NOTES & COMMENTS

THE MONTWHEELER EFFECT: EXAMINING THE PERSONALITY DISORDER EXCLUSION IN OREGON'S INSANITY DEFENSE

by
*Joseph Langerman**

In 1983, Oregon changed its insanity defense statute. One of the changes included a new provision that clarified what constituted a "mental disease or defect." Specifically, the new provision, ORS 161.295, stated that a "mental disease or defect" did not "[i]nclude any abnormality constituting solely a personality disorder." In other words, an individual could not successfully assert the insanity defense under Oregon law if the abnormality being asserted was "[s]olely a personality disorder." Oregon's changes to its insanity defense came at a time in which many states changed their insanity defenses. These state-to-state changes were part of the Hinckley effect, in which states made it harder for defendants to successfully assert the insanity defense after a jury found John Hinckley Jr. not guilty by reason of insanity for attempting to assassinate President Ronald Reagan. This Note examines the personality disorder exclusion in Oregon's insanity defense, in response to what this Note calls the "Montwheeler effect." The Montwheeler effect refers to the actions of Tony Montwheeler, who malingered a personality disorder for decades, fooling the Oregon Psychiatric Service Review Board, and in the end committed multiple murders. This Note starts off by introducing the Tony Montwheeler story. It then examines the legislative history behind the personality disorder exclusion, otherwise known as ORS 161.295, as well as the

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case law interpreting ORS 161.295 in the years after its enactment into law. This Note then analyzes the personality disorder exclusion, specifically analyzing it against the science behind personality disorders and its comparisons to psychosis and discusses a follow-up study done in the aftermath of ORS 161.295. In addition, this Note looks at how other states have interpreted their insanity defense statutes. Lastly, this Note examines potential solutions and fixes to Oregon's personality disorder exclusion. In the end, this Note recommends that the Oregon legislature get rid of the personality disorder exclusion.

I. INTRODUCTION

In 1996, Tony Montwheeler kidnapped his first wife and son, forcing them into his truck.[1] During the kidnapping, Montwheeler threatened to kill both of them.[2] Montwheeler's then-wife was able to get herself free, but Montwheeler holed up in his home with his son, who he was holding hostage. While he was holding his son hostage at his house, Montwheeler

[1] Les Zaitz, *He Wasn't Insane, He Says–He Faked It to Avoid Prison,* THE OREGONIAN (Mar. 29, 2017), http://www.oregonlive.com/pacific-northwest-news/index.ssf/2017/03/tony_montwheeler.html.

[2] *Id.*

set his truck on fire.[3] When the police arrived, they were able to get Montwheeler to surrender.[4] Subsequently, the State of Oregon charged Montwheeler with kidnapping, arson, and use of a dangerous weapon.[5]

During pre-trial proceedings, the issue of Montwheeler's sanity arose. After the arrest, a state psychiatrist examined Montwheeler to determine whether the court could hold Montwheeler responsible for his crimes and concluded that the answer was yes.[6] However, this conclusion did not kill Montwheeler's insanity defense. A second psychiatrist retained by the defense examined Montwheeler[7] and reached the opposite conclusion, finding that Montwheeler was mentally ill.[8]

Relying on the second psychiatrist's conclusion, a Circuit Court Judge in Baker County ruled that Montwheeler was "guilty except insane," and in doing so remanded Montwheeler to the custody of the Psychiatric Security Review Board (PSRB).[9] There was only one problem. Montwheeler was malingering mental illness symptoms the whole time.[10] This discovery was uncovered two decades after the fact and would only come to the public light after a flurry of horrifying events.

During the two-decade period between Montwheeler's commitment to the PSRB and his discharge from PSRB, several events transpired. Montwheeler did not remain civilly committed at the Oregon State Hospital the entire time he was under the jurisdiction of the PSRB; in fact, Montwheeler was able to move around rural Oregon and Idaho.[11] He married for a second time, had two children, got divorced, and then remarried for a third time.[12] Montwheeler faced criminal charges on multiple occasions, primarily for theft-related crimes.[13] Just before his discharge by the PSRB, Montwheeler was sentenced to two years in prison for aggravated theft.[14] He served his sentence, and afterwards an appel-

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[3] *Id.*

[4] *Id.*

[5] *Id.*

[6] Lez Zaitz, *Mental Hospital Doctors Suspected for Years Accused Killer Was Faking, Records Show,* THE OREGONIAN (Apr. 12, 2017), http://www.oregonlive.com/pacific-northwest-news/index.ssf/2017/04/mental_hospital_doctors_suspec.html.

[7] *Id.*

[8] *Id.*

[9] Zaitz, *supra* note 1.

[10] *Id.*

[11] *Id.*

[12] *Id.*

[13] *Id.*

[14] Everton Bailey Jr., *Idaho Man Accused of Abducting Ex-Wife, Causing Fatal Crash Facing Murder, Kidnapping Charges,* THE OREGONIAN (Jan. 12, 2017), http://www.oregonlive.com/pacific-northwest-news/index.ssf/2017/01/idaho_man_accused_of_abducting.html.

late court reversed his conviction.[15] After Montwheeler's appeal concluded, the PSRB took Montwheeler into custody at the Oregon State Hospital (OSH).[16] In 2015, Montwheeler wanted the PSRB to release him back into the community.[17] The PSRB had different ideas, wanting to place Montwheeler in a secure facility.[18] At this point, Montwheeler had had enough of the PSRB, and he revealed the two-decade con he played on the State of Oregon.[19]

The PSRB learned from Montwheeler about his two-decade con on them and the State of Oregon during a PSRB hearing in December 2016.[20] An internal review board agreed that Montwheeler was malingering mental illness, and as such recommended his discharge from PSRB.[21] On the other hand, a state psychologist recommended against discharge, saying that "[M]ontwheeler posed a violent threat to his intimate partner or family members."[22] Ultimately, the PSRB discharged Montwheeler.[23] It concluded that "[i]f Montwheeler was a risk, it was because of a personality disorder . . ."[24] The PSRB has no jurisdiction over individuals who have personality disorders.[25] In fact, ORS 161.295 states that a "mental disease or defect" that could serve as the basis for a finding of guilty except insane does not "[i]nclude any abnormality constituting solely a personality disorder." Because of its findings, the PSRB released Montwheeler. It did not take long for him to do wrong.

Montwheeler told family members three weeks after his release that he discovered his ex-wife had committed credit card fraud and that he went to the police.[26] Eleven days after this incident, Montwheeler kidnapped his ex-wife in Idaho.[27] He took her in his pick-up truck to Oregon, brought her to a gas station in Ontario,[28] and stabbed her to death.[29]

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[15] Zaitz, *supra* note 1.

[16] *Id.*

[17] *Id.*

[18] *Id.*

[19] *Id.*

[20] Travis Gettys, *Oregon Man Faked Insanity for 20 Years to Avoid Prison – Then Fatally Stabbed Wife Upon Release,* RAW STORY (Mar. 29, 2017), https://www.rawstory.com/2017/03/oregon-man-faked-insanity-for-20-years-to-avoid-prison-then-fatally-stabbed-wife-upon-release/.

[21] *Id.*

[22] *Id.*

[23] *Id.*

[24] Les Zaitz, *Deadly Decisions: State Records Show Doctors Early On Suspected Montwheeler Was Faking Illness,* MALHEUR ENTERPRISE (Apr. 12, 2017), https://www.malheurenterprise.com/posts/3529.

[25] Zaitz, *supra* note 1.

[26] *Id.*

[27] *Id.*

[28] Bailey, *supra* note 14.

[29] Zaitz, *supra* note 1.

He then fled the scene, ramming into another vehicle and killing a father of five and injuring that man's wife.[30] The police arrested Montwheeler and the State of Oregon charged him with aggravated murder, murder, assault in the first degree, and kidnapping in the first degree.[31] As of this Note, he is awaiting trial at the Malheur County Jail.[32] Reportedly, he intends to assert the defense of guilty except insane.[33] If convicted, Montwheeler could potentially get the death penalty.[34]

This sad story results in the Montwheeler effect, which for purposes of this Note, refers to examining under a microscope Oregon's "guilty except insane" (GEI) defense because of Mr. Montwheeler's actions. In bringing this defense forward, this story also puts under a microscope the restrictions contained within Oregon's GEI defense. One of those restrictions under ORS 161.295 is that a "mental disease or defect" that could serve as the basis for a finding of guilty except insane does not "[i]nclude any abnormality constituting solely a personality disorder." The Montwheeler effect touches the "personality disorder" exclusion because the PSRB concluded, in releasing Montwheeler, that if he served any risk, it was because of a "personality disorder," and in light of the personality disorder exclusion, the PSRB no longer had jurisdiction over Montwheeler.[35]

The intent of this Note is to examine the following questions raised as a result of the Montwheeler effect: Is the personality disorder exclusion appropriate? Is it too narrow? Too wide? Does the exclusion take into account the unique challenges mental health problems present?

II. BACKGROUND AND HISTORY

A. Oregon Revised Statute Section 161.295

Oregon Revised Statute section 161.295 (hereinafter ORS 161.295) was born House Bill (HB) 2075 in the 1983 session of the Oregon Legislature out of public concern over the insanity defense.[36] This bill coincided with the aftermath of the attempted assassination of President Ronald Reagan, in which a jury found Reagan's attacker, John Hinckley Jr., not

[30] *Id.*

[31] Bailey, *supra* note 14.

[32] Zaitz, *supra* note 1.

[33] *Id.*

[34] *Id.*

[35] *Id.*

[36] Beiswenger v. Psychiatric Sec. Review Bd., 84 P.3d 180, 186 (2004); *see also* OR. REV. STAT. § 161.295 (2017).

guilty by reason of insanity.[37] The Hinckley verdict was extremely controversial, with the main controversy being that "the prosecution had too difficult a task in rebutting the contention of Hinckley's attorneys that he was legally insane."[38] The Hinckley verdict resulted in several states either revising or revamping their version of the insanity defense.[39] This "Hinckley effect" reached Oregon in 1983.

