AN OFFENSE-VICTIM APPROACH TO INSANITY DEFENSE REFORM

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A number of major organizations have recently addressed the question of insanity defense reform. I have played a part in two such efforts, and believe those organizations have commendably sifted through and synthesized the best of the current thinking. But I am struck by the fact that suggestions for reform seem invariably to fall on one side or the other of the standard philosophical, legal, and psychiatric arguments. This Essay reflects my concern that, for genuine long-term gains to be achieved in this area, completely new analytical approaches need to be developed. For example, current reform proposals, like prior ones, often discuss possible limitations on the operation of the insanity defense. Those proposed limitations typically relate to the nature of qualifying mental disease and to the nature of the impact of the impairment on cognitive or volitional functions. Limitations of a very different sort may, however, address more directly the areas of public and professional dissatisfaction with the insanity defense. One such limiting approach—focusing on the nature of the offense and the offender-victim relationship—is advanced here. This Essay offers 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.

Despite the infrequency of its use, the insanity defense is once again at center stage in debates about American law. Particularly since the Hinckley verdict, there has been an immense amount of activity regarding insanity defense reform. Much legislation has been enacted, and much more has been proposed.[1] Policy statements regarding the defense have been released by the American Bar Association (ABA),[2] the American Psychiat-

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1. *See* Hagan, *The Insanity Defense: A Review of Recent Statutory Changes*, 3 J. LEGAL MED. 617 (1982).

2. A.B.A. CRIM. JUST. MENTAL HEALTH STANDARDS 261 (First Tentative Draft 1983)

ric Association (APA),[3] the National Commission on the Insanity Defense (NCID),[4] and, most recently, by the American Medical Association (AMA).[5] In this Essay, I will very briefly note the positions of those organizations and will then, almost as briefly, offer a position of my own.

The ABA, APA, and NCID all favor retention of the insanity defense, but each of those groups would tinker with the defense, or its administration, in certain ways. In many jurisdictions, for example, the insanity defense now embraces not only a "cognitive" prong but also a "volitional" one. In those jurisdictions, even a defendant who appreciates his wrongdoing may be held nonresponsible if he could not "control" his behavior or "conform his behavior to the requirements of the law." The ABA and the APA prefer a narrowing of the defense to delete the "volitional" prong from the test in jurisdictions in which that prong is now operative.[6] With regard to the question of who should shoulder the burden of proof regarding sanity-insanity, the APA takes no position,[7] the ABA favors putting the burden on the state,[8] and the NCID favors putting the burden on the accused.[9] The ABA, APA, and NCID all reject the "guilty but mentally ill" (GBMI) proposal,[10] enacted by a number of states,[11] under which a jury may find a defendant to have suffered from a mental illness falling short of full-blown legal insanity, and may return a verdict of GBMI. Finally, the APA, NCID, and task forces of the ABA Criminal Justice Mental Health Standards Project all support the creation of "special" dispositional commitment systems for persons acquitted on the basis of insanity;[12] all, therefore, reject the notion of funneling insanity acquittees through the "ordinary" civil commitment system.

In contrast to the ABA, APA, and NCID, the AMA does not propose "tinkering" with the insanity defense. Instead, in a vote taken on December 6, 1983, the House of Delegates of the AMA supported the *abolition* of

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(quoting a policy adopted by the A.B.A. House of Delegates) [hereinafter cited as A.B.A. STANDARDS].

3. *American Psychiatric Association Statement on the Insanity Defense*, 140 AM. J. PSYCHIATRY 681 (1983) [hereinafter cited as *A.P.A. Statement*].

4. MYTHS & REALITIES: A REPORT OF THE NATIONAL COMMISSION ON THE INSANITY DEFENSE (1983) [hereinafter cited as MYTHS & REALITIES].

5. A.M.A. Board of Trustees, The Insanity Defense in Criminal Trials and Limitation of Psychiatric Testimony (unpublished Report on file with the author) [hereinafter cited as A.M.A. Trustees Report]. On December 6, 1983, the A.M.A. House of Delegates approved and adopted the Report of the Board of Trustees. Arizona Daily Star, Dec. 7, 1983, at A13, col. 3.

