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## Why It Matters

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## WHY IT MATTERS

MARGARET L. PARIS\*

Does it matter that “unresolved ambiguities” and “unacknowledged departures from guidelines established in earlier rulings” have marked the Supreme Court’s free-standing due process jurisprudence, as Professor Israel carefully reveals?<sup>1</sup> Or that the Court has failed to articulate consistently the values that animate, or should animate, its free-standing due process decisions? Many areas of constitutional law share these shortcomings. Are there reasons why these judicial failures in free-standing due process cases might have especially dangerous consequences?

There surely are reasons to be alarmed, if one believes (as I do) that the Court functions as a “republican schoolmaster” whose opinions “call the people to their senses” by inculcating values and clarifying the bases for legal doctrines.<sup>2</sup> As teacher to the citizenry, the Court’s task is especially critical where the public is tempted to defect from the law’s underpinning values and manifests fundamental misunderstandings about the law’s premises. Due process suffers from both of these conditions.<sup>3</sup>

First, the public has an uneven fidelity to the “human rights” values that underlie due process. Although due process is the primary assurance that American criminal procedure will respect the dignity of defendants, treat

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1. See generally Jerold H. Israel, *Free-Standing Due Process in Criminal Procedure: The Supreme Court’s Search for Interpretive Guidelines*, 45 ST. LOUIS U. L.J. 303 (2001). Professor Israel uses the term “free-standing due process” to refer to the source of those rights that the Court has recognized as flowing from the due process clause of the Fourteenth (or Fifth) Amendment and not from an explicit procedural right mentioned in the Bill of Rights. *Id.* at 305.

2. The phrases in quotation marks are from Ralph Lerner’s study assessing whether it was originally understood that the national judiciary would act as “teachers to the citizenry.” See Ralph Lerner, *The Supreme Court as Republican Schoolmaster*, 1967 SUP. CT. REV. 127. Lerner acknowledges equivocal evidence about the original understanding of such a role for the “‘least dangerous’” branch. See *id.* at 171 (quoting Alexander Hamilton’s THE FEDERALIST NO. 78). But as he remarks, even those (like Hamilton) who predicted that the national judiciary would be “‘least in a capacity to annoy or injure’” the people would impose on those officers a duty to “call the people to their senses.” *Id.*

3. The reasons I will give apply to all criminal procedure guarantees, but they are especially important to free-standing due process, as I will explain.

defendants equally and maintain an appearance of fairness, the public's commitment to such due process guarantees is easily abandoned in the throes of passion that crime arouses. If left untempered, the natural tendency to vilify those prosecuted for crimes creates a hateful environment that breeds human rights violations. As my colleague Leslie Harris puts it, in criminal cases "we're never that far from Kosovo."

Second, the public misunderstands the basic premises for defendant-oriented due process protections in criminal cases. American criminal justice is a public process serving public goals, as opposed to a system of private prosecutions serving private ends. The imposition of state power against individuals requires a web of defendant-oriented procedures to prevent abuses. As some of the rhetoric of the victims' rights movement reveals, the public tends to recast criminal cases as private battles between victims and offenders, and as a result it seeks to invest victims with procedural power so as to offset defendant-oriented procedural rights. Moreover, popular focus on private harms and private recompense in criminal cases also obscures the social benefits that accrue from defendant-oriented procedures. Thus, the public fails to recognize its own stake in due process. Later in this essay, I will recount a recent case in my home state of Oregon that illustrates both the public's fickle attitude toward human rights in criminal cases and its misconception of due process's premises.

#### *Public Abandonment of Human Rights Values*

Due process encompasses human rights values—my focus here is on the values of dignity, equality of treatment and the appearance of fairness<sup>4</sup>—to

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4. Due process scholarship has identified a complex scheme of animating values, including dignity, equality of treatment, the appearance of fairness, participation, predictability and accurate decision-making. Martin H. Redish and Lawrence C. Marshall have nicely summarized these values in *Adjudicatory Independence and the Values of Procedural Due Process*, 95 YALE L.J. 455, 476-91 (1986). All of these are human rights values in the sense that they are "fundamental rights of individuals or groups that are expressed as valid claims against [the] state." See Gordon A. Christenson, *Using Human Rights Law to Inform Due Process and Equal Protection Analyses*, 52 U. CIN. L. REV. 3, 4 n.5 (1983). When I use the phrase "human rights values," though, I am referring specifically to the first three values mentioned above—dignity, equality of treatment and the *appearance* of fairness—because these form the principal protections against mistreatment during the pendency of the criminal process.

Scholars have urged courts to inform their due process decisions with human rights laws and concepts. See generally, e.g., Barbara Bennett Woodhouse, *The Constitutionalization of Children's Rights: Incorporating Emerging Human Rights into Constitutional Doctrine*, 2 U. PA. J. CONST. L. 1 (1999); Christenson, *supra*; see generally CHARLES L. BLACK, JR., A NEW BIRTH OF FREEDOM: HUMAN RIGHTS, NAMED & UNNAMED (1997). Although I think it is high time for courts in due process cases to make explicit reference to human rights concepts, what I am urging here is far more modest: frequent judicial reaffirmation of the human rights values that already have been recognized as underlying American due process.

whose fidelity public opinion is tenuous. If honored, these values create an atmosphere of civility and decency toward those prosecuted for crimes. Hatred and the desire for vengeance against offenders, however, easily overcome public commitment to such gentle values. Here, where passions run dangerously high, the Court must continually “call the people to their senses.”

The consequences of failing to do so can be catastrophic, because due process values serve as “moral resources” that enable people to behave humanely. Moral philosopher Jonathan Glover, in a chilling examination of multiple instances of twentieth century inhumanity, points out that when moral resources are depleted, ordinary people become capable of acts of brutality that would otherwise be unthinkable.<sup>5</sup> Through what he calls an “ethical interrogation” of history, Glover uncovers several moral resources that enable people to act humanely: first, an instinctive tendency to respond to other people with dignity, respect and sympathy;<sup>6</sup> second, a sense of moral identity (in other words, a commitment to certain kinds of behavior and to an image of who we want to be)<sup>7</sup>; and third, self-interest.<sup>8</sup>

Certain conditions, such as war or hostility against particular people or groups, diminish these moral resources. In times of hostility, aggressors view opponents as less than human, thus reducing both the instinctive respect felt for opponents and the feeling of human attachment, which is a predicate of the capacity for sympathy.<sup>9</sup> Moreover, in times of hostility social pressures in the aggressor group encourage people to replace their humanitarian moral identities with angrier, crueler identities. Social pressures also change the calculus of self-interest among the aggressors, so that people perceive their interests as being wrapped up in the escalation of hostilities.<sup>10</sup> Under these conditions, people are capable of shocking levels of brutality.<sup>11</sup>

We ought to fear this phenomenon very much, because it arises in the aftermath of crime and causes real threats to the human rights of defendants. Following Glover’s example, it is easy to see several conditions in criminal cases that cause the public to abandon its moral resources and its commitment

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5. See generally JONATHAN GLOVER, HUMANITY: A MORAL HISTORY OF THE TWENTIETH CENTURY 33-39 (1999).

6. *Id.* at 4, 22-25. Glover believes that humanitarian feelings are backed up by social pressures but are psychological (perhaps genetic) in origin.

