

DETRUDING THE EXPERTS

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The main reason for the abandonment of the rule in *Durham v. United States*¹ was to escape the “undue dominance by the experts” in determining a defendant’s mental responsibility.²

The Court of Appeals had devised the *Durham* rule, eighteen years before, mainly to meet the complaints of the psychiatric profession that under the traditional *M’Naghten* and irresistible impulse tests, they were obliged, when called to testify, “to reach outside of their professional expertise when they were asked . . . whether the defendant knew right from wrong,” and were prevented from conveying to the judge and jury the full range of information relevant to assessing the defendant’s responsibility.³ *Durham* was intended to permit medical experts to testify on medical matters without the confusion that many of them experienced in testifying under the older rule.

But although intended to facilitate the giving of expert testimony on medical data, in practice it also opened the door to conclusions rendered by experts on the non-medical, legal issue of the defendant’s responsibility. It opened the door to “trial by label,” by failing to make clear what abnormality of mind was an essential ingredient of mental “disease” or “defect.” Absent a legal definition of these terms, the psychiatrists naturally tended to give them medical meanings. The court had attempted to meet this in *McDonald v. United States*,⁴ by providing a legal definition: “mental disease or defect” included “any abnormal condition of the mind which substantially affects mental or emotional processes and substantially impairs behavior controls.” This definition, says the court, “was useful in the administration of justice because it made plain that clinical and legal definitions of mental disease were distinct, and it helped the jury to sort out its complex task and to focus on the matters given to it to decide.”⁵

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1. 214 F.2d 862 (D.C. Cir. 1954).

2. *United States v. Brawner*, 471 F.2d 969, 981 (D.C. Cir. 1972).

3. *Id.* at 976.

4. 312 F.2d 847, 851 (D.C. Cir. 1962).

5. *United States v. Brawner*, 471 F.2d 969, 978 (D.C. Cir. 1972).

But the *Durham* rule was found also to require explication to resolve the ambiguity inherent in the word "product." Therefore in *Carter v. United States*,⁶ the court explained that productivity required that there "be a relationship between the disease and the criminal act; and the relationship must be such as to justify a reasonable inference that the act would not have been committed if the person had not been suffering from the disease." In short, *Carter* identified productivity with "but for" causation.

But productivity presented other problems. Because the concept was so decisive a factor in the test, allowing experts to testify expressly to productivity raised concern lest the issue be in fact turned over to the experts rather than determined by the jury for itself.⁷

Thus it came about that in *Washington v. United States*⁸ the court forbade experts to testify as to productivity. "Psychiatrists," it concluded, "should not speak directly in terms of 'product,' or even 'result' or 'cause.'" Unfortunately, in the almost contemporaneous case of *Harried v. United States*,⁹ the court had seemed to differentiate between asking expert witnesses whether the act was the "product" of the disease, and asking them whether there was a "causal relationship." Whether *Washington* overruled *Harried*, or whether it only forbade "direct" testimony in such terms, but still allowed "indirect" reference to the issue, was apparently not clear, as shown by the action of the trial judge in the instant case, who ruled that the expert witnesses would not be allowed to testify to productivity, but then permitted questions concerning the existence of a "causal relationship."

So finally in *United States v. Brawner*¹⁰ the court came to the conclusion that it was necessary to abandon *Durham*, to escape from the undue dominance by the experts, which had survived even the *McDonald* modification. "There is," the court concluded, "no generally accepted understanding, either in the jury or the community it represents, of the concept requiring that the crime be the 'product' of the mental disease."¹¹ The medical experts, called to adduce information concerning the "medical" component of the responsibility issue, came

6. 252 F.2d 608, 615-16 (D.C. Cir. 1957).

7. This concern had been expressed by then Circuit Judge Warren Burger in *Blocher v. United States*, 288 F.2d 853, 863 (D.C. Cir. 1961).

8. 390 F.2d 444, 456 (D.C. Cir. 1967).

9. 389 F.2d 281, 285 (D.C. Cir. 1967).

10. 471 F.2d 969 (D.C. Cir. 1972).

11. *Id.* at 982.

to express, in terms of "product," ethical and legal conclusions. It is ironic, the court said, that a rule adopted "to permit experts to testify in their own terms concerning matters within their domain which the jury should know, resulted in testimony by the experts in terms not their own to reflect unexpressed judgments in a domain that is properly not theirs but the jury's."¹² The sound solution, the court decided, "lies not in further shaping of the *Durham* 'product' approach in more refined molds, but in adopting the ALI's formulation as the linchpin of our jurisprudence."¹³

In doing so, the court added a number of clarifying corollary rules:

a. Because the ALI test lacks a definition of "mental disease or defect," the court ruled that the *McDonald* definition would be engrafted thereon.

b. The ALI formulation allows an option in wording: A person is not responsible for criminal conduct if as a result of mental disease or defect he lacked "substantial capacity either to appreciate the criminality [wrongfulness] of his conduct" The court chose "wrongfulness" as the preferable term.¹⁴

12. *Id.* at 983.

