

Mr. GASCH. No, sir.

The CHAIRMAN. Thank you very much, Mr. Gasch. I very much appreciate your courtesy.

You have always been most cooperative and helpful to this committee and to me personally, in trying to work out some of these problems.

Mr. GASCH. Thank you.

The CHAIRMAN. Thank you very much.

Your letter of October 16, 1963, will be inserted in the record at this point.

(The letter referred to follows:)

CRAIGHILL, AIELLO, GASCH & CRAIGHILL,
Washington, D.C., October 16, 1963.

Hon. ALAN BIBLE,
Chairman, Committee on the District of Columbia,
U.S. Senate, Washington, D.C.

DEAR MR. CHAIRMAN: This statement is presented in response to the committee's request for my views, which request was delivered to me by the committee's counsel, Mr. McIntyre. I should like to make it plain at the outset that the views which I am about to express are my views which I express as an individual. I am not testifying as an officer of the District of Columbia Bar Association.

It is my understanding that the committee is concerned at this stage of its hearings with the subject of whether it is desirable and in the public interest to make any legislative changes respecting the rule of criminal responsibility in the District of Columbia. Legislation patterned largely on the American Law Institute's formulation has passed the House of Representatives.

The *Durham* rule, substantially modified by the *McDonald* decision, is the law in the District of Columbia today on this subject.

Prior to the *Durham* rule, the *M'Naghten* rule which superseded the old right-wrong test, as subsequently modified by the *Smith* decision of 1929 (the irresistible impulse test was the law in the District of Columbia until the decision in the *Durham* case in 1954. The date of the *M'Naghten* formulation is approximately 1843. It antedated the basic language of the *Durham* rule which was taken from the *Pike* decision in New Hampshire of 1869.

Durham and *M'Naghten*, then, are both products of the 19th century. They are separated by approximately 26 years.

I have favored the American Law Institute's formulation for several reasons. In the first place, it is a coherent, cohesive, self-contained document. Oftentimes, procedures are most important in achieving justice. The American Law Institute's formulation specifies the procedures to be followed from the outset. Doubt as to when and under what conditions one charged with a crime should be examined by a psychiatrist is removed. I recall well the *Sweeney* case in which a young college boy had stabbed to death his sweetheart. The Government sought a timely psychiatric examination to ascertain the youth's condition as close to the critical time as possible. We encountered delay after delay until a psychiatric examination was no longer meaningful.

I should like to emphasize two points in the American Law Institute's formulation which seem of the utmost importance to me. The first is the recognition that insanity is an affirmative defense. It must be proved by substantial evidence. There should be no serious constitutional question respecting this point for the reason that the Supreme Court in *Leland v. Oregon* sustained the constitutionality of an Oregon statute which requires one asserting the defense of insanity to prove it beyond a reasonable doubt. One of the great difficulties respecting the *Durham* rule has been the "some evidence" rule adopted by the court in the *Tatum* case. "Some evidence" over the years proved to be a very vague and light quantum, but whenever there was some evidence of insanity, the burden was thrown upon the Government to prove either that the defendant was sane beyond a reasonable doubt or, in the alternative, to prove beyond a reasonable doubt that there was no causal connection or productivity between the mental condition and the criminal act.

To a degree the situation has been alleviated by the decision of the court of appeals in *McDonald*. Under this decision the jury has regained its rightful place in the evaluation of expert testimony. Under *Douglas*, the jury was re-