7. *Id.* at 26-27. Glover argues that our moral identity—a sense of who we are—limits our capacity for cruelty because our “inner happiness” depends on acting in conformity with our identity. As Glover explains, “[t]he psychological conflict generated by trampling on others will be often (though not always) unacceptably great.” *Id.* at 27.

8. *Id.* at 18-21.

9. GLOVER, *supra* note 5, at 23-24.

10. *Id.* at 18-21.

11. Glover recounts many instances in the past century in which people engaged in extraordinary cruelty, and he traces the conditions that reduced their moral resources. See generally *id.*

to due process.<sup>12</sup> First, crime naturally invokes intense feelings of hatred and vengeance that overcome the humanity with which the public might otherwise view offenders.<sup>13</sup> Similarly, as public commitment to war-like hostility mounts, individuals experience social pressure to conceal or modify their humanitarian moral identities in order to sound (and behave) “tough on crime.” Finally, social pressure encourages people to perceive their interests as requiring vengeful responses to crime and diminishes public willingness to acknowledge the social benefits of due process that I discuss below.<sup>14</sup> Perhaps it is this set of conditions, whipped up by “war on crime” and “drug war” rhetoric, that has enabled the American public to become complicit in a criminal justice system that is rife with a startling level of racial, ethnic and class injustice.<sup>15</sup>

The Supreme Court has not been sufficiently attentive to its duty to “call the people to their senses” about these conditions. Its opinions, especially in

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12. It is unclear whether commitment to human rights varies according to race, ethnicity or class. Research consistently shows that members of minority groups and of lower socio-economic groups are sensitive to unfairness and inequality in the criminal justice system. *See, e.g.*, Catherine Kaukinen & Sandra Colavecchia, *Public Perceptions of the Courts: An Examination of Attitudes Toward the Treatment of Victims and Accused*, 41 CAN. J. CRIMINOLOGY 365, 367 (1999) (citing studies). On the other hand, some studies suggest that people with higher education levels are less likely to demand punitive sentences. Other research suggests that opinions about appropriate responses to crime depend more on “attitudinal variables” than “sociodemographic variables.” *See, e.g., id.*

13. Scholarly literature about victim impact statements provides a rich source of information on the emotions that are aroused by violent crime. *See, e.g.*, Susan Bandes, *Reply to Paul Cassell: What We Know About Victim Impact Statements*, 1999 UTAH L. REV. 545 (citing social science data that reveals jurors are more likely to approve death sentence after hearing victim impact evidence) [hereinafter Bandes, *Reply*]; Susan Bandes, *Empathy, Narrative, and Victim-Impact Statements*, 63 U. CHI. L. REV. 361, 392-410 (1996) (arguing that victim impact statements ought to be suppressed because they “evoke emotions that do not belong” in the context of criminal sentencing) [hereinafter Bandes, *Empathy*]. *But see* Paul G. Cassell, *Barbarians at the Gates? A Reply to the Critics of the Victims’ Rights Amendment*, 1999 UTAH L. REV. 479 (arguing that victim impact statements help sentencers assess the real harm from offenders’ conduct). *See generally* THE PASSIONS OF LAW (Susan Bandes, ed., 1999) (anthology exploring the roles of emotion and passion in the law).

14. The benefit I principally refer to is an increase of law-abiding behavior that results when defendants are treated in ways they perceive as fair. *See infra* text accompanying note 36.

15. The literature supporting this statement is well known. For a few key resources, see generally DAVID COLE, NO EQUAL JUSTICE (1999); CORAMAE RICHEY MANN, UNEQUAL JUSTICE (1993); MICHAEL TONRY, MALIGN NEGLECT (1995), and references therein. Stephen Bright points out that the war on crime mentality has also reduced the accuracy of decision-making in the criminal justice system. *See generally* Stephen B. Bright, *Casualties of the War on Crime: Fairness, Reliability and the Credibility of Criminal Justice Systems*, 51 U. MIAMI L. REV. 413 (1997).

recent years, fail to remind the people in clear and sweeping terms<sup>16</sup> that important human rights values are at stake in criminal cases. Indeed, for the most part, the Court has been silent with respect to these values or mentions them only perfunctorily. The Court's very few, and now antique, opinions that have ventured into human rights waters see little current "air time" and have become nothing more than futile citations in defense briefs.<sup>17</sup>

The Court can reduce the dangerous war-like atmosphere that attends criminal cases by continually reminding the public that its Constitution embodies a moral commitment to human rights.<sup>18</sup> Although hatred for criminals may be instinctive, that emotion needs to be restrained by a public morality that continually reinforces the importance of treating defendants fairly, equally and with dignity. Such a public morality would encourage people to aspire to act consistently with those values, as part of their moral identities. Finally, an effective public morality would remind the people that their self-interest depends on maintaining those values.<sup>19</sup>

#### *Popular Misconceptions about Defendant-Oriented Procedural Rights*

In addition to its uneven commitment to the human rights values that underlie due process, the public appears to have a fundamental misunderstanding about the premises that require defendant-oriented procedural rights. Ours is a system of public prosecution<sup>20</sup> directed toward

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16. As Carol Steiker points out, many scholars have criticized the Court's opinions in recent years for their incomprehensibility. See Carol S. Steiker, *Counter-Revolution in Constitutional Criminal Procedure? Two Audiences, Two Answers*, 94 MICH. L. REV. 2466, 2538-39 (1996).

17. I should know, having written many defense briefs resorting to such futile citations.

18. See *Rochin v. California*, 342 U.S. 162, 173 (1952).

19. There is good reason to believe that the Court can effectively create such a public morality. The Court has considerable legitimacy in the public's mind. See generally BARBARA A. PERRY, *THE PRIESTLY TRIBE* (1999). Moreover, social science data confirms that the Court's opinions do shape public attitudes. See generally WILLIAM K. MUIR, JR., *PRAYER IN THE PUBLIC SCHOOLS: LAW AND ATTITUDE CHANGE* (1967); STEPHEN L. WASBY, *THE IMPACT OF THE UNITED STATES SUPREME COURT* (1972). This is especially true where the public has the benefit of skilled "translators" to help it understand Court pronouncements and where interest groups have a stake in the outcome of cases. See MUIR, *supra*, at 111-21. In recent years, prosecutors have become the most powerful translators of Supreme Court opinions in criminal procedure cases and victims' rights groups the most active stakeholders. If the Court were to make a greater effort to illuminate the history and values that underlie defendant-oriented criminal procedures, a wider range of translators (including, perhaps, defense lawyer groups and civil rights experts) would have incentives to explain the Court's decisions to the public. In addition, more people might view themselves to be stakeholders in our system of procedural rights.