HB 2075 originally did not include the personality disorder exclusion.[40] The exclusion came up at a committee hearing held by the Judiciary Committee of the Oregon House of Representatives when a witness advised committee members that they ought to consider including a personality disorder exclusion.[41] Specifically, the Executive Director of the PSRB, Felicia Gniewosz, testified:

> [t]he legislature should take a position to either include or exclude 'personality disorders' from the definition [of 'mental disease or defect']. It should be noted that personality disorders include the following diagnoses: antisocial, inadequate, passive-aggressive, sexual conduct disorders, drug dependent, alcohol dependent and paranoid.[42]

In addition, the Oregon House heard testimony that "[p]ersonality disorders include child molestation, other sex offenses, and persons 'suffering from a drug-induced syndrome.'"[43]

Addressing personality disorders in Oregon's insanity defense came up at a second hearing the House Judiciary Committee held on HB 2075.[44] At that hearing, a legislator asked Ms. Gniewosz "[w]hether the distinguishing characteristic of a 'personality disorder' is the individual's self-control."[45] Ms. Gniewosz responded that "[s]ome individuals can control their disorders, while others cannot."[46] Ms. Gniewosz added that an

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[37] Saundra Saperstein, *'Insanity Defense' Tightened,* WASH. POST (Mar. 24, 1984), https://www.washingtonpost.com/archive/local/1984/03/24/insanity-defense-tightened/53aec79e-619f-4be2-9f2d-4d3ec198697c/?utm_term=.a6e3313da539.

[38] *Id.*

[39] Natalie Jacewicz, *After Hinckley, State Tightened Use of the Insanity Plea,* NAT'L PUB. RADIO (July 28, 2016), https://www.npr.org/sections/health-shots/2016/07/28/486607183/after-hinckley-states-tightened-use-of-the-insanity-plea.

[40] *Beiswenger*, 84 P.3d. at 187.

[41] *Id.* (citing *Hearing Before the H. Comm. on Judiciary,* 1983 Leg., 62d Sess. (Or. 1983) (statement of Felicia Gniewosz)).

[42] *Id.* (quoting *Hearing Before the H. Comm. on Judiciary,* 1983 Leg., 62d Sess. (Or. 1983) (statement of Felicia Gniewosz)).

[43] *Id.* (quoting *Hearing Before the H. Comm. on Judiciary,* 1983 Leg., 62d Sess. (Or. 1983) (statement of Judy Snyder)).

[44] *Id.*

[45] *Id.* (citing *Hearing Before the H. Comm. on Judiciary,* 1983 Leg., 62d Sess. (Or. 1983) (statement of Rep. Hill)).

[46] *Id.* (quoting *Hearing Before the H. Comm. on Judiciary,* 1983 Leg., 62d Sess. (Or. 1983) (statement of Felicia Gniewosz)).

example of where some individuals could control their disorders whereas others could not is when "[o]ne of the personality disorders would be somebody that's alcohol or drug dependent."[47]

At the end of the second hearing before the House Judiciary Committee, then-Representative Peter Courtney asked the chair of the task force that drafted HB 2075 to propose a draft of the bill that included the personality disorder exclusion.[48] The chair of the task force did so, and the House Judiciary Committee adopted a draft of the bill that included the personality disorder exclusion.[49] When the committee adopted HB 2075, it had at its disposal a staff analysis that defined the intent of HB 2075. The analysis stated:

> [t]he bill as amended further limits the scope of mental diseases or defects for which a person may be found, under present law, 'not responsible.' Existing law excludes abnormalities manifested only by repeated criminal or otherwise antisocial conduct. The bill would exclude, in addition, any abnormality which constitutes solely a personality disorder, which includes such diagnoses as sexual conduct disorders, drug dependent, and alcohol dependent.[50]

After the House committee adopted HB 2075, the bill went to the house floor.[51]

When HB 2075 went to the house floor, then-Representative Peter Courtney managed the floor debate.[52] Courtney was intricately involved with HB 2075 when it was before committee. In summarizing and explaining HB 2075 to his colleagues, Representative Courtney said the following:

> [r]ight now if a person has what is considered a personality disorder, by that I mean what they call 'anti-social, inadequate, passive-aggressive, sexual conduct disorders, drug dependent, alcohol dependent, or paranoid,' if they fit into that personality disorder category they're able to claim that they have a mental disease or defect. We now no longer, with this piece of legislation, will allow an individual to say that I have a mental disease or defect because I have a personality disorder.[53]

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[47] *Id.*

[48] *Id.* (citing *Hearing Before the H. Comm. on Judiciary,* 1983 Leg., 62d Sess. (Or. 1983) (statement of Rep. Peter Courtney)).

[49] *Id.* (citing *Hearing Before the H. Comm. on Judiciary,* 1983 Leg., 62d Sess. (Or. 1983) (statement of Jeffrey Rogers)).

[50] *Id.* (quoting *Staff Measure Analysis, HB 2075, H. Comm. on Judiciary,* 1983 Leg., 62d Sess. (Or. 1983)).

[51] *Id.*

[52] *Id.*

[53] *Id.* at 187–88 (quoting *House Floor Debate, HB 2075,* 1983 Leg., 62d Sess. (Or. 1983) (statement of Rep. Peter Courtney)).

After floor debate occurred, the Oregon House of Representatives passed HB 2075.[54] The next step was for the bill's consideration by the Oregon Senate, beginning with the referral of HB 2075 to the Senate Judiciary Committee.[55] During the course of the Senate Judiciary Committee's hearing, witness Jeffrey Rogers testified and "[e]xplained the findings of a recently completed study that he and two professors from [Ore- [Oregon Health & Science University] had completed concerning the insanity defense in Oregon. The report explicitly categorized alcohol and drug dependency as 'personality disorders.'"[56] Additionally, the Rogers report also characterized the following as personality disorders: antisocial, inadequate, passive-aggressive, sexual conduct disorders, paranoid, and other.[57] Personality disorders, according to the Rogers report, was the primary diagnosis of 20% of the individuals under PSRB jurisdiction.[58] In addition, when there was a disagreement as to what diagnosis an individual fell under, personality disorders made up 78% of such disagreements.[59]

Ultimately, committee members on the Senate Judiciary Committee grew concerned that personality disorders were too complex to define.[60] As a result, the Senate Judiciary Committee deleted the personality disorder exclusion from HB 2075, and the Oregon Senate then approved the modified HB 2075.[61] Because there were differences between the House and Senate versions of HB 2075, a conference committee had to resolve the differences between the two houses.[62]

Before the conference committee, then-Representative Courtney advocated for the personality disorder exclusion's placement in the bill.[63] In support of his position, Courtney cited the study performed by Jeffrey Rogers, which among other things labeled alcohol and drug dependency as personality disorders.[64] In the end, the conference committee sided with Courtney, reinstating the personality disorder exclusion in HB

[54] *Id.* at 188.

[55] *Id.*

[56] *Id.* (citing *Hearing Before the S. Comm. on Judiciary,* 1983 Leg., 62d Sess. (Or. 1983) (statement of Jeffrey Rogers)).

[57] Jeffrey L. Rogers et al., *Oregon's New Insanity Defense System: A Review of the First Five Years*, 12 BULL. AM. ACAD. PSYCHIATRY L. 383, 394 (1984).

[58] *Id.*

[59] *Id.*

[60] Beiswenger v. Psychiatric Sec. Review Bd., 84 P.3d 180, 188 (2004).

[61] *Id.*

[62] *Id.*

[63] *Id.* (citing *Conference Committee, HB 2075,* 1983 Leg., 62d Sess. (Or. 1983) (statement of Rep. Peter Courtney)).

[64] *Id.* (citing *Conference Committee, HB 2075,* 1983 Leg., 62d Sess. (Or. 1983) (statement of Rep. Peter Courtney)).

2075.[65] Both the Oregon House of Representatives and the Oregon Senate approved the conference report, and the Governor subsequently signed HB 2075 into law.[66] Upon HB 2075's enactment, the new version of Oregon's insanity defense was known as ORS 161.295.[67] In the years following the enactment of ORS 161.295, the Oregon courts on numerous occasions resolved questions regarding the interpretation ORS 161.295.[68] The litigation regarding ORS 161.295 has primarily been over whether a certain disorder was a "personality disorder" or a "mental disease or defect."[69] Such disorders the Oregon courts have interpreted as either a personality disorder or a mental disease or defect include: organic personality disorder, sexual conduct disorders, alcohol dependency, and drug dependency.

B. CASE LAW POST- ENACTMENT OF ORS 161.295

1. Osborn v. Psychiatric Security Review Board

In *Osborn v. Psychiatric Security Review Board,* the Oregon Supreme Court held that pedophilia constituted a "mental disease or defect," and, as such, it was not "manifested only by repeated criminal or otherwise antisocial conduct."[70] "[M]anifested only by repeated criminal or otherwise antisocial conduct" is the other exclusion in Oregon's guilty except insane defense.[71] While this Note does not address the antisocial conduct exclusion, *Osborn* is addressed in this Note to provide context on how the Oregon appellate courts have interpreted Oregon's GEI defense.

The defendant was found guilty except insane for sodomy in the first degree and sexual abuse in the first degree.[72] The trial court placed the defendant under the custody and jurisdiction of the Psychiatric Security Review Board, namely because the defendant was suffering from an organic personality disorder.[73] The defendant sought discharge from the PSRB, but the PSRB denied the defendant's request, finding that while the defendant no longer had a diagnosis of organic personality disorder, the defendant suffered from pedophilia, and pedophilia is a "mental disease or defect" under ORS 161.295.[74] The Oregon Court of Appeals af-

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[65] *Id.*

[66] *Id.*

[67] ORS 161.295 (1983).

[68] *Beiswenger*, 84 P.3d. at 188.

