THE GOWERS REPORT AND CAPITAL PUNISHMENT

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THE EAGERLY awaited *Report* of this Commission, appointed in 1949 to explore all aspects of the challenging problem of capital punishment, has finally appeared.[1] On first inspection it is apparent that this is a worthy addition to the long line of invaluable Royal Commission Reports of the past on a host of problems.[2] The impressive membership of the Commission—including not only leading representatives of the legal and medical professions but also of the career civil service and arts and letters—the ambitious scope of the field studies carried out, and the extensive comparative perspective sought by the Commission have combined to produce a study which, irrespective of one's agreement with the specific conclusions submitted, obviously ranks as a monumental contribution to this area of criminology and legal policy.

The Commission's mandate was

> to consider and report whether liability under the criminal law in Great Britain to suffer capital punishment for murder should be limited or modified, and if so, to what extent and by what means, for how long and under what conditions persons who would otherwise have been liable to suffer capital punishment should be detained, and what changes in the existing law and the prison system would be required; and to inquire into and take account of the position in those countries whose experience and practice may throw light on these questions.[3]

The procedure adopted is described in the Introduction. In the course of its labors the Commission held sixty-three meetings, of which thirty-one were devoted to hearing oral evidence. Many written statements were also solicited and received. Members visited various prisons to study the conditions under which prisoners serving long sentences are detained, and the arrangements for the detention of prisoners under sentence of death and for carrying out executions. In view of the express direction in its Terms of Reference to inquire into practice and experience outside as well as within Great Britain, the Commission visited and conducted firsthand inquires in Norway, Sweden, Denmark, Holland, Belgium and the United States. Questionnaires were also used to supplement the data obtained from witnesses and institutions

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1 Report of the Royal Commission on Capital Punishment 1949-1953. Sir Ernest Arthur Gowers, Chairman. London: Her Majesty's Stationery Office (Cmd. No. 8932). 1953. Pp. x, 506. 12s 6d.

2 The richness of these sources is well illustrated by the use made of them in Radzinowics, A History of English Criminal Law (1948). Dr. Radzinowics also served as a member of the present Commission.

3 Cmd. No. 8932 at iii (1953).

in these countries and to obtain further data from other ports of the Commonwealth and from France, Italy and Switzerland.

Somewhat over half the volume consists in the *Report* proper. The value of the volume as a source for further reflection and research is suggested, however, by the scope of its appendices. These consist of over 200 pages, and include (1) lists of witnesses and correspondents, (2) institutions visited, (3) thirteen statistical tables presenting the relevant data from Great Britain and a graph showing the murder rate for 1940-1951, (4) fifty cases of murder in England and Scotland, 1931-1951, (5) statistics relating to the exercise of the prerogative of mercy in England and Wales, (6) empirical data bearing on the deterrent value of capital punishment, (7) the law of murder, (8) the law relating to insanity and mental abnormality, (9) law and practice in Commonwealth and foreign countries relating to the same, (10) redefinition of murder, (11) law of murder in Commonwealth and foreign countries, (12) degrees of murder—the history and current trends in the law, (13) law of extenuating circumstances in Belgium and the Union of South Africa, (14) the regime of solitary confinement at Louvain Prison, (15) conduct of murderers after release from prison in England and Wales, Scotland, Commonwealth countries, Europe and the United States, and (16) life sentences in foreign and Commonwealth countries.

The *Report* proper is divided into three major parts. The first deals with the main question whether, and if so how, the liability to suffer capital punishment should be limited or modified; the second with the question for how long and under what conditions persons who would otherwise have been liable to capital punishment should be detained; and the third with methods of execution and such subsidiary matters as the forms of publicity which are given or should be given to executions. In general, the *Report* may be described as a thoroughgoing, well-documented and annotated analysis and review of law and practice in the areas indicated, and of conflicting current proposals and attitudes. The authors chose to weave into the text a great deal of their detailed data and extensive quotes or other indications of the views and attitudes of key persons interviewed—a choice on which they are to be congratulated, for while it undoubtedly greatly enhanced their labors, the value of the *Report* as well as its readability are more than commensurately enhanced.