13. *Id.* In adopting the ALI test, the Court of Appeals joins the courts of appeals in almost all the other circuits. Cases in which the ALI test has been adopted are, by circuit: *United States v. Tarrago*, 398 F.2d 621 (2d Cir. 1968); *United States v. Freeman*, 357 F.2d 606 (2d Cir. 1966); *United States v. Benus*, 305 F.2d 821 (3d Cir. 1962); *United States v. Currens*, 290 F.2d 751 (3d Cir. 1961) (volitional part of the test only); *United States v. Taylor*, 437 F.2d 371 (4th Cir. 1971); *United States v. Chandler*, 393 F.2d 920 (4th Cir. 1968); *United States v. O'Neal*, 431 F.2d 695 (5th Cir. 1970); *United States v. Smith*, 437 F.2d 538 (6th Cir. 1970); *United States v. Smith*, 404 F.2d 720 (6th Cir. 1968); *United States v. Bohle*, 445 F.2d 54 (7th Cir. 1971); *United States v. Shapiro*, 383 F.2d 680 (7th Cir. 1967); *Pope v. United States*, 372 F.2d 710 (8th Cir. 1967) (adopting a position of neutrality); *United States v. White*, 447 F.2d 796 (9th Cir. 1971); *Wade v. United States*, 426 F.2d 64 (9th Cir. 1970); *United States v. Stewart*, 443 F.2d 1129 (10th Cir. 1971); *Wion v. United States*, 325 F.2d 420 (10th Cir. 1963). Six states have adopted the ALI test by statutes: ILL. ANN. STAT. ch. 38, § 6-2 (Smith-Hurd 1972); MD. ANN. CODE art. 59, § 9(a) (Supp. 1971); MO. ANN. STAT. § 552.030 (Supp. 1971); MONT. REV. CODES ANN. § 95-501 (1969); N.Y. PENAL LAW § 30.05 (McKinney 1967); VT. STAT. ANN. tit. 13, § 4801 (1958). Four states have adopted ALI by judicial decision: *State v. White*, 93 Idaho 153, 456 P.2d 797 (1969); *Terry v. Commonwealth*, 371 S.W.2d 862 (Ky. 1963); *Commonwealth v. McHoul*, 352 Mass. 544, 226 N.E.2d 556 (1967); *State v. Shoffner*, 31 Wis. 2d 412, 143 N.W.2d 458 (1966) (at election of accused).

14. The choice is sound. The argument for preferring "wrongfulness" is presented in Weihofen, *Capacity to Appreciate "Wrongfulness" or "Criminality" under the ALI—Model Penal Code Test of Mental Responsibility*, 58 J. CRIM. L.C. & P.S. 27 (1967).

c. The ALI formula has a second paragraph, which reads:

(2) The terms "mental disease or defect" do not include an abnormality manifested only by repeated criminal or otherwise anti-social conduct.

The purpose of this was to exclude so-called "sociopathic personalities" from the insanity defense. The District of Columbia court had already said that the mere existence of a long criminal career does not excuse crime. The caveat paragraph is therefore not needed.¹⁵

In addition to the question of the test wording, the court discussed a number of collateral problems.

1. Closely related to the question of a proper test, and perhaps most important in affording possibilities for future development, is the court's adoption of the doctrine that mental condition, although insufficient to exonerate, may be relevant to negative the specific mental element of certain crimes or degrees of crime. The clearest example is the element of premeditation and deliberation for first-degree murder. Under the doctrine, a person who is not so mentally diseased as to be unable to appreciate the criminality of his conduct or to conform his conduct to the requirements of the law may nevertheless, because of such disease, not have acted deliberately in committing the homicide. Although his mental condition would therefore not suffice to justify an acquittal by reason of insanity, it would suffice to reduce the crime to second-degree murder.

The court declined to say whether the doctrine would also be available to reduce second-degree murder to manslaughter, where the defendant's mental condition negated malice aforethought. That question, it said, requires further analysis and so should be remitted to future consideration. Chief Judge Bazelon, in his full and searching concurring opinion, would resolve that question without delay.

In accepting this doctrine, as about half the other American juris-

15. Even apart from this reason, attempting by legislative fiat or judicial decision to exclude certain conditions such as sociopathic personality from the definition of mental disease or defect seems unsound. And even if the purpose were sound, the ALI provision seems ineffective to accomplish it. It speaks in terms not of sociopathic personality but of an abnormality manifested only by criminal or antisocial behavior. Any defense lawyer would be able to avoid having his case come within this provision by introducing some additional evidence of mental disease or defect. See H. WEIHOFEN, *THE URGE TO PUNISH* 87-90 (1956); Weihofen, *The Definition of Mental Illness*, 21 OHIO ST. L.J. 1, 6-8 (1960).

dictions have done,¹⁶ the court makes available what could become an important supplement to the established test, although thus far defense counsel in most states have not made much use of it.¹⁷

2. The *Browner* opinion also rejected the proposal that the insanity defense be abolished altogether, a proposal that had been urged by writers such as Professor Joseph Goldstein of Yale and which had also been suggested by some members of the court in prior cases, as one way to restrict expert psychiatric judgments to the disposition stage of criminal proceedings.¹⁸

3. It refused to decide the constitutionality of the 1970 addition to the District of Columbia Code¹⁹ which undertook to change the burden of proof rule so as to require the accused affirmatively to establish his mental irresponsibility by a preponderance of the evidence.²⁰

4. It reaffirmed prior cases holding that the jury has the right to know what disposition would be made of the defendant if the jury finds him "not guilty by reason of insanity."²¹

16. The cases are collected in 22 A.L.R.3d 1228 (1968).

17. Taylor, *Partial Insanity as Affecting the Degree of Crime—A Commentary on Fisher v. United States*, 34 CAL. L. REV. 625 (1946); Weihofen & Overholser, *Mental Disorder Affecting the Degree of a Crime*, 56 YALE L.J. 959 (1947).

