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COMMENT: "Killers Start Sad and Crazy":** Mental Illness and the Betrayal of
Kipland Kinkel

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On May 20, 1998, a fifteen year old boy, Kipland Kinkel, commonly known as Kip, killed both of his parents in their home outside of Springfield, Oregon. The next day he walked into Springfield's Thurston High School cafeteria and opened fire on the students present, killing two and wounding twenty-five. In September 1998 Kip pled guilty to four counts of murder and twenty-six counts of attempted murder (for the twenty-five injured students, plus an assault on a police officer). In November 1999, after a six-day sentencing hearing wherein Lane County Circuit Court Judge Jack Mattison heard details of the crimes, statements from the victims, and psychiatric testimony regarding Kip's mental health, Kip was sentenced to 111.67 years in prison, without possibility of parole. The judge's severe ruling makes Kip the first juvenile to serve a life sentence in the state of Oregon.

This Comment uses the recent case of Kip Kinkel to illustrate [*1082] our systemic failure to give serious credence and thorough care to the young mentally ill in our society. As evidenced by the lack of meaningful mental health care provided Kip throughout his youth and our decisions to prosecute him as an adult, require a mandatory minimum sentence without possibility of early release, and effectively nullify any defense he may have had based on his mental condition, we have decided that the "Rehabilitative Ideal" of the Progressive movement is dead. Oregon has unambiguously chosen to focus on retribution and incapacitation as criminal justice priorities, thereby laying the groundwork for the resolution of Kip's case: he killed, ignore the details, and warehouse him until he is dead.

Part I examines the mental health issues that have shrouded the life of Kip Kinkel and discusses potential reasons why his mental infirmities were not adequately addressed, leading to the eventual shootings for which he was found guilty.

Part II evaluates the relevance of Kip's mental history and status in his legal proceedings, focusing on possible reasons why the guilty except for insanity defense lacked viability as an effective means of defending his case.

Part III presents Oregon's legislative and political choices that reflect the national trend toward an increasingly punitive approach to offenders, especially juveniles. Particular attention is given to Measure 11, a constitutional ballot initiative passed in 1994, which both automatically waives many juvenile offenders to adult criminal court and imposes mandatory minimum sentences without possibility of parole.

I
KIP'S LIFE OF MENTAL ILLNESS

Kip's parents had high expectations. Both were popular and successful local teachers. One family friend said, "I think [Kip] realized there were expectations - everybody does their best. It was something the Kinkels drummed into their kids - it was almost like unspoken expectations." n1 Kip told one psychiatrist, "I had to be 100%.... No one is perfect though. Lots of times, life sucked. With my parents, if I didn't do the best, I was an embarrassment [*1083] to my parents." n2 Kip's older sister, Kristen, fulfilled those expectations. She was an exceptionally successful cheerleader and a top student, earning a full scholarship to continue her cheerleading at Hawaii Pacific University. n3 From a very early age Kip had difficulties. He had a difficult time learning to tie his shoes. He had an extremely hard time reading, writing, and spelling and had to repeat the first grade due to "lack of maturity and slow emotional and physical development." n4 His sister recalled: "He would study for hours and not pass. In first grade, second grade, and third grade, I remember him studying for those spelling tests over and over.... Of course he felt bad about himself, because he didn't understand what was wrong with him." n5 It was not until he was in the third grade that he was diagnosed with a learning disorder. n6 His parents also thought he might have had an attention deficit disorder. Kip told friends he was taking the drug Ritalin in middle school to control his temper. Kip has been characterized as being hyperactive, insecure, extremely sensitive and likely to have temper tantrums from his earliest years. n7 He cried easily and was smaller than others his age. He often exhibited bizarre behavior: One childhood friend said, "He did this weird thing when he watched T.V.... He'd turn his head to the side and roll his eyes back at the T.V. I'd ask him, 'Doesn't it hurt your eyes?' I don't know why he did it." n8

It seems that many people questioned Kip's actions, yet few seriously pursued answers. During high school Kip wrote on the top of a Spanish worksheet: "I will hunt you down and put a hole in your head. With explosives. You hear me. Power to the shampoo." Next to this he drew a sad face with X's for eyes and scrawled "RIP" above it. He wrote "You must DIE" next to the [*1084] sad face. The teacher responded: "I'm concerned??" n9 Three weeks before the shooting occurred, Kip blurted out in class: "God damn this voice inside my head." His teacher filled out a "respect sheet" regarding the incident. The bottom of the sheet stated, "The expected behavior for this situation was not to say 'damn.'" It continued: "In the future, what could you do differently to prevent the problem? Not to say 'damn.'" The teacher, Kip, and Kip's mother all signed the respect sheet. n10 Once, after his parents found a catalog for bomb-making materials Kip had obtained from the Internet, they responded by cutting his computer use. n11 The Kinkels' housekeeper of seven years, Tami Griswold, quit because Kinkel's knife collection and habit of setting objects on fire made her too uncomfortable. Griswold "repeatedly warned Kinkel's parents about his activities." She said the Kinkels' response was: "Thank you for telling us." n12 One teacher told the school counselor about a bomb-making speech Kip gave in her class. The counselor reassured the teacher that "Kinkel's father knew all about Kip's obsessions, so it was nothing to be concerned about." n13 In January of 1997, Kip was charged with kicking a large rock off of a highway overpass. The rock struck the front of a car passing below. Kip's mother told a fellow teacher her response to this incident was to help Kip "memorize 'The Lord's Prayer' - she thought it would be good for him." n14 Though the adults that had contact with Kip's strange behaviors probably possessed good intentions, they

exhibited a shocking lack of consideration that Kip could have had deeper mental health issues at the root of these occurrences that required psychiatric expertise and treatment.

When detectives searched the Kinkels' house they found explosives, fireworks, bomb-making books, several hundred rounds of ammunition, guns, knives, a sword, pipe bombs, wires and electrical components for assembling bombs, a hand grenade, and hunting, gun, and knife catalogs. Days after the initial [*1085] search, police were still not sure they had found all the explosives after finding a small bomb under the house. n15 After stripping all of the insulation from crawl spaces and the attic they found numerous, hidden, homemade explosives. They discovered fort-like structures outside that contained bomb-making chemicals and tools. n16 Excerpts of Kip's journal read:

The only reason I stay alive is because of hope. Even though I am repulsive and few people know who I am, I still feel that things might, maybe, just a little bit, get better. I don't understand any fucking person on this earth. Some of you are so weak, mainly, that a four year old could push you down. I am strong, but my head just doesn't work right.... I feel like everyone is against me, but no one ever makes fun of me, mainly because they think I am a psycho. There is one kid above all others that I want to kill. I want nothing more than to put a hole in his head. The one reason I don't: Hope. That tomorrow will be better. As soon as my hope is gone, people die.... Oh fuck. I sound so pitiful. People would laugh at this if they read it. I hate being laughed at.... Please. Someone, help me. All I want is something small. Nothing big. I just want to be happy.... [Killers start sad and crazy.] ... It is clear that no one will help me. Oh God, I am so close to killing people.... Why did God just want me to be in complete misery? I need to find more weapons. My parents are trying to take away some of my guns! My guns are the only things that haven't stabbed me in the back. My eyes hurt. They hurt so bad. They feel like they are trying to crawl out of my head. Why aren't I normal? Help me. No one will. n17

On May 20, 1998, Kip brought \$ 110 in cash to school to buy a stolen gun from another student. This was not the first gun Kip owned. His parents had purchased him others, including a handgun called a "Glock." He placed the gun he purchased from the student in his locker, where it was later discovered. Bill Kinkel picked Kip up from the Springfield police station, where he was taken after his arrest for possession of a firearm. Kip and his father went to Burger King on the way home. Kip told a psychologist his father said, "You disgust me" and went to the car, [*1086] leaving Kip to eat alone. n18 At this point the three command voices Kip had heard since sixth grade n19 plagued him once again. Kip claimed that the three voices commanded, "Get your gun, shoot him, shoot him," "Look at what you've done, you stupid piece of shit, you're worthless," and "Kill him, shoot him - you have no choice." n20 After Kip and his father returned home, Kip heard his father on the phone with the Oregon National Guard, inquiring about its regimented boot camp. n21 Kip grabbed a semiautomatic rifle and fired one shot into the back of his father's head, killing him. When his mother came home later, Kip killed her as well. Kip left a note on the coffee table in the Kinkels' living room:

I have just killed my parents! I don't know what is happening. I love my mom and dad so much.... I'm so sorry. I am a horrible son. I wish I had been aborted. I destroy

everything I touch. I can't eat. I can't sleep. I didn't deserve them. They were wonderful people. It's not their fault or the fault of any person, organization, or television show. My head just doesn't work right. God damn these VOICES inside my head. I want to die. I want to be gone. But I have to kill people. I don't know why. I am so sorry! Why did God do this to me. I have never been happy. I wish I was happy. I wish I made my mother proud. I am nothing! I tried so hard to find happiness. But you know me I hate everything. I have no other choice. What have I become? I am so sorry. n22

The next morning, on May 21, 1998, Kip dressed in a trench coat, filled a backpack with clips of ammunition, tucked a pistol on either side of his waistband, taped a knife to his ankle beneath his pants, grabbed his .22 caliber semiautomatic rifle, and taped two bullets - a .22 caliber and a 9mm - to his chest. He later told police he had taped the bullets on his chest so he could reload and kill himself. n23 When Kip arrived at school, he walked into [*1087] Springfield's Thurston High School cafeteria and opened fire. He killed two students and wounded twenty-five. As he was trying to reload, a student, Jake Ryker, tackled Kip. Several other students piled on top of Ryker to end the terror. Josh Ryker, Jake's brother, quoted Kip as saying: "Just shoot me, shoot me now." n24 When Kip was handcuffed he told the arresting officer that he "just wanted to die." n25 Detective Al Warthen interviewed Kip immediately after his arrest, where Kip confessed to his crimes. In the taped confession Kip is wailing, crying, and hyperventilating, repeating continuously how much he wanted to die. At one point he screams, "God damn the voices in my head!" n26 When discussing one incident where Kip talked about a voice in his head, Warthen stated: "He just went off He then banged his head against the wall a couple times." n27 Warthen also stated that when he was questioning Kip, Kip lunged at him with a folding knife he had hidden in his pants cuff. "He jumped up from the chair. He braced himself against the back wall.... Then he started screaming at me, 'Just kill me, just shoot me.'" n28 Police left the room, but when it appeared Kip was trying to slit his own wrists, they burst back in and sprayed him with pepper spray to disarm him. n29 A psychiatrist who interviewed Kip at the Springfield Police Station immediately after he was taken into custody testified that Kip confessed to him that "his head didn't work right." n30

