

"It's a heinous crime that he's charged with, but the fact of the matter is that there is a presumption of innocence and that's what the court is required to act on."

13.1 CRITICAL ISSUES IN THE COURTROOM: EXPLORING A HYPOTHETICAL CASE

Charles Nesson and Associates

At a conference on criminal courts, Charles Nesson of Harvard Law School led a panel of judges, attorneys, and other court personnel in an exchange about a hypothetical case. Among the issues they covered were bail, plea bargaining, and sentencing.

PROFESSOR CHARLES NESSON: You know Vernon Jones to be the reverend of Zion Baptist Church for 15 or 20 years, and he is being arraigned in front of you and when the charges are read, they're very serious. It's rape, attempted rape, and assault. Judge Daffron, you are going to have to set bail. That's the first order of business. Tell me how you are going to proceed.

JUDGE JOHN DAFFRON [a state circuit court judge]: The consideration would be the danger to the community, the likelihood that the accused would appear for future proceedings, and if he, in fact, is an established member of the community. On the point of his likelihood to appear, it seems he would be very likely to have bail set and be able to post bond in spite of the fact that the offenses are very serious.

PROFESSOR NESSON: Do you want to know any details about the offenses?

JUDGE DAFFRON: I would ask the prosecutor or the police officer the facts of the offenses and try to make some determination of the strength of the case, the potential danger to the community, and the effect on the victim.

PROFESSOR NESSON: Here is apparently what happened. Mr. Jones has been molesting young women right in his office at the Zion Baptist Church. He apparently has been making a practice of picking out young, impressionable women who were deeply religious, having sex with them in his office and then following it up with the strictest, scariest direction to them not to disclose to anyone or God will punish them and their mothers. By the way, there are people taking notes out there like mad. Suddenly you see a scurry in the back of the courtroom with people running out and court reporters starting to filter in.

JUDGE DAFFRON: If there is a probability that other charges may be placed or that other people were at risk, then it seems to me that it swings toward pretrial confinement.

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PROFESSOR NESSON: What do you mean it swings towards pretrial confinement? What are you actually going to do now?

JUDGE DAFFRON: If these are all the facts, I'm going to lock him up.

PROFESSOR NESSON: You're going to lock him up period? No bail, no bond, no nothing?

JUDGE DAFFRON: Place him in confinement. I would set a bail. It would be commensurate with what I think the risk is and so far, from what I've heard, there is a significant risk to others.

PROFESSOR NESSON: Judge O'Toole, are you right along with him here?

JUDGE THOMAS O'TOOLE [state superior court judge]: I just want to make sure that if he is going to be released, the community is assured he is going to abide by the conditions of the release, and I would make my decision according to those factors.

PROFESSOR NESSON: You don't have any problems at all using the dangerousness of this fellow as the criterion on which you are making the judgment?

JUDGE DAFFRON: If there is not a significant risk to the community or individual people, then there should be a moderate amount applied that would be designed to assure his appearances at the proceeding. When you add in the factor of potential risk as it has been presented so far, it comes as a matter that requires pretrial detention.

PROFESSOR NESSON: How are those reporters in the back of the room affecting you?

JUDGE DAFFRON: It sounds pompous, but I don't really think I'd be particularly concerned with the fact that it's going to be a news item.

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PROFESSOR NESSON: And it's sounding wiser and wiser to you, at least for the moment, to lock this guy up?

JUDGE DAFFRON: From what I've heard so far, yes. My leaning is to confinement.

PROFESSOR NESSON: Mr. Peruto, you represent this fellow. Now what do you think you could do for him?

CHARLES PERUTO [an attorney]: Well, in the first place, I need a couple of facts that would make me think he's a hell of a man.

PROFESSOR NESSON: We should let our audience know that you have in front of you a little sheet that gives some minor details on this fellow. It's got his name and his date of birth (he's 52 years old), his address (Rocky Peak), and telephone number. He was divorced seven years ago and he's employed. It also includes the date of the offense, the charges, possible penalties, and his employment history. His employment history is basically fairly impressive; it amounts to that he's been a minister here for 20 years.

