Journal of Criminal Law and Criminology

Volume 51
Issue 3 *September-October*

Article 3

Fall 1960

Background Evidence in Murder Cases

Joel F. Handler

BACKGROUND EVIDENCE IN MURDER CASES

JOEL F. HANDLER

The author is Assistant to the Reporter of the Advisory Committee on Civil Rules of the Judicial Conference of the United States, Professor Benjamin Kaplan of the Harvard Law School. Previously, Mr. Handler served as Law Secretary to Justice Nathan L. Jacobs of the New Jersey Supreme Court and as a teaching fellow at the Harvard Law School. He is a law graduate, magna cum laude, of Harvard, where he was an editor of the law review.

In capital cases today, jurors frequently perform two functions: in a single verdict they not only decide the question of guilt but also, where guilt is found, they assess the punishment. In this article, Mr. Handler tackles the troublesome question whether evidence concerning the defendant's background, relevant solely to the issue of aggravation or mitigation of punishment, should be placed before the jury during the trial, thus risking jury utilization of punishment-oriented evidence in resolving the precedent question of guilt. The author analyzes the numerous and often conflicting cases, discusses the California and Pennsylvania statutes which provide for a separate jury trial on the issue of punishment, and then suggests a solution which he believes will encourage the presentation of background evidence and at the same time prevent convictions based upon the "bad man" theory. —EDITOR.

With relatively minor exceptions,[1] the function of the jury in the non-capital criminal case is restricted to the determination of the guilt or innocence of the accused. The evidence that the jury receives, in the performance of its duty, is limited in the following manner: the evidence must be relevant to guilt or innocence; and, even though it is relevant and does not violate any other exclusionary rule, it nonetheless may be excluded if its potentiality for prejudice is too great, or if it may cause a confusion of issues or unfair surprise.[2] It is the task of the sentencing judge to fix the punishment, and, for obvious reasons, the information that the sentencing judge receives has none of the above limitations. It is usually provided by statute that the judge receive a presentence report,[3] which, if properly prepared, will cover the entire background of the defendant. The aim of the report is to bring before the judge all of the facts of the life of the defendant pertinent to the purposes of criminal punishment.[4]

In the capital case the function of the jury has been changed. Aside from the eight states which have abolished the death penalty,[5] all of the states now provide an alternate penalty for first-degree murder.[6] And, in all but two of these states,[7] the

[1] See, *e.g.*, ARK. STAT. ANN. §§43–2145, 2306 (1947); IND. STAT. ANN. §9–1819 (Burns 1956).

[2] See MCCORMICK, EVIDENCE ch. 16, 17 (1954).

[3] *E.g.*, FED. R. CRIM. P. 32 (c); N. J. RULES 3:10 (b); *cf.* N. Y. CODE CRIM. PROC. §931.

[4] See State v. White, 27 N.J. 158, 183, 142 A.2d 65, 79 (1958) (concurring opinion).

[5] ALASKA COMP. LAWS ANN. §65–411 (Cum. Supp. 1958); DEL. CODE ANN. tit. 11, §571 (1953); ME. REV. STAT. c. 130, §1 (1954); MICH. STAT. ANN. tit. 28, §28.548 (1938); MINN. STAT. ANN. §619.07 (1947); N. D. REV. CODE §12–2713 (1943) ("If a person shall be convicted of murder in the first degree while under a life sentence upon a conviction of murder in the first degree, he may be punished by death."); R. I. GEN. LAWS §11–23–2 (1957) ("Every person who shall commit murder while under sentence of imprisonment for life shall be hanged by the neck until dead."); WIS. STAT. ANN. ch. 940.01 (1958).

[6] ALA. CODE tit. 14, §318 (1940) (automatic death if murder committed while serving a life term); ARIZ. STAT. ANN. §13–453 (1956); ARK. STAT. ANN. §§41–2227, 43–2153 (1947); CAL. PEN. CODE §190 (Deering 1941); COLO. REV. STAT. §40–2–3 (1953); CONN. GEN. STAT. tit. 53–10 (1958); FLA. STAT. §§782.04, 919.23(1)(2) (1944); GA. CODE ANN. §26–1005 (1953); HAWAII REV. LAWS §291–1, 3, 5 (1955); IDAHO CODE §18–4004 (1948); ILL. ANN. STAT. c. 38, §360 (1935); IND. ANN. STAT. §§10–3401, 9–1819 (Burns 1956); 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 (1951); MD. ANN. CODE GEN. LAWS art. 27, §413 (1957); MASS. GEN. LAWS ANN. c. 265, §2 (1959) (automatic death if murder was "committed in connection with the commission of rape or attempt to commit rape"); MISS. CODE ANN. §2217 (1946) (court must fix punishment at imprisonment for life if the jury is unable to agree on the punishment); MO. STAT. ANN. §559.030 (1953); MONT. REV. CODE ANN. §94–2505 (1947) (same provision as Mississippi, *supra*); NEB. STAT., 1947, c. 91, §121; N. H. REV. LAWS c. 585.4 (1955); N. J. STAT. ANN. tit. 2A, c. 113, §§2, 4 (1953); N. M. STAT. ANN. §40–24–10 (1953); N. Y. PENAL LAW §§1045, 1045a (1944); N. C. GEN. STAT. §14–17 (1953); OHIO REV. CODE ANN. §2901.01 (1954); OKLA. STAT. ANN. 21: 707 (1958); ORE. REV. STAT. 163.010 (1957); PA. STAT. ANN. tit. 18, §4701 (Purdon 1959); S. C. CODE §16–52

responsibility of determining life or death has been shifted to the jury. California and Pennsylvania excepted,[8] in the states where the jury is required to fix the penalty, the jury must determine guilt or innocence and punishment in a single verdict. In view of this additional function, the problem of whether background evidence, relevant solely to punishment, should be presented to the jury in the single-verdict situation has been troubling commentators[9] and courts[10] alike. The experiences in California and Pennsylvania prior to their statutory solutions illustrate the fluctuating attitudes that exist even within a single jurisdiction.

