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REPORT OF THE ROYAL COMMISSION ON
CAPITAL PUNISHMENT (1949-1953): A REVIEW.

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The article on the following pages is based upon the Report of the British Royal Commission on Capital Punishment by Command of Her Majesty, September, 1953. (H. M.'s Stationery Office, Comd. Number 8932.) It is referred to in this article as the "Report."—EDITOR.

*To retain the death penalty is not the same
as multiplying it.*

CESARE LOMBROSO.¹

Retention of capital punishment posited in the Royal Warrant² circumscribed the Commissioners' inquiry. This ambient³ directive submitted for their consideration the core problem⁴ whether liability to suffer that forfeit should be limited or modified. Several derivative⁵ and homocentric questions were similarly sent the Commission. To these matters the Prime Minister⁶ added his request that the Commission consider whether any change should be made in method of execution. The threshold stricture permeated their investigation and generated a concept of purpose, epitomized in the Commissioners' recitation: Our duty then, as we understand it, has been to look for means of confining the scope of punishment as narrowly as is possible without impairing the efficacy attributed to it.

1. CRIME, ITS CAUSES AND REMEDIES, §238, p. 427 (Horton Transl., 1918).

2. Dated May 4, 1949.

The thirteen Commissioners, named in this Warrant, initiated their activities with a preliminary conference on May 27, 1949. Some sixty-three meetings were held.

Several administrative matters, embodied in the Warrant, are worthy of mention. Broad investigative powers were conferred upon any four or more Commissioners. Their investigative power was amply implemented by express authorization to call witnesses; to call for information in writing; to examine documentary materials and by powers of visitation.

See: H. Finer, *The British System* (Congressional Investigations: A Symposium), 18 U. OF CHI. L. REV. 521, 554 (1951) for an enlightening description of the role played by Royal Commissions in England.

3. Prime Minister Attlee, speaking in the House of Commons on January 20, 1949, dispelled any doubts concerning interpretation. Abolition of capital punishment was clearly outside the scope of this inquiry. Report, p. 3.

4. The total proposition was described in the Warrant as follows: "... We have deemed it expedient that a Commission should forthwith issue 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. . . ." Report, iii.

5. Report, p. 4.

6. Ibid.

That premise launches the trichotomic underpinnings on which the framework of the entire Report has been erected, and the conclusions and recommendations of this Commission are sorted into these compartments, viz.:⁷ (I) Limitation or modification of the liability to suffer capital punishment;⁸ (II) Alternatives to capital punishment and (III) Methods of execution.

Acting well within the ambit of the Royal mandate, the Commissioners reported several findings in narrative form, which were recast, distilled and itemized into some eighty-nine separate statements of conclusions⁹ and recommendations.

Those pertaining to modification or limitation of liability to suffer the death penalty must be examined in the environment of the Commission's statement¹⁰ prefacing all matters pertaining to part I i.e. "... Our inquiry has thus been restricted in effect to trying to find some practical half-way house between the present scope of the death penalty and its abolition. As we proceeded with this task, we have been compelled to recognize that the range of our quest is very narrow. . . . It is clear that a state has been reached where there is little room for further limitation short of abolition."

While there are patent correspondencies between several of the enumerated conclusions contained in the itemization, and others which represent collateral considerations, the following are the ultimate recommendations,¹¹ on the key issue:

7. These are the verbatim topics and captions corresponding to the three major divisions of the Report: Part I. contains ten chapters and encompasses the scope of the death penalty, function of this type of punishment, constructive malice, provocation, categories of murder and offenders, insanity and mental abnormality, criminal responsibility, diminished responsibility, questions of practice and procedure concerning insanity and mental abnormality, redefinition of murder, proposals concerning judicial discretion and proposals affecting the Royal Prerogative of Mercy (Report, pp. 5 ff.); Part II. is devoted to detention, treatment and after care (Report, pp. 215 ff.); Part III. presents a study of various problems arising in connection with executions (Report, pp. 240 ff.).

For an historical account of the Royal Prerogative of Mercy, see L. RADZINOWICZ, *A HISTORY OF ENGLISH CRIMINAL LAW (The Movement for Reform, 1750-1833)*, (London, Mac-Millan, 1948).

8. Previous proposals for limiting or modifying the liability under consideration in the instant Report are developed in Part I, pp. 1 ff., and 2 R. C. Evid., pp. 7 ff. This is the historical portion of the Home Office's memorandum, submitted to the present Commission. It is interesting to note that a prior Commission, in 1866, recommended that there be two degrees of murder and that problems, comparable to those involved here, were considered at this early date. Upon conviction for murder the death penalty is still mandatory in England.

9. These final conclusions are reduced to short statements in the "Summary of Conclusions" and recommendations (Report, pp. 274 ff.), to facilitate, inter alia, reference to the supporting paragraphs in the body of the Report. Numbering all paragraphs of the Report makes its use much more effective and convenient.

10. "The useless profusion of punishments, which has never made men better, induces me to inquire, whether the punishment of *death* be really just or useful in a well governed state? What *right*, I ask, have men to cut the throats of their fellow creatures?" Beccaria, *An Essay on Crimes and Punishment*, p. 102 (Transl. from the Italian, 1769).

11. From Chap. 10 of the Report, pp. 212 ff., particularly paragraph 609 thereof.

1. The doctrine of constructive malice should be abolished;
2. 'Aiding or abetting suicide' should no longer be treated as murder, but should be made a substantive offence punishable with imprisonment for life or for any lesser term;
3. The law should be amended to enable a jury to return a verdict of manslaughter where they are satisfied that the accused was deprived of his self-control by provocation and that a reasonable man might have been so deprived, notwithstanding that the provocation was by words alone;
4. (By a majority)—the M'Naghten Rules should be abrogated, or (with one dissentient) that, if they are retained, they should be enlarged to cover cases where the accused, as a result of insanity or mental deficiency, did not know the nature and quality of the act, or did not know that it was wrong, or was unable to prevent himself from committing it; and
5. (By a majority)—the law should be amended to provide that the sentence of death should not be passed on any person convicted of murder who was under 21 years of age at the time of the commission of the offence.

In addition to the majority opinion, one Commissioner¹² filed a note of reservation concerning finding four, *supra*, expressing adherence to the conclusion previously reached by Lord Blackburn¹³ in 1874.

Three¹⁴ dissenting Commissioners expressed an inability to agree with the majority that a case had been made for abolishing the M'Naghten Rules or for abandoning a formula descriptive of the relationship between insanity, mental abnormality and criminal responsibility. They attested to the inadequacy of the Rules while firmly resisting their abolition and rejecting tendencies congenial to letting such formulary slip into abdication. To these dissenters it appeared that the prevailing recommendation contemplated responsibility as an ethical question,¹⁵ and as one which invites only a subjective response. They further interpreted the majority's proposal as inviting abandonment of a formula, in order to free juries in their deliberations, on the issue of responsibility.

