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. . . HANGED BY THE NECK UNTIL . . .

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If the social utility and desirability of capital punishment really are subjects that can be rationally discussed, three recent books[1] and the Report of the Royal Commission on Capital Punishment, 1949-1953 (England)[2] contain practically all the relevant material known at this point of human history. All the arguments advanced by those who desire to retain it are presented by Sir Ernest Gowers and Mr. Gerald Gardiner, Q.C., with accuracy and fairness, and answered with clarity and precision. The third author Mr. Koestler is more polemical, and his dislike for the English judiciary, past and present, sometimes leads him to exaggeration and over-emphasis, which mean that his book is less convincing, though more entertaining, than the dispassionate presentation provided by the other two authors. This is understandable; he is much more emotionally involved than are Sir Ernest Gowers and Mr. Gardiner, for he carries with him always the scars of the memory of his experience during the Civil War in Spain, when, in 1937, he spent three months under sentence of death, aware of the executions of his fellow prisoners as they occurred, and awaiting his own.

But it is at least doubtful if the subject of capital punishment is, in general, capable of rational examination. Upon the question of its retention or abolition, a community falls roughly into three sections. There are those who by temperament feel no distaste for it, and believe that society is protected by its use, and therefore consider it should be retained; those, compassionate of nature, who feel that society is debased by recourse to it, and urge that it should be abandoned; and in between are the largest section, composed of those who have no strong feelings on the subject, and have no clear understanding of the reasons proffered in justification of the death penalty, or advanced in support of its abolition. From this section come mostly the citizens who, in answer to the pollster's question, often state their prefer-

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[1] *A Life for a Life?* by Sir Ernest Gowers, Chairman of the Royal Commission on Capital Punishment, 1949-53. (Chatto & Windus, London, 1956; pp. 7-133, Appendix, 139-144. No Index). *Reflections on Hanging*, by Arthur Koestler (London, Victor Gollancz Ltd., 1956; pp. 7-163, Appendices 171-179; References and Sources 180-188, Index 189-193). *Capital Punishment as a Deterrent; And the Alternative*, by Gerald Gardiner, Q.C. (Victor Gollancz, London, 1956, pp. 7-92, Notes 93-95. No index).

[2] *Cmd.* 8932.

ence according to whether or not there comes to mind an image of the perpetrator of some recent horrible and atrocious killing.

The justification for killing by the State in peace-time rests upon the notion of criminal responsibility, a concept all too often obscured by loose thinking and false assumptions. Sir Ernest Gowers and Mr. Gardiner do not address themselves specifically to this philosophically elusive concept, but Mr. Koestler does. In Part II of his long essay, he sets out his understanding of determinism and free-will. If his presentation is not wholly satisfactory or convincing, the same may be said of all examinations of what Professor Gilbert Ryle calls "the tangle of largely spurious problems, known as the problem of Freedom of the Will".[3] Certainly his treatment of the concept is stimulating and provocative. "Here, then, is the dilemma", writes Mr. Koestler. "According to science, man is no more free in the choice of his actions than a robot machine — an extremely subtle and complex type of machine, yet a machine. But he cannot help believing he is free; moreover, he can only function by believing this. Every human institution reflects this dilemma; and the law, which is meant to regulate human behaviour, reflects it in the most concentrated manner, like a distorting mirror".

Enthusiastic critics so often fail to grasp what are the fundamental concepts of the criminal law that it may be worth while to set out a lawyer's understanding of them.

Criminal responsibility is a conclusion of law. It is not a faculty or quality personal or peculiar to an individual; it is a condition imputed or ascribed to a human being by the legal agencies devised to control the behaviour of members of the group so that the group may achieve the essential feature of cohesion. A person is regarded as "criminally responsible" when the dominant public opinion of the society of which he is a member demands that he shall be made to suffer because of a harm he has done. At this stage of legal development, "to incur responsibility by a harmful act, the actor must *will* the act; *intend* the harm; *desire* primarily his own gratification".[4] Human beings are presumed by the law to have certain capacities, and their actions are presumed to be voluntary. A person is taken to have acted voluntarily if at the time he performed the action he was not in one of the conditions which the law accepts as excluding him from the conclusion that he should be treated as responsible for his action. What conditions will preclude the conclusion from being drawn will depend upon legal policy, and that policy will in turn depend upon a variety of considerations, among them being the accepted theories concerning human behaviour, and the received notions of what is fair and just. Philosophers may debate and dispute it, but the fundamental idea for legal purposes was stated in the 17th century by Sir Matthew Hale:[5]

> Man is naturally endowed with these two great faculties, understanding and liberty of the will, and therefore is a subject properly capable of a law properly so called, and consequently obnoxious to guilt and punishment for the violation of that law, which in respect of these two great faculties he hath a capacity to obey: The consent of the will is that, which renders human actions either commendable or culpable . . . .