6. A.B.A. STANDARDS, *supra* note 2, at 261 (quoting a policy adopted by the A.B.A. House of Delegates); *A.P.A. Statement, supra* note 3, at 684-85.

7. *A.P.A. Statement, supra* note 3, at 685.

8. A.B.A. STANDARDS, *supra* note 2, at 294 n.1 (quoting a policy adopted by the A.B.A. House of Delegates).

9. MYTHS & REALITIES, *supra* note 4, at 35.

10. A.B.A. STANDARDS, *supra* note 2, at 295-96 (referring to A.B.A. House of Delegates action); *A.P.A. Statement, supra* note 3, at 684; MYTHS & REALITIES, *supra* note 4, at 32.

11. For a discussion of the GBMI verdict, *see* Note, *The Guilty But Mentally Ill Verdict and Due Process*, 92 YALE L.J. 475 n.3 (1983) (citing statutes). The GBMI defendant is convicted, sentenced, treated for his mental illness, and, upon completion of treatment, serves the remainder of his sentence in prison. *Id.* at 476-77.

12. *A.P.A. Statement, supra* note 3, at 686-87; MYTHS & REALITIES, *supra* note 4, at 37; A.B.A. STANDARDS *supra* note 2, Standard 7-7.3.

the special defense of insanity.[13] Following the lead of Montana[14] and Idaho[15] and the theoretical perspective of Norval Morris,[16] the AMA voted to support in principle "the abolition of the special defense of insanity in criminal trials, and its replacement by statute providing for acquittal when the defendant, as a result of mental disease or defect, lacked the state of mind (*mens rea*) required as an element of the offense charged."[17]

The AMA vote was preceded by heated debates and by the expressed opposition of the ABA and APA.[18] At the same time that the AMA voted to support the abolition of the insanity defense, "[t]he delegates adopted a second resolution apparently aimed at mollifying members who opposed the new policy."[19] The second plan advocates "collaborative efforts"[20] among the AMA, ABA, and APA to "achieve a common policy position on the insanity defense."[21]

Although the AMA was accused by an APA representative of "swimming against the tide,"[22] the expectation of AMA President-elect Dr. Joseph F. Boyle that "this could have a very real impact on the future of the law in this area,"[23] and Boyle's promise that "AMA speakers would testify before congressional committees considering the insanity defense"[24] suggest that the AMA's recent action, together with the publication of Norval Morris' impressive "abolitionist" book *Madness and the Criminal Law*,[25] may stir anew legislative efforts at abolishing the defense of insanity.

Even if such efforts fail at the present, they may be successful in the foreseeable future. William Winslade should be taken seriously when he predicts that "[o]ne day, another case will spread across the newspapers and the public will again be outraged, unable to understand why there is still this problem."[26] The public will ask, "Didn't we get that straightened out after the Hinckley trial?",[27] and abolition may then appear to be the clear answer. If that scenario seems sufficiently likely, perhaps it would behoove "retentionist" groups such as the ABA and the APA to pursue "collaborative efforts"[28] with the AMA in order to "achieve a common policy position on the insanity defense."[29]

Despite the abolitionist arguments, there is much to commend the

13. Arizona Daily Star, Dec. 7, 1983, at A13, col. 3.
14. MONT. CODE ANN. § 46-14-102 (1979).
15. IDAHO CODE § 18-207(a) (1982).
16. N. MORRIS, MADNESS AND THE CRIMINAL LAW (1982).
17. A.M.A. Trustees Report, *supra* note 5, at 1.
18. Arizona Daily Star, Dec. 7, 1983, at A13, col. 3.
19. *Id.*
20. *Id.*
21. *Id.*
22. *Id.*
23. *Id.*
24. *Id.*
25. N. MORRIS, *supra* note 16.
26. W. WINSLADE & J. ROSS, THE INSANITY PLEA 197 (1983).
27. *Id.*
28. Arizona Daily Star, Dec. 7, 1983, at A13, col. 3.
29. *Id.*

"moral basis of the insanity defense."[30] Indeed, any society that recognizes defenses based on duress and choice of evils ought not to dismiss out of hand a defense that closely resembles *internal* duress or a pathologically produced and perceived choice of evils. Be that as it may, Paul Meehl speaks convincingly when he asserts that:

> if either the philosophical justification, or the statutory formulation, or the administration of the insanity defense is gravely disharmonious with the community sense of justice, it is bad for [the mental health] profession, it is bad for the public attitude toward the criminal justice system, and, more to the point, it won't be carried out.[31]

Accordingly, this Essay will propose a compromise measure that seeks largely to retain the defense except in those instances where its availability is likely to be viewed as going against the grain of community tolerance and the community sense of justice.