In California, the bifurcated trial has led to the use of this doctrine to bring the defendant's mental condition before the jury in both parts of the trial. See *People v. Conley*, 64 Cal. 2d 310, 411 P.2d 911, 53 Cal. Rptr. 321 (1966); *People v. Wolff*, 61 Cal. 2d 795, 394 P.2d 959, 40 Cal. Rptr. 271 (1964); Comment, *Admissibility of Subjective Abnormality to Disprove Criminal Mental States*, 12 STAN. L. REV. 226 (1959).

18. S. GLUECK, LAW AND PSYCHIATRY: COLD WAR OR ENTENTE CORDIALE? 152 (1962); Goldstein & Katz, *Abolish the "Insanity Defense"—Why Not?*, 72 YALE L.J. 853 (1963); Weintraub, *Criminal Responsibility: Psychiatry Alone Cannot Determine It*, 49 A.B.A.J. 1075 (1963); Weintraub, *Insanity as a Defense, a Panel Discussion*, 37 F.R.D. 365, 369 (1964); Comment, *Law—Rehabilitation, A Thesis: Punishment, The Antithesis—Insanity Defense in the Balance*, 19 DEPAUL L. REV. 140 (1969). See comments of then Circuit Judge Burger, quoted in *Wion v. United States*, 325 F.2d 420, 428 n.10 (10th Cir. 1963); Chief Judge Bazelon, in *Washington v. United States*, 390 F.2d 444, 457 (D.C. Cir. 1967); Chief Judge Haynesworth, in *United States v. Chandler*, 393 F.2d 921, 928 (4th Cir. 1968). Morris, *Psychiatry and the Dangerous Criminal*, 41 S. CAL. L. REV. 514 (1968), summarizes in an appendix the leading arguments that have been offered for abolition. Cf. Kadish, *The Decline of Innocence*, 26 CUMB. L.J. 273 (1968).

19. D.C. CODE ANN. § 24-301(j) (1970).

20. The District of Columbia rule had been that the Government has the burden of proving sanity beyond a reasonable doubt. *Davis v. United States*, 160 U.S. 469 (1895). About half the states follow the same rule. See cases collected in Annot., 17 A.L.R.3d 146 (1968).

21. *Lyles v. United States*, 254 F.2d 725 (D.C. Cir. 1957). The court in *Browner*

5. The court agreed that the law cannot distinguish between physiological, emotional, social and cultural sources of the mental impairment, and that such sources may be both referred to by the expert witnesses and considered by the trier of the facts. However, this does not mean that such factors may be taken as a separate defense; cultural deprivation, for example, unrelated to any abnormal condition of the mind, is not a defense.

These collateral determinations will not be further discussed in this paper, which is intended to focus on the main issue that the court wrestled with, the problem of expert domination.

The court strongly denied that its purpose in abandoning *Durham* was to tighten up on the insanity defense. The ALI rule it was adopting, the court said, "is contemplated as improving the process of adjudication, not as affecting number of insanity acquittals."²² Insanity acquittals since *Durham* was modified by *McDonald*, in 1962, had run at about two percent of all cases terminated, and the court saw no basis for concluding that the number or percentage of such acquittals had been either excessive or inadequate. It also saw no way of forecasting what the effect of the switch would be on jury verdicts. What it would do, the court felt confident, was to provide "a sounder relationship in terms of the giving, comprehension and application of expert testimony," and enhance jury deliberations.²³

Eliminating "productivity," the court hopes, will reduce the influence of expert conclusions on this legal issue and leave the jury freer to exercise its own judgment. This undue influence, in the court's opinion, had been due to two aspects of the *Durham* test: Juries were too prone to accept expert conclusions (1) that the defendant was or was not suffering from a mental disease or defect, and (2) that his criminal act was the "product" thereof. The first objection was met, apparently to the court's satisfaction, by *McDonald*, which required the jury to be given a "legal" definition of those terms, and the *Browner* decision specifically retains that definition and incorporates it into the new rule. The second objection is presumably disposed of by abandoning the rule that used the word "product." But will banishing the word eliminate the problem? Under the ALI test that the court has now

suggested a form of instruction that would accurately reflect what the consequences of such a verdict would be, in the light of recent statutory changes.

22. *United States v. Browner*, 471 F.2d 969, 989 (D.C. Cir. 1972).

23. *Id.* at 990.

adopted, the question is whether "as a result" of mental disease or defect the defendant lacked capacity, etc. And indeed, *any* formulation of the test necessarily involves such a causal relationship, because it is a test of *insanity* as a defense, as distinguished from other defenses, such as infancy or intoxication or somnambulism. Any wording therefore must express that limitation; the test does not apply to *any* incapacity, but only incapacity resulting from mental disease or defect. So, as Judge Bazelon says in his concurring opinion, "the critical question is not *whether* the act must be related to the impairment ('mental disease,' 'defect of reason,' or whatever) but rather how directly, if at all, the jury's attention should be focused on the question."²⁴ One wording may express that causal requirement more directly than another. *Durham*, under which the only requirement for criminal irresponsibility was that the defendant have a mental disease or defect and that the criminal act be the product thereof, focused on that relationship more singly and more emphatically than others. But the ALI requirement that the incapacity be the "result" of the mental condition brings in the same problem. The *M'Naghten* rule hides it best, by wording the question as whether the defendant "was labouring under such a defect of reason, from disease of the mind, as not to know the nature and quality of the act he was doing," etc. But the innocuous word "such" requires the same causal connection; its meaning would not be changed if it were worded that the defendant should be acquitted if he did not know the nature and quality of the act he was doing and if such lack of knowledge was the product of mental disease or defect.

