THE "OFFENSE-VICTIM" INSANITY LIMITATION: A REJOINDER

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My Essay, "*An Offense-Victim Approach to Insanity Defense Reform*,"[1] opened with a prefatory statement offering the offense-victim perspective as "illustrative of a fresh framework, as a means of re-orienting the debate, and as a device for provoking the development of different approaches to this area of the law."[2] That Essay closed with the statement that "[i]t is high time, however, to change the conversation about the insanity defense. It is tiring—even embarrassing—to be arguing in 1984 whether we should return to the *M'Naghten* rule of 1843—or to the rule of an even earlier era."[3] Unfortunately, Professor Donald J. Hall's reply to my Essay,[4] while thoughtful, follows a traditional and predictable path[5] and does not contribute substantially to broadening the debate. Indeed, by more or less embracing the insanity defense provision of the Comprehensive Crime Control Act of 1984,[6] Professor Hall seems satisfied with a "return to the *M'Naghten* rule of 1843."[7]

Basically, Professor Hall and I seem to be on different wavelengths largely because of the different assumptions we make regarding the likelihood of abolition of the insanity defense. Although I think the abolition movement is behind us for the time being, I view abolition as distinctly possible—even likely—if another case such as Hinckley comes upon us in the near future.[8] After all, some state legislatures have already abolished the defense,[9] the highest court of one of those states has sustained that action

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1. 26 ARIZ. L. REV. 17 (1984) [hereinafter cited as *Offense-Victim*].
2. *Id.*
3. *Id.* at 25.
4. Hall, *The Insanity Defense: Thumbs Down to Wexler's "Offense-Victim" Limitation*, 27 ARIZ. L. REV. 329 (1985).
5. Many if not most of his concerns were anticipated and addressed in Wexler, *Redefining the Insanity Problem*, an article elaborating the issues addressed in my Essay and forthcoming in a symposium issue of the *George Washington Law Review*. *See infra* note 19.
6. Pub. L. 98-473, Title II, § 402(a), 98 Stat. 2057 (1984) (codified at 18 U.S.C. § 20).
7. *Offense-Victim*, *supra* note 1, at 25.
8. *Id.* at 19.
9. IDAHO CODE § 18-207(a) (Supp. 1984); MONT. CODE. ANN. § 46-14-102 (1983).

against constitutional challenge,[10] and thoughtful scholarly commentary[11] and policy statements[12] are now in place urging (and lending credibility to) the abolitionist position. In my view, then, the type of tinkering with the defense endorsed by Professor Hall will simply not operate to head off eventual abolition efforts. I may of course be incorrect in my assessment of the factual likelihood of abolition in the absence of alternative reform efforts such as the "offense-victim" limitation. But I submit that any interesting reply to my thesis ought to deal with the matter within the confines of my factual framework.

Accordingly, when I speak of notions of "community tolerance,"[13] I do so not to propose a moral model for the insanity defense (or for principles of criminal justice in general), but rather out of a pragmatic concern that, once a certain level of intolerance is exceeded, abstract moral discourse will simply not carry the day, and legislative revision will follow suit. As Professor Hall notes, this worrisome possibility exists in other areas of the law as well. Indeed, the exclusionary rule, an example mentioned by Professor Hall,[14] would probably not be in the trouble it now is[15] had John Kaplan's proposal been taken seriously, and had the exlusionary rule been made inapplicable in the most serious felony prosecutions.[16]

In terms of the insanity defense, Professor Hall rejects both abolition and the "offense-victim" limitation. But if he believes, as I do, that there is a moral basis to the insanity defense worth preserving, what would he say if he had to accept my factual premise that the enactment by state legislatures of a law like the Comprehensive Crime Control Act insanity provision will simply not head off abolitionist-type action? Would Professor Hall prefer the "offense-victim" limitation to outright abolition if that is the choice? If he is willing, presumably on pragmatic grounds, to accept an insanity defense stripped of a volitional prong (this of course is what the Crime Control Act does to the American Law Institute test that it in essence supplants), why would he not wish to retain the insanity defense—and its volitional element—in all cases except the narrow category where my proposal would eliminate it? Would Professor Hall stick to his principles of equal treatment even if confronted with the question whether there is any "merit in the law deliberately spreading injustice so as to preserve consistency"?[17] In the ag-

10. State v. Korell, 36 CRIM. L. REP. (BNA) 2199 (Mont. 1984).

11. N. MORRIS, MADNESS AND THE CRIMINAL LAW (1982).

12. See the American Medical Association statement cited in *Offense-Victim*, *supra* note 1, at 18 n.5.

13. *Offense-Victim*, *supra* note 1, at 20.

