1973

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RESOLVING THE PROBLEM OF DOMINANCE OF PSYCHIATRISTS IN CRIMINAL RESPONSIBILITY DECISIONS: A PROPOSAL

by

Harlow M. Huckabee*

A continuing problem in criminal law is the tendency of courts and lawyers to turn over their responsibilities in determining criminal responsibility of defendants to psychiatrists. The courts and psychiatrists seem to agree that the criminal responsibility decision is a legal, social, and moral judgment for the jury rather than a medical or scientific question for expert witnesses. Yet psychiatrists continue to dominate in these determinations.

To a significant extent, this problem can be traced to the standard applied under the law to determine criminal responsibility. The standards have varied over judicial history and are recently again coming under review. Bills submitted to Congress containing proposals to revise and codify the federal criminal law include recommendations for adoption of a variation of the American Law Institute test of criminal responsibility. This test is also recommended by the National Commission on Reform of Federal Criminal Laws (the Brown Commission) and all United States Courts of Appeal, with the exception of the First Circuit, have adopted variations of the ALI test in recent years. The administration favors an alternative proposal with a different test.

The District of Columbia Circuit recently stated that a principal reason for abandoning the Durham rule in favor of the ALI test was to avoid

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1 S. 1, 93d Cong., 1st Sess. § 1-3C2 (1973); H.R. 10047, 93d Cong., 1st Sess. § 503 (1973). The ALI test, set out in the Model Penal Code, is as follows:

(1) A person is not responsible for criminal conduct if at the time of such conduct as a result of mental disease or defect he lacks substantial capacity to appreciate the criminality (wrongfulness) of his conduct or to conform his conduct to the requirements of law.

(2) As used in this Article, the terms 'mental disease or defect' do not include an abnormality manifested only by repeated criminal or otherwise anti-social conduct.


3 For an analysis of the important cases in this area, see United States v. Brawner, 471 F.2d 969, 979-81 (D.C. Cir. 1972).

4 The administration proposes a defense to prosecution if "the defendant, as a result of mental disease or defect, lacked the state of mind required as an element of the offense charged." S. 1400, 93d Cong., 1st Sess. § 502 (1973); H.R. 6046, 93d Cong., 1st Sess. § 502 (1973).

5 "The rule we now hold . . . is simply that an accused is not criminally responsible
dominance of psychiatrists on the responsibility issue. It is the purpose of this Article to review this dominance problem and to set forth reasons why, in fact, it can be expected that the problem will continue under both the ALI test and the test proposed by the administration.

As an alternative to the bills already submitted, it is recommended that Congress consider a modernized M'Naghten test of criminal responsibility. Psychiatrists could testify as to the details of any mental disease or defect and would be allowed to render opinions using the language of that test. In addition, psychiatrists could testify concerning the existence of a mental disease or defect. The jury would consider this evidence, along with all other relevant facts on the issue of whether the defendant in fact lacked the state of mind required as an element of the offense charged. Psychiatrists, however, would not be permitted to state opinions in the language of the state of mind element, since such an opinion would create the opportunity for even more psychiatric dominance than now exists. Under this proposal psychiatric testimony and evidence, as distinguished from opinions, would be admissible on the state of mind element even though the mental disease or defect might not be serious enough to meet the requirements of the responsibility test. The government would then, of course, be required to prove the state of mind element beyond reasonable doubt.

This Article examines the historical development of the dominance of psychiatrists problem in connection with the various responsibility tests, and discusses anticipated dominance problems under the administration's proposed test. It is submitted and will be shown that the proposal set out in the foregoing paragraph and more fully outlined herein will alleviate the dominance problem. In addition, this proposal, when joined with other provisions of the administration's bill, could help resolve some of the age-old complaints of psychiatrists and courts concerning the restrictiveness of the M'Naghten test. However, this will require that the legislation include language to ensure that, even though falling short of showing full lack of responsibility under the modernized M'Naghten test, testimony and evidence as to the existence of mental disease or defect be allowed in evidence to be weighed by the jury along with all other relevant facts on the state of mind element.

The federal courts, have, in recent years, adopted the ALI test, and

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7 The M'Naghten test requires acquittal if "the party accused was labouring under such a defect of reason, from a disease of the mind, as not to know the nature and quality of the act he was doing; or, if he did know it, that he did not know that he was doing what was wrong." M'Naghten's Case, 10 Clark & Fin. 200, 210, 8 Eng. Rep. 718, 722 (H.L. 1843). I propose a modernization of this language in the form of the cognition phase of the ALI test, to wit: A person is not responsible for criminal conduct if at the time of such conduct as a result of mental disease or defect he lacks substantial capacity to appreciate the criminality of his conduct.
9 S. 1400, 93d Cong., 1st Sess. § 4222 (1973); H.R. 6046, 93d Cong., 1st Sess. § 4222 (1973) (pertaining to hospitalization of persons found not guilty by reason of insanity); S. 1400, 93d Cong., 1st Sess. § 4224 (1973); H.R. 6046, 93d Cong., 1st Sess. § 4224 (1973) (pertaining to authority for the sentencing judge to order hospitalization for convicted defendants with mental disorders).
earlier had combined the irresistible impulse test with *M’Naghten*. Thus, it might appear to be an exercise in futility to recommend moving back toward the unadorned *M’Naghten* test at this time. However, since legislation is under consideration there is an opportunity to establish safeguards surrounding *M’Naghten* which could help resolve many of the problems which have plagued courts, lawyers, and psychiatrists alike over the years. These matters together are the focus of this Article.