The question becomes - why weren't Kip's problems addressed? The opportunity for Kip to have gotten thorough psychiatric counseling in the Oregon school system was not a very viable option. District counseling and mental health resources tend to be stretched very thin. Jim Hanson, president of the Oregon [*1088] School Psychologists Association, stated that counselors and psychologists are overloaded in Oregon because of budget constraints. n31 One Oregon teacher described school psychologist services as "basically a joke.... At the very, very best, you might get a diagnosis. So what? Unless the parents decide to take the kid somewhere for treatment, there's not going to be any." n32

From January 20 through July 30, 1997, at the age of fourteen, Kip received his first psychological treatment and the only treatment he would receive until incarceration. n33 Kip was referred to Dr. Jeffrey Hicks, a Eugene psychologist, by Ron Fountain of the Springfield School District, and was brought to treatment by his mother, Faith Kinkel. n34 His mother stated that she was seeking psychological consultation to help her son learn more appropriate ways of managing anger and to curtail his antisocial acting-out. n35 Dr. Hicks met with Kip and his mother nine times, about once every three weeks. Kip always attended these sessions with his mother; it was family, rather than one-on-one, counseling. n36

Dr. Hicks never completed a full psychological evaluation of Kip, stating in testimony that his contract was only to address the specific presenting problems the family brought in. n37 Dr. Hicks identified major depression symptoms in Kip and wrote in his June 2, 1997 treatment notes that he thought Kip's depression continued to interfere with his emotional functioning. n38 He suggested a trial of an antidepressant and referred Kip to Dr. Eric Geisler, M.D. n39 On June 6, Dr. Geisler started Kip on Prozac, 20 milligrams daily. On June 18, Dr. Hicks stated he thought Kip appeared less depressed, but thought it was too early to assess the usefulness of the Prozac. n40 It was during this time period that, on June 30, 1997, Kip's father went out and bought Kip a [*1089] "Glock" handgun. n41 When Dr. Hicks saw Kip three weeks later, on July 9, 1997, he felt Kip appeared less depressed and was generally doing well and experiencing no side effects from the Prozac. n42 In Kip's last meeting with Dr. Hicks, on July 30, 1997, Dr. Hicks' assessment read: "Kip continues to function well with no evidence of depression." n43 In that final session Kip and his mother were feeling that Kip had made "sufficient progress that they could manage things at that point," and discontinued their consultation with Dr. Hicks. n44 While it was Dr. Hicks' sense that the Kinkels intended to keep Kip on his medication, n45 Kip's parents mysteriously discontinued his Prozac treatment around September. n46 Kip later told Dr. Orin Bolstad that the Prozac was effective at alleviating the voices in his head and reducing the stress levels he felt; he characterized the summer he was in therapy and on Prozac as a "wonderful time" and the "best summer ever." n47 Unfortunately, shortly after Kip's discontinuation of psychotherapy and medication he returned to his depressed state. Faith discussed Kip's relapse with friends, telling them that Kip's malaise disturbed her and she did not understand what was wrong with him. n48

It is rather surprising, considering both the extent and severity of Kip's troubles, that his psychotherapy was limited to nine sessions and his Prozac treatment lasted a mere three months. The authors of Clinical Guide to Depression in Children and Adolescents present a suggested flow sheet for the pharmacological treatment of children and adolescents with major depressive disorder. When a psychologist has decided to conduct a trial of antidepressant [*1090] medication, in conjunction with psychotherapy, and that child or adolescent responds well to this medication, the authors suggest: "Continue medication for minimum of 4 months. At discontinuation, taper medication over 7-10 days. Watch for recurrence of depression at discontinuation. Continue psychoeducation and other support for child and family." n49 Kip was on Prozac for a total of only 3 months. Whether his dosage was tapered at discontinuation is unknown, but the recommended psychoeducation and other continued therapeutic support clearly did not occur. We do know that Faith was aware of the recurrence of depression in Kip from her discussions with friends. n50 Another study, aimed at determining the optimal length of continuation therapy for patients who responded to Prozac treatment for major depression, states "the chronic nature of major depression has been demonstrated, and attention is increasingly focusing on continuation and maintenance treatments. Continuation therapy strives to prevent relapse, a return of symptoms meeting the full criteria for a major depressive episode during an initial period of remission." n51 The researchers began with the premise that a patient received a 12 to 14 week "acute therapy phase," wherein she received Prozac, 20 mg/day. n52 The "acute therapy phase" is the stage designed for symptom resolution of an acute depressive episode. Although the precise day Kip's Prozac treatment was discontinued is unknown, assuming the best case, his treatment period barely fell within this 12 to 14 week window, which the researchers consider "baseline" treatment. The results of the study, consistent with findings of previous studies, n53 suggest that an additional 26 weeks of Prozac treatment, after the initial 12-14 weeks of acute therapy, is the minimum treatment duration required

to prevent the return of clinically significant depressive symptoms related to that [*1091] episode.
n54

Furthermore, the Agency for Health Care Policy Research has promulgated guidelines regarding Prozac, which suggest "that patients should receive 4 months of continuation therapy after remission symptoms." n55 It seems that many sources highly recommend long-term therapy with Prozac to prevent relapse or recurrence. The recommendations indicate that treatment for major depression with Prozac should last at least nine months; Kip was on this drug for about one-third of this recommended time, or for approximately three months.

When Dr. Hicks was asked at the Sentencing Hearing if he had formulated a plan with Kip and his mother for continued treatment or consultation at their final session, in July of 1997, he replied, "whenever I suspend treatment ... I also tell the parents to call if there are questions and concerns, and ... the teenager as well." n56 Although after discontinuing treatment Kip quickly returned to a severely depressed state, the Kinkels never contacted Dr. Hicks again.

Considering Kip's lifelong troubles, three main questions surface: (1) Why did the Kinkels not seek therapy for Kip until he was twelve, given all of the events that occurred? (2) Why did Faith end Kip's psychotherapy and medication so quickly, right after Kip had begun to show signs of improvement? (3) Why did the Kinkels fail to return to psychotherapy and possibly medication after Kip's depression returned?

A major part of the answer lies in the fact that being diagnosed with a mental illness brings with it a tremendous amount of long-standing and pervasive stigma. It is a "well-recognized cultural phenomenon that diminishes its victims, reinforces feelings of self-devaluation and alienation, and thus may well exacerbate or prolong the course of illness." n57 Dr. Robert Gibson has written that "stigma against mentally ill persons seems to have been present from the beginning of recorded history." n58 The Christian faith has embraced a long-held and persistent belief that mentally [*1092] ill patients are both sinful and personally blameworthy for their disorder:

The traditional belief among Christians that madness is often a punishment "visited by God on the sinner" predominated in American society during the 17th century and remained quite influential thereafter. Insofar as traditional Christianity stresses sin as the cause of insanity, although by no means the only cause, persons with mental illness become stigmatized. n59

Studies that compare mental illness to other conditions that are potentially stigmatizing have "shown that 'mental illness' is one of the most highly rejected conditions, clustering with drug addiction, prostitution, and ex-convict status rather than with cancer, diabetes, and heart disease." n60 Due to the highly stigmatized nature of mental illness, "being marked a mental patient transforms a person's beliefs about the devaluation and discrimination of mental patients into a personal expectation of rejection." n61 Considering all of these factors, it is no wonder that Kip hid much of his mental illness, and that his family did not aggressively pursue psychotherapy and medication. One author gives a profound characterization of the stigmatization experience:

Imagine what it would be like to have a member of your family afflicted with a condition whose sufferers, whenever the condition is depicted on television, are portrayed as violent 73 percent of the time, and homicidal 23 percent of the time.

Imagine what it would be like to have your neighbors afraid to come to your house.... Imagine having your relatives obliquely talking about your ill family member, unmistakably implying that your side of the family is guilty of something akin to original sin. No wonder Eugene O'Neill in *Strange Interlude* has the family hide their mentally ill aunt in the attic so that the family will not be disgraced. n62

The stigma of mental illness clearly causes many people to hide, belittle, or deny mental ailments. The Kinkels were no exception.

In his initial counseling session, Kip told Dr. Hicks that his father expected the worst from him and was not supportive of counseling because of the expense and belief it would not be [*1093] helpful. n63 Kristin, Kip's sister, corroborated Kip's statement of how his father perceived counseling: "My dad wasn't too excited about it. He felt that psychologists were like chiropractors, in the sense that they may not be as heavily needed as we think." n64 Faith Kinkel also told Dr. Hicks that Kip's father was not particularly supportive of counseling, did not think it would be helpful, and did not want to participate. A friend of Bill Kinkel's, Cori Taggart, a professional counselor, stated in an interview that Bill talked with him about his son's condition. "[Bill's] voice was low.... He said he had just found out his son was clinically depressed. 'What's going on?' he asked. 'I don't understand what this is all about.' He seemed sort of confused." n65

Additionally, at the initial consultation with Dr. Hicks, Faith Kinkel reported that there was no family history of psychiatric illness. n66 This, however, was inaccurate. Dr. William Sack, a psychiatrist who evaluated Kip and testified at his Sentencing Hearing, reviewed data on Kip's family history of mental illness. Dr. Sack testified that his diagnosis of Kip was "substantiated [by] the fact that this boy had some genetic loading that moved him towards a psychotic process.... He had major mental illness on both sides of his family tree." n67

Joyce Naffziger, a private investigator hired by the defense, spent a year and a half conducting research on the genetic history of Kip's family, uncovering an astonishing number of mentally ill individuals. n68 In fact, "severe psychopathology can be traced back three generations." n69 On Faith Kinkel's side of the family, Naffziger was able to identify at least thirty mentally ill individuals who were either diagnosed with, or presented identifiable signs of, mental illness. n70 Interestingly, this number includes [*1094] both of Faith's parents, Faith herself, and all three of Faith's sisters. Not only did all three of Faith's sisters admit to depression in themselves, one of them, Claudia, talked with Naffziger specifically about Faith's depression, and even her offer to help Faith pay for counseling at one point. n71 Medical records in the court file prove that Faith had been treated by their family physician with antidepressants in 1981 and 1987. n72 On Bill Kinkel's side of the family, Naffziger was able to identify at least seven individuals who were either diagnosed with, or presented clinical symptoms of, mental illness. n73 Although Bill himself had no history of treatment for mental illness, during the investigation psychologists noted several significant peculiarities about Bill, including his tendency to keep the heat in the house turned down so low that the family wore down jackets at home. n74 Naffziger also confirmed that at least nine of Kip's relatives had been institutionalized for mental illness. n75

Dr. Dorothy Lewis, a professor in the department of psychology at NYU Medical Center, noted the pervasive presence of "severe mental illness on both sides of Kip's family" in an addendum to her psychiatric report on Kip Kinkel prepared for his defense. n76 She stated that "the nature of the psychiatric illnesses from which Kip's relatives suffered ... sheds light on Kip's illness and its

prognosis and appropriate treatment." n77 Clearly, Dr. Hicks asked about Kip's potential family history of mental illness because knowledge of its existence would have informed his treatment of Kip. Not only did Faith not tell Dr. Hicks about her past experience with counseling and antidepressants, she gave a clear negative response when Dr. Hicks asked about any family history of mental illness in Kip's family. Either Faith knew about this history of serious mental illnesses, and chose to deny its existence to Dr. Hicks, in the hopes that by not discussing it Kip [*1095] might be less likely to be labeled mentally ill, or Faith did not know about this history because other family members shamefully hid their own mental illness and/or that of their relatives. In either case, stigma was the cause.

