get prepared, doesn't he?

Prof. NESSON: No, no. Now look. I want to go ahead with this trial myself, Your Honor.

Judge KAUFMAN: All you want—

Prof. NESSON: What I want to do is, I want to subpoena a witness and take the stand myself, and look, we'll be through with this in a day. I'm prepared to proceed—

Judge KAUFMAN: You want to represent yourself.

Prof. NESSON: Yes, yes.

Judge KAUFMAN: Well—

Prof. NESSON: And I don't want Fuller, who's been trying to manipulate me for weeks. Or Spence, who's been trying to buddy me up the whole time.

Judge KAUFMAN: Well, I think—I think the judge is in there to represent society. I think you're entitled to speak for yourself, and I permit you to speak for yourself, but I'd want Fuller, and I'd want Spence, sitting alongside of him all through the balance of that trial.

Prof. NESSON: What for?

Judge KAUFMAN: And to speak if I call on him. Because it's got to be an orderly trial. And it can't be a circus.

Prof. NESSON: Are they going to be his bodyguards?

Judge KAUFMAN: They're going to be lawyers, and members of the bar.

Prof. NESSON: It still sounds to me like this client, this defendant, whom we found competent by absolutely minimal standards, is, by that reason, given a great deal of power.

Judge KAUFMAN: Yes, Professor, he has a lot of power. But we don't live by the law of the jungle in the courtroom, and there are rules that we have to abide by, rules of evidence, rules of conduct, etcetera. And we cannot permit, it would be the worst thing for our system of justice to permit the public to believe that the criminal justice system can't handle criminal cases. And the easiest thing for a defendant is to say — easiest thing, the case you pose — "I don't like my lawyer." He's on the eve of summation, let us say. "I don't like my lawyer, I think he's going to do a terrible job for me on summation. I want him fired."

Prof. NESSON: All right, now, I understand your point. You're making the point that if a defendant could simply fire his lawyer and then say, "Look, we got to start all over again, I need a new lawyer," that he could delay the trial, and on and on we'd go.

Judge KAUFMAN: That's right. And the new lawyer would want time, and justifiably so.

Prof. NESSON: But if he doesn't want to go to a new trial, if he just wants to proceed. If he wants to make a bizarre defense — orderly, mind you, he's not going to shout, he's not going to call you names. He's just going to do things that his lawyer, Mr. Fuller, thinks are crazy. In fact, Mr. Fuller knows they're crazy. This guy is crazy. That's what it's about. He can do it.

Judge KAUFMAN: The trial is not the place for us to fulfill his dreams. The trial is the place where we are going to determine his guilt or innocence, by the process of due process. And I believe, as Mr. Fuller does, that he is in control of the case. His client hired him. I assume he laid down some rules to his client before he took the retainer. And he was hired because his client liked the cut of his jib, what he said about his defense, and how he was going to try the case.

Prof. NESSON: Judge Klein, do you have a view on this? You going to let this defendant take over his own trial?

Justice JOAN DEMPSEY KLEIN, California Court of Appeal: No. Granted, he's got a constitutional right for self-representation, that—that may be some sort of weird thing in our law, but it is there. Even crazy people have some sort of a constitutional right, allegedly, to represent themselves. But, it seems to me that I have the obligation to make a determination as to whether that individual has the right to represent himself—that's—that's my discretionary determination. I would conduct a hearing; I would ascertain from this individual why this individual wants to represent himself. I would probably, in this instance, come down on the side and say, "Look, you can't do it. You cannot." I have that discretionary right, as I understand the status of the law, and would not allow him to represent himself. And I'll tell you this: that would probably be affirmed on appeal. Because everybody recognizes what's going on here. This is not crazy time in court.

Prof. NESSON: Judge Alarcon, affirmed on appeal? You recognize what's going on here, it's not crazy time in court—

Judge ARTHUR ALARCON, U.S. Court of Appeals: I'm not sure—

Prof. NESSON: We got a—we gotta push the rules a little bit here.

