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PROBLEMS OF JURY DISCRETION IN CAPITAL CASES

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Many statutes require the jury to determine whether the death penalty shall be inflicted after conviction for certain crimes. It is the purpose of this article to analyze these statutes and the reasons for their enactment; to ascertain their place in the movement against capital punishment; to discuss the problems raised by these statutes; and finally, to make recommendations for a more rational method for distinguishing between offenders who are to be capitally punished and those who are not.

The American colonial laws which imposed the death penalty were never as numerous as their English counterparts,¹ and the movement to limit capital punishment to even fewer crimes gained added momentum after the Revolutionary War. In 1788 Ohio limited capital punishment to murder.² In 1794 Pennsylvania passed the first statute dividing murder into degrees and provided that the death penalty could

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1. BYE, CAPITAL PUNISHMENT IN THE UNITED STATES 2, 3 (1919); SUTHERLAND, CRIMINOLOGY 367 (1924). With regard to the English law, see 4 BL. COMM. *18 (where it is said that one hundred and sixty crimes were punishable by death); HALL, THEFT, LAW AND SOCIETY 85 (1935) (where it is said that the total number of capital crimes at the end of George III's reign was two hundred and twenty-two). For a breakdown of the number of capital statutes enacted during different periods of English history, see RADZINOWICZ, A HISTORY OF ENGLISH CRIMINAL LAW 4, 5 (1948).

In regard to the colonial law, see Keedy, *History of the Pennsylvania Statute Creating Degrees of Murder*, 97 U. OF PA. L. REV. 759 (1949); the Duke of York's Laws, 1 N.Y. COLONIAL LAWS 1664-1719, 20 (1894) which made ten crimes punishable by death; Acts and Laws of His Majesty's English Colony of Connecticut (1750) wherein twelve offenses are capital; BYE, *supra*, where it is said most New England colonies made twelve offenses capital, but Rhode Island punished only ten by death.

2. Shipley, *Does Capital Punishment Prevent Convictions?* 43 AM. L. REV. 327 (1909).

be imposed only upon conviction for a murder falling within the definition of the first degree.³ In 1847 Michigan permanently abolished capital punishment,⁴ and in the intervening period, several other states have followed her lead with varying degrees of permanence.⁵ In the great majority of the states the death penalty has been retained for one or more crimes, but its imposition in any given case has been made a matter for the jury to determine.

From the foregoing it is obvious that capital punishment has been limited extensively by decreasing the number of crimes punishable by death and by providing that only certain cases coming within the common law definition of the crime should be capitally punished. This second limitation has been accomplished by providing that the jury or the judge may determine upon which cases the penalty of death shall be imposed and by dividing murder into degrees.

A survey of state and Federal murder statutes shows that thirty-five states and the Federal Government provide that the jury shall determine whether the death penalty shall be imposed,⁶ four provide

3. Keedy, *supra* note 1, at 772-3.

4. Shipley, *supra* note 2, at 330. Actually, Michigan, by statute, still punishes treason by death. MICH. STAT. ANN. tit. 28, § 28,812 (1938). However, there has never been a conviction under this statute, so Michigan is generally considered as having abolished capital punishment.

5. States where the death penalty was abolished and later restored:

<i>Name of State</i>	<i>Date of Abolition</i>	<i>Date of Restoration</i>
Arizona	1917	1919
Colorado	1897	1901
Iowa	1872	1878
Missouri	1917	1919
Oregon	1914	1920
Washington	1913	1919

Chart from Bye, *Recent History and Present Status of Capital Punishment in the United States*, 17 J. CRIM. L. & CRIMINOLOGY 234, 240 (1926). Since that time Kansas, KAN. GEN. STAT. ANN. c. 21, § 21-403 (Corrick 1949), and South Dakota, S.D. LAWS 1939, c. 30, p. 40, have reinstated the death penalty. None of the states above listed have again abolished the death penalty. Maine is not shown in the above chart, because it abolished, restored, and abolished the death penalty again before the chart was made.

6. ALA. CODE tit. 14, § 318 (1940); ARIZ. CODE ANN. § 43-2903 (1939); ARK. STAT. ANN. §§ 41-2227, 43-2153 (1947); CAL. PEN. CODE § 190 (Deering 1941); COLO. STAT. ANN. c. 48, § 32 (1935); FLA. STAT. §§ 782.04, 919.23 (1), (2) (1951); GA. CODE ANN. § 26-1005 (1933); IDAHO CODE § 18-4004 (1948); ILL. ANN. STAT. c. 38, § 360 (1935); IND. ANN. STAT. §§ 10-3401, 9-1819 (Burns 1933); IOWA CODE §§ 690.2, 690.5 (1950); KAN. GEN. STAT. ANN. § 21-403 (1949); KY. REV. STAT. §§ 431.130, 435.010 (1948); LA. REV. STAT. tit. 14, § 30; tit. 15, § 409 (1950); MD. ANN. CODE GEN. LAWS art. 27, § 500 (1951); MISS. CODE ANN. § 2217 (1942); MO. STAT. ANN. § 559.030 (1953); MONT. REV. CODES ANN. §§ 94-2505, 94-7412 (1947); NEB. REV. STAT. § 28-401 (1943); Nev. Stat. 1947, c. 91, § 121; N.H. REV. LAWS c. 455, §§ 4, 5 (1942); N.J. STAT. ANN. tit. 2A, c. 113, §§ 2, 4 (1953); N.M. STAT. ANN. c. 41, § 41-2410 (1941); N.C. GEN. STAT. c. 14, § 14-17 (Supp. 1951); OHIO GEN. CODE ANN. § 12400 (1938); OKLA. STAT. tit. 21, § 707; tit. 22, § 927 (1941); ORE. COMP. LAWS ANN. tit. 23, c. 4, § 23-411 (1940); PA. STAT. ANN. tit. 18, § 4701 (Purdon 1945); S.C. CODE § 16-52 (1952); TENN. CODE ANN. §§ 10771, 10772 (1943); TEX. PENAL CODE c. 16, art. 1257 (Vernon 1936); TEX. CODE CRIM. PROC. ANN. art. 693 (1941); VA. CODE tit. 18, § 31; tit. 19, § 223 (1950); WASH. REV. CODE tit. 9, § 9.48.030 (1951); W. VA. CODE ANN. §§ 5917, 6204 (1949); WYO. COMP. STAT. ANN. § 9-201 (1945); 18 U.S.C. §§ 454, 567 (1946).

that the jury may recommend the punishment to be inflicted but that such a recommendation shall not be binding upon the judge,⁷ and six have abolished the death penalty for murder,⁸ leaving only three that still require capital punishment.⁹ Twenty-six states and the Federal Government divide murder into degrees and in addition, allow the jury to determine when a defendant convicted of first degree murder shall be sentenced to death.¹⁰ Of the four states which allow the jury to make a recommendation not binding upon the judge, only South Dakota¹¹ does not divide murder into degrees.

In summation, it is evident that all states except the six which have abolished the death penalty have limited capital punishment as it relates to murder by providing that only certain homicides coming within the common law crime shall be capitally punished. In accomplishing this limitation, the majority of states had divided murder into degrees, and have provided that the jury, or the jury and the judge together will have the right to determine the cases of first degree murder to be capitally punished.

THE STATUTES

Statutes which give the jury the right to determine the punishment may be divided into two main groups. In the first group the statutes provide for alternate penalties, the jury to impose one or the other upon conviction. Most of the states in this group have statutes

7. DEL. REV. CODE c. 149, §§ 1, 4 (1935); N.Y. PENAL LAW §§ 1045, 1045a (Discretion limited to cases wherein killing without a "premeditated design to effect the death of any individual; or without a design to effect death, by a person engaged in the commission of, or in an attempt to commit a felony. . . ." § 1044(2)); S.D. LAWS 1939, c. 30, p. 40; UTAH CODE ANN. tit. 103, c. 28, § 4 (1943).

8. ME. REV. STAT. c. 117, § 1 (1944); MICH. STAT. ANN. tit. 28, § 28.548 (1938); MINN. STAT. ANN. § 619.07 (1947); N.D. REV. CODE § 12-2713 (1943) (unless committed by a person already under life sentence for murder in the first degree); R.I. GEN. LAWS c. 606, § 2 (1938) (unless committed by a person under a sentence of life imprisonment); WIS. STAT. § 340.02 (1947).

9. CONN. REV. GEN. STAT. § 8351 (1949); MASS. ANN. LAWS c. 265, § 2 (1933); VT. REV. STAT. § 8242 (1947).

10. ALA. CODE tit. 14, § 318 (1940); ARIZ. CODE ANN. §§ 43-2227, 43-2903 (1939); ARK. STAT. ANN. §§ 41-2227, 43-2153 (1947); CAL. PEN. CODE § 190 (Deering 1941); COLO. STAT. ANN. c. 48, § 32 (1935); IDAHO CODE § 18-4004 (1948); IND. ANN. STAT. §§ 10-3401, 9-1819 (Burns 1933); IOWA CODE §§ 690.2, 690.5 (1950); KAN. GEN. STAT. ANN. § 21-403 (1949); MD. ANN. CODE GEN. LAWS art. 27, § 500 (1939); MO. STAT. ANN. §§ 559.010, 559.030 (1953); MONT. REV. CODES ANN. §§ 94-2505, 94-712 (1947); NEB. REV. STAT. § 28-401 (1943); Nev. Stat. 1947, c. 91 § 121; N.H. REV. LAWS c. 455, §§ 4, 5 (1942); N.J. STAT. ANN. tit. 2A, c. 113, §§ 2, 4 (1953); N.M. STAT. ANN. c. 41, § 2410 (1941); N.C. GEN. STAT. c. 14, § 17 (Supp. 1951); OHIO GEN. CODE ANN. § 12400 (1938); ORE. COMP. LAWS ANN. tit. 23, c. 4, § 23-411 (1940); PA. STAT. ANN. tit. 18, § 4701 (Purdon 1945); TENN. CODE ANN. §§ 10771, 10772 (1943); VA. CODE tit. 18, § 31; tit. 19, § 223 (1950); WASH. REV. CODE tit. 9, § 9.48.030 (1951); W. VA. CODE ANN. §§ 5917, 6204 (1949); WYO. COMP. STAT. ANN. § 9-201 (1945); 18 U.S.C. §§ 454, 567 (1946).

11. S.D. LAWS 1939, c. 30, p. 40.

that provide for either life imprisonment or death.¹² Four states¹³ allow the jury to impose imprisonment for a term of years up to and including life, or the death sentence. Twenty states have statutes which provide for alternate penalties, and all of these statutes divide murder into degrees except four.¹⁴

In the second main group the statutes provide for the imposition of a given penalty unless the jury by its verdict imposes another. In the majority of these states the statutes impose the death penalty unless the jury changes it to life imprisonment;¹⁵ the statutes of two states¹⁶ provide for life imprisonment unless the jury imposes death. Of the fifteen states (and the Federal Government) which have this type of statute, only five¹⁷ do not divide murder into degrees.

Two reasons have been advanced for the enactment of the aforementioned statutes. One reason bases their passage upon an attempt to prevent jury nullification;¹⁸ the other, upon the legislatures' realiza-

12. ALA. CODE tit. 14, § 318 (1940); ARIZ. CODE ANN. § 43-2903 (1939); CAL. PEN. CODE § 190 (Deering 1941); COLO. STAT. ANN. c. 48, § 32 (1935); IDAHO CODE § 18-4004 (1948); IND. ANN. STAT. §§ 10-3401, 9-1819 (Burns 1933); IOWA CODE §§ 690.2, 690.5 (1950); KAN. GEN. STAT. ANN. § 21-403 (1949); KY. REV. STAT. §§ 431.130, 435.010 (1948); MO. STAT. ANN. § 559.030 (1953); MONT. REV. CODES ANN. § 94-2505 (1947); NEB. REV. STAT. § 28-401 (1943); NEV. STAT. 1947, c. 91, § 121; OKLA. STAT. tit. 21, § 707 (1941); PA. STAT. ANN. tit. 18, § 4701 (Purdon 1945).

13. ILL. ANN. STAT. c. 38, § 360 (1935) ("... for a term not less than fourteen years."); TENN. CODE ANN. § 10771 (1943) ("... or be imprisoned for life or over twenty years. . . ."); TEX. PEN. CODE ANN. c. 16, art. 1257 (1936); TEX. CODE CRIM. PROC. ANN. art. 693 (1941) ("... or for any term of years not less than two."); VA. CODE tit. 18, § 31; tit. 19, § 223 (1950) ("... or for any term not less than twenty years.").

14. ILL. ANN. STAT. c. 38, § 360 (1935); KY. REV. STAT. §§ 431.130, 435.010 (1948); OKLA. STAT. tit. 21, § 707; tit. 22, § 927 (1941); TEX. PEN. CODE c. 16, art. 1257 (1936); TEX. CODE CRIM. PROC. ANN. art. 693 (1941).

15. ARK. STAT. ANN. §§ 41-2227, 43-2153 (1947); FLA. STAT. §§ 782.04, 919.23(1), (2) (1951); GA. CODE ANN. § 26-1001 (1933); LA. REV. STAT. tit. 14, § 30; tit. 15, § 409 (1950); MD. ANN. CODE GEN. LAWS c. 27, § 500 (1951); MISS. CODE ANN. § 2217 (1942); N.C. GEN. STAT. c. 14, § 14-17 (Supp. 1951); N.J. STAT. ANN. tit. 2A, c. 113, §§ 2, 4 (1953); N.M. STAT. ANN. c. 41, § 41-2410 (1941); OHIO GEN. CODE ANN. § 12400 (1938); ORE. COMP. LAWS ANN. tit. 23, c. 4 § 23-411 (1940); S.C. CODE § 16-52 (1952); W. VA. CODE ANN. §§ 5917, 6204 (1949); WYO. COMP. STAT. ANN. § 9-201 (1945); 18 U.S.C. §§ 454, 567 (1946).

16. WASH. REV. CODE tit. 9, § 9.48.030 (1951); N.H. REV. LAWS c. 455 §§ 4, 5 (1942).

17. FLA. STAT. §§ 782.04, 919.23(1), (2) (1951); GA. CODE ANN. § 26-1005 (1933); LA. REV. STAT. tit. 14, § 30; tit. 15, § 409 (1950); MISS. CODE ANN. § 2217 (1942); S.C. CODE § 16-52 (1952).