Stemming from past experiences, concrete proposals¹⁶ to divide murder into two degrees; to enact a new statutory definition of murder of narrower scope than was extant at common law; and for conferring power upon the trial judge to decide between death and lesser sentences

12. MR. N. R. FOX, Andrews, Q. C., Report, p. 284.

13. This was Lord Blackburn's statement made before the Select Committee on the Homicide Law Amendment Bill, 1874. The gist of his position is recorded in paragraph 323 of the current Report at page 113.

14. DAME FLORENCE HANCOCK, MR. H. MACDONALD, and MR. LEON RADZINOWICZ. Report, pp. 285-287. Their attack that the majority's conclusion is unsupported by the evidence should have a familiar ring to American readers of opinions written by our tribunals reviewing administrative decisions.

15. The basis for this contention is manifested by the material reviewed under "Insanity and Mental Abnormality," *infra*.

16. These are quoted from p. 214 of the Report. Cross references to supporting paragraphs in the body of the Report are correlated with the itemized statements of these principal proposals so rejected. *Ibid*, p. 278.

where convictions of murder have been returned, were each expressly rejected¹⁷ by the full Commission.

Certainly their commentary,¹⁸ made when striking down the fourth proposal to give juries discretionary mitigating powers through sentencing, manifests the over-view held by all Commissioners on the prime question before them:

. . . We have reached the conclusion that, if capital punishment is to be retained, and at the same time the defects of the existing law are to be eliminated, this is the only practicable way of achieving that object. We recognize that it involves a fundamental change in the traditional functions of the jury in Great Britain and is not without practical difficulties. For these reasons its disadvantages may be thought to outweigh its merits. If this view were to prevail, the conclusion to our mind would be inescapable that in this country a stage has been reached where little more can be done effectively to limit the liability to suffer the death penalty, and that *the real issue is now whether capital punishment should be retained or abolished*. (Italics supplied).

Reaching that portion of their Report devoted to the alternative to capital punishment, it appears that the Commissioners have presented a profile of policy rather than firm conclusions when they suggest:¹⁹

1. A re-examination of the prison work problem.
2. It seems possible that prisoner's pay increases might be justified.
3. Humanization of prisons.
4. The scheme of anti-discharge furloughs is welcomed by the Commission.
5. "The principles followed by Secretaries of State in determining the actual length of detention in each case 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."
6. "Strong support is given to the proposal already made by others that an institution should be established in England for the detention and treatment of psychopaths and other prisoners who are mentally abnormal, though not insane, and for research into the problems of psychopathic personality. Similar provision should be made for the same class of prisoners in Scotland."
7. "We do not think it necessary, except in special cases, to impose on prisoners serving a life sentence for murder an obligation to keep in touch with the after-care authorities after their release."

Their views on methods of execution are crystallized by the Commissioners in the third part of the Report. Since most of these pertain to situations peculiar to local operations they are of little moment to the general reader save to note it was agreed that "Neither electrocu-

17. Report, par. 610, pp. 213 ff.

18. Report, par. 611, p. 214. Possibly a note of frustration is implicit in this paragraph, but a reader of the cold record hesitates to attribute it solely to the Warrant's exclusionary fetters or to mere dogmatic assertion.

19. Report, Part II, pp. 279-280.

tion nor the gas-chamber has, on balance, any advantage over hanging
 . . .²⁰

Necessarily, the myriad conclusions and recommendations have been painted with broad brush strokes in the foregoing narration. But such treatment is not intended to portray any particular reaction to their validity or individual value. To appraise them in detail requires application of a sifting and testing process penetrating not only all of the underlying welter of evidence, parol and documentary, but which would go beyond it and extend into an analysis of the techniques employed in gathering it.

Two groups of supporting materials²¹ were published in conjunction with the basic Report; Memoranda and Replies to a questionnaire received from Foreign and Commonwealth Countries²² consisting of: (I) Commonwealth Countries (1951); (II) United States of America (1952); (III) Europe (1953); and a collection of thirty-one separate pamphlets containing minutes of evidence taken on various days before the Commission.

Questionnaires were used by the Commission to elicit information on the law of, and punishment for, murder conditions of detention, insanity, criminal responsibility and the results of abolishing or retaining capital punishment. In addition, information concerning methods of execution was specially sought, and received from, Illinois, Louisiana, Ohio, Pennsylvania, Texas, Virginia, Colorado, Nevada, North Carolina, Oregon, Iowa, Maryland, Washington as well as to those Governments which responded to the full scale interrogatories.

Perhaps this phase of Commission activity was more closely analagous to a survey, in that information was channeled to the Commission by replies to its questionnaires; through memoranda²³ especially prepared at its request; by statistical reports²⁴ and parol evidence given by wit-

20. Part III., Methods of Execution *et seq.*, pars. 58 to 89, Report, pp. 280-282.

21. These documents are hereinafter cited as follows: "Q", stands for the three pamphlets entitled Royal Commission on Capital Punishment—Memoranda and Replies to a Questionnaire; "R. C. Evid." refers to the Minutes of Evidence taken before this Commission. Volumes of Minutes are identified by numerals ranging from 1 to 31. However, several bear two consecutive numbers.

22. Replies to the Questionnaire were received from: Australia (New South Wales, Queensland, South Australia, Tasmania, Victoria, Western Australia), Canada, Ceylon, India, New Zealand, Pakistan, Southern Rhodesia, Union of South Africa, (Q-I); United States Government, California, Connecticut, Massachusetts, Michigan, Missouri, New Hampshire, New York, Wisconsin, (Q-II); Belgium, Denmark, France, Italy, Netherlands, Norway, Sweden, Switzerland, (Q-III).

23. Such memoranda are reprinted in Q-I, Q-II, Q-III, and in other instances they are presented with the testimony of the author-witness. Most of these documents contain valuable information and would require a separate review to accord appropriate recognition to authors who gave so freely of their experiences and technical knowledge.

24. For some theories concerning the use of statistics in this area, see, e.g., ENRICO FERRI, CRIMINAL SOCIOLOGY, Chap. 1, part 2, §109, *et seq.*, and pp. 168 ff. (Kelly transl., 1917);

nesses²⁵ coming before the Commissioners. Consequently full dress evaluation of the Report would necessarily embrace a statistical approach in order to ascertain, *inter alia*, if the design of the questionnaire was adequate and, as another example, whether the replies contained sufficient ancillary material²⁶ to aid in their translation.

Some adumbration of these replies is discernible in the major divisions of the Report, but it would be necessary to trace each summarization back to the particular source paper in order to ascertain the weight attached by the Commission. However, an over-view of this aspect of the evidence indicates that, at least, this Commission was exposed to the prevailing trend on the various topics discussed by the Governments submitting answers.²⁷ From the geographical strands in the net cast by the Commission it appears they assiduously attempted to broaden their investigative horizons. Visiting Norway, Sweden, Denmark, Holland and Belgium, they heard evidence from about thirty-eight witnesses and inspected various institutions.²⁸ Sittings in Washington, Cambridge (Massachusetts), New Haven (Connecticut), New York and Philadelphia brought contributions from some forty-one additional witnesses.²⁹ The bulk of oral evidence was taken in Great Britain where the witness roster included the Director of Public Prosecutions, the Crown Agent, Lord Chief Justice of England, Lord Chief Justice General of Scotland, representatives from the Home Office, Prison Commission and English and Scottish Judges, Police and prison officials, Members of Medical Association, Members of the Clergy, and witnesses from various organizations. Oral examinations were greatly facilitated by having witnesses submit memoranda³⁰ in advance of

GABRIEL TARDE, *PENAL PHILOSOPHY*, §97, at p. 544 (Howell transl., 1912); C. BERNALDO DE QUIROS, *MODERN THEORIES OF CRIMINALITY*, §4(3), at p. 9 (De Salvo transl., 1911).