Perhaps the foregoing will sufficiently indicate the enterprise involved and, in a general way, how the Commission went about it. Considering that the Terms of Reference wrap up in a deceptively neat single package practically all of the most baffling and perennially unresolved questions which plague criminologists as well as policy

decision-makers throughout the field of criminal law and its administration, one's major curiosity is naturally as to where the Commission ended up. Their conclusions and recommendations are summarized in Chapter 14, with certain individual reservations and dissents. Before passing to these, however, one important restriction on the Commission's mandate should be kept in mind. Speaking of the Terms of Reference, the Commission says:

> The natural construction of these words precludes us from considering whether the abolition of capital punishment would be desirable; and the Prime Minister (Mr. Attlee) stated . . . [Official Report (House of Commons), Vol. 460, Col. 330, 20th January, 1949] that they were intended to have this effect. But we have not thought it necessary on this account to exclude all evidence tending to establish or to refute the proposition that capital punishment should be abolished; evidence relevant to this issue may often also be relevant to the question whether the existing scope of capital punishment should be restricted. . . .[4]

It is regrettable that the Commission's scope in the matter of recommendation was in any way restricted, whether by reason of the postwar upturn in crimes accompanied by violence and the use of weapons (as this reviewer would infer) or otherwise. Whether the restriction affected the specific recommendations is a matter of speculation; it does not appear to have limited the study or to diminish the value of the *Report* as a source document and basis for discussion of the abolition issue among others.

What, then, are the conclusions and recommendations? Together with the reservation and dissents these are concisely stated in fourteen pages.[5] So quickly to focus on these, passing over the admirably searching and many-sided survey of history, law, practices and attitudes which precedes them, would be an inexcusable lifting out of context were it not for the necessarily limited confines of a review and the assumption that all interested persons will in any event contrive to read the *Report* for themselves. Obviously, it is worth it; and the philosophical, ethical and psychological significances of the supreme punishment as an element of human culture are so basic and emotionally deep-rooted that most persons may be counted on to keep the problem out of their minds if not their motivation and collective behavior, or searchingly to face it, as the case may be. In most respects, the *Report* is unanimous. To mention the highlights: The first group of conclusions and recommendations are addressed to the question whether liability to capital punishment should be limited or modified; the second group are addressed to the question of alternatives to

[4] Id. at 3-4.
[5] Id. at 274-87.

capital punishment; and the third group are addressed to questions concerning the methods and conditions of execution. The reservations by Mr. N. R. Fox-Andrews, Q.C.,[6] like the dissents by Dame Florence Hancock, Mr. Macdonald and Dr. Radzinowics,[7] are limited to the question of retention, abrogation or revision of the M'Naghten Rules governing criminal responsibility.

The conclusions are so numerous that it will be possible to mention only high points. Those in the first group include: (1) Criticism of the prevailing law of murder in that it provides a single punishment for a crime widely varying in culpability; (2) Dissatisfaction with main reliance on the prerogative of mercy as a method of mitigating the above rigidity; (3) Doubt on the evidence that the death penalty can be justified on grounds of deterrence; (4) Disapproval of the doctrine of "constructive malice"; (5) Disapproval of the existing distinction between provocation by words and other forms of provocation; (6) Amendment of the law to provide that one who aids, abets or instigates the suicide of another (as distinguished from the survivor of a suicide pact who killed the other) shall be guilty, not of murder, but of that offence and punishable with life imprisonment; (7) Doubt that a satisfactory definition of "mercy killings" appropriate to distinguish them from murder can be devised; (8) Rejection of any proposal to abolish the death penalty in respect of women so long as it remains applicable to men; (9) A majority recommendation that the age limit for persons subject to the death penalty be raised from eighteen to twenty-one; (10) Any test of criminal responsibility should involve a strong presumption that where a grave crime is committed by a person otherwise certifiable as insane or afflicted with one of the grosser forms of mental deficiency or certain epileptic conditions, such crime is wholly or largely caused by the pathological condition; (11) The M'Naghten Rules are so defective as to require revision (one dissent); (12) A majority would favor extending the M'Naghten Rules to exempt not only persons presently exempted but also any person committing a criminal act who is "incapable of preventing himself from committing it";[8] (13) A smaller majority would prefer to abrogate the M'Naghten Rules and "leave the jury to determine whether at the time of the act the accused was suffering from disease of the mind or mental deficiency to such a degree that he ought not to be held responsible";[9] (14) The tests of insanity on arraignment and of insanity as a defense should make no distinction in law between mental deficiency and in-