Obviously, any proposed "compromise" between retention and abolition is likely to be highly pragmatic and to flow from a "half a loaf" or "baby versus bathwater" school of jurisprudence. In assessing any such compromise proposal, however, it is important to recognize that the major proposed and enacted insanity defense reforms of the moment are *themselves* Hinckley-inspired and are grounded at least as much in pragmatics as they are in principle.[32]

If we wish to craft a proposal to retain the morally-appropriate insanity defense except in areas where its retention would likely enrage the community sense of justice and protection, we must inquire first about the kinds of cases in which the insanity defense is, in the view of the commu-

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30. Bonnie, *The Moral Basis of the Insanity Defense*, 69 A.B.A.J. 194 (1983).

31. Meehl, *The Insanity Defense*, MINN. PSYCHOLOGIST 11 (Summer 1983).

32. GBMI is perhaps the most transparent. One of its major objectives appears to be to provide the jury with a compromise verdict and hence to reduce the number of insanity acquittals.

With regard to the "volitional" test, it is true that there is a philosophical conundrum posed by distinguishing between an irresistible impulse and an impulse not resisted, but that conundrum did not, until Hinckley, prevent jurisdiction after jurisdiction from regarding a solely cognitive test as primitive and morally underinclusive. Bonnie, *supra* note 30, at 196; People v. Drew, 22 Cal. 3d 333, 583 P.2d 1318, 149 Cal. Rptr. 275 (1978).

The burden of persuasion question follows suit. If the insanity defense is ethically essential, and if ethically essential predicates for liability should be established by the state, Bonnie, *supra*, note 30 at 197, the post-Hinckley movement to place the burden of proof on the defendant goes against the conceptual grain of the criminal law.

Finally, until rather recently, there had been a growing acceptance of the view that morally, and as matters of due process and equal protection as well, persons acquitted by reason of insanity should be committed pursuant to procedures substantially similar to those employed in the ordinary civil commitment system. Morris, *Acquittal by Reason of Insanity*, in MENTALLY DISORDERED OFFENDERS: PERSPECTIVES FROM LAW AND SOCIAL SCIENCE 3 (J. Monahan & H. Steadman eds. 1983). No dramatically "special" system was needed, and automatic and indefinite commitment was surely frowned upon. Indeed, when the ABA Criminal Justice Mental Health Standards Project began, the task force involved with drafting proposed standards for the commitment of insanity acquittees originally proposed that civil commitment was at least a perfectly acceptable option for the processing of insanity acquittees. A.B.A. CRIM. JUST. MENTAL HEALTH PROVISIONAL STANDARDS, Standard 7-5.3 (undated). After Hinckley, however, the mood changed rather abruptly. In fact, the revised A.B.A. draft urges each state to create a "special" system for committing insanity acquittees—a system that favors public protection interests far more than does the traditional commitment option. A.B.A. STANDARDS, *supra* note 2, Standard 7-7.3. And, after Hinckley, the United States Supreme Court, in Jones v. United States, 103 S. Ct. 3043 (1983), gave further momentum to such an effort by upholding the constitutionality of an automatic and indefinite commitment scheme for insanity acquittees.

nity, most inappropriate. Public concern over the insanity defense does not arise in all cases. The crux of the concern over the insanity defense, as Norval Morris mentions almost as an aside in his book, is with the "insane killer."[33] That concern is also evident in William Winslade's recent abolitionist book, *The Insanity Plea*.[34] Winslade argues for the abolition of the insanity defense and supports his argument by presenting several chapter-length case studies. A content analysis of Winslade's book, however, is very revealing. Interestingly, each chapter involves a homicide or, in the case of the Hinckley chapter, an attempted homicide.