25. It is not amiss to note that the Report singles out for prideful mention Mr. Justice Frankfurter, Professor Thorsten Sellin, Sir John Beaumont, Dr. Lansdown and Professor Sam. B. Warner, all of whom made valuable contributions to the intellectual arsenal of the Commission.

26. An isolated example will reflect this situation, e.g., "Question 24: (a) By what method is the sentence of death carried out? (b) Is this method regarded as satisfactory? (c) What criticisms have been made of it?" Reply (Q-II, p. 752) from Connecticut: "(a) Electrocution. (b) Yes. (c) That it destroys life." Non-response from Massachusetts on parts (b) and (c). New Hampshire—no information available to reply to (b) and (c). New York—the Attorney General's reply: "This office cannot comment on these questions."

27. An alphabetical list of witnesses who gave testimony in Europe appears at page 293 ff. of the Report.

28. Report, Appendix 2, p. 297, is a complete itemization of persons and institutions visited by the Commissioners.

29. The alphabetical list of witnesses, Report, p. 295, contains names of many prominent American authorities in law and medicine.

30. Various individuals contributed valuable memoranda, which have been reprinted by the Commission. Among those authoring such papers were: Professors Jean Constant and Paul Cornil of Belgium; Professor Stephan Hurwitz of Denmark; M. Marc Ancel, M. Ch. Germain, Professors P. Bouzat and Donnedieu de Vabres of France; Professor J. E. van

their personal appearances. Moreover, such procedure brought a rich mine of documentary information into the Commission's files and which, in contrast to most of the testimony, provides better source material. Obviously, the temptation to embark on tangential excursions during examination of some witnesses could not be entirely resisted.

All the Commission's evidence cannot be subjected to comment within the limited confines of this paper, and it is only with the most serious deference to the various witnesses, that several are, here, singled out. Certainly the testimony and memorandum of the Home Office, containing a detailed study of previous proposals similar to those facing the instant Commission is worthy of mention and detailed study. No doubt the Report writers tapped this source with a free hand. Mr. Justice Frankfurter was called and examined by the Commission in July, 1950 and one of the salient aspects of his testimony lies in this question³¹ and answer:

Would you be in favour of reducing the scope of capital punishment—I myself would abolish it.

CONSTRUCTIVE MALICE

Confronted with various suggestions extracted from its collected data pertaining to limitations or modification of the liability to suffer the death penalty, this Commission set up a rigid dichotomy between altering the law defining that liability and investing judge or jury with broader palliating powers. Thus, they say by abolishing the "doctrine of constructive malice" and expanding the concept of provocation to implement mitigation, the sweep of murder, without redefinition, could be delimited.

Having traced,³² at this juncture, the origination and development of constructive malice, the Commissioners proceed to cut ground from under this doctrine by an examination of judicial rubrics inserted and published in familiar decisions. Here it is enough to note that the semantic problem implicit in the traditional phrase "malice aforethought"³³ has been squarely faced and recognized as "an arbitrary

Bemmelen and W. P. J. Pompe of the Netherlands; Professor Johannes Andennaes of Norway; Professor Ivar Strahl of Sweden; and Professor Jean Graven of Switzerland; Professor LOUIS B. SCHWARTZ, *PUNISHMENT OF MURDER IN PENNSYLVANIA*, (Q-II, p. 776); DR. WINFRED OVERHOLSER, *PSYCHIATRY AND THE LAW OF MURDER IN THE UNITED STATES* (Q-II, p. 779); Professor HERBERT WECHSLER, *DEGREES OF MURDER AND RELATED ASPECTS OF THE PENAL LAW OF THE UNITED STATES*, (Q-II, p. 783).

31. Par. 7968, 26 R. C. Evid. 580.

32. Report, pp. 25 ff. The Law of Murder with a detailed note on the early development of "malice aforethought" is reproduced in Report, Appendix 7, pp. 381 ff.

33. "Nothing is more frequent in jurisprudence than the confusion of motive with intention; and of this confusion the law of England affords a flagrant instance, when it lays down

symbol." Their approach by-passes the etiological problem underlying "*actus non facit reum nisi sit rea*." No doubt this ancient maxim laid a heavy hand upon opinion writers who struggled to soften dogma into principle for specific factual situations.³⁴ And it is the penumbra of such ideas that are now echoed in this Report. For in striving to demonstrate an awareness that constructive malice should be abolished in England, since the doctrine³⁵ is widely criticised as "illogical, unjust and unnecessary," the Commissioners state "No one would now support the old rule that any killing in the course of any felony is murder." And among authorities relied upon in support of this proposition they cite reports issued by the Commissioners on Criminal Law in 1834-1845.

What chiefly emerges from the discussion on constructive malice is cogently stated in these two sentences:³⁶

We have no doubt that, as a matter of general principal, persons ought not to be punished for consequences of their acts which they do not intend or foresee. The doctrine of constructive malice clearly infringes this principle. . . .

Then, as if anticipating the readers question they have added an expression of confidence that English juries "can be trusted to discharge their responsibilities" while delicately balancing fairness to defendant and protecting society. But this answer dilutes their solution. Because

that murder must be committed of *malice aforethought*. By this is merely meant that it must be committed intentionally." 1 AUSTIN, JURISPRUDENCE, Lecture 12, at page 355 (1869).

Reference to Sir James Stephen's description of malice aforethought on page 27 of this Report brings to mind that this identical passage was reproduced by MR. JUSTICE HOLMES in THE COMMON LAW, and used as a prefatory statement to the discussion on murder. HOLMES, THE COMMON LAW, pp. 51 ff. (Boston, Little Brown & Co., 1949 printing).

For an interesting sidelight, see 1 HOLMES—POLLOCK LETTERS, p. 21 (Howe ed., 1941) where Justice Holmes describes his estimate of STEPHEN'S DIGEST OF CRIMINAL LAW in a letter written March 25, 1883.

A good discussion of malice aforethought is found in PERKINS, *The Law of Homicide*, 36 J. CRIM. LAW AND CRIMINOL. 392, 397 (1946).

See, II AUSTIN, JURISPRUDENCE, 1093, for his discussion on the "inconveniences of 'malice' as a name for criminal design."