The criminal law is one of society's mechanisms of social control, indispensable at this stage of civilisation, and the purpose of the concept of criminal

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[3] *The Concept of Mind* (1950) 71.

[4] Mercier, *Criminal Responsibility* (1905) 153, *cf. Lang* v. *Lang* (1955) A.C. at 425, 428-9.

[5] 1 *Pleas of the Crown* (3 ed., 1800) 14.

responsibility is to decide whether a person is justly a subject for punishment, because criminal responsibility means liability to legal punishment. He is not regarded as fairly liable to punishment for contravening a prohibition which society reinforces by the threat of a penalty if at the time he committed the forbidden act he suffered from certain kinds of ignorance or under certain kinds of compulsion. These exculpatory ignorances and compulsions are carefully limited, and in practice the law proceeds upon the assumption that once the forbidden act, the *actus reus*, is established, the person is guilty of the crime charged unless there were present certain specific conditions which preclude the conclusion of criminal responsibility. The doctrine of *mens rea* can be understood only in the light of the conditions — nonage, insanity, accident, mistake of fact, coercion and duress, reasonable necessity, and, to a limited extent, provocation — that negative the existence of the mental element required to make an act a crime. Generally speaking, these exceptions are accepted as satisfactory, and apart from those who adhere to the Italian Positivist school and regard free will as "a mere subjective illusion", the substantial criticism from psychiatrists concentrates on the restrictive legal attitude to insanity and the inadequacies of the McNaghten rules. There is, of course, no direct access to the inner or mental life of a human being, and the judge (or jury) can do no better than make problematic inferences from the observed behaviour of the accused person's body as to the states of mind (and its soundness) which, by analogy from his own conduct, and from the concurrence of communicated human experience, he supposes to be signalised by that behaviour. Hence the law proceeds upon the reasoning that as normally a man is able to foresee the ordinary consequences of his acts, it is fair and reasonable to infer that he did foresee and intend them. But such an inference is not an inevitable one, and it is permissible to make it only when the facts as a whole justify it. The burden of establishing guilt as a rational conclusion thus rests upon the prosecution, but that conclusion may be drawn if the deed is proved and no material is adduced which puts an exculpatory complexion on the facts established.[6]

Man is a moral animal, capable at least of formulating moral principles governing his conduct. The criminal law and the moral law are obviously separate concepts, but as Professor Goodhart has observed,[6a] "they tend always to be married to each other and to support each other. A divorce between them may lead to social disaster". Since the introduction of the concept of *mens rea*, plainly moral in its origin and development,[7] the history of the criminal law reveals a slow extension of the field of exculpatory conditions, and in every instance the added or expanded ground of exculpation has reflected the accepted moral law of the time. Even where a matter may not be admitted as a general ground of excuse, as in the case of provocation (which in most British communities is restricted in its operation to reduce an intentional killing from murder to manslaughter), circumstances which would be regarded as an extenuation under the moral law are now taken into consideration by the courts in determining the extent and the mode of punishment. But in societies which prescribe the death penalty as the mandatory sentence upon conviction for murder, a discretionary judicial assessment

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[6] *Cf. The Queen* v. *Bonnor* (1957) V.L.R. at 255; (1957) A.L.R. at 215; *Lang* v. *Lang* (1955) A.C. at 425; G. Ryle *op. cit.*, 14. Anomalously, the burden of proving insanity on the balance of probabilities rests upon the accused.

[6a] *Cf.* J. W. C. Turner, *The Mental Element in Crimes at Common Law*, in *The Modern Approach to Criminal Law* (1945) 201.

[7] *Outline of Modern Knowledge* (1956), *sub voce* "Law" 598.

of punishment is not open, and when the sentence is executed, its irrevocable nature prevents an adjustment by the Executive that is possible under a sentence of imprisonment if subsequently discovered facts make that a proper course. The exaction of capital punishment in instances where the penalty goes beyond what is felt to be fair and just, or where there exists a doubt of the prisoner's guilt, has done much to strengthen the demand for abolition, a demand not lessened by the apparent irrationalities that have attended the exercise of the prerogative of mercy.

The backgrounds of the three authors are not without interest. Mr. Koestler is a professional writer, whose personal experience in connection with the penalty of death has already been mentioned. Sir Ernest Gowers served in the Treasury (at whose invitation, incidentally, he wrote two valuable and entertaining works on English expression, later embodied in a publication of H.M. Stationery Office, *The Complete Plain Words*); his capacity and eminence as a civil servant were beyond question, and in 1949 he became the Chairman of the Royal Commission to which was given the task of considering, not whether capital punishment should be abolished or retained, but whether the liability to suffer it should be "limited or modified". He himself describes how he approached that task, and where he now stands.