[6] Id. at 284.
[7] Id. at 285-87.
[8] Id. at 276.
[9] Ibid.

sanity; (15) The Scottish doctrine of "diminished responsibility," while thought to work well in that country, is not recommended for England; (16) The mental state of every prisoner charged with murder should be examined by two doctors, of whom one at least should be a qualified psychiatrist unassociated with the prison medical service; (17) The appointment of medical witnesses by the court rather than by the prosecution or defense is not recommended; (18) Proposals that trial of the issue of insanity at the time of commission of a criminal act be separated from trial of the issue of commission of the act are rejected; (19) The judge should be empowered to raise the issue of insanity, to call relevant evidence and to put the issue to the jury, where he has reason to believe that the interests of justice may so require; (20) The verdict of "guilty but insane" should be abolished in favor of "acquittal on the ground of insanity"; (21) The best way to cure the existing rigidity of the murder law is not to redefine the crime, to divide it into degrees, or to empower the judge to substitute a lesser sentence than death after conviction, but rather to empower the jury rather than the executive to decide in each case whether life imprisonment should be substituted for death; and (22) Failing a system of such jury discretion, the stage has now been reached where the issue is whether capital punishment should be retained or abolished.

Conclusions in the second group include the following: (1) It is believed that adoption of the foregoing recommendations, while reducing the number of cases in which a person sentenced to death is subsequently reprieved, would also reduce the total number of cases in which a death sentence is actually carried out—and hence in an increase in the number of persons (particularly those who are mentally abnormal though not insane) serving life sentences; (2) Those who are not abnormal could suitably be detained in the conditions presently in force in the long-term prisons in England and Scotland; (3) As to prison conditions, the possibility of increasing the opportunity of useful and stimulating work by prisoners, some increase in rates of prisoners' pay for the same, and furtherance of the scheme of "home leave" instituted by the Prison Commission and the Scottish Home Department, should be seriously considered; (4) "The principles followed by Secretaries of State in determining the actual length of detention in each case are in general appropriate for the purposes of punishment, deterrence and the protection of the public, without undue risk of causing moral or physical deterioration in the prisoner; if, in exceptional cases, an exceptionally long period of detention is called for, the additional risk of such consequences ought not to be held to rule it out";[10] and (5) An institution should be established for the detention and treat-

[10] Id. at 279.

ment of psychopaths and other prisoners who are mentally abnormal, though not insane, and for research into the problems of psychopathic personality.

Conclusions in the third group include: (1) "Neither electrocution nor the gas chamber has, on balance, any advantage over hanging as now carried out in this country";[11] (2) Other possible methods are considered and rejected, but the practicability of lethal injection should be periodically re-examined in the light of progress in the use of anesthetics; and (3) Press notices (rather than those posted on the prison gate) should constitute the only publicity in connection with an execution.

Such are the major points which emerge in the Commission's recommendations and on which the eleven members (with the exceptions noted) were able to agree. Since the chief area of disagreement, as already noted, appears to have centered around the M'Naghten Rules and the problem of an appropriate juridical formulation in respect of individual responsibility, the reservations of Mr. N. R. Fox-Andrews, Q.C., and the dissents of the other three mentioned, are of particular interest—as, of course, is the involved problem itself. The distinguished barrister summarizes his reservations as follows:

(a) The M'Naghten Rules should remain without modification.
(b) I would accept a satisfactory alternative, but I do not believe it can be devised.
(c) If any alteration is made, the Rules should be abrogated and the question whether or not the accused was so insane as to be criminally irresponsible be left to the jury to decide on the whole of the evidence.[12]

The remaining three members who dissented from the conclusions of the majority in respect of the M'Naghten Rules feel that the Rules have been shown to be unsatisfactory, but that no case has been made for abrogating the Rules in favor of having "no formula at all."[13] They recognize the difficulty of framing any general formula which could be more than a somewhat closer approximation of the policy desired; but they point out that just as the early crude and narrow rule of the common law was gradually enlarged by judicial interpretation, so the M'Naghten Rules in their turn, largely by reason of the continuing development of medical science, were widened by interpretation. The major premise of the three appears to be that it is the inescapable "duty of our criminal law to lay down by definition—as clearly as pos-

[11] Id. at 280.