18. Case, J: "... the object of the legislation was not primarily to benefit a person undergoing trial for murder but, on the contrary, was to so accommodate the law to the psychology of jurors that convictions of first degree murder might be reached when deserved. . . ." *State v. Molnar*, 133 N.J.L. 327, 334, 44 A.2d 197, 202 (1945). See *Commonwealth v. Parker*, 294 Pa. 144, 152, 143 Atl. 904, 906-907 (1928). For a description of jury nullification in other times, see HALL, *THEFT, LAW AND SOCIETY* 87-98 (1935); RADZINOWICZ, *A HISTORY OF ENGLISH CRIMINAL LAW* 94-97 (1948). It is interesting to note that in those instances, the judge and the prosecuting attorneys sanctioned and encouraged the jury's "pious perjury." That does not appear to have been the case in regard to the jury's nullification of the first degree murder statute.

tion that some cases of first degree murder did not deserve to be capitally punished.¹⁹ It is quite probable that both reasons contributed to the enactment of these statutes, for they are not in conflict with each other.²⁰

Effect of the Statutes Upon Defendants' Right to Bail

Of the thirty-six jurisdictions having statutes which permit the jury to establish the punishment, twenty-five have constitutional provisions which allow the defendant bail as a matter of right, except in capital cases where proof is evident or presumption great.²¹ It is well settled that abolition of the death penalty gives all defendants bail as a matter of right, even though the crime for which they are indicted had heretofore been punishable by death.²² The question arises as to whether giving the jury the discretion in murder cases destroys the capital nature of the crime.

The majority of jurisdictions hold that the jury's privilege to impose a sentence less than death does not give the defendant a constitutional right to bail.²³ Such courts define a "capital case" as any case in which the penalty "may" be death.²⁴ However, the Missouri court has said that the phrases requiring the proof to be evident or the presumption great require that before bail is denied the evidence be such that the jury will likely impose the death penalty.²⁵

19. Harlan, J: "The statute evidently proceeds upon the ground that there may be cases of murder in the first degree, the punishment for which by imprisonment for life at hard labor will suffice to meet the ends of public justice." *Calton v. Utah*, 130 U.S. 83, 86-87 (1889). See *People v. Leary*, 105 Cal. 486, 496, 39 Pac. 24, 26 (1895).

20. See *Andres v. United States*, 333 U.S. 740, 753 (1948).

21. ALA. CONST. Art. I, § 16; ARIZ. CONST. Art. II, § 22; ARK. CONST. Art. II, § 8; CALIF. CONST. Art. I, § 6; COLO. CONST. Art. II, § 19; FLA. CONST. D.R. § 9; IDAHO CONST. Art. I, § 6; ILL. CONST. Art. II, § 7; IOWA CONST. Art. I, § 12; KAN. CONST. B.R. § 9; KY. CONST. § 16; MISS. CONST. Art. III, § 29; MO. CONST. Art. I, § 20; MONT. CONST. Art. III, § 19; NEV. CONST. Art. I, § 7; N.J. CONST. Art. I, p. 10; N.M. CONST. Art. II, § 13; OHIO CONST. Art. I, § 9; OKLA. CONST. Art. II, § 8; PA. CONST. Art. I, § 14; S.C. CONST. Art. I, § 20; TENN. CONST. Art. I, § 15; TEX. CONST. Art. I, § 11; WASH. CONST. Art. I, § 20; WYO. CONST. Art. I, § 14. A typical provision reads as follows: "All prisoners bailable by sufficient sureties, unless for capital offences when the proof is evident or the presumption great. . . ." PA. CONST. Art. I, § 14.

22. *Re Welisch*, 18 Ariz. 517, 163 Pac. 264 (1917); *Re Perry*, 19 Wis. 676 (1863); *In re Ball*, 106 Kan. 536, 188 Pac. 424 (1920). The prisoner is not entitled to bail as a matter of right if the crime of which he is accused was punishable by death at the time of its commission, even though the death penalty has been abolished subsequently. *In re Schneck*, 78 Kan. 207, 96 Pac. 43 (1908).

23. *Ex parte McCrary*, 22 Ala. 65 (1853); *Ex parte McAnally*, 53 Ala. 495 (1875); *Ex parte Fortenberry*, 53 Miss. 428 (1876); *Ex parte Dusenberry*, 97 Mo. 504, 11 S.W. 217 (1888); *Ex parte Nagel*, 41 Nev. 86, 167 Pac. 689 (1917).

24. Cases cited note 23 *supra*; note 29 *infra*; *Lee v. State*, 31 Ala. App. 91, 13 So.2d 583 (1943).

25. Walker, J: "What is meant by the presence of proof evident, or its alternative, presumption great, is simply that if the evidence is clear and strong, leaving a well-guarded and dispassionate judgment to the conclusion that the offense has been

It is uniformly held that the constitutional right to bail does not require that it be granted after conviction pending an appeal.²⁶ However, several states have statutes which are specifically applicable to post-conviction cases and use the terminology "capital cases."²⁷ If the jury has imposed the death penalty, the case is obviously capital. On the other hand, if the jury has imposed life imprisonment, there is merit in the argument that bail should be granted. This contention would be of even greater significance should the courts rule that the jury could not raise the punishment if the case is later reversed and remanded. Only one state has held that a defendant may have bail as a matter of right when the jury has determined that the punishment be life imprisonment.²⁸ The rest of the states follow the same reasoning as that applied under the constitution in a pre-conviction case.²⁹

The practical reason for the limitation upon the right to bail in capital cases is the fear that the defendant will escape. The nature of the punishment in such cases makes great the probability of flight.³⁰ The question which arises upon these constitutional sections is whether or not the jury's power to impose life imprisonment instead of death materially affects the probability of flight. It would seem that few prisoners would refuse to flee if given the opportunity merely because the jury might impose life imprisonment instead of death.³¹ Defining "capital cases" as those in which the death penalty "may" be imposed is, therefore, justifiable upon grounds of policy.

committed as charged and that the accused is the guilty agent, and that he would probably be punished capitally if the law is administered, bail is not a matter of right, and should be refused." *Ex parte* Burgess, 309 Mo. 397, 406, 274 S.W. 423, 426 (1925) (Italics added). On the basis of this dictum, the court in *Ex parte* Dawson, 190 S.W.2d 465 (Mo. App. 1945) granted bail because it felt that no jury would impose the death penalty on the basis of the evidence.

26. *Ex parte* Voll, 41 Cal. 29 (1871); *In re* Halsey, 124 Ohio St. 318, 178 N.E. 271 (1931); *Ex parte* Herndon, 18 Okla. Cr. 68, 192 Pac. 820 (1920). For a compilation of cases upon this point see Notes, 19 A.L.R. 805 (1922); 77 A.L.R. 1235-6 (1932).

27. ARK. STAT. ANN. § 43-2714 (1947); ILL. ANN. STAT. c. 38, § 609 (1935); N.J. REV. ANN. STAT. § 2:195-11 (1937); WASH. REV. CODE tit. 10, § 10.73.040 (1951).

28. Walker v. State, 137 Ark. 402, 209 S.W. 86 (1919).

29. People v. St. Lucia, 315 Ill. 258, 146 N.E. 183 (1924); State v. Baronne, 96 N.J.L. 374, 114 Atl. 809 (1921); *In re* Baronne, 97 N.J.L. 249, 117 Atl. 163 (1922); *Ex parte* Berry, 198 Wash. 317, 88 P.2d 427 (1939). See also, State v. Christensen, 165 Kan. 585, 195 P.2d 592 (1948).

30. "And where the probabilities of flight are overwhelming, there should be no bail. Thus, —2. A Capital Crime,—with guilt and conviction certain, is of this sort. . . ." 1 BISHOP, NEW CRIMINAL PROCEDURE § 255-1, 2 (2d ed. 1913). For a brief history of bail in early English law, see 4 BL. COMM. * 293-297.

31. The effect of the jury's power to determine the punishment upon the desire of the defendant to flee might depend upon the type of murder statute involved. There presumably would be less need for flight in those jurisdictions wherein the statute imposed life imprisonment with the jury having the power to impose death, than in those areas wherein the statute imposed death with the jury having a right to change the penalty to life imprisonment.

Requirement that the proof be evident or the presumption great is predicated upon the belief that the possibility of acquittal lessens the probability of flight. To say that this requires the evidence to be such as will likely cause the jury to impose the death penalty seems to misconstrue this section of the constitution. The constitution requires that before a defendant can be denied bail, as a matter of right he must be accused in a "capital case" and the proof be evident or the presumption great that he committed the crime. To require that the jury will likely impose the death penalty is to say that the presumption must be great that the crime is capital, rather than that the presumption be great that the defendant committed the crime. Aside from this, the interpretation requires that there be at least a minimum degree of certainty in the prediction of which punishment the jury will impose. Under the present approach of the majority of jurisdictions, the jury is allowed an untrammelled and arbitrary discretion. It is, therefore, extremely difficult to foretell what twelve unknown jurors will impose as the punishment at some future date. From the viewpoint of the defendant, little solace can be gained from the declaration that the jury would not be likely to impose the death penalty. Thus, the probability of flight would not be greatly alleviated. It would seem, therefore, that the defendant in a first degree murder case should not be entitled to bail as a matter of right, either before or after conviction. This would be true even after a conviction and an imposition of a life sentence, when the jury upon a retrial could raise the punishment to death.

Challenge of Prospective Jurors for Conscientious Scruples Against the Death Penalty

Conscientious scruples against the death penalty were grounds for a challenge for cause when punishment for murder was a compulsory death sentence.³² States which allow the jury to impose a sentence less than death have almost unanimously continued to permit the prosecuting attorney to challenge for cause any prospective juror with such scruples.³³ However, the juror cannot be required to state which

32. 1 THOMPSON, TRIALS §74 (2d ed. 1912); 3 WHARTON, CRIMINAL PROCEDURE §1600 (10th ed. 1918).

33. Johnson v. State, 203 Ala. 30, 81 So. 820 (1919); Leigh v. Territory, 10 Ariz. 129, 85 Pac. 948 (1906); Bell v. State, 120 Ark. 530, 180 S.W. 186 (1915); People v. Kynette, 15 Cal.2d 731, 104 P.2d 794 (1940); Shank v. People, 79 Colo. 576, 247 Pac. 559 (1926); Swain v. State, 162 Ga. 777, 135 S.E. 187 (1926); State v. Wilson, 41 Idaho 616, 243 Pac. 359 (1925); People v. Winchester, 352 Ill. 237, 185 N.E. 580 (1933); Stephenson v. State, 110 Ind. 358, 11 N.E. 360 (1886); Smith v. Commonwealth, 100 Ky. 133, 37 S.W. 586 (1896); State v. Ledet, 211 La. 769, 30 So.2d 830 (1947); Corens v. State, 185 Md. 561, 45 A.2d 340 (1945); Spain v. State, 59 Miss. 19 (1881); State v. Pinkston, 336 Mo. 614, 79 S.W.2d

punishment he would impose, given a hypothetical statement of future contingencies.³⁴

Many jurisdictions have statutory rules of criminal procedure which allow a challenge for cause for conscientious scruples against the death penalty in "capital cases" or in cases wherein the offense charged is "punishable with death." Murder cases may be brought within this class by defining "capital cases" as those wherein the death penalty "may" be imposed and by saying that "punishable by death" means "may be so punished."³⁵ A more difficult problem is presented by the statutes which require the juror's scruples to be such as to "preclude him from finding any defendant guilty of an offense punishable with death. . . ." ³⁶ Since a juror could impose life imprisonment, it is difficult to see how scruples against the death penalty could prevent convictions. The courts have sustained challenges for cause under this statute by saying that since the juror would not be "free to render any verdict that the circumstances of the case call for," he would be within the meaning of the aforementioned procedural rule.³⁷

Several courts have arrived at the same result without such statutory rules of criminal procedure. Unfettered by statute, these courts have been free to place their rule upon broad considerations of public policy. Reasons set forth for giving the state this ground for a challenge for cause have been: (1) the jurors are required to exercise their discretion upon the facts of the case, and if they have scruples against the death penalty, they cannot do this;³⁸ (2) if the state has to accept such jurors, it is being required to abandon one of the two possible verdicts of the case;³⁹ (3) the state has a right to a jury with

1046 (1935); *State v. Won*, 76 Mont. 509, 248 Pac. 201 (1926); *Taylor v. State*, 86 Neb. 795, 126 N.W. 752 (1910); *State v. Comery*, 78 N.H. 6, 95 Atl. 670 (1915); *State v. Juliano*, 103 N.J.L. 663, 138 Atl. 575 (1927); *Smith v. State*, 5 Okla. Cr. 282, 114 Pac. 350 (1911); *Commonwealth v. Pasco*, 332 Pa. 439, 2 A.2d 736 (1938); *Gonzales v. State*, 31 Tex. Cr. R. 508, 21 S.W. 253 (1893); *State v. Condit*, 101 Utah 558, 125 P.2d 801 (1942); *State v. Leuch*, 198 Wash. 331, 88 P.2d 440 (1939); *State v. Aragon*, 41 Wyo. 308, 285 Pac. 803 (1930).

34. *State v. Pinkston*, 336 Mo. 614, 79 S.W.2d 1046 (1935).

35. As to the phrase "capital cases" see *Stephenson v. State*, 110 Ind. 358, 11 N.E. 360 (1886); *State v. Ledet*, 211 La. 769, 30 So.2d 830 (1947). As to the phrase "punishable with death" see *Leigh v. Territory*, 10 Ariz. 129, 85 Pac. 948 (1906); *People v. Kynette*, 15 Cal.2d 731, 104 P.2d 794 (1940); *Smith v. Commonwealth*, 100 Ky. 133, 37 S.W. 586 (1896); *State v. Pinkston*, 336 Mo. 614, 79 S.W.2d 1046 (1935); *Taylor v. State*, 86 Neb. 795, 126 N.W. 752 (1910); *Smith v. State*, 5 Okla. Cr. 282, 114 Pac. 350 (1911); *Gonzales v. State*, 31 Tex. Cr. R. 508, 21 S.W. 253 (1893); *State v. Leuch*, 198 Wash. 331, 88 P.2d 440 (1939).

36. See statutes in *People v. Rollins*, 179 Cal. 793, 179 Pac. 209 (1919); *State v. Pinkston*, 336 Mo. 614, 79 S.W.2d 1046 (1935); *Taylor v. State*, 86 Neb. 795, 126 N.W. 752 (1910); *Smith v. State*, 5 Okla. Cr. 282, 114 Pac. 350 (1911).

37. *People v. Rollins*, 179 Cal. 793, 179 Pac. 209 (1919); *State v. Leuch*, 198 Wash. 331, 88 P.2d 440 (1939).

38. *Shank v. People*, 79 Colo. 576, 247 Pac. 559 (1926).

