

“A Situation So Unique That It Will Probably Never Repeat Itself”: Madness, Youth, and Homicide in Twentieth-Century Criminal Jurisprudence

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In 2000, a court in Connecticut faced the question of whether to try a thirty-nine-year-old man named Michael Skakel as a juvenile for a murder he is alleged to have committed in 1975, when he was fifteen years old.¹ Beyond the tabloid sensationalism of another scion of a celebrity family being accused of murder, the case presented rather dramatically how much the justice system’s approach to youthful killers has been transformed in less than a generation. In 1975 Skakel almost certainly would have been tried as a juvenile. The juvenile court had the discretion to transfer the case to adult court after providing a due process hearing on the question, but that outcome would have been extremely unlikely, especially for a young man from a privileged background. Today, in most states, prosecutors have the power to try a fifteen-year-old as an adult, at their own election, possibly for first-degree murder. It is also far less likely that Skakel’s background would prevent adult prosecution. Elected prosecutors would face withering scrutiny if they elected not to seek a punitive sanction in a similar case today. In 1975 Skakel would have faced a maximum of six years (in a specialized institution for juveniles). In contrast, in 2001 a fourteen-year-old in Florida was sentenced to twenty-eight years for fatally wounding his teacher with a firearm he brought to school (he could have received life).

In 1975 the legal system would have presumed that the killing was a

sign of a kind of mental illness rooted in both the normal and pathological features of adolescent development. Law's task was to know and act on this inner madness: the madness of youth itself, and the madness that comes from youth's mistreatment at the hands of parents, schools, and society itself. In place of the mystery that violent adolescents once posed for society, the current system posits willful evil and seeks maximum punishment in the name of protecting the community.

The transformation in the response to serious juvenile crime from individualizing judgment in the service of rehabilitation to uniform punishment in the name of accountability has been well documented.² In this essay I take a closer look at a little-used but revealing legal procedure involving the issues of violent crime, youth, and madness. In these cases, juveniles or young adults charged with murder waive an insanity defense³ in favor of a psychological⁴ presentation to the judge of the evidence about the mental state of the defendant in mitigation of sentence. The defendants acknowledge that legally they are guilty of the crimes but seek the court's discretionary mercy to mitigate punishment by showing how the crime is rooted in mental illness or abnormality.⁵ Although rare, these defenses typically take place in celebrated cases where community outrage over a terrible crime is met with expert testimony on mental illness. Frequently these cases become national contests over whether criminal law should reflect the vengeful emotion of the public or the dispassionate search for the truth behind acts of terrible violence.

A recent example was the case of Kip Kinkel, charged with killing his parents and two classmates near Portland, Oregon. Kinkel, fifteen years old at the time, killed his parents after being suspended for having brought a gun to school. The next day he came back to school with a gun and opened fire in a cafeteria full of students, killing two and wounding at least seven others. Kinkel was charged as an adult under Oregon law. He faced life without parole, as the maximum sentence permissible against a person of his youth. Although he was diagnosed as a severe untreated schizophrenic, his lawyers presented no insanity defense. Instead Kinkel pled guilty. He presented his mental illness, complete with testimony by defense experts before the judge, in a sentencing hearing in which the judge was authorized to take mental state among other factors into consideration in setting punishment.

The major strategic value of this proceeding, which for simplicity I will refer to as the psychological sentencing hearing, is for the defen-

dant to enter detailed knowledge about his or her mental condition while avoiding the jury that would normally be called upon to weigh that knowledge were it presented in an affirmative defense of insanity to the charges. As the confessed author of a widely publicized and reviled crime in a community still much alarmed, Kinkel would have faced an uphill battle winning mitigation from a jury that might find the psychiatric discourse of the defense experts cold and distancing. In this case, however, the judge and the popular audience (as recorded by the media) found common ground in utterly rejecting not the validity but the relevance of the detailed testimony of several experts on mental life including psychologists, psychiatrists, and neurologists.

Kip Kinkel's case introduced interesting echoes of a murder long considered one of the "crimes of the twentieth century." In 1924, attorney Clarence Darrow successfully used precisely the same maneuver to save Nathan Leopold and Richard Loeb from hanging for the kidnapping, murder, and mutilation of a young boy from their own neighborhood. Seeking to commit what they conceived as the "perfect crime," Leopold and Loeb kidnapped Bobby Franks, a much younger boy from the neighborhood. Following an intricate but absurd plan they killed the boy and then disposed of the body in swamplands south of the city after using acid in a failed effort to disguise the identity of the victim. They then faked a kidnapping plot by telephoning the Franks family and demanding ten thousand dollars for the safe return of the boy. The plan fell apart when, the day after the killing, the body was discovered. Near it was a pair of glasses belonging to Leopold with a unique frame hinge sold to only a handful of people in the city. Leopold and Loeb, who had been helping the press cover the story, soon fell under suspicion and were arrested and charged with capital murder and kidnapping.

Darrow's closing argument is one of the most oft-cited pieces of lawyer's prose from the twentieth century. Indeed the fame of Darrow and his clients outlasted many other seemingly more notorious crimes to be among the best remembered of recent times. The outcome, which spared Leopold and Loeb from the scaffold, was long celebrated as a landmark on the road to a fully modern and progressive criminal justice system. Loeb died in a fight with other prisoners in the 1930s, but Leopold emerged from prison in 1957 having participated in critical medical experiments, taught other prisoners how to read and write, and written peer-reviewed articles on criminology, a walking symbol of the rehabilitative ideal.

Leopold and Loeb, both over eighteen at the time of the crime, were not subject to juvenile court jurisdiction and faced the death penalty. The defense emphasized their youth and the combination of mental illness and youth in mitigation. When the judge handed down his verdict sparing their lives, Leopold and Loeb passed into collective memory as icons of a justice that sought to lay down the bloody tools of the past in favor of science, humanity, the psychological roots of behavior, and the capacity of government to know the truth about individuals. The dominant voices of progressive penalty struggled over its meaning and through it to interpret an era that was already waning. As historian Paula Fass notes regarding the case: "The themes explored in the repeated re-imaginings of the case were the ones important to twentieth-century culture: childhood, sexuality, the non-rational self, and psychology as a way to understand these."⁶ Leopold's release from prison in the 1950s provided a post-World War II generation a triumphant portrait of the killer redeemed from youth and madness by the healing powers of prison.

Superficially there is much in common between the sentences given Nathan Leopold in 1924 and Kip Kinkel in 1999. Each faced charges of murder as well as in Leopold's case kidnapping and in Kinkel's case multiple counts of attempted murder. Leopold faced the death penalty, and Kinkel most likely would have had he been two years older. Each was ultimately sentenced to a severe prison sentence, 99 years plus life for Leopold (as he titled his memoir) and 111 years for Kinkel. Indeed, because Leopold was in very real danger of being hung, and Kinkel was constitutionally protected from the death penalty because of his youth at the time of the crime, we might even observe a moderate progress in the humanity of criminal sentencing of just the sort that Clarence Darrow invoked repeatedly in his celebrated closing argument in the Leopold and Loeb case.

But here the similarities stop. Despite the severe sound of Leopold's sentence, he became eligible for parole within a few years under Illinois's indeterminate sentencing system (although due to the notoriety of his case he served more than 30 years). Kinkel's sentence, unless overturned on appeal or interrupted by an executive pardon, will not permit release for 111 years, no matter how "rehabilitated" Kinkel becomes.⁷

There is perhaps an even greater discontinuity in the meaning of the proceeding. Darrow, and even many of his critics, expected that the

psychiatric and psychological expertise introduced in the sentencing hearing would someday all but replace the judicial and legal proceeding surrounding it. But seventy-five years later, the experts at the hearing of Kip Kinkel were even more marginalized than at the Leopold and Loeb trial, while judges and prosecutors find themselves striving to represent the sentiments of the people. The judge sentencing Leopold and Loeb invoked the progress of humanity in declining to sentence them to hang. The judge sentencing Kinkel invoked no less mystifying but quite different ideals of accountability and community security.

These cases provide handy bookends for the twentieth century,⁸ but the trajectory is more complicated than they would suggest. In seeking to draw some conclusions from this unscientific comparison I want to reflect, more briefly, on a third example of a judicial sentencing hearing from that era, the fictional prosecution of Bigger Thomas, the young Black protagonist of Richard Wright's masterpiece *Native Son* (1940).⁹ While Bigger is fictional, as a Black youth living in segregated poverty in proximity to great wealth he is far more typical of young killers in the arms of the law in that century and especially in its last few decades. Both Leopold and Loeb as well as Kinkel were white youths from relatively privileged backgrounds.¹⁰

Wright clearly had the Leopold and Loeb case in mind when he wrote the novel. The Daltons lived in precisely the same wealthy liberal neighborhood as Leopold, Loeb, and their victim. Bigger, a twenty-year-old Black youth from Chicago's infamous South Side ghetto, does kill Mary Dalton, the young daughter of a wealthy white philanthropic family that had taken Bigger in to work as a chauffeur, albeit in a terrible accident. After a night of unwanted socializing with Mary and her communist-leaning boyfriend, Bigger carries an intoxicated Mary back to her room and helps her into bed. Before he can leave, Mary's blind mother enters the room. Bigger, attempting to quiet Mary (and avoid discovery in a highly dangerous position for a Black male), accidentally smothers her. Trying to cope with a killing he had not intended, Bigger burns the body in a furnace (which requires mutilation) and then sets up a phony ransom scheme (as did Leopold and Loeb). Later, in a scene parallel to the first murder, he deliberately kills his Black girlfriend, Bessie Meares, in order to prevent her from making sounds that would attract a police patrol.

