idealisation of certain Catholic authors. There is a primary need for authentic and enlightened spiritual teaching, in which absolute values stand out because they are set against a real background. Realistic preaching does not need to be less supernatural, more journalistic; but it must correspond to man's true needs, and be centred on the objective facts of nature and grace.

Once again it is easy to diagnose, hard to produce a cure. We hope that these remarks, far from discouraging anyone, will help all Christians to know themselves more fully, so that when they reach the time of life in which they can view their future realistically, they will enter with renewed vigour the service of that God who searches the reins and the heart.

JUDGMENT OF DEATH[1]

LETITIA FAIRFIELD

IT has for long been a source of disquiet to the public conscience that Great Britain is among the very few western countries which find it necessary to retain the death penalty. This policy is only a continuance of a curious national tradition of ruthlessness about executions, for although England had always made a minimal use of torture, and was a pioneer in prison reform, she retained on her statute books until well into the nineteenth century more capital offences than any other civilised country. For Catholics, teaching on the morality of a death sentence is clear. As Mr Hollis points out in his admirable contribution to Messrs Paget and Silverman's book, 'It is certainly the teaching of the Christian religion that life is sacred, that it is God who gives life, and therefore only reasons of absolute necessity could justify the taking of life'. The Church has never condemned capital punishment as such; in practice it connived at or even demanded its use by the secular arm for heresy, sorcery, and other offences, and when the popes held temporal power it was in operation in the papal states.

[1] *The Report of the Royal Commission on Capital Punishment, 1949-1953*. (H.M.S.O., 12s. 6d.).
Hanged—and Innocent? By R. T. Paget, Q.C., M.P., and Sidney Silverman, M.P., with epilogue by Christopher Hollis, M.P. (Gollancz, 12s. 6d.).

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Catholics may, one concludes, support capital punishment if it is necessary. But is it necessary? Are there really circumstances in which the only right thing Christians can do with a fellow-citizen is to break his neck? That is the question which the Royal Commission, which recently reported, was appointed in 1949 to answer.

There could be little criticism of the personnel of the Commission, which met under the chairmanship of Sir Ernest Gowers and included such well-known figures as Sir Alexander Maxwell, the humanitarian reformer of the Home Office, Léon Radzowicz, Dame Florence Hancock, and Dr Eliot Slater of the Maudsley Hospital. A valuable innovation was the presence of a distinguished Scottish lawyer, Mr G. A. Montgomery, which ensured for the first time a proper consideration of the law and practice of the Scottish Courts. The terms of reference postulated the retention of capital punishment (probably because its abolition is regarded as a matter solely for the Houses of Parliament), 'but required the Commissioners to consider how far the liability to suffer it might be limited or moderated'. Never was there a more industrious and peripatetic Commission; in the course of its enquiries (which cost over £17,000) it visited Denmark, Norway, Sweden, Holland and Belgium, spent three weeks in the United States, and heard over a hundred and fifty witnesses. Every aspect of the law of murder in England and in Scotland, the practical results of the penalties incurred, alternative methods of punishment and their effects, methods of execution, the Prerogative of the Crown, were all investigated and the results collated in a well-written if rather wordy and repetitive Report. It is indeed more a text-book than a Report and contains such masses of statistical and legal information that it will provide ammunition for disputants—on both sides—for years to come. The conclusions reached are, however, rather disappointing considering the alpha-quality of the Commission's membership; it is already doubtful if they will find wide acceptance.

In considering in what ways the number of death sentences could be reduced, the Commission rightly concentrated on the most-criticised doctrines of the law. The most important is that of 'constructive malice', which may roughly be defined

as providing that 'where death is caused in the commission of a felony involving violence, a lesser degree of violence may justify a verdict of murder than would be necessary in other circumstances' (p. 31). The accidental choking of a night-watchman tied up by burglars is a classical example. The doctrine is unknown in any of the countries of western Europe and the Commissioners had little difficulty in coming to the conclusion that it should be abolished altogether, though their legal witnesses were not unanimous in agreement. The law of 'provocation', whereby the crime of killing may be reduced from murder to manslaughter, if the deed is done in the heat of passion caused by some immediate irritation, also comes in for revision. In its present form it is both too vague and too narrow, and there will be general applause for the recommendation that, legally, provocation should include any act or words 'likely to deprive a reasonable man of his self-control'. On the very disputable question of the raising of the age-limit for executions to twenty-one, the Commissioners were divided, six being for it and five against.

Concerning certain types of murder, 'suicide pacts' and 'mercy murders', on which much sympathy has been expended, the Report is commendably forthright and morally sound. The Commissioners admit that such episodes may be pitiful gestures of despair, which no one of decent feeling would want to treat harshly, but may also amount to cunning and cold-blooded methods of getting rid of unwanted obligations. As regards suicide pacts, the fact has to be faced that the popular view of suicide is now far removed from Catholic teaching. The Commissioners make a distinction (probably it would appear less sharp to a theologian) between cases in which each party agrees to take his or her own life, and those in which one party kills the other. During the years 1931 to 1950, we learn, there were thirteen convictions of murder arising from suicide pacts. In seven of these cases the accused had killed his partner and the evidence indicated that in only two cases had he made a more than half-hearted attempt to take his own life. These persons the Commission would still make liable to a charge of murder, but they recommend that the law should be amended to provide that

where the partner has killed him or her self, the survivor should be charged with a new offence, that of aiding or abetting or instigating suicide.

