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THE
CONSTITUTION
THAT DELICATE BALANCE

Crime and Punishments

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Crime and Punishments

FRED W. FRIENDLY, Columbia University School of Journalism *[Voice-over]*: From the birthplace of the Constitution . . . Who goes to prison? For how long? And under what conditions?

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Professor CHARLES NESSON, Harvard Law School: What's the mistake, Mr. Ward?

BENJAMIN WARD, New York City Police Commissioner: Well, he would think that he's going to let out petty larcenies and pickpockets and, in fact, he's going to be letting out people that have some very serious crime labels on their case.

Judge ARTHUR ALARCON, U.S. Court of Appeals: So he's faced with a jail that's inadequate for his population, and I'm faced with a Constitution that requires me to interpret it to make sure that people are treated decently and humanely, regardless of what they are charged with. And so we both have a problem.

Rep. BARNEY FRANK, Massachusetts: In terms of what kind of confinements there should be, you guys are making me nervous by letting that nurse run around after she shot that guy. How that became a non-violent crime, I missed it. At the very least, I hope—I hope she would have to give a kind of reverse Miranda warning, and if you're going to let her out, please say to people, "Hi, I'm so-and-so, and if we hit it off, I might shoot you." People are entitled to be warned.

JAMES THOMPSON, Governor, Illinois: Violent criminals belong in prison. That's where they belong.

THOMAS STODDARD, New York Civil Liberties Union: Maybe we should think of alternatives to incarceration, because incarceration doesn't work.

* * *

Mr. FRIENDLY: What was the foremost in the framers' minds when they drew up the Eighth Amendment's prohibition against "cruel and unusual" punishment were the physical tortures common in England at the time. They wanted to make sure those barbaric practices were never revived in the United States.

What "cruel and unusual" punishment means in the world of prisons today is, to a large extent, a reflection of the times. The first American penitentiary was opened here, alongside Independence Square, in 1790, by a group of Philadelphia Quakers who believed that a harsh prison sentence could reform criminals.

Today, crowded cellblocks testify to our fear of crime as legislators, prosecutors and judges crack down and send more criminals away for longer stretches.

We incarcerate people to get criminals off the street, to punish, and perhaps to reform them. But what will it take to reform a criminal justice system that has left the courts clogged, the prisons jammed and our streets unsafe?

Retired Supreme Court Justice Potter Stewart will join us later for analysis. Now, let's move to Congress Hall where experts on criminal justice confront the crisis of crime and punishment. Our moderator is Harvard Law Professor Charles Nesson.

Professor CHARLES NESSON, Harvard Law School: Mr. Ward, you run a pre-trial detention system in the state of Piedmont. Tell us what pre-trial detention is.

BENJAMIN WARD, NYC Police Commissioner: It's a facility for holding people who have been accused of crimes but have not yet had their cases adjudicated, so then, under our system, they're innocent until—presumed innocent until proven guilty.

Prof. NESSON: Haven't been tried yet?

Comm. WARD: Haven't been tried.

Prof. NESSON: These are people on bail?

— 1 —

CASE STUDY

The inmate population of the state of Piedmont increased nearly 15 percent last year. Despite the completion of a new state correctional center, Piedmont admitted 1500 more inmates than it discharged, and 800 convicts, for whom there is no more prison space, are being held in seven of Piedmont's overcrowded county jails: some inmates are confined in boiler rooms while others sleep in a bathroom, and the infirmary serves as a general housing unit. Under the limits set by a federal court order, the Piedmont Corrections Department may be forced to release 100 inmates early.

Among the recent cases processed through the Piedmont criminal justice system are:

1. A 44-year-old professional car thief who has a previous conviction for possession of a sawed-off shotgun;
2. A 60-year-old man and his 25-year-old son, neither of whom has a prior record, charged with Medicaid fraud involving several Piedmont nursing homes they jointly own and operate;
3. A 25-year-old man with a minor criminal record, indicted for attempted armed robbery of a bank;
4. A 35-year-old burglar caught emerging from the basement window of a Piedmont camera store with several thousand dollars worth of merchandise;
5. A 37-year-old nurse with no previous record who, after an argument, shot her longtime lover with a .38-caliber revolver four times, charged with manslaughter in the first degree; and
6. A 28-year-old murderer with a lengthy violent-offender history, already serving a life sentence, recently indicted for bludgeoning a prison guard to death.

Comm. WARD: Have not— people for whom bail has been set but they have not made the bail, or the judge, in his discretion, has remanded them without bail.

Prof. NESSON: Tell me what a facility of this kind you run looks like.

Comm. WARD: Well, it looks like a prison. Except it has a different name. It's called a jail.

Prof. NESSON: It's called a jail and not a prison?

Comm. WARD: That's right.

Prof. NESSON: But otherwise, it's a place with bars—

Comm. WARD: That's right.

Prof. NESSON: How long might I expect to be in your hotel?

Comm. WARD: Well, in Piedmont, the quick and speedy justice state in the Northeast, it might take two years, and in some cases three years, if it's in some towns.

Prof. NESSON: That doesn't sound like a short stay to me, Mr. Ward.

Comm. WARD: It should be much shorter than that. If you looked at the average stay, the average stays are short because the case is turned over rapidly, but the people who are charged with serious crimes will generally have very high bails or then no bails, and then stay very long periods of time in pre-trial status.

Prof. NESSON: Tell me what life is like for me in your hotel.

Comm. WARD: Very boring, very little to do.

Prof. NESSON: What's the room look like that I live in?

Comm. WARD: About forty-five square feet.

Prof. NESSON: Forty-five square feet?

Comm. WARD: Yeah, about nine by five.

Prof. NESSON: Nine by five.

Comm. WARD: About seven feet high. Open bar— steel bars on the front.

Prof. NESSON: You don't seem to have any control over who comes into your hotel.

Comm. WARD: Well, that's a popular theory, but in fact, I have more control than some correctional experts believe. There are a lot of interactions along the way, with District Attorneys, with courts, with defense attorneys, and you can control your intake by seeing that the criminal justice system works more efficiently, and if it goes faster, literally, as you reduce your number of jail man-days, you really are controlling the population, to a large degree.

Prof. NESSON: Let me see if I understand what you're saying. You're saying. You're saying, you have more control than people think you do.

Comm. WARD: That's right.

Prof. NESSON: You have contact.

Comm. WARD: That's right.

Prof. NESSON: One of the guests at your hotel checks out—

Comm. WARD: Yes—

Prof. NESSON: —when he's processed at trial, right?

Comm. WARD: Possibly. Sometimes, it takes quite a while for them to check out.

Prof. NESSON: And after he goes through your system, if he gets convicted, he goes to Mr. Estelle's system, huh?

W. J. ESTELLE, Jr., Former Director, Texas Dept. of Corrections: That's correct.

Prof. NESSON: Mr. Estelle. You run the prison system in Piedmont.

Mr. ESTELLE: Yes.

Prof. NESSON: Are you his boss?

Mr. ESTELLE: Negative.

Prof. NESSON: Is he your boss?

Mr. ESTELLE: No way.

Prof. NESSON: You two have just independent hotel systems.

Mr. ESTELLE: That's correct.

Prof. NESSON: He's got the pre-trial hotel system; you've got the post-trial hotel system?

Mr. ESTELLE: Not even in competition with each other.

Prof. NESSON: You just look and see what his population looks like, and you know that they're going to come along to you sooner or later.

Mr. ESTELLE: Many of them.

Prof. NESSON: Do you control who checks into your hotel?

Mr. ESTELLE: No, sir.

Prof. NESSON: Do you control who goes out?

Mr. ESTELLE: Not in Piedmont.

Prof. NESSON: So you just have to provide facilities for the guests who arrive.

Mr. ESTELLE: Right. We're a middleman for the system.

Prof. NESSON: Tell me what life is like in your system—I got forty-five feet out of him.

Mr. ESTELLE: That's about all you're going to get, is forty-five square feet, in our system also, albeit there are some— much— many more opportunities to get out of that cell. There are a lot of programs going on. There's work still available. We have, in spite of the fact we're the only growth industry left in the state of Piedmont, why, we can provide a pretty— a fairly full employment program.

Prof. NESSON: How fast are you growing, Mr. Estelle?

Mr. ESTELLE: At the rate of about twelve percent per annum.

Prof. NESSON: It sounds like you need a lot more facilities.

Mr. ESTELLE: That's one alternative.

Prof. NESSON: Sounds like you need a lot more facilities, Mr. Ward.

Comm. WARD: I probably don't need as much as I have. I need a more efficient prosecutorial and court system. And then I probably would have excess space. At \$84.00 a day. So there seems to be some incentive to get more efficient, but I have not been that persuasive in convincing the other people that they ought to get more efficient.

Prof. NESSON: What do you mean, eighty-four dollars a day?

Comm. WARD: Well, that's what they pay at this hotel that I run. That's what you pay for the people that stay there.

Prof. NESSON: Mr. Carlson, the establishment that you run — do you have any control over who comes to you?

NORMAN CARLSON, Director, Federal Bureau of Prisons: None at all

Prof. NESSON: Any control over the outflow?

Mr. CARLSON: Very limited.

Prof. NESSON: Tell us what life looks like in your system?

Mr. CARLSON: It varies from institution to institution. It's a very complex system of 42 separate institutions. Some are very new, quite modern and quite efficient. Others are very old, very overcrowded and provide very limited opportunities for inmates to spend their time constructively.

Prof. NESSON: Mr. Hammock, you run the parole system in Piedmont.

EDWARD HAMMOCK, New York State Parole Board: It's a job.

Prof. NESSON: You control the spigot on the way out, yes?

Mr. HAMMOCK: It depends.

Prof. NESSON: Depends on what?

Mr. HAMMOCK: Well, Piedmont could be like some other jurisdictions. Could be like others. Depending upon the jurisdiction, parole has a lot of control, little control, or next to

no control.

Prof. NESSON: Is Mr. Estelle your boss?

Mr. HAMMOCK: No.

Prof. NESSON: Mr. Carlson?

Mr. HAMMOCK: No.

Prof. NESSON: Mr. Ward?

Mr. HAMMOCK: No.

Prof. NESSON: You're an independent person?

Mr. HAMMOCK: Independent of them.

Prof. NESSON: Independent of them.

Mr. HAMMOCK: Yes.

Prof. NESSON: And they are independent of you?

Mr. HAMMOCK: Yes.

Prof. NESSON: So we have this system that will take somebody from entry-level at Mr. Ward, all the way through to parole at your level, and each of you runs it independent. I mean, you may talk, but nobody is in charge of anybody else. Governor Thompson, are you in charge of all these people?

JAMES THOMPSON, Governor, Illinois: Mostly.

Prof. NESSON: Can you tell them what to do?

Gov. THOMPSON: More precisely, the Legislature and I can do much to affect the work of all these gentlemen, depending on the resources that we give people who run jails. Or—
Prof. NESSON: Lots of power?

Gov. THOMPSON: Lot's of power.

Prof. NESSON: If there are problems in the system, it seems like the buck ought to stop with you.

Gov. THOMPSON: It does.

Prof. NESSON: All right, well, here's what Piedmont looks like. Piedmont is a chock-a-block full with people. Mr. Ward, your pre-trial detention system is bursting at the seams. And, in fact, you are under a federal court order. Judge Alarcon, over here, has imposed an order on you as a result of a lawsuit that the American Civil Liberties Union, Mr. Stoddard, has brought alleging that the conditions in your jail are cruel and unusual. And the order says, basically, when you hit a certain limit, you've got to start releasing people.

Comm. WARD: There are such orders, and I in fact have such an order, but it's a mistake.

Prof. NESSON: Yeah, but you already lost that case.

Comm. WARD: Sure. The judge made a mistake. But the judge is a lawyer and he promised to practice law, which says he's still practicing, and he made a mistake during this practice session.

Prof. NESSON: What's the mistake, Mr. Ward?

Comm. WARD: Well, in my case, he would probably say, "Let those people out with the lowest bails for the longest period of time." And then I would come forward with a computer list of about 400 to 500 names on it, of people with \$500 bails or less, and there would probably be about two attempted murders in there, maybe about 24 robbers, about 60 or 70 burglars. It would scare him when I showed him the rapists and the sodomies that some judge, in his wisdom, had put very low bails on.