ATTORNEY PERUTO: In the first place, I'd argue that he's been removed from his position where this was alleged to have occurred, and therefore the likelihood of recurrence is remote. I would point out that he has a splendid

record. I'm going to say to the judge that here are alternatives. I have to recognize that rape is a very frightening thing in the community, at least to half of the community, and that the judge is in a ticklish position. I also have to recognize that I'm not going to get very far persuading the judge to release this man on a bail that he can make because I've got to understand that he's going to be incurring the wrath of the press. So I think I would start thinking about alternatives, such as daily calling-in, but confined to his own home. In other words, present a program for a man who otherwise had had a splendid record and obviously has been disturbed in some fashion and promise to present him for psychiatric examination; present a program of reporting to the court with regard to any evidence of propensities along the lines of the charges that he faces and suggest alternatives to prison.

PROFESSOR NESSON: Ms. Washington, should this fellow be locked up right now or not?

FRANCES WASHINGTON [probation officer]: Yes, he should. He's one of the most trusted members of the community. He molested children, little girls who are probably taught to trust him, and he violated that trust. He inflicted physical and long-lasting psychological damage to these children. He should go to jail. I would not release him back to the community, not to call in. He could be molesting more children while he's calling in. Calling in doesn't have anything to do with this.

PROFESSOR NESSON: Judge Murphy, do you have any problem with this reaction? We've got a guy whose got roots in the community that are solid as a rock. He's going to show up on the day of trial and yet the reaction from all of these folks is, "Hey, that's not what counts. What counts, 'Is he dangerous?'" Is that what counts?

CHIEF JUSTICE ROBERT MURPHY: I think the fear of those who are opposed to pretrial detention to some extent may be justified by what we're hearing here. I share defense counsel's view on this entirely. He starts with the presumption of innocence. He's probably going to say, "I was in Chicago when all this happened." But this man, based on what I have before me, does not seem to be a candidate for pretrial detention. I don't know how much space you have in the Rocky Peak jail detention center, but I'd save it for someone who's got a track record of dangerousness.

PROBATION OFFICER WASHINGTON: If this man was a drifter, a drunk, a drug addict, or a burglar who had a history of appearing in court for every hearing, he would still be held with or without bond. I believe that the minister's about to get away with rape because he is "somebody" in the community. Granted, we don't know that he's guilty and I've already found him guilty, but you have to look out for your children and you have an obligation to look out for other people's children.

PROFESSOR NESSON: What does the presumption of innocence mean to you?

PROBATION OFFICER WASHINGTON: That you're innocent until found guilty. But mind you, I work with juveniles, and 90 percent of the juveniles who are caught did what they were accused of doing and that is just the way it is.

JUDGE MERCEDES DEIZ [state circuit court judge]: What we are hearing from the probation officer is clearly what we are all concerned about at this conference. The arraigning judge must make a decision as to whether the individual should be released, recognizing the tremendously terrible crime that he is charged with. I have to somehow push that out of my mind and get input from defense counsel and the attorney who is representing this minister. We're lucky enough in my area to have a closed-street supervision outfit, and so if the closed-street supervision people will take this man under their regular supervision pending the time of trial then, based upon everything I'm hearing from defense counsel and the district attorney, I think I would release him.

PROFESSOR NESSON: Respond to Ms. Washington. She says, "Listen, the presumption of innocence is a very important part of our trial procedure, but let's not set it up as something totally realistic. I've worked day to day for years in the system, and I know that 90 percent of the people that come into the system as arrestees are guilty. If I have to presume that they are innocent, you're asking me to take a totally unrealistic view of the world. And certainly a view of the world that the constituency out there and the reporters scribbling on their pads aren't going to take." What do you say to her?