> Before serving on the Royal Commission I, like most other people, had given no great thought to the problem. If I had been asked for my opinion, I should probably have said that I was in favour of the death penalty, and disposed to regard abolitionists as people whose hearts were bigger than their heads. Four years of close study gradually dispelled that feeling. In the end I became convinced that abolitionists were right in their conclusions — though I could not agree with all their arguments — and that so far from the sentimental approach leading into their camp and the rational one into that of the supporters, it was the other way about.

His book reveals the conclusions at which he arrived, but which he was prevented from expressing in the Royal Commission's Report because of the limited terms of reference.

Mr. Gerald Gardiner is a barrister in active legal practice, who has concerned himself with reform of the penal laws. With Mr. Nigel Curtis-Raleigh he wrote an interesting and rather disquieting study, *The Judicial Attitude to Penal Reform*.[8] He concluded soberly that "in the field of penal reform the record of the judges has not been a fortunate one". It is, perhaps, a sign of an improvement in the judicial approach that at least four of the Law Lords voted for the second reading of the Bill for the abolition of capital punishment when it was defeated in the House of Lords in 1956. Mr. Gardiner does not write with Mr. Koestler's vigour or Sir Ernest Gowers' graceful lucidity, but his temperate and restrained presentation of the subject accords with the best traditions of the English Bar, which is at its happiest in reasoned rather than emotional advocacy.

Sir Samuel Romilly (1757-1818) may fairly be regarded as the founder of the English movement for the abolition of capital punishment.[9] Romilly's efforts rested upon two rational propositions:

(i) The chief deterrent to crime resides not in barbarous punishments,

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[8] (1949) 65 *L.Q.R.* 196.

[9] See C. G. Oakes, *Sir Samuel Romilly, 1757-1818* (1935); Coleman Phillipson, *Three Criminal Law Reformers, Beccaria, Bentham and Romilly*, (1923); L. Radzinowicz, *History of English Criminal Law from 1750*, vol. i (1948) *passim*.

but in certainty of detection and conviction. Harsh punishments tend to diminish the likelihood of convictions.

(ii) Brutal punishments accustom the populace to brutality and in themselves tend to create an attitude likely to result in crimes of violence, for violence breeds violence, and cruel punishments have an inevitable tendency to produce cruelty in the people.

Romilly's propositions are still the basis of that movement, and the mainspring of its activities.

It may be that in truth the demand for the retention of capital punishment springs from mankind's deep and unrecognised urges, but it is fair to set out the reasons advanced by the retentionists. They come down to six major contentions:

(i) Death as a punishment for murder is unique in its deterrent effect;
(ii) Abolition of the death penalty for murder would result in an increase in murder, and in attacks of police officers;
(iii) Death is the appropriate penalty for a human being who has unjustifiably taken life;
(iv) There is no satisfactory alternative penalty for murder;
(v) Public opinion requires its retention; and
(vi) Even if abolition is desirable, the present time is inopportune for such a serious step.[10]

The argument that the penalty of death is unique in its deterrent effect rests really upon personal intuition; upon the feeling that each one of us has that awareness that his life will be forfeit if he does a forbidden act will prevent him from doing that act. Implicit in that awareness is, of course, the assumption that discovery and conviction are certain, or, at least, highly likely. Where that assumption is not made or is rejected, plainly the awareness does not operate effectively or universally as a restraining influence, for it is notorious that many planned murders have been committed by persons who felt sure their guilt would not be discovered. The argument involves, too, that no lesser form of punishment will be as effective. But if the argument is to be regarded as coercive, it is applicable to every crime, and thus the whittling down of the list of capital offences during the 19th century in England from over two hundred to four was done in disregard of it. Experience has demonstrated its falsity in connection with the crimes that were made non-capital, for the adverse consequences predicted did not occur. Moreover, if deterrence is the object, the logic of deterrence requires that the penalty be attended by more than simple death. It should be preceded by torture and death should be inflicted in the most agonising forms. Furthermore, executions should be publicly carried out, and unless the health laws are regarded as of greater importance than punitive deterrence, felons' bodies should be exhibited to public view. In brief, rigorous application of the theory requires that the criminal's social usefulness as a deterrent example should be exploited to the full, not only before and at death, but afterwards as well.