The court in *Browner* admits that the ALI rule contains this requirement of causality, but curiously, it says nothing to explain why the word "result" will lead to fewer difficulties than the word "product," which it considered the main weakness of the *Durham* rule. Its reference to the "result" in the ALI test consists of two sentences: "Exculpation is established not by mental disease alone but only if 'as a result' defendant lacks the substantial capacity required for responsibility. Presumably the mental disease of a kleptomaniac does not entail as a 'result' a lack of capacity to conform to the law prohibiting rape."²⁵

But if the court's opinion does not articulate its reasoning on this point, Bazelon does. Although the ALI test retains (necessarily) the

24. *Id.* at 1022 (emphasis original).

25. *Id.* at 991.

“core requirement” of productivity in the sense that there must be a “meaningful relationship between the mental illness and the incident charged,” the question of causality does not occupy the position of prominence that it does under *Durham*. By eliminating the word “product,” the court can eliminate the vocabulary that was “conductive to a testimonial mystique permitting expert dominance and encroachment on the jury’s function.”²⁶

This reasoning, says Bazelon, suggests that the primary goal is to *de-emphasize* the question of productivity or causality. But he suspects that the ALI test will not bring us closer to that goal. The difficulty of applying the ALI causality requirement—and hence the amount of attention that requirement will attract—is likely to vary with the nature of the defendant’s impairment. If he cannot distinguish right from wrong *generally* (*i.e.* with respect to *any* act or most of his acts) the jury is likely to conclude that his impairment “caused” his act. And if the court’s purpose had been to dispose of the productivity problem by adopting a test that limited the defense to those forms of mental disorder so severe that a relationship between the disorder and the act could readily be found, the ALI test could be seen as serving that end. Its wording lends itself to a restrictive interpretation: A person’s ability to control his behavior might be “substantially impaired” (and so meet the *Durham-McDonald* test), yet he might retain “substantial capacity” (and so fail the ALI test). The reporter for the Model Penal Code himself said the test would have the effect of limiting the defense to “the most severe afflictions of the mind,”²⁷ and some of the courts that have adopted the test have given it such a narrow interpretation.²⁸

26. *Id.* at 1023.

27. Wechsler, *Codification of Criminal Law in the United States: The Model Penal Code*, 68 COLUM. L. REV. 1425, 1443 (1968).

28. The Court of Appeals for the Tenth Circuit, in adopting the ALI test, agreed with Judge Burger that it was “essentially M’Naghten plus irresistible impulse recast in modern terminology.” That court was “content to adhere to” its prior rule “in the more simplified and understandable language of the ALI formulation.” *Wion v. United States*, 325 F.2d 420, 426-27 (10th Cir. 1963). The Fourth Circuit also seems to regard the ALI test as only making a cosmetic change. In *United States v. Butler*, 409 F.2d 1261 (4th Cir. 1969), that court held that the trial court had not erred in instructing the jury in terms of M’Naghten plus irresistible impulse. “Appellant’s able and zealous counsel on appeal was unable to point to any significant difference between the charge given and the one refused.” *Id.* at 1262. See also *United States v. Chandler*, 393 F.2d 920, 929 (4th Cir. 1968) (ALI test does not exculpate “all those persons for whose deviant conduct there may be some psychiatric explanation”).

In other circuits, however, the ALI test has been interpreted broadly. In the ninth and

But retention of the *McDonald* definition of mental disease or defect has the effect, as the court says, of expanding the defense beyond the gravest types of mental disorder. Under the *McDonald* definition, if the defendant's mental processes or emotional controls are "substantially impaired," it matters not whether the impairment results from a psychosis or from a neurosis or sociopathic personality. But the latter conditions, more often than psychosis, may significantly affect some aspect of behavior while leaving the personality substantially intact. Where that seems to be the situation, disputes are likely to arise concerning the relationship of the act to the impairment, and the causal relationship requirement may be used, by prosecutors and perhaps by juries, as a basis for rejecting the irresponsibility defense.

Whereas *Durham* focused on the relationship between the mental illness and the act, the ALI test focuses on the relationship between the defendant's illness and his impairment. Will this help alleviate or eliminate the productivity problem? Judge Bazelon thinks not. The question of the relationship between the impairment and the particular act charged remains, even though it is concealed in two questions which are implicit in the ALI test: Could the defendant appreciate the wrongfulness of the act he committed, and could he have conformed his action to the requirements of law? The test uses the word "conduct" but it does not mean conduct generally; it talks of his capacity "at the time of such conduct," *i.e.* the time of the act charged. And, as said, where the defense is based on one of the lesser forms of mental illness, the question of whether such illness produced a lack of substantial capacity to appreciate the wrongfulness of the act will still