Prof. NESSON: All right, let's play it out, Mr. Ward.

Comm. WARD: And he would think that he's going to let out petty larcenies and pickpockets and, in fact, he's going to be letting out people that have some very serious crime labels on their case.

Prof. NESSON: Let's play it out. It's Friday afternoon. You're close to that limit.

Comm. WARD: Yes.

Prof. NESSON: Another 75 people, you're going to be over that limit. It's coming up to the weekend.

Comm. WARD: Yes.

Prof. NESSON: You're planning to go fishing upstate for the weekend. What do you do?
Comm. WARD: I would look back at my historical records and analyze what my increase is from Friday at the close of the courts, to Monday at the opening of the courts, and then I would let out enough people to make sure that I would not go over the judge's order. Friday night, all day Saturday, all day Sunday, right up to Monday morning, and then I'd go fishing. Because they'd be out. I couldn't stay there 24 hours a day watching them come in and go to make sure that I don't run over, so I would make the adjustment and let them out that Friday night. After I called the federal judge and the press.

Prof. NESSON: Ooh, wait. Wait. Let's take those calls one at a time. You're going to call him up?

Comm. WARD: Oh, sure.

Prof. NESSON: What do you say to him?

Comm. WARD: I just—

Prof. NESSON: Hello, is this Judge Alarcon? Is he there?

Comm. WARD: Judge Alarcon, we're about to implement the Alarcon release order. We're going to have a press conference. Would you like to come?

Prof. NESSON: What do you say, Judge Alarcon? You're running this order. Are you going to take his call?

Judge ARTHUR ALARCON, U.S. Court of Appeals: Yeah. I would say I'm delighted that you're cooperating, that you're providing due process of law, that you're no longer housing people inhumanely and I hope that you tell the media that's the reason that I issued the order.

Prof. NESSON: You've obviously got something in mind here, Mr. Ward. I mean, you're holding this press conference for a reason, right? You're calling it "the Alarcon order" for a reason, right? Tell us.

Comm. WARD: Well that's what the papers have been calling it all along. "the Judge Alarcon Release Order."

Prof. NESSON: I have feeling that that's because of what you've been saying.

Comm. WARD: Well, he's the one who signed the order, and he set the formula. I didn't set it. In fact, I disputed all the findings and facts that he made.

Prof. NESSON: And that's what you want the press to know, isn't it? "I didn't set this order. This isn't my order. This is Judge Alarcon's order. These people are getting out because Judge Alarcon, that's A-L-A-R-C-O-N, is letting them out."

Comm. WARD: The judge with lifetime tenure—

Judge ALARCON: Given lifetime tenure to insure that you carry out due process of law. So that I'm not afraid to issue such an order.

Prof. NESSON: Judge, you seem very pleased that he's obeying your order and it's all a plus, but he's letting out some very tough people.

Judge ALARCON: Well, that's a problem that I'm sure he would like to visit upon the court system. The problem is not created by him or me. The problem's created by the Governor and the local authorities who are supposed to provide sufficient jail cells and humane conditions, and they haven't done it. So he's faced with a jail that's inadequate for his population, and I'm faced with a Constitution that requires me to interpret it to make sure that people are treated decently and humanely, regardless of what they are charged with. So we both have a problem. It's not of our doing. He has to do his job, I have to do my job.
Prof. NESSON: Mr. Ward, do you expect the consequences of this press conference you're going to hold to be?

Comm. WARD: It'd be informational.

Prof. NESSON: Informational for whom?

Comm. WARD: For the public. To let the public know that Judge Alarcon has been co-administering this system for thirteen years; has closed up one of the jails that he found to be inadequate. Several Supreme Court decisions have come down and said to Judge Alarcon that you should not get involved in the day-to-day activities of the jail, but Judge Alarcon reads those decisions and distinguishes them and continues to think that he is above the system.

Prof. NESSON: Do you think that Judge Torres is going to read about this to the press?

Comm. WARD: Sure.

Prof. NESSON: Is he going to get the message?

Comm. WARD: Yes.

Prof. NESSON: What's the message?

Comm. WARD: Do not use the jails as part of your dispositional process—and administer justice, and do not get yourself involved inventing a kind of shock probation in which, very frequently, the judge will set a bail he knows that the defendant cannot make, but that he'll give this person a taste of jail for three or four—five days until the case comes back before him, and then the case will be dismissed or some other kind of disposition that does not involve incarceration will be dispensed.

Prof. NESSON: Judge Torres, is he talking about you?

Justice EDWIN TORRES, New York State Supreme Court: Doesn't sound like me. Apropos of this outstanding order of Judge Alarcon, that is, at least by my lights, when it came down, it was an infernal order.

Prof. NESSON: An infernal order.

Justice TORRES: Yes. And it's been a debacle since. Because I have to wait every single morning, okay, for the arrival of the defendants who appear before me and, invariably, there's a laundry list of problems and hassles that arise, and apropos of the expedition of justice in our system, one cannot sentence a prisoner without a probation report. So now starts the comic opera: The probation officer is taken ill. Or the probation officer is on vacation, or the typists are not available or on strike. Or the prisoner wants to get married. Or the prisoner has been assaulted at Ryker's Island, and/or the prisoner has assaulted his lawyer. You see? So we go from there. So this, in turn, necessitates delay. Okay? So—

Prof. NESSON: Due process is fine—

Justice TORRES:—the wheels may grind— may grind, hopefully—

Prof. NESSON:—but it does take time.

Justice TORRES:—inexorably, but slowly.

Prof. NESSON: Slowly, yes. Judge Pincham, do you get Mr. Ward's message? You pick up your newspaper, there it is. Saturday morning. The Alarcon order. Let all these attempted murderers, rapists— what else have we got, Mr. Ward?

Comm. WARD: Burglars.

Prof. NESSON: Burglars. Four—three hundred people— out. And any more that you send in, that means somebody else is coming out. That's the message he wanted you to get. Does that affect how you do business?

Judge R. EUGENE PINCHAM, Circuit Court, Cook County, Illinois: No.

Prof. NESSON: You won't deal with bail just a little bit more carefully?

Judge PINCHAM: I deal with bail predicated on the Constitution. That is, a criminally accused defendant is entitled to reasonable bail. I endeavor to the best of my ability to comply with that mandate and set reasonable bail.

Prof. NESSON: And it doesn't make any difference to you whatsoever if the jail system is right up full?

Judge PINCHAM: No.

Prof. NESSON: In fact, you don't even know whether it's full or not. You don't care whether it's full or not.

Judge PINCHAM: I am not going to observe his press conference, nor will I read his press releases.

Prof. NESSON: Or take his telephone call?

Judge PINCHAM: Oh. I'd be courteous enough to answer the call. And if he called me and gave me the information that he indicated he would give, I would advise him that I'm reputed to be the most liberal judge in Piedmont in setting bail, and if I'm assured that conditions of our statutes and Constitution have been met, I am going to rule in favor of admitting the defendant to bail prior to trial.

Prof. NESSON: I see. What you're saying is, "Hey, nobody is more liberal than I am, so I'm certainly not the problem."

Judge PINCHAM: Well, I can't say that. I can say that he does not have any of my defendants to appear before me who ought to be released.

Prof. NESSON: Mr. Ward, you speak from some experience. What happens the next week?

Comm. WARD: Oh, the population drops off radically in my jail because when all the judges and district attorneys read what has happened, the bail policies change.

Prof. NESSON: So Judge Alarcon's offer turns out to be a pretty good thing for you. I mean, you get to hold press conference. You get to— get to change policy, make the system respond. Your population drops.

Comm. WARD: Never said it was a bad order except in the simplicity of the release mechanism.

Prof. NESSON: I see. You don't mind a limit set on your capacity.

Comm. WARD: Oh, no.

Prof. NESSON: You don't mind an order you've got to single-cell these people.

Comm. WARD: Oh, no.

Prof. NESSON: You don't mind an order that says you have to run a pretty decent facility.

Comm. WARD: Not at all. Because chief executives listen better to federal judges, particularly since they're always named as a defendant in the case, as well as I am.

Prof. NESSON: Why? Why didn't you get that order from Governor Thompson here? I mean, why did it have to be Judge Alarcon, federal judge? Why? What's the matter with Thompson here?

Gov. THOMPSON: Wait a second. What's Alarcon doing in this business anyway? What basis did he have to issue that order? Just because there are a couple of guys in the cell rather than one? Just because it's forty-five square feet? First of all, I thought I heard somebody say he got in here because that's cruel and unusual punishment. If I've listened correctly here, the prison population in the United States is at an all-time high; it isn't unusual at all to have crowded jail cells. So that—

Prof. NESSON: Just regular, ordinary circumstances—

Gov. THOMPSON: Regular, ordinary business. That part of it doesn't bother me.

Prof. NESSON: There's hardly a prisoner that has more than forty-five feet!

Gov. THOMPSON: Sure. Now, is it cruel? When I'm out visiting with people on the outside, law-abiding, tax-paying citizens who are being asked to shell out for these eighty-four dollars a day cells which is more than my taxpayers pay when they check into a hotel on vacation, so they tend to get the notion that, sometimes, prisons are country club places when they hear the prices. But they wouldn't want to live there.

Prof. NESSON: Here you have your Commissioner here, who actually welcomes this order by Judge Alarcon. He'd like to fix it up a little bit. He'd like to make some judgments about who gets released. But he actually welcomes somebody in authority telling him he's got to run a decent place. I mean, I don't think he likes running an over-crowded, terrible institution.

Gov. THOMPSON: Well—

Prof. NESSON: And the question I put to you is not, "Why should Alarcon be in it?" I mean, you say, "Yeah, maybe he's over-jumping the gun on 'cruel and unusual'..." punishment. My question is, why didn't you tell him to do it?

Gov. THOMPSON: Maybe we had a difference of opinion about the jail and what he needed. Sure, it's easier to run a place that's got one prisoner in a cell rather than two. There are not as many problems—

Prof. NESSON: You're really telling me you think the prison system is okay? The jail system is okay?

Gov. THOMPSON: Some are, some aren't. But legislators and governors and mayors should clean that up, not federal judges. Those are issues that the people elected me and the General Assembly to decide. How much money to prisons, how much money to children, how much money to seniors, and how much money to poor people. What's he doing in here?

Prof. NESSON: Mr. Merola, you have your hand on the intake part of the system.

MARIO MEROLA, District Attorney, Bronx County, New York: That's correct.

Prof. NESSON: You make a judgment, "Am I going to indict, am I going to seek bail, what sentence am I going to ask for?" Let's look at some cases, all right?

Mr. MEROLA: Gladly.

Prof. NESSON: Prostitutes walking up and down the street in front of some of the nicest buildings in town. A lot of citizens complain, got to do something about it. And here they come in, a busload.

Mr. MEROLA: Professor, we're not talking about that. We're talking about robbers, rapists and murderers.

Prof. NESSON: What do you do with prostitutes?

Mr. MEROLA: Prostitutes don't go to jail. Not in Piedmont.

Prof. NESSON: Not in Piedmont?

Mr. MEROLA: Not in Piedmont.

Prof. NESSON: No incarceration for prostitutes?

Mr. MEROLA: Absolutely not.

Prof. NESSON: Car thief.

Mr. MEROLA: Car thieves, by and large, in Piedmont do not go to jail. Do not go to jail except that they are involved in what is known as a chop shop, a larger operation involving large sums of grand larceny.

Prof. NESSON: In other words, if I'm a really bad car thief—

Mr. MEROLA: Absolutely.

Prof. NESSON:—maybe you'll do something?

Mr. MEROLA: That's correct.

Prof. NESSON: But if I'm just your regular, ordinary working car thief—

Mr. MEROLA: I have not made that decision. These constraints are because of the system. If we don't deal with the system, if we don't make the system work, the system will collapse, out of its own sheer weight.

Prof. NESSON: Don't get me wrong. I don't mean to put you on the defensive with this.

Mr. MEROLA: I am not on the defensive.

Prof. NESSON: What you're saying is, you know damn well he hasn't got the space—

Mr. MEROLA: I know damn well.

Prof. NESSON:—to take all your clients.

Mr. MEROLA: And he lets me know about it, too.

Prof. NESSON: That's what you're telling him—

Mr. MEROLA: And the executive branch of government lets me know about it, also.