The argument based upon the fear that the removal of the threat of death will result in an increase of murder is, like the one just considered, equally applicable to all other crimes that once attracted death as a penalty. Again, experience has shown the invalidity of the argument in regard to those crimes, but additional experience directly related to the crime of murder is available from various countries, including our own, which can supply

[10] See Sir E. Gower, *op. cit.* c. iii; G. Gardiner, *op. cit.* c. ii.

information from Queensland, an abolition State since 1922. For reasons not clearly explained, the Archbishop of Canterbury (Dr. Fisher) and two former Lord Chancellors, Lord Simon and Lord Jowitt, and the late Lord Brentford, did not regard statistics from other countries as even of persuasive value. Upon this matter the cautious conclusion of the Royal Commission that "there is no clear evidence . . . that the abolition of capital punishment has led to an increase in the homicide rate or that its re-introduction has led to a fall", is undeniably true; this being so, its relevance is too plain for argument. Statistically, it is clear that the mode of the penalty cannot be demonstrated to have any significant effect upon the crime rate. As long ago as 1869 the French social statistician Quetelet observed that we could "enumerate in advance how many individuals will stain their hands with the blood of their fellows, how many will be forgers, how many poisoners, almost as we predict births and deaths". The factors that give rise to crime, of whatever kind, are complex and various, and except that conviction, because it leads to punishment, reinforces the threat of punishment which society uses as a mechanism of control, the degree of harshness of punishment has probably little significant effect on the crime rate. As one branch of this argument for retention, concern for the safety of police if capital punishment were abolished is constantly expressed, and it is argued that killings of police officers would increase. Recently Professor Thorsten Sellin, of the University of Pennsylvania, and Father Donald Campion, S.J., undertook companion investigations into the validity of this argument. Their results (which probably were not available to the writers under review) were supplied to the Canadian Parliamentary Committee on *Capital and Corporal Punishment and Lotteries*, (1955). Professor Sellin concluded that

> the claim that if data could be secured they would show that more police are killed in abolition States (in the U.S.A.) than in capital punishment States is unfounded. On the whole the abolition States, as apparent from the findings of this particular investigation, seem to have fewer killings, but the differences are small. If this is, then, the argument upon which the police is willing to rest its opposition to the abolition of capital punishment, it must be concluded that it lacks any factual basis.

Father Campion's conclusions were twofold: (a) the different States of the U.S.A. manifested no fixed pattern of opinion among police officers on the value of the death penalty as a protection to the police, and (b) in Pennsylvania there is no consistent pattern of association between the number of criminals executed in that State and the killings and woundings of members of the State police there.

The argument that death is the appropriate penalty for him who kills is less of a rationalisation than some of the other arguments, and reveals more clearly a significant factor operating on the minds of the retentionists. It rests upon the deeply implanted desire of the human being to equate evil with evil; it is expressed in the *lex talionis* embodied in the Mosaic code; "life for life, eye for eye, tooth for tooth, hand for hand, foot for foot, burning for burning, wound for wound, stripe for stripe", (Exodus XXI, 23-25). This doctrine, let it be said, was a considerable advance on the unlimited right of vengeance which it replaced; at least it demanded a proportion between the injury and the penalty. We have, of course, abandoned all the equations except life for life, and stripe for stripe and even here society could not now endure the complete application. Even the retentionists do not mean that all murders, let alone all killings, should be visited with the death

penalty. When the law prescribes a uniform sentence for a specified crime, it must do so upon the postulate that the crime is of uniform culpability, or at least that the crime, even when committed under cogent circumstances of extenuation, is nevertheless so culpable that the sentence is the only one that is just and proper. Under our law, that is not true of murder. The Royal Commission summarised 50 cases that occurred in England between 1931 and 1951, and observed—

> From this list we may see the multifarious variety of crimes for which death is the uniform sentence. Convicted persons may be men, or they may be women, youths, girls, or hardly older than children. They may be normal or they may be feeble-minded, neurotic, epileptic, border-line cases or insane; and in each case the mentally abnormal may be differently affected by their abnormality. The crime may be human and understandable, calling more for pity than for censure, or brutal and callous to an almost unbelievable degree. It may have occurred so much in the heat of passion as to rule out the possibility of premeditation, or it may have been well prepared and carried out in cold blood. The crime may be committed in order to carry out another crime, or in the course of committing it, or to secure escape after its commission. Murderous intent may be unmistakable or it may be absent, and death itself may depend on an accident. The motives, springing from weakness as well as from wickedness, show some of the basest and some of the better emotions of mankind — cupidity, lust, revenge, jealousy, anger, fear, pity, despair, duty, self-righteousness, political fanaticism: or there may be no intelligible motive at all.