At an early date, the California court, in *People v. Atherton*,[11] held that the circumstances of the crime were relevant to the issue of punishment, and for that reason, should be considered by the jury. After citing the statutory power of the jury to determine punishment, the court said: "In determining between these penalties juries should be, and doubtless are, influenced by the degree of atrocity with which the particular murder has been attended."[12] The trial court's instruction was premised on the fact that what was involved was a bald assassination as distinguished from an equal combat. The Supreme Court held that the instruction would be proper if there was evidence to support it; the alternate-penalty statute did not intend that the fair combatant suffer the same penalty as the assassin. Six years later, in *People v. Hong Ah Duck*,[13] the prosecution was permitted to introduce evidence that the accused was presently serving a term of life imprisonment. In affirming the ruling, the court was careful to point out that the evidence was not "offered as affecting in any manner the question of defendant's guilt" and the jury was so instructed. It was offered solely on the question of punishment; its object was to inform the jury that if they fixed the punishment at life imprisonment there would be no addition to defendant's punishment. The court said: "In order to exercise that discretion [on the issue of punishment] in a wise and intelligent manner, the jury should be put in possession of all the facts of the case; and if it be true, as it was in respect to this defendant, that a verdict fixing the punishment at imprisonment for life, would in effect be no punishment at all, we think it was proper to inform the jury of that fact."[14]

The decisions in *Atherton* and *Hong Ah Duck* permitted the introduction of evidence in aggravation of the penalty in the sense that the purpose of such evidence was to influence the jury in favor of the death penalty. When it came time for the defendants to introduce background evidence in mitigation of punishment, the California courts became restrictive. The leading decision is *People*

(1952); S. D. CODE OF 1939, Supp. 13.2012 (1952); TENN. CODE ANN. §39-2405 (1955); TEX. PENAL CODE c. 16, art. 1257 (1948); UTAH CODE ANN. §76-30-4 (1953); VT. STAT. ANN. tit. 13, §2303 (1958) (automatic death for an "unrelated second offense"); VA. CODE tit. 18, §31, tit. 19, §223 (1950); WASH. REV. CODE tit. 9, §9.48.030 (1957); W. VA. CODE OF 1955 ANN. §§5917, 6204; WYO. STAT., 1957, §6-54; 18 U. S. C. §§454, 567 (1946).

[7] In New York and Utah the jury recommendation is not binding on the trial court. See statutes cited note 6 *supra*. In some states the appellate court can modify the jury verdict on punishment. See, *e.g.*, State v. Ramirez, 34 Idaho 623, 203 Pac. 279 (1921); Anthony v. State, 12 Okla. Cr. 494, 159 Pac. 934 (1916); and see, generally, Hall, *Reduction of Criminal Sentences on Appeal I*, 37 COLUM. L. REV. 521, 530 (1937). In South Dakota the trial court may disregard a verdict of death and impose life imprisonment, but a jury verdict of life imprisonment is binding. See statute cited note 6 *supra*.

[8] CAL. PENAL CODE §190.01 (Deering 1957 Pocket Supp.): "The guilt or innocence of every person charged with an offense for which the penalty is in the alternative death or imprisonment for life shall first be determined, without a finding as to penalty. If such person has been found guilty of an offense punishable by life imprisonment or death, there shall thereupon be further proceedings on the issue of penalty, and the trier of fact shall fix the penalty. . . . The determination of the penalty shall be in the discretion of the court or jury trying the issue of fact on the evidence presented . . . ." PA. STAT. ANN. tit. 18, §4701 (Purdon 1959): "In the trial of an indictment for murder, the court shall inform the jury that if they find the defendant guilty of murder in the first degree, it will be their further duty to fix the penalty therefor, after hearing such additional evidence as may be submitted upon that question. Whenever the jury shall agree upon a verdict of murder in the first degree, they shall immediately return and render the same, which shall be recorded, and shall not thereafter be subject to reconsideration by the jury, or any member thereof. After such verdict is recorded and before the jury is permitted to separate, the court shall proceed to receive such additional evidence not previously received in the trial as may be relevant and admissible upon the question of the penalty to be imposed upon the defendant, and shall permit such argument by counsel, and deliver such charge thereon as may be just and proper in the circumstances."

[9] *E.g.*, REPORT, ROYAL COMM. ON CAPITAL PUNISHMENT 194-207 (1953); A. L. I., MODEL PENAL CODE §210.6 (Tent. Draft No. 9, 1959); Knowlton, *Problems of Jury Discretion in Capital Cases*, 101 U. PA. L. REV. 1099 (1953); Hayden, *Criminal Law and Procedure*, 13 RUTGERS L. REV. 105, 124 (1958); 29 J. CRIM. L. & C. 883 (1939).

[10] *Compare* State v. Mount, 30 N. J. 195, 152 A. 2d 343 (1959) *with* Ashbrook v. State, 49 Ohio App. 298, 197 N.E. 214 (1935).

[11] 51 Cal. 495 (1876).

[12] *Id.* at 496.

[13] 61 Cal. 387 (1882); *accord*, People v. Hall, 199 Cal. 451, 249 Pac. 859 (1926).

[14] People v. Hong Ah Duck, *supra* at 393.

v. Witt,[15] decided in 1915. In that case, appellant, the non-killing member of a burglary team, unsuccessfully attempted to introduce evidence of his character and previous habits. He argued that "inasmuch as the jury had the right to assess the punishment in the event of conviction at either death or life imprisonment appellant was entitled to have admitted for their consideration evidence as to matters not otherwise relevant or material"[16] to the issue of guilt. The Supreme Court affirmed the refusal of the trial court on the ground that the determination of the punishment by the jury must be based "solely on such evidence as is admissible on the issue made by the indictment or information and plea of the defendant."[17]

Following the *Witt* decision, the court disallowed the introduction of evidence that the defendant was more susceptible to "blinding passion" because he had suffered a fairly recent sunstroke.[18] But, two years later, in 1925, the court in *People v. Perry*,[19] allowed the defendant to introduce a very broad range of evidence tending to prove mental weakness short of legal insanity.[20] This decision was overruled *sub silentio* three years later in *People v. Troche*[21] which held that the jury must decide the question of punishment solely on the evidence relevant to guilt or innocence, and "the circumstances connected with the offense."[22] In 1934 the court articulated an approach contrary to *Witt* and *Troche*. In *People v. Larrios*[23] the trial court excluded evidence that the defendant was on a peaceful mission at the time he encountered the deceased. By way of dictum, the Supreme Court said that even though the evidence had no direct bearing on the homicide, "a person on trial for his life should, as against technical objections, be permitted to state, within reasonable limitations, something of his background."[24] But any liberalization that the *Larrios* court might have intended was snuffed out in the decision of *People v. French*.[25] In that case the court held that evidence of a long and exceedingly bitter family feud, tending to show mental derangement short of legal insanity, cannot be considered by the jury in mitigation of punishment. The court re-affirmed the rigid approach of the *Witt-Troche* line. There was a strong dissent which argued that it was a denial of due process to require the jury to fix the penalty in ignorance of any facts which relate to the commission of the crime other than those which show the circumstances connected with the offense.[26]

In summing up these decisions, the court, in *People v. Barclay*,[27] stated the rule in California as follows: evidence of good or bad habits and background is generally inadmissible, but the jury may consider the facts and circumstances of the offense itself. The line between the two is far from clear; this is especially so when the court cites the *Perry* case in support of the rule restricting the jury to a consideration of the facts and circumstances of the offense itself.[28] When one compares the decision in *Hong Ah Duck*, which has been followed,[29] allowing the introduction of the fact that the accused is serving a life term, with *Witt*, *Troche*, and *French*, the California rule works unfairly to the defendant. A legislative solution was passed in 1956 providing for two separate trials. The jury is first to consider the question of guilt; if the defendant is found guilty, there is to be a second trial on the question of punishment. At the second trial evidence both in aggravation and mitigation of punishment may be introduced.[30]