Although set only a few years after Darrow's defense of Leopold and

Loeb, and in the same city, Wright describes a very different Chicago moved by the appearance of a horrible crime to a moment of racialized, racist community. Where the Leopold and Loeb trial held the city fascinated for some weeks in the hot summer, the murder trial of Bigger Thomas was squeezed into a few days in a fierce Chicago winter, under a symbolic coat of white snow. Darrow's analogue, communist labor attorney Boris Max, pleads Bigger guilty in the certainty that a jury would be little more than a lynch mob in a city that was setting crosses afire above the snow-whitened urban landscape. Facing an establishment already made uneasy by the worsening grip of the Great Depression, and bereft of the resources that the Leopold and Loeb families put into the defense of their sons, the fictional defense of Bigger has to rest on attorney Max's (and one supposes Wright's) own Marxist-Freudian interpretation of Bigger's life.

The most striking difference between the Leopold and Loeb case and Bigger Thomas's fictional trial was in the outcomes. Judge John R. Caverly spared the lives of the young men, finding their youth sufficient reason to allow the prison system to be society's "response" to an admittedly horrible killing of a much younger child, one committed in such a way as to make it the most aggravated kind of murder (planned, carried out using other serious felonies, and for motives of self aggrandizement). In Bigger Thomas's case the judge peremptorily affirmed the sentiments of the community and ordered that Bigger Thomas be executed. Wright, whose interests spanned the political and social scientific thought of the twentieth century, was highlighting the difference that race makes to the progressive standard of justice articulated in the Leopold and Loeb verdict. He was also identifying racism as one of those forces endangering the project of scientifically and therapeutically shaped reform of criminal justice and of the legal system generally.

As Michel Foucault wrote regarding the records and commentary of a remarkably similar case:¹¹

All of them speak, or appear to be speaking, of one and the same thing; . . . But in their totality and their variety they form neither a composite work nor an exemplary text, but rather a strange contest, a confrontation, a power relation, a battle among discourses and through discourses. . . . The reason we decided to publish these documents was to draw a map, so to speak, of those combats, to reconstruct these confrontations and battles, to rediscover the interaction

of those discourses as weapons of attack and defense in the relations of power and knowledge.

In what follows I want to raise a similar question about these cases. What does the claim of madness now bring to the judicial act of speaking the truth of punishment (or literally “sentencing”)?

Psy-Knowledge

Nikolas Rose has introduced the term *psy-knowledge* to describe the complex of discourses produced by psychologists, psychiatrists, and many other professionals around the problem of knowing and managing the individual.¹² As Rose’s work shows, *psy-knowledge* became a crucial element of liberal governmentality in its various forms and remains so. Liberal governmentalities, which inevitably rely heavily on self-management, have been far more enthusiastic consumers of *psy-expertise* than authoritarian or totalitarian ones (although the latter have often been the focus of concerns about the “political” role of *psy-experts*).¹³ One of the most important sites deploying *psy-knowledge* from the nineteenth century to the present has been the criminal trial. While the insanity defense has presented the most famous example of it, the psychological sentencing hearing, following a plea of guilty, is in some respects a purer case of the possibilities of *psy-knowledge* in rendering criminal justice. As mentioned previously, the insanity defense is typically presented to a jury (sometimes as a matter of law). The psychological sentencing hearing is always before a judge as the exclusive sentencer. Thus the dialogue between law and its others (both *psy-knowledge* and madness) is uninterrupted by the jury and its more populist determinations.

In reading through the discourses of *psy-experts* in 1924 and in 1999 a number of observations come to the fore. One is the sheer diversity of *psy-knowledge* at both ends of the twentieth century. Leopold and Loeb’s defense *psy-experts* traced their abnormalities to a wide array of registers from heredity, to fantasies, to endocrine glands. Kip Kinkel’s defense *psy-experts* examined voices in his head as well as holes in his brain.

A rigorous archaeology of *psy-knowledge* in the criminal jurisprudence of the twentieth century is beyond the scope of this essay. Still a number of hypotheses can be generated even from looking at these two

cases. Perhaps most important is the declining will to explain through psy-knowledge. The experts in the Leopold and Loeb case viewed themselves as the advance guard of a determinist revolution that would sweep away the foundations of criminal justice.¹⁴ The experts in the Kinkel case had a much more circumspect view of their role as supplying not explanations but assessment of the degree of risk posed by the abnormal offender.

1924: "The Biopsychologic Doctrine of Determinism"

Financed by the combined resources of two wealthy families, the defense amassed what amounted to a state-of-the-art scientific analysis of the two defendants as human beings. One part of this focused on the organic body. The defense employed two physicians who conducted what amounted to a massive physiological survey of both men in the form of a report of some eighty thousand words.¹⁵

The physical examination of Leopold revealed that there had been a premature involution of the thymus gland and a premature calcification of the pineal gland in the skull; that the pituitary gland was smaller than normal; that the thyroid was overactive; and that the adrenal glands did not function normally. One of the doctors gave it as his opinion that these abnormalities produced an early sex development and had a direct relationship to Leopold's extraordinary precocity and his mental condition.¹⁶

The defense also employed a dream-team of the leading experts on criminal psychology and psychiatry including William Healy, William Alan White, and Bernard Glueck. These men were not only eminent clinicians; they were national advocates making the argument for the priority of psy-expertise in administering criminal justice. Healy at the time was the director of the Judge Baker Foundation in Boston, but earlier he had served as the first director of the Juvenile Psychopathic Institute in Chicago that served as a diagnostic and treatment arm of that city's pioneering juvenile court. White was the superintendent of St. Elizabeth's Hospital in Washington, D.C., the leading mental hospital of its day. Bernard Glueck was the former director of the psychiatric clinic of Sing Sing Prison in New York.¹⁷

The dominant theme in the testimony of the psy-experts was abnor-

mality. As Georges Canguilhem observed, the concept of normal embodies twin themes of average on the one hand and perfection on the other.¹⁸ The normal student is the average student. The normal liver is the liver unmarred by any sign of disease or disorder. Leopold and Loeb both stood out as anything but average students, attending college while they were in their mid-teens. From a legal perspective this precocity argued for severity. A great deal of the task of the psy-experts was to move from this kind of abnormality to the pathological variety. In the first part of their report on Leopold titled "His Delusionally Disordered Personality," the psy-experts painted a picture of unnatural precocity and obsessive self-interest.

We find that already from five to seven years of age peculiar tendencies were shown quite at variance with the trends of normal childhood. He was not only precocious in his mental interest, but these interests assumed a degree of intensity and showed themselves in special directions which were in themselves indications of abnormality.¹⁹

At five he showed an intense preoccupation with religion, especially the rituals of Catholicism. He showed an early and unnatural conception of his own superiority.

Beginning very early in life with conceptions of his own superiority, . . . there was a steady growth of delusional tendencies concerning himself, and to the extent that he definitely conceives of himself as a superior being, quite apart and not called on to be amenable to the social regulations or legal restrictions which govern the ordinary human being. His ego is all important, right or wrong, his desires and will being the only determinants of his conduct.²⁰

This was driven by the "early recognition of his superior attainments by his teacher and by his mother" that "made him feel unlike and apart from others and superior to them."²¹

The report diagnosed Leopold as striving to separate his own sense of self from any emotional attachment to others.

The essence of his abnormality in this clearly perceivable lack in his emotional life is found, then, in the fact of the constant subordination

of normal feelings of loyalty and obligation and sympathy to his intellectual life, and to the demands of his diseased ego. Herein lies also the explanation of the absence of natural feelings on his part about the commission of criminal acts.²²

The report emphasized the significant abnormality of his fantasy life, which included fantasies of crucifixion (himself and others) as well as an elaborate king/slave fantasy in which he as a slave was attached by a golden chain to a king figure.

In seeking to explain the development of Leopold's "mental abnormality," the report emphasized the early asymmetry between an overdeveloped intellect and an underdeveloped physical body. This was exacerbated when he was sent for his first two years of school to a girl's school. Later a nurse overprotected him, walking him to school and back until he was eleven years old. After this period of overprotection, he was sent to college at age fifteen, a juxtaposition that, in the view of the psy-experts, exacerbated his sense of isolation and uniqueness.

The report's conclusion on Leopold summarized these themes but seemed to stop short of a more thorough scientific diagnosis of him.