I. THE PROBLEM OF DOMINANCE OF PSYCHIATRISTS

A. The *M’Naghten* Test

The *M’Naghten* test originated in an English case which gave rise to heated debate at the time it was decided. Evidence that defendant *M’Naghten* was insane was given in open court by nine medical witnesses, and the court almost directed the jury to render a verdict of acquittal. The court stated to the jury: “I cannot help remarking, in common with my learned brethren, that the whole of the medical evidence is on one side, and that there is no part of it which leaves any doubt on the mind. It seems almost unnecessary that I should go through the evidence.” The furor over the acquittal, including the dissatisfaction of Queen Victoria with the administration of justice, caused the House of Lords to submit questions to the judges of England for an authoritative statement of the law. This ultimately resulted in the *M’Naghten* test, which has been extensively used in determining criminal responsibility since that time. Professor Glueck has stated that Lord Brougham’s reason for putting the questions to the assembly of judges was that their assistance would be invaluable in that:

[[I]t would lead to more uniformity in the language they used on future occasions in charging and directing juries on this most delicate and important subject. They would no longer indulge in that variety of phrase which only served to perplex others, if it did not also tend to bewilder themselves, as he supposed it sometimes did; but they would use one constant phrase, which the public and all persons concerned would be able to understand.]

Thus, it can be seen that the *M’Naghten* trial involved a definite element of “dominance” by the medical witnesses, which resulted in pressure for the development of an adequate legal framework in which to instruct the jury in connection with evaluating the medical evidence. In spite of other criticisms of *M’Naghten*, and regardless of how workable the test may have been in practice, it appears clear that the reason for developing it was to establish a framework of law in order to avoid the dominance of psychiatrists in questions of fact.

The need for such a legal framework continues. It is essential that a

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9 See United States v. Brawner, 471 F.2d 969, 975-81 (1972).
10 See note 7 *supra*.
12 *Id.* at 101-02.
jury trying the issue of criminal responsibility be provided "with a verbal tool by which it can relate the defendant's mental disease to his total personality and by means of which it can render an ultimate social and moral judgment." Without such a framework it is impossible fairly to evaluate psychiatric testimony under our present system of justice.

B. The Irresistible Impulse Test

The irresistible impulse test, which many courts added to the M'Naghten test, is that, although a person is able to distinguish right from wrong, he is not responsible if "his will . . . the governing power of his mind, has been so completely destroyed that his actions are not subject to it, but are beyond his control . . . ." A modernized version of the irresistible impulse test is incorporated as the volition phase of the ALI test. Numerous authorities agree that the volition phase of the ALI test is essentially the same as the old irresistible impulse test except that ALI is wider in scope and gives more flexibility to psychiatrists in arriving at opinions and juries in arriving at decisions that persons lack criminal responsibility. Furthermore, it is clear that the irresistible impulse test was designed to broaden the scope of M'Naghten, catching "in its exculpatory net many persons with mental aberration whom the knowledge tests miss . . . ."

The cases discussing the irresistible impulse test do not specifically use the language of dominance of psychiatrists in describing problems under the test. Those cases which decline to adopt the irresistible impulse test discuss its problems in terms of vagueness and uncertainty and difficulty in determining whether the impulse was really irresistible. The dominance of the fact questions which give rise to the many uncertainties in the test, undoubtedly afforded the opportunity for psychiatrists to dominate, even though the cases do not discuss the problem in these terms.

C. The Durham Rule

In 1954 the Court of Appeals for the District of Columbia Circuit set out what has come to be known as the Durham rule of criminal responsibility, holding that "an accused is not criminally responsible if his unlawful act was the product of mental disease or mental defect." Eighteen years later the same court in United States v. Brawner conducted an extensive review

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15 United States v. Shapiro, 383 F.2d 680, 685 (7th Cir. 1967).
16 See note 1 supra.
17 See United States v. Parks, 460 F.2d 736, 743-44 (5th Cir. 1972); United States v. Frazier, 458 F.2d 911, 916-17 (8th Cir. 1972); Blake v. United States, 407 F.2d 908, 913-14 (5th Cir. 1969); United States v. Shapiro, 383 F.2d 680, 684-85 (7th Cir. 1967). See also Wade v. United States, 426 F.2d 64, 75 (9th Cir. 1970) (Trask, J., dissenting).
18 S. GLUECK, supra note 13, at 49-57.
20 See, e.g., Judd v. State, 41 Ariz. 176, 183-84, 16 P.2d 720, 723 (1932); People v. Hoin, 62 Cal. 120 (1882); Cunningham v. State, 56 Miss. 269, 279 (1879); Flanagan v. People, 52 N.Y. 467, 470 (1873).
22 471 F.2d 969 (D.C. Cir. 1972).
of the problem of dominance of psychiatrists under Durham. Both the majority opinion and the separate opinion of Chief Judge Bazelon, the author of the Durham rule, noted that the problem involved the use of conclusory labels and terms in connection with the key concepts of "product" and "mental disease or mental defect." In the words of Chief Judge Bazelon:

[I]t quickly became apparent that while our decision produced some expansion of the inquiry, it did not do nearly enough to eliminate the experts' stranglehold on the process. Even after Durham counsel for both sides often sought to present the issue to the jury in 'simplified' form by eliciting from the experts little more than conclusory yes-or-no answers to the questions, 'Was the accused suffering from a mental disease or defect?' 'Was his act the product of that disease or defect?' And so the experts continued, on the whole, to speak in conclusory terms which inevitably included but concealed their underlying judgments, and their own views as to the appropriate legal outcome. The use of conclusory psychiatric labels often provided an aura of certainty which made it difficult to discern the inadequacies of the examination on which the expert testimony was based, and the limitations of psychiatric knowledge generally.23

As Judge Burger pointed out in Blocker v. United States, "The hazards in allowing experts to testify in precisely or even substantially the terms of the ultimate issue are apparent. This is a course which, once allowed, risks the danger that lay jurors, baffled by the intricacies of expert discourse and unintelligible technical jargon may be tempted to abdicate independent analysis of the facts on which the opinion rests . . . ."24

Subsequent developments have not eased the problem under the Durham rule. Neither the definition of "mental disease or mental defect" in McDonald v. United States,25 nor the proscription in Washington v. United States,26 against psychiatrists testifying as to whether an act was the "product" of such a disease or defect, has brought an end to psychiatric dominance.27 Reviewing its own rule in Brawner, the District of Columbia Circuit was compelled to the conclusion that Durham had opened the floodgates for the dominance of psychiatrists, and neither McDonald nor Washington had been successful in closing them.

D. The ALI Rule

The broadness and flexibility of the ALI rule, as described by the courts adopting it,28 is due in part to its reference, like the Durham rule, to a "mental disease or mental defect," and in part to its requirement of only partial, as opposed to total, cognitive or volitional incapacity. But broadness

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23 Id. at 1011 (Bazelon, C. J., concurring in part and dissenting in part).
25 312 F.2d 847, 851 (D.C. Cir. 1962).
26 390 F.2d 444 (D.C. Cir. 1967).
28 See note 3 supra, and accompanying text.
and flexibility notwithstanding, the ALI rule still fosters the same sort of conclusory testimony that allows psychiatrists to dominate under Durham. The court stated in Brawner that a psychiatrist could be asked "whether the mental disease or defect resulted in lack of substantial capacity to control the behavior in question (or appreciate its wrongfulness)." Other federal courts also allow psychiatrists to render opinions in terms of the language of the test. Thus, there is full opportunity for the dominance of psychiatrists to continue within the wide scope of the ALI test. This is particularly true as to the volition phase of the test. In his separate opinion in Brawner, Chief Judge Bazelon opined: "The court's approach may very well succeed and encourage jurors to look behind the testimony and recommendations of the experts. But, as I have tried to demonstrate above, there is also a significant possibility that our test will leave the power of the experts intact—or even make possible an enlargement of their influence."

The majority in Brawner found no indication in the available literature that the language of the ALI test is "conducive to a testimonial mystique permitting expert dominance and encroachment on the jury's function." However, in 1962 Professor Sheldon Glueck stated that the language of the ALI test is, in fact, conducive to producing that result. The volition phase of the ALI test has also been discussed by Professor David Robinson, consultant on psychiatric defenses to the Brown Commission, who indicated that the arguments against control tests, including irresistible impulse and ALI, are that they have a tendency to exculpate too many individuals; that "determinism seems dominant in the thinking of many expert witnesses;" that some deterministic views are "consistent with the notion that all criminal conduct is evidence of lack of power to conform to the requirements of law;" and that "[p]erhaps the most fundamental objection to the control tests is their lack of determinate meaning." With reference to the ALI test Professor Robinson further stated:

The key terms are without meaning or extremely vague. A.L.I. is largely a control test, and subject to metaphysical quandaries associated with assigning operational meaning. To a determinist, the abolition of criminal liability appears to be authorized by it; to a non-determinist it remains indeterminate in scope. 'Mental disease or defect' and 'substantial capacity to conform' cannot be resolved except by utilizing the moral preferences of expert witnesses and triers of fact.

