TO BE OR NOT TO BE AN EXPERT

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INTRODUCTION

To be or not to be an expert may no longer be the question for the behavioral science expert.[1] The expert who has doubts or misgivings about participation in criminal trials, would, upon even casual perusal of *United States v. Brawner*,[2] elect not to participate. This statement in legal parlance is conclusory and obviously deals with an ultimate question—whether or not experts will continue to prostitute themselves in the name of justice. Before proceeding to justify this position, or perhaps mold the notion into a position for consideration, some introductory statements and disclaimers are necessary.

The *Law Quarterly* has solicited comments on the *Brawner* case from a variety of people with different backgrounds and experience. The *Law Quarterly* editors have allowed wide discretion to each in terms of style, format and tack taken in response to their invitation. An undertaking such as this cannot be taken lightly, and the importance of the decision will undoubtedly reach into corners which even the drafters of the opinion have not contemplated. The rule in *Brawner* applies only to federal courts and has the result of bringing federal courts into closer harmony[3] in their construction of insanity pleas. Yet the prestige of this court throughout the country is likely to make the *Brawner* case significant in many local courts across the land. This will be true of jurisdictions where *Durham v. United States*[4] has been

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1. The word "expert" will be used throughout this essay to refer to psychiatrists, psychologists, social workers, and other behavioral scientists whose testimony is sought by attorneys or courts for purposes of establishing or denying an insanity plea in a criminal proceeding. There are differences between people with different professional backgrounds as well as differences between those with similar professional identification. This condensation is used to facilitate communication and because it is believed by this observer that, with regard to the issues to be discussed, all experts are placed in the same untenable position.

2. 471 F.2d 969 (D.C. Cir. 1972).

3. *Id.* at 984.

4. 214 F.2d 862 (D.C. Cir. 1954).

followed explicitly, as well as in those jurisdictions such as Kansas which adhere to the *M'Naghten* rule[5] but actually allow the flexibility of *Durham*. The *Brawner* case unfortunately is likely to be construed by many as a call for law and order in spite of the court's statements to the contrary.[6] The potential impact of *Brawner* makes the task of commenting upon it onerous, and one approached with trepidation. The *Law Quarterly* editors supplied to each commentator not only the decision itself but also the briefs submitted by the parties, supplemental memoranda, and briefs submitted by amici curiae. The amount of effort that has gone into the drafting of the opinion, its length and scholarliness, plus the well-prepared supporting documents and briefs,[7] present a formidable and weighty legal analysis of the issues relevant and central to the primary legal thrust of the case. The sheer weight, the deluge of words, eloquently articulated, does raise a question as to what more can be said.

Nevertheless, commentators here and elsewhere will undoubtedly follow the traditional legal style of treating legal principles set forth by the court and further elucidating the technical impact the decision will have on the rule of law considered and the criminal justice system. While not wishing to undermine the traditional legal scholar's method of analysis, perhaps in this instance it may be more fruitful to consider from a slightly different perspective what the majority and Chief Judge Bazelon, in his concurring opinion, succeeded in doing or undoing. This commentator is aware of what the standard legal exercise would be, but is persuaded that little can be accomplished by further analyses of that nature. This comment, then, will not be a legal analysis, but will address the issues raised in *Brawner* from the perspective of the expert witness, and will hopefully convey an understanding of the decision that other people (experts) of similar persuasion would maintain and articulate if they had the opportunity to comment publicly on this case.

The editors of the *Law Quarterly* have provided a summary of the law for the symposium, and the opinion can more than adequately

5. M'Naghten's Case, 8 Eng. Rep. 718 (H.L. 1843).

6. United States v. Brawner, 471 F.2d 969, 989-90 (D.C. Cir. 1972).

7. The briefs, memoranda, and supplemental documents, while not generally available, contain information which is available elsewhere. The issues dealt with are not new and have been extensively commented upon by many well-informed individuals. A listing, however exhaustive, would undoubtedly exclude important references and thus such a task is not undertaken here.

speak for itself. This comment is more personal in nature, less scholarly, but perhaps a reflection of justified outrage and feelings of ambivalence toward the court for the manner in which it has dealt with the expert. There is little excuse for the court's scapegoating and its failure to substantially recognize the inadequacies of the criminal justice system. The court has adhered to the outdated, outmoded free will doctrine[8] and has failed to recognize that expert witness testimony has nothing to do with mens rea, intention, causality, product, or any other term designed to correlate general maladaptive behavior or mental illness with a specific action by any individual.

THE BRAWNER DECISION

In this commentator's view, there are at least two pivotal issues upon which the majority opinion is balanced. First, the court states explicitly that it is dealing with a rule of law, developing a statement of the court's position with respect to the ultimate question of criminal responsibility. This is an appropriate issue upon which the court should focus its deliberation. Regardless of whether one agrees with the court's opinion and reasoning, one must recognize the appropriateness of undertaking the task. This aspect of the case is relatively straightforward, with legal issues clearly considered and developed.