34. "... for if the act be unlawful, I mean if it be *malum in se*, the case will amount to felony, either murder or manslaughter, as circumstances may vary the nature of it. If it be done in prosecution of a felonious intention it will be murder, but if the intent went no farther than to commit a base trespass, manslaughter: though, I confess, Lord Coke seemeth to think otherwise." SIR MICHAEL FOSTER, A REPORT OF SOME PROCEEDINGS ON THE COMMISSION FOR THE TRIAL OF THE REBELS IN THE YEAR 1746, Foster, Crown Cases, p. 258 (1792).

35. See, e.g., WECHSLER, THE CHALLENGE OF A MODEL PENAL CODE, 65 HARV. L. REV. 1097, 1111 (May, 1952).

Compare the discussion of "*actus reus*" by J. W. C. TURNER, in THE MENTAL ELEMENT IN CRIMES AT COMMON LAW, RADZINOWICZ AND TURNER, eds., THE MODERN APPROACH TO CRIMINAL LAW, pp. 195 ff. (London, MacMillan, 1948).

"We think there can be no doubt that the severity of the old rules has been mitigated by judicial decisions during the last 100 years and that the law is now no longer as stated by STEPHEN," REPORT, par. 77, p. 29.

As pointed out, by the current Commission, their witnesses were "unanimous that the ancient rule was absurd and objectionable," REPORT, par. 98, p. 37. They report some difference of opinion as to whether it is now so "clearly and entirely dead" and to be beyond need for abolishment by statute.

36. REPORT, par. 107, at p. 40.

as the Commission points out it will be for the jury to decide between murder and manslaughter in those cases lying between "trivial violence" and gross violence or "where it appears that some degree of 'real violence' was employed."

Freeing proposed statutory provisions³⁷ bottomed on constructive malice from a multiplicity of definitions proved to be an insuperable problem³⁸ for the Commissioners. They struck down suggestions aimed at reconstructing this concept, at the statutory level, because such enactments restricting constructive malice to felonies "involving violence" must necessarily contain the definitive characteristics intended to be encompassed by the legislator. And sponsoring enactments grounded in the theory that it is "the violence and not the felony involving violence that should make such offenses murder" generates the problem of excluding "genuinely accidental killings" and this gambit, too, invites checkmate by "definition." Clearly, then, preparation of blueprints for such legislation is hindered by a struggle for communicable formulations.

Though they found the vitality of the felony-murder rule to be undiminished in various American jurisdictions, it was noted that two of our professors criticized the "doctrine" in their evidence. Thus it was pointed out that Professor Wechsler³⁹ would restrict the sweep of the rule to instances where there "was intent to kill or to do serious bodily harm." Whereas Professor Schwartz⁴⁰ suggested confining its applicability "to cases where some dangerous act was done, not necessarily with intent to kill or cause serious bodily harm."

PROVOCATION

Viewing provocation as an extenuating circumstance, coupled with a recognition of the frailties of human nature, produced, on the evidence, traced in this record, the ultimate conclusion of the Commissioners that:

Where the jury are satisfied that the accused killed the deceased upon provocation, that he was deprived of his self control as a result of that provocation and that a reasonable man might have been so deprived, the nature (as distinct from the degree) of the provocation should be immaterial and it should be open to them to return a verdict of manslaughter.⁴¹

37. REPORT, par. 92, p. 34, it is noted that the law of Scotland does not recognize any doctrine of constructive malice.

38. REPORT, par. 111, p. 41.

39. REPORT, par. 115, p. 42.

40. REPORT, par. 115, p. 42. Memoranda submitted by Professors WECHSLER and SCHWARTZ were reprinted at Q-II, p. 779 and p. 783, where their views are expanded on these and other aspects of the total investigation.

41. REPORT, par. 151, p. 56.

INSANITY AND MENTAL ABNORMALITY

An evaluation of the sweep of irresponsibility⁴² in law as a bar to conviction and punishment necessitated examination of considerable evidence concerning insanity and mental deficiency. And a review of diminished responsibility was a natural by-product of this basic probing. Defective communications, springing primarily from loose usage of terms and imprecision of definitions in these areas, is all too frequent between speakers, writers and readers. Diagnostic groupings from the field of medicine are not easily transferrable to the field of law. By delineating a practical guide or glossary of terms⁴³ employed in pre-

42. A trenchant discussion of the historical background of insanity in the field of law is presented in E. FERRI, *CRIMINAL SOCIOLOGY*, pp. 356 ff., (The Modern Criminal Science Series, Kelly transl., 1917).

43. An interesting contrast to Commission descriptions are found in several replies to the following question; answers to which are hereinafter reprinted in the margin: (a) What kind or degree of insanity or mental abnormality relieves an offender of responsibility for his actions under the criminal law? (c) How is insanity defined for the purpose of the general law relating to the medical treatment of persons of unsound mind? (c) Is every person who is insane within the meaning of the definition referred to in (b), regarded as irresponsible under the criminal law?" (Q.III, p. 794).

Sweden's reply to the questionnaire (Q.-III, p. 845) particularly notes with respect to their Act: "By insanity is meant a profound pathological change in the mental faculties. There is, however, no intention of giving to the term any meaning other than the generally accepted meaning according to the usage and language of medical science."

"There are no provisions in Italian legislation for the definition of insanity in the medico-legal sense," Q.-III, pp. 822.

Netherlands has no definition, but adds that "no punishment may be imposed on a person who commits an act for which he cannot be held responsible because of backward development or morbid disturbance of his mental faculties." Q.-III, pp. 828.

Norway replied as follows: "... The question what forms of mental disorder are included under the term 'insanity' will depend on the views of psychiatric experts on each occasion. The legal term 'insane' includes, in addition to mental disorders proper, gross defects of intelligence (pronounced mental deficiency)... Neither in dealing with exemption from punishment nor with compulsory detention in a mental hospital does the law give any other definition of insanity, but the term is taken to have the same meaning in both cases. . . ."

Belgium's reply: "... Insanity is not defined in any law dealing with the treatment of the insane. . . ." Q.-III, p. 798.

Denmark: no definition.

France—"The only provision concerning insanity in the Penal Code in article 64, which provides: "There is no crime or offence when the accused was in a state of madness (démence) at the time of the act. The state of madness contemplated by the law is that which deprives the accused of all understanding and consequently of all responsibility." Q.-III, p. 812. M. ANCEL, Institute of Comparative Law, University of Paris, supplemented the foregoing by this explanation: "The law gives no definition other than that of article 64. The word madness (démence) refers generally to complete mental derangement; but it is generally accepted that this provision should be applied to states approximating to (complete) madness. Individuals with minor mental abnormalities, however, are outside the scope of the law. In practice they are considered as possessing a semi-responsibility. . . ." Q.-III, p. 814. M. GERMAIN, Director of Prison Administration (France) contributed the following explanation: "French law knows no intermediate degree between complete responsibility and absolute irresponsibility. . . . French legislation, therefore, provides only for complete insanity and not for any other form of mental disease; it does not provide for situations between insanity and mental health." Q.-III, p. 817.