second circuits, it is clear that the courts of appeals regard the ALI test as more liberal than *M'Naghten*, because they reversed convictions in which the jury was instructed in *M'Naghten* terms. *Wade v. United States*, 426 F.2d 64 (9th Cir. 1970); *United States v. Freeman*, 357 F.2d 606 (2d Cir. 1966). Some cases have expressed the view that there is no significant difference between ALI and *Durham-McDonald*. *Wade v. United States*, *supra*; *United States v. Smith*, 404 F.2d 720, 726-27 (6th Cir. 1968); *Pope v. United States*, 372 F.2d 710, 735 (8th Cir. 1967). The Fifth Circuit Court of Appeals interprets ALI as working a measurable change in the old test, but not so great as to include sociopaths. *United States v. O'Neal*, 431 F.2d 695 (5th Cir. 1970); *Blake v. United States*, 407 F.2d 908 (5th Cir. 1969). But in the seventh circuit, the court in adopting the ALI test reversed the conviction and remanded for a new trial although the evidence established nothing more than sociopathy. *United States v. Shapiro*, 383 F.2d 680 (7th Cir. 1967). *But cf.* *United States v. Gorman*, 393 F.2d 209 (7th Cir. 1968) (no insanity instruction required where testimony was that accused had "a psychoneurotic reaction, depressive type," but that his ability to reason logically was unimpaired).

be with us. The *Browner* case itself illustrates such a situation. The experts on both sides agreed that defendant was mentally ill, afflicted with some type of organic brain pathology associated with an explosive personality disorder. The act for which he was charged, shooting through a closed door in retaliation for a blow on the jaw a short while before, could be (and was by two experts) found to be consistent with and related to his mental condition—or it could be found to have been committed (as one expert put it) “to get even with someone who broke [his] jaw.” However one words it, this is the problem of productivity.²⁹

The court will thus continue to face inquiries into causality in many cases. The numerous references to the causality question in the *Browner* opinion indicate a recognition that this is so.

The critical question, therefore, says Judge Bazelon, is how the productivity issue will be presented to the jury. The *Durham* mistake of giving the false impression that it is a medical question must be avoided. The ALI test itself may be of some help because it does not invite direct expert testimony that defendant’s impairment did or did not “cause” the act. But by avoiding highlighting the issue, that test may only hide it without eliminating it. It may repeat the mistake it points out concerning *Durham*: “the articulation of a catch-phrase that facilitates conclusory expert testimony and that obscures the moral and legal overtones of the productivity question.” The expert, instead of testifying that the act was not the “product” of the disease, can now assert that the disease did not “result” in a lack of substantial capacity to appreciate or to conform.³⁰

The *Washington* rule, that psychiatrists should not be permitted to testify to a conclusion on whether or not the criminal act was the “product” of mental disease or defect, is abrogated in *Browner* in one subordinate clause of one sentence: “Since both *Washington* and *Harried* are superseded—on this point—by our change today of the ultimate rule. . . .”³¹ This abrogation strikes Bazelon as “inexplicable” inasmuch as the court repeatedly acknowledges that under the new rule the causality requirement remains. The effect, says Bazelon, is now to permit experts to testify in conclusory terms, so long as the term used is “result” instead of “product.” If, as was agreed by all the mem-

29. *United States v. Browner*, 471 F.2d 969, 977-78 (D.C. Cir. 1972).

30. *Id.* at 1027.

31. *Id.* at 1003.

bers of the court, the primary objection to the "product" requirement was that it facilitated expert domination of the decision, and the aim of the *Washington* rule was to eliminate such domination, it seems optimistic for the court to assume that that danger is eliminated by adoption of the new test.

Might it have been more effective, instead of abrogating *Washington*, to strengthen it by forbidding expert witnesses to testify in any of the terms of the test question? That is, if the *Durham* test were retained, forbid the experts to testify to either productivity or the existence of mental disease or defect; if the ALI test is substituted, forbid testimony as to whether the defendant could or could not "appreciate" "wrongfulness" or "conform." It is true that the *Washington* rule did not work very effectively, but that was largely because it was weakened from the outset by the court's ambiguity about whether it prohibited only testimony stated in terms of "productivity" or whether it also forbade conclusions about "causal relationship." If instead of moving to a new set of test concepts, the court had tightened up the *Washington* rule, might it have succeeded finally in forcing the experts to present the details about the defendant's mental functioning from which the jury could itself reach a conclusion on the test question? It would at least spare the experts from having to do what they have been telling us they feel incompetent to do, to speak to these judgmental questions. By abrogating *Washington*, will not the court encourage counsel in doing what they have shown themselves so prone to do even in the face of discouragement, to get the expert to give conclusory answers to the test questions and so in effect tell the jury whether the defendant should or should not be held responsible?

Continuance of the danger of expert dominance may also be facilitated by the court's rejection of suggestions for disentangling the insanity defense from a medical model. The irresponsibility defense must be predicated on the existence of an "ascertainable condition characterized by 'a broad consensus that free will does not exist.'"³² Bazelon fears that this will work to effect "a delegation of sweeping new authority to the medical experts." True, the court expressly rules that all evidence, not merely medical, may be presented to the jury. But that is already allowed under the rules of evidence. "The real impact of the court's decision is to establish a barrier which will prevent

32. *Id.* at 995, quoting *Salzman v. United States*, 405 F.2d 358, 365 (D.C. Cir. 1968) (Wright, J., concurring).

some defendants from taking any evidence at all to the jury on the issue of responsibility. The power to open and close that barrier is effectively delegated to the psychiatric experts."³³

This new requirement also may work to undermine the "some evidence" rule. In the District of Columbia, if some evidence relevant to the insanity issue has been presented, the issue must be put to the jury. But as Bazelon reads *Browner*, a defendant can now introduce some evidence that his capacity to control his behavior was in fact impaired, yet not be allowed to take the issue to the jury unless he can also offer "convincing evidence" that he is suffering from a medically recognized condition characterized by "a broad consensus that free will does not exist."