JUDGE DEIZ: Thank God for the jury system because they listen. The jurors listen to that instruction and literally apply it and recognize that the defendant has to be proven guilty beyond a reasonable doubt on every material aspect of the case. Too often, the DAs goof and forget some material aspect of the case and some guy gets off who is just as guilty and horrible a human being as Ms. Washington is concerned about. But the guy gets off because we have a system that says the person has to be proven guilty.

JUDGE RICARDO URBINA [District of Columbia superior court judge]: You haven't given us the law of the jurisdiction, but I think the judge has to bite the bullet on a case like this. The information you've given us makes it rather clear that there are alternatives to locking this person up before trial. He is presumed innocent, and there's any number of reasons that explains the allegations that have been made. It's a heinous crime that he's charged with, but the fact of the matter is that there is a presumption of innocence, and that's what the court is required to act on. If there is some danger to the community, there's a number of things the court can do to try to insulate the community from being harmed. The first factor in my mind is going to be whether or not he's going to return to court. The second would be trying to set up some system to assure me, as the judge, the court, or the system in the community that they can rest at ease, even based on these allegations about him.

PROFESSOR NESSON: Ms. Washington's got a system. Her system to put the people in that church at ease is to lock him up, and that is very reassuring. And in fact all the rest of this stuff, about keeping him at home and checking in with the probation officer once a week, is not very reassuring.

JUDGE URBINA: I think it's the judge's job to identify the issue and to deal with it directly. It's not the judge's job to make the community feel comfortable with that decision. The judge has got the law to rely on, and often that's what the judge has to do—make a decision that's going to make the community uncomfortable.

LUCY FRIEDMAN [executive director, Victim Services Agency]: I think that in this case the judge's job is not to make the community feel comfortable in general terms but to deal with the specifics of this case. From the victim's perspective, this is a troubling case because although we want to presume innocence, we clearly don't want to have this man take advantage and continue doing what he's been doing. I hope the reporters are out there because the more publicity about this case, the better. If he were then released with some kind of supervision, the community would be protected because people would be aware of what he has been accused of doing.

PROFESSOR NESSON: Judge Daffron, after considering this very difficult problem, winds up making the judgment that he's going to set fairly high bond of \$150,000. After bond is set, there is quite a bit of action out there in the community. There's a lot of people raising money in support of this fellow to pay off his bond. And you, Mr. Peruto, kind of like the political support that he's getting. You figure you'll have him out in awhile and I want you to think about talking to Mr. Goldsmith about pleading this one out. Mr. Goldsmith, you're willing to talk with him?

STEPHEN GOLDSMITH [prosecutor]: Yes, I think so.

ATTORNEY PERUTO: I would talk about plea bargaining in the sense of assault and point out that there was no serious injury because I haven't heard anything like that and that this man obviously has mental difficulty, which I can assure him will be taken care of. Now I would have had him thoroughly examined by people whom I hired that knew how to examine people. You'll always find psychiatrists who you can interest in the efficacy of the problem.

PROFESSOR NESSON: You're gonna hire these psychiatrists and you're then going to write the script for them?

ATTORNEY PERUTO: Absolutely, with all due honesty.

PROFESSOR NESSON: Let's assume I'm your psychiatrist. What are your interests in this examination, Mr. Peruto?

ATTORNEY PERUTO: I want you to examine my client because obviously he has some aberration of mind, which has caused this. He's been divorced seven years. He's been very, very morose, and he's been very, very depressed. I think it's worked on him to such a point where it's caused him to be a little bit, well, a little careless. He's misinterpreted the smiles of these young ladies. I think that once you've examined him, you'll agree that this man is not dangerous but really in dire need of medical attention.

PROFESSOR NESSON: Mr. Goldsmith, is this somebody you're gonna press hard with?

PROSECUTING ATTORNEY GOLDSMITH: This is a difficult case for the prosecutor, in fact, an unusual case, because the dynamics are against the prosecution.

The church has rallied, and they're convinced of the man's innocence. It's not a case the prosecutor particularly wishes to test. At the same time, we know there are multiple counts, whether you call them child molesting or rapes. We've gotten your psychiatric report saying he's not a pedophile; he's really a sick person.