Judge ALARCON: I'm not as sure that they would be affirmed on appeal. It would depend on the record, it would depend on what kind of an inquiry. Judge Klein has indicated that she will hold a hearing. I think that would be critical in this situation. If that client is competent enough to stand trial and competent enough in my eyes to represent himself, I might well have to, even in the middle of the trial if no delay would occur—and Judge Kaufman is correct that if it's a device to secure delay, or to start the case over again, that would be something that I would have to consider. But if the defendant sincerely believes that the defense that he wants to assert is in his best interests, and he has the mental capacity to make a free choice to represent himself, I'd have to perhaps appoint some psychiatrist to assist me in making that decision.

Prof. NESSON: Do I hear you saying there's a different standard of competence to stand trial, and a competence to make decisions to represent yourself, for example?

Judge ALARCON: Well, let's put it this way. You've been using competence, and we've been using it all throughout this exercise. That's a legal question. I am now concerned about other issues, and that is: Is this person mentally competent to tell me that he wants to represent himself, and is he making a free choice? Which I think is a totally different question than the legal standard imposed by the law on psychiatrists as to whether he's competent to stand trial at all.

* * *

Prof. NESSON: All right, Mr. Fuller, it comes to a point where you're now getting ready to go to trial. You're planning your strategy still. You've decided that you want to go with an insanity defense, and you're now at the point where you need a psychiatrist, or psychiatrists, to examine your client with the idea in mind that maybe they'll testify on the defendant's behalf. How do you find the psychiatrist? Sitting there in your office, 'Hey, I need a psychiatrist.' How do you find a psychiatrist?

Mr. FULLER: It's a difficult job.

Prof. NESSON: You look up in the phone book?

Mr. FULLER: Hardly.

Prof. NESSON: Let me ask you this—

Mr. FULLER: You may be fortunate enough to know one.

Prof. NESSON: Are you looking for—are you looking for psychiatrists who you think will testify for the defense? Is that a class of psychiatrists?

Mr. FULLER: No, I would not look for that. I would look for a psychiatrist who, in my opinion, would give me the most honest, and most professional appraisal of the man's mental condition, his legal responsibility, if you will, at the time of the offence. I would not...

Prof. NESSON: You go down the list—you go down the list of psychiatrists and you come to the name Gaylin. Now there's a name that I've heard before, a reputable person. Maybe I'll call him. Would you think of calling him?

Mr. FULLER: I might well call him.

Prof. NESSON: You just call him on the telephone.

Mr. FULLER: No, I'd go see him. I'd—

Prof. NESSON: Why do you want to see him?

Mr. FULLER: I want to get some reaction from him. He has a role as a potential witness; I don't lose sight of that.

Prof. NESSON: Ah, you want—

Mr. FULLER: I'm unconcerned—

Prof. NESSON: You want to screen test him.

Mr. FULLER: I'm unconcerned whether he—

Prof. NESSON: You want to see how he's going to come over.

Mr. FULLER: I'm a—

Prof. NESSON: You want to size him up.

Mr. FULLER: Yes, indeed. I'm unconcerned whether he's ever testified before. I'm not looking for a professional witness. But I want somebody who can make a decent presentation to a fact-finding body.

Prof. NESSON: Somebody who's going to come up on the stand and look good, and speak well, and be persuasive.

Mr. FULLER: Be articulate, be able to communicate with the jurors to whom he's talking, not talk over their heads—

Prof. NESSON: And that's what you want to size up.

Mr. FULLER: That's correct.

Prof. NESSON: So what do you think of Gaylin here? Are you agreeable to interviewing his client?

Dr. WILLARD GAYLIN, Psychiatrist, The Hastings Center for Bioethics: No, I wouldn't waste my time doing that at all.

Prof. NESSON: You wouldn't waste your time?