14. Hall, *supra* note 4, at 331.

15. United States v. Leon, 104 S.Ct. 3405 (1984)("good faith" exception to exclusionary rule in context of search warrants).

16. Kaplan, *The Limits of the Exclusionary Rule*, 26 STAN. L. REV. 1027, 1046 (1974).

17. ABA CRIMINAL JUSTICE MENTAL HEALTH STANDARDS § 7-6.1 Commentary at 272 n.5 (First Tent. Draft). Further, regarding Hall's objection to drawing the domestic/non-domestic distinction within homicide cases, would he prefer offering the insanity defense to *no* homicidal defendant rather than to offering it only to those accused of domestic homicide? Would he be willing to sacrifice the mentally ill infanticidal mother—and theoretically subject even her to the death penalty, *see* Hall, *supra* note 4, at 332, in his insistence that domestic and non-domestic homicides are intrinsically the same and ought to be treated in like fashion? In the *George Washington Law Review* article, I offer some evidence that, deep down, we do not really regard domestic and non-domestic

gregate, which view—mine or Hall's—is the most morally robust?

Apart from our differences over the factual likelihood of abolition, does Hall disagree with my assessment of the "real" problem (e.g., basically nondomestic homicides and attempted homicides)? If that *is* the real problem, does the Comprehensive Crime Control Act seriously address it? Are there *other* ways of addressing it? What about the suggestion in my Essay,[18] now embellished in a full-fledged article,[19] about using the "offense-victim" distinction in matters of *disposition* of insanity acquittees rather than in matters pertaining to the *assertability* of the defense itself?

Professor Hall also regards my proposal as constitutionally suspect, disparaging my citation to *Marshall v. United States*,[20] a case upholding disparate treatment of offenders under the Narcotic Addict Rehabilitation Act;[21] he cites instead *Skinner v. Oklahoma*,[22] a case rejecting on equal protection grounds the sterilization of some multiple offenders—such as those convicted of larceny—but not others—such as embezzlers—who "committed intrinsically the same quality of offense."[23] *Skinner*, however, emphasized that it dealt with the remarkably fundamental right of reproduction and the "very existence and survival of the race."[24] In fact, *Skinner* suggests that drawing distinctions between embezzlement and larceny for purposes other than, and less drastic than, sterilization would seemingly pose "no substantial federal question."[25]

In *Skinner*, moreover, there was simply no way in which the two classes of offenders—embezzlement defendants and larceny defendants—could be viewed as differentially dangerous;[26] accordingly, a statute authorizing eugenic sterilization for purposes of protecting the public from the offspring of one group but not of the other crossed the line of constitutional acceptability. The "offense-victim" approach, on the other hand, was crafted specifically to take account of the differential danger to the public at large posed by (and the differential fear spawned by) domestic versus nondomestic homicidal offenders.[27]

Further, the 1942 decision in *Skinner* does not, when it comes to insanity defense distinctions, hold a candle to the 1974 *Marshall* decision, a decision which deals specifically with the constitutionality of differential eli-

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homicides as intrinsically the same. *See also* Shotland, *When Bystanders Just Stand By*, PSYCHOLOGY TODAY 50, 52 (June 1985) (third parties perceived objectively identical injuries as much more severe when inflicted by a stranger than when inflicted by a spouse).

18. *Offense-Victim*, *supra* note 1, at 24 n.53.

19. Wexler, *Redefining the Insanity Problem*, 53 GEO. WASH. L. REV. — (1985).

20. 414 U.S. 417 (1974).

21. 18 U.S.C. §§ 4251-4255 (1982).

22. 316 U.S. 535 (1942).

23. *Id.* at 541.

24. *Id.* The insanity defense is surely of a lesser stature. *See* State v. Korell, 36 CRIM. L. REP. (BNA) 2199 (Mont. 1984) (upholding the constitutionality of Montana's legislative effort to abolish the insanity defense).