39. *Spain v. State*, 59 Miss. 19, 22 (1881).

an open mind on the question of punishment;⁴⁰ and (4) the challenge for cause is addressed to the sound discretion of the trial judge.⁴¹

The Iowa court in *State v. Lee*⁴² held that a prospective juror could not be challenged for cause because of conscientious scruples against the death penalty, the reason for this being that the Iowa legislature had deleted the ground for challenge for implied bias⁴³ from the statute. The Iowa court had held in another case that a juror may be examined as to scruples against capital punishment on his voir dire to form a basis for the use of counsel's peremptory challenges.⁴⁴

The best reason for allowing the state to challenge a juror for cause when he has scruples against capital punishment is stated in *Shank v. People*⁴⁵ wherein Justice Burke, in commenting upon the purpose of the statute allowing the jury to determine the punishment, said: "Its purpose to have that discretion exercised according to the facts is evident. A juror who, by reason of conscientious scruples, cannot fix the death penalty on *any* state of facts, has no discretion to exercise. . . ." ⁴⁶

This reasoning would appear to give the defendant the right to challenge for cause a juror who says that he would not consider any penalty but death. The Utah court in *State v. Thorne*⁴⁷ held that it was not error for the trial court to overrule the defendant's challenge for cause of a juror who would refuse to consider a recommendation of life imprisonment. The court said that scruples against capital punishment would be grounds for the state to challenge the juror for cause, but that since the judge could neither influence nor control the jury's discretion, the defendant's challenge could not be sustained.⁴⁸ The inconsistency of the reasoning is apparent. If sustaining the defendant's challenge for cause were interfering with the exercise of discretion, sustaining the state's challenge, when the juror had scruples against imposing death, would likewise be interfering. The better view would seem to be to allow both the defendant and the state to challenge a prospective juror for cause when the juror would be unable to exercise the discretion upon the facts of the case.

40. *State v. Juliano*, 103 N.J.L. 663, 138 Atl. 575 (1927); *Commonwealth v. Pasco*, 332 Pa. 439, 2 A.2d 736 (1938).

41. *Commonwealth v. Pasco*, 332 Pa. 439, 2 A.2d 736 (1938).

42. 91 Iowa 499, 60 N.W. 119 (1894).

43. *Id.* at 502, 60 N.W. at 120.

44. *State v. Dooley*, 89 Iowa 584, 57 N.W. 414 (1894). See also *State v. Garrington*, 11 S.D. 178, 76 N.W. 326 (1898).

45. 79 Colo. 576, 247 Pac. 559 (1926).

46. *Id.* at 582, 583, 247 Pac. at 562.

47. 41 Utah 414, 126 Pac. 286 (1912).

48. *Id.* at 419-420, 126 Pac. at 288-289.

ADMISSIBILITY OF EVIDENCE RELEVANT SOLELY TO PUNISHMENT

After the jury has been chosen and the trial has commenced, the first problem to arise in connection with statutes which permit the jury to determine the punishment is whether evidence may be introduced which is relevant solely to punishment. None of the statutes giving the jury the right to decide the penalty are useful in the solution of this question. As a result of the legislative silence, such evidence is admissible in some states but not in others. The view that evidence relevant solely to punishment is not admissible was well stated by Chancellor Walker in the case of *State v. James*,⁴⁹ wherein he said: "It is a general principle that an issue must be single and certain and that an irrelevant one will not be permitted to be tried. This rule precluded the proffered evidence, and its exclusion was correct."⁵⁰

This principle which excludes all evidence relevant solely to punishment is still applied in New Jersey.⁵¹ Certain other states have also adopted broad language prohibiting the introduction of such evidence.⁵² Chief Justice Angellotti of the California Supreme Court said in *People v. Witt*: ". . . the determination of the jury, under the provisions of section 190 of the Penal Code, as to death or life imprisonment, is necessarily to be based solely on such evidence as is admissible on the issues made by the indictment or information and the plea of the defendant."⁵³

The holding of the case was that evidence of the defendant's character and past habits was not admissible.⁵⁴ The dictum has been applied in several cases to prevent the admission of evidence of mental defects which the defendants have attempted to introduce in mitigation of punishment.⁵⁵ On the other hand, the California court has held that the state may introduce evidence that the defendant was serving a life sentence at the time of the killing for which he is being tried.⁵⁶ Such evidence was held admissible "as tending to enlighten the jury on the very important matter of the extent of the punishment to be fixed by

49. 96 N.J.L. 132, 114 Atl. 553 (1921).

50. *Id.* at 151, 114 Atl. at 560-561.

51. *Cordasco v. State*, 2 N.J. 189, 66 A.2d 27 (1949).

52. *Campbell v. Territory*, 14 Ariz. 109, 125 Pac. 717 (1912); *Gardner v. State*, 90 Ga. 310, 17 S.E. 86 (1892); *State v. Tranmer*, 39 Nev. 142, 154 Pac. 80 (1915); *Ashbrook v. State*, 49 Ohio App. 298, 197 N.E. 214 (1935).

53. 170 Cal. 104, 110-111, 148 Pac. 928, 930 (1915).

54. *Ibid.*

55. *People v. Golsh*, 63 Cal. App. 609, 613, 219 Pac. 456, 458 (1923); *People v. Troche*, 206 Cal. 35, 47, 273 Pac. 767, 772 (1928); *People v. French*, 12 Cal.2d 720, 737, 87 P.2d 1014, 1024 (1939); *cf. People v. Perry*, 195 Cal. 623, 639, 234 Pac. 890, 897 (1925); *People v. Leong Fook* 206 Cal. 64, 71, 273 Pac. 779, 781 (1928); *People v. Pantages*, 212 Cal. 237, 271-277, 297 Pac. 890, 904-907 (1931).

56. *People v. Hong Ah Duck*, 61 Cal. 387 (1882); *People v. Hall*, 199 Cal. 451, 249 Pac. 859 (1926).

the jury in the exercise of its discretion.”⁵⁷ In *People v. Larrios*,⁵⁸ the California Supreme Court indicated that a defendant should, “as against technical objections, be permitted to state, within reasonable limitations something of his background.”⁵⁹ The court, however, held that the defendant had not been injured by the lower court’s refusal to permit the introduction of the evidence.⁶⁰ In a more recent case,⁶¹ the California court, in holding that evidence of the defendant’s claimed mental defect⁶² was inadmissible, seemingly reverted to a rigid application of the dictum of the *Witt* case.⁶³ There was, however, a strong dissent in which it was stated that to refuse the introduction of such evidence was a denial of due process, because it required the jury to determine the punishment in utter ignorance of facts which related to the commission of the crime.⁶⁴ As a result of these cases, the California rules are badly confused. It is difficult to see why the state should be allowed to introduce evidence in aggravation of the penalty, while the defendant is denied the right to introduce evidence in mitigation, on the broad ground that the punishment is not an issue in the trial.

Pennsylvania⁶⁵ and several other states have allowed the admission of evidence relevant solely to the question of punishment.⁶⁶ It has long been recognized that evidence admissible upon the issue of guilt does not furnish sufficient facts upon which to determine the punishment. When the judge has a discretion as to punishment, it is customary for him to obtain facts in addition to those admitted during the trial. If one of the reasons for the statute is to separate those cases wherein capital punishment should be imposed from those wherein it should not, the desired result is more apt to be obtained by furnishing the jury with evidence of all the facts relevant to punishment.

Once it has been determined that evidence relevant to punishment should be admitted, two problems arise: (1) what evidence is so relevant; and (2) what will be its effect upon the jury in regard

57. *People v. Hall*, 199 Cal. 451, 459, 249 Pac. 859, 861 (1926).

58. 220 Cal. 236, 30 P.2d 404 (1934).

59. *Id.* at 241, 30 P.2d at 405.

60. *Id.* at 242, 30 P.2d at 406.

61. *People v. French*, 12 Cal. 2d 720, 87 P.2d 1014 (1939).

62. The defendant’s contention was that deceased’s insults over a protracted period of time had given rise to a mental defect. *Cf. Commonwealth v. Williams*, 307 Pa. 134, 160 Atl. 602 (1932).

63. See note 53 *supra*.

64. *People v. French*, 12 Cal. 2d 720, 776, 87 P.2d 1014, 1042 (1939).

65. *Commonwealth v. Parker*, 294 Pa. 144, 143 Atl. 904 (1928); *Commonwealth v. Stabinsky*, 313 Pa. 231, 169 Atl. 439 (1933).

66. *Fields v. State*, 47 Ala. 603 (1872); *Keirsev v. State*, 131 Ark. 487, 199 S.W. 532 (1917); *Fletcher v. People*, 117 Ill. 184, 7 N.E. 80 (1886); *State v. Henry*, 196 La. 217, 198 So. 910 (1940); *Prather v. State*, 14 Okla. Cr. 327, 170 Pac. 1176 (1918); *see State v. Hofer*, 238 Iowa 820, 837, 28 N.W.2d 475, 484 (1947).

to the issue of guilt. In determining the guilt or innocence of the accused, the question of relevancy is easily answered by saying that the evidence must have a rational probative value in establishing the fact in issue.⁶⁷ However, the determination of punishment is more than a mere finding of fact. It is a prediction that the ends of society will best be served by the imposition of a given penalty. Unless such a prediction is based upon facts, it will be inaccurate; yet, it is difficult to determine the relationship any given fact bears to the type of punishment that should be inflicted.

In *Fields v. State*⁶⁸ the deceased had cursed, struck and abused the defendant a few hours before the fatal shooting. The defendant had attempted to prove that the deceased was of a turbulent, violent and bloodthirsty nature, but the trial court had held such evidence inadmissible. In reversing the trial court for failure to admit the evidence, Chief Justice Peck said that the evidence "was clearly proper for the consideration of the jury in determining the turpitude of the crime"⁶⁹ in fixing the penalty. The case of *Fletcher v. People*⁷⁰ involved a motion for a new trial upon the basis of newly discovered evidence. The evidence tended to show that the defendant had fired the shot which killed the deceased only after the deceased had struck the defendant's father with a stick. The Supreme Court of Illinois held that a new trial should be granted, because the evidence placed the defendant's conduct "in a moral point of view, less objectionable" and made the act "less culpable."⁷¹ The Pennsylvania Supreme Court in *Commonwealth v. Williams*⁷² said that any evidence which the jury should "in fairness and mercy" consider in determining the "moral culpability" of the defendant is admissible.⁷³ The proffered evidence tended to show that the deceased was guilty of acts of perversion against the defendant and the defendant's sister. After reversing the case to allow the admission of the aforementioned evidence upon the issue of the defendant's sanity, the court held that the evidence should not be considered in determining the punishment because: (1) it tended only to prove the bad character of the deceased, which fact was not a mitigating factor; and (2) the killing was, at least in part, motivated by a desire for insurance money.⁷⁴ Although the terminology of the

67. 1 WIGMORE, EVIDENCE §§ 9-12 (3d ed. 1940).

68. 47 Ala. 603 (1872).

69. *Id.* at 608.

70. 117 Ill. 184, 7 N.E. 80 (1886).

71. *Id.* at 189, 7 N.E. at 83.

72. 307 Pa. 134, 160 Atl. 602 (1932).

73. *Id.* at 153, 160 Atl. at 609.

74. That most courts feel that a profit motive should aggravate the penalty, see note 111 *infra*.

above cases varies, the same basic idea is inherent in all of them. The test as formulated by these courts depends upon the blameworthiness of the act.

The second problem arising from the admission of evidence relevant solely to punishment is created by the fact that the question of punishment is determined in the same hearing as is the issue of guilt. This requires the jurors to hear the evidence as to punishment prior to the determination of guilt, and might seriously prejudice them upon the issue of guilt. Since the issue of guilt is fundamental, it is obvious that evidence which prejudices the jury upon that issue should not be admitted, regardless of its relevancy to the question of punishment.

Evidence of Other Crimes

Evidence of other crimes has been admitted in aggravation of punishment.⁷⁵ In cases wherein the trial judge exercises a discretion as to punishment, the defendant's record has long been recognized as one of the guiding factors in the judge's determination of punishment. However, even though evidence of other crimes is relevant to punishment, it should not be introduced when the jury determines the issue of guilt and the penalty at the same hearing. Such evidence is a most striking example of creating prejudice upon the issue of guilt.⁷⁶

There are three general rules for the introduction of evidence of other crimes in the traditional criminal trials. (1) Evidence of the defendant's commission of a separate and distinct crime is not admissible as proof that he committed the crime with which he is presently charged, except when the evidence has independent relevance, *e.g.*, shows intent or plan.⁷⁷ (2) Evidence of other crimes is not admissible to show the bad character of the defendant.⁷⁸ (3) Evidence of other

75. *Commonwealth v. Parker*, 294 Pa. 144, 143 Atl. 904 (1928).

76. Jones, J.: "A jury was supposed to keep separate in its 'adjudicating' mind the evidence it heard as to the defendant's guilt and, in its 'penalty-fixing' mind, the evidence as to the defendant's prior unrelated criminal offenses. The thing could, and no doubt has, actually worked out in practice in a truly shocking way." *Commonwealth v. DePofi*, 362 Pa. 229, 251, 66 A.2d 649, 659 (1949) (dissenting opinion). "Following the passage of the 1947 amendment to the Act of 1911, I have seen habitual criminals set free only because the jurors had no knowledge of the defendant's prior criminal record." McClelland, *Prior Convictions of a Defendant as Evidence in a Criminal Trial in Pennsylvania*, 22 TEMP. L.Q. 220 (1949). Mr. McClelland is the Assistant District Attorney of Erie County, Pennsylvania. The "1947 amendment" was an act designed to prevent the introduction of evidence of other crimes solely because of relevancy to punishment. The statement by Mr. McClelland clearly indicates that the evidence of other crimes was responsible for the conviction of certain defendants, even though such evidence was inadmissible upon the issue of guilt. See also 1 WIGMORE, EVIDENCE § 194b (3d ed. 1940).

77. 1 WIGMORE, EVIDENCE § 192 (3d ed. 1940).

78. *Ibid.* But see *Michelson v. United States*, 335 U.S. 469 (1948) (character witness for the defendant may be cross-examined as to a previous arrest of defendant to test qualifications of character witness).

crimes is admissible to impeach the defendant as a witness.⁷⁹ If under the above rules evidence of other crimes were introduced upon the issue of guilt, assuming such evidence to be relevant to punishment, there would be no prejudice upon either issue. However, if the evidence could not be admitted under the above rules but was allowed solely because of relevance to the issue of punishment, the defendant would be harmed upon the issue of guilt.