Finally, Kip hid many signs of the seriousness of his mental disorder from everyone. While incarcerated, Kip reported to three different psychologists that he had heard three command voices since the sixth grade and had never told anyone. In a clinical interview on February 3, 1999, Kip told Dr. Orin Bolstad why he had never revealed the voices to anyone. Kip's disclosures perfectly illustrate the intense stigmatization of mental illness:

I thought maybe others heard voices too. But never talked about it. Sort of like masturbation. It's something I don't want to talk about. I decided not to tell anyone about it. I didn't want anyone to think I was nuts. I didn't want to go to a mental hospital. I didn't want my friends to know because that would end my friendships. I really didn't want any girls to know because they wouldn't want to be seen with me.... My parents might think I was nuts; they would be disappointed with me.... I'd be ostracized....

....

If my Dad would have found out about the voices, it would have been like telling him I was gay. A mental.

....

I cried when he gave me medicine [referring to time Kip was on Prozac in Summer of 1997]. Because it meant that he knew I was crazy. And now everybody would know. He figured me out. Splotch on my record. No one would ever hire me. n78

II

LACK OF VIABILITY OF THE "GUILTY BUT MENTALLY ILL" DEFENSE

In June 1999, Kinkel's defense lawyers, Mark Sabitt and Rich Mullen, announced that they would argue what is commonly called the "guilty but mentally ill" defense in a jury trial. n79 On September 24, 1999, three days before jury selection was set to begin, Kip abandoned this defense and pled guilty to four counts of murder and twenty-six counts of attempted murder. n80 Kip's [*1096] plea petition read: "By entry of pleas of guilty to these charges I expressly and knowingly waive the defenses of mental disease or defect, extreme emotional disturbance, or diminished capacity." n81 Mark Sabitt, in an interview regarding Kip's decision to plead guilty, stated that they felt "as a practical matter ... a jury might be swayed by negative public perception of insanity

defenses and by the fear of what would happen if Kip was released, rather than the isolated question of whether he was responsible for his actions." n82 As corroborated by one commentator, "any lawyer representing a severely mentally disabled criminal defendant must recognize that, if she enters an insanity defense plea, the jurors will likely be suspicious, negative, and hostile." n83

According to many authors, Sabitt's fears were well-founded. "Public opinion data have shown that the public's most prevalent concern regarding the insanity defense is that it is a loophole through which would-be criminals escape punishment for illegal acts." n84 Many studies have indicated that the American public meets the insanity defense with deep skepticism. In a study conducted via a telephone survey, one researcher found that ninety-one percent of people polled felt that "judges and juries have a hard time telling whether the defendants are really sane or insane." Eighty-nine percent agreed that the "insanity plea is a loophole that allows too many guilty people to go free." Eighty-nine percent also felt that "the insanity defense allows dangerous people out on the streets." n85 Another study found that ninety percent of people agreed with the statement that "the insanity plea is used too much. Too many people escape responsibilities for crimes by pleading insanity." n86 A recent, large-scale study involving eight states, confirmed this sentiment. In analyzing the data gathered, the researchers found:

[*1097]

For every 1,000 felony cases, the public would estimate 370 insanity pleas of which 44% (163) would be estimated as successful. In fact, there are nine insanity pleas for every 1,000 felony cases of which 26% (about 2) are successful. The public's estimate of the number of insanity acquittals is 81 times the actual number. n87

Many reasons have been posited to explain why the public is so deeply skeptical of the insanity defense, as well as why so few insanity defenses are successful.

A. The Media

Some researchers have focused on the role of the media in the formation of attitudes and perceptions of the public toward mentally ill persons. In a content analysis conducted on all prime-time American television dramas, one group of researchers found that "17% of them depicted a mentally ill character, and that 73% of these mentally ill characters were portrayed as violent." n88 They also discovered that "twice as many homicides were attributed to mentally ill characters as to the normal characters." n89 Another content analysis performed on the United Press International Database found that 86% of all print articles dealing with formerly mentally ill patients focused on a violent crime. n90

Additionally, the media's portrayal of the insanity defense contributes to the public perception of the defense as a loophole. "Loophole" in this context refers to phenomena wherein defendants successfully utilizing the insanity plea are thought to be dealt with less severely than those found guilty of the same crime, in terms of the incapacitation level imposed and their length of confinement. This contributes to the public image that one successfully defending herself by reason of insanity "gets off scot free" and is not held responsible for her crimes in the same way the defendant would be if she had been found guilty. n91

On December 30, 1992, The Boston Globe printed an article regarding Kenneth Seguin, a man awaiting trial for the murder of his wife and two children, who planned on using the insanity defense. When discussing the insanity defense, the paper stated [*1098] that if Seguin was found not guilty by reason of insanity, he "would remain confined to a psychiatric facility where he would undergo periodic examination. If psychiatrists determined at some point that Seguin no longer suffered from a mental illness and was not a danger to himself or others, they could release him." n92 The article then quoted the district attorney trying the case: "Our plan in this case is very straightforward: We intend to prove that Kenneth Seguin killed his wife and two small children and that he should be held responsible for what he has done." n93 Juxtaposing the more vague words the article used when discussing the insanity defense, "periodic examination," "at some point," and "they could release him," with the very determinative words used by the district attorney, "this case is very straightforward," "prove [he] killed his wife and two small children," and "should be held responsible," belies a clear message: if Seguin killed his family, he should be held "responsible" (go to prison for life). Successful use of the insanity defense was given a more casual and unofficial demeanor. It meant Seguin would occasionally be examined and would likely be released eventually. Terms and/or conditions of release were never mentioned.

The articles concerning the insanity plea in the Jeffery Dahmer case exhibit similar qualities. Time magazine stated that "if convicted, Dahmer will be sentenced to life imprisonment. However, if he is found NGRI [not guilty by reason of insanity], he will be sent to a mental hospital where he will be eligible for release in 1 year." n94 When media reports, such as this, imply tremendous advantages for people acquitted by reasons of insanity in gaining early release, the public's perception of the defense is bound to be influenced. Statistics show, however, that insanity acquittees are rarely immediately released upon acquittal, or anytime soon thereafter. To cite one example, a comprehensive study of California insanity acquittees showed that "only one percent ... were released following their NGRI verdict and that another four percent were placed on conditional release, the remaining 95 percent being hospitalized." n95

In another article concerning the Dahmer case, USA Today quoted Dr. Park Dietz, a psychiatrist who testified for the prosecution [*1099] in the Dahmer case: "If this jury had found Mr. Dahmer insane, it would have been open season for sex offenders. It would have meant that anyone who has unusual sexual drives could claim they weren't responsible for their behavior, simply by virtue of the unusual thing they wanted to do." n96 In an article entitled "Dahmer Plea Put Scare in Prosecutors: A Successful Insanity Claim Would Have Been Imitated," The Atlanta Journal quoted an assistant state's attorney as saying, "If Dahmer had been found not responsible, then all child molesters would put forth this defense because it would become more believable." n97

This "loophole" mentality was pervasive in media portrayals of Kip Kinkel's case. The Oregon statute under which Kip could have defended himself is what is frequently called the "guilty but mentally ill law." This law has been enacted in many states as an alternative to acquittal by reason of insanity. The essential difference between an insanity acquittal and a guilty but mentally ill finding has been thus characterized:

Under an insanity acquittal, a defendant is not guilty because he is sufficiently mentally ill to negate the mens rea requirement for criminal culpability. Conversely, when a court determines that a defendant is guilty but mentally ill, it finds that the defendant's mental illness did not impair his mens rea. Once a defendant is convicted

under a guilty but mentally ill statute he must be provided with an opportunity to receive psychiatric treatment in a prison hospital. In order for the court to employ the guilty but mentally ill alternative, it must be convinced that the defendant committed the offense charged and was mentally ill at the time the offense was committed. n98

Oregon's enactment of its "guilty except for insanity" statute allows a jury to recognize that a defendant had a serious enough mental illness to warrant treatment, yet not serious enough to completely absolve her of criminal responsibility for her acts. Many have proposed that the enactment of the guilty but mentally ill laws signify the legislative response to the public's growing dissatisfaction with existing insanity laws. One author argues that "the legislators framed a law capable of drastically reducing the number of people who could be found not guilty by reason of [*1100] insanity solely to assuage public disenchantment." n99

Under the law in Oregon, "[a] person is guilty except for insanity if, as a result of mental disease or defect at the time of engaging in criminal conduct, the person lacks substantial capacity either to appreciate the criminality of the conduct or to conform the conduct to the requirements of law." n100 Evidence that the defendant suffered from a mental disease or defect operates as an affirmative defense and is admissible at any time it is relevant to the issue of whether or not the defendant had the requisite criminal intent. n101 The Oregon statutes regulating the defendant found guilty except for insanity are very stringent and include the following: if there is a victim of the crime for which the defendant was found guilty, that victim can require notification of any Psychiatric Security Review Board hearings concerning the defendant and of any conditional release, discharge, or escape of the defendant; n102 if the court finds that the person would have been guilty of a felony or misdemeanor of which the person caused physical injury (or risk thereof), and the person affected by the mental disease or defect presents a substantial danger to others requiring commitment to a state mental hospital, the court shall order the person placed under the jurisdiction of the Psychiatric Security Review Board for care and treatment; n103 the jurisdiction of the Psychiatric Security Review Board shall be equal to the maximum sentence provided by statute for the crime for which the person was found guilty except for insanity. n104 The guilty except for insanity statute gives very strict, supervised and explicit directions regarding any possibility of conditional release the person may have. n105 Specifically, whenever a court can determine whether to require state hospital commitment or permit conditional release, "the court shall have as its primary concern the protection of society." n106

Despite the very demanding and unyielding requirements regarding any release of a person found guilty of a crime except for [*1101] insanity in Oregon, under which Kip may not necessarily ever have even been "conditionally released," his defense lawyers still urged him to plead guilty, believing their success to be too remote. Their suspicions that the people of Oregon would not look favorably to the defense were clearly supported by newspaper coverage of the case. In December of 1998, before the defense had announced Kip's initial intent to plead the insanity defense, the Associated Press announced that Kip's lawyers "did not indicate whether they'll claim Kinkel suffers a mental disease or defect that made him unable to understand the consequence of his actions.... If found guilty but insane, Kinkel would go to a hospital rather than to prison. If convicted of the most serious charges, Kinkel faces life in prison without parole" n107 As with the media portrayals of the cases cited earlier, the insanity defense is characterized as temporary and casual, whereas a guilty verdict is more determinative and serious. Additionally, the defense itself is mischaracterized - a person can lack substantial capacity to appreciate the criminality of his conduct

or the ability to conform his conduct to the legal requirements. n108 So, Kip could have "understood the consequences of his actions," yet still have successfully raised the defense because, due to his mental infirmities, he was unable to conform his conduct to the law.