[69] *Id.*

[70] Osborn v. Psychiatric Sec. Review Bd., 934 P.2d 391, 399 (1997).

[71] *Id.*

[72] *Id.* at 392.

[73] *Id.*

[74] *Id.*

firmed the PSRB's decision.[75] Osborn successfully sought review by the Oregon Supreme Court.[76]

The defendant argued before the Oregon Supreme Court that at the time the PSRB discharge hearing occurred, he no longer had an "organic personality disorder," which served as the basis for him being put under the jurisdiction of the PSRB.[77] Therefore, the defendant contended that because he no longer had an organic personality disorder, the PSRB no longer had jurisdiction over him.[78] Additionally, the defendant argued that "[t]he PSRB could not continue its jurisdiction over him by finding that he now suffers from a *different* condition, even if that condition is a mental disease or defect within the meaning of ORS 161.295."[79]

The PSRB argued before the Oregon Supreme Court that "[a]s long as an individual who is under the PSRB's jurisdiction continues to suffer from *any* mental disease or defect within the meaning of ORS 161.295, the PSRB continues to have jurisdiction over that individual."[80] Regarding the defendant, the PSRB argued that while the defendant's diagnosis changed from organic personality disorder to pedophilia, pedophilia is still a mental disease or defect, and as such, the PSRB can continue to have jurisdiction over the defendant.[81]

The Oregon Supreme Court agreed with the PSRB's position that pedophilia constitutes a "mental disease or defect."[82] In so ruling, the court noted that pedophilia "[i]s both criminal and antisocial."[83] Additionally, the court noted that "[p]edophilia is more than just 'criminal or otherwise antisocial conduct,' because it also has mental or psychological features."[84] The court looked at the Diagnostic and Statistical Manual of Mental Disorders III (DSM-III).[85] The DSM-III, the court noted, stated that the "'[e]ssential feature" of pedophilia "is '[t]he act or fantasy of engaging in sexual activity with prepubertal children.'"[86] In light of the DSM-III and the mental and psychological features of pedophilia, the court found that pedophilia is a "mental disease or defect."[87] The court also found that the PSRB can continue to have jurisdiction over an individual in situations where the individual's original diagnosis changes by

[75] *Id.*
[76] *Id.* at 394.
[77] *Id.*
[78] *Id.*
[79] *Id.*
[80] *Id.*
[81] *Id.*
[82] *Id.* at 399.
[83] *Id.*
[84] *Id.*
[85] *Id.* The DSM-III was in effect at the time of the *Osborn* decision.
[86] *Id.*
[87] *Id.*

the time such an individual has their PSRB hearing, so long as the new diagnosis is a "mental disease or defect" under ORS 161.295.[88]

2. Mueller v. Psychiatric Security Review Board

In *Mueller v. Psychiatric Security Review Board,* the Oregon Supreme Court held than an organic personality disorder constituted a "mental disease or defect," and as such it was not a personality disorder.[89] The DSM-III listed several criteria for a diagnosis of organic personality disorder, which the DSM-III called "organic personality syndrome."[90] Those criteria included:

> [A.] A marked change in behavior or personality involving at least one of the following:
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> (1) emotional ability, e.g., explosive temper outbursts, sudden crying
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> (2) impairment in impulse control, e.g., poor social judgment, sexual indiscretions, shoplifting
>
> (3) marked apathy and indifference, e.g., no interest in usual hobbies
>
> (4) suspiciousness or paranoid ideation
>
> [B.] No clouding of consciousness, as in Delirium; no significant loss of intellectual abilities, such as Dementia; no predominant disturbance of mood, as in Organic Affective Syndrome; no predominant delusions or hallucinations, as in Organic Delusional Syndrome or Organic Hallucinosis.
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> [C.] Evidence, from the history, physical examination, or laboratory tests, of a specific organic factor that is judged to be etiologically related to the disturbance.[91]

The defendant was found guilty except insane on the charge of burglary in the first degree.[92] As a result, the trial court placed the defendant under the custody and jurisdiction of the PSRB.[93] However, when the court, in February 1985, placed the defendant under the PSRB's jurisdiction, the court conditionally released the defendant.[94] After the conditional release, the defendant tried to strangle his brother.[95] At this point,

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[88] *Id.* at 395.

[89] Mueller v. Psychiatric Sec. Review Bd., 937 P.2d 1028, 1033 (1997).

[90] The DSM-III was also in effect at the time the Oregon Supreme Court decided *Mueller.*

[91] *Id.* (quoting DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS 119–20 (3d. ed. 1980) (hereinafter DSM-III)).

[92] *Id.* at 1029.

[93] *Id.*

[94] *Id.*

[95] *Id.*

the PSRB revoked the defendant's conditional release.[96] During a second hearing before the PSRB, the defendant's treating physician at the Oregon State Hospital highlighted the defendant's diagnoses: organic personality disorder, personality disorder with borderline and antisocial traits, and cerebral palsy.[97] The PSRB denied the defendant's request for a conditional discharge or release.[98] The defendant appealed, but the Oregon Court of Appeals affirmed.[99] The Oregon Supreme Court granted Mueller's petition for review.[100]

The defendant argued before the Oregon Supreme Court that his organic personality disorder fell under the personality disorder exclusion in ORS 161.295.[101] As such, he argued to the court that he did not have a mental disease or defect.[102] In response, the PSRB argued that an organic personality disorder is distinguishable from a personality disorder and accordingly, the defendant's organic personality disorder did not fall under the personality disorder exclusion.[103] The PSRB further argued that since an organic personality disorder does not fall under the personality disorder exclusion, it still had jurisdiction over the defendant.[104]

The Oregon Supreme Court found that the defendant's organic personality disorder was a "mental disease or defect."[105] As such, the court found that the PSRB could have jurisdiction over an individual that has an organic personality disorder diagnosis.[106] In reaching this decision, the court noted the DSM-III listed "organic personality syndrome" (DSM-III equivalent of an organic personality disorder) as an Axis I disorder.[107] Axis I disorders consist of "[m]ental disorders or conditions *other than* personality disorders and specific developmental disorders."[108] Personality disorders, on the other hand, are Axis II disorders.[109] The DSM-III lists several disorders that qualify as personality disorders, such as schizoid personality disorder, avoidant personality disorder, antisocial personality disorder, passive-aggressive personality disorder, borderline personality disorder, among others; organic personality syndrome is not part of such

[96] *Id.*
[97] *Id.*
[98] *Id.* at 1030.
[99] *Id.*
[100] *Id.* at 1031.
[101] *Id.*
[102] *Id.*
[103] *Id.*
[104] *Id.*
[105] *Id.* at 1033.
[106] *Id.*
[107] *Id.*
[108] *Id.* at 1032.
[109] *Id.*

list.[110] Finally, the court turned to the definitions of "organic personality syndrome" and "personality disorder" in reaching its decision.[111]

Organic Personality Syndrome, according to the DSM-III, has the "essential feature" of "a marked change in personality that is due to a specific organic factor but that is not due to any other Organic Brain Syndrome."[112] The distinction between personality traits and disorders, according to the DSM-III, is that:

> Personality *traits* are enduring patterns of perceiving, relating to, and thinking about the environment and oneself, and are exhibited in a wide range of important social and personal contexts. It is only when *personality traits* are inflexible and maladaptive and cause either significant impairment in social or occupational functioning or subjective distress that they constitute *Personality Disorders*.[113]

The court found that the contrasts between personality traits and personality disorders lent credence to the finding that the defendant's organic personality disorder was a "mental disease or defect."[114] Specifically, the court noted that

> [p]ersonality disorders are *not* characterized by an organic etiology as is organic personality syndrome. Neither is a personality disorder characterized by a "*marked change* in behavior or personality"; rather, it is characterized by "*enduring patterns*" that are "inflexible and maladaptive."[115]

Lastly, the court noted that both disorders are on different axes, have different origins, and have different manifestations.[116] As such, the court ruled that the defendant's organic personality disorder was a "mental disease or defect" for purposes of Oregon law.[117] Thus, the court reversed the Oregon Court of Appeals' decision, vacated the PSRB's order, and remanded the case back to the PSRB in order for the PSRB to determine if the defendant met the criteria for "organic personality disorder" set forth in the DSM-III.[118]

3. Beiswenger v. Psychiatric Security Review Board

In *Beiswenger v. Psychiatric Security Review Board*, the Oregon Court of Appeals held that sexual conduct disorders, alcohol dependency, and drug dependency all constituted personality disorders, and as such none

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[110] *Id.* at 1033. *See also* DSM-III, *supra* note 91, at 305.

[111] *Mueller*, 937 P.2d at 1033.

[112] *Id.* (quoting DSM-III, *supra* note 91, at 118).

[113] *Id.* (quoting DSM-III, *supra* note 91, at 305).