20. In Anglo-American criminal justice systems, the state "steals the conflict" from victim and offender. See, e.g., Andrew Ashworth, *Some Doubts About Restorative Justice*, 4 CRIM. L.F. 277 (1993) (using phrase from Nils Christie, *Conflicts as Property*, 17 BRIT. J. CRIMINOLOGY 1, 4 (1977)); Sue Anna Moss Cellini, *The Proposed Victims' Rights Amendment to the Constitution of the United States: Opening the Door of the Criminal Justice System to the Victim*, 14 ARIZ. J.

public goals.<sup>21</sup> Victims are not parties in criminal cases, and private prosecutions seeking vengeance, compensation or other private ends, are rarely permitted or pursued.<sup>22</sup> Because of the public character of American criminal justice, the constitutional guarantees that protect individuals against state power extend to those suspected, accused or convicted of crimes, and not to victims or the state representing victims' interests.<sup>23</sup>

This orientation results in procedures that appear one-sided at first. For example, there is no point in a criminal prosecution at which one can avoid asking, "Does this procedure affect the defendant's rights?" On the other hand, there are many points at which the victim's interests remain unacknowledged or subordinate to the defendant's rights. Every defendant enjoys a constitutionally protected right to be present in the courtroom, to protect his right to confront witnesses<sup>24</sup> and, when witnesses are not present, to preserve the "fulness [sic] of his opportunity to defend against the charge."<sup>25</sup> Thus, the defendant may not be excluded from the courtroom even if the court fears that his testimony would be affected by hearing the testimony of other witnesses. On the other hand, crime victims constitutionally can be excluded

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INT'L & COMP. L. 839, 842-48 (1997) (describing history of public prosecution in the United States).

21. Among these is the orderly enforcement of laws through decisions that punish, reform, or incapacitate lawbreakers, deter others from lawbreaking, and express societal disapproval of lawbreaking. The maintenance of individual rights against state power also is a prominent public goal of American criminal justice. See, e.g., Susan Bandes, *Taking Some Rights Too Seriously: The State's Right to a Fair Trial*, 60 S. CAL. L. REV. 1019, 1045-50 (1987).

22. Victim participation is reduced in our system, although victims may have rights to restitution and to sue civilly, and under some circumstances, to engage in a private prosecution. See, e.g., Cellini, *supra* note 20, at 867-68 (referencing survival of private prosecution statutes in some states); John D. Bessler, *The Public Interest and the Unconstitutionality of Private Prosecutors*, 47 ARK. L. REV. 511, 552-97 (1994) (arguing that private prosecutors violate due process). Victim participation in criminal cases appears more pervasive in other legal systems, but those systems feature significant structural differences. See William T. Pizzi & Walter Perron, *Crime Victims in German Courtrooms: A Comparative Perspective on American Problems*, 32 STAN. J. INT'L L. 37, 45 (1996); Matti Joutsen, *Listening to the Victim: The Victim's Role in European Criminal Justice Systems*, 34 WAYNE L. REV. 95, 96-102 (1987); Daniel W. Van Ness, *New Wine and Old Wineskins: Four Challenges of Restorative Justice*, 4 CRIM. L. F. 251, 259 (1993) (suggesting reconceptualization of Anglo-American criminal justice to feature a collaborative effort between victims, offenders and government).

23. The prosecution sometimes enjoys reciprocal procedural benefits, but these are not rights in the same sense. See Bandes, *supra* note 21, at 1022-24. Of course, as Professor Israel points out, the Court frequently decides due process claims by examining the interests of society and the prosecution. See Israel, *supra* note 1, at 420-24.

24. See *Coy v. Iowa*, 487 U.S. 1012, 1016 (1988) ("We have never doubted . . . that the Confrontation Clause guarantees the defendant a face-to-face meeting with witnesses appearing before the trier of fact.").

25. See *Snyder v. Massachusetts*, 291 U.S. 97, 105-06 (1934); *United States v. Gagnon*, 470 U.S. 522 (1985); Israel, *supra* note 1, at 372, 391 n.502.

from trial proceedings. Even where statutes or state provisions provide a right to victims to be present,<sup>26</sup> they may nevertheless be excluded if the trial court believes their testimony would be affected by the testimony of others.<sup>27</sup>

This lack of parity between defendant and victim runs counter to popular expectations.<sup>28</sup> It has been a central tenet of the victim's rights movement, whose advocates (including many prosecutors) envision criminal cases as battles between offenders and victims<sup>29</sup> and who argue that because defendants have procedural rights, victims should have them too.<sup>30</sup> For example, a task force appointed in 1982 by President Reagan characterized the criminal justice system as a set of scales "out of balance," evoking the image of defendants' rights on one side of the scale and victims' rights on the other.<sup>31</sup> This theme has been taken up in state constitutions and statutes. My own state recently amended its constitution to add a "Crime Victims' Bill of Rights," the stated purposes of which are:

To preserve and protect the right of crime victims to justice, to ensure crime victims a meaningful role in the criminal and juvenile justice systems, to

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26. States have enacted constitutional and statutory provisions granting procedural rights to crime victims. See Robert P. Mosteller & H. Jefferson Powell, *With Disdain for the Constitutional Craft: The Proposed Victims' Rights Amendment*, 78 N.C. L. REV. 371, 374 (2000). Those rights are enforceable only to the extent they do not conflict with federal constitutional guarantees, although as Mosteller and Powell point out, few victims' rights run afoul of federal guarantees. See *id.* Victims also enjoy rights granted by federal statute. Again those rights are limited by constitutional guarantees and, if the statute so provides, by other concerns, such as the need for accurate fact finding. See *id.* at 375; see also *United States v. McVeigh*, 106 F.3d 325 (10th Cir. 1997) (citing the Victim's Rights and Restitution Act of 1990, 42 U.S.C. § 10606(b)(4) (1994)).

27. See *McVeigh*, 106 F.3d at 325 (affirming, in Oklahoma City bombing case, trial court's exclusion from trial proceedings of victims who would be presenting impact evidence at sentencing). In the federal system, crime victims have a statutory right "to be present at all public court proceedings related to the offense." See *id.* at 334 (citing 42 U.S.C. § 10606(b)(4)). That right is limited by the trial court's power to exclude victims if it determines "that testimony by the victim would be materially affected if the victim heard other testimony at trial." *Id.* at 335. According to the Tenth Circuit in *McVeigh*, the limitation subordinates the victim's right to the policies expressed in Federal Rule of Evidence 615, which provides: "At the request of a party the court shall order witnesses excluded so that they cannot hear the testimony of other witnesses." *Id.*

28. Apparently it runs counter to the expectations of some judges as well. See, e.g., Joshua D. Greenberg, *Is Payne Defensible?: The Constitutionality of Admitting Victim-Impact Evidence at Capital Sentencing Hearings*, 75 IND. L.J. 1349, 1379-80 (2000) (describing a "balancing" justification that some courts have used in order to craft victim participation that offsets the "privileged" position that the criminal justice system affords defendants).

29. See Angela P. Harris, *The Jurisprudence of Victimhood*, 1991 SUP. CT. REV. 77, 101.

30. See Lynne Henderson, *Co-Opting Compassion: The Federal Victim's Rights Amendment*, 10 ST. THOMAS L. REV. 579, 582-83 (1998).

31. See Cellini, *supra* note 20, at 853-54 (citing PRESIDENT'S TASK FORCE ON VICTIMS OF CRIMES, FINAL REPORT vi (Dec. 1982)).



accord crime victims due dignity and respect and to ensure that criminal and juvenile court delinquency proceedings are conducted to seek the truth as to the defendant's innocence or guilt, and also *to ensure that a fair balance is struck between the rights of crime victims and the rights of criminal defendants* in the course and conduct of criminal and juvenile court delinquency proceedings.<sup>32</sup>

Even leaving the victims' rights movement aside, it is not hard to understand why the public would expect parity between defendants and victims: within American culture many people believe that every question has two sides, and that a fair resolution of any question requires giving the two opponents an equal opportunity to battle it out.<sup>33</sup> There is no reason to think that the public is aware that the structure of criminal procedure diverges from this victim-offender battle model.<sup>34</sup> Without constantly reminding the public why due process has a defendant orientation, we can hardly expect the public to abandon its commitment to a notion of parity between victims and defendants.<sup>35</sup>

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32. OR. CONST. art. I, § 42, cl. 1 (1999) (emphasis added).