Dr. GAYLIN: No, because I know I wouldn't be used. It's not that I'm so inarticulate—I may not be the best at this kind of thing—but they're not going to hire me. They're going to interview me. They're going to find a lot of ambiguities, a lot of questions, a lot of confusions, a lot of statements about what the law might be and shouldn't be, a lot of principles—and the last thing they want are principles. They want someone articulate. They want someone who can speak to a jury, and doesn't get fancy-schmancy with his language. They want someone who can keep the facts simple. I can do the first things, I can't do the last. The facts are complicated and I'm going to make them complicated.

Prof. NESSON: Say it to me in language that's not so fancy-schmancy. Why do you think he won't hire you?

Dr. GAYLIN: I won't give him a clear enough—I won't give him clear enough facts, ordered in such a way that they will be useful for his defense.

Prof. NESSON: What do you think he wants you to say?

Dr. GAYLIN: I would say, quite, that what he wants me to do is take all of these confusing facts, many of which are contradictory, and in language that's simple enough for a layman to understand, organize those facts that point out a clear arrow of consensus to innocence for his client. And I'm not prepared to do that. I'm not trained as an advocate. I will come as a witness, under oath, putting my professional reliability, integrity on the line, to present the facts, which will be very confusing, hoping that a jury then will use those facts that I present to act on their heart and mind in the way they want. That doesn't make for a very impressive—I mean, he might hire me, but I'm sure Mr. Spence wouldn't.

Mr. SPENCE: He's right.

Prof. NESSON: You really are making the proposition that any psychiatrist who testifies becomes an advocate.

Dr. GAYLIN: Yeah, not a— anyone who is invited becomes an advocate. Why should they invite someone who will not become an advocate, there are others who will become—

Prof. NESSON: That's the job— is to be an advocate.

Dr. GAYLIN: I think so, it's their job— Oh, no, I don't think it's a— I think it's a moral compromise of my position. I think the word "expert" means something, and I think the word "witness" means something. If I'm an engineer testifying about why the ceiling falls on us. I should be as an engineer testifying as a witness. I take those words seriously as a moral person. I don't think it should be, but his job is to be an advocate, and he knows that certain psychiatrists will— certain psychiatrists will enhance his advocacy case. And he's smart to get someone who is a little less ambivalent and ambiguous and confused and intellectual than I am.

Prof. NESSON: Well, let's try Dr. Roth. Doctor, clean slate, no contact with this case before. Defense lawyer calls you on the phone. Says, "Doctor, could I come see you?" Yes?

Dr. ROTH: Yes.

Prof. NESSON: You understand he's coming to look you over.

Dr. ROTH: Surely.

Prof. NESSON: To see how you—

Dr. ROTH: I understand.

Prof. NESSON: You understand. Yes. Comes to see you. Says, "Would you examine my client?"

Dr. ROTH: Yes. If I'm interested in doing this type of case, and I've heard a little bit about it and I have the time. This is not the main thing that I do, but if it was an interesting case, and I thought it could teach me something, yes I would do it.

Prof. NESSON: In other words, you're not in business, hundred percent, of being a professional witness.

Dr. ROTH: No, no. No way.

Prof. NESSON: But it is— I don't use that— I don't—

Dr. ROTH: There are very few psychiatrists like that. Very few, really.

Judge KAUFMAN: May I suggest to Professor Nesson, a question, really, that we must answer ultimately is whether this system of having antagonist psychiatrists — three, four on one side or three or four on the other side — submitted to a lay jury, for an ultimate determination as to whether the man is not guilty by reason of insanity. Therefore, what do we do about that, are we playing games here? Games of semantics? And we're asking lay people to judge these expert psychiatrists and determine which one is telling the truth. And mind you, they're only giving opinions. They're not testifying as to facts.