The second pivotal issue concerns the expert's role in the process. The issue of expert witness testimony cannot be finely separated from the legal rule as long as the "intention issue"[9] is believed to be related to medical or psychological information as provided exclusively by medical or psychological experts.[10] The court's adoption of a different rule, but one still requiring expert opinion, continues the fiction that information provided by experts is a necessary ingredient. However, the ingredient is to be sifted into the recipe without any "un-

8. Throughout the opinion the concept of mens rea is visible, although disguised. *See* United States v. Brawner, 471 F.2d 969, 985-86 (D.C. Cir. 1972). The court does deal with arguments to abolish the insanity defense. Primarily the court bases its decision against abolition on tradition and constitutional restraints, an all too familiar way of not considering the issue.

9. Free will or mens rea.

10. Perhaps people other than experts can provide useful information to the court concerning these issues. Family members, for example, may have been in a position to observe the defendant just prior to his alleged actions, a position the expert rarely is in. *See* United States v. Brawner, 471 F.2d 969, 1010-11 (D.C. Cir. 1972) (Bazelon, C.J., concurring).

due domination"[11] or influence by the experts. The court stresses that the jury and not the expert has the complicated, if not impossible, task of melding into its decision moral,[12] legal and ethical considerations. The court gives back to the jury its primary function.[13] But still the court will not frame the jury's responsibility in terms of what is *just* or *unjust* since that would leave the jury to define these concepts on their own,[14] a task beyond the jury's capacity. The expert should no longer be allowed to directly and expressly influence the trier of fact.

These two issues which underlie the court's reasoning are treated as if they were necessarily correlated. That is to say, that by changing the test the expert's influence will be diminished, or that by changing the input of the expert the test will change. The weakness of these arguments concerning the jury's function, the naive assumption that a change in the rule will change the procedure, and the continuation of the worn-out free will philosophy lead one to conclude that the majority wishes to take the opportunity to apply sanctions and criticisms to the expert.

The court was urged to consider the abolition of the insanity defense. However, the court reasoned from legal theory that the issue of free will must continue to dominate the legal perspective of criminal behavior. But if this is the case, what do experts know about "intentions" used in the legal sense by courts when considering the insanity issue? In most instances the expert is probably beyond the scope of his knowledge when he attempts to make statements about intention in the sense that they relate to the mens rea doctrine. Intention has little or nothing to do with psychological illness or, if you prefer, maladaptive behavior. The court reifies the intention doctrine, acting as if the concept were not man-made and changeable by man. Throughout, the court recognizes the complicated, intricate, delicate task that the jury must accomplish. Why not leave it to the jury completely, and totally remove the expert from the litigation phase concerned with criminal responsibility? Perhaps if the court will not do that, then this is the time for the expert to opt out himself.[15]

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11. *Id.* at 983-84.
12. But not in the narrow religious sense. *Id.* at 982.
13. *Id.* at 989-90.
14. *Id.* at 986-89.
15. This is not a novel suggestion; however, the impetus for opting out of the system may be greater following the *Brawner* decision.

The majority views its decision as a step forward and as an effort to untangle the complicated rules of criminal responsibility; but from the expert's view it may be a step backward, not because of restrictions placed on testimony but because of the complete lack of understanding by the court of the framework within which the expert works. This dismal abyss, after so many years of attempts at rapprochement between the law and its experts, brought the court to the point of castigating the expert, which was unnecessary if the court only wished to change the legal rule regarding insanity.

The impaling of the expert by the majority is intensified by Chief Judge Bazelon in his concurring opinion. He begins his opinion by taking valid issue with the announced new rule and argues semantic gamesmanship on the part of the majority. The thrust of Bazelon's objection to the majority opinion is diminished, however, by the axe-grinding one begins to sense in Bazelon's own writing. Bazelon acknowledges the need for change and that the *Durham* rule he authored fell short because of inherent weaknesses. He argues that what should have been forthcoming from the court was an updated, revised version of *Durham* instead of the American Law Institute test, a test which Bazelon perceives as moving in the wrong direction, or worse, in a backward direction.[16] Bazelon does not need, nor is he asking for, sympathy, and yet it is impossible to read the opinion and not feel that the author of *Durham* has been betrayed. One senses conspiracy by his judicial colleagues and betrayal by the expert community. The *Durham* rule has been used by the experts to gain domination, and the collegial conspiracy of the majority amounts to putting the law back where "it should be" or at least taking it away from where it should not be. The majority base their decision on this distorted perception of expert domination, but why does Bazelon fall into this same trap?[17] His opinion supports the majority as they take the expert to task. The betrayal Bazelon experiences is multidimensional, but understandably related to unrealistic expectations of what experts could deliver. Bazelon is understanding and accurate in his assessment of procedural prob-