Prof. NESSON: Does Torres know that?

Mr. MEROLA: He knows that—he's not told it officially because that would really interfere with the alleged independence of the judiciary. But that's utter nonsense. That's utter nonsense because the Mayor delivers the message, the Governor delivers the message. If Eddie don't want to get the message, that's his prerogative. But I assume he gets it.

Prof. NESSON: Sixty-year-old guy. He's made a lot of money ripping off people in nursing homes. In it with his son. Fraud. How about him?

Mr. MEROLA: I think that this individual who has benefited by his wrongdoing, that he should make some contribution to society. I think he and his son should provide some sort of community service in addition to a very nice, stiff fine that he could really feel. In other words, we really ought to take some of the profit out of his activities.

Prof. NESSON: A nurse, thirty-five years old, in love with a doctor who's cheating on her. She shoots him with a .38.

Mr. MEROLA: I would suspect that that person obviously, vis-a-vis an individual who's a day-in-day-out mugger, or a day-in-day-out person who sodomizes people, or a person who kills people, that that person ought to get a little bit, and some kind of community service.

Prof. NESSON: But you don't really want to take up too much of Mr. Ward's and Mr. Estelle's—

Mr. MEROLA: No! I want to take up all their spaces. You're not reading me right.

Prof. NESSON: No, I understand.

Mr. MEROLA: I want to utilize all their spaces—

Prof. NESSON: But not with her?

Mr. MEROLA:—but they're not giving me much space.

Prof. NESSON: Not with her?

Mr. MEROLA: Well, it all depends. You know if—

Prof. NESSON: Well, if they've got room, sure. But if they haven't got room—

Mr. MEROLA:—if there's room she goes in. If there's room, she goes in.

Prof. NESSON: If I put you in—and this is what I'm trying to do, obviously—if I put you in the position of having to make comparative judgments, as opposed—

Mr. MEROLA: I don't like the idea of making—

Prof. NESSON:—as opposed to simply saying, "Are they—are they bad?" then your scale sounds to me like it's violence right at the top.

Mr. MEROLA: Violence as opposed to property crimes, and certain distinctions in both areas. That is absolutely correct. I don't like the idea that I have to make those distinctions. I'm certainly not mandated by law to do so, but we have a job to carry out, the penal law, to prosecute everybody and to convict them and, theoretically, to send them to jail. Our system doesn't permit us that kind of luxury. We don't have that luxury. Nor do we have—

Prof. NESSON: Mr. Burke?

Mr. MEROLA:—the resources or the facility, nor do I know that the public wants it.

Prof. NESSON: Mr. Burke, you're in the television business. You've got a prosecutor here in Piedmont who is making a lot of judgments about the categories of people he'll put away, and those he won't. Tell me, what kind of pressures is your business going to put on him?

DAVID W. BURKE, Vice President, ABC News: Our business is going to put less pressure on him than it will upon the mayor of the city in which he works or on the governor. That's where we'll bring the pressure. If the policy is wrong, and we'll go after the policy.

Prof. NESSON: What's the policy that you think is wrong?

Mr. BURKE: The policy that's wrong is that we do have certain constitutional rights we're supposed to give to people, regardless of the kinds of crimes they commit, when we incarcerate them. And yet, people in public life won't stand up to the costs involved.

Prof. NESSON: It's a question of money?

Mr. BURKE: It's a question of money and it's a question of attracting the ire of your constituents when you're going to build a prison in their neighborhood. He won't do it. That's why we need a federal judge.

Prof. NESSON: Governor Thompson over here says that his constituency thinks that any place you spend 84 bucks a day on must be like the Ramada Inn. And yet, when Ben Ward and Mr. Estelle and Mr. Carlson describe their Ramada Inns, they don't sound like any eighty-four-dollar-a-day palace. It sounds like your business hasn't been doing its job, Mr. Burke, how come? How come his constituency doesn't understand that that \$84 is buying an incredibly horrible place?

Mr. BURKE: I don't think that's what the constituency's problem is. I think the constituents of the Governor want law and order, and they want people thrown in jail and throw away the key, and they won't build the institutions to do that. It's irrational and it's paradoxical and it's purely political that no one in public life is going to go around and come into your neighborhood or your county or your area of the state and say, "I'm going to put a prison here." Or worse, "I'm going to put a prison for the criminally insane here." It's impossible.

Prof. NESSON: Mr. Stoddard?

THOMAS STODDARD, New York Civil Liberties Union: Yes. As a journalist friend here has just identified what we view as the principle problem. People are afraid of crime, understandably. But many politicians do have the courage to say, "The answer is not longer and longer sentences." The answer is probably something closer to Mr. Merola's suggestion, that maybe we shouldn't put everybody in jail. Maybe we should think of alternatives to incarceration, because incarceration doesn't work; it simply creates a larger and larger process. A larger and larger crisis that at some point will explode.

Gov. THOMPSON: Violent criminals belong in prison. That's where they belong. They don't belong on probation, they don't belong in work release, they don't belong on community service. Violent criminals—

Prof. NESSON: Are you prepared to accept the other side of that proposition?

Gov. THOMPSON: What's that?

Prof. NESSON: That nonviolent criminals do not belong in prison?

Gov. THOMPSON: Oh, sure. To a great degree. But don't kid yourself. All those alternatives are expensive. Sometimes, they're just as expensive as the prison. It costs just about as much to supervise those folks who are living on the fringes of a free society as it does to supervise them in a maximum security or minimum security institution.

Mr. STODDARD: But, Governor, it costs over \$20,000 a year in this country to keep someone in prison.

Gov. THOMPSON: Right.

Mr. STODDARD: Governor Thompson has just given us reasons for not exploring alternatives to the present system, which isn't working.

Gov. THOMPSON: No, no, no. No, I like the alternatives because most nonviolent offenders belong there. I just want you to understand it may cost.

Mr. STODDARD: That it may be expensive, okay.

Gov. THOMPSON: I mean, the taxpayer's pocket is not bottomless.

Prof. NESSON: Judge Pincham, I know that you're a city judge. But let me just move you for a minute, all right?

Judge PINCHAM: Don't take me too far, now.

Prof. NESSON: I'll take you to upstate Piedmont. The biggest crime that's happened in this county of Piedmont this whole year is that we caught this car thief. This is big time stuff for Piedmont. The newspaper's been going bananas about it. The sheriff's had a wonderful time. And now it comes up to you for sentencing.

Judge PINCHAM: Well, you have really shifted the discussion from pre-trial detention to the punishment aspect. I am adamantly, violently, opposed to the policy of discrimination by pre-trial detention. It is one of the most despicable areas in the criminal justice system, simply—

Prof. NESSON: Discrimination in what sense?

Judge PINCHAM: Because the poor are in jail, pre-trial, and the affluent are on bond, pre-trial, and it's my understanding of the law that money should not be a factor to determine when a person should or should not be confined; that is, money alone. But pre-trial detention is a discriminating area in the criminal justice system because those who are affluent make bond; those who are not affluent don't. Taking me upstate, this celebrated car thief case, I don't suppose you could remove my policy—I could remove my background from the case. To me, it does not constitute as serious a threat to the community as something else would.

Prof. NESSON: What about that nursing home case?

Judge PINCHAM: That case, I suppose, upstate, I would perhaps be more inclined to incarcerate for a period of time.

Prof. NESSON: He commits a rich person's kind of a crime.

Judge PINCHAM: All right.

Prof. NESSON: A white-collar kind of crime.

Judge PINCHAM: Yes?

Prof. NESSON: What I hear all these people saying is, "Jails aren't for those kind of people. Prisons aren't for those kind of people. We'll give them nice, special community service. The poor people that commit poor people's crimes like 'Stick 'em up, give me your fifty bucks,' they're the ones."

Judge PINCHAM: I wouldn't be reluctant to incarcerating him. I wouldn't be reluctant at all. I would be more inclined to incarcerate him than the nurse, who in a fit of passion, shot her lover. Because I think, one, the nurse's case is one of emotion. She's not a threat to the community. Recidivism is very unlikely. It wasn't planned. The offender who exploited the indigent and the elderly, was planned, calculated, purposeful. I don't think that he's entitled to the graces and mercies of the court to the same extent that the other defendant would be, and I'd be inclined to send him to jail.

* * *

Mr. FRIENDLY: Prisons are virtually invisible institutions. Improving prison conditions requires the involvement of the public and, therefore, coverage by the news media. Let's return to the dialogue now as journalist Bill Moyers voices concern over the public's need to know about life behind bars.

* * *

BILL MOYERS, CBS News: If I said, "Mr. Ward, I'd like to take my cameras into your jail to see precisely what the conditions are, so that we do not have to rely merely upon the judge's description of what is happening," what do you say to me?

Mr. WARD: I'd probably quote the Supreme Court decision to you that said that you had all the rights that the public had, and the public had no right at all in that regard, and deny you access to the jail, and I might—

Mr. MOYERS: Without appealing to a higher authority, would you prefer for me to go in there?

Mr. WARD: No. And I think you would do some mischief if you did.

Mr. MOYERS: What kind of mischief?

Mr. WARD: The prison is overcrowded, the jail is overcrowded and you come with your cameras, and I know from long experience—both before I became a correction official and when I was a police official—that your camera has the ability to excite people and actually get people to act and do things that they would not ordinarily do and will not do as soon as you leave. So that you have an instrument there that makes a living for you but causes considerable mischief in certain circumstances, both in and outside the prison.

Prof. NESSON: Mr. Ward, it sounds a little like you—it sounds to me like you're shooting yourself in the foot.

Mr. WARD: Maybe I am. I've done it before.

Prof. NESSON: I mean, if we go back to the beginning, the problem that we started with is that we've got a public that thinks the \$84 dollars a day you're spending on those people is giving them the Ramada Inn. And here's Mr. Moyers. He wants to come in and show them the real thing.

Mr. WARD: I think that cameras, except on rare occasions, inside of penal institutions are probably a poor correctional practice. You have to consider that a place like Attica, or one of Jim Estelle's places, are probably the highest density populated areas short of a skyscraper.

Mr. MOYERS: It is possible that Attica might not have happened if there had been intelligent coverage of what Attica is like, and the public of Piedmont had said, "We hadn't seen that. We didn't know that. We'll give the Governor the money he needs to build another prison."

Mr. WARD: I don't think that's a realistic assessment, Mr. Moyers. The cameras did get into Attica and after the Attica riot and they stayed a long time, because the correction administrator could keep them out after the riot. Attica is still Attica with very little change in practice or—and very little interest by the public.

Prof. NESSON: Mr. Estelle, how do you respond to Mr. Moyers?

Mr. ESTELLE: Well, first of all I think that the public does have a right to know what's going on there, and you're the only way that they can learn that, if I give you reasonable run on our institutions and that's my intent. Not that you're going to be any great leader of a crusade that's going to reform the prison system, as bad as it is.

Prof. NESSON: Mr. Rosenblatt, here we have system in which there's enormous pressure to push people in, and enormous pressure against building new facilities, spending money, so that you get results just as Mr. Ward describes. "Attica is Attica." What do you make of that and what would you do about it?

ROGER ROSENBLATT, Essayist, Time Magazine: I don't think people like the idea of prison very much. I don't think they like to envisage prisons very much. It's a dirty business. And it's dirty in all aspects. One reason that these various facets of the criminal justice system are independent is that they ought to be independent. You have to think of what does society want and what does society need. I think most people simply want to be safe. That's their idea of a prison system. What they don't understand, sometimes, is that in a situation where you try to make demarcations between a lesser crime and a greater crime, is that if you let off a crime entirely, you leave out the idea that punishment is devised for this—the law-abider, too. It keeps the law-abider in line, so you just don't let people off that easily for crimes. If the person who commits the white collar crime is let off simply because he doesn't show as great a degree of danger as a violent criminal, it says something to society. It says, "This is okay."

Prof. NESSON: You want this system to be independent. You want Estelle's operation, Carlson's operation, independent of Ward and all the judges. Don't you inevitably wind up with Mr. Estelle and his overcrowded prison?