Only three states modified these rules to any extent after the jury was given the additional function of exercising its discretion in regard to punishment. California⁸⁰ and Oklahoma⁸¹ have held that if the defendant was serving a life sentence in the penitentiary at the time of the commission of the murder for which he was on trial, that fact could be introduced in court. While this may not actually be evidence of the commission of another crime, it does demonstrate to the jury that the defendant has previously been convicted, and so may be considered in the same aspect. The reason for the holding is to prevent the jury from imposing another life sentence, since the courts feel that such a sentence would actually constitute no added penalty.⁸² There are two possible reservations as to the wisdom of such a rule. In the first place, it ignores the fact that the issue of guilt is being determined at the same time. It is possible that the value obtained by introducing such evidence is negated by the prejudice created in the jury against the defendant upon the issue of guilt. Secondly, it seems apparent that a second life sentence would tend to prevent any consideration of parole, and the defendant might be required to remain in prison much longer than he otherwise would have. In addition, he could be deprived of certain privileges and subjected to punishments, so that the manner of serving his sentence would be changed considerably.⁸³

Pennsylvania has gone much further than California and Oklahoma. In a first degree murder case in Pennsylvania, the prosecution may introduce evidence of other crimes solely because of its relevance to punishment.⁸⁴ Of course, the judge must charge the jury that

79. 3 WIGMORE, EVIDENCE §890 (3d ed. 1940). For a critical comment upon the use of other crimes to attack credibility, see Ladd, *Credibility Tests—Current Trends*, 89 U. OF PA. L. REV. 166, 174-191 (1940).

80. *People v. Hall*, 199 Cal. 451, 249 Pac. 859 (1926); *cf. State v. Kelley*, 118 Ore. 397, 247 Pac. 146 (1926). *Contra: Hartfield v. State*, 186 Miss. 75, 189 So. 530 (1939).

81. *Prather v. State*, 14 Okla. Cr. 327, 170 Pac. 1176 (1918).

82. *People v. Hall*, 199 Cal. 451, 459, 249 Pac. 859, 861 (1926); *Prather v. State*, 14 Okla. Cr. 327, 329, 170 Pac. 1176, 1177 (1918); see also N.D. REV. CODE § 12-2713 (1943) and R.I. GEN. LAWS c. 606, § 2 (1938).

83. See SUTHERLAND, CRIMINOLOGY 374 (1924).

84. *Commonwealth v. Parker*, 294 Pa. 144, 143 Atl. 904 (1928).

such evidence may be considered only when determining punishment,⁸⁵ but it is naive to think that such a charge does not really emphasize the fact that the defendant already has a criminal record.⁸⁶ No other state has allowed the introduction of evidence of other crimes in aggravation of the penalty, but several have expressly ruled upon the question and have held such evidence inadmissible.⁸⁷ In some states, the courts have not been faced with the precise problem but, in ruling upon evidence in mitigation, have stated that no evidence is admissible unless it is admissible upon the issue of guilt.⁸⁸ The Colorado court in *Reppin v. People*⁸⁹ held that evidence of other crimes was not admissible when the defendant had pleaded guilty and the jury had only to determine the degree of the crime and the punishment to be imposed. In a similar situation a Federal Court held evidence of other crimes admissible, but in dictum said the evidence would be inadmissible in a trial wherein the defendant had pleaded not guilty.⁹⁰ However, in *State v. Hofer*,⁹¹ a case which involved the killing of a prison guard during the perpetration of an escape, the Iowa court, although expressly refusing to rule upon the point, cited the Pennsylvania authority with apparent approval.

The traditional rule that evidence of other crimes is not admissible to prove the crime charged is based upon the fact that such evidence does not have sufficient probative value.⁹² If the jury is influenced upon the issue of guilt because of the introduction of such evidence upon the question of punishment, this rule is successfully avoided. The rule that such evidence could not be introduced to show bad

85. *Commonwealth v. Williams*, 307 Pa. 134, 160 Atl. 602 (1932).

86. As to the effect of such an instruction: "The more carefully the defense attorney and the court warn the jury that its purpose is only to test credibility, the more emphasized the fact becomes that the jury has before them one who has been convicted of crime before, that he is on trial again, and that it is perhaps time that something should be done about it." Ladd, *supra* note 79, at 190. "Incidentally, the Judge in his charge to the jury must strictly limit the evidence of prior convictions to aggravation of the penalty and such evidence must not be considered in determining guilt or innocence. As though the words of a Judge at the end of a long murder trial would mean very much to a jury!" McClelland, *supra* note 76, at 224.

87. *Williams v. State*, 183 Ark. 870, 39 S.W.2d 295 (1931); *Fitzgerald v. State*, 184 Ga. 19, 190 S.E. 602 (1937); *Farris v. People*, 129 Ill. 521, 21 N.E. 821 (1889); *Call v. State*, 69 Okla. Cr. 264, 264 Pac. 643 (1928); *Watson v. State*, 123 Tex. Cr. R. 360, 59 S.W.2d 126 (1933); *State v. Barton*, 198 Wash. 268, 88 P.2d 385 (1939); *State v. Vines*, 49 Wyo. 212, 54 P.2d 826 (1936).

88. *Campbell v. Territory*, 14 Ariz. 109, 125 Pac. 717 (1902); *People v. Witt*, 170 Cal. 104, 148 Pac. 928 (1915); *Gardner v. State*, 90 Ga. 310, 17 S.E. 86 (1892); *State v. Tranmer*, 39 Nev. 142, 154 Pac. 80 (1915); *State v. Molnar*, 133 N.J.L. 327, 44 A.2d 197 (1945); *Ashbrook v. State*, 49 Ohio App. 298, 197 N.E. 214 (1935).

89. 95 Colo. 192, 34 P.2d 71 (1934).

90. *United States v. Dalhover*, 96 F.2d 355 (7th Cir. 1938).

91. 238 Iowa 820, 28 N.W.2d 475 (1947).

92. ". . . where the doing of an act is the proposition to be proved, there can never be a direct inference from an act of former conduct to the act charged; there must always be a double step of inference of some sort, a 'tertium quid'. . . . Human action being infinitely varied, there is no adequate probative connection between the two." 1 WIGMORE, EVIDENCE § 192 (3d ed. 1940).

character is founded upon the fact that it proves too much with a resultant prejudice to the rights of the defendant.⁹³ Since the courts have felt that an instruction limiting the jury's consideration of the evidence to the question of the defendant's character is not a sufficient safeguard for the accused, there is no reason to believe that they would feel that an instruction limiting the jury's consideration of evidence of other crimes to the question of punishment would be any more effective.

The reason for holding evidence of other crimes admissible in *Commonwealth v. Parker* was stated by Chief Justice von Moschzisker in the following language:

"The Act of 1925 was not passed to help habitual criminals, and we take judicial knowledge of the fact that offenders of that designation have become so general that the law, not only *lex scripta* but *non scripta*, must advance to protect society against them."⁹⁴

The date of the case, 1928, is of significance in the light of the above quotation. The use of the automobile as a rapid means of transportation was just emerging. This development widened the possible area of activity for the criminal and provided him with an easy means of escape as well. Another factor not involved in this particular case was prohibition, which provided a prize lucrative enough in the illicit liquor market to cause the formation of organized gangs. There can be little quarrel with the court for taking judicial notice of the increasing number of habitual criminals.

However, there appears to be no justification for the statement that the Act was not passed to help habitual criminals. Such a statement seems to indicate that all habitual criminals should still be capitally punished,⁹⁵ and apparently assumes that a record of past convictions is controlling upon the question of punishment, regardless of the effect of other pertinent facts. There is nothing to indicate that such was the legislative intent. Neither is there anything to indicate that the legislature intended the Act to result in convictions of first degree murder on the strength of the defendants' criminal records. Under the present system in Pennsylvania, evidence of other crimes is used to convict.⁹⁶ We have then a situation wherein the defendant, who is

93. "It may almost be said that it is because of this indubitable Relevancy of such evidence that it is excluded. It is objectionable, not because it has no appreciable probative value, but because it has too much." 1 WIGMORE, EVIDENCE § 194 (3d ed. 1940).

94. 294 Pa. 144, 154, 143 Atl. 904, 907 (1928).

95. The word "help" in the quotation must refer to the imposition of a sentence of life imprisonment rather than death since that was the only innovation made by the Act of 1925. Therefore, the court is actually saying that all habitual criminals should still be executed.

96. See note 76 *supra*.

entitled to require that the Commonwealth prove its case beyond a reasonable doubt, is being convicted upon evidence inadmissible to prove guilt, merely because the jury has been prejudiced against him. Since police methods are far from perfect and since juries continue to acquit defendants upon occasions, it must be assumed that the possibility of the defendant's being innocent is ever present. The thought that the accused might be guiltless and yet be convicted and executed because of a jury's prejudice is so utterly abhorrent to the Anglo-Saxon philosophy of criminal law that no supposed or real advantage gained in the determination of punishment could justify such a practice.

The Pennsylvania Supreme Court has attempted to place certain restrictions upon the introduction of evidence of other crimes. The first deals with the type of case in which such evidence may be introduced. It is allowable only when the defendant is a "professional criminal" engaged in a crime for profit, or when the crime is of an atrocious nature.⁹⁷ The second defines the form of the evidence, which must be either a criminal record of convictions but not a record of a mere arrest,⁹⁸ or an admission by the defendant.⁹⁹ The third allows only evidence of past crimes which were of a violent nature.¹⁰⁰ While there may be some argument as to the validity of these limitations, it must be conceded that any restriction upon the introduction of such evidence is desirable, since the rule in such instances should have been one of absolute exclusion.

The Illinois and Nevada courts have established different rules upon the question of whether the admission of evidence of other crimes must in all cases be considered as prejudicial error, unless such ad-

97. *Commonwealth v. Williams*, 307 Pa. 134, 152, 160 Atl. 602, 608 (1932). In regard to the requirement that the defendant be a "professional criminal," it was held in *Commonwealth v. Brooks*, 355 Pa. 551, 50 A.2d 325 (1947) that evidence of the defendant's record was admissible when the defendant had been convicted of only one other crime. Therefore, the requirement seems illusory.

Another problem which apparently remains unanswered is what makes a murder atrocious. It would seem that all first degree murder is atrocious by nature. For a case wherein the court has said that the murder was atrocious, see *Commonwealth v. Szachewicz*, 303 Pa. 410, 154 Atl. 483 (1931) and its companion case, *Commonwealth v. Nafus*, 303 Pa. 418, 154 Atl. 485 (1931).

98. *Commonwealth v. Jones*, 355 Pa. 594, 50 A.2d 342 (1947).

99. *Commonwealth v. Parker*, 294 Pa. 144, 143 Atl. 904 (1928) (confession of defendant may be used as evidence of other crimes); *Commonwealth v. Kurutz*, 312 Pa. 342, 168 Atl. 28 (1933) (defendant may be cross-examined to show evidence of other crimes).

100. Kephart, J.: "But in no case should a record of . . . criminal acts such as pickpocketry, adultery, embezzling, perjury, or others of a similar nature be used in aggravation of the penalty." *Commonwealth v. Williams*, 307 Pa. 134, 152, 160 Atl. 602, 608 (1932). See *Commonwealth v. Clark*, 322 Pa. 321, 185 Atl. 764 (1936) (admission of evidence of prior conviction of drunkenness held to be reversible error). See also *Commonwealth v. Harris*, 314 Pa. 81, 171 Atl. 279 (1934) (when defendant has a record of two past convictions only one of which is admissible, the entire record is admissible).

missions can be justified under the rules established for the trial of guilt. The Illinois court has held the admission of such evidence to be reversible error, because it may have prejudiced the jury upon the question of punishment even though it did not do so upon the issue of guilt.¹⁰¹ Since evidence of other crimes is relevant to punishment, this holding is hard to justify. In *People v. Popescue*¹⁰² the Illinois court held that when the judge determines the punishment upon a plea of guilty, he may consider the defendant's criminal record. In dictum, the court has said that the reason such evidence is inadmissible when the jury is determining both guilt and punishment is because of prejudice upon the issue of guilt. This case represents a clearer evaluation of the problem and would appear to undermine the reasoning of the earlier Illinois cases. Nevada has held that although the admission of evidence of other crimes is error, it is not in all cases prejudicial.¹⁰³ The approach adopted by this court has been to examine the evidence of each case to determine whether the jury could have found the defendant innocent had the evidence of other crimes not been admitted.¹⁰⁴ If it is determined that the error was not prejudicial as to guilt, the case is not reversible. It is beyond the scope of this paper to evaluate the tests employed by the various courts in determining whether error in the trial of guilt is prejudicial. Whether or not the Nevada test is good, the rule requiring the evidence of other crimes to be prejudicial as to guilt before a case may be reversed is far superior to the rulings of the Illinois cases.

Evidence in Mitigation of Punishment

Evidence of environment,¹⁰⁵ motive,¹⁰⁶ mental defect,¹⁰⁷ and provocation¹⁰⁸ has been admitted in mitigation of punishment. In

101. *Farris v. People*, 129 Ill. 521, 21 N.E. 821 (1889); *People v. King*, 276 Ill. 138, 114 N.E. 601 (1916); *People v. Heffernan*, 312 Ill. 66, 143 N.E. 411 (1924); *People v. Mangano*, 375 Ill. 72, 30 N.E.2d 428 (1940).

102. 345 Ill. 142, 177 N.E. 739 (1931).

103. *State v. Skaug*, 63 Nev. 59, 161 P.2d 708 (1945).

104. Ducker, J.: "Hence, in the presence of such enormous and clearly proven guilt we will not pause to speculate as to whether, if evidence of other offenses had been omitted the jury might have returned a verdict carrying a lesser penalty." *Id.* at 66, 161 P.2d at 711 (1945).

105. *State v. Henry*, 196 La. 217, 198 So. 910 (1941). *Contra*: *State v. Barth*, 114 N.J.L. 112, 176 Atl. 183 (1935).

106. *Nowacryk v. People*, 139 Ill. 336, 28 N.E. 961 (1891). See also *State v. Hofer*, 238 Iowa 820, 837, 28 N.W.2d 474, 478 (1947).

107. *Commonwealth v. Stabinsky*, 313 Pa. 231, 169 Atl. 439 (1933). See also *Hamblyn v. State*, 81 Neb. 148, 115 N.W. 850 (1908) (evidence that defendant suffered from mental disease led court to reduce punishment to life imprisonment); *Swartz v. State*, 118 Neb. 591, 225 N.W. 766 (1929) (punishment reduced because defendant was a drug addict). *Contra*: *Ashbrook v. State*, 49 Ohio App. 298, 197 N.E. 214 (1935); *State v. Schlaps*, 78 Mont. 560, 254 Pac. 858 (1927).

