THE INSANITY DEFENSE: THUMBS DOWN TO WEXLER'S "OFFENSE-VICTIM" LIMITATION

Donald J. Hall*

In a recent article by Professor David B. Wexler,[1] he proposed that the insanity defense be retained when, and only when, its allowance is not likely to be viewed as contrary to "community tolerance and the community sense of justice." Upon that premise he then argues that the defense should be unavailable as to serious specified crimes when victims of such offenses are not related to the defendant; where the same crime [e.g., homicide] is perpetrated upon a family member, however, the accused should be allowed to claim the defense of insanity. This system, according to Professor Wexler, would permit the not guilty by reason of insanity verdict only in cases in which that verdict would not engender societal unrest. In prosecutions that arguably outrage the citizenry, however, defendants would be denied the option of asserting a lack of criminal responsibility based upon the plea of insanity. The purpose of this essay is to urge the rejection of such a proposition.

Any proposal which may literally spell the difference between life and death[2] should be rational, articulated with specificity, based upon reliable empirical data, and constitutionally defensible. Against that standard, the Wexler proposal invites multiple challenges.

First, Professor Wexler builds upon an assumption that verdicts of not guilty by reason of insanity in certain cases fall outside a community's "sense of justice" or run counter to that community's "tolerance level." How does one measure such elusive notions? Are random opinion polls appropriate measuring sticks? Is a ledger sheet pro and con assessment of "letters to the editor" a sound indicator? Would it matter that members of certain socio-economic and/or professional groups were more or less outraged with respect to particular verdicts? Must legislators be the ones demanding changes

* Professor of Law, Vanderbilt University School of Law. B.S., 1965, Florida State University; J.D. 1968, University of Florida.

1. Wexler, *An Offense-Victim Approach to Insanity Defense Reform*, 26 ARIZ. L. REV. 17 (1984).

2. *See* Sherrill, *In Florida, Insanity is No Defense*, THE NATION, Nov. 24, 1984, at 537, discussing cases in which capital punishment was imposed upon persons whose mental state at the time of the underlying crimes was arguably impaired.

in the criminal law? Must a pattern of intolerance to certain kinds of verdicts or rules of law be established, or would vociferous outpourings of "verdict intolerance" as to isolated not guilty verdicts suffice? Given the intuitive assumption that lay citizens frequently are upset when persons accused of any crime are found not guilty, must Professor Wexler's "community intolerance" be demonstrably above and beyond that "base level" of intolerance?

As these questions suggest, I doubt that the concept of community justice or tolerance is sufficiently free of ambiguity to permit its utilization as a means of barring use of the insanity defense. Reactions to the Hinckley verdict—while strong in many quarters—may show citizen reaction to a single case; such an occurrence hardly provides proof of the community's criticism of the legal doctrine upon which that verdict is based. Isolated examples of community reaction should not suffice as acceptable bases for significant modifications of well-established legal concepts.

Second, even assuming that community intolerance can be defined and measured in acceptable ways, why should that kind of intolerance matter? Professor Wexler's answer rests upon the statement by Professor Meehl that "when the insanity defense is disharmonious with this sense of justice, it is bad for the criminal justice system."[3] Why does that follow? Is the system in need of repair simply because people disagree with certain decisions produced by that system? What became of the notion that jurors transfer the "community sense of justice" into the system?[4] Indeed, studies reveal that jurors are, for the most part, unwilling to find a defendant not guilty by reason of insanity unless the evidence in support of that defense is clear and overwhelming.[5] And even if there is some sense of community uneasiness over the insanity defense, why should that prompt a call for responsive changes? Should legal changes occur when the outcry is more emotional than informed? Indeed, even Professor Meehl, cited approvingly by Professor Wexler, advocates on grounds of fairness and social efficiency retention of the insanity defense. As for disharmony between the defense and the community sense of justice, which he calls exaggerated, he suggests that the blame rests elsewhere: ". . . a few atypical cases filtered through the media's muddy lenses can arouse widespread fear and anger in the public mind."[6]

Third, even if community intolerance is "bad for the criminal justice system," why should that analysis be limited to the insanity verdict? It is true, of course, that the Hinckley verdict has prompted some in our society

3. Meehl, *The Insanity Defense*, MINN. PSYCHOLOGIST, Summer 1983, at 11.

4. *See, e.g.*, Meehl's statement that ". . . there is ample evidence that juries will [not] consistently do things that violate the community's sense of Justice." *Id.* at 11.

