

But all the Court held in Leland against Oregon was that if a State chose to impose a greater burden upon defendants, that that was permissible within the meaning of the due process clause.

The Supreme Court has never, as far as I am aware, had any case in which the argument was made that *M'Naghten* was unconstitutional.

I believe there may be some attempt to do that.

I would think it would be very difficult to do. I don't think it is unconstitutional.

I just think it is a bad, unwise, unjust test.

The CHAIRMAN. Well, in summary you are going to the heart of title II—you would not enact it into statute. You would let it rest upon case law. You think that the *Durham* case as amplified by the *McDonald* case is the best test that has been devised for the giving of instructions to the jury on this difficult area of "not guilty" or "acquittal by reason of insanity" up to the present time.

Mr. KRASH. I think that is correct. You state my views very accurately, Senator.

One thing I would hope would be, and I want to emphasize, I don't regard it as a definitive, ultimate solution. I think it is capable of improvement.

I am not sure that, for example, the *Currens* test isn't in some respect even a better test. But it is a very operable test which has worked quite well.

The CHAIRMAN. The *Currens* test is really very close to the *Durham-McDonald* test, is it not?

Mr. KRASH. Very close.

The CHAIRMAN. There is a little change in phraseology. But it appears to me it is fairly minor.

Mr. KRASH. Very much so. You are absolutely correct, Senator.

At this point, if I may say so, I think we are in an area of what I would call legally esthetic. You are getting down to very precise differences and shades of meaning here which in terms of the rough and tumble of day-to-day trial practice in the trial courts, where this test is administered as a practical matter, I don't think we are talking about really important practical considerations.

I don't mean to suggest these are not important as a theoretical matter, and that the legal scholars and commentators and I included, will write long and dreary law review articles and make long speeches about how important it is to distinguish these.

All I am saying as a practical matter now, wherever, it concerns people who support that test, Judge Biggs' is, the American Law Institute test, *Durham* as modified by *McDonald*—the circle which we are all in is very close. We are all hitting at the same table.

The CHAIRMAN. Thank you very much, Mr. Krash. You have been an excellent witness and extremely knowledgeable in this very difficult field. I appreciate your taking time out from obviously what is a very busy practice to appear before us this morning.

Our next witness will be Dean Pye, associate dean of Georgetown Law School.

We would be very happy to have your testimony now.

I am sorry it has taken us so long to get to you.