Pennsylvania took a different approach. In mitigation of punishment the defendant was permitted to introduce a wide range of background evidence including mental deficiency short of legal

[15] 170 Cal. 104, 148 Pac. 928 (1915).
[16] *Id.* at 110, 148 Pac. at 930.
[17] *Id.* at 111, 148 Pac. at 930.
[18] People v. Golsh, 63 Cal. App. 609, 219 Pac. 456 (1923).
[19] 195 Cal. 623, 234 Pac. 890 (1925).
[20] None of the defendants claimed insanity. On behalf of defendant Montijo, the following evidence was introduced: five psychologists testified as to his mental deficiency; his father related the defendant's life story during which he recalled an injury to the boy's head, his incorrigibility as a youth, reformatory commitment, occasional nervous seizures and mental peculiarities. It was also shown that the defendant was a narcotics user, and there was expert testimony that his intellectual quotient, as gauged by the Binet-Simon test, was no higher than a normal 11 year old. The defense claimed error because the jury was instructed on legal insanity. The court held this not to be erroneous because "the right of the jury . . . to consider mental weakness as a mitigating circumstance was not infringed in the slightest degree by anything said in the instructions." *Id.* at 639–40, 234 Pac. at 897.
[21] 206 Cal. 35, 273 Pac. 767 (1928).
[22] See also People v. Valenzuela, 7 Cal.2d 650, 63 P.2d 142 (1936); *but cf.* People v. Selph, 106 Cal. App. 704, 289 Pac. 918 (1930).
[23] 220 Cal. 236, 30 P.2d 404 (1934).
[24] *Id.* at 241, 30 P.2d at 405; *cf.* People v. Pantages, 212 Cal. 237, 297 Pac. 890 (1931).
[25] 12 Cal.2d 720, 87 P.2d 1014 (1939).
[26] *Id.* at 776, 87 P.2d at 1042.
[27] 40 Cal.2d 146, 252 P.2d 321 (1953).
[28] See also People v. Selph, cited note 22 *supra*.
[29] People v. Hall, cited note 13 *supra*. *Hong Ah Duck* and *Hall* have been cited with approval in People v. Barclay, *supra* at 158, 252 P.2d at 327, and in People v. Reese, 47 Cal.2d 112, 301 P.2d 583, 585 (1956), *cert. den.*, 355 U.S. 929 (1958).
[30] See note 8 *supra*.

insanity, early environment, impaired health, intoxication, drug addiction, and lack of schooling.[31] In aggravation of punishment the prosecution introduced evidence of prior unrelated crimes.[32] The rule seemed simple—admit all evidence relevant to the issue of punishment. Still, the courts of that state were not without their difficulties. On mitigation, the court at one time seemed to hold that the defendant would not be permitted to introduce background evidence where the crime was at least in part committed for profit.[33] But this limitation apparently disappeared.[34] The rule allowing the introduction of prior unrelated crimes, not unexpectedly, produced violent dissent.[35] At one point the court began to engraft qualifications. In *Commonwealth v. Williams*[36] the court limited the record of prior convictions to those involving habitual offenders, professional criminals engaged in crimes for profit, or to murders of a cold blooded or atrocious nature. Further, "... [I]n no case should a record of such criminal acts as pickpocketry, adultery, embezzling, perjury or others of a similar nature be used in aggravation of penalty."[37] The limitations were later rejected[38] and the law of Pennsylvania, prior to its statutory reform, was that in aggravation of penalty records of all prior convictions were admissible even though the defendant had been placed on probation, or pardoned, including convictions in a foreign jurisdiction; but proof simply of arrest was not admissible.[39] Pennsylvania's statutory reform followed the California solution; if there is a finding of guilty, at the second hearing the court shall receive such "additional evidence not previously received in the trial as may be relevant and admissible upon the question of penalty."[39a]

Many courts, either in anticipation or the difficulties encountered by California and Pennsylvania, or for other reasons, have refused to permit the introduction of evidence relevant solely to the issue of punishment.[40] Others, in varying degrees, have permitted the introduction of the evidence,[41]

[31] See, *e.g.*, Commonwealth v. Simmons, 361 Pa. 391, 65 A. 2d 353, *cert. den.*, 338 U. S. 862 (1949); Commonwealth v. Brooks, 355 Pa. 551, 50 A.2d 325 (1947); Commonwealth v. Stabinsky, 313 Pa. 231, 169 Atl. 439 (1939); *cf.* Commonwealth v. Elliott, 371 Pa. 70, 89 A. 2d 782 (1952), *aff'd*, 373 Pa. 489, 96 A. 2d 122, *cert. den.*, 345 U.S. 976 (1953); Commonwealth v. Irelan, 341 Pa. 43, 17 A.2d 897 (1941); Commonwealth v. Hawk, 328 Pa. 417, 196 Atl. 5 (1938).

[32] See, *e.g.*, Commonwealth v. Parker, 294 Pa. 144, 143 Atl. 904 (1928); Commonwealth v. Thompson, 389 Pa. 382, 133 A.2d 207, *cert. den.*, 355 U.S. 849 (1957).

[33] Commonwealth v. Williams, 307 Pa. 134, 160 Atl. 602 (1932). The defendant attempted to introduce evidence that "the crime resulted from passion (not generated at the time the crime was committed), rather than from a savage and hoplessly antisocial nature"; that the deceased was an "ill-tempered, fault-finding degenerate, and that, if defendant was not justified in killing... [him], society was well rid of him." *Id.* at 153, 160 Atl. at 608. In addition to the holding stated in the text, the court seemed to imply that this evidence should be excluded because it tended to aggravate rather than mitigate punishment. It would seem, however, that this judgment should be left to defense counsel.

[34] See Commonwealth v. Davis, 396 Pa. 158, 150 A.2d 863 (1959); Commonwealth v. Wilson, 394 Pa. 588, 148 A.2d 234 (1959).

[35] See, *e.g.*, Musmanno, J., dissenting in Commonwealth v. Thompson, cited note 32 *supra* at 429, 133 A.2d at 231: "Now that this Court has apparantly thrown open the floodgates on all trivial as well as serious offenses of an accused's past, it is possible for an innocent man to be sent to the electric chair not on the evidence of murder but because of the suit of peccadillos which the prosecution forces him to wear. No other state permits so bizarre and tragic a performance. Nothing in history since Justinian, nothing in all the logic of Aristotle, nothing in the mathematics of Euclid, nothing in the science of Newton or Einstein can justify so unAmerican, so unjust, and so unreasonable a procedure." See also Jones, J., dissenting in Commonwealth v. DePofi, 362 Pa. 229, 66 A. 2d 649, 659 (1949), quoted in text at note 88 *infra*; Biggs, Hastie, and McLaughlin, J. J., in United States v. Price, 258 F. 2d 918 (3rd Cir.), *cert. den.*, 358 U. S. 922 (1958); Knowlton, cited note 9 *supra* at 1111; *but see* McClelland, *Prior Convictions of a Defendant as Evidence in a Criminal Trial in Pennsylvania*, 22 Temp. L. Q. 220 (1949).

