"Should The Insanity Defense Be Abolished?"

DebatesDebates #110
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YES

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TIMEKEEPER- MARK NIX: Welcome to this week's debate, Should The Insanity Defense Be Abolished? Dr. Szasz, will you begin the debate?

DR. SZASZ: I'm Thomas Szasz, professor of psychiatry emeritus at State University in New York. My belief that the insanity defense should be abolished is based partly on a conceptual critique and partly on a practical one. Now the conceptual one, very briefly, is that insanity is a dubious term which can refer to one of two things: First, to a brain disease, and I will say something about that; and secondly, to misbehavior. Well, disease, brain disease, does not cause criminal acts. Epilepsy as a brain disease doe s not cause criminal acts. Epileptics may or may not, just like other people, commit crime. Now, insofar as the term insanity refers to behavior, it is a fiction. It is not a disease, and doctors have no competence in judging that. It's usually determined after a person commits a crime; usually if something gets upsetting socially. My second basis for objecting to it is that the consequences of the insanity defense typically is incarceration in

the name of diagnosis, disease, and treatment. And that is a charade and a misuse of the medical profession for depriving people of liberty who are nominally declared to be innocent. [bell]

TIMEKEEPER: Thank you, Dr. Szasz. Mr. Kuby, your introduction.

MR. KUBY: My name is Ronald Kuby; I'm a civil rights lawyer. Under our system of justice, we only punish people who know the difference between right and wrong and people who are capable of making a choice between right and wrong. For that reason we don't criminalize small children. Even if a two year old burns down the whole house, we don't hold her accountable. For the same reason, we don't criminalize the insane. If a person doesn't know the difference between his wife and a grapefruit, and he carves up the former, thinking it's the latter, we don't hold that person criminally responsible. If the Vietnam veteran in the throes of a flashback fires his weapon, thinking he's back in Vietnam, we don't hold that person criminally accountable for his conduct. After all, the purposes of punishment are to deter, and the insane by definition are beyond deterrence. They're beyond rational argument. We punish in order to warehouse, to protect society, but in fact, with the insanity defense, we can put people in mental institutions and treat them rather than punish them. And lastly, we punish people in order to retribute, to extract vengeance. And it's outrageous in a civilized society to seek vengeance against the insane. The British used to hang mules in full view of other barnyard animals when they kicked their owners. I would like to think we've gone beyond that.

TIMEKEEPER: Thank you, Mr. Kuby. Dr. Szasz, will you introduce your first teammate?

DR. SZASZ: Yes. I would like to introduce Professor George Alexander, who is professor of law at Santa Clara University in Santa Clara, California.

MR. ALEXANDER: Thank you. In point of fact, the insanity defense, however conceptually interesting the argument you just heard is, is a lawyer's tactic for obtaining for defendants some compassion, some reduced result, and it operates, unfortunately, exactly the opposite way. Most lawyers who use the insanity defense do their client a great disservice because in point of fact it is almost never successful. It's successful in less than one half of one percent of cases in which it's tried. The consequences of being found insane when the defendant urged the insanity defense are usually longer term incarceration than would have visited a finding of guilty; and in general it really does not accomplish the only thing that seems to me to be justified about the idea--that is, some form of compassion. I'm for compassion; I'm against the insanity defense. The difficulty with the argument that Mr. Kuby makes is that he makes it seem as though there really are two kinds of people, some who make rational judgments and others who don't. In point of

fact, that's a myth. People all make decisions, and in fact, the process is extremely inadequate for focusing on the extent to which other considerations interfere with decision making. It simply does not function that way. If you look at the one-half percent that make the defense successfully, they make it because [bell] they are the most upright citizens. Ex-policemen make it; people who drink blood, fail.

TIMEKEEPER: Thank you, Professor. Mr. Kuby, your first teammate.

MR. KUBY: Yes. To my right is Susan Boleyn, assistant attorney general of the state of Georgia. I don't know whose constituency is going to be heard more by us being on the same side, hers or mine. But we are in rare agreement on this issue.

MS. BOLEYN: The insanity defense has often been thought of as the bastion for desperate defense lawyers, but in our case I think that, from the trenches point of view that I bring to this debate, the not guilty by reason of insanity is rarely tried. Even more rarely is it applied by the juries. And I think that it should continue to be a viable alternative for the juries in their ultimate task of determining the accountability and the responsibility of individuals for their actions. The use of mental health professionals to assist the jury in making that judgment is in line with the rest of the jury system in which other experts often testify as to their opinions, and the jurors make the ultimate determination. Many of the statistics now show that successful insanity defenses are commonly where the mental health professionals, both the state side and the defense side, concur in that there is mental illness. And even some hard-nosed prosecutors generally agree that when a case is so bizarre or so off-the-wall, that insanity has to genuinely be called into question. And in many cases both the state and the prosecution agree that the insanity defense is appropriate in that case, and this is one of the most successful ways in which an insanity defense is utilized. So essentially the reality of it is today that insanity defenses are almost always, except in some high profile cases, a negotiated type plea in which there is some question about the individual's ability to conform their acts to society's mores.

TIMEKEEPER: Thank you. Dr. Szasz, your final teammate.

DR. SZASZ: Yes. I would like to introduce Dr. Jeffrey Schaler, who teaches at American University and Johns Hopkins.

DR. SCHALER: Thank you. The controversy concerning the insanity defense touches upon the most profound values that we have regarding justice. And I think that we all agree that the reason it's so controversial is because we share a common value in the sense that people who are guilty of a crime should not be set free and people who are innocent of a crime should not be

punished. The issue here of course is that a person has obviously committed a crime, and the contention is that he was not capable, or she was not capable, of knowing what he or she was doing, what was right or wrong, or could conform his or her behavior to the dictates of law. It's important too to remember that insanity is not a medical, psychiatric term. It is a legal term. So to address the proposition here, Should the Insanity Defense Be Abolished?, well, of course it should abolished, because criminal behavior cannot be the product of a legal term.

TIMEKEEPER: Thank you, Doctor. Mr. Kuby, your final teammate.

MR. KUBY: Yes. Dr. Robert Berger, who is the director of forensic psychiatry at Bellevue Psychiatric Center and who has testified in numerous cases, both for the prosecution and the defense.

DR. BERGER: The debate is not one of numbers. We all recognize that the number of individuals who put forth an insanity defense are small: one percent of all those cases that are put forth to trial. It's not a matter of how many individuals are found not responsible. We know that number is small: It's one quarter of that one percent. And it's not a matter of whether or not these individuals have legitimate psychiatric disturbances. It's a moral issue. And moral and legal considerations make up a determination of guilt. People need to find individuals responsible for the behavior that they do against society's rules and regulations. But at the same time, it's the morality in an individual that recognizes--and every society has recognized this, even primitive societies, and it's even recorded in Biblical times--that there are individuals who are not responsible for their behavior because they could not appreciate the consequences of what their act would be or could not appreciate that it was wrong. This notion of the insanity defense provides the law with some moral authority. This is the-- [bell]

TIMEKEEPER: I hate to interrupt. Mr. Kuby, could you stand? Dr. Szasz, your team can begin questioning.