If the public were outraged only about certain categories of offenders successfully asserting the insanity defense, it would be possible, as is typically true with the duress defense,[35] to render the defense unavailable *only* for certain types of offenses—such as homicide and attempted homicide (and perhaps aggravated assault). Such an action, however, would sweep too broadly. After all, if we are to tailor the availability of the defense to situations where the public seems likely, in its sense of justice, to tolerate it, it is fairly clear that the public is in actuality concerned principally about only a *subset* of insane killers: mentally ill persons who kill strangers (or, more broadly, non-relatives). Again, Winslade's illustrations are helpful. None of the case studies used by Winslade to argue for the abolition of the insanity defense involves the killing of a family member. Winslade in fact notes that "we are least able to tolerate the gratuitous murder: the murder of absolute strangers for which there is no explanation or justification . . . ."[36] The National Commission on the Insanity Defense is likewise cognizant of the public lack of tolerance for such random or wheel-of-fortune killings. The Commission notes that one source of concern regarding the insanity defense is the myth, not grounded in fact, that "most insanity defendants are murderers who commit random acts of violence."[37]

We should, therefore, be able rather easily to dissipate public fear over and objection to the insanity defense if, through legislation, we render the defense *unassertable in the prosecution of specified crimes* (e.g., homicide, attempted homicide, and perhaps aggravated assault) *unless the victim of the offense is somehow "related to"*[38] *the defendant*.

Conventional wisdom holds that the insanity defense is successfully asserted only in homicide cases. In fact, however, the relevant research indicates that jurisdictions vary widely regarding the seriousness of the criminal acts committed by insanity acquittees. In some jurisdictions, it is clear that insanity acquittals occur overwhelmingly in prosecutions for non-homicidal offenses.[39] In any event, an appreciable percentage of

33. N. MORRIS, *supra* note 16, at 73.
34. W. WINSLADE & J. ROSS, *supra* note 26.
35. *E.g.*, ARIZ. REV. STAT. ANN. § 13-412(c) (1983).
36. W. WINSLADE & J. ROSS, *supra* note 26, at 106.
37. MYTHS & REALITIES, *supra* note 4, at 20.
38. For statutory approaches to defining familial relationships, see sources cited in Wexler, *Victimology and Mental Health Law: An Agenda*, 66 VA. L. REV. 681, 690 n. 46 (1980).
39. In testimony presented in 1982 before a U.S. Senate subcommittee, Dr. Henry Steadman summarized the existing empirical literature regarding the crimes for which insanity acquittees are acquitted:

homicides involve victims who are related to the offender, and this intra-familial pattern holds true even when we limit our attention to killers who are mentally ill.[40] Accordingly, an "offense-victim" limitation on the assertability of the insanity defense will disallow the defense in instances (e.g., homicides against non-family members) that may well exceed bounds of public tolerance, but will nonetheless allow the defense to be asserted for most offenses and even for a large segment of homicide cases.

Apart from its pragmatics, the offense-victim limitation may be acceptable because the familial/non-familial distinction seems, in many ways, to be a meaningful one. In terms of the public protection interest, the distinction is particularly potent. Surely, the public at large will be less fearful of one who has killed a family member than of one who has killed a stranger.[41] Moreover, although this is an area that can profit from em-

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> In [Michigan and New York], the most frequent crime among acquittees was murder. In Michigan, 57% of [the] acquittees were acquitted of murder and in New York 51% (which also included attempted murder). In these two urban states, assault was also frequent among acquittees (20% and 13%, respectively). Rape and other sex crimes were very infrequent (5% and 3%). Most other offenses were less serious property offenses ranging across the entire spectrum of crimes.
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> In New Jersey, Missouri and Oregon the number of serious crimes was sharply less than the other two states with available data. Respectively, 26%, 5% and 5% of their total acquittals were for murder. Less serious assaults (35%, 22%, and 14%, respectively) along with a wide range of other less serious crime predominated among acquittals.
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> In sum, there is a wide variation on the seriousness of the crimes of insanity acquittees by jurisdiction. Minor offenses are always frequent among NGRIs and in some jurisdictions minor crimes make up the vast majority of all crimes. In contrast to public perceptions and media portrayals, all insanity acquittees are not assassins, rapists, deranged mutilators or mass murders (sic). It would be inappropriate to predicate policy on popular conceptions of acquittees.