The court does not explain why the boundary of the legal concept of responsibility must be marked by medical concepts, especially when the validity of the "medical model" is seriously questioned by some eminent psychiatrists. Nor does the court explain what it means by "convincing evidence" of the existence of a "broad consensus." How many psychiatrists on one side will suffice to give a "broad consensus"? A broad consensus about "free will" seems particularly difficult to attain, for psychiatrists are not in the habit of discussing that philosophical concept. This, says Bazelon, gives an ironic twist to the history of the insanity defense. "Under M'Naghten, medical experts effectively answered moral and legal questions, and cloaked the answers in medical terminology. The court now seems to ask experts to make moral and legal determinations about the nature of an exculpatory condition, and invites them to state their conclusions in *non-medical* terms."³⁴ But perhaps the court's reference to free will is not intended to carry philosophical implications, but is shorthand for the ALI requirement of substantial capacity to conform to the requirements of law. If so, why does the court omit reference to the appreciation part of the test?

Judge Bazelon would prefer a rule that would instruct the jury to acquit the defendant if, because of his mental disease or defect, he cannot justly be held responsible. This was one alternative to the ALI formulation submitted by the drafters of the Model Penal Code.

The jury's function, says Bazelon, is first to measure the extent to

33. *Id.* at 1028.

34. *Id.* at 1029 (emphasis original).

which the defendant's mental and emotional processes were impaired, and second to evaluate that impairment in the light of community standards of blameworthiness. Nothing in the court's opinion, he says, suggests a departure from "our long-standing view" that the second of these functions "is the very essence of the jury's role." And he quotes from the court's opinion: "The jury is concerned with applying the community understanding of this broad rule to particular lay and medical facts. Where the matter is unclear it naturally will call on its own sense of justice to help it determine the matter."³⁵

The best hope for the new test, he says, "is that jurors will regularly conclude that no one—including the experts—can provide a meaningful answer to the questions posed by the ALI test"—questions which present "such unfamiliar, if not incomprehensible, concepts as the capacity to appreciate the wrongfulness of one's action, and the capacity to conform one's conduct to the requirements of law."³⁶ In searching for some semblance of an intelligent test, they may be forced to consider whether it would be just to hold the defendant responsible. The court seems to read the ALI test as allowing the jury "sufficient latitude so that it can give the instruction an application that harmonizes with its sense of justice."³⁷ Bazelon would favor telling the jury candidly that that is their function. The experts then would be asked "a single question: What is the nature of the impairment of the defendant's mental and emotional processes and behavior controls?"³⁸ It would leave for the jury the question whether that impairment was such as to relieve the defendant of responsibility for the act charged.

The ALI ultimately rejected this alternative approach, because some members of the Council "deemed it unwise to present questions of justice to the jury, preferring a submission that in form, at least, confines the inquiry to fact."³⁹ The court in *Browner* shared this view. An instruction cast simply in terms of justice, it says, would permit the jury to convict or acquit without regard to any fixed legal standards. "It is one thing . . . to tolerate and even welcome the jury's sense of equity as a force that affects its application of instructions which state the legal rules that crystallize the requirements of justice as determined by the

35. *Id.* at 1030-31.

36. *Id.* at 1031.

37. *Id.*

38. *Id.* at 1032.

39. *Id.* at 1033.

lawmakers of the community. It is quite another to set the jury at large, without such crystallization, to evolve its own legal rules and standards of justice."⁴⁰

But Bazelon thinks that the legal rules provided by the ALI test, and particularly its requirement that the jury determine whether there has been *substantial* impairment, provides no real "crystallization" of the requirements of justice. The test offers the jury no real help in making the "intertwining moral, legal, and medical judgments" expected of it. In fact, it may lull the jury into assuming that the question of responsibility can best be resolved by experts. It "does nothing to sort out for the jury the difference between its function and the function of the expert witnesses." The "justly" rule would come directly to grips with the problem of expert dominance. And it would confront juries squarely with the task of "giving defendants the kind of careful, individual study that should precede any decision as consequential as the imposition of moral condemnation on another human being."⁴¹

The problem of expert dominance might be further mitigated if the courts, in explaining the ALI test to juries, would offer a clearer and simpler explanation of what is meant by "mental disease." Although the American Psychiatric Association in its amicus brief to *Browner* said that the ALI test "affords a standard of criminal responsibility which a jury can understand,"⁴² the American Psychological Association brief said that even the *McDonald* explanation of what is meant by "mental disease" needs clarification.⁴³ Peter Barton Hutt, as counsel for ACLU, in his amicus brief suggested substituting "mental disability" for "mental disease," on the ground that the latter term may mislead the jury into a fruitless search for some type of tangible disease condition. He also urged that trial courts be instructed to advise the

40. *Id.* at 989. Both the prosecution and the defense took a similar view. So did the bar association of the District. The prosecution's brief argued that specific appeals to "justice" would result in litigating extraneous issues and encourage improper arguments phrased solely in terms of sympathy and prejudice. Amicus curiae William H. Dempsey, Jr., argued that such a rule might leave the jury with the notion that the question was the wide-open one of whether it is "just" to convict. He suggested instead the wording recommended by the British Royal Commission on Capital Punishment leaving it to the jury to determine "whether at the time of the act the accused was suffering from a disease of the mind (or mental deficiency) to such a degree that he ought not to be held responsible."

