

zation and punishment, e.g., when is a "hospital" a penitentiary? And again, if we cannot determine whether punishment deters or whether experts can rehabilitate offenders, what is the status of so-called retributive punishment?

10. Finally, efforts might be made to formulate conclusions reached at the end of the inquiry, which, presumably, would correctly and precisely reflect the various positions held at that time. Evidently, also, some of the topics and some of the methods of analysis indicated above would be dealt with or employed at several meetings.

STUDY HAS VALUES EVEN WITHOUT ANSWERS

There is, of course, no certainty that a general agreement will be reached on these difficult questions even after a year's study; it is possible that one's ultimate premises, one's "can't helps," as Holmes put it, will persist to the very end. But this does not imply that painstaking inquiries are illusory or mere "ideologies." The more defensible view is that such study takes one closer to the relevant truths as well as to a fuller appreciation of opposed positions. Certainly the direction and degree of tolerable compromise could be more clearly discerned, and in the practical realm of daily life in a democracy, that may suffice.

For me the existence of a significant degree of human freedom is a "can't help," as it is, no doubt, for Justices Brennan and Douglas and the vast majority of thoughtful Americans. So, too, as regards moral values, e.g., that after thinking about a problem it makes sense to speak of "right" and "wrong" actions. But human freedom and moral values depend upon understanding—they imply the reasoning, generalizing, cognitive functions of the human mind. "Mental illness" in at least some of its meanings deeply affects the validity of these postulates and their implications.

Seen in relation to these basic postulates, the M'Naghten rules are neither a political contrivance nor a mere tradition. They may be faulty in their formulation, in emphasis on one phase of personality, and in connotating the one-sidedness of the supporting psychology of the times. But despite its defects, M'Naghten incorporates the most important function of human personality in terms of criteria with which a civilized body of criminal law must be concerned.

M'NAGHTEN NEEDS REPAIRS, NOT ABANDONMENT

For that reason, what is relevant is not the abandonment of M'Naghten, but only its repair. Just as the Venus de Milo is not neglected because an arm is missing, just as the Winged Victory holds the place of honor in the world's greatest art museum despite its glaring defect, so, too, reform of the present law should preserve what is essential in the M'Naghten rules. This means the avoidance of completely autonomous alternatives such as the Durham rule, the American Law Institute's alternative proposal in terms of lack of "substantial capacity . . . to conform" and other forms of the "irresistible impulse" hypothesis. A test solely in terms of "control of conduct" is ambiguous because it is silent on the crucial question: whether understanding has anything to do with conduct. To preserve the sound core of M'Naghten requires that the rationality of the human mind (understanding, knowledge, appreciation) be included in the proposed test, in which case it may, of course, and probably should be, joined to other major functions of the personality.⁹

There is sufficient acceptance of these basic premises to warrant the expectation that a very substantial agreement can be reached on their application to criminal responsibility, including the problem of mental illness. The hazards are the traditions which envelop and condition our attitudes toward the judiciary and the possibility that powerful judges will be called on to render extremely important decisions before they have studied this difficult subject. American realism, resourcefulness, and candor should be able to meet this challenge.

ACTIVITIES OF SECTIONS

The section of labor relations law conducted spirited meetings at the association's 86th annual meeting, with an extensive 3-day program.

Supreme Court Associate Justice Arthur J. Goldberg, a former member of the council of the section, was a featured speaker. His remarks will appear in a later publication of the section.

⁹ Hall, *op. cit.*, supra, at 521-522.