As Chief Judge Bazelon opined in Brawner, the change from the Durham test to the ALI test will probably not be an improvement with regard to the psychiatric dominance question. "In fact, because it describes the ques-
as one of fact it may lull the jury into the mistaken assumption that the question of responsibility can best be resolved by experts, leaving the jury at the mercy of the witness who asserts most persuasively that, in his expert judgment, the defendant's capacity was or was not substantially impaired."35 A review of federal cases tried since adoption of the ALI test indicates that Chief Judge Bazelon was on target in his statement that the jury (or court trying the case without a jury) is at the mercy of expert witnesses under ALI. All of the cases show that psychiatric opinions are rendered in the language of the ALI test, giving full opportunity for psychiatrists to continue to dominate. The cases further illustrate that courts and juries continue to weigh the responsibility issue to a great extent in terms of what psychiatrists have the most impressive credentials and are the most effective witnesses.36

Since the courts allow psychiatrists to render their opinions in the exact terms of the ALI test, dominance of psychiatrists is particularly a problem with reference to the volition phase of that test. The "law" includes the state of mind element of the offense. Thus, for a psychiatrist to render an opinion as to whether or not a person lacks substantial capacity to conform his conduct to the requirements of the law requires that the psychiatrist have an intricate knowledge of all of the facts and legal concepts involved in the state of mind element of the offense. In fact, unless the psychiatrist has sat through the trial and heard all of the evidence and the court's instructions on the law (in effect, as a thirteenth juror), he is really not in a position to render such an opinion. To some extent, the same thing is true with the cognition phase of the ALI test. That concept also focuses on the particular conduct involved in the offense, but may not require as much knowledge by the psychiatrist of the intricate legal and factual concepts.

A further point to consider with reference to the volitional phase of the ALI test is that it is broader and more open to varying interpretations by psychiatrists than the cognition phase and, thus, is more susceptible to domination by defense oriented psychiatrists. This is demonstrated by the fact that in numerous cases a psychiatrist renders an opinion that the person lacks substantial capacity to conform his conduct to the requirements of the


36 United States v. Kohlman, 469 F.2d 247 (2d Cir. 1972); United States v. Huffman, 467 F.2d 189 (6th Cir. 1972); United States v. Parks, 460 F.2d 736 (5th Cir. 1972); United States v. Handy, 454 F.2d 885 (9th Cir. 1971); United States v. Harper, 450 F.2d 1032, 1040-43 (5th Cir. 1971); United States v. Stewart, 443 F.2d 1129, 1132-35 (10th Cir. 1971); United States v. Hernandez, 438 F.2d 676 (5th Cir.), cert. denied, 402 U.S. 976 (1971); United States v. O'Neal, 431 F.2d 695 (5th Cir. 1970), cert. denied, 401 U.S. 917 (1971); United States v. Weiser, 428 F.2d 932, 935 (2d Cir. 1969), cert. denied, 402 U.S. 949 (1971); United States v. Baird, 414 F.2d 700, 703-05 (2d Cir. 1969), cert. denied, 396 U.S. 1005 (1970); United States v. Retolaza, 398 F.2d 235, 240-42 (4th Cir. 1968), cert. denied, 393 U.S. 1032 (1969); United States v. Levy, 326 F. Supp. 1285, 1289-94 (D. Conn.), aff'd, 449 F.2d 769 (2d Cir. 1971); United States v. McGirr, 320 F. Supp. 1333, 1338-39 (D. Md. 1971). Of course, these cases do not reflect information as to the number of acquittals, or decisions against prosecution, resulting from opinions of psychiatrists under the ALI test; nor do they reflect cases which are not appealed, or in which there is no discussion of psychiatric testimony in an opinion.
law but does not lack substantial capacity to appreciate the criminality of his conduct.37

E. The Case Against Dominance

Doctor Bernard L. Diamond, psychiatrist and professor of criminology and law at the University of California, has recently stated that psychiatrists are unable effectively to perform the task of differentiating “the mentally ill offender who committed his crime as a result of his psychopathology from the mentally sound offender who committed his crime for more normal reasons such as greed, passion or other evil intent.”38 Further, he has stated that the expert has difficulty communicating “the basis for this differentiation with sufficient clarity to permit the trier of fact to make a rational decision, fully taking into consideration the psychiatric evidence, yet not blindly submitting to the authority of the expert.”39 He has stated that these problems exist under the Durham test, and he predicts that the psychiatrist is not going to do any better under any variant of the ALI test.40

The problems mentioned by Doctor Diamond arise from the fact that it is recognized that there is a lack of scientific foundation in psychiatry in the area of criminal responsibility.41 Psychiatrists are treatment oriented, and many of them have had deterministic training.42 For all these reasons, among others, it is clear that psychiatrists should not dominate in criminal responsibility decisions.

Over the years psychiatrists themselves have complained that they should not give their opinions in the language of the legal responsibility tests because there is no scientific answer to the criminal responsibility question, and psychiatrists do not feel they should make legal, social, and moral judgments.44 Doctor Karl Menninger has stated that “I oppose courtroom appearances because I consider guilt, competence, and responsibility to be moral questions, not medical ones . . . .”45 Doctor Manfred Guttmacher

39 Id. at 110-11.
40 Id.
41 See H. Goulet, The Insanity Defense in Criminal Trials 7-16 (1965); J. Hall, General Principles of Criminal Law 466-72 (2d ed. 1960); Diamond, supra note 38, at 111-15.
42 See Mims v. United States, 375 F.2d 135, 141-42 (5th Cir. 1967); S. Glueck, supra note 13, at 8; Diamond, supra note 38, at 116.
43 See United States v. Brawner, 471 F.2d 969, 1002 (D.C. Cir. 1972); United States v. Chandler, 393 F.2d 920, 929 (4th Cir. 1968); H. Goulet, supra note 41, at 22-23.
has said that "[s]ince we, as psychiatrists, know that responsibility is not something inherent within the individual, which we as professionals can measure, but is a social judgment, we feel that it is best carried out by the jury that represents the community." Courts are unanimous in holding that psychiatrists should not dominate in criminal responsibility decisions. Undoubtedly, the reasons for this include the lack of scientific foundation, treatment orientation, and deterministic elements discussed above.