108. *Fields v. State*, 47 Ala. 603 (1872); *Keirsev v. State*, 131 Ark. 487, 199 S.W. 532 (1917); *Fletcher v. People*, 177 Ill. 184, 7 N.E. 80 (1886). See also

addition, courts have indicated that the age of the defendant¹⁰⁹ or his having been intoxicated at the time of the commission of the crime¹¹⁰ might also be considered by the jury.

All of the above evidence is obviously relevant if the courts' test of relevance is adopted, *i.e.*, those things which the jury in "fairness and mercy" should consider in determining the "moral culpability" of the defendant—and none of it would appear to have the effect of prejudicing the state's case upon the issue of guilt. Therefore, the courts would be justified in admitting such evidence purely because of its relevance to punishment.¹¹¹

Another type of evidence which the defendant should be allowed to introduce is proof that although he took part in the felony, he did not commit the act which caused the death.¹¹² To punish such a defendant capitally is to inflict the supreme penalty for the creation of a dangerous situation, and there is an inherent difference in culpability between creating a dangerous situation and performing an act which must reasonably result in death. However, such evidence should not be admissible in all cases. Suppose A and B arm themselves and go to rob a bank. Upon encountering resistance, A turns and flees without firing a shot, but B shoots and kills C. Then, assume the

Anthony v. State, 12 Okla. Cr. 494, 159 Pac. 934 (1916); *Commonwealth v. Garramone*, 307 Pa. 507, 161 Atl. 733 (1932) (sentences reduced because of provocation).

109. See *Ridge v. State*, 28 Okla. Cr. 150, 229 Pac. 649 (1924); von Moschzisker, *Capital Punishment in the Pennsylvania Court*, 20 PA. B.A.Q. 174, 187 (1949).

110. *Harris v. Commonwealth*, 183 Ky. 542, 209 S.W. 509 (1919). See also *Commonwealth v. Ritter*, 13 Pa. D. & C. 285 (1930); *Commonwealth v. Esposito*, 24 Luz. L.R. 517 (Pa. 1927); *cf. Triplett v. Commonwealth*, 272 Ky. 714, 114 S.W.2d 1108 (1938).

111. It should be noted that evidence of motive may be considered in aggravation of punishment, as well as in mitigation thereof. "Factors bearing on the moral responsibility of the defendant are almost the only matters considered in murder cases. The chief circumstance of aggravation is found where the killing was deliberately planned, for a sordid or monetary motive, without provocation by the victim. In the opinion of the courts, there can be no more aggravated killing." Hall, *Reduction of Criminal Sentences on Appeal I*, 37 COL. L. REV. 521, 531 (1937). See also *Commonwealth v. Parker*, 294 Pa. 144, 143 Atl. 904 (1928); *Commonwealth v. Williams*, 308 Pa. 134, 160 Atl. 602 (1932).

112. See *Commonwealth v. Zietz*, 364 Pa. 294, 298, 72 A.2d 282, 284 (1950) wherein Stern, J., in discussing why Capone, an accomplice of defendant's, was sentenced to life imprisonment while defendant was sentenced to death, said: ". . . moreover, not only did Zeitz take a leading and aggressive part in the holdup whereas Capone remained outside in the automobile, but it was Zietz who actually committed the murder for which all of those engaged in the affair were indicted and convicted." Other reasons advanced were that Capone was only sixteen years of age and mentally retarded. If the felony-murder rule is to be extended to make the accomplices guilty of murder when the person resisting the felony actually does the killing, such fact should be considered by the jury. That the rule has been extended that far, see *Commonwealth v. Almeida*, 362 Pa. 596, 68 A.2d 595 (1949). *Contra: Commonwealth v. Moore*, 121 Ky. 97, 88 S.W. 1085 (1905). See also *State v. Meadows*, 330 Mo. 1020, 51 S.W.2d 1033 (1932) (affirming refusal by lower court to charge that jury should consider fact that defendant had not lighted fire which caused victim's death).

same set of facts except that both A and B fire at C, but A fires wildly. In the first hypothetical both A and B are "morally" blameworthy for the creation of a dangerous-situation, but B alone is blameworthy for C's death. In the second, both are equally blameworthy, and the result should not turn upon marksmanship. To allow the introduction of such evidence would not do violence to the rule that a conspirator is liable for the acts of his confederates in the prosecution of the conspiracy. Both would still be guilty of the same crime, with only the punishments differing.

Counsel's Right to Argue Punishment

There is agreement upon the fundamental proposition that the counsel may argue the question of punishment,¹¹³ and on this point the courts have had little difficulty in spite of the fact that some of them have held that punishment is not an issue in the trial. It must be recognized that since the questions of guilt and punishment are decided at the same hearing in all states, such a rule places the counsel for the defendant in anomalous position. Whereas the prosecuting attorney's argument for the death penalty is the natural culmination of his case, the defense attorney must first argue that the defendant is not guilty, and then that even if he is guilty, he should not be capitally punished. Such an inconsistency could be very damaging to the defendant insofar as the issue of guilt is concerned. The defendant's counsel must then decide whether to ignore the issue of punishment, and avoid this danger, or to argue the issue and incur the danger. The courts apparently have not considered this discrepancy in formulating the rule that counsel may argue the question of punishment. It is probable that such a rule is desirable, although the above difficulty cannot be remedied unless a system is established which allows a separate hearing upon the question of punishment.

Since the statute permitting jury determination of the sentence is predicated upon the proposition that some but not all murderers should be capitally punished, the jury has a duty to evaluate the facts or the circumstances of each case in order to determine into which category it should fall. Counsel may not, therefore, appeal to the jury's prejudices,¹¹⁴ nor condemn the use of capital punishment in all

113. See *Commonwealth v. Brown*, 309 Pa. 515, 164 Atl. 726 (1933); *Burgunder v. State*, 55 Ariz. 411, 103 P.2d 256 (1940); *House v. State*, 192 Ark. 476, 92 S.W.2d 868 (1936); *People v. Goodwin*, 9 Cal.2d 711, 72 P.2d 551 (1937); *Biggers v. State*, 171 Ga. 596, 156 S.E. 201 (1930); *Howell v. State*, 102 Ohio St. 411, 131 N.E. 706 (1921); *Arcos v. State*, 120 Tex. Cr. R. 315, 29 S.W.2d 395 (1930); *State v. Buttry*, 199 Wash. 228, 90 P.2d 1026 (1939); *State v. Shawen*, 40 W. Va. 1, 20 S.E. 873 (1894).

114. *People v. Riley*, 208 Cal. 385, 281 Pac. 606 (1929); *State v. Blackman*, 108 La. 121, 32 So. 334 (1902).

cases,¹¹⁵ nor call the statute a farce,¹¹⁶ because such arguments tend to discourage the jury from carrying out their duty and thereby tend to negate the policy of the statute. On the other hand, any argument that is drawn as a logical inference from the facts in evidence aids the jury in evaluating the punishment to be inflicted and should be allowed.

An argument by the prosecuting attorney to the effect that if the defendant is given life imprisonment he may be paroled and return to endanger society again is a fertile source of appeals. The courts have indicated that they do not consider such an argument prejudicial, although they do regard it as improper.¹¹⁷ Whether it is prejudicial or not may depend upon the particular circumstances of the case. For instance, the argument was held to be reversible error in the case of *Berry v. Commonwealth*,¹¹⁸ because it was shown in evidence that the defendant had twice before been committed to a mental institution only to be released in a short time to continue his criminal activity. The argument appears to be improper because the parole laws do not destroy the power of the state to keep the defendant in prison until he dies if the jury imposes life imprisonment. The fact that a person sentenced for life might be released before he may safely be returned to society indicates a weakness in the parole system—not that he ought to have been executed. If the jurors impose capital punishment because of the fear that the defendant may be paroled at some future time, they are, in effect, predicting that when the question of his parole arises several years hence, he will be unworthy of it but will be paroled nonetheless. No man should be sentenced to death upon such a prophecy. To allow this argument in any case should be prejudicial error. It is difficult to imagine any contention the prosecuting attorney could make which would have as great a tendency to lead the jury to impose the death penalty. The test as to the prejudicial character of the error applied in *People v. Ramirez*¹¹⁹ was whether or not the appellate court could say that the result would have been different but for the error. Regardless of the validity of such a test upon the issue of guilt, it should not be used when a discretion is involved. By

115. *Commonwealth v. Sykes*, 353 Pa. 392, 45 A.2d 43 (1946); *State v. Garlington*, 11 S.D. 178, 76 N.W. 326 (1898).

116. *State v. Johnson*, 151 La. 625, 92 So. 139 (1922); *State v. Henry*, 196 La. 217, 198 So. 910 (1940); *State v. Tiedt*, 357 Mo. 115, 206 S.W.2d 524 (1947).

117. *People v. Riley*, 208 Cal. 385, 281 Pac. 606 (1929); *Bryan v. State*, 206 Ga. 73, 55 S.E.2d 574 (1949); *McLendon v. State*, 205 Ga. 55, 52 S.E.2d 294 (1949); *State v. Junkins*, 147 Iowa 588, 126 N.W. 689 (1910); *Lee v. Commonwealth*, 262 Ky. 15, 89 S.W.2d 316 (1936); *Jacobs v. State*, 103 Miss. 622, 60 So. 723 (1913); *Commonwealth v. Earnest*, 342 Pa. 544, 551, 21 A.2d 38, 41 (1941); cf. *McNeill v. State*, 102 Ala. 121, 15 So. 352 (1894); *Sullivan v. State*, 47 Ariz. 224, 55 P.2d 312 (1936); *People v. Sampsell*, 34 Cal.2d 757, 214 P.2d 813 (1950); *Pena v. State*, 137 Tex. Cr. R. 311, 129 S.W.2d 667 (1939); *State v. Stratton*, 170 Wash. 666, 17 P.2d 621 (1932).

118. 227 Ky. 528, 13 S.W.2d 521 (1929).

119. 1 Cal.2d 559, 36 P.2d 628 (1934).

its nature a discretion embodies to some extent the character and attitude of the person or the group exercising it. Consequently, it would be virtually impossible to determine the exact basis for the punishment imposed, and the test could never be adequately met. If this argument for capital punishment is made, the prejudicial effect of the error would not be negated by an instruction by the judge that the jury must not consider the effect of the parole laws. Courts have been admonishing prosecuting attorneys for years of the impropriety of the argument, but it continues to be made. The only way to solve this problem is to require a new trial if the parole laws are discussed in such a manner by a prosecutor.

Instructions Upon Punishment

It is well settled that the judge must instruct the jury that it may determine which of the prescribed punishments is to be imposed, and failure to so instruct is reversible error.¹²⁰ Such a rule is essential to the effective operation of the statute. Kansas has gone even further and has ruled that failure to inform the jury of its power in relation to punishment constitutes reversible error, even when the defense attorney, the prosecuting attorney, and the judge have agreed that if the jury should find the defendant guilty, the punishment shall be life imprisonment.¹²¹ It seems unnecessary under such circumstances to require that the case be reversed and remanded for a retrial. The defendant cannot complain of the error because he is receiving the lowest sentence possible under the Kansas statute for first degree murder, and the actions of the judge and the prosecuting attorney in agreeing to life imprisonment should constitute a waiver of the state's statutory right to have the jury impose the death penalty if it so desires.

There is a split of authority upon the problem of whether the judge may instruct the jury that it must consider the evidence in determining the punishment.¹²² The question arises in those states wherein evidence is admissible only if it is relevant to the issue of guilt,

120. *Smith v. State*, 205 Ark. 1075, 172 S.W.2d 248 (1943); *State v. Wilson*, 157 Iowa 698, 141 N.W. 337 (1913); *State v. Christensen*, 166 Kan. 152, 199 P.2d 475 (1948); *Vickers v. United States*, 1 Okla. Cr. 452, 98 Pac. 467 (1908); *Commonwealth v. Madaffer*, 291 Pa. 270, 139 Atl. 875 (1927); *Marshall v. State*, 33 Tex. 664 (1871); *State v. Yamashita*, 61 Utah 170, 211 Pac. 360 (1922); *Calton v. Utah*, 130 U.S. 83 (1889); *Bradshaw v. Commonwealth*, 174 Va. 391, 4 S.E.2d 752 (1939); *State v. Chaney*, 117 W. Va. 605, 186 S.E. 607 (1936).

121. *State v. Christensen*, 166 Kan. 152, 199 P.2d 475 (1948). That such a procedure does not constitute double jeopardy, see: *Application of Christensen*, 166 Kan. 671, 203 P.2d 258 (1949).

122. That determination of punishment should be based upon evidence: *Sukle v. People*, 107 Colo. 269, 111 P.2d 233 (1941); *State v. Galvano*, 4 W. W. Harr. 409, 154 Atl. 461 (Del. O. & T. 1930); *State v. Meadows*, 330 Mo. 1020, 51 S.W.2d 1033 (1932); *State v. Jefferson*, 131 N.J.L. 70, 34 A.2d 881 (1943); *State v.*

as well as in those wherein it is admissible if it is relevant solely to punishment. The reason for this is that much of the evidence upon the issue of guilt should be considered in establishing the punishment. Since many courts hold that the punishment the jury has established may not be reviewed, the jury can ignore the evidence and determine the penalty as it sees fit without fear of having it changed. However, in many respects this is analogous to the question of whether the juries were judges of the law because of their power to render general verdicts. The majority of the courts have decided that the jury has the duty to obtain the law from the judge, even if it has the power to override that law when the defendant is acquitted.¹²³ Similarly, if the rule were that the jury should consider the evidence in determining the punishment, they would have the duty to do so, despite the inherent power to disregard it. As a practical matter, it must be realized that an instruction by the court requiring the determination of punishment to be based upon the evidence would at least bring it to the attention of the jurors and thus be effective to some degree in preventing them from ignoring their duty.