The Insanity Defense: Hearings Before the Subcomm. on Criminal Law of the Senate Committee on the Judiciary, 97th Cong., 2d. Sess. 367, 369 (1982) (testimony of Dr. Henry Steadman). *See also id.* at 372-73 (citing the relevant empirical studies).

40. Petrilla, *The Insanity Defense and Other Mental Health Dispositions in Missouri*, 5 INT'L. J.L. AND PSYCHIATRY 81, 96 (1982); Pasewark, Pantle & Steadman, *Characteristics and Disposition of Persons Found Not Guilty By Reason of Insanity in New York State, 1971-1976*, 136 AM. J. PSYCHIATRY 655, 657 (1979).

Some may object that the offense-victim approach proposed here will operate to deny the insanity defense to the psychotic killer who kills randomly and senselessly—the most deranged of the deranged. I demur. Under my approach, the defense is denied such persons because, despite the presence of serious mental disturbance, in such cases the insanity defense is wholly at odds with the community sense of justice. Note, however, that with regard to intra-familial homicides, the offense-victim approach does not by any means operate to excuse all offenders; it simply regards it as just to allow the defense to be *asserted* in the intra-familial situation.

41. W. WINSLADE & J. ROSS, *supra* note 16, at 106 ("[t]hese are the murders that are most threatening to us because we cannot protect ourselves from them"); MYTHS AND REALITIES, *supra* note 4, at 20.

Note that Norval Morris takes the position that, even under a "just deserts" punishment model, "desert itself may be conditioned by fear." N. MORRIS, *supra* note 16, at 161. Under that model, those who kill strangers may be more feared than those who kill family members, and may accordingly "deserve" a punitive sanction without the opportunity of seeking a therapeutic disposition through the assertion of the insanity defense.

There are other reasons why society is more willing to accept a non-punitive disposition in intra-familial homicides than in other homicide cases. For example, in a family setting, some sort of victim contribution to the offender's aggressivity, Wexler, *Patients, Therapists, and Third Parties: The Victimological Virtues of Tarasoff*, 2 INT'L. J.L. AND PSYCHIATRY 1 (1979), or even a contribution to the offender's pathology, Kaffman, *Paranoid disorders: family sources of the delusional system*, 5 J. FAMILY THERAPY 107 (1983), is often present.

pirical research,[42] a person who has killed a non-relative seems in actuality to be more likely to pose a threat—particularly to the general public—than does a person who has killed a family member. Research by Paul Meehl, for example, "failed to reveal one single instance of a psychotically depressed patient who, after an altruistic homicide of a family member (unlike paranoid schizophrenics, depressed patients don't kill strangers or neighbors) was a repeater."[43] Even more to the point, Monahan, in his monograph regarding the clinical prediction of violent behavior, notes that violence is an interactional concept and that murderers may range from "indiscriminate" to very "specific" in their choice of victims.[44] Spouse murderers, he notes, "have a very low recidivism rate . . . ."[45] After all, they have "removed their source of irritation."[46]

If the public at large—the community—fears (appropriately) the person who kills a non-relative but is not nearly as fearful of the person who kills a family member, that factor ought to weigh heavily in supporting a formulation of the insanity defense that disallows its assertion in the former category of cases but not in the latter. Also relevant to the formulation, however, are the reactions of the victims of violence or, in the case of homicide victims, the reactions of surviving relatives, commonly known as "secondary victims."

The viewpoint of the victim appears to be gaining increased acceptance in both criminal law and mental health law.[47] The President's Task Force on Victims of Crime recently recommended that "[j]udges should allow for, and give appropriate weight to, input at sentencing from victims of violent crimes."[48] That Task Force also noted, however, that "[u]nlike the victims of other crimes, family violence victims often do not want their attacker punished."[49]

Testimony before the National Commission on the Insanity Defense bears out that assertion. Among other testimony, the Commission heard from five relatives of patients hospitalized following an insanity acquittal. One witness was herself a victim of her son's violence—violence that led to her son's knocking her unconscious with a bat. The other four were "secondary victims" of homicide. Representative of them was a man whose wife was killed by their 23 year old son. These witnesses testified to the tragic events, but all supported the retention of the insanity defense and all

42. See *infra* note 55 for a general discussion of empirical research issues connected with the reforms proposed in this Essay.