II. POTENTIAL DOMINANCE PROBLEMS UNDER THE ADMINISTRATION'S PROPOSAL

Section 502 of the administration's bill is subject to the same problems of psychiatric dominance which have been outlined heretofore. The language of section 502 parallels the language in Brawner and numerous other authorities to the effect that mental disease or defect, although not serious enough to exonerate under the responsibility test, may be considered by the jury on the state of mind element. Thus, it can be expected that under section 502 many psychiatrists, under the guidance of defense attorneys, will attempt to render opinions in the language of the state of mind so that even the most minor mental disease or defect will eliminate the state of mind required for conviction. Even in varying circumstances under existing law, such attempts have been made, and section 502 is an open invitation for more of the same. In this connection Professor John Monahan has recently commented on an approach suggested by Professor Norval Morris that evidence of mental illness should be admitted as to the presence or absence of mens rea and that there should be no other insanity defense. "Menninger has stated that 'the time will come when stealing or murder will be thought of as a symptom, indicating the presence of a disease.' To the extent that this occurs, Morris' rule would result in the elimination of all criminal sanctioning." In essence, this is the concept involved in section 502.

It is because of this trend, as well as for reasons previously stated, that it can be expected that section 502 will cause more rather than less use of mental illness as a defense. For this reason it seems clear that section 502 would not eliminate the battle of psychiatrists or cut down on personnel involved in handling mental illness defenses in connection with criminal trials. The arena would merely be shifted from a traditional responsibility test to the mens rea concept. Professor Alan M. Dershowitz has recognized that

48 M. GUTTMACHER, supra note 44, at 77.
46 See note 4 supra.
49 471 F.2d at 998-1002.
52 Goldstein, supra note 51, at 134-36; Monahan, supra note 51, at 728; Weihofen, supra note 35, at 42 n.17. Chief Justice Burger has been quoted as being in favor of abolishing the insanity defense. It should be noted, however, that in his comment
One irony of the Nixon proposal, pointed out by some observers, is that it may actually increase the number of cases in which evidence of mental illness is sought to be introduced by defendants. Today, with the insanity defense available, many courts refuse to allow psychiatric testimony on the issue of intent, limiting it exclusively to whether the defendant knew the difference between right and wrong (or met whatever other insanity test happens to prevail in the particular jurisdiction). Under the Nixon proposal, however, psychiatric evidence would be admissible to show, in the words of the bill, that the defendant 'lacked the state of mind required as an element of the offense charged.' Thus, the courts may soon hear psychiatrists explaining that an alleged tax evader, while not insane, could not have formed the 'intent' to defraud because he had a compulsion to cheat.\footnote{Dershowitz, Abolishing the Insanity Defense: The Most Significant Feature of the Administration's Proposed Criminal Code—An Essay, 9 CRIM. L. BULL. 434, 438 (1973).}

My recommendation differs from section 502 in two major respects. In the first place, although my proposal and section 502 are essentially the same with regard to the admissibility of evidence as to the state of mind of the defendant, my proposal includes a modernized statement of the M'Naghten test. This test provides a legal framework for the evaluation of psychiatric testimony.

Second, my proposal, as distinct from section 502, would allow no opinions of psychiatrists framed in the language of the state of mind elements. The situation under section 502 would be different. Rule 704 of the proposed federal rules of evidence states: "Testimony in the form of an opinion or inference otherwise admissible is not objectionable because it embraces an ultimate issue to be decided by the trier of fact."\footnote{Proposed Rules of Evidence for United States Courts and Magistrates, 704, 34 L. Ed. 2d cxcvii (1972).} When rule 704 goes into effect, and if section 502 becomes law, it can be expected that the courts will allow opinions of psychiatrists in the exact language of the state of mind elements of the various offenses. The reason for this is that section 502 would be the responsibility test. On the other hand, if modernized M'Naghten is the responsibility test, psychiatric opinions directly on the state of mind element should not be admissible under rule 704 because such opinions could only be in terms of the responsibility test and would not be "otherwise admissible." If the proposals herein are adopted, this should be made clear in the legislation.

at a conference of judges he merely referred to that as a hypothetical possibility in the context of a full treatment and rehabilitation system, and said that the only determination at the trial would be whether the defendant did the act "which would constitute a crime if he had the mens rea, the criminal intent." Wion v. United States, 325 F.2d 420, 428-29 n.10 (10th Cir. 1963). From this it cannot be said that Chief Justice Burger favors abolishing the insanity defense and allowing psychiatric evidence on only mens rea at the trial. Furthermore, Judges Bazelon, Haynesworth, and Weintraub have not taken such a position either, according to authority cited in note 19 supra. United States v. Brawner, 471 F.2d 969, 985 (D.C. Cir. 1972). Abolishing the insanity defense and not allowing evidence of mental disease or defect on mens rea may create constitutional problems. See Monahan, supra note 51, at 727; Robinson, supra note 33, at 252.