Two months later, still before Kip's defense had announced its plan, The Oregonian reported:

[Kip's] lawyers have not divulged what mental health defense they might pursue. Prosecutors said the defense was stalling and countered that the case was not complex. "The case is factually a very simple case," said Assistant District Attorney Kent Mortimore. "Everybody in this courtroom knows who committed these crimes. It's not a whodunit." Mortimore said a delay would be unfair to the victims "The victims feel a strong need from a psychological point of view to resolve this matter as quickly as possible," Mortimore said. "Their lives are very much on hold." n109

Much airtime is given to the prosecutor's view - if the case is not a "whodunit" then the story is over, the defendant is guilty. What is being reported is the emotional needs of the victims. [*1102] The prosecutor's focus on the unfairness that a delay causes victims ignores the fundamental purpose of a criminal trial. Forcing a proceeding to resolve as quickly as possible so as to assuage a victim's psychological concerns is at odds with a fair factual inquiry into whether a defendant is legally responsible for a criminal act.

Further, although the statute Kinkel could have defended himself under is "guilty except for insanity," the media continued to refer to the defense as the "insanity defense." On June 8, 1999, The Oregonian printed an article entitled "Kinkel's Lawyers Plan to Argue Insanity Defense." n110 Oregon, like many states, replaced the "insanity defense" with the less forgiving "guilty but mentally ill" law; the media's failure to use accurate descriptive terminology perpetuates misperceptions amongst the public. Without clarification between the two defenses, the public can easily transpose all of the hesitations and dislikes they have regarding the highly publicized "insanity defense" to the new law. In discussing the possibilities for trial outcome, the Associated Press printed, "If convicted of aggravated murder, Kinkel could spend the rest of his life in prison.... If the insanity defense succeeds, Kinkel would go to a state mental hospital for treatment until he no longer is considered a danger to society." n111 Not only is the stated defense again technically inaccurate, but, because the selective reporting of this article fails to discuss the statutory details of what actually occurs to one found guilty but mentally ill, the result of Kip's successful defense appears open-ended, casual, and entirely temporary. From what was stated, the public could easily infer that Kip could be out on the streets, totally unmonitored, within six months. By stating "Kinkel would go to a state mental hospital," one could even think that the option was Kip's - he is not "confined" - maybe he can come and go as he chooses.

After Kip's lawyers decided against the guilty except for insanity defense, The Oregonian, in an article entitled "Kinkel Pleads Guilty to Murder in Oregon School Shootings," stated: "Kip Kinkel abandoned an insanity defense and pleaded guilty today to murdering his parents at home and then killing two classmates in a shooting rampage last year at Springfield's Thurston [*1103] High School." n112 Once again, this article ignores the fact that the statute Kinkel had planned on defending himself under was "guilty except for insanity." The textual message given is that "guilty" and "insanity defense" are mutually exclusive: when Kinkel claimed "insanity" he was essentially

stating he did not commit the crimes; now that he has pled guilty he will go to prison for his "shooting rampage."

As found in the media portrayals of other cases involving the insanity defense, the role of the media in the Kinkel case clearly contributed to the pervasive public opinion that the insanity defense is a loophole.

B. "Craziness"

Michael L. Perlin, winner of the 1995 Guttmacher Award for his book, *The Jurisprudence of the Insanity Defense*, has devoted much energy toward understanding what has been called "the insanity defense problem." n113 In a fairly recent article, Perlin addressed our reliance on "ordinary common sense" ("OCS") as a powerful "unconscious animator of legal decisionmaking. Such positions frequently demonstrate a total lack of awareness of the underlying psychological issues and focus on such superficial issues as whether a putatively mentally disabled criminal defendant bears a 'normal appearance.'" n114 In explaining his argument he states:

Where defendants do not conform to "popular images of 'craziness,'" the notion of a handicapping mental disability condition is flatly and unthinkingly rejected. Views such as these reflect a false kind of "ordinary common sense." In criminal procedure, OCS presupposes two "self-evident" truths: "First, everyone knows how to assess an individual's behavior. Second, everyone knows when to blame someone for doing wrong." n115

Hence, if a defendant does not conform to popular images of extreme "craziness," or what has been called the "wild beast" test, n116 we tend not to believe that she could have a legitimate mental infirmity because looking "normal" while having a mental disease or defect defies "ordinary common sense." The majority [*1104] of American people still assess criminal responsibility by visual frames of reference: if a person didn't "seem frenzied" or appear insane, then we say "there's no craziness here." n117 Psychiatric expertise is devalued and layperson perceptions of the mental situation of the defendant are placed on par with, and oftentimes above, the diagnosis and/or explanation given by a psychiatric expert. Another explanation of this phenomena is that "we deride psychodynamic and behavioral explanations of 'crazy' behavior when it appears 'obvious' to one and all that the defendant, in fact, 'did it.'" n118

In the Dahmer case, where the insanity defense was tried without success, several jurors stated that "[a] large part of what convinced the jury was evidence of Dahmer's premeditation in planning his crimes and his ability to talk himself out of several encounters with police 'His whole conduct showed he was a real con artist.'" n119 If there is an indication that the criminal defendant displayed any "normal" behaviors, such as planning, preparation, or coherently speaking with other people, we seem to be willing to throw away any possibility that she could have a mental disease or defect. Additionally, psychiatrists for the prosecution tend to play on this "ordinary common sense" idea with the jury. Dr. Park Dietz, perhaps the most famous prosecution psychiatrist in the country, stated in the Dahmer case that "there was no evidence his behavior in the killings was impulsive ... his killings were planned and deliberate. He often knew hours before he did them that he would kill his victims and planned them with his preparation of the drugs in advance to put them out." n120

Perhaps the overwhelming persuasiveness of psychiatrists for the prosecution n121 can be explained because their appeal to "ordinary common sense" rings true with what the juror or layperson perceived before she entered the courtroom. When we think "insane" we still conjure up the drooling, babbling, wild beast who lacks any connection to reality.

"Ordinary common sense" as an unconscious animator of legal decision making was evident in Judge Mattison's decision to rule [*1105] Kip's confession admissible in June of 1999. Judge Mattison ruled that Kip "voluntarily, knowingly, and intelligently" waived his rights to a lawyer before he spoke about the killings to two police officers and a psychiatrist shortly after he was taken into custody. Although Kip's lawyers argued that Kip was in a psychotic state and unable to voluntarily waive his right to speak with a lawyer, Judge Mattison concluded that Kip was "lucid" because "he displayed no confusion, appeared to understand each question asked of him and responded appropriately." n122 Without consulting a psychiatrist's expertise, Judge Mattison confidently made the determination that Kinkel suffered from no mental infirmity that could have disabled his abilities to fully understand the situation in which he confessed. It is difficult to understand how one who is not a psychiatrist, learned in the complex field of mental illnesses, could feel qualified to make a determination with such serious ramifications.

Kip's Sentencing Hearing, in which four experts testified for the defense, and none for the prosecution, bears similar shortcomings. Under the plea agreement, Kip could have served from 25 to 220 years. Under Oregon's mandatory sentencing statute, a sentence of 25 years was required for each of the four counts of murder and 7<fr12> years for each of the twenty-five counts of attempted murder. It was ultimately up to Judge Mattison to determine whether any, or all, of those sentences should be served concurrently or consecutively. Sabitt stated the defense felt the judge would be more favorable to Kip's case than a jury due to the fact that a judge is "more educated, [and a] more intellectually honest fact finder." n123 The defense stated its reason for having psychiatric testimony at the Sentencing Hearing in its Sentencing Recommendation: "We're seeking to have you understand his conduct and to apply that understanding to your discretion in this case, based on his youthfulness and his mental disease and his neurologic dysfunction." n124

Dr. Richard Konkol, a reknowned pediatric neurologist, conducted a very thorough neurologic examination of Kip and found [*1106] numerous abnormalities in a wide range of areas. n125 His testimony was long and fairly technical. In addition to the brain abnormalities he discovered via his mental status, motor, and sensory examinations of Kip, Dr. Konkol conducted a SPECT scan of Kip's brain, wherein he discovered several major abnormalities. n126 Among other things, the scan of Kip's brain revealed a lesion in his prefrontal lobe. Dr. Konkol explained that this lesion causes a disruption in the executive function of the brain, which includes the ability to strategize, plan, create goals, prioritize, and make choices. n127 There were also damaged areas in the temporal lobes, which relates to emotional instability, distortions of sensory perceptions, illusions, and delusions. n128 Dr. Konkol testified that the abnormalities rose to the level of a mental defect, specifically cognitive, meaning a defect in thinking that could lead to a psychotic episode. n129 He specifically linked the presence of his neurologic findings to childhood onset schizophrenia. n130 Dr. Konkol testified to at least a 75%, and possibly a 90% chance, that Kip could get a positive response from medication. n131 Perhaps because Konkol's testimony involved many very concrete and well-defined scientific tests, not easily controvertible by a lay person, the district attorney engaged in no cross-examination. n132

Dr. Orin Bolstad, a clinical child psychologist who has performed approximately 2000 psychological evaluations of adolescents and juveniles, n133 also testified in Kip's defense at his Sentencing Hearing. Although Dr. Bolstad felt that giving a definitive specific diagnosis at Kip's young age was a bit presumptuous, he was certain that Kip had a psychotic disorder with profound paranoid symptoms. n134 Dr. Bolstad stated that Kip's symptoms, including the hallucinations and command voices Kip experienced from an early age, were consistent with the paranoid [*1107] type of schizophrenia. n135 He read from the Diagnostic and Statistical Manual (DSM-IV) to demonstrate how Kip's symptomatology was consistent with his diagnosis of paranoid type of schizophrenia. n136 Bolstad also found that Kip had a lot of features in common with schizoaffective disorder (a combination of schizophrenia and depression) and bipolar, manic disorder. n137 He was confident that Kip is psychotic and has neurological processing difficulties, a learning disorder, a generalized anxiety disorder, and major depressive disorder. n138 He testified that, in the case of early onset schizophrenia, individuals were more often male and had more evidence of structural brain abnormalities and cognitive impairments identifiable through neurologic testing. n139 The neurological tests undertaken by Dr. Konkol indicated that these abnormalities and impairments did exist.

