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THE BRAWNER RULE—WHY?
or
NO MORE NONSENSE ON NON
SENSE IN THE CRIMINAL LAW, PLEASE!

JOSEPH GOLDSTEIN*

I. INTRODUCTION

It ought not to be a matter of great scholarly interest to learn that yet another court has adopted as its formulation for the insanity defense the oft-embraced, oft-analyzed and oft-criticized text of the ALI Model Penal Code. It is not. It ought not to be a matter of more than momentary interest that in so doing that court “abandoned” its very own eighteen-year-old, oft-rejected, oft-analyzed and oft-criticized rule of *Durham v. United States*.¹ It is not. It ought not to be worthy of more than slight interest that by retaining the definition of mental disease and defect which it adopted more than a decade ago in its reconstruction of *Durham* in *McDonald v. United States*,² and by retaining the position it took later in *Washington v. United States*³ concerning the respective roles of the medical expert and the jury in determining criminal responsibility under *Durham*, the court in *United States v. Brawner*⁴ does no more than change the label and the apparent vintage year of its old and presumably discredited rule. It is not.

The question becomes, why devote any time to the study of a decision in which a court, not unlike the Esso tiger announcing its change of name with the assurance of no change in stripes, announces, albeit

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1. 214 F.2d 862 (D.C. Cir. 1954).
2. 312 F.2d 847 (D.C. Cir. 1962).
3. 390 F.2d 444 (D.C. Cir. 1967).
4. 471 F.2d 969 (D.C. Cir. 1972).

with far more words, a change in name only for its insanity defense formulation.⁵ The answer is to be found in another question which is worth asking and worth trying to answer: "Why does the court, except for Chief Judge Bazelon, who writes a separate but concurring "dissent,"⁶ fail to recognize how great is its contribution to the confusion and misunderstanding which hallmark the debate about the insanity defense?" The answer is that the court neither asks nor answers: "Why an insanity defense? What are its purposes?"

The significance of asking "why" an insanity defense before finally trying to determine what "the ultimate standard"⁷ for such a defense should be seems too obvious to say. But *Browner* demonstrates that it is not—in an eighty page marathon slip opinion replete with Introduction, Table of Contents, Main Text, Clarifying Supplement, and Appendices. It seems worth repeating observations made more than a decade ago about the insanity defense:

. . . No device has troubled the administration of criminal law and obscured the goals involved more than "insanity" as a basis for relieving persons of criminal responsibility.

. . . To evaluate such a defense, it is necessary to identify the need for an exception to criminal liability. Unless a conflict can be discovered between some basic objective of the criminal law and its application to an "insane" person, there can be no purpose for "insanity" as a defense. Until a purpose is uncovered, debates about the appropriateness of any insanity-defense formula as well as efforts to evaluate various formulae with respect to the present state of psychiatric knowledge are destined to continue to be frustrating and fruitless. . . .

. . . Neither legislative report nor judicial opinion nor scholarly comment criticizing or proposing formulations of the insanity defense has faced the crucial questions: "What is the purpose of the defense in the criminal process?" or "What need for an exception to criminal liability is being met and what objectives of the criminal law are being reinforced by the defense?"⁸

5. *See id.* at 990:

In the last analysis, however, if there is a case where there would be a difference in result [between the ALI rule and *Durham-McDonald* rule] and it would seem rare

6. Judge Bazelon does not label his opinion. He opens it by making unanimous the court's adoption of the ALI rule. A substantial part of the remainder has the tone and substance of a dissent. *Id.* at 1010: "[O]n the whole I fear that the change made by the Court today is primarily one of form rather than of substance."

7. *Id.* at 1006.

8. Goldstein & Katz, *Why an "Insanity Defense"?*, 92 DAEDALUS 549, 550, 552-53
https://openscholarship.wustl.edu/law_lawreview/vol1973/iss1/9

At the time plans for this symposium were made, the expectations were high that the court would face just such questions. The court, in sua sponte ordering a rehearing en banc, appointed amicus "without instructions as to result or theory, 'to research the authorities on the issue of criminal responsibility'"⁹ and to submit, with other interested organizations, briefs which would address such far reaching questions as:

6. If a defendant's behavior controls are impaired, should a test of criminal responsibility distinguish between physiological, emotional, social, and cultural sources of the impairment? . . . Is it appropriate to tie a test of criminal responsibility to the medical model of mental illness? . . .

9. Would it be sound as a matter of policy to abolish the insanity defense? Possible as a matter of law? If so, what are the possible alternatives? Should the issues presently under that heading be subsumed under the inquiry into mens rea? Should we reconsider the possibility of "diminished" or "partial" responsibility?¹⁰

In the preface to the opinion the court announces that "the interest of justice that has called us to this labor bids us set forth comments in which we review the matters we concluded were of *primary consequence* . . ." and to comment on features of the rule designed "to improve its capacity to further its *underlying objectives*."¹¹ But the court never reveals what it or the legislature understands are the "underlying objectives" of an insanity defense in the administration of criminal justice. The court assumes the need for such a defense without giving definition to that need. At most it assumes that the defense is related to a determination of "blameworthiness" in assessing criminal liability. But the court never examines, except in rhetorical terms, *why* we wish to make a "blameworthiness" determination or *what* the implications of the need to make such a determination should be for the administration of the defense or for the disposition of the accused.

The court limits its consideration to second-order and relatively insignificant objectives. It never confronts the hard issues it raises. Nor

(1963); Goldstein & Katz, *Abolish the Insanity Defense—Why Not?*, 72 YALE L.J. 853 (1963).

9. 471 F.2d at 973.

10. *Id.* at 1007 (Appendix A).

11. *Id.* at 973 (emphasis added).

does it evaluate the substantive merits of any of the tests it considers.¹² To illustrate how such an approach leads to confusion on both a practical and analytical level, this essay will focus primarily on two matters in the court's opinion:

- 1) its decision not to abolish the insanity defense; and
- 2) its decision to permit the introduction of evidence concerning a defendant's abnormal mental condition if relevant to establishing or negating the specific intent element of certain crimes.

Before turning directly to these determinations, it may be helpful to first clarify, to the extent possible, the court's perception of the point in time in a jury's deliberations when the insanity defense may become operative, and secondly, to explain the special meaning which the court gives to "exculpation," "exoneration," "complete exoneration," and "exculpatory mental illness"—terms used interchangeably by the court to describe the function of the insanity defense as a device for "negating criminal responsibility."¹³

A. *When Does the Insanity Defense Become Operative?*

The court's jury instruction on insanity provides:

You are *not* to consider this defense unless you have first found that the government has proved beyond a reasonable doubt *each essential element of the offense*.¹⁴

The court must mean that the insanity defense does not become ripe for consideration until a finding has been made by the jury, or by a judge without a jury, that the prosecution has established beyond reasonable doubt that the accused *voluntarily* ACTED with *purpose* or

12. What the court does consider are the relatively minor matters which it calls "the inter-related goals of the insanity defense":

- (a) a broad input of pertinent facts and opinions
- (b) enhancing the information and judgment
- (c) of a jury necessarily given latitude in light of its functioning as the representative of the entire community.

Id. at 985.

The court's reasons for adopting the ALI rule are equally unrelated to "underlying objectives." It justifies its choice in terms of serving the "Interest of uniformity of judicial approach and vocabulary" (*id.* at 984), and meeting the need to prevent "undue dominance by experts." See *id.* at 981-83; and Judge Bazelon's concurrence, *id.* at 1021-22.

13. *Id.* at 995.

14. *Id.* at 1008. (Appendix B: Suggestion for Instruction on Insanity) (emphasis added).

knowledge (mens rea) to *purposely* or *knowingly* (mens rea) CAUSE the prohibited RESULT which he *intended* or *knew* (mens rea) *would occur*.¹⁵ It is, thus, not enough for the jury to find beyond a reasonable doubt that the defendant *acted* so as to *cause* the offending result. The insanity defense does not become operative if the jury remains in doubt, for example, about either the actor's volition or his mens rea. It must find him not guilty because not all of the requisite elements of the offense were established. The defendant must be acquitted.