If section 502 became law, its application to many of the offenses in the new federal criminal code would obtain the same result as the application of M'Naghten. This would occur with regard to offenses using the words "knowingly" or "with knowledge" as the mental element, since the definition of those words in the administration's bill is a state of mind of the defendant "when he is aware of the nature of his conduct." As to the other offenses in the new code with state of mind elements couched in terms of "intent," "recklessness," or "negligence," however, the result obtained by application of section 502, unlike that under M'Naghten, would be built upon the unfettered opinions of psychiatrists. And even under the other types of offenses section 502 would allow psychiatrists to involve themselves deeply in opinions directed toward the intricate legal and factual issues involved in the state of mind elements. This would not be the case were M'Naghten applied as outlined below.

III. PROPOSAL

I recommend that Congress consider adopting a modernized M'Naghten test of criminal responsibility. This should be in the language of the cognition phase of the ALI test to the effect that "a person is not responsible for criminal conduct if at the time of such conduct as a result of mental disease or defect he lacks substantial capacity to appreciate the criminality of his conduct." This is broader than the original M'Naghten test. It does not constitute a step backward in the law, since even though the federal courts have moved from M'Naghten to ALI, numerous state courts have retained M'Naghten. The reason for recommending adoption of modernized M'Naghten is to help reduce dominance of psychiatrists. However, to allay any remaining fears that this may be a backward movement, certain additional provisions should be included in the legislation to resolve the criticisms of M'Naghten. One of these criticisms is that the "language of the old right-wrong/irresistible impulse rule for insanity was antiquated, no longer reflecting the community's judgment as to who ought to be held criminally liable for socially destructive acts ..." and did not "comport with modern medical knowledge that an individual is a mentally complex being with varying degrees of awareness." More specifically, M'Naghten has been criticized because of its emphasis on the cognitive aspect of the personality which recognizes no degrees of crime. Psychiatrists were also concerned that under M'Naghten and other traditional tests the law asked them to go beyond their profes-

55 S. 1400, 93d Cong., 1st Sess. § 302(b) (1973); H.R. 6046, 93d Cong., 1st Sess. § 302(b) (1973).
56 Id. §§ 301, 302, 303.
57 See note 7 supra.
58 See Wade v. United States, 426 F.2d 64, 82-83 (9th Cir. 1970) (Trask, J., dissenting).
60 Wade v. United States, 426 F.2d 64, 66 (9th Cir. 1970).
criminal responsibility and decide "which defendants were guilty and which ones should be excused for lack of criminal responsibility." Some courts have emphasized that individuals held responsible under M'Naghten may be sent to prison, not treated for existing mental disease, and, upon release, be a danger to society. Other courts have said that M'Naghten placed tight shackles upon expert testimony of psychiatrists, depriving the triers of fact of information vital to their judgment.

I recommend that Congress include in the legislation an authorization for psychiatrists to testify, and for evidence to be presented, concerning the existence of a mental disease or defect, to be considered by the jury along with other relevant facts on the issue of whether or not the defendant in fact lacked the state of mind required as an element of the offense charged. This is now authorized in the District of Columbia and other jurisdictions in varying situations.

This concept of testimony as to mental disease or defect which may affect the state of mind required for the crime has been described in a variety of ways in various contexts, but it is intended herein that it encompass terms such as diminished capacity, diminished responsibility, partial insanity or partial responsibility reducing the degree of the offense, and the volition phase of ALI.

Procedurally, the issue involved may arise in situations where the mental condition is offered as a defense under the responsibility test but the jury finds that the defendant is responsible under the test. In such a case, the psychiatric testimony and evidence of the existence of mental disease or defect may be considered on the question as to whether the defendant in fact had the requisite state of mind required as an element of the offense. Similarly, such testimony and evidence may be considered directly on the state of mind element if a full lack of responsibility defense under the legal test is not raised, or if it is held that there is insufficient evidence for an instruction under the responsibility test.

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63 Wade v. United States, 426 F.2d 64, 66-67 (9th Cir. 1970); United States v. Chandler, 393 F.2d 920, 927 (4th Cir. 1968); United States v. Freeman, 357 F.2d 606, 618 (2d Cir. 1966); United States v. Currens, 290 F.2d 751, 767 (3d Cir. 1961).