Dr. ROTH: I don't know why there's such a shock, that there are psychiatrists on both sides in a legal case. I thought this is America. I thought that we were living in a jurisprudential, adversary system, in which in all kinds of cases, structural steel cases, engineering cases, postal cases, expert witnesses are brought in on both sides to do the best job they can within the limits of scientific knowledge.

Judge KAUFMAN: The reason I say what I do about psychiatry is that it is such an inexact science. And that although it is utilized in so few cases, there is nothing that shocks the public as much as a verdict of insanity. Now I don't say the public is right, but I say that you're treading on different territory when you're dealing with the field of psychiatry than you are with a steel case, or anything else where there's an adversary proceeding.

Prof. NESSON: Now, Dr. Roth, you get the call from the defense attorney. He says, "Will you see the patient?" You go and you see the patient; you evaluate the patient. And it's as Dr. Gaylin says, there are ambiguities. You say to yourself, "I could see an opinion going this way; I could see an opinion going that way." Mr. Fuller wants you to testify for him.

Dr. ROTH: Yes.

Prof. NESSON: He's not going to pay you unless you testify—

Dr. ROTH: I understand that. I'm going to share with him my knowledge of the case, and he's going to tell me "Now, is this helpful? Is this not helpful? What do you believe?" And we're going to discuss. He may determine that I cannot be helpful to him. He may determine that my opinion will not be helpful, in which case he is not going to put me on as a witness.

Prof. NESSON: He's going to sit down with you and go over what your testimony might be.

Dr. ROTH: Assuming—

Prof. NESSON: "Might you testify this way, Doctor?" "Would you feel it absolutely necessary to say that, Doctor?"

Dr. ROTH: He's going to say things like this—

Prof. NESSON: And you know that he's making a judgment based on your answers as to whether he's going to hire you as a witness.

Dr. ROTH: That's true.

Prof. NESSON: So your livelihood — I mean, you may be a professor and it's only a couple of times a year—

Dr. ROTH: Right.

Prof. NESSON: But if this is a much bigger part of your business, your livelihood depends on his judgment, and therefore on your answers to his questions.

Dr. ROTH: It's implicit, understood, if you're working on a particular side, that you're going to identify with the aims and objectives of that side. That would simply be human nature.

Prof. NESSON: You're going to use your scientific ability and your ability to describe, to put forward, the most powerful case that's consistent with the defense Persuasively.

Dr. ROTH: Persuasively, if possible. I don't see anything wrong with that, by the way.

Prof. NESSON: Dr. Stone, is that— is that view of being a psychiatrist consistent with your ideas of what a professional witness is — a psychiatrist witness?

Dr. STONE: I feel very strongly that the problem is not the inexactness of the science of psychiatry. Psychiatry is an inexact science and I don't—I don't want to debate that. But the problem is that the question the law is asking doesn't have an answer that we have. I claim you can't solve this, because these people don't fit into your game. The ambiguity of what they do, the ambiguity of their motives, the ambiguity of their intentions does not fit into the comfortable rules of the courtroom.

Prof. NESSON: And so?

Dr. STONE: So you have to face the fact that this is not going to be solved by having the judge appoint a psychiatrist. Dr. Roth has to face the fact that this isn't going to be solved by having more scientific psychiatrists testify. And the people who think and are concerned about this have to face the fact that we don't live in a perfect world, the legal system isn't perfect, and this is one of the ways in which it is imperfect.

Judge KLEIN: But I would say, if I am the judge I am going to appoint myself a psychiatrist and I going to say to that psychiatrist, "Get in here and testify, because if you key people can't give us the help, who on earth is going to be able to do that?" They are behavioral scientists, they are the people who are supposedly at the cutting edge of the knowledge of human behavior. Now, if I can't rely on help from them, where am I going to get it and where is the juror going to get it?

Dr. STONE: Judge Klein, the jury should be confused. We shouldn't clear it up for them because to clear it up for them is to distort the realities, right? But I'm telling you that in the end it is closer to the truth if the jury is confused than if they think they've got the answer.