The issue is whether this is an aberrational event and he can be treated. We ought to take into consideration whether he is in fact a pedophile who will continue to molest children if he's out. I would say to his attorney, we will not bring the other sixteen counts if you will pick one of these counts for which we want a guilty plea. Leave sentencing open to the judge.

PROFESSOR NESSON: And what's that going to mean if you take the plea to one count?

PROSECUTING ATTORNEY GOLDSMITH: We would require some sort of prison term to be determined by the court.

PROFESSOR NESSON: It's going to be up to the judge to sentence?

PROSECUTING ATTORNEY GOLDSMITH: I'm assuming that either there's a mandatory imprisonment period or the prosecution requires some imprisonment to be determined by the court.

PROFESSOR NESSON: All right, so let me see if I've got this straight. It depends a little bit for you on what the law is in the jurisdiction.

PROSECUTING ATTORNEY GOLDSMITH: What the judge's discretion is under the law.

PROFESSOR NESSON: If the judge has no discretion, then you are in a total position of power, aren't you? You are going to decide whether this guy does time or not? On the other hand, if the judge has discretion, you have a good deal less power? And you'd respond to that by saying I'm gonna be much less willing to bargain away charges?

PROSECUTING ATTORNEY GOLDSMITH: We're trying to get him to plead to something, and what I'm giving up is my requirement he goes for a fixed period of time. We're going to kind of roll the dice. He's gonna put his psychiatrist on before the judge; I get a guilty plea out of it. So long as the guy goes to prison, that's good for the state.

PROFESSOR NESSON: All right; now here's the situation in the jurisdiction. The judge has discretion. He could put this fellow on probation. That's possible. And the law in your jurisdiction is that you can't sentence-bargain. You can charge-bargain; you can't sentence-bargain. You go in front of the judge; he pleads guilty; it's up to the judge to sentence. Now, where does that leave you?

PROSECUTING ATTORNEY GOLDSMITH: The reason we have a lot less with which to deal is because the sentence ranges from the three counts that have been provided to us are twenty to forty years for rape, fifteen to thirty-five for attempted rape and eight to twenty for aggravated assault. If there's no realistic chance the man's ever going to get more than eight years, there's not much advantage for the state to go to trial at all on the top two charges because we know the judges are way to the left of prosecutors and it's going to come down to the minimum sentence. So we say

plead guilty to one of the counts, eight to twenty years, and we'll forgive the other two counts.

If the judge has a full range of discretion on sentencing, which essentially in this case is zero to forty years, we want a guilty plea which will allow the court—after it hears from you and the probation department, thank goodness, and the other psychiatrist—to come in with a range of penalty that's appropriate. Or we way, "Plead guilty to the eight to twenty, that's the lowest one, you reduce your risk of going to prison for forty years, and then let the judge decide."

PROFESSOR NESSON: Mr. Goldsmith, is this the discussion between you and Mr. Peruto that's taking place down in your office?

PROSECUTING ATTORNEY GOLDSMITH: Right.

PROFESSOR NESSON: What happens if Mrs. Robinson wants to present? She's Darlene's mother. Darlene was the victim of charge number one. Ms. Washington, would you be Mrs. Robinson for me? Talk to Ms. Washington here and discourage her.

PROSECUTING ATTORNEY GOLDSMITH: We think, Mrs. Robinson, that if this man is found guilty, the sentence is going to be six or eight years, and there is a chance it could go higher. We could go to trial with your twelve-year-old daughter and the chances of an increased sentence are a little bit greater. We can try to get a guilty plea and not put her through it. I'd like your permission to offer a guilty as charged to the count of eight to twenty years.

PROBATION OFFICER WASHINGTON: I don't want my twelve-year-old to be subjected to a trial after what she has been subjected to by this man. I want him to serve sixteen years, not eight, because when he is released, I want my child to be grown, through college, maybe even out of the area and hopefully over this.