[12] Id. at 284.

[13] Id. at 285. For an interesting summary of the evidence of the opinions received on this point from legal and medical witnesses heard in a number of countries, see the same page.

sible—the essential elements of liability to conviction and punishment."[14]

Here my summary of the *Report* ends. I have used most of my space for that purpose, partly because reports of this size and solidity rarely achieve the reading currency which they deserve, but chiefly because the numerous points on which the members of the Commission were able to agree sharpen up the few issues on which they diverged. These latter differences, emerging in such a group after such a common experience, suggest the problems now deserving of the highest research priority in the field.

The prime problem, I suppose, is that of conceiving and framing an appropriate operational statement concerning responsibility. Or could we do without one? This seems doubtful if one concedes that it is the function of law to further and protect the preferred values and institutions of the community. Responsibility on the part of individuals being among those preferences, it is difficult to conceive a code which would not postulate its possibility and, indeed, no such code in the contemporary world comes to mind. From this point of view the reluctance of the three dissenters to throw the question to the jury without some instruction expressing the considered policy of the community in respect of deviates whose motivation and behavior, while not psychotic, are characterized by rigidity rather than flexibility, by anxiety-generated compulsiveness rather than insight, or by nonassimilation into the culture of the community due to inadequate learning opportunities or sheer immaturity, is understandable. The position that the M'Naghten Rules, sensibly construed, might prove adequate for this purpose is also not without its appeal. That they frequently have not been so construed is a proposition on which many of us could probably agree. Consider, for example, the notion entertained by some of our judges that if an accused can give "right answers" to an abstract moral catechism or his criminal behavior shows some evidence of cunning he must be responsible even though any qualified psychiatrist would pronounce him psychotic in the context of a civil commitment proceeding.

But whether the M'Naghten Rules are abrogated, reconstrued or replaced, the policy choices which continue to divide those who seek a formula will still face us. Is it possible that a part of the difficulty at least may stem from the rather negative conception of responsibility associated with law of a retributive cast? So long as responsibility in the criminal law remains synonymous with blameworthiness we are in the somewhat paradoxical position of penalizing a supposedly desirable condition of personality. Once retribution (as distinguished from

[14] Id. at 286.

discipline or deterrence, education, therapy and prevention) is rejected and with it the traditional sharp line between criminal and other forms of regulative law, however, much of the difficulty disappears. One can then think of a classification of deviates according to their probable responsiveness or nonresponsiveness to the various dispositional measures at the community's command. A positive conception of responsibility as a combination of health and maturity such that the individual is ready to profit from education and experience, including disciplinary measures where indicated, then suggests itself. Exemption from major therapy or purely preventive custody would be a reward of responsibility.

To conclude without touching on the over-all issue of the justification, if any, for further retention of capital punishment for any type case, should of course be unthinkable. Suffice it to say that the Commission's findings and empirical evidence in this regard, despite the restriction imposed by their Terms of Reference, obviously make a sufficient case for abolition to shift the burden of proof to the proponents of retention. The Commission's conception of an alternative measure does, however, raise some interesting questions centering around the more difficult problem of dealing with the living. Should the "psychopaths" (or "sociopaths," depending on the approved terminology of the moment) be segregated in a special custodial institution, as the Commission suggests, or not? From the point of view of a superintendent of any given institution, no doubt it would be convenient to have them elsewhere. They make trouble, and unlike the disturbed psychotic they are capable of organizing and leading trouble. Presently, from the point of view of most therapists, they are not "treatable"—which is to say that they do not readily relate to a therapist. But what would a custodial institution specially designed for and exclusively populated by prisoners of this description be like? Might it be better to distribute them throughout the custodial population? An early consensus on this question in advance of further capital investments in correctional building programs, since those inevitably freeze policy, is to be desired.