We could draw no other conclusions from Leopold's abnormal phantasy life, his delusional development of notions about himself, his defective or deteriorated judgement which has not permitted him to see the pathological absurdity of mixing up phantasy and real life; his repression and misplacement of emotional life; his abnormal urge towards activity and search for the experience of new mental and physical sensations; his disintegrated personality to the extent that he has shown an essential and abnormal lack of foresight and care even for his much beloved ego—we can draw no other conclusions from the above than that Leopold is and was on the twenty-first day of May 1924 a thoroughly unbalanced individual in his mental life.²³

The report on Loeb was quite similar although shorter. Their explanation similarly emphasized precocity and overprotection at an early age. In Loeb's case a particularly dominating governess controlled his upbringing from age four to fourteen.²⁴ In the psy-experts' narrative it was the governess, rather than the parents,²⁵ who pushed him too far

and too fast in scholastic achievement. The report also emphasized that from age ten on he was quite obsessed with detective stories whose characters came to fill the emptiness left by his governess's cold mandate to strive for success.

The opinion is inescapable that in Loeb we have an individual with a pathological mental life, who is driven in his actions by the compulsive force of his abnormally twisted life of phantasy or imagination, and at this time expresses itself in his thinking and feeling and acting as a split personality, a type of condition not uncommonly met with among the insane.²⁶

In their overall explanation of the murder of Bobby Franks, the psy-experts saw the interaction of these two independently peculiar adolescents as the real cause.

An unbiased estimate of the facts pertaining to this association between the two defendants leads us to the conviction that their criminal activities were the outgrowth of a unique coming-together of two peculiarly maladjusted adolescents, each of whom brought into relationship a longstanding background of abnormal mental life. This has made a situation so unique that it probably will never repeat itself. There is justification for stressing the uniqueness of this case if for no other reason than that it has created widespread panic among parents of young people.²⁷

The state anticipating an insanity defense had immediately hired the leading elite private psychiatrists in town. Not surprisingly their testimony consisted primarily of negating links between the "abnormality" of Leopold and Loeb and their crime.

[T]here is not anybody with an active mind that does not have fantasies now and then. . . . It is natural to have fantasies for thirty-minutes before going to sleep.²⁸

With reference to judgment or comparison, comparative worth of conduct or judgment of values, judgment of situations, this man gave samples of having power of judgment and comparison that in no wise was interfered with. In placing himself on the front seat of

the car, in his argument that the natural thing would be for him to open the front door and for the boy to get in there, he showed that he was weighing different events and making judgments as to worth or value. . . . The same faculty of mind makes judgment as to other things, as moral conditions.²⁹

The defense psy-experts were also criticized from their own partisans for not putting on a more aggressive display of psy-knowledge. The lines between psy-expertise and law were already jagged and overlapping in the 1920s. Harry Olson, chief justice of the Municipal Court of Chicago criticized the defense psy-experts for not pursuing the strong hereditary sources of the crime.

For a diagnosis or an understanding of this case one should have the background afforded by a study of heredity. I believe from this report that the Leopold-Loeb case is not an environmental calamity, but a hereditary catastrophe.³⁰

The weakness of the defense in this case lay, in my opinion in a failure to present the heredity background of the case, if any, and in their failure to "call a spade a spade." They evidently did not want their clients sent to the insane asylum, but preferred to have them sent to the penitentiary. While they apparently sought to make their clients out mental defectives, they did not wish to go too far for fear they would get them in the insane asylum.³¹

Judge Olson also criticized the defense for avoiding the homosexual relationship between Leopold and Loeb at least in their public diagnosis.

This case is not so unique from a psychological standpoint that it will not frequently repeat itself. On the contrary, it is very common in criminology where one of the parties is homosexual. . . . The part of the report referring to their contempt for women is interesting because it suggests homosexuality, to which no direct allusion is made.³²

Olson's critique was a friendly one. The Leopold and Loeb case may have come down to us as a victory for the cause of a more progressive and scientific criminal law but to many like Judge Olson it was an opportunity of which more might have been made. Olson was left wish-

ing for the decisive public judgment that a jury trial on insanity would have brought. "Counsel evidently did not dare to take the chance with a jury in this day of slight public knowledge of psychiatry."

It is unfortunate for the administration of justice and for modern psychiatry in this country that the court in his written opinion apparently ignored the testimony which showed them to be emotional defectives.³³

Other critics saw the efforts of the defense experts as a fully adequate display of the danger of allowing psy-knowledge into the judgment of crime.

Now all of this is not the language of modern penal law. It is the language of biology. It points out that these cruel, ruthless deeds were simply the result of the parties' innate characters, as they developed even amidst the most favorable surroundings. The psychiatrists' description is just such a description as a botanist might give of a certain weed, as distinguished from a certain useful plant.³⁴

It is an excellent thing that these scientists have had their day in court thus publicly, because their theories have been going about in books and articles and have begun to affect public opinion. It is time that the issue be squarely faced in the open, before the whole administration of the penal law is undermined. Let public opinion look into the literature on this subject, and learn to discard that false sympathy and dangerous weakening that is apt to rise on first acceptance of the biopsychologic doctrine of Determinism.³⁵

1999: "God Damn This Voice inside My Head"

Kinkel's mental defense was dominated by his own description of voices he has been hearing inside his head since sixth grade. According to what Kinkel told the psy-experts, three male voices afflicted him. One put him down relentlessly. One urged him to kill others. A third commented on the other two and the general situation. The voices came and went with some tendency to appear more frequently during periods of high stress or depression. Kinkel suffered from the latter during the summer and fall before the killings. He was prescribed

Prozac and met with Dr. Hicks and his mother in an effort to address the sources of depression and his hostile behavior toward his parents. Dr. Hicks felt he had improved enough by the beginning of the winter to take Kip off Prozac and end the counseling.

The only public sign that Kinkel suffered from the voices was an incident that took place in his English class about a month before the fatal events. In the midst of the class, Kinkel yelled out "God damn this voice inside my head."³⁶ The response of Thurston High was to put Kinkel through a mini-penal ritual of the sort that is all too common in our "zero-tolerance" schools today. It was known at Thurston as a "respect sheet." Kinkel was required to write out a kind of promissory note stating "the expected behavior for the situation was . . . ," which was "not to say 'damn'" and stating "in the future, what could you do differently to prevent the problem?" The answer he wrote was "not to say damn." The school made no effort to inquire into the meaning of the outburst or the "voices" referred to.

The psy-experts also pointed to a series of delusions that Kinkel reported having (and which friends confirmed that Kinkel had long manifested). These included fears that the Disney Corporation was taking over the country and would soon replace the presidents on paper money with Mickey Mouse; fears that China was getting ready to invade the United States; and fears that the government or some other force had placed a computer chip inside his head that was responsible for the voices.

The state engaged a number of experts to examine Kinkel and write reports, including one of the leading forensic psychiatrists in the country. In the end they decided not to put these reports into evidence. It is not clear whether the prosecution decided the reports were too helpful to Kinkel, whether in the absence of a full-blown insanity defense they were considered unnecessary to the prosecution, or whether the prosecution believed its greatest advantage to be repudiating psy-expertise as irrelevant.

Four psy-experts testified for the defense at Kinkel's sentencing hearing. Dr. Jeffrey Hicks was a child psychiatrist with whom Kip and his mother Faith had met approximately nine times in the year before the fatal incident. Dr. Hicks testified for the defense but his testimony may have hurt since he claimed to have found no signs of severe psychosis although he acknowledged that he was not looking for them

either. The defense put three other experts on the stand. Dr. Orin Bolstad, a psychologist who works with young killers inside the Oregon penal system, testified that Kip was severely psychotic. Bolstad acknowledged that precise diagnosis was difficult in the case of adolescents, but he suggested that Kinkel's symptoms were compatible with paranoid schizophrenia and bipolar disorder. Dr. William Sack, a child psychiatrist, agreed that Kip was severely mentally ill and testified that his own validation instrument designed to probe the consistency of the content and emotions of Kip's statements confirmed that he was telling the truth about voices and delusions. A final expert, pediatric neurologist Dr. Richard J. Konkol, testified that Kip's brain was literally perforated with holes and that those sectors most associated with emotional control and decision making experienced reduced blood flow. A private investigator, Joyce Naffziger, presented evidence on the frequency of mental illness in Kip's extended family.

After eliciting descriptions of Kip's experience of voices and his delusions, the defense focused on placing Kip in the context of the *Diagnostic and Statistical Manual*, the authoritative collection of diagnostic categories.

Q. Did you reach diagnostic conclusions on the DSM axes?

Well, I did with some of the same qualifiers I've already said earlier. I think diagnosing adolescents is difficult. Adolescents' symptoms change as they develop and get older. What I'm clear about is he has psychotic symptoms. I'm clear that he has a mental illness. I believe that most of his symptoms are consistent with schizophrenia, paranoid type. Although I can't yet rule out schizoaffective disorder; I think that's a real possibility. Schizoaffective disorder is a combination of schizophrenia with depression. . . .

I also can't rule out a bipolar type of affective disorder, because he has a lot of manic symptoms as well. So it's still a bit confusing as to exactly the nature of his diagnosis, but I am confident that he is mentally ill. I am confident that he is psychotic. He also has a learning disorder. He has generalized anxiety disorder, and major depressive disorder.

The defense also sought to counter the view that Kinkel's actions were carefully planned and executed.