41. *United States v. Browner*, 471 F.2d 969, 1034 (D.C. Cir. 1972).

42. Brief for American Psychiatric Association as Amicus Curiae at 16.

43. Brief for American Psychological Association as Amicus Curiae at 13.

jury on the intangible and uncertain nature of mental disabilities, and suggested a form of wording for an instruction.⁴⁴

Amicus curiae William H. Dempsey, Jr., would also like to eliminate "mental disease or defect." He believes, however, that we need some term that relates the issue to a pathological mental condition, else the instructions would be misleading unless the court wants to broaden the rule. He suggested a term like "abnormal mental condition." This he admits also sounds like a medical term, but "perhaps it would be broad enough to eliminate any problems and to focus attention upon the degree of impairment rather than upon the clinical categories of mental illness." He too suggested a form of instruction, which, in addition to defining with some care what "abnormal mental condition" meant, set forth the British Royal Commission test—whether the accused "ought to be held responsible."⁴⁵

44. Mr. Hutt's proposed instruction would read in part as follows:

The term "mental disability" has a special meaning in law. It exists where there is a substantial effect on the defendant's mental or emotional processes and a substantial impairment or weakening of his behavior controls. You should remember this definition because whether or not the defendant had a mental disability is for you to decide. The diagnostic terms used by the psychiatrists are nothing but medical labels, and are relatively unimportant. What is important is the psychiatrist's description of the defendant's mental and emotional processes, and his behavior controls, at or near the time of the alleged crimes.

You are instructed to consider the defendant's emotional processes as well as his mental functioning. A substantial impairment of either is sufficient to show a mental disability. This may take the form of an uncontrollable or irresistible impulse, or may be the result of a more deep-seated problem with a long history. Neither the cause of a disability nor the length of its history are important.

You are further instructed that a mental disability is often difficult to diagnose, and that it is not a condition that has tangible symptoms that can easily be seen like physical disabilities. Mental disabilities can manifest themselves in very subtle ways in the person's daily life. It is therefore important that you give close consideration to the descriptions of the defendant's background, development, adaptation and functioning.

You should ask yourself the following questions. First, was there a substantial effect on the defendant's mental or emotional processes? Second, if there was a substantial effect on the defendant's mental or emotional processes, was his behavior also substantially impaired or weakened? If you answer both questions "yes," you must find that defendant had a mental disability.

Brief for American Civil Liberties Fund of the National Capitol Area as Amicus Curiae at appendix A.

45. If you find that the defendant committed the acts charged in the indictment, you must then consider whether he ought to be held responsible for the crime or whether instead he should be acquitted because of an abnormal mental condition. In order to acquit on this ground, you must find that the acts committed by the defendant were related to an abnormal mental condi-

Irrespective of the test adopted, a cluster of practical problems faces the courts in insanity cases. Most criminal defendants are indigent and so without easy access to legal and psychiatric assistance. "In a long line of cases," as Judge Bazelon says, "we have been asked to confront difficult questions concerning the right to an adequate psychiatric examination, the right to psychiatric assistance in the preparation of the defense, the right to counsel at various stages of the process, the role and responsibility of a government expert who testifies on behalf of an indigent defendant, the burden of proof, the right to treatment during postacquittal hospitalization, and many more. If the promise of *Durham* has not been fulfilled, the primary explanation lies in our answers, or lack of answers, to those questions."⁴⁶

Most of these questions are just as pertinent in other jurisdictions as in the District of Columbia, even though most other courts have done even less in the way of finding answers. Here we can do no more than point up some of them.

1. Conflicts of interest when hospital doctors are called to testify.

In many jurisdictions, as in the District of Columbia, a defendant who pleads insanity or whose mental condition seems to be in question may be sent to a state hospital or other institution (in the District, St. Elizabeths Hospital) for observation and examination. If the hospital doctors report that he is not mentally ill, the court may fear that he would promptly be released if found not guilty by reason of insanity. Also, the doctors who examined him may consciously or unconsciously be influenced in making their diagnosis by the prospect that if found not guilty by reason of insanity, he will be returned to them for hospital care, and would pose difficult control problems. Should courts therefore refuse to permit the prosecution to rely on

tion that impaired his mental or emotional processes. By that, I mean a condition that made it considerably more difficult for him to appreciate that what he did was wrong or to control his conduct. This sort of impairment, of course, may be of different degrees. If a person is completely deprived of the ability to appreciate that what he is doing is wrong or to keep from doing it, naturally he should be acquitted. But the law does not require that the impairment be so grave before a defendant may be acquitted. A lesser degree of impairment may be sufficient. It is up to you to decide whether defendant had such an abnormal mental condition, and if he did whether the impairment was substantial enough, and was so related to the commission of the crime, that he ought not be held responsible.

Brief of William H. Dempsey, Jr., as Amicus Curiae at 78.

46. *United States v. Brawner*, 471 F.2d 969, 1012 (D.C. Cir. 1972).

experts from the hospital, if the hospital will have responsibility for post-trial care? If not, will non-hospital psychiatrists, who presumably will have had less time to observe and examine the defendant, be able to provide more reliable opinions?