'Mercy murders' proved even more difficult to provide for with justice and humanity. A deliberate and intentional killing, the Archbishop of Canterbury pointed out in his evidence, is murder whatever the motive and 'ought not to be called something different from what it is'. The Report recommends reluctantly that no change is possible. 'How can a jury decide whether a daughter had killed her invalid father from compassion, from a desire for material gain, from a natural wish to bring to an end a trying period of her life, or from a combination of motives?' The Report recommends reluctantly that no change is possible. The Commissioners were also unanimous in holding that there was no case for the exemption of women from the death penalty, though ninety per cent of the one hundred and thirty women sentenced in the last fifty years have been reprieved.

An eagerly awaited section of the Report deals with the law concerning mentally abnormal prisoners: it turns out to be sixty-five pages long and the most exhaustive survey ever made of this contentious field. The too-famous M'Naghten Rules are once again examined in detail, and the view is accepted that although they probably work fairly well in practice they are indefensible as a statement of the limits of the criminal responsibility of the insane. The Commissioners, with one dissentient, cannot agree with those who would leave them alone, but are driven to alternative suggestions. If the Rules must be retained, they would add a third clause to the familiar provisos: (*a*) that the prisoner did not know the nature and quality of the act, or (*b*) did not know he was doing wrong. The new clause would run: (*c*) *or was incapable of preventing himself from committing it*. This is our old friend the 'irresistible impulse' in modern dress, but still open to some of the historic objections. It does not get at the heart of the matter. Doubtless in time a convention of interpretation would be established which did substantial justice to the insane but kept out the 'normal' murderer. It seems to me a better guide to the jury than the one actually preferred by the Commissioners.

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> 'We consider (with three dissentients) that a preferable amendment of the law would be 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.' (p. 276.)

This would leave a very wide issue of mental disease to be tried out in the unsuitable *venue* of a criminal court, for there is no medical or legal definition of insanity or 'disease of the mind'. As regards mental deficiency, which is hardly treated under the existing law, we regret that the Commissioners were not willing to recommend the adoption of the excellent Scottish practice of bringing in a plea of 'diminished responsibility' and inflicting a sentence as for 'culpable homicide'. The term 'diminished responsibility' accurately describes a defective's mental state, and ensures that in so far as he understands the quality of his acts, he will not escape suitable punishment. An excellent suggestion, applicable to a few cases only, is that the judge should have power to raise the issue of insanity if the defence has not done so.

The section contains much valuable information about the rational and humane attention given by our prison service to mentally abnormal prisoners; there is no evidence of an unduly sentimental approach. How closely this subject is linked with murder may be seen in the table on page 300. In the past fifty years, 7,454 murders were known to the police, 1,674 persons (of whom many were certainly insane) committed suicide before trial, 658 were found 'insane on arraignment', 758 were tried and found 'guilty but insane', another 47 were subsequently 'respited to Broadmoor'.

All these suggested amendments to the law would affect sentences rather than executions, for most of the prisoners in whose cases questions of insanity, constructive malice, etc., are raised, *are in fact reprieved*. To alter the position substantially it would be necessary to break down the offence of murder into degrees or to allow an alternative sentence or verdict. The Commisson found that classification of killings into degrees is already the practice in thirty-eight States of the U.S.A. and of most European countries. In France,

for example, the death sentence is reserved for the crime of *assassinat*, i.e. murder committed with premeditation, if accompanied by torture, if undertaken in association with another crime, murder of parents or of a public official in the course of his duty, or poisoning. Similar proposals have been discussed in Britain for over a hundred years but are always wrecked on the objection that 'there are not in fact two classes of murder, but an infinite variety of offences, which shade off by degrees from the most atrocious to the most excusable'. Rules whereby the penalty is varied according to premeditation, intention, motive, or association with a felony, do not stand up to philosophical examination and it is not surprising that the Commissioners ultimately decided that the introduction of 'degrees of murder' would be no improvement to the English legal system.