They talk about the paranoid type of schizophrenia. And what's a distinguishing feature of the paranoid—and I think this is very important—is that the paranoid type of schizophrenia is characterized by the presence of prominent delusions or hallucinations in the context of a relative preservation of cognitive functioning and affect. What that means is you can have these symptoms of hallucinations and delusions and at the same time have well preserved cognitive thinking in most other areas of your life. The thing we know about people with paranoid symptoms is they often do well in school, adults do well in their businesses, until someone touches a button that is related to a delusion or until they start hearing voices. But otherwise their behavior can look pretty normal. . . . If he were not a paranoid schizophrenic, I do not think he would be a killer.

Q. How do you explain when you say that there's no rational reason for going to school and killing, the fact that he has verbalized and planned going to the school and shooting it up or bombing it, and targeting certain people for quite a period of time?

A. Ms. Tracy, I think you're mixing apples and oranges. There's a distinction between the reason why he kills, okay, and the process by which he kills. The process by which he killed was, in my opinion, consistent with paranoia. It was—it was intentional. It was planful. But the reason why he killed is quite another matter than the process by which he killed. And I cannot find a rational reason why he would kill these people at school. I have read through all these medical reports. I've read through a lot of different materials. And I can't find—in talking with him, I can't find anywhere in any report that anyone has proposed a viable explanation for why he killed. And if there is one, I would like to hear it.

Leopold and Loeb's psy-experts spend little time addressing the problem of treatment or curability. It was assumed that long or even indeterminate sentences to prison combined with the natural progress of science would resolve the problem in time. In contrast, Kinkel's psy-experts were asked about treatment and could point to the existence of contemporary pharmacological methods. The objective has shifted as well. Cure has largely disappeared as a goal in favor of a behavioral management that appears to be a realizable objective, but is also easily undercut by the question of safety.

Q. How do you make us safe?

A. Ms. Tracy, I personally don't think there is any way of curing this disorder. There's not a cure for it, okay? I do think he can be managed. I think the principal way you manage this kind of mental illness is with psychotropic medicine.

And I am awestruck by how much people change once they are given appropriate medicine. The gentleman that I've been evaluating at OSH tells me now, six months after his crime, [said to me], "Dr. Bolstad, I was really delusional, I had crazy thoughts back then." And he can say that because he has been on medicine, and the medicine has helped him a lot. It squared away his thinking.

So I think people are very different when they're in his condition. Real frankly, I would not want to see Kip Kinkel out on the streets, ever, with this condition, okay? Without medicine and without an awful lot of structure and support services arranged for him.

Defense: "We're Seeking to Have You Understand His Conduct"

Both Darrow and Kip Kinkel's defense lawyer Mark Sabitt shared a belief that their clients had a better chance obtaining mercy through a narrative of madness from a judge than if they were forced to present a full insanity defense to a jury. In doing so both affirmed a picture of the judge as a crucial interlocutor in the dialogue between law and the human sciences that has been one of the dominant features of twentieth-century jurisprudence (Rothman 1980; Simon 1995). In this dialogue, defense lawyers have long had the difficult task of interpolating between scientific and legal discourses that in large part fail to recognize each other's existence.

1924: Clarence Darrow

Darrow's decision to plead Leopold and Loeb guilty electrified Chicago. Then as now, the insanity defense provided a narrow scope for negating culpability by demonstrating mental illness so severe that the defendants could not distinguish right from wrong. In seeking, however, to introduce psy-knowledge into the sentencing hearing, Darrow had to define a broader role for madness.

We make no claim that the defendants were legally insane, but we do claim and we will show that there are many mental conditions which fall short of the legal definition of insanity, and would not avail us for a moment in the defense of this case. We know that men and women may be and are seriously mentally ill and yet may know the difference and be able to choose between right and wrong; but they are still mentally afflicted, and the Court will take account of their condition.³⁷

In identifying a space for madness and its narrative in the sentencing hearing, Darrow emphasized the problem of explaining the crime. In the absence of a meaningful motive, their madness furnished the meaning of the crime.

Out of that compact and out of these diseased minds grew this terrible crime. Tell me, was this compact the act of normal boys, of boys who think and feel as boys should—boys who have thoughts and emotions and physical life that boys should have? There is nothing in it that corresponds with normal life. There is a weird strange, unnatural disease in all of it which is responsible for this deed.³⁸

Darrow recognized that youth rather than madness was the more established ground for mercy at the sentencing stage. A central focus of his argument was to link the evidence of madness to the condition of youth itself. In doing so he identified childhood as a kind of madness all its own.

The law knows and has recognized childhood for many and many a long year. What do we know about childhood? The brain of the child is the home of dreams, of castles, of visions, of illusions and of delusions. In fact, there could be no childhood without delusions, for delusions are always more alluring than facts. Delusions, dreams, and hallucinations are a part of the warp and woof of childhood.³⁹

There is not an act in all of this horrible tragedy that was not the act of a child, the act of a child wandering around in the morning of life, moved by new feelings of a boy, moved by uncontrollable impulses which his teaching was not strong enough to take care of, moved by the dreams and hallucinations which haunt the brain of a child.⁴⁰

Darrow's argument multiplied the images of madness, associating it not simply with the defendants, but with the prosecutor, the community, and even himself.

I have never seen a more deliberate effort to turn the human beings of a community into ravening wolves and take advantage of everything that was offered to create an unreasoned hatred against these two boys.⁴¹

I have become obsessed with this deep feeling of hate and anger that has swept across this city and this land. I have been fighting it, battling with it, until it has fairly driven me mad, until I sometimes wonder whether every religious human emotion has not gone down in the raging storm.⁴²

Darrow placed himself not only on the side of science but on the side of the future. While the prosecution's arguments quoted the eighteenth-century treatise writer Blackstone to assert the right of the court to demand death, Darrow invoked the future. The powers of the state to judge and punish the actions of the past were contrasted with its potential power to facilitate struggle of every individual toward his or her own future.

Your Honor stands between the past and the future. You may hang these boys; you may hang them by the neck until they are dead. But in doing it you will turn your face toward the past. In doing it you are making it harder for every other boy who, in ignorance and darkness, must grope his way through the mazes which only childhood knows. In doing it you will make it harder for unborn children. You may save them and make it easier for every human being with an aspiration and a vision and a hope and a fate.

I am pleading for the future; I am pleading for a time when hatred and cruelty will not control the hearts of men, when we can learn by reason and judgment and understanding and faith that all of life is worth saving, and that mercy is the highest attribute of man.⁴³

1999: Mark Sabitt

Defense lawyer Mark Sabitt's decision to take Kinkel's case directly before the judge invoked the progressive tradition of judges as seats of

dispassionate rationality that Darrow had done so much to promote, but his arguments reflected a downgraded expectation for the role of scientific explanation in sentencing. Sabitt began with an effort to distinguish the insanity defense from the role of psy-knowledge in the sentencing hearing that was remarkably similar to Darrow's.

We're not running a mental defense here. We're not seeking to have you send him to the state hospital based on mental disease or defect. 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.⁴⁴

Much of the rest of his summary was aimed at attacking the planning theory of the prosecution. At the end, however, he turned to the purposes of punishment in terms that express a dramatically different vision of how psy-knowledge would change justice than that presented by Darrow.

Retribution is what these victims demand, and justifiably so. . . . There's no question *these victims have a right to retribution in some fashion, as does society*. But given the lesser culpability of children for bad actions, their capacity for growth, and society's special obligation to its children, isn't twenty-five years enough in the way of payback?⁴⁵

Moreover, we can't ignore the mental illness. We can't ignore the neurologic defects and the other aspects that are particular to this case. I would submit to the court, *revenge is a consideration the court should have in measuring its discretion in this case*, but it's only one consideration the court should have.⁴⁶

Interestingly, the only person to appeal to the future at Kip Kinkel's hearing was his sister. No member of Leopold's or Loeb's families testified or presented written testimony to the judge. Reflecting the growing importance of nonexperts in producing justice, both Kinkel's victims and a family member participated.

In twenty-five years, we will be well into the Twenty-first Century. Our society will be very different. The technology and knowledge

we will have then is mind boggling. The advances we will have made in psychological research and medication will amaze us. Kip will be forty.⁴⁷

Prosecution: "As Little Entitled to Sympathy and Mercy as a Couple of Rattlesnakes, Flushed with Venom, and Ready to Strike"

Of all the professional roles that figure in this narrative, perhaps none has changed less than that of prosecutor. The basic themes mobilizing the will to punish—evil, deliberation, danger—are little different in State Attorney Robert Crowe's closing argument in the Leopold and Loeb case and Assistant District Attorney Kent Mortimore's closing argument in the Kinkel case. Indeed, these arguments are remarkably similar to those made even a century earlier by the French prosecutors in the case of Pierre Riviere.⁴⁸

1924: State's Attorney Robert Crowe

Chief Prosecutor Robert Crowe was a significant and complex figure. A retired judge, Crowe had only recently headed the Crowe Crime Commission, mandated by the Illinois legislature to make recommendations on whether the state should pursue segregation of "mental defectives." Prosecution critic Harry Olson, himself chief justice of the progressive Municipal Court of Chicago, noted the irony that the Crowe commission had proffered a broad definition of mental defectives.