MR. KUBY: May it please the court. [laughter]

DR. SZASZ: Well, I'll begin with a very short question. You are a civil rights defender and so are we on this panel, so perhaps we have something in common. So let me begin with what is patently kind of a thick question. Do you believe in incarcerating innocent persons?

MR. KUBY: Well, of course I don't--

DR. SZASZ: Thank you.

MR. KUBY: --as a general proposition.

DR. SZASZ: Well then, why do you believe in incarcerating people who have been declared by an American court, an American jury, and a judge, as innocent?

MR. KUBY: Because under these circumstances, what makes up the crime itself, what makes something a crime or makes something not a crime--

DR. SZASZ: But there is no crime, I am sorry.

MR. KUBY: --is the-- Right, you are not guilty by what? By reason of insanity.

DR. SZASZ: You are not guilty.

MR. KUBY: That's correct.

DR. SZASZ: That means you are innocent.

MR. KUBY: But Dr. Szasz, if you got rid of the insanity defense, all that would happen is that that person would then be found guilty and go off to prison. I don't think that that is an acceptable, civil libertarian perspective.

DR. SZASZ: Well, would you prefer to be in jail for a determinate period or in a mental hospital for an indeterminate period?

MR. KUBY: I would much prefer, and I think society would be better served, by taking people who are mentally ill, who are sick, providing them with treatment; then they can be released, rather than incarcerating somebody in one of the hellholes of American prisons for 20-30-40-50-100 years.

MR. ALEXANDER: I have to comment rather; then I'll make a question out of it. When I tried the Schuster case in the 2nd Circuit, they said that people, even those eligible for parole, could not be denied that eligibility simply because they'd been incarcerated in a mental institution. The state filed a declaration for certiorari, in which they argued the Supreme Court has to hear the case because almost everybody in the mental institution wants to go back to jail. Now at least in my experience, I don't understand your comment that you would rather be in a mental institution than in a prison, because apparently all of the people here in the state of New York wanted just the opposite.

MR. KUBY: Well, certainly not all the people in the state of New York wanted just the opposite--

MR. ALEXANDER: Well, the--

MR. KUBY: And it's not-- I mean, I find it ironic to hear this argument when we are not talking about what the individual defendant wants. The individual defendant wants to go free; whether he is guilty or innocent, he wants to be set back loose on the street. That's not the function that we have to serve as lawyers, as jurists. We have to look not just at what the individual wants, but look at what's best for society. And I have to say that the people that are driving the debate to get rid of the insanity defense are not people that are driving it from a civil libertarian perspective. They don't want to see more people being treated more compassionately. They want to see more people going off to prison for longer periods of time. And you know that as well as I.

MR. ALEXANDER: Again you said-- No, I know just the opposite, because I am one of the people that really wants to move in the direction of compassion--

MR. KUBY: So do we.
MR. ALEXANDER: --and therefore I want to get rid of the insanity defense. But we'll have a chance to address that in a little while. You thoroughly believe that there is such a thing as mental illness, and that of course drives your argument.

MR. KUBY: Well, I certainly believe--

MR. ALEXANDER: And you believe it's curable.

MR. KUBY: I certainly believe that there are people who are nuts, who are crazy, who don't process--

MR. ALEXANDER: Now, in--

MR. KUBY: --basic concepts like right and wrong, who think--

MR. ALEXANDER: Yes. Now in--

MR. KUBY: --that they are in another place.

MR. ALEXANDER: In your experience, have you ever found an insanity defense client who did not have opposing him a psychiatrist who said he was perfectly sane?

MR. KUBY: No.

MR. ALEXANDER: Does that surprise you at all?

MR. KUBY: No. Not at all.

MR. ALEXANDER: And that's because psychiatrists generally lie or what?

MR. KUBY: It's because reasonable people, reasonable doctors, reasonable lawyers, and reasonable scientists can disagree.

MR. ALEXANDER: But always disagree?

MR. KUBY: Well--

DR. BERGER: Not always. The majority of times it's not always-- In fact, the majority of cases, 84 percent of the cases, are determined by a judge or by plea.

MR. ALEXANDER: Yes.

DR. BERGER: And of those, the majority of those that actually go to the insanity defense, which is a small percentage of them, are achieved through agreement. So the myth that's constantly being fostered by opponents of the insanity defense that this is some bizarre battle of experts to individuals who are hired guns battling out myths of illogical and incorrect and invalid theory does not hold up to the tests of research.

MR. KUBY: I mean, I had a psychiatrist oppose me. He didn't believe in multiple personality disorder. Didn't believe in it. Didn't believe it existed, no matter what was in the DSF. So of course he is going to oppose me. Dr. Szasz, as I understand it, doesn't believe in any of this stuff. So of course he would be opposing me under those kinds of circumstances. I mean, psychiatrists are just as ideologically and morally and spiritually driven as anybody else, and they do disagree.

MR. ALEXANDER: Have you read any studies on the validity and reliability of psychiatric diagnosis?

MR. KUBY: I have not.

MR. ALEXANDER: I suggest that is light reading. I would like to return to the question that was posed in what should have been your time about consequences of mediation that result in the insanity defense being used. Would you think that it might be described, the insanity defense in that context, as a sort of fancy plea bargain?

MR. KUBY: You know, in many ways I think that my colleague was correct, and in many ways I think you are correct as well. The insanity defense as a

defense usually doesn't prevail in the sense of the person being found innocent and going off to a mental institution. Usually what happens is that the proffering of psychiatric evidence causes the jury to exercise their function of leveling and convict somebody of a lesser offense--

MR. ALEXANDER: Then let me ask you--

MR. KUBY: --rather than a greater one.

MR. ALEXANDER: --whether there might not be another issue in which the jury might do that. Can you tell us--we're the only lawyers here, so we've got to explain these things--what's mens rea?

MR. KUBY: Mens rea is the Latin term for "guilty mind," and as the lawyers here know, that for a crime to take place, you need not just a wrongful act--

MR. ALEXANDER: And who decides--

MR. KUBY: --but also a wrongful state of mind.

MR. ALEXANDER: Who decides whether a defendant had adequate mens rea?

MR. KUBY: Ultimately in this system it's the jury that decides.

MR. ALEXANDER: So even if we abolished the insanity defense, we would still have mens rea, the difference being that for mens rea, the jury would be instructed much more to use its own judgment, its own experience, and not the physicians', who--I will later argue--really can't communicate with each other.

MR. KUBY: That's not entirely correct. [bell]

TIMEKEEPER: I have the judge's gavel here, so Dr. Szasz, if you don't mind standing, and you may just begin questioning.