In New Jersey the court in *State v. Martin*¹²⁴ held that the jury need not consider the evidence in determining the punishment. The reasoning of the case was based upon the fact that the statute did not make the recommendation a part of the verdict, thereby giving the jury an absolute discretion regardless of the facts of the case. It was immediately discarded when the legislature of that state amended the statute to read: "Every person convicted of murder in the first degree . . . shall suffer death unless the jury shall *by its verdict*, and as a part thereof, *upon and after the consideration of all the evidence*, recommend. . . ." ¹²⁵ The only other state statute which is helpful in determining this question is Tennessee's, wherein the law requires the jury to find mitigating circumstances before allowing the punishment to be reduced to life imprisonment.¹²⁶ Obviously, the circum-

Cooper, 2 N.J. 540, 67 A.2d 298 (1949); *People v. Ertel*, 283 N.Y. 519, 29 N.E.2d 70 (1940); *Howell v. State*, 102 Ohio St. 411, 131 N.E. 706 (1921); *State v. Kelley*, 118 Ore. 397, 247 Pac. 146 (1926); *Commonwealth v. Childers*, 346 Pa. 258, 27 A.2d 35 (1943); *Woodruff v. State*, 164 Tenn. 530, 51 S.W.2d 843 (1932). That determination need not be based upon evidence: *Hill v. State*, 72 Ga. 131 (1883); *State v. Henry*, 196 La. 217, 198 So. 910 (1940); *State v. McMillan*, 233 N.C. 630, 65 S.E.2d 212 (1951); *State v. Martin*, 92 N.J.L. 436, 106 Atl. 385 (1919); *State v. Jones*, 201 S.C. 403, 23 S.E.2d 387 (1943); *State v. Markham*, 100 Utah 226, 112 P.2d 496 (1941); *cf. Reece v. State*, 208 Ga. 165, 66 S.E.2d 133 (1951).

123. *E.g.*, *Commonwealth v. McManus*, 143 Pa. 64, 86 (1891) (concurring opinion); *United States v. Battiste*, 2 Sumn. 240 (U.S.C.C. Mass. 1835); *State v. Croteau*, 23 Vt. 14 (1849).

124. 92 N.J.L. 436, 106 Atl. 385 (1919).

125. N.J. STAT. ANN. §2A:113-4 (1953) (Italics added).

126. ". . . or the jury may, if they are of the opinion that there are mitigating circumstances. . . ." TENN. CODE ANN. §10772 (Williams 1934).

stances could be found only in the evidence, so it must be considered if the jury is to perform its function adequately.¹²⁷

Thus, the judge should be required to instruct the jury that it must consider the evidence in deciding the punishment. If the statute is to achieve its purpose of separating those murderers who should be sentenced to life imprisonment from those who should be sentenced to death, it is essential that the jury evaluate the evidence of the case. The fact that the jury exercises a discretion in determining the punishment should not prevent this instruction. When the judge exercises a discretion upon the question of punishment, he must consider the evidence, and there is no reason why the jurors' discretionary power should be treated any differently. To allow them to arrive at their decision arbitrarily creates a danger of the defendant being capitally punished even though the facts of his case would seem to require only life imprisonment.

In California, which has a statute providing for alternative penalties,¹²⁸ an instruction requiring the jury to find mitigating circumstances before life imprisonment may be considered justifiable has been approved.¹²⁹ Such an instruction is obviously against the literal meaning of the statute, but it was reached by the following reasoning: murder was punishable by death prior to the enactment of the statute; after the enactment of the statute, the policy of the state continued to be that murderers should be executed; and therefore, murderers should be capitally punished unless mitigating factors can be found.¹³⁰ The defect in such reasoning is the court's assumption that the statute does not alter the policy of the state. Such an instruction places an undue burden upon the defendant;¹³¹ and it is doubly unjust inasmuch as California allows the introduction of only that evidence which pertains to the issue of guilt.¹³² The result is that the defendant is required to show mitigating circumstances and then is denied the right to do so. This has led to a strong attack upon the validity of the instruction,¹³³ but it is still not regarded as reversible error.

127. *Woodruff v. State*, 164 Tenn. 530, 51 S.W.2d 843 (1932).

128. "Every person guilty of murder in the first degree shall suffer death, or confinement in the state prison for life, at the discretion of the jury. . ." CAL. PEN. CODE § 190 (Deering 1941).

129. *People v. Brick*, 68 Cal. 190, 8 Pac. 858 (1885); *People v. Kolez*, 23 Cal.2d 670, 145 P.2d 580 (1944); *People v. Williams*, 32 Cal.2d 78, 195 P.2d 393 (1948); cf. *People v. Bollinger*, 196 Cal. 191, 237 Pac. 25 (1925). See also *State v. Skaug*, 63 Nev. 59, 72, 161 P.2d 708, 713 (1945) and cases cited therein for the reason Nevada adopted the California rule.

130. *People v. Welch*, 49 Cal. 174, 179-180 (1874).

131. See *People v. Williams*, 32 Cal.2d 78, 89, 195 P.2d 393, 399 (1948) (dissenting opinion).

132. *People v. Witt*, 170 Cal. 104, 148 Pac. 928 (1915).

133. Traynor, J.: "For over fifty years precedents have accumulated condemning such instructions, even though the court has fallen short of reversing judgments be-

Pennsylvania has allowed the judge the right to comment upon the evidence concerning punishment.¹³⁴ His comment has not been limited to pointing out the various facts relevant to punishment, but may contain an appraisal of the weight of the evidence as well.¹³⁵ Such comment is not compulsory, even if requested by counsel, but if the judge discusses any evidence, he must discuss all evidence upon which comment has been requested by counsel.¹³⁶

The trial judge should be allowed to bring to the jury's attention the facts pertinent to an intelligent determination of punishment. Such comment is necessary to aid the jury in reaching a just decision, and will lead to a greater standardization of treatment of substantially similar defendants, and eventually develop a body of case law to act as a guide in the future. However, there is a danger apparent in allowing the judge to comment upon the evidence concerning punishment. He may abuse his power, and the appellate court will constantly be required to decide whether or not the trial judge has gone beyond the realm of permissible comment. The danger is inherent in the same question when applied to the trial of guilt. The difference is only one of degree, *i.e.*, what is permissible comment when the jury is making a finding of fact may be an abuse of power when the jury is exercising a discretion, and this difference of degree might well increase the number of appeals. However, this does not necessitate a rule prohibiting any comment.

Assuming then that judges' comment is desirable, we take up the second question: Should his comment be limited merely to pointing out relevant considerations? To utilize to the fullest his experience in such matters, the trial judge should be allowed to comment upon how much weight should be given the various factors in reaching the sentence. In this respect, it would be wise to differentiate between the situation wherein the existence or non-existence of a fact has been the subject of conflicting evidence, and that wherein the existence of the fact is not controverted and the sole question is its significance in the light of the other circumstances. In the first instance, the procedure involved is essentially the same as that in any other finding of

cause of them." *People v. Kolez*, 23 Cal.2d 670, 674, 145 P.2d 580, 582 (1944) (dissenting opinion).

134. *Commonwealth v. Sykes*, 353 Pa. 392, 45 A.2d 43 (1946); *Commonwealth v. Wooding*, 355 Pa. 555, 50 A.2d 328 (1947).

135. *Commonwealth v. Sykes*, *supra* note 134.

136. *Commonwealth v. Wooding*, 355 Pa. 555, 50 A.2d 328 (1947). "It may be difficult to draw a distinct line between those murderers who do, and those who do not, merit the death penalty. But this need not mean that there is no line, and it does not mean that trial judges cannot adequately instruct juries as to the factors to be considered in fixing the penalty. Yet, *Commonwealth v. Wooding* throws a protective mantle over the refusal of any judge so to charge." von Moschzisker, *Capital Punishment in the Pennsylvania Courts*, 20 PA. B.A.Q. 174, 188 (1949).

fact. However, when the evidence is not controverted or when the jury has established the facts, these facts can have no plausible significance unless they are viewed in the light of the goal to be achieved and the means through which this achievement may be hoped for. Members of the jury cannot be expected to be aware of these various theories of criminal law, and so if they are to perform their function adequately they must be advised of the significance of the many factors. The Pennsylvania court's solution, *i.e.*, that the judge shall have the *right* but not the *duty* to comment, is regrettable. Once it is established that the jury's need of assistance requires the judge to aid them, there is no reason for allowing him to avoid his responsibility.¹³⁷

In addition to permitting comment upon the evidence, Pennsylvania allows the judge to express an opinion upon the punishment to be inflicted.¹³⁸ The rule is based upon the reasoning that the jury may accept or reject the opinion.¹³⁹ In view of the judge's position in the jurors' eyes and the total unpreparedness of the average jurors to solve the problem of punishment, the great likelihood is that they will accept it.¹⁴⁰ To allow the judge to express his opinion is to discourage the jury from making an independent determination of the punishment in the light of the facts, but to allow the judge to comment upon the evidence is to aid the jury in evaluating these facts.

The problem of whether or not the trial judge should instruct regarding the possibility of parole has not been uniformly handled by the courts. Some say that although such a charge constitutes error, the error is not reversible.¹⁴¹ It also has been held that to refuse to make such a charge was not error.¹⁴² On the other hand, the New

137. "There either is or is not a rational way to approach the problem of whether a man should live or die. If there is such a way, a vigilant judiciary can define it and do much to assure that it is followed. If there is no rational basis for deciding between life and death, would not the latter penalty be better abandoned than imposed capriciously?" von Moschzisker, *supra* note 136, at 188.

138. Commonwealth v. Nafus, 303 Pa. 418, 154 Atl. 485 (1931); Commonwealth v. Stabinsky, 313 Pa. 231, 169 Atl. 439 (1933); Commonwealth v. Edwards, 318 Pa. 1, 178 Atl. 20 (1935).

139. Commonwealth v. Nafus, 303 Pa. 418, 420-421, 145 Atl. 485-486 (1931).

140. McCulloch, J.: "Jurors are generally alert to catch the slightest intimation from the Court . . . and he should exercise the utmost care and circumspection not to say anything to the jury which might be understood as an intimation of the court's opinion upon the facts of the case." Pittman v. Arkansas, 84 Ark. 292, 296, 105 S.W. 874, 876 (1907) (dissenting opinion).

141. People v. Sukdol, 322 Ill. 540, 153 N.E. 727 (1926); Postell v. Commonwealth, 174 Ky. 272, 192 S.W. 39 (1917); State v. Carroll, 52 Wyo. 29, 69 P.2d 542 (1937); *cf.* Sukle v. People, 107 Colo. 269, 111 P.2d 233 (1941) (prejudicial error even though instruction was requested by the jury).

142. State v. Dooley, 89 Iowa 584, 57 N.W. 414 (1894); State v. Lammers, 171 Kan. 668, 237 P.2d 410 (1951); Gaines v. Commonwealth, 242 Ky. 237, 46 S.W.2d 75 (1932). See Sundahl v. State, 154 Neb. 550, 48 N.W.2d 689 (1951) (defendant not entitled to instruction that jury could, by its verdict, forbid parole). See also State v. Tudor, 154 Ohio St. 249, 95 N.E.2d 385 (1950).

Jersey court apparently approves of such an instruction.¹⁴³ Due to the judge's position, an instruction would be more damaging than information by the counsel, so if argument of counsel upon this point is considered prejudicial error, obviously an instruction by the judge should be considered reversible error.¹⁴⁴

THE DUTY OF THE JURY TO DETERMINE PUNISHMENT, AND THE REQUIREMENT OF UNANIMITY

The thirty-six¹⁴⁵ statutes with which we have been primarily concerned all provide that the jury's determination of punishment is binding upon the court. We have yet to discover whether or not the jury's power constitutes a mere *right* to establish the penalty or a *duty* to do so. This problem is complicated by the wording of some of the statutes which give significance to the jury's silence upon the question of punishment.¹⁴⁶ For instance, if the statute provides for life imprisonment unless the jury changes the penalty to death,¹⁴⁷ the jury's silence automatically would impose life imprisonment. Under statutes of this type, the only time the court can be sure that the jurors are not imposing the punishment is when they specifically state in their verdict that they disagree as to the penalty. On the other hand, when they may choose between alternate punishments, their silence gives rise to the problem here being discussed.

Two states which provide for alternative penalties have special statutes which deal with the question of the jury's determination of punishment. Both the Montana¹⁴⁸ and the Missouri¹⁴⁹ statutes provide that when the jurors fail to agree upon the punishment or when they fail to assess it in the verdict, the court may establish it. In Missouri this has been held to mean that the judge may poll the jurors as to their opinions concerning the proper punishment and inflict the death penalty if the majority favor it.¹⁵⁰ Presumably, under

143. *State v. Mosely*, 102 N.J.L. 94, 121 Atl. 292 (1925). Some states place great weight upon whether the instruction is voluntary or has been requested by the jury. See *Freeman v. State*, 156 Ark. 592, 247 S.W. 51 (1923) and notes 141, 142, *supra*.

144. Stern, J.: "If the thought when thus conveyed to the jury by the district attorney was 'improper and is out of place' it would certainly be all the more objectionable when conveyed to the jury by the trial judge even though by way of a response to their express inquiry." *Commonwealth v. Johnson*, 368 Pa. 139, 147, 81 A.2d 569, 573 (1951).

145. See note 6 *supra*.

146. See notes 15 and 16 *supra*.

147. N.H. REV. LAWS c. 455, § 4 (1942); WASH. REV. CODE § 9.48.030 (1951).

148. MONT. REV. CODE ANN. tit. 94, c. 74, § 94-7412 (1947).

149. MO. REV. STAT. c. 37 § 546.440 (1949).

150. *State v. Jackson*, 340 Mo. 748, 102 S.W.2d 612 (1937).

this statute such a procedure is not required.¹⁵¹ In Idaho, because of the permissive wording of its statute, *i.e.*, "may decide,"¹⁵² the judge may establish the punishment if the jury does not.¹⁵³

Nevada's statute, which is copied after California's,¹⁵⁴ reads as follows: "Every person convicted of murder in the first degree shall suffer death or confinement in the state prison for life, at the discretion of the jury trying the same; or upon a plea of guilty the court shall determine the same. . . ." ¹⁵⁵ Both states ¹⁵⁶ allow an instruction to the effect that if the jury is silent as to punishment in its verdict, the trial judge must impose death. However, if the jury informs the court that it has been unable to agree upon the punishment, for the trial judge to impose the death penalty is error in California,¹⁵⁷ but not in Nevada.¹⁵⁸

In the California case of *People v. Hall*,¹⁵⁹ Shenk, J., said:

"If he be found guilty of murder in the first degree, it is then incumbent on the jury to fix the penalty.

" . . .

"Under the law the verdict in such a case must be the result of the unanimous agreement of the jurors and the verdict is incomplete unless, as returned, it embraces the two necessary constituent elements. . . ." ¹⁶⁰

The California interpretation shown above represents the plain meaning of the statute.¹⁶¹ The Nevada interpretation deprives the

151. "Where the jury agree upon a verdict of guilty but fail to agree upon the punishment to be inflicted or do not declare such punishment by their verdict; the court shall assess and declare the punishment and render judgment accordingly." MO. REV. STAT. c. 37 § 546.440 (1949). There is obviously no requirement that the judge assess the punishment in accordance with the majority of the jurors' desires in this section.