33. See generally DEBORAH TANNEN, *THE ARGUMENT CULTURE: STOPPING AMERICA'S WAR OF WORDS* (1999). Tannen, who writes about contemporary American culture, argues that Americans are wedded to a battle model of communication, which posits differences as polarities that are to be resolved by confrontation. The loudest and most skilled advocates emerge the victors in these confrontations, and there is little attention paid to understanding other points of view, perceiving shared interests and values, and developing consensus.

34. The victims' rights movement encourages the public to view the criminal process as a battle between offenders and victims. See, e.g., Harris, *supra* note 29, at 101. Social science data suggests that the public is susceptible to such an invitation, because it lacks knowledge about many aspects of criminal justice in the United States. See Deborah W. Denno, *The Perils of Public Opinion*, 28 HOFSTRA L. REV. 741, 753-55 (2000) (citing research documenting public ignorance about "matters significant to criminal justice policy," including the nature and extent of crime, recidivism rates, laws, legal rights and sentencing policies). Tom Tyler and John Darley confirm popular misconceptions about law and legal procedure and the need for "public education." See Tom R. Tyler & John M. Darley, *Building a Law-Abiding Society: Taking Public Views About Morality and the Legitimacy of Legal Authorities into Account When Formulating Substantive Law*, 28 HOFSTRA L. REV. 707, 728-29 (2000) (citing studies).

35. When I urge the Court to "call the people to their senses" about due process values that are inconsistent with some of the goals of the victims' rights movement, I do not mean to suggest that victims should have no role in the criminal process. But victims' roles must be carefully crafted to avoid diminishing public commitment to human rights values. Moreover, prosecutors must be careful not to become victims' advocates. See Walker A. Matthews, Note, *Proposed Victims' Rights Amendment: Ethical Considerations for the Prudent Prosecutor*, 11 GEO. J. LEGAL ETHICS 735, 743 (1998). Others have written extensively on the appropriate role of victims in the criminal process, especially after the United States Supreme Court decided *Payne v. Tennessee*, 501 U.S. 808 (1991), which permits victim impact statements in capital sentencing proceedings. See, e.g., Greenberg, *supra* note 28, at 1381-82 (disagreeing with *Payne* on constitutional grounds); Bandes, *Reply*, *supra* note 13; Bandes, *Empathy*, *supra* note 13; Vivian Berger, *Payne and Suffering—A Personal Reflection and a Victim-Centered Critique*, 20 FLA. ST.

The public needs to be educated also about the societal benefits that accrue from adherence to defendant-oriented procedures. Among these is the likelihood that defendants will be more law-abiding in the future if they believe they have been treated fairly during the criminal process. Tom Tyler and John Darley have recently described several findings that support this statement.<sup>36</sup> Studies demonstrate that law-abidingness requires “supportive public values.”<sup>37</sup> Chief among these is a belief in the legitimacy of legal authority, and legitimacy depends on a perception that legal authorities use fair procedures to make decisions.<sup>38</sup> Studies suggest that even lawbreakers tend to be more law-abiding in the future if they believe they have been treated fairly.<sup>39</sup> The lesson is that society as a whole benefits in terms of law-abidingness (and presumably lower recidivism rates) from procedures that are oriented around fairness to the defendant—procedures that, among other things, respect the defendant’s dignity, ensure equal treatment and maintain the appearance of fairness.

When prosecutors, victims and politicians demand severe punishments, they encourage the public to overlook the social benefits of due process,<sup>40</sup> and as a result the Court needs to step in and “call the people to their senses.” Although the Court on rare occasions has made reference to rehabilitative aspects of due process,<sup>41</sup> it must articulate the link between due process and

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U. L. REV. 21 (1992) (arguing that permitting victims to present impact evidence “actually amounts to a step backward for their cause”). *But see* Cassell, *supra* note 13. *See also generally* Robert P. Mosteller, *Victims’ Rights and the United States Constitution: An Effort to Recast the Battle in Criminal Litigation*, 85 GEO. L.J. 1691, 1694 (1997) (arguing that the victims’ rights movement is an effort to reduce or deny defendants’ rights).

36. *See generally* Tyler & Darley, *supra* note 34, at 722-39 (describing “psychological jurisprudence” research).

37. *Id.* at 738-39.

38. *Id.* at 722-24. *See also, e.g.*, Tracey L. Meares, *Norms, Legitimacy and Law Enforcement*, 79 OR. L. REV. 391, 400-01 (2000).

39. *Id.* at 724.

40. Victims, because they are “prone to vindictive attitudes,” rarely pay attention to reformatory goals and overwhelmingly complain that defendants are treated too leniently. *See* Donald J. Hall, *Victims’ Voices in Criminal Court: The Need for Restraint*, 28 AM. CRIM. L. REV. 233, 244 (1991). They may even exaggerate the harms done in order to convince courts to mete out severe penalties. *See* Robert C. Black, *Forgotten Penological Purposes: A Critique of Victim Participation in Sentencing*, 1994 AM. J. JURIS. 225, 230-32. Other studies have found that in some contexts (for example, settlement conferences in which victims are allowed to participate), victims do not necessarily demand the maximum authorized penalty. *See* Hall, *supra*, at 244-45.

41. *See* *Minnick v. Mississippi*, 498 U.S. 146, 167 (1990) (Scalia, J., dissenting) (urging broad admissibility of non-coerced confessions: “Not only for society, but for the wrongdoer himself, admission of guilt, if not coerced, is inherently desirable because it advances the goals of both justice and rehabilitation”); *Morrissey v. Brewer*, 408 U.S. 471 (1972) (involving due process rights owed parolee) (“[S]ociety has a further interest in treating the parolee with basic fairness: fair treatment in parole revocations will enhance the chance of rehabilitation by avoiding reactions to arbitrariness.”).

law abidingness much more clearly and consistently if it is to counteract the punitive messages of powerful interest groups. In other words, the Court should remind the public that its own self-interest is enhanced when due process is honored, so that the public will consider itself a stakeholder in our system of defendant-oriented procedural rights.

What I have said above argues for a renewed attention to the Court's teaching role throughout criminal procedure cases. But that role probably is especially important in free-standing due process cases, which tend to involve defendant-oriented rights about which the public knows very little. A large fraction of the public probably is aware of some of the rights embodied in explicit Bill of Rights guarantees, such as the search and seizure provisions and the right against self-incrimination. Undoubtedly much less is known popularly about some of the rights embodied within free-standing due process.<sup>42</sup> Not only are search and seizure and confession provisions more obviously part of our public conversation (they feature prominently in television and movie portrayals of police-citizen encounters), but also the prototypic behaviors they regulate—government snooping, police brutality and so on—fall into instantly recognizable patterns. Psychological research suggests that people make judgments by analogizing to familiar patterns, and legal rules that fit familiar patterns are more likely to be understood accurately.<sup>43</sup> Some of the free-standing due process guarantees are less readily analogized to familiar patterns. The right of represented defendants to be present during trial, for example, lacks an immediately relevant analog. Because the public may have a lower level of understanding about the defense orientation of procedural protections that spring from free-standing due process, it is especially important that the Court's opinions in those cases fulfill the “republican schoolmaster” role.