A person who has:

- (a) a defect of intelligence; or
- (b) a defect of affectivity or emotion; or
- (c) a defect of will

To such a degree that he has criminal propensities and while at large is a menace to the life and property of others.⁴⁹

Despite his support for a considerable expansion of the state's power to confine people based on psy-knowledge, Crowe responded aggressively to Darrow's guilty plea and attempt to present psy-knowledge in the sentencing hearing.

The state's attorney's reply to Darrow's argument was bitter and sarcastic—it was all nonsense; either the defendants were sane or they were insane; either they knew the difference between right and wrong or they didn't; the evidence offered by the state showed a deliberate, cruel and wanton murder without a single extenuating circumstance; justice and an outraged public demanded and he would insist upon the extreme penalty.⁵⁰

In his role as prosecutor, Crowe subjected the defense psy-experts to what Paula Fass describes as a "withering populist cross-examination" (1993, 938). His closing argument took two days. Based on press reports, trial chronicler Francis X. Busch described his tone as

unrestrained, sarcastic and vituperative. In rapid-fire sequences, which one press reporter likened to the striking and clawing of a maddened panther, he assailed and belittled the defense experts, the defendants and the defendants' lawyers—Darrow in particular. The experts, stated Crowe, with their "emotional immaturity," their "fantasies and delusions," their "glandular abnormalities," and their "split personalities" were the hired, crooked and gullible tools of a "million-dollar defense," prepared to swear to anything, no matter how fantastic.

The state put on its own experts who, as summarized above, offered their opinion that Leopold and Loeb were quite normal.

The bulk of the state's case, however, was given over to presenting the overwhelming evidence that Leopold and Loeb were guilty of the crime. This seemed absurd in the face of the plea of guilty, but it served at least two functions. First, it served to underscore that the defense was granting the prosecution no favors in pleading guilty, since the evidence of guilt was strong. In the name of this strategy the prosecution spent days putting on hotel clerks and car rental agents to tie Leopold and Loeb to the crime. Second, it allowed the state to enunciate the violence of the crime in considerable detail, bringing the victim into the testimony by an exacting description of Bobby Franks's death. Franks's father took the stand to provide the very last testimony in the hearing, not directly to describe his family's loss, but only to offer formal proof of the charge of kidnapping.

Crowe invoked animal images to describe the danger posed by the

defendants and repeatedly attacked the idea that their motives for the crime were utterly inexplicable.

The defendants, shouted Crowe, were ruthless killers, dangerous to society, and “as little entitled to sympathy and mercy as a couple of rattlesnakes, flushed with venom, and ready to strike.” . . . Both planned the crime. Both executed it. The motive was \$10,000 ransom money.⁵¹

1999: Assistant District Attorney Kent Mortimore

Like Crowe, prosecutor Kent Mortimore attacked the legitimacy of presenting evidence of madness outside of the confines of the insanity defense.

It’s puzzling that we’ve spent so much of the last several days dealing with what really is the defendant’s mental defense to these crimes. It’s very disingenuous of him to come into court now and say that he isn’t responsible for what he did. . . . We need to remember that he specifically disclaimed legal insanity, and I quote: “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.” That quote is from page four of the Plea Petition. He initialed that paragraph . . . it was an admission of guilt. And it’s likely that his lawyers understand better than the experts that he hired that this defense would not have succeeded at trial.⁵²

Notwithstanding the defense’s decision not to raise an insanity defense, the prosecution invariably invoked that as the proper standard for assessing psy-knowledge even in a discretionary sentencing situation. Reviewing the steps of the crime, Mortimore found instance after instance of planning, deliberation, and strategic behavior.

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. . . .

He shot his father from behind. He snuck up behind him. Another

volitional act. And then he locked his father in the bathroom after dragging his body out of view and cleaning the counter to the point that it took Luminol for the detectives to discover where the crime scene had been.⁵³

One difference from the prosecution strategy in the Leopold and Loeb case was in the issue of childhood. Darrow and Crowe fought over whether or not Leopold and Loeb should be thought of as children. This battle ranged from the nature of the psychological discourse to the terms used to describe Leopold and Loeb in court. Assistant Lane County District Attorney Kent Mortimore in contrast conceded the category of childhood and argued for the natural life sentence notwithstanding. At fifteen, Kip Kinkel is far closer to popular concepts of childhood in the twentieth century than were Leopold and Loeb at nineteen. To Mortimore, however, even at six Kinkel already revealed a rogue in need of harsh punishment.

Here is the essence of Kip Kinkel. Let's ignore the labels. From a very early age, Kip Kinkel was a very nasty, violent, easy-to-frustrate and easy-to-anger boy. This was his essence long before any so-called mental illness. . . .

We know from Sherrie Warthen that he nailed kids in the face with a dodgeball, and we heard a similar rendition of that from Amber Ramsey this afternoon when she addressed the court as a victim.

He didn't understand that it was wrong to cut things in his desk with a knife. He teased kids he considered losers, particularly fat people, and made nasty comments like, quote, "If we could just get the fat people out of the way."

According to Dick Bonard, he would be aggressive, punched kids, put them in headlocks and wrestle them to the ground. And if the court has had an opportunity to read his writings, the court knows the central theme in his diary: "Hate drives me." . . .

That's the essence of Kip Kinkel. And he's been that way since— as long as we know. At least since he was about six years old. Long before any symptoms of so-called mental illness set in. We also know that he's been incredibly good at manipulating people, particularly adults. He is so smart, he's close to brilliant in many areas.⁵⁴

Like Crowe, prosecutor Mortimore emphasized the potential danger to the community posed by the existence of any chance for eventual release of the defendant. But while Crowe expressed this in the language of the dangerous individual (“a couple of rattlesnakes, flushed with venom, and ready to strike”), Mortimore invoked a more complex construction of risk as a factor of individual dangerousness and institutional weakness.

In essence, what we’re told by all of the doctors is that with a hope and a prayer, he might be okay, maybe, as long as we can figure out exactly what’s wrong with him and we can carefully control his environment and make sure he’s taking his medication. . . . Our community is not willing to take that risk. And our community shouldn’t be expected to take that risk.

Under contemporary sentencing practice, Mortimore had a vehicle unavailable to Crowe: he could put the victims themselves on the stand to testify as to their loss and to opine freely as to what should happen to Kinkel. The witnesses included students who had survived gunshot wounds as well as parents of the wounded and dead children. The testimony, portions of which were excerpted on television and radio shows, provided a powerful scene of emotions with victims permitted to speak directly to Kinkel, who kept his head buried in his arms most of the time.

One of the most disturbing voices was that of Jacob Ryker, both a victim and a hero whose action in tackling Kinkel while he was reloading his gun undoubtedly saved many lives. Ryker, now serving in the U.S. Marine Corps, acknowledged that his own capacity to maintain military discipline was endangered by the passion he felt to hurt or kill Kinkel. Interestingly, his fantasy acts of violence against Kinkel, which he freely shared from the stand, included forms of medical treatment made into punishment (surgery without anesthesia, sutures being cleaned or removed, etc.).

Jacob Ryker: I don’t care if you’re sick, if you’re insane, if you’re crazy. I don’t care. I think prison, a lifetime in prison is too good for you. . . . I don’t think you should go to prison. I think the victims should get to do to you what you did to them. I think you should have to suffer in the hospital like they did.

Mark Walker, the father of one of those killed, initially framed his remarks in terms of classic deterrence theory, but in the end emphasized a kind of retributive exaction of vengeance.

If Mr. Kinkel is sitting in prison without possibility of release for the rest of his life, it might—just might—keep some other young person from taking a gun to school. That would be the only positive thing that could come from this tragedy.

The account of my son's death as it was related to me indicated Mr. Kinkel walked past my son in the hall, turned, put his gun to the back of my son's head, and killed him. This was cold-blooded murder, not the random act of rage Mr. Kinkel would have us believe. His actions were callous, calculated, premeditated, and with no regard for human life. Benjamin was sixteen years old. He lost sixty to seventy years of his life, as did the Nickolauson boy.

The sentence you are about to render will send a message to other young people whether they can expect leniency from the law or that they will be held accountable for their actions. I can only plead with you to sentence Mr. Kinkel to a term that will keep him in prison for the rest of his natural life. The law provides for this length of sentence to be imposed, not only to protect us from Mr. Kinkel, but also to serve as a deterrent to someone else considering similar actions.

Jennifer Aldredge invoked for Kinkel the specter of what he had himself forfeited and the enduring condition of her own wounds.

You killed the two people in your life who loved you unconditionally. Guess what? Mommy can't kiss it and make it better anymore, because you killed her. And not just shot her once, but six times maliciously. Daddy isn't able to bail you out of jail anymore. No one can hug you and tell you everything will be okay, because it won't. It won't ever be okay until Mike and Ben can walk and talk with their families again, it won't be okay until my friends' surgeries are done and the scars have miraculously erased. It won't ever be okay again until every memory, every fear, and every consequence becomes non-existent. And that won't happen unless you can go back in time.