PROSECUTING ATTORNEY GOLDSMITH: Well, I'm going to have a settlement discussion with his attorney. I'll offer him fifteen to thirty-five years. I think it would be easier if you weren't there. If he rejects it, then I'll come back to you and talk to you about whether your daughter wants to go through it. But one thing I want you to understand is even if we do go through this trial, the judge could still give the range of sentence that could go all the way down to zero. We can't guarantee a sentence to you, but I'll take your proposal to the defense attorney.

PROFESSOR NESSON: You're letting her run your office?

PROSECUTING ATTORNEY GOLDSMITH: In this case, the mom has a major say in whether to put her daughter, the victim, through the trial for what could come out of it, much more so than in a robbery or other case that doesn't put her child victim on the stand.

PROFESSOR NESSON: Mr. Peruto, what are you going to do about this?

ATTORNEY PERUTO: Well, I would point out to the district attorney that even with eight years, the man will be sixty, so I don't know where she's coming off with the protection of her own child. I would talk to Mr. Goldsmith about things such as considerations of track record. For

example, if he has tried cases against me before that he thought were winners and wound up losers, I would say that one of the bits of input has to do with the possibility of success at the trial. I would point out to him that although he gets great sympathetic appeal from the fact that the child is twelve, he also has a child that is not going to be able to understand the kind of cross-examination that I would put the child through. I would suggest that he speak again to Mrs. Robinson and let her know these things and that it might result in serious damage to the child, far greater than the risk she would fear after his release in eight years. It might cause irreparable harm to her. I would throw in all of these things, and I would suggest to him that if he wants a plea from me to the extent he wants a plea on the higher charge of rape and leave it to the judge, I could not accept that because he's only passing the buck. I am all too familiar with judges saying, "Well, he's already gotten his break on the reduction of the number of counts," and the judge is on the hot seat because now it's not a question of presumption of innocence. You have a guilty person before you, and he's gonna face the press, and we all know the way the press came down on that one judge who made that unfortunate comment, "She'll get over it." No judge is going to give him eight years or less than eight years on a plea to the rape charge. It must be the kind of bargain where we have a cap on the sentence; otherwise, I would have to tell my client, "You're a fool—you may as well face a thousand charges than one which exposes you to ninety-five years total because you can't trust the judge." You gotta put yourself in that judge's position. We just cannot deal under those circumstances on anything higher than the assault charge.

PROFESSOR NESSON: What I hear you saying to me, Mr. Peruto, is if you can't make a firm deal that at least caps the sentence, you don't want any deal at all.

ATTORNEY PERUTO: That's right. I would point out to the DA that I've got my doctors who are going to testify, I've got the great number of parishioners that are going to come in for him; it's going to be a real donnybrook. I'm just going to have to tell my own client you're shooting crap if you come in on a rape plea because then you're defenseless, and you're putting the judge in the position that I've previously described, and I would advise him to go for broke.

PROFESSOR NESSON: Judge O'Toole, should the law permit the prosecutor and defense to make a firm deal on the amount of the sentence? Must it be the law that the prosecution and the defense can make a firm deal on the amount of the sentence?

JUDGE O'TOOLE: The answer to that is no, because the judge has to impose sentence, and if he has no discretion in accepting or rejecting the deal, they're passing the buck to him whether it's a bad deal. The judge gets the buck from the community so to speak, and they don't suffer from it.

PROFESSOR NESSON: Judge Urbina? Do you understand the problem? How should it be?

JUDGE URBINA: I don't like the idea of having the defense and prosecution dictate what the sentence should be in the case. The judge, as more or less of a neutral person in the situation, has oversight of what's going on and has insight into what should ultimately be appropriate as a sentence. Both the prosecution and defense are coming at the problem with a particular point of view in mind, and they've reached a point where they've compromised. I don't think that compromise should really involve the judge.

PROFESSOR NESSON: Judge Murphy, how should it be?