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42. Carol Steiker uses Meir Dan-Cohen's distinction between “conduct rules” and “decision rules” to suggest that the public is much more aware of the Supreme Court's “conduct rules” for police than its “decision rules,” which regulate what happens at trial. *See* Steiker, *supra* note 16, at 2532-40 (referencing Meir Dan-Cohen, *Decision Rules and Conduct Rules: On Acoustic Separation in Criminal Law*, 97 HARV. L. REV. 625, 630-32 (1984)).

43. *See* Dan M. Kahan, *Lay Perceptions of Justice vs. Criminal Law Doctrine: False Dichotomy?*, 28 HOFSTRA L. REV. 793 (2000) (summarizing theory of pattern recognition and current research). The public also appears to have a very detailed set of expectations about some sorts of police conduct and government snooping. *See generally* Christopher Slobogin & Joseph E. Schumacher, *Rating the Intrusiveness of Law Enforcement Searches and Seizures*, 17 LAW & HUM. BEHAV. 183 (1993).

*Lessons from the Kip Kinkel Sentencing*

A recent Oregon case exemplifies what happens when the public's commitment to human rights values is overcome by hatred and when the public's misunderstanding about the appropriate role of victims is left uncorrected. The case promised from the beginning to have a tragic outcome. It featured a large group of victims who engaged in an extreme form of "victim allocution."<sup>44</sup> The victims were pitted against (to use a battle image) a defendant who was both unusually sympathetic (by virtue of his youth and undisputedly serious mental illness) and unusually dangerous. Refereeing the battle was a trial judge who applied Oregon law carefully but declined to employ the larger notion of due process to "call the people to their senses." Though you may be familiar with the facts of this case broadly, a more detailed examination follows.

On May 21, 1998, fifteen-year-old Kip Kinkel opened fire on students in his Springfield, Oregon high school cafeteria.<sup>45</sup> Kinkel was small and slight, and fellow students quickly wrestled him to the floor, disarmed him and beat and kicked him.<sup>46</sup> Before that happened, however, he had killed two students and wounded twenty-five others.<sup>47</sup> After his arrest Kinkel was suicidal and distraught.<sup>48</sup> He charged at a detective brandishing a knife he pulled out of his sock.<sup>49</sup> Officers subdued and interrogated Kinkel without giving him an

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44. I have borrowed the word "allocution" from its common law context, in which it referred to the convicted defendant's opportunity to speak before sentencing. See Black, *supra* note 40. More broadly, to allocute means to speak, to address, even to exhort. See, e.g., OXFORD ENGLISH DICTIONARY 236 (2d ed. 1961), available at <http://dictionary.oed.com/cgi/entry/00006068>. The victims in my Oregon case did all that, and more. They were permitted to express hatred toward the defendant, threaten him with physical harm, and inflict on him what can only be called psychic damage. The victims also were permitted to give their opinions about the appropriate sentence. Not surprisingly, they demanded that the sentencing judge mete out the harshest possible sentence.

45. Information about the shooting, and the aftermath, can be found on the Web site of the REGISTER-GUARD, the local newspaper for the Eugene-Springfield, Oregon area. See *Information Related To the May 21, 1998, Thurston High School Shootings in Springfield, Ore.*, THE REGISTER-GUARD, available at [http://www.registerguard.com/standingdocs/shoot\\_items.html](http://www.registerguard.com/standingdocs/shoot_items.html).

46. See Eric Mortenson, *Tragedy Hits Home: Shootings In Springfield*, THE REGISTER-GUARD, May 22, 1998, available at <http://www.registerguard.com/news/19980522/1a.shooting.0522.html>.

47. As students held him down he reportedly said, "Just shoot me. Shoot me now." See Joe Kidd, *Teen-agers' Bravery Earns Praise Amid the Anguish*, THE REGISTER-GUARD, May 23, 1998, available at <http://www.registerguard.com/news/19980523/1a.rykerhero.0523.html>.

48. See Bill Bishop, *Kinkel's Pretrial Hearing Wraps Up*, THE REGISTER-GUARD, March 6, 1999, available at <http://www.registerguard.com/news/19990306/1a.kinkel.0306.html>.

49. See Janelle Hartman, *Boy Charged as Adult on 4 Counts of Murder*, THE REGISTER-GUARD, May 23, 1998, available at <http://www.registerguard.com/news/19980523/1a.mainstory.0523.html>.

opportunity to consult with counsel, although a defense attorney had rushed to the jail where he was being held.<sup>50</sup> Police feared that Kinkel had planted bombs in his home, and upon searching the home they discovered the bodies of Kinkel's mother and father, whom he apparently had killed the previously evening.<sup>51</sup> By nightfall, local and national news media were giving the story extensive coverage. Kinkel was placed under suicide watch at the county juvenile detention center. Personnel reported that he appeared grief-stricken and the suicide watch continued throughout his detention.<sup>52</sup>

The Lane County District Attorney's office charged Kinkel with twenty-six counts of attempted murder and four counts of aggravated murder, a capital offense under Oregon law, though Kinkel's youth made him ineligible for the death penalty.<sup>53</sup> It was clear from the outset of the case that Kinkel's lawyers would most likely mount an insanity defense, and although the prosecution planned to contest his legal insanity it never disputed the fact that he was seriously mentally ill. There was much evidence that Kinkel had been mentally ill for years, and that his family (and a treating psychologist) had gravely underestimated the seriousness of his illness.<sup>54</sup> For example, virtually from birth Kinkel had stuck out like a sore thumb in his talented family.<sup>55</sup> His parents had difficulty controlling him but only sporadically sought professional

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50. See Bishop, *supra* note 48. The trial judge later upheld Kinkel's *Miranda* waiver of counsel, accepting the prosecution's argument that Kinkel was not rendered incompetent to waive his rights either by virtue of his youth or his mental condition, and that he had waived his rights knowingly and intelligently. See Bill Bishop, *Kinkel's Statements Admissible, Judge Rules*, THE REGISTER-GUARD, June 9, 1999, available at <http://www.registerguard.com/news/19990609/1a.kinkevidence.0609.html>.

51. See Hartman, *supra* note 49.

52. See Eric Mortenson, *Kinkel's Conduct Troubled Jailers*, THE REGISTER-GUARD, Nov. 2, 1999, available at <http://www.registerguard.com/news/19991102/1a.kinkel.1102.html>. According to a PBS *Frontline* documentary about the case, Kinkel became "increasingly upset as he describes [to police] killing his father and putting a sheet over his body, wailing and crying and hyperventilating. Through his tears he says, 'I told her I loved her,' before he killed his mother. Then he screams, 'God damn the voices in my head!'" *Frontline: The Killer at Thurston High* (PBS television broadcast, Jan. 18, 2000), available at <http://www.pbs.org/wgbh/pages/frontline/shows/kinkel/trial/> [hereinafter *Frontline*]. The *Frontline* documentary highlights Kinkel's "descent into darkness and murder." See Diane Dietz, *Kinkel Documentary Fleshes Out Tragedy*, THE REGISTER-GUARD, January 12, 2000, available at <http://www.registerguard.com/news/20000112/1d.cr.frontline.0112.html>.