Thus, the court appears to recognize that in defining an offense the legislature, in making certain elements requisites for liability, excludes thereby from liability all those who did not act, as well as all those *actors* who beyond doubt *caused* offending results, but about whose volition, or mens rea, there is reasonable doubt. Such actors are not deemed "blameworthy" apparently because reasonable doubt exists about the voluntariness of their actions or the purpose or knowledge with which they *caused* the prohibited results.¹⁶ The insanity defense applies then, only to persons covered, not excluded, by the definition of the offense charged. The defense may become operative only in relation to those who have already been found beyond doubt to have voluntarily acted with purpose or knowledge to cause the offending result.

The insanity defense, as the *Browner* court apparently wishes it to be employed by the jury, is a defense in pure form. It is not an evidentiary standard for casting doubt on volition, purpose, knowledge or any other requisite of liability.¹⁷ It is a defense that comes alive

15. This structural definition of an offense rests on articles 1 & 2 of the ALI Model Penal Code (Tent. Draft 1954). Those provisions are concerned with the general principles of criminal liability. For purposes of this discussion, the lesser degrees of culpability, recklessness and negligence have generally been left out. As *Morrisette v. United States*, 342 U.S. 246 (1952), demonstrates, the words of mens rea—intent, wilfulness, knowledge, premeditation, purpose, etc.—are countless but are all designed, as is the volitional element associated with the act, to assure that criminal liability is imposed on the "blameworthy." Cf. D.C. CODE ANN. § 22-2401 (1967) (murder in the first degree); D.C. CODE ANN. § 22-2403 (1967) (murder in the second degree).

16. See, e.g., *Morrisette v. United States*, 342 U.S. 246 (1952).

17. On retrial following the introduction of the *Durham* rule, the trial judge committed error when he instructed the jury as follows:

If you find the defendant not guilty by reason of insanity, you will render a verdict of not guilty by reason of insanity.

If you do not so find, then you will proceed to determine whether he is guilty or innocent of one or both of the offenses charged on the basis of the same

act.

only when those requisites are established beyond doubt and fail in their application to exclude from responsibility someone whom the court or legislature or jury believes justice would require finding not criminally liable. Thus, the insanity defense may be seen as a safety valve, not unlike the pardon, for words that "go too far," for crimes whose requisites of liability are not precisely enough worded to prevent convictions which would subvert the goals of the criminal law.¹⁸

The literature of the law needs, but does not have, a word to describe the status of the accused at that moment in the criminal process when the insanity defense can become operative—that moment when the accused is no longer presumed innocent. This status begins when the jury has determined that the defendant has committed the crime and continues until it determines whether his insanity defense precludes his being found criminally responsible. The nature of this status of "suspended guilt" may be more easily perceived in jurisdictions which, unlike the District of Columbia, require a bifurcated trial.¹⁹ It was more clearly revealed in the former British verdict of "guilty but insane" than it is in our and the current English verdict of "acquittal by reason of insanity."²⁰ For our purposes, the phrase "suspended guilt" will be employed to describe the status of an accused from that moment when the trier of fact may take into account the insanity defense until a determination is made of either acquittal by reason of insanity or guilt as charged. If the defense fails, the accused is found guilty; whatever sanctions are authorized for the offense may then be imposed. If the defense prevails, the accused is acquitted by reason of insanity and, according to the Brawner court, will then be "completely exonerated."²¹

Durham v. United States, Record on Retrial, reprinted in R. DONNELLY, J. GOLDSTEIN & R. SCHWARTZ, CRIMINAL LAW 776 (1962) (emphasis added).

18. Conceptually, at least, the insanity defense could be invoked for crimes of strict liability, malum prohibitum offenses. Once liability is established beyond reasonable doubt the defense would come alive, if the accused chose to raise it.

19. "The D.C. Court has indicated approval of bifurcated trials where the insanity defense is to be raised." United States v. Brown, 428 F.2d 1100, 1103 n.2 (D.C. Cir. 1970). And see, e.g., United States v. Alexander & Murdock, 471 F.2d 923 (D.C. Cir. 1972).

20. See Austin v. United States, 382 F.2d 129, 138 n.21 (D.C. Cir. 1967) (Leventhal, C.J.). The Criminal Procedure (Insanity) Act 1964 c. 84, § 1:

1. *Acquittal on grounds of insanity.*—The special verdict required by section 2 of the Trial of Lunatics Act 1883 . . . shall be that the accused is not guilty by reason of insanity

21. 471 F.2d at 972 (Syllabus by the court).

B. *On the Meaning of Exoneration Following Acquittal by Reason of Insanity*

What do "complete exoneration," "exculpation" and "exculpatory mental illness"—words and phrases of high frequency in the majority opinion as well as the concurring "dissent"—mean to the *Browner* court? The syllabus by the court, in which the principal features of its decision are announced, notes in considering another "defense" that it "is not, like insanity, a complete exoneration." But "complete exoneration" as a result of a finding of not guilty by reason of insanity does not mean for the court what it would mean to the average citizen, nor what it would mean to the average law-trained person, nor what it would mean to the court were it talking about the outright acquittal which follows a successful plea of self-defense.

To all, including the court, "complete exoneration" would usually mean a finding of no liability, of no responsibility, of no guilt, of no authorization for the state to impose any sanction or to deprive the "exonerated" of any of his freedoms. But to the *Browner* court, "complete exoneration" means automatic incarceration in a mental institution for an initial period of fifty days, during which time one acquitted by reason of insanity must assume the burden of establishing by a preponderance of evidence that he is entitled to release from incarceration; that is, "that he is not likely to injure himself or others due to mental illness."²² The entire court often employs "complete exoneration," "exculpation" and "negating criminal responsibility" as if those words continued to carry the meaning generally borne by them. It is as if the court had forgotten what special meaning it had assigned to them.

In order to comprehend the confusion in the court's reasoning, this unusual meaning of "exoneration" must be kept in mind when analyzing the *Browner* opinions. Following an acquittal by reason of insanity, exoneration is not liberty for the defendant, but restraint

22. *Id.* at 1009-10 (Appendix B: Suggestion for Instruction on Insanity):

Effect of verdict of not guilty by reason of insanity

If the defendant is found not guilty by reason of insanity, it becomes the duty of the court to commit him to St. Elizabeths Hospital. There will be a hearing within 50 days to determine whether defendant is entitled to release. In that hearing the defendant has the burden of proof. The defendant will remain in custody, and will be entitled to release from custody only if the court finds by a preponderance of the evidence that he is not likely to injure himself or other persons due to mental illness.

Note: If the defendant so requests, this instruction need not be given.

coupled with a presumption of his dangerousness to self and others. For the state, such an acquittal is authority to incarcerate coupled with a presumption of power to hold the acquitted indefinitely. It is as if the word "benign" were substituted whenever ordinary usage called for "malignant." "The first task of free men," the court fails to keep in mind, "is to call things by their right name."²³ For purposes of this essay, it is important not just to reveal that the court has destroyed the meaning of some ordinary words upon which ordinary citizens should be able to base their understanding of the law; it is also important to remain more alert than the court apparently wishes its readers to be to the confusion which permeates its jurisprudence as a result of its pious references to such critical words as "exoneration" and "exculpation."²⁴

In summary, the insanity defense, according to *Browner*, becomes ripe for consideration only if, and only after, it is determined that the accused is beyond reasonable doubt guilty of each requisite element of the crime charged, *i.e.* in a state of suspended guilt; and the words "complete exoneration," "exculpation" and "negating criminal responsibility"—often used interchangeably in association with a finding of "not guilty by reason of insanity"—mean automatic incarceration as criminally insane, with the burden on the person so acquitted to establish his right to release. It is with this understanding of the court's perception of the place of the insanity defense and its consequences—an understanding which the court clearly wishes to convey to the jury, but which the court either forgets or wishes to obscure in the body of its opinion—that we turn to its decisions to: (1) reject the proposal to abolish the insanity defense and (2) accept the proposal to admit evidence of an accused's abnormal mental condition, which "though insufficient to exonerate, may be relevant . . . to show . . . that the defendant did not have the specific mental state required for a particular crime or degree of crime."²⁵

23. *People v. McMurty*, 64 Misc. 2d 63, 66, 314 N.Y.S.2d 194, 197 (N.Y. Crim. Ct. 1970).