MURPHY: To a large extent, judges know their prosecutors and their defense counsels and, to some extent, will pay deference to their judgment. They certainly don't have all of the facts before them, but by no means or measure can a trial judge be bound by a bad deal on his judgment. As a practical matter on the plea-bargaining process, the bargainers know their judge, and I think they ride on the philosophy that what they agree to will in fact be accepted, but they can never be totally assured.

PROFESSOR NESSON: What would happen in this case if we were to live in a world with no plea bargaining, no sentence bargaining, and no charge bargaining?

MURPHY: It's a cruel, cruel world and a very unrealistic one. Obviously, the court system would probably break itself very, very shortly if you didn't have the plea-bargaining process.

PROSECUTING ATTORNEY GOLDSMITH: It's an unrealistic world that doesn't allow those people closest to the case to negotiate an outcome based on the dynamics of the evidence, the dynamics of the community, and the importance of the charge.

PROFESSOR NESSON: So as far as you're concerned, it's part of the prosecutor's job to negotiate outcomes?

PROSECUTING ATTORNEY GOLDSMITH: Absolutely.

PROFESSOR NESSON: And God help the defense—if they didn't have that to do, what else would they offer their clients?

PROSECUTING ATTORNEY GOLDSMITH: Well, I think we arrive together at a decision that more than anything takes the evidence and predicts the judge.

PROFESSOR NESSON: All right. Let's predict the judge here. Judge O'Toole, just looking for a reaction. What are you going to sentence this man to?

JUDGE O'TOOLE: Well, he's gonna to go prison, it's just a question of how long. It's a very serious crime, and apparently we have mitigating factors and aggravating factors.

PROFESSOR NESSON: He's a distinguished member of the civil liberties movement, civil rights movement, and a pillar in the Baptist Church. Tremendous support from his congregation.

JUDGE O'TOOLE: That isn't at the top of my list of priorities for determining sentence.

PROFESSOR NESSON: And he's sick.

JUDGE O'TOOLE: Is that a factor to consider? That also works the other way because if he's sick, who's to know whether he's going to recover? I

would perhaps have a psychiatric examination conducted by a court-appointed expert, and you also have the expert input from the probation department. Included in the expert input would be statements of the victims and interested parties. All these players come in line on a sentence.

Mrs. Robinson rings a loud bell when she talks about the concerns of her daughter. I would want to know the impact on the victim. I'd also want to be satisfied as to the length of incarceration that this man would serve under the particular sentence. I'd want to know the guidelines for release and what type of parole supervision he's going to have. The man's fifty-two years old, perhaps it's somewhat pragmatic, but I'd want to see him incarcerated until he's sixty and put parole on him. I'd propose a sentence that considers not only punishment and deterrence but community safety and also the interests of the defendant. This is a very serious ongoing pattern of conduct, evident not only by this particular charge, but if I understand the facts, this has been occurring with other young females in the parish.

PROFESSOR NESSON : You're going to find out about that during sentencing?

JUDGE O'TOOLE : I would think so.

PROFESSOR NESSON: Commissioner Coughlin, can you use this man? You've got him now, and you've got him for a minimum of eight years. What are you going to do with him?

THOMAS COUGHLIN [commissioner, state correctional services]: Put him to work. I would probably use whatever skills I could get out of him. Not in terms of ministerial skills, but I'd imagine he could read and write pretty good, and we'd probably put him in some setting within the prison system where we could use those skills. . . .

"Negotiation and mutual accommodation dominated workgroup interactions and facilitated guilty pleas."

13.2 FELONY JUSTICE

James Eisenstein and Herbert Jacob

James Eisenstein is Professor of Political Science at Pennsylvania State University;

Herbert Jacob was Professor of Political Science at Northwestern University.

Courtroom Workgroups in Chicago

Two sets of courtroom workgroups [preliminary workgroups and trial court workgroups] determined the fate of defendants in Chicago.

From James Eisenstein and Herbert Jacob, *Felony Justice* (Boston: Little, Brown, 1977), pp. 106–109.