Compare: "Mental disease is a generic term intended to include all forms of fully developed mental disturbance which are recognized by medical science. . . ." From the summary of PROFESSOR J. GAVIN's memorandum, Prof. of Criminal Law, Geneva's University, Switzerland, Q.-III, p. 867.

senting their views on these topics, the Commissioners warded off possible misinterpretations by readers, and simultaneously furnished benchmarks to guide them in understanding the line of reasoning supporting the final recommendations published in the Report.

Thus, the Commissioners use "mental abnormality" as descriptive of all forms of mental disease, mental deficiency and personality disorders. "Mental diseases" or "diseases of the mind" is the terminology used to convey a description of that pathological transformation originating "*de novo*" in the mind of a maturing or matured person. Choice of these words stemmed from the Commissioners' opinion that "disease" connotes a mental deterioration, not previously existing, which induces deviation from a pre-existing norm. The Commissioners felt that the phrase "mental disease" encompassed psychoses, though medical men would not regard certain of the conditions⁴⁴ enumerated and so catalogued by the Commissioners, as psychotic. But there is some blurring, in this part of the Report, between the word "doctors" and "psychiatrists," it being difficult to ascertain if the Commissioners intended to reflect an interchange of the technical vocabularies of each profession. In any event, the Report spells out the sense in which various terms have been used for its purposes. "Insanity," as a word, is here used to describe a state where ". . . the patient is suffering from a major mental disease (usually a psychosis) to such a degree that restriction of his liberty is justified in his own or in the public interest" and he can thereupon be restricted pursuant to the Lunacy Acts. Since the phrase "of unsound mind" is not used by medical men it found no place in the Report. The meaning accorded "responsible" lies in the query pertaining to a particular person, i. e., "ought he to be punished, whatever the existing law may be?"

A fitting prefatory statement to this facet of the Report is found in the memorandum submitted by Sir Norwood East:⁴⁵

It is significant that no substitute for the M'Naghten test of insanity has been accepted. It is too often forgotten that an alternative test must be capable of being understood and applied by the jury.

This is a fair summary of certain thinking encountered by the Commission and the following suggestion by the British Medical Association is representative of an opposing view. That group sought to enlarge

44. E.g., epilepsy and cerebral tumour, REPORT, par. 212, p. 73.

45. F. R. C. P., Lecturer on Forensic Psychiatry, Institute of Psychiatry, Maudsley Hospital, London University; formerly H. M. Commissioner of Prisons, 22 R. C. Evid., 511 (1950).

Compare, WEIHOFEN, *The M'Naghten Rule in Its Present-Day Setting*, 17 FEDERAL PROBATION 8 (Sept., 1953).

the M'Naghten⁴⁶ Rules through acceptance of a formula whereby a person relying on disease of the mind, as a defense, would be required to prove that "at the time of the committing of the act he was labouring, as a result of disease of the mind, under

(1) a defect of reason such that he did not know (a) the nature and quality of the act he was doing; or (if he did know this) (b) that he was doing what was wrong; or

(2) a disorder of emotion such that, while appreciating the nature and quality of the act, and that it was wrong, he did not possess sufficient power to prevent himself from committing it.

When a jury find that an accused person, at the time of committing the act, was labouring, as a result of disease of the mind, under a defect of reason or a disorder of emotion to such an extent as not to be fully accountable for his actions, they shall return a verdict of 'Guilty, with diminished responsibility.'"⁴⁷

This is premised on a recognition of the loose interplay between law and medicine. And it is not a mere time lag that is involved. Such reactions run from medicine to morals to law and rarely *per saltum*. And this phase of Commission activity was merely to inventory the doctrine of responsibility to ascertain if it had absorbed current moral standards by exposure thereto, as well as to ascertain if this doctrine reflected contemporary scientific knowledge concerning the impact of mental abnormality, on behavior and personality. Has the species of responsibility kept pace with the evolution of mental disorders discovered, named and catalogued by medical profession, is the question.

Despite frequency of investigations in these areas and advancement of medical science⁴⁸ to its present status, these investigators were still driven back to the recognition that a moral question confronted them whenever they touched the question of responsibility. It is on this point that the Commissioners avoided philosophical arguments, yet here they point out that there is "no pre-established harmony between the criteria of moral and of criminal responsibility."⁴⁹ Whether the current

46. Since there are at least 10 variations in spelling this famous defendant's name, it was decided that "M'Naghten" should be used on authority of the report in 10 C. & F. 200, Report, p. 75.

PROF. J. W. C. TURNER notes there is considerable elasticity found in current applications of the M'Naghten Rules, which he reports in his latest revision of KENNY'S OUTLINES OF CRIMINAL LAW, par. 53, p. 70 (16th ed., 1952). He stresses that "the courts are not concerned with insanity as such but with criminal responsibility." (id. 70).

47. REPORT, par. 264, p. 93. There is a note to this page of the Report, viz., "'Disease of the mind' covers incomplete mental development as well as grave disturbances of mental health; 'Wrong' means not 'punishable by law,' but morally wrong in the accused person's own opinion."

48. Compare JUSTICE CARDOZO's observations in his address of November 1, 1928, "What Medicine Can Do For Law," reprinted in CARDOZO, LAW AND LITERATURE AND OTHER ESSAYS AND ADDRESSES, pp. 70 ff. (New York, Harcourt, Brace and Company, 1934).

49. The precursor to this premature closure lies in the Commission's announced desire

doctrine of responsibility reflects both "contemporary moral standards" and the latest medical knowledge⁵⁰ is the core in the struggle for an opinion on the cardinal issue, viz., retention or abrogation of the M'Naghten Rules. This is the most sensitive area in the Report. Without defining their concept of ethics it was said by the Commissioners that:⁵¹

Neither the law nor ethics can reasonably be expected to base itself on extreme and untried medical theories or to go beyond what appears to be the general consensus of moderate legal opinion. If the problem of criminal responsibility is approached from this point of view, it should not prove impossible to find a solution which will satisfactorily reconcile the requirements of justice with the moral feelings of the community at large.

This record is not overflowing with evidence demonstrating the manner in which "untried medical theories" attain such wide proclamation as to become integrated in the mores of the community. A permissive inference concerning the basis of that quotation, could be drawn from the Commission's admission that they approached the evaluation of the M'Naghten Rules with a "practical and empirical^{51a} spirit." Of course, the vital phrase, in the quoted description of a facile solution, is the concluding one closing the circle at its point of reconciliation between justice and moral feelings of the community. The end-product of the quoted postulation envisages a jury resolving the issue of responsibility without a pilot formula, allured by broad discretion.

A short excerpt from the testimony of Mr. Justice Frankfurter is not only pertinent, here, but serves to summarize the trend of thought which the Commission found congenial to their position on the point:⁵²

to avoid "philosophical arguments which have led to barren controversy in the past." REPORT, par. 279, p. 99.

Reading that summary disposition recalls, for example, the chapter on "The Theory of Irresponsibility" written by GABRIEL TARDE, PENAL PHILOSOPHY, p. 150 *et seq.* (The Modern Criminal Science Series, Howell transl., 1912).