24. Judge Leventhal, who writes for the court in *Browner*, demonstrates in both pre- and post-*Browner* decisions that he does not wish exoneration or exculpation to be the consequence of an "insanity acquittal." For significant passages from *Dixon v. Jacobs*, 427 F.2d 589 (D.C. Cir. 1970), and *United States v. Brown*, No. 24,646 (D.C. Cir. Jan. 8, 1973), see Appendix *infra*.

Note further the introduction of the euphemistic and misleading label "legal exculpation" which the court in *Brown* attaches to the consequences of an insanity acquittal.

25. 471 F.2d at 998.

II. CONSIDERATION AND REJECTION OF THE PROPOSAL TO ABOLISH THE INSANITY DEFENSE

The court introduces the proposal by noting, without discussion, that numerous journals and responsible judges, including Chief Justice Burger, have recommended abolition of the insanity defense. It avoids an examination of the reasons for and against abolition that amicus were invited to address, and summarily concludes "that the proposal cannot properly be imposed by judicial fiat."²⁶ The court apparently means more than the truism that it would be wrong for a court, without explanation, arbitrarily to issue an edict of abolition. The court must have meant that even if it were to conclude after reasoned discourse that such a proposal be adopted, it could not adopt it because legislative action, if not constitutional amendment, might be required to abandon the court-created, though statutorily recognized, defense.²⁷

In two short paragraphs of explanation and reinforcement which follow its declaration of incapacity, the court reveals either its confusion about the place and the consequences of the insanity defense or its unwillingness to clarify its position. It fails to face openly the general issue of why there should be a blameworthiness determination, how it should be made, and what its consequences ought to be:

The courts have emphasized over the centuries that "free will" is the postulate of responsibility under our jurisprudence. 4 Blackstone's Commentaries 27. The concept of "belief in freedom of the human will and a consequent ability and duty of the normal individual to choose between good and evil" is a core concept that is "universal and persistent in mature systems of law." *Morrisette v. United States*, 342 U.S. 246, 250 (1952). Criminal responsibility is assessed when through "free will" a man elects to do evil. And while, as noted in *Morrisette*, the legislature has dispensed with mental element in some statutory offenses, in furtherance of a paramount need of the community, these instances mark the exception and not the rule, and only in the most limited instances has the mental element been omitted by the legislature as a requisite for an offense that was a crime at common law.

The concept of lack of "free will" is both the root of origin of the insanity defense and the line of its growth. [*Davis v. United States*, 160 U.S. 469, 484-85 (1895).] This cherished principle is not under-

26. *Id.* at 985.

27. See D.C. CODE ANN. § 24-301 (1967).

cut by difficulties, or differences of view, as to how best to express the free will concept in the light of the expansion of medical knowledge. We do not concur in the view of the National District Attorneys Association that the insanity defense should be abandoned judicially, either because it is at too great a variance with popular conceptions of guilt or fails "to show proper respect for the personality of the criminal [who] is liable to resent pathology more than punishment."²⁸

The court mistakenly equates the proposal to abolish the insanity defense with a proposal to eliminate "free will," "mens rea," "intent," and possibly even "voluntariness" as essential elements of criminal liability for *mala in se* offenses. It mistakes the proposal to be a proposal that murder, as well as all other now-codified infamous common law offenses, become strict liability offenses; that is, that they be placed in the same category as traffic violations and other so-called "statutory" (*malum prohibitum*) offenses.²⁹

Proposals to abolish the insanity defense are just that and not more. They are not proposals to eliminate mens rea or volition or any other requisite element of criminal liability. Nor are they intended to "sweep out of all federal crimes . . . the ancient requirement of a culpable state of mind."³⁰ That was the issue in *Morrisette v. United States*.³¹ Congress had failed explicitly to preserve the mens rea requisite in its codification of some common law offenses. There is no such issue in *Browner*. There is no proposal to automatically exclude evidence of a defendant's mental health if it be relevant to any of the requisites of liability—including, of course, intent and volition. It is as if the court suffered a lapse of memory concerning its jury instruction that the insanity defense becomes a matter of concern only after the jury has found beyond a reasonable doubt that each requisite element of the offense charged has been established, *i.e.* the defendant is found to have the status of *suspended guilt*.³²

If anything, the proposal to abolish the insanity defense would en-

28. 471 F.2d at 985-86.

29. The court cites with approval, but without quotations (471 F.2d at 985 n.18), a research memorandum from the University of Virginia Law School Research group. That memo contains the following statement, which reflects the court's misreading of proposals to abolish the insanity defense: "Complete abolition of the insanity defense, with an emphasis solely on whether the act charged was committed, is legally an unrealistic solution."

30. *Morrisette v. United States*, 342 U.S. 246, 250 (1952).

31. 342 U.S. 246 (1952).

32. See note 24 *supra*, and Appendix *infra*.
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hance the vitality of the "free will," "mens rea," and "volition" postulates of responsibility which the court seems so anxious to safeguard. It would restore to evidence of mental abnormality the same status of admissibility which any other potentially relevant evidence has for casting doubt on or establishing culpable states of mind.³³ With the abolition of the insanity defense there would no longer be any basis for the judge-made rule to exclude evidence of mental state from the main focus of the trial until a finding of "suspended guilt." The real consequence of abolishing the insanity defense would be to provide "real exculpation," in the *Morrisette* outright-acquittal sense, not the *Browner* incarcerative-acquittal sense, to all those accused for whom the jury has doubt about their "free will."³⁴

Beyond the court's misapplication, if not misreading, of *Morrisette* is its misuse of *Davis v. United States*,³⁵ the other Supreme Court opinion on which it relies. The only question decided in *Davis* was that the burden of proof, once the defense of insanity is in issue, is on the government to establish beyond doubt the defendant's sanity.³⁶ Interestingly enough, the insanity defense in *Davis*' trial, in accord with the then current practice, became an issue for jury determination once the *act*—not the crime including all the requisite elements—had been established beyond doubt. The Court in *Davis* did not question that part of the judge's instruction which advised the jury that if it found the defendant criminally responsible "for the act of killing"³⁷ it was to take the next step "and see whether these attributes of the crime of murder existed as I have defined them to you: that is, that

33. See, e.g., Goldstein & Katz, *Abolish The Insanity Defense—Why Not?*, 72 YALE L.J. 853 (1963).

34. See *Dixon v. Jacobs*, 427 F.2d 589 (D.C. Cir. 1970); note 24 *supra*.

35. 160 U.S. 469 (1895).

36. The question in *Davis* arose because the evidence on the issue of insanity was in equipoise. It is interesting to note that Congress in 1970 in effect reversed *Davis* by enacting D.C. CODE ANN. § 24-301(j) (Supp. IV, 1971), which provides:

No person accused of an offense shall be acquitted on the ground that he was insane at the time of its commission unless his insanity, regardless of who raises the issue, is affirmatively established by a preponderance of the evidence.

The court decided to avoid determining the validity of the D.C. statute—one of the few issues genuinely before it and the only issue to which *Davis* might be relevant. The court's suggested instruction provides both wording which conforms to *Davis* and alternate wording which conforms to the new statute. I gather that the trial judge is free to choose.

