

or supplemented by the *McDonald* case and the ALI test? The reason I ask that question is this: In my questioning of the U.S. attorney yesterday he took the position they are substantially the same. I got the impression from Dr. Guttmacher and possibly from Dr. Overholser—at least from one of the two witnesses—that they did not feel they were the same. In fact, they have joined in writing a paper criticizing the ALI rule. Yet both psychiatrists testified this morning and stated they were in full accord with the *Durham* rule as modified by the *McDonald* case.

Mr. KRASH. Well, I think here you are in an area of medipysics. I think they are very close. I think there is some difference between *McDonald* and the *Durham* test and the ALI test. I think the difference is this: the *Durham-McDonald* test may require a more direct focus on the relationship of the disease to the particular offense, whereas the ALI test I think would focus more generally on the defendant's capacity to conform his conduct to the requirements of law generally as opposed to the relationship of the illness to the particular act. And I think there is that shade of difference remaining. I think the reason that—the psychiatrists found the *Durham* test I think an easier test in terms of their discipline to work with. So there is that difference.

The point I just wanted to complete, Senator—

The CHAIRMAN. Pardon my interruption.

Mr. KRASH. I wanted to complete my answer to your question with this: One reason why I think that it would be—that there would be no real practical advantage in shifting to ALI, because as I say I have no great objection to it, or to *Currens*—which I think really is a better test than ALI—is this: I think under any one of those tests the practical results are going to be just about the same. That is, under *Durham*, *Currens*, or ALI you really—I would doubt very much if the results, the ultimate outcome in many cases would be very different. I think they would be pretty much the same.

I may say that the very able U.S. attorney, Mr. Acheson, in an article in the Georgetown Law Journal I think substantially agrees with that position, at least as to two-thirds or three-quarters of the cases.

The CHAIRMAN. Of course I asked him a question yesterday to arrive at the conclusion that the ALI test and the *Durham-McDonald* test are substantially the same—what is the objection of writing it into the statutory law rather than relying on case law? Would you give any opinions on that? He expressed himself on that.

Mr. KRASH. Well, Senator Dominick also asked one of the earlier witnesses I believe—

The CHAIRMAN. He touched on the same point a little earlier.

Mr. KRASH. Yes, he did. Senator Dominick—Senator Bible just asked me if the test, the *Durham* rule and the—as modified or clarified by *McDonald*—is the same test as the American Law Institute test, what objection if any would be to make that a part of the statute? And I believe that really touches a question which you were addressing to Dr. Overholser, and I think probably in the back of your mind was the idea that the criminal law ought to be a matter of statute law and not a process of judicial law. Let me say this as to that:

The reason I think I will be inclined to leave the situation as it is, at least for the time being, is that the law in this area, criminal re-