53. Links to court documents can be found on the Lane County Web site, at <http://www.co.lane.or.us/trial/>.

54. Aside from failing to get adequate help for Kinkel's illness, his parents also purchased him at least one gun. See Joe Mosley, *Kinkels: Neighbors and Friends Paint a Picture of a Level-headed Family Whose Son Had a Fascination with Guns*, THE REGISTER-GUARD, May 22, 1998, available at <http://www.registerguard.com/news/19980522/1a.kinkels.0522.html>.

55. See, e.g., *id.*

treatment for him.<sup>56</sup> Dr. Jeffrey Hicks, a psychologist who had treated Kinkel over a six-month period, testified that Kinkel was “angry and depressed,”<sup>57</sup> but psychologists hired by the defense believed that he had suffered from auditory hallucinations for years, that he was psychotic and that he possibly suffered from schizophrenia or paranoid schizophrenia.<sup>58</sup> A pediatric neurologist performed brain scans and found that Kinkel had brain lesions that would have

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56. See *Frontline*, *supra* note 52, available at <http://www.pbs.org/wgbh/pages/frontline/shows/kinkel/trial/#4>. Dr. Jeffrey Hicks, who had been Kinkel’s treating psychologist for six months, testified regarding Faith Kinkel’s concern about “anti-social acting out.”

57. Hicks testified that he met with Kinkel and his mother nine times. During these visits, Kinkel did not mention voices or hallucinations, but Hicks found him “angry and depressed” and recommended that his physician prescribe medication. *Id.* Apparently Kinkel improved after taking Prozac, but his parents discontinued the medication after a short while. *Id.*

58. See *id.* For example, Dr. Orin Bolstad, a child psychologist who examined Kinkel for more than thirty-two hours and performed a battery of tests, testified that Kinkel’s auditory hallucinations had begun in sixth grade. *Id.* As *Frontline* recounts Bolstad’s testimony,

Kip told him that he remembered the first time he heard a voice; it said, “You are a stupid piece of shit. You aren’t worth anything.” They scared and upset him, he said, and he tried various things to quiet them: biking, watching TV, punching his head. According to Bolstad, Kip said that he never told anyone about the voices because he was embarrassed. He didn’t want anyone, especially girls, to think he was crazy. Bolstad also related his discussion with Kip about an incident in 1998 when he had disrupted English class by shouting, “God damn this voice inside my head!” This is the only time before the shootings that any mention of voices was recorded. Bolstad believed that Kip murdered his parents and opened fired on fellow students the next day . . . under the influence of these hallucinatory voices. He described Kip recounting the voices to him: “My Dad was sitting at the bar [in the kitchen]. The voices said, ‘Shoot him.’ I had no choice. The voices said I had no choice.’ and later, after he killed his mother, ‘The voices said, ‘Go to school and kill everybody. Look what you’ve already done.’” During cross-examination, Bolstad stated categorically, “I think the primary thing that was operating in his feeling and need to kill . . . were the voices.”

*Frontline*, *supra* note 52. Dr. William Sack, another child psychiatrist who interviewed Kinkel, concluded that Kinkel was “a very very sick psychotic individual.” *Id.* Sack also said that as Kinkel grew older he might “eventually might fall into the schizoaffective category or into paranoid schizophrenia.” *Id.* Sack concurred with Bolstad that auditory hallucinations were the immediate cause of the shootings: “I feel his crimes and his behavior over those two days are the direct result of a psychotic product that was building over three years that suddenly emerged, taking over his ego.” *Id.* When asked whether Kinkel could have been lying to the psychologists in order to convince them of a mental illness, Dr. Sack said he had employed a “validity analysis” that consisted of “a formal evaluation of the content and consistency of Kip’s statements, his affect during the interviews and the results of various tests designed to figure out if he was telling the truth.” *Id.* Pursuant to this analysis, Sack concluded that Kinkel “was so consistent in the details of his stories and emotional reactions that he was as sure as he could be that Kip was not faking.” *Frontline*, *supra* note 52. Dr. Sack concluded, “If he were lying to me, he would be the best actor I’ve ever seen.” *Id.*

impeded his impulse control.<sup>59</sup> Kinkel himself was terrified by his illness and agonized over his problems and their impact on his family.<sup>60</sup>

The trial was expected to be a showdown between the defense experts and a well-known prosecution insanity expert nicknamed “Dr. Death” by the defense bar for his role in defeating insanity claims throughout the country.<sup>61</sup> Publicity was extraordinary, and public sentiment against the defendant ran high, as might be expected. The trial judge refused to move the trial’s venue to another location.<sup>62</sup> On the eve of trial, the prosecution and Kinkel’s lawyers agreed to a plea agreement under which Kinkel would admit his sanity and his intent to kill and plead guilty to four murder and twenty-six attempted murder counts.<sup>63</sup> The benefit to Kinkel from the deal was that it removed the possibility of a jury convicting him of aggravated murder, which in Oregon carries a potential life without parole sentence. As part of the deal the parties also agreed that the sentences on the murder counts should run concurrently.<sup>64</sup>

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59. *See id.* (testimony of Dr. Richard J. Konkol). At the sentencing hearing, Dr. Konkol displayed a computer scan of Kinkel’s brain. Dr. Konkol testified that these revealed lesions, or holes, in the frontal lobe. According to Konkol:

These images revealed reduced blood flow to the frontal lobe, the area associated with emotional control and decisionmaking. He testified that this reduced brain activity was consistent with new research on children who become schizophrenic, and that he thought it could make Kip more susceptible to a psychotic episode.

*Id.*

60. In a note found in his home after the killings, for example, Kinkel wrote:

I have just killed my parents! I don’t know what is happening. I love my mom and dad so much. I just got two felonies on my record. My parents can’t take that! It would destroy them. The embarrassment would be too much for them. They couldn’t live with themselves. 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.

*Frontline*, *supra* note 52, available at <http://pbs.org/wgbh/pages/frontline/shows/kinkel/kip/writings.html>.

61. *See* Paul Neville, *Expert Put Kinkel on Defensive*, THE REGISTER-GUARD, Sept. 26, 1999, available at <http://www.registerguard.com/news/19990926/1a.dietz.0926.html>.

62. *See* Bill Bishop & Eric Mortenson, *Kinkel Trial Delayed*, THE REGISTER-GUARD, Feb. 18, 1999, available at <http://www.registerguard.com/news/19990218/1a.kinkel.0218.html>; *see also* Bill Bishop, *Kinkel’s Attorneys Want Trial Relocated*, THE REGISTER-GUARD, Dec. 16, 1998, available at <http://www.registerguard.com/news/19981216/1a.kinkel.1216.html>.

63. *See* Defendant’s Plea Petition, Oregon v. Kinkel, No. 20-98-09574, slip op. (Lane County Ct. 1999), available at <http://www.co.lane.or.us/trial/pleatext.htm>.

64. *Frontline*, *supra* note 52. Under Oregon law, the maximum sentence on the murder convictions was twenty-five years in prison. *See* <http://www.co.lane.or.us/trial/pleatext.htm>.