37. 160 U.S. at 478.

the killing was done wilfully and with malice aforethought.”³⁸ The insanity defense at that time became an issue for decision before—not after, as *Browner* requires—“each essential element of the offense” has been proven by the government beyond doubt. There was no stage of suspended guilt. The insanity defense was *not* a defense to a crime established, but solely an evidentiary provision which went to the capacity to be criminally responsible once the physical *act* and apparent *result* (here a killing) were established. Even if capacity to be responsible were established by the government’s establishing *sanity* beyond doubt, the question of the accused’s criminal liability for the offense charged remained an issue. The prosecutor in *Davis* was still required to establish the defendant’s willfulness and malice before he could be held criminally liable.³⁹ The *Browner* construction of the insanity defense as a “defense” rather than a rule of evidence makes clear, it would seem to all but the *Browner* court, that the proposal to abolish the insanity defense is not a proposal to eliminate the concept of “free will,” “mens rea” or “volition.” The court, were it not so confusing and confused about its task, might have better understood the limited implications of the proposal had it consulted its own Suggestion for Instruction on Insanity. The jury is to be instructed that one of the essential elements of an offense which must be established beyond doubt before the insanity defense is to be considered is the requirement of premeditation or deliberation for first degree murder or of specific intent for unspecified offenses.⁴⁰

Since the court goes to such lengths to segregate the insanity defense from mens rea, it should be obvious that a proposal to abolish one is not a proposal to abolish the other. Yet the court rests its decision on the absurd—once directly stated—position that to abolish the insanity defense which can only arise after, not before, mens rea, volition or any other free will requisite has been established is to abolish mens rea, volition or any other free will requirement of criminal liability. Finally, it should be noted that the court does not develop a relationship between an undefined “free will” and an undefined “mental abnormality” for insanity defense purposes. Probably more im-

38. *Id.*

39. For a detailed development of this point, see Goldstein & Katz, *Abolish The Insanity Defense—Why Not?*, 72 YALE L.J. 853 (1963).

40. 471 F.2d at 1008 (Appendix B: Suggestion for Instruction on Insanity): “One of these [essential] elements is the requirement (of premeditation or deliberation for first degree murder) (or of specific intent for —)”
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portant is that the court, despite its abiding concern for protecting the concepts of "free will" and "blameworthiness," never raises them above the level of rhetoric. They are not employed in the court's Suggestion for Instruction on Insanity. Who more than the jury should be told what the purposes of an insanity defense are?

This illustration of the court's general confusion about the proposal to abolish the insanity defense and about the meaning and place of that defense should not be read to be more than that. This analysis does not lead to a conclusion that the insanity defense should be either abolished or retained. It may be that even if we can find no greater reason for retention of an insanity defense than that it has somehow and in some form persisted in our criminal law through the ages, that is reason enough. But the issue here has not been the relative merits of abolishing the insanity defense, rather it has been the *Browner* court's serious confusion, if not duplicity, in thinking about the insanity defense at all.

III. ON THE ADMISSIBILITY OF EVIDENCE OF MENTAL CONDITION, INSUFFICIENT TO EXONERATE, IF RELEVANT TO SPECIFIC MENTAL ELEMENT OF CERTAIN CRIMES OR DEGREES OF CRIME

Before *Browner*, testimony on a defendant's mental health was inadmissible except to the extent it was relevant to the defense of insanity. It could not be introduced, even if relevant, to negate or to establish the mens rea or the voluntariness requisites essential for conviction of the crime charged.⁴¹ *Browner*, in slightly modifying this exclusionary rule, provides further evidence of the court's confusion about the insanity defense. The court holds

that expert testimony as to a defendant's abnormal mental condition may be received and considered, as tending to show, in a responsible way, that defendant did not have the specific mental state required for a particular crime or degree of crime—even though he was aware that his act was wrongful and was able to control it, and hence was not entitled to *complete exoneration*.⁴²

This holding has at least two plausible and conflicting readings. The first and less likely reading is that the jury may now consider evidence of mental abnormality so far as it relates to specific intent in its initial de-

41. See *Fisher v. United States*, 149 F.2d 28 (D.C. Cir. 1946).

42. 471 F.2d at 998 (emphasis added).

termination of guilt or suspended guilt without a prior finding that such evidence is insufficient to sustain the insanity defense. An accused would be found not guilty if such evidence cast doubt on the requisite element of specific intent. Under this reading, the *Browner* court would abolish the insanity defense for all crimes requiring specific intent.⁴³ When there is no lesser included "general intent" offense, this would mean outright acquittal⁴⁴ and reliance on the civil commitment process to incarcerate "dangerous" actors.⁴⁵ When the accused may be found guilty of a lesser included offense, such as second degree murder, the insanity defense may still apply. In other words, a defendant may be released as not guilty of the usually more severe specific intent offense while he may not, on the basis of the same evidence (about mental abnormality), be released as not guilty of the less severe general intent volitional offenses. It would seem more difficult for the court to justify this result than to abolish the insanity defense for just the lesser included offenses. This first reading leads the court, one would guess unwittingly, to an outcome which would require at least a reasoned explanation for not abolishing the insanity defense altogether. Furthermore, if civil commitment is an adequate instrument for safeguarding societal interests from persons acquitted outright because they lacked "specific intent," then surely it is adequate protection from persons who also lack general intent and volition as a result of mental abnormality. At the very least, this first reading would require that the consequences of acquittal by reason of insanity be the same as those of outright acquittal, a position unequivocally rejected by the court in its special definition of exculpation and exoneration.⁴⁶

That the court contemplated that its opinion might be so mis-

43. Of course, such evidence of mental abnormality might not cast doubt on specific intent. The insanity defense would then be available following a finding of suspended guilt for that offense. See note 77 *infra* and accompanying text.

44. See D.C. CODE ANN. §§ 22-401 to 404 (1967). Arson and its associated offenses seem to be such specific intent offenses which do not have lesser included general intent offenses.

45. 471 F.2d at 1001-02:

In 1964 . . . Congress enacted the Hospitalization of the Mentally Ill Act, which provides civil commitment for the "mentally ill" who are dangerous to themselves or others. . . . Those statutory provisions provide a shield against danger from persons with abnormal mental condition—a danger which in all likelihood bolstered, or even impelled the draconic *Fisher* doctrine.

46. See *United States v. Brown*, No. 24,646 (D.C. Cir. Jan. 8, 1973), which seems to reaffirm the court's general view about the need for less stringent civil commitment standards for those acquitted by reason of insanity than for others. See note 24 *supra*, and Appendix *infra*.

read and that another reading is preferred is strongly suggested by the footnote with which the court closes its discussion of "mental conditions [which], though insufficient to exonerate, may be relevant to specific mental element of certain crimes or degrees of crimes."⁴⁷ The court in footnote 75 observes:

At the risk of repetition, but out of abundance of caution, and in order to obviate needless misunderstanding, we reiterate that this opinion retains the "abnormal mental condition" concept that marks the threshold of *McDonald*. Assuming the introduction of evidence showing "abnormal mental condition," the judge will consider an appropriate instruction making it clear to the jury that even though defendant did not have an abnormal mental condition that absolves him of criminal responsibility, *e.g.*, if he had substantial capacity to appreciate the wrongfulness of his act, he may have a condition that negatives the specific mental state required for a higher degree of crime, *e.g.*, if the abnormal mental condition existing at the time of the homicide deprived him of the capacity for the premeditation required for first degree murder.⁴⁸

The court's holding under the second and more likely reading means: (1) if evidence of mental abnormality is sufficient to sustain the defense of insanity, the exclusionary rule remains in full force; (2) if such evidence is insufficient, it may be introduced, but only "if it is relevant to negative, or establish, the specific mental condition [specific intent] that is an element of the crime."⁴⁹

In its Suggestion for Instruction on Insanity the court provides: "You are not to consider this [insanity] defense unless you have first found that the Government has proved beyond a reasonable doubt each essential *element* of the offense."⁵⁰ Under the old, as well as the new, exclusionary rule, this continues to mean that the crucial elements of voluntariness and mens rea may be established *beyond doubt* even if (possibly only if) relevant evidence concerning the defendant's mental state is withheld from the factfinder.