Prof. NESSON: Dr. Stone, let's just see what they're confused about here.

Prof. NESSON: They are not confused that Harvey Brink is crazy as a bedbug.

Dr. STONE: Right.

Prof. NESSON: What they are confused about is whether he is guilty—

Dr. STONE: Absolutely.

Prof. NESSON: Whatever the hell that means.

Dr. STONE: That's right.

Prof. NESSON: So isn't that where the problem lies?

Dr. STONE: If all they wanted from psychiatrists — and they would have problems with that — but if all they wanted from psychiatrists was some discussion of the exact nature of Harvey Brink's mental illness— hopefully psychiatrists are getting better at that, and— if, however, what they want to know is what is the connection between that mental illness and this crime, it's at that point that we can't give them the answer.

Prof. NESSON: Mr. Frank, you stand back from this situation—

Rep. BARNEY FRANK, Massachusetts: Further and further.

Prof. NESSON: Further and further. You see every participant in the process saying, "Hey, this is a mess. I need help somewhere else. It's not me, it's somewhere else."

Rep. FRANK: What I think we ought to do is first have a trial with a jury about whether or not Harvey Brink knowingly pulled the trigger — if he thought he was shooting a windmill, as Mr. Merola said. Then we put him somewhere else. But if we get by that, I think appropriately minimal standard of competence, competence just to stand trial not to conduct one, and he is found by the jury to have committed the crime, then a second question arises: Given that this person has pulled the trigger willingly, and shot someone and killed him, what do we do with him? And I think those are two separable questions.

Prof. NESSON: Do you think the jury can answer that one?

Rep. FRANK: No, then I would have a separate proceeding in which we decide what form of confinement — and I think there has to be a form of confinement — that the person has. I think Judge— Judge Kaufman was correct about the public being shocked at the notion that you're not guilty because you were insane, and I share the public's view on that. He was guilty. He willfully took a pistol and killed someone. People who kill other people ought, it seems to me, to be kept away from the rest of us, particularly those of us they might kill. I think that's a perfectly reasonable concern that we have.

Prof. NESSON: If I heard you right, you've just abolished the insanity defense.

Rep. FRANK: Yeah, the notion that society will extract no penalty, and society will not protect itself from you because you were insane when you pulled the trigger, doesn't have a lot of appeal to me. And the other problem we get is the notion of cure. I'm not a psychiatric expert, but that you would be crazy enough to kill someone and then within a very short period of time be perfectly safe for everyone else to associate with, is one that I'm very skeptical of.

Dr. GAYLIN: But the role and the relationship of the people are only one factor involved. We live in a society that assumes that people ought to be responsible for their actions. We also live in a society that has the minimal compassion to recognize that certain people are not responsible. They are a minority of people, but we recognize that limitation. And we've recognized that for fifteen hundred years, not just a sophisticated society like ours.

Rep. FRANK: People who have a propensity to shoot other people ought, in my judgment, to be locked up, i.e. the rest of us ought to be prevented from being shot at by them. Now, what kind of treatment they get during that period of confinement is different. Whether or not we are morally censorious of them would be different, but they certainly ought to be locked up.

Prof. NESSON: Dr. Gaylin, do you disagree that the fellow should be locked up?

Dr. GAYLIN: I personally, were a juror, would vote on the insanity defense in this case. Very tightly. I said that I would not be offended if the jury decided differently because I recognize that the most crazy are rarely found innocent, even if they plead that way. There are certain crimes that are so heinous that a juror wants them punished, and I think that for the purposes of the social order it may be well that we pay that small price of injustice in one

case, so we will send absolutely crazy people to punishment. I know that as a fact. So I'm not disturbed by that. Law deals a general social purpose.

Rep. FRANK: You say that this is a close question, and you wouldn't be offended if the person were convicted. I'd be frightened if the person were not confined. People who shoot other people, and maybe I'm being particularly parochial, but people who shoot other people who are candidates for public office make me very nervous, and I would like to see them somehow restrained.