Mr. ROSENBLATT: You have inevitably wound up with Mr. Estelle and his overcrowded prison. Your question is just turned around. What would you have if each of these elements leaned on each other in such a way as to work up a beautiful system of connivance so that your end is satisfied? You don't have overcrowded prisons. But at the same time, you might not have justice, the wrong people might get out, and you have an endangered society. The other independent factor in the criminal justice system is the people. If, as has been said before, the people wish to have more prisons, they'd better pay for more prisons. If, on the other hand, the people wish to make a line of demarcation so that there are alternative forms of punishment while retaining the idea that it is punishment, then the people independently ought to make that choice.

Prof. NESSON: And if people want both at the same time, and they're inconsistent, it winds up with Judge Alarcon and that's inevitable?

Mr. ROSENBLATT: Yes.

Prof. NESSON: Mr. Frank, can you do better?

Rep. FRANK: We should do better. The notion that we should make decisions on what's an appropriate confinement based on physical space is a terrible one, and it's clearly the fault of the political system. And that's three elements: It's the chief executive, it's the legislature, and it's the voters. And Mr. Burke is absolutely right. The voters' attitude in this reminds me of a great piece of philosophy I heard from a member of the Boston City Council: Everybody wants to go to Heaven, but nobody wants to die. People want things, but they don't want to go through what you have to do to them, now, in terms of what—what kind of confinements there should be, you guys are making me nervous by letting that nurse run around after she shot the guy. How that became a nonviolent crime, I missed it. At the very least, I hope—I hope she would have to give a kind of a reverse Miranda warning, and if you're going to let her out please say to people "Hi, I'm so-and-so, and if we hit it off, I might shoot you." People are entitled to be warned. I think also the nursing home guy is probably one of the prime candidates to be locked up, because that is one of the most deterrable crimes. That is a calculated, rational crime and it is one that has to be deterred. And I don't want that bum performing community service. On the other hand, there are clearly people who are locked up that shouldn't be. So what we ought to do is to, I think, have rational reasons for putting people away, the heat's got to be put on the political system. Legislators, like myself, chief executives and the voters themselves. You know, politicians cause a lot of problems, but the voters are no bargain, either. And I think all elements in the system have to bear the responsibility.

Prof. NESSON: Mr. Carlson, if you had the system to run—not just the federal prison system, but the whole criminal justice system—what changes would you make?

NORMAN A. CARLSON, Director, Federal Bureau of Prisons: First of all, I think we have to recognize that prison and jail space is a scarce resource. It's a finite resource in our criminal justice system. I think the basic issue is how do we allocate that resource like any other resource? I think we should try to maximize it so it has the most—the greatest possible impact on the criminal justice system. The violent and the dangerous are the first category that I think ought to be incarcerated, but there are others, as well, that I think should be incarcerated. The repetitive offender, for example, I think should be incarcerated to demonstrate that society does have a mechanism to deal with those who continue to violate the law.

Prof. NESSON: Let's move this one step further, I have one other case I'd like you to consider. This is a twenty-seven year old guy. Serving a life term. Stomps a guard to death. Mr. Giuliani, you've got a death penalty statute in Piedmont. You go for it with this fellow?

RUDDOLPH W. GIULIANI, U.S. Attorney, New York: Sure. No question about it.

Prof. NESSON: No question about it?

Mr. GIULIANI: No, that's an easy capital punishment case.

Prof. NESSON: The easiest capital punishment case?

Mr. GIULIANI: No question he committed the murder?

Prof. NESSON: None whatsoever.

Mr. GIULIANI: And he's incarcerated for murder?

Prof. NESSON: Right.

Mr. GIULIANI: I—I see no difficult question about that at all. Of course, you prosecute him for a capital crime and you seek the death penalty.

Prof. NESSON: Mr. Estelle, this is your prison we're talking about. Do you need that death penalty to control this prisoner?

Mr. ESTELLE: I guarantee you, I'll give you another bed if you'll let us invoke that law. Now, do we need it to control that prisoner? I think probably, in my opinion, even more cruel and unusual punishment, and the usual alternative that is proposed to the death penalty, is life without hope. And I want no part of administering a system that has a sentence of life without hope. The death penalty, I submit, it a deterrent.

Prof. NESSON: You favor death penalty over the life sentence without—

Mr. ESTELLE: Life without hope of parole, yes.

Prof. NESSON:—parole. Am I hearing you say you need the death penalty to control that

person in your prison?

Mr. ESTELLE: No, no. I can weld the door shut on him.

Prof. NESSON: There was a time when you ran your prison without the death penalty, right?

Mr. ESTELLE: There has been— in this nation, all of us ran our prisons without the death penalty for some years.

Prof. NESSON: Was it tougher then?

Mr. ESTELLE: No, no.

Prof. NESSON: When the death penalty come back in for you, did you run your prison in a different way?

Mr. ESTELLE: No. Except in the area of where the sentenced-to-die were housed. You obviously run that differently.

Prof. NESSON: So from your point of view, the death penalty is something you care about as a deterrent broadly?

Mr. ESTELLE: That's correct.

Prof. NESSON: You're not saying, "When I've got a lifer, with no hope, the only control I have over him is the threat to kill him"?

Mr. ESTELLE: No, but I don't want that lifer without hope. I— I'm convinced that we as a community, any time we take it upon ourselves to lock people up, we have to maintain that last vestige of hope, above and beyond anything else. This is one of the few things, I think, that makes us different from the rest of God's animal kingdom — is that vestige of hope.

Prof. NESSON: Your people get out?

Mr. ESTELLE: Yes.

Prof. NESSON: In fact, a very large percentage of your people get out at some point.

Mr. ESTELLE: About 99% of them.

Prof. NESSON: Mr. Moyers, you were ready to take your cameras into Mr. Ward's jail and Mr. Estelle's prison to show the conditions in the prison. When this fellow that we're describing here, who stomps the guard, gets executed, would you be willing to take your camera in and televise that?

Mr. MOYERS: No. All of us are the creation of our own experiences and our own taste and there are certain scenes, there are certain realities that I believe that one cannot, as a personal arbitrator of the taste of his business, make public. I wouldn't do that. It's an easy way out because— I recognize, because there's always somebody who will.

Prof. NESSON: I think the ball just got thrown to you, Mr. Burke.

Mr. BURKE: Yes, it did, now, just a moment here. These are all bona fide laws of our society and they're about to be executed to the fullest extent, and what are we ashamed of? What is the shame in showing a man being electrocuted? The state is committing legal homicide and it is our business to report the news and there we are.

Mr. MOYERS: It is the—

Mr. BURKE: If we're ashamed of showing it, that means we're ashamed of this law.

Mr. MOYERS: Fear isn't the issue, David. There are several issues. One is that death, it seems to me, should be the last act of privacy that a human being can protect.

Mr. BURKE: You have to live up to the fact that you live in a society that may want to pass a law that it is legal to kill a man.

Mr. MOYERS: But I live in a society where I want certain—

Mr. BURKE: It's not a— you want it nice.

Mr. MOYERS:—moments to— not nice—

Mr. BURKE: You want it nice.

Mr. MOYERS: No.

Mr. BURKE: "Don't show this awful thing."

Mr. MOYERS: Certain moments should remain private.

Mr. BURKE: What right do you have to make the judgment— what right do you have to make the judgment that there are some things a society shouldn't see even though it is the most legal thing that the society can do?

Mr. MOYERS: I didn't say, "shouldn't see." I said there are certain things that professionals don't do.

Justice JOAN DEMPSEY KLEIN, California Court of Appeal: You know, I find it singularly peculiar, the sanctimony, or the sanctimonious attitude that you're not going to show the death of a person on TV!

Mr. BURKE: That's right.

Justice KLEIN: I can't watch that TV ten minutes without witnessing death, violence, destruction, gore, you name it. And here, now, an individual from a network, says "Oh, no, I'm not going to show a little—a little execution, on account of how that's in bad taste and violates somebody's privacy." Somehow that whole concept offends me.

Mr. MOYERS: Just because Hollywood makes commerce out of death is no indication to me that journalists should make news out of death. There's nothing sanctimonious about it. I don't approve of what commercial television does with the caricature of life. But I do think there are certain things that you don't do as a professional, and the public spectacle of a death by the state is one that I would choose not to do for personal taste. It has nothing to do with sanctimony.

Prof. NESSON: Mr. Moyers, that's what everybody's asking. What is it that's so abhorrent— it clearly is not death. We see death all the time—

Mr. MOYERS: That's right.

Prof. NESSON:—on television. What is it? It's— is it that it's— it's that you're responsible for this death?

Mr. MOYERS: No, it seems to me that when you make a willful choice to execute a man publicly—

Prof. NESSON: When you make a willful choice?

Mr. MOYERS: You, society, make a willful choice to execute a man publicly, you're passing beyond some stage at which civilization must maintain a sense of dignity. That's unprovable, but it seems—

Mr. STODDARD: But the society has to live up to what it's doing. We have to face up the fact that this is death and that death involves the destruction of a human being, and that the society is sanctioning that.

Prof. NESSON: So you want it to be as horrible as it can be?

Mr. STODDARD: Well, I—

Prof. NESSON: And you want people to see it?

Mr. STODDARD: Yes.

Prof. NESSON: Is it going to bother you when people see it?

Mr. STODDARD: Is it going to bother me? I think some people—

Prof. NESSON: Is it going to bother you when people see it and the ratings are pretty good and people are saying, "When's the next one?"

Mr. STODDARD: Assuming they do. I don't think they do. I think—

Prof. NESSON: You don't remember the old days when people would gather in the park to see the hanging?

Mr. STODDARD: I have seen movies of hangings and movies of electrocution and they are more horrible than any of us can imagine and, frankly, I think that a lot of people would oppose the death penalty if they saw those depictions.

Prof. NESSON: Judge Oaks, I'd be very anxious to know your feelings on this.

Justice DALLIN OAKS, Utah Supreme Court: I don't believe it should be televised

because I think it would have the effect of brutalizing the society, to see that kind of thing on television. I'd be worried about people trying to duplicate the experience, I'd be worried about things that I have seen in my life that seemed to be unnecessary and brutalizing duplications of things that appear on television. I do think that the public is entitled to know all the gory details. I think that the public needs to know what the execution of a capital punishment means, and I think that there should be wide latitude in covering it. But I think Mr. Moyers has the right idea when he talks about ultimate privacy and I would—I would make the judgment that Mr. Moyers makes.

Prof. NESSON: Mr. Giuliani, what are your views about Mr. Burke televising this?

Mr. GIULIANI: I think he should be permitted to televise it.

Prof. NESSON: You'd go for it?

Mr. GIULIANI: Yes. I think it makes sense to do it and I think that it would help in terms of deterrent impact. I think there'd have to be very—some very strict limits placed on how it was done and how many people were permitted there, but assuming the defendant and the state agreed, I think it's something that should be done.

Prof. NESSON: Mr. Rosenblatt, what do you think?

Mr. ROSENBLATT: I'd like to think, because I, too, oppose capital punishment, that showing it would indicate not so much the immediate horror but the logical consequence of deciding to have the state do what is, in my judgment, a criminal act in my name, or in our name—the taking of a life. But I guess I would come down on—rather seeing it as clearly as possible than not. We sort of see it now. We have some reporters who are allowed in various situations.

Prof. NESSON: It's not a private act, is it?

Mr. ROSENBLATT: It's not a private act. They write the thing up and then they're in this kind of cartoon diagram that always shows up in the papers of where the guy was, where the clergyman sat. I was always interested in the purpose of a clergyman in these scenes. I didn't know whether the absorption was to be for the public or for the criminal. Even in the case we have now, in the cases you put before us, of a man who is going to live without hope, as Mr. Estelle said, capital punishment is the decision of the people; therefore, they ought to see that decision carried out to the fullest.

* * *

Mr. FRIENDLY: Justice Stewart, in your time on the bench, capital punishment was declared—or seemed to be declared—unconstitutional.

Hon. POTTER STEWART, retired Justice, U.S. Supreme Court: Although it never was, as such.

Mr. FRIENDLY: But they stopped.

Justice STEWART: That's correct.

Mr. FRIENDLY: In state after state—

Justice STEWART: That's right.

Mr. FRIENDLY:—the death rows began filling up and there was, virtually, an embargo on executions.

Justice STEWART: That's correct.

Mr. FRIENDLY: Because of the Supreme Court. Now, we're beginning to have them again. Why did we start them again?