MS. BOLEYN: Dr. Szasz, as I understand it, you think-- You have written many articles on the myth of mental illness as a whole. What do you mean, just basically speaking, when you talk about the myth of mental illness, and in your response to that question, would you address what we would do with the mentally retarded or what we would do with persons who might not suffer from a psychosis, but for some reason might have a mental defect?
DR. SZASZ: Well, those are two questions. What I mean by the myth of mental illness is that the mind--that "disease," as used by physicians, pathologists, if you look at a textbook of pathology, a disease is an abnormal condition of the human body. The mind is not a part of the human body. So mental illness cannot exist. It is a metaphor for misbehavior

typically. That's why psychiatry is involved with the law in a manner like no other medical specialty--gynecology, ophthalmology, and so on, are not involved with the law like psychiatry.

MS. BOLEYN: So therefore, where your specialty overlaps my specialty--and I am a lawyer as well--

MR. ALEXANDER: Excuse me. [laughter]

DR. SZASZ: It doesn't overlap. Psychiatry, I have also argued, is in fact--and historically this is clear--a branch of the law. Psychiatry began, not as a discovery of diseases, but by incarcerating innocent people.

MS. BOLEYN: So under your view then, there would be no mental justification for any criminal act whatsoever then?

DR. SZASZ: There would be mental justification along the lines that Professor Alexander pointed out, in a common sense way. If a poor man steals a loaf of bread, that would be judged differently than if a man holds up a bank and shoots a bank guard because he wants more money.

MR. KUBY: But Dr. Szasz, do you--

DR. SZASZ: But let me add one other thing, which is absolutely essential: that I not only do not believe mental illness is an illness, I also do not believe that people who have not committed any crime should be deprived of liberty. I believe that the term "mental hospitalization" is an ugly, political term for incarcerating innocent people who are depressed, who are anxious, who complain about something, who have not done anything which is against the law. And this is what psychiatry is based on. The insanity defense and civil commitment are like Siamese twins. You cannot abolish one without killing the other.

MR. KUBY: You do recognize though, don't you, Doctor, that if you abolish the insanity defense, people who were found not guilty by reason of insanity will simply be found guilty and be marched off to prison. From a civil libertarian perspective, do you find that more desirable, less desirable, or--

DR. SZASZ: Far more desirable.

MR. KUBY: --just as desirable?

DR. SZASZ: Because I do not believe that the medical profession should, from a civil liberty point of view, be involved in depriving people of liberty, just like it shouldn't be involved with killing people.

MR. KUBY: So as long as another branch is involved in depriving people of liberty--

DR. SZASZ: I have to give--

MR. KUBY: --that satisfies your civil libertarian concerns.

DR. SZASZ: I have to give you a specific example. The most famous case of insanity acquittal in America is John Hinckley. There is abundant evidence that John Hinckley asked to be tried as a defendant, not as a mental patient. Your client, Mr. Ferguson, that made a great deal of publicity--whom you defended--the judge allowed him to defend himself. Now his behavior was not what you and I would consider to be conventional. I believe in unconventional behavior--

MR. KUBY: Do you recognize though--

DR. BERGER: That then in and of itself is the injustice, because an individual should understand what it is that he is being charged with, what the--

DR. SZASZ: He knew perfectly well.

DR. BERGER: --process is.

DR. SZASZ: He went along and he only shot white people.

DR. BERGER: He had no rational understanding of that. In fact, I think that it is quite evident from his own statements, that he truly was on a self-defeating and self-destructive course from the first word that came out of his mouth.

DR. SZASZ: I disagree with you completely. He recognized--

DR. BERGER: Because your position--

MR. KUBY: Do you recognize that someone can be incapable of understanding the nature and consequences of what they're doing?

DR. SZASZ: I do not believe that anyone who commits a crime is incapable of understanding what he did.

MR. KUBY: That's just a semantic distinction in terms of committing a crime. If a two year old--

DR. SZASZ: It's not semantic.

MR. KUBY: If a two year old burns down the house--

DR. SZASZ: Now here you go. We are not talking about children.

MR. KUBY: But I am. I am asking you that question. If a two year old burns down the house, you would clearly say that she doesn't understand what she is doing, and she shouldn't be criminalized, isn't that right?

DR. SZASZ: Not necessarily. A two year old may very well understand that--

MR. KUBY: So from the civil libertarian perspective you would actually criminalize that two year old.

DR. SZASZ: No, no, no. That doesn't follow. That doesn't follow. Society has always had, and should have, different policies towards minors than towards adults--you are introducing a whole other dimension here--but not because they are mentally incompetent. A 16 year old is likely to be mentally much more competent than some stupid adult.

MR. KUBY: There is a difference--

DR. SZASZ: But still, it's a different--

MR. KUBY: --between a 16 year old and a two year old, in fairness.

DR. SZASZ: The two year old is also competent--

DR. BERGER: Psychiatrically, developmentally, and legally as well.

DR. SZASZ: But incompetence--and this touches on the question of mental retardation, people who are so incompetent do not know how to commit the crime. A crime is a coordinated human act. You have to pick out something, you have to have a gun, you have to have a knife. It's a complicated performance.

DR. BERGER: That is, again, certainly a myth, because I think that you understand well that an individual--and that's why the laws made out this separation and why it's stood the test of time, many years of time--at least over 150 years of time--that an individual can have the actus rea--commit a guilty, bad act--have the mens rea, that is, have the intention to perform such an act, yet at the same time, not be able to appreciate that what the consequence of that act could be or that that act was wrong. And it is that specific distinction, it seems, that the law wanted to make. And it's not psychiatrists who are going in and are not the triers of fact, but they are

educators for the jury. And yes, there are those who educate in one ideology and others who educate in another, and it's for the trier of fact to make a decision who is more persuasive. [bell]

TIMEKEEPER: Thank you. Thank you, Dr. Szasz. Ms. Boleyn. You may start questioning.

DR. SCHALER: I have a question. There are two parts to this question.

MS. BOLEYN: Okay.

DR. SCHALER: I would like to know how you could tell, or anyone could tell, the difference between someone who is sane pretending to be insane, and someone who is insane. And the second part of my question is: How can you tell the difference between someone who is insane pretending to be sane, and someone who is really sane?

MS. BOLEYN: Well, I think the answer to both questions is, not being a mental health professional, that I am not--

DR. SCHALER: But wait. Insanity is a legal term; it's not a medical term.

MS. BOLEYN: Well, let me perhaps preface my answer. I understand that that's your position and I agree with insanity. But first of all, you have to have some predicate facts upon which to even bring into question whether the person is sane or not. The jury always has to find, or the trier of fact, always has to find some predicate facts. And so in terms of malingering, in terms of faking, there have to be some predicate facts before the finder of the jury. And the jury, of course, has to be the ultimate determiner of lots of expert opinions, whether it's autopsy reports, whether it's ballistics, all those types of experts.