Prof. NESSON: Governor Thompson, what should we do about this problem?

JAMES THOMPSON, Governor, Illinois: The real issues in this case is where does Harvey Brink go now? I think most of us would agree with Mr. Frank that he shouldn't go back to political meetings anymore. He's got to go to a prison, or a hospital, or a prison hospital. He ought to be seen regularly by doctors so that if he can be sucked out of his delusions, as Dr. Gaylin said, we can do that for him. He can't be allowed to wander the streets. He can't be a free person anymore. And it doesn't take all that much to reach that conclusion. In fact, this jury's been sitting in the box for an hour and a half now, waiting to get at the disposition of Harvey Brink, and they may not be as confused as all of we are. They may come to a common sense conclusion that anybody who closely tracks a political candidate is capable of buying a gun and going to meetings and finding out where they are, he's probably competent to stand trial, probably competent to conduct his own defense if he wanted to. He's probably not so crazy, but he shouldn't be allowed to run around. The jury will say that. The law ought to say that.

RUDOLPH GIULIANI, U.S. Attorney: Isn't it—the real question, what happens to him after he's been confined? Let's assume he's acquitted on grounds of insanity, he's then confined. We then have to answer the question, "Is he cured?" And this inexact science and these inappropriate legal rules get applied to a really important question, and that is, when do you put him back on the street? And I think that's what really frightens people about the insanity defense: that dangerous people, whether they're responsible or not responsible, but people who have the propensity to commit murder, are released based upon an inexact science, and very often, inappropriate rules. And that's really where the surgery has to be done. That's the most important question. The rest of it is important but somewhat theoretical.

Judge KAUFMAN: Are we over the hill on the question of intent? Nobody paid any attention to whether or not the man had any intention or whether he had a *mens rea*. He was guilty, and shove him on. Now, are we going to have another system of justice in America? Is that the idea? Is that what we're really discussing now? I haven't heard *mens rea*. I haven't heard intention mentioned here at all.

Justice KLEIN: That's my point. We have bypassed that crucial finding that the jury has to make in this case. The jury has to either find this person guilty or not guilty by reason of insanity. That's what this whole business is about. The jury has to make the determination, the ultimate determination of guilt or innocence, and we have just bypassed that already. We've got this person in a mental institution without the jury making that determination and that has to be done.

Prof. NESSON: Mr. Spence, you look awfully unhappy.

Mr. SPENCE: Oh, I'm feeling sad. I thought I could never agree with Judge Kaufman, but I find that I embrace him when he says, "How is it that we punish people, put them in prison, put them away, when we haven't determined whether or not they had any intent to kill; whether there was a *mens rea*." In this country, we don't punish people who aren't—who don't intend to kill. In this country we have, from the very beginning, demanded that people be guilty of a crime, that somehow they have committed some malicious crime against society, and people who are insane don't fit that. People who— they don't intend to do what they do.

BILL MOYERS, CBS News: But you say we haven't been talking about the alleged assassin, murderer, but we haven't even mentioned the name of the victim. You said time heals anger, but it doesn't resurrect the deceased. And there is, in some sense, accountability here, and I lament somewhat the whole argument gets cast around the issues of the person who is your client.

Mr. SPENCE: The question seems to me— it isn't a question that— of revenge that you raise, although—

Mr. MOYERS: No. No.

Mr. SPENCE: I hear that, somehow, we need to . . .

Mr. MOYERS: Accountability.

Mr. SPENCE: But how do you punish somebody who is not accountable? How do you punish someone who is insane?

Prof. NESSON: Mr. Spence, in a sense that really is the hard question, isn't it? How do you assess this idea of responsibility? What Dr. Gaylin's been suggesting, what Judge Klein has been suggesting is that there are some small, few cases in which people do act and in which he or she would truly say, "They're not responsible. They are that crazy." And one of the problems that the public has in dealing with that is, if they're that crazy they probably need treatment for a long time.