Justice STEWART: While it's always existed, the Constitution does impose limits—as decided by the Supreme Court in 1972—that the Constitution imposes limits upon the method by which a state can exact the death penalty, or impose the death penalty. And that is that it cannot be imposed by a totally uninstructed jury, in that jury's unbridled discretion.

Mr. FRIENDLY: So, the death penalty was never unconstitutional, it was the process by which the states carried it out.

Justice STEWART: That's correct. And that's all the—that's what the Court decided in 1972, and that's all the Court decided and, then, four years later, the Court decided, in the wake of the activities of many state legislatures—the state legislatures of more than—considerably more than half of our states, had repaired the constitutional infirmity in their present—in their existing laws and had required that the juries be given criteria and standards. And then, the Court upheld the imposition of the death penalty.

Mr. FRIENDLY: Why are federal judges involved in the day-to-day administration of state prisons and local jails?

Justice STEWART: Because of the overcrowding and the lawsuits that have been brought, some judges have held that the prison conditions violate the Eighth and—Eighth and Fourteenth Amendments.

Mr. FRIENDLY: And that's because the state legislatures won't do the job, won't build prisons that are not cruel and unusual punishment?

Justice STEWART: Well, because they won't—they won't do their proper job, which is building and maintaining and financing prisons.

Mr. FRIENDLY: So federal judges have to go in and enforce the cruel and unusual punishment prohibition of the Constitution of the United States, found in the Eighth and Fourteenth Amendments.

Isn't, by its very nature, the word—the ambiguous words “cruel and unusual”—isn't that hard for—to define?

Justice STEWART: Well, as I said, it's very hard to define, but it's supposed to be—take on contemporary significance.

Mr. FRIENDLY: So what cruel and unusual punishment is has to depend on the perspective and what's in the mind of the judge?

Justice STEWART: Well, it shouldn't depend upon what's in the mind—the subjective mind of a judge, but what does society now consider to be cruel and unusual punishment.

Mr. FRIENDLY: Do you think we've figured that out, as a society?

Justice STEWART: Well, I don't think so.

Mr. FRIENDLY: Thank you, Justice Stewart

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CASE STUDY

Congressman Ernest is a four-term incumbent from a suburban district in the large, Midwestern state of Centralia. Ernest covets the U.S. Senate seat that is held by first-term Senator Silver, a member of the opposition party. Before being elected to Congress, Ernest had been a state senator and before that, an assistant professor of political science at the local state college. He is respected as both an academic and a public official. While popular in his own district, Ernest is virtually unknown throughout the state. The incumbent Senator Silver, however, enjoys 70 percent statewide recognition, but might be vulnerable to a well-organized challenge.

Harry Alger is a 43-year-old tycoon who heads a multi-million-dollar corporation. After Alger's mother was fatally shot by a burglar, he pressed for an outright ban on the manufacture and sale of pistols at a U.S. Senate subcommittee hearing chaired by Silver. Silver's vote resulted in killing the bill. Alger, generally unimpressed with Silver's record, asks himself, "Why shouldn't I be the U.S. Senator from Centralia?" Primary day is a year away.

MEDIA AND SOCIETY SEMINARS

Air Date: October 30, 1984

Campaign Spending: Money and Media

FRED W. FRIENDLY, Columbia University School of Journalism: From the birthplace of the Constitution . . . Does the cost of campaigning corrupt the system?

* * *

JOHN V. LINDSAY, Former Mayor, NYC; Former Congressman, New York: There's no guarantee if you have a multimillion dollar campaign kitty, which comes from all these contributions, that you're going to win. But you can't win without it.

TERRY DOLAN, National Conservative Political Action Committee: We spend more advertising dog food in America — several times more — than we do in electing a Congress.

TYRONE BROWN, Attorney, Steptoe & Johnson: Does the giver own a piece of you?

Rep. BARNEY FRANK, Massachusetts: Unfortunately, not own, but let me put it this way: Elected officials are the only human beings I know of who are supposed to accept large amounts of money from relative strangers for important purposes and have that have no influence whatever on their behavior.

FLOYD ABRAMS, Attorney: That's what ABSCAM was all about — that's exactly what ABSCAM was all about: introduce a private bill for me, and I will therefore give you money. People went to jail for that.

Mr. BROWN: What would you do about the money problem?

BILL MOYERS, CBS News: It's better the way it is now than it was under the Johnson White House, when people walked in with fifteen to twenty thousand dollars in cash and that was never reported.

JOHN ANDERSON, Chairman, National Unity Committee; Former Congressman, Illinois: But to equate money in this case with the historical antecedents of the First Amendment, I think, is something that would make the Founding Fathers whirl in their graves.

* * *

Mr. FRIENDLY: When George Washington ran for the Virginia House of Burgesses, he provided the 391 voters in his district with 28 gallons of rum, 34 gallons of wine and 46 gallons of beer. In those days, that was considered a large campaign expenditure.

Soap box speeches and whistle-stop campaigns are relics of our political past. In modern elections, it's the electronic platform. High-priced, high-tech campaigns have dramatically altered the way candidates win votes.

What matters today is money, and concern about the role of big money in our political system raises serious questions about how campaigns are financed and conducted.

In the past decade, we've witnessed sweeping changes in our federal election laws. But instead of solving the money problem, these well-intentioned reforms have become part of the problem.

As spending continues to soar, the issue of whether any limitations on campaign finance violates our First Amendment guarantee of free speech remains hotly contested.

So let's move now to Congress Hall where politicians and policymakers grapple with the dilemmas raised by money and politics. The moderator is Washington attorney Tyrone Brown.

* * *

Mr. BROWN: Judge Mikva, I'm going to ask you to step out of your judge's role for awhile

and assume the role of a retired senator from the Midwestern state of Centralia.

Congressman Ernest is a fourth-term congressman. He tells you of his decision to run for the Senate seat. He asks you for advice on the practical and personal considerations that he needs to take into account as he embarks on this effort. What are you going to tell him?

Judge ABNER MIKVA, U.S. Court of Appeals: Well, after asking if he'd be interested in a judgeship, I think the next question I'd ask him is, where does he think he is going to get the money and what has he thought about in terms of raising the kind of money that's needed for a statewide race?

Mr. BROWN: Money twice. What about the personal considerations?

Judge MIKVA: Well, he's already spent eight years being a congressman. I assume that by this time his family has adjusted or left him or whatever most families do when he has done all those things. And I would assume that those are the kinds of decisions that he has already spent a lot of lonely time thinking through and he doesn't need me for those.

Mr. BROWN: Senator Kassebaum, do you agree that money is the most important consideration in this situation?

Sen. NANCY KASSEBAUM, Kansas: It's become, recently, a real factor that if you don't have the money, well, then you shouldn't get in. And I think we are losing some very capable people by somehow exaggerating money in the process.

Mr. BROWN: Mr. Moyers, is money his major concern in entering into this campaign?

Mr. MOYERS: Yes. Money becomes the issue which decides whether he will accomplish or fail to accomplish his goal.

Mr. BROWN: Does it trouble you at all that money plays such an important role?

Mr. MOYERS: Sure.

Mr. BROWN: Why?

Mr. MOYERS: Because I believe political freedom is not the same as economic freedom and that economic power is different from political power, and that the more economic power is used to affect political power, the less—the more unbalanced our democratic society of equilibrium forces is.

Mr. BROWN: Congressman Frank, as chief fundraiser, how are you going to go about raising the money that Congressman Ernest is going to need?

Rep. FRANK: You start—an easy place to start, and those are the people who have given before. The penalty of past generosity is to be bothered for the rest of your life. As long as the guy is around. You start with the people who have already given.

Mr. BROWN: What if—what if Congressman Ernest had a financial angel who could simply finance the whole campaign for him? Then he'd be in safe city, would he not?

Rep. FRANK: No, he'd be in a different country because that is not legal under the federal election law. You can't give more than a certain amount under the federal election laws, and the fact that he had one single angel wouldn't help him run for the United States Senate.

Mr. BROWN: Let's assume that the Congressman and you agree that it's going to cost \$1.5 million to win this seat. The \$1.5 million can't come from a single source?

Rep. FRANK: No, under federal election law, no individual can give more than a thousand dollars for the primary and a thousand dollars for the final. So if the angel is married, then Mr. and Mrs. Angel can give a total of four thousand dollars to the campaign for that particular Senate round.

Mr. BROWN: Well, couldn't his brother-in-law provide the one point five million?

Rep. FRANK: I don't think—not having a brother-in-law with a million five. I haven't done extensive research on it. But I don't believe that a relative could give it to him either, under the federal election law.

Mr. BROWN: Mr. Abrams? What about his wife?

Mr. ABRAMS: I don't think his wife could do it if the money were in her name. He could do it himself if he had the money, but as far as I know, if you don't own the money yourself, there is no other way that you can have unlimited amounts spent on your behalf.

Mr. BROWN: How's he going to raise the one point five million?

Rep. FRANK: You make a list of everyone you think might give you a quarter or more and you ask them. And you send them letters and you call them up and you go and see them and you give parties. The more you ask, the more you'll get.

Mr. BROWN: What do you do when you make the direct approach?

Rep. FRANK: You mean, when you ask someone for money? Well, if you're like most of us, you kick your feet and you look at the ceiling and you make a lot of small talk, and then finally you dive into the pool. And you say, "Geez, I really hate this, but you know I'm running, and I've got to have the dough, and you've been a good friend, but—do you think you could come up with something?" And you hope that he will—or she will—interrupt you midway through that painful pause and stick a check in your hand.

Mr. BROWN: Okay. I have the check.

Rep. FRANK: Do I have to sit up and beg for this one? We have all gone through similar kinds of rituals.

Mr. BROWN: Does the giver own a piece of you?

Rep. FRANK: Unfortunately—not own, but let me put it this way. Elected officials are the only—only human beings I know of who are supposed to accept large amounts of money from relative strangers for important purposes and have that have no influence whatsoever on their behavior. To be a totally honest candidate, you presumably have to be someone capable of perfect ingratitude, and I don't think many humans achieve that standard.

Mr. BROWN: So that is not a reasonable thesis?

Rep. FRANK: No, it is not reasonable to assume that people are totally without influence once they have given you money.

Mr. BROWN: The Congressman spoke a moment ago, Mr. Abrams, about limitations under the Federal Election Campaign Act. Do you know what those limits are?

Mr. ABRAMS: Well, basically, it's a thousand dollars per primary. A thousand dollars per election. There is also a total amount that anyone is allowed to give in any campaign year, for everything. And that is twenty thousand.

Mr. BROWN: Mr. Broder, are the limits a good idea?

DAVID BRODER, Political Correspondent, The Washington Post: I think the idea of having some limit on individual contributions is sensible. A thousand dollars is not a realistic limit in today's economy.

Mr. BROWN: Mr. Moyers, would you eliminate the contribution limitation?

Mr. MOYERS: No, I would not eliminate it.

Mr. BROWN: Why not?

Mr. MOYERS: Because I believe society's effort to regulate the impact of money on politics is in principle a good thing. Doesn't work perfectly, but in principle it's a good thing.

Mr. BROWN: Does it work at all in your judgment?

Mr. MOYERS: Yes. I don't think that in every election money is the deciding factor. I think it's been proven there are exceptions to the rule, maybe more than we think. But money is not, as some of the practicing politicians have said around here, always the determining factor.

Mr. BROWN: Mr. Abrams, what does the First Amendment say?

Mr. ABRAMS: Congress shall make no law abridging the freedom of speech or of the press.

Mr. BROWN: Is the giving—making a contribution to the candidate of my choice, is that an exercise of free speech?

Mr. ABRAMS: I believe that it is very, very close to an exercise of free speech. The Supreme Court indicated that it was at least a half-step away, and therefore it was subject to regulation and, on that basis, upheld the regulation of contribution.

Mr. BROWN: You're talking about the *Buckley v. Valeo* case?

Mr. ABRAMS: Yes.

Mr. BROWN: And what did the Supreme Court hold there with respect to contributions?
Mr. ABRAMS: The Supreme Court said it was constitutional for Congress to impose limits on contributions.

Mr. BROWN: Because?

Mr. ABRAMS: Because it was conduct. Because it was not pure speech as constitutionally defined. Because it was a little more in the direction of action and activities rather than the mere expression of views.