DR. SCHALER: But I think you are avoiding my question. On what basis--

MS. BOLEYN: Perhaps I don't understand it.

DR. SCHALER: --can a jury determine the difference? How can a jury determine that difference between someone who is insane and someone who is sane pretending to be insane; someone who is insane pretending to be sane? How can you tell the difference?

MS. BOLEYN: Well, there you go to the whole framework of the American judicial system.

DR. SCHALER: But what are those criteria? I really would like to know. How can the jury make that decision? Based on what criteria?

MS. BOLEYN: Well, I think what you're saying is that it's difficult to mix your metaphors, to mix legal and medical terminology in order to have an ultimate valid result. But that's just the framework of the judicial system in which you have--

DR. SCHALER: But I'm not mixing it. I'm asking this in a legal context. How does one make that distinction? This seems of critical importance--

MS. BOLEYN: Well, the--

DR. SCHALER: --with very important consequences. How does one make the distinction? I submit it can't be done.

MS. BOLEYN: Well, you're not asking a question, you're making a statement.

DR. SCHALER: I'm asking you: Tell me how can it be done.

MS. BOLEYN: The legal--

DR. SCHALER: I don't see how it can be done.

MS. BOLEYN: I think the legal definitions can be applied by the jury in the concept of the individual context of that case. As we've already had pointed out by Dr. Alexander, every single criminal case involves the determination of mens rea, whether the acts were done, and if that's admitted, then you have to look at the person's intent. So how are you ever going to know what's in anybody's head, whether it's voluntary intoxication, whether it's voluntary manslaughter? All of those things are all mental processes that the jury has to weigh. So I see no difference in insanity and other forms of justification that require you to get inside somebody's mind.

DR. SZASZ: Let me suggest just another angle to what I think Dr. Schaler--what I know Dr. Schaler is asking you. Underlying your argument--and you actually made it quite explicit--that you regard mental health testimony as similar to pathologists or toxicologists or ballistics experts.

MS. BOLEYN: With some significant differences.

DR. SZASZ: Excuse me. The difference is that only mental health professionals run a system of prisons in which more people are incarcerated today in America than in jails--called mental hospitals.

MS. BOLEYN: But as I understand it, in my experience, most times the mental health professionals that are testifying on both sides agree that there is

some form of mental illness.

DR. SZASZ: Of course. That is their religion.

MS. BOLEYN: It's a question of degree. They are not able to testify. The jurisdictions don't even allow them to say whether the person is--

DR. SZASZ: But if you don't believe in mental illness--

MS. BOLEYN: --sane or insane.

DR. SZASZ: --you don't qualify as a psychiatrist. So this is circular.

MS. BOLEYN: Well--

MR. ALEXANDER: May I ask you the kind of testimony you elicit? What does a psychiatrist tell you, other than the conclusions? What do they describe? Lesions?

MS. BOLEYN: They describe whether they think the person is suffering from some sort of--

MR. ALEXANDER: How do they know?

MS. BOLEYN: --delusions--

MR. ALEXANDER: What's the data? It's all behavioral, isn't it?

MS. BOLEYN: Yes, and also I guess interviews and the type of training that they have, clinical training--

MR. ALEXANDER: But it's all about behavior.

MS. BOLEYN: Yes.

MR. ALEXANDER: It's not about what physicians normally testify about.

MS. BOLEYN: Right. That's correct.

MR. ALEXANDER: And can't juries handle the question of behavior--

MS. BOLEYN: Well, as I--

MR. ALEXANDER: --without the physician?

MS. BOLEYN: Well, as I understand it, in many cases, you have expert

testimony--at least in my experience, in my cases, you'll have the jailers that will testify as to their observation, you'll have family members that will testify, so oftentimes you have expert testimony that is supplemented, if you will, for the jury's consideration, with the non-expert testimony. I've even seen some statistics that say it may be that we don't give as much credence to the mental health experts as we do to the jailer who says, "Well, I thought he acted funny." A lot of time jurors are just as persuaded by lay testimony as they are by expert testimony. So it seems to me that mental health professionals sometimes exaggerate their role in the jury's ultimate determination.

MR. ALEXANDER: I think you're making my point beautifully, which is that we could strip away that level and we would still have the issue of how behavior affects responsibility--

MS. BOLEYN: That's--

MR. ALEXANDER: --which I think is an important issue for the jury. Second question: Would you not agree as a fundamental matter of jurisprudence that innocent people should at least be treated better than guilty people?

MS. BOLEYN: Well, if you define innocent in terms of not having committed the act--

MR. ALEXANDER: No, innocence-- Any finding of innocence.

MS. BOLEYN: Are you talking about legal finding of innocence?

MR. ALEXANDER: Legal finding of innocence, otherwise unqualified.

MS. BOLEYN: So in other words, the post-verdict treatment of them should affect the pre-verdict treatment of them? Is that the question?

MR. ALEXANDER: No. My question really is: Is it not usually a matter of justice that at least an innocent person should be treated as well as a person found guilty?

MS. BOLEYN: Well, of course.

MR. ALEXANDER: Well, of course. And then I want you to explain to me why Backstrom says that a supposedly sick person must be released at the latest at the end of the criminal sentence he would have served, while someone found innocent by reason of insanity can be held forever.

MS. BOLEYN: Well, see, I think that's where I'd like to disagree and go back to my teammates' discussion, where an innocent --

MR. ALEXANDER: Do you disagree with the outcome? I mean, do you think I incorrectly stated the law?

MS. BOLEYN: No, I think there's a question of how you define innocence. It's how you define innocence, whether they're-- They're not innocent in the sense that they have been absolved from having done the act.
MR. ALEXANDER: Exactly.

MS. BOLEYN: They've been absolved of responsibility.

MR. ALEXANDER: Exactly. The labeling which you found so compassionate in fact becomes much more malevolent than a finding of guilt. So so much for the civil libertarian approach. That's why I think I'm a civil libertarian in this respect and maybe you're not. [bell]

TIMEKEEPER: Thank you, Susan. Well, this is your chance, too. Now you can stand up, Professor, and you can start questioning.

MR. KUBY: From the standpoint of civil liberties, and you'll recognize, won't you, that most of the time the insanity defense plays out in the course of homicide cases, of murder cases--seldom does someone plead insanity, you know, for drug use or for stealing--

MR. ALEXANDER: No, forgive me, because very often the prosecution pleads insanity because that prevents having to prove the case.

MR. KUBY: Let me ask you this. If somebody interposes an insanity defense for a homicide, say in the state of Texas, that regularly uses capital punishment, and he prevails in his defense, he goes to a mental institution, where he may or may not be released, he may or may not be made well. But if he's found guilty of murder, he goes off and gets a needle stuck in his arm on a gurney. Is that a more compassionate outcome from a civil liberties perspective than treating somebody who's been ill?