It is difficult to escape the feeling that a law is not a just one which provides that a woman facing early death from cancer, who kills her idiot child because she believes that no one but herself will care for it, must receive the same sentence as an habitual criminal who has brutally killed in the course of robbery. The retentionists' reply that by the exercise of clemency the sentence will not be carried out in the case that stirs to pity is really no answer, because, as the Archbishop of Canterbury (Dr. Fisher) conceded, "the finality of that terrible warning does, in the public mind, lose something of its force by the working of the system of reprieves". Commutation controverts the essential principle of certainty which is required to make punishment an effective deterrent, for it proclaims that the law does not always, but only sometimes, mean what is says.

Before proceeding to consider the fourth and fifth arguments together it may be observed that the sixth argument is the stand-by of the opponent of change. It falls into the category of the cynic's advice to the young man contemplating matrimony, "Not yet", and to the elderly man similarly placed, "Not now". In the very nature of things, reforms of any kind are never opportune to those who are wedded to the existing state of affairs.

The fourth and fifth arguments, that there is no satisfactory alternative to the death penalty, and that public opinion requires its retention, go close to the heart of the matter. Whether there is a satisfactory alternative depends, of course, upon the purpose it is desired to achieve, and the willingness of society to devise an alternative. In reality, capital punishment combines a crude and haphazard and incomplete method of social hygiene or sanitation, whereby society rids itself of those members whose continued existence is felt to imperil the group, with a ritual act whereby the feelings of the group, outraged by an impious act, are assuaged. If one approaches the matter realis-

tically and dispassionately, it is impossible not to regard both these considerations as of great social significance. The viciousness of some monstrous criminals is beyond dispute, and the instinctive reaction of the average citizen that such creatures have lost their claims upon the social conscience and should be eliminated is readily understandable. Such an attitude is, however, contrary to the moral principle that even the worst criminal nevertheless retains his dignity as a member of the human race; as Julius Stone has put it,[11] the punishment of the criminal must stop short of denying his humanity, for that denial draws with it the denial of that of members of society generally. Moreover, the concept on which it rests is too dangerous in its logical implication for a civilised society to accept. When it was logically applied upon a viciously wrong premise, it led to the gas chambers and the death camps of Hitler's Germany. It must be conceded too, that the need to assuage the outraged feelings of the group is a very important aspect of the legal process. The group has parted with the right of personal redress on the assumption that the instruments it has created will be effective substitutes for that right. Concealed by a thin veneer, but ever present in the dark continent of the human mind, are the ~~radical~~ fears and irrational superstitions which our civilised conditioning may control under favourable conditions, but cannot eradicate. There is a great deal of substance embedded in Lord Denning's insight that punishment is the way in which society expresses its denunciation of wrong-doing, and that in order to maintain respect for the law it is essential that punishment inflicted for grave crimes should adequately reflect the revulsion from them felt by the great majority of law-abiding citizens.

Lawyers are not particularly well fitted to determine the weight that should be given to these considerations. Full comprehension of them requires a knowledge of anthropology and psychology that lawyers are not likely to have. The extent to which the demands they represent may safely be indulged is also a matter upon which a legal training affords no special guidance. *A priori* judgments spring largely from prejudice and emotion, and little or no validated scientific knowledge exists concerning these demands. The phrase "public opinion" has no certain meaning; it may refer to the prejudice or preconceptions of the class in which the speaker moves, or to unconsidered utterances collected by "opinion poll" interviewers from a rough sample of the community affected. The real question, it is submitted, is not whether a popular demand exists that a particular form of punishment (in this instance, the infliction of death by the State) should be retained, but whether it is effective for the social purpose which it is claimed to achieve, and if it is, whether, even then, it is desirable in the larger interests of society that it should be preserved.

The idea that human beings are deterred by the fear of punishment, and that a recollection of punishment suffered or seen ought to restrain a potential offender from wrong-doing is as old as the human group, and in broad terms its truth cannot be disputed. But acceptance of the truth of the idea does not tell us anything about how and when and to what extent such a fear or recollection works in individual cases; it leads really to the conclusion that it ought to do so, and not that in fact it does in any particular case. Archbishop Whately wisely observed that every instance of infliction of a punishment is an instance of the failure of that punishment. We know it can often be demonstrated that the barbarous quality of a punishment, or its rigour, has not later exercised a restraining influence on those who have suffered or seen it.

[11] *The Province and Function of Law* (1946) 598.

Men are variously constituted, but there appears substantial support for the opinion that a high proportion of wrong-doers are lacking in imagination, and, surrendering to the gratification of an immediate self-regarding impulse, do not foresee the consequences of doing so. As a rule, crime is the product of stupid selfishness rather than wickedness. Human experience in the use of punishment seems to show that Beccaria and Romilly were right, and that the really effective deterrent is not the terror inspired by harsh punishments, but the realisation of the certainty of detection and conviction, with a consequent exposure to punishment, even if that punishment be moderate only. An honest and efficient police force, and a legal administration that ensures prompt and impartial trial, are obviously more likely to restrain potential wrongdoers than brutal punishments sporadically and capriciously administered.