Dr. Bolstad spent quite a bit of time distinguishing the paranoid type of schizophrenia, characterized by the presence of prominent delusions or hallucinations in the context of a relative preservation of cognitive functioning and affect, from other forms of schizophrenia. n140 He testified that people with paranoid schizophrenia can look rather normal most of the time. He also indicated that their behavior can be playful and that they can premeditate. They can plan out a course of action and can complete it, but that does not mean they are thinking logically. While their actions can be intentional, premeditated, and planful, they are also twisted, illogical, and irrational. n141 Dr. Bolstad also conducted a thorough exploration of validity issues and the possibility that Kip was malingering. Through the results of a myriad of standardized tests he performed on Kip, in a voluminous report Dr. Bolstad concluded that Kip was not feigning mental illness. n142

District Attorney Caren Tracy did cross-examine Dr. Bolstad. Her line of questioning was a prime example of Perlin's contention that we deride psychodynamic and behavioral explanations [*1108] of "crazy" behavior when it appears "obvious" that the defendant, in fact, "did it." One of the first questions she asked was: "Now, as I understand it, you're saying that you acknowledge Mr. Kinkel is a mass murderer. He's killed a multitude of people, attempted to kill a lot more; correct?" n143 She wanted to immediately point out that Kip, in fact, "did it." Despite the fact that Dr. Bolstad gave a lengthy explanation that, in the case of paranoid schizophrenia, the person appears to be functioning normally most of the time, Tracy spent the majority of her cross-examination of Dr. Bolstad addressing the fact that, essentially, Kinkel didn't fit the "wild beast" image, and as such, couldn't really be "insane." In response to this line of questioning, Dr. Bolstad stated:

I think it's important to understand that the public, generally speaking - and I think for that matter, often our legal system doesn't understand the nature of paranoid schizophrenia. It's altogether possible for someone to be lucid one minute and very crazy the next minute. That's characteristic of paranoid schizophrenia. In fact, I read that out of the Diagnostic Manual. That's not an uncommon feature of this illness. n144

Dr. Bolstad went on to offer the Unabomber as an example of a clever, manipulative, deceitful, calculating, yet profoundly mentally ill paranoid schizophrenic. Tracy immediately responded to Dr. Bolstad's introduction of the Unabomber by stating how Kip told several people he saw himself as the next Unabomber and that the Unabomber is spending the rest of his life in prison. n145 Tracy constantly reiterated the theme that what is critical is that a horrific crime was committed and basically, since Kip bears some resemblance to "normalcy" (he is not in a perpetually drooling and hysterical state of non-reality), there is no "important" mental disease or defect that requires any serious consideration.

Dr. William Sack, a child and adolescent psychiatrist, also testified that Kip had a psychosis with a strong paranoid flavor. n146 He stated that Dr. Bolstad and his own information converged [*1109] toward the same diagnosis: paranoid schizophrenia. n147 Like Dr. Bolstad, Dr. Sack also found depressive symptoms in Kip, leading him toward thinking Kip "might eventually fall into the schizoaffective category." n148 In describing Kip's condition, Dr. Sack stated:

The tragedy of his illness is that, on the one hand, it allowed him to plan in a methodical way because his cognitive structures were relatively intact compared to other forms of schizophrenia. I think our common notion of schizophrenia is a disheveled person walking down the street, talking incoherently. That is schizophrenia, but we're talking about a different kettle of fish here. This is paranoid schizophrenia. These people can look very normal. So on the one hand, the illness had caused him to commit these tragedies. Also, it's the illness that responds better to treatment and has a better prognosis in general than the other forms of schizophrenia. That's the ironic tragedy of the whole thing. n149

In the State of Oregon's Sentencing Recommendation for Kip, n150 Assistant District Attorney Kent Mortimore not only disregarded the diagnoses made by the psychiatrists, he essentially inserted his own diagnosis, which was directly contrary to what the experts held:

[Kinkel's] acts were volitional. He was able to make conscious choices.... He was able to choose his conduct.... because they were his choices, he doesn't meet the definition of legal insanity.... Almost everything that occurred the 20th and 21st of May last year was calculated, required careful consideration, and required careful planning on the part of Kip Kinkel. This is very unusual and very unlikely to be legal insanity. In cases involving that true condition, one would expect lashing out at people perceived to be aliens, or more specifically, lashing out at people that he perceived to be threatening to him. One would expect to have seen his victims be part of his delusions. And yet that wasn't true. n151

Mortimore used the term "so-called mental illness" at least three times in his statement. It is interesting that, although the state created quite a different analysis or "diagnosis" of Kip, it [*1110] failed to present any expert testimony to endorse its opinions. Mortimore's analysis perfectly illustrates the two "self-evident" truths employed in Perlin's "ordinary common sense" paradigm: everyone knows how to assess an individual's behavior, and everyone knows when to blame someone for doing wrong. Mortimore felt he had perfect liberty to assess, analyze, and judge Kip's mental state, despite the fact that, as a lawyer, this is not where his training lies. Furthermore,

Mortimore's perceptions of Kip's mental situation are given credence, despite his utter lack of knowledge of psychiatry. It is hard to believe that this credibility would exist in other situations. For instance, imagine that psychiatrists were trying to interpret a particular statute. In order to do this they hired several well-respected attorneys to come to a meeting and give a lecture as to the legal meaning of the statute. The reason the psychiatrists bring these attorneys to the meeting is they feel that, due to their study and practice of the law, these attorneys have a much more educated and knowledgeable understanding of the statute than they would alone. Then, after the attorneys give their lecture and leave, a couple of the psychiatrists, who have never studied or practiced law, stand up and state what they think the statute means. It is unlikely that one would be willing to defer to the opinion of the psychiatrists over the lawyers, because one would recognize that their knowledge of the law is very insubstantial and likely to be flawed. Moreover, although one might argue that it is a different case with psychiatric testimony in legal proceedings, because psychologists "can't even agree on a diagnosis," this "battle of the experts" mythology has been shown to be a false perception. On average, "there is examiner agreement in 88 percent of all insanity cases." n152

In the end, on November 9, 1999, Judge Mattison sentenced Kip to an unconditional "111.67 years, which is more than anyone will ever serve." n153 He stated:

Based on my experience, I believe it is highly probable that a jury would have found Mr. Kinkel guilty of multiple counts of aggravated murder and would have sentenced him to life in prison without the possibility of release. Believing that, the [*1111] question becomes, should the court sentence any differently, at least without some good reason to do so? n154

Apparently, the psychiatric testimony given by four different experts in the field of mental disease gave no "good reason" to Judge Mattison. Their opinions were basically irrelevant to his decision. He imposed beyond a life sentence in prison on Kip, every second of which will be served. The message we are sending to the mentally diseased or defective defendant has become resoundingly clear: do not bother with an explanation because the choice has already been made - if you "did it" the story is over.

Gary Hawk of the University of Virginia's Institute of Law, Psychiatry and Public Policy stated: "I think that, in general, judges find it hard, even with younger defendants, to keep rehabilitation in mind." n155

III

OREGON'S RETRIBUTIVE FOCUS ON JUVENILE CRIMINAL JUSTICE

At fifteen years old, Kinkel was automatically prosecuted as an adult in criminal court, by virtue of Oregon's legislative waiver statute. In relevant part this statute provides:

Notwithstanding any other provision of law, when a person charged with aggravated murder ... or an offense listed in subsection (4)(a) of this section is 15, 16 or 17 years of age at the time the offense is committed,... the person shall be prosecuted as an adult in criminal court.

....

When a person charged under this section is convicted of an offense listed in subsection (4) of this section, the court shall impose at least the presumptive term of imprisonment provided for the offense in subsection (4) of this section. The court may impose a greater presumptive term if otherwise permitted [*1112] by law, but not impose a lesser term. The person is not, during the service of the term of imprisonment, eligible for release on post-prison supervision or any form of temporary leave from custody. n156

This severe legislative waiver statute became law April 1, 1995, after the passage of Ballot Measure 11, a voter initiative approved in the November 1994 election. Measure 11 was a product of direct democracy: the initiative was introduced and approved of by the public at large. In criticizing direct democracy as a method of shaping state policies, authors have noted that voters have "little motivation to gather detailed information and often search for 'information shortcuts' to help them decide on any given issue." n157 Mass media is notoriously one of the most popular shortcuts. n158 One author noted that when Oregon voters turned to the media for information and direction regarding Measure 11, they were told that "juvenile crime and violence were out of control in the state." She goes on to state:

During the months of October and November - before the November 18, 1994 election - the two major newspapers in Oregon, The Oregonian and The Register-Guard, took advantage of public hysteria and reported extensively on the issue of crime.... Oregonians were persuaded that Measure 11 would "deter crime" with its tougher sentences and "keep potential repeat offenders locked up longer." In one newspaper article, Measure 11's author, Kevin Mannix, indicated that the ballot measure would keep "predators" off the streets. n159

The public took the media's message about juvenile crime seriously; approximately sixty-five percent of Oregonians voted in favor of the measure. n160

With the passage of Measure 11, Oregon now utilizes judicial and legislative waivers, both of which make it much easier to try juveniles in adult criminal court. Additionally, for the majority of offenses enumerated in Measure 11, the new mandatory minimum [*1113] sentences imposed are much longer than the presumptive sentences provided under the Oregon Sentencing Guidelines. n161 Prior to the passage of the measure, mandatory minimum sentences were not imposed on juveniles in Oregon, even if those juveniles were judicially waived to adult criminal court. n162 Not only are minimum sentences for the enumerated offenses now mandatory, juveniles receive them without possibility of parole or sentence reduction. n163 Hence, Measure 11 forces young offenders to face a dual enhancement. Not only was Kip subjected to criminal court with its attendant exposure to adult sanctions, he faced the second punitive measure of mandatory minimum sentencing without possibility of parole.

Although numerous cases have reached the Oregon Court of Appeals challenging the legality of Measure 11 on various grounds, none of them have had any success. n164 The Oregon Supreme Court has thus far rejected all state and federal constitutional challenges to ORS 137.700, which is the codification of Measure 11 adopted by popular vote in 1994. n165 Widespread approval of Measure 11 by both the public and the judiciary indicates that Oregon is following the national

trend that increasingly demands that treatment of juvenile offenders focus on punishment and retribution. This, however, was not always the case.

The enactment of the Juvenile Court Act of 1899 founded the American juvenile justice system and created the first juvenile court in Cook County, Illinois. n166 The Progressives' approach toward juvenile court attempted to remove children from the adult criminal justice and corrections systems and to provide them with individualized treatment in a separate system of their own. Under the guise of *parens patriae*, an emphasis on treatment, supervision, and control, rather than punishment, allowed the state [*1114] to intervene affirmatively in the lives of more young offenders. n167

Traditionally, the juvenile system distinguished between children and adults based on their cognitive developmental differences. American criminal jurisprudence dictates that the severity of imposed punishment corresponds to both the level of harm inflicted and the offender's culpability. We assess culpability through cognition, including the mental and emotional states of the offender at the time of the offense, as well as her maturity. n168

Although developmental psychological research indicates that adolescents may know right from wrong as an abstract proposition, whether they are sufficiently aware of the consequences of their actions and are as capable of making mature choices as older offenders is questionable. Indeed, it is this "developmental fact" that accounts for many of the legal disabilities imposed on children. n169

Thus, cognitive developmental differences that separate young offenders from adult offenders make youths less culpable for their offenses. Youths are treated differently in the juvenile justice system than adults are treated in criminal courtrooms due to the recognition of these cognitive developmental differences.