Compare, PATTERSON, JURISPRUDENCE, MEN AND IDEAS OF THE LAW, pp. 230 ff. (Brooklyn, The Foundation Press, Inc., 1953). MIRAGLIA's work in COMPARATIVE LEGAL PHILOSOPHY, pp. 242 *et seq.* Modern Legal Philosophy Series III., (Boston, The Boston Book Company, Lisle transl., 1912) contains some "philosophical arguments" (Report, p. 99) which the Commission might have had in mind. REPORT, par. 279, p. 99.

See also, Jerome Hall, Prolegomena to a Science of Criminal Law, 89 U. Pa. L. REV. 549 (1941).

50. See: *Psychiatry and the Law of Murder in the United States*, Memorandum of Evidence (Q-II, 779), submitted to the Commission, by DR. WINFRED OVERHOLSER; OVERHOLSER,

THE PSYCHIATRIST AND THE LAW (New York, Harcourt, Brace and Company, 1952); OVERHOLSER, *Psychiatric Expert Testimony In Criminal Cases Since Mc'Naghten*—A Review, 42 J. CRIM. L. AND CRIMINOL. 283 (1951).

51. REPORT, par. 284, p. 100.

51a. "Empiricism implies judgment upon variant situations by the wisdom of experience." From the dissenting opinion of Mr. Justice Frankfurter in the very recent and controversial case of IRVINE v. PEO. of the STATE OF CALIF., 347 U.S. 128, 147 (1954).

52. Par. 8064, 26 R. C. Evid. 587. PROFESSOR RADNINOWICZ's question to the Justice.

As the Chairman has told you, in England the M'Naghten Rules are very often disregarded or very loosely interpreted. Am I right in saying that this is true also of the United States—I believe that is a fair statement of our situation.

At another point in his testimony the Justice said, *inter alia*:⁵³

. . . I would certainly not adhere to the M'Naghten Rules They are in large measure abandoned in practice, and therefore I think the M'Naghten Rules are in large measure shams I think probably the safest thing to do would be to do what they do in Scotland, because it is what it gets down to in the end anyhow.

The Right Hon. Lord Cooper⁵⁴ testified about his difficulty in finding a copy of M'Naghten Rules in Scotland for his use in preparing testimony for the Commission. This witness stated that since insanity is normally pleaded to stop the trial, questions concerning charging juries on the Rules rarely arise. Insane persons simply do not stand trial in this witness' jurisdiction. It is in Lord Cooper's testimony that the realistic answer appears:⁵⁵

. . . I think myself that however much you charge a jury as to the M'Naghten Rules or any other test, the question they would put to themselves when they retired is—

"Is the man mad or is he not"?

Despite much valid criticism of the M'Naghten Rules on the grounds of obsolescence and inadequacy, particularly in borderline cases, replacement with a workable substitute remains the hurdle to solution. This situation is analogous to a managerial problem, arising in commerce. Management knows that a certain asset is depreciating, but is without a replacement for it, at the end of its service life. But here the analogy ends since commercial management can more readily ascertain if such useful life has expired. That certain concepts underlying responsibility have reached the end of their useful lives appears to find some support in the evidence received by the Commission. But whether the solution lies in maintenance work to be done on the Rules or whether replacement is the appropriate solution is not satisfactorily concluded. Despite valid appraisals criticizing the M'Naghten Rules on the grounds of obsolescence and inadequacy, particularly in borderline cases there remained the hurdle of devising a workable substitute.

Accordingly it was said that if scope of the Rules were to be enlarged,

53. Par. 8068, 26 R. C. Evid. 587. This is only a small portion of a lengthy answer and should be read in context.

54. Lord Justice General of Scotland, par. 5465, 18 R. C. Evid. 437. The witness said they were once reported in a footnote to a Scottish decision of 100 years ago.

55. Par. 5479, 18 R. C. Evid. 438.

then the following formula, predicated upon the British Medical Association's suggestion, *supra*, would be recommended.⁵⁶

The jury must be satisfied that, at the time of committing the act, the accused, as a result of disease of the mind or (mental deficiency), (a) did not know the nature and quality of the act or (b) did not know that it was wrong or (c) was incapable of preventing himself from committing it.

Mental deficiency⁵⁷ was examined separately and treated as embracing intellectual defects or "defects of understanding, existing from birth or from an early age." The vein of inquiry here runs the familiar gauntlet of definitional questions all pointed at the problem of what should be regarded as a "disease of the mind." Abrogation of the Rules enunciated in M'Naghten's case was approved by a majority of Commissioners, with a strong recommendation that juries be permitted 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."⁵⁸ As pointed out⁵⁹ in the Report, these Rules are wanting in statutory authority and had been frequently marked as questionable general statements of the law on this subject. This appraisal was countered long ago by Stephen⁶⁰ who argued that these Rules represented views of many judges. But, at least, there was and is continued and consistent criticism of the Rules from many, varied and reputable quarters.

By their ultimate holding, it appears, that the Commission found the jury process a convenient vehicle by which to escape solving a difficult problem. It is here that the three dissentients gather strength for

56. Par. 317, Report, 111. This is also recommendation number 18, chapter 14, Report, 276.

Briefly stated the fatal defect in the M'Naghten Rules, according to the British Medical Association, is that certain offenders who are insane in the medical sense are still held responsible and punishable under law. This is the core of the evidence adduced from the medical evidence.

57. "We use 'mental deficiency' in the sense defined in the Mental Deficiency Acts, as meaning an incomplete or arrested development of mind existing before the age of eighteen years, whether arising from inherent causes or induced by disease or injury. By 'mental defective' we mean a person certifiable under the Mental Deficiency Acts; such persons are divided by the Acts into four categories, idiots, imbeciles, feeble-minded persons and moral defectives," Report, par. 212, p. 74.

By statute, in England, mental defectives are classified as, idiots, imbeciles, feeble-minded persons and moral defectives, Report, par. 337, p. 117.

58. Report, par. 19, p. 276. Compare Sir James Fitzjames Stephen's criticisms of M'Naghten Rules, over the years, reprinted in considerable detail in APPENDIX 8, REPORT 391, pp. 399 ff. APPENDIX 8 contains a useful exposition and historical survey of insanity and mental abnormality in the field of criminal law.

59. Appendix 8, Report, par. 4, p. 398.

60. *Ibid.*, p. 399. Conclusions reported by the Royal Medico-Psychological Association and transmitted to the Atkin Committee (Report of Committee on Insanity and Crime (Cmd. 2005, p. 31) are illuminating and recorded in the Report, 404.

their separate opinion which contains this penetrating and pervasive sentence.⁶¹

The advantage of a formula is that it serves to limit the arbitrary element and to promote uniformity, as well as to help a jury to decide between conflicting views.

Thus it is manifest from the Report, that the majority simply cast on a jury the identical problem that these Commissioners were unable to resolve with all the intellectual ammunition, skill and training ranged before them. This is, no doubt, an attempted reconciliation between "the requirements of justice" and "the moral feelings of the community" reflected in the jury box.⁶² While here is a convenient escape hatch for the Commission's majority, it overlooks the individual accused.