If the theory of deterrence by punishment (as distinct from the theory of deterrence by the relative certainty of conviction and the carrying into effect of the threat of moderate punishment) is sound, then public executions and the gibbeting of malefactors are justified. Doubts of its soundness and countervailing social considerations led to the abandonment of those methods because they were undesirable and did more harm than good to the community whose welfare they were intended to serve. The case against capital punishment must depend in the ultimate resort upon similar considerations. Granted there are monsters whose extinction at first glance would seem to be in the public interest, was John Bright nevertheless right when he said: "A deep reverence for human life is worth more than a thousand executions in the prevention of murder; it is, in fact, the great security of human life. The law of capital punishment, whilst pretending to support this reverence, does in fact tend to destroy it."? Should the Commandment, "Thou shalt not kill" bind not only the particular individual, but also the collection of individuals in the corporate character of the State? In the final resort, the answer to this question must depend in a civilised State not on any quibbles of dogmatic theology, such as were used by some of the Anglican bishops in the debates in the House of Lords, or the positive assertions of legislators and lawyers, however eminent, but upon the essential principles of morality common to the great religious and ethical systems of the world.[11a]

One argument has not yet been noticed, because, important though it is, it falls into a class different from those that have been discussed. By way of defence of the existing system in England (and in the Australian States except Queensland and New South Wales) it is argued that there is no risk that an innocent person will be hanged. In strictness, this can mean no more than that no one who has not been conclusively proved to have killed, or participated in a killing, will be executed. Concealed in the argument is the proposition that no one who has not done an act deserving of capital punishment will be executed. It is plain that the concealed part of the argument begs the whole question, for it depends upon emotional judgments and not upon a fixed and unvarying standard. All of the hangman's victims have not been monsters. Ruth Ellis, hanged in London in 1955 for the murder of a man who had been her lover but who had treated her despicably, did not come within such a description. Neither did the youth Bentley, who was hanged for

[11a] The moral aspects are brilliantly discussed by Vladimir Solovyov (1853-1900) in *Morality and Legal Justice* (*A Solovyov Anthology*, ed. S. L. Frank, 1950, at pp. 212-219) and G. E. Hughes, *Capital Punishment: A Moral Discussion* (Landfall, New Zealand, September 1957, p. 243).

a killing committed by a younger companion when Bentley was actually in the hands of the police. The melancholy list of persons executed in England and in Australia who could not be thus described could be lengthened beyond the limits of space. But even in its narrowest sense the validity of the argument cannot be established. There is more than a little reason to doubt the guilt of Timothy Evans, hanged for the murder of his child. There are some real grounds for believing that John Christie, later executed for one of a series of murders, was the author of those killings. At any rate, Mr. Chuter Ede, the Home Secretary who wrote on Evans' papers, "the law must take its course", now considers a mistake was made. It is more than probable, too, that Walter Rowland, hanged in England in 1947, was not guilty of the murder for which he suffered the extreme penalty. The three cases of Rowland, Bentley and Evans have been soberly examined by three responsible M.P.'s in a book with the disturbing title *Hanged — and Innocent?*[12] Mr. Koestler deals with this aspect in some detail, and he quotes from the evidence of Sir Fitzroy Kelly (successively Solicitor-General, Attorney-General and Lord Chief Baron) to the 1864 Royal Commission, that "in many instances innocent men have been capitally convicted, and in certain numbers of instances, few, of course, but yet formidable numbers, have actually been executed". Fallibility is the mark of human institutions, and if capital punishment be otherwise necessary and desirable, it might be contended that the risk of error, deplorable though it may be, would not be a sufficient reason to abstain from its use. Such an argument is contrary to morality, because the penalty exacted precludes rectification of a miscarriage of justice. But to argue thus is plainly a different matter from defending the institution by the obviously untrue argument that mistaken executions are impossible.

Each of the books reviewed discusses the immediate and far from inconsiderable harm that is done to society by the retention of capital punishment. Mr. Gardiner quotes a prison governor who told the Select Committee on Capital Punishment (1929-1930), "I am certain young people copy what they read in the Press as regards these murder cases", and supplied instances to support this statement. The authors stress, too, the undesirable effects upon some members of the community of the gruesome formalities that attend a killing by the State. Strange as it may seem to the ordinary man, there is never lack of candidates for the post of executioner. Aspiring hangmen may be unusual creatures but there are elements of sadism in the best of human beings, and the achievement of a healthy form of society requires that cruelty should be condemned by public opinion and confined within the narrowest possible limits, and that nothing should be done to encourage its expression.