152. IDAHO CODE, § 18-4004 (1948).

153. *State v. Ramirez*, 34 Idaho 623, 633, 203 Pac. 279, 282 (1921).

154. Taber, C.J. "The provision . . . has been the subject of much controversy, not only in this state, but in the State of California from whose penal code the provision was adopted by the Legislature of Nevada." *Kramer v. State*, 60 Nev. 262, 273, 108 P.2d 304, 309 (1940).

155. NEV. COMP. LAWS § 10068 (1929). The statute has been amended to read: "If the jury shall find the defendant guilty of murder in the first degree, then the jury by its verdict shall fix the penalty at death or imprisonment in the state prison for life." Nev. Stat. c. 91, § 121 (1947). The use of the words "shall fix" indicates that the rule of *State v. Skaug*, 63 Nev. 59, 161 P.2d 708 (1945) may no longer be applicable.

156. *People v. French*, 69 Cal. 169, 10 Pac. 378 (1886); *People v. Adams*, 199 Cal. 361, 249 Pac. 186 (1926); *People v. Hall*, 199 Cal. 451, 249 Pac. 859 (1926); *State v. Russell*, 47 Nev. 263, 220 Pac. 552 (1923); *Kramer v. State*, 60 Nev. 262, 108 P.2d 304 (1940); *State v. Skaug*, 63 Nev. 59, 161 P.2d 708 (1945).

157. *People v. Hall*, 199 Cal. 451, 249 Pac. 859 (1926).

158. *State v. Skaug*, 63 Nev. 59, 161 P.2d 708 (1945). See note 155 *supra*.

159. 199 Cal. 451, 249 Pac. 859 (1926).

160. *Id.* at 456, 249 Pac. at 860.

161. "One who contends that a section of an act must not be read literally must show either that some other section of the act expands or restricts its meaning, that the section itself is repugnant to the general purview of the act . . . or with

defendant of an important right which the legislature intended to give. Obviously, neither state is justified under the statute in imposing the death penalty when the jury is silent as to punishment, and allowing the imposition of the death penalty when the jury is in disagreement upon the punishment is to amplify the error. In the remaining states whose statutes provide alternative penalties, the courts which have ruled upon the question have held that to accept a verdict which does not specify the punishment constitutes error.¹⁶²

It is clear that no problem can arise in those states wherein the statutes impose a specified punishment unless changed by the jury, so long as the jurors are unanimous in their agreement to remain silent or to change the punishment. However, when they affirmatively indicate that there is disagreement as to punishment,¹⁶³ or when the judge instructs them as to the effect of disagreement,¹⁶⁴ an interesting problem of statutory interpretation develops. Does this type of statute first require a determination of guilt, and then automatic infliction of the prescribed punishment unless all the jurors agree to change it?

Four states have statutes which are controlling upon this point. The Florida statute provides that a recommendation of mercy by the majority of the jury requires the court to impose a life sentence.¹⁶⁵ The Mississippi statute provides that mere disagreement (1 to 11) among the jurors regarding punishment requires the imposition of a life sentence.¹⁶⁶ It is interesting to note that the Mississippi statute was enacted after the Mississippi court had adopted the view that the judge must automatically impose the death sentence unless all twelve jurors agreed to change the punishment.¹⁶⁷ In Missouri and Montana

the legislative history of the subject matter, imports a different meaning. If the language is plain, unambiguous and uncontrolled by other parts of the act or other acts upon the same subject the court cannot give it a different meaning." 2 SUTHERLAND, STATUTORY CONSTRUCTION § 4702, pp. 335, 336 (3d ed. 1943).

162. *Smith v. State*, 23 Ala. App. 72, 121 So. 692 (1929); *Lowery v. Howard*, 103 Ind. 440, 3 N.E. 124 (1885); *State v. Christensen*, 166 Kan. 152, 199 P.2d 475 (1948); *Davis v. State*, 51 Okla. Cr. 386, 1 P.2d 824 (1931); *Mays v. State*, 143 Tenn. 443, 226 S.W. 233 (1920); *In re Voight*, 130 Wash. 140, 226 Pac. 482 (1924). See also *Commonwealth v. Curry*, 287 Pa. 553, 558, 135 Atl. 316, 317 (1926) (jury has duty to determine punishment).

163. See *People v. Hall*, 199 Cal. 451, 249 Pac. 859 (1926); *State v. Skaug*, 63 Nev. 59, 161 P.2d 708 (1945). As previously pointed out, allowable instructions in these states virtually changed their type of statute to that of one giving significance to the jury's silence.

164. See *Smith v. United States*, 47 F.2d 518 (9th Cir. 1931); *People v. Hicks*, 287 N.Y. 165, 38 N.E.2d 482 (1941); *Andres v. United States*, 333 U.S. 740 (1947); cf. *Parker v. State*, 24 Wyo. 491, 161 Pac. 552 (1916); *Cirej v. State*, 24 Wyo. 507, 161 Pac. 556 (1916) (instruction that court could exercise discretion if jury did not hold error).

165. FLA. STAT. c. 919, § 919.23(2) (1951).

166. MISS. CODE ANN. § 2217 (1942).

167. *Green v. State*, 55 Miss. 454 (1877); *Fleming v. State*, 60 Miss. 434 (1882).

disagreement of one juror regarding the punishment would make its determination the responsibility of the judge.¹⁶⁸

Counsel for the United States in *Andres v. United States*¹⁶⁹ contended that the defendant should be sentenced to death unless all twelve jurors agreed to change the punishment.¹⁷⁰ However, the United States Supreme Court held that it was error to instruct the jury that if they could not agree upon the punishment, the verdict of guilty must stand unqualified.¹⁷¹ The basis of the holding was that the determination of punishment, even though it may have been manifested by the silence of the jury, is a part of the verdict and hence, must be unanimous.¹⁷² This view is adequately sustained by the statute which expressly states that "the jury may qualify their verdict by adding thereto 'without capital punishment.'" ¹⁷³ The statutes of Wyoming¹⁷⁴ and Louisiana¹⁷⁵ use similar terms. Statutes of seven other states also indicate that the jury's determination is a part of the verdict.¹⁷⁶ That the Court in the *Andres* case felt that the jury must determine the penalty is evidenced by the fact that they said an instruction requiring unanimity upon both guilt and punishment would be proper. In states where the statute provides alternate punishments, the determination is part of the verdict and must be unanimous also, so actually results under both types of statutes are identical.

Right of Appeal from Jury's Determination of Punishment

A great number of courts hold that the jury's determination of punishment cannot be reviewed when the only error claimed is the jury's abuse of discretion.¹⁷⁷ The Iowa Supreme Court has even said

168. See notes 160, 161 *supra*.

169. 333 U.S. 740 (1947).

170. *Id.* at 746.

171. *Id.* at 748-749. *Contra*: State v. Bunk, 4 N.J. 461, 73 A.2d 249 (1950).

172. Reed, J.: ". . . In criminal cases this requirement of unanimity extends to all issues—character or degree of the crime, guilt and punishment—which are left to the jury. A verdict embodies in a single finding the conclusions by the jury upon all the questions submitted to it." *Andres v. United States*, 333 U.S. 740, 748 (1947).

173. 18 U.S.C. § 567 (1946).

174. WYO. COMP. STAT. ANN. § 9-201 (1945).

175. LA. REV. STAT. tit. 15, § 409 (1950).

176. ARK. STAT. ANN. tit. 43, § 43-2153 (1947); GA. CODE ANN. § 26-1005 (1933); MD. ANN. CODE GEN. LAWS art. 27, § 500 (1951); N.J. STAT. ANN. tit. 2A, c. 113 §§ 2, 4 (1953); ORE. COMP. LAWS ANN. tit. 23, c. 4, § 23-411 (1940); S.C. CODE § 16-52 (1952); W. VA. CODE ANN. § 6204 (1949). See N.C. GEN. STAT. c. 14, § 14-17 (Supp. 1951), which indicates that the recommendation is not a part of the verdict by the following: "Provided, if at the time of rendering its verdict in open court, the jury shall so recommend. . . ."

177. *People v. Leary*, 105 Cal. 486 (1895); *Catalina v. People*, 104 Colo. 585, 93 P.2d 897 (1939); *Morrow v. State*, 168 Ga. 575, 148 S.E. 500 (1929); *State v. O'Donnell*, 176 Iowa 337, 157 N.W. 870 (1916); *Spurlock v. Commonwealth*, 311 Ky. 238, 223 S.W.2d 910 (1949); *State v. Butner*, 220 P.2d 631 (Nev. 1950); *State*

that it would be an unconstitutional delegation of power to review the jury's determination.¹⁷⁸ On the other hand, three states have held that the court may reduce the punishment from death to life imprisonment.¹⁷⁹ The reasoning of the Idaho court's decision in this respect is as follows: the jury's determination of punishment is a judicial act; the Idaho statute allowing the jurors to determine the punishment is permissive, and if they leave the question of punishment to the judge, his determination may be modified for an abuse of discretion; the court has the power to review any decision of the district court, and the jury is as much a part of the court as the judge; therefore, the determination of the jury may be modified.¹⁸⁰

Seventeen states including Idaho have statutes giving the appellate court power to modify the lower court's sentence.¹⁸¹ There are certain advantages to be obtained by this. Since the jury is an untrained and inexperienced group, it seems that to prevent arbitrary action, there would be a greater need to review the jury's determination than to review that of the trial judge. Similarly, because of the constant change of personnel on juries, there is little likelihood of developing uniformity of treatment in corresponding cases.

The court on appeal has the ability to reverse the case if during the trial there has been an error in relation to the question of punishment. For example, if the judge failed to instruct the jury as to their power to impose less than the death sentence, the death penalty would not be allowed to stand. The problem is whether the court may then impose a lower penalty, or whether it must remand the case for a new trial. To require the latter is time consuming and expensive. If there was a prejudicial error during the trial upon the question of punishment and the jury imposed death, the court on appeal could vacate this sentence and impose life imprisonment subject to protest. If either objected, the case could be remanded for a retrial upon the question of punishment.

v. Ames, 80 N.E.2d 168 (Ct. App. Ohio 1947); *State v. Casey*, 108 Ore. 386, 213 Pac. 771 (1923); *Commonwealth v. Neill*, 362 Pa. 507, 67 A.2d 276 (1949); *Walker v. State*, 144 Tex. Cr. R. 329, 161 S.W.2d 1077 (1942); *State v. Lantzer*, 55 Wyo. 230, 99 P.2d 73 (1940).

178. *State v. O'Donnell*, 176 Iowa 337, 345, 157 N.W. 870, 873 (1916).

179. *Davis v. State*, 155 Ark. 245, 244 S.W. 750 (1922); *State v. Ramirez*, 34 Idaho 623, 203 Pac. 279 (1921); *Hubka v. State*, 40 Okla. Cr. 161, 267 Pac. 864 (1928). *But see* *Hildreth v. State*, 215 Ark. 808, 811, 223 S.W.2d 757, 758 (1949).

180. *State v. Ramirez*, 34 Idaho 623, 634, 203 Pac. 279, 282-283 (1921).

181. ORFIELD, *CRIMINAL APPEALS IN AMERICA* 104 (1939); Hall, *Reduction of Criminal Sentences on Appeal*, 37 COL. L. REV. 521, 525 (1937). Under this statute Pennsylvania has allowed modification without remanding when the judge imposed death upon a plea of guilty. *Commonwealth v. Garramone*, 307 Pa. 507, 161 Atl. 733 (1932). Since 1939 California has enacted a similar statute, but its court holdings have been contrary to those of Pennsylvania. See *People v. Odle*, 37 Cal.2d 52, 230 P.2d 345 (1951); *People v. Thomas*, 37 Cal.2d 74, 230 P.2d 351 (1951).

REMEDIAL LEGISLATION

At the outset, it must be recognized that legislation which would establish uniformity of punishment for all convicted persons would solve the problems raised in this paper. However, to return to a system of mandatory death would be to resurrect the problem of jury nullification. On the other hand, to argue for absolute abolition of capital punishment would be a waste of time, since the value of capital punishment is incapable of proof¹⁸² and there is little to add to the already voluminous literature upon the subject.¹⁸³ This discussion, therefore, will assume the merit in the differentiation of punishment based upon the facts involved in a particular case. The investigation must concern itself solely with the questions of who should make the determination and what legislation should be enacted should the jury continue to exercise the discretion in regard to punishment.

Who Should Determine Punishment

Jury.—At the present time the great majority of jurisdictions provide for the jury to decide when the death penalty shall be imposed.¹⁸⁴ In the United States, the only other agency allowed to make such a decision when the defendant has not pleaded guilty, is the trial judge, but even then the jury has a right of recommendation.¹⁸⁵ The apparent reason for having the jury perform this function is that the procedure minimizes the possibility of jury nullification. As may be deduced from the concept of jury nullification, the jury has always played an influential part in the determination of punishment by rendition of general verdicts.¹⁸⁶ They may still acquit by a general verdict when the defendant is obviously guilty, or find a defendant who is obviously guilty of murder in the highest degree, guilty of a lower degree of murder or of manslaughter. Therefore, the effect of the discretion concerning punishment is to reduce the number of cases in which the jurors will resort to nullification, not to preclude completely the possibility of that nullification.

182. SUTHERLAND, *CRIMINOLOGY* 370 (1924); see MICHAEL AND ADLER, *CRIME LAW AND SOCIAL SCIENCE* 181 (1933) for a criticism of the past studies upon the efficacy of capital punishment; and the same book at 366-367 wherein it is said that in our present state of ignorance all treatment of offenders is based upon conjecture. See also Sutherland, *Murder and the Death Penalty*, 15 *J. CRIM. L. & CRIMINOLOGY* 522 *et seq.* (1924).

183. For a partial list of articles dealing with the death penalty see Henderson, *Capital Punishment 1910-1925 (A Selected Bibliography)*, 17 *J. CRIM. L. & CRIMINOLOGY* 117 (1926). That the subject is not of sufficient importance to justify the great amount of literature already written, see SUTHERLAND, *CRIMINOLOGY* 376 (1924); BARNES AND TEETERS, *NEW HORIZONS IN CRIMINOLOGY* 426 (1945).

184. Note 6 *supra*.

185. See note 7 *supra*.

186. See note 18 *supra*.

Actually, differentiation of punishment, regardless of who exercises the discretion,¹⁸⁷ would decrease the possibility of jury nullification. If somebody else were to exercise the discretion, the jurors would be relieved of any responsibility for the punishment, other than the difference between the lowest alternative penalty for murder and the highest for a lesser included crime. They would then be able to devote their entire energies to the determination of guilt. It would seem that other methods of control, *i.e.*, special verdicts, imposed upon a system giving somebody other than the jury discretion as to punishment would be at least as effective as the present method in preventing nullification.