Mr. BROWN: Over there sits not Mr. John Anderson, but Mr. John Ernest. Congressman Ernest, are you going to be able to go off and concentrate on the issues and not worry about the fundraising? You can leave it in the good hands of Barney Frank?

Mr. ANDERSON: No, unfortunately, I don't think it works quite that way. Even with an efficient fundraiser, there are functions, there are fundraising parties, there are fundraising dinners, affairs of that kind, where it is almost mandatory that the candidate appear. You have to press the flesh with these people that are expected to give you the thousand dollars or the contribution, whatever it be. So it does take—it does take a great deal—from my own experience, at least—of the candidate's time to be actually involved himself in a part of the fundraising activity.

Mr. BROWN: You're going to have to spend an awful lot of your time raising money.

Mr. ANDERSON: I think so. That's a fair assumption.

Mr. BROWN: Well, let's assume you do that, and that you're making very good progress. And one morning you wake up, and you find on the second page of the newspaper that a self-made millionaire, an industrialist in the state of Centralia, has decided to throw his hat into the ring to run against you in the primary. His name is Harry Alger. Is Mr. Alger's entry in the race going to affect your ability to raise the rest of the money that you need?

Mr. ANDERSON: I think it very possibly could have a chilling effect on those prospective contributors that would say, well, he doesn't have much of a chance now against this very wealthy man. And it could affect, I think adversely, your ability to raise more money.

Mr. BROWN: The law places a limit on how much you may receive from others for your campaign, and yet it places no limit on Mr. Alger?

Mr. ANDERSON: That's right.

Mr. BROWN: He can simply sit down and write his one-point-five-, or two- or three-million-dollar check if he wishes to?

Mr. ANDERSON: You're absolutely correct.

Mr. BROWN: Does that make sense?

Mr. ANDERSON: It certainly does not, and it goes back to the fundamental error that the Supreme Court committed back in 1976 when they ever decided that you should equate free speech with spending money and therefore allow individuals using their own money to spend any amount that they wish.

Mr. BROWN: Congressman Hyde, does it make sense?

Rep. HENRY HYDE, Illinois: I feel that spending one's own money in political advocacy is a form of free speech. And unpleasant as it is to be running against a multimillionaire, the cost of abridging that person's right of spending his own money in political advocacy is far greater a cost. It's one that's too high to pay, in my judgment.

Mr. BROWN: Mr. Lindsay, who has the better of this controversy?

Mr. LINDSAY: I'm on the side of John Anderson. I think that the Supreme Court decision in the Buckley case has wreaked havoc in the political system. Its damage has been profound. And I don't see any connection between free speech and the policing of the election process in this country, which has now become a money game all the way through.

Mr. BROWN: Mr. Ferris, doesn't the limitation on contributions, when tied with no limits on what an individual can spend of his own funds—doesn't that favor the wealthy?

CHARLES FERRIS, Former Chairman, Federal Communications Commission: I think it does. It's very unfortunate.

Mr. BROWN: So the Federal Election Campaign Act has the effect of making it that much easier for the wealthy to run for office. And that's good? You like that?

Mr. FERRIS: No. I—I think as—not being a wealthy person, I—I feel excluded from that process. But I don't know what to replace it with.

Mr. BROWN: Mayor Green, whose law is this, the Federal Election Campaign Act?

WILLIAM J. GREEN, Former Mayor, Philadelphia; Former Congressman, Pennsylvania: It's the law of the land. It's the United States' law.

Mr. BROWN: But who's responsible for the law?

Judge MIKVA: Congress. I was there, too, and Congress didn't pass that law.

Mr. BROWN: Judge Mikva.

Judge MIKVA: Congress passed a law that put restraints on both the spending and the raising, and when the Court said, "We will accept half as constitutional and strike down the other half,"—and found them severable—they created a system that nobody can defend.

Mr. GREEN: Let's make it worse. Let's just—it's not just—

Mr. BROWN: Wait a minute. Let's find out.

Mr. GREEN: There's another factor.

Mr. BROWN: Who here does defend the system as it exists today?

Rep. HYDE: I defend it.

Mr. BROWN: You're not troubled by the limitations?

Rep. HYDE: No, sir. It seems to me that they're really two different animals. If you're contributing money to a candidate, you may be doing that for several different reasons, one of which could be that you expect this candidate to be responsive to your particular special interests. That's different from spending your own money to tell the world what a great guy you are. That's freedom of speech.

Judge MIKVA: Henry, I've never accused you of being politically naive before, but that is naive.

Mr. BROWN: I don't understand the difference.

Rep. HYDE: Spending your own money to advocate your position is a First Amendment right. That's what the Court said.

Mr. BROWN: What's the problem with receiving contributions in any amount?

Rep. HYDE: Because when someone is giving money to you for a specific purpose there may be several—a range of motives in doing that.

Mr. BROWN: Such as?

Rep. HYDE: And the purchase of influence—seeking to purchase influence. Seeking to buy a candidate. Seeking to own a piece of that candidate.

Mr. BROWN: So what was the concern of the Congress in imposing the limitation on contributions?

Rep. HYDE: Because if there are limits, then you need to get more money from more people and the less you give, the less you own.

Mr. BROWN: Mayor Green, do you agree with Congressman Hyde that the reason for the limitation on contributions is a concern about buying a congressman or a senator?

Mr. GREEN: I think—the Congress's intent, I think, was essentially a valid one, which was to try not to have an inordinate influence of some special interest or a few individuals in the campaign. I think that makes sense.

Mr. BROWN: But if the basis for the limitation is concern about the purchase of a Senate seat or a House seat, that concern doesn't exist, does it, where the individual is spending his own money?

Mr. GREEN: The absurdity is to allow the spending on the one hand and restriction on the other.

Mr. BROWN: Why? Why is it absurd?

Mr. GREEN: Because you create a completely unequal contest where one person is able, in effect, to speak, and the other people who also wish to speak, if that is what it is, are barred from doing so.

Mr. BROWN: Judge Mikva, why did the Congress adopt the Federal Election Campaign Act?

Judge MIKVA: The American people had lost confidence in the electoral process and—

Mr. BROWN: When was this?

Judge MIKVA: It was after Watergate. And it was a concern that people had thought—had lost their ability to believe that the federal government was functioning on the merits, that it was for sale.

Mr. BROWN: And how was the Congress going to overcome that widespread feeling among the electorate?

Judge MIKVA: By trying to diminish the unfairness of some people being able to buy a larger voice in the government than others; by limiting the amount that could be spent altogether; by limiting the amount that an individual candidate could spend in his own behalf; and by limiting the amount that individuals or corporations could contribute to a candidate.

Mr. BROWN: So it was a comprehensive package that included limitations on contributions?

Judge MIKVA: Yes.

Mr. BROWN: Limitations on expenditures.

Judge MIKVA: Expenditures.

Mr. BROWN: Limitations on the amount that an individual could spend on his own behalf?

Judge MIKVA: Yes.

Mr. BROWN: What happened to that grand scheme?

Judge MIKVA: Well, the grand scheme went before the Supreme Court of the United States and—far be it from me to criticize their results, but—they found a piece of it reflected—was implicated by the First Amendment and a piece of it wasn't.

Mr. BROWN: So it's not Congress's statute?

Judge MIKVA: It never—that never was the plan of Congress.

Mr. BROWN: Whose statute is it?

Judge MIKVA: Well, right now it's the remnants of a statute that the Supreme Court decimated.

Mr. BROWN: Mr. Justice Stewart, it seems it's your statute. The Supreme Court's statute. Is that right?

Hon. POTTER STEWART, Retired Justice, U.S. Supreme Court: Well, Congress enacted it, as Judge Mikva correctly said, in the wake of Watergate, so-called. And it had a presumption of validity, and the Supreme Court upheld all it could uphold, all it conscientiously thought it could uphold of that legislation.

Mr. BROWN: I assume you would agree that the making of a contribution to a political campaign partakes of a First Amendment activity?

Justice STEWART: Yes, I would. I agree with what Mr. Abrams said—it's very, very close.

Mr. BROWN: So Congress can impose limitations on the exercise of the First Amendment right of speech?

Justice STEWART: Well, the Court found that—that the interest that Congress had in seeing to it that the electoral process was not distorted or corrupted was a major enough interest to put limitations upon the contributions that could be made to any candidate.

Mr. BROWN: So there was a balancing involved. There was a First Amendment interest, and the Court recognized that interest.

Justice STEWART: I think that's fair to say.

Mr. BROWN: Congress also decided that limitations should be imposed on campaign expenditures.

Justice STEWART: On the amount that people could spend on behalf of their own candidacies.

Mr. BROWN: And the Court struck that provision.

Justice STEWART: Yes, because the Court found that that was, regardless of the interest of Congress, was just intolerable under the First Amendment of the United States Constitution.

Mr. BROWN: Well, what is the difference—as a constitutional matter—between Congress imposing a limitation on contributions by individuals and Congress imposing a limitation on expenditures?

Justice STEWART: It's not big, and it may be arbitrary; it may seem arbitrary or capricious. But is it the Court's duty to strike down anything, any act of the Congress or of any state legislature, that it finds violates the Constitution of the United States.

Mr. BROWN: You have heard near unanimity that the statute as it now exists, as a result of the creative interplay between the Court and the Congress, is not something that the Congress would have adopted.

Justice STEWART: Well, for ten years they have known what the situation is, and let them—they are the legislative body under the Constitution, and if they don't like the result, let them legislate.

Mr. BROWN: Mr. Dolan?

Mr. DOLAN: I happen to think that the decision was probably fairly characterized as ridiculous. But there is a terminology in the computer business, "garbage in, garbage out." And I think that that is what the Supreme Court was faced with. What we haven't talked about is that the single biggest factor for an election to office, when you are playing the statistical game, is not how much money you spend, but whether you're an incumbent. For the past twenty years, ninety-four percent of all incumbents have been re-elected. The only time they aren't re-elected is when their opponent outspends them.

Mr. BROWN: You think the limitation on contributions then favors incumbents?

Mr. DOLAN: There's no question about it. And there is no question that the incumbents knew it when they passed this bill. Anytime the Congress wants, it can change the law. It has chosen not to because this law still favors incumbents because even with the contribution limitations, it prohibits challengers from effectively competing with incumbents.

Mr. BROWN: Congressman Ernest, you have a problem. Your recognition outside your district is very low. How are you going to get it up?

Mr. ANDERSON: Well, of course, I suppose in most cases now we go to somebody like David Garth and ask him, "What do I do?"

Mr. BROWN: Mr. Garth, what do you do?

DAVID GARTH, Political Consultant: At what point?

Mr. BROWN: What is your profession?

Mr. GARTH: Political consultant.

Mr. BROWN: What will you do for Congressman Ernest?

Mr. GARTH: Well, if we decided to take the campaign, we would first take a poll to find out what the universe that he's running in feels, what their attitudes are, what their knowledge of the Congressman is, and then we'd look at the Congressman's record very, very closely to see those things that we could project through the media.

Mr. BROWN: Will part of your service be to help him develop the appropriate image—
Mr. BROWN: Absolutely.

Mr. BROWN:—for the campaign?

Mr. GARTH: That's a very bad word, but yes.

Mr. BROWN: Well, what word would you use?

Mr. GARTH: Project.

Mr. BROWN: To project—

Mr. GARTH: What he cares about, what he stands for.

Mr. BROWN: Why does he need your help to do that? He knows what he stands for.

Mr. GARTH: Because you're talking about communicating, and he's going to be out there campaigning — as he said, "pressing the flesh" — and you're talking about organizing a campaign. And you've got to organize a campaign. You just don't walk in and run an election.

Mr. BROWN: You're going to package him?

Mr. GARTH: Well, I guess the word that they like to use is the word "packaging." I think fifty years ago it was called "campaign managing." But it is the same basic thing. You're trying to put a campaign together, all parts of it — what his record is, how to project that record, the fundraising, the free media — and those are all parts of how you run a campaign.

Mr. BROWN: How would you describe this packaging activity, Mr. Moyers?

Mr. MOYERS: Part of it is packaging, but part of it is projecting and part of it is selling. It's a little bit like splitting rails to project an image as a rural boy when you've really been a smart railroad lawyer. It is very much part of the modern society in which we live, and I don't think it is demonstrably provable that it has produced a worse political process than we've ever had, or a better one. I mean, there were a long string of congresspeople and presidents who seldom rose above mediocrity when we didn't have this kind of issue.