With the court's modification of the exclusionary rule the jury may apparently reopen its finding of suspended guilt if the testimony on abnormal mental condition is not sufficient to sustain the insanity defense. For example, had the jury in *Browner* made a suspended guilt

47. 471 F.2d at 998.

48. *Id.* at 1002 n.75.

49. *Id.* at 1002.

50. *Id.* at 1008 (emphasis added).

finding of murder in the first degree and then, in considering evidence of mental abnormality, found it insufficient to sustain the insanity defense, it need not then automatically render a verdict of guilty. It may find that doubt is now cast on the *specific intent requirement*, and thus must modify its initial finding "that the Government has proved beyond a reasonable doubt each essential element" of murder in the first degree. It must, apparently, then declare Brawner guilty of the lesser included non-specific intent offense of murder in the second degree. Of course, it must find that each essential element of murder in the second degree has been established without considering the still partially excluded testimony on mental abnormality, even if it be relevant to the defendant's volition or malice. Even if such evidence became fully admissible, it would, of course, according to the second and preferred reading of the court's holding, be considered only if it were insufficient to sustain the defense of insanity.⁵¹

A finding by jury or judge of "not guilty by reason of insanity" thus may mean that the defendant will be "completely exonerated" for an offense greater than that for which he might otherwise have been convicted. He could be acquitted by reason of insanity of first degree murder rather than of second degree murder, manslaughter, or possibly of carrying a dangerous weapon, when in fact a lesser included offense might have been the only offense or offenses that could be established beyond doubt if all relevant evidence were admissible before a finding of suspended guilt. In an area so heavily freighted with the symbols of justice, it seems, at a minimum, to be unfair

51. D.C. CODE ANN. § 22-2403 (1967) provides:

Whoever with malice aforethought . . . kills another is guilty of murder in the second degree.

The court apparently does not foreclose the possibility of introducing evidence of mental abnormality to cast doubt on malice aforethought. 471 F.2d at 1002 n.75:

. . . Whether it may be applicable in a case where malice is established on a subjective standard, so as to reduce the offense to manslaughter, is a matter that requires further analysis and reflection. The cases are in conflict, *see* Annot., 22 ALR 3d 1228 (1968). Generally, at least, a defendant with substantial capacity to appreciate the wrongfulness of his crime would appear to have the capacity requisite for malice. Without further study, however, we hesitate to rule as a matter of law concerning the possibility that there may be abnormal mental conditions falling short of legal insanity that would leave the defendant with capacity to appreciate the wrongfulness of his acts, but without awareness of the danger of serious harm. The problem is remitted to future consideration, which we think will be aided by the availability of a specific factual context.

The *Brawner* case in fact provides just such a "specific factual context." *See* text accompanying notes 64-66 *infra*.

that an "acquittal" by reason of insanity for all the offenses charged be deemed equivalent to an outright acquittal for first and second degree murder coupled with an acquittal by reason of insanity for only the remaining offenses charged, here manslaughter and carrying a dangerous weapon.⁵² In application the new doctrine is absurd.

The court, in adopting its new evidentiary rule, seems to have forgotten, or is willing to ignore, that its meaning of "complete exoneration" is complete incarceration. The insanity defense, whatever formula the court selects when joined with the old or new exclusionary rule, serves to undercut the very concept of blameworthiness that the definition of an offense is designed to reinforce. The court thereby supports in fact the concept of strict criminal liability while endorsing only in assertion the Supreme Court's powerful argument in *Morrisette* against such liability for major crimes.⁵³ The court in *Browner* correctly observes:

52. D.C. CODE ANN. § 22-3214 (1967) (Possession of Certain Dangerous Weapons Prohibited) is no crime of strict liability. Not only is volition a requisite of the act of possession, intent is a requisite of at least one of its provisions. Section 22-3214 (b) provides:

No person shall within the District of Columbia possess with intent to use unlawfully against another, an imitation pistol, or a dagger . . . or other dangerous weapon.

Of course, defense counsel, knowing the meaning of "complete exoneration," may decide not to invoke a defense of insanity to a charge of carrying a dangerous weapon.

With the court's decision in *Brown*, it becomes of even greater significance to determine which specific crime the accused is acquitted of by reason of insanity. The court observed with regard to the period of civil detention of the "insanity acquittal": "The extent of that period calls for sound discretion, would take into account *e.g.*, the nature of the crime (violent or not) . . . would generally *not exceed five years, and should, of course, never exceed the maximum sentence for the offense. . . .*" *United States v. Brown*, No. 24,646 (D.C. Cir. Jan. 8, 1973), slip opinion at 11 (emphasis added).

53. A. GOLDSTEIN, *THE INSANITY DEFENSE* 206-07 (1967):

If the pressures toward a subjective theory continue to build, it may become necessary to refashion the traditional devices in order to solve the new problems. This has, of course, already begun with the insanity defense as it comes to encompass the broader conception of mental disease. But so long as the insanity defense remains an *alternative* to these other defenses which the defendant may assert or not, as he wishes, it is unreasonable to expect that very many defendants will use it. It may become necessary, therefore, to develop doctrines that will once again make the insanity defense the exclusive avenue for bringing subjective evidence into the trial. . . . Moreover, we may see a legislative effort to avoid the problem entirely by expanding the number of crimes which abandon *mens rea* and which impose strict liability on the offender.

Implicit in this observation is a recognition that the insanity defense is a device for achieving, without disclosure, strict liability while appearing to reinforce the doctrine of blameworthiness.

Neither logic nor justice can tolerate a jurisprudence that defines the elements of an offense as requiring a mental state such that one defendant can properly argue that his voluntary drunkenness removed his capacity to form the specific intent but another defendant is inhibited from a submission of his contention that an abnormal mental condition, for which he was in no way responsible, negated his capacity to form a particular specific intent, even though the condition did not exonerate him from all criminal responsibility.⁵⁴

That view should be rephrased to read:

Neither logic nor justice can tolerate a jurisprudence that defines the elements of an offense as requiring a mental state or volition such that one defendant can properly argue that some evidence about him or the surrounding circumstances removed his capacity to act voluntarily or with intent or knowledge or malice (etc.) to cause the offending result but another defendant is inhibited from a submission of his contention that an abnormal mental condition, for which he was in no way responsible, negated his capacity to act voluntarily or with intent or knowledge or malice (etc.) to cause an offending result.

The court in its resolution of the evidentiary issue provides a perception of the insanity defense which is in direct conflict with the description it gives to the jury of the place of the insanity defense in the fact-finding process. Rather than reflect the court's alleged uneasiness that, without an insanity defense, some persons might unfairly be held criminally responsible because the definition of an offense with all its requisite elements might still be inadequate to the task of excluding from liability all those persons it wishes to exclude from the sanctioning authority, it reflects the opposite. The court seems to fear that too many people might be excluded from liability if the requisite elements were really applied.⁵⁵ By coupling the evidentiary rule with the insanity defense, the court can, while declaring the opposite, remove from circulation those it could not hold criminally responsible. That may be a desirable goal and may even be constitutional, but it is not the issue here.

This analysis of two plausible readings of the court's ruling on the process for admitting evidence of an accused's mental abnormality is used only to illustrate again the magnitude of the court's confusion or its disingenuousness. However characterized, the court's

54. 471 F.2d at 999.