16. United States v. Brawner, 471 F.2d 969, 1012-13 (D.C. Cir. 1972).

17. Bazelon states that *Durham* did not remove the expert's "strangle hold" on the process, and experts continued to offer conclusions and judgments based on their view as to an appropriate legal outcome. United States v. Brawner, 471 F.2d 969, 1010-11 (D.C. Cir. 1972). Experts are castigated for offering conclusions instead of correlative productivity statements.

lems surrounding expert testimony,[18] but that does not undo the support or at least implicit support he gives to the majority's condemnation of the expert.

The entire decision, the majority as well as concurring opinion, is an example of scapegoating. This kind of reasoning or rationalizing about expert domination demonstrates why experts have been able (if they have) to exercise influence in the court. If the experts have dominated, it is because attorneys and judges have avoided their reponsibilities.

THE RISE AND FALL OF THE BEHAVIORAL SCIENCE EXPERT

The ascendency of the expert as the "golden boy" of the court began prior to the turn of the century and culminated in *Durham*. The rise of the expert in cases involving criminal responsibility is relatively easy to understand if one first looks at the relationship between law and the behavioral sciences which developed in civil matters. Aside from criminal matters, the legal system and attorneys traditionally have had the duty of restricting the activity of mentally ill persons who would otherwise disturb the ongoing activities of the community. The expert's duty was to treat or rehabilitate an individual so he could again function in the community. Prior to modern behavioral science, what this meant was that the law restrained mentally ill people. The advent of behavioral science, as we broadly understand it today, gave the attorney the opportunity to seek help and guidance in dealing with mentally ill people as he carried out his responsibility to the community. The lawyers were seeking help and the experts were willing to give it.

The alienists (psychiatrists) did not wish to be isolated from the criminal area of the law, and from the time of *M'Naghten* they increasingly sought recognition. It is clear that the courts wished to have the burdensome responsibility of considering the question of criminal intent lightened. The erosion of the court's responsibility and abdication of that responsibility in favor of the expert resulted in the *Durham* decision. As has been noted by numerous commentators, *Durham* freed the behavioral science expert and supposedly allowed him to apply his skill unfettered by legal shackles. The expert could

18. Indigent persons—really persons of modest means—are unable to obtain quality "expertise." Most often this problem is related not to quality per se, but to the amount of time (economic consideration) the expert can devote to a patient-offender.

describe to the trier of fact the nuances and subtleties of personality functioning of the individual who had allegedly violated the law. Before *Durham*, the expert often had much the same leeway in individual cases, but this operated on a case-by-case basis. Thus attention was not called to the expert's "domination" of the court procedures. The institutionalization of this "domination" following *Durham*, or at least the potential for such domination, called too much attention to this factor, and subsequent cases[19] began to again limit the expert's freedom in testifying. *Brawner* is the logical conclusion of the trend which followed *Durham*. The rise of the expert's prominent role must be attributed to the legal system's inability to deal with the problem and reflects judicial efforts to find solutions elsewhere. Surely the expert did not just take over the court in cases where criminal responsibility was an issue; if the expert did approach a position of dominance it was due to the willingness of the courts to relinquish control.

The *Brawner* opinion pretends that the expert assertively took the position of dominance and in a sense overpowered the judge. The actual situation is more accurately described as a covert agreement between court and attorney to maneuver the expert into the position of giving conclusory statements on the ultimate issues. The expert filled the void left by the court—a void which, in spite of *Brawner*, will still exist. The expert merely shielded the court from painful scrutiny of its deficiencies in dealing with intention, free will and the criminal justice system.

The *Brawner* opinion intimates that the behavioral science expert had some desire to control the court, some hidden agenda, some social-political axe to grind.[20] The court claims that the behavioral science expert was substituting his judgment concerning morality and criminal standards for that of the court or jury. If this occurred, it occurred because the court and attorneys asked for these judgments, and not only allowed such judgments, but encouraged the expert to respond in judgmental conclusory ways.

The expert is culpable of overselling his product. This was an error in judgment on the part of the experts. The overselling by experts of skills which are imperfect and geared to the "clinical imperfection" that can be tolerated when working in a hospital, rehabilitation

19. *See* the introduction to this symposium, *supra*, for cases subsequent to *Durham* which began carving away at the illusory freedom of the expert.