2. Adequacy of pre-trial examinations.

Under any test applied in any jurisdiction, expert opinion evidence will have great weight, and the opinion evidence of the "impartial" experts at the state hospital will usually have conclusive weight.⁴⁷ It is therefore vital that the examinations on which the opinions are based be adequate. But state hospitals are likely to be understaffed, and examinations may be inadequate. A person may be committed for a thirty-day period of observation, yet be seen by a psychiatrist for only an hour or two during that entire period. Observations by the nursing staff, psychologists and other personnel may not regularly be conveyed to the medical staff members who make the diagnosis. Background information about the patient may be nil. The prosecution may not have transmitted to the hospital much, if any, information concerning the facts surrounding the alleged crime. The examining psychiatrists thus may have little more information about the alleged crime than the defendant's version.

3. Presenting adequate medical explanation in non-jury cases.

In the District, some ninety percent of the criminal cases involving the defense of insanity are tried by the court without a jury. Elsewhere, the percentage is also high. At such non-jury trials, the expert testimony is most brief—notwithstanding the Court of Appeals' strenuous efforts to get the psychiatrists to discuss, in lay language, the whole course of the defendant's life. In practice, these trials resemble the taking of guilty pleas rather than an adversary trial. Trial courts tend to use a standard order, simply asking the hospital for a conclusory statement on whether the defendant does or does not meet the test, and the hospital obliges with a short and categorical answer. The Court of Appeals, and the appellate courts in other jurisdictions, may call for "description and explanation of the origin, development and manifestations of the alleged disease,"⁴⁸ but busy trial judges some-

47. See Weihofen, *Eliminating the Battle of Experts in Criminal Insanity Cases*, 48 MICH. L. REV. 961 (1950).

48. *Carter v. United States*, 252 F.2d 608, 617 (D.C. Cir. 1959). "The chief value

times express impatience at long reports; all they want is the answer to the ultimate question.

No change of wording of the test will affect this situation. Pressure will continue to exist for achieving a bargained defense that takes up a minimum of time and disposes of the case to the satisfaction of both sides: victory (*i.e.* an acquittal—of sorts) for the defense attorney, and for the prosecution a disposition that assures long-term incarceration.

Whether this practice makes for optimum disposition of defendants is debatable. It probably results in sending to the hospital a certain number with whom hospitals are probably not more competent to deal than are prisons; the antisocial personality (sociopath or psychopath) is an example. On the other hand, because of the inadequacy of examinations already mentioned, a certain number of treatable mentally ill offenders are overlooked and sent to prison. One solution would be a well-staffed mental facility within the prison system, but few states have this. The courts, it has been suggested,⁴⁹ could take it on themselves to explore with the psychiatrists whether the hospital is the best place for the defendant, even if he does suffer from a recognized form of mental illness.

4. Permitting counsel to attend hospital staff meetings.

In the District of Columbia, the courts have faced demands that counsel be allowed to sit in on hospital staff conferences at which the client's mental condition is discussed and a report to the court agreed upon.⁵⁰ St. Elizabeths Hospital has resisted such requests, on the ground that it would impede full and frank discussion among the doctors. The argument is made, however, that this is a "critical stage" in the proceedings, at which the right to counsel is constitutionally guaranteed. The right to cross-examine the doctors concerning what took place in the conference is not an adequate substitute, because the doctors are likely to have forgotten the specifics of any one of the hundreds of cases they pass upon. One benefit would be that attendance at such

of an expert's testimony," the court in that case went on to say, "rests upon the material . . . and the reasoning by which he progresses from his material to his conclusion; . . . that is, how it occurred, developed, and affected the mental and emotional processes of the defendant; it does not lie in his mere expression of conclusion."

49. Brief of Prof. David L. Chambers, III, as Amicus Curiae at 34.

50. Thornton v. Corcoran, 407 F.2d 695 (D.C. Cir. 1969).

conferences would not merely enable counsel better to examine and cross-examine the doctors, but give counsel a fuller and sounder understanding of the dynamics of the client's mental condition and behavior. Professor David L. Chambers, III, reports⁵¹ that at least one facility, the Forensic Psychiatry Center at Ypsilanti, Michigan, does from time to time invite defense counsel to attend staff conferences on the issue of competency to stand trial, and that the practice has been found mutually beneficial.

5. Instructing the jury before the trial concerning the insanity defense.

Should our traditional practice of instructing the jury on the law only at the conclusion of the presentation of evidence be changed in these cases, and the jury told at the outset what they need to know? Would the jury be able better to evaluate testimony, expert and non-expert, concerning the defendant's condition if they knew what the legal test was? Absent such knowledge, may they assume that if they find the accused "not guilty by reason of insanity" he will walk out of the courthouse a free man? We have few data on which to base answers to these questions. Some judges do give the jury some introductory explanations, but Professor Chambers suggested that the practice be formalized, and he offered a form of wording.⁵² Such a practice would not be wholly unprecedented. In *Washington v. United States*,⁵³ the Court of Appeals devised a special instruction to be read to each expert witness before he began to testify, to inform such witness (and the jury) the nature of the questions to be asked in insanity cases.

The court in the *Browner* case has given answers to a number of questions. But questions such as those listed above remain. New ones may arise out of the answers provided. It is not likely that a court that has labored so painstakingly over the many facets of the insanity defense will want to or be able to shrug off the questions that will continue to confront it.

51. Brief of Prof. David L. Chambers, III, as Amicus Curiae at 27.

52. *Id.* at 22-24.

53. 390 F.2d 444 (D.C. Cir. 1967).