55. See *United States v. Brown*, No. 24,646 (D.C. Cir. Jan. 8, 1973).
https://openscholarship.wustl.edu/law_lawreview/vol1973/iss1/9

reasoning can only plague rather than facilitate its declared intention to improve communication between the federal courts on the subject of the insanity defense.⁵⁶ The opinion can only worsen communication and understanding about that defense between judge and jury, between court and counsel, between counsel and client, and between court and mental health administrators. Possibly of greater significance, the court's garbled communication leaves the average person without a basis for understanding the concept of blameworthiness which has been declared fundamental to the just administration of a law of crimes.

IV. ON THE MEANING OF JUDICIAL RESTRAINT

There remains a matter of significance which this analysis has ignored up until now; namely, the court's concept of judicial restraint. In an admirable pledge of allegiance to that doctrine, the court rejects the proposal to abolish the insanity defense as improper to impose without "a legislative re-examination of settled doctrines of criminal responsibility, root, stock and branch."⁵⁷ "The judicial role," the court declares in recalling Mr. Justice Holmes, "is limited to action that is molecular, with the restraint inherent in taking relatively small steps"⁵⁸

Judicial restraint to the court means that, even following a careful examination of the court's experience with its own judge-made rule, it cannot abandon the rule, though it may, as it does, "enact" a new rule which has been drafted primarily for legislative consideration by the American Law Institute. It means that though a proposal to abolish the insanity defense requiring a reassessment "that seeks to probe and appraise society's processes and values" is a task better left to the legislative branch,⁵⁹ the court is willing to review and dispose of a series of issues, raised not by the appellant but by the court sua sponte, which require just such an appraisal of "society's processes and values." Its eighty page opinion is cluttered with *obiter dicta*. One example out of many is the court's discussion of Judge Bazelon's proposed formulation of the insanity defense: "If mental disease im-

56. 471 F.2d at 984-85.

57. *Id.* at 986.

58. *Id.*

59. *Id.*

pairs capacity to such an extent that the defendant cannot 'justly be held responsible.'"⁶⁰ In rejecting the proposal, the court engages in the kind of analysis it warns against:

The thrust of a rule that in essence invites the jury to ponder the evidence on impairment of defendant's capacity and appreciation, and then do what to them seems just, is to focus on what seems "just" as to the particular individual. Under the centuries-long pull of the Judeo-Christian ethic, this is likely to suggest a call for understanding and forgiveness of those who have committed crimes against society, but plead the influence of passionate and perhaps justified grievances against that society, perhaps grievances not wholly lacking in merit. In the domain of morality and religion, the gears may be governed by the particular instance of the individual seeking salvation. The judgment of a court of law must further justice to the community, and safeguard it against undercutting and evasion from overconcern for the individual. What this reflects is not the rigidity of retributive justice—an eye for an eye—but awareness how justice in the broad may be undermined by an excess of compassion as well as passion. Justice to the community includes penalties needed to cope with disobedience by those capable of control, undergirding a social environment that broadly inhibits behavior destructive of the common good. An open society requires mutual respect and regard, and mutually reinforcing relationships among its citizens, and its ideals of justice must safeguard the vast majority who responsibly shoulder the burdens implicit in its ordered liberty. . . .

It is the sense of justice propounded by *those charged with making and declaring the law—the legislatures and courts*—that lays down the rule that persons without substantial capacity to know or control the act shall be excused.⁶¹

Thus, without succumbing to the temptation of assuming what it calls the legislature's function of "prob[ing] and apprais[ing] society's processes and values," the court does just that and more. It rightly recognizes what it was quick to deny earlier in its opinion, that courts as well as legislatures may and do make and declare law. The point is more than that the court misstates the doctrine of judicial restraint. The point, even accepting the court's notion of the doctrine, is more than that it avoids examining the global issues posed by one proposal and takes them on in another by arbitrarily applying its doctrine. The main point, as the material which follows demonstrates, is that in the

60. *Id.*

61. *Id.* at 988 (emphasis added).

name of judicial restraint the court decides issues not raised by the case before it.⁶²

What judicial restraint means to the court in practice is that after adopting a new standard for the insanity defense, it finds no reversible error in the conviction of Brawner. Less restrained courts might have suggested that if there is no error below there is no occasion for announcing a new standard. The court remands the case to the trial judge not for a new trial under the new rule, but for a determination of whether the new rule would or could affect Brawner's jury conviction and "whether a new trial is appropriate in the interest of justice."⁶³

The clearest illustration of "judicial restraint," according to the court's way, is found in its decision to modify its exclusionary rule. In holding that an accused's abnormal mental condition is admissible when relevant to the specific intent requisite of a crime charged, the court decides an issue that it must know is not before it. At the same time, it leaves unresolved an issue clearly raised by the case on the appeal involving the exclusionary rule. But that matter, it says, requires further "analysis and reflection." So far as the court's decision relates to specific intent, it might have been apposite had the trial judge not granted Brawner's motion for a judgment of acquittal on the charge of first degree murder. The trial judge held that the evidence—despite the exclusion of evidence of mental abnormality—was insufficient to permit the jury to conclude beyond a reasonable doubt that the defendant had acted with the *deliberation* essential to that specific intent offense. Rather, Brawner was convicted of the general intent offense of murder in the second degree. "[T]he Court thus resolves," as Judge Bazelon in his separate opinion observes, "the question of diminished responsibility up to the point where it becomes relevant to this case, and it remits to future consideration the only aspect of the issue which could have any bearing on the outcome of the case before us."⁶⁴ In remanding the case to the trial judge, the court instructs the trial judge to *consider* the appropriateness of a new trial only in relation to the new insanity defense rule because "the benefit of the rule cannot wholly be withheld from the defendant in

62. For a vigorous statement urging the court not to speak out on matters not before it, see the concurring opinion of Leventhal, J., in *Scott v. United States*, 419 F.2d 264, 281 *et seq.* (D.C. Cir. 1969).

63. *Id.* at 1005. Even the *Durham* rule was announced only after the court concluded there was reversible error. On remand a new trial was ordered.

64. 471 F.2d at 1039.

whose case it is to be established.”⁶⁵ The court thus denies Brawner, the appellant, the benefit of what might generously be perceived as the ambiguity of its position with regard to the admissibility of evidence on mental abnormality. “Out of an abundance of caution, and in order to avoid needless misunderstanding” the court announces its uncertainty about the application of its new evidentiary rule to general intent offenses: “we hesitate to rule as a matter of law concerning the possibility that there may be abnormal mental conditions falling short of legal insanity that would leave the defendant with capacity to appreciate the wrongfulness of his acts, but without awareness of the danger of serious harm. The problem is remitted to future consideration, which we think will be aided by the availability of a specific factual context.”⁶⁶ Brawner, the defendant, is thereby denied the opportunity to benefit from the new rule by establishing, even via a new trial, the specific factual context which the court has in fact before it and chooses to ignore. This may be because amici briefs did not address the question. But the court had the authority to ask for supplemental briefs to address the question, as well as the discretion, if not the obligation, to focus on the actual issues before it.⁶⁷

Apparently anticipating the new meaning it had in mind for “judicial restraint,” the court’s opinion opens with “we have stretched our canvas wide. . . .” “We have in doing so,” it might have added, “lost Archie W. Brawner somewhere in the landscape before us.” Without obtaining the informed consent of the appellant to its experiment, the court deprives its human subject of the review his right of appeal was designed to provide. More significantly, the court, in a manner not unlike its treatment of “complete exoneration,” drains of real meaning another important concept in the overall adminis-

65. *Id.* at 1005.

66. *Id.* at 1002 n.75. Similarly it avoids the issue before it of the reversal of *Davis* by Congress when evidence of insanity is in equipoise. See note 51 *supra* for the relevant text of the opinion’s footnote 75.