MR. ALEXANDER: You know, the answer to that is not as obvious as you would suggest. I know a number of people who would rather die than spend their life in the hellholes in which they're put.

MR. KUBY: Well, so we should--

DR. BERGER: But also those people have a psychiatric diagnosis, because I happen to work in a forensic psychiatric hospital, and I will tell you that it is the individuals who are determined by psychiatrists to be the most ill who want to return to the jail. And it is the individuals without mental illness, but rather character pathology, who persistently attempt to get to

the hospital. So what you find really is that the most sick people do not want interventions which can decrease their mania, take away their delusions. They want to be left alone. They want to be tucked in a room under a bed and not come out, eat when they want or not eat at all. So they don't see themselves as having that advantage.

MR. ALEXANDER: See, this--

DR. BERGER: It is those insane people--

MR. ALEXANDER: --is really what psychiatry gives us in law, the statement that, Listen to people and remember they mean exactly the opposite of what they say. And that's because they're crazy.

MR. KUBY: Well, wouldn't this whole problem be solved then if you simply gave the person a choice? I mean, the amazing thing about the insanity defense is it takes a certain amount of mental composure to interpose in the first place. And we all know from the Ferguson case, the craziest people--the most erratic people, in deference to Dr. Szasz, it says they are not insane at all. But if your problem is a problem of individual choice, wouldn't it be easier to simply leave it up to the defendant? If the defendant wants to say, "Go ahead, I won't interpose an insanity defense--try me, I'm innocent," that's the defendant's choice. On the other hand, if the defendant says, "I want an insanity defense, I want to interpose that, I prefer to go to a mental institution and get treatment," doesn't that solve the problem?
DR. SCHALER: Well, you know, it's an ingenious solution. The reason it doesn't is because it brings with it the whole notion that we are dealing with something legitimate, something that people really can testify, when in fact we are dealing with something that is actually two metaphors. First of all, the notion that it's disease is a metaphor; secondly that it is disease of the mind is a double metaphor, because the mind, like disease, doesn't exist. It is--

DR. BERGER: And what facts support that?

MR. ALEXANDER: It's a construct.

DR. BERGER: You said, "in fact it is." What facts are you referring to that seem to--

MR. ALEXANDER: That there is no mind? I can't find it.

DR. BERGER: When there are studies indicating--

MR. ALEXANDER: Not on his side anyway. [laughter]

DR. BERGER: --reliability among various relaters in diagnosing particular conditions. Do you suggest that the so-called harder sciences have any better outcome at a trial, and I think that we can all look at the O.J. Simpson case and laugh at that assumption, a case in which medical testimony was at in its abundance, the hardest of sciences--radiology, criminology, pathology, et cetera--debated on longer than any psychiatric testimony has ever been debated in any court--

MR. ALEXANDER: Everything was debated--

DR. BERGER: --in this entire country.

MR. ALEXANDER: --longer than it's ever been debated anywhere.

DR. BERGER: But that was an extreme that represents an inherent problem among scientific testimony in the courtroom, but that doesn't mean that because it's a problem, that there's no place for it. [bell]

TIMEKEEPER: Thank you. Dr. Berger, you can now stand and get ready to be questioned.

DR. SCHALER: Dr. Berger, could you please define schizophrenia for us?

DR. BERGER: It's a disorder of behavior, thought, and feeling.

DR. SCHALER: If a person differs in political views in a society where a majority of people hold one point of view, would that person be considered schizophrenic?

DR. BERGER: Every society, regardless of how different to others their beliefs are, recognizes within that society individuals who have disorders of thought. An example: I was in the emergency room as a young resident and a family came in jumping up and down, dancing and singing and throwing their hands up to the sky. And they brought their young son in and they said, "He's been screaming and dancing around and jumping up and down and hearing voices," and I just looked up at them at two in the morning and said, "But you all are," and they said, "But he's doing it wrong." [laughter]

DR. SCHALER: Yes, I understand--

DR. BERGER: It is recognized regardless of what the culture is.

DR. SCHALER: Now--

DR. BERGER: And would we find that person-- Possibly.

DR. SCHALER: That's a very good point. A second part of my question is: Are the people labeled as deviant or what you call perhaps schizophrenic, are they consistently labeled that way between cultures? In other words, would a person who is labeled as schizophrenic here be considered deviant in another society or does that vary?

DR. BERGER: There is a certain degree of variation. In fact--

DR. SCHALER: That's a very good point.

DR. BERGER: --we're studying cultural differences--

DR. SCHALER: That's a very good point. Doesn't that support the idea that a deviance designation is socioculturally determined, not medically determined?

DR. BERGER: I would say that one cannot take away the sociocultural aspects of medical illness, whether it's physical illness or it's--

DR. SCHALER: Is AIDS here--

DR. BERGER: --psychiatric disturbance.

DR. SCHALER: AIDS here and AIDS in East Africa and in Asia, isn't it consistently AIDS? Syphilis is consistently diagnosed, regardless of the culture?

DR. BERGER: That's where you have biological evidence--

DR. SCHALER: No, that's--

DR. BERGER: --and so--

DR. SCHALER: --high reliability, which you do not have in this deviant designation. I beg to differ. One is constant, with high reliability--

DR. BERGER: You should review--

DR. SCHALER: --and one is not.

DR. BERGER: You should review the studies more in terms of reliability and interrelater studies in terms of diagnosing mental illness. I too studied Dr. Szasz--

DR. SCHALER: And they are--

DR. BERGER: --when I was younger and quite believed--

DR. SCHALER: In fact they are quite right.

DR. BERGER: --his notions of deviance.

DR. SCHALER: Let me ask you about one other thing that you've mentioned. You mentioned that this individual hears voices. Do you--

DR. BERGER: You like to ask questions, you don't like to hear answers, I think.

DR. SCHALER: Well, it's my turn to ask questions.

DR. BERGER: And mine to answer them.

DR. SCHALER: Do you believe that a person--

DR. BERGER: That's what I am saying, otherwise I could just sit here and talk.

DR. SCHALER: --who is hearing voices in their head, is that an indication of schizophrenia?

DR. BERGER: Not specifically.

DR. SCHALER: It is not.

DR. BERGER: Hearing voices can be a result of just a) cultural phenomena, acceptable in many cultures, or it could be a result of severe depression--

DR. SCHALER: The issue--

DR. BERGER: --or it could be a result of schizophrenia--

DR. SCHALER: Okay.

DR. BERGER: --it could be a result of AIDS, as you mentioned. [bell] Many illnesses have many--

TIMEKEEPER: Okay, Doctor, you can now sit and get ready to answer your questions. Dr. Schaler.