[114] *Id.*

[115] *Id.*

[116] *Id.*

[117] *Id.*

[118] *Id.* at 1034.

of the three constituted a "mental disease or defect."[119] A trial court found the defendant guilty except insane on the following charges: kidnapping in the second degree, menacing, and unlawful use of a weapon.[120] As a result, the trial court ordered the defendant's placement under the jurisdiction of the PSRB, but also ordered the defendant's conditional release.[121] The basis of the GEI verdict as applied to the defendant was that at the time, the defendant had the following diagnoses: "incipient paranoid schizophrenia," and "chronic residual schizophrenia."[122] A year later, however, the PSRB revoked the defendant's conditional release; the Oregon Court of Appeals did not explain why the PSRB revoked the defendant's conditional release.[123]

The defendant was then committed to the Oregon State Hospital.[124] During his period of commitment, the defendant received diagnoses of several mental health disorders on numerous occasions over a period of several years. The diagnoses were, including but not limited to: paranoid schizophrenia, a paraphilic coercive disorder, psychoactive substance abuse, a schizoid personality disorder, alcohol abuse, cannabis abuse, amphetamine abuse, cocaine abuse, and "the Axis II disorder of personality disorder with obsessive-compulsive features."[125] The defendant got another conditional release in October 1997, but revocation of the release occurred in 1999 for reasons not explained in the Oregon Court of Appeals' opinion.[126]

In 2002, the defendant applied for a conditional release.[127] The PSRB held a release hearing; by the time the hearing occurred, out of all the diagnoses' the defendant received over the years, the following were still active: "the Axis I disorders of paraphilia not otherwise specified, alcohol abuse, cocaine abuse, cannabis abuse, and amphetamine abuse, and with the Axis II disorder of personality disorder with obsessive-compulsive features."[128] At the release hearing, the defendant "argued that he was entitled to [conditional] release because he was not currently suffering from a mental disease or defect."[129] The defendant argued that "his current drug- and alcohol-related diagnoses and his sexual disorder diagnosis of paraphilia demonstrated that he suffered only from 'person-

[119] Beiswenger v. Psychiatric Sec. Review Bd., 84 P.3d 180, 189 (2004).
[120] *Id.* at 183.
[121] *Id.*
[122] *Id.*
[123] *Id.*
[124] *Id.*
[125] *Id.* at 183–84.
[126] *Id.* at 183.
[127] *Id.* at 184.
[128] *Id.*
[129] *Id.*

ality disorders.'"[130] The PSRB concluded otherwise.[131] It also determined that he "continued to present a substantial danger to others, and that he could not adequately be treated or controlled in the community if conditionally released."[132] As a result, the PSRB continued the defendant's commitment.[133] The defendant appealed the PSRB's decision to the Oregon Court of Appeals.[134]

There, the defendant argued that since the GEI statute does not define what constitutes a "mental disease or defect," the court should resort to examining legislative history and that such history results in the conclusion that the defendant's diagnoses constituted personality disorders, not a mental disease or defect.[135] The PSRB argued that the court need not resort to examining legislative history; rather, the PSRB argued that the court should look at the DSM-IV because that version was the version in effect under the current rules of the PSRB, and that the DSM-IV established that the defendant's diagnoses qualified as a mental disease or defect.[136] The defendant argued that to any extent that the PSRB was relying on its rules and the DSM-IV, "[t]hose rules [were] clearly at odds with the intended meaning of the statute and that, at the very least, the [PSRB] cannot define statutory terms by reference to editions of professional publications that did not even exist at the time the statute was enacted."[137] The court determined, however, that the PSRB's rules and the DSM-IV are not dispositive of the defendant's appeal; rather, if the court needs to resort to examining legislative history, it can do so.[138]

The court determined that in light of the fact that the definitions of "mental disease or defect" and "personality disorder" were not clear, this case presented an issue of statutory construction.[139] At the time the court decided *Beiswenger*, whenever a case before an Oregon appellate court presented an issue of statutory construction, the court was to apply methodology set out in *PGE v. Bureau of Labor and Industries*.[140] Under the *PGE* methodology, the court "attempt[s] to determine the intended

[130] *Id.*
[131] *Id.*
[132] *Id.*
[133] *Id.*
[134] *Id.*
[135] *Id.*
[136] *Id.*
[137] *Id.*
[138] *Id.* at 185.
[139] *Id.* at 184.
[140] *Id.* (citing PGE v. Bureau of Labor and Indus., 859 P.2d 1143 (1993)). Several years after the court decided *Beiswenger*, the Oregon Supreme Court modified the *PGE* methodology. *See* State v. Gaines, 206 P.3d 1042 (2009).

meaning of the statute by reference to its text in context and, if necessary, its legislative history and other aids to construction."[141]

As required by the *PGE* methodology, the court first analyzed the text and context of the statute in which the terms at issue were located.[142] The court noted that ORS 161.295 does not explicitly define "mental disease or defect."[143] However, based on the dictionary definitions of "mental disease" and "defect," the court noted that "mental disease or defect" "could refer to virtually any infirmity of a nonphysical nature, including sexual misconduct disorders and alcohol and drug dependence."[144] When the court analyzed the term "personality disorder," the court noted that the GEI statute did not define what constituted a "personality disorder" under Oregon law.[145] However, based on the dictionary's and the DSM-III's definitions of "personality disorder," the court noted that "it is plausible that the legislature intended such deviant or nonadaptive life patterns [such] as sexual misconduct disorders and alcohol and drug dependence to be regarded as 'personality disorders' within the meaning of the statute and, as a result, to be excluded from the meaning of 'mental disease or defect.'"[146] As a result, the court found that the terms "mental disease or defect" and "personality disorder" were ambiguous based on the references of both terms in Oregon's GEI statute.[147] Accordingly, the Court of Appeals determined that it needed to look at legislative history, the next step in Oregon's *PGE* statutory interpretation framework.[148]

In looking at legislative history, the court looked at materials such as minutes from committee hearings, floor debates, and staff measure analyses.[149] The court concluded that "the legislative history consistently and pervasively reflects an understanding that the statutory term 'personality disorder' includes, among other things, sexual conduct disorders, alcohol dependency, and drug dependency."[150] Additionally, the court noted that the legislative history made clear the intent of the legislature regarding ORS 161.295. The intent of the legislature in enacting ORS 161.295 was to ensure that culpable defendants not be able to avoid criminal responsibility based on an overly broad definition of "mental disease or defect."[151] The legislature, in its desire to avoid such a conundrum, believed that a "personality disorder" exclusion would make the GEI defense less

[141] *Beiswenger*, 84 P.3d. at 184–85.
[142] *Id.* at 185.
[143] *Id.*
[144] *Id.*
[145] *Id.*
[146] *Id.*
[147] *Id.*
[148] *Id.*
[149] *Id.* at 186–89.
[150] *Id.* at 188.
[151] *Id.*

broad.[152] In sum, the legislative history demonstrates that the Oregon legislature did not want "the determination of whether an individual suffers a 'mental disease or defect' . . . to be exclusively within the domain of psychiatric or psychological professionals."[153]

While the legislative history, combined with the text and context of ORS 161.295, established that sexual conduct disorders, alcohol dependency, and drug dependency are personality disorders for purposes of the GEI defense, the court decided, even though it did not need to do so, to follow the last step in its *PGE* methodology: application of general maxims of statutory construction.[154] General maxims of statutory construction can be statutory, but are mostly found in case law.[155] An example of a general maxim frequently used by Oregon courts is the maxim that "in the absence of other clear indications of legislative intent, courts should attempt to reconstruct what the legislature would have done had it confronted the issue at hand."[156] The court concluded that based on the general policy behind the personality disorder exclusion, which was the legislature's desire to narrowly define what constitutes a "mental disease or defect" in order to limit the assertion of the GEI defense by defendants, the PSRB's proposed construction of the personality disorder exclusion went against the general policy of the exclusion.[157]

After conducting the *PGE* statutory interpretation analysis, the court determined that the Oregon legislature's intent in adding the personality disorder exclusion was to encompass sexual conduct disorders, alcohol dependency, and drug dependency.[158] As such, the PSRB erred in relying on such disorders and dependencies in continuing the defendant's commitment.[159]

4. Tharp v. Psychiatric Security Review Board

In *Tharp v. Psychiatric Security Review Board,* the Oregon Supreme Court held substance dependency is a personality disorder, and as such was not a "mental disease or defect" for purposes of Oregon's GEI statute.[160] The defendant was found guilty except insane for robbery.[161] The basis of the GEI verdict was the defendant's diagnosis of a paranoid thought disorder and schizophrenia.[162] As a result of the GEI verdict, the

[152] *Id.*

[153] *Id.* at 189.

[154] *Id.*

[155] PGE v. Bureau of Labor and Indus., 859 P.2d 1143, 1147 (1993).

[156] *Beiswenger*, 84 P.3d. at 189.

[157] *Id.*

[158] *Id.*

[159] *Id.* at 190.

[160] Tharp v. Psychiatric Sec. Review Bd., 110 P.3d 103, 112 (2005).

[161] *Id.* at 104.

[162] *Id.*

trial court placed the defendant under the jurisdiction of PSRB for at most 20 years.[163] Two years later, the defendant requested that PSRB discharge him.[164] At the hearing, the defendant's psychiatrist and psychologist both opined that the defendant did not suffer from a mental illness, but that rather the defendant had a substance dependency problem.[165] However, the PSRB denied the defendant's request, finding that the defendant "failed to prove by a preponderance of the evidence that he no longer was affected by a mental disease or defect."[166] On appeal, the Oregon Court of Appeals affirmed,[167] and the Oregon Supreme Court accepted review.[168]

The arguments both sides made in *Tharp* before the Oregon Supreme Court were the same arguments both sides made when *Tharp* was before the Oregon Court of Appeals.[169] The defendant argued that he did not have a "mental disease or defect" because he suffers from substance dependency, which under ORS 161.295 is a "personality disorder."[170] The PSRB argued that substance dependency could qualify as a "mental disease or defect" under ORS 161.295.[171] Additionally, the PSRB argued that regardless of what substance dependency qualifies as under ORS 161.295, the defendant still had the burden to prove that he was no longer affected by a mental disease or defect, a burden that the defendant failed to meet at the PSRB hearing.[172]

The court first noted that to determine whether "substance dependency" constitutes a "mental disease or defect" or a "personality disorder," it needed to apply the *PGE* statutory interpretation methodology.[173] In interpreting the term "mental disease or defect," the court noted that to resolve that question as applied to this case, the court needed to answer whether the meaning of "mental disease or defect" is the same in ORS 161.295, ORS 161.319, and ORS 161.325.[174] The court said this question needed to be resolved because the utilization of the phrase "mental disease or defect" occurred both when the defendant was found guilty except insane, and when the defendant was denied a discharge by PSRB.[175]