67. It might be argued—though it seems to have gone unnoticed by the court as well as Chief Judge Bazelon—that the modified exclusionary rule may apply to Brawner himself. Brawner was convicted of carrying a dangerous weapon. Though it is not clear of which section of the code provision he was found guilty, at least one section seems to require for conviction the establishing beyond reasonable doubt of a specific intent to do harm with the dangerous weapon being carried. D.C. CODE ANN. § 22-3214 (1967). Thus, the court may have unwittingly decided an issue before it on appeal.

tration of the criminal process. The antithesis of judicial restraint thus becomes "judicial restraint"—a most dangerous legal fiction.

V. CONCLUSION

Chief Judge Bazelon is almost right when he closes the preface to his separate opinion with the rhetorical statement: "If the court's decision today rests on the belief that nothing is wrong which cannot be cured by fixing a new label to our text, then eighteen years' experience has surely been wasted."⁶⁸ He would have been more accurate had he said that the court's decision rested on just such a belief and that those years had been wasted. Wasted, not because the court has not been able to formulate the right or a better test for the insanity defense, nor because it rejects the Bazelon preference for a jury instruction which would provide:

. . . a defendant is not responsible if at the time of his unlawful conduct his mental or emotional processes or behavior controls were impaired to such an extent that he cannot justly be held responsible for his act.⁶⁹

But wasted because the court, including Judge Bazelon, has failed to ask "why" and "what" the insanity defense is designed to accomplish. The court, eighteen years after *Durham*, does not know today any better than it did when it formulated that test what it is doing and why it is doing it. The court would not recognize the "right" test if it happened upon it.⁷⁰ The court may even have passed it by with "the wild beast test," "the *M'Naghten* test," "the irresistible im-

68. 471 F.2d at 1013.

69. *Id.* at 1032.

70. *Id.* at 989 (emphasis added):

[S]ince *Durham* was modified by *McDonald*, insanity acquittals have run at about 2% of all cases terminated. In the seven years subsequent to *McDonald* jury verdicts of not guilty by reason of insanity averaged only 3 per annum. In trials by the court, there has been an annual average of about 38 verdicts of not guilty by reason of insanity; these typically are cases where the Government psychiatrists agreed that the crime was the product of mental illness. *We perceive no basis in these data for any conclusion that the number or percentage of insanity acquittals has been either excessive or inadequate.*

The criteria which the court has for determining if "the number or percentage of insanity acquittals [is] either excessive or inadequate" are never revealed in this or any other of the court's opinions. The court would have to determine what characteristics of an event as well as of the accused would "appropriately" place him in the acquittal category—a task the court clearly does not wish to confront by determining what the legislature wishes to accomplish with the defense.

pulse test," "the *Durham-McDonald-Washington* test," or "the justly responsible test." It may even have embraced it in *Browner* with the "ALI-McDonald-Washington test." It may be that all tests are equally "satisfactory"—equally "appropriate" tests—and that none of the labels makes any real difference.⁷¹ It may be that some still unidentified function or purpose of an insanity defense is being served, whatever test may be selected. It may be that some societal need is being satisfied that we cannot understand or do not wish to acknowledge.⁷² This may account for the tenacity with which tests of insanity emerge in the administration of the criminal process.

That the court in *Browner* could respond to its massive experience of eighteen years with *Durham* without learning from it is what is most noteworthy about the case. It makes *United States v. Browner* a leading non-landmark decision.

How the court could proceed, as it did, without first asking and answering for itself, at least, "What fundamental purposes do we mean to further in the administration of criminal justice with a *Durham* or an ALI Rule, or more broadly, with any insanity defense?" remains incomprehensible—though, I guess, in retrospect, predictable. The court has again left itself and the rest of us without any basis for evaluating its decision to abandon the *Durham* rule or its decision to adopt the ALI rule—unless it is acknowledging, even if it is not saying so, that the court does not know what the insanity defense is supposed to do, but that it does know that for whatever it is designed, it is not de-

71. That is the way the court could and probably should have read Dean Abraham S. Goldstein's magnificent *tour de force*, in his chapter entitled *M'Naghten: The Stereotype Challenged*. There he demonstrates that whatever the *Durham* test can do, *M'Naghten* can do better or at least as well. See A. GOLDSTEIN, *THE INSANITY DEFENSE* 45-66 (1967).

72. For one speculation, see Goldstein & Katz, *Why An "Insanity Defense,"* 92 *DAEDALUS*, 549, 557 (1963):

[T]he insanity defense is not designed, as is self-defense, to define an exception to criminal liability, but rather to select for restraint a group of persons from among those who would be free of liability. It is as if the insanity defense were prompted by an affirmative answer to the silently posed question: Does *mens rea* or any essential element of an offense exclude from liability anyone whom the community wishes to restrain? Thus, if the suggested relationship between *mens rea* and "insanity" means that "insanity" precludes proof beyond doubt of *mens rea*, then the "defense" is designed to authorize the holding of persons who have committed no crime. So conceived, the problem really facing the criminal process has been how to obtain authority to sanction the "insane" who would be excluded from liability by an over-all application of the general principles of the criminal law.

signed to accomplish what it is currently accomplishing in the way that it is doing it.

Yet, without an explicit answer, even if only a tentative one, to the question of "why" before "how," or at least an acknowledgment that it has no answer to "why," the court has been compelled to repeat its past failures. It only adds another name to the body count of undistinguished and often undistinguishable decisions that have unjustifiably consumed the energies and talents of many of our most talented judges and lawyers. Chief Judge Bazelon, in another massive opinion concerning the insanity defense, issued only two months before *Browner*, wrote: "While brevity may normally be the touchstone of good writing style as well as sound judicial practice, it is occasionally essential to write at length on issues of far reaching importance."⁷³ When the insanity defense is in issue, the term "occasionally" has, like "complete exoneration," "judicial restraint," and "strict liability," come to mean for the court its opposite—"normally."

It is hoped that *Browner*, despite all its pages and tables of contents, or because of them, will remain another profoundly insignificant case.

VI. EPILOGUE

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

Tenthjudge, J., dissenting: While I have an emotional and intellectual sympathy with much of what is said in my brother Bazelon's engaging and forthright concurrence, I should not wish to be understood as expressing judicial agreement with his conclusion to join the majority in what he calls their "scholarly opinion."⁷⁴ I share his conclusion on the narrow issue. The only real issue before us concerns the rule which prevents the jury from considering evidence of mental abnormality as it may relate to any of the requisite elements of murder in the second degree, and of all lesser included offenses, as well as of the crime of carrying a dangerous weapon. In the words of my most

73. *United States v. Alexander & Murdock*, 471 F.2d 923, 926 (D.C. Cir. 1972) (emphasis added).

74. Bazelon's opinion opens: "We are unanimous in our decision today to abandon the formulation of criminal responsibility adopted eighteen years ago in *Durham v. United States*, 94 U.S. App. D.C. 228, 214 F.2d 862 (1954)." Despite this beginning, the unlabeled opinion might better have been introduced with "dissent on the whole concurrence in small part." 471 F.2d at 1010.

distinguished namesake, Mr. Justice Tenthjudge, dissenting in *Morrisette*:⁷⁵

We ought to refrain from writing discursive essays on the law, if only to spare law students the burden of reading them and law professors the pain of deciding whether to reproduce them in their case books. But there is a still more compelling reason for restraint. We cannot possibly apply our minds to all the considerations which are relevant to all the propositions which the Court's opinion advances. We cannot possibly be sure, therefore, that each proposition will stand up when it is tested in the crucible of a litigation squarely involving it. Thus, to the peccadillo of announcing too much law in this case, we add the cardinal sin of announcing law of dubious reliability.

If our eighteen years of experience with a less discursive but equally unjudicious determination in *Durham* should have taught us anything, it should have been that.