[36] Cited note 33 *supra*.

[37] *Id.* at 152, 160 Atl. at 608.

[38] Commonwealth v. Cannon, 386 Pa. 62, 123 A.2d 675 (1956); Commonwealth v. Thompson, cited note 32 *supra* at 400, 133 A.2d at 217.

[39] See Commonwealth v. Thompson, *supra* at 400, 133 A.2d at 217 for a collection of the Pennsylvania decisions.

[39a] See note 8 *supra*.

[40] *E.g.*, Campbell v. Territory, 14 Ariz. 109, 125 Pac. 717 (1912); Goosby v. State, 153 Ga. 496, 112 S.E. 467 (1922); State v. Schlaps, 78 Mont. 560, 254 Pac. 858 (1927); Ashbrook v. State, cited note 10 *supra*.

[41] *E.g.*, Fields v. State, 47 Ala. 603 (1872); Kiersey v. State, 131 Ark. 487, 199 S.W. 532 (1917); State v. Owen, 73 Idaho 394, 253 P.2d 203 (1953); Nowacryk v. People, 139 Ill. 336, 28 N.E. 961 (1891); Fletcher v. People, 117 Ill. 184, 7 N.E. 80 (1886); Harris v. Commonwealth, 183 Ky. 542, 209 S.W. 509 (1919); State v. Henry, 196 La. 217, 198 So. 910 (1940), *rev'd on other grounds*, 197 La. 999, 3 So.2d 104 (1941); State v. Mount, cited note 10 *supra*; State v. Brown, 60 Wyo. 379, 151 P.2d 950 (1944). Compare also Commonwealth v. Hardy, 3 Mass. 278, 290 (1807): "Sewall & Parker, Justices, said that they were not prepared to say that testimony of general character should be admitted in behalf of the defendant in all criminal prosecutions; but they were clearly of the opinion that it might be admitted in capital cases, in favor of life." Apparently at this time there was some question as to whether the accused was permitted to introduce evi-

but they have failed to articulate and come to grips with the difficulties encountered when embarking on this course of action.

The arguments in favor of the admissibility of background evidence were forcefully stated in the early decisions allowing the evidence. In *Fields v. State*[42] the defendant was not permitted to introduce evidence that the deceased was a violent, turbulent, revengeful, blood-thirsty, dangerous man, reckless of human life, and had previously attacked and publicly abused the defendant. After discussing the function of the jury at common law, the Supreme Court said:

> "The common law, on this subject, has been greatly changed by our statutes, and the duties and responsibilities of juries largely increased; consequently, evidence that would have been irrelevant and impertinent at the common law, becomes proper and necessary, under our statutes, to enable juries to discharge their newly imposed duties rightly and properly.... Although the violence and outrage committed about the person of the defendant in this case might not have been sufficient to reduce the offense from murder to manslaughter, yet, we hold it was clearly proper for the consideration of the jury in determining the turpitude of the punishment to be inflicted."[43]

In *Fletcher v. People*[44] a dispute arose concerning the grazing of cattle in a particular area. One Steinbourne, an employee of the deceased, testified that one of the defendants, Merritt Fletcher, shot and wounded Steinbourne and shot and killed the deceased. Subsequent to the trial the parties discovered an affidavit made by Steinbourne prior to the trial stating that Merritt did not shoot Steinbourne until after Steinbourne had struck Merritt's father with a stick and that Merritt did not shoot the deceased until after the deceased had thrown Merrit to the ground. The court held that there must be a new trial because this evidence was relevant to the question of punishment. After citing the alternate-penalty statute, the court said:

> "It necessarily follows that in order to determine the degree of punishment to be imposed for this offense, evidence must be admissible which would not have been admissible, or, if admitted, could have availed nothing at common law.... If Steinbourne's attention had been called to this statement on the trial, and he admitted that he had made it, and that it was true, it must have tended to have the effect to put the conduct of Merritt in a less unfavorable light before the jury. ...If Merritt... did not shoot until his father had been struck by Steinbourne, his conduct, however inexcusable, is certainly, in a moral point of view, in some degree less objectionable than it would have been if he had shot before. And if he did not shoot and kill Hope until after Hope had thrown him on the ground, his act is also, in this respect, in some degree, however slight it may be, less culpable than it would have been if he had shot him before when he might without difficulty, have retreated from the conflict."[45]

In *Nowarcryk v. People*[46] the defendant was not permitted to introduce evidence of prior ill feeling between the defendant and the father of the deceased, and that on the day before the homicide the father, armed with a knife, went searching for the defendant with the expressed intention of killing him. In holding error, the court said:

> "The evident design of the [alternate-penalty] statute is that the punishment shall be proportioned to the turpitude of the offense, and it follows that evidence having a direct and legitimate bearing upon that question should be given to the jury, so as to enable them to fix the punishment understandingly and justly.... [I]t is clear from the evidence that... the defendant's intention was not to kill her, but to kill her father. If, then, so late as the day next previous to that on which the homicide was committed,... [the father] was in persistent pursuit of the defendant... seeking to take his life... the act of the defendant in attempting to

dence of good character. See 1 WIGMORE, EVIDENCE §56 (3d ed. 1940).

In Texas, by statute, it is provided that in all prosecutions for felonious homicide "the State or the defendant shall be permitted to offer testimony as to all relevant facts and circumstances surrounding the killing and the previous relationship existing between the accused and the deceased, together with all relevant facts and circumstances going to show the condition of the mind of the accused at the time of the homicide, which may be considered by the jury in determining the punishment to be assessed." TEX. PEN. CODE ANN. art. 1257a (Vernon 1936). The evidence that this paper is concerned with extends beyond that covered by the above statute. *Compare* King v. State, 156 Tex. Cr. R. 508, 243 S.W.2d 846 (1951) *and* Wiggins v. State, 115 Tex. Cr. R. 434, 27 S.W.2d 236 (1930) *with* State v. Henry, State v. Mount, and State v. Owen, *supra*, discussed in text at note 50 *infra*.

[42] 47 Ala. 603 (1872).

[43] *Id.* at 606.

[44] Cited note 41 *supra*.

[45] *Id.* at 189, 7 N.E. at 83.