43. Meehl, *supra* note 31, at 15.

44. J. MONAHAN, THE CLINICAL PREDICTION OF VIOLENT BEHAVIOR 96 (1981). *See generally id.* at 113-14.

45. *Id.* at 96.

46. *Id. See also* Pasewark, Pantle, & Steadman, *supra* note 40, at 659 ("The popular conception that acquittals due to insanity return persons to the street to kill more strangers is simply incorrect. Most of the prior violence was directed at family and friends, and it is probable that any subsequent violence would also be directed at these two groups.").

47. PRESIDENT'S TASK FORCE ON VICTIMS OF CRIME, FINAL REPORT (1982) [hereinafter cited as TASK FORCE REPORT]; Wexler, *supra* note 38; D. WEXLER, MENTAL HEALTH LAW: MAJOR ISSUES 157-90 (1981).

48. TASK FORCE REPORT, *supra* note 47, at 76. *See also* ARIZ. REV. STAT. ANN. § 13-702(F) (1983).

49. TASK FORCE REPORT, *supra* note 47, at 50.

were grateful for the opportunity their patient-relatives had for a therapeutic rather than a punitive disposition.[50] Quite clearly, the testimony and recommendations of those victims and secondary victims differed greatly from the testimony that would be expected from victims or secondary victims in cases where the violent individual had offended against a stranger or non-relative.

Under an "offense-victim" formulation that renders the insanity defense unavailable in homicide cases except where the victim is related to the offender, the interests of secondary victims are attended to. Where the victim is not related to the offender, the secondary victims may well be outraged (even more than is the community at large) by the assertability of the insanity defense, and it is here that the formulation disallows the defense. Where, however, the homicide victims are related to the offender, the secondary victims will, after all, be relatives of the offender as well as of the victim. We can expect such persons in the aggregate to support—or at least not to be outraged by—the assertability of the insanity defense. If such is the view of the secondary victim, the view of the community at large—the community sense of justice—should be in accord.

An "offense-victim" limitation ought to be workable[51] and, given the United States Supreme Court's extreme deference to legislative judgment regarding the administration of criminal justice in the areas of mental disease, scientific uncertainty, and therapeutic experimentation, ought not to pose constitutional problems.[52] The "offense-victim" limitation proposed here will not operate perfectly, but it should address the crux of the problem, allowing the insanity defense to operate in situations where we would most like it to, and foreclosing its assertion in areas where the community sense of justice would expectedly be offended. If enacted, the limitation should have the beneficial impact of avoiding the very type of enraging insanity acquittals that lead to precipitous legislative action.

There undoubtedly are other ways, some closely related to this approach,[53] to address the perceived problem. It is best to address these

50. MYTHS & REALITIES: HEARING TRANSCRIPT OF THE NATIONAL COMMISSION ON THE INSANITY DEFENSE 133-50 (1983).

51. In very rare instances, however, a two-trial procedure may be necessary. For example, if a defendant is charged with an offense for which the defense is unassertable, but is found "guilty" of a lesser offense which ought to be subject to a defense of insanity, the defendant should be entitled to a second trial on the lesser charge, and should, at that trial, be entitled to raise the insanity defense. Other considerations are presented where an offender kills two victims, one of them a relative and the other a non-relative. If the two homicides are tried together, the jury will need to receive very specific instructions regarding insanity, *mens rea*, and the possible defenses available to the offender with regard to each victim. Alternatively, the two cases could be tried separately. In fact, if the prosecutor secures a conviction on the homicide involving the non-relative victim, the prosecution of the remaining homicide might be regarded as unnecessary.

52. Marshall v. United States, 414 U.S. 417 (1974) (equal protection). *See also* W. LA FAVE & A. SCOTT, CRIMINAL LAW § 19 (1972).

53. Another approach, derived from the offense-victim perspective, might be to retain the insanity defense in all cases but process insanity acquittees through a three-tiered dispositional system designed to take account of the supposed differential dangerousness of different categories of acquittees. For example, those acquitted by insanity of non-violent crimes might be subsequently committed, if at all, through the ordinary civil commitment system. The remainder, with the exception of those acquitted of homicide or attempted homicide against non-relatives, could be committed pursuant to a "special" system such as the one proposed by A.B.A. STANDARDS,

problems in a calm atmosphere rather than in the frenzied context of a post-Hinckley type case.[54] Now that the dust from Hinckley has settled, this may be a particularly appropriate time to reflect seriously about alternative approaches. It 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. The debate (and the research)[55] should be expanded considerably to include rather unconventional approaches to the problem. I hope this Essay will serve as a step in that direction.