MR. KUBY: Dr. Schaler, I have a question and I don't want to mischaracterize your position. Is it fair to say that from your perspective that if somebody goes out and commits the act, they should be punished for the act, and what's

going on inside their head is not really the relevant consideration. It's what they do that's important.

DR. SCHALER: When they commit--

MR. KUBY: Is that fair?

DR. SCHALER: Well, let me qualify that. If they commit the act and it's a criminal act, then it comes under the jurisdiction of criminal justice.

MR. KUBY: But you recognize it's the mental state--

DR. SCHALER: The second part of that--

MR. KUBY: You recognize though it's the mental state that makes it a criminal act in part, right?

DR. SCHALER: The second part of that is that if they committed the act and it is not-- And I am not talking about someone who may have a heart attack driving down the road, lose control of his car, and kill someone. That I would not consider a criminal act.

MR. KUBY: Why not? Because the person is just as dead.

DR. SCHALER: Because the element of volition is not present.

MR. KUBY: Okay. So it's volition.

DR. SCHALER: We do have an identifiable, physiological lesion associated with that act. Now if in fact we were to determine consistently a physiological lesion correlated with what is called schizophrenia, I suspect--although I would never dare to speak for Thomas Szasz--that he would say yes, this seems to be part and parcel of a brain disease, although it would not be a mental illness. It would be a brain disease. You see? So even if you found a lesion that was correlated consistently, such as in the case of a heart attack, lose control of a car, et cetera, it would not be called a mental illness.

MS. BOLEYN: But part of that hypothetical is the person I'm sure that we've all heard about who knows they have a heart condition, is told not to drive because it endangers others, and then doesn't that get your volition when they get behind the wheel. Then how are you going to know their purposeful intent?

DR. SCHALER: I think this is a very good and important ethical question that you're asking. I don't see it as related to the issue of the insanity

defense.

MR. KUBY: Well, it's related in this way: Can you posit, for the sake of this argument, a person who by reason of mental problems or whatever you want to call them--I'm not wedded to the illness metaphor--mental problems, is incapable of conforming his or her conduct to societal norms, suffers an irresistible impulse to do something?

DR. SCHALER: I don't believe such a thing exists, so you assume that I agree with that entity? I can't--

MR. KUBY: Okay, but that's the nature-- I mean--

DR. BERGER: That's why you don't understand the purpose of the insanity defense.

DR. SCHALER: I understand the purpose of the insanity defense very well.

DR. BERGER: But you seem to keep equating intent with criminal responsibility and that's much different, isn't it?

DR. SCHALER: You seem to be equating lack of intent with an act. I don't see how it could happen. I don't see how--

MR. KUBY: You don't believe in mental illness--

DR. SCHALER: --someone can act without intent.

MR. KUBY: You don't believe in mental illness either.

DR. BERGER: I'm not discussing intent.

MR. KUBY: There is not such a thing. Is that your position?

DR. SCHALER: There is no such thing as mental illness.

MR. KUBY: Okay.

DR. BERGER: Most individuals that plead lack of criminal responsibility had the intent to commit the act. If they didn't, they would be found not guilty and they would go home. So it's that area of people that seems to be ignored by you--those individuals who have intent, yet at the same time couldn't appreciate the consequence of what they were doing and that it was wrong. Is it that you feel that it is less practical to have these people not found responsible, or--

DR. SCHALER: I think if you commit a criminal act--

DR. BERGER: --or less moral?

DR. SCHALER: --you should be punished for your criminal act. If you haven't committed a criminal act, you should not be punished for it. Very simple. [bell]

TIMEKEEPER: Thank you. It's time to go to one-on-one questioning, so Dr. Szasz, Mr. Kuby, if you would stand, Dr. Szasz, you can start the questioning.

DR. SZASZ: How would you respond to the proposition that the insanity defense is patently a legal and social tactic to achieve a certain result, usually clothed as ostensibly some mercy. And yet when it comes to its determination, we pretend that it's a phenomenon that can be found, and the best way I can illustrate my point is to point out something which perhaps you are aware of, perhaps you are not. The origin of the insanity defense as now used really originates before modern psychiatry in defending people who have committed suicide in England, where it was very severely punished. The person couldn't be buried, was denied burial, in consecrated ground, and all his goods were taken away so his family was impoverished. And in order to circumvent this law, they were posthumously declared insane. Well, that's obviously a medical chicanery, because the person was dead--how can somebody be declared insane who is already dead that the doctor has never seen, and doctors didn't even examine those cases. They became involved later. That was a jury determination. So that is the origin of the insanity defense, simply a way to circumvent the punishment for suicide.

MR. KUBY: Well, that argues counter to hundreds of years of Anglo-American law. In this society we take the position--this is back where I started out from--that we only punish people who are capable of knowing the difference between right and wrong and who are capable of conforming their conduct to do the right thing. When people cannot know the difference between right and wrong, when they can't conform their conduct, when they can't control themselves, we say as a social construct that they are ill and they need treatment rather than they are criminal and they have committed crimes. And this is a way of showing compassion, but it's also a way of recognizing that the criminal justice system deals with crimes, and that's what it's designed to deal with, and when you're dealing with people who engage in aberrant behavior who don't know what they're doing, they need treatment.

DR. SZASZ: So you believe in involuntary treatment, as a civil libertarian?

MR. KUBY: I am terribly troubled by involuntary treatment--

DR. SZASZ: You just admitted that--.

MR. KUBY: --but I need to tell you this, Doctor--

DR. SZASZ: --they needed treatment for mental illness.

MR. KUBY: --I am terribly troubled by involuntary incarceration. I mean, I don't think from a civil libertarian perspective that taking somebody--

DR. SZASZ: But you--

MR. KUBY: --and sticking him on a gurney [bell] and sticking a needle in his arm--

TIMEKEEPER: Let's turn it around. You can now go on the offensive.

MR. KUBY: Let me ask you this: From a civil libertarian perspective, is it more compassionate to take somebody, treat them psychiatrically, give them medication, or stick them on a gurney and stick a needle in their arm and kill them?

DR. SZASZ: Well, you are playing the death penalty card, which is not quite fair, because if you are so upset about that, then abolish the death penalty and then let's reconsider the insanity defense--

MR. KUBY: Okay. Is it more compassionate-- Then let me ask-- We'll assume the death penalty is abolished. Is it more compassionate to stick somebody in a place like Attica for 80-90-100 years than it is to take somebody and treat them psychiatrically when they want the psychiatric treatment and they don't want the incarceration?

DR. SZASZ: I don't have any problem with that. Then let them choose.

MR. KUBY: And that's what they do when they choose the insanity defense.

DR. SZASZ: Or they go, but let's assume after two weeks of treatment, they say, "Now I'm cured. Thank you very much. Goodbye." [laughter]

MR. KUBY: Or they can retain you as their psychiatrist who will examine them and say, "You are perfectly fine."