I hope you spend the rest of your life in jail. You can't be cured.

And if a medication was found to sedate you enough, I don't trust you to take it. You don't deserve to be out of jail. You don't deserve to have the same freedoms your victims have. . . . I never want to worry about you hurting my friends and me ever again. I never want to send my kids off to school one day and worry if you have been released. I'm tired of being scared. I'm tired of letting you have that much power over me. You shouldn't ever be able to have that power again.

Judgment

Perhaps no part of this story reveals as much change as the discourse of judges. There are similarities to be sure. Both judges expressed themselves with grave caution. Both kept their remarks brief in comparison with the psy-experts and lawyers. But between the two sentencing speeches we can trace a dramatic change in the judges' sense of the role and the larger logics informing their sentencing choices.

1924: Judge John R. Caverly: "The Progress of Criminal Law" and "the Dictates of Enlightened Humanity"

Judge Caverly began by addressing the absent insanity defense and the absent jury to which it would have been presented.

The testimony has satisfied the Court that case is not one in which it would have been possible to set up successfully the defense of insanity as insanity is defined and understood by the established law of this state for the purpose of the administration of criminal justice.⁵⁵

Judge Caverly acknowledged the force of the psy-knowledge presented, but explicitly rejected its relevance to the task of sentencing.

The Court, however, feels impelled to dwell briefly on the mass of data produced as the physical, mental and moral condition of the two defendants. They have been shown in essential respects to be abnormal; had they been normal they would not have committed the crime. It is beyond the province of this court, as it is beyond the capacity of human science in its present state of development, to predicate ultimate responsibility for human acts.⁵⁶

The Court is set up as parallel to human science. For courts, however, this is beyond their province, while for the human sciences it is only "beyond the capacity."

The Court is willing to recognize that the careful analysis made of the life history of the defendants and of their present mental, emotional and ethical condition has been of extreme interest and is a valuable contribution to criminology. And yet the Court feels strongly that similar analysis made of other persons accused of crime would probably reveal similar or different abnormalities.⁵⁷

On Judge Caverly's account, all criminals are abnormal, so abnormality cannot meaningfully regulate the power to punish. Instead, the court recognizes as its province the task of "examin[ing] witnesses as to the aggravation and mitigation of the offense."

The value of such tests seems to lie in their applicability to crime and criminals in general. Since they concern the broad questions of human responsibility and legal punishment, and are in nowise peculiar to these individual defendants, they may be deserving of legislative but not of judicial consideration. For this reason the Court is satisfied that his judgment in the present case cannot be affected thereby.⁵⁸

Psy-knowledge and the discourse of abnormality may ultimately transform criminal justice through the legislature, but they are incapable of addressing "these individual defendants." But what can regulate this act of judgment? Judge Caverly describes himself as alone, not only in the absence of other judges but in the paucity of norm or policy.

Under the plea of guilty, the duty of determining the punishment devolves upon the Court, and the law indicates no rule or policy for guidance of his discretion. . . . In some states the legislature, in its wisdom, has provided for a bench of three judges to determine the penalty in cases such as this.⁵⁹

Having declared the psy-evidence irrelevant, the court grounds the life decision fully on the age of the defendants.

In choosing imprisonment instead of death, the Court is moved chiefly by the consideration of the age of the defendants, boys of 18 and 19 years. It is not for the Court to say that he will not in any case enforce capital punishment as an alternative, but the Court believes that it is within his province to decline to impose the sentence of death on persons who are not of full age.⁶⁰

Judge Caverly's repudiation of the psychological evidence and his insistence that his decision was based only on the "youth" of Leopold and Loeb ignored the contribution the psy-experts played in Darrow's strategy of infantilizing Leopold and Loeb before the court.⁶¹ It was the psychological narrative that located them deeper into the stream of childhood than otherwise would likely have been the case. They were already eighteen and nineteen, an age when men of less elite backgrounds would have been working and raising families.

Judge Caverly anchored his decision in two broad principles as well as in the practice of Illinois courts.

This determination appears to be in accordance with the *progress of criminal law all over the world* and with the *dictates of enlightened humanity*. More than that, it seems to be in accordance with the precedents hitherto observed in this state.⁶²

The two evocative phrases in the first sentence would once have seemed so banal and expression of common ideology in penal law as to draw virtually no attention. To the student of contemporary penal law, however, they might as well be invocations of Greek gods. The former phrase embodies two distinct ideas: first, that criminal law is an autonomous body of principles that is capable of its own progress, of movement toward an ideal defined by its own internal logic; and second, that this is a worldwide movement rooted not in the life-world of particular communities but in general principles of criminal law. The latter phrase invokes a collective subject humanity, apparently distinct from the citizenry of Chicago and its newspapers who by all indications were strongly in favor of executing the two defendants. The judge uses the adjective *enlightened*, indicating either the existence of a different, more enlightened public somewhere else or of a perspective even Chicago citizens would have if they were enlightened.

1999: Judge Jack Mattison: "A Price to Be Paid"

If Judge Caverly felt himself sentencing in a dangerous empty space of discretion, Judge Mattison emphasized constantly the presence of other authorities, the people through ballot initiatives, the jurors, and the victims.

Turning to the sentence itself, Article 1 Section 15 of the Oregon Constitution as adopted in 1859 stated: "Laws for the punishment of crime shall be founded on the principles of reformation, and not of vindictive justice." On November 5 of 1996, the people of Oregon voted to change this section to its present form, which reads: "Laws for the punishment of crimes shall be founded on these principles: the protection of society, personal responsibility, accountability for one's actions, and reformation." 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.⁶³

Oregon courts had long held that the old language already intended a balance between reform and the protection of society, which the Oregon Supreme Court held "does not have to be expressed in the constitution as it is the reason for criminal law."⁶⁴ The new law continued to include reform, as well as a notion of personal responsibility to which Kinkel's youth might well be considered highly relevant. But as we shall see, Judge Mattison chose to place the entire weight of his judgment on "the protection of society" and "accountability for one's actions." Note that this latter value, whatever exactly it means, is something different from personal responsibility (otherwise there would be no point in listing it separately).

Although the defense had pleaded guilty and put on no insanity defense, Judge Mattison invoked the jury, the trial that might have taken place before them, and their sentiments, in determining the punishment. He then bound himself to this totally imaginary public.

Based upon 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 question becomes,*

*should the court sentence any differently, at least without some good reason to do so? (emphasis added)*⁶⁵

Where Judge Caverly had invoked the progress of criminal law and the sentiments of an enlightened society, Judge Mattison invoked community safety and accountability as the overarching purposes of punishment. Valuing community safety sounds incredibly reasonable, as if it was hardly necessary to state it. It is only after we have considered Judge Caverly's sentence of 111 years that we can understand it for what it is. It is not the theory that the community's safety must be balanced against or even outweigh the reform of the offender, but that any risk to the community no matter how distant must outweigh any need of the offender no matter how basic, even the hope for a future itself.

We cannot predict what advances medical science will make in the treatment of whatever mental illness he has. *We cannot guarantee* that he will receive the treatment these doctors believe is necessary while in prison. And Dr. Bolstad, who knows the system, was not optimistic in that regard. And *we cannot guarantee* that Mr. Kinkel would follow up as necessary were he released to a relatively uncontrolled environment. (emphasis added)⁶⁶

When it comes to community safety, the only guarantees are meaningful acts of judgment. In part, Judge Mattison was prevented by the absence of any discretionary parole function in Oregon (and in many contemporary state penal systems) from leaving open the question of reform. Having to decide in the present exactly when Kinkel should be released, Mattison chose to eliminate any likelihood of release. Even the danger that the seventy-, eighty-, or ninety-year-old Kinkel might pose to the community was apparently too much.

The only other principle accorded explicit weight by Judge Mattison was that of accountability. Accountability is often conflated with personal responsibility, but the fact that both are in the Oregon statute and Mattison recognized no relevance of either severe mental illness or youth to making this assessment indicates that accountability is something else.

It became very apparent yesterday that this sentence needed to account for each of the wounded, *who rightly call themselves survivors,*

and for Mr. Kinkel to know there was a *price to be paid* for each person hit by his bullets. (emphasis added)⁶⁷

That something else would appear to be vengeance, notwithstanding the prosecution's insistence that it sought justice, not hate. Two phrases are particularly important. By describing the wounded victims as those who "rightly call themselves survivors" Judge Mattison invoked the Holocaust and the peculiar genealogy of *survivor* as a kind of supercitizenship status in contemporary society.

By invoking the "price to be paid" Judge Mattison invoked a quantitative nature to law's violence, the literal pound of flesh. This found its realization in the repetition of 7.5-year sentences for each and every wounded.