[46] Cited note 41 *supra*.

kill . . . [the father] and killing his daughter may possibly have been regarded by the jury as manifesting a somewhat less degree of turpitude than that shown by the offense proven, viz., an unprovoked assassination."[47]

The idea expressed in the three cases was that the alternate-penalty statutes for murder imposed an additional duty on the jury; in order for the jury to satisfy understandingly and justly that obligation, it was necessary that it receive evidence relevant to that question. The later decisions, while their expression is somewhat broader, contain the same idea. "[T]he purpose . . . is that they [the jury] should be able intelligently to fix the penalty, and, to that end, that they ought to know what manner of man it is upon whom they are being asked to impose sentence,—his criminal proclivities, his demonstrated attitude toward law and order, and, on the other hand, such mitigating factors as may exist in the nature of impaired health, mental deficiencies, state of intoxication, or other circumstances."[48] The analogy is often made to the role of the sentencing judge in the non-capital case, where it is usually required that he receive a pre-sentence report. Justice Francis, arguing for the admissibility of evidence of mental disorder short of legal insanity, drew the analogy in the following manner:

"In dealing with every type of criminal offense, a judge fixes the punishment. . . . However, in no instance can a judge, no matter how long his experience in administering the criminal law or how vast his knowledge of human nature, sentence a defendant without first obtaining a presentence report. . . . Such reports are prepared by men trained in the field of criminal responsibility. They range over the entire life of the offender—his religious training, education, environment, family life, work habits, medical history, if any, and the like—in an endeavor to bring to the mind of the court all of the elements pertinent to the degree of the punishment and potentiality for rehabilitation. . . . On the basis of my own experience as a County Court judge, I do not believe that adequate or just sentences can be meted out without such investigations."[49]

On the basis of this reasoning a broad variety of background evidence has been allowed. In *State v. Henry*[50] the court held that it was error not to permit the defense to introduce evidence that the accused's mother died when the defendant was four years old and that an aunt had taken care of her until she was fourteen; that the child ran away from home because her father was cruel to her; that she married at an early age and subsequently lived as a lewd woman; in short, that she was a child of misfortune and a victim of circumstances. In *State v. Owen*[51] the offer of proof was that the defendant's mother was a full-blooded American Indian; she died when the defendant was six years old and he had no real home life in the ordinary meaning of the term; he lived from time to time with his sister and other relatives; he had to provide for himself since the age of fourteen; he learned the foundary moulding trade and was so occupied until two weeks before the homicide. In *State v. Mount*[52] the defense offered to show that the accused was five years old when his father entered the army; that his mother then took up with a paramour and lived in open adultery; that at one time he was placed in an orphanage; when he was sixteen he was sent to live with his father who was then living with another woman and that the father was " 'a man of loose morals, who flaunted his immorality in the presence of the boy.' "

Other offers have been more limited in scope. Courts have held that evidence may be introduced showing mental deficiency short of legal insanity,[53] intoxication,[54] war records,[55] prior ill feeling between the accused and the deceased,[56] and circumstances aggravating to the defendant such as statements of the deceased reflecting upon the chastity of the defendant's daughter,[57] and that the deceased was sexually abusing his wife, the

[47] *Id.* at 342, 28 N.E. at 963.

[48] Commonwealth v. Simmons, cited note 31 *supra* at 401, 65 A.2d at 358.

[49] State v. White, cited note 4 *supra* at 183, 142 A.2d at 79 (concurring opinion).

[50] Cited note 41 *supra.*

[51] *Ibid.*

[52] *Ibid.*

[53] *E.g.,* Commonwealth v. Stabinsky, cited note 31 *supra*; Miller v. Commonwealth, 200 Ky. 435, 255 S.W. 96 (1923); *cf.* Commonwealth v. Elliott, cited note 31 *supra* at 75, 89 A.2d at 785: "Mental deficiency is a fact which always should be . . . taken into consideration in determining and fixing the penalty or sentence."

[54] Harris v. Commonwealth, cited note 41 *supra*; Commonwealth v. Simmons, cited note 31 *supra.*

[55] State v. Owen, cited note 41 *supra.*

[56] State v. Hofer, 238 Iowa 820, 28 N.W.2d 475 (1947); Nowacryk v. People, cited note 41 *supra*; Fields v. State, cited note 41 *supra.*

[57] Kiersey v. State, cited note 41 *supra; cf.* Anthony v. State, cited note 7 *supra* (The appellate court modified the sentence on the ground that the conduct of the wife (the victim) in running around, which would, as the defendant feared, lead to the immorality of the

sister of the accused.[58] In other situations courts have indicated that age[59] and drug addiction[60] were proper considerations on the issue of punishment. In aggravation of punishment, the state has been permitted to show the circumstances of the crime even though a plea of guilty has been entered,[61] bad character,[62] past criminal convictions, and prison status at the time of the offense.[63]

Three principal arguments have been advanced against the introduction of background evidence: (1) the evidence is irrelevant to the case because the issue is guilt or innocence;[64] (2) there are no limits to this type of evidence—it will submerge the trial in myriad collateral issues; (3) contrary to the intentions of its adherents, adoption of the rule admitting background evidence will result in the introduction of evidence extremely prejudicial to the defendant on the issue of guilt.

The first argument is plainly spurious. It is quite clear that in a great many murder trials the *only* issue is punishment. This will arise when the jury is required to fix the penalty on a guilty plea.[65] It also occurs quite frequently in states where the court may refuse, or is required to refuse to accept a guilty plea;[66] the trial then proceeds formally and the defendant waits for his opportunity to admit his guilt and plead for mercy.[67] And even in the situation where guilt is at issue, punishment is not only relevant, but perhaps even uppermost in the defendant's mind. In this situation, the choice of whether to plead for mercy, with the possibility of compromising the accused's case on guilt, is a decision that ought to be made by defense counsel. It should not be decided beforehand by a rule of law.

The second argument is more serious. It is based on the fear that the trial will be distracted by the various details of the accused's life. It is analogous to the policy reasons behind the rule that character be evidenced by reputation rather than specific instances of conduct.[68] A typical statement of the argument for disallowing background evidence on this ground runs as follows: "Were the rule otherwise, it is quite evident that first-degree murder trials might well become hopelessly mired in autobiographical sketches and psychosociological debates, submerging the true issue of guilt or innocence."[69] As stated above, background evidence has ranged over a broad area. And the standards contained in the decisions which have authorized the evidence state only the vaguest limits. For example, Justice Burling described the majority rule, and its implications, in *State v. Mount*, as follows:

"It is said that evidence relevant to punishment should be kept within 'reasonable bounds.'

daughter, was provocation, while not sufficient to justify the homicide, at least sufficient basis for holding the imposition by the jury of the death penalty an abuse of discretion.).

[58] Commonwealth v. Williams, cited note 33 *supra*.