Moreover, many have noted that juvenile crimes fall, at least in part, onto the shoulders of society. This is due to the dependent status of youths, which systematically deprives them of many opportunities to learn to make correct choices. n170 As one court noted:

The concept of establishing different standards for a juvenile is an accepted legal principle since minors generally hold a subordinate and protected status in our legal system. There are legally and socially recognized differences between the presumed responsibility of adults and minors.... This State, like all the others, has recognized the fact that juveniles many times lack the capacity and responsibility to realize the full consequences of their actions. As a result of this recognition minors are unable to execute a binding contract, unable to convey real property, and unable to marry of their own free will. It would indeed be inconsistent and unjust to hold that [*1115] one whom the State deems incapable of being able to marry, purchase alcoholic beverages, or even donate their own blood, should be compelled to stand on the same footing as an adult [for purposes of waiving constitutional rights]. n171

Hence, the sentences traditionally given in juvenile courts focus on treating and rehabilitating youths based on a judge's individualized assessment of a youth's needs, characteristics, and history. The sentences, centered around rehabilitation, involve counseling, training, and education and are often indefinite, until the state agency supervising the offender decides to release her. n172

The criteria used in forcing a juvenile into the adult criminal court system under Oregon's legislative waiver is entirely contingent upon the alleged crime committed by the youth. The fact that a youth has committed a violent crime does not mean, however, that the youth is as criminally responsible as an adult counterpart, is any more mature than her peers, that society is any less responsible for the minor's act, or that the minor is able to control her actions or understand their consequences. It means that we have forsaken the rehabilitative model for children. Youths are labeled adults and turned over to the adult system, "not because the juveniles have reached a level of maturity consonant with adulthood but rather because society has given up on them." n173 We have shifted from the "best interests of the child" rehabilitative standard, "which bases sentencing on the offender's needs, to punishment and 'accountability.'" Juvenile sentences are now dictated according to the perceived need for the protection of public safety." n174

We are making widespread policy decisions based on worst-case scenarios. Through the implementation of Measure 11, Oregon has effectively chosen to dismantle the juvenile justice system for all but the most minor of crimes, replacing rehabilitation with retribution in no uncertain terms. From 1859 until 1996, article I, section 15 of the Oregon Constitution read: "Laws for the punishment of crime shall be founded on the principles of reformation, and not of vindictive justice." On November 5, 1996, the people of Oregon voted to change this section to read: "Laws for [*1116] the punishment of crime shall be founded on these principles: protection of society, personal responsibility, accountability for one's actions and reformation." n175 During his ruling, Judge Mattison noted this constitutional change and stated, "To me, this was a clear statement that the protection of society in general was to be of more importance than the possible reformation or rehabilitation of any individual defendant." n176 Judge Mattison proceeded to sentence Kip to over 111 years in prison, without possibility of release.

The first location where Kip is serving his term is the Oregon Youth Authority (OYA) MacLaren Youth Correctional Facility's Secure Intensive Treatment Program (SITP) for young violent offenders, located in Woodburn, Oregon. The mission statement of the OYA is "to protect the public by holding youth offenders accountable and providing opportunities for reformation." n177

As similarly evidenced in the language of both the Oregon Constitution and Measure 11, if the OYA considers rehabilitation to be a worthy pursuit at all, according to their mission statement, it is clearly not a priority, subservient to the far more important missions of retribution and incapacitation. Examining OYA's methodology further supports this proposition. The first four methods listed are: (1) Hold youth offenders accountable; (2) Emphasize public safety; (3) Provide certain, consistent sanctions for youth offenders; (4) Support the concerns of crime victims. n178 Karen Andall, a spokeswoman for the OYA, stated in an interview that the treatment at MacLaren is intended to "ensure that offenders accept responsibility for their crimes." n179 Immediately preceding the court's ruling, Maxine Bernstein of The Oregonian interviewed Patrick Kirby, the treatment coordinator for violent offenders at MacLaren. The conditions Kip will live in were described as: "An 8-by-12 foot cell called a 'safe room.' The staff will monitor the cell with cameras, and a guard will check on him every 10 to 15 minutes. He will have a metal cot [*1117] and a latrine." n180 Kirby went on to describe the tough approach Kip will be made to face:

He will be made to "relive" his crimes, re-creating them through role-playing. He will be shown crime scene photos, pictures of his victims' grave sites and be forced

to read their obituaries. "I go traipsing around in cemeteries and bring back blow-up pictures of their victims' headstones.... We show them, 'This is the result of your decisions.'" n181

The assumption that the inmate has not accepted responsibility for his crimes does not apply to Kip; from the note he left at his house after killing his parents onward, he has claimed total responsibility. In the statement he read to the victims present at his Sentencing Hearing, Kip said:

I am truly sorry that this has happened. I have gone back in my mind hundreds of times and changed one detail, one small event so this never would have happened. I wish I could. I take full responsibility for my actions. These events have pulled me down into a state of deterioration and self-loathing that I didn't know existed. I am very sorry for everything I have done, and for what I have become. n182

Kip was on perpetual suicide watch from the date of his initial incarceration because of his overwhelming guilt and desire to take his own life. n183 Although Dr. Sacks' testimony briefly alludes to the fact that MacLaren's SITP provides medication and counseling to inmates when appropriate, MacLaren does not publicly stress any such commitment to rehabilitation. MacLaren, as a publicly funded institution, channels the desire of the people, and this desire is retribution. The Oregonian's interview with Patrick Kirby gives the impression that the MacLaren methodology treats all inmates as if they are mentally sane and just heartless "bad seeds." The underlying belief seems to be "if we just hammer them over the head with the horrific crime they committed enough we can get them to break down, to cry, and to be made to suffer like their victims did." There seems to be no [*1118] consideration that a person, such as Kip, may be himself victimized by a mental infirmity beyond his control that is responsible for the crimes he committed. The assumption is that every inmate was in control, that she made an unimpeded rational decision to perpetrate a crime, in the same way you or I make a decision to go grocery shopping. An inmate with a mental disorder such as paranoid schizophrenia, which requires both medication and frequent long-term psychiatric counseling in order to be actually treated, is unlikely to gain much benefit from the "treatment" program described by Patrick Kirby. If Kip's treatment at MacLaren does indeed contain a rehabilitative component, it would differ dramatically from the image presented by MacLaren. Sadly, perhaps MacLaren intentionally conveys a primarily harsh, retributivist method because, cognizant of the public's disinterest and distrust of rehabilitative treatment, they seek to avoid condemnation for expending time, effort, and money helping someone seen in the eyes of the public as a worthless murderer. As well-stated by Professor Barry Feld:

Punishment and treatment can be conceptualized as mutually exclusive goals because of the backward-looking nature of punishment and the forward-looking emphasis of therapy. Punishment imposes unpleasant consequences on offenders because of their past offenses; therapy seeks to alleviate undesirable conditions and thereby improve the offender's life in the future. Treatment assumes that certain antecedent factors are responsible for the individual's undesirable condition and that steps can be taken to alter those factors. n184

The people of Oregon, through their political and legislative choices, clearly endorse Feld's conception of punishment, while ignoring the hopeful possibility of treatment.

CONCLUSION

"Negative public attitude has historically been one of the greatest obstacles preventing individuals with special needs or disabilities from leading more productive, meaningful, and involved lives in modern society." n185 This Comment, through its analysis of Kip Kinkel's case, attempts to initiate a dialogue that strives to mitigate the obstacle of stigma. As the treatment of Kip illustrates, the stigma of mental illness has many psychological, [*1119] legal, and legislative consequences. As a society we must address the danger of those consequences and recognize that mental illness is legitimate, that children are different from adults, and that rehabilitation is inherently possible. If not, our culture may devolve into a vengeful collective, unable to realize our common humanity.

FOOTNOTES:

* Third-year law student, University of Oregon School of Law. I would like to thank Mitchell Slater for inspiring me to write about this area. This work is dedicated with love and gratitude to John Patrick Moore, a courageous lawyer who has devoted his life to the pursuit of justice.

** Excerpted from the writings of Kipland Kinkel. Sentencing Hearing, State v. Kinkel, No. 20-98-09574, State's Exhibit 25. Some of these writings were also read aloud at the Sentencing Hearing, State v. Kinkel, No. 20-98-09574, at 79-83 (Nov. 2, 1999) (testimony of Detective Pamela McComas). This exact phrase can be found in its actual form (Kip's handwriting) at PBS, Kip's Writings & Statements, at <http://www.pbs.org/wgbh/pages/frontline/shows/kinkel/kip/writings.html> (last visited Mar. 29, 2001).

n1. Maxine Bernstein, Kinkel's Boyhood Troubles Explode in Rage, Destruction, Oregonian (Portland), Aug. 30, 1998, at A1.

n2. Jeff Barnard, Kinkel Pleads Guilty to Murder, AP Online, Sept. 24, 1999, available at 1999 WL 28121092.

n3. Bernstein, supra note 1.

n4. Id.

n5. From an interview with Kristin Kinkel done for the Frontline program entitled The Killer at Thurston High (PBS television broadcast, Jan. 18, 2000). Transcripts from this interview can be found in PBS, An Interview with Kristin Kinkel, at <http://www.pbs.org/wgbh/pages/frontline/shows/kinkel/kip/kristin.html> (last visited Mar. 29, 2001).

n6. Sentencing Hearing, State v. Kinkel, No. 20-98-09574, at 646 (Nov. 4, 1999) (testimony of Sandra L. Farber).

n7. Bernstein, supra note 1.

n8. Id.

n9. PBS, Kip's Writings & Statements, at <http://www.pbs.org/wgbh/pages/frontline/shows/kinkel/kip/writings.html> (last visited Mar. 29, 2001).

n10. Sentencing Hearing, State v. Kinkel, No. 20-98-09574, Defendant's Exhibit No. 107 (Copy of the Respect Sheet); Sentencing Hearing, State v. Kinkel, No. 20-98-09574, at 399-401 (Nov. 3, 1999) (testimony of Dr. Orin Bolstad).

n11. Bernstein, supra note 1.

n12. The Associated Press, Kip Kinkel Scared Many Early On, Papers Show, Oregonian (Portland), Feb. 16, 2000, at B14, available at 2000 WL 5377368.

n13. Id.

n14. Bernstein, supra note 1.

n15. Maxine Bernstein, Police Papers Detail Kinkel Findings, Oregonian (Portland), Oct. 2, 1998, at A1.

