

Thus, evidently referring to those who defend the McNaghten rules, he asks a startling and illuminating question: "How valid is the assumption that morality and safety require punishment * * * of mentally ill people?" This is startling because it seems to suggest that defenders of the McNaghten rules wish to have psychotic persons punished. It is illuminating because it indicates a lack of awareness of the fact that the principal problems in this area concerning the meaning of "mentally ill", the "knowledge" by reference to which this is to be determined, and how mental illness can best be decided in a democratic society when the issue is criminal responsibility.² One's concern is heightened by the justice's confidence in "medical assessment" as a condition of release from imprisonment and by his evident opinion that there is an obvious answer to the question whether "mentally ill offenders" should be sent to a hospital or a penal institution.

The McNaghten rules were propounded by English judges in 1843 in *Daniel McNaghten's Case*, 10 Cl. and Fin. 200, 8 Eng. Rep. 718, in response to inquiries from the House of Lords. They hold that "to establish a defense on the ground of insanity, it must be clearly proved that, at the time of the committing of the act, the party accused was laboring under such a defect of reason, from disease of the mind, as not to know the nature and quality of the act he was doing; or, if he did know it, that he did not know he was doing what was wrong." This test has been and is followed (with some glosses) in almost all American jurisdictions, except New Hampshire, Vermont, and perhaps Illinois. In New Hampshire, for instance, in *State v. Pike*, 49 N.H. 399 (1869), the supreme court of that State formulated a test holding that an accused is not criminally responsible "if the [unlawful act] was the offspring or product of mental disease * * *."

DURHAM CASE AROUSES INTEREST IN INSANITY RULES

The present interest in insanity is a defense in trials of criminal responsibility was aroused by the decision of the U.S. Court of Appeals for the District of Columbia Circuit in 1954 in *Durham v. United States*, 214 F. 2d 862, in which the court held that a defendant was not criminally responsible "if his unlawful act was the product of mental disease or mental defect." The Court of Appeals for the Third Circuit has refused, as have many other courts, to follow the *Durham* rule, stating: "We are of the opinion that the following formula most nearly fulfills the objectives just discussed: The jury must be satisfied that at the time of committing the prohibited act the defendant, as a result of mental disease or defect, lacked substantial capacity to conform his conduct to the requirements of the law which he is alleged to have violated."³

Another alternative to the McNaghten rules is proposed in the Model Penal Code of the American Law Institute. This provides:

(1) A person is not responsible for criminal conduct if at the time of such conduct as a result of mental disease or defect he lacks substantial capacity either to appreciate the criminality [wrongfulness] of his conduct or to conform his conduct to the requirements of law.

(2) As used in this article, the terms "mental disease or defect" do not include an abnormality manifested only by repeated criminal or otherwise antisocial conduct.⁴

In his article Justice Brennan goes on to state that "a glance at the transcripts in more than a handful of cases" convinced him that although an accused may be "legally sane," he may "nevertheless [be] seriously disordered." Able psychiatrists, after considerable study of many cases, disagree on this, and experienced forensic psychiatrists have said that the McNaghten rules operate well and justly and are preferable to alternative proposals.⁵

The Justice then asks: "Can a true moral judgment be made about responsibility for any act without delving deeply enough into the actor's background * * * to attempt to explain the whole man?" While no mention is made of anyone who wishes to limit such an inquiry or of inevitable limitations of any legal or psychiatric inquiry, the implication regarding the present law and its administration is plain and disturbing.

² These questions are discussed in Hall, "General Principles of Criminal Law," 449-529 (2d ed. 1960).

³ *United States v. Currens*, 290 F. 2d 751 (1961).

⁴ Sec. 4.01, Model Penal Code (proposed official draft) 66 (1962). See, also, Schwartz, "The Model Penal Code: An Invitation to Law Reform," 49 A.B.A.J. 447, at 449 (May 1963).

⁵ Hall, *op. cit. supra* at 519-520, *passim*.