64 United States v. Freeman, 357 F.2d 606, 619-20 (2d Cir. 1966).


67 United States v. Brawner, 471 F.2d 969, 998 (D.C. Cir. 1972); United States v. Gorman, 393 F.2d 209, 211 (7th Cir. 1968).
of the Model Penal Code, "Evidence that the defendant suffered from a mental disease or defect is admissible whenever it is relevant to prove that the defendant did or did not have a state of mind which is an element of the offense."⁶⁸

Certainly the concept described in the foregoing paragraphs should be applicable to crimes with specific intent. So in homicide cases it should apply to premeditation, deliberation and malice, even though the authorities are divided as to malice.⁶⁹ With specific reference to the administration's proposed bill, the concept should apply to offenses involving the culpability requirements described as intentionally, knowingly, recklessly, or negligently.⁷⁰ Furthermore, the concept should not only have the effect of reducing the degree of crime where degrees are involved, but as a factor to be weighed along with other evidence as to whether the state of mind element existed, it should have the effect of contributing to complete acquittal if the jury is so inclined. In addition, if a non-degree crime is involved the concept should be available for consideration by the jury so it can contribute to complete acquittal.⁷¹

The concept under consideration allows psychiatric testimony and evidence as to the existence of a mental disease or defect, to be considered along with other relevant facts on the issue of whether the defendant lacked the state of mind required as an element of the offense charged. Thus, although social and cultural factors may be considered by a psychiatrist in connection with other factors as to whether, in fact, there is a mental disease or defect, such social and cultural factors standing alone should not be considered admissible under this concept.⁷² It is also noted that there is a split in the federal circuits as to the adoption of the so-called ALI caveat paragraph that excludes from the terms “mental disease or defect” an “abnormality manifested only by repeated criminal or otherwise anti-social conduct.”⁷³ Of course, if such repeated activity is all that is involved, then it does not meet the requirements of “mental disease or defect” in the concept under consideration here. However, there may be other evidence “augmenting mere recidivism” which could result in a diagnosis of a mental disease.⁷⁴

With reference to burden of proof, it is contemplated that where there is a full insanity defense, once some evidence of mental disease or defect has been introduced, the presumption of sanity no longer controls and the government must prove sanity beyond reasonable doubt in terms of modernized M'Naghten. The jury would be instructed that it is authorized to bring in a verdict of not guilty by reason of insanity, if warranted by the evidence.⁷⁵ However, the jury should also be instructed that even if there is a decision

⁷¹ Cf. United States v. Gorman, 393 F.2d 209, 211 (7th Cir. 1968).
⁷³ Id. at 992-93.
⁷⁴ United States v. Freeman, 357 F.2d 606, 625 (2d Cir. 1966). See also Wade v. United States, 426 F.2d 64, 72-73 (9th Cir. 1970).
that the evidence is not sufficient for a verdict of not guilty by reason of insanity, the evidence of mental disease or defect may also be considered on whether the government has proved the state of mind element beyond a reasonable doubt.\textsuperscript{76} If the government does not prove the state of mind element beyond a reasonable doubt, a full acquittal would result rather than an acquittal by reason of insanity.\textsuperscript{77} The defendant should also be authorized to present psychiatric testimony and evidence directly on the state of mind element, without raising a full insanity defense, in which case the jury would be instructed to consider it in terms of whether the government had proved that element beyond a reasonable doubt.\textsuperscript{78}

Under the various responsibility tests there have been many complaints by psychiatrists that the tests do not reflect modern medical knowledge, that yes or no answers have been demanded in the language of the tests, and that psychiatric testimony is, therefore, artificially limited and distorted.\textsuperscript{79} As the foregoing discussion indicates, under the proposals set forth herein this should no longer be a problem. These proposals go further than courts which have earlier attempted to resolve this problem by merely allowing broad psychiatric testimony.\textsuperscript{80} In this connection, a significant problem has been that many courts have not allowed instructions to be given to juries drawing attention to psychiatric testimony already in evidence concerning its effect on the state of mind element, if such testimony is not sufficient to exonerate under the responsibility test.\textsuperscript{81} Even more significant is the fact that some courts have not allowed such testimony to be admitted in evidence if it does not meet the standards of the responsibility test.\textsuperscript{82} Within the framework previously discussed such evidence would be admitted under the proposals herein, and there would be an instruction to the jury to consider it on the state of mind element. It is recommended that this be made clear by Congress in the legislation.

The concept under consideration would result in admissibility of psychiatric testimony and evidence which would encompass what has been called diminished capacity, diminished responsibility and partial insanity or partial responsibility. In fact, it would go even further than some courts in that it would authorize complete acquittal, under appropriate circumstances, rather than merely reducing the degree of the offense.\textsuperscript{83}

Admissibility of psychiatric testimony and evidence as to the existence of

\textsuperscript{76} \textit{Id.} See also 1 E. Devitt & C. Blackmar, supra note 66, at § 13.17.
\textsuperscript{77} 1 E. Devitt & C. Blackmar, supra note 66, at § 13.17.
\textsuperscript{78} United States v. Brawner, 471 F.2d 969, 998, 1002 (D.C. Cir. 1972).
\textsuperscript{79} S. Glueck, supra note 13, at 61-65. See also notes 59, 60, and 61 supra, and accompanying text.
\textsuperscript{80} United States v. Brawner, 471 F.2d 969, 994-95 (D.C. Cir. 1972); United States v. Frazier, 458 F.2d 911, 915-16 (8th Cir. 1972); United States v. Chandler, 393 F.2d 920, 925 (4th Cir. 1968).
\textsuperscript{83} Cf. Annot., 22 A.L.R.3d 1228, 1235-43 (1968); S. Glueck, supra note 13, at 22-30. See also note 64 supra, and accompanying text.
mental disease or defect affecting the state of mind element would also encompass what is involved in the irresistible impulse test (and the modern version of that test which is the volitional phase of ALI). In order to broaden M’Naghten to include a volitional concept there is no need for an addition to the responsibility test. The problem would be resolved by allowing the jury to consider the psychiatric testimony and evidence in the framework previously discussed. The only difference is that the jury would consider the testimony and evidence, along with other evidence, in determining whether the state of mind element had been proved beyond a reasonable doubt, rather than considering the volitional concepts in terms of a full responsibility test. Such consideration by the jury should be adequate, and would answer the long existing complaints of psychiatrists, courts, and other authorities on this subject.84