Two courses only remain if a real change of major importance is to be made in murder trials: either to give the judge discretion to substitute a lesser sentence according to his view of the case, or to give the jury power to add a supplementary verdict of 'mitigating circumstances'. The first of these alternatives has long been the law in India and is said to work very well, but all witnesses from the English judiciary and the Lord Justice General of Scotland were strongly against it. They felt it would lead to a gross disparity in sentences; that the judge had not sufficient material before him on which to make such a grave decision; that it would lead to disedifying conflicts with the Home Secretary over his exercise of the Royal Prerogative of Mercy, and—this seems to have weighed with the Commissioners most—it is too much responsibility to impose on one individual. Finally the Commissioners come down on the side of the suggestion that the jury be given the discretion to bring in a verdict of 'guilty with extenuating circumstances', which must be unanimous. The judge would then be required to pass a sentence of imprisonment for life, or, as the Commissioners suggest, 'detention during Her Majesty's pleasure'. It is admitted that this is a marked breach with English traditions of the function of the jury, and would in practice mean a very serious change in the whole aspect of a murder trial. The necessity for placing full information about the prisoner's

character and antecedents before the jury when they consider the issue of extenuating circumstances would necessitate the trial being divided into two parts. The second part would give the defence opportunities for pathetic appeals which might well mislead the jury badly, and could not be effectively countered by the prosecution. The more one attempts to visualise the procedure, the less attractve it becomes. My own impression is that either the judge should take the responsibility or the law should remain as it is: a strict and well-defined rule mitigated by the Royal mercy, as exercised by a Minister of the Crown. This is not to deny that the present system has grave disadvantages. The Report points out that however well we hope the present system works in practice, it is open to grave objections. During the last twenty-five years, 475 sentences were reviewed and 186 were commuted, i.e. thirty-nine per cent. Obviously the Royal Prerogative was intended as an exceptional measure and not for use as a routine method of correcting an imperfect law. Yet the Commissioners have, I submit, found no effective alternative.

There remains the possibility lurking behind the whole work of the Commission—that the better course would be to abolish the death penalty altogether as there is no means of securing its just application. One argument advanced by Mr Hollis, a strong abolitionist, finds a certain amount of support in these pages. There is no evidence that the death penalty acts as a unique deterrent. The figures from countries where it has been abolished are not wholly clear, and the eminent Swiss authority, Professor Sellin, seems to come nearest to the truth when he says that abolition might easily 'cause a temporary increase of murders but has little if any effect in the long run. Many other factors come into play.' It must not be forgotten, however, that England—for whatever reason—has one of the lowest murder rates in the world (4.0 per million) and Scotland quite the lowest (2.7 per million). It would be very easy to raise them, and the police are convinced that abolition of the death penalty would do so in this country, whatever the experience abroad, as it is much dreaded by young gangsters and professional criminals. There is a strong tendency to underrate the impor-

tance of police evidence in this matter. They know criminals a great deal better than any of us and, what is more, they are acting as our agents in the protection of life and property. Would it be right for us to send them out unarmed against men who would have every motive for killing them and very little inducement not to do so?

An important and lengthy section of the Report deals with alternatives to capital punishment and their effects on the prisoners. It seems that nearly every country has tended of recent years to reduce the length of time that murderers are incarcerated (the average is eight to ten years) and to soften the conditions under which they live. In many countries prisoners are allowed bright well-furnished cells, interesting work, home-leave and much better pay than they can earn in English prisons. It may surprise the public to learn of the shortness of the term to which many English life sentences are reduced by the Home Secretary. Of ninety-three men and women discharged in the last ten years after having been reprieved to a life sentence, six served under one year, four for one year, and only seven had served more than ten years (p. 316). If it is true, as the Commissioners state early in the Report, that the unique crime of murder should be visited by a unique penalty, we seem to have gone far already to ignore the rule. It is only fair to say that murderers 'as a class' give no particular trouble in prison, and very rarely commit murders or any serious crime on discharge, though a very horrible exception has occurred in Austria since the Report was published.

One haunting fear that besets every supporter of capital punishment is that of the execution of an innocent man. The Report does not discuss the grim possibility, but the book by Mr Paget and Mr Silverman attempts to expose what they believe to be three examples. In one of them, the recent case of Bentley, there can be little dispute about the law or the facts. Criticism could only be directed against the failure to use the Prerogative of mercy. Rowland's case was that of a man charged with murdering a woman on a bomb-site, a deed to which a professional criminal, Ware, confessed but retracted the confession. Rowland had already murdered a child and been reprieved; the other man was an insane

person who had twice before confessed to murders he had had nothing to do with, and is now in Broadmoor. I am not surprised that the Home Office accepted Ware's retraction and allowed Rowland to hang. That Ware did subsequently attack a woman with a hammer is not so extraordinary, as he had identified himself imaginatively with this type of murder. The case of Evans is more complicated, and the facts will be in everyone's mind. The point brought out most strongly by this highly prejudiced book is the deplorably poor way in which the Home Office presents a good case, allowing its opponents to score unnecessary points against the police, to the discredit of the law and its administration.

It cannot be a matter for regret that the community should be so sensitive to its duty in the matter of a death sentence. This Report gives few major solutions which appear to be satisfactory or final. It has been impelled by the fashion of our time to consider a matter of death and judgment without being able to invoke a moral law and without even a mention of eternity. But it has done invaluable work in collecting facts, in examining theories, and in illuminating the path ahead.