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supra note 2, Standard 7-7.3. The final category—acquittees who have killed or attempted to kill non-relatives—could be automatically and indefinitely committed under a highly security-oriented *Jones*-like system, Jones v. United States, 103 S. Ct. 3043 (1983), and could be confined until they carry the burden of establishing their readiness for release.

54. Meehl, *supra* note 31, at 11.

55. A number of relevant research questions flowing from an offense-victim perspective come readily to mind. For instance, instead of inquiring into the recidivism rates of insanity acquittees generally, researchers could ask more precise questions. Thus, regarding insanity acquittees who kill relatives and those who kill non-relatives, we could compare, for each class, the *type* of future criminality, the *frequency* of the criminality , and the *object* (victim) of the criminality.

A related inquiry would explore the extent to which relevant decisionmakers regard the familial/non-familial distinction as significant. Thus, we might look to see whether the nature of the offender-victim relationship influences prosecutors' decisions to accept insanity pleas, Petrila, *supra* note 40, at 99, and whether the nature of the relationship influences jury verdicts in contested insanity cases. Steadman, Keitner, Braff & Arvanites, *Factors Associated with a Successful Insanity Plea*, 140 AM. J. PSYCHIATRY 401, 402 (1983) [hereinafter cited as Steadman et al.]. (Relatedly, it might be interesting to see whether, for moral or public protection reasons, the *death penalty* is differentially imposed depending upon the nature of the offender-victim relationship. Methodologically, but not conceptually, the inquiry could parallel studies that seek to ascertain whether the death penalty is applied in a *discriminatory* manner depending upon the race of the victim. Pulley v. Harris, 104 S. Ct. 871, 884, 887-88 (1984) (Brennan, J. dissenting).) Steadman concludes that the relationship of offender and victim plays no role in the outcome of insanity cases. Steadman et al., *supra* at 402. But his other research reveals that, with regard to women acquittees, "murder was by far the most prevalent offense" and "the murders tended to be infanticide or spousal." Steadman & Braff, *Defendants Not Guilty by Reason of Insanity*, in MENTALLY DISORDERED OFFENDERS: PERSPECTIVES FROM LAW AND SOCIAL SCIENCE 109, 125 (J. Monahan & H. Steadman eds. 1983). Such results may be explainable less by the demographic features of the offenders and more by the importance of the offender-victim relationship. Steadman, Pasewark & Pantle, *The Use of the Insanity Defense*, in NEW YORK STATE DEP'T OF MENTAL HYGIENE, THE INSANITY DEFENSE IN NEW YORK 37, 68-69 (1978). *See also* Criss & Racine, *Impact of Change in Legal Standard for Those Adjudicated Not Guilty by Reason of Insanity 1975-1979*, 8 BULL. AM. ACAD. PSYCHIATRY AND LAW 261, 266 (1980) (many insanity acquittals for homicide involved uxoricide or other domestic violence). It is perhaps noteworthy that in England, a special statutory provision relieves mentally imbalanced infanticidal mothers from liability for murder and reduces their crime to manslaughter. That reduction usually results in the judicial imposition of probation or a "hospital order." Parker & Good, *Infanticide*, 5 LAW AND HUMAN BEHAVIOR 237, 238 (1981). Research is also needed on adolescent murderers, including those who commit matricide and patricide. *See* Cormier & Markus, *A Longitudinal Study of Adolescent Murderers*, 8 BULL. AM. ACAD. PSYCHIATRY AND LAW 240 (1980).

Finally, even if the nature of the offender-victim relationship does not influence the outcome of contested or uncontested insanity cases, it is possible that the relationship does influence the *duration* of insanity acquittees' hospital stays. It would be interesting to learn whether, when other factors are held constant, insanity acquittees who killed non-relatives are detained for a longer average stay than are those who killed relatives. See *supra* note 53 (dealing with a related policy consideration).