20. 471 F.2d at 983-84, 1010-11.

center, or other clinical setting, contributes to Bazelon's unrealistic expectations and disappointment. Clinical imperfections are not tolerable when decisions made concerning a person are not remedial but punitive and not easily corrected except through expensive and complicated legal procedures. The legitimate product to be marketed by the expert is a diagnosis of present mental disorder and its treatment toward rehabilitation of the accused. None of these functions has any scientific relationship to a state of mind at a specific point in the past. No one is able to make that determination. Consequently, the law and its jurists may be trapped into the position of placing crucial importance on an intervening variable (mens rea) which is easy to give lip service to, but defies observation, delineation, and measurement. It is possible to say something about mental disturbance existing at earlier times in a person's life and maybe even at the time past behavior took place, but that still does not say anything about intention, productivity or causality. It was difficulties of this nature which forced courts to *Durham*, irresistible impulse and other modifications of *M'Naghten*. If jurists and attorneys had been satisfied with statements which were possible for the expert to make, the rise and subsequent fall of the expert would not have occurred. The court, in its effort to have a definite and precise statement of the relationship between mental condition and specific alleged behavior, modified the test of responsibility in ways designed to foster greater reliance on the expert. But the court still asked the wrong questions and required the expert to tie specific behavior to mental disturbance and in this way respond to the ultimate question.[21] Now in *Brawner* we have the court suggesting that this was done by the experts in an effort to assert influence.

For reasons of its own, the legal system allowed or forced experts to assume a prominent role in deciding cases. The greater the attention paid to questions of intent, the greater the role of the expert. The greater the interest in being sure that the defendant deserved to be punished, the greater the role of the expert. The expert's rise within the legal system also reflected society's greater acceptance of the psychological underpinnings of not only criminal behavior but also behavior gen-

21. I cannot undertake a discussion of the free will versus determinism debate, but it should be noted that the expert's adherence to a deterministic model does not lead to predictions of specific responses. Rather, the expert's opinion based on a deterministic model can attempt prediction (and postdiction) of a range of possible responses and behaviors. That is, given personality factors A-C plus historical factors D-F, then responses G-Z are possible.

erally. With this increasing acceptance came unreasonable expectations by the law and unrealistic claims by experts of what could be accomplished and understood through the knowledge and technology of behavioral science. Perhaps the most important reason for the exaggerated optimism was the growing awareness that the courts and penal systems did very poorly in understanding intention and criminal behavior, and in doing anything at all about recidivism and rehabilitation. The more the courts recognized their inadequacy, the greater the judicial frustration and the greater the reliance at the time of decision on experts. This misguided scheme was and still is doomed to failure, but the law is slow to change and *Brawner* is a reflection of unwillingness to depart from tradition.

Everyone is responsible[22] for his actions, even those actions growing out of an insane delusion. After all, who is responsible for any delusion except the person suffering it? Such arguments have been made before but have not persuaded the court. Why is the court so closed to considering new approaches which would not only facilitate the progress and process of the criminal justice system, but lead more efficiently to the ultimately stated goal of rehabilitation? Perhaps one reason is that the court and society will not come to grips with the fact that we do wish to punish and not rehabilitate wrongdoers. Simultaneously, however, we attempt to psychologically demonstrate a sensitivity, perhaps humanitarianism, by not punishing those few seriously deranged people who supposedly are not responsible—not just for alleged criminal behavior but any behavior. These few people that would fall within this category could be detected by any sensitive attorney and should not require extensive, expensive psychiatric evaluation. Everyone, judges, attorneys and experts, who becomes involved in this process knows that it is nothing but a game.

But the game persists and will persist in spite of—or because of—*Brawner*. Bazelon charges that the decision changes nothing, and he is undoubtedly and unfortunately correct. The court did have the opportunity to do something creative and innovative, but it failed. Perhaps when experts learn of this decision—not the rule announced, but the lashing out at experts which moves through the decision like a vam-

22. A deterministic model of human behavior does not lead to the conclusion of no responsibility. The argument can be made that a deterministic model produces the ultimate responsibility insofar as the person is responsible for all behavior. Such a model, for example, would leave no room for excusable negligence of any kind.

pire drawing blood at every opportunity—then perhaps the experts will indeed take the initiative. The initiative may come in a form neither imaginative nor creative, but by the expert's refusal to become involved with a person for the purpose of testifying at the trial level. The result of such a "work stoppage" would focus the issue clearly as one for the courts to resolve, thus putting the expert back where he belongs, in the rehabiliation setting. The man-hours wasted by experts, not to mention the cost to all of us, on insanity pleas is absurd and an outrageous fraud on the public by both the legal system and the expert community. If the leaders in charge of the legal system cannot respond innovatively to a problem that has been considered *ad nauseam* for too many years, then perhaps experts must take a dominant, assertive, leadership role, even if it be through abstention. If experts do this, some will claim lack of cooperation, but to date there really has been little cooperation and even less understanding. This is what *Brawner* really stands for.