

as a psychiatrist. And the theory was that if they gave the jury the benefit of what they knew about the accused, you would get a more just result. And I think that premise is fundamentally sound.

In other words, I think if the jury is more informed, has greater information concerning the defendant's emotional makeup, they are more likely to do justice in the particular case.

Now, the *Durham* rule has, I think, two great virtues. First, it focuses the issue very sharply on the question of mental disorder, and secondly I believe it is intelligible.

Now, I do think there is support to the criticism that the product phase of it is ambiguous, and I think it has presented some problems in some cases—I don't know how many—I don't think very many—to the prosecution. But I think most of those problems are probably now resolved by the *McDonald* decision.

The CHAIRMAN. Right at that point, I wonder why you do not include the *McDonald* case in your test of criminal responsibility. Maybe you do not consider that as a test.

Mr. KRASH. That's right—I don't. It is really, to be accurate about it in my judgment—it is a clarification, it is a definition of the terms "disease or defect" in the *Durham* rule.

The law in the District of Columbia is the *Durham* test, as clarified by *McDonald*.

Now, let me say one thing about the *McDonald* test which I think has been overlooked.

The important point about the *McDonald* case is this—that the phrase "mental defect" is defined in such a way that it reaches the mentally retarded. Not just persons who are mentally diseased in the sense of being psychotic—but it reaches the mentally retarded. The case involved a mentally retarded man, a man with an IQ of 68. And in that sense it is a very important decision, because the President's Panel on Mental Retardation has indicated this problem is extremely important, and the *McDonald* case is designed to reach that situation.

Now, in that connection I would say this with respect to one section of the bill before the committee:

The bill would make an important change with respect to the evidence which must be produced. It would require in subsection (c) (1) that the defendant must establish by substantial evidence—the words "substantial evidence"—the defense of insanity.

Now, under the *McDonald* case, which simply repeats the law which the Supreme Court laid down in the *Davis* case, the defendant must produce some evidence, not substantial evidence—some evidence in order to create an issue. And once he has produced some evidence, the prosecution, which has the burden of proof on this issue from the beginning—the prosecution has the duty of going forward and must prove beyond a reasonable doubt that the defendant is mentally competent. So if the bill would change the existing law, it would increase the burden.

Now let me say, I think I would not be in favor of that, and very simply for this reason: Over 90 percent of these defendants are indigents. And many of them are illiterate and have been poorly educated. And while I would agree, Senator Dominick, with an observation you made this morning that indigent defendants are fre-