

That is very close to the American Law Institute formula. It is this:

The jury must be satisfied that at the time of committing the prohibitive act the defendant, as a result of mental disease or defect, lacked substantial capacity to conform his conduct to the requirements of law which he is alleged to have violated.

And Chief Judge Biggs, in quite an admirable way, set forth what the instruction should be in these cases.

As a former prosecutor, I always like to see the court tell both the prosecution and the defense what a proper instruction is. If you know what a proper instruction is then you certainly save a lot of time and a lot of headaches, and a lot of expense, incident to retrial of these criminal cases, and that is something that is very desirable to achieve.

I am not going to read this instruction, but it is set forth at 290th Federal Reporter, 2d series, at page 775.

The CHAIRMAN. The case was referred to by a witness yesterday. I am certain that it was incorporated in full in the record.

Of course, I think some of the testimony yesterday was to the effect that when you take the *Currens* case, and you read that side by side with the *Durham* rule, as amplified and supplemented by the *McDonald* rule, you have two tests that are very, very close together.

Now, I do not know. Lawyers seem to differ on this, and I understand that, but there was testimony to the effect that when you read the Judge Biggs' test, which I understand you to say seems to be a very fair test, and the *Durham* case, as supplemented by the *McDonald* test, that you have very close to the same test. I would appreciate your views.

Mr. GASCH. Well, at page 7 of the slip opinion in *McDonald*, you do have a recognition of this capacity to control one's unlawful conduct, which is the heart and soul of the American Law Institute formula and the American Law Institute formula was adopted by Judge Biggs in the *Currens* case.

Now, here is what the court said per curiam is the definition of "disease and defect." This is on page 7.

Consequently, for that purpose the jury should be told that a mental disease or defect includes any abnormal condition of the mind which substantially affects mental or emotional processes and substantially impairs behavioral control.

Now, that is as far as the court has gone in that regard. I personally prefer the way that Chief Judge Biggs has stated it but, quite frankly, when I read Mr. Acheson's testimony I must respect his experience. He has been there during the last 2 years. I have not.

I have been concerning myself with civil cases except for an occasional criminal assignment, and I cannot say that I am as well up on these cases.

I am as well informed on the problem as he is, but I do feel basically, in conclusion, that when a group of respectable legal scholars get together and coolly figure out what these procedural steps should be, they are more likely to come up with a code that is in the interest of justice than if you have the case by case method to which we have in the District of Columbia heretofore been relegated, and that is basically why I feel that the American Law Institute formula, adopted by the House bill, is preferable and, of course, the three