DIMINISHED RESPONSIBILITY

Those varieties of mental abnormalities which are not sufficiently advanced as to debar an accused from pleading or render him totally irresponsible for his acts, are not taken into account by contemporary English law.⁶³ Since the death penalty is mandatory in England an accused afflicted with such mental abnormality will upon conviction of murder be accordingly sentenced. The sole channel of reprieve lies with the Royal Prerogative. The Home Secretary is empowered to invoke clemency when the prisoner's mental abnormality warrants mitigation, not otherwise available, under prevailing rigid standards for testing responsibility in judicial proceedings.

Thus in England, as in Scotland, officials exercising such palliating powers can weigh⁶⁴ all the various forms of abnormality when evaluating the propriety of the death sentence for a particular condemned person.

By this individualized study, responsibility is evaluated to ascertain if it has been "substantially diminished" by mental abnormality. Each case must be resolved in its own anamnesis, clinical differentiations, psychiatric data and diagnostic report, among other matters. Special difficulty is encountered with accused persons who are epileptics⁶⁵ and psychopathic personalities.

Since there is a blurring between the extremes of sanity and insanity it is difficult, if not impossible, to draw a clear line of demarcation

61. Memorandum of dissent, Report, pp. 285, 287.

62. REPORT, Par. 284, p. 100.

63. But cf. the English Mental Deficiency Act, see, e.g., par. 374, of the REPORT, 130.

64. Psychopathic personality is possibly excluded in Scotland, REPORT, par. 384, p. 133.

65. Unfortunately space limitation prevents extensive description of the useful material reported, e.g., the electro-encephalograph (E.E.G.) examination described in marginal note 3 to par 389, REPORT, 134 and par. 400, REPORT, 139, where results of these examinations are related for a particular group of prisoners.

between responsibility and irresponsibility. Coupled with this ineluctible condition and the fact that a wide variety of mental abnormalities generate diminution⁶⁶ of responsibility, led the Commissioners to their final conclusion on the proposal to introduce this doctrine into English law. It was decided that this aspect of the investigation would range beyond the scope of this Commission's power, and could only be undertaken by another specially appointed body.

AMENDMENT OF THE LAW OF MURDER

Application of the death penalty can, of course, be restricted by statutory enactments grading murder into degrees. But the Commission declined to sponsor such redefinitions in light of various⁶⁷ theoretical and practical objections which they deemed to be of moment. It is disappointing to find that after their efforts all that could be finally reported on statutory gradation was: "We conclude with regret that the object of our quest is chimerical and that it must be abandoned."⁶⁸

Pennsylvania's statute⁶⁹ is quoted in full as demonstrative of the policy behind grading murder in degrees through legislative enactment. Stress being laid upon the legislative declaration, in its preamble, as indicative of the reasons for classifying murder into two degrees. And it is noted that commencing some seventy years after Pennsylvania first adopted this legislation, continuous pressure was exerted in England to bring about a similar enactment. Obviously, these efforts were successfully resisted.⁷⁰

Difficulty in drafting adequate and "rational" definitions of the several degrees appears to be the theme of those who oppose this kind of legislation. The Commission, itself, reports this was their obstacle. They urge that objective characteristics of this crime must be embodied in a legal definition. But the flexibility of such a penalty is dependent on a

66. Here it is important to note that the REPORT mentions the Europeans' wider concept of "diminished responsibility," generally applicable to all crimes in contrast to the narrow scope of Scottish doctrine.

REPORT, APPENDIX 8, p. 392 *et seq.* contains several Scottish decisions illuminating their theory of diminished responsibility, viz., *H. M. Advocate v. Savage* (1923) J. C. 49 (REPORT, p. 392); *Kirkwood v. H. M. Advocate* (1939) J. C. 36; *H. M. Advocate v. Braithwaite* (1945) J. C. 55.

67. E.g., "The evidence we heard (ed., concerning the United States) convinced us that, in those cases which go to trial, juries frequently return a verdict in the second degree in the face of clear evidence that the accused was guilty of murder in the first degree." REPORT, Par. 532, p. 188.

68. REPORT, Par. 534, p. 189.

69. REPORT, Par. 486, p. 168. No reply by Pennsylvania to Commission questionnaire is printed. Apparently much weight was given to the memorandum of Professor Louis B. Schwartz (Q.—II, p. 776) who described this statute in detail.

70. Various reasons urged by opponents have been recorded. See, e.g., REPORT, Par. 488 *et seq.*, pp. 169 ff.

broad range of factors which do not readily lend themselves to the strait-jacket of definition. They are matters "for the exercise of discretion." And when striking down proposals to grade murder, this Commission has reflected the memorandum⁷¹ of the Home Office in which lies the pith of the views reported by the Commissioners on this sphere of their inquiry:

There are not in fact two classes of murders, but an infinite variety of offences which shade off by degrees from the most atrocious to the most excusable. . . . No simple formula can take account of the innumerable degrees of culpability, and no formula which fails to do so can claim to be just or satisfy public opinion.

STATISTICAL DATA

A substantial component of the total evidence received, consists of statistical tables,⁷² tabulations, graphs and diagrams. They could be identified with two spheres of inquiry; one, pertaining particularly to the deterrent value of capital punishment and the other group, a presentation of more generalized criminal statistics. In either instance, however, nothing contained in the printed materials furnishes adequate information by which to test statistical methodology. Tabulations presented in appendices to the Home Office's memorandum are those reprinted in the Report. But the Commission has supplied some clue concerning the value of statistics in the deterrence area by pointing up "the difficulty of drawing any firm inferences from them."⁷³

That there has been an utter paucity⁷⁴ of reliable criminal statistics in the United States has long been known to interested scholars. But the fact emerges into clear relief by the responses of various States

71. 1—2 R. Com. Evid. 13; REPORT, Par. 498, at page 174.

72. E.g., Recommendations to mercy (England and Wales, 1900-1949) Table 1, Report, 9; Incidence of murders, per million of population, (1929-1949) Table 3, Report, 303; Analysis by age of males convicted of murder (England and Wales (1900-1949) Table 6, Report 308-309; Insanity and Mental Abnormality (England and Wales) Table 8, Report, 311; Reasons for Recommendations to Mercy (England and Wales, 1900-1949) Table 10, Report, 312 to 313; Graph of murder rate for 1939 to 1951 (1938 as 100) Report, 319; Homicide statistics' in countries where the death penalty is in abeyance or abolished, Report, 344. APPENDIX 6, REPORT, 328 *et seq.*, contains the statistical material concerning the deterrent value of capital punishment.

That "Number of Murders *known* to Police" is the basic columnar caption of the "Murder Statement" for England and Wales from 1900-1949, reveals the usual problem present in such an analysis, as does Table 3, "Incidence of Murders *known* to the Police Per Million Population."

Bachelor readers will be interested in knowing that of the 1,080 males sentenced to death from 1900 to 1949, 209 of such males had murdered their wives. In fact wives, as a group, led all other victims for that period. Table 4, Report, 304-305. Wives seem to be better insulated against this type of untimely demise in Scotland, Table 5, Report, 306.