[163] *Id.*
[164] *Id.*
[165] *Id.* at 104–05.
[166] *Id.* at 105.
[167] *Id.* at 106.
[168] *Id.* at 104.
[169] *Id.* at 106.
[170] *Id.* at 105.
[171] *Id.*
[172] *Id.*
[173] *Id.* at 106.
[174] *Id.* at 107.
[175] *Id.*

The court ultimately found that the term "mental disease or defect" had the same meaning for both the GEI statute and the discharge from PSRB statute.[176] The court mentioned that both statutes were part of the Oregon legislature's 1971 revision of the Criminal Code.[177] Additionally, the court pointed out that there were amendments to the statutes on several occasions post-1971.[178] That said, the court found the following:

> The phrase "mental disease or defect" continues to denote a defense, under some circumstances, in a criminal proceeding, and the absence of a "mental disease or defect" continues to be a means by which a person who has been committed involuntarily to the state hospital may seek discharge. Although many other aspects of those statutes have changed since 1971, the parallel use of the phrase "mental disease or defect" has remained the same.[179]

Next, the court considered the meaning of "mental disease or defect" based on more details regarding the context of ORS 161.295.[180] On appeal, the PSRB argued that the court already interpreted the term "personality disorder" in *Mueller,*[181] having concluded that the basis of the interpretation of "personality disorder" was the definition of "personality disorder" in the DSM-III.[182] However, here, the Oregon Supreme Court shot down this argument. The court noted that *Mueller* only determined that an "organic personality syndrome" was a "mental disease or defect," and in doing so relied on the DSM-III.[183] However, the court concluded that *Mueller* had not answered whether the Oregon legislature intended to include or exclude from the term "personality disorder" in the personality disorder exclusion.[184] The court concluded that the DSM-III did not govern the interpretation of "personality disorder" but rather, the DSM-III was "an important source for interpreting statutory terms related to mental illness . . . ."[185]

The court then turned to the question of whether "substance dependency" is a "mental disease or defect" or a "personality disorder." Even though the DSM-III's interpretation of a personality disorder was not outcome-determinative, the parties nevertheless anchored their arguments off the DSM-III.[186] The defendant argued that the legislature in-

[176] *Id.*
[177] *Id.*
[178] *Id.*
[179] *Id.*
[180] *Id.* at 108.
[181] *Id.*
[182] *Id.*
[183] *Id.*
[184] *Id.*
[185] *Id.* at 109.
[186] *Id.*

tended for "substance dependency" to not be a "mental disease or defect."[187] On the other hand, the PSRB argued that substance dependency is a "mental disease or defect"[188] because substance disorders were not in the personality disorders section of the DSM-III.[189] Rather, the classification of substance disorders was in Axis I, which encompassed clinical disorders.[190] The court, in analyzing the arguments of both sides, determined that based on the text and context of the GEI statute, the interpretations as argued by either side could be plausible.[191] Accordingly, the court determined that it was necessary to look at legislative history to resolve the question presented.[192]

In evaluating the legislative history, the court placed heavy reliance on the same analysis conducted in *Beiswenger*.[193] The court, after considering the legislative history, concluded "that the legislature intended to exclude personality disorders such as drug and alcohol dependency from the terms 'mental disease' and 'mental defect' as it used those terms in ORS 161.295."[194] In conclusion, the Oregon Supreme Court sided with the defendant, finding that the legislature intended for "substance dependency" to be a personality disorder, not a mental disease or defect.[195] In light of the court's ruling, the court remanded the case back to the PSRB for further proceedings.[196]

5. Ashcroft v. Psychiatric Security Review Board

In *Ashcroft v. Psychiatric Security Review Board,* the Oregon Supreme Court held that alcohol dependency constituted a personality disorder, and as such it was not a "mental disease or defect."[197] The defendant was found guilty except insane on the charge of attempted assault in the second degree.[198] As a result of the verdict, the trial court placed the defendant under the custody and jurisdiction of the Psychiatric Security Review Board.[199] Later, the PSRB held a hearing to determine whether the PSRB should conditionally discharge or release the defendant.[200]

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[187] *Id.*
[188] *Id.*
[189] *Id.*
[190] *Id.*
[191] *Id.*
[192] *Id.*
[193] *Id.*
[194] *Id.* at 112.
[195] *Id.*
[196] *Id.*
[197] Ashcroft v. Psychiatric Sec. Review Bd., 111 P.3d 1117, 1117 (2005).
[198] *Id.*
[199] *Id.*
[200] *Id.*

At the hearing, the State argued that the defendant suffered from both antisocial personality disorder and alcohol dependence.[201] As such, the State also argued that alcohol dependence was a "mental disease or defect" under Oregon law.[202] On the other hand, the defendant argued that alcohol dependence was a personality disorder under Oregon law.[203] The PSRB disagreed with the defendant's argument and decided against either conditionally discharging or releasing the defendant.[204] Defendant appealed, and on appeal, the Oregon Court of Appeals reversed the PSRB's decision, finding that alcohol dependency was a personality disorder, not a "mental disease or defect."[205] The PSRB appealed to the Oregon Supreme Court, which allowed the PSRB's petition for review.[206]

The Oregon Supreme Court affirmed the Oregon Court of Appeals, finding that alcohol dependency was a personality disorder.[207] The court supported its ruling with its prior decision in *Tharp v. Psychiatric Security Review Board,* which found that based on legislative history, "[t]he legislature intended to exclude personality disorders such as drug and alcohol dependency from the terms 'mental disease' and 'mental defect' as it used those terms in ORS 161.295."[208]

III. ANALYSIS

A. Examining Oregon's Personality Disorder Exclusion

Oregon's personality disorder exclusion gives rise to several questions: is the exclusion good policy? If not, should the exclusion be kept, removed, or changed?

1. Insanity Defense Reform Post-Hinckley Verdict

It is first helpful to note the backdrop of the time period in which the legislature passed the personality disorder exclusion. In 1981, John Hinckley Jr. attempted to assassinate President Ronald Reagan, believing that doing so would win the heart of actress Jodie Foster.[209] A jury found Hinckley not guilty by reason of insanity, resulting in a firestorm of criticism of the insanity defense by the American people.[210] "In response, Congress and states created stricter rules to govern the insanity defense

[201] *Id.* at 1117–18.
[202] *Id.* at 1118.
[203] *Id.*
[204] *Id.*
[205] *Id.*
[206] *Id.*
[207] *Id.*
[208] *Id.*
[209] Jacewicz, *supra* note 39.
[210] *Id.*

or in some cases abolished the defense altogether."[211] Oregon was one of the states to curtail the insanity defense, instituting the personality disorder exclusion in 1983. Thirty-eight states and the federal government rewrote their insanity defense laws.[212] As of today there are four states that went so far as to eliminate the insanity defense: Idaho, Montana, Utah and Kansas.[213]

The Hinckley verdict was not the only one that fueled backlash against the insanity defense. In Oklahoma, Jerrod Murray committed murder, leaving his victim's body in a ditch after doing so.[214] However, Murray suffered from both antisocial personality disorder and delusions, and was found not guilty by reason of insanity.[215] The Oklahoma legislature modified its insanity defense, excluding individuals with antisocial personality disorder from raising Oklahoma's insanity defense.[216]

Another backlash to the insanity defense occurred in Nebraska, where Erwin Charles Simants murdered six people in 1975.[217] Simants was convicted at his first trial, but an appellate court reversed those convictions, and, as such, he got a second trial.[218] At his second trial, Simants asserted an insanity defense, and the jury found Simants not guilty by reason of insanity.[219] As a result of the Simants verdict, the Nebraska legislalegislature made changes to Nebraska's insanity defense.[220] Before the Nebraska legislature made changes to Nebraska's insanity defense, the prosecution had the burden to prove that a defendant was sane at the time the offense was committed.[221] Additionally, mental health boards had authority to decide when to release an individual who had been found not guilty by reason of insanity.[222] Under the changes to the insanity defense that occurred in light of the Simants verdict, the defendant now must prove that they are not guilty by reason of insanity.[223] Addition-

[211] *Id.* (citation omitted).

[212] Lincoln Caplan, *The Insanity Defense, Post-Hinckley,* N.Y. TIMES (Jan. 17, 2011), http://www.nytimes.com/2011/01/18/opinion/18tue4.html.

[213] Jacewicz, *supra* note 39.

[214] Natalie Jacewicz, *Does A Psychopath Who Kills Get To Use The Insanity Defense?,* NAT'L PUB. RADIO (Aug. 3, 2016), https://www.npr.org/sections/health-shots/2016/08/03/486669552/does-a-psychopath-who-kills-get-to-use-the-insanity-defense.

[215] *Id.*

[216] *Id.*

[217] Margaret Reist, *38 Years Later, Simants Murder Case Still Raises Tough Questions*, LINCOLN J. STAR (Oct. 21, 2013), https://journalstar.com/news/state-and-regional/nebraska/years-later-simants-murder-case-still-raises-tough-questions/article_4ad142f1-ef56-52ea-9d3a-63de73a830ca.html.

[218] *Id.*

[219] *Id.*

[220] *Id.*

[221] *Id.*

[222] *Id.*

[223] *Id.*

ally, judges in Nebraska now have the authority to decide when to release an individual who has been found not guilty by reason of insanity.[224]

2. What Science Says About Personality Disorders and Psychosis

An area pertinent to examining Oregon's personality disorder exclusion is what science says about personality disorders and psychosis. Do individuals with personality disorders and psychosis have similarities in cognitive functioning? Differences? Are differences between individuals with personality disorders and individuals with psychosis significant to the degree that the culpability of a defendant would be dependent on whether the defendant suffered from a personality disorder or psychosis? What role does science play into this debate?