DR. SZASZ: But once they have chosen this treatment, when can they stop it?

MR. KUBY: Well, I mean, that of course is the problem. They stop--

DR. SZASZ: That's not the problem, that's not a phenomenon--

MR. KUBY: --when they're well.

DR. SZASZ: That's not a phenomenon. We saw this in One Flew Over the Cuckoo's Nest.

MR. KUBY: Okay, fine.

DR. SZASZ: It was a dramatization of this story.

MR. KUBY: Okay, fine.

DR. SZASZ: He chose to be in a mental hospital.

MR. KUBY: Would this solve your problem then? We have some sort of time limit on treatment. We have two years to make somebody well, then release them.

DR. SZASZ: No, I can't compromise--

MR. KUBY: Three years. We do that with welfare. We do that with prison.

DR. SZASZ: They can't have treatment [for mental illness]--

MR. KUBY: Why not?

DR. SZASZ: --any more than you can have treatment for being a black or a Jew. The founder of the American Psychiatric Association, Benjamin Rush is on record--a signer of the Declaration of Independence, as saying being black is a disease; it's a sign of leprosy. Masturbation used to be a disease.

MR. KUBY: But you know what?

DR. SZASZ: Homosexuality--

MR. KUBY: We've come a long way.

DR. SZASZ: --was a disease until 25 years ago.

MR. KUBY: We've come a long way since then.

DR. SZASZ: No, we haven't. We have played musical chairs. [laughter] Now smoking cigarettes, now Churchill and Roosevelt are sick. You call that a long way?

MR. KUBY: I think we have come a long way from the time--

DR. SZASZ: I think we are regressing. We are going towards what I have called a therapeutic state, where we are steadily making society less and less safe for innocent people and are locking up people under medical auspices who are not sick.

MR. KUBY: But isn't your solution a prison state? If you abolish the insanity defense, what you end up doing is putting more people in prison, isn't that right?

DR. SZASZ: Now we can talk as civil libertarians.

MR. KUBY: Yes.

DR. SZASZ: I am presuming that in a civilized society we don't have victimless crimes, and that taking drugs is a civil right like having a religion, that selling drugs is a right just like selling alcohol or tobacco. If you don't want to take it, you don't take it. [bell]

TIMEKEEPER: Unfortunately I have to interrupt. Ms. Boleyn, Professor Alexander, if you don't mind starting, you may begin questioning Ms. Boleyn.

MR. ALEXANDER: This has taken an interesting turn.

MS. BOLEYN: It has.

MR. ALEXANDER: So I need to know to what extent do you repudiate or agree with the positions taken by Mr. Kuby. In the first place, do you agree that really using disease in this context is sort of misleading and unnecessary?

MS. BOLEYN: I think my concerns-- As a prosecutor, I too share some of the concerns that have been expressed of defining disease more in terms of-- We see post-traumatic stress disorder, we see these types of syndromes, ever new syndromes coming up. But I don't know how to explain the situation I had in which a man killed an Oriental exotic dancer. No one would have ever known anything about the crime. He went and told that he had a dream. He said, you know, "I am afraid for this person's life," and then of course ultimately he was charged with that offense. I don't know where that person is going to fit in the system, who would not have been found, who would not have been prosecuted, but for their statements against themselves and for this delusional compulsion.
MR. ALEXANDER: Well, I know--

MS. BOLEYN: I don't know where that person is going to fit.

MR. ALEXANDER: --Mr. Kuby is going to leave you at that point. If the use of psychiatry is to find you defendants whom you would not otherwise have, I suspect Mr. Kuby has to leave you far behind.

MS. BOLEYN: I think he's already left. [laughter]

MR. ALEXANDER: He's already left, all right. Well, it's hard. Your side's position is rather squishy. But let me ask you: If you don't really see this as a medical problem, why don't you agree with me, let's throw the doctors out and that takes care of the insanity defense; and then all we have to do is argue about Mr. Kuby's conclusion that we can be more compassionate by looking at these factors than by not looking at them. Would you agree that far?

MS. BOLEYN: I don't think I would. I think that we need to get away-- As I think several mental health professionals, including some here, have said, if we did away with psychologists and psychiatrists as God, that type of thing, sort of directing the jury's verdict onto the ultimate question. But I am not so sure that mirrors reality. I think that we might give experts less credence as lay people than they think that we do. And I think we're selling the juries short in terms of their ability to evaluate the defendant, their state of mind--insofar as anyone can evaluate someone's state of mind. I think that we're not so much a battle of the experts as the publicity makes it seem.

MR. ALEXANDER: So your point--let me make sure I understand it--is that you and I know that psychiatrists don't know what they are talking about, but the jury knows also, so it doesn't matter.

MS. BOLEYN: No, I think the jury should have input from mental health professionals, but of course, the mental health professionals should not make that ultimate decision. But I am not disturbed by the input they are making to the system, as many of you are. It doesn't disturb me to get expert testimony. I think a lot of people think that DNA is voodoo and I think that is much more hard science than is psychiatry or psychology.

MR. ALEXANDER: Well, I certainly agree with that. Let me ask you another question. Mr. Kuby seems to think that it's compassionate for clients to plead mental health. Now he has seen a very short sight of this, but you do this fairly frequently. Can you point to a lot of defendants who have spent less time, if you consider time in mental institutions as equivalent to--I think it's worse than--time in jail? Have you seen many people who really did better?

MS. BOLEYN: I think, if I understand your question right, there is a public fear that people will get out earlier if they are institutionalized rather

than--

MR. ALEXANDER: And that fear is met by?

MS. BOLEYN: I think that's why we have the public notification laws and all those types of things that come up as a matter of moral outrage when someone gets out earlier than they think. I don't think that happens. Again, I think this is more--

MR. ALEXANDER: Of course it doesn't happen.

MS. BOLEYN: --a question of perception.

MR. ALEXANDER: Of course it doesn't happen.

MS. BOLEYN: People are afraid. And I think the true statistics--and I think we would all agree probably--are that they serve at least as much time and sometimes more time than someone who is in prison.

MR. ALEXANDER: I think that's absolutely right, and that's why, as interesting as it may be, Mr. Kuby's notion that this is in some sense compassionate simply defies the facts.

MS. BOLEYN: I guess part of my problem is, I don't think that post-verdict treatment has to do with whether the insanity defense ought to be abolished in terms of the jury's determination. Now whether we all think there ought to be reform in institutions and in prisons to me begs the question of whether we ought to have the defense at all.

MR. ALEXANDER: Well, try this reform. Suppose the issue were mens rea instead of insanity and suppose we said that while you can bring in mental health professionals, they are not supposed to discuss this in terms of medical jargon. They can simply discuss what they know about behavior. Would that solve your problem?

MS. BOLEYN: Isn't that essentially what they do? I mean--

MR. ALEXANDER: No.