[59] People v. Ray, 172 Misc. 1004, 16 N.Y.S. 2d 224 (Sup. Ct. 1939), *aff'd*, 259 App. Div. 1065, 22 N.Y.S. 2d 119 (App. Div.), *app. dismissed*, 282 N.Y. 680, 26 N.E.2d 811 (1940); Ridge v. State, 28 Okla. Cr. 150, 229 Pac. 649 (1949); Commonwealth v. Zietz, 364 Pa. 294, 72 A. 2d 282 (1950).

[60] Swartz v. State, 118 Neb. 591, 225 N.W. 766 (1929).

[61] State v. Brown, cited note 41 *supra*.

[62] See State v. Owen, cited note 41 *supra* (dictum).

[63] See Prather v. State, 14 Okla. Cr. 327, 170 Pac. 1176 (1918).

[64] See, *e.g.*, Ashbrook v. State, cited note 10 *supra*; Campbell v. Territory, cited note 41 *supra*; State v. James, 96 N.J.L. 132, 114 Atl. 553 (E. & A. 1921).

[65] See, *e.g.*, ALA. CODE tit. 14, §317 (1940); ARK. STAT. ANN. §43: 2108 (1947) (Carson v. State, 198 Ark. 112, 128 S.W.2d 373 (1939); Scarber v. State, — Ark. —, 291 S.W.2d 241 (1956)); TENN. CODE ANN. §§39-2404, 2406 (1955) (Betts v. State, 189 Tenn. 30, 222 S.W.2d 190 (1946)); State v. Best, 44 Wyo. 383, 12 P.2d 1110 (1932) ("The right to a trial on the issue of guilt or innocence may be waived by a plea of guilt, which leaves only the question of punishment to be decided by the jury."). In New Hampshire, it is optional with the court. See N. H. REV. LAWS c. 585.5 (1955).

[66] *Required to refuse plea:* See, *e.g.*, HAWAII REV. LAWS §291-4 (1955) ("A plea of guilty to a charge of murder in the first degree shall not be received and if such plea is offered it shall be disregarded by the court, and a jury shall determine the guilt or innocence of the defendant."); LA. REV. STAT. tit. 15: 262 (1951); N. Y. CODE OF CRIM. PROC. §332 (In New York the jury recommendation is not binding on the trial court. See statute cited note 6 *supra*; Williams v. People, 337 U. S. 241 (1949)); TEX. CODE OF CRIM. PROC. arts. 502, 517 (Vernon 1954) (Ex parte Stewart, 155 Tex. Cr. R. 479, 236 S.W. 2d 799 (1951)). *Discretionary*: See, *e.g.*, KY. REV. STAT. §431.130 (1948); N. J. STAT. ANN. tit. 2A, c. 113, §§2, 4 (1953) (The defendant cannot plead guilty, but can plead non vult or nolo contendere, which, if accepted, carries an automatic sentence of life imprisonment. Acceptance of such a plea is discretionary with the court, see, *e.g.*, State v. Martin, 92 N.J.L. 436, 106 Atl. 385 (E. & A. 1919), and the practice is that if the prosecution feels that the death penalty is warranted, the court will not accept the plea, see State v. White, cited note 4 *supra* at 186, 142 A.2d at 81 (concurring opinion)); UTAH CODE ANN. §77-24-7 (1953) (In Utah the jury recommendation is not binding on the court. See statute cited note 6 *supra*.); *Compare* State v. Hardy, 339 Mo. 897, 98 S.W.2d 593 (1939) (discretionary) *with* In re Opinion of the Judges, 87 Okla. Cr. 297, 197 P.2d 629 (1948) (a common-law right to plead guilty).

[67] See Francis, J., in State v. White, *supra*.

[68] See MCCORMICK, *op. cit. supra* note 2 at 334.

[69] State v. Wise, 19 N.J. 59, 106, 115 A.2d 62, 87 (1955).

This standard has sufficient vagueness to insure that we will be plagued with the problem for some time to come.

"When the issue is life or death, the scope of relevant proof is assuredly broad. Does the standard of reasonable bounds import the notion that some evidence, although relevant and not unduly cumulative, can nevertheless be excluded in the discretion of the trial court? If not, then the reasonable bounds referred to are as broad as the issue to which the proofs are addressed."[70]

The problem of limiting the scope of background evidence does not appear to be difficult in cases like *Fields*, *Fletcher*, and *Nowarcryk* since the relevancy would be defined by the purpose of proving the turbulent character of the deceased and the circumstances surrounding the homicide. In cases where the object is to prove intoxication, drug addiction, or perhaps mental deficiency short of legal insanity,[71] the scope of the relevancy, while somewhat broader, also appears to have limits. In cases like *Henry*, *Owen*, and *Mount*, however, the purpose was to show anything in the general background of the accused that might strike a sympathetic response on the part of the jury. In this type of case, even though the permissible range of inquiry on the issue of punishment is necessarily broad, the court will have to draw the line at the point where the probative value of the evidence is outweighed by the cost of undue consumption of time or the threat of confusion of issues, prejudice, or surprise.[72] This is the balancing and line-drawing approach used when the courts are faced with cumulative testimony.[73] The court decides when the parties have sufficiently made their point and when the additional benefits to be gained will be insignificant when compared to the disadvantages of the continued introduction of the evidence.[74]

[70] Cited note 10 *supra* at 223, 152 A. 2d at 357 (concurring opinion). Despite the opinion of the draftsman of the California statute that the scope of the admissible evidence under that statute is as broad as the presentence and probation reports, letter to author from Hon. Roy A. Gustafson, District Attorney, Ventura County, California, dated April 7, 1960, the courts of that state have considerably narrowed the scope of the evidence. See People v. Moya,—Cal. 2d—,350 P.2d 112, 3 Cal. Rptr. 360 (1960); People v. Baldonado, —Cal. 2d —, 350 P. 2d 112, 3 Cal. Rptr. 363 (1960); People v. Purvis, 52 Cal.2d 871, 346 P.2d 22 (1959), discussed in note 72 *infra*. Compare also People v. Love, —Cal. 2d—, 350 P.2d 705, 3 Cal. Rptr. 665 (1960), discussed in text at note 75 *infra*. The Pennsylvania courts will be faced with the same problem since their statutory language provides no guides as to the scope of the admissible evidence at the second hearing. See statute cited note 8 *supra*.

[71] *But see* State v. Perry, cited note 19 *supra*, where evidence of mental deficiency short of legal insanity ranged far over the defendant's life. See note 20 *supra*.

[72] *Cf.* McCORMICK, *op. cit. supra* note 2 at 319. In People v. Purvis, cited note 70, *supra*, the defendant had been convicted of murder in the second degree. While on parole he committed a second homicide and was convicted of murder in the first degree. During the second hearing on penalty, it was held prejudicial error to admit records of criminals who had been released or paroled after two or more convictions. Parole records of individuals convicted of felonies other than murder are inadmissible in the penalty trial of a defendant found guilty of murder. People v. Baldonado, cited note 70 *supra*. In People v. Moya, cited note 70 *supra*, at the penalty trial, it was held proper to exclude four tape recordings of defendant's asserted religious conversion after defendant himself had already testified as to his remorse and beliefs at the time of the taped conversations.