5. "[T]he consensus of the experts . . . is that the insanity defense trial is an extremely rare event and a successful insanity defense is even more rare." MYTHS AND REALITIES: A REPORT OF THE NATIONAL COMMISSION ON THE INSANITY DEFENSE 15 (1983). *See also* State v. Clayton, 656 S.W.2d 344 (Tenn. 1983), in which a jury returned a verdict of guilty, notwithstanding testimony by several expert witnesses in support of the insanity plea. Based, in part, upon the state's failure to offer witnesses expressing a contrary opinion, the Tennessee Supreme Court reversed because no rational trier of fact could have found proof of guilt beyond a reasonable doubt.

6. Meehl, *supra* note 3, at 17.

to demand a change in the insanity law.[7] Demands for change have also surfaced when persons thought to be guilty have been excused because of the entrapment defense.[8] Similarly, societal protestations occur when an accused is not brought to trial because his confession arguably has been obtained in violation of *Miranda v. Arizona*.[9] The exclusionary rule, by which unlawfully seized evidence is disallowed as admissible evidence, sometimes results in the release of persons who might otherwise be adjudged guilty of crimes;[10] when this occurs, cries of "foul" can be heard.[11] While this is not an exhaustive list of "community intolerance" rules of law, the examples serve to illustrate the arbitrariness with which the insanity defense has been singled out for such an analysis. Were Professor Wexler's proposal accepted, honest application of the principle would lead to similar limitations (such as withdrawal of the claim or defense) with respect to entrapment, confessions, exclusionary rule and other matters.

Assuming that it is legitimate, though, to single out only the insanity defense for special treatment, one must next carefully examine Wexler's proposal to allow the assertion of the defense in some cases, while denying its availability in others. His system, as applied to homicide cases, explicitly accepts the possibility of acquittals when the victim is a family member; those who kill non-family victims cannot even argue the insanity defense. Let us examine this principle by way of two cases:

Case No. 1. Perry Clayton, with a history of mental problems, observed a 12 year-old boy walking by an apartment complex. Without provocation, he brutally and fatally assaulted the boy. The victim was stabbed 11 times; at one point, Clayton hesitated during the attack to put the knife on the ground and straighten out its blade. These acts were committed in broad daylight, in the presence of numerous witnesses. When shouted at, Clayton fled a short distance until he suddenly stopped and surrendered to pursuing adults. He dropped the knife and stood with his foot over it. He told his pursuers that he was "sick." He obeyed their instructions and sat quietly until taken into custody by police. At his trial for first degree murder, he has offered to prove through appropriate expert testimony that he was unable to appreciate the nature and consequences of his behavior by reason of a well-recognized mental illness.[12]

Case No. 2. Ellen Therrien, a person with a history of mental problems,

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7. Hermann, *Assault on the Insanity Defense: Limitations on the Effectiveness and Effect of the Defense of Insanity*, 14 RUTGERS L.J. 241 (1983).

8. The John Delorean verdict of not guilty has been viewed by some citizens as another example of a "guilty person going free."

9. 384 U.S. 436 (1966).

10. Davies, *A Hard Look at What We Know (And Still Need to Learn) About the "Costs" of the Exclusionary Rule: The NIJ Study and Other Studies of "Lost" Arrests*, 1983 AM. B. FOUND. RESEARCH J. 611; NATIONAL INSTITUTE OF JUSTICE, CRIMINAL JUSTICE RESEARCH REPORT — THE EFFECTS OF THE EXCLUSIONARY RULE: A STUDY IN CALIFORNIA (1982).

11. In United States v. Leon, 104 S. Ct. 3405 (1984), it was observed that application of the exclusionary rule may result in the release of guilty defendants; this, in turn, may generate disrespect for the law and the administration of justice.