Mr. BROWN: Mr. Garth, where is most of this money going to go? How is it going to be spent?

Mr. GARTH: Well, in the situation that you gave, the congressman who is very well-known in his district and not known outside of it would probably go into television.

Mr. BROWN: And what would be your principal objective?

Mr. GARTH: To give the people in the rest of the state a sense of what they had — he had accomplished in Congress, what he had stood for, the fights he had made; things he had won and lost, why he made those fights; and what he produced for the people in his district. And I would use the people in the district who knew him best to project that across the state.

Mr. BROWN: And you — you'll buy time on television stations in order to —

Mr. GARTH: You'll have to, because they're not going to give it to you. Now, there is a certain amount of time you can get in free media, but that doesn't usually happen early in the primaries.

Mr. BROWN: Because?

Mr. GARTH: Because the papers usually wait, and the TV stations, until it gets down close to election day and there's mass interest or more interest in the campaign. So you have to go on the air sometimes four and five months before the television stations, newspapers really give you more than a very peremptory treatment.

Mr. BROWN: How do you go about getting free media from the press, from television and newspapers?

Mr. GARTH: You work like hell. You try and get situations where you can put the congressman next to, if it's a job, factories — which is a classic situation, a closed factory. You put the man, the person running for Congress, in that kind of a situation, do a commercial that talks about what has been done here; i.e., it could be done for the rest of the state.

Mr. BROWN: You're — you're staging a situation —

Mr. GARTH: Absolutely. Absolutely.

Mr. BROWN: —with the hope that the press will treat it as news?

Mr. GARTH: A press conference in a closet does no good. I mean, if nobody comes to it, it's not going to help you. So you try to stage —

Mr. BROWN: So Congress — Congressman Ernest is going to spend his day in two ways: one, seeking to raise funds, and, secondly, going out and staging news events —

Mr. GARTH: Press conferences and so on.

Mr. BROWN: —with the hope of getting some coverage?

Mr. GARTH: I don't know anybody running for public office who doesn't have a press conference every day. And if they don't, they're in a lot of trouble.

Mr. BROWN: If — if he did not have to spend so much time staging events — wouldn't it be better if he could get more free time from press and television?

Mr. GARTH: Yes, it would be better if you could get free time. Then you wouldn't have to pay for it. But I'm not sure that they would even give you the free time —

Mr. BROWN: Should they?

Mr. GARTH: I think they should.

Mr. BROWN: Mr. Burke, Mr. Garth's point is that his candidates don't get enough time, particularly during the primaries.

DAVID BURKE, Vice-President, ABC News: It is just not true that in any community or state, municipality, or in the country that there is a lack of programming that is open and, indeed, invites candidates to come. Now, they may make the choices — I don't — Congressman Ernest may say, "I don't wish to appear on the program with my opponent," or "I don't wish to do this," or "I don't wish to do that." I mean, he may wish to set the agenda himself as to how he wishes to appear.

Mr. BROWN: Who decides whether or not a television station has given sufficient time in — in the primary stage of an election campaign? Who makes that decision?

Mr. BURKE: No one decides. If — there are news judgments that are made every day as to whether or not this candidate is — what his schedule is today, whether it's worthy of coverage or not.

Mr. BROWN: So who controls the election process?

Mr. BURKE: The candidate.

Mr. BROWN: What is the candidate trying to do?

Mr. BURKE: The candidate is trying to communicate with people, easy, in a controlled environment.

Mr. BROWN: Can — does the candidate control the means of communication?

Mr. BURKE: He can control the means of communication if he accepts our invitations to come on news programs. But if he wants a half an hour to sit there in a controlled-style environment to make a pitch, that's a different question altogether.

Mr. BROWN: Mr. Broder?

Mr. BRODER: I think my colleagues from the electronic side are being disingenuous. They are making the decision as to when and how the candidates get on television, and television is the prime means of communication.

Rep. FRANK: I would add to Mr. Broder — I talk now as a candidate — and I think Mr. Burke burlesques us. I think Mr. Garth indicated he agreed with me. No candidate wants a half hour to sit there by himself. No one would watch it except your very close relatives, and you can only lose them; you started with them. But the fact is that I have found, as a candidate, whether as an incumbent or a challenger, that news people in general, electronic and print, make a judgment first of all that it's too early and nobody's interested, and secondly, that it's not "our job" to get your views across to the people. The most basic thing we're supposed to do — communicate our views on issues — is, to the people in journalism, the most boring thing about the campaign. The reason we stage events is that you'll come to a staged event more than you'll come to me sitting there saying, "Here's what I think."

Mr. BROWN: Congressman, Congressman, would you take that judgment out of the hands of the networks and the local stations?

Rep. FRANK: No, I wouldn't take it out of the hands of either the — the TV people or the journalism people. And I think you have to —

Mr. BROWN: Because?

Rep. FRANK: Because I think once government starts telling these people what to put on the air, it would be unfortunate. And I think, again, human nature being what it is, the prospects for abuse are just too great.

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Mr. FRIENDLY: Our dialogue now turns to the much-publicized political action committees, commonly called "PACs."

Whether candidates are more responsive to these special-interest groups than to their own constituents is a constant source of worry — to the voters, to Congress, and to the candidates themselves.

* * *

Mr. BROWN: Mr. Dolan, what is a political action committee? It's been mentioned a number of times here.

Mr. DOLAN: It's a voluntary association of people who have a common interest and who band together and pool their contributions and then contribute them to various candidates.

Mr. BROWN: Are they usually connected with some other organization?

Mr. DOLAN: I believe most of them are; I think the majority of them are affiliated with labor unions, corporations or associations of some sort or the other.

Mr. BROWN: But not all?

Mr. DOLAN: No, my recollection is the smallest category of the three or four thousand PACs are independent political action committees.

Mr. BROWN: What's an independent political action committee?

Mr. DOLAN: It's one that's not affiliated with a particular business or association or labor union.

Mr. BROWN: Well, what are you affiliated with then?

Mr. DOLAN: Well, you have a common interest. For example —

Mr. BROWN: Is your organization unaffiliated?

Mr. DOLAN: Ours is, yes, it's unaffiliated. The common concern of contributors to our organization is conservative philosophy. There are many conservative organizations, there are many liberal organizations. There are many that —

Mr. BROWN: But what organization is your political action committee connected with?

Mr. DOLAN: No one. It's totally independent.

Mr. BROWN: It exists for itself?

Mr. DOLAN: Just for itself.

Mr. BROWN: Unconnected?

Mr. DOLAN: Unconnected.

Mr. BROWN: A loose cannon.

Mr. DOLAN: If you want to call it that — as loose as the Republican Party is, I guess.

Mr. BROWN: Once you make the decision whether or not to support a particular candidate, how do you go about demonstrating that support?

Mr. DOLAN: Well, our committee acts different than most. Most of them merely make a contribution directly to the candidate. Ours spends most of its money on something called independent expenditures.

Mr. BROWN: What's an independent expenditure?

Mr. DOLAN: An expenditure made without the cooperation or consultation of the candidate you're attempting to assist. So, in other words, if I said, "Here's five thousand dollars" to a candidate, and I communicated with his campaign strategy and so on and so forth, I would be limited. However, if I just decided to go out and spend whatever sum I had without his

cooperation, that is legal.

Mr. BROWN: So you can go out and spend as much on his behalf as your organization wishes to?

Mr. DOLAN: Well, as much as we raise. Sometimes as much as we wish to, but as much as we raise.

Mr. BROWN: To — to whom are you accountable?

Mr. DOLAN: Well, we're accountable to our contributors, certainly. We're accountable to the same forces that everybody else in the political process is: the parties, the media, the candidates themselves.

Mr. BROWN: Mr. Broder, do independent political action committees do anything other than spend money on — on media in support of a candidate that they support?

Mr. BRODER: Sometimes, Mr. Brown, they spend money on what they call "negative advertising," criticizing the record of the candidate that they're opposing.

Mr. BROWN: Mr. Moyers, the rise of the kind of organization that Mr. Dolan described, does that trouble you?

Mr. MOYERS: I am troubled by the ability of organized money — and that is organized money — to caricature people in the political process, and I think many of their commercials did indeed caricature the politicians they were trying to beat. I'm also concerned that non-independent expenditures are used to caricature politicians in commercials. Yes, it does concern me.

Mr. DOLAN: We — our — the negative commercials, as people tend to call them, do things like say, "Senator So-and-So voted to give away the Panama Canal," or "He voted this way," or "He voted that way." I think virtually everybody here would agree that the typical commercial for the typical candidate running for office — particularly someone with no name ID — is not, "Vote for him so he'll go and raise taxes and do these other things." It's "Vote for him because he's a nice fellow, he takes care of his wife, here's his dog running down the sand on a beach, and looking like a thoughtful, caring father."

Mr. GARTH: It seems to me that when you're doing a commercial for a candidate running for public office, that candidate is responsible for the commercial. They're a part of that commercial, they have a judgment in that commercial. One of the things that bothers me about the independent PACs is sometimes they may be helping — they think they're helping the candidate; they're destroying your campaign. You have totally no control; it can backfire. Sometimes their taste is outrageous, and if it's done by the candidate himself, then it will backfire on the candidate, who should be punished.

Mr. BROWN: Ms. Greenfield, why is the press concerned about the impact of political action committees?

MEG GREENFIELD, Editorial Page Editor, The Washington Post: Well, I think to some extent there is an assumption that's been in this room — I've shared it, I think, to some degree — that it's a kind of "stop me before I kill again" thing that the politicians are expressing, saying, "control the money because if someone gives me five thousand dollars I'm going to do anything he tells me to do."

Mr. BROWN: Why does that concern about a lack of control over the money focus on the political action committee?

Ms. GREENFIELD: The procedures have become so distorted and — and distorting of how a campaign is run, that something should be done.

Mr. BROWN: Mr. Anderson?

Mr. ANDERSON: I would single them out, Mr. Brown. I would single them out as a cause of the problem: the proliferation, from three hundred, ten years ago, to three thousand seven hundred at the present time; the fact that in 1980 for the first time they gave more money to federal legislative races than did all of the party committees, Democrat and Republican, and as a result the political parties are no longer serving as organizations that are capable of mediating the various conflicts in our society, the various interests that have a claim on the public purse or the public treasury, because they are being taken over gradually — the parties themselves — by special interest PACs that are pushing their particular agenda without any

particular concern at all that that political party have a coordinate, coherent, cohesive program. They're destroying the parties.

Mr. BROWN: Senator Kassebaum, do you agree with that?

Sen. KASSEBAUM: I think this is a great danger, and I've always felt that one of the great strengths of our democracy was the fact that we had two strong political parties; I think it is being undermined by the strength of the PACs.

Mr. BROWN: Are you saying that the political action committees have—have led to the demise or the lessening of the effectiveness of the political parties?

Sen. KASSEBAUM: Yes.

Rep. HYDE: I think it's a delight, if I may, to welcome John back into the fold of supporting the two-party system!

Mr. ANDERSON: You misunderstood me. I said we will have political parties—

Rep. HYDE: I'm sorry.

Mr. ANDERSON: We will have political parties.

Rep. HYDE: I might point out—I might point out that twenty-seven percent of the candidate receipts in the last election were from PACs. So that doesn't seem to be—to me to be inordinate. And I also would say from experience, the more that the PACs proliferate, the less influence any individual PAC has, and incumbents find that they are routinely given contributions by an array of PACs, and so if this one gets mad at you because you didn't vote the way they wanted you to—there's no matter, because there are more PACs where they came from.

Mr. BROWN: So first the PACs—

Rep. HYDE: Their influence is diminished by their proliferation.

Mr. BROWN: Mr. Watts, does your organization have a political action committee?

GLENN WATTS, Communications Worker of America, AFL-CIO: Yes, we do.

Mr. BROWN: What is its purpose?

Mr. WATTS: Its purpose is to influence legislation that is compatible with what is the overall philosophy of our organization.

Mr. BROWN: Do you buy votes?

Mr. WATTS: We do not buy votes. I don't think that we are able to accumulate enough funds to buy votes, and I don't think votes are for sale as a matter of fact, except in rare instances.

