

time, Senator, that even though I think the *Durham* test as clarified is a good test. It is by no means a perfect test.

And I think probably as we go along we will find we can improve on it. And it is precisely because I think it probably can be improved and because I think that I believe that the processes of change are easier in the courts, which I think work with these problems day-to-day, and perhaps could do the job more easily than the Congress, that I would be inclined to leave it where it is.

I do not think, however, that would be a grave error on the part of the Congress by any means. I do think it would be a mistake to adopt the test contained in the bill specifically because primarily I may say because of the inclusion of the phrase "to know" which comes from the old *M'Naghten* rule.

In other words, the test in the bill, Senator Bible, is really the American Law Institute test modified or commingled with a part of the *M'Naghten* test.

And the *M'Naghten* test is so thoroughly discredited and is so objectionable to so many people that I think it would be a grave mistake to turn the clock back to that.

It is for that reason I would object to that.

Now, if you took out the phrase "to know."

The CHAIRMAN. Is it actually as discredited as you indicate? I mean, isn't it still the rule or the test for insanity in a great majority of our States?

Mr. KRASH. It sure is. But I would just say that Justice Frankfurter, for example, called it a sham. Judge Cardoza said it had nothing to do with psychic reality.

I think every committee which I am familiar with, which in recent years has studied it, the American Law Institute, the Royal Commission of England, has said it is a totally unsatisfactory, unjust, and inadequate test.

Now, that is what I mean. I mean it is discredited by the people, by commentators, by—

The CHAIRMAN. It hasn't been discredited by the State legislature that originally enacted it.

Mr. KRASH. No, it certainly has not.

And I should say it certainly does have its supporters in various jurisdictions.

The CHAIRMAN. What is the U.S. Supreme Court case on the *M'Naghten*?

Mr. KRASH. There is a case called *Leland* against Oregon, Senator, which really does not involve the *M'Naghten* test directly. The question there was whether or not a State which imposed a requirement upon the defendant to prove the defense of insanity—whether such a statute violates the due process clause of the 14th amendment.

The Supreme Court held that it did not.

Oregon at this time has the *M'Naghten* rule.

Now it is interesting to note that the Supreme Court has adopted a different rule for the Federal courts with respect to the burden of proof, namely, the "some evidence" rule.

In all Federal courts that is the rule.