[73] See, *e.g.*, State v. Mucci, 25 N.J. 423, 136 A.2d 761 (1957).

[74] It may be argued that pre-sentence reports could be the method for presenting background evidence to the jury. However, it is usually assumed that witnesses are the proper vehicles. See, *e.g.*, People v. Perry, cited note 19 *supra* (psychologists; father); State v. Henry, cited note 41 *supra* (defendant; aunt); State v. Schlaps, cited note 40 *supra* (mother; school teacher). The California statute has been construed to authorize the use of competent evidence only, see People v. Purvis, cited note 70, *supra*; *cf.* People v. Green, 47 Cal.2d 209, 302 P.2d 307 (1956), but the Model Penal Code authorizes the use of hearsay if there is fair opportunity to rebut it, see A. L. I., MODEL PENAL CODE, cited note 9 *supra*. If the defendants can still use witnesses to present their story, the problem of limiting the scope of the evidence remains unsolved. It would be undesirable to use the pre-sentence reports as the only source of background evidence. First, they are replete with opinions, rumors, and reports of persons whom the probation officer has sought out; indeed, this is the officer's duty. Such people range from prison doctors to known enemies of the accused, and it is difficult to see how the defendant can test their statements. See, *e.g.*, Williams v. People, cited note 66 *supra*; Note, 49 COLUM. L. REV. 567 (1949). In addition, there is serious doubt as to the technical and professional competency of the reports. See, *e.g.*, People v. Adams, 379 Ill. 323, 140 N.E.2d 730 (1942). See generally RUBIN, CRIME AND JUVENILE DELINQUENCY 187 (1958). Along with questions of fairness and due process, those who argue in favor of permitting the accused to have a hearing on the pre-sentence report, do so on the ground that the reports often lack competency and contain rumor and gossip. See, *e.g.*, RUBIN, *op. cit. supra*; Wyzanski, *A Trial Judge's Freedom and Responsibility*, 65 HARV. L. REV. 1281, 1292 (1952); Note, *supra*; Williams v. People, *supra*. The pre-sentence reports that the author has examined contain both of these faults. Finally, in their present form, the reports deal extensively with the criminal background of the defendant. For objections to the use of this information in the single-verdict states, see text at note 76 *infra*. The courts could exclude the portions of the reports dealing with past criminal behavior, but this would cut out perhaps the most valuable thing in the reports—the

Similarly, evidence introduced on the issue of punishment may be inflammatory. Even though the jury, on this question, has wide discretionary powers, the determination of the issue of penalty must be a rational one. The probative value of the evidence must be weighed against its inflammatory effect, and it must be excluded if it serves primarily to inflame the passions of the jury without furthering the purposes of criminal punishment, or, even if relevant to the purposes of punishment, it must still be excluded if it can be presented effectively in a non or less inflammatory manner. In a recent California case,[75] evidence was introduced at the second hearing for the sole purpose of showing that the victim died in unusual pain. This was held to be prejudicial error on the ground that there was no claim that the pain was intentionally inflicted, and pain unintentionally inflicted is relevant only to the extent that retribution for the evil done by the criminal is a primary objective of the criminal law, a doubtful proposition in California. Furthermore, reasoned the court, even if pain was relevant, it was testified to by a doctor, and there was no need to employ the dramatic techniques involved—a photograph showing not the wound, but the expression of the face in death, and a tape recording of the failing voice and groans of the dying victim.

The third argument focuses its attention on the situation where the defendant has a prior criminal record and draws its support from the Pennsylvania experience. If the jury is to know "what manner of man it is upon whom they are being asked to impose sentence,"[76] then the jury must have before it the complete background of the accused. This is the function of the pre-sentence report in the non-capital case. The reports not only cover the early environment, religious training, schooling, work record and the like, but also the criminal history of the accused including arrests, indictments, convictions, and conduct in prison.[77] The jury in the capital case performs the same function as the sentencing judge in the non-capital case; therefore the jury should have the same background information. "Surely it cannot be suggested that the truth in relation to the question of punishment travels a one-way street."[78] The logic of this argument is unassailable, and indeed, this is apparently the position of the American Law Institute's Model Penal Code,[79] and was thought to be the position of the legislative solution in California.[80]

Under this approach the Pennsylvania courts had in effect wiped out the rule which disallows the state to introduce initially any kind of evidence of bad character.[81] Evidence of bad character, including not only prior convictions, but also evidence of reputation,[82] is excluded not because it lacks relevancy; to the contrary, it proves too much."[T]here is no doubt that conduct is relevant to character. An assault is relevant to indicate a violent character; a fraud is relevant to indicate a dishonest character."[83] It is because of the danger of destructive prejudice that the exclusionary rule applies.[84] "The deep tendency of human nature to punish not because our victim is guilty this time, but because he is a bad man and may as well be condemned now that he is caught, is a tendency which cannot fail to operate with any jury, in or out of court."[85] It is not surprising that the Pennsylvania rule provoked such bitter dissent, even to the point where three judges of the Court of Appeals for the Third Circuit characterized it as "so gross" as to amount to a denial of due process.[86] Chief Justice Jones, dissenting in *Commonwealth v. DePofi*,[87] described the practice as follows:

> "The thing could, and no doubt has, actually worked out in a truly shocking fashion. It is not beyond the range of possibility that where, upon a trial for murder, the defendant's guilt is doubtful . . . the balance may be tilted in favor of a conviction because of . . . the evidence of the defendant's prior criminal record. If anyone think the possibility overdrawn, see observation by a Pennsylvania assistant district attorney in his complaint against the Act of 1947

results of medical and probationary examinations while in prison.

[75] People v. Love, —Cal. 2d—, 350 P.2d 705, 3 Cal. Rptr. 665 (1960).

[76] Commonwealth v. Simmons, cited note 31 *supra* at 401, 65 A.2d at 358.

[77] Francis, J., quoted in text at note 49 *supra*.

[78] State v. Mount, cited note 10 *supra* at 223, 152 A. 2d at 358 (concurring opinion).

[79] See A. L. I., MODEL PENAL CODE, cited note 9 *supra*.

[80] See notes 70 and 72 *supra*.

[81] See MCCORMICK, *op. cit. supra* note 2 at 327.

[82] See Martin v. People, 114 Colo. 120, 162 P.2d 597 (1945); MCCORMICK, *op. cit. supra* at 327.

[83] 3 WIGMORE, *op. cit. supra* note 41 at 549.

[84] See 1 *id.* §57. Confusion of issues and unfair surprise are additional reasons for the exclusionary rule.