12. These are the essential facts presented in *State v. Clayton*, 656 S.W.2d at 345, wherein the Tennessee Supreme Court determined, contrary to the jury verdict, that the accused had established the defense of insanity. *Id.* at 353.

killed her 20-month-old son by placing his body in her kitchen oven. She was described by her husband as a loving and caring mother who had never demonstrated physical or emotional abuse toward her son. At her trial for first degree murder, she has offered to demonstrate through expert testimony that she was unable to appreciate the nature and consequences of her behavior because of a well-recognized mental illness.[13]

Wexler's proposal, as applied to these cases, would allow Ms. Therrien to assert that she should not be found guilty of murder by reason of insanity. Mr. Clayton, on the other hand, would not be permitted the opportunity to present such a plea. If these two cases were presented to the "citizen on the street," would the sense of outrage and repulsion be greater as to Clayton or Therrien? Clearly, two innocent persons have lost their lives through no fault of their own. Is Professor Wexler sincere in maintaining that Ms. Therrien's verdict of not guilty by reason of insanity is more tolerable than a like verdict for Mr. Clayton? To modify the cases somewhat, should the result be any different if Mr. Clayton happened to have selected as his victim his young son? Similarly, let us assume that Ms. Therrien was sitting for both her infant son and a neighbor's young child. If she were to place both children in separate ovens, should she be allowed the right to assert insanity as to one homicide count but not as to the other?[14]

Next, the question begging for a convincing answer is what principle of criminal liability gives a defendant the option of pleading not guilty by reason of insanity based upon either the seriousness of his offense or the identity of his victim? I submit there is none. The insanity defense should be available based *not* upon what acts are committed by the individual but, rather, the mental state of that individual at the time those acts occur. Thus, similarly situated defendants—from the perspective of each person's mental state—should be treated the same. If examining psychiatrists were to conclude that Mr. Clayton and Ms. Therrien had identical mental illnesses rendering both persons unable to appreciate their actions, then both parties should receive identical verdicts. The Wexler proposal, however, endorses contrary verdicts where persons' actions are equally irrational and supporting expert testimony regarding persons' mental health is the same. The only justification offered by Professor Wexler is that a not guilty by reason of insanity verdict in one case may be more at odds with the community sense of justice than an identical verdict in the other case.[15] This merely states a

13. These facts are based upon an actual case in which a Montgomery County, Tennessee jury returned a verdict of guilty. The trial judge overturned the verdict, however, based upon his determination that Therrien had established the insanity defense. Interestingly, in the context of Wexler's theme, a Tennessee legislator was quoted as having said, ". . . this is a good example that those who commit horrible crimes should not be able to hide behind the insanity laws." The Tennessean, Dec. 16, 1984, at 1, col. 2. This calls into question Wexler's suggestion that if the secondary victim — in this case, her husband — does not object to a verdict of not guilty by reason of insanity, then "the view of the community . . . should be in accord." Wexler, *supra* note 1, at 24.

14. Wexler acknowledges this possibility and suggests that careful jury instructions or separate trials may be necessary. Wexler, *supra* note 1, at 24 n. 51. While this may be procedurally workable, he fails to discuss whether or how the community sense of justice would be offended by such a schizophrenic system.

15. Wexler, *supra* note 1, at 22 n. 40.

conclusion, of course, and offers no logical reason for such disparate legal treatment.

Finally, if this solution were embraced statutorily, would it survive a constitutional challenge? Professor Wexler claims that his proposal should pose no "constitutional problems,"[16] and cites *Marshall v. United States*[17] for the proposition that his system would not violate equal protection. *Marshall* involved a claim that Title II of the Narcotics Addict Rehabilitation Act of 1966[18] denied equal protection by excluding from discretionary rehabilitative commitment (in lieu of penal incarceration) addicts with two or more prior felony convictions. The Supreme Court concluded that it was not irrational for Congress to have adopted this scheme on the predicate that a multiple felony offender would be less likely to benefit from the treatment program than those with lesser criminal charges. *Marshall* acknowledges the constitutionality of disparate sentencing for differently situated defendants; it fails to address a guilty/innocence dichotomy for similarly situated offenders. Consequently, it provides little authority for the conclusion that the proposal would be free of constitutional infirmities.