Conclusion

In a system of discipline, the child is more individualized than the adult, the patient more than the healthy man, the madman and the delinquent more than the normal and the non-delinquent. In each case, it is towards the first of these pairs that all the individualizing mechanisms are turned in our civilization; and when one wishes to individualize the healthy, normal and law abiding adult, it is always by asking him how much of the child he has in him, what secret madness lies within him, what fundamental crime he has dreamt of committing.⁶⁸

We are today, perhaps more than ever, a society that valorizes the individual, but are we a society that individualizes? To what extent, and how, do we bring power and knowledge to the level of the individual (the dream of both totalitarian and democratic reformers)? These are questions that must be answered empirically, strand by strand. How are we known and acted on? As Foucault's work suggested, the series *youth, madness, crime* describes an important strand. During the twentieth century a partial institutional base was laid to know and act on part of the American population, mainly its urban "dangerous classes." It differentiated between the state's general power to punish and special mandates to address crime in the context of youth, as well as crime in the context not of legal insanity necessarily, but in the face of mental deviance traceable in the terms of positive psychological sciences.

While these institutions often produced fatally incomplete fragments of knowledge about the individual,⁶⁹ they were by no means merely ideological gestures. Instead a limited and always insufficient investment was made in knowing Americans through the aberrations of their children and acting on American society.

For much of the twentieth century it seemed plausible that inevitable advances in human science, starting with youth, madness, crime, would rebuild criminal justice generally around the model of a clinical practice. Prisons were built with spaces labeled *diagnostic centers*. Corrections departments funded experimental research to prove that intensive casework substantially altered recidivism rates for released prisoners. Today these gestures seem naive if not Orwellian.

An important task for sociolegal scholars today is exploring the pathways created by this investment, with the aim of understanding both how they failed to achieve their own objectives and ways those pathways continue to shape how people are governed and seek self-governance. The archive of the Kip Kinkel case is a portal into the continued vitality of that root pathway youth, madness, crime (homicide). Seen against our earlier examples (Leopold and Loeb as well as the fictional trial of Bigger Thomas), Kinkel's case suggests that the foundations of the psychological sentencing hearing have been rocked. Both psy-knowledge and the adversary system it serves have altered in their strategies and aims.

Psy-Knowledge: Defining Deviancy and Science Down

To some legal observers in the early twentieth century it seemed only a matter of time before the strength of the human sciences would be great enough to wrest control of criminal justice altogether away from judges and lawyers.⁷⁰ The great compromise that placed the problem of guilt solidly in the hands of lawyers while giving human scientists a large role in the penal correctional establishment was deemed temporary. The Kinkel case suggests that the health of the psy-sciences and their role in the criminal process are now more independent. The psy-knowledges that surface in the Kinkel archive include the claims of scientists aspiring to explain Kinkel's course of action. But that archive also includes a very different picture of psy-knowledge, one governed not by science as a vocation but by contract.

Nikolas Rose's *Powers of Freedom* (1999) suggests that we are in the midst of a transformation in the nature and role of psy-knowledges. In

the nineteenth century, according to Rose, the emphasis was on the individual in relationship to the concept of the normal and the abnormal. Psy-experts turned to both biology and hermeneutics in order to document deviance from a notion of normality grounded in conventional morality. During the twentieth century the concept of individual was recast as a problem of social relations. Over the last several decades psy-knowledge has changed again, this time emphasizing the individual as a site of risk calculation and control.⁷¹

The psy-experts of the 1920s set themselves a high and imperious task: to explain human behavior and thus to become the singular language of judgment. From this perspective the Leopold and Loeb hearing was a failure to many, a missed opportunity to spell out the truth of crime in a new and compelling language. The demands of courtroom norms regarding prurience and the potential harm of scandalizing the public through the media weighed on both the judge and the defense. Still, they presented the authority of psy-science independent of both the adversary process and the servicing of individual clients.

The psy-discourse of the 1990s is greatly deflated. It is a service science of small adjustments. Even Kinkel's top defense experts avoided a specific interpretation of his conduct. Their task was not to explain Kinkel but to locate him properly within the *Diagnostic and Statistical Manual* and predict the degree of control contemporary pharmacology can provide. Here psy-discourse does not seek to replace the judgment of criminal law but rather to provide a kind of auxiliary knowledge of largely custodial relevance. While this new role for psy-experts may take away much of the imperiousness with which they once laid claim to govern others, it also highlights the self-imposed limits that psy-experts now place on their knowledge of their patients.

This is even more the case for Dr. Hicks, who was brought in by Kip's mother Faith to address his manifest depression and generally disturbing behavior. His testimony underlined how partial and tentative the claims of psy-knowledge are today. When pressed on the fact that Kip's violent strains seemed to be increasing during the period when Dr. Hicks was seeing him and his situation was supposed to be improving enough to take him off Prozac, Hicks invoked his contract with the Kinkels.

Q. Did you do anything in the way of a full psychological evaluation?

A. No. That wasn't my contract. It was to address the specific presenting problems the family brought in. . . .

Q. How did he tell you he would react when he had a bad day at school? What would he do to make himself feel better?

A. He would often go to a local quarry and detonate explosives, and that would help him feel better.

Q. Did you get some sort of a commitment from him, I guess it would be the following week, with regard to whether or not he would use explosives anymore?

A. I certainly encouraged him not to. I don't recall that he contracted with me not to.⁷²

The contract has emerged as both a preferred technology and a central metaphor for neo- or advanced liberal governance. In Dr. Hicks's testimony we see contracts operating in two different ways. First, the contract acts to limit the psy-expert's own responsibility (and, of course, liability) for the patient. By establishing a narrow definition of the objective, the therapist can avoid the inflation of expectations that follows from the assertion of expertise.⁷³ Second, the contract operates as a tool of behavioral management. The goal is not to produce self-knowledge but self-control. What emerges from the therapeutic dialogue are not truths from the deep, but agreed-upon standards for assessment of performance. Not surprisingly, contemporary psy-experts show little desire to claim jurisdiction over the crimes of the young and the mad. Their success as a profession and their influence in society is founded much more in the retail services they provide in addressing specific needs of private clients as well as providing expert knowledge for psychological sentencing hearings.

Law: Return of Community and Vengeance

In the Kinkel case we see the disappearance of criminal law as an autonomous system linked to things like science, progress, and humanity. Instead we have the simple facticity of collective desire, the need for a precise equivalence of violence, what the Nazis called the healthy racial sentiment to exact vengeance. Wright's novel powerfully paints the image of racial community manifesting itself in the light of Bigger's crime and the state's prosecution. Crosses are burned as mobs of White citizens gathered whenever the defendant was brought outside.

Even before the front door was opened, he heard the faint roar of voices. As far as he could see through the glass panels, up and down

the street, were white people standing in the cold wind and sunshine. They took him through the door and the roar grew louder; as soon as he was visible the roar reached a deafening pitch and continued to rise each second. Surrounded by policemen, he was half dragged and half-lifted along the narrow lane of people, through the gate, toward the waiting car.

"You black ape!"

"Shoot that bastard!"

He felt hot spittle splashing against his face. Somebody tried to leap at him, but was caught by the policemen and held back. As he stumbled along a high bright object caught his eyes; he looked up. Atop a building across the street, above the heads of the people, loomed a flaming cross.⁷⁴

The formation of the citizenry as a community defined by vengeance continued even into the courtroom.

"It is not often," [State Attorney] Buckley continued, "that a representative of the people finds the masses of the citizens who elected him to office standing literally at his back, waiting for him to enforce the law . . ." The room was quiet as a tomb. Buckley strode to the window and with one motion of his hand hoisted it up. The rumbling mutter of the vast mob swept in. The court room stirred.

"Kill'im now!"

"Lynch'im!"⁷⁵

When the time came to sentence Bigger, the judge made abundantly clear his duty to express the sentiments of this community.

"In view of the unprecedented disturbance of the public mind, the duty of the Court is clear," the judge said and paused . . .

"[T]he sentence of this Court is that you, Bigger Thomas, shall die . . ."⁷⁶

As Judge Mattison's explanation for his sentencing Kip Kinkel to life in prison makes clear, there is a convergence in the treatment of violent youths. Wholly committed to representing the fears and angers of the community, judges and other authority figures today are less likely to permit individualization of even privileged defendants. Darrow

argued for a vision of law powerful enough to explain and absorb even extreme pathology. Richard Wright reminded us that for Blacks like Bigger Thomas, the mandate to absorb and integrate was replaced by its opposite. The specialized dialogue that law had with madness, youth, and murder was eliminated in the name of protection and vengeance. The Kip Kinkel sentence suggests that at the end of the twentieth century the treatment of young violent offenders had largely been leveled. The status once reserved for African Americans in the arms of the criminal law is now conferred on all who commit crimes.

NOTES

1. Elizabeth Mehren, "Trial of Man in '75 Slaying Spurs Search for Precedent," *Los Angeles Times*, Jan. 25, 2000, <<http://www.latimes.com/news/nation/2000125/to00007958.html>>. He is entitled to be tried under the law that existed at the time of the crime (at least as to those aspects that would determine the length or character of punishment). The question of whether he remains entitled to juvenile procedure is a novel one. The more lenient penalties of the juvenile court historically are based on both the theory of more limited culpability for juveniles and on the theory of a compelling state interest in the reclamation of juveniles. Skakel's case nicely splits the two.

2. Simon Singer, *Recriminalizing Delinquency: Violent Juvenile Crime and Juvenile Justice Reform* (Cambridge: Cambridge University Press, 1997); Barry Feld, *Bad Kids: Race and the Transformation of the Juvenile Court* (New York: Oxford University Press, 1999).