25. 316 U.S. at 540.

26. "Oklahoma makes no attempt to say that he who commits larceny by trespass or trick or fraud has biologically inheritable traits which he who commits embezzlement lacks." *Id.* at 541. "We have not the slightest basis for inferring . . . that the inheritability of criminal traits follows the neat legal distinctions which the law has marked between those two offenses." *Id.* at 542.

27. *Offense-Victim*, *supra* note 1, at 22-23.

gibility standards for therapeutic commitment. In *Marshall*, the Supreme Court upheld, over an equal protection objection, a statutory scheme "excluding from discretionary rehabilitative commitment, in lieu of penal incarceration, addicts with two or more prior felony convictions."[28]

The *Marshall* Court was asked to decide "whether Congress could rationally have assumed that a person who has committed two or more prior felonies and is an addict at the time sentence is to be imposed is likely to be less susceptible of rehabilitation by reason of his past record, thus posing a greater threat to society upon release."[29] In upholding the scheme, the Court regarded as sensible the legislative judgment excluding from therapeutic commitment those who seemed to pose "a greater potential danger to society on early release . . . ."[30] Recognizing that "when courts deal with problems in the administration of criminal law such as those relating to drug addiction, alcoholism, mental disease, and the like, they are necessarily confined to the existing limits of human knowledge in those areas,"[31] the Court made it clear that "[w]hen Congress undertakes to act in areas fraught with medical and scientific uncertainties, legislative options must be especially broad and courts should be cautious not to rewrite legislation . . . ."[32]

In the insanity defense area, we are also confronted with concerns of public safety, the dangers of early release, scientific uncertainty, and therapeutic experimentation. In fact, in *Jones v. United States*,[33] the Supreme Court's latest word on insanity matters, the Court closes its opinion by quoting with approval *Marshall*'s mandated deference to the legislature in areas of medical and scientific uncertainty,[34] and states, "*[t]his admonition has particular force in the context of legislative efforts to deal with the special problems raised by the insanity defense.*"[35] Therefore, if a legislature, with some empirical support, were to regard insane non-domestic killers as posing too great a risk for therapeutic commitment, it should, under *Marshall* and *Jones*, be able to exclude that category of persons from therapeutic commit-

28. 414 U.S. at 418.

29. *Id.* at 425.

30. *Id.* at 429.

31. *Id.* at 426-27.

32. *Id.* at 427. With regard to Professor Hall's attempt to demonstrate by case illustration that the domestic/non-domestic distinction is an imperfect classification scheme, the *Marshall* litigation is particularly noteworthy. Because of the public protection interest, the scientific uncertainty, and the need for therapeutic experimentation, the Court upheld the exclusion even though, as Justice Marshall nicely illustrated in his dissent, *id.* at 434, the two-felony exclusion might sometimes lead to the wrong result:

> Defendant A, with a prior felony conviction for assault with intent to commit murder, is convicted of stealing funds from a national bank. Neither crime was in any way related to narcotics addiction. In fact, A was not even an addict at the time he committed the crimes, but had become an addict during the pendency of his bank theft trial. Defendant B, who has two prior felony convictions for narcotics offenses, is convicted of possession of heroin for his own use. Given the above-stated legislative purpose, one would think that Defendant B, all of whose criminal activity was related to his narcotics addiction, would be eligible for NARA [therapeutic] treatment, while Defendant A, none of whose criminal activity was so related, would not be eligible. But just the opposite is true, because of the two-felony exclusion.

33. 463 U.S. 354.

34. *Id.* at 370.

35. *Id.* (emphasis added).

ment by denying to them, and to them alone, the right to assert the insanity defense.

But arguing constitutionality at this point really is—or ought to be—largely beside the point. In fact, in my view, the most troublesome problem with Professor Hall's reply to my Essay is his attempted closure of the question by resorting to claims of unconstitutionality. Of course, constitutional worries cannot be wholly ignored. But new solutions to the insanity defense problem (or to other problems) should not be eclipsed by premature cries of unconstitutionality. Instead, legal scholars and policy makers should be encouraged to identify what is at the root of the insanity defense problem (psychologically as well as morally) and to craft responses tailored narrowly to that problem. If that effort succeeds, courts will have to think twice about calling into question the constitutionality of the solution.