The administration’s proposed bill includes a section providing hospitalization for a person acquitted by reason of insanity,85 and a section providing that the sentencing court may commit the defendant to the custody of the Attorney General for treatment in a suitable mental hospital or other facility if a convicted defendant is presently suffering from a mental disease or defect as a result of which he is in need of custody, care, or treatment in a mental institution.86 The provision for hospitalization for those acquitted by reason of insanity fills in a gap which has been recognized by the courts.87 Authority for the sentencing court to order treatment in a mental institution for convicted defendants having a mental disease or defect resolves the problem, recognized by the courts, that a person might not be treated in prison and could be released while still a danger to society.88

With reference to dominance, the major problem under Durham appears to have been opinions of psychiatrists in the language of the responsibility test. This problem will continue under ALI. As stated earlier, dominance of psychiatrists under the volitional phase of the ALI test is particularly troublesome because of the wide-open nature of that phase of the test, giving psychiatrists much more leeway to dominate than under modernized M’Naghten. For purposes of a standard or framework in which to evaluate psychiatric testimony and evidence a responsibility test is necessary. Modernized M’Naghten is recommended since it is the least susceptible of causing domination by psychiatrists. It is also clear that because the volitional phase

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84 Cf. GLUECK, supra note 13, at 54-58; Keedy, Irresistible Impulse as a Defense in the Criminal Law, 100 U. Pa. L. Rev. 956, 991-93 (1952). See also note 64 supra, and accompanying text.
87 United States v. Chandler, 393 F.2d 920, 927 (4th Cir. 1968); United States v. Shapiro, 383 F.2d 680, 686-87 (7th Cir. 1967); United States v. Freeman, 357 F.2d 606, 625-26 (2d Cir. 1966). See also Wade v. United States, 426 F.2d 64, 80-82 (9th Cir. 1970) (Trask, J., dissenting).
88 See note 63 supra, and accompanying text. See also S. 1400, 93d Cong., 1st Sess. § 4225 (1973); H.R. 6046, 93d Cong., 1st Sess. § 4225 (1973). These sections provide for examination and further commitment if, at the expiration of the sentence, a court determines that the defendant is still a danger to himself or the person or property of others.
of ALI requires psychiatrists to go into whether the defendant can conform to the requirements of the "law," including particularly the state of mind element, psychiatrists would be more involved in legal, social, and moral questions than under modernized M'Naghten. Thus, psychiatrists should welcome the opportunity to avoid rendering opinions in the language of the volitional phase of ALI.

It is true that under the recommendations herein it is contemplated that psychiatrists will still be authorized to render opinions in the language of modernized M'Naghten. This is consistent with the position taken by the court in Brawner to the effect that with reference to the responsibility test "[t]he goal of avoiding undue dominance of the jury by expert testimony does not require ostrich disregard of the key issue of causality." Thus, in Brawner the court held that a psychiatrist could be asked for an opinion in terms of the full ALI test, and similarly under the proposals herein psychiatrists would be authorized to render opinions in the language of the cognition phase of ALI (modernized M'Naghten).

Because of potential continued dominance of psychiatrists there are some who question whether there should be opinions in the language of the responsibility test. However, the opportunity for dominance will be reduced by not allowing psychiatrists to render opinions on the volitional phases. The jury will still have the benefit of psychiatric testimony and evidence as to existence of mental disease or defect and will be given instructions by the court on this in connection with the state of mind element.

Since modernized M'Naghten is a legal, not a medical concept, and psychiatrists will be able to fully present their testimony and have it considered in the framework outlined herein, it does not appear that they should have difficulties about being asked to render an opinion in terms of modernized M'Naghten. If, in fact, they have a problem in rendering such an opinion they can say so, and their testimony will still be considered by the jury.

All of the points, previously discussed, as to other wide-open tests such as Durham and the volitional phase of ALI are fully applicable as to why there should be no psychiatric opinions in the language of the state of mind element. This applies not only to opinions as to whether or not the defendant had the requisite state of mind for the offense, but also as to whether or not he had the mental capacity for such state of mind. It is recommended that Congress make clear in the legislation that there should be no such opinions. Otherwise, the dominance problem would be far worse than it is now, since there would be no framework whatsoever in which the court and jury could evaluate these opinions except the language of the statutes defining the offenses.

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89 471 F.2d 969, 1006 (D.C. Cir. 1972).
90 Id. at 1006-07.
91 Id. at 1011-12, 1034 (Bazelon, C.J., concurring in part and dissenting in part).