73. APPENDIX 6, REPORT, 328.

74. SELLIN, *The Uniform Criminal Statistics Act*, 40 J. CRIM. LAW AND CRIMINOL. 679 (1950); Criminal Statistics, 4 Encyc. Soc. Sci. 579; ALPERT, *National Series on State Judicial Criminal Statistics Discontinued*, 39 J. CRIM. L. AND CRIMINOL. 181 (1948).

to question 30 of the official questionnaire.⁷⁵ This interrogatory sought to elicit information, for each of the 50 years, 1900-1948, concerning the number of murders known to the police; and known to the police per 1,000,000 of population; number of persons convicted of murder; number of cases in which sentence of death was carried out and cases where the death sentence was mitigated. California reported, "no information available relating to murders known to the police or persons convicted of murder over any period of years"; Connecticut, "unavailable;" Massachusetts, "there are no statistics which have been collected on the matters referred to"; Michigan, "figures available only for the years 1946-1949"; Missouri, "there is no available information from which the table requested may be prepared"; New Hampshire, "no information is available concerning the matters raised in this question"; New York, only to the extent of a short table showing final disposition of persons convicted of 1st. degree murder; Wisconsin, "we have insufficient information to answer parts (a) and (b) of this question, as there is no central agency to which matters of this nature are referred and recorded."

Even this fragmentary background lends support to Professor Thorsten Sellin's sad commentary⁷⁶ concerning his attempt to assemble statistical data for use, as testimony, before the Commission, viz.:

... criminal statistics are poorly developed in the United States. Judicial criminal statistics are virtually non-existent and police statistics are of such character that they are not usable in this connection.

METHODS OF EXECUTION

At the then Prime Minister's request⁷⁷ for these Commissioners to consider methods of execution, their inquiry was extended beyond the basic directive.

Hanging, electrocution, guillotine, lethal gas and shooting are the current methods of execution employed in the Western World. In

75. Q.—II, p. 739. Continuous marginal notations are eliminated by citing, here, the various replies to question 30 referred to in the text, viz., California, *ibid*, 751; Connecticut, *ibid*, 752; Massachusetts, *ibid*, 754; Michigan, *ibid*, 758; Missouri, *ibid*, 762; New Hampshire, *ibid*, 764; New York, *ibid*, 770; Wisconsin, *ibid*, 772.

Question 30 (Q.—II, 739) is as follows: "Please give, if possible for each of the 50 years 1900-1948, a table showing the following information:—(a) how many murders were known to the police; (b) what was the number of murders known to the police per million of population; (c) how many persons were convicted of murder; (d) (To countries where capital punishment has not been abolished.) (i) in how many cases was the sentence of death carried out? (ii) in how many cases was the sentence of death mitigated?"

76. Par. 26, 30 R. C. Evid. 649.

Professor Sellin's testimony occupied a day and is amplified by a memorandum, supported by graphs, diagrams and tabulations. As usual the Professor's labors have produced a fine source of materials, which are worthy of a more detailed examination by interested persons.

77. REPORT, Par. 700, p. 246.

appraising electrocution or lethal gas as compared to hanging, the Commissioners used humanity, certainty and decency, as yardsticks. Upon the evidence it was held that simplicity and speed, attributes of humanity in execution, favored hanging, though this method did not meet the requisite standard of decency.

Only two other methods received serious consideration; lethal gas (gassing by carbon monoxide) without a gas chamber and lethal injections by hypodermic syringe. The first was rejected since it is administered through a mask and would precipitate a struggle, and naturally cause a victim to hold his breath as long as possible.

Intravenous injections of hexobarbitone, or thiopentone were also disapproved because of the difficulty in restraining unwilling subjects, and anatomical difficulties (i.e., veins, layers of fat, etc.). Furthermore, the British Medical Association vigorously protested against any member performing this service or instructing lay persons in the techniques.

SUMMARY

From the collection of evidentiary materials, reprinted by this Commission, several items are hereinafter extracted and highlighted, not as gauges of specific conclusions and particular recommendations, but solely for noting their independent usefulness;

1. The assembly of source materials for comparing legislation concerning homicide, penal sanctions, insanity and criminal responsibility, conditions of detention and methods of execution.

- a. Particularly worthy of emphasis are the extracts from the Indian Penal Code.

2. The exhaustive study of treatment given by prior Royal Commissions to proposals for limiting or modifying the liability to suffer the death penalty presented in the Home Office Memorandum.⁷⁸

3. A note reflecting the accumulated overtones of legal dogmas in the early development of "malice aforethought" and the doctrine of constructive malice brings together familiar, but scattered materials, as a springboard for further research.⁷⁹

4. Particularly worthwhile is the detailed analysis of law and practice in commonwealth and foreign countries concerning insanity and criminal responsibility, assembled from replies to the official questionnaire.⁸⁰

78. 1-2 R.C. Evid. 1 *et seq.*

79. REPORT, APPENDIX 7, pp. 381 ff.

80. REPORT, APPENDIX 9, pp. 407 ff.

5. The summary of the law of murder in foreign and commonwealth countries drawn from answers to the questionnaire.⁸¹

6. The need for an appraisal of the statistical methodology employed in gathering data by the Commission and by those sources assembling such materials and passing them on to that body.

7. A helpful assembly of case citations and discussion lies in the United States Government's reply to the Commission's questionnaire. This reply contains a generous extract (including the Court's footnotes) from the Brief for the United States in *Fisher v. United States*.⁸²

8. Arguments supporting abolition of capital punishment are well stated and supported by extensive data in two Memorandums submitted by the Howard League for Penal Reform.⁸³

9. An illuminating review and statement concerning insanity and diminished responsibility in Scotland is provided by the Crown Agent's Memorandum.⁸⁴

10. A concise recapitulation of the views held by the British Medical Association, including thought provoking comments pertaining to M'Naghten's Rules are set forth in its Memorandum.⁸⁵

11. A glimpse of the traditional application and development of M'Naghten's Rules is provided by a concise historical survey of that precursor to the polemics on insanity and mental responsibility.⁸⁶

This Royal Commission will have rendered a distinctive service if its work activates an investigation of our criminal laws and procedures. Contours of the legal, medical, psychiatric, ethical and moral terrain, only adumbrated in the Report, require sharper focusing in our Country. Certainly this report amply demonstrates a vital need for full scale research projects in areas similar to those touched by the Commissioners. Even a cursory reading of the several States' replies to the official questionnaire supports that contention.

It is manifest from the collection of statutes, cited to the Commission that peripheral and transitory pressures have stimulated that hodge-podge legislation. Too frequently the overlay of amendatory patches has obscured original statutory framework. Clearly, codification of penal laws should be launched from coordinated research centers; not piecemealed from remnants cut in legislators' cloakrooms.

81. REPORT, APPENDIX 11, pp. 432 ff.

82. 328 U. S. 463 (1945).

83. 13 R. C. Evid. 279, 27 R. C. Evid. 591.

84. 7 R. C. Evid. 167.

85. 14 R. C. Evid. 316.

86. REPORT, APPENDIX 8, pp. 397 ff.