Exemptions from jury service tend to eliminate those people most likely to be aware of the basic considerations necessary to an intelligent choice of punishment.¹⁸⁸ Many jurors, without suitable backgrounds for the task, face a unique duty with insufficient time in which to become cognizant of what is required of them. Even if they do have the time, they lack the incentive to master relevant subjects because of the small likelihood that they will ever again be confronted with a similar situation.¹⁸⁹ The dangers of arbitrary action by jurors in determining the punishment could be minimized by requiring (1) that the exercise of discretion be based upon the evidence; (2) that evidence relevant solely to punishment be admissible only if it does not prejudice the jury upon the issue of guilt; (3) that the judge be required to comment upon the evidence; and (4) that the appellate court be allowed to modify the judgment on appeal. Even these rules would not eliminate the possibility of arbitrary action. There can be no uniformity of punishment for like offenders, and the interests of the

187. That the possibility of nullification may depend upon what the jury feels the sentencing body may do, see Michael and Wechsler, *A Rationale of the Law of Homicide*, 37 *COL. L. REV.* 1261, 1267 n. 19 (1937).

188. For some typical statutes granting exemption from jury duty see: ALA. CODE ANN. tit. 30, § 3 (1940); CAL. CIV. CODE § 200 (1949); ILL. ANN. STATS. c. 78, § 3 (1935); KY. REV. STATS. § 29.030 (1948); OKLA. STAT. ANN. tit. 38, § 28 (Cum. Supp. 1952); WYO. COMP. STAT. ANN. c. 12, § 12-103 (1945). The professional members of society—*i.e.*, attorneys, ministers, physicians, teachers, pharmacists and editors—are generally exempt from jury service. Cf. COLO. STAT. ANN. c. 95, § 1 (Cum. Supp. 1949) which reads as follows: "The judge of the courts in which the trial of the case for which prospective jurors have been summoned shall have the right to exempt from involuntary service those persons whose presence, in the opinion of the court, is necessary for the care of other persons, and those persons upon whom such service would work undue hardship. . . ."

189. "I would on no account leave to the jury either the question whether the circumstances of mitigation existed, except in the case of insanity, or the question whether the sentence should be mitigated. There is no subject on which the impression of a knot of unknown and irresponsible persons, who have to decide at a moment's notice without reflection, is less to be trusted than the question whether or not the punishment of death should be inflicted in a given case." 3 STEPHEN, A HISTORY OF THE CRIMINAL LAW OF ENGLAND 86 (1833). See also, 1 WIGMORE, EVIDENCE § 194(b) (3d ed. 1940); Michael and Wechsler, *supra* note 187, at 1310-11; and FULLER, CRIMINAL JUSTICE IN VIRGINIA 133, 161 (1931).

state as well as the defendant will be jeopardized as long as the jury is allowed to fix the punishment.

Judge or Judges.—Advantages of placing the determination of punishment at the discretion of the trial judge or of a panel of judges en banc, are (1) that the judge or judges represent an experienced group, (2) that the judge or judges are aware of the purpose of punishment, and (3) that the possibility of reversal for errors upon the problem of punishment would be greatly reduced.

If determining the punishment is left to the trial judge alone, there might be a hesitancy to assume responsibility for the imposition of the death penalty.¹⁹⁰ On the other hand, while a panel of judges might obviate the problem of undue reluctance to impose capital punishment, this solution raises procedural difficulties. Much of the evidence introduced upon the issue of guilt is relevant to the question of punishment also, and some way must be found to inform the judges who did not sit in the trial of guilt about evidence presented at that time. A copy of the record would be sufficient when the evidence was uncontroverted, but when facts are subject to conflicting testimonies, the record is of little value in determining the veracity and the reliability of witnesses. The general verdict of the jury demonstrates the finding as to the ultimate fact of guilt. Similarly, it shows that state witnesses convinced the jury of the truth of certain crucial points. However, it does not necessarily indicate that the testimony of these witnesses was believed upon all points which might have been subjects of conflicting evidence. For instance if defendant's character was brought into issue, a verdict of guilty does not declare that the state's evidence regarding his character was believed.¹⁹¹

Since both the record and the general verdict are deficient in meeting the need, if the penalty is to be determined by a panel of judges, it would probably be necessary to require the jury to find special verdicts upon disputed facts which although not controlling as to guilt are relevant to punishment.

If the system of special verdicts proved to be too cumbersome and productive of error to be of value, a system of probational reports might be devised. This would require a determination of facts relevant to punishment by a trained agency under the direction of the panel of judges. Such a report would, of course, be subject to disproof by the defendant but the contents, along with evidence introduced at the hearing as to punishment, and the verdict of the jury upon the issue

190. Note, *Should the Jury Fix the Punishment for Crimes*, 24 VA. L. REV. 462, 465 (1938).

191. 1 WHARTON, CRIMINAL LAW § 398 (12th ed. 1932); 1 WHARTON, CRIMINAL EVIDENCE § 330 *et seq.* (11th ed. 1935).

of guilt, should provide sufficient factual material upon which to exercise intelligent discretion.

As previously noted, states which provide that a judge determine the punishment allow the jury to recommend that the defendant be imprisoned for life. In Utah, New York and Delaware a judge may not impose a penalty other than death unless the jury recommends life imprisonment, although he may impose the death sentence in spite of such a recommendation if he so desires.¹⁹² In South Dakota the judge may not impose death unless the jury recommends that he do so, but similarly, he may ignore the recommendation and impose life imprisonment if he wishes.¹⁹³ The fact that the jury's recommendation is a prerequisite to the judge's exercise of the discretion makes both types of the above statutes undesirable. If a panel of judges is better qualified to determine the punishment, its exercise of discretion should not be circumscribed by requiring the concurrence of a less efficient group.

However, when the discretion as to punishment is placed in a panel of judges, the possibility of nullification very likely depends upon the jury's guess as to what the judges will do in case of conviction.¹⁹⁴ Here would appear to be the greatest value of the recommendation, for if the jury is permitted to recommend a term of life imprisonment and knows that its recommendation is likely to be considered seriously, the possibility of nullification would be further alleviated. How much weight the judges should give the recommendation is difficult to determine. It should certainly not be controlling; neither should it be arbitrarily discarded or it will lose its value in preventing jury nullification. It would be best if the judges, in reaching their determination of the punishment, would consider the recommendation of the jury only in connection with all other relevant facts.

Board of Experts to Impose Punishment.—A third possible body for the determination of punishment might be a board of experts in related fields,¹⁹⁵ whose sole function would be to prescribe the penalty.¹⁹⁶

192. DEL. REV. CODE c. 155, § 5330 (1935); N.Y. PENAL LAW § 1045; UTAH CODE ANN. § 76-30-4 (1953). The Utah statute is perhaps typical: "Every person guilty of murder in the first degree shall suffer death, or upon the recommendation of the jury, may be imprisoned at hard labor in the state prison for life, in the discretion of the court."

193. S.D. Laws 1939, c. 30, p. 40.

194. Michael and Wechsler, *supra* note 187, at 1267.

195. One suggestion is that the board be composed of "a psychiatrist or psychologist, a socialist and a lawyer." Glueck, *Principles of a Rational Penal Code*, 41 HARV. L. REV. 453, 476 (1928); cf. Gausewitz, *Considerations Basic to a New Penal Code* 11 WIS. L. REV. 480, 508 (1936) (recommended that board members be chosen for general wisdom rather than for any special background or specialty).

196. Glueck, *supra* note 195, at 477.

"It would be preferable from the standpoint of a scientific program to have these legal agencies decide only whether the offender has committed the anti-social

The proposal that such a group undertake to impose the punishment, the judge and jury having determined the guilt of the accused, has been made in regard to the whole field of criminal law¹⁹⁷ and in regard to certain limited types of offenders,¹⁹⁸ but not specifically for murder cases. The reason for this is that a board would concern itself primarily with the need for incapacitation and reformation, and since the difference between life imprisonment and the death penalty lies in the deterrent effect of the two punishments, a group of experts is not designed to function effectively in such cases. The great value of the board lies in its continued control over the prisoner.¹⁹⁹ To be effective, the experts must have it within their power to control the handling of the offender, to check his progress while he is being treated, and finally, to release him when he is fit to be returned to society. Whether or not such a program should supplant life imprisonment as the alternative to the death penalty is not in issue here. The present problem is the question of who should make the initial decision as to whether the defendant should be allowed to continue to live.

Since the board of experts is not primarily designed for determining whether the death sentence should be imposed, and since the

act, and, once having established that he has done that act, forthwith turn him over to a diagnostic board set up for the purpose of determining what further is to be done with him. This would dispose of the defense of insanity and other mental incompetency defenses. This result obviously is a desirable objective, for these defenses impede the program of protecting society. The insane criminal manifestly is a major menace to society. It would also render superfluous the orthodox legal tests on insanity and would make the division of crimes into degrees unnecessary." Harno, *Rationale of A Criminal Code*, 85 U. OF PA. L. REV. 549, 560 (1937).

197. Glueck, *supra* note 195, at 457; Gausewitz, *supra* note 195, at 499 *et seq.*

198. The Youth Correction Authority Acts are examples of the application of the suggestion to cases involving juveniles. See also HALL, LAW, THEFT AND SOCIETY 288 *et seq.* (1935) wherein Professor Hall advocates complete individualization of treatment for persons convicted of petty larceny. In 1947 the New York Legislature passed a bill providing that sexual psychopaths might be confined indefinitely until cured. Governor Dewey vetoed this bill and in 1948 the legislature directed that a study of the causes of sex crimes and the treatment for such offenders be made.

199. "§ 28 (2) The Authority shall make periodic reexaminations for all persons within its control for the purpose of determining whether or not existing orders and dispositions in individual cases should be modified or continued in force. . . ."

"§ 29 (1) The Authority shall keep under continued study all persons who are in its control and shall retain them subject to the limitations of sections 28(4) and 32, under supervision and control so long as in its judgment such control is necessary for the protection of the public."

Section 28(4) deals with the situation wherein the board fails to examine a person committed to it within two years of a previous examination. In such case, upon petition by the committed person, the court will discharge such person unless the Authority satisfies the court of the necessity of further control. Section 32 deals with steps the Authority must take to retain control over a person after such person attains a given age. A.L.I., YOUTH CORRECTION AUTHORITY ACT (Proposed Final Draft No. 1, 1940).

See also Glueck, *supra* note 195, at 477; SUTHERLAND, CRIMINOLOGY 609 (1924).

jury is an inefficient and arbitrary agency with respect to that issue, discretion as to punishment should be given either to the trial judge or to a panel of judges. The former is the more convenient procedurally, whereas the latter has substantive value in that it negates individual responsibility for the death sentence. However, one of the policies of the statutes providing for alternative punishments is to make imposition of death dependent upon the facts of the particular case,²⁰⁰ and if a judge would be hesitant to impose capital punishment because of the pressure of responsibility, he would not be inflicting the penalty required by the facts of the case. On the other hand, an adequate procedural device could be found either in the requirement of special verdicts by the jury upon facts relevant to punishment but not controlling as to guilt, or by the employment of reports prepared by a special fact-finding group. Thus it would seem best that punishment be determined by a panel of judges sitting en banc.

RECOMMENDED CHANGES IF JURY CONTINUES TO DETERMINE PUNISHMENT

It may be anticipated that legislatures will be slow to enact legislation taking the duty of determining the punishment from the jury. Therefore, it is necessary to consider what innovations might be made to improve the present system.

In recent years, there has been considerable agitation in Pennsylvania to establish a system of separate hearings for the issue of guilt and the question of punishment. Indeed, a chapter in the proposed criminal code of 1949 was designed to effectuate such a system. However, Governor Duff vetoed the proposed code, so both are still determined at a single hearing. The necessity of a statutory provision establishing a second hearing for determining punishment is most pressing in Pennsylvania, because in that state evidence of other crimes may be introduced prior to conviction.²⁰¹ The system of double hearings would seem to assume that the exercise of discretion must be based upon the evidence, and that evidence relevant solely to punishment is admissible only in the second hearing. Equally obvious is the fact that evidence relevant solely to punishment cannot prejudice the jury upon the issue of guilt, since it would be admissible only in the second hearing. Other benefits to be derived from this system would be the elimination of the anomaly of the defendant's attorney asking for an acquittal and a life sentence in the same argument, the clarification of the issues in the jurors' minds, and the simplification of instructions, *i.e.*,

200. See note 30 *supra*.

201. *Commonwealth v. Parker*, 294 Pa. 144, 143 Atl. 904 (1928).

there would be no necessity for instructions limiting the use of evidence to one or the other issue. In addition, an error in regard to punishment would not necessitate disturbing the conviction. With regard to this, the proposed statute should require the verdict of guilty to be recorded immediately after its rendition. This would avoid discrediting that verdict when the only error pertained to punishment, and would also prevent a juror from changing his mind subsequent to the rendition of the verdict but prior to the determination of punishment. It is obvious that the statute should require that the hearing as to punishment follow immediately after the rendition of the verdict. The jury should not be subjected to outside pressure between the two hearings, and also, since much of the evidence relevant to guilt is relevant to punishment as well, the hearing upon the latter issue should be held while all the evidence is still fresh in the jurors' minds.

Another provision should require the trial judge to sentence the defendant to life imprisonment, should the jury disagree as to punishment. This would avoid the necessity of obtaining a new jury and having a rehearing upon the question of punishment. Admittedly, this provision would tend to limit the infliction of capital punishment, but such a result would, as demonstrated at the beginning of this paper, be quite in accord with the present trend. There is no reason to believe that such a result would be detrimental to society's interests. Other provisions should require the judge to comment upon the weight and significance of the evidence, and allow the appellate court to lower the sentence from death to life imprisonment if it finds prejudicial error in the hearing upon punishment or feels that the jury has abused its discretion. The value of these sections has already been discussed.

While it is submitted that a panel of judges is better able to determine the question of punishment, it would seem that if the jury is to continue to perform this function, the above statutory provisions ought to be enacted. The system today is haphazard and arbitrary in most states, and in Pennsylvania it creates an obvious injustice insofar as the prosecution uses the jury's discretion concerning punishment as a pretext to introduce evidence which may prejudice them upon the issue of guilt. The proposed legislation would tend to minimize the arbitrary character of the jury's decision, and more important, would prevent prejudice upon the issue of guilt without depriving the jury of relevant evidence upon which to exercise its discretion concerning punishment.