We have to deal here with an appeal from a jury verdict finding the appellant guilty of second degree murder and of carrying a dangerous weapon. He was sentenced to a term of imprisonment of not less than five nor more than twenty years. He argues that evidence concerning his mental condition, specifically an epileptic personality disorder, should not automatically have been excluded from jury consideration in determining whether the prosecution had established beyond doubt the voluntariness and mens rea requisites essential to both his conviction for murder in the second degree and his conviction for carrying a dangerous weapon. The principal question to be determined is whether the trial court erred in automatically limiting the use of such testimony to jury deliberations concerning the insanity defense. I would find plain error in that rule. Such testimony, if relevant, must be considered by the jury in deciding whether, for example, the appellant's act of killing was *voluntary* and whether it was done with *malice aforethought*. To make such evidence inadmissible without first allowing the trial court to determine relevance, and to exclude such evidence from the jury if relevant, would be to deny appellant his right not to be punished for a crime unless each of the requisite elements of the offenses charged is established beyond doubt. I join my brethren, therefore, in overruling our decision in *Stewart v. United States*, 245 F.2d 617 (1960), *rev'd on*

75. Hart, *The Aims of the Criminal Law*, 23 LAW & CONTEMP. PROB. 401, 431 n.70 (1958).
https://openscholarship.wustl.edu/law_lawreview/vol1973/iss1/9

other grounds, 360 U.S. 1 (1961). But I would, as they do not, extend that ruling to apply to the appellant.

We all accept the view that the function of the definition of each specific offense is to exclude from criminal liability all those whom the legislature has determined ought not to be held criminally liable, *i.e.* blameworthy. That function is buttressed by the presumption of innocence, which in turn is reinforced by placing upon the prosecution the burden of proof beyond a reasonable doubt of each basic element of the crime's definition. To assure that the legislative intent is not thwarted, I would hold that all admissible evidence relevant to any requisite element of liability of the offense charged, in this case murder in the second degree and possession of a dangerous weapon, must be taken into account in determining guilt. Thus, evidence of the accused's mental health may no longer be excluded if it is deemed relevant to voluntariness, intent, purpose, knowledge, willfulness, or any other requisite reflecting the legislature's obligation to relieve those who do not have the capacity to exercise free will from criminal liability.

To hold otherwise would be to undermine the Supreme Court decision in *Morrisette v. United States*, 342 U.S. 246 (1952), which sought to protect those who were not blameworthy in mind from conviction of infamous common law crimes. The Court held that the "mere omission [by statute] of any mention of intent will not be construed as eliminating that element from the crimes denounced."⁷⁶ To retain the language of intent in second degree murder, as well as in the crime of carrying a dangerous weapon, as Congress does, only to eliminate it by an evidentiary rule such as that in issue here would maintain as a fiction our commitment to convict only those who are blameworthy. In those cases—and this may be one—the crimes of second degree murder and carrying a dangerous weapon would become strict liability offenses.

I would reverse and remand for a new trial.⁷⁷

76. *Morrisette v. United States*, 342 U.S. 246, 263 (1952).

77. Of course, evidence of mental health which now becomes admissible with this holding continues to be admissible if relevant to the insanity defense, which defense would become operative only upon a finding of suspended guilt for one of the crimes or lesser included offenses charged.

APPENDIX

Before *Browner*, Judge Leventhal wrote in *Dixon v. Jacobs*, 427 F.2d 589, 601, 604 (D.C. Cir. 1970) (emphasis in original):

What I find doubtful is the view of the majority opinion that because Congress has provided that a civilly committed person cannot be kept in confinement if he is not "*likely to injure himself or other persons*," the same standard governs a man who has killed another, and is relieved of a conviction for that homicide only because of a doubt that this may have been the product of a mental disease.

Plainly the acquittal by reason of insanity reflects a jury determination, beyond a reasonable doubt, that except for the defense of insanity, defendant did do the act, e.g. kill the deceased, and have the intent, that constitutes the substantive crime without any exculpation or mitigation in noninsanity defenses (e.g. self-defense). . . . If a jury is not ready to make that determination it must acquit completely, without going on to consider the insanity defense.

. . . .

. . . I think there may be room for a difference in the standard that governs the issue of detention or release for the person who has already unhappily manifested the reality of anti-social conduct, perhaps even shifting to him the burden of proof that decides the doubtful case where we cannot have confidence in our predictions. . . .

Following *Browner*, Judge Leventhal wrote in *United States v. Brown*, No. 24,646 (D.C. Cir. Jan. 8, 1973), slip opinion at 9-10 (emphasis added):

There is justification for the preponderance of proof standard for confinement of the insanity-acquitted even assuming a higher standard is required prior to civil commitment for propensity. . . .

The difference between the classes for purposes of burden of proof, is in the extent of possibility and consequence of error. If there is error in a determination of mental illness that results in a civil commitment, a person may be deprived of liberty although he never posed any harm to society. If there is a similar error in confinement of an insanity-acquitted individual, there is not only the fact of harm already done, but the substantial prospect that the same error, ascribing the quality of mental disease to a less extreme deviance, resulted in a *legal exculpation* where there should have been legal responsibility for the antisocial action.

Judge J. Skelly Wright dissenting, wrote in *Brown*, slip opinion at 13-14, 16-18:

. . . I believe the disparity in treatment sanctioned by the majority is logically untenable, rests on unsupportable policy grounds, and is in conflict with prior decisions of this court and the Supreme Court. . . . [Emphasis added.]

In *Bolton v. Harris*, 130 U.S.App.D.C. 1, 10, 395 F.2d 642, 651 (1968), this court held that persons acquitted of criminal charges by reason of insanity could not be civilly committed under 24 D. C. CODE § 301(d) (1967) without being provided a judicial hearing with pro-

cedures "substantially similar" to those in ordinary civil commitment proceedings. These safeguards included a right to a judicial hearing on the issue of whether the defendant was presently dangerous as a result of mental illness, imposition of the burden of proof on the Government, trial by jury, and a right to counsel. . . .

[*Bolton* was] based on *Baxstrom v. Herold*, 383 U.S. 107 (1966), where the Supreme Court held that New York's statutory procedure permitting civil commitment of persons at the end of jail sentences without the jury trial safeguard afforded persons subject to ordinary civil commitment violated equal protection. The Court held that the fact of past criminal conduct lacked a sufficient connection with current mental illness to justify lesser procedural safeguards. . . .

. . . .

The majority's central proposition is that Brown should be treated differently because he has already been found to have committed a series of indisputably dangerous felonies. These acts are said to dictate lesser solicitude for his rights—as expressed through a burden of proof—than if he were sought to be committed before he was found to have committed such acts. But it should be obvious that these acts, standing alone, go only to the civil commitment standard of dangerousness, which Brown's counsel has stipulated is not at issue, and not to the additional, central, question of mental illness. Yet the majority opinion is willing to accept the *non sequitur* that the admitted fact of dangerousness in the past must have a necessary bearing on the court's finding on the question of illness in the present.

The underlying justification for the majority's acceptance of this illogic seems to be its fear that strengthening the burden of proof in Section 301(d) proceedings will cause wholesale release of persons acquitted of crimes by reason of insanity. . . .

. . . .

Finally, in my view it is untenable to argue, as does the majority, that this disparity in burdens of proof is justifiable as a means of deterring frivolous insanity defenses. . . . [I]t seems anomalous, to say the least, that this court, which has given such consistent recognition to the need for a carefully administered insanity defense. . . . should suddenly embrace such a roughhewn and very possibly useless means of restraining its use.

It is doubtless true, as the majority suggests, that the insanity defense as it has been administered in this case, when coupled with the *Bolton* decision, might in theory give rise to a "revolving door" phenomenon whereby persons who have committed dangerous acts may be first acquitted by reason of insanity and next totally freed because of the Government's inability to meet the standards of proof for civil commitment. . . . *Bolton* sought to place those acquitted by reason of insanity on the same footing as those haled before the court in ordinary civil commitment proceedings. I would continue to follow its teaching. Indeed, given *Baxstrom*, in my judgment we have no choice.

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