It is accurate to characterize the Wexler system as a law that would treat two similar defendants in radically different ways. *Skinner v. Oklahoma*[19] held violative of equal protection a law permitting sterilization of certain multiple felony offenders, yet excluding other multiple offenders who had committed crimes which were deemed to be "intrinsically the same."[20] In language suitable to both the Oklahoma law and the Wexler scheme, the U.S. Supreme Court stated: "When the law lays an unequal hand on those who have committed intrinsically the same quality of offense and sterilizes one and not the other, it has made as invidious a discrimination as if it had selected a particular race or nationality for oppressive treatment."[21] Would the *Skinner* result have been different if based upon a statute reflecting community outrage leveled only at offenders who preyed upon non-relative victims? I think not.

While victim-based criminal statutes may be defensible in some limited circumstances,[22] when harm to victim is the same, culpability should turn on an assessment of characteristics personal to the offender and *not* the victim. In light of *Skinner* and principled notions of equal application of the law, Wexler's schizophrenic scheme has little chance of surviving an equal protection challenge.

Professor Wexler and I agree that efforts to abolish the insanity defense should be resisted. Similarly, we concur that the insanity defense, both in theory and in practice, is in need of rethinking and improvement. Further-

16. Wexler, *supra* note 1, at 24.
17. 414 U.S. 417 (1974).
18. 18 U.S.C. §§ 4251-4255 (1982).
19. 316 U.S. 535 (1942).
20. *Id.* at 539.
21. *Id.* at 541.
22. In Michael M. v. Superior Court of Sonoma County, 450 U.S. 464 (1981), the Supreme Court upheld a California statute punishing males for engaging in sexual intercourse with females under the age of 18 years. The majority enumerated legislative justifications for according special protection to female victims.

more, I appreciate his expressed concern that insanity defense modifications may have the salutory consequence of halting efforts to eliminate the defense altogether. At that point, however, we part ways.

It is my view that changes less drastic than the offense-victim limitation are indicated. Without full elaboration, some of the revisions reflected in the Comprehensive Crime Control Act of 1984[23] seem appropriate. But even if that kind of measured statutory adjustment were in place, insanity acquittals would continue, and those verdicts, however limited in number, would engender some negative public attention.[24] I submit that no insanity defense modification—whether it be the new federal legislation or the offense-victim limitation—will foreclose such an occurrence.

The insanity defense is deeply embedded in our criminal justice system and, though imperfect, should remain so. Properly applied, persons should be adjudged not guilty by reason of insanity. As recent post-Hinckley events demonstrate, such verdicts unfortunately encourage calls for "simplistic, compulsive solutions."[25] Professor Wexler and I assert that we should guard against the simplistic solution of abolition of the defense. But for reasons stated in this essay, his proposal should similarly be rejected as misguided and constitutionally suspect.

23. The Comprehensive Crime Control Act of 1984 was signed by President Reagan October 12, 1984. This legislation includes the "Insanity Defense Reform Act of 1984," which (1) modifies the insanity test by limiting it to a defendant who "as a result of a severe mental disease or defect, was unable to appreciate the nature and quality or the wrongfulness of his act"; (2) places upon the defendant the burden of proving the defense by clear and convicing evidence; (3) provides that when the issue of insanity is raised, the verdict shall be (a) guilty, (b) not guilty, or (c) "not guilty only by reason of insanity"; and (4) provides detailed provisions regarding hospitalization and discharge of, inter alia, (a) persons found not guilty only by reason of insanity and (b) convicted persons suffering from a mental disease or defect. It is entirely possible that application of this legislation to the Hinckley case might have resulted in a verdict of guilty (principally because of the shifting of the burden of proof to the defendant). This legislation, though not ideal, represents a modification of the insanity defense that offers a "promising path to a rational, consistent, and inherently just criminal law." Robinson, *Imputed Criminal Liability*, 93 YALE L.J. 609, 676 (1984).

24. *See, e.g.*, W. GAYLIN, THE KILLING OF BONNIE GARLAND 351 (1982) ("[Insanity defense cases] . . . become conflated and confused with the public's already existing anxiety about law and order. . . .")

25. *Id.*