Mr. BROWN: Which members of Congress does your organization support?

Mr. WATTS: It supports people that we consider to be generally speaking liberal, who are in favor of legislation that we consider to be in the interests of working people, mainly, but all people in general.

Mr. BROWN: Is your support then a reward for past votes?

Mr. WATTS: I suppose someone might characterize it as a reward for—for past support of legislation we're interested in, as well as a hopeful indication as to how people would act in the future. We attempt to be close enough to candidates so that—we would expect a candidate that we would make a contribution to to generally support the kinds of things that we're interested in.

Mr. BROWN: Mr. Williams, do political action committees buy votes?

EDDIE WILLIAMS, Joint Center for Political Studies: I don't believe they buy votes in the sense of direct, immediate barter; however, I do believe that enormous sums of money, given in the heat of political campaign, does translate into favorable interest. If that is tantamount to buying, in quotes, yes. Other kinds of influence may very well lead to the same result.

Rep. FRANK: I—

Mr. BROWN: Mr. Frank?

Rep. FRANK: I didn't think it was newsworthy, but since it's asked, of course they buy votes. Do you think people are giving away all this money just for truth, justice and the

American way? That's not true.

Mr. BROWN: Well, based on the majority statements here, that's certainly the case.

Rep. FRANK: If the question is, "Do people tell you that particular political contributions are conditioned on specific acts of legislative behavior?" the answer is "Of course." Secondly, the question about money has a broader problem, and I was a little surprised at Meg Greenfield saying, "Well, it's stop me before I kill again." People objecting to adverse influences in the system aren't necessarily confessing to weakness in their own efforts to try and resist it. I assume in the democratic theories with which I'm familiar that public policy ought to be influenced by a number of factors. It ought to be influenced by popular opinion. It ought to be influenced by how well people can debate and argue and marshal their forces. I do not agree with, and I haven't seen many theories of democracy that say the ways in which money is concentrated and spent in that society should be a major factor in deciding what public policy is, and it is much too much a factor right now. But I don't limit it to PACs. I think that the problem of money having an excessive influence on public policy—I don't think it's an ideological issue. I don't think it's a liberal or a conservative issue. I think it's an interference with the way the democratic process ought to work. I raised more money than anybody else who ran for Congress last time; I am not complaining personally. I am saying that I don't understand how a theory of democracy accommodates itself to a situation in which money has, what seems to me, a disproportionate influence. No individual is bad for acting to protect himself. It's a systemic problem.

Mr. BROWN: Senator Lugar, do you agree?

Sen. LUGAR: Even the suggestion that money is buying votes, that money is buying influence is absolutely false with regard to the Congress as it's now constituted. And these implications so easily thrown around simply play havoc with public understanding.

Mr. BROWN: Father Drinan, what do you have against political action committees?

Rev. ROBERT DRINAN, Former Congressman, Massachusetts: Because we've never had it—bankers and realtors and funeral directors have never been able in the history of our country to contribute to campaigns. And we get rid of the railroads and all of the corporate bankers—

Mr. BROWN: Is that correct? Just a moment. Is that correct, Mr. Broder?

Mr. BRODER: No.

Mr. BROWN: In what way is it not correct, then, in your judgment?

Mr. BRODER: Because American political history is replete with examples of every industry, every large conglomeration of people putting money into politics. What's changed under the new system is that much more of it is reported than used to be the case.

Rev. DRINAN: But my point was that the whole theory is that individuals should contribute, and the political parties, and that you should not have corporation money—

Mr. BROWN: Whose—whose theory?

Rev. DRINAN: That's the traditional American theory, and Mr. Broder would admit that it is—it has been wrong when corporations, directly or indirectly, covertly or overtly, give money to the political process.

Mr. BROWN: But Congress enacted a law. You were—you were in Congress when it enacted a law—

Rev. DRINAN: I know, and that law was done with the hope and the anticipation that we would have for Congress the system that we have, more or less, for the presidential elections. That has worked out fairly well, with some limitations.

Mr. BROWN: And what is the system for the presidential election?

Rev. DRINAN: That is public financing. That—on April 15th a person can check off, and a dollar or two goes to the presidential campaign; there's matching funds, and that each party gets so much. And I think that's one way of equalizing the—advantage of the incumbent with the challenger, and it has many, many other advantages, and it gets rid of this corporate impact on the federal structure. And I think people are terrified—

Mr. BROWN: Mr. Moyers. It would be better if the funds were channeled into the political

parties?

Mr. MOYERS: It's better the way it is now than it was under the Johnson White House when people walked in with fifteen to twenty thousand dollars in cash and that was never reported. It's better today than it was, in the sense of the opportunities for personal scandal. It is not in the sense—

Mr. BROWN: Okay, why is it better today?

Mr. MOYERS: Because of disclosure, for one thing.

Mr. BROWN: And what is the— what is the effect of disclosure that turns corruption into something clean?

Mr. MOYERS: What do you mean by corruption?

Mr. BROWN: Oh, I'm getting around to asking you what you mean by corruption.

Mr. MOYERS: Well, I'm not talking about a—

Mr. BROWN: What are you— what are you talking about?

Mr. MOYERS: I'm not talking about a member of Congress on the take.

Mr. BROWN: What are you talking about when you indicate that during the Johnson years people walked into the White House with cash in their hands and it wasn't disclosed?

Mr. MOYERS: It wasn't used for personal purposes. It was used, as Robert Caro reported, to put into different political—

Mr. BROWN: It was used for political purposes.

Mr. MOYERS: That's right.

Mr. BROWN: What was wrong with that? Was there anything wrong with it?

Mr. MOYERS: Sure. It's a hidden influence on the political process in a society which is devoted, in a flawed way, to openness.

Mr. BROWN: I'll buy that.

Mr. MOYERS: Accountability.

Mr. BROWN: How do you go about placing effective limits on campaign spending for congressional elections, given the Supreme Court's 1976 decision?

Mr. ABRAMS: Mr. Brown—

Mr. BROWN: Mr. Abrams?

Mr. ABRAMS: You don't. The First Amendment doesn't promise us a good government. It promises—

Mr. BROWN: Are there effective—

Mr. ABRAMS: —it promises us free people, from the government. And so there are some things which we just can't do. We can do public financing. Father Drinan is right. There's no First Amendment problem with public financing at all. But I—I want to make clear, if I may, an additional point relating to public financing. It seems to me that public financing avoids, too—or helps to avoid—is how close we have come, I believe, in some of our talk today, to what I would have called "corruption." I may be the last naive person at this table. I would have thought that it was actionable if somebody came to a congressman and said, "I will give you five thousand dollars if you will do this." That's what Abscam was all about. That's exactly what Abscam was about—introduce a private bill for me, and I will therefore give you money. People went to jail for that.

Mr. BROWN: But you have heard it said that it happens, from people who are in a position to know.

Mr. ABRAMS: Well, I—I hear them, and I'm sorry to hear it, and I understand how close that illegitimate action is to quite legitimate action of supporting people who you think are on the right side of the issues.

Mr. BROWN: Mr. Mikva?

Mr. MIKVA: That's why the public financing is a constitutional way of getting us back at least to square one. I think that the—the present system, which was neither congress-

sional nor court-ordained but ended up as what was left, has created a worse situation, with all due deference to those who say, "Well, at least we now have disclosure." I like disclosure, too, but sometimes when what disclosure does is make people aware that there is all kinds of access being bought, that makes them even more disdainful for the system to begin with. It isn't that this is a better or worse system than the Johnson White House; the system is currently perceived to be worse than the Johnson White House because it is so well-known. And the—the advantage of public financing, whether it achieves any of the other good things that those sponsors say it would, is that it would allow us once again to get back to the notion of trying to create a fair system that says if you take public financing, you will be limited in how much you can spend, and if you don't take public financing, your opponent who does is going to get some advantages that you don't have. And it—will it solve the problems of corruption or improper access? No, but at least people will get the notion that other voices will be heard. Right now, the voices that most people think are being heard are everybody's but theirs.

Mr. BROWN: Mr. Dolan, do you have a problem with public financing for congressional races?

Mr. DOLAN: Oh, certainly. I think it's a ridiculous position for a number of reasons. One is never more than thirty percent of the people in America have ever checked off that box which supposedly gives money to the public fund that finances these elections, which means that we now have thirty percent of the people appropriating money from the U.S. Treasury, which I think is a novel idea. And, lastly, I'd like to challenge the notion that we seem to accept here that too much money is spent on politics. That is simply wrong. I see nothing wrong with Barney Frank spending a million five. I wish he could spend two million, five million, because I can assure you right now the problem in America is not that we don't know enough about our elected—that we know too much about our elected officials. It's that we don't know enough. And the reason we don't know enough is, I think, because the media has a tendency to caricature the candidates, and because the candidates don't have enough money to run on. We spend more advertising dog food in America—several times more—than we do in electing a Congress. We know more about Alpo than we do about Senator—

Mr. BROWN: I gather you also oppose the public financing for presidential elections?

Mr. DOLAN: I do indeed, yes.

Mr. LINDSAY: Unless a person who wishes to run for office—and I don't care if it's a challenger or an incumbent, if he's running for another office—can demonstrate that he or she has available multi-millions of dollars, or whatever the sum is for campaign purposes, he's not taken seriously. There's no guarantee, if you have a multi-million dollar campaign kitty, which comes from all these contributions, that you're going to win. But you can't win without it. And I'm troubled by that.

Mr. BROWN: What's wrong with that?

Mr. LINDSAY: I think that's bad. I think that is—I think that—I think that's anti-democratic. I think it's slowly beginning to corrupt the process in the sense that the only people who are running for office any longer are those who either have huge amounts of money or access to it. And I think that's the wrong test for our country.

Mr. BROWN: Mr. Justice, let's assume for the moment that it does require that one be a near-millionaire to run for a Senate seat. And the Congress, in its wisdom, therefore, acts to place limits on the amount that can be spent in a campaign. But why would it not, in such circumstances, be appropriate for the Congress to make that legislative judgment?

Justice STEWART: Because it, in my view, violates the First Amendment of the Constitution of the United States to put a limit on how much a person can spend on his own candidacy.

Mr. ANDERSON: Well, one judge put it this way. Mr. Brown, and I think it was Judge Wright, that you can abridge speech; what you cannot abridge is freedom of speech. You abridge speech, he pointed out, in a town meeting in New England when you have rules and regulations whereby some windbag cannot get up and monopolize the discussion throughout the town meeting. But to equate money in this case with the historical antecedents of the First Amendment, I think is something that would make the Founding Fathers whirl in their graves.

Rep. FRANK: We limit access to the candidate process in a lot of ways that you wouldn't allow speech to be limited. You have state residency requirements that are upheld. I never heard of a state where you had to live there five years to talk. We have age limits. We have a certain number of petition signatures to get on the ballot. Nobody needs five hundred signatures to make a speech. I don't think it is obviously the case— it's not our practice that we equate speech with the right to a candidacy, and regulating the conditions of a candidacy are not automatically speech, and I think there is room for a set of regulations, and we admit that in a number of other areas. But we do make— we have a different set of rules, and somewhat more restrictive, with regard to candidacies, to try and preserve the electoral process. I don't agree with all of them, but constitutionally there are a lot of them that have been upheld and validated. You can only run a certain number of times for office.

Mr. BROWN: Mr. Broder?

Mr. BRODER: I quake to get into a debate where there are so many learned lawyers on both sides, but as a layman it doesn't seem to me that the distinction that the Court made between contributions and expenditures is either arbitrary or capricious. A contribution, it seems to me, is an effort by an individual to give voice to the candidate or cause that the person is supporting. Expenditures are voice and, I must say, I am disturbed that there are so many liberals in this room who cannot see as a constitutional principle that you are treading on very dangerous grounds when you say to an individual in this country, "You may not spend your own money legitimately in the cause of seeking public office in this country."

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Mr. FRIENDLY: When the framers of the Constitution crafted the First Amendment, they sought to encourage political expression, not to stifle it. But they could not have foreseen the spiraling cost of politics today.

In the Buckley case, the Supreme Court equated freedom of speech with the spending of money. At the oral arguments before the Court, Justice Potter Stewart observed that "money is speech and speech is money."

Whether campaign financing needs reform remains the crucial question — for candidates and voters alike.

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