Mr. SPENCE: Yes, I agree with that.

Prof. NESSON: This question that Mr. Giuliani and others raise about, "Well, how fast is he going to get out?" seems a kind of an obscure question.

Mr. SPENCE: Yes, and— but it's an important question, and I think society has a great interest in that. But I think that there's a distinction between trying to treat people who are insane and punish people who are insane.

Mr. MOYERS: I think the issues is not punishment, Counsel. I think it is how does society cope with this lonely, estranged individual who suddenly enters into our lives by a bizarre act against a public official? How do we cope with him? That's the issue. Now, I don't— and my question is not even punishment, it's not even penalty. It is how do the rest of us cope with what we might be, what our children might be, or what we might be called upon as officials to do?

Mr. SPENCE: Yes, but you see, the important thing is that we do this in a way that we can live with, because tomorrow, you know, it may be you, or it may be your child or your relative or your close friend, so that what we do— and we tend, you know, always to see these things as separated from us. It's that man out there who we have to protect ourselves against. But tomorrow, suddenly, you are saying to an attorney or a court, "Please understand that this is little Johnnie, he's my son, I love him." Or, "This is me. I was out of my mind. Can't somebody please understand me?" And so when we deal with the rights of those who are somehow strangers out there, we also are dealing away our own rights and the rights of our loved ones.

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Mr. FRIENDLY: Justice Stewart, we heard Judge Kaufman and attorney Gerry Spence refer to a legal term called *mens rea*. What does that mean?

Justice STEWART: Well, it literally means— it's a Latin term and it means "a guilty mind," but that generally has been meant to stand for a specific intent, and it's a tradition of Anglo-American law that nobody can be convicted of a criminal offense unless he's had deliberate intent to commit that offense.

Mr. FRIENDLY: What is the legal basis for the insanity defense?

Justice STEWART: Well, I think it probably all goes back to a fellow by the name of McNaughton, who attempted to assassinate Robert Peel who was—

Mr. FRIENDLY: Prime Minister—

Justice STEWART: —Prime Minister of England, under Queen Victoria in her early—the early part of her reign. But— but he didn't kill Robert Peel; he was— he actually committed— killed a body guard or an agent—

Mr. FRIENDLY: His assistant.

Justice STEWART: —his assistant. And he interposed, or his counsel interposed, the defense of insanity, and that went all the way to the House of Lords, the Privy Council, as it's

called in England. And they came out with the rule—in McNaughton's case, the so-called McNaughton Rules—which define insanity as not knowing the nature and quality of your act or not knowing the difference between right and wrong, and that was the definition of insanity, until fairly recently in our country.

Mr. FRIENDLY: And what is it now in our country?

Justice STEWART: Well, there— there are fifty different answers to that, because there are fifty different states, and because the administration of the criminal law has been, under our system, has been generally conferred upon the states.

Mr. FRIENDLY: Is the insanity defense a constitutional issue? Could it ever be?

Justice STEWART: No, it hasn't been so far. And the insanity was not ever constitutionalized. In fact, in the case of Powell against Texas, the Court rejected, in that case, the idea that the Constitution somehow embraced the defense of insanity. Or the definition of insanity.

Mr. FRIENDLY: The insanity defense emerges from not the Constitution—

Justice STEWART: But from common law, which is, with us, in our federal system and is generally administered by states.

Mr. FRIENDLY: That you, Justice Stewart. The way in which a society treats the criminally insane expresses some of its innermost assumptions about human nature. As one of the participants in the seminar, Dr. Alan Stone, observed, "The marriage between law and psychiatry is like many other marriages in which one hears it said, 'I don't know what to do. I can't live with her and I can't live without her.'"

Like it or not, that marriage of convenience and necessity is how our system works. The insanity defense remains one of the most hotly-debated legal issue of our time.

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