There was no agreement, however, about whether the attempted murder sentences should run concurrently,<sup>65</sup> and the parties proceeded to a sentencing hearing.

The stakes at the hearing were high, because the judge had to decide whether to sentence Kinkel to an effective life without parole sentence (if he were to order consecutive sentences on the attempted murder counts Kinkel would face up to 220 years in prison)<sup>66</sup> or a concurrent term of years (a minimum of twenty-five) that would give Kinkel the possibility of freedom much later in his life. The prosecution urged consecutive sentences. The defense put on the expert witnesses discussed above in an effort both to mitigate Kinkel's acts and to convince the court that he could safely be released in the future, with appropriate treatment and medication.<sup>67</sup>

The judge devoted a full day of the sentencing hearing to hearing from more than fifty victims and members of victims' families.<sup>68</sup> Statements of these victims served as a counterweight to the defense plea for the possibility of freedom in the future.<sup>69</sup> The words of these victims were powerful. Many of the victims expressed hatred and anger, speaking directly to the defendant.<sup>70</sup> Several told Kinkel that he deserved to die and threatened violence. One wounded student spoke to Kinkel thus during his statement:

I think prison, a lifetime in prison is too good for you. If a dog was to go insane and if a dog got rabid and it bit someone, you destroy it. So I stand here and I ask, why haven't you been destroyed? . . . You don't deserve to live. You don't deserve to breathe. . . . I can't stand here and look at you without wanting to kill you.<sup>71</sup>

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65. These carried minimum sentences of ninety months each, and under Oregon law the judge could order the sentences to be served consecutively. See Defendant's Plea Petition, Oregon v. Kinkel, No. 20-98-09574, slip op. (Lane County Ct. 1999), available at <http://www.co.lane.or.us/trial/pleatext.htm>.

66. Oregon, like many states, has abolished its parole system. Kinkel would be required to complete the term of years ordered, minus statutory "good time." See *id.* Oregon retains the possibility of executive clemency. See Judge's Statement, Oregon v. Kinkel, No. 20-98-09574, slip op. (Lane County Ct. 1999), available at [http://www.co.lane.or.us/trial/judge's\\_statement.htm](http://www.co.lane.or.us/trial/judge's_statement.htm).

67. Dr. Konkol, the defense neurologist, testified that Kinkel "might improve under proper medication and treatment." See *Frontline*, *supra* note 52.

68. See Bill Bishop, *Victims Have Their Say: Sentence Expected Today*, THE REGISTER-GUARD, Nov. 10, 1999, available at <http://www.registerguard.com/news/19991110/1a.kinkel.1110.html>.

69. See, e.g., Oregon v. Kinkel, No. 20-98-09574, slip op. (Lane County Ct. 1999). A complete transcript of the victims' statements [hereinafter *Victim Impact Statements*] is on file with the Saint Louis University Law Journal. Some of the statements are available on the web, as indicated.

70. See Neville, *supra* note 61.

71. For the complete statement of Jakob Ryker, see *Frontline*, *supra* note 52, available at <http://www.pbs.org/wgbh/pages/frontline/shows/kinkel/trial/victims.html>. The media widely



Another victim, the mother of a wounded student, said this to Kinkel:

Death wouldn't have been the answer for you, or for us. To get any kind of justice, for you to be tortured and troubled as we are is, to me, the final justice. Knowing the kind of person that you are, it's not going to be long, when you get put into prison, that you're going to become someone's little friend. And everyone knows that.<sup>72</sup>

A father stated, "Kip, I'm a pacifist. I have endured many things without taking a blow back. But if the court allowed me, I would kick the shit out of you."<sup>73</sup> There were victims who did not express anger or hatred. One student said, "I don't hate you. I have no hate inside of me for you. In fact, I care about you."<sup>74</sup> Such sentiments, however, were few. Neither the defense nor the prosecution objected during the victim statements, and the trial judge stemmed the tide of these expressions only once.

In addition to their expressions of feelings to the defendant, the victims appeared to believe they should share their own sentencing preferences. Said a parent, "We're here in a court of law today to tell you what we think is a fair sentence for those crimes."<sup>75</sup> Forty of the fifty-two victim statements expressed an opinion about the appropriate sentence, and thirty-eight of those called specifically for life in prison. Only Kristen Kinkel, the defendant's sister and daughter of the slain parents, urged the judge to give Kinkel a chance of freedom in the future.<sup>76</sup> Some victims commented on the consecutive

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portrayed Ryker as a hero, because he had helped disarm Kinkel. *See, e.g.,* Mortenson, *supra* note 46.

72. *Statements by Kip Kinkel's Victims and Their Survivors*, THE REGISTER-GUARD, available at [http://www.registerguard.com/standingdocs/shoot\\_victims.html](http://www.registerguard.com/standingdocs/shoot_victims.html).

73. *Id.*

74. *Victim Impact Statements*, *supra* note 69, at 21.

75. *Id.* at 44.

76. *Frontline*, *supra* note 52, at <http://www.pbs.org/wgbh/pages/frontline/shows/kinkel/trial/letter.html>. Kristen Kinkel read this letter to the trial judge:

Dear Judge Mattison. I am shaken by how difficult this letter is for me to write. I was told that you may need it to better understand my little brother. I wish there was an ideal place to begin. But where does one start when a loved one's life is laid across someone else's table?

What keeps me believing in him and loving him is the fact that he is a good person that came from a good home. I feel silly writing that, because it seems so contradictory, looking at what actually took place. However, it's the truth, and it keeps me alive. I wish more than anything that you, the man who decides his fate, could know him like I do. So a little bit of the Kip Kinkel that I know is where I will begin.

Growing up with him was very average. I was the typical big sister, and he seemed like every other little brother I had ever had any contact with. Only with hindsight do I truly see the signs of someone who was in desperate need of help, different help than any of us knew how to give.

Kip was a very compassionate person. Like my mother, the norm for him was to put others first. He absolutely loved animals and treated them better than most. He was a

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people pleaser. He found ways to learn what those around him wanted and made every effort to become it. I believe that is how he dealt with his illness so well and with such subtlety for so long.

He was genuinely concerned about the same issues kids his age are, and unusually devoted to those that meant something extra special to him. When asked about his interests and opinions, he was able to rationally explain his ideas about them in ways far beyond those which someone his age would be capable of. He was very likeable and had a great sense of humor. He loved to make people laugh and did it well. My mother and I used to say that he would be a wonderful boyfriend because of his sensitivity and his devotion to what he loved. Kip had a lot of potential, and to see that die absolutely crushes me.

That is who I remember Kip to be, and let me tell you about who he is today. He's extremely bright, and the potential I mentioned before is still there, buried inside. He is hurting more than any of us can imagine, and yet is adapting to an extremely unpleasant situation better than most ever could. He is polite and considerate to those that have contact with him. He is realistic about his situation, yet remains hopeful that he will find something positive in it.

He does have plans for the future and has discussed with me his ideas of becoming a productive member of society, even from behind bars. All of his hopes and dreams have to do with getting an education and using it to help people without one. He already has passed the GED with very high scores.

I believe what he needs is the hope that he has a chance of achieving these goals. My first visit with him after this happened was at Skipworth and consisted of only crying. It took weeks for him to make eye contact with me, and even longer to say something. When he finally did, it was, 'I am so sorry.'