Research seems to indicate that individuals with personality disorders and psychosis have similarities in cognitive functioning. According to George B. Palermo, "neuroimaging of individuals with a diagnosis of antisocial personality has revealed brain scans similar to those of individuals with psychosis."[225] Research also seems to indicate that any differences between individuals with personality disorders and individuals with psychosis are not significant to the degree that the culpability of a defendant would depend on whether the defendant was suffering from a personality disorder or psychosis. According to Robert Kinscherff, "[t]here is . . . no reliable and meaningful *categorical* difference between Axis I diagnoses and Axis II personality disorders for purposes of analyzing the criminal responsibility of a defendant."[226] Namely, "simply assigning a person to a diagnosis on Axis I or Axis II indicates nothing itself about the severity of functional impairment associated with the diagnosis for individual persons . . . ."[227] Additionally, "convergent research in neurocognitive sciences and behavioral genetics has increasingly rendered meaningless any distinction between those mental disorders with a 'biological' basis and those that are 'merely' a 'psychological' disorder."[228] Lastly, "emerging research suggests that the heritability of personality disorders approximates or exceeds the heritability of some Axis I disorders that would be permitted to form the basis of a criminal responsibility defense."[229]

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[224] *Id.*

[225] Ralph Slovenko, *Commentary: Personality Disorders and Criminal Law*, 37 J. AM. ACAD. PSYCHIATRY L. 182, 183 (2009) (citing George B. Palermo, SEVERE PERSONALITY DISORDERED DEFENDANTS AND THE INSANITY PLEA IN THE UNITED STATES (Mar. 2, 2009) (unpublished manuscript)).

[226] Robert Kinscherff, *Proposition: A Personality Disorder May Nullify Responsibility for A Criminal Act*, 38 J. L. MED. & ETHICS 745, 748 (2010). For context, Axis I disorders include schizophrenia, major mood disorders, and anxiety disorders, whereas Axis II disorders include personality disorders. *See id.* at 747.

[227] *Id.* at 748.

[228] *Id.*

[229] *Id.*

In addition, research has suggested that "personality disorders often present with co-occurring mental disorders."[230] Symptoms that are associated with personality disorders tend to be similar if not identical to symptoms associated with other disorders, particularly when they are co-occurring.[231] As a result, it is very difficult to distinguish and differentiate the impact of the symptoms of personality disorders versus the impact of the symptoms of other mental disorders.[232] Based on this, it is "not possible to state as a categorical rule that impairments and experiences arising from personality disorders are always less intense or disabling than those arising from other mental disorders."[233] Kinscherff notes as an example that an individual with schizophrenia (which could form the basis of an insanity defense) could have few if not modest symptoms from their condition, whereas an individual with a personality disorder (which in Oregon cannot solely form the basis of an insanity defense) could have severe symptoms from their condition.[234]

In other words, personality disorders and psychosis are strikingly similar. As the science shows, the brain scans of individuals with personality disorders and individuals with psychosis show similarities in cognitive functioning. Based on the science, the differential treatment that Oregon's insanity defense gives to personality disorders versus psychosis is questionable.

Compelling research shows that individuals diagnosed with personality disorders frequently suffer symptoms that are similar to symptoms suffered by individuals diagnosed with psychosis.[235] Specifically, individuals with personality disorders often suffer "acute episodes of psychotic or psychotic-like disturbances of experience, intense emotional dysregulation (most frequently panic or rage), distortions of perceived threat (yielding sense of immediate serious threat or paranoia), and intense experiences of despair and desperation contributing to poorly considered actions."[236]

The research thus shows that there is no clear differentiation between personality disorders and psychosis. The symptomology of both personality disorders and psychosis are similar. If individuals suffering from personality disorders have similar symptoms to individuals suffering from psychosis, then it makes no sense to treat them differently under the law for purposes of Oregon's insanity defense.

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[230] *Id.* at 750.

[231] *Id.*

[232] *Id.*

[233] *Id.*

[234] *Id.*

[235] *Id.*

[236] *Id.*

3. Follow-Up Study to 1983 Legislation

Another important document that sheds light on this debate is a follow-up study to the 1983 legislation, which looked at a study sample of insanity acquittees given a primary diagnosis of a personality disorder upon admission to the Oregon State Hospital. "[Fifty] percent . . . of 34 personality disordered patients were diagnosed with psychotic disorders, affective disorders, retardation, and organic brain disorders."[237] The study showed that even after the 1983 legislation, "courts were still acquitting personality disordered individuals as insane."[238] Additionally, while the percentage of acquittals due to insanity decreased after the enactment of the 1983 legislation into law, the "decrease was not statistically significant."[239] Based on the finding that courts were still acquitting individuals with personality disorders, the study concluded that either:

> (1) the criminal court heard evidence that the defendant suffered from a mental illness other than, or in addition to, a personality disorder, or (2) the criminal court heard evidence that the person had only a personality disorder, and disregarded the mental health input or acted in apparent conflict with the mandate of the legislature.[240]

The study noted that after the personality disorder exclusion was enacted, "five subjects identified to the trial court as personality disordered successfully raised insanity defenses."[241] Two of the five had no other diagnoses and so technically those two should have been barred from raising the GEI defense.[242] The other three, on the other hand, had other diagnoses, such as pedophilia, PTSD, and alcoholism.[243]

What the study shows is that even though Oregon's insanity defense supposedly has a personality disorder exclusion, the exclusion's viability is questionable. The Oregon legislature wanted a decrease in successful uses of the insanity defense by instituting the personality disorder exclusion, yet the decrease that occurred after enactment of the exclusion was so statistically insignificant that it was arguably not a decrease at all.

4. How Other States Have Interpreted Their Insanity Defense Statutes

In evaluating the personality disorder exclusion, it is also helpful to look at how other states have constructed their insanity defenses. One state that stands out is New Jersey, where the state's Supreme Court con-

[237] Scott M. Reichlin et al., *Excluding Personality Disorders from The Insanity Defense–A Follow-Up Study*, 21 BULL. AM. ACAD. PSYCHIATRY L. 91, 91 (1993).

[238] *Id.* at 92.

[239] *Id.*

[240] *Id.*

[241] *Id.* at 95.

[242] *Id.*

[243] *Id.*

strued the defense of diminished capacity broadly.[244] While the Oregon statute at issue here does not concern diminished capacity, mental diseases or defects play a role in both defenses. Under New Jersey law:

> Evidence that the defendant suffered from a mental disease or defect is admissible whenever it is relevant to prove that the defendant did not have the state of mind which is an element of the offense. In the absence of such evidence, it may be assumed that the defendant had no mental disease or defect which would negate a state of mind which is an element of the offense. Mental disease or defect is an affirmative defense which must be proved by a preponderance of the evidence.[245]

At issue in *State v. Galloway* was whether the term "mental disease or defect" under New Jersey's diminished capacity statute precluded evidence that the defendant was suffering from a borderline personality disorder.[246] The defendant was charged with murder and endangering the welfare of a child.[247] He was accused of shaking his girlfriend's son so hard that the child died.[248] At his trial, the defendant admitted that he shook his girlfriend's son to death, but "sought through expert witnesses to establish that his mental condition at the time warranted the defense of diminished capacity."[249] Namely, the defendant contended that he had borderline personality disorder that resulted in him having diminished capacity when he shook his girlfriend's son to death.[250] The defendant was convicted and sentenced to thirty years in prison.[251] A New Jersey appellate court affirmed the defendant's convictions.[252] The court held "that the trial court had erroneously instructed the jury concerning the burden of proof on the diminished-capacity defense."[253] However, the court "found that error harmless because the evidence failed to establish that defense."[254] The defendant appealed to the New Jersey Supreme Court, which granted the defendant's petition for certification.[255]

The court first addressed the appellate court's "emphasis on the fact that [the] defendant's mental condition had been characterized by the expert testimony as a 'personality disorder' and could not, therefore, be

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[244] State v. Galloway, 628 A.2d 735, 740 (1993).

[245] *Id.* at 739 (quoting N.J.S.A. 2C:4-2).

[246] *Id.*

[247] *Id.*

[248] *Id.* at 738.

[249] *Id.* at 739.

[250] *Id.* at 743.

[251] *Id.* at 739.

[252] *Id.*

[253] *Id.* at 738.

[254] *Id.*

[255] *Id.* at 739.

considered a 'mental disease or defect.'"[256] Additionally, the court addressed the appellate court's finding that the evidence presented at trial regarding a "mental disease or defect" only related to a loss of impulse control, but did not relate to a "mental disease or defect" recognized under New Jersey law "as diminishing mental capacity by affecting the cognitive faculties."[257] The New Jersey Supreme Court disagreed with the appellate court on both points, finding that the term "mental disease or defect" under New Jersey law did not preclude the defendant from introducing evidence of diminished capacity due to suffering from borderline personality disorder.[258] In so doing, the court noted "that the statutory defense of diminished capacity contemplates a broad range of mental conditions that can be a basis for the defense . . . ."[259]

The court, in deciding *Galloway,* discussed the understanding of diminished capacity based on the history of the New Jersey Code of Criminal Justice, which codifies New Jersey's diminished capacity defense.[260] New Jersey's diminished capacity defense under the New Jersey Code of Criminal Justice is a carbon copy of the Model Penal Code's version of the diminished capacity defense.[261] In analyzing New Jersey's diminished capacity defense, the court, citing its previous decision in *State v. Breakiron,* noted that New Jersey's diminished capacity defense does not define "mental disease or defect" because the intent of the defense as written is for the "finder of fact" to determine what constitutes a "mental disease or defect."[262] Accordingly, the court found that based on this understanding of "mental disease or defect," the New Jersey legislature "did not intend to preclude evidence of a mental condition" in the form of a "disorder," such as borderline personality disorder.[263]

The court, in the end, concluded that "[the] defendant did provide expert testimony sufficient to warrant a jury instruction on diminished capacity."[264] Namely, expert testimony opined that the defendant was under quite a bit of stress at the time he shook his girlfriend's son to death, and that such stress, which was aggravated by the defendant's borderline personality disorder, could have affected the defendant's cognitive functioning.[265] In light of this expert testimony, the court found that the trial

[256] *Id.* at 740.
[257] *Id.*
[258] *Id.*
[259] *Id.*
[260] *Id.*
[261] *Id.*
[262] *Id.* at 739 (citing State v. Breakiron, 532 A.2d 199 (1987)).
[263] *Id.* at 741.
[264] *Id.* at 743.
[265] *Id.*

court erred in withdrawing the diminished capacity defense from the jury, and reversed the defendant's murder conviction.[266]

The *Galloway* interpretation, although from New Jersey, puts the validity of Oregon's personality disorder exclusion in doubt. Based on the Court's findings in *Galloway*, the interpretation appears to be that a personality disorder, specifically borderline personality disorder, is a mental disease or defect that could serve as a basis for a successful insanity defense. If a personality disorder can serve as the basis for an affirmative defense, such as diminished capacity, in one state, another state's barring of using a personality disorder as the basis for an insanity defense comes into question.