The extent to which executions have diminished in number affords an indication that those who administer justice are no longer as strongly persuaded of its utility and desirability as was once the case. In England, the average annual number of executions has been 12 or 13. Until recently in the U.S.A., with a population of nearly 170 million, the number of executions (some for crimes other than murder) has declined from a peak of 199 in 1935 to 62 in 1953, 83 in 1954, 76 in 1955 and 65 in 1956. In Australia, with a population of 9 millions, we do not average an execution a year; even in the four States in which the penalty of death remains on the statute book, it is the policy of Labour administrations, very rarely departed from, not to

[12] R. T. Paget, Q.C., M.P., Sidney Silverman, M.P., and Christopher Hollis, M.P. (1953). See also Michael Eddowes, *The Man on Your Conscience* (1955); F. Tennyson Jesse, *Trials of Evans and Christie (Notable British Trials,* 1957), Intro.

carry out the sentence, whilst under Liberal governments the death sentence is commuted in all but the most unusual circumstances.

The time when nations will cease to execute spies and traitors will not be seen while wars, hot or cold, inflame national passions and create a climate of fear and hatred. But plainly the distaste for death as a punishment for crimes that affect the individual and only indirectly the State is growing more general, and the complete abandonment of capital punishment as a feature of the criminal law is not far distant. The English Homicide Act, 1957 (5 & 6 Eliz. 2, c. 11) defining the kind of cases in which the death penalty may be imposed seems to be aimed at intentional killings committed in the course of enterprises undertaken by persons who have chosen deliberately to follow or to live by criminal pursuits: although the decision of the Court of Criminal Appeal in *Reg.* v. *Vickers*[12a] indicates that the Act has not narrowed the range of capital murders as much as was at first thought, and as Parliament really intended. It must be conceded that the argument for capital punishment as a deterrent has much more substance in such cases, but the power of reprieve will still exist in respect of those murderers, and its exercise may deprive the legislation of such logic as it has and introduce an element of uncertainty in its application.

The history of the movement against capital punishment is a very revealing chapter in the still unfolding story of man as a social animal. The real meaning, psychologically considered, of the insistence on retaining the death penalty, and its relation to ancestral memories and subliminal fears, have not yet been elucidated. But considered temporally, the successes of the movement have been rapid. The advance in human compassion between the reign of Henry VIII when, if Holinshed is to be believed,[13] 72,000 or an average of 2,000 a year, were hanged, and the reign of Elizabeth II when society is satisfied with a monthly victim, or less, has been very great. In a little over a century the ghastly business of killing by the State has become the exception rather than the rule. This development has been due to many factors. Not the least of them has been the constant agitation by sensitive human beings who have subscribed to the belief that cruel punishments debase the society that uses them. Sir Ernest Gowers, Mr. Gerald Gardiner and Mr. Arthur Koestler can justly be numbered in that goodly company.[14]

These three books provoke a reflection which is perhaps beyond their immediate purpose, but which is highly relevant to the question which is implicit in any discussion of capital punishment. It is that scientifically conceived research into the factors that result in homicides is badly needed. What society wants to know, as Mr. Christopher Hollis has pointed out, is not what is an effective deterrent at the moment of execution, but what is an effective deterrent at the moment of murder. This knowledge cannot be gained without exhaustive investigations carried out by persons adequately trained for the task. In England between 1900 and 1950, there were 7,454 murders known to the police; of the persons who committed these

[12a] (1957) 3 W.L.R. 326.

[13] He is not. See 1 Radzinowicz, *op. cit.* 139.

[14] Mr. Koestler's book is marred by errors which could have been avoided if the proofs had been carefully checked by a lawyer. The Departmental Committee on Corporal Punishment was the Cadogan, and not the Atkin Committee (38). On 40 presumably "Lord Chief Justice Collins" is Lord Justice Collins. "Mrs. Woolmington" (133) seems to be a slip for "Mrs. Merrifield". There are other similar mistakes, but they do not affect the substance of the exposition, and they should not deter lawyers from a perusal of what is a vigorous and passionately sincere examination of a subject of great social significance.

killings, 1,674 took their own lives as well. That may indicate that the suicides feared arrest and trial, or it may be that there were deeper, and to the ordinary individual, much less comprehensible motives impelling their conduct, but the deed as well as its aftermath certainly suggest that they were not restrained by fear of death. During the same period, 1,273 persons who killed were declared to be insane.[15] The Royal Commission on Capital Punishment found that murderers whose sentences had been commuted to prison terms rarely committed fresh crimes of violence when released, and that it was common for them to become useful citizens; convicted murderers whom it would be unsafe to release are in the category of the mentally abnormal and diagnosable as such.[16] Albert Morris, of Boston University, has investigated over 2,700 murders and non-negligent manslaughters, about one third of the killings of that kind that occurred in U.S.A. between June 1, 1950 and May 31, 1951. He reported:

> Only 37 were clearly planned or intended to gain economic, political or other considered ends such as relief from suffering (as in so-called mercy killings) or even a planned vengeance. The large number of cases of stabbing, beating with and without weapons, strangling and pushing is associated with quarrels in which the killer simply makes use of a bottle, a poker, a tyre iron, or whatever happens to be handy and who resorts to feet and fists, if there is nothing more serviceable at his disposal.

Professor Morris concludes also that generally murder is an impulsive, unplanned crime.

> Murder is, in many respects, an atypical crime. It tends to be non-repetitive; most murderers commit the crime but once . . . It tends also to be chiefly an offence whose immediate victims are relatives, friends and acquaintances rather than strangers. If you are to be killed, the chances are overwhelmingly in favour of its being done by one of your relatives and friends and not by a gangster or someone bent on robbery.[17]

The investigations of the Royal Commission led to conclusions not dissimilar from those of Professor Morris. They found confirmation of the opinion expressed by an eminent jurist, Sir John Macdonnell, who had early in this century conducted a survey of 208 cases of murder. Sir John Macdonnell's analysis was tentative only, but he observed,

> I am inclined to think that this crime is not generally the crime of the so-called criminal classes, but is in most cases rather an incident in miserable lives in which disputes, quarrels, angry words and blows are common. The short history of a large number of cases which have been examined might be summed up thus:— Domestic quarrels and brawls; much previous ill-treatment; drinking, fighting, blows; a long course of brutality and continued absence of self-restraint. The crime is generally the last of a series of acts of violence.
>
> There is, however, a clearly marked class of murders, of rare occurrence, the motive of which is robbery committed by habitual criminals and forming the climax, and usually the termination, of a career of crime.

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[15] See Sir E. Gowers, *op. cit.* 91, and *cf.* the authors (*supra* n. 12) of *Hanged — and Innocent?* (1953) 269-270.

[16] *Report*, at 228-9.

[17] A. Morris, *Homicide: An Approach to the Problem of Crime* (1955) 14-15.

Among his then findings were that the great majority of murderers are men, and the majority of victims are women, most of them wives, mistresses or sweethearts; that more murders were committed on Saturday than on any other day and that nearly half the murders took place between 8 p.m. and 2 a.m.; and that most murders were committed in densely populated urban areas.

The Australian community provides an ideal field for research into the factors that give rise to homicide. Our numbers are not yet so large as to make the investigation unwieldy, and as yet the homogeneous "old Australian" population can be distinguished from newcomers. The offence is readily identifiable and the salient facts are commonly ascertainable without much difficulty. A sociological investigation, competently organised and conducted, should provide facts that may illuminate many dark places, both in regard to aberrant human behaviour and to firmly cherished misconceptions about criminal punishment. It might supply us, too, with validated information for use in efforts to achieve what should be the primary objective of a sound criminal law administration, the prevention of crime.

One concluding observation may be offered. The impious nature of murder has probably a great deal to do with popular abhorrence.

> Most sacrilegious murder hath broke ope
> The Lord's annointed temple, and stole thence
> The life o' th' building.[18]

But the addition that murder makes to life's insecurities, involving as it does the ending of a human life by violent or secret means, and its stimulation of the fears that assail us all, must have contributed a good deal to the unanimity of the social shock it creates and the strength of the demand that it should be harshly punished. Yet the extensive use of the internal combustion engine as a means of transport confronts us with a record of human carnage which is regarded almost with indifference by the community at large, and with a feeling of impotence by those whose business it is to devise means of lessening it. Professor Morris has offered some observations on the American scene that can readily be adapted to our own:

> Our response to 36,000 traffic fatalities a year appears both less vigorous and less emotional than our reaction to 7,000 criminal homicides, but those who are killed accidentally are just as dead, and just as unwillingly so, as those who are killed by negligence or by malice. In fact there is some basis for arguing that there is in a high proportion of cases as much logic in attaching "blame" to killings by accident as to killings with legal intent. To put it another way, I think we tend to overestimate the evilness of mind in the murderer and to underestimate it in the auto driver.

As acquisitiveness is the badge of the age, perhaps the citizen would fear the loss of his vehicle more than the loss of his liberty, and the time may be ripe for at least a revised version of the law of deodand.

[18] *Macbeth*, Act 2, Sc. 3. Macduff was, of course, speaking of the murder of a King.