I believe he is aware of the pain that he has caused, and is just as shocked as the rest of us that he was capable of such horror. We were talking last week about the upcoming hearings and preparing ourselves for the things that we would have to listen to. I told him to do what I do, and just tune out that which you don't want to hear. I told him to go to a safe place in his memory, and not listen to the victims when they talk, because they are angry and going to say things they really don't mean. He stopped me and said, 'No, I owe it to them to listen.'

I share this story because I think it emphasizes the kind of person Kip was and still is. I think it also shows that there really should be no concern for this kind of thing to happen again.

I love my brother more than I ever thought possible. And not because he needs me to, but because I need to. It is a difficult concept for an outsider to understand, but it comes from what is inside us.

He will need support, love, medical help, et cetera. But most of all right now, he needs hope. 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.

Thank you for your time in reading this. I wanted to speak from my heart and hope you will forgive the informality of this letter. I realize you have a huge amount of things to consider in this case, and I hope I haven't sounded like a nagging sister. Thanks again for your attention.

*Id.*

versus concurrent possibilities for the attempted murder counts. Here is Michael Crowley, father of student Ryan Crowley, on that issue:

Your Honor, don't tell Kip that it didn't matter when he pointed the gun at Ryan's head and pulled the trigger. Don't tell Ryan it was no big deal, it doesn't matter, "you don't matter." . . . If you don't run the sentence consecutively, it is the same effect as saying it didn't happen, there is no penalty. Do not treat it as if nothing happened. Do not send the message to my son and the other children that their suffering has no consequences to Kip . . . .<sup>77</sup>

A parent of a wounded student said, "Anything less [than life in prison] would be a slap in the face on the victims and the families of children you have murdered."<sup>78</sup> Another parent warned the judge:

All of the victims, as I've heard today, stand united in wanting Kip Kinkel put in prison for the rest of his life. If it doesn't happen, and Kip has the potential to be released back into society, then another crisis is going to occur, for every family affected by this crime, and many others that reacted to it. So this is what you can do, now, to affect our future. That's what you can do to help my family.<sup>79</sup>

The sentencing judge clearly felt the impact of these statements. After hearing from the victims, and from Kinkel,<sup>80</sup> the judge ordered a sentence of 111 years, making it certain that Kinkel would die in prison.<sup>81</sup> The judge noted in his sentencing order that his decision had been affected by the victims' sentiments: "It became very apparent yesterday that this sentence needed to account for each of the wounded, who rightly call themselves survivors, and

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77. *Frontline*, *supra* note 52, available at <http://www.pbs.org/wgbh/pages/frontline/shows/kinkel/trial/victims.html>.

78. *Victim Impact Statements*, *supra* note 69, at 41.

79. *Id.* at 69.

80. *See Frontline*, *supra* note 54. Kinkel read this statement:

I have spent days trying to figure out what I want to say. I have crumpled up dozens of pieces of paper and disregarded even more ideas. I have thought about what I could say that might make people feel just a little bit better. But I have come to the realization that it really doesn't matter what I say. Because there is nothing I can do to take away any of the pain and destruction I have caused. I absolutely loved my parents and had no reason to kill them. I had no reason to dislike, kill or try to kill anyone at Thurston. 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.

Available at <http://www.pbs.org/wgbh/pages/frontline/shows/kinkel/trial/#5>.

81. *See Frontline*, *supra* note 52, available at <http://www.pbs.org/wgbh/pages/frontline/shows/kinkel/trial/judge.html>.

for Mr. Kinkel to know there was a price to be paid for each person hit by his bullets.”<sup>82</sup>

The reader will no doubt have noticed in my account of the Kinkel sentencing the sorts of public reactions to crime I mentioned earlier in this article: intense hatred and dehumanization of Kinkel (“if a dog got rabid . . . you destroy it”), abandonment of a commitment to moral behavior (“for you to be tortured and troubled . . . is the final justice”); blindness to public benefit from any disposition other than the maximum possible sentence (“[a]nything less . . . would be a slap in the face on the victims”).<sup>83</sup> These reactions could have been diminished by a court that took seriously its role of reminding the people about our Constitution’s commitment to human rights. The judge in the Kinkel case should have done this. He should have pointed out to the victims the humanity of the defendant and the defendant’s mental illness and suffering.

The Kinkel sentencing also displayed a profound misunderstanding about the noncompensatory character of criminal justice, a misunderstanding exacerbated when the judge caved in to victim demands that the sentence pay each of them back for their wounds. The judge should have reinforced the notion that criminal sentences serve public goals and not private ones. He also should have discussed with the victims the benefits to them, and the public as a whole, of a fair and impartial sentence, regardless of its length. He should have addressed seriously the goal of rehabilitation.

I do not mean to suggest that the judge in the Kinkel case was ill-intentioned or malicious. Rather, he was unenlightened by example. He had seen nothing in recent opinions by the justices of the United States Supreme Court to serve as inspiration or to give him the courage to resist victims’ angry demands. Although I have not spoken with him, I have spoken with other Oregon trial judges about victim statements at sentencing. Those I have spoken with have agreed that victim demands put unbearable pressure on judges to enact harsher sentences than they would otherwise believe to be appropriate. One judge acknowledged that it is wrong—and even illegal under

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82. See *id.*, available at <http://www.pbs.org/wgbh/pages/frontline/shows/kinkel/trial/judge.html>. The judge also based his sentence on a recent change to the Oregon Constitution, which formerly stated: “Laws for the punishment of crime shall be founded on the principles of reformation, and not of vindictive justice.” OR. CONST., art. I, § 15 (1859). In 1996, Oregon voters amended the constitution to read: “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.” *Id.* (1996). Finally, the judge compared the seriousness of Kinkel’s conduct with that of other defendants he had sentenced. *Frontline*, *supra* note 52.

83. There were, as well, at least two violations of Kinkel’s free-standing due process rights, although it is not my purpose here to argue doctrine. First, Kinkel’s due process rights were violated when the judge permitted the victims to give their opinions about the appropriate sentence, and second, due process was offended when the judge enacted sentence after hearing the sentencing demands of a large angry crowd in his courtroom. The pressure on the judge should leave us in doubt that the sentence was fair and impartial.

Oregon law—to permit victims to make sentencing demands,<sup>84</sup> but she said she was helpless to stop it or to engage in the kind of teaching that I have urged in this essay.

Of all judges, surely Supreme Court justices are best positioned to teach the difficult lessons of due process, insulated as they are from the political process and the raw emotions of the trial courtroom. The silence of these privileged judicial officers suggests that we need to call them to their senses.

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84. Victims in Oregon are permitted by statute to explain the impact of the crime and to give their views about the defendant and those sentencing matters that relate to victim compensation—*i.e.*, restitution and a compensatory fine. *See* OR. REV. STAT. § 137.013 (1999). Oregon statutes (including its capital sentencing statute) do not, however, give victims the right to speak about other aspects of criminal sentencing. *Id.* *See also* § 163.150(1)(a). The Oregon Constitution includes a provision granting victims “the right to be present at and, upon specific request, . . . to be heard at . . . sentencing.” OR. CONST. art. I, § 42, cl. 1(a). There are no cases yet interpreting the breadth of that right.