The *Galloway* interpretation brings forth a compelling and credible argument that since a personality disorder can serve as a "mental disease or defect" for purposes of asserting a diminished capacity defense, a personality disorder can legitimately serve as a "mental disease or defect" for purposes of asserting an insanity defense. The argument the *Galloway* interpretation brings forth results in the conclusion that the *Galloway* approach is better than the Oregon approach because it enables the fact finder to determine whether a defendant's condition constitutes a "mental disease or defect" without any restrictions on what the factfinder can consider as a "mental disease or defect," such as a personality disorder.

The *Galloway* approach, unlike the Oregon approach, leaves it in the hands of the factfinder to decide, based on the facts presented in a criminal case, whether a defendant's mental condition constitutes a "mental disease or defect" for purposes of determining whether a defendant has successfully asserted an affirmative defense such as diminished capacity. The Oregon approach, on the other hand, is not better than the *Galloway* approach because it takes away from the factfinder the ability to consider, based on the facts presented, whether a defendant suffers from a "mental disease or defect," and essentially restricts when a factfinder can conclude that a defendant is guilty except insane. Namely, the Oregon approach restricts factfinders from determining if a defendant is guilty except insane in any case where the defendant's "mental disease or defect" is solely a personality disorder.

B. Potential Actions the Oregon Legislature Could Take

As the analysis above clearly shows, Oregon's insanity defense, in particular the personality disorder exclusion, has its problems. Science seems to indicate that personality disorders and psychosis are similar. In the aftermath of the 1983 legislation, the decrease in successful assertions of the insanity defense, which is what the Oregon legislature desired, was statistically insignificant. And there are states, such as New Jersey, that al-

[266] *Id.* at 744.

low disorders such as borderline personality disorder to serve as a basis for an affirmative defense, such as diminished capacity. The question remains: how should the Oregon legislature solve the problems present within Oregon's insanity defense, particularly regarding the personality disorder exclusion? The Oregon legislature has three possible options.

1. Abolishing the Insanity Defense as a Whole

The first option the Oregon legislature could take is abolishing the insanity defense as a whole. This would be the most radical option of the three. Four states have taken the plunge on this option by abolishing their insanity defenses. But this is not the way to go by any means. The implementation and consequences of the insanity defense abolition in Montana, one of the four insanity defense abolition states, supports the conclusion that Oregon should not abolish its insanity defense.

Montana's legislature abolished the insanity defense in 1979 due to "increasing frustration with perceived fraudulent assertions of the insanity defense and the growing role of psychiatrists."[267] However, even with the abolition, Montana courts can still evaluate a defendant's mental state for purposes of determining competency to stand trial, a defendant can use evidence of insanity to present reasonable doubt to a crime's mental state element, and a defendant can introduce evidence at their sentencing hearing regarding their mental state.[268] That said, a defendant in Montana cannot assert the insanity defense as an affirmative defense at trial. Cases post-insanity defense abolition in Montana, including *State v. Cowan*, show abolishing the insanity defense creates new problems.[269]

In *State v. Cowan*, the victim entered into her cabin, finding that someone had eaten food and watched television there.[270] During this time, the victim called the authorities.[271] While she was on the line with the authorities, the defendant tried to get in, yelling a multitude of profanities and claiming that the cabin was his home.[272] Among the multiple profanities issued, he referred to the victim as a "society bitch" and a "mechanic robot bitch."[273] He eventually barged his way in and attacked the victim repeatedly.[274] The State of Montana charged the defendant with attempted deliberate homicide and aggravated burglary.[275] There was just one problem though: every medical professional who examined

[267] Stephanie C. Stimpson, *State v. Cowan: The Consequences of Montana's Abolition of the Insanity Defense*, 55 MONT. L. REV. 503, 510 (1994).

[268] *Id.*

[269] 861 P.2d 884, 885 (1993).

[270] Stimpson, *supra* note 267, at 513.

[271] *Id.*

[272] *Id.*

[273] *Id.*

[274] *Id.* at 513–14.

[275] *Id.* at 514.

the defendant found that the defendant was a paranoid schizophrenic.[276] Over the years, the defendant had numerous hospitalizations for mental health problems including schizophrenia and depression.[277] Throughout this time, the defendant had hallucinations, delusions, and paranoid thoughts.[278] Among such thoughts included believing that the government and religious groups programmed some people.[279] In light of the defendant's extensive mental health problems and past, a defense psychiatrist opined the defendant was suffering from psychosis at the time of the crime and that he "could not understand the reality or the criminality of his conduct."[280]

However, because of Montana's insanity defense prohibition, the defendant could not assert an affirmative defense of insanity. Despite the defendant's long history of mental health problems, the trial court found the defendant guilty and sentenced the defendant to 60 years in state prison.[281] The defendant appealed his conviction to the Montana Supreme Court on the grounds that abolition of the insanity defense violated the Due Process Clause, and that the imposed sentence violated his Eighth and Fourteenth Amendment rights.[282]

The Montana Supreme Court rejected the defendant's Due Process challenge to Montana's insanity defense abolition, concluding "that the Due Process Clause of the United States Constitution does not require the use of any particular insanity test or allocation of burden of proof."[283] After the court rejected the defendant's constitutional challenge to the Montana insanity defense ban, the court went ahead and considered the defendant's constitutional challenge to his sentence.

In challenging his sentence, the defendant argued that "considering a defendant's insanity only for the purpose of reducing the degree of the crime or determining the punishment for the crime qualifies as cruel and unusual punishment and a violation of due process."[284] Specifically, the defendant argued that it was "inhumane to consider the insanity of a person accused of a crime only to reduce the degree of the crime or the punishment therefor."[285] Additionally, the defendant argued that "sentencing an insane person like himself to the law-of-the-jungle conditions in prison is essentially a death sentence."[286] However, the court, rejected

[276] *Id.*
[277] *Id.*
[278] *Id.*
[279] *Id.*
[280] *Id.*
[281] *Id.* at 515.
[282] *Id.* at 517–18.
[283] *Id.* at 517.
[284] *Id.* at 518.
[285] State v. Cowan, 861 P.2d 884, 885 (1993).
[286] *Id.* at 888.

these arguments, and declined to find that a defendant had a fundamental right under the Constitution to assert the insanity defense.[287] Rather, the court found "that no specific insanity defense is required by the Due Process Clause."[288] Specifically, the court found "that Montana's criminal procedures, which consider the defendant's mental defect at three stages of a trial, provide adequate due process."[289] The U.S. Supreme Court denied the defendant's cert petition.[290]

Although the Montana Supreme Court upheld Montana's insanity defense abolition, the fact that the abolition was held as a matter of law does not by any means result in the conclusion that the abolition is the way to go in fixing the problems with Oregon's insanity defense, namely the personality disorder exclusion. In fact, the Oregon legislature should not go the route that some states have gone in abolishing their insanity defenses. Abolishing the insanity defense, while it may be constitutional, is a terrible public policy. An insanity defense abolition in Oregon would be just like Montana's in that it would "offend traditional notions of fairness and mercy for the mentally ill."[291] Namely, it would do so because it would put individuals who are severely mentally ill in prison rather than in a mental hospital. This would further increase the rate of violence mentally ill inmates have to endure compared to non-mentally ill inmates. Indeed, studies and reports have shown that mentally ill inmates have a higher likelihood of being victims of violence in prison compared to non-mentally ill inmates.[292]

In sum, the following quote from Stephanie Stimpson's article sums up the problems with insanity defense abolition very well:

> A criminal system absent the insanity defense contravenes the notion that a criminal conviction represents society's judgment that a person has chosen to violate social, moral, and legal principles. People unable to understand their own actions or conform their conduct to the law suffer from mental illnesses. They need treatment from trained professionals, not the disgrace, shame, and punishment of criminal convictions. Convicting those defendants for crimes that lacked criminal intent advances no goal of deterrence. Instead, the conviction may result in the imprisonment of a severely mentally ill defendant.[293]

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[287] Stimpson, *supra* note 267, at 518.

[288] *Id.*

[289] *Id.*

[290] *Id.* at 520.

[291] *Id.*

[292] *See* E. Lea Johnston, *Vulnerability and Just Desert: A Theory of Sentencing and Mental Illness,* 103 J. CRIM. L. & CRIMINOLOGY 147, 158–169 (2013).

[293] Stimpson, *supra* note 267, at 523.

Oregon should not adopt the Montana approach of abolishing the insanity defense. The Montana approach is problematic in that it bars courts from considering the insanity defense in *any* case. The Montana approach fails to consider that there are certain cases in which the facts that encompass these cases would more likely than not result in a successful assertion of the insanity defense. The Montana approach fails to consider that there are individuals that the insanity defense would be appropriate for. The flaws and problems that accompany Montana's approach are avoided by New Jersey's *Galloway* approach. Namely, if the *Galloway* approach was utilized in cases where the insanity defense was at issue, would be more appropriate than the Montana approach because it would allow factfinders, without any statutory restrictions, to consider based on the facts of a particular case whether an individual is guilty except insane, or in some states not guilty by reason of insanity.