n16. Id.

n17. Sentencing Hearing, State v. Kinkel, No. 20-98-09574, State's Exhibit 25. Kinkel's journal was also read aloud at the Sentencing Hearing, State v. Kinkel, No. 20-98-09574, at 79-83 (Nov. 2, 1999) (testimony of Detective Pamela McComas). This writing can be found in its actual form (Kip's handwriting) at PBS, Kip's Writings & Statements, supra note 9.

n18. Sentencing Hearing, State v. Kinkel, No. 20-98-09574, Court's Exhibit No. 303 (Psychological Evaluation by Dr. Orin Bolstad, June 30, 1999, at 32).

n19. Sentencing Hearing, State v. Kinkel, No. 20-98-09574, at 392 (Nov. 3, 1999) (testimony of Dr. Orin Bolstad).

n20. Sentencing Hearing, State v. Kinkel, No. 20-98-09574, Court's Exhibit No. 303 (Psychological Evaluation by Dr. Orin Bolstad, June 30, 1999, at 32).

n21. Bernstein, supra note 1.

n22. Sentencing Hearing, State v. Kinkel, No. 20-98-09574, State's Exhibit 6. This note was also read aloud at the Sentencing Hearing, State v. Kinkel, No. 20-98-09574, at 268-70 (Nov. 3, 1999) (testimony of Detective Pamela McComas). This note can be found in Kip's handwriting at PBS, Kip's Writings & Statements, supra note 9.

n23. Sentencing Hearing, State v. Kinkel, No. 20-98-09574, at 227-28 (Nov. 2, 1999) (testimony of Alan Dale Warthen); Sentencing Hearing, State v. Kinkel, No. 20-98-09574, at 412 (Nov. 3, 1999) (testimony of Dr. Orin Bolstad); Maxine Bernstein, Kinkel Planned to Shoot Himself, Detective Testifies, Oregonian (Portland), Feb. 17, 1999, at A1.

n24. Jeff Barnard, Teen Shoots 20 in Oregon School: Kipland Kinkel Kills One Student and Wounds 19 Others, Apparently After Slaying His Parents, Portland Press Herald, May 22, 1998, at 1A, available at 1998 WL 249116.

n25. Bernstein, supra note 23.

n26. The Killer at Thurston High, supra note 5.

n27. Sentencing Hearing, State v. Kinkel, No. 20-98-09574, at 242 (Nov. 2, 1999) (testimony of Alan Dale Warthen).

n28. Id. at 219.

n29. Id. at 220-22.

n30. Maxine Bernstein, Court Restricts Psychiatrist's Opinion of Kinkel, *Oregonian* (Portland), Mar. 6, 1999, at C1.

n31. Betsy Hammond & Steven Carter, Educators are Taught to Recognize Needs of Troubled Students, *Oregonian* (Portland), June 3, 1998, at A9.

n32. Id.

n33. Sentencing Hearing, *State v. Kinkel*, No. 20-98-09574, Defendant's Exhibit No. 118 (Dr. Hicks' Treatment Notes).

n34. Id.

n35. Id.

n36. Sentencing Hearing, *State v. Kinkel*, No. 20-98-09574, at 523 (Nov. 4, 1999) (testimony of Dr. Jeffrey L. Hicks).

n37. Id. at 524.

n38. Sentencing Hearing, *State v. Kinkel*, No. 20-98-09574, Defendant's Exhibit No. 118 (Dr. Hicks' Treatment Notes).

n39. Id.

n40. Id.

n41. Sentencing Hearing, *State v. Kinkel*, No. 20-98-09574, at 535-36 (Nov. 4, 1999) (testimony of Dr. Jeffrey L. Hicks).

n42. Sentencing Hearing, *State v. Kinkel*, No. 20-98-09574, Defendant's Exhibit No. 118 (Dr. Hicks' Treatment Notes).

n43. Id.

n44. Sentencing Hearing, *State v. Kinkel*, No. 20-98-09574, at 529 (Nov. 4, 1999) (testimony of Dr. Jeffrey L. Hicks).

n45. Id.

n46. Sentencing Hearing, *State v. Kinkel*, No. 20-98-09574, Court's Exhibit No. 302 (Diagnostic Report of Dr. Richard Konkol). Although available reports vary on the exact date Kip discontinued Prozac, all concur that, at most, he was on the drug through September of 1997. In one session, Kip told Dr. Orin Bolstad that he was on the drug for about three months. Sentencing Hearing, *State v. Kinkel*, No. 20-98-09574, Defendant's Exhibit No. 303 (Psychological Evaluation by Dr. Orin Bolstad).

n47. Sentencing Hearing, *State v. Kinkel*, No. 20-98-09574, Court's Exhibit No. 303 (Psychological Evaluation by Dr. Orin Bolstad).

n48. Bernstein, *supra* note 1.

n49. Neal D. Ryan, M.D., Pharmacological Treatment of Major Depression, in *Clinical Guide to Depression in Children and Adolescents* 219, 229 tbl. 10-1 (Mohammad Shafii, M.D. & Sharon Lee Shafii, R.N., B.S.N. eds., 1992).

- n50. See Bernstein, *supra* note 1.
- n51. Frederick W. Reimherr, M.D. et al., Optimal Length of Continuation Therapy in Depression: A Prospective Assessment During Long-Term Fluoxetine Treatment, 155 *Am. J. Psychiatry* 1247, 1247 (1998) (citations omitted).
- n52. *Id.* at 1249.
- n53. See, e.g., R.F. Prien & D.J. Kupfer, Continuation Drug Therapy for Major Depressive Episodes: How Long Should it be Maintained?, 143 *Am. J. Psychiatry* 18 (1986).
- n54. Reimherr, M.D. et al, *supra* note 51, at 1252 (emphasis added).
- n55. *Id.* at 1250 (citation omitted).
- n56. Sentencing Hearing, *State v. Kinkel*, No. 20-98-09574, at 529 (Nov. 4, 1999) (testimony of Dr. Jeffrey L. Hicks).
- n57. Harriet P. Lefley, Ph.D., The Stigmatized Family, in *Stigma and Mental Illness* 127, 127 (Paul Jay Fink, M.D. & Allan Tasman, M.D. eds., 1992).
- n58. Robert Gibson, M.D., The Psychiatric Hospital and Reduction of Stigma, in *Stigma and Mental Illness*, *supra* note 57, at 185, 185.
- n59. Norman Dain, Ph.D., Madness and the Stigma of Sin in American Christianity, in *Stigma and Mental Illness*, *supra* note 57, at 73, 73 (citations omitted).
- n60. Bruce G. Link, Ph.D. et al., The Consequences of Stigma for Persons With Mental Illness: Evidence From the Social Sciences, in *Stigma and Mental Illness*, *supra* note 57, at 87, 91 (citations omitted).
- n61. *Id.* at 94.
- n62. E.F. Torrey, *Hidden Victims* xi-xii (1988).
- n63. Sentencing Hearing, *State v. Kinkel*, No. 20-98-09574, Defendant's Exhibit No. 118 (Dr. Hicks' Treatment Notes, Jan. 20, 1997).
- n64. PBS, An Interview with Kristin Kinkel, at <http://www.pbs.org/wgbh/pages/frontline/shows/kinkel/kip/kristin.html> (last visited Apr. 12, 2001).
- n65. See Bernstein, *supra* note 1.
- n66. Sentencing Hearing, *State v. Kinkel*, No. 20-98-095740, Defendant's Exhibit No. 118 (Dr. Hicks' Treatment Notes).
- n67. Sentencing Hearing, *State v. Kinkel*, No. 20-98-09574, at 680-81 (Nov. 5, 1999) (testimony of Dr. William H. Sack).
- n68. Sentencing Hearing, *State v. Kinkel*, No. 20-98-09574, at 598-628 (Nov. 4, 1999) (testimony of Joyce Naffziger).
- n69. Sentencing Hearing, *State v. Kinkel*, No. 20-98-09574, Court's Exhibit No. 303 (Preliminary Psychological Evaluation by Dr. Dorothy Otnow Lewis).
- n70. Sentencing Hearing, *State v. Kinkel*, No. 20-98-09574, at 602-617 (Nov. 4, 1999) (testimony of Joyce Naffziger).

- n71. Id. at 611.
- n72. Id.; see also Sentencing Hearing, State v. Kinkel, No. 20-98-09574, Court's Exhibit No. 303 (Psychological Evaluation by Dr. Orin Bolstad).
- n73. Sentencing Hearing, State v. Kinkel, No. 20-98-09574, at 616-28 (Nov. 4, 1999) (testimony of Joyce Naffziger).
- n74. Sentencing Hearing, State v. Kinkel, No. 20-98-09574, Defendant's Exhibit No. 118 (Dr. Hicks' Treatment Notes).
- n75. Sentencing Hearing, State v. Kinkel, No. 20-98-09574, at 598-628 (Nov. 4, 1999) (testimony of Joyce Naffziger).
- n76. Sentencing Hearing, State v. Kinkel, No. 20-98-09574, Defendant's Exhibit No. 154.
- n77. Id.
- n78. Sentencing Hearing, State v. Kinkel, No. 20-98-09574, Court's Exhibit No. 303 (Psychological Evaluation by Dr. Orin Bolstad, Feb. 3, 1999, at 27-31).
- n79. Maxine Bernstein, Kinkel's Lawyers Plan to Argue Insanity Defense, Oregonian (Portland), June 8, 1999, at B1.
- n80. Barnard, *supra* note 2.
- n81. Kipland Kinkel's Plea Petition (on file with author).
- n82. PBS, 111 Years Without Parole, at <http://www.pbs.org/wgbh/pages/frontline/shows/kinkel/trial/#4> (last visited Mar. 29, 2001).
- n83. Michael L. Perlin, J.D., Myths, Realities, and the Political World: The Anthropology of Insanity Defense Attitudes, 24 Bull. Am. Acad. Psychiatry L. 5, 8 (1996).
- n84. Eric Silver et al., Demythologizing Inaccurate Perceptions of the Insanity Defense, 18 L. & Hum. Behav. 63, 64 (1994).
- n85. Id. (quoting V.P. Hans, An Analysis of Public Attitudes Toward the Insanity Defense, 4(2) Criminology 393, 402 (1986)).
- n86. Id. (quoting P.A. Pasewark & D. Seidenzahl, Opinions Concerning the Insanity Plea and Criminality Among Mental Patients, 7 Bull. Am. Acad. Psychiatry L. 199-200 (1979)).
- n87. Id. at 67-68.
- n88. Id. at 64.
- n89. Id.
- n90. Id.
- n91. See id. at 65.
- n92. Patrice Nealon, Trial to Focus on Seguin's Mental State, Boston Globe, Dec. 30, 1992, at 21.
- n93. Id.
- n94. Anastasia Toufexis, Do Mad Acts a Madman Make?, Time, Feb. 3, 1992, at 17.