3. Which would, if accepted by the fact finder, require an acquittal, although one followed by the strong likelihood of compulsory confinement.

4. I want to invoke a very broad meaning of *psychological* here, encompassing all of those expert discourses that claim a scientific standing to comprehend the motivation of individuals.

5. These hearings bear a resemblance to the sentencing phase of contemporary capital trials. I will concentrate here on their use outside of the post-Furman capital context, but our discussion could well include that.

6. Paula Fass, "Making and Remaking an Event: The Leopold and Loeb Case in American Culture," *Journal of American History* 80 (1993): 919, 920.

7. Perversely, due to his age Kinkel will be housed for several years in a prison designed to aggressively rehabilitate young offenders. Even if that is successful he will graduate from that prison to an adult prison oriented toward punishment and incapacitation for the rest of his life.

8. This comparison is facilitated by the existence of an accessible archive of discourses on both cases. The Leopold and Loeb case was extensively documented by the editors of the *Journal of Criminal Law and Criminology* in 1924 just after the trial. See Symposium, "The Loeb-Leopold Murder of Franks in

Chicago, May 21, 1924," *Journal of Criminal Law and Criminology* 15 (1924): 347–508. Kip Kinkel's case was the subject of a powerful documentary by Frontline Videos and shown over the Public Broadcasting Station in January 2000. See Frontline Video, *The Killer at Thurston High* (2000). Frontline has set up a web page that contains extensive materials on the case and the public reaction to it that can be found at <<http://www.pbs.org/wgbh/pages/frontline/shows/kinkel/index.html>>.

9. Richard Wright, *Native Son* (New York: Harper and Brothers, 1940).

10. Leopold and Loeb faced additional marginalization for being Jewish. They were also from very well-to-do families, as compared to Kip Kinkel's solidly middle-class household.

11. That of Pierre Riviere, a young man who killed his mother, sister, and brother in the village of La Faucherie, France, in 1835. See Michel Foucault, *I, Pierre Riviere, having slaughtered my mother and sister, and my brother . . . : A Case of Parricide in the Nineteenth Century* (Lincoln: University of Nebraska Press, 1975), x–xi.

12. Nikolas Rose, *The Powers of Freedom: Reframing Political Thought* (Cambridge: Cambridge University Press, 1999), 89–93.

13. The best-known contemporary examples concern the use of psychiatric confinement against political dissidents in the former Soviet Union.

14. Thomas Green, "Freedom and Responsibility in the Age of Pound: An Essay on Criminal Justice," *Michigan Law Review* 93 (1995): 1915.

15. Fass, "Making and Remaking an Event," 933.

16. Francis X. Busch, *Prisoners at the Bar: An Account of the Trials of the William Haywood Case; the Sacco-Vanzetti Case; the Loeb-Leopold Case; the Bruno Hauptmann Case* (New York: Bobbs-Merrill, 1952), 165.

17. If there was a "disciplinary society" sometime in the twentieth century, these were the kind of men who helped shape governance strategies, not simply in criminal justice, but throughout the burgeoning enterprise of governance. At the time of the Leopold and Loeb case these psy-experts were at the peak of their careers, and their cause was nearing its high-water mark for the first half of the twentieth century at any rate. The Depression and later the war would distract American society from the problems of delinquency and the possibilities of psychiatry and psychology as arts of government until the 1950s. Interestingly, popular culture would mark this renewal with a widespread interest in the Leopold and Loeb case including Ira Levin's best-selling novel *Compulsion*, made into a film by director Richard Fleischer in 1959 (Orson Wells played Darrow). A decade earlier Alfred Hitchcock's *Rope* (1948) drew substantially on the Leopold and Loeb case.

18. Georges Canguilhem, *The Normal and the Pathological*, trans. Carolyn R. Fawcett (New York: Zone Books, 1989), 151.

19. Symposium, "The Loeb-Leopold Murder," 361.

20. Symposium, "The Loeb-Leopold Murder," 361–62.

21. Symposium, "The Loeb-Leopold Murder," 363.

22. Symposium, "The Loeb-Leopold Murder," 365.

23. Symposium, "The Loeb-Leopold Murder," 372.
24. Symposium, "The Loeb-Leopold Murder," 377.
25. Blaming the parents, especially the mother, emerged as a major theme in explaining aberrational crimes of violence. See Simon, "Ghost in the Disciplinary Machine." In the late twentieth century this theme has subsided somewhat as part of a general decline of interest in the origins of criminal behavior as a key to controlling it.
26. Symposium, "The Loeb-Leopold Murder," 379.
27. Symposium, "The Loeb-Leopold Murder," 371.
28. Symposium, "The Loeb-Leopold Murder," 381.
29. Symposium, "The Loeb-Leopold Murder," 389.
30. Symposium, "The Loeb-Leopold Murder," 395.
31. Symposium, "The Loeb-Leopold Murder," 396.
32. Symposium, "The Loeb-Leopold Murder," 395.
33. Symposium, "The Loeb-Leopold Murder," 397.
34. Symposium, "The Loeb-Leopold Murder," 403.
35. Symposium, "The Loeb-Leopold Murder," 405.
36. Although the defense experts agreed this was in response to the experience of voices, it is also a quote from a Nine-Inch Nails song that Kinkel was attached to, in large part because he identified with the reference to voices inside the head.
37. Busch, *Prisoners at the Bar*, 163.
38. Busch, *Prisoners at the Bar*, 187.
39. Arthur Weinberg, *Attorney for the Damned: Clarence Darrow in the Courtroom* (Chicago: University of Chicago Press, 1957), 62.
40. Quoted in Busch, *Prisoners at the Bar*, 183.
41. Busch, *Prisoners at the Bar*, 164.
42. Weinberg, *Attorney for the Damned*, 53.
43. Quoted in Weinberg, *Attorney for the Damned*, 86.
44. Frontline, *Killer at Thurston High*, <<http://www.pbs.org/wgbh/pages/frontline/shows/kinkel/trial/defense.htm>>.
45. Frontline, *Killer at Thurston High*.
46. Frontline, *Killer at Thurston High*.
47. Frontline, *Killer at Thurston High*.
48. Foucault, *I Pierre Riviere*.
49. Symposium, "The Loeb-Leopold Murder," 396.
50. Busch, *Prisoners at the Bar*, 163.
51. Busch, *Prisoners at the Bar*, 194.
52. Frontline, *Killer at Thurston High*, <<http://www.pbs.org/wgbh/pages/frontline/shows/kinkel/trial/state.html>>
53. Ibid.
54. Ibid.
55. Symposium, "The Loeb-Leopold Murder," 392.
56. Symposium, "The Loeb-Leopold Murder," 392.
57. Symposium, "The Loeb-Leopold Murder," 392.

58. Symposium, "The Loeb-Leopold Murder," 392.
59. Symposium, "The Loeb-Leopold Murder," 393.
60. Symposium, "The Loeb-Leopold Murder," 393.
61. Interestingly, most historical commentary has accepted the judge's explanation largely at face value.
62. Symposium, "The Loeb-Leopold Murder," 393, emphasis added.
63. Frontline, *Killer at Thurston High*, <<http://www.pbs.org/wgbh/pages/frontline/shows/kinkel/trial/judge.html>>. The language was originally enacted by the Oregon legislature and then approved by the voters. In the legislature it was introduced by the Speaker of the House and the Senate President on behalf of the founders of a victims' rights organization, Crime Victims United. See Angela Wilson, "More than Just Words: House Votes to Remove 'Vindictive Justice' Language from State Constitution," *Portland Skinner*, May 10, 1995 (Westlaw file #1547089).
64. *Tuel v. Gladden*, 234 Or. 1, 6 (1963).
65. Frontline, *Killer at Thurston High*, <<http://www.pbs.org/wgbh/pages/frontline/shows/kinkel/trial/judge.html>>.
66. Frontline, *Killer at Thurston High*.
67. Frontline, *Killer at Thurston High*.
68. Michel Foucault, *Discipline and Punish: The Birth of the Prison* (New York: Pantheon, 1977), 193.
69. The most famous example in our time is Lee Harvey Oswald, a likely assassin of President Kennedy, who was held for a monthlong period of diagnosis by the New York juvenile court at the age of fourteen for truancy. See Jonathan Simon, "Ghost in the Disciplinary Machine: Lee Harvey Oswald, Life-History, and the Truth of Crime," *Yale Journal of Law and the Humanities*, 10 (1997): 75.
70. The phrase "defining deviancy down" comes from an essay by Daniel Patrick Moynihan in *American Scholar* (winter 1993).
71. Rose, *The Powers of Freedom*, 90, 260.
72. Frontline, *Killer at Thurston High*, <<http://www.pbs.org/wgbh/pages/frontline/shows/kinkel/trial/hicks.html>>.
73. The massive ethical and moral hazard issues this creates for the psy-professions is beyond the scope of this discussion.
74. Wright, *Native Son*, 337.
75. Wright, *Native Son*, 373.
76. Wright, *Native Son*, 417.