Abolishing the insanity defense in Oregon would not fix the problem presented in this Note. As shown above, other states that have abolished the insanity defense have in the years after such abolition put severely mentally ill individuals in state prison, rather than a mental hospital where they need to be. Rather than fixing the problem discussed in this Note, abolishing the insanity defense in Oregon would make the problem worse, and would result in mentally ill offenders getting an even shorter end of the stick.

Granted, there are concerns that defendants will fake mental illness in an attempt to successfully assert the insanity defense, and therefore escape punishment. However, a concern over malingering does not serve as an adequate basis for abolishing the insanity defense because it would prevent individuals who would be otherwise guilty except insane under Oregon law from successfully asserting the GEI defense. As such, abolishing the insanity defense would be too extreme and would place too much weight on concerns that defendants will malinger. Most importantly, putting severely mentally ill offenders in state prison rather than a state hospital does not solve anything. Rather, it creates more problems. With that said, what are our other options here?

2. Maintaining the Status Quo

Another potential option is maintaining Oregon's insanity defense as it is, namely keeping the personality disorder exclusion on the books. In other words, maintaining the status quo. However, maintaining the status quo is not the way to go either. The personality disorder exclusion fails to consider what science says about personality disorders. Brain scans of individuals with personality disorders versus brain scans of individuals with psychosis seem to indicate that there are similarities between individuals with personality disorders and individuals with psychosis.[294] Additionally,

[294] Slovenko, *supra* note 225, at 183.

symptoms of personality disorders and psychosis are similar.[295] Lastly, people with personality disorders are at a higher risk of suicide, being victims of crime, suffering from substance abuse, and suffering from other adverse experiences than people with psychosis.[296] In light of all the flaws the personality disorder exclusion presents, maintaining the status quo is not the appropriate course of action. So, what is the appropriate course of action?

3. Abolishing the Personality Disorder Exclusion?

Is abolishing the personality disorder exclusion the way to go? As stated above, abolishing the insanity defense period is not the prudent action to take here. Additionally, maintaining the status quo of keeping the personality disorder exclusion is also not the way to go. This leaves abolition of the personality disorder exclusion a potential viable option. But should the Oregon legislature go this route?

Science does not support excluding personality disorders from the insanity defense. Additionally, the insignificant decrease of successful assertions of Oregon's insanity defense post-personality disorder exclusion undermines the usefulness and effectiveness of the personality disorder exclusion. But the key argument and reason in support of abolishing the personality disorder exclusion is relatively simple: the personality disorder exclusion is arbitrary.

A law review article written by Emily Stork hypothesized "that defendants with Axis II personality disorders should not be categorically denied a finding of incompetency because such a denial is arbitrary."[297] Stork gave six reasons why "Axis II personality disorders should not be categorically excluded from counting as mental diseases or defects [due to] the categorical exclusion [being] arbitrary. . ."[298] While those reasons pertain to why a categorical denial of incompetency because of a personality disorder is arbitrary, such reasons, as explained below, also apply in support of the conclusion that Oregon's personality disorder exclusion under its insanity defense is arbitrary.

The first reason Stork gave in support of her hypothesis regarding the categorical exclusion of personality disorders from a finding of incompetency was that "diagnostic distinctions like Axis I and Axis II are not discrete, naturally-occurring phenomena."[299] Specifically, "Axis I and Axis II are not natural kinds because it means that Axis I was not delineated from Axis II because there is a certain, bright-line distinction be-

[295] Kinscherff, *supra* note 226, at 750.

[296] *Id.*

[297] Emily Stork, *A Competent Competency Standard: Should It Require A Mental Disease Or Defect?,* 44 COLUM. HUM. RTS. L. REV. 927, 931 (2013).

[298] *Id.* at 932.

[299] *Id.* at 945.

tween them."[300] By "natural kinds," Stork was referring to "something that is internally consistent from one instance to the next, like elements or species."[301] This reason applies to and supports the conclusion that Oregon's personality disorder exclusion is arbitrary because the DSM categories, including the category that consists of personality disorders, are unable to be placed into "classical categories" as the DSM categories do not have "necessary and sufficient properties that definitively delineate their members."[302]

The second reason Stork gave in support of her hypothesis regarding the categorical exclusion of personality disorders from a finding of incompetency was that "patients are often diagnosed with both Axis I and Axis II personality disorders, which is referred to as high comorbidity and suggests overlap."[303] This reason applies to and supports the conclusion that Oregon's personality disorder exclusion is arbitrary because the exclusion fails to consider and take into account the fact that the high rates of comorbidity between Axis I disorders and Axis II personality disorders suggest "that the Axes may not be distinct entities."[304]

The third reason Stork gave in support of her hypothesis regarding the categorical exclusion of personality disorders from a finding of incompetency was that "clinicians cannot reliably distinguish Axis II personality disorders from Axis I disorders, which do count as mental diseases or defects."[305] This reason applies to and supports the conclusion that Oregon's personality disorder exclusion is arbitrary because the exclusion fails to consider and take into account the fact that exclusions of particular disorders would force clinicians to distinguish a defendant's Axis II personality disorder from a defendant's Axis I disorder, both of which are not reliably distinguishable from one another.[306]

The fourth reason Stork gave in support of her hypothesis regarding the categorical exclusion of personality disorders from a finding of incompetency was that research increasingly shows "that Axis II personality disorders, like Axis I disorders, have biological bases."[307] Namely, "personality disorders are more genetically heritable than some Axis I disorders."[308] Additionally, "personality disorders have neural substrates and identifiable, predictable anomalies in brain function."[309] Lastly, "[p]eople with personality disorders tend to have serotonin dysregulation in their

[300] *Id.* at 945–46.
[301] *Id.* at 945.
[302] *Id.* at 946–47.
[303] *Id.* at 945.
[304] *Id.* at 947.
[305] *Id.* at 945.
[306] *Id.* at 947–48.
[307] *Id.* at 945.
[308] *Id.* at 951.
[309] *Id.* at 952.

brains."[310] This reason applies to and supports the conclusion that Oregon's personality disorder exclusion is arbitrary because the exclusion fails to consider and take into account the fact that personality disorders are not exclusively or primarily psychological in nature. Rather, personality disorders, while psychologically based in part, have strong biological bases as well.[311]

The fifth reason Stork gave in support of her hypothesis regarding the categorical exclusion of personality disorders from a finding of incompetency was that "[t]he functional impairments of Axis II personality disorders can be as severe as the functional impairments associated with an Axis I disorder."[312] For example, "some chronically psychotic people are capable of functioning in the community, whereas some people with Axis II personality disorders are indefinitely hospital-bound."[313] Additionally, individuals with Axis II personality disorders, just like individuals with Axis I disorders, "suffer from higher rates of suicide and substance abuse."[314] The fifth reason that Stork gives to support her hypothesis applies to and supports the conclusion that Oregon's personality disorder exclusion is arbitrary because the exclusion fails to take into account the fact that the effects of Axis II personality disorders can be just as bad, if not worse, than Axis I disorders.[315]

Lastly, the sixth reason Stork gave in support of her hypothesis regarding the categorical exclusion of personality disorders from a finding of incompetency was that "analogous case law concludes that the focus should be on impairment rather than diagnosis."[316] In particular, the Fifth Circuit in *United States v. Long* found that an Axis II personality disorder could sometimes be severe enough to support an insanity defense.[317] As such, the Court found that "an insanity defense based on an Axis II diagnosis of schizotypal personality disorder could go to the jury."[318] The sixth reason that Stork gave applies to and supports the conclusion that Oregon's personality disorder exclusion is arbitrary because, contrary to the personality disorder exclusion, some manifestations of Axis II personality disorders are severe enough to the degree that some defendants diagnosed with Axis II personality disorders could very well rise to the level of being "insane," such that they are not responsible for

[310] *Id.*
[311] *Id.* at 951–53.
[312] *Id.* at 945.
[313] *Id.* at 954.
[314] *Id.* at 954–55.
[315] *Id.* at 954–56.
[316] *Id.* at 945.
[317] *Id.* at 956.
[318] *Id.*

actions that would otherwise result in a criminal conviction and possibly imprisonment.[319]

Oregon's personality disorder exclusion for guilty except insane verdicts is arbitrary in the same way that a personality disorder exclusion would be arbitrary for purposes of determining competency. For this reason, along with the fact that science does not support the personality disorder exclusion, the Oregon legislature should abolish the personality disorder exclusion.

IV. PROPOSED SOLUTION FOR THE OREGON LEGISLATURE

What happened with Tony Montwheeler and the victims of his actions is a tragedy. The Montwheeler debacle, however, put Oregon's insanity defense, and therefore the personality disorder exclusion, under a microscope. It would be easy to take what Tony Montwheeler did and use it as a justification to make the insanity defense stricter. After all, that is what happened in the aftermath of John Hinckley Jr.'s commitment to a hospital rather that incarceration for trying to kill the President. States and the federal government were outraged by the Hinckley verdict and used it as justification to make their respective insanity defenses harder for defendants to successfully assert. But the Oregon legislature should not take this route. There will always be a risk that some individuals who are asserting the insanity defense are malingering. However, such a risk does not justify making the insanity defense stricter for everyone because such restrictions would also be placed on individuals who would otherwise qualify as guilty except insane.

It is clear that Oregon's personality disorder exclusion is not serving its purpose and is no longer good policy for the State to abide by. The science does not support such an exclusion. The data post-passage of the exclusion indicates that the exclusion's purpose of curtailing the successful assertion of the insanity defense did not go as planned. And the personality disorder exclusion is arbitrary.

There are several ways the Oregon legislature could tackle this problem. However, abolishing the insanity defense will not solve anything. And maintaining the status quo will keep the problems with the personality disorder exclusion intact. Therefore, this Note recommends that the Oregon legislature abolishes the personality disorder exclusion and in doing so, removes it from Oregon's insanity defense.

[319] *Id.* at 956–57.