- n95. Perlin, *supra* note 83, at 12.
- n96. Dahmer's Parents Speak Out U.S. TV, USA Today, Feb. 20, 1992, at 3A.
- n97. Dahmer Plea Put Scare in Prosecutors: A Successful Insanity Claim Would Have Been Imitated, Atlanta J., Feb. 19, 1992, at A7.
- n98. Scott Leigh Sherman, Guilty But Mentally Ill: A Retreat from the Insanity Defense, 7 Am. J.L. & Med. 237, 253-54 (1981) (footnotes omitted).
- n99. *Id.* at 256.
- n100. Or. Rev. Stat. 161.295(1) (1997). This Article refers to the 1997 version of the Oregon Revised Statutes because that version was applicable to the case at issue.
- n101. See Or. Rev. Stat. 161.300, 161.305 (1997).
- n102. Or. Rev. Stat. 161.325(b) (1997).
- n103. Or. Rev. Stat. 161.327(1) (1997).
- n104. *Id.*
- n105. Or. Rev. Stat. 161.327(2)-(8), 161.332, 161.336 (1997).
- n106. Or. Rev. Stat. 161.327(5) (1997).
- n107. Lawyers for Kip Kinkel Want School Shooting Trial Moved from Eugene, Associated Press, Dec. 16, 1998.
- n108. Or. Rev. Stat. 161.295(1) (1997).
- n109. Bernstein, *supra* note 23.
- n110. Bernstein, *supra* note 79.
- n111. Kinkel Lawyers Try to Stop Prosecution Plan to Test His Brain for Physical Defects, Associated Press, Sept. 10, 1999.
- n112. Barnard, *supra* note 2.
- n113. Perlin, *supra* note 83.
- n114. *Id.* at 16.
- n115. *Id.* at 16-17 (footnotes omitted).
- n116. *Id.* at 18.
- n117. *Id.* at 15.
- n118. *Id.* at 6.
- n119. Rogers Worthington, Dahmer Sane, Faces Life Terms, Chi. Trib., Feb. 16, 1992, at C1.
- n120. Richard W. Jaeger, Dahmer Held Control in Murders, Doctor Says, Wis. St. J., Feb. 13, 1992, at 1C.
- n121. See statistics, *supra* note 85.

n122. Maxine Bernstein, Judge Rules Confession by Kinkel Admissible, *Oregonian* (Portland), June 10, 1999, at C11.

n123. Maxine Bernstein, Kinkel Begins Life as Inmate, *Oregonian* (Portland), Nov. 12, 1999, at A1.

n124. Sentencing Hearing, *State v. Kinkel*, No. 20-98-09574, at 979-80 (Nov. 10, 1999) (Defense Sentencing Recommendation).

n125. Sentencing Hearing, *State v. Kinkel*, No. 20-98-09574, at 592-94 (Nov. 4, 1999) (testimony of Dr. Richard J. Konkol).

n126. *Id.* at 569-82.

n127. *Id.* at 586.

n128. *Id.* at 587.

n129. *Id.* at 592-93.

n130. *Id.* at 593.

n131. *Id.* at 597.

n132. *Id.* at 598.

n133. Sentencing Hearing, *State v. Kinkel*, No. 20-98-09574, at 347 (Nov. 3, 1999) (testimony of Dr. Orin Bolstad).

n134. *Id.* at 354-55.

n135. *Id.* at 355.

n136. *Id.* at 414-18.

n137. *Id.* at 355.

n138. *Id.* at 362, 414.

n139. *Id.* at 416.

n140. *Id.* at 417.

n141. *Id.* at 424-25.

n142. Sentencing Hearing, *State v. Kinkel*, No. 20-98-09574, Court's Exhibit No. 303 (Validity Analysis Report of Dr. Orin Bolstad).

n143. Sentencing Hearing, *State v. Kinkel*, No. 20-98-09574, at 456 (Nov. 3, 1999) (cross-examination of Dr. Orin Bolstad).

n144. *Id.* at 465.

n145. *Id.* at 465-67.

n146. Sentencing Hearing, *State v. Kinkel*, No. 20-98-09574, at 672 (Nov. 5, 1999) (testimony of Dr. William H. Sack). This is also available at PBS, Dr. Williams Sack's Evaluation of Kinkel, at <http://www.pbs.org/wgbh/pages/frontline/shows/kinkel/trial/sack.html> (last visited Mar. 29, 2001).

n147. Sentencing Hearing, *State v. Kinkel*, No. 20-98-09574, at 683 (Nov. 5, 1999) (testimony of Dr. William H. Sack).

n148. *Id.* at 678.

n149. *Id.* at 687-88.

n150. PBS, State of Oregon's Sentencing Recommendation for Kinkel, at <http://www.pbs.org/wgbh/pages/frontline/shows/kinkel/trial/state.html> (last visited Mar. 29, 2001).

n151. *Id.*

n152. Perlin, *supra* note 83, at 12.

n153. Sentencing Hearing, *State v. Kinkel*, No. 20-98-09574, at 1026 (Nov. 10, 1999) (Court's Ruling). This is also available at PBS, Statement by Lane County Circuit Court Judge Jack Mattison, at <http://www.pbs.org/wgbh/pages/frontline/shows/kinkel/trial/judge.html> (last visited Mar. 29, 2001).

n154. *Id.* at 1023.

n155. Bernstein, *supra* note 123. Additionally, it is worth noting that Oregon Circuit Court judges, like Judge Mattison, are elected by popular vote to serve six-year terms. Many people have raised the concern that the practice of electing judiciaries is in conflict with the impartial adjudicator requirement of due process. For more discussion on the complicated issue of elected judiciaries, see Kathryn Abrams, *Some Realism About Electoralism: Rethinking Judicial Campaign Finance*, 72 *S. Cal. L. Rev.* 505 (1999); Paul D. Carrington, *Judicial Independence and Democratic Accountability in Highest State Courts*, 61 *L. & Contemp. Prob.* 79 (1998); and Scott D. Wiener, *Popular Justice: State Judicial Elections and Procedural Due Process*, 31 *Harv. C.R.-C.L. L. Rev.* 187 (1996).

n156. *Or. Rev. Stat.* 137.707 (1)-(2) (1997) (codification of Ballot Measure 11).

n157. Shari Del Carlo, *Oregon Voters Get Tough on Juvenile Crime: One Strike and You Are Out!*, 75 *Or. L. Rev.* 1223, 1250 (1996) (quoting Jane S. Schacter, *The Pursuit of "Popular Intent": Interpretive Dilemmas in Direct Democracy*, 105 *Yale L.J.* 107, 135 (1995) (quoting Arthur Lupia, *Shortcuts Versus Encyclopedias: Information and Voting Behavior in California Insurance Reform Elections*, 88 *Am. Pol. Sci. Rev.* 63, 63 (1994))).

n158. See David B. Magleby, *Direct Legislation: Voting on Ballot Propositions in the United States* 133 (1984).

n159. Del Carlo, *supra* note 157, at 1250 (footnotes omitted).

n160. *By the Numbers*, *Oregonian* (Portland), Nov. 11, 1994, at C1.

n161. Del Carlo, *supra* note 157, at 1231-32.

n162. See *Or. Rev. Stat.* 161.620 (1995); *State v. Engweiler*, 118 *Or. App.* 132, 136, 846 P.2d 1163, 1165 (1993).

n163. *Or. Rev. Stat.* 137.707(4) (1997).

n164. See *State v. Rhodes*, 149 *Or. App.* 118, 941 P.2d 1072 (1997); *State v. Jackson*, 145 *Or. App.* 27, 929 P.2d 323 (1996); *State v. Lawler*, 144 *Or. App.* 456, 927 P.2d 99 (1996).

n165. See *State ex rel. Caleb v. Beesley*, 326 Or. 83, 949 P.2d 724 (1997); *State ex rel. Huddleston v. Sawyer*, 324 Or. 597, 932 P.2d 1145 (1997).

n166. Cathi J. Hunt, *Juvenile Sentencing: Effects of Recent Punitive Sentencing Legislation on Juvenile Offenders and a Proposal for Sentencing in the Juvenile Court*, 19 B.C. Third World L.J. 621, 623 n.12 (1999).

n167. Barry C. Feld, *Criminal Law: The Juvenile Court Meets the Principle of the Offense: Legislative Changes in Juvenile Waiver Statutes*, 78 J. Crim. L. & Criminology 471, 476 (1987).

n168. See Hunt, *supra* note 166, at 664-65.

n169. Feld, *supra* note 167, at 525 (footnotes omitted).

n170. See, e.g., *id.* at 526 (citing Twentieth Century Fund Task Force on Sentencing Policy *Toward Young Offenders, Confronting Youth Crime* 7 (1978)); Franklin E. Zimrig, *The Changing Legal World of Adolescence* (1982).

n171. *Lewis v. Indiana*, 288 N.E.2d 138, 141-42 (Ind. 1972) (citations omitted).

n172. See Hunt, *supra* note 166, at 645-46.

n173. Catherine R. Guttman, Note, *Listen to the Children: The Decision to Transfer Juveniles to Adult Court*, 30 Harv. C.R.-C.L. L. Rev. 507, 509 (1995).

n174. See Hunt, *supra* note 166, at 630 (footnotes omitted).

n175. Or. Const. art I, 15.

n176. Sentencing Hearing, *State v. Kinkel*, No. 20-98-09574, at 1022 (Nov. 10, 1999) (Court's Ruling). This is also available at PBS, *Statement by Lane County Circuit Court Judge Jack Mattison*, *supra* note 153.

n177. Oregon Youth Authority, *The OYA Mission*, at <http://www.oya.state.or.us/mission.htm> (last visited Mar. 29, 2001).

n178. *Id.*

n179. Maxine Bernstein, *Judge's Call Will Decide Kinkel's Fate at Sentencing*, *Oregonian* (Portland), Sept. 28, 1999, at B1.

n180. Maxine Bernstein, *Kinkel Could Move Soon from Jail to MacLaren for Housing, Treatment*, *Oregonian* (Portland), Oct. 29, 1999, at D1.

n181. *Id.*

n182. Sentencing Hearing, *State v. Kinkel*, No. 20-98-09574, at 1019-20 (Nov. 10, 1999) (Statement of the Defendant).

n183. A letter to Kip's lawyer, Mark Sabitt, from Dr. William H. Sack details Dr. Sack's findings, impression, and psychiatric diagnosis of Kip (on file with author). Sentencing Hearing, *State v. Kinkel*, No. 20-98-09574, at 541-42 (Nov. 4, 1999) (testimony of Richard Sherman).

n184. Feld, *supra* note 167, at 484 (footnotes omitted).

n185. *Overcoming Stigma: The Mad Hatters*, in *Stigma and Mental Illness*, *supra* note 57, at 217, 223.