[85] *Ibid.*

[86] Biggs, Hastie, McLaughlin, J. J., in United States v. Price, cited note 35 *supra*.

[87] Cited note 35 *supra*.

> ... where he says ... 'Following the passage of the 1947 amendment ... I have seen habitual criminals set free because the jurors had no knowledge of the defendant's criminal records.' "[88]

The policy considerations behind the rule disallowing the introduction of evidence of bad character in the state's case-in-chief apply with equal force to the question of background evidence on the issue of punishment. The Pennsylvania courts mistakenly assumed that the question was one of relevancy. But evidence of bad character is relevant to the issue of guilt as well as to the issue of punishment. In the single-verdict states the danger of prejudice is present in both situations, and if the jury cannot be trusted in the former, there is no basis for assuming a different conclusion in the latter. It cannot be denied that on the question of punishment a jury should know the complete background of the defendant, but here as in other criminal proceedings, the rules of relevancy must give way to more crucial competing considerations.

The same policy considerations apply to the problem of what type of background evidence the state may use in rebutting mitigating evidence. Absent the question of background evidence, in the standard criminal situation, if the defense introduces evidence of reputation of good character, the state, in addition to producing its own witnesses to testify as to evidence of bad reputation, may ask the defense witness whether he has heard that the defendant has committed particular criminal acts inconsistent with the reputation sworn to.[89] The state may question the defense witness as to indictments, arrests, convictions, and imprisonment.[90] This rule has been criticized not only because it tends to nullify the policy of the rule prohibiting evidence of bad character in the state's case-in-chief, but also because it comes in by way of hearsay and it leaves the accused no means of defending himself by a denial or explanation.[91] As justification it has been said that this is "the price a defendant must pay for attempting to prove his good name. ... [I]t subjects his proofs to tests of credibility designed to prevent him from profiting by a mere parade of partisans."[92]

Persuasive arguments have been raised that it is unjust and illogical to impose this price upon an accused with a spotty record should he deem it necessary to rebut the state's case on guilt by evidence of his good character.[93] In the area of background evidence there are additional considerations against the imposition of this choice. The statutes investing the jury with the power to decide the alternate penalty to death were passed as part of the swing away from capital punishment.[94] They were designed to prevent jury nullification[95] and were an expression on the part of the legislature that different degrees of moral turpitude deserved different punishments.[96] It was a recognition that in the capital as well as the non-capital case the punishment must fit the offender as well as the offense. They were passed in response to the ethical and humanitarian arguments against capital punishment, and viewed in that light, they were ameliorating.[97] It has been persuasively pointed out that if the jury is to fulfill the purposes of the statutes, it must have before it the type of evidence that the sentencing court has in the non-capital case; even the opponents to background evidence concede this.[98] The considerations, then, on the issue of punishment are broader than the defendant's interest in deciding whether to open the door on character evidence. The considerations include the community's interest in not having murder penalties decided in the dark. The policy of the statutes is to have the defendant

[88] *Id.* at 251, 66 A.2d at 659. The reference is to McClellan, cited note 35 *supra*.

[89] See MCCORMICK, *op. cit. supra* note 2 at 335.

[90] *Ibid.*

[91] See 3 WIGMORE, *op. cit. supra* note 41, §988.

[92] Michelson v. United States, 335 U.S. 469, 479 (1948).

[93] See Rutledge, J., dissenting in Michelson v. United States, *supra* at 488.

[94] See Frankfurter, J., concurring in Andres v. United States, 333 U.S. 740, 753 (1948); Commonwealth v. Thompson, cited note 32 *supra* at 410, 133 A.2d at 222 (dissenting opinion); SUTHERLAND & CRESSEY, PRINCIPLES OF CRIMINOLOGY 263 (5th ed. 1955); Bye, *Recent History and Present Status of Capital Punishment in the United States*, 60 AM. L. REV. 905, 908 (1926).

[95] See Frankfurter, J., *supra*; State v. Molnar, 133 N. J. L. 327, 44 A. 2d 197, 202 (E. & A. 1945); Commonwealth v. Parker, cited note 32 *supra* at 152, 143 Atl. at 906–07; Note, *Statutes Authorizing Assessment of Punishment by the Jury*, 27 HARV. L. REV. 169 (1913).

[96] See Frankfurter, J., *supra* at 753; Calton v. Utah, 130 U. S. 83, 86–87 (1889).

[97] See Frankfurter, J., *supra*. Thus, in California, where the danger of prejudice on the question of guilt has been removed, it is apparently felt that the unrestricted use of prior criminal records will be too harsh on the defendant. See footnote 72 *supra*.

[98] See, *e.g.*, State v. Mount, cited note 10 *supra* at 221, 152 A. 2d at 356. With the exception of those who oppose the introduction of background evidence because it is not relevant, the principal objections are based on the grounds that it is incapable of being limited and that it will result in prejudice.

speak. The effect of allowing the state to rebut by the use of specific instances of criminal behavior is to deter the defense from presenting background information. This will not only prejudice the defendant, but will also contradict the legislative purpose.

This is not to say that the state should be foreclosed from rebutting mitigating evidence. The state may cross-examine defense witnesses as to their qualifications to speak concerning the history of the defendant; the state may introduce countervailing evidence on matters other than criminal behavior; and, under existing rules, the state may introduce evidence of bad reputation.[99] But the state should not be able to introduce evidence of prior criminal conduct, whether it be arrest, indictment, conviction, or imprisonment.

Conclusion

Except for the "single-issue" adherents, all are agreed that background evidence should be presented to the jury in the states where the jury must decide the penalty for first-degree murder. Those who oppose the introduction of the evidence do so on the ground that it will either submerge the trial into collateral issues or will unduly prejudice the defendant on the issue of guilt. These difficulties could be avoided if the trial were separated into two distinct hearings, which is the California and Pennsylvania practice, and which has been adopted by the American Law Institute in its Model Penal Code. In the states where the jury must decide guilt and punishment in a single verdict, rational decisions on the issue of punishment can still be reached without sacrificing the orderliness of the trial or basic fairness to the defendant. The problem of limiting the seemingly endless scope of the evidence can be entrusted to the discretion of the trial court. While this solution is vague, it seems to be the best available in view of the variant circumstances of each case, and is the method used to adjust competing interests in other areas of the law of evidence. The problem of prejudice caused by the introduction of evidence of prior criminal history raises considerations not different from those concerning the introduction of character evidence on the issue of guilt or innocence, with the exception that the prosecution should be further limited in the manner in which it may rebut mitigating evidence. This will encourage the presentation of background information, which is in accord with the statutory policy, and, at the same time, prevent convictions based upon the bad-man theory.

[99] See McCormick, *op. cit. supra* note 2 at 337; *cf.* Rutledge, J., dissenting in Michelson v. United States, cited note 93 *supra* at 496.