

views primarily to the *McDonald* case and the extent to which it does modify the *Durham* doctrine, and to my own view that the American Law Institute Code, as passed by the House, does represent a substantial step in the direction of criminal justice.

In the first place, it is important to note what *McDonald* does and what it does not do. I think it tends to restore the jury to the traditional place that it has had in criminal jurisprudence.

I said "tends to restore" because it certainly does not overrule the *Douglas* and *Wright* cases in which the court of appeals said that the jury was not free to ignore the testimony of the expert or psychiatric witness.

I do not read the *McDonald* case as taking that step. I think it does, however, indicate that the traditional function of the jury, in weighing the evidence, is somewhat restored.

It seems to indicate that the quantum of proof, which was established in the *Tatum* case, the same evidence quantum, which can be quite vague, is somewhat enlarged but the extent to which that important quantum of proof of the state of insanity or mental disease or defect must be established is still vague.

Now, reference is often made in the court of appeals decisions to the *Davis* case in the Supreme Court.

There are two *Davis* cases, because the first one (160 U.S.) represented a reversal of a conviction of first degree murder; whereas, the second *Davis* case (165 U.S.) was an affirmance of the second trial of the same man.

Judge Holtzoff has read to you, and I will not repeat it though I have the volume with me, the essential language from the second *Davis* case which does define "insanity."

I think it is important to realize that because it includes, among other things, this test which is implicit in the House bill and the American Law Institute formula which is capacity to control one's unlawful behavior.

Now, one of the greatest difficulties that we experienced in the U.S. attorney's office, during the 5 years that I was at the courthouse in the capacity of U.S. attorney, was the fact that this capacity to control one's unlawful impulses or inclinations to commit crime was not a part of the *Durham* formula.

The *Durham* formula basically is not a new formula. It was adopted only 26 years after the *M'Naghten* case in the *Pike* case in New Hampshire.

So it also is a product of the 19th century.

Let me state briefly the reason why I prefer the American Law Institute formula.

In the first place, this formula was worked out by some of the leading and most respected legal craftsmen in the country, people like Learned Hand, Judge Parker of the fourth circuit, Judge Fee of the ninth circuit, Professor Wechsler, now director of the American Law Institute and for many years professor of law at Columbia and Harvard, and a former Assistant Attorney General of the United States.

Those people were not under the pressure of deciding a given case for certain reasons that in that case seemed important. They were attempting to work out a code, you might say, in the cool of the evening where people could sit down and exchange views and experiences gained over a lifetime.