MS. BOLEYN: --all they do is talk about behavior and then they classify it--

MR. ALEXANDER: But then the judge--

MS. BOLEYN: --under DSM-4?

MR. ALEXANDER: Then the judge tells the jury that what the jury has to find

out is whether the person, for example, if McNaghten is the rule, knows the difference between right and wrong. Now how does the psychiatrist help that?

MS. BOLEYN: Well, I think they're going to have to describe their methodology to the jury and see if the jury finds any credibility in the methodology that they utilize to reach their conclusion. Yes, they know, they are able to say whether the person, they believe, knew right from wrong at the time of the offense. And so in a sense they are testifying--

MR. ALEXANDER: Do you think they know? [bell]

TIMEKEEPER: Thank you. Thank you. Gentlemen, you can now stand. You can start questioning.

DR. SCHALER: Okay, Dr. Berger, I'd like to go back to this issue of schizophrenia and mental illness. Do you agree-- It seems to me--do you agree, that the insanity defense does include this term, "mental disease and mental illness"-- the notion of mental illness is an integral part of the insanity defense?

DR. BERGER: Well, as you noted before, the insanity defense was based on a set of legal criteria. Of those criteria, mental disease or mental defect is a prerequisite. That's not a psychiatric term, but a legal term again, but it in some way reflects notions of mental disorder.

DR. SCHALER: Okay. My next question is this. And I assume that you agree that schizophrenia and manic depression, for example, are mental diseases.

DR. BERGER: Yes.

DR. SCHALER: Now, I have an idea as to what the answer to this question is for myself, but I am sincerely interested in your answer. Why is it that standard textbooks on pathology do not include mental illnesses? Schizophrenia, manic depression. The pathology textbook is a categorization of diseases. Why are schizophrenia and manic depression not included in those textbooks?

DR. BERGER: At least for the present we don't have histological basis to be able to study it from a pathological perspective in terms of a medical pathologist reviewing slides of body tissue.

DR. SCHALER: So you would agree then that schizophrenia at this point in time, and manic depression, do not meet the nosological criteria for disease classification.

DR. BERGER: No. For medical disease other than mental disorder, yes.

DR. SCHALER: But isn't that why schizophrenia and manic depression are not included in these pathology textbooks? [bell]

TIMEKEEPER: Dr. Berger, you can now ask a question.

DR. BERGER: What I would like to understand, quite frankly, is your position. I don't understand your position. Why is it that you want the insanity defense abolished? Certainly it's used in a very small number of cases and a very small percentage of those are successful. That is, juries seem to be able to distinguish something in these cases, whether it's a fluke or whether it's a basis of data--that is psychiatric testimony is one piece of data--or it's the psychiatric testimony itself, they come to a decision. Is it that you feel it's more practical to abolish it or that you feel that it's morally irresponsible or it doesn't reflect the moral sentiment of the people? Why? What's--

DR. SCHALER: I appreciate this question, and this is something I touched on in my opening statement. The insanity defense is of concern to me because I think it does touch on the sense of morality and justice in our contemporary society. And I think it is irresponsible to impose the insanity defense. However, this insanity defense is just part of what Dr. Szasz has referred to as the therapeutic state, and I object not only to the insanity defense, but also to the involuntary commitment and the deprivation of due process on the basis of mental incompetence to stand trial. All of these concern me a great deal, because I see a very important relationship between liberty and responsibility in our society. They are two sides to the same coin. If we decrease responsibility, as is done in terms of psychiatric diagnosis, we will always decrease liberty, and I don't see how, as a civil libertarian you can reconcile depriving someone of responsibility and encouraging them to have more liberty--

DR. BERGER: Individuals who--

DR. SCHALER: --because it's impossible.

DR. BERGER: Individuals who lack the capacity for free will don't have the kind of autonomy that you're describing.

DR. SCHALER: The person who--

DR. BERGER: But at this--

DR. SCHALER: --lacks the capacity for free will is literally unconscious. You're not talking about someone who is literally unconscious. You're talking about someone who is metaphorically unconscious. There's a big

difference.

DR. BERGER: The thing is though, would you be willing to accept what befalls us in the end when we do away with involuntary commitments and when we have no insanity defense? I've been at many cocktail parties with individuals having this discussion. But those same individuals when they're on the jury vote to acquit by reason of insanity, because when they listen to the data and they listen to the individual's history and they listen to the testimony, they understand. So all I can hope is that one day perhaps you can be a juror.

DR. SCHALER: According to your thinking, maybe they don't understand the consequences of their actions. [laughter] [bell]

TIMEKEEPER: Thank you, gentlemen. Mr. Kuby, if you don't mind giving your closing statement.

MR. KUBY: It's ironic that I'm listening to three people who would support getting rid of the insanity defense because they don't believe in mental illness, period. Those people that we see out there that are doing crazy things, swatting imaginary insects, talking to themselves, you know, walking the streets in a shambles, in a muddle, being tortured by demons--well, that's just an alternative form of being, or that's just akin to some sort of strange religious expression. Well, I mean, the sad reality is that there are people in this society who are terribly sick and they do terrible things acting out that illness. And what's important from a civil libertarian perspective, from a societal perspective, and from a compassionate perspective, is to take them, treat them, make them better, and release them, rather than what society does to them, just to lock them up in prison and let them die there.

TIMEKEEPER: Thank you, Mr. Kuby. Dr. Szasz, your closing statement.

DR. SZASZ: Well, I'm afraid that my view is that the sort of thing that Mr. Kuby has just said and the general societal view on the insanity defense is insincere because, in point of fact, people get punished under this rubric; and that's illustrated by the fact that no one in his "right mind" pleads insanity. If this is a real condition, how come nobody with a parking violation ever pleads insanity, or a traffic violation? So this is a legal tactic to damage people in the name of helping them, which is as old as mankind.

TIMEKEEPER: Thank you, Dr. Szasz. That ends this week's television debate. But next week, a new debate. But the debate continues at our website. Our web site is at www. debatesdebates.com. That's www.debatesdebates.com. You will be able to join an ongoing forum of our debates, as well as download free transcripts of all our programs. E-mail us your comments and suggestions, and check our schedule for topics of upcoming debates. Once again, our address is: www.debatesdebates.com.

That's www.debatesdebates.com. We'd also like to send out our thanks to people who have written into our website, giving some great comments, and also to a few stations that have been helpful with DebatesDebates, such as: KBDI in Denver; WUFT in Gainsville; WYIN in Chicago; KCPT in Kansas City; WNEQ in Buffalo; WNYE in New York, channel 25; KETA, Oklahoma City; WHYY, Philadelphia; KERA, Dallas; KLRU, Austin; WCMU, Detroit; and WKNO, Memphis; WCVM, Richmond; and everyone else who's been airing DebatesDebates these last two months for making us a great success so far. Thank you, and good night.